Testimony of Charles J. Cooper

on

"Protecting American Citizenship:

Birthright Citizenship for Illegal Aliens and Tourists"

before the

Subcommittee on the Constitution

of the

Senate Committee on the Judiciary

March 10, 2026

Washington, DC

Good morning Chairman Schmitt, Ranking Member Durbin, and Members of the Subcommittee. Thank you for inviting me to participate in today's hearing.[1] I am honored to share with you my thoughts on the Citizenship Clause of Section 1 of the Fourteenth Amendment. That Clause provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The plain text of the Clause makes clear that a child not only must be born in the United States but must also be born subject to its *jurisdiction* to be constitutionally entitled to citizenship at birth.

The term "jurisdiction" is ambiguous; it has no plain meaning. Indeed, as the Supreme Court has repeatedly stated, it is "a word of many, too many, meanings." *Wilkins v. United States*, 598 U.S. 152, 156–57 (2023) (internal quotation marks omitted). The relevant question is thus what does the term "jurisdiction" mean as used in the Citizenship Clause's phrase "subject to the jurisdiction thereof"?

[1] Founding partner, Cooper & Kirk, PLLC. During the Reagan Administration, I served as the Assistant Attorney General for the Office of Legal Counsel from 1985–1988, and I was appointed by Chief Justice William H. Rehnquist to three terms on the Standing Committee on Practice and Procedure of the Judicial Conference of the United States (1998–2005). Much of my litigation practice over almost four decades has focused on cases involving constitutional issues, and I have testified before congressional committees on more than 25 occasions. I gratefully acknowledge the assistance of my colleagues Pete Patterson and Brad Larson in the preparation of this testimony.

It turns out, however, that this is not a hard question, for there is compelling evidence from the mouths of the Clause's framers and supporters in the 39th Congress that the term "jurisdiction" was used in its "full and complete" sense, requiring a permanent reciprocal political bond between the parents of the new citizen and the United States. That reciprocal bond is defined by the kind of enduring "allegiance" to America that is owed only by those who have made this country their *lawful and permanent home*—their *domicile*—and thus receive in return the country's full sovereign "protection." In adopting this view, the Clause's framers thus agreed with Justice Joseph Story, who in 1834 explained that although "[p]ersons, who are born in a country, are generally deemed citizens and subjects of that country," a "reasonable qualification" to this general rule was that "it should not apply to the children of parents who were *in itinere* in the country, or abiding there for temporary purposes." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 48 (1834). And if the children of *lawful* visitors to the United States are excluded from birthright citizenship, it follows *a fortiori* that the children of *illegal* aliens are excluded as well.

Some judges and scholars disagree with the Clause's framers. Adopting a narrow definition of the term "jurisdiction," one derived from the feudal English doctrine of *jus soli*, they read the Citizenship Clause to guarantee essentially

universal birthright citizenship, arguing that anyone who is "subject to" the "authority and . . . laws" of the United States is "subject to the jurisdiction thereof." *Trump v. CASA, Inc.*, 606 U.S. 831, 881 (2025) (Sotomayor, J., dissenting) (quoting U.S. CONST. amend. XIV, § 1); *e.g.,* James C. Ho, *Defining "American,"* 9 GREEN BAG 367, 368–69 (2006). Under this narrow "regulatory jurisdiction" interpretation, the Clause grants citizenship essentially to anyone born within our borders, whether here legally or illegally, fleetingly or permanently.

But in addition to being rejected by the 39th Congress, *jus soli* and the regulatory jurisdiction interpretation are fundamentally incompatible with the republican principles of a nation founded by free citizens who declared, and then won, their independence from the Crown. *Jus soli* "no more survived the American Revolution than the same rule survived the French Revolution." *United States v. Wong Kim Ark*, 169 U.S. 649, 710 (1898) (Fuller, C. J., joined by Harlan, J., dissenting). And it was certainly not *sub silentio* resurrected in 1868. An amendment designed to realize the Declaration's principles did not take our Nation back to the medieval doctrine that it threw off generations before.

SUMMARY

The text, structure, and history of the Fourteenth Amendment's Citizenship Clause support the constitutionality of President Trump's Executive Order. Well-recognized canons of interpretation counsel reading the term "jurisdiction" at full

face value—to mean the *complete* jurisdiction of the United States and not temporary or partial jurisdiction. And complete jurisdiction requires a permanent, reciprocal political bond with the sovereign that only citizens and lawful permanent residents have established. The structure of the Citizenship Clause confirms this reading. To be a citizen of a state at birth, one must "reside" in that state. It is simply not plausible that the Framers of the Fourteenth Amendment would extend *national* birthright citizenship to the child of a foreign sojourner or an illegal alien but deny *state* citizenship to those same individuals. The facial implausibility of this proposition comes into sharp focus in the case of the modern phenomenon of "birth tourism," where foreign expectant mothers journey to the United States for the specific and sole purpose of securing birthright American citizenship for their newborns and then promptly return to their home countries. Obviously, neither sojourning foreign parents nor their newborns "reside" in the United States, at least not if that term means something more fixed and permanent than a short stay in a hotel room.

The history of the Citizenship Clause confirms this interpretation. The framers of the Fourteenth Amendment modeled it after the citizenship clause in the Civil Rights Act of 1866. That statutory clause granted citizenship at birth to individuals born in the United States and "*not subject to any foreign power*, excluding Indians not taxed." The Act thus unequivocally excluded from birthright citizenship children of aliens here temporarily and of aliens who have deliberately entered the country illegally. A scant two months after enactment of the 1866 Act, the 39th

Congress replaced the phrase "not subject to any foreign power" with "subject to the jurisdiction thereof" in the Fourteenth Amendment to avoid confusion about the citizenship status of Indians. But the authors of both provisions expressly stated that the change was not intended to alter the meaning, and the entire 1866 Act was "re-enacted" after the Fourteenth Amendment was ratified. Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144. Thus the 1866 Act's language demonstrates that when Congress used the term "jurisdiction," it meant jurisdiction in the full and complete sense, requiring both regulatory and political jurisdiction, and thus excluding from birthright citizenship the American-born children of parents who were "subject to [a] foreign power."

The Supreme Court confirmed this understanding of the Citizenship Clause in *Elk v. Wilkins*, which held that "jurisdiction" was used in the complete sense, thus excluding those who are born to parents with allegiance to another sovereign. 112 U.S. 94 (1884). And despite the Court's broad, and incorrect, dictum in *Wong Kim Ark*, that case's explicit holding is entirely consistent with the Clause's requirement of complete jurisdiction at birth to qualify for citizenship.

I. The Text of the Citizenship Clause

Advocates of the regulatory jurisdiction interpretation of the Clause are met at the front door with a series of difficult questions regarding its text.

A. First, if "subject to the jurisdiction" of the United States means nothing more than subject to the duty—owed by essentially everyone on American soil—to

obey "the laws of the United States," then why did the Framers of the Clause choose such a strange way to say that? Why did they not just say "subject to the laws thereof"? That the Framers of the Fourteenth Amendment chose the word "jurisdiction" instead of "laws" must mean, at least presumptively, that they intended to condition birthright citizenship on the newborn being "subject to" something different from the basic duty owed by everyone on American soil to obey our laws. And indeed, the Supreme Court held in its first decision interpreting "subject to the jurisdiction" of the United States that the Framers meant "not merely subject *in some respect or degree* to the jurisdiction of the United States, but *completely subject* to their *political jurisdiction*, and owing [the United States] *direct and immediate allegiance*." *Elk*, 112 U.S. at 102 (emphases added).[2]

B. Second, the validity of the Executive Order turns on the question whether the term "jurisdiction" is used in a narrow and specific sense to refer only to a small and irreducible part of the jurisdiction of the United States—the regulatory jurisdiction, *see CASA*, 606 U.S. at 881 (Sotomayor, J., dissenting)—or is used in a broader and general sense to refer to the *full and complete* jurisdiction of the United States, comprised of all the benefits and burdens that come with living lawfully and permanently in *direct and immediate allegiance* to this country.

[2] The Supreme Court's had previously addressed the Citizenship Clause in the *Slaughter-House Cases*, 83 U.S. 36, 73 (1872), where the Court noted, albeit in dicta, that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and *citizens or subjects of foreign states* born within the United States." (emphasis added).

The most natural reading of the Citizenship Clause is that it requires a person, as Senator Howard insisted when introducing it in the 39th Congress, to be subject to the "full and complete" jurisdiction of the United States. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866). This is in keeping with the standard canon that "[g]eneral words (like all words, general or not) are to be accorded their full and fair scope." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF JUDICIAL TEXTS 101 (2012). For example, in interpreting the phrase, "[t]he executive Power" in accordance with the general-terms canon, the Supreme Court explained that "all of it" is vested in the President. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1). In other words, the *full and complete* executive power is what the Constitution means by vesting in the President "[t]he 'executive Power.' " This is in contrast to the Legislative Vesting Clause, which vests only the "legislative Powers herein granted" in Congress. U.S. CONST. art. I, § 1. The term "jurisdiction," likewise, is thus "not to be arbitrarily limited" to only a subset of its natural breadth. Scalia & Garner, *supra*, at 101; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1057 (1833) ("The words being general, the sense must be general also, and embrace all subjects comprehended under them[.]")

Thus, when the Framers of the Citizenship Clause used the term "jurisdiction," standard tools of interpretation counsel that they meant more than just one's temporary presence in the United States that creates a "temporary and local

allegiance" requiring obedience to our laws. *The Schooner Exch. v. McFaddon,* 11 U.S. 116, 144 (1812); *see Fleming v. Page*, 50 U.S. 603, 615–16 (1850) (describing the "temporary allegiance" owed by "foreigners and enemies" while in United States). As the Supreme Court in *Elk* recognized, it requires a person to owe the kind of "direct and immediate allegiance" to the sovereign that renders him subject completely to its "political jurisdiction." 112 U.S. at 102 (1884); *see also* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 243 (Boston, Little, Brown & Co. 1880). Accordingly, persons who were merely in the country temporarily are not subject to the full and complete jurisdiction of the United States because their presence (and that of the child) only created an inherently "temporary and local allegiance," *The Schooner Exch.*, 11 U.S. at 144, and not the permanent "direct and immediate allegiance" required by the Clause, *Elk,* 112 U.S. at 102.

C. Third, given that the Citizenship Clause expressly contemplates that persons eligible for birthright citizenship "reside" in a state, in what rational sense does a child who is born to a foreign mother during, for example, a "birth tourism" visit to the United States *reside* in the state wherein the child was born?[3]

[3] Because state citizenship explicitly turns on residence and not just place of birth, it is flatly untrue that the Fourteenth Amendment applied English principles of *jus soli* without qualification. *Contra, e.g.,* Ho, *supra*, at 369; Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L. REV. 405, 472 (2020). After the passage of the Fourteenth Amendment, if residents of New York went on vacation in Florida and had a child there, the child would undeniably be a citizen of New York, not Florida. Likewise, if a couple from England vacationed in Florida and had a child

1. "Reside" meant the same thing in 1868 as it means today: the place where one lives and makes his home, where he is "domiciled." As Justice Story explained, "[b]y 'residence,' in the constitution, is to be understood . . . such an inhabitancy, as includes a *permanent domicil* in the United States." STORY, COMMENTARIES ON THE CONSTITUTION, *supra*, § 1473 (emphasis added).

In turn, "the domicil of a person[] [is] where he has his true, fixed, and permanent home . . . and to which, whenever he is absent, he has the intention of returning." STORY, COMMENTARIES ON THE CONFLICT OF LAWS, *supra*, § 41; *Martinez v. Bynum,* 461 U.S, 321, 330–31 (1983) (same). And as the Supreme Court held early on, under the law of nations "a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, . . . so fixed that, as to all other nations, he follows the character of the country, in war as well as in peace." *The Pizarro*, 15 U.S. 227, 246 (1817) (Story, J.); *see, e.g., Fong Yue Ting v. United States,* 149 U.S. 698, 724 (1893) ("[A]liens residing in a country, with the intention of making it a permanent place of abode, acquire . . . a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, and may invoke its protection against other nations.").

---

there, the child would not be a citizen of Florida because neither he nor his parents "reside" there. The Framers of the Fourteenth Amendment did not understand citizenship to depend on residence for state citizenship but not for national citizenship.

A newborn child, of course, is "legally incapable of forming the requisite intent to establish a domicile," and so the child's "domicile is determined by that of [its] parents." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). As Joseph Story explained, "the 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. . . . [M]inors are generally deemed incapable, *proprio marte*, of changing their domicil during their minority; and therefore . . . if the parents change their domicil, that of the infant children follows it." STORY, COMMENTARIES ON THE CONFLICT OF LAWS, *supra*, § 46.); *see, e.g., Lamar v. Micou,* 112 U.S. 452, 470 (1884) (same). Accordingly, the international-law principle that persons "are generally deemed to be citizens and subjects of [their birth] country," was subject to the "reasonable qualification," as Story put it, "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," although such a qualification was not "universally established." STORY, COMMENTARIES ON THE CONFLICT OF LAWS, *supra*, § 48; *see* EMMERICH DE VATTEL, THE LAW OF NATIONS § 212, at 101 (1797 ed.) (same).

It was thus well settled both before and after the Civil War that a person who makes the United States his domicile becomes a kind of quasi-citizen, *subject to the jurisdiction* of the United States in the same way as a citizen. Secretary of State Marcy, in the celebrated Koszta Affair in 1853, put the point well in explaining the

United States's intervention with Austria on behalf of a Hungarian who was domiciled in the United States but not yet naturalized:

> This right to protect persons having a domicil, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and, if he breaks them, incurs the same penalties; he owes the same obedience to the civil laws, and must discharge the duties they impose on him; his property is in the same way, and to the same extent as theirs liable to contribute to the support of the Government…. In nearly all respects his and their condition as to the duties and burdens of Government are undistinguishable.

Koszta Case, 2 Whart. Int. Law Dig. § 198; *see Fong Yue Ting,* 149 U.S. at 724; *id.* at 735 (Brewer, J. dissenting). A child born to a person domiciled in the United States is thus "subject to the jurisdiction thereof" and is entitled to United States citizenship at birth.

2. It was equally well settled by the time of the Fourteenth Amendment that the enduring bonds of allegiance owed by "those who have become domiciled in a country . . . entitle[them] to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in, it . . . ." *Fong Yue Ting*, 149 U.S. at 734 (Brewer, J. dissenting); *accord The Venus,* 12 U.S. 253, 278 (1814) ("The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode.").

To be sure, foreigners who lawfully visit the United States on "business or caprice" owe the country, in Chief Justice Marshall's words, a "temporary and local allegiance," which renders them "amenable to the laws" of the country and thus to the "ordinary jurisdiction of the judicial tribunals." *The Schooner Exchange*, 11 U.S. at 144, 146. But obedience to our laws is all that such temporary visitors owe the United States. They do not owe it unqualified permanent allegiance, unlike those who have made the United States their permanent domicile and have thus joined the American body politic. Instead, they continue to owe their home countries their unqualified permanent allegiance.

The Supreme Court in *Elk* adopted this interpretation of the Citizenship Clause, holding that "the evident meaning of ['subject to the jurisdiction thereof'] is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely subject* to their *political* jurisdiction and owing them direct and immediate allegiance." 112 U.S. at 102 (emphases added). And a person is "completely subject to [the United States's] political jurisdiction" if he "has severed his . . . relation to [his home country], and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a *bona fide* resident [there]of." *Id.* at 98, 102. The Court was unanimous in this reading of the Citizenship Clause. *See id.* at 121–22 (Harlan, J. dissenting).

3. Although there were generally no laws at the time of the Fourteenth Amendment limiting immigration of foreigners into the United States (the first such law was the Chinese Exclusion Act of 1882), it was nonetheless uniformly understood by both courts and scholars that citizenship by birth required not only *permanent* residence in the United States but *lawful* permanent residence. "[N]o one can become a citizen of a nation without its consent." *Id.* at 103. This principle is inherent in sovereignty: "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).; *accord Ping v. United States,* 130 U.S. 581, 609–10 (1889). It follows that the United States can "preclude[] alien[s] from establishing domicile in the United States," *Toll v. Moreno*, 458 U.S. 1, 14 (1982), and it has done just that with respect to aliens whose very presence in the country has been prohibited. For this reason, *Elk* described only "*bona fide* residents" as possessing the requisite relationship. 112 U.S. at 111.

After all, the very idea of a domicile requires the consent of both alien and sovereign to a reciprocal relationship—lawful permanent allegiance from the person seeking to establish domicile in return for the sovereign's full and permanent protection. *See* Ilan Wurman, *Jurisdiction and Citizenship,* 49 HARV. J.L. & PUB. POL'Y 315, 320–21, 393 (2026*)*; *see generally* PETER H. SCHUCK & ROGERS M. SMITH,

CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985); *cf.* *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813) (Kent, J.). And a person who has entered or remained in the United States illegally is not entitled to *any* of the benefits granted to lawfully admitted aliens, let alone the full sovereign protection that attends such lawful domicile. *See, e.g.,* ROBERT PHILLIMORE, THE LAW OF DOMICIL 63 (T. & J. W. Johnson 1847) (explaining that a person cannot establish domicile in a place from which he has been exiled).

In accord with these principles, the Supreme Court has long recognized that to "reside permanently" in the United States, an alien must have "legally landed" here. *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). Thus, a person who is not eligible to be admitted to the United States, is detained at the border, and then paroled into the country while awaiting deportation, "never has entered the United States within the meaning of the law," *id.* at 231, and thus "never has begun to reside permanently in the United States," *id.* at 230; *see, e.g., Gonzales v. Holder*, 771 F.3d 238, 244–45 (5th Cir. 2014); *see also Park v. Barr*, 946 F.3d 1096, 1099–100 (9th Cir. 2020) (per curiam).[4]

[4] Some scholars who favor the regulatory jurisdiction interpretation of the Citizenship Clause point to the existence of illegally imported slaves after the slave trade was banned in 1808. *See* An Act to prohibit the importation of slaves, 2 Stat. 426 (1807) (effective on Jan. 1, 1808). Their argument is that slaves who were illegally trafficked into the country after 1808 were essentially equivalent to today's illegal immigrants, and because there was no indication that the children of these persons were denied citizenship, the Citizenship Clause must cover the children of illegal aliens. S*ee generally* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021); *see also* Brief of *Amicus Curiae*

No reasonable understanding of the concept of the allegiance-for-protection bond between citizen and sovereign can be stretched to include a person born in the United States to illegal aliens, who are at pains to evade discovery by our government because, although bound like anyone else on American soil to comply with our laws, their very presence here is in intentional defiance of them. They cannot legally "reside" in any state and thus can owe no genuine allegiance to the United States, much less an enduring "direct and immediate allegiance." *Elk,* 112 U.S. at 102. In short, only aliens who have been permitted to make the United States their domicile can be "subject to the jurisdiction thereof."[5]

Professor Akhil Reed Amar in Support of Respondents at 15, *Trump v. Barbara*, No. 25-365 (U.S. Feb. 23, 2026). The 1808 law criminalized and punished only those involved in trafficking the slaves, not the slaves themselves. The slaves committed no crime by their involuntary entry into the country. And surely there is a fundamental difference between slaves illegally brought against their will into this country by the criminal acts of their captors and aliens voluntarily and knowingly violating our laws by illegally entering the country or illegally overstaying their permission to be present in our country. *See* Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. ____, 107 (Forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5140319. Additionally, just like the children of slaves who entered the country before the prohibition on the slave trade, slaves in the country illegally were not "subject to any foreign power" within the meaning of the Civil Rights Act of 1866. And because that Act, again, has the same meaning as the Citizenship Clause, the children of illegally imported slaves would be entitled to citizenship under any reading of the Citizenship Clause.

[5] Some advocates of the regulatory-jurisdiction view have argued that in America children are not punished for the sins of their illegal alien parents. *See* Evan D. Bernick et al., *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 Cornell L. Rev. Online 101, 129 (2025). True, but neither are the sinning parents and their blameless children *rewarded* in America for the sins of their parents. And a child born in the United States to illegal aliens inherits his parents' foreign citizenship, the same consequence that would have obtained if the parents had not violated our laws and illegally entered the United States in the first place. If that is punishing the child, it is the parents who administered it.

D. Other provisions of the Fourteenth Amendment confirm this understanding. The Equal Protection Clause, for instance, invokes the regulatory jurisdiction of each state by using the territorial phrase "within its jurisdiction." U.S. CONST. amend. XIV, § 1 ("nor deny to any person within its jurisdiction the equal protection of the laws"). Although both clauses use the word "jurisdiction," their textual difference explains the difference in meaning. When the Framers simply meant regulatory power to enact and enforce the laws on American soil, they used the term "within," which carries a spatial or territorial connotation, not the phrase "subject to." Thus, members of Indian tribes are entitled to the equal protection of the laws, *United States v. Antelope*, 430 U.S. 641, 647–49 (1977), even though they are not constitutionally entitled to citizenship at birth, *Elk*, 112 U.S. at 102. Indeed, even illegal aliens "within [the] jurisdiction" of a state are entitled to the "equal protection of the laws." *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (internal quotation marks omitted).[6]

II. The History of the Citizenship Clause

The history of the Fourteenth Amendment confirms that the Framers of the Citizenship Clause in the 39th Congress intended to guarantee birthright

[6] In a footnote, *Plyler* asserts that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful." 457 U.S. at 211 n.10. At the same time, *Plyler* recognizes, paradoxically, that "jurisdiction" with respect to citizenship may be "bounded . . . by principles of sovereignty and allegiance," which clearly does distinguish legal from illegal aliens. *Id.* In any event, the footnote is dictum because the case had nothing to do with the Citizenship Clause.

citizenship only to American-born persons whose parents permanently and lawfully reside in the United States.

A. The history of the Fourteenth Amendment is inextricably bound up with that of Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which was debated in and passed by the 39th Congress just two months before it adopted the Fourteenth Amendment, and was "re-enacted" by the 41st Congress after the Fourteenth Amendment was ratified, Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144. The 1866 Act guaranteed the newly freed slaves property rights, contract rights, access to courts, and equal treatment under the law. Most importantly here, it contained a citizenship provision, as noted above, establishing 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," without distinction of color. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added). But the constitutionality of the Act was debatable (as even its proponents acknowledged), and because it was ordinary legislation, it could be repealed by a future Congress. *See McDonald v. City of Chicago*, 561 U.S. 742, 775 & n.24 (2010) (plurality op.). Congress thus proposed and the states ratified the Fourteenth Amendment. Given this history, "it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866." *Id.* at 775.

The citizenship provision of the 1866 Act explicitly excludes from birthright citizenship American-born persons "subject to any foreign power." That phrase, on its face, precluded the birthright citizenship of children of temporary foreign visitors and illegal aliens because the child's foreign parents would continue to owe their direct and permanent allegiance to their home country, where they (and therefore their child) were permanently domiciled citizens. *See The Pizarro*, 15 U.S. at 246 (Story, J.); *The Venus,* 12 U.S. at 278. The Act's congressional history confirms this understanding.

The citizenship provision of the 1866 Act was authored and introduced by Illinois Senator Lyman Trumbull, who announced in his opening remarks that "the meaning of the provision . . . is to make citizens of everybody born in the United States who owe allegiance to the United States." CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866). He admitted to his colleagues, however, that "[t]here is a difficulty in framing the [statute] so as to make citizens of all the people born in the United States and who owe allegiance to it." *Id.* Trumbull explained that he initially thought the provision should state 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." *Id.* (emphasis added).

Trumbull was plainly referring to the principle that foreigners sojourning in this country owe it a "temporary and local allegiance" rendering them "amenable to the laws" and "the ordinary jurisdiction of the judicial tribunals" of the United States. *The Schooner Exchange*, 11 U.S. at 144, 146.[7] But the important point is that the Act was not intended to extend birthright citizenship to a child born to foreign parents while temporarily visiting the United States, and the words "not subject to any foreign power" were chosen to make that clear. To the contrary, it was intended to *affirmatively exclude* such children from birthright citizenship. This understanding of the provision's meaning was not at all controversial: no one, proponent or opponent, objected to Trumbull's description of the provision's intended scope nor expressed the view that an American-born child of foreign visitors should be an American citizen at birth. Indeed, when Chairman of the House Judiciary

[7] Trumbull had earlier noted that "we cannot make a citizen of the child of a foreign minister who is temporarily residing here." CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866). Some advocates of universal birthright citizenship argue that the reason Trumbull settled on the language 'subject to a foreign power' was to account only for the situation of children of foreign ambassadors and not foreign sojourners. Ho, *supra*, at 363–64. But that view is not tenable given Trumbull's explanation that the Clause was framed to exclude the children of tribal Indians because tribal Indians "were not a part of our population. . . . They are not . . . part of our people." CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866). Foreign temporary sojourners, then and now, are likewise not part of our people. Moreover, it is not at all likely that Trumbull came to the plainly *wrong* legal conclusion that foreign ambassadors owed a "sort of allegiance" to the United States rather than the plainly *correct* conclusion, under settled Supreme Court precedent, that visiting aliens generally owed a "local and temporary allegiance" to the United States. *The Schooner Exchange*, 11 U.S. at 144, 146. Trumbull, a former Illinois Supreme Court Justice and Chairman of the Senate Judiciary Committee, would not have made such a basic mistake. And why would he opt for language that plainly included foreign temporary sojourners within its plain meaning, if he intended only to exclude foreign diplomats? Indeed, if that was his purpose, why would he not have simply selected the familiar words of Article II Section 3 and specifically excluded, in addition to "Indians not taxed" the children of "ambassadors and other public ministers?"

Committee James Wilson introduced the bill in the House, he explained that its citizenship provision means "that every person born in the United States is a natural-born citizen of such States, except . . . children born on our soil to *temporary sojourners* or representatives of foreign Governments." CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (emphasis added).

What *was* controversial was the effect of the citizenship provision on Native Americans, and the meaning of the words "excluding Indians not taxed" was the dominant focus of debate. There was general agreement among the Senators that Indians "who. . . belong to the Indian tribes" owed their allegiance primarily to the tribe and thus were excluded from birthright citizenship under the Act. *See* CONG. GLOBE, 39th Cong., 1st Sess. 571–74 (1866). Assimilated Indians, however, "who are no longer connected with their tribes" and are residing and "earning a livelihood in the white settlements"—that is, Indians who joined the American body politic—would be within the Act's scope. *Id.* at 572. As Trumbull explained, tribal Indians were "[c]onsidered virtually as foreigners" who "belonged to a foreign Government" and therefore were "not regarded as part of our people" and were "not counted in our enumeration of the people of the United States." *Id.* But "[w]henever they are separated from those tribes, and come within the jurisdiction of the United States so as to be counted, they are citizens of the United States." *Id.*

In response to the question why an "Indian not taxed" is excluded from citizenship when an American-born "white man or a negro [can] be a citizen without

being taxed," Trumbull made clear that the Act's disqualification from birthright citizenship of persons subject to a foreign power applies not only to tribal Indians, but to *everyone*: "If the negro or a white man belonged to a foreign Government he would not be a citizen; we do not propose that he should be." *Id.* Maryland Senator Reverdy Johnson likewise emphasized that "all black persons born in the United States, who are not subject to any foreign Power, would become citizens by virtue of birth" under the Act. *Id.* at 573.

Consistent with his statement about those temporarily in the United States, Trumbull stated in a letter to President Andrew Johnson that the Act declared citizens those "born of parents *domiciled* in the United States, except untaxed Indians." Letter from Sen. Lyman Trumbull to President Andrew Johnson (in Andrew Johnson Papers, Reel 45, Manuscript Div., Library of Congress) (emphasis added).

B. The debate over the 1866 Act was still fresh in the minds of the members of the 39th Congress in May 1866, when the Fourteenth Amendment was taken up in the Senate. The version of the Fourteenth Amendment passed by the House did not contain a citizenship provision, and Michigan Senator Jacob Howard moved to add the Citizenship Clause to Section 1. The language he proposed differed from that of the citizenship provision in the freshly passed Civil Rights Act: the phrase "not subject to any foreign power, excluding Indians not taxed," was replaced with the phrase "subject to the jurisdiction thereof."

It is clear from the debate over the proposed clause, however, that the change in language was not intended to change the scope of birthright citizenship established under the Civil Rights Act. Rather, the Citizenship Clause simply states in positive terms ("subject to the jurisdiction thereof") what the Act stated in negative terms ("not subject to any foreign power"). Trumbull accordingly emphasized to his colleagues that while the language of the proposed clause differed from that of the Act, "[*t*]*he object to be arrived at is the same*." CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (emphasis added). And the Clause's leading proponents emphasized that the Clause drew a sharp distinction between the citizenship status of "Indian[s] belonging to tribe[s]," which the United States had "always regarded . . . as foreign Powers," *id.,* at 2895, and Indians who had left their tribal reservations and had domiciled and assimilated in the American body politic. The distinction was based on *allegiance*.

Noting that the Senators had previously "so fully discussed [citizenship] in this body as not to need any further elucidation," Senator Howard stated that his proposed addition to Section 1 "is simply declaratory of what I regard as the law of the land already," i.e., the 1866 Act's citizenship provision. *Id.*, at 2890. He then emphasized that the proposed clause "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons." *Id.*

Some commentators have argued that Howard meant by this statement that only persons who are born into the families of foreign ambassadors or ministers while posted here are not included in the Clause, as though he had said that the clause *will include* "persons born in the United States who are foreigners, aliens," *except* those "who belong to the families of ambassadors or foreign ministers." *Id.* (emphasis added); *see, e,g*., Ramsey, *supra*, at 448; Ho, *supra*, at 370. This is not a remotely plausible interpretation of Howard's statement given that the ink was not yet dry on the 1866 Act's express exclusion from birthright citizenship of American-born persons "subject to any foreign power." Such an abrupt and dramatic reversal of so fundamental a policy would surely have required explanation, ignited fierce debate, and undoubtedly been roundly rejected. But even assuming that such a reading of Howard's statement could reasonably be offered, the rest of his extensive remarks in the debate leave no doubt that his reference to American-born "foreigners, aliens" was intended to identify a class of American-born persons distinct from, and excluded from birthright citizenship in addition to, those born into "families of ambassadors or foreign ministers."

The debate over the proposed Citizenship Clause turned immediately to the citizenship rights of American Indians, when Wisconsin Senator James Doolittle moved to amend the clause by adding the phrase "excluding Indians not taxed." CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). He asked, "[w]hat does it mean when you say that a people are subject to the jurisdiction of the United States?" *Id.*

at 2896. He complained that "[a]ll the Indians upon reservations within the several states are most clearly subject to our jurisdiction, both civil and military," and that the clause, as framed, would thus confer on all Indians "the rights, the responsibilities, the duties, the immunities, the privileges of citizenship." *Id.* at 2892–93. Senator Hendricks shared this concern, adding that "[i]f the Indian is bound to obey the law he is subject to the jurisdiction of the country." *Id.* at 2894. Both Senators emphasized that the text of the Civil Rights Act (as well as Section 2 of the proposed Fourteenth Amendment) used the words "excluding Indians not taxed," and they asked "[w]hy not insert them in this constitutional amendment" to avoid any ambiguity. *Id.* at 2896 (Sen. Doolittle); *see id.* at 2895 (Sen. Hendricks); *id.* at 2894 (Sen. Johnson).

Senator Trumbull, author of the 1866 Act's citizenship provision, answered first. He admitted that he had included the phrase "excluding Indians not taxed" in the Act, but had since become concerned that "mak[ing] a distinction . . . on the ground of taxation" was "objectionable . . . because it would make of a wealthy Indian a citizen and would not make a citizen of one not possessed of wealth under the same circumstances." *Id.* at 2894. As he further explained: "I am not willing, if the Senator from Wisconsin is, 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." *Id.*

Senator Howard added that the language "excluding Indians not taxed" would effectively grant the states a de facto naturalization power because states controlled who was taxed. *Id.* at 2895. Trumbull and Howard had therefore come to believe that the "language proposed in the constitutional amendment is better than the language of the civil rights bill. *The object to be arrived at is the same*." *Id.* at 2894 (Sen. Trumbull) (emphasis added).

As to the meaning of "subject to the jurisdiction" of the United States, Senator Howard spoke first. In keeping with his opening comment that the proposed clause was "simply declaratory" of the Civil Rights Act's provision excluding from birthright citizenship persons born "subject to any foreign power," he stated: "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." *Id.* at 2890.

Senator Trumbull followed, arguing that the new language "means 'subject to the *complete* jurisdiction thereof.'. . . What do we mean by 'subject to the jurisdiction of the United States?' Not owing *allegiance* to anybody else. That is what it means." *Id.* at 2893 (emphasis added). And tribal Indians on reservations are not "in any sense subject to the *complete* jurisdiction of the United States." *Id.* (emphasis added). To further clarify, he added: "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.' . . . It is only those persons who come *completely* within our jurisdiction, who are subject to our laws, that we think of making citizens." *Id.* (emphasis added).[8] Later in the debate, Trumbull reiterated that tribal Indians "are not subject to our jurisdiction in the sense of owing allegiance solely to the United States." *Id.* at 2894.

Senator Howard then reiterated Trumbull's argument, again noting that "[t]he Government of the United States have always regarded and treated the Indian tribes within our limits as foreign Powers":

> I concur entirely with [Senator Trumbull] in holding that the word "jurisdiction," 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 a limits of a state, is subject to this full and complete jurisdiction."

Id. at 2895 (emphasis added); *see id.* at 2893 (Sen. 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

[8] At least one respected commentator has seized on Trumbull's reference in this passage to those "who are subject to our laws" as supporting the regulatory jurisdiction interpretation of the Citizenship Clause. *See* Ho, *supra*, at 373; *see also* Ramsey, *supra*, at 449–50. In light of Trumbull's authorship of the 1866 Act's exclusion from birthright citizenship of persons "subject to any foreign power," and his comments during the debates on that provision and on the Citizenship Clause, as discussed in text, the notion that Trumbull supported the regulatory jurisdiction interpretation of the Clause is untenable. His full and complete comments in the debates make clear that his reference to "those persons who come completely within our jurisdiction" meant those who have chosen our country as their permanent domicile and thus have become *permanently* subject to *all* our laws.

brought the matter before us—shall be considered as citizens of the United States."); *id.* at 2897 (Sen. Williams) ("I understand the words here, 'subject to the jurisdiction of the United States,' to mean fully and completely subject to the jurisdiction of the United States.").[9]

Almost as revealing as what was said by the drafters and leading proponents of the proposed clause is what was not said—by anyone. No one who spoke in the Senate debate suggested that American-born children of visiting foreigners would, or should, become American citizens at birth.

The congressional history of the Citizenship Clause thus confirms, as renowned jurist and constitutional scholar Thomas Cooley put it, that the words "subject to the jurisdiction thereof, . . . 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." Cooley, *supra*, at

[9] An exchange in the Senate debate over the citizenship status of the children of Chinese and "Gypsy" *immigrants permanently residing* in the United States is similarly revealing. Senator Edgar Cowan of Pennsylvania, in a virulently racist speech, opposed the Citizenship Clause because he worried that it would prohibit Pennsylvania from removing immigrant Gypsies from its territory and would cause California to be "overrun by a flood of immigration" of Chinese laborers. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866). California Senator Conness, a leading supporter of the proposed Citizenship Clause, acknowledged that the clause would make no distinctions based on race, and thus the American-born children of Chinese immigrants domiciled in California would not be excluded from birthright citizenship based on their race. *Id.* at 2891–92. And he made clear that, just as the Civil Rights Act had "declared" that "children begotten of Chinese parents in California . . . shall be citizens," he supported the Citizenship Clause's "incorporat[ion of] the same provision in the fundamental instrument of the nation." *Id.* at 2891. This exchange shows that the race of domiciled immigrants would play no role in birthright citizenship under the Fourteenth Amendment, but it does not show, contrary to Professor Magliocca's view, that anyone understood sojourners or illegal aliens would be so entitled. Amicus Brief of Professor Gerard N. Magliocca in Support of Respondents at 4–7, *Trump v. Barbara*, No. 25-365, (U.S. Feb. 3, 2026).

243. Accordingly, "when any individual [Indian] withdraws [from his tribe] and makes himself a member of the civilized community, adopting the habits of its people and subjecting himself fully to the jurisdiction," his children are no less citizens than those of "any other native-born inhabitant." *Id*. And if the children of Indians "belong[ing] to their tribes" were not entitled to citizenship at birth under the clause, it follows "a fortiori [that] the children of foreigners in transient residence are not citizens, their fathers being subject to the jurisdiction less completely than Indians." 1 WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 237 n.1 (4th ed. 1895).

The Ninth Circuit, echoing other advocates of universal birthright citizenship, cast aside the 1866 Act as irrelevant because its citizenship language was not "ultimately adopted in the text of the Fourteenth Amendment." *Washington v. Trump*, 145 F.4th 1013, 1033 (9th Cir. 2025); *cf. also Doe v. Trump*, 157 F.4th 36, 68, 75 (1st Cir. 2025). But Congress re-enacted the 1866 Act in 1870 without changing its language. Civil Rights Act of 1870, ch. 114, § 18, 16 Stat. 140, 144. The Ninth Circuit thus came to the wholly untenable conclusion that the 39th Congress impliedly invalidated the Act's citizenship provision and then immediately reenacted the same unconstitutional statute. To the contrary, the clause was intended to constitutionalize the *same* scope of birthright citizenship established in the 1866 Act, not to render *unconstitutional* the Act's facial exclusion from birthright citizenship of children born to temporary foreign visitors.

The short of it is this: "The [1866] act was passed and the [Fourteenth] amendment proposed by the same congress, and it is not open to reasonable doubt that the words 'subject to the jurisdiction thereof' in the amendment, were used as synonymous with the words 'and not subject to any foreign power,' of the act." *Wong Kim Ark,* 169 U.S. at 721 (Fuller, C. J., joined by Harlan, J., dissenting).

C. Some advocates of universal birthright citizenship downplay the interpretive importance of the Civil Rights Act of 1866 by claiming that it, and thus the Fourteenth Amendment's Citizenship Clause, merely adopted the rule of *jus soli* that governed the English for hundreds of years. *See* Ho, *supra*, 364; Amicus Brief of Professor Keith Whittington Supporting Respondents at 17–18, *Trump v. Barbara*, No. 25-365 (Feb. 26, 2026). But that argument is plainly wrong for at least two reasons. First, as discussed above, the plain text of the 1866 Act is facially irreconcilable with the doctrine of *jus soli* in the slightest. It was well understood that foreigners, for example, remained subject to the authority of their home country while traveling in the United States. Under the *jus soli* doctrine, the child of a foreign sojourner would be a citizen of the country in which his parents were visiting. But under the Civil Rights Act of 1866, he would not be.

Second, and perhaps more importantly, *jus soli* was and is deeply inconsistent with American principles of self-government. *Jus soli* was a doctrine of perpetual, indissoluble subjectship, not citizenship. It grew out of feudal notions concerning the relation between lord and vassal, with the King holding ultimate

lordship over all land within his dominion. Any person born in the King's domain thus became a subject that owed him an "allegiance" that could not be "forfeited, cancelled, or altered." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357 (1765). The allegiance of a subject was not merely owed to the King in his "political capacity" but to the King's "natural person." *Id.* at 359.

Americans chose a different path in 1776. With both the pen and the musket, the former colonists rejected the idea that "allegiance" to the King could not be "forfeited, cancelled, or altered," a fundamental element of the English common law of subjectship. *Id.* at 357. The Declaration of Independence gave birth to a new nation, one that "deriv[ed] [its] just powers from the consent of the governed." In doing so, we rejected the English concept of Royal "subjects" and established a nation to be governed by *citizens*. In England, there was no such thing as a citizen, and in America, there was no such thing as a subject. It is difficult to imagine a cleaner break with a common-law tradition.

As the Supreme Court has recognized, "English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 35 (2022). And if *jus soli* had somehow survived the founding of a nation based on the consent of the governed, one would expect it to be universally applied in the years thereafter. But that was not the case in the late 18th and early 19th centuries. Even outside the peculiar context of slavery, various states applied

various rules for determining citizenship of the children of foreign sojourners. For instance, the Texas Supreme Court affirmatively held that the children of sojourners were not entitled to citizenship at birth, describing the question as too "well settled to admit" dispute. *Hardy v. De Leon*, 5 Tex. 211, 237 (1849). As noted above many influential commentators agreed. *See supra* at 3, 9, 28. True, one trial court in New York believed that the English rule ported over despite the rejection of subjectship in the Declaration of Independence, *see Lynch v. Clarke*, 1 Sand. Ch. 538 (N.Y. Ch. 1844), but that lone opinion was later contradicted by a New York appellate court, *Ludlam v. Ludlam*, 31 Barb. 486, 503 (N.Y. Gen. Term. 1860), and cannot come close to establishing the kind of uniform practice that would be necessary (but not sufficient) to influence the interpretation of the Civil Rights Act of 1866 or the Citizenship Clause of the Fourteenth Amendment.

In short, the Civil Rights Act of 1866 was not some drastic break from early American practice; nor was the Citizenship Clause. The break happened generations before, when Americans revolted against eternal subjectship under the King and created a new political community based on consent of the governed. The feudal doctrine of *jus soli* "no more survived the American Revolution than the same rule survived the French Revolution." *Wong Kim Ark*, 169 U.S. at 710 (Fuller, C. J., joined by Harlan, J., dissenting).

III. The Supreme Court's Precedent Interpreting the Citizenship Clause

The Supreme Court's interpretation of the Citizenship Clause in *Elk* confirms what the Clause's text and history make clear: the Clause requires a newborn to be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to the[] political jurisdiction, and owing the[] [United States] direct and immediate allegiance." 112 U.S. at 102. Thus, because the plaintiff, John Elk, was born on a reservation to tribal Indians, he did not have a valid claim to citizenship by birth alone. Despite being "within the territorial limits of the United States," the Indian tribes "were alien nations" whose members "owed immediate allegiance to their several tribes, and were not part of the people of the United States." *Id.* at 99. Accordingly, even though Elk had "voluntarily separat[ed] himself from his tribe and tak[en] up his residence" in the body politic, he was born "owing immediate allegiance" to the tribe and thus was not entitled to birthright citizenship under the Fourteenth Amendment. *Id.* at 99, 102. There is no doubt at all, however, that John Elk's American-born children would be birthright citizens given that their father had made the United States his *domicile* and thus owed it his "direct and immediate allegiance." *See* Cooley, *supra*, at 243.

Though commonly misunderstood, the holding in the *Wong Kim Ark* case is not to the contrary. Indeed, *Wong Kim Ark* had nothing to do with the children of illegal aliens or aliens lawfully but temporarily admitted to the country. The plaintiff in *Wong Kim Ark* was born and raised in California by Chinese parents who "had

established and enjoyed a permanent domicile and residence…in the United States," 169 U.S. at 651, and thus enjoyed a "more distinct and larger measure of [sovereign] protection than those who are simply passing through," *Fong Yue Ting*, 149 U.S. at 734 (Brewer, J. dissenting). Upon returning from a temporary visit to China, he was denied reentry under the Chinese Exclusion Act, which barred aliens "of the Chinese race . . . from coming into the United States." *Wong Kim Ark*, 169 U.S. at 653. The Court held that he was a natural-born United States citizen and therefore not subject to exclusion under the Act. The Court was especially careful to frame the "single question" presented, which it repeated verbatim *twice* in the opinion, as follows:

> [W]hether a child born in the United States, of parents of Chinese descent, who at the time of his birth, are subjects of the emperor of China, but have a *permanent domicile and residence in the United States*, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States.

Id. at 653, 705 (emphasis added).

The Court held that this "question must be answered in the affirmative." *Id.* at 705. As the Court explained, "[t]he amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, *domiciled* within the United States." *Id.* at 693 (emphasis added); *see id.* ("Every citizen or subject of another country, while

domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.") (emphasis added).

The holding of the case was thus confined, by its own terms, to the birthright citizenship of children born to parents *lawfully domiciled* in the United States. And it was the plaintiff's own lawful permanent domicile in the United States, inherited from his parents, that gave rise to the duty of allegiance that he owed to the country where he was born and where he was raised by his parents. The holding of the Court—that a child born here to lawful permanent residents domiciled in this country is a citizen at birth—is thus correct, as the text, structure, and history of the Citizenship Clause demonstrate.

To be sure, the Court majority opined at length, in dicta, that our Nation's Founders adopted the English feudal principle of *jus soli*, under which "every person born within the dominions of the crown, no matter whether of English or of foreign parents, and … whether the parents were settled, or merely temporarily sojourning … was an English subject .... " *Id.* at 657 (quoting Cockburn Nat. 7). Accordingly, "before the enactment of the civil rights act of 1866 ... all white persons, at least, born within the sovereignty of the United States, whether children of

citizens or of foreigners, ... were native-born citizens of the United States." *Id.* at 674–75.[10]

But the Court's dictum is not binding and, more fundamentally, is wrong. Chief Justice Fuller, in a dissenting opinion joined by Justice Harlan, thoroughly and convincingly refuted the facially implausible idea that, "in the matter of nationality [the Framers of the Constitution in 1789] intended to adhere to principles derived from regal government, which they had just assisted in overthrowing." *Id.* at 709. To the contrary, "when the sovereignty of the crown was thrown off, and an independent government was established, every rule of the common law ... in derogation of the principles on which the new government was founded, was abrogated." *Id.* And as explained above and by Justices Fuller and Harlan, the rule of indissoluble subjectship by mere birth in the territory of the sovereign was one of those common-law principles that had no place in a free nation.[11]

[10] The majority recognized four "exceptions" to the doctrine: "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." *Wong Kim-Ark*, 169 U.S. at 693. The "additional exception" was not derived from *jus soli*, but rather was contrived by the majority to navigate around the congressional history of the Citizenship Clause.

[11] The dissenting Justices concluded, however, that the Treaty of 1870 between the United States and China precluded birthright citizenship of children of permanently domiciled Chinese immigrants, including the plaintiff, because it expressly denied citizenship to the parents. Accordingly, "the proper construction" of the Citizenship Clause is "that all persons born in the United States of parents permanently residing here, and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens." *Wong Kim-Ark*, 169 U.S at 731.

Even after *Wong Kim Ark*, eminent authorities, such as Henry Campbell Black and retired Supreme Court Justice Samuel Miller, continued to express the complete-jurisdiction view. *See* HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 634 (3d ed. 1910) (3d ed. 1910) ("This jurisdiction 'must at the time be both actual and exclusive.' . . . So if a stranger or traveler passing through the country, or temporarily residing here, but who has not himself been naturalized and who claims to owe no allegiance to our government, has a child born here, who goes out of the country with his father, such child is not a citizen of the United States, because he was not subject to its jurisdiction."); SAMUEL FREEMAN MILLER, NATURALIZATION AND CITIZENSHIP, IN LECTURES ON THE CONSTITUTION OF THE UNITED STATES 275, 279 (J. C. Bancroft Davis ed., 1893) (same); *see, e.g.,* Hannis Taylor, A TREATISE ON INTERNATIONAL PUBLIC LAW 220 (1901); HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 25 (W. H. Anderson & Co. 1901).

CONCLUSION

Text, structure, congressional history, binding precedent, and common sense all point in the same direction. The Citizenship Clause applies only to the children of those who have been allowed to adopt our country as their permanent and lawful home.