PRIMA FACIE CITIZENSHIP: BIRTH, ALLEGIANCE, AND THE FOURTEENTH AMENDMENT'S CITIZENSHIP CLAUSE

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The Fourteenth Amendment's Citizenship Clause establishes two conditions for natural born citizenship. First, the person must be born in the United States. Second, the person must be born "subject to the jurisdiction" of the United States. The current debate over the original meaning of the so-called Birthright Citizenship Clause generally divides between those that claim birth on American soil is sufficient to establish citizenship with only a limited and closed set of historical exceptions, and those that read the jurisdiction clause as containing an independent principle capable of application to novel yet analogous situations.

This essay adopts the latter view but does so in a manner that gives primary consideration to the first condition, birth in the United States. As articulated by Attorney General Edward Bates in his influential 1862 Report "On Citizenship," prima facie citizenship treats birth in the United States as establishing a presumption of citizenship. That presumption may be overcome, however, by positive evidence that the child was born into a familial context of refused or counterallegiance to the United States. In such cases, it cannot reasonably be said that the child was born subject to the jurisdiction of the United States as that phrase was understood in 1868.

Although the framers of the Fourteenth Amendment emphasized the need to establish a race-neutral definition of birth citizenship, they also understood the need to exclude those persons born into families that either refused allegiance or held a counterallegiance to the United States. After months of debating the appropriate conditions of citizenship, they drafted a clause requiring persons to be born in, and subject to, the jurisdiction of the United States. The first condition involves place,

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the second involves personal allegiance. As framer Lyman Trumbull explained, "[W]hat do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."

As originally understood, the allegiance requirement looked to the status of the child's parents and excluded children born to parents bearing allegiance to a foreign government (including "foreign" Indian tribes). Expressly excluded were children born in the United States to tribal members who lived in the United States without authorization and refused allegiance to either a tribal government or the United States. An analogous situation today involves children born to noncitizen parents who intentionally enter the United States without legal authorization. Such parents cannot reasonably be viewed as having placed themselves "subject to the jurisdiction" of the United States, defeating what would otherwise be a child's prima facie case of natural-born citizenship.

INTRODUCTION

> *[E]very person born in the country is, at the moment of birth,* prima facie *a citizen.*
>
> *Attorney General Edward Bates, Report on Citizenship (1862)*[1]

> *[W]hat do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means.*
>
> *Lyman Trumbull (1866)*[2]

The Citizenship Clause of the Fourteenth Amendment declares, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[3] Although often described as establishing "birthright citizenship,"[4] in fact, birth on American soil by itself confers no such right. One must be born on American soil *and* be "subject to the jurisdiction of the United States."

Although courts have had some occasion to study the meaning of the second requirement,[5] no decision to date has resolved whether the text applies to children born to noncitizen parents who have illegally entered the United States.[6] Despite a growing body of legal and historical investigation, legal scholars remain divided regarding the effect of the Citizenship Clause for children born to parents who have entered the United States without

1 Citizenship, 10 Op. Att'ys Gen. 382, 394 (1862).

2 CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull).

3 U.S. CONST. amend. XIV, § 1.

4 *See, e.g.*, Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 843 (2007); Maggie Blackhawk, *The Supreme Court 2022 Term—Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 48 (2023) ("Many also continue to assume that the Birthright Citizenship Clause does not extend to territorial residents, like 'Indians.'"); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020) [hereinafter, Ramsey, *Birthright Citizenship*]. *See also* BEN HARRINGTON, CONG. RSCH. SERV., LSB10214, THE CITIZENSHIP CLAUSE AND "BIRTHRIGHT CITIZENSHIP": A BRIEF LEGAL OVERVIEW 1 (2018) ("Under federal law, nearly all people born in the United States become citizens at birth. This rule is known as 'birthright citizenship,' and it derives from both the Constitution and complementary statutes and regulations.").

5 *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 73 (1873); Minor v. Happersett, 88 U.S. 162 (1875); Elk v. Wilkins, 112 U.S. 94, 98 (1884); United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).

6 *But see* Plyler v. Doe, 457 U.S. 202, 211 n.10 (1982) (suggesting that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between [legal and illegal aliens]").

authorization or children born to foreign nationals legally but only temporarily residing in the United States.[7]

Some scholars emphasize the role of birth on American soil, making it dispositive unless trumped by a limited and closed set of common law "exceptions."[8] Other scholars claim the second requirement of "jurisdiction" communicates a principle capable of application beyond a limited set of historical categories. For example, some scholars claim there must be independent evidence that one has become "subject" to the United States by way of mutual consent or positive allegiance to the American sovereign.[9]

Both approaches are supported by at least some historical evidence. Interpretations that give primary consideration to whether a person is born in the United States echo an emphasis shared by the framers of the Clause. There are multiple examples of framers abbreviating their description of the text into a simple declaration of birthright citizenship.[10] On the other hand,

7 *Compare* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLICY (1985); John Eastman, Commentary, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11,* 42 RICH. L. REV. 955 (2008); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008); Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 TEX. REV. L. & POL. 135 (2019); Ilan Wurman, *Jurisdiction and Citizenship*, 49 Harv. J. L. & Pub. Pol'y 315 (2026), *with* James C. Ho, *Defining "American," Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367 (2006); Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 J. CONST. L. 499 (2008); Ramsey, *Birthright Citizenship*, *supra* note 4,; Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331 (2010); Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719 (2012); Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 YALE L.J. 1351 (2010).

8 *See, e.g.*, Epps, *supra* note 7, at 380; Magliocca, *supra* note 7, at 509; Ramsey, *supra* note 7, at 471–72. *See also* John Yoo, *Birthright Citizenship is American Citizenship*, UNIV. TEX. AT AUSTIN, CIVITAS INSTITUTE (Jan. 24, 2025), https://www.civitasinstitute.org/research/birthright-citizenship-is-american-citizenship [https://perma.cc/VQ66-Y2TT]; James C. Ho, *Citizenship by Birth—Can It be Outlawed?*, L.A. TIMES (Mar. 10, 2007, at 00:00 PT), https://www.latimes.com/archives/la-xpm-2007-mar-10-oe-ho10-story.html [https://perma.cc/NMC9-YTJG].

9 *See, e.g.*, Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenship*, 36 NAT'L AFFS. 50, 64–65 (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-question-of-birthright-citizenship [https://perma.cc/ZA9D-R837]; PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985). For a recent and more nuanced approach to the role of consent in natural born citizenship, see generally Wurman, *supra* note 7.

10 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull) (declaring "that every free-born person in this land is, by virtue of being born here, a citizen of the United States, and that the bill now under consideration is but declaratory of what the law now is"); Speech of John Bingham, Aug. 24, 1867, BROWNLOW'S KNOXVILLE WHIG, Oct. 2, 1867, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn83045629/1867-10-02/ed-1/?sp=1 [https://perma.cc/H67T-BUDL]) ("[T]he man is a natural-born fool who does not understand that the term 'natural born citizen' implies that citizenship is a birthright. It comes with a man into the world. He has a right to citizenship, no matter what his complexion, upon the

those scholars that insist on giving the jurisdiction clause distinct and substantive meaning also have abundant historical support. The framers spent months debating, drafting, and redrafting the "jurisdiction" language.[11] Although these debates often referenced well-known excluded categories, no one described the words "subject to the jurisdiction thereof" as a term of art referring to a closed set of historical exceptions. Instead, the drafters insisted that the final language required requisite allegiance to the United States. This makes the clause applicable to any situation, novel or not, where such allegiance is lacking.

In this article, I propose an originalist reading of the Citizenship Clause that acknowledges the primary role of a person's birthplace but also gives effect to the historical requirement that a person be born "subject to the jurisdiction [of the United States]." This approach, which I call "prima facie citizenship," grants presumptive citizenship to any person born in the United States. This presumption can be defeated only if there is positive evidence that the person was born in a familial context of refused or counterallegiance to the United States.

For example, children of ambassadors were not viewed as natural-born citizens since they presumptively shared the same foreign allegiance as their parents.[12] Likewise, children born to Native American parents living under a tribal government were not viewed as natural-born citizens since they were presumed to share their parents' allegiance to the "*quas*i foreign" Native American tribe.[13]

In 1862, Attorney General Edward Bates gave this antebellum doctrine of presumed natural-born citizenship a name: prima facie citizenship.[14] As Bates explained in his 1862 opinion "Citizenship," birth in the United States

spot in which he had his origin; and the man who denies it to him, or attempts to withhold it from him, is simply a monster.").

11 *See infra* notes 189–249 and accompanying text.

12 *See, e.g.*, JOEL TIFFANY & E.F. BULLARD, THE LAW OF TRUSTS AND TRUSTEES, 340 (Albany, W.C. Little, Law Bookseller 1862) ("All persons born within the jurisdiction and allegiance of the United States are natives, except the children of ambassadors who are, in theory, born within the allegiance of the foreign power [the parent ambassadors] represent.").

13 *See, e.g.*, CONG. GLOBE, 39th Cong. 1st Sess. at 2890 (May 30, 1866) (Statement of Sen. Howard) ("Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being *quasi* foreign nations.") (emphasis in original). Newspapers reported Howard as stating that "he believed, with Mr. Trumbull, that the Indian tribes were foreign powers." *See, e.g.*, *Consideration of the Reconstruction Resolutions in the Senate*, N.Y. HERALD, May 31, 1866 at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn83030313/1866-06-01/ed-1/?st=pdf [https://perma.cc/7Q2K-DDY6]).

14 *See* Citizenship, 10 Op. Att'ys Gen. 382, 394–95 (1862) ("[E]very person born in the country is, at the moment of birth, prima facie a citizen . . . the country he is born in is, prima facie, his country.") (emphasis omitted).

established a presumption of citizenship.[15] That presumption could be defeated by "proving some great disfranchisement strong enough to override" the otherwise controlling presumption.[16]

In 1866, the members of the Thirty-Ninth Congress debated, defined, and constitutionalized this antebellum theory of citizenship. Although all Republicans shared the common goal of establishing a race-neutral definition of natural-born citizenship, they struggled with how to articulate this principle in a manner consistent with the antebellum understanding of birth and allegiance. After an initial attempt to define natural-born citizenship in the 1866 Civil Rights Act, the framers ultimately adopted what they referred to as the "better" language of the Fourteenth Amendment's Citizenship Clause.[17] Henceforth, birth in the United States establishes a presumption of citizenship unless there is sufficient evidence that the child was not born "subject to the jurisdiction" of the United States.

As Chair of the Senate Judiciary Committee, Lyman Trumbull explained, "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."[18] To be born "subject to the jurisdiction of the United States" meant the child was born into a context of parental allegiance to the sovereign people of the United States. A child was presumed *not* to hold the requisite allegiance if born into a family that either refused allegiance or held a counterallegiance to another sovereign. As co-drafter of the Fourteenth Amendment, John Bingham declared during the 1866 Civil Rights Act debates, "every human being born within the jurisdiction of the United States *of parents not owing allegiance to any foreign sovereignty* is, in the language of your Constitution itself, a natural-born citizen."[19]

Although the Citizenship Clause establishes two separate criteria for natural-born citizenship, a prima facie application of those requirements gives birth on American soil pride of place. According to antebellum citizenship jurisprudence, a child is presumed to have a natural allegiance to their country of birth. Under the Citizenship Clause, that presumption prevails unless there is evidence that the child was not born in a manner "subject to the jurisdiction" of the United States. According to the allegiance understanding of this phrase, this would involve evidence that the child was born into a familial context of refused or counterallegiance. The most common historical example would be a child born to a family of foreign ambassadors formally pledged to maintain allegiance to their home sovereign.

15 *Id.* at 394.

16 *Id.*

17 CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (speech of Sen. Johnson).

18 *Id.* (speech of Sen. Trumbull).

19 *Id.* at 1291 (statement of Rep. Bingham) (emphasis added).

As was discussed at length during the framing debates, this allegiance requirement also excluded children born in the United States to parents who were members of Indian tribes.[20] Such parents were officially recognized as holding a primary allegiance to the quasi-foreign government of their tribe. Their children, therefore, were not born subject to the jurisdiction of the United States. This status was independent of whether the United States government exercised immediate oversight of local tribal affairs (which treaties sometimes expressly allowed).[21] The same was true for children born to tribal parents who had disassociated themselves from any treaty-recognized tribal government and lived in the United States in a manner not subject to any formal government.[22]

On the other hand, a prima facie approach to citizenship would not exclude children born to families of black Americans kidnapped into slavery and smuggled into the United States in violation of laws banning the international slave trade.[23] All such children born on American soil were prima facie citizens of the United States (as were their parents after the abolition of slavery) and nothing about their familial context called into question their natural allegiance. Indeed, Reconstruction Republicans viewed *all* freed people as presumptive citizens regardless of how they arrived on American soil.[24]

Finally, a prima facie application of an originalist understanding of the Citizenship Clause would exclude children born in the United States to parents who intentionally refuse to subject themselves to the authority of any sovereign. At the time of the Fourteenth Amendment, this included tribal Indians who refused to recognize either the authority of treaty-based tribal governments or the sovereign authority of the United States. An analogous situation today would be children born in the United States to foreign national parents who intentionally enter the United States without authorization and refuse to formally subject themselves to the sovereign authority of the United States. Although their children would have presumptive citizenship, that presumption would be rebutted by their birth into a familial context of refused or counterallegiance to the American sovereign.

* * *

Part II of this essay explores the antebellum understanding of American citizenship. From the earliest decades of the country, most courts and commentators viewed citizenship as contingent on a combination of birthplace and allegiance. Although children born in the United States were

20 *See infra* notes 189–249 and accompanying text.

21 *See, e.g.*, Treaty with the Cherokee Indians, Cherokee Nation-U.S., art VI, July 19, 1866, 14 Stat. 799, 800. *See* discussion *supra* note 13 and accompanying text.

22 *See infra* note 125 and accompanying text.

23 *See infra* note 593 and accompanying text.

24 *See infra* note 73 and accompanying text.

presumptively citizens, that presumption could be defeated by considerations of the parents' allegiance. The most common examples involved parents who were foreign diplomats or members of a hostile army of occupation. Far more significant in terms of actual numbers, however, was the uniquely American context of tribal Indian families. To be born to parents living under tribal government was, at the time, to be born into a quasi-foreign nation and hold an allegiance to that tribe. There also was the increasingly divisive issue of race. Although the Supreme Court in *Dred Scott v. Sandford* ruled that black Americans could not be citizens of the United States, antebellum Republicans embraced a race-neutral understanding of national citizenship. When it came time to draft the Fourteenth Amendment, Republicans did so with an eye both to racial neutrality and familial allegiance.

Part III explores the historical ideas and debates that informed the drafting of the Fourteenth Amendment's Citizenship Clause. In 1862, Republican Attorney General Edward Bates issued his influential *Report on Citizenship* which summarized antebellum Republican thinking on the subject of citizenship. Bates concluded that, according to antebellum law, birth on American soil established a prima facie citizenship—a presumption overcome only in exceptional cases involving some kind of disqualifying evidence. The Republicans in the Thirty-Ninth Congress accepted Bates's basic view but went further and defined what triggered disqualification. Birth in the United States sufficed to establish natural-born citizenship unless the child was not born "subject to the jurisdiction" of the United States.

The phrase "subject to the jurisdiction [of the United States]" emerged after countless hours of debate on the requirements of natural-born citizenship. Although most members were familiar with the historical exclusions of foreign ambassadors and families living under tribal governments, they found themselves confronted with a host of less familiar situations and groups, including Chinese immigrants in California, "Gypsy" families living in Pennsylvania, and Native American families who refused to live subject to any government authority whatsoever. Unable to rely on any preexisting antebellum phrase or adequate "term of art," members constructed new constitutional language that communicated the dual requirements of natural born citizenship.

The 1866 Civil Rights Act contained what was, in effect, the first Citizenship Clause: "[A]ll 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 . . . ."[25] In speeches published in newspapers across the United States, its framers explained that the language excluded children born into families holding an allegiance to another sovereign. When it came time to draft the Fourteenth Amendment, the statute's language was reconfigured to require both birth in the United States and being born

25 Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27.

"subject to the jurisdiction [of the United States]."[26] As had the Civil Rights statute, this language excluded children born to tribal Indian parents who lived separated from any tribal government and sought to live in the United States without formal recognition or authorization.

Part IV considers commentary during the ratification debates and early scholarly and judicial commentary on the Fourteenth Amendment citizenship clauses. During the ratification phase, supporters of the proposed amendment repeatedly associated the Citizenship Clause with the opening sentence of the 1866 Civil Rights Act. Both, advocates insisted, simply restated the proper (Republican) interpretation of antebellum law.

Post-ratification sources are mixed regarding whether birth to noncitizen parents was sufficient to defeat a child's presumptive citizenship. Dicta in the early *Slaughterhouse Cases* said yes, while the ruling in the much-later *United States v. Wong Kim Ark* said no. No judicial decision during this period seriously investigated the original meaning of the Citizenship Clause.

Part V constructs a textually and historically grounded doctrine of prima facie citizenship and considers how it might play a role in four simplified scenarios involving children born in the United States to (1) citizen parents, (2) legally present noncitizen parents residing in the United States, (3) legally present noncitizen parents temporarily residing in the United States, and (4) noncitizen parents who illegally enter the United States. I conclude that children in the first two categories retain their presumptive birth citizenship. Children in the third category are best viewed as retaining presumptive citizenship, though alternative conclusions are reasonable. Finally, children born in the United States to noncitizen parents who intentionally refuse to comply with the legal requirements for entry into United States cannot reasonably be viewed as born "subject to the jurisdiction" of the United States.

II. ANTEBELLUM UNDERSTANDING OF AMERICAN CITIZENSHIP

A. Birth and Allegiance

Prior to the Fourteenth Amendment, American "'citizenship' was a concept more assumed than defined."[27] Neither the Articles of Confederation nor the original Constitution defined national citizenship or explained how and when it arose.[28] According to Chief Justice John Marshall, "[a] citizen

26 U.S. CONST. amend. XIV, § 1; *see* discussion *infra* Section III.C.3.

27 *See* Kurt T. Lash, *The State Citizenship Clause*, 25 U. PA. J. CONST. L. 1097, 1101 (2023).

28 *Id.* at 1101–02. The original Constitution requires the President to be a "natural born Citizen." U.S. CONST. art II, § 1, cl. 5. In his discussion of this requirement, William Rawle concluded that "every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution, and entitled

of the United States, residing in any state of the union, is a citizen of that state."[29] But Chief Justice Marshall did not explain whether this was a legal definition or simply common understanding.[30] Chief Justice Marshall's protégé Joseph Story claimed that "[e]very citizen of a state is *ipso facto* a citizen of the United States" but, like Chief Justice Marshall, he failed to explain whether this was a rule of law or a simply a common assumption.[31]

There being no federal constitutional rule to the contrary, antebellum states simply assumed that they retained the power to determine who could and who could not become a local citizen. For white Americans, birth and current residency generally sufficed to establish state citizenship.[32] This tracked the general common law presumption that persons born within the dominions of the King held a kind of "natural allegiance" to the sovereign.[33] As quoted by the American judge St. George Tucker in his 1803 edition of Blackstone's *Commentaries*, Blackstone explained:

> Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king: and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.[34]

to all the rights and privileges appertaining to that capacity. . . . [N]o person is eligible to the office of president unless he is a natural born citizen, the principle that the place of birth creates the relative quality is established as to us." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 86 (2d ed., William S. Hein & Co. 2003) (1829). Rawle's discussion focuses on the lack of an age requirement for American citizenship. *Id.* He does not discuss the general topic of birth and allegiance or any of the common exceptions to "citizenship by birth."

29 *See* Gassies v. Ballon, 31 U.S. (6 Pet.) 761, 762 (1832).

30 *Id.*

31 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1687, at 565 (Bos., Hilliard, Gray, & Co. 1833).

32 *See* JAMES H, KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, 236 (1978).

33 *See*, *e.g.*, WILLIAM YATES, THE RIGHTS OF COLORED MEN 36–37 (Phila., Merrihew & Gunn 1838) ("[A]ll who are born within the jurisdiction of a State are natives, and all others are aliens. This classification grows out of the doctrine of natural allegiance, a tie created by birth."). *See also* 1 JOHN BOUVIER, *Allegiance,* A LAW DICTIONARY 93 (6th ed. 1856) [hereinafter BOUVIER (1856)] ("Allegiance; . . . [n]atural allegiance is such as is due from all men born within the United States . . . ."). Following the adoption of the Fourteenth Amendment, Bouvier altered his definition to read, "Allegiance . . . [n]atural allegiance is that which results from the birth of a person within the territory and under the obedience of the government." 1 JOHN BOUVIER, *Allegiance*, LAW DICTIONARY 115 (14th ed. 1871) (citing 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (Bos., Little, Brown & Co., 11th ed. 1867)) (emphasis omitted). Bouvier here references Kent's COMMENTARIES lecture 25, "Of Aliens and Natives": "Natives are all persons born within the jurisdiction and allegiance of the United States." KENT, *supra*, at 1.

34 *See* ST. GEORGE TUCKER, 2 BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 366 (The Lawbook Exchange, Ltd. 1996) (1803).

At common law and in antebellum American jurisprudence, there were different kinds or degrees of allegiance: Natural, Acquired, and Local. Natural allegiance is that presumed to accompany birth on the soil of a sovereign.[35] Acquired allegiance referred to that accompanying naturalization.[36] Finally, "local" allegiance is that temporarily owed by an alien to a foreign sovereign "for so long time as he continues within the king's dominion and protection."[37]

The general rule was that "an alien [was] one who is born out of the king's dominions, or allegiance," and reflected the "general principle, that every man owes natural allegiance where he is born."[38] There were, however, important exceptions where the allegiance of the parent defeated what was otherwise the presumed natural allegiance of the child. For example:

> [T]he children of the king's [a]mbassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent: so with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the [a]mbassador.[39]

As the above demonstrates, at both common law and early American jurisprudence, natural-born citizenship involved both consideration of place and of personal allegiance. For example, in the first edition of Chancellor James Kent's *Commentaries on American Law*, Kent explained that "[n]atives are all persons born within the jurisdiction of the United States."[40] This general rule reflected the "doctrine of . . . allegiance by birth."[41] In his next edition, Kent expanded on this rule by noting that "[t]o create allegiance by birth, the party must be born, not only within the territory, but within the ligeance of the government."[42] The sixth edition, published in 1848 soon after the Chancellor's death,[43] made the dual requirement of birth and

35 *Id.* at 369. *See also* BOUVIER (1856), *supra* note 33, at 93.

36 *See* BOUVIER (1856), *supra* note 33 at 93.

37 TUCKER, *supra* note 34, at 370.

38 *Id.* at 372–73.

39 *Id.* "Postliminum" is a Latin term: "A doctrine or fiction of the law by which the restoration of a person to any status or right formerly possessed by him was considered as relating back to the time of his original loss or deprivation; particularly in the case of one who, having been taken prisoner in war, and having escaped and returned to Rome, was regarded, by the aid of this fiction, as having never been abroad, and was thereby reinstated in all his rights." *See Postliminium*, BLACK'S LAW DICTIONARY 918 (1891).

40 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 33 (N.Y., O. Halsted 1827).

41 *Id.* at 34.

42 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 42 (N.Y., 2d ed. O. Halsted 1832).

43 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (6th ed., N.Y., William Kent 1848) [hereinafter 2 KENT (1848).]. It is not clear whether the final text of the sixth edition is completely the work of the Chancellor or includes additions by his son, William, who edited the sixth edition. It appears the Chancellor was working on sixth edition right up to his death in December 1847. *See* PORTLAND ADVERTISER, Dec. 21, 1847, at 3 ("His health has been failing for some months, by

allegiance even clearer: "Natives are all persons born within the jurisdiction and allegiance of the United [S]tates."[44] This became the rule for all subsequent editions, including those published just prior to the debates on the Fourteenth Amendment.[45]

As every edition of Kent's *Commentaries* explained, it was possible for two children to be born on the same territory but have a different presumed allegiance depending on the allegiance of the child's parents. To illustrate the point, Kent posited a situation involving children born in territory under "hostile occupation":

> If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state while abroad and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law, that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the ligeance of the conquered.[46]

The passage is a bit opaque. Kent's point is that although the child is born to parents temporarily forced to obey a "conqueror," the parents' original allegiance remains unchanged (their child is not born "under the ligeance of the conquered."[47]). The same idea was more clearly expressed by Justice Joseph Story in his opinion in *Inglis v. Trustees of the Sailor's Snug Harbor*:[48]

> [B]irth within the allegiance of a foreign sovereign, does not always constitute allegiance, if that allegiance be of a temporary nature within the dominions of another sovereign. Thus the children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens; but the children of the natives, born during such temporary occupation by conquest, are, upon a reconquest or

slow degrees for some months past, and he was duly waiting for his departure. He expired without suffering and in perfect possession of his faculties to the last. Up to within a few days of his death he was occupied with correcting the proof sheets of one of his works, an edition of which was passing through the press.").

44 KENT, *supra* note 43, at 38.

45 *See* KENT, *supra* note 33, at 1.. According to the historian James Kettner, by the 1820s, "Americans merely continued to assume that 'birth within the allegiance' conferred the status [of citizenship] . . . ." KETTNER, *supra* note 32, at 287.

46 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 41 (5th ed., N.Y., James Kent 1844) [hereinafter 2 KENT (1844)]. In support of this rule, Kent cites the common law decision of *Calvin's Case*. *Id.* at 42 n.c. ("To make a subject born, the parents must be under the actual obedience of the king, and the place of birth be within the king's obedience, as well as within his dominions.") (same as 1832 edition, 2 KENT, *supra* note 42 at 42, n.b.).

47 2 KENT (1844), *supra* note 46, at 42.

48 Inglis v. Trs. of the Sailor's Snug Harbor, 28 U.S. 99, 145 (1830) (Story, J., dissenting on other grounds).

> reoccupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy.[49]

The majority in *Inglis* went further than Justice Story in defining a child's citizenship as dependent on the allegiance of the parent. In determining whether the child John Inglis, born in New York to an English citizen during the Revolutionary War, was a United States citizen, the court resolved the issue on the basis of the father's loyalist allegiance to Great Britain: "John Inglis the son must be deemed to have followed the condition of his father, and the character of a British subject attached to and fastened on him also, which he has never attempted to throw off by any act disaffirming the choice made for him by his father."[50]

Thus, by the time of the Fourteenth Amendment, both treatises and the Supreme Court acknowledged the basic doctrine that American citizens are "persons born within the jurisdiction and allegiance of the United States," and that the child's otherwise presumed allegiance to the United States can be trumped by a counterallegiance of noncitizen parents.[51] As we shall see, this same understanding was expressly echoed by members of the Thirty-Ninth Congress.

B. Common Exceptions to Natural Born Citizenship

Outside of the issue of Indian tribes (discussed below), the most commonly cited antebellum exceptions to citizenship by birth involved children born to foreign ministers or to parents participating in an army of hostile occupation. In his 1853 essay, "The Alienigenae of the United States," for example, Horace Binney summarized the presumptive rule as "[t]he child of an alien, if born in the country, is as much a citizen as the

49 *Id.* at 156. Although Justice Story dissented from the majority on other grounds (having to do with charitable trust doctrine), he noted that "[u]pon another leading point, that of the alienage of the demandant, my opinion coincides generally with that of the majority of the court . . . ." *Id.* at 145. Justice Story also emphasized the role of the parents in determining the citizenship of a child in cases involving the American Revolution ("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. If he was born after the 15th of September 1776, and his parents did not elect to become members of the state of New York, but adhered to their native allegiance at the time of his birth, then he was born a British subject."). *Id.* at 164–65.

50 *Id.* at 124 (majority opinion).

51 The 1860 edition of Kent's *Commentaries* added a note referring the reader to *Inglis v. Trustees of the Sailor's Snug Harbo*r as part of that volume's discussion of the basic rule that "Natives are all persons born within the jurisdiction and allegiance of the United States." *See* 2 James KENT, COMMENTARIES ON AMERICAN LAW 1, 4 n.b. (10th ed., Bos., Little, Brown & Co. 1860).

natural-born child of a citizen . . . ."[52] The exceptions to this rule included "children born abroad, of ambassadors and their wives . . . [and] persons who are born within the places possessed by the King's army, if he enters the territories of another prince in a hostile manner, and the parents are subjects and not hostile."[53]

One could view these exceptions as either relating to considerations of sovereign territory (sovereign "soil") or as relating to considerations of allegiance. Antebellum jurisprudence was agnostic on that issue; one could view it either way. For example, in *The Schooner Exchange v. McFaddon*,[54] Chief Justice John Marshall noted that although the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute," common law allowed for exceptions in cases involving the arrest or detention of foreign ministers.[55] The reason for this exception, Chief Justice Marshall explained, was because "[a] foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained."[56] Then, in discussing the related rule involving the grant of common law immunity of foreign officials, Chief Justice Marshall explained:

> Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides, still the immunity itself is granted by the governing power of the nation to which the minister is deputed.[57]

In other words, one could view these common exceptions as involving a "political fiction" of sovereign territory, or one could view the exceptions through the lens of allegiance. According to the latter view, the minister stands in the place of, and maintains his allegiance towards, the sovereign he represents. As Chief Justice Marshall put it, "[a] foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation . . . ."[58] In such cases, "every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction . . . ."[59]

52 HORACE BINNEY, THE ALIENIGENÆ OF THE UNITED STATES 22 n.* (Phila., C. Sherman 1853).

53 *Id.* at 17.

54 The Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812).

55 *Id.* at 138.

56 *Id.* at 137–38.

57 *Id.* at 138.

58 *Id.* at 137.

59 *Id.*

Note that Chief Justice Marshall's reference to a minister's "subject[ing] himself to a jurisdiction"[60] is not a reference to soil. It is a reference to a minister's refusal to give his allegiance to a foreign state. Absent diplomatic immunity, the "minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission."[61]

In sum, by the time of Reconstruction, American jurisprudence viewed children born in the United States to a family of ambassadors through the lens of allegiance. As John Bouvier noted in his *Institutes on American Law*, "[c]hildren of foreign ambassadors, although born in the United States, are not citizens, being aliens, as their fathers were at the time of their birth."[62] Similarly, as Joel Tiffany and E.F. Bullard explained in their treatise on the law of trusts, "[a]ll persons born within the jurisdiction and allegiance of the United States are natives, except the children of ambassadors who are, in theory, born within the allegiance of the foreign power they represent."[63] Again, such considerations do not turn on soil. They turn on parental allegiance.

C. Naturalization and Temporary Residence

Even if not a natural-born citizen, one could become a citizen by way of naturalization. As St. George Tucker reported regarding early federal naturalizations laws, any alien

> if he desire to be naturalized, must make report of himself, or be reported by his parent, guardian, or master to the clerk of the district court where he may arrive, or some other court of record, and obtain a certificate thereof, which shall be exhibited to the court to whom application may be made to admit him as a citizen, as evidence of the time of his arrival within the United States.[64]

Under the naturalization laws of 1790, moreover, "the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States."[65]

Those aliens arriving in the United States for only a temporary visit posed a more difficult issue. In his *Commentaries on the Conflict of Laws*, Justice Joseph Story wrote,

60 *Id.*

61 *Id.* at 139.

62 1 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 17 (Phila., Robert E. Peterson 1851).

63 TIFFANY & BULLARD, *supra* note 12, at 340.

64 TUCKER, *supra* note 34, at 374 n.12.

65 Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795). Under the act of 1790, only white immigrants could become citizens. *See id.* at 103.

> "[p]ersons, who are born in a country, are generally deemed citizens and subjects of that country. A reasonable qualification of this rule would seem to be, that it should not apply to the children of parents, who were in *itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business.[66]

Here Justice Story uses "temporary" residence in contradistinction to one's "domicile."[67] According to Justice Story, the term "domicile" "mean[s] . . . where a person lives, or has his home . . . . [where a person] has his true, fixed, permanent home . . . to which, whenever he is absent, he has the intention of returning . . . ."[68] Wrote Justice Story,

> If, therefore, a person leaves his home for temporary purposes, but with an intention to return to it, this change of place is not in law a change of domicil . . . . [F]or it is not the mere act of inhabitancy in a place, which makes it the domicil, but the fact coupled with the intention of remaining there . . . ."[69]

Thus,

> [T]he place of birth of a person is considered as his domicil, if it is at the time of his birth the domicil of his parents . . . . This is usually denominated the domicil of nativity . . . . But, if the parents are then on a visit, or on a journey (*in itinere*), the home of the parents (at least if it is in the same country) will be deemed the domicil of nativity.[70]

Writing in 1834, Justice Story conceded that "[i]t would be difficult, however, to assert, that in the present state of public law such a qualification is universally established."[71] Some Reconstruction Republicans also tied citizenship to residency and domicile, but it is not clear whether they meant this as excluding temporary visitors. For example, in 1858, Ohio Representative John Bingham declared "every person born of free parents within the jurisdiction of the United States, and who are *residents* thereof, is a citizen of the United States, and therefore of the state his residence . . . ."[72]

66 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 48, at 48 (Bos., Hilliard, Gray & Co. 1834).

67 For an excellent discussion of the historical understanding of "domicile" and the Fourteenth Amendment Citizenship Clause, though reading that evidence somewhat differently than this author, see Andrew T. Hyman, *Originalism, Illegal Immigration, and the Citizenship Clause*, 15 BRIT. J. AM. LEGAL STUD. 1 (2025) https://doi.org/10.2478/bjals-2025-0011 [https://perma.cc/YG7B-9QND].

68 STORY, *supra* note 66, § 41, at 39.

69 *Id.* § 44, at 42.

70 *Id.* § 46, at 44.

71 *Id.* § 48, at 48.

72 *Speech of Hon. John A. Bingham of Ohio*, CARROLL FREE PRESS (Ohio), May 19, 1858, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn83035366/1858-05-19/ed-1/?sp=1&st=pdf&r=-0.284,-0.078,1.569,1.569,0) [https://perma.cc/GZG7-MGNL] (emphasis added). Some scholars edit the full quote. *See, e.g.*, David W. Blight, *Birthright Citizenship is a Sacred Guarantee*, ATLANTIC

The next year, Bingham similarly declared, "Who, sir, are citizens of the United States? First, all free persons born and domiciled within the United States. . . ."[73] Likewise, in his 1862 *Report on Citizenship*, Attorney General Edward Bates wrote that "it needs no argument to prove that every citizen of a State is, necessarily, a citizen of the United States; and to me it is equally clear that every citizen of the United States is a citizen of the particular State in which he is domiciled."[74]

These statements could be read to limit natural-born citizenship to the children of aliens who had established their domicile in the United States and not "temporary" visitors. But the sources are not unanimous on this point. Some sources, such as *Lynch v. Clarke*,[75] point in another direction.

1. *Lynch v. Clarke* (1844)

In *Lynch v. Clarke*, the New York Chancery Court had to decide whether a child of noncitizen parents only temporarily residing in the United States was a citizen of the United States and therefore eligible to inherit real estate devised to her by her uncle.[76]

In his single-judge opinion, Assistant Vice Chancellor Lewis Sandford concluded that Julia Lynch's birth in the United States sufficed to establish her eligibility. "By the common law," Judge Sandford wrote, "all persons born within the ligeance of the crown of England, were natural born subjects, without reference to the status or condition of their parents."[77] "The exceptions," he explained, "are the children of ambassadors, (who are deemed to be born within the allegiance of the sovereign represented,) and the children of our own citizens born abroad."[78] Sandford did not explain the underlying principle informing these exceptions which *were* based on the condition of the parents.

Chancellor Sandford described natural-born citizenship as a combination of place and person. Children must be "born within [the state's]

(Jan. 27, 2025) https://www.theatlantic.com/ideas/archive/2025/01/birthright-citizenship-blight/681477/ [https://perma.cc/RD8V-93D6] (editing Bingham's quote to read "Every man knows that under our free institutions, every person born of free parents within the jurisdiction of the United States . . . is a citizen of the United States.").

73 CONG. GLOBE, 35th Cong, 2d. Sess. 981–85 (1859) (statement of Rep. John Bingham), *reprinted in* 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS, 155 (Kurt T. Lash ed., 2021).

74 *See* Citizenship, 10 Op. Att'ys Gen. 382, 388 (1862). For a full discussion of Bates's report, see *infra* Section III.A.2.

75 Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. Ch. 1844).

76 *Id.* at 637.

77 *Id.* at 639 (emphasis omitted). The New York Constitution required courts to apply the common law unless and until formally changed. *See* N.Y. CONST. art. I, § 16 (renumbered § 14 and amended in 1938). My thanks to John Eastman for the pointer.

78 *Lynch*, 1 Sand. Ch. at 658.

territory and ligeance respectively."[79] This presumed territorial allegiance could be defeated if the parents were ambassadors, since their children are "deemed to be born within the allegiance of the sovereign represented."[80] The same was true for children born to American citizen parents traveling abroad.[81] In general, though, so long as children were born to parents within the "ligeance of the crown," then any *other* "status or condition" of the parents did not matter (in this case, the status of temporary residence).

A footnote in the sixth edition of Kent's *Commentaries* (edited by his son William) referenced the *Lynch* case but mischaracterized the language of the opinion. After correctly stating the general rule that "[n]atives are all persons born within the jurisdiction and allegiance of the United States," the editor of sixth edition added a note claiming that "[t]his 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" (citing both *Calvin's Case* and *Lynch v. Clarke*).[82]

Chancellor Sandford's opinion actually does *not* declare the "allegiance" of parents to be irrelevant. Indeed, he actually wrote that "all persons born *within the ligeance of the crown* of England, were natural born subjects, without reference to the *status or condition* of their parents."[83] His ruling specially involved the status of temporary residence, a status he likely thought involved the obligatory "local allegiance" owned by foreign visitors.[84] But, whatever Sandford meant by "status or condition," he could not have meant parental allegiance since he expressly noted that the common law *did* consider the political condition and "allegiance" of foreign minister parents.[85]

As far as *Lynch*'s specific holding regarding temporary visitors, there is no evidence that the opinion in *Lynch* represented a consensus understanding of citizenship and temporary residence.[86] Although some

79 *Id.* at 650.

80 *Id.* at 639. Note also the issue turns on the presumed allegiance of the parents and not some fictious construct regarding the "soil" of the embassy.

81 *See id.* at 639–40.

82 KENT (1848), *supra* note 43, at 38, 38 n.a. (citing Calvin's Case, (1608) 77 Eng. Rep. 377; Lynch v. Clarke,1 Sand. Ch. 583, 639 (N.Y. Ch. 1844)).

83 *Lynch*, 1 Sand. Ch. at 639 (emphasis added).

84 *See supra* note 37 and accompanying text.

85 *Lynch*, 1 Sand. Ch. at 658. "Status and condition" could include anything from foreign birth, to nobility, to property ownership.

86 *See*Ramsey, *Birthright Citizenship*, *supra* note 4 at 416 ("[D]espite the holding in *Lynch*, it seems fair to say that the issue of temporary visitors remained somewhat unsettled in the mid-nineteenth century."); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 239–40 (2008) ("Whatever light that case provides, though, should be adjusted by the fact that it is the unreviewed opinion of a single New York judge and that shortly thereafter, in *Ludlam v. Ludlam,* that state's highest court with all justices concurring spoke differently, saying that birthright citizenship depended on parentage rather than the 'boundaries of the place.'"); *id.* at

newspapers noted the opinion prior to Reconstruction, none described *Lynch* as addressing the "political condition or allegiance of the parents."[87] Likewise, a one-paragraph note by Attorney General Black in 1859 cites *Lynch* for the proposition that "a free white person born in this country, of foreign parents, is a citizen of the United States," but says nothing at all about parental allegiance.[88] Similarly, a short opinion by Abraham Lincoln's Attorney General Edward Bates mentions *Lynch,* but not the language of the note in Kent's *Commentaries*.[89] In his exhaustive and influential *Report on Citizenship*, Bates did not find *Lynch* worth mentioning at all.[90] Finally, during the Fourteenth Amendment debates of the Thirty-Ninth Congress, *Lynch* went unmentioned.[91] It was only during the Civil Rights Act that *Lynch* appeared—a single mention by a member who played no role in drafting the Fourteenth Amendment.[92]

Such a minor and relatively insignificant case would generally not warrant an extended discussion. It is only because *Lynch* plays an important role in a major Supreme Court opinion written decades after the adoption of the Fourteenth Amendment[93] that readers need to know about the case and its history.

At most, *Lynch* might inform our understanding of antebellum jurisprudence on temporary residency. As far as allegiance is concerned, Chancellor Sandford's actual opinion merely restates the common antebellum idea that presumptive natural-born citizenship can be rebutted by considerations of the parents' allegiance.

239 ("*Lynch v. Clarke* is the only antebellum decision (and possibly the only reported case in our history) that clearly finds that *jus soli* per *Calvin's Case* determines United States citizenship."). *See also* Wurman, *supra* note 7 at 37–38 (providing additional historical evidence calling into question the status of *Lynch*).

87 *See Title*, NEW YORK SPECTATOR, July 20, 1848, at 4 (on file with author); *Title*, COMMERCIAL ADVERTISER, July 14, 1848, at 2 (on file with author) (same story). Post-1868 newspaper references, of course, had no effect on the original understanding of the Fourteenth Amendment. Among those I've found, these sources cite the language of the decision but do not mention the note's reference to the "political condition or allegiance of the parents." *See, e.g.*, MORNING OREGONIAN, Nov. 18, 1871, at 5 (on file with Libr. of Cong., Chronicling America, https://www.newspapers.com/image/1083846815/ [https://perma.cc/RP69-GS7J]); *What Constitutes Citizenship*, CHICAGO TRIBUNE, Sept. 10, 1886, at 10 (on file with Libr. of Cong., Chronicling America, https://www.newspapers.com/image/349257315/ [https://perma.cc/VYL6-TCEN]); *Citizenship*, AKRON TIMES DEMOCRAT, June 23, 1886, at 1 (on file with Libr. of Cong., Chronicling America, https://www.newspapers.com/newspage/227827820/ [https://perma.cc/U9AC-2TBK]).

88 Citizenship, 9 Op. Att'ys Gen. 373, 373–74 (1859).

89 *See* Citizenship of Children Born in the United States of Alien Parents, 10 Op. Att'ys Gen. 328, 328–29 (1859).

90 *See* Citizenship, 10 Op. Att'ys Gen. 382 (1862).

91 *See infra* notes 266, 521, and accompanying text.

92 *See infra* note 266 and accompanying text (discussing the speech of Mr. Lawrence).

93 *See infra* note 462 and accompanying text (discussing *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)).

2. Summary

By the time of the Civil War, most commentators and courts had settled on a view of natural-born citizenship that involved considerations of both place and person. A child born on American soil was presumed to bear a kind of natural allegiance to the American sovereign, but that presumption could be overcome by evidence of a counter-allegiance held by noncitizen parents.

Although natural-born citizens had a duty of allegiance to their sovereign,[94] allegiance also served as condition precedent to becoming a natural born citizen. This is clear in the above-discussed sources, but particularly clear in public commentary just prior to the Civil War. In an 1857 editorial critical of the Supreme Court's decision in *Dred Scott*, the *New York Tribune* praised the Maine Supreme Court's opinion that "citizenship, as the term is used in the Constitution of the United States, is the inevitable consequence of birth and allegiance . . . ."[95] In 1859, the American Anti-Slavery Society similarly praised the doctrine announced by the Maine courts, that "citizenship, as the term is used in the Constitution of the United States, is the inevitable consequence of birth and allegiance."[96] As we shall see, the members of the Thirty-Ninth Congress shared this same understanding.

D. Citizenship and Indian Tribes[97]

1. Quasi-Foreign Governments

The original Constitution expressly recognized the unique status of Indian tribal governments. According to Article I, Section 2, clause 3, "Representatives and direct Taxes shall be apportioned among the several States . . . excluding Indians not taxed" and in the Commerce Clause of

94 *See* Citizenship, 10 Op. Att'ys Gen. 382, 395 (1862) ("In every civilized country the individual is *born* to duties and rights, the duty of allegiance and the right to protection . . . .").

95 NEW-YORK DAILY TRIBUNE, Aug. 22, 1857, at 4 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn83030213/1857-08-22/ed-1/?sp=4&q=New+York+Daily+Tribune&r) [https://perma.cc/T2PD-4HF4] (quoting the Maine Court opinion of Judge Davis, and praising the opinion for "go[ing] to prove that Judge Taney's reasoning and conclusions [in *Dred Scott*], and those of his associates who concurred with him, the more they are tested, the less are they able to hold water").

96 EXEC. COMM., AM. ANTI-SLAVERY SOC'Y, ANNUAL REPORTS 135–36 (N.Y.C., American Anti-Slavery Society 1859) (quoting with approval the opinion of Maine Supreme Court Judge Davis).

97 The historical sources in this article repeatedly refer to "Indians," "Indian Tribes," and Indian "Tribal Governments." I have chosen to maintain these same terms in order to remain consistent with the sources and also with contemporary federal law and opinions of the Supreme Court. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020); Haaland v. Brackeen, 143 S. Ct. 1609, 1622 (2023).

Article I which empowered Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[98] According to Justice Story in his *Commentaries on the Constitution*, the exclusion of "Indians not taxed" reflected a recognition at the time of the Founding that "[t]here were Indians . . . probably in most, of the states at that period, who were not treated as citizens, and yet, who did not form a part of independent communities or tribes, exercising general sovereignty and powers of government within the boundaries of the states."[99]

As Justice Story explained, Indian tribes are "to be deemed politically a state; that is, a distinct political society, capable of self-government; but it is not to be deemed a *foreign state*, in the sense of the constitution."[100] Instead, from the time of the Constitution through Reconstruction, Indian tribes existed as "*quasi*-foreign" governments, capable of entering into treaties with the United States but no other government.[101] As far as states were concerned, Indian tribes maintained their sovereign independence.[102] As far as the federal government was concerned, however, Indian tribes retained no more than a limited or quasi-sovereign status in the sense that all tribal law had to conform with the supreme federal Constitution and its laws. As Justice Neil Gorsuch explained in *Haaland v. Brackeen*,

> '[T]he only restriction on the power' of Tribes 'in respect to [their] internal affairs' arises when their actions 'conflict with the Constitution or laws of the United States.' . . . . In cases like that, the Constitution

98 U.S. CONST. art. I, § 2, cl. 3; *id.* § 8, cl. 3.

99 2 STORY, *supra* note 31, § 330, at 239.

100 *Id.* § 535, at 381–82. *See also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (stating that under American law, Native American Tribes are the equivalent of "domestic dependent nations"). As Professor Magliocca points out, later antebellum courts emphasized that tribal governments nevertheless remained subject to the legal jurisdiction of the United States government. *See also* Magliocca, *supra* note 7, at 91..

101 Although described as "foreign nations" from the earliest days of the Founding, *see, e.g.*, Letter from Henry Knox to Pres. Washington (July 7, 1789), *reprinted in* 3 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 137–38 (Abbot et al. eds, 2008) (https://rotunda-upress-virginia-edu.proxy.library.nd.edu/founders/GEWN-05-03-01-0001) [https://perma.cc/LTM5-NKB6], unlike other foreign nations, Indian tribes lacked the authority to make treaties with any other government than the United States. Thus, the framers of the Fourteenth Amendment regularly referred to Indian tribes as "quasi-foreign nations." *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard) ("[Indians under tribal governments] are regarded, and always have been in our legislation and jurisprudence, as being *quasi* foreign nations."). *See also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942) ("[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a *limited sovereignty* which has never been extinguished.") (emphasis added); Epps, *supra* note 7, at 364 ("In 1866, Indian relations were still largely governed by treaties between individual tribes and the United States, which treated the tribes as quasi-sovereign and accorded tribal members something much like extraterritoriality.").

102 *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832); *see also Haaland*, 143 S. Ct. at 1652 ("Precisely because Tribes exist as a 'distinct community,' this Court concluded in *Worcester*, the 'laws of [States] can have no force' as to them.").

> provides, federal law must prevail. See Art. VI. This creates a hydraulic relationship between federal and tribal authority. The more the former expands, the more the latter shrinks."[103]

Although "quasi-foreign nations," mid-nineteenth-century treaties repeatedly described Indian tribes as legally within the "jurisdiction" of the United States. For example, according to the 1849 Treaty with the Navajo, "the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection."[104] Similarly, the 1852 Treaty with the Apache declared that the, "[s]aid nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."[105]

Only weeks after passing the Fourteenth Amendment, the Senate ratified a treaty with the Cherokee Indians.[106] The treaty granted the tribe amnesty for its participation in "the rebellion," abolished slavery, and granted the freedmen "all the rights and privileges of other Cherokees."[107] The treaty also mandated a "United States court to be created in the Indian Territory," and that, until that court was up and running, "the United States district court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party."[108] Although the members of the tribe had the right "to control all their local affairs, and to establish all necessary police regulations and rules for the administration of justice in said district," those police regulations could not be inconsistent with the "laws of the United States."[109] Finally, "if any such police regulations or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same."[110]

103 *Haaland*, 143 S. Ct. at 1653 (alterations in original) (quoting *Roff v. Burney*, 168 U.S. 218, 222 (1897)),

104 Treaty with Navajo, Navajo Nation-U.S., Sept. 9, 1849, 9 Stats. 974, *in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 583 (Charles J. Kappler ed., 1904). As Francis Prucha reports, under this treaty the tribal chiefs "agreed to recognize United States jurisdiction and to submit to the trade and intercourse laws, to return captives and stolen property and remain at peace, and to allow the federal government to determine their boundaries." FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 257 (1994).

105 Treaty with the Apache, July 1, 1852, 10 Stat. 979; *see also* Treaty with the Utah, Dec. 30, 1849, 9 Stats. 984 ("The Utah tribe of Indians do hereby acknowledge and declare, they are lawfully and exclusively under the jurisdiction of the government of said States: and to its power and authority they now unconditionally submit.").

106 Treaty with the Cherokee Indians, *supra* note 21.

107 *Id.* arts. II, V, IX.

108 *Id.* art. VII.

109 *Id.* art. V.

110 *Id.*

Although the above treaties make clear that Indian tribes were subject to the jurisdiction of the United States in some form, the precise nature and scope of that jurisdiction became a matter of increasing dispute throughout the nineteenth century. At the time of the Fourteenth Amendment, federal relations with Indian tribes came by way of treaties negotiated by the Executive and ratified by the Senate. Congress did not assert general legislative authority over Indian tribes until 1871, after the adoption of the Fourteenth Amendment.[111] This means that, at the time of the adoption of the Fourteenth Amendment, Indian tribes were viewed as quasi-foreign governments over which Congress (meaning both the House and the Senate) had only partial or "incomplete" jurisdiction. The incomplete or partial jurisdiction did not involve a lack of federal legal or administrative authority. It involved the exclusion of the House in the treaty-making process and the requirement of tribal consent on account of their quasi-foreign status.

2. Native American Citizenship[112]

As reflecting their status as quasi-foreign nations, children born to members of Indian tribes were not considered citizens of the United States. As Chancellor James Kent explained in *Goodell v. Jackson* (1823), "[t]hough born within our territorial limits, the Indians are considered as born under the jurisdiction of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes."[113]

Although members of Indian tribes were not American citizens by birth, treaties could establish a path to citizenship. According to James Kettner, Indians who left their tribes "and received a land allotment in fee simple from the government could or would thereby become a citizen."[114] For example, 1817[115] and 1819[116] treaties with the Cherokee permitted "every head of any Indian family residing on the east side of the Mississippi river . . . who may wish to become citizens of the United States, the United States do agree to

111 *See* PRUCHA, *supra* note 104, at 289–310 (discussing the 1871 Appropriations Act and the end of the treaty-making period).

112 This section has greatly benefited from conversations, emails exchanges and essays by multiple outstanding Native American scholars, including Gregory Ablavsky, Bethany Berger and David Wilkins. Although Ablavsky and Berger point out scholarly disagreement about the application of this history, they do not dispute any of my historical claims about antebellum and Reconstruction era Native American Law. *See,* Gregory Ablavsky and Bethany Berger, *"Subject to the Jurisdiction Thereof": The Indian Law Context*, 100 N.Y.U. L. REV. ONLINE 201, 203 n. 7 (2025).

113 Goodell v. Jackson *ex rel.* Smith, 20 Johns. 693, 712 (N.Y. 1823); *see also* KETTNER, *supra* note 32, at 294.

114 KETTNER, *supra* note 32, at 292.

115 Treaty with the Cherokees, Cherokee Nation-U.S., July 8, 1817, 7 Stat. 156.

116 Treaty with the Cherokees, Cherokee Nation-U.S., Feb. 27, 1819, 7 Stat. 195.

give a reservation of six hundred and forty acres of land."[117] According to Kettner, "[t]hese and similar treaties often required a period of residence 'with the intention of becoming citizens' before the titles became valid."[118]

For those members who wished to leave their tribe and become United States citizens, it was not enough to simply leave the "quasi-foreign" jurisdiction of their tribal government. Instead, Indians seeking American citizenship were required to present themselves to federal authorities and formally dissolve their allegiance to their former tribe.[119] For example, under an 1866 Treaty with the Delaware Indians, members of the tribe were given the option "to elect whether they will dissolve their relations with their tribe and become citizens of the United States."[120] According to the treaty, those tribal members who elected to do so had to place their names on an official registry and appear before a,

> judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family."[121]

Similarly, an 1867 treaty with various tribes residing in Kansas acknowledged that "portions of said tribes desire to dissolve their tribal relations and become citizens."[122] For those so desiring, "any member of the tribe may appear before the United States district court for Kansas, and

117 Treaty with the Cherokees, *supra* note 115, art. 8; Treaty with the Cherokees, *supra* note 116, art. 2 (referring to those "who choose to become citizens of the United States, in the manner stipulated in said treaty").

118 KETTNER, *supra* note 32, at 292, n. 18 (quoting 2 Op. Att'ys Gen. 838, 838 (1831)); *see also* Treaty with the Stockbridges and Munsees, Feb. 5, 1856, 11 Stat. 663, at pmbl. (noting that the "majority of the said tribe of Stockbridges and the Munsees are averse to removing to Minnesota and prefer a new location in Wisconsin, and are desirous soon to remove and to resume agricultural pursuits, and gradually to prepare for citizenship, and a number of other members of the said tribe desire at the present time to sever their tribal relations and to receive patents for the lots of land at Stockbridge now occupied by them").

119 *See* FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 156 (2009) ("[E]arly statutes and treaties took a wide array of approaches—but all of them required fulfillment of some condition precedent by the individual Indian before citizenship was conferred."); *see also* Epps, *supra* note 7, at 366 ("Many Native Americans had no desire whatsoever to become a part of and be subject to the rules of white society. For those who did, naturalization was the only option . . . ." (footnote omitted)).

120 Treaty with Delaware Indians, Delaware Tribe of Indians-U.S., art. III, July 4, 1866, 14 Stat. 793.

121 *Id.* art. IX.

122 Treaty between the United States of America and the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Miamies, Ottawas of Blanchard's Fork and Roche de Boeuf, and certain Wyandottes, pmbl, Feb. 23, 1867, 15 Stat. 513.

declare his intention to become a citizen, when he shall receive a certificate of citizenship, which shall include his family, and thereafter be disconnected with the tribe."[123]

Some tribal members sought to live beyond the authority of either tribal governments or the government of the United States. The status of these unaligned Indians became a major subject of discussion when Congress drafted the citizenship clauses of the Civil Rights Act and the Fourteenth Amendment.[124] As we shall see, their refusal to subject themselves to the jurisdiction of the United States rendered both parents and their children beyond the scope of the Citizenship Clause.[125] This did not place them beyond the reach of government authority, however. As members of the Thirty-Ninth Congress noted, unaligned tribal Indians living outside of treaty-recognized boundaries were subject to removal and placement in federally authorized areas by federal officials.[126]

Finally, following the Civil War, the federal government renegotiated treaties with slave-holding tribes that had fought alongside the Confederacy.[127] As quasi-sovereign nations, Indian tribes were not, or arguably were not, covered by the scope of the Thirteenth Amendment. Accordingly, post-Civil War treaties mandated the abolition of slavery among the native tribes and required that the now-free black tribal residents

123 *Id.* art. XVII.

124 *See infra* Sections III.B., III.C.

125 *See infra* note 330 and accompanying text.

126 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 526 (1866) (statement of Sen. Conness) ("The Superintendent of Indian Affairs and his agents and employés have control of them. These Indians are brought in and placed upon reservations. They are cut off from all connection with their tribes. . . . They are in all respects subject to the authority of the agents of the Government."); *see also Rules for the Government of Hoopa Indian Reservation*, WEEKLY TRINITY JOURNAL (Weaverville, Calif.), April 6, 1867 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn85025202/1867-04-06/ed-1/) [https://perma.cc/RHP8-J2TA] (reporting on instructions to local federal Indian agents that "[y]ou are expected to keep strict watch over the Indians in your charge, allow none to leave the Reservation without permission, unless sent by you on business"). Treaties also established the authority of the United States to determine whether non-tribal members could enter the reservation. *See, e.g.*, Treaty with the Crow Indians, Crow Tribe-U.S., art. II, May 7, 1868, 15 Stat. 649 ("[defined reservation is] set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employés of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article").

127 *See* BARBARA KRAUTHAMER, BLACK SLAVES, INDIAN MASTERS: SLAVERY, EMANCIPATION, AND CITIZENSHIP IN THE NATIVE AMERICAN SOUTH 101 (2013).

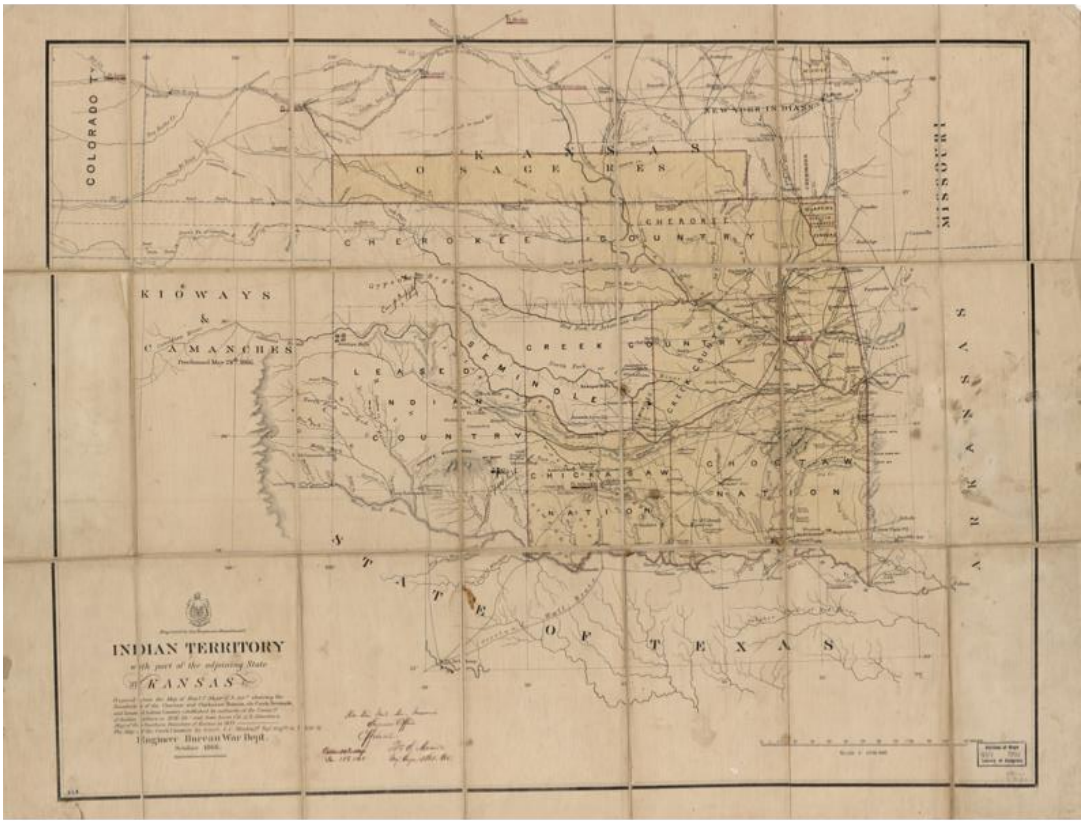
be granted full *tribal* citizenship, with the same local or municipal rights as were granted to other tribal citizens.[128]

The antebellum and early Reconstruction-era legal status of Indian tribes no longer exists. In 1871, the United States government ceased its practice of entering into treaties with Indian tribes[129] and, in 1924, Congress granted citizenship to all tribal Indians within the territorial limits of the United States.[130] This pre-1871 history nevertheless remains important to understanding the original meaning of the 1868 Citizenship Clause.

128 *See, e.g.*, Treaty with the Choctaws and Chickasaws, art. III, Apr. 28, 1866, 14 Stat. 769 (requiring the tribe to pass laws granting to "all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations"). *See also*, FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 141 (abr. ed. 1986).

129 The Indian Appropriations Act of 1871 ended the practice of treating Native American tribes as sovereign nations with whom treaties could be negotiated. *See* COHEN, *supra* note 101, at 114. Pre-existing treaties, however, remained in effect until officially abrogated. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (implying that treaty rights persist unless Congress clearly abrogates them).

130 *See* The Indian Citizenship Act of 1924, 43 Stat. 253 ("That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States . . . ."); *see also* KETTNER, *supra* note 32, at 300 n.45.



Map of "Indian Territory" 1866[131]

E. Citizenship and Race

Although birth to a resident family in a state generally sufficed to establish citizenship for white children, the same was not true for black Americans. Enslaved black Americans were treated not as persons at all (much less citizens) but as "property." Free black Americans in southern states often faced severe legal disabilities not imposed on white state residents.[132] Under the "Negro Seaman Laws," for example, southern slave-state officials imprisoned free black sailors while their ships were in port.[133]

131 United States Army Corps of Topographical Engineers, *Indian Territory, with part of the adjoining state of Kansas, &c.*, LIBR. OF CONG. (1866), https://www.loc.gov/resource/g4021e.ct003199/ [https://perma.cc/GG8R-GH8U].

132 *See* KETTNER, *supra* note 32, at 319.

133 *See* KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION, 123 (2021); MARTHA S. JONES,

Even in northern free states, state laws frequently denied black Americans equal civil rights.[134]

To some antebellum legal commentators, the widespread denial of equal civil rights constituted evidence that free black Americans were not "citizens of the United States." In 1821, for example, Attorney General William Wirt denied that "free persons of color" were citizens of the United States qualified to command vessels under a federal coasting license.[135] According to Wirt, no person could be considered a "citizen of the United States who has not the full rights of a citizen in the State of his residence."[136] In Virginia, Wirt noted, free black residents were denied "the full and equal privileges of white citizens in the State."[137] These discriminatory laws included the denial of equal suffrage, the right to bear arms, and laws that rendered black males "incapable of contracting marriage with a white woman."[138] To Wirt, these discriminatory denials of equal civil rights proved that free Black residents were not citizens of Virginia and, therefore, "not citizens of the United States."[139]

Most infamously, in *Dred Scott v. Sandford*,[140] Chief Justice Taney relied on this history of racially discriminatory laws in support of his conclusion that black Americans were not "citizens" as the term was used in the federal Constitution.[141] The contrary conclusion, Chief Justice Taney pointed out, would require granting black Americans equal Article IV comity rights throughout the Union—a prospect he found self-refuting.[142] Although the dissenting Justice Benjamin Curtis insisted that black Americans could be citizens of the United States, Justice Curtis nevertheless conceded that the status of state citizenship remained under the control of the states themselves. According to Justice Curtis, states retained the power to determine who could become a citizen of the state and to determine "[w]hat civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same. . . ."[143]

Abolitionist Republicans rejected Chief Justice Taney's race-based reading of the Constitution and his denial of black citizenship. According to Joel Tiffany in his *Treatise on the Unconstitutionality of Slavery* (1849), since the time of the Founding all persons born within and under the

BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 52–53 (2018).

134 Masur, UNTIL JUSTICE BE DONE, *supra* note 133, at 42.

135 Rights of Free Virginia Negroes, 1 Op. Att'ys Gen. 506, 509 (1821); *see also* JONES, *supra* note 133, at 42.

136 Rights of Free Virginia Negroes, 1 Op. Att'ys Gen. 506, 507 (1821).

137 *Id.*

138 *Id.* at 508.

139 *Id.*

140 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

141 *Id.* at 416.

142 *Id.* at 416–17.

143 *Id.* at 583.

jurisdiction of the United States were automatically citizens of the United States, regardless of race.[144] According to Tiffany, in light of the fact that

> Congress [had] made no provision for naturalizing persons residing within the United States during the Revolution, and the formation of the Federal Government, nor for the children of aliens born, and residing in this Government, the conclusion is that they were considered citizens, and subjects of the National Government, and no such provision was necessary.[145]

Likewise, Ohio Representative John Bingham declared in his 1859 speech against the racially discriminatory Oregon Constitution:

> Who, sir, are citizens of the United States? First, all free persons born and domiciled within the United States—not all free white persons, but all free persons. You will search in vain, in the Constitution of the United States, for that word white; it is not there. You will look in vain for it in that first form of national Government—the Articles of Confederation; it is not there. The omission of this word—this phrase of caste—from our national charter, was not accidental, but intentional.[146]

Bingham's declaration reflected the standard Republican view that *Dred Scott* erred in its racially restrictive view of national citizenship. Still, the case represented a potential roadblock to Republican efforts to secure equal civil rights for black Americans. Going forward, Republicans would have to decide whether Chief Justice Taney's opinion could be ignored, overruled by statute, or interred by way of a constitutional amendment.

III. THE RECONSTRUCTION DEBATES

A. The Opinions of Attorney General Edward Bates

During the Civil War, the issue of citizenship and race became a matter of official discussion among the members of President Lincoln's Cabinet. The resulting 1862 *Report on Citizenship* by Attorney General Edward Bates became one of the most influential discussions of national citizenship in American history and clearly influenced the debates of the Thirty-Ninth Congress.

144 JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (Cleveland, J. Calyer 1849).

145 *Id.* at 92.

146 CONG. GLOBE, 35th Cong., 2d. Sess. 981–85 (1859) (statement of Rep. John Bingham), *reprinted in* 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS, *supra* note 73, at 155.

1. Bates's Letters to Seward

In the early months of 1862, Attorney General Bates briefly addressed the question of alien citizenship in a couple of one-page letters responding to queries by William Seward.[147] In the first letter, Bates explained that common law, "earlier and later commentators on our Constitution," and "familiar practice and usage of the country" combined to establish the proposition "that children born in the United States of alien parents, who have never been naturalized, are native-born citizens of the United States."[148] Rather than exhaustively cite all these sources, Bates simply pointed Seward to the "full and clear statement of the principle" authored "by Assistant Vice Chancellor Sandford, in the case of Lynch *vs.* Clarke."[149] Although such was the general rule, Bates cautioned "[o]f course you will understand that I do not affirm the rule in such exceptional cases as the birth of the children of foreign ambassadors and the like."[150] Bates did not explain the principle that distinguished children born to such parents.

The very next day, Bates followed up by pointing out that an alien child's claim to citizenship could be strengthened by evidence of the parents' desire to swear allegiance to the United States. First, Bates repeated that the rule, "in general terms" was that children born in the United States to alien parents are "native-born citizens of the United States."[151] That general rule was even more dispositive, however, "[i]f, in addition to the fact of native birth, the parents of such children have declared their intention of becoming citizens of the United States."[152] In such a case "the right of the children to be considered citizens becomes still more unquestionable."[153]

The short opinions track the standard idea that birth on American soil establishes the presumed allegiance necessary for citizenship, subject to "exceptions" involving the situation of the child's parents. Neither letter seems to have been published in time to have any effect on the public debates over the Fourteenth Amendment.[154] As far as I know, no newspaper at the time referred to these one-page letters, nor did any Framer or Ratifier of the Fourteenth Amendment.

147 Citizenship of Children Born in the United States of Alien Parents, 10 Op. Att'ys Gen. 328, 328–29 (1862); Citizenship of Children of Naturalized Parents, 10 Op. Att'ys Gen. 329, 329–30 (1862).

148 Citizenship of Children Born in the United States of Alien Parents, 10 Op. Att'ys Gen. 328, 328 (1862).

149 *Id.* at 329.

150 *Id.*

151 *Id.* at 330.

152 *Id.*

153 *Id.*

154 The collection containing the one-page letters was not published until 1868, long after the framing debates and after most states had ratified the Fourteenth Amendment. *See* 10 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL (J. Hubley Ashton ed. 1868).

2. Bates's Report on Citizenship

Bates was soon prompted to provide a more extended analysis of the subject. In September of 1862, Secretary of the Treasury Salmon Chase requested an opinion from the Attorney General regarding whether "colored men [are] Citizens of the United States, and therefore Competent to command American vessels?"[155] Given the importance of the issue to the Lincoln Administration, and the still-looming presence of the Supreme Court's decision in *Dred Scott*, Bates decided a proper response required more than a one page letter. Instead, Bates engaged in a deep dive on the history and law of American citizenship.

Bates began his report by noting the paucity of reliable legal authority regarding "the exact meaning of the word, or the constituent elements" of national citizenship.[156] "The Constitution of the United States does not declare who are and who are not citizens" but instead simply leaves the issue to "the laws of the several states."[157]

Turning to one of the major issues addressed in *Dred Scott*, though without naming that case directly, Bates asserted that "it needs no argument to prove that every citizen of a State is, necessarily, a citizen of the United States; and to me it is equally clear that every citizen of the United States is a citizen of the particular State in which he is domiciled."[158]

As for the Constitution's requirement that Presidents be "natural born citizens,"[159] Bates explained that this referred to those who became citizens by birth as opposed to being naturalized by law.[160] Nothing in the Constitution, however, limited this category to persons of a certain race.[161] Once again obliquely referencing *Dred Scott*, Bates noted that "[w]hatever may have been said, in the opinion of judges and lawyers, and in State statutes, about negroes, mulattoes, and persons of color, the Constitution is wholly silent upon that subject."[162]

After canvassing Greek and Roman law (including the biblical case of the Roman citizen Paul of Tarsus), Bates concluded that "our Constitution, in speaking of natural born citizens, . . . only recognizes and reaffirms the universal principle, common to all nations, and as old as political society, that the people born in a country do constitute the nation, and, as individuals, are natural members of the body politic."[163] Bates concludes,

155 MASUR, *supra* note 133, at 283.
156 Citizenship, 10 Op. Att'ys Gen. 382, 383 (1862).
157 *Id.* at 385.
158 *Id.* at 388.
159 U.S. CONST. art. II § 1 cl. 5.
160 Citizenship, 10 Op. Att'ys Gen. 382, 389 (1862).
161 *Id.*
162 *Id.*
163 *Id.* at 391–94, 394 (emphasis omitted).

> If this be a true principle, and I do not doubt it, it follows that every person born in the country is, at the moment of birth, *prima facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the "natural-born" right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance."[164]

Bates's doctrine of *prima facie* citizenship nicely synthesized a number of otherwise disparate "exceptions" to the general rule of birth citizenship. A child born in the United States is presumed to have a kind of natural allegiance to the sovereign people of the United States.[165] That presumption however may be overcome by evidence "strong enough to override the 'natural-born' right as recognized by the Constitution . . . ."[166]

Bates did not purport to present an exhaustive list of "disqualifying facts." Instead, he simply cited "the small and admitted class of the natural-born composed of the children of foreign ministers and the like."[167] Bates could not have meant this to be an exhaustive list, as he must have been aware of the well-known additional categories of invading armies and Native American Tribes.

At that moment, though, Bates had neither reason nor desire to present an exhaustive list of "disfranchisements." His focus was whether *race* constituted a disqualifying fact—a proposition Bates decidedly rejected. Where former Attorney General William Wirt had relied on state law in concluding that free black Americans could not be citizens of the United States,[168] Bates reversed the analysis and insisted that national citizenship existed regardless of state law.[169] The fact that some states denied their black citizens the same rights as white citizens (such as the right to vote) was irrelevant to the question of citizenship—after all, a great many white citizens also were denied the right to vote (in particular women and children).[170]

As for *Dred Scott*, Bates insisted that the procedural posture of that case limited its relevance to the specific facts and backgrounds of the parties.[171] Accordingly, Chief Justice Taney's musings about race and citizenship were "'*dehors the record*,' and of no authority as a judicial decision."[172]

164 *Id.* at 394 (emphasis omitted).

165 *See also*, HORACE GRAY, A LEGAL REVIEW OF DRED SCOTT, note (Bos., Crosby, Nichols & Co. 1857)21 ("The authorities therefore clearly show that free negroes, born in the United States, are to be presumed citizens in all those States in which no law to the contrary is proved.").

166 Citizenship, 10 Op. Att'ys Gen. 382, 394 (1862) (emphasis omitted).

167 *Id.* at 397 (emphasis omitted).

168 *See* Rights of Free Va. Negroes, 1 Op. Att'ys Gen. 506, 508 (1821).

169 *See* Citizenship, 10 Op. Att'ys Gen. 382, 400 (1862).

170 *See id.* at 385.

171 *Id.* at 412.

172 *Id.*

Despite his exhaustive exploration of the subject of citizenship and his reliance on multiple cases and treatises, Bates omitted any reference to *Lynch v. Clarke*.[173] The omission is surprising, given his praise of the case in an opinion letter only a few months earlier.[174]

Bates's Report had an immediate public impact. As Kate Masur notes, it "received extensive coverage in newspapers."[175] These articles expressly noted Bates's doctrine of prima facie citizenship. According to the *New York Times*, for example, Bates's Report "only recognizes and reaffirms the universal principle common to all nations, that the people born in the country constitute the nation, and that every individual of them is prima facie a citizen."[176] According to the *Weekly National Intelligencer*, "Mr. Bates holds that 'every person born in th[e] country is at the moment of birth *prima facie* a citizen.' To disprove this citizenship 'some great disfranchisement' must be shown to override the 'natural born' claim."[177]

Later treatises also embraced Bates's doctrine of prima facie citizenship as a proper distillation of antebellum law. This includes Timothy Farrar's *Manual of the Constitution of the United States* (1867),[178] George Paschal's treatise on *The Constitution of the United States* (1868),[179] and Israel Ward

173 *Id.* at 394–95 ("I note a few books, which, I think, cannot fail to remove all such doubts: Kent's Com., vol. 2, part 4, section 25; Bl. Com., book 1, chapter 10, p. 365; 7 Co. Rep., Calvin's case; 4 Term. Rep., p. 300; Doe vs. Jones, 3 Pet. Rep., p. 246; Shanks vs. Dupont; and see a very learned treatise, attributed to Mr. Binney, in 2 Am. Law Reporter, 193."). It is possible that Bates thought his reference to Kent's *Commentaries* was sufficient to alert the reader to Lynch, but that would be true only if the reader had an edition published after James Kent's death in 1847. *See* JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM 1763–1847 326 n.89 (1939). *Compare* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, James Kent 5th ed. 1844), *with* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, William Kent 6th ed. 1848).

174 *See* Citizenship of Child. Born in the U.S. of Alien Parents, 10 Op. Att'ys Gen. 328, 329 (1862).

175 MASUR, *supra* note 133, at 284.

176 *See* Opinion of Attorney General Bates, N.Y. TIMES, Dec. 27, 1862 at 4 (on file with N.Y. Times (https://timesmachine.nytimes.com/timesmachine/1862/12/27/90529784.html?pageNumber=4).

177 .*Rights of Citizenship*, WEEKLY NATIONAL INTELLIGENCER (D.C.) Jan. 3, 1863 at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn83045784/1863-01-03/ed-1/?sp=1&st=pdf&r=-0.197,-0.07,1.394,1.394,0) [https://perma.cc/RL9W-VPXW] (quoting Citizenship, 10 Op. Att'ys Gen. 382, 394 (1862)).

178 TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 55 n.1 (Fred B. Rothman & Co. 1993) (1867) ("Every person born in the country is, at the moment of birth, *prima facie* a citizen. . . ." (quoting Citizenship, 10 Op. Atty's Gen. 382, 394 (1862))).

179 GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES 167 (Washington, D.C., W.H. & O.H. Morrison 1868) ("Every person born in the country is, at the moment of birth, *prima* facie, a citizen. . . ." (quoting Citizenship, 10 Op. Atty's Gen. 382, 394 (1862))). In this section discussing the original Constitution's reference to natural born citizens, Paschal expressly cites Bates's *Report on Citizenship*, including Bates's list of supporting authorities which omits any

Andrews' *Manual of the Constitution of the United States* (1874).[180] Likewise, in an 1871 speech before the House of Representatives, future president James Garfield referred to

> the admirable opinion of Attorney General Bates, delivered to President Lincoln, November 29, 1862, [where] this whole subject is thoroughly discussed. [Bates] says: 'The Constitution does not make the citizen; it is, in fact, made by them. Every person born in the country is, at the moment of birth, *prima facie*, a citizen.'[181]

Bates did not invent the doctrine of prima facie citizenship. The idea was simply his way of conceptualizing the status of American law regarding natural-born citizenship. According to antebellum law, birth on American soil established a presumptive citizenship, but that presumption could be overridden in certain contexts. Bates himself believed the presumption survived absent proof of "some great disfranchisement," but that phrasing was his alone, and he left undefined exactly what might or might not meet that standard.[182] It would be up to the members of the Thirty-Ninth Congress to legally define the circumstances in which birth on American soil was insufficient to establish citizenship.

Of immediate import was the *Report*'s implication for black citizenship. If Bates was right, then every formerly enslaved black American born in the United States automatically became a presumptive citizen of the United States (or had their citizenship restored) upon the ratification of the Thirteenth Amendment.[183] Moreover, if one accepted the reasoning of Joseph Story (the most influential legal theorist in the country at that time), formerly enslaved black Americans also automatically became citizens of their state of residence.[184] Republicans thus initially hoped that black

reference to *Lynch v. Clarke*. *Id.* at 167–68. For more on Paschal's treatise, see *infra* note 393 and accompanying text.

180 ISRAEL WARD ANDREWS, MANUAL OF THE CONSTITUTION OF THE UNITED STATES 96 (Homer Morris ed., Am. Book Co. 1900) (1887) ("Citizens are either native-born or naturalized. Every person born in the country is, from the time of birth, *prima facie* a citizen.").

181 JAMES GARFIELD, ENFORCEMENT OF THE FOURTEENTH AMENDMENT 9 (Washington, Rives, & Bailey 1871) (quoting Citizenship, 10 Op. Att'ys Gen. 382, 394 (1862)).

182 Citizenship, 10 Op. Att'ys Gen. 382, 394 (1862).

183 There is a major exception to this general rule. The Thirteenth Amendment neither freed nor made citizens of black Americans who had been enslaved by Native American Tribes. Nor would this be accomplished by the Fourteenth Amendment. Instead, in 1866, following the passage of the Fourteenth Amendment, the Senate ratified a number of treaties requiring Native American Tribes to free their slaves and grant them equal status as *tribal* citizens. *See* Treaty with the Choctaws and Chickasaws, *supra* note 128; *see also* PRUCHA, *supra* note 104 at 267.

184 *See supra* note 31 and accompanying text; *see also* Colchester v. Lyme, 13 Conn. 274, 278 (1834) ("The master of this slave, by relinquishing all claims to service and obedience, effectually emancipated her; and thus she became *sui juris*, and entitled to all the rights and privileges of other free citizens of the state."); State v. Manuel, 20 N.C. 144 (3 & 4 Dev. & Bat., 20, 25 (1838) ("Slaves manumitted here became freemen—and therefore if born within North

citizenship would be immediately and automatically recognized in the southern states.[185] Instead, southern states enacted the infamous Black Codes.[186] By the time the Thirty-Ninth Congress was gaveled into session in December of 1865, most Republicans recognized that the formal eradication of slavery would not be enough to secure the rights of equal citizenship in the southern states.

A few days before the opening of the Thirty-Ninth Congress, General Benjamin Butler wrote to Massachusetts Republican Senator Henry Wilson suggesting that Congress pass an official statement regarding black citizenship.[187] Such a statement "is necessary as a declaration that the freedmen have become citizens of the United States by the operation of the [Thirteenth] Amendment, and thus to overturn the lingering remains of the authority of the *Dred Scott* decision."[188] Ultimately, the Thirty-Ninth Congress would pass both a statute and an amendment addressing issues of citizenship.

B. The Citizenship Clause of the 1866 Civil Rights Act

1. The Senate Debates

On January 11, 1866, the Chairman of the Senate Judiciary Committee introduced Senate Bill 61 "to protect all persons in the United States in their civil rights."[189] On January 30, Trumbull submitted a draft of the bill which opened by declaring "That all persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color. . . ."[190]

Trumbull's proposal prompted Senator Guthrie to inquire whether "he intends by that amendment to naturalize all the Indians of the United

Carolina are citizens of North Carolina—and all free persons born within the State are born citizens of the State.").

185 *See* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 133 (2004) ("[M]ost Republicans, even the radicals among them, did not foresee a time when the clause would be invoked to increase federal power over the states. Instead, they assumed that the states would apply the laws of freedom equally. Republicans who assumed that the states would act responsibly may have been naive, but their assumption was nonetheless genuine.").

186 For a discussion (and description) of the Black Codes in the Thirty-Ninth Congress, see 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 24–26 (Kurt T. Lash ed., 2021).

187 Letter from Gen. Benjamin Butler to Henry Wilson (Nov. 20, 1865), *in* 1 THE RECONSTRUCTION AMENDMENTS, *supra* note 73, at 556.

188 *Id.* (emphasis added).

189 CONG. GLOBE, 39th Cong., 1st Sess. 184 (1866).

190 *Id.* at 498.

States?"[191] Trumbull responded by declaring it was perfectly appropriate to make citizens of tax-paying Indians who had left their tribal government:

> Our dealings with the Indians are with them as foreigners, as separate nations. We deal with them by treaty, and not by law, except in reference to those who are incorporated into the United States as some are, and are taxable and become citizens, and then it would be desirable that it should apply to the Indians so far as those who are domesticated and pay taxes and live in civilized society are concerned.[192]

According to Trumbull, because the federal government considered Indian tribes to be "separate nations," this meant that their members were "subject to [a] foreign Power" and therefore were textually excluded from his proposed citizenship clause.[193] As evidence of this status, Trumbull noted that "[w]e [Congress] deal with them by treaty, and not by law."[194]

This is the first of many times Trumbull pointed to treaty-based regulation of Indian tribes as evidence that Indians were "subject" to a foreign authority, and therefore not "subject" to the jurisdiction of the United States. His point had nothing to do with Indians not being within the *legal* jurisdiction of the United States. Antebellum and Reconstruction treaties regularly and expressly declared that Indian tribes fell within the legal and judicial "jurisdiction" of the United States.[195] Trumbull's point was that, even if subject to federal law, tribal governments and their members existed within the territory of the United States as "separate nations." This made them, in the language of his original draft, "subject to [a] foreign Power."[196]

When asked by Senator Cowan whether the proposal would "have the effect of naturalizing the children of Chinese and Gypsies born in this country?" Trumbull answered "[u]ndoubtedly."[197] This was not because of natural right, but because of federal statutes. According to Trumbull, "under the naturalization laws the children who are born here of parents who have not been naturalized are citizens. That is the law, as I understand it, at the present time."[198] The law made no distinction "between the children of German parents and the children of Asiatic parents."[199]

Kansas Senator Jim Lane pointed out that in Kansas some Indians had "separated . . . from their tribal relations" and held taxable allotments of

191 *Id.* Mr. Howard immediately echoed Guthrie's query: "That is the very question I was about to put." *Id.*

192 *Id.* (statement of Sen. Trumbull).

193 *Id.*

194 *Id.*

195 *See supra* notes 104–05 and accompanying text.

196 CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866).

197 *Id.*

198 *Id.*

199 *Id.*

land.[200] "I suppose the chairman does not intend to make the Indians of Kansas citizens of the United States."[201] In response, Trumbull presumed that they would be citizens if "they . . . separated from their tribes and incorporated in your community."[202] Lane retorted that "they are not" so incorporated and "[w]e [Kansans] do not intend to extend to them the right of citizenship, but our supreme court [has] decided that their lands are taxable and that they are separated from their tribes."[203] Lane proposed extending the language of the statute to read, "All persons born in the United States and not subject to any foreign Power *or tribal authority*, are hereby declared to be citizens of the United States."[204] Although Trumbull thought his proposal "would mean [the same] without it," he nevertheless accepted Lane's proposed addition.[205]

At this point, former Attorney General Reverdy Johnson raised the problem of *Dred Scott*. Warned Johnson, "[i]f the Supreme Court decision is a binding one and will be followed in the future, this law which we are now about to pass will be held of course to be of no avail."[206] Accordingly, "the object can only be safely and surely attained by an amendment of the Constitution."[207]

Johnson's call for the constitutional abolition of *Dred Scott* would come to pass with the adoption of the Fourteenth Amendment. For the time being, however, a sufficient number of Republicans believed they had the power to pass the statute regardless of *Dred Scott* and they continued to debate its language.

The complicated status of Indian tribes continued to trouble the drafters of the Civil Rights Act. On January 31, California Senator John Conness

200 *Id.*

201 *Id.*

202 *Id.* at 498–99.

203 *Id.* at 499. Lane's concerns were prompted by a recent ruling by the state court that Indians holding certain allotments could be treated separately from the rest of their tribe and their allotments subject to state taxation. *See* Blue-Jacket v. Johnson County Com'rs, 3 Kan. 299, 364 (1865); *see also* Miami County Com'rs v. Wan-zop-pe-che, 3 Kan. 364, 371 (1865). The United States Supreme Court later that year invalidated the decision of the Kansas Supreme Court. *See*, *In re Kansas Indians*, 72 U.S. 737, 756 (1866) ("Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common.").

204 CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (emphasis added).

205 *Id.* The language solved Lane's concern by clarifying that Indians remaining on tribal lands would not be made citizens, even if their allotments were ruled subject to state taxation.

206 *Id.*

207 *Id*. Although Reverdy Johnson had defended the slave owners in *Dred Scott*, Johnson himself was opposed to slavery and was one of the few congressional Democrats to vote in favor of the Thirteenth Amendment. *See* BERNARD C. STEINER, LIFE OF REVERDY JOHNSON 37–38 (1914); CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1864).

noted that, as currently drafted, the bill would make citizens of Indians who, although living on reservations, nevertheless "are entirely under the control and disposition of the United States and its officers [and] are not under the direction of any tribal authority whatever."[208] According to Conness, "[t]hey have no capacity for citizenship and there would be no propriety in extending citizenship to them."[209]

Kansas Senator Samuel Pomeroy remarked that he "was not aware" of situations where "Indians . . . had no tribal authority or no tribal organization" and that he had "never known any officers of the United States to have control over Indians without an organization."[210] In response, California Senator John Conness explained that "[t]he Superintendent of Indian Affairs and his agents and employés have control of them. These Indians are brought in and placed upon reservations. They are cut off from all connection with their tribes. . . . *They are in all respects subject to the authority of the agents of the Government.*"[211]

Minnesota Senator Alexander Ramsey raised similar concerns about unaligned groups of Indians. According to Ramsey, "there have been large numbers of roving Indians on our frontier . . . that were outlaws, refugees from all tribal authority, and recognized no such authority."[212] Since Congress could not possibly want to make these "refugees" Indians citizens, Ramsey suggested amending the statute to exclude "Indians not admitted to citizenship by the laws of any of the States."[213]

208 CONG. GLOBE, 39th Cong., 1st Sess. 526 (1866).

209 *Id.*

210 *Id.*

211 *Id.* (emphasis added). In his paper on birthright citizenship, Ilan Wurman describes "wild" or "roaming" (unaligned) Indians as not subject to the jurisdiction of the United States because, under his theory of "allegiance for protection" they had "never recognized the authority of the United States and derived no protection from it." See, Wurman, *Jurisdiction and Citizenship*, *supra* note 7 at 407. Although this might be true under Wurman's stipulated definition of those terms, it is not true in terms of the language of Indian treaties or the responsibilities of Indian agents whose jurisdiction very much included the protection of unaligned groups of Indians who were subject to both predation and, occasionally, starvation. See, PRUCHA, *supra* note 104 at 235–40. Wurman also claims that "So long as the municipal relations among tribal members or the non-tribal Native Americans were not governed by U.S. law, such persons were not subject to U.S. jurisdiction in the relevant sense." Wurman, *Jurisdiction and Citizenship*, *supra* note 7, at 423. In fact, the United States held and occasionally exercised "jurisdiction" over local municipal rights. For example, Treaties enacted after the Civil War required the tribal governments to abolish slavery, to grant tribal citizenship to formerly enslaved black Americans, and to grant these black tribal members all of the local rights and privileges as granted to other tribal citizens. *See, e.g.*, Article 3, Treaty with the Choctaw and Chickasaw (1866) (requiring the tribes to grant to "all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations. . . ."); *see also* PRUCHA, *supra* note 104, at 261.

212 CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866).

213 *Id.*

Senators Conness and Ramsey were referring to Indians who, by law, were considered members of "foreign nations," but who refused to live under any tribal government and instead attempted to live in the United States as "refugees" under the nominal control of "agents of the government."[214] Federal law did not treat them as having become part of the people of the United States, but instead made them subject to being "brought in" by government officials and "placed upon reservations."[215] All members agreed that none of these unaligned Indians, adults or children, should be made citizens of the United States.

Lyman Trumbull agreed that the benefits of birthright citizenship should not extend to Indians who refused to recognize the authority of any government. The problem was finding the proper language that excluded both Indians living under recognized tribal government and those that refused to live under any government.[216] Explained Trumbull:

> Of course we cannot declare the wild Indians who do not recognize the government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted.
>
> The Constitution of the United States excludes them from the enumeration of the population of the United States, when it says that Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United States, excluding Indians not taxed, and not subject to any foreign power, shall be deemed citizens of the United States.[217]

Trumbull's efforts were focused on establishing a race-neutral criteria for citizenship. He was prepared to discuss the condition of black Americans in the south. Federal relations with Indians was a subject he knew needed to be addressed, but he was not particularly familiar with the full scope of federal regulation of Indian affairs. His general knowledge was correct: Indian tribes were subject to treaty-based laws but were "not subject to *our* laws."[218] By "our laws," Trumbull meant the laws of general congressional legislation. The consensus by the time of early Reconstruction was that

214 *Id.* at 526–27.

215 *Id.* at 526.

216 *See id.*at 527.

217 CONG. GLOBE, 39th Cong., 1st Sess., at 527. Trumbull's assertion that "we do not pretend to interfere" with Indian tribes is a reference to Congress and not to the federal government as a whole. As discussed in a prior section, although tribal governments were generally left to their own internal policing, the federal government nevertheless maintained both civil and criminal oversight over Indian tribes, including judicial oversight. See *supra* notes 101–05 and accompanying text.

218 *Id.* (emphasis added).

Indians were members of foreign nations and were not viewed as part of the "population of the United States." As proof of this general legal consensus, Trumbull cited the text of the Constitution which excluded "Indians not taxed" from being counted as part of the population of the United States.

To Trumbull, for the purposes of national citizenship the key distinction was between those who owed allegiance to a foreign government and those who held allegiance to the United States. "My own opinion," Trumbull explained, "is that all these persons born in the United States and *under its authority*, owing *allegiance* to the United States, are citizens without any act of Congress."[219] Here Trumbull introduces an ambiguity. Is every child born in the United States and subject to the *legal* authority of the United States a citizen of the United States? If so, then members of Indian tribes clearly would be included. The fact that Trumbull believed they would be *excluded* suggests he understood being born "under [the] authority" of the United States as something different than simply being born subject to the enforcement of federal law. This ambiguity became the subject of substantial additional debate.

To satisfy the concerns of Conness and Ramsey, Trumbull agreed to alter the draft so that it read "all persons born in the United States, excluding Indians not taxed, and not subject to any foreign Power, shall be deemed citizens of the United States."[220] When debate continued the next day, Missouri Senator John Henderson objected to the exclusion of "Indians not taxed."[221] "What objection," complained Henderson, "can the Senators have to declaring Indians living in the country, although they may not be taxed, to be citizens of the United States?"[222] Addressing Minnesota's Senator Ramsey in particular, Henderson demanded, "the Indian, if he is connected with no tribe, whether he is taxed or not, ought to be a citizen of the United States. What harm can there be in declaring that fact?"[223]

In reply, Senator Ramsey observed that his colleague seemed to think that "all Indians who are no longer connected with their tribes or under a tribal government are civilized Indians, living as farmers, or in some other way earning a livelihood in the white settlements. That is an entire mistake."[224] In fact:

> [I]n all the border States there are large numbers of wild, savage Indians . . . who have no tribal government, who are outlaws from their

219 *Id.* (emphasis added).

220 *Id.* at 527; see *id.* at 526 (showing Conness's concerns); *id.* at 571 (showing Ramsay's satisfaction with the modified amendment).

221 *Id.* at 571.

222 *Id.*

223 *Id.*

224 *Id.* at 572.

> tribes and their nations. It certainly is not the intention of the Senator or the intention of the Senate to admit Indians of that class to citizenship.[225]

Trumbull's response to Senator Henderson focused on the question of allegiance. "The Senator from Missouri and myself desire to arrive at the same point precisely," Trumbull explained, "and that is to make citizens of everybody born in the United States who owe *allegiance* to the United States."[226] There was, however, "a difficulty in framing the amendment as to make citizens of all the people born in the United States and who owe allegiance to it."[227]

Here one must pause. Notice Trumbull's publicly stated goal. This was not an effort to divide those subject to federal law from those not subject to federal law. Nor was this an effort to simply grandfather into the statute the ancient categories of common law exceptions to natural-born citizenship. This conversation did not occur in a legal and historical vacuum. The country had just emerged from a civil war that cost the lives of over 600,000 men due to a treasonous denial of allegiance to the Union—the United States. Going forward, there would be no national citizenship absent a reasonable expectation of national *allegiance*.

Trumbull then walked his colleagues through the various categories which he desired to exclude from the statute's definition of natural born citizenship:

> We cannot make a citizen of the child of a foreign minister who is temporarily residing here. . . . I thought that might perhaps be the best form in which to put the amendment at one time, "That all persons born in the United States and owing allegiance thereto are hereby declared to be citizens;" but upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens, and that that form would not answer.
>
> Then it was suggested that we should make citizens of all persons born in the United States not subject to any foreign Power or tribal authority. The objection to that was, that there were Indians not subject to tribal authority who yet were wild and untamed in their habits, who had by some means or other become separated from their tribes and were not under the laws of any civilized community, and of whom the authorities of the United States took no jurisdiction.
>
> The Senator from California [Mr. Conness] told us that there were in his State Indians who had been placed upon reservations under charge of Indian superintendents who had not been separated from their tribes and were not under any tribal authority, but they were under the regulation of treaties which had been made with them, and were supplied and looked

225 *Id.*
226 *Id.* (emphasis added).
227 *Id.*

> after by our Indian agents the same as other Indians who were perfectly wild, not submitting at all to the usages of civilized life, and it could not be intended to make that class of persons citizens.
>
> Then it was proposed to adopt the amendment as it now stands, that all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, shall be citizens. What does that phrase "excluding Indians not taxed" mean? The Senator from Missouri understands it to be a property qualification to become a citizen. Not at all. It is a constitutional term used by the men who made the Constitution to designate, what? To designate a class of persons who were not part of our population. That is what it means. They are not counted in the census. They are not regarded as part of our people. The term "Indians not taxed" means Indians not counted in our enumeration of the people of the United States."[228]

Note Trumbull's struggle to apply a commonly accepted principle to a wide variety of potential (and only recently recognized) situations. Everyone agreed that natural-born citizenship required meeting conditions of place and allegiance. But sometimes children were born in the United States into families owing no more than an incomplete allegiance, or to families holding a counter allegiance, or still other families refusing allegiance to any government.

This last category was especially problematic. Unaligned Indians living separate from tribal authority did not owe "allegiance to a foreign Power," whether to a tribal government or to the United States or to anybody else. Children born into this kind of familial context could not reasonably be viewed as holding even presumptive allegiance to the United States. This is why Trumbull's early draft making citizens of "[a]ll persons born in the United States and not subject to any foreign Power or tribal authority"[229] was insufficient. It would have *excluded* Indians under tribal government ("subject to a foreign Power"), but *included* children born into families of unaligned Indians who refused to live under any "foreign" tribal government.

In order to avoid granting citizenship to the children of tribal members living as "refugees from all tribal authority" (Ramsey's term),[230] Trumbull added an additional exclusion of "Indians not taxed." As Trumbull explained:

> As there is so much difficulty about this matter, and as it seems impossible to satisfy all gentlemen as to this phraseology, I think we had better stand by the constitutional phrase "excluding Indians not taxed." That means Indians not counted as part of our population. It is not a

228 *Id.* (alteration in original) (emphasis added). In the debates on the proposed Fourteenth Amendment, Trumbull would repeat the idea that he viewed the term "Indians not taxed" as a term of art, and not a literal reference to "taxation." *See infra* note 581 and accompanying text.

229 CONG. GLOBE, 39th Cong., 1st Sess., at 572.

230 *Id.* at 527.

> property qualification at all. The people will not so understand it, and we do not so understand it. . . . I think it is in the best form in which we can place it[231]

Once again, Trumbull's focus was on a person's allegiance to a sovereign people. Tribal Indians were members of quasi-foreign governments and, from the time of the original Constitution, had not been considered members of "our" population (and so not counted for purposes of congressional apportionment).[232] Their allegiance lay elsewhere.

The next day, Trumbull concluded his remarks on the citizenship clause by repeating his opinion

> that every free-born person in this land is, by virtue of being born here, a citizen of the United States, and that the bill now under consideration is but declaratory of what the law now is; but, inasmuch as some persons deny this, I thought it advisable to declare it in terms in the statute itself.[233]

Note how Trumbull's shorthand description of the text could be misconstrued as establishing citizenship purely on the basis of birth in the United States. Although not strictly accurate, it distilled the major focus of the effort. Congress's primary goal in drafting a citizenship clause was to reverse the erroneous holding in *Dred Scott* and declare what should have always been a race-neutral understanding of natural-born citizenship. Accomplishing this without accidently sweeping in persons lacking the proper allegiance was important but secondary.

Soon after Trumbull spoke, the Senate passed its final version of the Civil Rights Bill's citizenship clause: "All persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States, without distinction of color. . . ."[234]

2. The House Debates

On March 1, the House began debate on the Civil Rights Bill.[235] At this point, the House version read: "all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States without distinction of color."[236] According to the bill's sponsor, Iowa Representative James Wilson, the provision "is merely declaratory of what the law . . . is."[237] Wilson supported

231 *Id.* at 574.
232 *See supra* notes 99–102 and accompanying text.
233 CONG. GLOBE, 39th Cong., 1st Sess., at 600 (statement in session of Feb. 2
234 *See id.* at 569, 606–07.
235 *See id.* at 1115.
236 *Id.*
237 *Id.* (statement of Rep. Wilson).

his assertion by quoting Blackstone's explanation that "[n]atural-born subjects are such as are born within the dominions of the Crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king . . . ."[238] "This law," Wilson explained, "bound the colonies . . . and was not changed afterward."[239]

Dismissing Taney's opinion in *Dred Scott* as partisan subterfuge, Wilson extolled Attorney General Edward Bates's *Report on Citizenship* as the "ablest and most exhaustive opinion ever given on the subject of negro citizenship by any . . . officer of the Government."[240] The Attorney General's "careful and painstaking examination" fully supported the idea that a "free man of color . . . if born in the United States, is a citizen of the United States."[241] According to Wilson, an examination of "general law" suggested that "every person born in the United States is a natural-born citizen of such States, except it may be that children born on our soil to temporary sojourners or representatives of foreign governments, are [not] native born citizens of the United States."[242]

The next day, Pennsylvania Representative M. Russell Thayer described the bill as "simply declaring that all men born on the soil of the United States shall enjoy the fundamental rights of citizenship."[243] This was simply "declaratory of the existing law" which was that "every man born in the United States, and not owing allegiance to a foreign Power, is a citizen of the United States."[244] It was "a rule of universal law," Thayer maintained, "that they who are born upon the soil are . . . citizens of the State. They owe allegiance to the State, and are entitled to the protection of the State."[245]

238 *Id*. at 1116 (alteration in original) (quoting 1 WILLIAM BLACKSTONE COMMENTARIES 365 (George Sharswood ed., Philadelphia, J.B. Lippincott Co. 1859)).

239 *Id.*

240 *Id.*

241 *Id.* at 1117 (quoting Bates, *supra* note 1, at 413). For this opening section of his speech, Wilson also cites "Rawle, on the Constitution," and "Kent's Commentaries, volume two, lecture twenty-five" and "Lawrence's Appendix to Wheaton on International Law." *Id.*

242 *Id.* The word "not" is not in the text of the *Congressional Globe* but seems necessarily implied (and accidently omitted) by the context.

243 *Id.* at 1151.

244 *Id.* at 1152.

245 *Id. See also id.* at 1262 (March 8, 1866) (Speech of Rep. Broomhall) ("The first provision of the bill declares that all persons born in the United States and not subject to any foreign Power are citizens of the United States. As a positive enactment this would hardly seem necessary. . . . What is a citizen but a human being who by reason of his being born within the jurisdiction of a Government owes allegiance to that Government?)"; Representative Columbus Delano, Speech in the House, March 8, 1866, CONG. GLOBE, 36th Cong., 1st Sess. App. 156–59, *reprinted in* 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 186 at 130 ("In reference to the question of citizenship, which has been ably discussed by the chairman of the Judiciary Committee [Wilson], I have no doubt. It needs no law, in my estimation, to make citizens of these emancipated people. They are citizens by law now. . . .").

The allegiance required for establishing natural born citizenship was that of the parents. As Ohio Republican John Bingham explained, the citizenship provision in the Civil Rights Act was "simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States *of parents not owing allegiance to any foreign sovereignty* is, in the language of your Constitution itself, a natural-born citizen. . . ."[246] Bingham thus shared the general antebellum view that natural-born citizenship inevitably required consideration of the parent's allegiance. Although Bingham believed Congress lacked the power to pass such an act prior to the adoption of an empowering amendment, he had no substantive objection to the citizenship clause as he believed it merely restated existing law.[247]

On March 13, Congress passed the final version of the Civil Rights Act which declared 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."[248]

3. President Johnson's Veto and Response

Following Congress's failure to override President Johnson's veto of the Freedmen's Bureau Bill, Lyman Trumbull led the effort to convince Johnson to sign the Civil Rights Bill. According to Reconstruction historian Michael Les Benedict, Trumbull "visited the president several times and believed he had won his approval [of the Civil Rights Act]."[249] At some point

246 CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. John Bingham) (emphasis added). Bingham continued, "I may be allowed to say further, that I deny that the Congress of the United States ever had the power or color of power to say that any man born within the jurisdiction of the United States, not owing a foreign allegiance, is not and shall not be a citizen of the United States. Citizenship is his birthright, and neither the Congress nor the States can justly or lawfully take it from him." *Id.* Bingham's reference to "parents not owing allegiance to any foreign sovereignty" was reproduced in multiple newspapers. *See, e.g.*, THE NATIONAL REPUBLICAN (D.C.), Apr. 2, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn86053571/1866-04-02/ed-1/?sp=1&q=national+republican [https://perma.cc/NHY4-ZNBZ]) (full quote from text and this footnote); *XXXIXTH Congress*, NEW YORK TRIBUNE, March 10, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn83030213/1866-03-10/ed-1/?sp=1&st=image [https://perma.cc/4KR4-VURM]) ("He [Bingham] denied that Congress ever had the power, or colorable power, of saying that any man born of parents owing allegiance to the Government, and within its jurisdiction, was not and should not be a citizen of the United States."); ILLUSTRATED NEW AGE (Philadelphia, Pa.), Mar. 10, 1866, at 1 (same quote); *The Civil Rights Bill: Mr. Bingham's Speech*, PHILADELPHIA INQUIRER , Mar. 10, 1866, at 1 (on file with 1 Newspapers.com, https://philly.newspapers.com/image/168071006 [https://perma.cc/8N7H-RNPN]). (same quote).

247 CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

248 *Id.* at 1366–67 (March 13, 1866).

249 MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869 147 (1974). *See also* ERIC L. MCKITRICK, ANDREW JOHNSON

during Trumbull's effort to win Johnson's approval, Trumbull wrote a letter to the President explaining the substantive content and scope of the proposed bill. Proceeding section by section, Trumbull's letter summarized the meaning and scope of each section of the proposed bill. In his description of the opening citizenship clause, Trumbull explained: "The Bill declares 'all persons' born of parents domiciled in the United States except untaxed Indians to be citizens of the United States, & of course entitled to all the rights and privileges and subject to all the duties and responsibilities of citizenship."[250]

This letter confirms that a key framer of the Civil Rights Act and the Fourteenth Amendment shared John Bingham's understanding that natural born citizenship depended on the familial context into which the child was born. As we shall see during the Fourteenth Amendment debates, Trumbull expressly (and publicly) echoed Bingham's view that natural-born citizenship required being born into a context reflecting *allegiance* to the United States.

Despite Trumbull's efforts, President Andrew Johnson vetoed the Civil Rights Bill.[251] In his accompanying message, Johnson complained that the citizenship provision "comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is by the bill made a citizen of the United States."[252]

Johnson also noted a key omission in the Act. "It does not," Johnson wrote, "purport to declare or confer any other right of citizenship than

AND RECONSTRUCTION 316–17 (1960) (describing Trumbull's efforts and his public speech declaring he had kept the president informed of the bill's progress throughout its framing).

250 Letter from Sen. Lyman Trumbull, Chairman, Senate Judiciary Comm., to President Andrew Johnson (undated), (on file with Library of Congress, Andrew Johnson Papers, Reel 45, Manuscript Div.). Although Trumbull's letter to the President was not published at the time, it is nevertheless important evidence of the original understanding of the Fourteenth Amendment's Citizenship Clause. It confirms that Fourteenth Amendment framer John Bingham's parent-based view natural born citizenship was not idiosyncratic and was shared by key framers of both the Civil Rights Act and the Fourteenth Amendment. Also, although written in regard to the Civil Rights Act, we know that Trumbull and the other framers believed (and publicly declared) that the Fourteenth Amendment's Citizenship Clause had the same "object" as the Civil Rights Act's Citizenship Clause, and that both represented the proper understanding of antebellum law. *See infra* note 312. During the ratification phase, advocates repeatedly declared that the amendment's Citizenship Clause was simply a restatement of the Civil Rights Act. *See infra* note 312. For a full transcription of the handwritten letter, see, Kurt T. Lash, "Lyman Trumbull's Letter to Andrew Johnson": Authorship, Transcript, and Artificial Intelligence (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5967595) (forthcoming, Georgetown Journal of Law and Public Policy, 2026).

251 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866) (statement of President Andrew Johnson).

252 *Id.*

Federal citizenship."[253] Accordingly, "the power to confer the right of State citizenship [remains] just as exclusively with the several States as the power to confer the right of Federal citizenship is with Congress."[254] Remedying this omission ultimately prompted the framers of the Fourteenth Amendment to add a *state* citizenship clause following the national citizenship clause.[255]

Newspapers widely reported Johnson's veto. As far away as Placer County, California, papers reported that Johnson had vetoed a bill which "declared that all persons born on American soil were citizens, except those acknowledging allegiance to a foreign power and untaxed Indians."[256] *The Chicago Republican* reported that one of Johnson's primary objections was that "the bill declares all persons born in the United States, save those subject to foreign governments, as the children of Ministers and Consuls officially residing in the United States, and of foreign parents temporarily sojourning in this country, to be citizens of the United States."[257] The newspaper did not challenge the President's interpretation of the clause, but instead defended the interpretation as representing a proper approach to national citizenship.[258]

The vetoed Bill now returned to Congress for possible override. Responding to Johnson's veto message, Senator Trumbull noted that the President did not dispute the Bill's claim that the citizenship provision simply declared existing law:

> It was believed by myself and many others that all native-born persons since the abolition of slavery were citizens of the United States. This was the opinion of Mr. Bates, the Attorney General during Mr. Lincoln's Administration, the opinion adopted by his Administration and acted upon since by all departments of the Executive Government."[259]

As far as state citizenship was concerned, Trumbull cited Chief Justice John Marshall's opinion in *Gassies v. Ballon,*[260] where Marshall wrote that "[a] citizen of the United States residing in any state of the union, *is* a citizen

253 *Id.*

254 *Id.*

255 *See* Lash, *supra* note 27, at 1140.

256 *See Another Veto,* THE PLACER HERALD, March 31, 1866, at 2 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn82014998/1866-03-31/ed-1/?sp=2&st=image [https://perma.cc/PRB3-799N]).

257 *See* DAILY INTER OCEAN (published as THE CHICAGO REPUBLICAN), (Chicago, Illinois), March 30, 1866, p. 4.

258 *Id.*

259 CONG. GLOBE, 39th Cong., 1st Sess. 1756 (1866) (statement of Sen. Trumbull). Newspapers at the time reported Trumbull's speech, including his reliance on the opinion of Attorney General Bates. *See, e.g.*, *The Civil Rights Bill*, BOSTON DAILY ADVERTISER, April 5, 1866, at 1 ("[A]ll native born persons, since the abolition of slavery, were citizens of the United States. This was the opinion—the official opinion—of Mr. Bates, the Attorney General of Mr. Lincoln's administration, and acted upon since by all the departments of the executive government . . . .")

260 Gassies v. Ballon, 31 U.S. (6 Pet.) 761, 762 (1832).

of that state."[261] In other words, citizens of the United States automatically became citizens of their state of residence (with all the rights attendant on that status). Finally, Trumbull mocked the President's objections to non-white citizenship:

> The President also has an objection to the making citizens of Chinese and Gypsies. I am told that but few Chinese are born in this country, and where the Gypsies are born, I never knew. [Laughter]. Like Topsy, it is questionable whether they were born at all, but "just come." [Laughter].[262]

Democrat Senator Reverdy Johnson once again raised the problem of constitutional authority. If antebellum law left citizenship to the states and some states had denied such status to black Americans (free or not), "then I should like to know where is the authority in Congress to interfere with what the State has done in the past, or may be doing in the present . . . unless it can be accomplished under the constitutional amendment."[263]

Despite such objections, the Senate overrode President Johnson's veto—by a single vote.[264] The House quickly followed suit. There, Ohio Representative William Lawrence repeated the standard Republican view that the citizenship clause "is unnecessary, but nevertheless proper, since it is only declaratory of what is the law without it."[265] As authority, Lawrence cited, among other works, Bouvier's *Law Dictionary*, Kent's *Commentaries*, "Attorney General Bates, Opinion, Nov. 29, 1862," and "the great case of *Lynch vs. Clarke*" and its rule that "children born here are citizens without any regard to the political condition or allegiance of their parents."[266]

Lynch, of course, contains no such "rule." Lawrence seems to be quoting the previously discussed note anonymously added to the sixth edition of Kent's *Commentaries*.[267] No one else during the debates mentioned the *Lynch* case, much less the editorial note. Nor did Lawrence's speech receive the same attention in the national press as did the speeches of more important members like Trumbull and Bingham. Instead, Lawrence's comments seem to have been reported only in a handful of small-town papers in Lawrence's home state.[268] Compare, in this regard, the national newspaper

261 *Id.*; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1756 (1866) (statement of Sen. Trumbull).

262 CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866). "Topsy" is a character in Harriet Beecher Stowe's massively popular abolitionist novel, *Uncle Tom's Cabin*. HARRIET BEECHER STOWE, UNCLE TOM'S CABIN, 315 (Mary R. Reichardt ed., Ignatius Press 2009) (1852).

263 CONG. GLOBE, 39th Cong., 1st Sess. 1777 (1866) (statement of Sen. Johnson).

264 *See id.* at 1809 (statement of Sen. Foster).(

265 *Id.* at 1832 (statement of Rep. Lawrence).

266 *Id.* (alteration in original) (quoting *Lynch v. Clarke*, 1 Sand. Ch. 583, 584 (N.Y. Ch. 1844)).

267 *See supra* note 82 and accompanying text. This suggests that Lawrence was relying on the note and not the opinion.

268 *See, e.g.*, *Speech of Hon. William Lawrence on Civil Liberties*, THE TIFFIN WEEKLY TRIBUNE (Ohio), April 19, 1866, at 1 (on file with Libr. of Cong., Chronicling America,

coverage of Bingham's insistence that the bill's citizenship clause was "simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen."[269] Although Congress voted to override the President's veto,[270] lingering questions remained regarding the *Dred Scott* decision and the scope (and legality) of the Civil Rights Act. Members like John Bingham continued to press for the adoption of a constitutional amendment that would expressly and permanently end any doubts about equal rights of American citizenship. The Joint Committee would draft most of that amendment. It would be the Senate, however, that proposed adding language defining the requirements of natural born citizenship.

C. The Citizenship Clause of the Fourteenth Amendment

1. The Draft of the Joint Committee

The Thirty-Ninth Congress simultaneously pursued two approaches to securing basic rights for southern freedmen.[271] The first involved the passage of statutes like the Civil Rights Act. The second approach, pursued by the Joint Committee on Reconstruction, involved drafting a series of proposed constitutional amendments.[272] Following the initial failure of submitting separate shorter amendments, the Joint Committee ultimately combined several proposed amendments into a single five-sectioned amendment.[273] Section One of this proposed amendment declared:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor

https://www.loc.gov/resource/sn87076793/1866-04-19/ed-1/?sp=1&st=image&r=-0.664,-0.072,2.327,1.436,0 [https://perma.cc/Q257-KYQL]); THE TROY TIMES (Ohio), Apr. 19, 1866, at 1 (on file ????).Some of this small-town coverage came long after the speech. *See, e.g.*, THE COSHOCTON AGE (Ohio), May 11, 1866 at 1 (on file ????); THE URBANA CITIZEN AND GAZETTE (Ohio), May 3, 1866, at 1 (on file ????); SIDNEY JOURNAL (Ohio), June 1, 1866, at 6 (on file ????). phEven if someone, somewhere, outside Ohio noticed Lawrence's speech, the fact that he was the sole member of Congress to mention the case suggests that *Lynch* played no significant role in the drafting or public understanding of the Civil Rights Act, much less the Fourteenth Amendment's Citizenship Clause.

269 CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Sen. Bingham). As noted previously, Bingham's reference to "parents not owing allegiance to any foreign sovereignty" was reproduced in multiple newspapers. *See supra* note 247.

270 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1861 (1866) (statement of Rep. Colfax).

271 Portions of this section are from Lash, *supra* note 27, at1122–23.

272 For a general description of these occasionally competing strategies, see LASH, *Introduction to Part IA*, *in* 2 RECONSTRUCTION AMENDMENTS, *supra* note 186, at 5–14.

273 *Id.* at 5.

> deny to any person within its jurisdiction the equal protection of the laws.[274]

Drafted by John Bingham, this draft of Section One did not include a provision defining either national or state citizenship. The omission might reflect Bingham and the Joint Committee's agreement with Attorney General Bates that birthright national citizenship was already the law of the land.[275] They might also have accepted the rule announced in *Gassies* that all freedmen born in the United States automatically become national citizens and citizens of their state of residence.[276] The Supreme Court in *Dred Scott*, of course, had reasoned to the contrary.[277] But Republicans rejected the authority of Taney's opinion beyond the specific parties involved.[278] Whatever the reason, neither Bingham nor the Joint Committee considered it necessary to define national or state citizenship in their final submitted draft of Section One.

House Republicans quickly rallied around the proposed amendment and voted its passage on May 10, 1866.[279] It was up to the Senate to either pass the Fourteenth Amendment or to suggest changes to the Committee's draft.

2. The Need to Define Citizenship

On May 23, 1866, Joint Committee member Senator Jacob Howard introduced the proposed Fourteenth Amendment to his Senate colleagues.[280] Although the draft contained a clause requiring states to protect the privileges or immunities of citizens of the United States, it did not define *how* one became such a citizen. Obliquely acknowledging this omission, Howard noted that the original Constitution's Comity Clause had impliedly created a form of national citizenship whereby "the citizens of each one of the original States" received rights belonging to "citizens of the United States."[281] "And how," Howard rhetorically asked, "did they antecedently become citizens of the several States?"[282] By way of that "natural law which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country."[283] Presumably, the same natural law that

274 *See* CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866) (statement of Rep. Stevens).

275 *See supra* note 155–63 and accompanying text.

276 *See supra* note 262 and accompanying text.

277 *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 416 (1857).

278 *See, e.g.*, ABRAHAM LINCOLN, Speech on the *Dred Scott* Decision at Springfield, Ill. (June 26, 1857), *in* THE WRITINGS OF ABRAHAM LINCOLN 108, 110–11 (Steven B. Smith ed., 2012. *See also* BATES, *supra* note 1, at 412.

279 CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866) (statement of Rep. Colfax).

280 *Id.* at 2764 (statement of Sen. Howard).

281 *Id.* at 2765.

282 *Id.*

283 *Id.*

established state citizenship also, if only impliedly, made persons born in the United States citizens of the United States.[284]

Howard's theory not only left national citizenship dependent on theories of *state* citizenship, but also presumed states would agree with Howard's understanding of the "natural law."[285] As antebellum practice illustrated, however, individual states often had very different ideas about natural law, particularly when it came to black Americans. Moreover, as Justice Curtis had written in his *Dred Scott* dissent, states retained the authority to regulate both citizenship and the scope of local civil rights.[286] Howard's "implied national citizenship" theory of the Joint Committee draft thus left open an enormous loophole through which the states might escape simply by denying black residents the status of state citizenship.

Howard's colleagues recognized the draft's weakness. Immediately following Howard's speech, Republican Senator Benjamin Wade rose to suggest rewording the draft so that it declared "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of persons born in the United States or naturalized by the laws thereof."[287] Wade's approach intentionally removed the term "citizen" from Section One altogether. Explained Wade, "['citizen'] is a term about which there has been a good deal of uncertainty in our Government. The courts have stumbled on the subject, and even here, at this session, that question has been up and it is still regarded by some as doubtful."[288] Although Wade himself believed that "every person, of whatever race or color, who was born within the United States was a citizen of the United States; . . . by the decisions of the courts there has been a doubt thrown over that subject."[289]

Members immediately challenged Wade's presumption that "every person . . . who was born within the United States was a citizen of the United States." The Chair of the Joint Committee on Reconstruction, Maine Senator William Pitt Fessenden, remarked "in an undertone, that persons may be born in the United States and yet not be citizens of the United States."[290] Fessenden then openly queried, "[s]uppose a person is born here of parents from abroad temporarily in this country[?]"[291] Wade responded that the only exception that he was aware of involved

> children of foreign ministers who reside "near" the United States, in the diplomatic language. By a fiction of law such persons are not supposed

284 *Id.*

285 Portions of this section are from Lash, *supra* note 27, at 1124.

286 *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 292, 583 (1877) (Curtis, J., dissenting). For a discussion of Justice Curtis's dissent, see Lash, *supra* note 27 at 1121.

287 CONG. GLOBE, 39th Cong., 1st Sess. 2768–69 (1866) (statement of Sen. Wade).

288 *Id.* at 2768.

289 *Id.*

290 *Id.* at 2769.

291 *Id.* (statement of Sen. Fessenden).

> to be residing here . . . . [But that] 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.[292]

Wade's response convinced no one. Instead, multiple members proposed their own suggested changes to the Joint Committee's draft amendment.[293] Rather than work through the various proposals on the Senate floor where Democrats might delay or obstruct the effort, Republicans agreed to discuss the matter among themselves in a series of separate (and closed) meetings.[294] According to the *New York Herald*, Republicans met in a private caucus and appointed a drafting subcommittee made up of the "Senatorial portion of the Reconstruction Committee" including "Fessenden, Grimes, Howard, Harris and Williams."[295]

3. The Citizenship Clauses

On May 29, Jacob Howard returned to the floor of the Senate and presented "a series of amendments to the joint resolution."[296] The proposed changes included a new opening sentence to Section One: "All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside."[297]

Like the Civil Rights Act, the Fourteenth Amendment would now begin by defining national citizenship. However, instead of the statute's negative requirement that persons "*not [be] subject* to any foreign power," the Amendment imposed a positive requirement that persons "*be subject* to the jurisdiction" of the United States. We know that the original version excluded persons holding an allegiance to a foreign sovereign. The changed language signaled the exclusion of persons lacking the requisite allegiance to the United States. This language, Trumbull explained, "is better than the language in the civil rights bill" though "[t]he object to be arrived at is the same."[298]

In response to Pennsylvania Senator Edgar Cowan's racist concerns that the amendment would make citizens of children born to Chinese immigrants, California Senator John Conness pointed out that children of Chinese parents had *already* been made citizens by the Civil Rights Bill which included "children of all parentage whatever."[299] The new amendment

292 *Id.* (statement of Sen. Wade).

293 *Id.* at 2770–71.

294 *See* Epps, *supra* note 7, at 355.

295 *The Senatorial Caucus,* NEW YORK HERALD, May 29, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn83030313/1866-05-29/ed-1/?sp=1 [https://perma.cc/M3UR-UKCT]).

296 CONG. GLOBE, 39th Cong., 1st Sess. 2869 (1866) (statement of Sen. Howard).

297 *Id.*

298 *Id.* at 2894 (statement of Sen. Trumbull).

299 *Id.* at 2891 (statements of Sens. Cowan and Conness).

simply "incorporate[d] the same provision in the fundamental instrument of the nation."[300]

As members had repeatedly claimed regarding the citizenship clause of the Civil Rights Act, Jacob Howard insisted that

> [t]his amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.[301]

This "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of embassadors [sic] or foreign ministers accredited to the Government of the United States, but will include every other class of persons."[302]

There is an ambiguity in Howard's remarks. His list of excluded persons can be read either as referring only to children of foreign ministers or as excluding "foreign" children born to alien parents of any status whatsoever.[303] However one resolves the ambiguity, Howard cannot have meant to present an exhaustive list of excluded persons, since on other occasions he acknowledged the additional exclusion of Indians living under tribal government.[304]

The proposed addition of the Citizenship Clauses to the Fourteenth Amendment prompted a new round of discussion regarding Chinese

300 *Id.* (state of Sen. Conness). Ablavsky and Berger claim that Conness agreed with Cowan that the Chinese, like Gypsies, "owe[] . . . no allegiance" to the United States. *See* Ablavsky & Berger, *supra* note 112, at 220. If so, then the fact that Conness nevertheless believed children of Chinese immigrants would be made citizens under the amendment shows that he did not believe loyalty or subjective "allegiance" to the United States was a requirement. *See id.* at 19. This is unconvincing. Cowan himself never accused the Chinese of disloyalty or as lacking allegiance to the United States—his concerns involved a racist fear of an increasing Chinese population. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan) ("Are [the people of California] to be immigrated out of house and home by Chinese?"). Likewise, Conness never accused the Chinese of lacking allegiance or loyalty and instead praised the valuable contributions of this legally present population. *Id.* at 2891–92 (statement of Sen. Conness). The sole accusation of disloyalty involved Cowan's fevered concerns about the "gypsies" (Romani) and their lack of allegiance to *Pennsylvania*. *Id*. at 2891 (statement of Sen. Edgar Cowan). Even if it such accusations were true, it would not matter under an allegiance reading of the Citizenship Clause, since no one claimed the Romani were born outside of the United States.

301 CONG. GLOBE, 39th, 1st Sess. 2890 (1866).

302 *Id.*

303 *See, e.g.*, Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 758 (2012) (arguing that "Howard simply omitted an 'or' between 'foreigners, aliens'"); Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 TEX. REV. L. & POL. 135, 161 (2020) (arguing that the natural reading of this passage is "[t]his will not, of course, include persons in the United States who are foreigners, aliens[, or those] who belong to the families of ambassadors or foreign ministers" (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard)).

304 *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard).

immigrants, "Gypsies," and members of Indian tribes. Senator Cowan, for example, asked

> "[i]s the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen? If so, what rights have they? Have they any more rights than a sojourner in the United States? If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws."[305]

Cowan was particularly concerned about "Gypsies . . . [who] wander in gangs in my state."[306]

In response to Cowan's concerns about children born to Chinese immigrants in California, California Senator John Conness assured Cowan "[w]e are not troubled with them at all," as "it is only in exceptional cases that they have children in our State."[307] Conness then noted that California had occasionally tried to pass "restrictive statutes as to the Chinese" but "when tested before the supreme court of the State of California . . . [such laws] have been decided to be unconstitutional and void."[308] For his part, Conness welcomed the passage of the Citizenship Clause precisely because it would prohibit such discriminatory policies and that "the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others."[309]

In response to Cowan's concern about Gypsies, Mr. Conness joked, "really I have heard more about Gypsies within the last two or three months than I have heard before in my life."[310] As far as Conness was concerned, their inclusion posed no problem and simply ensured that "a few score of

305 *Id.* (statement of Sen. Cowan).

306 *Id.* at 2891.

307 *Id.* (statement of Sen. Conness).

308 *Id.* at 2892. *See also id.* ("[T]hey have been declared again and again by the supreme court of the State of California to be void, violative of our treaty obligations, an interference with the commerce of the nation."). Conness's statement about California courts invalidating such discriminatory laws prompted Senator Howard to immediately exclaim "[a] very just and constitutional decision, undoubtedly." *Id.* (statement of Sen. Howard).

309 *Id.* at 2892 (statement of Sen. Conness). In an essay arguing that the Fourteenth Amendment grants citizenship to children of illegal aliens, Professor Jed Shugerman argues that California's discriminatory laws had the effect of creating a class of "illegal" Chinese immigrants. Thus, he argues, when members of the Thirty-Ninth Congress insisted that children of Chinese immigrants would be made citizens they were presumed to have known this included children of "illegal" immigrants. *See* Jed Handelsman Shugerman, *An Originalist Case for Birthright Citizenship of Unlawful Immigrants' Children: 1850s–1860s Anti-Chinese Restrictions as Categorical Context* 13–16 (Boston Univ. Sch. L. Research Paper No. 5278199, 2025), https://ssrn.com/abstract=5278199. The above comments of California Senator Conness, however, show precisely the opposite. Although members were made aware of such laws, they viewed such laws as invalid and knew that the proposed amendment would render such discriminatory laws against the Chinese unconstitutional.

310 CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866) (statement of Sen. Conness).

human beings born in the United States shall be regarded as citizens of the United States . . . ."[311]

Meanwhile, the issue of potential Indian citizenship continued to dominate much of the Senate's discussion. Wisconsin Senator James Doolittle thought Howard's proposal should be altered to use the language of the Civil Rights Act and expressly "exclud[e] Indians not taxed."[312] Howard rejected the proposal as unnecessary since "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being *quasi* foreign nations."[313]

Doolittle, however, thought the text could be read otherwise. By itself, the term "jurisdiction" is ambiguous and could be read as referring to being "subject to the law." If so, then the proposed text would sweep in a great many people who were subject to the laws but nevertheless refused allegiance to the United States. Explained Doolittle:

> All the Indians upon reservations within the several States are most clearly subject to our jurisdiction, both civil and military. We appoint civil agents who have a control over them in behalf of the Government. We have our military commanders in the neighborhood of the reservations, who have complete control. . . . Go into the State of Kansas, and you find there any number of reservations, Indians in all stages, from the wild Indian of the plains, who lives on nothing but the meat of the buffalo, to those Indians who are partially civilized and have partially adopted the habits of civilized life. . . . Are these persons to be regarded as citizens of the United States, and by a constitutional amendment declared to be such, because they are born within the United States and subject to our jurisdiction?[314]

Doolittle's point was that all members of Indian tribes, whether living under tribal government or with a nomadic tribe on the plains, fell within the general legal oversight of the United States. If all "jurisdiction" meant was "legal jurisdiction," then unaligned ("wild") Indians would be made citizens by the proposed clause. Doolittle's concerns prompted Senator and Chair of the Joint Committee on Reconstruction William Pitt Fessenden to ask Lyman Trumbull, "who has investigated the civil rights bill so thoroughly," for clarification on the issue.[315] Warned Fessenden, "if there is any reason to doubt that this provision does not cover all the wild Indians, it is a serious doubt."[316]

311 *Id.*
312 *Id.* at 2890 (statement of Sen. Doolittle).
313 *Id.* (statement of Sen. Howard).
314 *Id.* at 2892 (statement of Sen. Doolittle).
315 *Id.* at 2893 (statement of Sen. Fessenden).
316 *Id.*

In response, Trumbull denied that the phrase "subject to the jurisdiction" of the United States included either Indians living under tribal governments or those living "wild" on the plains.[317] First of all, all members of Indian tribes living under tribal governments were presumed to have at least "partial allegiance" to their tribes.[318] Such divided allegiance, however, did not satisfy the clause's jurisdictional requirement. As Trumbull put it:

> Now, does the Senator from Wisconsin pretend to say that the Navajoe [sic] Indians are subject to the complete jurisdiction of the United States? What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anybody else. . . . It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is "subject to the jurisdiction of the United States."[319]

Trumbull thus rejects Doolittle's claim that "subject to the jurisdiction" of the United States could reasonably be interpreted as being subject to the enforcement of federal law. The term referred to allegiance to the United States and not to any foreign government. Indian tribes like the Navajo were considered quasi-foreign governments to whom members owed their allegiance. They were not within the "complete" jurisdiction of the United States *because* they were viewed as foreign governments who were regulated by way of treaty and not general congressional legislation.[320] The issue was allegiance, not federal law enforcement.

Trumbull's specific reference to the Navajo tribe is instructive. According to the 1849 Treaty with the Navajo, the "tribe was lawfully placed under the *exclusive jurisdiction and protection* of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection."[321] As Indian law expert Francis Prucha explains, under this treaty the tribal chiefs had "agreed to recognize United States jurisdiction and to submit to the trade and intercourse laws, to return captives and stolen property and remain at peace, and to allow the federal government to determine their boundaries."[322] Despite this express federal "jurisdiction," the Navajo, as members of a quasi-foreign nation, were not subject to the "complete" jurisdiction of the United States and not within the general legislative authority of Congress. Though this would

317 *Id.* (statement of Sen. Trumbull).

318 *Id.*

319 *Id.* (emphasis added).

320 *See* Gregory Ablavsky, *Structural Federal Indian Law after* Brackeen, 67 ARIZ. L. REV. 291, 318 (2024) (describing this portion of the debates as involving a "jurisdictional debate" between those who favored "governing relations with Native nations through treaties" and those who believed the "United States should instead legislate over them directly").

321 *See* Treaty with the Navaho, Navaho-U.S., Sept. 9, 1849, 2 INDIAN AFFAIRS: LAWS AND TREATISES 583 (Charles J. Kappler ed., 1904) (emphasis added).

322 *See* PRUCHA, *supra* note 104, at 257.

change in the coming years, in 1866 Congress did not exercise general legislative jurisdiction over Indian tribes. Instead, the executive negotiated treaties, obtained the consent of the tribes and then sought ratification by the Senate.[323] The House's limited role (a limit members increasingly resented) involved passing supportive appropriations bills.[324]

The scope of this "incomplete" treaty-based congressional jurisdiction allowed for the extension of federal authority into both the external and internal affairs of the tribe.[325] As for Indians living outside of treaty established lands, they also fell outside the "complete" jurisdiction of the United States since they refused to subject themselves to treaty-based oversight. Since treaty-based laws were the *only* vehicle (at this time) by which the United States interacted with tribal Indians, a refusal to be subject to such laws amounted to a refusal to be subject the jurisdiction of the United States.[326] Accordingly, as Trumbull explained, the Citizenship Clause "by no means embraces, or by any fair construction—by any construction, I may say—could embrace the wild Indians of the plains or any with whom we have treaty relations."[327]

In short, Trumbull's claim that Congress lacked "complete jurisdiction" over tribal members and his reference to Congress not passing legislation regulating "murders and robberies,"[328] reflected the fact that, as foreign nations, any laws regulating tribal matters came by way of treaty and not the ordinary process of bicameralism and presentment. As Jacob Howard explained only moments after Trumbull spoke:

> "[J]urisdiction" as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now. Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction . . . . The Government of the United States have always

323 *Id.* at 209.

324 For a discussion of this process, the growing resentment of the House, and the abandonment of treaty-based relations with Indian tribes in 1871, see PRUCHA, *supra* note 104 at 289–358.

325 *See, e.g.*, Treaty with the Choctaws and Chickasaws art. III, Apr. 28, 1866, 14 Stat. 769, 769 (guaranteeing "all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations . . .").

326 *See* CONG. Globe, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull).

327 *Id.*

328 *Id.*

> regarded and treated the Indian tribes within our limits as foreign Powers . . . .[329]

Notice Howard's final point: It's not that federal law does not extend to members of Indians tribes. Such power does extend, but it does so through treaty-based laws that are framed by the Executive and ratified by the Senate—a process that excludes one of the houses of Congress. The reason for this is because Indian tribes have traditionally been viewed as "foreign powers." Other members echoed the same point. According to Maryland Senator Reverdy Johnson,

> [A]ll that this amendment provides is, that all persons born in the United States and not subject to some foreign Power—for that, no doubt, is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States. That would seem to be not only a wise but a necessary provision . . . . [A]nd 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.[330]

Like Trumbull and Bingham, Reverdy Johnson understood that natural-born citizenship depended on the status of the child's parents. Johnson nevertheless remained concerned that, as written, the reference to "jurisdiction" was unclear. It was possible, he thought, that the text might be erroneously read as a reference to mere "legal jurisdiction" and not to an allegiance-based understanding.[331] If so, then all members of Indian tribes would be made citizens since "[t]hey are within the territorial limits of the United States."[332] "In one sense," after all,

> [T]hey are a part of the people of the United States, and independent of the manner in which we have been dealing with them it would seem to follow necessarily that they are subject to the jurisdiction of the United States, as is anybody else who may be born within the limits of the United States.[333]

Even if this was not how Republican framers understood the text, courts might come to that conclusion when they "come to consider the meaning of this provision."[334] It would be safer, thought Johnson, to clarify the issue by adding express language excluding "Indians not taxed."[335]

329 *Id.* at 2895 (statement of Sen. Howard). *But see,* Wurman, *supra* note 7, at 76 (arguing that "Trumbull thought the United States did not have such control over the municipal law of the tribes because of the prevailing rules under the law of nations").

330 CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson).

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.* at 2894.

Trumbull disagreed, insisting that such a reading would be unreasonable: "I have already replied to the suggestion as to the Indians being subject to our jurisdiction. They are not subject to our jurisdiction in the sense of owing allegiance solely to the United States."[336] It was true that there was "a large region of country within the territorial limits of the United States, unorganized . . . where wild tribes of Indians roam at pleasure, subject to their own laws and regulations . . . ."[337] They might be technically "regarded as within the territorial boundaries of the United States, but I do not think they are subject to the jurisdiction of the United States in any legitimate sense; certainly not in the sense that the language is used here."[338] As he had already explained, "[Indians] are not subject to our jurisdiction in the sense of owing allegiance solely to the United States."[339]

Months earlier Trumbull had been willing to add the "Indians not taxed" language to the Civil Rights Act.[340] At this point, however, he no longer thought a reference to being taxed was appropriate. "I am not willing," Trumbull explained, "that the rich Indian residing in the State of New York shall be a citizen and the poor Indian residing in the State of New York shall not be a citizen."[341] Trumbull had agreed to use such language in the Civil Rights Act only because he had been convinced that it was used as a term of art "meaning civilized Indians."[342] Trumbull now believed "the language proposed in this constitutional amendment is better than the language in the civil rights bill."[343]

4. The Final House Debates

Five days after the Senate passed its amended version of Section One, Thaddeus Stevens presented the now-final draft of the Fourteenth Amendment to the House.[344] There was no need for extended debate, advised Stevens, since the Senate "amendments are so slight."[345] The new opening language of Section One "defining who are citizens of the United States and of the States . . . . is an excellent amendment, long needed to settle conflicting decisions between the several States and the United States. It

336 *Id.* (statement of Sen. Trumbull).

337 *Id.*

338 *Id.*

339 *Id*.

340 *Id*. at 572.

341 *Id.* at 2894. Trumbull's explanation was quickly published in national newspapers. *See, e.g.*, THE DAILY AGE (Philadelphia, Pennsylvania), May 31, 1866, at 1 (on file with ????) ("Mr. Trumbull of Illinois, was unwilling to adopt a proposition that recognized taxation as a basis of citizenship. It would not be just to admit rich Indians to citizenship and exclude poor ones.").

342 CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (statement of Sen. Trumbull).

343 *Id.*

344 *Id*. at 3144.

345 *Id.*

declares this great privilege to belong to every person born or naturalized in the United States."[346]

During the final House debate, no one addressed the specific scope of the citizenship clause or its effect on Indian populations. On June 13, 1866, the House voted 120–32 in favor of the final draft,[347] and on June 22, President Johnson forwarded the proposed amendment to the states.[348]

It is important to keep in mind that the public was well informed about all of these debates and the framers' explanation of the meaning of the citizenship clause.[349] Unlike the secret meeting in Philadelphia that drafted the original Constitution, the debates on the Fourteenth Amendment were open to the public and received extensive and daily newspaper coverage. *The New York Herald*, for example, provided extensive coverage of the citizenship debates, including Trumbull's statement that "the word 'jurisdiction' was intended to mean, and clearly meant, complete and entire jurisdiction, and not such as is exercised over Indians."[350]

346 CONG. GLOBE, 39th Cong., 1st Sess., 3148–49 (1866) (statement of Rep. Stevens), *as reprinted in* 2 LASH, *supra* note 186, at 219.

347 *Id.* at 220.

348 CONG. GLOBE, 39th Cong., 1st Sess., 3349 (1866), *as reprinted in* 2 LASH, *supra* note 186, at 223.

349 Portions of the May 30th debates were published in BALT. DAILY COM., May 31, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn83009569/1866-05-31/ed-1/ [https://perma.cc/JHM8-89TL]); *The Reconstruction Resolutions*, N. Y. HERALD, May 31, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn83030313/1866-05-31/ed-1/ [https://perma.cc/F96K-PAUR]) ("Senator Doolittle then moved to amend the section by inserting the usual 'excluding Indians not taxed,' and was supported by Senator Johnson. Mr. Trumbull, in reply, contended that the amendment was unnecessary, and that the word 'jurisdiction' was intended to mean, and clearly meant, complete and entire jurisdiction, and not such as is exercised over Indians."); ILLUSTRATED NEW AGE, May 31, 1866, at 1 ("Mr. Trumbull said the pending amendment of Mr. Howard did not include Indians living in Tribes, who were not subject to the complete jurisdiction of the United States."); *Reconstruction*, NEW-YORK TRIBUNE, May 31, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn83030214/1866-05-31/ed-1/ [https://perma.cc/3EKR-YVM7]) ("Mr. Trumbull said the pending amendment of Mr. Howard did not include Indians living in tribes, who were not subject to the complete jurisdiction of the United States.").

350 *The Reconstruction Resolutions*, N. Y. HERALD, May 31, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn83030313/1866-05-31/ed-1/ [https://perma.cc/F96K-PAUR]). *See also Reconstruction*, NEW-YORK TRIBUNE, May 31, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn83030214/1866-05-31/ed-1/ [https://perma.cc/3EKR-YVM7]) ("Mr. Trumbull said the pending amendment of Mr. Howard did not include Indians living in tribes, who were not subject to the complete jurisdiction of the United States."); *Reconstruction*, PHILA. INQUIRER, May 31, 1866, at 1 (on file with Newspapers.com, https://www.newspapers.com/newspage/168141460/ [https://perma.cc/QB7K-D4RP]) (same).

D. The Ratification Period

The opening round of the Fourteenth Amendment ratification debates coincided with the 1866 congressional election campaign. Political candidates from both sides of the aisle made the proposed Fourteenth Amendment a major part of their speeches.[351] Democrats commonly insisted that the Citizenship Clauses of Section One established, or would soon lead to, black suffrage.[352] Republicans commonly responded by pointing out that the rights of citizenship did not include the "political" right to vote. Women and children, for example, were American citizens but neither held the rights of suffrage.[353] In support of their arguments, Republicans confidently cited Attorney General Bates' *Report on Citizenship*.[354]

Republicans also repeatedly described Section One as simply constitutionalizing the citizenship clause of the Civil Rights Act.[355] For example, in what the Chicago Republican referred to as a "great speech," Senator Henry Lane explained that Congress had first passed a civil rights bill declaring that "all persons born in the Union, not owing any allegiance to any foreign power, shall be citizens of the United States."[356] Congress then passed a constitutional amendment in which, "[t]he first clause in that Constitutional Amendment is simply a re-affirmment of the first clause of the Civil Rights Bill."[357]

351 *See* 2 LASH, *supra* note 186, at 228.

352 *See id.*

353 *See, e.g.*, Representative Schuyler Colfax, Speech in Indianapolis (Aug. 7, 1866), *in* SPEECHES OF THE CAMPAIGN OF 1866, at 14, *as reprinted in* 2 LASH, *supra* note 186, at 257–59.

354 *See Article Title*, CHI. REPUBLICAN, Aug. 8, 1866, at 1 (on file with NAME OF SOURCE, url [permalink]).

355 *See*, *e.g.*, *Connecticut, Debate and Ratification of the Fourteenth Amendment: June 25 and 27, 1866*, COLUMBIAN REG. (New Haven), June 30, 1866, at 2*, as reprinted in* 2 LASH, *supra* note 186, at 235 ("Mr. B. passed over the first clause, which he said was the re-enactment of the civil rights bill; its discussion would consume more time than he cared to occupy."); Senator Lyman Trumbull, Speech in Chicago (Aug. 2, 1866), *in* SPEECHES OF THE CAMPAIGN OF 1866, at 6, *as reprinted in* 2 LASH, *supra* note 186, at 256 ("The first, and it is all one, article declares the rights of the American citizen. It is a reiteration of the rights as set forth in the Civil Rights Bill. An unnecessary declaration, perhaps, because all the rights belong to the citizen, but it was thought proper to put in the fundamental law the declaration that all good citizens were entitled alike to equal rights in this Republic [applause] . . . ."); Senator John Sherman, Speech in Cincinnati (Sept. 28, 1866), *in* SPEECHES OF THE CAMPAIGN OF 1866, at 39, *as reprinted in* 2 LASH, *supra* note 186, at 276 ("The first section was an embodiment of the Civil Rights Bill, namely; that every body—man, woman and child—without regard to color, should have equal rights before the law; that is all there is in it; that every body born in this country or naturalized by our laws should stand equal before the laws . . . .").

356 *Article Title*, CHI. REPUBLICAN, Aug. 22, 1866, at 2 (on file with NAME OF SOURCE, url [permalink]).

357 *Id. See also* Senator Henry Lane, Speech in Indianapolis (Aug. 18, 1866), *in* SPEECHES OF THE CAMPAIGN OF 1866, at 13–14, *as reprinted in* 2 LASH, *supra* note 186, at 261.

Over and over again, the framers linked the Fourteenth Amendment to the Civil Rights Act and described both as establishing conditions of birthplace *and* allegiance. For example, during the congressional debates, John Bingham declared that "every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen."[358] Following the passage of the Amendment, Bingham explained that that this same idea informed the meaning of Amendment's Citizenship Clause: "[The] amendment consists of five sections, the first of which provides that persons born in the United States and not owing allegiance to any foreign power, and all persons of foreign birth duly naturalized within the United States, are declared to be citizens of the United States."[359]

There is nothing here about persons born subject to, or immune from, federal law. Instead, to be born subject to the jurisdiction of the United States was to be born in a context of *allegiance* to the United States and not a "*foreign power*."

Like every other politician, Bingham occasionally described the citizenship clause in less specific and more colorful language. At one point, for example, Bingham declared that:

> [T]he man is a natural-born fool who does not understand that the term 'natural born citizen" implies that citizenship is a birthright. It comes with a man into the world. He has a right to citizenship, no matter what his complexion, upon the spot in which he had his origin; and the man who denies it to him, or attempts to withhold it from him, is simply a monster.[360]

358 CONG. GLOBE, 39th Cong., 1st Sess. 1291 (statement of Rep. Bingham) (The Civil Rights Act's Citizenship Clause "is simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen; but, sir, I may be allowed to say further, that I deny that the Congress of the United States ever had the power or color of power to say that any man born within the jurisdiction of the United States, not owing a foreign allegiance, is not and shall not be a citizen of the United States. Citizenship is his birthright, and neither the Congress nor the States can justly or lawfully take it from him."); *see also* NEW-YORK TRIBUNE, Mar. 10, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn83030213/1866-03-10/ed-1/ [https://perma.cc/BM7N-YR52]) (reporting that "[h]e [Bingham] denied that Congress ever had the power, or the colorable power, of saying that any man born of parents owing allegiance to the Government, and within its jurisdiction, was not and should not be a citizen of the United States").

359 The Constitutional Amendment. Exposition Of Its Meaning, And Reasons For Its Adoption. Speech of Hon. John A. Bingham, Albany Evening Journal (Albany, New York), September 5, 1866, p. 1 (emphasis added).

360 *See A Great Speech*, BROWNLOW'S KNOXVILLE WHIG, Oct. 2, 1867, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn83045629/1867-10-02/ed-1/ [https://perma.cc/H2BT-28QV]).

But such stump speech summaries were just that, summaries focusing on the central purpose of the clause—a race-neutral criteria for citizenship. As noted above, Bingham was happy to be more specific when the occasion required.

1. "Rebel" Citizenship

In January 1867, while the amendment remained pending before the states, Thaddeus Stevens proposed a bill calling for new elections in the former rebel states, forfeiture of citizenship for any rebel who had sworn allegiance to the Confederacy, and the permanent federal oversight of former "Confederate" states.[361] According to Stevens's bill, "the word citizen, as used in this act, shall be construed to mean all persons (except Indians not taxed) born in the United States, or duly naturalized."[362] Stevens's proposal thus provided an even broader definition of natural-born citizenship than that provided in either the Civil Rights Act or the proposed Fourteenth Amendment.

John Bingham recognized Stevens's effort as an attempt to bypass the pending Fourteenth Amendment. Speaking in opposition, Bingham reminded the House that Congress had recently passed an amendment declaring that "all persons born in this land, within the jurisdiction of the United States, without regarding to complexion or previous condition, are citizens of the Republic . . . [and] this amendment was to be made the basis of reconstruction."[363] The final version of that amendment rejected proposals to disenfranchise southern rebels, but instead denied official office to "those who have violated official oaths to support the Constitution of the United States."[364] It was this proposal, Bingham insisted, that the people believed would be the basis for reconstruction.[365]

Although rebel state governments had been temporarily overthrown, "it does not follow from this that the people of each of those States may not reorganize their local State governments destroyed by their rebellion, and ratify the pending amendment with the consent of this Government."[366] As far as Bingham was concerned, Stevens's bill amounted to "a clear, palpable departure from the intent and letter of your constitutional amendment."[367]

361 See CONG. GLOBE, 39th Cong., 2d Sess. 250–52 (1867), *as reprinted in* 2 LASH, *supra* note 186, at 327–28.

362 *Id.*

363 CONG. GLOBE, 39th Cong., 2d Sess. 500 (1866) (statement of Rep. Bingham).

364 *Id.* Stevens had tried and failed to add a disenfranchisement provision to the Fourteenth Amendment. *See* Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 Harv. J. L. & Pub. Pol'y 309, 317, 350 (2024).

365 CONG. GLOBE, 39th Cong., 2d Sess. 500 (1866).

366 *Id.* at 501 (statement of Rep. Bingham).

367 *Id.* at 500.

Stevens's bill, Bingham objected, was "framed upon the idea . . . [that] these insurrectionary States are a foreign nationality, that they are alien enemies."[368] However, the Supreme Court in the Prize Cases had only held that Congress was entitled "to treat the insurgent States as though they were a foreign nationality—not that they were so."[369] "The words of the court are, 'they were enemies, though not foreigners.'"[370] Thus, "[t]he States lately in rebellion were and still are within the jurisdiction of the United States . . . ."[371] That being the case, "the Congress of the United States has no color of authority for providing by law, first, that a million persons, natural-born male citizens of this Republic and resident therein, are no longer citizens of the United States . . . ."[372]

When asked whether rebels could "denude themselves of their citizenship,"[373] Bingham responded, "their treason and revolt does not make them a foreign nationality, nor put them or the States in which they reside beyond the jurisdiction of the United States, nor absolve them from their allegiance to this Government."[374]

The biggest problem with Stevens's proposal was its grant of perpetual national authority to oversee the laws of the states and remove any state from the Union that altered or amended its law against the wishes of Congress. This, to Bingham, violated the most basic restrictions of a federal Constitution. "I will never," declared Bingham, "with my present conviction of duty, incorporate by law upon the statute-book of this Union a provision which knocks out the corner-stone of the fabric of American Government."[375] He continued:

> Sir, I am not to be thus driven into a violation of the letter and spirit of the Constitution of the country. Under it the rights of the States are as sacred as those of the nation . . . . The equality of the States and the equality of men in the rights of person before the law is what the Constitution enjoins and the people demand.[376]

In the end, Bingham successfully insisted that this bill which "recede[d] from the principles of the pending constitutional amendment," was best recommitted to committee.[377]

The full colloquy illustrates both Bingham's unwavering commitment to constitutional federalism and his belief that rebel states remained "within

368 *Id.* at 502.
369 *Id.*
370 *Id.*
371 *Id.*
372 *Id.* at 503.
373 *Id.* (statement of Sen. Maynard).
374 *Id.*
375 *Id.* at 504.
376 *Id.*
377 *Id.* at 816.

the jurisdiction of the United States." This meant that the rebels themselves remained American citizens who owed allegiance to the United States and remained subject to punishment for treason. Obviously, children born in the United States to rebel citizen parents also were citizens.

Summary: The above account allows for a number of conclusions regarding the original understanding of the Citizenship Clause. Its public history began during the Civil Rights Act debates and continued up to its "better" formulation in Section One of the Fourteenth Amendment. Throughout this debate, its framers publicly declared that the effort was to establish a color-blind definition of natural-born citizenship based on considerations of allegiance to the United States.

Children born in the United States to citizen parents were themselves citizens, even if their parents had committed treasonous crimes against the people of the United States. This reflected the fact that citizenship brought with it obligations of loyalty (and punishments for treason). Children born to non-citizens might be citizens depending on the allegiance of their parents. This principle excluded children born to foreign ministers or children born to tribal parents who either maintained an allegiance to their tribal leadership, waged war against the United States, or simply refused to place themselves under the jurisdiction of the United States (for example, rejecting available treaty-established pathways to naturalization). Absent a formal dissolution of tribal allegiance through a process of naturalization, these unaligned Indian families might be subject to federal law but were not considered "subject to the jurisdiction of the United States"—not in the sense communicated by the Citizenship Clause.

In short, to be born "subject to the jurisdiction of the United States" had nothing to do with mere territorial presence or simply being subject to federal law. The text instead imposes a positive requirement of requisite allegiance to the sovereign people of the United States and not a foreign government.

In a later section, I will address how this original meaning might be constitutionally applied in specific cases. In doing so, I will return to the insight of Attorney General Bates and the idea that birth in the United States establishes *prima facie* citizenship. This approach is consistent with the original understanding but not required. Before exploring application, however, I'll address post-adoption opinions and discussions that are commonly addressed in historical investigations of Fourteenth Amendment citizenship.

IV. POST ADOPTION ISSUES, COMMENTARY AND JUDICIAL CONSTRUCTION

The central purpose of this article is to present the original understanding of the Fourteenth Amendment Citizenship Clause. The most relevant materials for that endeavor involve the publicly disseminated

framing debates, ratification commentary, and antebellum materials that help explain the framers' and ratifiers' likely understanding of particular terms and words. Post-adoption commentary and caselaw are of much lesser relevance as they often involve arguments never presented to the ratifiers and made by persons not involved with the framing. That said, post-adoption commentary can be helpful to discern common patterns of interpretation that are either consistent or inconsistent with the ratification period debates.

In the case of the Fourteenth Amendment Citizenship Clause, post-adoption commentary and caselaw point in multiple and sometimes contradictory directions. The one constant is the lack of serious engagement with the historical record surrounding the framing and ratification of the text.

A. Indian Tribes

Following the adoption of the Fourteenth Amendment, some members of Congress argued that the Fourteenth Amendment had made tribal members citizens of the United States, and that Congress could therefore regulate on their behalf by way of ordinary (non-treaty-based) legislation.[378] Such an approach not only threatened Native American independence but also the continued enforcement of prior treaties. Accordingly, tribal leaders and their advocates in Congress argued that Indians had not been made citizens of the United States and that all prior treaties remained valid.[379]

In 1870, the Senate Judiciary Committee issued a report insisting that the Amendment had not altered the quasi-sovereign status of Indian tribes.[380] According to the Report, from the time of the Founding, Indian tribes had "uniformly been treated as nations."[381]

> [T]he Constitution and the treaties, acts of Congress, and judicial decisions . . . all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the

378 *See, e.g.*, CONG. GLOBE, 41st Cong., 1st Sess. 560 (1869) ("I suppose no one will doubt all these Indians 'are in the United States, and within the jurisdiction thereof.' Then, if that be so, the fourteenth amendment of the Constitution requires to be considered. That provides that—'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the States wherein they reside.' Now, then, this brings us to this question: can the Government of the United States, can the Senate and President of the United States make valid treaties with a portion of the citizens of the United States? Can we make valid treaties with a portion of the people within our own jurisdiction?") (speech of Rep. Butler).

379 *See, e.g.*, S. MISC. DOC. NO. 83, at 2 (1870) ("The following are some of the devices resorted to for our demoralization and ultimate overthrow: First. To place us under a territorial government. Second. To abrogate our treaties. Third. To refuse to pay us our just demands. Fourth. To declare us citizens of the United States and subject to its legislative jurisdiction."); *see also* PRUCHA, *supra* note 104, at 341.

380 *See* S. REP. NO. 41-268, at 1 (1870) ("[T]he fourteenth amendment to the Constitution has no effect whatever upon the status of the Indian tribes within the limits of the United States . . . .").

381 *Id.* at 9.

> term *jurisdiction* is employed in the fourteenth amendment to the Constitution.[382]

By 1871, however, Congress abandoned its treaty-based relationship with Indian tribes.[383] Congress's passage of the 1885 Indian Appropriations Act marked a full shift from a treaty-based (incomplete) jurisdiction over Indian tribes to a more general (or complete) congressional legislative authority over members of Indian tribes.[384]

Whether Congress actually had constitutional authority to make this shift,[385] the result was the foundation of modern Indian law jurisprudence. This change masks the original understanding of Indian tribes during the framing and ratification of the Citizenship Clause of the Fourteenth Amendment. As discussed below, keeping that original understanding in mind is important in determining contemporary analogues to non-citizen members of "foreign" governments.

B. The Citizenship Clause in Government Reports and Scholarly Treatises

Official government discussions of the Citizenship Clause generally declined to investigate the historical record of its framing and adoption. For example, in an 1871 letter to the American Minister of Italy, Secretary of State Hamilton Fish suggested that the Fourteenth Amendment's declaration that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States" was "simply an affirmance of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage."[386] Secretary Fish declined to investigate why the framers added the "subject to the jurisdiction" clause but supposed that it "was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality."[387]

In a later report to President Grant, Secretary Fish wrote that children born to American citizen fathers abroad were not citizens of the United States, unless they shall have made themselves residents of the United States,

382 *Id.*

383 *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (1871) ("[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation . . . .").

384 *See* Indian Appropriations Act (1885), ch. 341, § 9, 23 Stat. 362, 384 (1885) (codified as amended at 18 U.S.C. § 1153).

385 *See, e.g.*, DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 64–117 (1997) (arguing that the act lacks a clear constitutional foundation).

386 Statement of Hamilton Fish, U.S. Sec'y of State, to George Perkins Marsh, Am. Minister to It. (May 19, 1871), *in* 2 DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES § 183, at 394 (Francis Wharton ed., Washington, D.C., Gov't Printing Off. 1886).

387 *See id.*

thus having made themselves "subject to the jurisdiction thereof" as stated in the Fourteenth Amendment.[388] Fish also believed that general principles of law established that "[t]he child born of alien parents in the United States is held to be a citizen thereof" and that "[t]he same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to children of American fathers born without the jurisdiction of the United States."[389] Once again, Fish declined to engage the actual history and original understanding of the Fourteenth Amendment.

Most post-adoption commentary viewed the Fourteenth Amendment as maintaining the antebellum doctrine Attorney General Bates described as "*prima facie* citizenship."[390] Legal treatises invoking Bates's theory included Timothy Farrar's *Manual on the Constitution of the United States* (1867),[391] George Paschal's *Treatise on the Constitution of the United States* (1868),[392] and Israel Ward Andrews's *Manual of the Constitution of the United States*

388 *See* OPINIONS OF THE PRINCIPAL OFFICERS OF THE EXECUTIVE DEPARTMENTS, AND OTHER PAPERS RELATING TO EXPATRIATION, NATURALIZATION, AND CHANGE OF ALLEGIANCE 17–18 (Washington, D.C., Gov't Printing Off. 1873); *see also id.* at 12 ("The fourteenth amendment to the Constitution makes subjection to the jurisdiction of the United States an element of citizenship of the United States. If, then, . . . [an] act of voluntary submission of himself to the sovereignty of another power be added a formal renunciation of American citizenship, I cannot see that it can be regarded otherwise than an act of expatriation.").

389 *Id.* at 18.

390 Citizenship, 10 Op. Att'y Gen. 382, 394 (1862).

391 TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 55 n.1 (1867) (quoting Bates's Report for the proposition that "[e]very person born in the country is, at the moment of birth, *prima facie* a citizen").

392 GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES: DEFINED AND CAREFULLY ANNOTATED 167 (Washington, D.C., W.H. & O.H. Morrison 1868) ("Every person born in the country is, at the moment of birth, *prima facie*, a citizen."). Paschal expressly cites Bates's *Report*, including Bates's list of supporting authorities which omits any reference to *Lynch v. Clarke*. *Id.* at 167–168. Later, in his discussion of congressional power to enforce the Thirteenth Amendment, Paschal reproduces a paragraph from the circuit-riding Justice Swayne in *United States v. Rhodes*, 27 F. Cas. 785 (1866). In the actual opinion, Swayne writes: "All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons. 2 Kent, Comm. 1; Calvin's Case, 7 Coke, 1; 1 Bl. Comm. 366; Lynch v. Clarke, 1 Sand. Ch. 583." *Id.* at 789.

Pascal accurately quotes the passage but changes the citation so that it expressly refers to *the third edition* of Kent's *Commentaries*—an edition that did not include any reference to *Lynch*, much less the added note about parental allegiance. *See* PASCHAL, *supra*, at 274 ("(2 Kent's Com. 3d ed. 1; Calvin's Case, 7 Coke, 1; 1 Black. Com. 366; Lynch; v. Clark, 1 Sandf. Ch. Rep. 139.)"). In short, by omitting any reference to the "note," Paschal's cite to *Lynch* is fully consistent with a parental allegiance understanding of antebellum law.

(1874).[393] In an 1871 speech before the House of Representatives, future president James Garfield quoted

> [t]he admirable opinion of Attorney General Bates, delivered to President Lincoln, November 29, 1862, [where] this whole subject is thoroughly discussed. He says: 'The Constitution does not make the citizen; it is, in fact, made by them. Every person born in the country is, at the moment of birth, *prima facie*, a citizen.'[394]

Major treatises also echoed the allegiance-based understanding of the clause and its exclusion of tribal members despite their being subject to federal law. In his 1873 annotated edition of Story's *Commentaries on the Constitution*, Thomas Cooley explained that the term "citizen" in the Fourteenth Amendment's Citizenship Clause meant "a person owing allegiance to the government, and entitled to protection from it."[395] As for members of Indian tribes, Cooley believed that the Citizenship Clause also excluded

> the aboriginal inhabitants of the country citizens, so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. . . . [They are] a *quasi* foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities. They are 'subject to the jurisdiction' of the United States only in a much qualified sense . . . "[396]

and "[i]t would not for a moment be contended that [their inclusion] was the effect of this amendment."[397]

According to Cooley, Indians could become citizens when a former member of a tribe took affirmative steps to separate themselves from any former allegiance and become a member of "civilized" society. As Cooley explained,

> When, however, the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic; he gives evidence of his purpose to adopt the habits and customs of civilized life; and as his case is then within the terms of this

393 ANDREWS, *supra* note 180, at 96 ("Citizens are either native-born or naturalized. Every person born in the country is, from the time of birth, *prima facie* a citizen.").

394 GARFIELD, *supra* note 181, at 9.

395 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1932 (Thomas M. Cooley ed., Bos., Little, Brown, & Co. 4th ed. 1873) (1833).

396 *Id.* § 1933.

397 *Id.*

> amendment, it would seem that his right to protection, in person, property, and privilege, must be as complete as the allegiance to the government to which he must then be held; as complete, in short, as that of any other native-born inhabitant.[398]

Cooley summarized this theory a few years later in his treatise, *The General Principles of Constitutional law in the United States of America*.[399] There, Cooley wrote that

> a citizen by birth must not only be born within the United States, but he must also be subject to the jurisdiction thereof; and by this is meant that full and complete jurisdiction to which citizens generally are subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government.[400]

Cooley did not explain exactly what he meant by a Native American "giv[ing] evidence of his purpose to adopt the habits and customs of civilized life."[401] According to antebellum- and Reconstruction-era treaties, this would have involved a formal appearance before a district court to initiate the process of naturalization.[402] Another treaty-established method involved a formal acceptance of an allotment from authorities.[403] As we shall see, the need to present formal "evidence of purpose" to leave one sovereign and join another was the subject of the Supreme Court decision in *Elk v. Wilkins*.[404]

Finally, in his 1891 *Lectures on Constitutional Law*, Justice Samuel Miller addressed the meaning of the "Subject to the Jurisdiction" Clause of the Fourteenth Amendment.[405] Like other commentators, Miller interpreted the Clause as involving parental allegiance. After quoting the text, Miller noted that

> a child of a foreign ambassador, born within the limits of the United States, is not subject to its jurisdiction within the meaning of the language just quoted. He remains a foreigner and a subject of the kingdom or country which is represented by his father, and the same is true of all other diplomatic representatives.[406]

Likewise,

> [i]f a stranger or traveller passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe

398 *Id.* (emphases added).

399 *See* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 241–48 (Bos., Little, Brown, & Co. 1880).

400 *Id.* at 243.

401 2 STORY, *supra* note 396, at § 1932.

402 *See supra* note 119 and accompanying text.

403 *See supra* notes 114–118 and accompanying text.

404 Elk v. Wilkins, 112 U.S. 94 (1884). *See* discussion *infra* Section IV.C.1.

405 SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 279–80 (N.Y.C. & Albany, Banks & Bros. 1891).

406 *Id.* at 279.

> no allegiance to our Government, has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction.[407]

C. Post-Adoption Caselaw

1. *McKay v. Campbell*

In the 1871 district court case *McKay v. Campbell*, the court ruled that a man born in Oregon territory to a British father and a tribal Indian mother was not a citizen of the United States.[408] At the time of William McKay's birth, the territory was jointly administered by both English and American governments.[409] When later denied the right to vote on account of non-citizenship, the adult McKay sued, arguing that the action violated the Citizenship Clause of the Fourteenth Amendment.[410]

In his opinion for the district court, Judge Deady explained that "[t]he case turns upon the single point—was the plaintiff born subject to the jurisdiction of the United States—under its allegiance?"[411] The answer to that question turned on the allegiance of McKay's parents at the time of his birth.

According to Judge Deady:

> [i]t is admitted that the plaintiff's father was a British subject by birth, and while he lived in the territory—at least between 1818 and 1846—he was in the allegiance of the king of Great Britain, and his children wherever born therein, were born in the same allegiance and are British subjects.[412]

Nor would McKay be a citizen of the United States if his allegiance followed that of his tribal mother. As Judge Deady explained, if McKay were viewed as "born a member of 'an independent political community'—the Chinook—[then] he was not born subject to the jurisdiction of the United States—not born in its allegiance."[413] Thus, whether his allegiance followed that of his father or his mother, "[i]n neither case was he born a citizen of the United States, and can only become one by complying with the laws for the naturalization of aliens."[414]

Judge Deady's decision in *McKay v. Campbell* prompted Oregon Senator Henry Corbett to sponsor congressional legislation retroactively making citizens of anyone born in the territory of Oregon, so long as they

407 *Id.*
408 McKay v. Campbell, 16 F. Cas. 161, 162, 167 (D. Or. 1871) (No. 8,840).
409 *Id.* at 164.
410 *Id.* at 162, 165.
411 *Id.* at 163.
412 *Id.* at 165.
413 *Id*. at 167.
414 *Id.*

were "subject to the jurisdiction of the United States *at this* time."[415] Added as a rider to a longer bill, the brief statute declared: "That all persons born in the district of country formerly known as the Territory of Oregon, and subject to the jurisdiction of the United States at this time, are citizens of the United States in the same manner as if born elsewhere in the United States."[416]

After Corbett's comments introducing the legislation, Senator Kelly noted that during the period of joint administration, the territory of Oregon had been held in common by both the English and American governments.[417] During this period, a child born in Astoria under the British flag was

> the child of a British subject, and born without the allegiance of the United States, because he was not born within the allegiance of the United States . . . . [I]n order to be a citizen of the United States he must have been not only born within the United States, but born within the allegiance of the United States. . . . There is no question that those who were born of American parents [in the territory] were American citizens; but the class to which this bill refers are the children of British subjects . . . .[418]

Commenting on Corbett's proposed bill, California Senator Eugene Casserly noted that it proceeded on the assumption (which he did not challenge) "that the citizenship of the children born within the territory so held in joint occupation was regulated by the citizenship of their parents."[419] That being the case, Casserly wondered whether it was proper to naturalize the children of British subjects.[420] Corbett responded that the bill applied only to those who chose to remain in the territory after it became officially part of the United States.[421] Ordinarily, Corbett explained, it had been "usual to provide in such treaties that all such persons [remaining in the territory] are naturalized citizens, but there was no such provision in this treaty."[422]

Both the text of Corbett's statute and the congressional debate track an understanding of the Citizenship Clause as requiring both birthplace and allegiance, and that the relevant allegiance was that of the parents. The citizenship of children of different families living in the same territory depended on the allegiance of the parents. Any child born to British parents under the British flag (or its equivalent) was not subject to the jurisdiction of the United States since the child's allegiance followed that of their parents.

415 CONG. GLOBE, 42d Cong., 2d Sess. 2796 (1872) (statement of Sen. Corbett) (emphasis added).

416 CONG. GLOBE, 42d Cong., 2d Sess. 2796 (1872) (statement of Sen. Edmunds).

417 *Id.* (statement of Sen. Kelly).

418 *Id.*

419 *Id.* (statement of Sen. Casserly).

420 *See id.*

421 *Id.* (statement of Sen. Corbett).

422 *Id.*

Parents who legally and voluntarily chose to remain in the territory after it officially became United States territory could reasonably be viewed as having abandoned their former allegiance in favor of the United States (as would their children), and thus appropriately naturalized by statute.[423]

2. The *Slaughter-House Cases*

Although citizenship was not the focus of the Supreme Court's opinion in the *Slaughter-House Cases*,[424] Justice Samuel Miller's opinion briefly addressed in dicta the meaning of the recently ratified Citizenship Clause. According to Justice Miller, the purpose of the Clause was "to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State."[425] The Citizenship Clause, Justice Miller observed, "overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States."[426] As for the phrase "subject to its jurisdiction," this "was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."[427] Justice Miller's list somewhat echoed Jacob Howard's earlier (if ambiguous) explanation of the clause.[428]

In his dissent, Justice Stephen Field thought that the Citizenship Clause

> recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws

423 In a post at *Balkinization*, Michael L. Rosin argues that the Oregon territory naturalization statute indicates that members of Congress in 1872 did not understand the words "subject to the jurisdiction thereof" as the equivalent of the Civil Rights Act language "subject to any foreign power." *See* Michael L. Rosin, *What Did "Subject to the Jurisdiction of the United States" Mean in the Oregon Citizenship Legislation of 1872?*, BALKINIZATION (May 5, 2025) (first quoting U.S. CONST. amend. XIV, § 1; and then quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27), https://balkin.blogspot.com/2025/05/what-did-subject-to-jurisdiction-of.html#:~:text=It%20demonstrates%20that%20the%20phrase,legislation%20would%20have%20had%20no [https://perma.cc/4Y9T-8HSW]. Rosin reasons that since the statute made citizens of persons "subject to the jurisdiction of the United States" who had been born "subject to a foreign power," this must mean that members understood the phrases as having different meanings. *Id.* This does not seem correct to me. The language of the 1872 naturalization statute refers to persons who were "subject to a foreign power" at a *prior* time but who were now "subject to the jurisdiction of the United States *at this time*." Act of May 18, 1872, ch. 172, § 3, 17 Stat. 122, 134 (emphasis added). Both phrases refer to a condition of allegiance, one in the past and one in the present.

424 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

425 *Id.* at 73.

426 *Id.* (first italics not in original).

427 *Id.*

428 *See supra*, note 281–82 and accompanying text.

> of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State.[429]

Justice Field's explanation could be read as disagreeing with Justice Miller's list of excluded individuals, but the context suggests that Justice Field is simply stressing that citizenship is no longer under the control of the states.[430]

A year later, in *Minor v. Happersett*,[431] Chief Justice Morrison Waite briefly discussed pre-Fourteenth Amendment jurisprudence on natural-born citizenship. Chief Justice Waite noted that

> it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens.[432]

Although Justice Miller's statements in *Slaughter-House* and Chief Justice Waite's comments in *Happersett* are dicta, they do evidence a degree of judicial "doubt" (to use Chief Justice Waite's phrase) regarding children born to certain non-citizen parents. Neither case, however, engages in any kind of originalist analysis of the framing and ratification debates.

3. *Elk v. Wilkins*

A more substantial discussion of citizenship, and one that includes at least some analysis of the original debates, occurred in the 1884 case, *Elk v. Wilkins*.[433] *Elk* involved a tribal Indian named John Elk who had been born on a reservation but had since left and assimilated into the community of Omaha, Nebraska.[434] When Elk attempted to register to vote in a local election, he was turned away on the ground that he was not a United States citizen.[435]

429 *Slaughter-House*, 83 U.S. at 95.

430 In his separate dissent, Justice Bradley emphasizes the same nationalist point. *See id.* at 112 ("The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence.").

431 Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

432 *Id.* at 167–68.

433 Elk v. Wilkins, 112 U.S. 94 (1884).

434 *See id.* at 95.

435 *Id.* at 95–96.

a. The Majority

Writing for the Court, Justice Horace Gray noted that original Constitution had excluded "Indians not taxed" from the representational count, illustrating that members of Indian tribes were not considered citizens of the United States.[436] Indian tribes were the equivalent of "alien nations, distinct political communities," and "[t]he members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States."[437] Since their status vis-à-vis the United States was the equivalent of a non-citizen "alien," this meant their non-citizen status "could not be put off at their own will, without the action or assent of the United States."[438]

Here, Justice Gray cited the example of treaties that allowed members of a tribe to choose "to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life."[439] Under these treaties, persons born under tribal government could not become citizens of the United States without their first making a "formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law."[440] The 1867 Treaty with the Kansas Indians, for example, provided for the naturalization of members "and their families, upon their making declaration, before the District Court of the United States, of their intention to become citizens."[441] These kinds of treaties "strikingly illustrate[] the principle that no one can become a citizen of a nation without its consent."[442]

Turning specifically to the "jurisdiction" provision of the Citizenship Clause, Justice Gray explained that Indians born under tribal government were "in a geographical sense born in the United States."[443] However, they

> are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[444]

436 *Id.* at 99.

437 *Id.*

438 *Id.* at 100.

439 *Id.* Here, Justice Gray cites a number of specific treaties, including the "treaties with the Stockbridge Indians in 1848 and 1856, 9 Stat. 955; 11 Stat. 667." *Id.*

440 *Id.* at 101.

441 *Id.* at 103–04.

442 *Id.* at 103.

443 *Id.* at 102.

444 *Id.*

The jurisdiction requirement was not met if one is "merely subject in some respect or degree to the jurisdiction of the United States."[445] Instead, one must be "completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[446]

Elk's problem, it seems, was his failure to formally present himself for naturalization. The fact that he lived an assimilated, law-abiding life was irrelevant. As the Court put it,

> [t]he fact that [John Elk had] abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form.[447]

b. The Dissent

Writing in dissent, Justice John Marshall Harlan insisted that the affirmative steps John Elk had taken to leave his tribe and establish residence in a state were sufficient to render him a United States citizen. According to Harlan, "prior to his application to be registered as a voter in the city of Omaha, he had severed all relations with his tribe, and, as he alleges, fully and completely surrendered himself to the jurisdiction of the United States."[448] Since Elk had become "a *bona fide* resident of the State of Nebraska," this meant that he would have been subject to taxation.[449] That would make him a citizen under the 1866 Civil Rights Act, which made citizens of "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed."[450]

The Civil Rights Act, Harlan insisted, distinguished "wild Indians" from those that had taken steps to place themselves completely subject to the jurisdiction of the United States. Here, Harlan quoted Lyman Trumbull's distinguishing between "wild roaming Indians, not taxed, not subject to our authority" from "the Indian when he shall have cast off his wild habits, and submitted to the laws of organized society and become a citizen."[451]

As for the Fourteenth Amendment, the phrase "'subject to the jurisdiction thereof' embraced only those who were subject to the complete jurisdiction of the United States, which could not be properly said of Indians

445 *Id.*
446 *Id.*
447 *Id.* at 109.
448 *Id.* at 110 (Harlan, J., dissenting).
449 *Id.*
450 *Id.* at 112 (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).
451 *Id.* at 14 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 527–28 (1866) (statement of Sen. Trumbull)).

in tribal relations."[452] Its framers did not intend to deny citizenship to those "Indians who were within the jurisdiction of the States, and subject to their laws, because such Indians would be completely under the jurisdiction of the United States."[453] Instead,

> [E]very one who participated in the debates, whether for or against the amendment, believed that in the form in which it was approved by Congress it granted, and was intended to grant, national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good faith, outside of Indian reservations and within one of the States or Territories of the Union.[454]

Justice Harlan agreed with Cooley that children born to non-citizen parents who have not "renounced" their allegiance to a foreign sovereign were the equivalent of Indians who "preserve[d] their tribal relations" and so had not made themselves "subject to the jurisdiction of the United States."[455] The case was altogether different, however, for those Indians who "by becoming *bona fide* residents of States and Territories within the complete jurisdiction of the United States, had evinced a purpose to abandon their former mode of life and become a part of the People of the United States."[456]

Nor were tribal Indians born into a context similar to that of foreign ambassadors. Adopting a post-1871 understanding of Indian affairs, Justice Harlan explained that common law exclusions of children born to foreign ministers were based on "the fiction of extra-territoriality."[457] Such was not the case of children born under tribal governments since those governments were not actually "foreign State[s]" and persons born into them were "completely under the sovereignty and dominion of the United States."[458] Thus, even though Elk had been born on a tribal reservation, he nevertheless had been born into a territory "completely" within the jurisdiction of the United States, and had "acquired, as was his undoubted right, a residence in

452 *Id.* at 117.

453 *Id.*

454 *Id.* at 118.

455 *Id.* at 119. Wrote Justice Harlan: "The question before us has been examined by a writer upon constitutional law whose views are entitled to great respect. Judge Cooley, referring to the definition of national citizenship as contained in the Fourteenth Amendment, says: 'By the express terms of the amendment, persons of foreign birth, who have never renounced the allegiance to which they were born, though they may have a residence in this country, more or less permanent, for business, instruction, or pleasure, are not citizens. Neither are the aboriginal inhabitants of the country citizens, so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government.'"
Id. (quoting 2 STORY, *supra* note 396, at § 1933).

456 *Id.* at 121.

457 *Id.*

458 *Id.* at 121–22 (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)).

one of the States, with her consent, and is subject to taxation and to all other burdens imposed by her upon residents of every race."[459]

In sum, the basic disagreement between the majority and the dissent involved the formal steps tribal Indians must take in order to officially dissolve tribal relations and become a United States citizen. To the majority, the standard practice both before and after the adoption of the Fourteenth Amendment required tribal Indians to formally present themselves to United States officials for the purposes of initiating naturalization. To the dissent, because members of Indian tribes were not really members of "foreign nations," citizenship required nothing more than "good faith" or law-abiding assimilation into a non-tribal community.[460] Neither the majority nor the dissent seriously investigated the original understanding of the clause.

4. *United States v. Wong Kim Ark* (1898)

The Supreme Court's decision in *United States v. Wong Kim Ark*[461] occurred long after the framing and ratification of the Fourteenth Amendment. The case is important nevertheless due to its high-profile role in contemporary scholarly debate. As explained below, the Court's judgment is most likely correct in terms of the original meaning of the Fourteenth Amendment. Its reasoning, however, is problematic on a number of grounds.

Wong Kim Ark was born in the United States to non-citizen Chinese parents.[462] The parents were legally present in the United States, "enjoying a permanent domicile and residence therein at San Francisco"[463] but forbidden by naturalization laws from becoming citizens themselves.[464] When the twenty-one-year-old Wong Kim Ark returned to the United States after a temporary trip to China, officials refused him entry on the ground that he was a Chinese citizen barred from entry under the federal Chinese Exclusion Acts.[465] Wong Kim Ark sued claiming that he was a United States citizen who met the Fourteenth Amendment requirements of his being born in the United States in a manner "subject to the jurisdiction thereof."[466] A majority of the Supreme Court agreed.[467]

459 *Id.* at 122.

460 Note that Justice Harlan penned his dissent in 1884, after the United States had ceased its treaty-based approach which viewed Indian tribes as quasi-foreign nations. *See supra* notes 384–85 and accompanying text.

461 United States v. Wong Kim Ark, 169 U.S. 649 (1898).

462 *Id.* at 652.

463 *Id.*

464 *See* Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, 61 (known colloquially as the Chinese Exclusion Act).

465 *Wong Kim Ark*, 169 U.S. at 653.

466 *Id.*

467 *Id.* at 705.

a. The Majority

In a lengthy opinion by Justice Horace Gray, the majority ruled that birth on American soil was sufficient to satisfy the Fourteenth Amendment Citizenship Clause, regardless of laws prohibiting the child's parents from becoming citizens.[468] Justice Gray based his reading of the Fourteenth Amendment on "the ancient rule of citizenship by birth within the dominion" (the common law doctrine of *jus soli*).[469] The only exceptions to this rule involved "children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes."[470]

Although Justice Gray relied on a variety of early English and antebellum American sources, he expressly declined to rely on the original congressional debates of the Thirty-Ninth Congress, or the ratification debates. "Doubtless," declared Justice Gray, "the intention of the Congress which framed and of the States which adopted this Amendment of the Constitution must be sought in the words of the Amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words."[471] Instead, Justice Gray relied on antebellum common law.[472] As far as Justice Gray was concerned, "[t]he language of the Constitution, as has been well said, could not be understood without reference to the common law."[473] Therefore, the Citizenship Clause "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."[474]

According to Justice Gray, the common law rule was best articulated in *Lynch v. Clarke*, where "the matter was elaborately argued in the Court of Chancery of New York, and decided upon full consideration by Vice Chancellor Sandford."[475] According to *Lynch*, "all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth."[476] "The same doctrine," Justice Gray believed, "was repeatedly affirmed in the executive departments . . . [including] by Attorney General Bates in [sic] 1862, 10 Opinions, 328, 382, 394, 396."[477] Justice Gray then quoted, not the opinion

468 *Id.*
469 *Id.* at 667.
470 *Id.* at 693.
471 *Id.* at 699.
472 *Id.* at 667.
473 *Id.* at 654.
474 *Id.*
475 *Id.* at 664.
476 *Id.* (citing Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. Ch. 1844)).
477 *Id.*

in *Lynch*, but the language of the note added to the sixth edition of Kent's *Commentaries*:

> Chancellor Kent, in his Commentaries, speaking of the "general division of the inhabitants of every country, under the comprehensive title of aliens and natives," says: "Natives are all persons born within the jurisdiction and allegiance of the United States. 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."[478]

Justice Gray's *jus soli*-based reasoning in *Wong Kim Ark* departed substantially from the allegiance-based reasoning he had deployed in *Elk v. Wilkins*. In *Elk*, Justice Gray had insisted that to become a natural-born citizen, one must be "completely subject to [the country's] political jurisdiction, and owing them direct and immediate allegiance."[479] In an attempt to distinguish his prior ruling, Justice Gray insisted that *Elk* was limited to situations "concern[ing] only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent, not in the diplomatic service of a foreign country."[480]

"The real object" of the Citizenship Clause, Justice Gray now insisted, was:

> [T]o exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State.[481]

Over and over again, Justice Gray used the lens of the "ancient" common law to construe the Reconstruction-era language of the Fourteenth Amendment. "The Fourteenth Amendment," Justice Gray insisted,

> affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.[482]

478 *Id.* (quoting 2 KENT (1848), *supra* note 43, at 38).
479 Elk v. Wilkins, 112 U.S. 94, 102 (1884)).
480 *Wong Kim Ark*, 169 U.S. at 682.
481 *Id.*
482 *Id.* at 693.

Applying this "ancient rule" to the case at hand, Justice Gray concluded that:

> Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States.[483]

Congress had no authority to "restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."[484]

Despite having previously dismissed the original congressional debates as "not admissible,"[485] Justice Gray then quoted portions that he believed supported his conclusion, including Senator Trumbull's insistence that the Civil Rights Act would "naturaliz[e] the children of Chinese and Gypsies, born in this country,"[486] and Senator Conness's statement that the Citizenship Clause simply constitutionalized the Civil Rights Act and his belief that the Act included "children begotten of Chinese parents."[487] Even if "not admissible as evidence to control the meaning of those words," these particular exchanges were nevertheless "valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves."[488]

Finally, in dicta, Justice Gray suggested that this "ancient and fundamental rule" also applied to children born to non-citizen parents who were only temporarily in the United States.[489] "Every citizen or subject of another country, while domiciled here," Gray asserted,

> is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary [and] continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in *Calvin's Case*, 'strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject.'[490]

483 *Id.* at 694.

484 *Id.* at 703.

485 *Id.* at 699.

486 *Id.* at 697 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Cowan); *see also supra* note 197 and accompanying text (presenting the exchange between Trumbull and Cowan).

487 *Wong Kim Ark*, 169 U.S.at 698 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Conness)).

488 *Id.* at 699.

489 *Id.* at 693.

490 *Id.* at 693 (emphasis added) (citation omitted).

b. The Dissent

In a dissent joined by Justice Harlan, Chief Justice Fuller partially agreed with the majority regarding the general principle of citizenship for children born in the United States to non-citizen parents. As Chief Justice Fuller noted, "the Fourteenth Amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens . . . ."[491] However, the Fourteenth Amendment should not be read as "mak[ing] citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens."[492]

Like the majority, Justice Fuller spent little time engaging the framing and ratification debates. Instead, Justice Fuller thought American practice provided a better interpretive lens than English common law:[493]

> The English common law rule recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents. . . . But a different view as to the effect of permanent abode on nationality has been expressed in this country."[494] In his work on Conflict of Laws, § 48, Mr. Justice Story, treating the subject as one of public law, said: "Persons who are born in a country are generally deemed to be citizens of that country. A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health or curiosity, or occasional business."[495]

Justice Fuller rejected the majority's "territorial jurisdiction" reading of the text and insisted that the Clause referred to requisite allegiance. Citing the Civil Rights Act, for example, Fuller noted that the statute made citizens of "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed . . . ."[496] This phrasing suggests that a person might be born on American soil but still lack requisite allegiance to the United States:

> The words "not subject to any foreign power" do not in themselves refer to mere territorial jurisdiction, for the persons referred to are persons born

491 *Id.* at 732 (Fuller, C.J., dissenting).

492 *Id.*

493 *Id.* at 707 ("Obviously, where the Constitution deals with common law rights and uses common law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving as it does international relations, and political as contradistinguished from civil status, international principles must be considered . . . .").

494 *Id.* at 718.

495 *Id.* at 718; *see also supra* note 66 and accompanying text.

496 *Wong Kim* Ark, 169 U.S. at 719–20 (Fuller, C.J., dissenting) (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).

> in the United States. All such persons are undoubtedly subject to the territorial jurisdiction of the United States, and yet the act concedes that nevertheless they may be subject to the political jurisdiction of a foreign government. In other words, by the terms of the act all persons born in the United States, and not owing allegiance to any foreign power, are citizens.[497]

As for the children of foreign ministers or "aliens born during hostile occupation," those exceptions were based "on the fiction of extra-territoriality or on the waiver of territorial jurisdiction."[498] In other words, even without the words "subject to the jurisdiction," the children of foreign ministers would be excluded on the grounds that they were not really born "in" the United States at all. Therefore, the additional words of "subject to the jurisdiction thereof" must require something other than mere territorial presence.

Turning to the Fourteenth Amendment debates, Justice Fuller pointed out that the majority omitted key exchanges that undermined its interpretation. Here, Justice Fuller quoted Lyman Trumbull's explanation, "'What do we mean by 'subject to the jurisdiction of the United States'? Not owing allegiance to anybody else; that is what it means,'" and Reverdy Johnson's view that "all that this amendment provides is that all persons born within the United States and not subject to some foreign power . . . shall be considered as citizens of the United States."[499] The same allegiance-based understanding, Chief Justice Fuller explained, had been the basis of the Supreme Court's ruling in *Elk v. Wilkins*.[500]

Chief Justice Fuller concluded that children born to alien parents who

> have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country.[501]

Finally, Chief Justice Fuller took issue with Justice Gray's common law-based dicta regarding temporary residence: "[T]he rule in respect of citizenship of the United States prior to the Fourteenth Amendment differed from the English common law rule in vital particulars . . . ."[502] In particular, it "recognize[d] an essential difference between birth during temporary, and

497 *Id.* at 720.

498 *Id.*

499 *Id.* at 721–22 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson)); *see also supra* note 322–24 and accompanying text.

500 *Id.* at 722, 724.

501 *Id.* at 725.

502 *Id.* at 729.

birth during permanent, residence. If children born in the United States were deemed presumptively and generally citizens, this was not so when they were born of aliens whose residence was merely temporary, either in fact, or in point of law."[503]

c. Analysis

Despite its failure to engage the text's original understanding, the specific judgment of the majority in *Wong Kim Ark* nevertheless is consistent with a plausible originalist reading of the Citizenship Clause. Children born in the United States to non-citizen parents legally and permanently domiciled in the United States likely fell within the original understanding of the Citizenship Clause (though there is some evidence on the other side). The reasoning of the majority, however, was exceedingly weak in terms of justifying its conclusion.

Justice Gray dismissed the framing debates as "inadmissible" (except when he admits them)[504] despite the public nature of those debates and despite their broad dissemination among the ratifying public. Even on its own terms, Justice Gray's analysis of antebellum law ignored a wealth of evidence that common law principles were only one aspect of antebellum analysis of citizenship and allegiance. For example, Justice Gray said nothing at all about Attorney General Bates' *Report on Citizenship*, despite Bates's exhaustive treatment of the subject just prior to the drafting and ratification of the Fourteenth Amendment.

Turning to post-adoption caselaw, Justice Gray's effort to distinguish his own prior opinion in *Elk* actually turned the Citizenship Clause on its head. The status of tribal Indians was not a *de minimis* side issue during the drafting phase; it was a central issue, one exhaustively discussed and which played a key role in the crafting of the text. Finally, Justice Gray's thoughts about children born to non-citizens temporarily on American soil was pure dicta. The parents in *Wong Kim Ark* were not temporarily in the United States, but instead "enjoy[ed] a permanent domicil[e] and residence therein at San Francisco."[505]

For all the weaknesses of the majority's reasoning, Chief Justice Fuller's dissent was even weaker. Like the majority, Justice Fuller gave primacy to antebellum sources that long preceded the Fourteenth Amendment and he spent relatively little time engaging the actual framing debates. Like the majority, Chief Justice Fuller entirely neglected the major role of Indian tribes in the framing of both the Civil Rights Act and the Fourteenth Amendment. The dissent's effort to justify the exclusion of Chinese nationals ignored significant historical evidence regarding the

503 *Id.*
504 *Id.* at 699 (majority opinion).
505 *Id.* at 652.

inclusion of that very group. Finally, and most damningly, Chief Justice Fuller would make United States citizenship turn on transient political presumptions about race and nationality. The historical evidence overwhelmingly indicates that the framers and ratifiers understood the Fourteenth Amendment as extinguishing the power of political majorities to deny natural born citizenship on the basis of race or ethnicity.

Of the two opinions by Justice Gray, his allegiance-based reading of the Citizenship Clause in *Elk v. Wilkins* better reflects the original understanding of the text. Justice Gray's efforts in *Wong Kim Ark* to distinguish his earlier opinion on the ground that it involved Indian tribes rather than foreign nations contradicts both *Elk* itself and the original understanding of the framers (the primary reason, one suspects, that Justice Gray avoided engaging the debates). Having studied the history behind the framing and adoption of the Citizenship Clause, we know that tribal members were excluded from the Clause precisely *because* their status was analogous to citizens of foreign nations.

V. A TEXTUAL ORIGINALIST THEORY OF FOURTEENTH AMENDMENT CITIZENSHIP

Having fully canvassed the historical record, both pre- and post-adoption, we are now in a position to construct a theory of the Citizenship Clause consistent with its text and likely original meaning.

The Citizenship Clause of the Fourteenth Amendment establishes two separate requirements for natural-born citizenship. First, a person must be "born in the United States." Second, that person must be born "subject to the jurisdiction [of the United States]." There is nothing textually obvious about the meaning of the second requirement. It might refer to being within the territory of the United States (territorial jurisdiction). Or it might refer to being subject to the enforcement of state or federal law (legal jurisdiction). Or it might refer to a condition of allegiance—having been born in a manner *subject* to the sovereign authority of the United States (as opposed to a foreign sovereign). Finally, if less plausibly, the phrase might be a term of art reference inclusive of all persons born in the United States except for a pre-existing set of exceptions to the general rule.

The words themselves cannot resolve this textual ambiguity. This is why every scholar and court to consider the issue has gone beyond the text and relied on some kind of interpretive guide. Commonly cited guides include the "ancient rule" of the common law,[506] antebellum abolitionist theory,[507] mid-nineteenth-century Indian law,[508] post-adoption judicial

506 *Id.* at 667; *see also* Wurman, *supra* note 7, at 6.

507 *See* Amanda Frost, *Dred Scott's Daughter: Gradual Emancipation, Freedom Suits, and the Citizenship Clause*, 35 YALE J.L. & HUMANITIES 812 (2024).

508 *See* Ablavsky & Berger, *supra* note 112.

precedent,[509] historical practice,[510] and the original understanding of those who framed and ratified the text,[511] or some combination of all the above.[512]

Evidence of the original understanding can be found in a variety of historical sources, including public speeches, legislative and political debates, published essays, and newspaper reports. Even private letters and diaries can serve as relevant sources to the extent that they illuminate how words and phrases were used by relevant participants at the time of framing and ratification. Pre-framing historical materials such as cases, treatises, treaties, and historical discussion and debate *might* be relevant, but only to the extent there is evidence that they informed the understanding of the framers and ratifiers. Originalists generally view post-ratification commentary as weak evidence at best.

The *best* originalist evidence involves widely disseminated public explanations of the proposed text by key players at the time of framing and ratification. Thankfully, in the case of the Citizenship Clause, we have a wealth of such high-value originalist evidence.

First, we know beyond doubt that both the framers and ratifiers understood the Fourteenth Amendment Citizenship Clause as a reworded version of the citizenship clause in the 1866 Civil Rights Act. The Amendment's advocates expressly and repeatedly said this during framing and ratification. As Trumbull explained, the same principle informed both texts, though the amendment's language was "better." Any persuasive originalist account must engage this publicly declared link between the Amendment and the Act.

Second, we know that the public was fully informed of the congressional debates attending the drafting and passage of both the Civil Rights Act and the Fourteenth Amendment. The first session of the Thirty-Ninth Congress was period of high political drama and intense public interest. The political stakes could not be higher: Republicans had barred southern representatives from returning to Congress and used the opportunity to establish new civil rights and new constitutional text, and did so in time for the coming fall congressional elections. The fall elections, in fact, would serve as a referendum on the public's acceptance of these texts. Newspapers, well aware of public interest, published the congressional debates of the Thirty-Ninth Congress on a daily basis.[513] By doing so, the

509 *See, e.g.*, Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185 (2016).

510 *See, e.g.*, *Subject to the Jurisdiction Thereof": Birthright Citizenship and the Fourteenth Amendment Before the H. Subcomm. on the Constitution and Limited Government*, 119th Cong. (2025) (statement of Amanda Frost, Professor, University of Virginia School of Law).

511 *See* Ramsey, *supra* note 4; Hyman, *supra* note 67.

512 *See* Samuel Estreicher & Rudra Reddy, Revisiting the Scope of Constitutional Birthright Citizenship (Aug. 11, 2025) (unpublished manuscript) (on file with New York University School of Law).

513 *See supra* note 350–51.

ratifying public across the nation had both reason and opportunity to follow the debates regarding the meaning of the Civil Rights Act and its relationship to the Citizenship Clause of the Fourteenth Amendment.

Third, the debates establish an allegiance-based meaning of the Fourteenth Amendment's Citizenship Clause. The clearest and most obvious example, is the explanation provided by Civil Rights Act and Fourteenth Amendment framer, Senate Judiciary Chairman Lyman Trumbull: "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."[514]

Critics of the allegiance reading sometimes argue that Trumbull's words carry a different meaning when read in their full context.[515] In fact, the more "context" one adds, the clearer it becomes that Trumbull meant exactly what he said. Trumbull's explanation of the text's meaning occurred during an extended conversation with his colleagues regarding the meaning of the proposed citizenship clause. In a remarkable series of exchanges with his colleagues that takes up several pages in the *Congressional Globe*, Trumbull provides a detailed explanation why the proposed text did *not* refer to territorial or legal jurisdiction (which would include Indians) but instead referred to personal allegiance (which does not).

The reason why children of tribal members would not be made citizens was because they held a personal allegiance to a foreign sovereign—their tribe. As proof that Indian tribes should be viewed as analogous to foreign sovereigns, Trumbull reminded his colleagues that the federal government dealt with Indian tribes by way of treaty, not general law, just as the government did with other foreign sovereigns. Unlike other foreign sovereigns, Indian tribes and their members were within the territory of the United States, and they were subject to the enforceable laws of the United States. But, once again, all of those laws were passed pursuant to treaties—treaties negotiated between the "foreign" tribes and the Executive Branch and ratified by one branch of Congress, the Senate. This long-standing practice of treaty-based ("incomplete") jurisdiction demonstrated the foreign status of the tribes and their members. Republicans understood that tribal members maintained allegiance to another sovereign absent some kind of formal process of dissolution and naturalization. Until this dissolution and transferred allegiance occurred, neither the tribal parents nor their children

514 CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (speech of Sen. Trumbull).

515 *See, e.g.*, Evan Bernick, Paul Gowder and Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 Cornell Law Review Online 101, 119. To date, Bernick et al. have avoided engaging the evidence and arguments presented in this and prior drafts, choosing instead to limit their comments to a very early draft posted on SSRN in early 2025. *See, id.* at 104 n.14. To the extent their concerns had merit to begin with, they've long since been addressed.

were subject to the jurisdiction of the United States in the sense required by the amendment[516]

Other key participants in the framing debates also understood natural-born citizenship required both birth in the United States and disavowal of foreign allegiance. According to Representative M. Russell Thayer, the Civil Rights Bill was simply "declaratory of the existing law" which was that "every man born in the United States, and not owing allegiance to a foreign Power, is a citizen of the United States."[517] Similarly, during the debates over the Civil Rights Act, Fourteenth Amendment framer John Bingham declared that "every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen."[518] Bingham repeated the same idea during the ratification: "[The] amendment consists of five sections, the first of which provides that persons born in the United States and not owing allegiance to any foreign power, and all persons of foreign birth duly naturalized within the United States, are declared to be citizens of the United States."[519]

Given these in-depth, high profile, and well-published statements by some of the most influential framers and advocates, no plausible originalist account of the debates can ignore the role of allegiance in determining whether a person born in the United States is "subject to the jurisdiction thereof."[520]

Fourth, the relevant allegiance was that of the *parents*. As explained in the opening section of this Article, this was already well-established under antebellum law. Although Republicans rejected the idea that a parent's *race* played any role in establishing a child's citizenship, they broadly agreed that the parent's allegiance was critically important. Again, quoting John Bingham, "every human being born within the jurisdiction of the United

516 *See* CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (speech of Sen. Trumbull) ("I have already replied to the suggestion as to the Indians being subject to our jurisdiction. . . . in the sense of owing allegiance solely to the United States . . . .").

517 *Id.* at 1152 (statement of Sen. Thayer).

518 *Id.* at 1291 (statement of Rep. Bingham).

519 *The Constitutional Amendment. Exposition Of Its Meaning, And Reasons For Its Adoption. Speech of Hon. John A. Bingham*, ALBANY EVENING JOURNAL (Albany, New York), Sept. 5, 1866, at 1.

520 In the thousands of pages of 1866 congressional debate on citizenship, historians have discovered only a single counter-example: Representative Lawrence's reference to *Lynch* during the Civil Rights debate. *See supra* note 267 and accompanying text. Lawrence played no discernable role in drafting either the Civil Rights Act or the Fourteenth Amendment. Although his speech was published by a number of small-town Ohio newspapers, it received no national attention whatsoever. *See supra* note 269 and accompanying text. Compare this to the multiple major national newspapers reporting on Bingham's claim that "every human being born within the jurisdiction of the United States *of parents not owing allegiance to any foreign* sovereignty is, in the language of your Constitution itself, a natural-born citizen." *See supra* note 270 and accompanying text.

States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen."[521] Trumbull himself shared this view. In a letter written to President Johnson in support of the Civil Rights Act, Trumbull explained that "the Bill declares 'all persons' born *of parents* domiciled in the United States, except untaxed Indians, to be citizens of the United States."[522] Even members of the political opposition shared this view. In comments supportive of the amendment's Citizenship Clause, Democratic Senator Reverdy Johnson declared, "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."[523]

The consensus view was that, although children were presumed to bear a natural allegiance to the country of their birth, that presumption is rebutted in situations where the child's parents either refuse allegiance or hold a counterallegiance to the United States. Children born to ambassadors, for example, are born to parents who have formally declared their allegiance to another sovereign and officially withhold allegiance to the United States. Children born to parents engaged in a hostile occupation of the United States are born to parents holding a *counter* (or hostile) allegiance. Finally, since tribal governments in the 1860s were viewed as "foreign" governments, this meant that children born to parents living under a treaty-based tribal government were viewed as formally maintaining an allegiance to a foreign government and refusing similar allegiance to the United States. That status could be changed only by way congressional action or a formal process of naturalization.

Having established the most likely original understanding of the text, I now turn to considerations of application.[524] Applying the original meaning

521 CONG. GLOBE, 39th Cong., 1st sess. 1291 (1866).

522 Letter from Sen. Lyman Trumbull, *supra* note 251. Although this was a private letter, Trumbull was committing himself to an understanding of the Act that, he hoped, would be shared by the President and prompt a presidential signature. In other words, Trumbull chose his words and arguments carefully and with the full knowledge they likely would be communicated to others and potentially repeated in the press. For a detailed investigation of the letter and its complete transcript, see Lash, "*Lyman Trumbull's Letter to Andrew Johnson*," *supra*, note 250.

523 CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson) (emphasis added).

524 In his article and essay, Professor Michael D. Ramsey explores the antebellum understanding of word "jurisdiction" and concludes that the Fourteenth "Amendment's framers chose a phrase that was well-defined in pre-enactment law. 'Subject to the jurisdiction' of a nation meant under sovereign authority, and it included everyone within sovereign territory apart from foreign sovereigns, diplomats, and armies." *See,* Michael D. Ramsey, *The Originalist Basis of Birthright Citizenship,* LAW AND LIBERTY, (Feb. 13, 2025),https://lawliberty.org/the-originalist-basis-of-birthright-citizenship/) [https://perma.cc/9BJL-T7G4] [hereinafter, Ramsey, *Originalist Basis*]; *see also*, Ramsey, *supra* note 4, at 440 ("'[S]ubject to the jurisdiction [of the United States]' had a clear meaning and scope in nineteenth-century language. It meant within the United States' power of 'governing or legislating . . . .'). According to Ramsey, the framing debates indicate "that

to a particular contemporary case requires an act of construction—a construction of doctrine.[525] Below, I suggest that the most historically justified theory of application was first suggested by Attorney General Edward Bates: Birth in the United States establishes a prima facie case for natural-born citizenship. Absent evidence that the child's parents have refused or hold a counterallegiance to the United States, the child's presumed allegiance and natural-born citizenship prevails.

A. Prima Facie Citizenship

Although the historical record supports certain conclusions about the original meaning of the Citizenship Clause, it does not demand a single approach to judicial enforcement. An originalist interpretation demands only that judicial construction be consistent with what we know about the original understanding.[526]

Even if the above account is correct regarding the original public understanding of the dual-requirement Citizenship Clause, there are different ways courts might go about applying the text to contemporary situations.

senators understood being subject to US jurisdiction to mean under US sovereign authority with respect to, for example, ordinary crimes—which (to repeat) was the case for everyone in the United States other than diplomats and tribes." Ramsey, *Originalist Basis*, *supra* note 525. Ramsey concludes, "temporary visitors and persons not lawfully present are subject to complete jurisdiction of the United States. They are not equivalent to nineteenth-century tribes, over whose intra-tribal acts the United States claimed no authority." *Id.*

There are multiple problems with Ramsey's argument. First, Ramsey's "sovereign authority" definition of "subject to jurisdiction" would have included Indian Tribes and their members, as they had long been subject to the sovereign authority of the United States, including occasional legal oversight of intra-tribal crimes and civil actions. Ramsey seems unaware of this historical fact. As explained above, such federal oversight waxed and waned, depending on the particular treaty or executive policy, but the authority was well-established. Ramsey's assertion that the "United States claimed no authority" over intra-tribal acts also is demonstrably incorrect. As described in detail above, a number of post-Civil War treaties imposed federal regulatory authority over intra-tribal affairs, requiring, among other things, that black tribal members receive the same tribal "civil rights" rights as other tribal citizens. *See supra* note 211 and accompanying text. Although Trumbull might have initially been unaware of the full scope of federal jurisdiction over tribal affairs, his colleagues quickly brought him up to speed. *See supra* note 211 and accompanying text. Trumbull accepted the information as accurate and simply clarified that the houses of Congress lacked "*complete*" or general jurisdiction over tribes and their members. Such jurisdiction was incomplete in the sense that Congress in general (meaning the House and Senate) lacked ordinary policy making authority over tribal Indians. *See supra* note 219 and accompanying text.

In sum, Ramsey is incorrect when he claims that "[i]n nineteenth-century language, 'subject to the jurisdiction' of a nation meant under that nation's sovereign authority." Ramsey, *Originalist Basis*, *supra* note 525 It is incontrovertible that members of Indian tribes were under the sovereign authority of the United States, even if allowed a range of autonomy as "quasi-foreign" sovereigns.

525 *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 468–69 (2013) (discussing the "construction zone").

526 *See id.* at 472.

Some scholars suggest courts should read "subject to the jurisdiction thereof" as a term of art referring to a closed set of specific exceptions.[527] Such a construction, however, is neither required by the text nor supported by the historical record.[528] We know, for example, that the framers continuously modified textual expressions of natural-born citizenship in response to new arguments and new information. There was no "term of art" and certainly no well-known list of "exceptions."

Another approach might construct a jurisprudence demanding proof of native birth *and* proof of satisfactory parental allegiance. Though textually permissible, this approach introduces numerous evidentiary conundrums, including what to do in cases where we know the child was born in the United States, but we have no information regarding the parents or the context surrounding the child's birth.

It also seems historically inappropriate to treat the two requirements as substantive equals. The historical record contains a wealth of examples of theorists, framers, and ratifiers giving pride of place to considerations of birthplace—often to the point of emphasizing nothing other than the question of birthplace.[529] Although an originalist account of the text does not allow erasing the second requirement altogether, a constructed jurisprudence attentive to the history of its adoption may appropriately place the burden of proof on those challenging otherwise presumptive allegiance.

The approach that seems most consistent with both the text and its history was first articulated by Attorney General Edward Bates in his *Report on Citizenship*. There, Bates explained that antebellum jurisprudence

527 *See, e.g.*, Adam Cox, Pamela Karlan, Marty Lederman, Trevor Morrison and Cristina Rodríguez, *Fundamental Flaws in the Barnett/Wurman Defense of Trump's Birthright Citizenship Order*, JUST SECURITY (Feb. 19, 2025), https://www.justsecurity.org/108070/fundamental-flaws-barnett-wurman-birthright-citizenship/# [https://perma.cc/339P-P3Y2]("A child born here is both entitled to the government's protection and bound to adhere to its laws. This is true regardless of the characteristics of the child's parents, subject only to the narrow exceptions identified in *Wong Kim Ark*.").

528 The idea that "subject to the jurisdiction thereof" was understood by both framer and ratifier as a term of art seems radically inconsistent with the historical record. Constructing the text took hours of debate and multiple drafts.

529 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull) (declaring "that every free-born person in this land is, by virtue of being born here, a citizen of the United States, and that the bill now under consideration is but declaratory of what the law now is"); *see also A Great Speech*, BROWNLOW'S KNOXVILLE WHIG, Oct. 2, 1867, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/item/sn83045629/1867-10-02/ed-1/ [https://perma.cc/H2BT-28QV]) ("[T]he man is a natural born fool who does not understand that the term 'natural-born citizen' implies that citizenship is a birthright. It comes with a man into the world. He has a right to citizenship, no matter what his complexion, upon the spot in which he had his origin; and the man who denies it to him, or attempts to withhold it from him, is simply a monster.").

established a general presumption of citizenship for any person born in the United States. As Bates put it:

> [E]very person born in the country is, at the moment of birth, prima facie a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the "natural-born" right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance.[530]

We know that the framers of the Fourteenth Amendment accepted Bates's *Report on Citizenship* as an authority, in particular his conclusion regarding the race-neutral principle of natural-born citizenship.[531] We also know that post-Fourteenth Amendment legal commentators viewed the *Report on Citizenship* as consistent with the meaning of the Fourteenth Amendment Citizenship Clause.[532] It seems safe, then, to presume that constructing a Bates-like prima facie approach to applying the Citizenship Clause can be done in a manner consistent with the original understanding of the text.

In law, satisfying a "prima facie" requirement has the effect of shifting the burden of proof to one's opponent.[533] Absent a satisfactory rebuttal, the prima facie case prevails. Applying this idea to the Citizenship Clause, this would mean that, if a person establishes that she was born in the United States, then the burden shifts to those challenging that status. Meeting that burden requires (as Bate's would say) "proving some great disfranchisement strong enough to override" the presumption.[534] Absent such proof, the presumption of citizenship prevails. In other words, absent any reason to believe otherwise, the newborn babe left on the steps of the Kansas City schoolhouse will be presumed a citizen of the United States.

This prima facie approach makes birth in the United States the major and generally dispositive requirement for establishing citizenship. Such an emphasis is consistent with the many examples of framers and ratifiers referring to the Citizenship Clause as a simple requirement of birth in the United States.[535] Of the two textual requirements, birth on American soil was viewed as the primary consideration.

Nevertheless, however important the requirement of birthplace, the text establishes a second requirement of being born "subject to the jurisdiction" of the United States. Under a prima facie approach, if there is satisfactory

530 Citizenship, 10 Op. Att'ys Gen. 382, 394 (1862).

531 *See supra* note 164 and accompanying text.

532 *See supra* note 302 and accompanying text.

533 The Latin phrase means "the first blush" or "the first view." 2 JOHN BOUVIER, A LAW DICTIONARY 377 (Phila., 5th ed. 1855). In legal terms "[p]rima facie evidence of a fact is in law sufficient to establish the fact, unless rebutted." *Id.*

534 Citizenship, 10 Op. Att'ys Gen. 382, 394 (1862).

535 *See supra* note 470 and accompanying sources.

evidence that a person is not born subject to the jurisdiction of the United States, then this would be a "great disfranchisement strong enough"[536] to defeat the otherwise sufficient fact of birth in the United States.

This "proof" must align with the original meaning of the text. Given the history recounted above, at least some aspects of what such proof would involve are clear. As the framers repeatedly explained to their colleagues and to the public, the text excluded children born to parents who failed to dissolve a prior foreign allegiance and initiate a process of naturalizations. Common examples included children born into a family of foreign ministers (parents who maintain allegiance to their home country), children born to parent-members of a hostile army of occupation (parents who evidence hostility, not allegiance, to the United States), and children born to non-naturalized parent members of Indian tribes.

Under a prima facie approach, establishing a defeating condition requires evidence. If we know nothing at all about the child's familial allegiance, then birth in the United States would be sufficient to establish natural-born citizenship. If a child's parents are unknown, or there is no information regarding refused or counter-allegiance on the part of the parents, then the child should be accepted as a citizen of the United States.[537]

B. Criminality

Below, I apply a prima facie approach to four simplified situations: children born in the United States to (1) citizen parents, (2) legally permanent-resident noncitizen parents, (3) legally-but-temporarily resident noncitizen parents and (4) noncitizen parents who have illegally entered the United States. Before doing so, it is helpful to address an irrelevant consideration: law-breaking or general criminality.

Although the categories of allegiance and criminality may sometimes overlap, considerations of criminality are orthogonal to considerations of allegiance. A child may be born into a completely law-abiding family and not be a citizen (children of ambassadors) or a child may be born into an active American "crime family" and yet still be a citizen of the United States. This seems intuitively obvious: one does not lose one's citizenship upon conviction of a crime. This intuition is also supported by an abundance of historical evidence.

The repeated references to "Gypsies" (Roma) during the congressional debates reflected bigoted assumptions about ethnic-based criminal activity.

536 Citizenship, 10 Op. Att'ys Gen. 382, 394 (1862).

537 It is true that this leaves open the possibility that information may come to light long after birth. For example, a child long viewed a citizen may someday discover his parents were visiting foreign ministers. But such possibilities seem unavoidable under any theory of the Citizenship Clauses. For example, under any proposed theory it is possible to learn years after the fact that a child was not actually born in the United States.

For example, consider Senator Cowan's concern about making citizens of Gypsies "[who] wander in gangs in my state."[538] The response (in addition to appropriate mockery) was "so what?" Allegations of criminal activity are not per se allegations of refused allegiance to the United States: Thus, Lyman Trumbull's affirmance that the children of Gypsies *would* be citizens[539] and Mr. Conness's remark that, as far as he was concerned, their inclusion posed no problem and simply ensured that "a few score of human beings born in the United States shall be regarded as citizens of the United States."[540]

The most dramatic criminal activity during this period, of course, involved the criminal conspiracy that styled itself the "Confederate States of America."[541] If criminal activity called into question natural-born citizenship, this would have been the crime to do so. Yet, as John Bingham forcefully maintained, Americans who participated in the rebellion remained citizens, as did their children.[542] Parents who had joined the Confederacy did not thereby become "foreigners." The entire military policy of the United States was grounded on the idea that southern states *could not* secede and rebels *could not* establish a foreign country out of the seceded states. Rebels remained citizens in and of the United States—and potentially prosecutable for treason. The "stickiness" of established citizenship was not a morally obtuse reward to rebel parents, it was a warning to those who thought they could escape the responsibilities of citizenship.

In sum, neither obedience to, nor disregard for, municipal law has any necessary connection to determining whether one is born "subject to the jurisdiction" of the United States.[543] It is possible that criminal activity by non-citizens might serve as evidence of refused or counterallegiance. A historical example here would be Indian tribes who waged war against the United States. A related example, discussed below,[544] involves children born to non-citizen parents who intentionally enter the United States without

538 CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan).

539 *Id.* at 498 (statement of Sen. Trumbull).

540 *Id.* at 2892. Professor Garrett Epps suggests that the "discussion of Gypsies provides about the closest thing we are likely to get to this issue of illegal immigration." Epps, *supra* note 7, at 360. This seems inapt, as no one claimed these people were illegally present in United States, only that they were engaged in criminal activities.

541 *See* CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA (1861), *reprinted in* 1 LASH, THE RECONSTRUCTION AMENDMENTS, *supra* note 73, at 348.

542 *See supra* note 375https://perma.cc/Z64V-MB9876 and accompanying text.

543 *But see* Jed Shugerman, Birthright Citizenship 4: The Concept of "Unlawful Immigrants" Existed in the 1850s–60s, and Americans Ratified Birthright Citizenship Without Worrying About It, SHUGERBLOG (Feb. 21, 2025), https://shugerblogcom.wordpress.com/2025/02/21/birthright-citizenship-4-the-concept-of-unlawful-immigrants-existed-in-the-1850s-60s-and-americans-ratified-birthright-citizenship-without-worrying-about-it/ [https://perma.cc/Z64V-MB98] (suggesting that, because Chinese immigrants might not have paid taxes, they were arguably "illegally" present). For my response to Shugerman, *see supra* note 310.

544 *See infra* notes 595–610 and accompanying text.

authorization.[545] Unlawful activity per se, however, has no necessary relationship to refused or counter allegiance, much less serve to rebut the presumed natural allegiance of a child born in the United States.[546]

C. Four Simplified Situations

Below I apply the above textual-historical theory of the Citizenship Clause to four simplified situations. I acknowledge that issues related to citizenship, immigration and foreign national parents are extraordinarily complex and can involve a myriad of situations and statutes. The best place to begin, however, is by considering how an originalist account of the Citizenship Clause might be applied to less complex scenarios and leave more complicated scenarios for future analysis.

1. Children Born in the United States to Citizen Parents

We know that one of the primary purposes of the Citizenship Clause was to overrule *Dred Scott* and remove the color bar from national and state citizenship. Republicans insisted that Chief Justice Taney had erred and that antebellum law presumed that all persons born in the United States were citizens absent some kind of race-neutral disqualifying circumstance. As far as they were concerned, it was already the case in 1866 that black Americans born in the United States were citizens of the United States, as were their children. Declaring such to be the case in constitutional text simply made the revocation of *Dred Scott* official.

545 Illegally entering the United States is a crime. Under U.S. federal law, specifically 8 U.S.C. § 1325 (2018), improper entry by an alien is a misdemeanor for a first offense. This includes entering or attempting to enter the U.S. at any place other than a designated port of entry, or using fraudulent means to cross the border. *Id.* A subsequent offense can be charged as a felony. Penalties may include fines, imprisonment for up to six months for a first offense, or up to two years for a subsequent offense, depending on the circumstances. *Id.* This specific section of the U.S. Code, titled "Improper Entry by Alien," establishes that any noncitizen who enters or attempts to enter the U.S. at an improper time or place (outside designated ports of entry), eludes examination or inspection by immigration officers, or uses false or misleading representations to gain entry, is committing a federal offense. *Id.* For a first violation, it's punishable by a fine, imprisonment for up to six months, or both. A second or subsequent violation can carry penalties including up to two years in prison.

546 A more complicated situation involves children of noncitizens who legally entered the country but overstayed their visa. Depending on how one resolves issues of temporary residence, this could be viewed through the lens of ordinary law-breaking (maintaining the presumption of a child's allegiance) or as refused allegiance due to the parents' formally declared "temporary" stay under a continued allegiance to a foreign sovereign. This may be an area where the prima facie rule makes a difference, with close calls viewed as not successfully rebutting presumptive citizenship. *See, e.g.*, I.N.S. v. Rios-Pineda, 471 U.S. 444, 451 (1985) ("There is a difference in degree between one who enters the country legally, staying beyond the terms of a visa, and one who enters the country without inspection.").

The easiest case, then, involves children of citizen-parents. All such children enjoy the presumed and unrebutted natural allegiance of one born in the United States. As noted above, this remains true even in cases involving parental criminal activity—even to the point of citizen-parents rebelling against the Union. As Bingham explained while the amendment was pending before the states: "[T]heir treason and revolt does not make them a foreign nationality, nor put them or the States in which they reside beyond the jurisdiction of the United States, nor absolve them from their allegiance to this Government."[547]

2. Children Born to Non-Citizen Parents Legally Residing in the United States

Although one can find references to the contrary, the very public declarations that the proposed Citizenship Clause included children born to Chinese parents seems to sufficiently support inclusion of children born in the United States to legally present non-citizen parents. One finds statements to this effect in abolitionist antebellum treatises,[548] as well as in the congressional framing debates.

During the debates over the Civil Rights Act, the textual precursor to the Citizenship Clause, Lyman Trumbull expressly declared that children born to Chinese parents in California would be citizens,[549] and multiple newspapers published Trumbull's comments.[550] During the ratification debates, proponents of Fourteenth Amendment repeatedly described the Citizenship Clauses as simply constitutionalizing the Civil Rights Act.[551]

When Congress debated adding the Citizenship Clause to the Fourteenth Amendment, members once again questioned whether it would make citizens of children born to Chinese immigrants. In response,

547 CONG. GLOBE, 39th Cong., 2nd Sess. 503 (1866) (statement of Rep. Bingham).

548 *See* TIFFANY, *supra* note 144 at 92 (in light of the fact that "Congress [had] made no provision for naturalizing persons residing within the United States during the Revolution, and the formation of the Federal Government, *nor for the children of aliens born, and residing in this Government*, the conclusion is that they were considered citizens, and subjects of the National Government, and no such provision was necessary.") (emphasis added).

549 *See supra* note 197 and accompanying text.

550 *See, e.g.*, *Indians and Chinese*, PHILADELPHIA INQUIRER, Jan. 31, 1866, at 4 (on file with Newspapers.com, https://www.newspapers.com/image/168042408/) [https://perma.cc/B2AH-V54H]; Memphis Daily Avalanche (Memphis, Tennessee), Feb. 3, 1866, p. 4; Daily Commercial Register (Sandusky, Ohio), Jan. 31, 1866, p.3; *XXXIXth Congress—First Session*, THE CINCINNATI DAILY ENQUIRER, Jan. 31, 1866, at 3 (on file with ProQuest Historical Newspapers, https://www.proquest.com/cv_1990804/docview/877219890/pageviewPDF/AFE54F955419454EPQ/39?accountid=12874&sourcetype=Newspapers) [https://perma.cc/94B3-85QY]; *The Eastern News*, SAN FRANCISCO EVENING BULLETIN, Feb. 1, 1899, at 1 (on file with author); Daily Inter Ocean (Chicago, Illinois), Jan. 31, 1866, p.1; Public Ledger, (Philadelphia, Pennsylvania), Jan. 31, 1866, p.1. This is only a partial list.

551 *See supra* note 301 and accompanying text.

California Senator John Conness noted that this had already been accomplished by the Civil Rights Bill and that the proposed Citizenship Clause simply "incorporate[d] the same provision in the fundamental instrument of the nation."[552] The front page of the most widely read newspaper in the country, *The New York Herald*, duly reported Conness's explanation that the proposed amendment would make citizens of children born to Chinese immigrants.[553]

The only evidence to the contrary is an ambiguous statement by Jacob Howard and scattered post-adoption commentary. When introducing the Citizenship Clause, Howard declared that the Citizenship Clause "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors of foreign ministers accredited to the [g]overnment of the United States, but will include every other class of person[]."[554] While Howard might be understood as excluding all foreigners and aliens born in the United States, his comment is ambiguous and can plausibly be read as referring solely to those "foreigners and aliens" who are born into the families of ambassadors. Given that only moments later Howard's colleague Mr. Conness noted (without contradiction) that the text included children born to Chinese parents,[555] the latter seems most likely.

In the *Slaughter-House Cases*,[556] Justice Samuel Miller suggested that the phrase "'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."[557] Once again, this can be read two ways. It could be read as excluding all children born to foreign nationals, or Justice Miller could have intended it as a general reference to the unique cases of foreign diplomats and analogous situations involving clearly refused allegiance (children born to parents living under the quasi-foreign states of tribal government). Whatever Justice Miller's intention, his statement was dicta in a case handed down years after ratification and could not have affected the ratifying public's understanding of the text.

552 CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Conness).

553 *Thirty-Ninth Congress*, NEW YORK HERALD, May 31, 1866, at 1 (on file with Libr. of Cong., Chronicling America, https://www.loc.gov/resource/sn83030313/1866-06-01/ed-1/?st=pdf) [https://perma.cc/X8WS-R5QS] ("Mr. Conness (rep.) of Cal., spoke in favor of Mr. Howard's amendment [the Citizenship Clause]. The progeny of Mongolians in California were very small in number, and the proposed amendment would but very slightly affect the citizenship of California.").

554 CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard).

555 *See id.* at 2890 (statement of Sen. Howard), and *id.* at 2891 (statement of Sen. Conness).

556 *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873).

557 *Id.* at 73.

Although in 1866 Chinese immigrants residing in California by law could not become citizens of the United States,[558] the framers did not regard that exclusion as evidence of refused or counter-allegiance. The issue was not under the immigrants' control, and so nothing about their situation can be viewed as proof of refused or counterallegiance to the point of defeating their child's presumed natural allegiance. This means that the judgment (if not the reasoning) in *Wong Kim Ark* was correct.

3. Children Born to Noncitizen Parents Legally but Temporarily Residing in the United States

Under the doctrine of prima facie citizenship, children born in the United States to parents only temporarily residing in the United States are presumptively citizens of the United States. The issue is whether the familial context into which they are born rebuts their presumptive allegiance and citizenship. On this issue, the historical record is mixed.

At common law, all visiting foreign nationals were presumed to have a "local" allegiance to the host sovereign.[559] This is distinct from both "natural" and "naturalized" allegiance and was not understood as necessarily defeating the visitor's full allegiance to their home sovereign.[560] In a similar way children of loyal parents "temporarily" in the dominion of an army of hostile occupation were thought to maintain the same (loyal) allegiance of their parents.[561] As Justice Joseph Story wrote in *Inglis v. Trustees of Sailor's Snug Harbor*,[562] "birth within the allegiance of a foreign sovereign, does not always constitute allegiance, if that allegiance be of a temporary nature within the dominions of another sovereign."[563] Four years later, in his *Commentaries on the Conflict of Laws*, Story explained that

> [p]ersons who are born in a country are generally deemed to be citizens and subjects of that country. A reasonable qualification of the rule would seem to be, that it should not apply to the children of parents who were in itinere in the country, or were abiding there for temporary purposes, as for health, or occasional business. It would be difficult, however, to assert, that in the present state of public law such a qualification is universally established.[564]

558 In 1868, the Naturalization Act of 1790, ch. 3, 1 Stat. 103, and subsequent amendments limited citizenship to "free white person[s]."

559 *See supra* note 37 and accompanying text.

560 *See supra* note 38–39 and accompanying text.

561 *See* 2 KENT (1844), (N.Y.) ("It is equally the doctrine of the English common law, that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the ligeance of the conquered.").

562 Inglis v. Trs. of Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99 (1830) (Story, J., dissenting).

563 *Id*. at 156.

564 2 STORY, *supra* note 66 § 48.

Whether the framers and ratifiers shared Story's view of temporarily present noncitizens is not clear. During the Civil Rights Act debates, Lyman Trumbull explained:

> I thought that might perhaps be the best form in which to put the amendment at one time, "That all persons born in the United States and owing allegiance thereto are hereby declared to be citizens;" but upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens, and that that form would not answer.[565]

It is possible to read this paragraph either as referring to the children of foreign ministers or as a broader reference to all temporary visitors who owe "a sort of allegiance" (what Blackstone called "local" allegiance) and whose children should not be constitutionally naturalized.[566] In a letter to President Johnson, Trumbull explained that "[t]he Bill declares 'all persons' born of parents domiciled in the United States, except untaxed Indians, to be citizens of the United States."[567] If, by "domiciled," Trumbull meant those parents who have chosen to make the United States their permanent home, then this understanding would exclude temporary visitors.

There are scattered references in the record that refer to temporary visits. In a speech supporting the Civil Rights Act, Representative Wilson suggested that the "general law" of the United States established that "every person born in the United States is a natural-born citizen of such States, except it may be that children born on our soil to temporary sojourners or representatives of foreign governments, are [not] native born citizens of the United States."[568] At least one newspaper viewed the Civil Rights Act as excluding the broader category of children born to any temporarily visiting foreign national, ambassadors or not. According to Chicago's *Daily Republican*, Andrew Johnson objected to the Civil Rights Act because the citizenship provision "declares all persons born in the United States, save those subject to foreign governments, as the children of Ministers and Consuls officially residing in the United States, and of foreign parents temporarily sojourning in this country, to be citizens of the United States."[569]

Much later, Justice Samuel Miller in his *Lectures on Constitutional Law*, wrote that

> [i]f a stranger or traveler passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe

565 CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (statement of Sen. Trumbull).

566 *See supra* note 37 and accompanying sources.

567 Letter from Sen. Lyman Trumbull, *supra* note 251.

568 CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson). The context ("*except* it may be") suggests the reporter erroneously omitted the word "not." *Id.* (emphasis added).

569 Daily Inter Ocean (published as The Chicago Republican.), (Chicago, Illinois), March 30, 1866, p. 4.

> no allegiance to our Government, has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction.[570]

Some antebellum sources, however, point in a different direction. As discussed earlier, the Assistant Vice Chancellor in *Lynch v. Clarke*[571] ruled that a child of noncitizen parents temporarily residing in the United States was a citizen of the United States and therefore eligible to inherit real estate devised to her by her uncle.[572] In 1862, Attorney General Edward Bates wrote a one page advisory opinion agreeing with *Lynch*'s conclusion regarding children born to temporarily present noncitizens.[573]

Some scholars doubt *Lynch*'s ruling as well as its influence,[574] and Bates himself omitted *Lynch* from his influential *Report on Citizenship*.[575] In fact, throughout the debates on the Civil Rights Act and Fourteenth Amendment, there appears to be but a single example of a member citing the *Lynch* decision.[576] But that reference did not mention *Lynch*'s discussion of children born to temporarily present noncitizen parents.[577]

As far as post-adoption evidence is concerned, an 1872 opinion by Attorney General George Williams cites Bates's letter in support of his conclusion that a child born in the United States to non-citizen parents only temporarily in the country is, at least presumptively, a citizen of the United States.[578]

However one resolves this mixed historical record, the doctrine of prima facie citizenship establishes a presumption of natural allegiance defeasible only by adequate evidence of refused or counterallegiance. As far as children born to foreign ministers are concerned, this evidence exists in the form of a parent's declaration of ambassadorial status—a claim of

570 MILLER, *supra* note 406, at 279.

571 Lynch v. Clarke, 1 Sand. Ch. 583 (1844).

572 *Id.* at 638.

573 *See supra* note 89 and accompanying text.

574 *See* Ramsey, *Birthright Citizenship*, *supra* note 416 n.43 (2020) ("[D]espite the holding in *Lynch*, it seems fair to say that the issue of temporary visitors remained somewhat unsettled in the mid-nineteenth century."); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 239–40 (2008) ("Whatever light that case provides, though, should be adjusted by the fact that it is the unreviewed opinion of a single [state-court] judge and that shortly thereafter, in *Ludlam v. Ludlam*, that state's highest court with all justices concurring spoke differently, saying that birthright citizenship depended on parentage rather than the 'boundaries of the place.'"); *id.* at 239 ("*Lynch v. Clarke* is the only antebellum decision (and possibly the only reported case in our history) that clearly finds that *jus soli* per *Calvin's Case* determines United States citizenship.").

575 *See supra* note 173 and accompanying text.

576 *See*, CONG. GLOBE, 39th Cong., 1st sess. at 1832 (Rep. Lawrence's reference to "the great case of *Lynch vs. Clarke*" and its rule that "children born here are citizens without any regard to the political condition or allegiance of their parents.").

577 *See id.*

578 *See* Case of François A. Heinrich, 14 Op. Att'ys Gen. 154, 154–57 (1872).

retained full allegiance to a foreign sovereign and a legal status established by treaty.[579]

Absent evidence to the contrary, even temporarily present noncitizens who have presented themselves to federal authorities upon arrival in the United States may ultimately decide to seek permanent residence and naturalization. Accordingly, granting citizenship to children born to temporarily present noncitizen parents who have legally entered the United States may be the best application of the Citizenship Clause, even if not clearly required by the original understanding.[580] In the end, both constructions seem textually and historically plausible.[581]

4. Children born to Non-Citizen Parents Who Illegally Entered the United States[582]

a. Involuntary Presence

Children born in the United States to noncitizen parents, forced against their will to enter the United States, remain presumptive citizens of the United States. Nothing about such a context suggests, much less involves proof of, refused or counterallegiance. These parents were denied the freedom to be subject to anyone but their purported "masters." Thus, children born in the United States to parents who had been enslaved and smuggled into the United States in violation of laws prohibiting the international slave

579 *See, e.g.*, Treaty of Amity and Commerce, Japan-U.S., art. I, July 29, 1858, 7 Stat. 1051; Vienna Convention on Diplomatic Relations, art. XXXI § c(4), Apr. 18, 1961, 23 U.S.T. 3227.

580 Because foreign nationals holding a non-immigrant visa for temporary residence in the United States (e.g., visas for tourism, business, or education) are not counted for the purposes of United States (*see, e.g.*, Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018)) ("Citizens of foreign countries visiting the United States, such as on a vacation or business trip—Not counted in the census."), they could be viewed as analogous to "Indians not taxed" who, as Trumbull stressed, also were not counted for the purposes of apportionment and so were not considered part of the population of the United States subject to the "complete" jurisdiction of the United States. *See supra* note 221 and accompanying text. Congress, of course, has the power to grant citizenship to the children of any of these visa holders, even if not required by the Fourteenth Amendment.

581 For an argument that children of non-domiciled noncitizens only temporarily in the country are not citizens of the United States, see Wurman, *supra* note 9 at 81. Although I am not convinced that international law provides the best lens through which to view the debates of the Thirty-Ninth Congress, Wurman makes an important argument about the role of international law and issues of domicile and temporary residence. *Id.* at 84–90.

582 This section does not address the variety of situations whereby noncitizen parents legally enter the country but later lose their initial authorization (e.g., overstaying the period of time authorized by a visa). Such situations may be best thought of as violations of law which, as discussed above, do not defeat a child's presumptive citizenship.

trade retained an unrebutted presumption of allegiance to the United States.[583]

In fact, there is no evidence that any framer considered the specific situation of children born in the United States to enslaved parents illegally smuggled into the country. As far as Republicans were concerned, the abolition of slavery made every slave in the United States a presumptive citizen of the United States.[584] The Freedmen's Bureau Bill, for example, presumed that freemen were citizens.[585] President Lincoln called for the inclusion of freedmen into the Union Army[586] and he later advocated for their receiving the right to vote[587]—a right Republicans believed should be limited to United States citizens.[588] The most dramatic example of presumed freedmen citizenship is the Second Reconstruction Act, which directed federal officials in the south to register formerly enslaved black males in

583 At the time of the Civil War, there were notorious examples of such illegal smuggling. For example, in 1861, Nathaniel Gordon was convicted of slave trading and sentenced to hang. Lincoln on the Execution of a Slave Trader, 1862, *reprinted by* GUILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY (https://www.gilderlehrman.org/history-resources/spotlight-primary-source/lincoln-execution-slave-trader-1862)[https://perma.cc/J6XV-XGJK].

584 *See* Columbus Delano, U.S. House Debate, Civil Rights Bill Speech (Mar. 8, 1866) *in* 2 LASH, *supra* note 186, at 130 ("It needs no law, in my estimation, to make citizens of these emancipated people. They are citizens by law now."); *see also*, CONG. GLOBE, 39th Cong., 1st Sess. at 1266 (1866) (statement of Rep. Raymond) ("[T]he special object of the [Civil Rights] bill, is to introduce into American citizenship the four million persons just emancipated from the condition of slavery. I do not know that any bill is necessary for that purpose. I am inclined to think that none is necessary; that the moment the disabilities imposed upon them by the condition of servitude were removed, that moment they became, by virtue of that act, citizens of the United States."). It was because the former rebel states refused to recognize such citizenship that Republicans found it necessary to pass the Civil Rights Act and the Fourteenth Amendment. *See* Lash, *supra* note 25, at 1108.

585 *See, e.g.*, An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, § 4, 13 Stat. 507, 508 (1865) ("[T]he commissioner, under the direction of the President, shall have authority to set apart, for the use *of loyal refugees and freedmen*, such tracts of land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise*, and to every male citizen, whether refugee or freedman, as aforesaid*, there shall be assigned not more than forty acres of such land, and the person to whom it was so assigned shall be protected in the use and enjoyment of the land for the term of three years . . . .") (emphasis added).

586 *See* Abraham Lincoln, Emancipation Proclamation (Jan. 1, 1863) *reprinted in* 1 LASH, *supra* note 73, at 363 ("I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free . . . . [S]uch persons of suitable condition, will be received into the armed service of the United States."). Freedmen served with distinction, particularly in the 54th and 55th Regiments of Massachusetts. *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 565 (1988).

587 *See* Abraham Lincoln, Speech on the Status of Louisiana (Apr. 11, 1865), *in* 1 LASH, *supra* note 73 at 534–35 ("It is also unsatisfactory to some that the elective franchise is not given to the colored man. I would myself prefer that it were now conferred on the very intelligent, *and on those who serve our cause as soldiers*." (emphasis added)).

588 *See* John A. Bingham, Speech Opposing the Admission of Oregon, *in* 1 LASH, *supra* note 73 at 152.

order to have them vote on new state constitutional conventions, new state constitutions, and new state legislatures.[589] The Act, which declared an intent to register "citizens of the United States," required nothing more than an oath that one had been a state citizen for a sufficient period.[590] There is no record of a single freedman disqualified from voting (as Elk had been) on grounds of non-citizenship, much less for being "illegally present" in the United States.[591]

Had Republicans believed in the existence of a category of "free but illegally present due to former forced but illegal entry into the United States," one would expect to find evidence that such persons were arrested and deported. Scholars have found no such evidence.[592] Finally, even if it were reasonable to imagine a challenge to the presumed citizenship of a child born in the United States to an allegedly smuggled slave parent, there is nothing about that context that involves *evidence* of either refused or counter allegiance to the United States.

In short, nothing about the prima facie application of the original understanding of the Citizenship Clause results in the exclusion of children born in the United States to formerly enslaved parents, whether or not those parents were kidnapped and smuggled into the United States in violation of law.[593]

589 *See* Second Reconstruction Act, 16 Stat. 52 (Mar. 23, 1867), *reprinted in* 2 LASH, *supra* note 186 at 391–92.

590 *Id.* at 392.

591 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 314 (1988); W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION 325–80 (1935).

592 Professors Gabriel J. Chin and Paul Finkelman insist that illegally kidnapped and smuggled enslaved persons constituted "illegal aliens" at the time of the Fourteenth Amendment. *See* Gabriel J. Chin and Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2250 (2021). However, they produce no evidence that any framer or ratifier believed this and they concede there is no evidence of *any* deportations of such a putative class after the Thirteenth Amendment. *See id.* at 2259 (conceding "the absence of deportations after the Civil War" but arguing (again without evidence) this was due to political considerations).

593 In her essay, *Dred Scott's Daughter: Gradual Emancipation, Freedom Suits and the Citizenship Clause*, 35 YALE J.L. & HUMANS. 812 (2024), Amanda Frost examines antebellum examples of northern states declaring free children born to mothers who had escaped slavery and made their way to a free state. Although these cases provide powerful examples of birthright freedom laws in the northern states, they do not involve any discussion of birthright *citizenship*. *See id.* Frost recognizes this and she also notes that at the time the framers considered drafting the Fourteenth Amendment, the concept of "citizenship remained deeply contested." *Id.* at 837. Frost does not engage the citizenship debates during the framing of the Civil Rights Act, *id.* at 838–39, and she limits her discussion of the Fourteenth Amendment debates to an exchange between Senators Cowan and Conness, *see id.* at 839–41. To Frost, Conness's ethnic egalitarian view of citizenship "mirror[ed] the linkage between birth, borders, and egalitarian status established by northern states in the antebellum era." *Id.* at 842. According to Frost, her claim "is not that the Citizenship Clause was consciously modeled on antebellum laws establishing freedom based on location of birth . . . . [but instead], that the well-established antebellum doctrine of birthright

b. Voluntary Unlawful Entry

A different analysis is required if the child's noncitizen parents voluntarily but illegally enter the United States. The closest historical analogue to this situation involves tribal Indians who left the "foreign" government of their tribe and treaty-established lands and resided in the United States without formal authorization.[594] Both framers and ratifiers were well aware of such cases, and the framers publicly and repeatedly declared that such families lacked the requisite allegiance to the United States required for natural born citizenship.[595]

As discussed above, at the time of the Fourteenth Amendment, Republicans viewed Indian tribes as foreign governments.[596] This is why children born to parents living under tribal government were presumed citizens of the tribe and *not* citizens of the United States. During the treaty period, the only way a member of a tribe could become a citizen of the United States was either by a blanket naturalization statute[597] or an individual-specific naturalization process.[598] Tribal members who left the "foreign nation" of their tribe and entered the United States without official authorization were subject to punishment and forced return to treaty-established lands. This fact was expressly acknowledged during the framing debates.[599] In the years following the adoption of the Fourteenth Amendment, Congress abandoned the "foreign nation" assumptions of the

freedom linking birth, borders and rights-bearing status was a part of the background legal context that informed the Citizenship Clause's connection of those same elements." *Id.* at 843. Of course, whether the Citizenship Clause *actually* "connect[ed] . . . those same elements" requires engaging the debates in full, including the multiple references to the role of parental allegiance—debates and references Frost does not address.

594 Federal officials could authorize temporary sojourning outside of a treaty-established area for temporary purposes such as hunting. *See, e.g.*, Treaty with the Sioux Indians, Sioux Nation-U.S., art. XV, Apr. 26, 1868, 15 Stat. 635 ("The Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI. hereof.").

595 *See supra* note 208–215 and accompanying text.

596 As Lyman Trumbull explained during the Civil Rights Act debates, "Our dealings with the Indians are with them as foreigners, as separate nations." CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull). *See also* Epps, supra note 7, at 365 ("Relations with Indians in "Indian country" were, in 1866, governed as foreign affairs, subject to the Treaty Power. Treaties frequently recognized the sovereignty of Indian tribes, but numerous treaty provisions also attested to their status as dependent nations.").

597 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1756 (1866) (statement of Sen. Trumbull) (listing the various historical examples of treaties granting blanket citizenship to Indian tribes).

598 *See supra* note 441 and accompanying text.

599 *See supra* note 211 and accompanying text (remarks of Mr. Conness) ("The Superintendent of Indian Affairs and his agents and [employees] have control of them. These Indians are brought in and placed upon reservations."); *supra* note 126 and accompanying text.

treaty approach and declared all American Indians citizens of the United States.[600] What is relevant to the meaning of the Citizenship Clause, however, is that people in 1868 understood that children born to tribal parents residing in the United States without authorization were excluded *because* they viewed such tribal parents as noncitizens with an allegiance to a foreign government.

The exclusion of children born to such families had nothing to do with parental criminality. Consider again the situation of John Elk. It was not due to any criminal activity that Elk was denied citizenship, but due to his failure to formally present himself to United States officials and initiate the formal process of naturalization. Absent such affirmative acts neither he, nor any of his children (if he had any) qualified for citizenship—even if the children were born after Elk left the treaty-established lands of his tribe. As noted above, non-naturalized tribal families living outside treaty-established lands without authorization remained subject to removal.[601] They also remained subject to challenge at the local ballot box, even if living otherwise law-abiding lives.

During the debates of the Thirty-Ninth Congress, members repeatedly referred to the existence of unaligned Indians who refused to live subject to the jurisdiction of any sovereign government. Minnesota Senator Alexander Ramsey, for example, noted that Congress would not want to make citizens of the "large numbers of roving Indians on our frontier . . . that were outlaws, refugees from all tribal authority, and recognized no such authority."[602] Trumbull conceded that "[o]f course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws."[603]

These references involved tribal members who had either exited a treaty-established tribal government or refused to be subject themselves to any treaty-establishment government. In either case, they avoided subjecting themselves to the jurisdiction of any government, including that of the United States.

Trumbull repeatedly emphasized this point in response to those who objected to the "Indians not taxed" exclusion. Declared Trumbull, "[d]oes the Senator from Indiana want the wild, roaming Indians not taxed, not

600 *See* An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, ch. 233, 43 Stat. 253 (1924).

601 *See* Berger, *supra* note 510, at 1216 (discussing the 1837 Treaty with the Winnebago Tribe which ceded tribal land to the federal government and required tribal members to leave the ceded lands.) As Berger relates, "[a]lthough many Winnebago refused to comply with the treaty, the federal government rounded them up and forced them across the Mississippi River." *Id*. Berger also describes an 1865 Treaty with the Winnebago whereby "the treaty-abiding faction was forcibly moved again and again, [but] some Winnebago remained illegally in Wisconsin and others returned there in flight from ill-fated reservations." *Id.* at 1218.

602 CONG. GLOBE, 39th Cong., 1st Sess. 526–27 (1866) (statement of Sen. Ramsey).

603 *Id.* at 527 (statement of Sen. Trumbull).

subject to our authority, to be citizens of the United States . . . ?"[604] The better approach was to include only those tribal members who had affirmatively dissolved their former allegiance and "submitted to the laws of organized society."[605]

As described in depth earlier, the members of these quasi-foreign governments were not beyond the legal and regulatory jurisdiction of the United States. They remained subject to federal legal and executive authority, including the enforcement of civil and criminal laws in federal court.[606] The problem was, they had not formally submitted themselves to the general legislative jurisdiction of the United States in a manner indicating the allegiance requisite for their children to enjoy natural born citizenship.

Children born in the United States to non-citizen parents who have intentionally entered the United States without formally dissolving any prior allegiance and presenting themselves to federal authorities as required by law are in an analogous situation. In such a case, the problem is not a continued allegiance to their country of origin, any more than exclusion of unaligned Indians was due to their continued allegiance to their original tribal government.

Nor does it matter that contemporary unauthorized aliens are subject to a "kind" of jurisdiction involving the enforcement of civil and criminal laws or that they, like John Elk, are living otherwise law-abiding lives. The problem involves an intentional refusal to formally present themselves to the sovereign authority of the people whose country they unlawfully entered. No doubt, many aliens illegally enter the United States hoping that they and their children will be allowed to remain, and perhaps someday become citizens. Congress, moreover, is empowered to effectuate exactly that.[607] For natural born citizenship, however, the American people have established constitutional requirements, one of which involves being born in a context reasonably understood as having subjected oneself to the complete jurisdiction of the people of the United States.

Some might insist that the nineteenth century status of tribal Indians is *sui generis*, with no application outside of that historical context. However, what is unique about 1868 tribal status has nothing to do with whether it is relevant to contemporary discussion. What made tribes unique was a legal regime that acknowledged the existence of quasi-sovereign governments

604 *Id.* at 527–28.

605 *Id.* at 528.

606 *See supra* notes 101–03 and accompanying text (describing treaty-based federal judicial jurisdiction); *supra* note 108–09 and accompanying text (members noting ongoing federal official jurisdiction over tribal members).

607 Even if they fall outside the constitutional requirements of natural born citizenship, Congress may exercise its power "[t]o establish an uniform Rule of Naturalization" and provide a path to citizenship for such parents and their children. U.S. CONST. art. I, § 8, cl. 4.

within the territory of the United States.[608] The reason why the United States government had special rules for Indian tribes is because they viewed them as analogous to the common category of foreign nations. This understanding is why the original Constitution excluded tribal populations from being counted as part of the people of the United States. Likewise, it was because of their allegiance to a "foreign government" that nineteenth century tribal Indians were required to formally present themselves for naturalization if they sought to become United States citizens. There is nothing *sui generis* at all about citizenship rules that take into consideration familial allegiance to a foreign sovereign, whether tribal or international. Accordingly, the historical rules associated with Indian citizenship remain directly relevant to contemporary discussions of how to apply the original understanding of the Citizenship Clause.

CONCLUSION

The primary object of the Citizenship Clause was to establish a race-neutral standard for natural born citizenship. A secondary but essential consideration involved accomplishing this in a manner that required allegiance to the United States—an unsurprising goal in the aftermath of the Civil War. Finding the proper language to advance this secondary object took time and painstaking textual construction. That construction did not take place in secret. Americans followed the debates and framers' explanations in the daily newspapers. Justice Gray in *Wong Kim Ark* was wrong therefore to dismiss the debates as irrelevant. In fact, they provide the best window into original understanding.

Trumbull's simple public explanation of the jurisdiction clause was not a one-off. It summarized and constitutionally entrenched the Republican's understanding of antebellum American law. Natural-born citizenship required birth in the United States in a context of familial allegiance. "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."

This allegiance should be presumed for any child born in the United States, regardless of parentage. But this prima facia citizenship may be rebutted. This has always been our law, and it is the clear original understanding of the Citizenship Clause of the Fourteenth Amendment.

608 *See* Prucha, *supra* note 104, at 1–2.