
Chapter 12

Contracting the Scope of the Thirteenth and Fourteenth Amendments

ASSIGNMENT 5

E. The Citizenship Clause of the Fourteenth Amendment

The Constitution of 1787 made several references to citizenship, but did not define the concept. But from the early days of the republic, the concept of citizenship was closely bound up with debates over slavery. Citizens were entitled to certain “privileges and immunities.” If an enslaved person was a citizen, could the state deprive him of these fundamental rights? A citizen of one state was able to bring a “diversity” lawsuit in the federal courts against a citizen of another state. If an enslaved person is a citizen, could he invoke the diversity jurisdiction in federal courts? In *Dred Scott v. Sandford* (1857), the Supreme Court answered both of these questions in the negative. Chief Justice Roger Taney ruled that slaves, and indeed all people of African descent, could never be citizens, so therefore were not entitled to the privileges and immunities of citizenship and could not invoke federal diversity jurisdiction.

Dred Scott, however, would not settle the meaning of citizenship. In the wake of the Civil War, the Civil Rights Act of 1866 and Section 1 of the Fourteenth Amendment granted citizenship to the freed slaves. Yet, the language of both citizenship provisions extended beyond the freedmen. The most pressing question concerned the children of parents who were not authorized to be in the United States, or who were only temporary visitors. The Supreme Court addressed this issue in *United States v. Wong Kim Ark* (1898), but did not settle the matter.

In 2025, President Donald Trump issued an executive order that would have denied citizenship documentation to a child born in the United States whose parents were illegal aliens or were on a temporary visa. The lower courts immediately enjoined the order. Indeed, some judges stated that the government’s arguments were worthy of professional sanction. However, over the course of a year, several originalist scholars looked at the issue anew and determined the issue was closer than the conventional wisdom suggested. Justice Clarence Thomas would later highlight some of the new scholarship.

The President’s initiative generated a groundswell of new scholarship into the original meaning of the Citizenship Clause. A wide range of originalist scholars

have concluded that the 20th century executive practice was mistaken and that the Order has substantial lawful applications. [Kurt] Lash, 101 Notre Dame L. Rev. 101; R[ichard] Epstein, *The Myth of Birthright Citizenship* (2026); I[lan] Wurman, *Jurisdiction and Citizenship*, 49 Harv. J. L. Pub. Pol’y 315 (2026); [Amy] Swearer, 2 Tex. A & M J. L. & Civ. Gov. 73; R[andy] Barnett, *Trump Is Right on Birthright Citizenship*, Wall Street Journal, Mar. 31, 2026; P[hilip] Hamburger, *Allegiance, Birthright, and Citizenship*, Law and Liberty (Apr. 9, 2026), <https://lawliberty.org/allegiance-birthright-andcitizenship>. . . .

The debate over what is called “birthright citizenship”—a term that does not appear in the Fourteenth Amendment—seems very complicated. It becomes much easier to understand, however, once one identifies the five propositions that nearly everyone involved in the debate agree upon:

1. The Fourteenth Amendment specifies not one but two distinct requirements for citizenship: (a) being born on U.S. soil *and* (b) being “subject to the jurisdiction” of the United States. Being born on U.S. soil was not enough.
2. The entire debate concerns the original meaning of the second requirement: “subject to the jurisdiction” (which presumably requires something in addition to being born on U.S. soil).
3. Whether a child was “subject to the jurisdiction” of the U.S. depended on the status of his or her parents.
4. In 1868, when the amendment was ratified, three categories of children were thought not to be “subject to the jurisdiction” due to the status of their parents: (a) the children of ambassadors, (b) the children of enemy aliens during a hostile occupation, and (c) the children of American Indians who were affiliated with their tribe.
5. These three categories were not a closed set; in other words, although just three categories may have been recognized at the time of ratification, more might be recognized under the same principle.

The debate about birthright citizenship turned on which conception of “subject to the jurisdiction” explained these three categories and whether that conception might also include the children covered by the President’s executive order.

While the lower courts all ruled against the government, the Supreme Court was divided. By a 5-4 vote, the Court in *Trump v. Barbara* (2026) ruled that President Trump’s order violated Section 1 of the Fourteenth Amendment. Chief Justice John Roberts, writing for the Court, held that the children of American Indians, the children of ambassadors, and the children of enemy aliens during a hostile occupation were not “subject to the jurisdiction” of the United States. The Court contended that each category fell under a general principle called the “extraterritoriality fiction.” Although such persons were physically present in the U.S. at their birth, each category was fictitiously deemed to be outside its sovereign territory.

The decision in *Barbara* stretched nearly two-hundred pages. All of the opinions offer a deep historical analysis of citizenship stretching back to seventeenth

century England. To make the case more digestible, we have split up *Barbara* into six discrete parts. The first presents the differing conceptions of the majority and dissenting Justices; the next three present different categories of evidence bearing on the meaning of “subject to the jurisdiction”; the fifth posits a statutory rather than constitutional outcome of the case.

- The first excerpt presents the majority’s and dissenters’ rival conceptions of “subject to the jurisdiction.” In particular, the majority opinion held that the Fourteenth Amendment adopted a modified version of the English common law rule of birthright citizenship. The dissenters argued that America charted a different course.
- The second, third, and fourth excerpts consider different types of evidence of the original meaning of the Citizenship Clause: (a) analysis of the text; (b) the context provided by the citizenship clause in the Civil Rights Act of 1866; (c) the congressional debate over the citizenship clause of the Fourteenth Amendment; and (d) post-ratification practice by the executive branch.
- The fifth excerpt provides a summary of the judiciary’s interpretation of the Citizenship Clause—in particular the Supreme Court’s decision in *United States v. Wong Kim Ark* (1898), a decision from three decades after ratification. Before this excerpt, we reproduce a portion of *Wong Kim Ark*, so that you can judge what the case decided before reading the Justices’ competing characterizations of it.
- In the sixth and final excerpt, Justice Kavanaugh takes an entirely different tack. On the one hand, he joins the other dissenters in rejecting the majority’s interpretation of the Fourteenth Amendment. Justice Kavanaugh maintains that the President’s executive orders violate the original meaning of the Constitution. But on the other hand, all agree that the Naturalization Clause empowers Congress to *expand* citizenship beyond the original meaning of the Citizenship Clause. Justice Kavanaugh contends that Congress did exactly this when it enacted the Immigration and Nationality Act of 1952. On his analysis, then Congress may cut back on its own expansion of citizenship by enacting a statute returning to the original meaning of the Fourteenth Amendment. No other Justice accepted Justice Kavanaugh’s reading of the 1952 statute. We include Justice Thomas’s brief rebuttal.

1. The Rival Theories of Citizenship

STUDY GUIDE

- Why does Chief Justice Roberts contend that the Fourteenth Amendment adopted the common law rule of citizenship? How do Justices Thomas and Alito contend that the American legal system departed from the English rule?

- How does the majority opinion define “subject to the jurisdiction thereof”? How do Justices Thomas and Alito define that phrase? How do these opinions explain the three agreed-upon exceptions to birthright citizens: the children of Indians, ambassadors, and enemy aliens?
- Chief Justice Roberts wrote: “Citizenship, then and now, was the right to have rights—to freely participate in our political community.” Is this accurate? Do noncitizens have no rights? Do all citizens, including minors and felons, have all rights in the political community?
- Do the dissenters conclude that the children of *all* illegal aliens can be denied birthright citizenship?
- When reading each justice, ask yourself whether their conception of “subject to the jurisdiction” applies equally to children of parents lawfully but temporarily in the U.S. and those whose parents are unlawfully but indefinitely present.
- What role is *Dred Scott* playing in the reasoning of the Justices? Can you see how the anti-canon works in constitutional adjudication?

Trump v. Barbara—Part I 609 U.S. __ (2026)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

At issue in this case is whether the Constitution guarantees citizenship to children born of parents unlawfully or temporarily present in the United States.

I

The Fourteenth Amendment 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.”

On January 20, 2025, President Trump issued Executive Order No. 14160, titled Protecting the Meaning and Value of American Citizenship. The Order provides that children born of persons unlawfully or temporarily present in the United States are not “subject to the jurisdiction” of the United States—and thus do not qualify for citizenship under the Fourteenth Amendment or the Immigration and Nationality Act (INA), which uses the same language.¹

1. In full, the Executive Order declares that “the privilege of United States citizenship does not automatically extend to persons born in the United States: (1) when that person’s mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person’s birth, or (2) when that person’s mother’s presence in the United States at the time of said person’s birth was lawful but temporary . . . and the father was not a United States citizen or lawful permanent resident at the time of said person’s birth.”

Several parents filed suit, some on their own behalf, others on behalf of (and in the name of) their children. They argued that the Executive Order violates the Fourteenth Amendment and the INA. The District Court agreed. It provisionally certified a nationwide class of children who would be denied citizenship by the Order and preliminarily enjoined the Order's enforcement. We granted certiorari before judgment.

II

To understand the Citizenship Clause of the Fourteenth Amendment, it is first necessary to understand the context in which it arose—and the opinion of this Court, *Dred Scott v. Sandford* (1857), that it rejected.

A

The story of citizenship in the United States begins with the English common law. Before the Revolution, the American colonists—like all in the British Empire—were considered subjects of the sovereign. See *Inglis v. Trustees of Sailor's Snug Harbour in City of New York* (1830). That arose not from royal fiat, but from what the common law conceived as the relationship between the sovereign and the people. The King, Blackstone explained, owes those “born within the dominions” a duty of “protection.” And “in return for that protection,” those “born within the dominions” owe the King a “duty” of “allegiance” (sometimes rendered “ligeance”). Children born with that allegiance were “natural-born subject[s].” As Lord Coke put it in the celebrated *Calvin's Case* (K. B. 1608), a “dual and reciprocal tie” thus connects “the Sovereign and [his] subject[s].”

Because the sovereign's power (and thus his duty) was limited in various respects, so too was the scope of this rule. He could not demand allegiance from—for he could not protect—those born in lands that he did not control. The same held true even in discrete areas within his kingdom that were temporarily outside his control. And the same held true for ambassadors (and their families), who were considered—by a fiction of extraterritoriality—to remain on foreign soil and thus “under the ligeance” of their home country.

In all other respects, however, the sovereign's power—and his claim to the people's allegiance—was complete. A foreign mother could enter the British Isles, give birth, and leave with her child the very next day, and that child would remain a British subject. Why? Because the child owed an implied allegiance to the sovereign who protected him at his birth—no matter how “momentary and uncertain” his presence in the King's realms. The same rule applied to children born in the realm of parents subject to expulsion. For example, children of “gypsies” (today, called Romani or Roma people) born in the realm were natural-born subjects, notwithstanding that British law at the time “directed” the Roma people “to avoid the realm” under “pain of imprisonment” or even death. Brief for Gerard N. Magliocca as *Amicus Curiae*. For those children, and all others

born in Britain, the rule was the same: With protection came allegiance, and with allegiance came the status of a natural-born subject.

This view crossed the Atlantic with the colonists—and was adopted with little fanfare after the Revolution, as “subject[s]” of the sovereign became “citizens” of the States. This common law of citizenship—known as *jus soli*, or right of the soil—prevailed in “each and all of the states” after American independence, and continued to emphasize reciprocal “allegiance” and “protection.” By “the doctrine of natural allegiance,” all “who [we]re born within the jurisdiction of a State” were citizens.

When the newly independent Americans confronted a novel situation, unknown to England—that of the quasi-sovereign Indian tribes—they turned to the principles of the common law. Did the tribes truly govern their people? Or were their people wholly subsumed within the United States? Echoing Coke and Blackstone, Chancellor Kent answered with the common law. . . . Indians born under those dominions, he concluded, were not “citizens or subjects of the *United States*,” but members of “alien and sovereign tribes.” Others followed Kent’s lead, all the while emphasizing that the “very few exceptions” to the sovereign’s power were narrow indeed.

In a Nation of immigrants—an “asylum for mankind,” in Thomas Paine’s words—*jus soli*’s broad scope took on particular importance. Common Sense (1776). The young Republic attracted tens of thousands of émigrés from the Old World—Scotch-Irish, French, German, Welsh, and many more, some of whom hoped to stay only a short time, others of whom hoped never to leave. No matter their intentions, however, they could be assured that their children would be American citizens by birth alone. As Justice Story said, “[n]othing is better settled.” *Inglis*. The very first American legal treatise agreed. As did the antebellum era’s foremost case on the topic, *Lynch v. Clarke* (N. Y. Ch. 1844). *Lynch* reiterated that “the common law rule was the law of the land” for the children of “citizens” and “foreigners” alike—including those foreigners here merely on a “temporary sojourn.” The promise of American citizenship, *Lynch* declared, extends to “all persons born within the jurisdiction of the United States.”

B

The common law “made no distinction on account of race or color.” But the slave States did. As the Civil War approached, more and more Southern States sought to deny citizenship to black Americans—and openly rejected the common law to reach that result. It was “not the place of a man’s birth” that made him a citizen, these States said, “but the rights and privileges he may be entitled to enjoy.” On that view, “[t]he prejudice . . . of caste” was “unconquerable.” Not even emancipation could “confer *citizenship*,” these States held, because free African Americans still suffered from “social and civil degradation” based on “the taint of blood.” With the common law abandoned, almost 500,000 free black Americans in the South were left little more than “strangers.”

In the odious decision of *Dred Scott v. Sandford*, this Court imposed the Southern States' beliefs onto the Nation. Chief Justice Taney, writing for the Court, concluded that "the words 'people of the United States' and 'citizen[s]'" had an unexpressed (and atextual) racial component—one that excluded all those descended from slaves. Even if Massachusetts or Connecticut chose to grant citizenship to the freedmen, they still could not participate in national affairs. They were "born in the country," Chief Justice Taney acknowledged, and thus "did owe allegiance to the Government"—the precise criteria for citizenship at common law. But they were "not included, and were not intended to be included, under the word 'citizens' in the Constitution." For them, blood, not soil, was made the rule.

Dred Scott was met with shock. . . . The decision was, in Lincoln's famous words, an "astonisher in legal history."

Abolitionists swore to undo what the Court had done. "By birth," Frederick Douglass insisted, "we are American citizens." "The Constitution knows all the human inhabitants of this country as 'the people,'" he explained, no matter their "color, class, or clime." . . .

The Government and the principal dissent share many of our premises. They agree that the Citizenship Clause was intended to incorporate the "background principles" of the common law. They agree that, under the common law, "citizenship turns on allegiance." And they agree that "*Dred Scott* departed from that traditional, allegiance-based view of citizenship"—a departure that Congress "repudiated" in the Clause.

Where the Government and the principal dissent err is with their definition of "allegiance." They concede that *Calvin's Case* and Blackstone state the rule that prevailed before the Declaration of Independence—that a natural "allegiance" arises for all children who are "born here . . . under the protection of the sovereign." Yet according to the Government and the principal dissent, "the United States' conception of allegiance"—at some unspecified point in time—broke "from Great Britain's." (The Government has variously dated this change to the late-18th century, the early-19th century and the Reconstruction era; the principal dissent declines to offer a date.) Natural allegiance, they contend, was no longer sufficient for citizenship; some greater quantum of allegiance was required.

How much? The Government offers a smorgasbord of formulations: "primary allegiance," "sufficient allegiance," "full allegiance," "requisite allegiance." (The principal dissent, for its part, seems to have settled on "primary allegiance.") What all these formulations supposedly share is that they turn on domicile—the place of one's permanent home. At some point before the ratification of the Fourteenth Amendment, the argument goes, it became "deeply rooted" in this country that "[d]omicile is the key concept that creates allegiance."

The trouble is that there is scant evidence for this dramatically revisionist view. Certainly no one said that such a change had occurred. Indeed, even as the antebellum Americans hotly debated whether the Declaration of Independence had abrogated one aspect of the British common law—that natural allegiance

was infeasible, no matter a person's desire to expatriate—all agreed that such allegiance was owed in the first place.

The only evidence the Government and the principal dissent can muster to show that some alternative ("primary") conception of allegiance displaced the common law is a "funeral oration" for President Lincoln. Ahistorical modifiers aside, the Government and the dissent identify no source that defined allegiance at birth as being based on domicile in the period from 1776 to 1868.² Sources from that period instead defined "allegiance by birth" just as the British did—as "the tie or duty" owed by one who is "born within the dominions and under the protection of a particular sovereign."

Of course, some wished to change the rule. But even those who wished to limit *jus soli* did not deny that children born of temporary visitors owed *natural allegiance* to the United States. They instead thought that domicile might serve as a "reasonable qualification" to the common law rule (namely, that citizenship derives solely from the "[n]atural allegiance" owed "to the government of the territory of a man's birth").

The principal dissent (but not the Government) at times seems to directly equate domicile and national citizenship. That is wrong. "It is, in fact, a general axiom of international law, that there may be domicil where there is no nationality, and nationality where there is no domicil." After all, one who establishes a domicile in a new country does not automatically become a citizen thereof. (He has to be naturalized.) Nor does he automatically lose his prior citizenship. (He has to expatriate.) Thus, the principal dissent ultimately acknowledges that domicile alone was insufficient to make someone "formally" a "citizen."

Of course, domicile was relevant to naturalization and expatriation. But that by no means suggests it was a prerequisite to national citizenship at birth. The principal dissent's reliance on cases concerning *changes* to a person's *state* citizenship is thus misplaced. And the Government's remaining support for the idea that a domicile "qualification" to birthright citizenship was "widely accepted" in the United States before the Civil War, consists of a single state-court case about citizenship in the Republic of Texas, a proposed (but never adopted) model code for the State of New York, and another treatise that discussed the subject only in terms of "the principles of natural reason," which it expressly distinguished from "[t]he *common law*." . . .

* * *

Again and again, the dissents cast the common law as "feudal," "medieval"—a remnant of "the darkness of the middle ages."

That was not the view of the Reconstruction Congress. Where the dissents see feudalism, the Framers of the Fourteenth Amendment saw emancipation. By the time of the Glorious Revolution in 1688, in fact, the tie created by birth was

2. The principal dissent comes closest with the decision of New York's intermediate appellate court in *Ludlam v. Ludlam*, (N. Y. Gen. Term 1860). When New York's highest court heard the case, however, it did not follow the lower court's reasoning; it relied instead on *Lynch v. Clarke*.

less a “duty” than a “right”—the foundation of the “ancient liberties” of “free-born subjects.” That is why Blackstone described the “privileges” owed to the “natural-born.” That is why the colonists demanded the “rights of Englishmen” more than 250 years ago. And that is why abolitionists lauded the “ancient and universal” rule of citizenship by birth alone as “an ordinance of Heaven.”

Citizenship, then and now, was the right to have rights—to freely participate in our political community. The Framers of the Fourteenth Amendment extended that promise to “every free-born person in this land.” We keep that promise today.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

This Court’s decision in *Dred Scott v. Sandford* (1857), would have permanently denied citizenship to blacks as “a subordinate and inferior class.” After the Civil War, the Reconstruction Congress overruled *Dred Scott*, first with the Civil Rights Act of 1866, then with the Citizenship Clause of the Fourteenth Amendment. Both the Civil Rights Act and the Citizenship Clause guaranteed citizenship to persons born and domiciled in the United States regardless of their race. Neither guaranteed citizenship to persons who were not domiciled in the United States.

Blacks were entitled to citizenship because they were Americans. They had no other homeland, owed no allegiance to any foreign power, and were subject to no other authority. . . . The Citizenship Clause thus guaranteed them the “dignity and glory of American citizenship,” so as to ensure that they would never be treated as second class under the law. *Plessy v. Ferguson* (1896) (Harlan, J., dissenting).

The same could not be said for the children of foreign temporary visitors. Foreign temporary visitors were attached to their home country, lacked similar bonds to this country, and would not be called upon in time of war. Americans, consistent with their settler ethos, believed that citizens were the people who called a place home. Accordingly, domicile—a person’s legal home—played a key role in both state and national citizenship in America. A person was a “citizen” of the state where he had his “domicil.” When foreigners temporarily visited, their “national character” was unchanged. Such visitors were “strangers,” not “subjects.” A person born here but domiciled in a foreign land was therefore considered “as much a stranger to the country as his father.”

That is why, when *Dred Scott* went to court, he argued that to be a “citizen,” “it is only necessary that he should have acquired a domicil.” After this Court held that Scott was not a citizen because he was black, Republicans in Congress, such as Representative John Bingham, stated that a person was a citizen if he was “born and domiciled” in the United States. Scott was a citizen, in their view, because he was born to Americans, not to “temporary sojourners.” . . .

Congress implemented the principle that citizenship follows birth and domicile in the Civil Rights Act of 1866 and then in the Citizenship Clause of the Fourteenth Amendment. The Civil Rights Act guaranteed citizenship to persons who were both “born in the United States” and, as relevant here, “not subject to any foreign power.” The phrase “not subject to any foreign power” excluded from citizenship children of foreign temporary visitors, who were subject to the

power of their home nation. The Citizenship Clause, which the same Congress passed shortly after the Civil Rights Act, was understood to have the same meaning. It guaranteed citizenship to persons who were both “born . . . in the United States” and “subject to the jurisdiction thereof.”

A person was subject to the jurisdiction of the government of his domicile. “Domicil” was “the foundation of jurisdiction over persons.” The government of a person’s domicile had broad power over that person, including with respect to his personal affairs, his conduct abroad, his personal taxes, and the mutual duties of protection and allegiance. So, as the Senator [Jacob Howard] who introduced the Citizenship Clause explained, “the word ‘jurisdiction,’ as here employed, ought to be construed so as to imply a full and complete jurisdiction . . . the same jurisdiction in extent and quality as applies to every citizen of the United States now.” After all, [said Senator Lyman Trumbull] Congress “would have no right to make citizens” of “persons temporarily resident.”

The Citizenship Clause was consistently interpreted not to apply to the children of foreign temporary visitors, who were by definition not domiciled in the United States. . . .

III

In my view, the Citizenship Order is not facially unconstitutional. The Order is consistent with the original meaning of the Citizenship Clause, at least insofar as it applies to children born to parents, here lawfully or unlawfully, who are not domiciled in the United States.

The Citizenship Clause was enacted for people who were born in this country and called it home. It was enacted for freed slaves such as Dred Scott, who had “a domicil” here and therefore were entitled to sue as citizens. It was enacted for men such as Frederick Douglass, who demanded citizenship “not as aliens nor as exiles,” but as “Americans.” Its authors and supporters promised, over and over again, that it would exclude the children of “persons temporarily resident” here, whom “we would have no right to make citizens.” In Senator Trumbull’s words: “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, for decades after ratification, it was interpreted by all three branches of Government and by a wide range of legal authorities to be limited to people who were already Americans.

The ordinary principles of constitutional interpretation—the ones on which this Court typically relies when presented with a constitutional question such as this one—support the conclusion that the Citizenship Clause requires domicile. That conclusion is supported by the constitutional text, contemporaneous evidence, early executive practice, early legislative practice, judicial precedent, and all of the other indicators of original public meaning. The Court’s alternative account does not have a similar degree of support.

The Citizenship Order is therefore, insofar as it applies to persons not domiciled here, consistent with the Citizenship Clause. It is consistent with the

Citizenship Clause in its exclusion of the children of lawful temporary visitors, such as birth tourists. The exclusion of the children of lawful temporary visitors—who are, by definition, not domiciled here—was originally a matter of widespread agreement. As to them, the Citizenship Order does exactly what the Executive Branch did for most of the rest of the 19th century, what this Court said that it could do, and what scholars for decades confirmed that it could do. And, the Order is at least facially consistent with the Citizenship Clause in its exclusion of the children of illegal aliens because at least some such persons are not domiciled here, and therefore also are not citizens.³ . . .

a

The Court defines the phrase “subject to the jurisdiction” of the United States to refer to “the power of the United States to govern those within its territory.” It then says that at least three categories of persons born within United States territory are not subject to its jurisdiction.

First, a person is not subject to the jurisdiction of the United States when the Government “impliedly waive[s]” its regulatory power over him. The Court understands this category to exempt all children of “representatives of foreign sovereigns,” endeavoring to capture a longstanding principle that such children were not entitled to citizenship. . . . [I]f the political branches can deny someone citizenship by “waiv[ing]” their regulatory power over him, then they can deny citizenship to any child in America, even if his family has lived here for generations and has no other home. The better explanation for excluding the children of foreign representatives is that they were not domiciled in the United States.⁴

Second, the Court says, a person is not subject to the jurisdiction of the United States when the Government lacks “actual power” over him. This category,

3. Because this case presents a facial challenge and no one disputes that lawful temporary visitors and some illegal aliens are not domiciled here, I would reserve for another day the question whether the children of illegal aliens *can* be domiciled here. The Government and several scholars have suggested some reasons why, they believe, illegal aliens can never be domiciled here. An illegal alien’s entry and presence violate federal law. He is subject to potential removal at any time. And, some authorities have suggested that domicile requires permission to remain. Therefore, when presented with variations on this question in other contexts, some courts have concluded that an alien who wishes to remain in the United States in violation of federal law cannot be “domiciled” here because he “lacks the legal capacity to establish domicile.” That said, many others understandably have suggested that long-term resident illegal aliens satisfy the elements of domicile because they reside here with the intent to permanently remain. As Justice Gorsuch explains, the children of such aliens may be domiciled here because they are “born here to parents who have long chosen to make this Nation their permanent home.” Such questions are best resolved in the context of as-applied challenges.

4. Diplomats and other foreign officials were likely mentioned specifically in accounts of the scope of citizenship for another reason. They shared much in common with domiciliaries—they were often not transient visitors, but instead stayed in the country for long indefinite periods (and were likely to have and raise children here)—but the law treated them uniquely and presumed that they were not domiciled regardless of the duration of their residence.

presumably, is an attempt to accommodate the consensus that citizenship would not have been granted to the children of foreign invaders. But, while the child of a foreign invader is of course not constitutionally entitled to citizenship, it is not because America lacks “actual power” over him. If it were, then citizenship could be denied to any American over whom the Government happened to lack “actual power” at birth. The more likely reason why foreign invaders are not citizens is that they too are foreign and not domiciled here.

Third, the Court says, a person is not subject to the jurisdiction of the United States when he is a “membe[r]” of an “alien and sovereign” nation. This category reflects the Court’s attempt to accommodate the historical record that the Citizenship Clause excluded the children of Indians in tribes. But, the Court cannot explain why tribal Indians were not “subject to the jurisdiction” of the United States if they happened to be born outside Indian lands while foreign temporary visitors were. . . . But, temporarily visiting foreigners also belong to “alien and sovereign” nations, and the United States’ relations with them also implicate “intersovereign concerns.” It is difficult to understand why China, for example, would be less alien or less sovereign than the Cherokee Nations. It is also difficult to understand why tribal Indians would be less entitled to American citizenship if born on non-Indian land within the United States than children of birth tourists who immediately returned to China.

b

IV

The Court’s alternative history is mistaken.

A

. . . The first pillar of the Court’s theory is *Calvin’s Case*, a 418-year-old English common-law decision. *Calvin’s Case* held that a child born in Scotland could hold land in England. . . . The English principle was a rule of feudal servitude, not a rule of citizenship. . . . The English feudal principle “was not accepted by the American governments.” Report of 1868. . . . Americans . . . dissolved “all Allegiance to the British Crown.” Declaration of Independence. And, they set up a new system of government in which the people were not regarded as servile dependents. Instead, the people were sovereign, and the government derived its legitimacy from them. Declaration of Independence. In this new system of government, feudalism had no place. See M. Rothbard, *Conceived in Liberty* (2011). The soil did not belong to the government, but to the people. And, those who were born on it did not owe the government a lifetime of obeisance or servitude. . . . The Reconstruction Congress expressly opposed the feudal principle that the Court claims that it adopted. . . .

The second pillar of the Court’s theory is *Lynch v. Clarke*—a “single state-court case about citizenship” from 1844. . . . The Court’s reverence for *Lynch v. Clarke* is not commensurate with its importance. *Lynch* was not a

precedent of this Court, or any federal court, or any state appellate court, or even a court of law. Instead, it was decided by a New York “assistant vice-chancellor” in a court of equity’s equivalent to a trial court. . . . Lynch also did not interpret the Citizenship Clause, a statute using the same language as the Citizenship Clause, or even a statute that remained in effect at the time of the Citizenship Clause. Instead, it interpreted a New York state law. . . . Lynch also lacked staying power. By the time of the Citizenship Clause, New York’s higher courts had all but abrogated it. . . .

Then, “during the Fourteenth Amendment debates of the Thirty-Ninth Congress, *Lynch* went unmentioned. It was only during the Civil Rights Act [debates] that *Lynch* appeared—a single mention by a member who played no role in drafting the Fourteenth Amendment.” Lash, 101 Notre Dame L. Rev.; see Epstein, *The Myth of Birthright Citizenship*. So, while this Court’s opinion invokes *Lynch* 13 times in 26 pages, the entire Reconstruction Congress in the combined course of deliberations over the Civil Rights Act and the Citizenship Clause mentioned it only once. . . .

[Chief Justice Roberts responded to the dissenters’ claim that New York’s courts had abandoned Lynch: “When New York’s highest court heard the case, however, it did not follow the lower court’s reasoning; it relied instead on *Lynch v. Clarke*. See *Ludlam v. Ludlam* (N.Y. 1863).” —Eds.]

As for the remainder of the Court’s reasoning, much of it is self-defeating.

To begin, the Court invokes Frederick Douglass’s statement that “[t]he Constitution knows all the human inhabitants of this country as ‘the people.’” But, temporary visitors are not “inhabitants”; to be an inhabitant, a person must be domiciled. And, Frederick Douglass himself argued that blacks were citizens because they were not comparable to temporary visitors—they were not “aliens”; they were not “exiles”; and they were not “strangers.” Instead, they were “Americans,” he said, who—unlike temporary visitors—“owe equal allegiance to the same government.”

Likewise, the Court invokes Attorney General Bates’s statement that persons born here were “*prima facie*” citizens. But, the Court does not seem to be aware that this phrase corresponds to the rule of domicile that the Court rejects. . . . If a person’s parents were domiciled abroad, then the *prima facie* case was overcome.

Beyond these statements, the Court mainly emphasizes that the children of temporary visitors owed a partial “allegiance” to and were owed partial “protection” from the sovereign. That (undisputed) fact does not demonstrate that the children of these visitors were citizens. To the contrary, Senator Trumbull explained that the Civil Rights Act was written to avoid this very misunderstanding: The Act said “not subject to any foreign power” instead of “owing allegiance” to the United States precisely because temporary visitors owed a partial allegiance to the United States, and he did not want anyone to mistakenly conclude that the Act included the children of temporary visitors. The language chosen thus excluded temporary sojourners, who “continue[d] to owe allegiance to [their] native country.”

Finally, the Court relies on general statements without recognizing that those statements are also compatible with my view of the Citizenship Clause. The Citizenship Clause indeed followed the pre-existing law, but the pre-existing law

was based on domicile; children born here to foreign parents indeed were generally citizens, but that is because they were generally domiciled here; and citizenship did indeed almost always follow birthplace, but that is because birthplace almost always followed domicile. . . .

B.

. . . The Court ultimately denigrates the evidence in support of my position as “scant.” I see it differently. The Court cites little evidence from the Reconstruction Congress that gave us the Citizenship Clause. And, its other 19th-century evidence is slim in comparison. As for the evidence in support of my position, it is substantial. Representative Bingham, the architect of the Fourteenth Amendment, believed that the Citizenship Clause would not apply to the children of temporary visitors. Senator Trumbull, a principal champion of the Amendment, agreed. Jacob Howard, who introduced the Citizenship Clause, agreed. Congressman after Congressman during the legislative debates agreed. Congress in 1870 agreed. President Grant’s Attorney General agreed. President Grant’s Attorney General before that agreed. The Supreme Court in 1873 agreed. State legislatures agreed. Executive Branch decisionmakers over the course of multiple decades agreed. Justice Miller agreed. Thomas Cooley agreed. A battery of other eminent scholars agreed. And, the great Justice John Marshall Harlan, on three separate occasions, agreed. Once again, “I am quite comfortable in the company I keep.” *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007) (Thomas, J., concurring).

VI

The Fourteenth Amendment was enacted in the wake of the Civil War, “with the one pervading purpose” of securing equal citizenship for the freed slaves. *Slaughter-House Cases*. It was enacted, as Justice Harlan wrote, “to secure to a race recently emancipated” the “civil rights” that other citizens enjoyed. *Plessy*.

This Court has time and again denied Americans that promise. Shortly after the Amendment was ratified, this Court deprived black citizens of the right to peaceably assemble and to keep and bear arms. See *United States v. Cruikshank* (1876); see *McDonald* (Thomas, J., concurring in part and concurring in judgment). A little later, in *Plessy*, the Court upheld the subjugation of black citizens in the form of state-coerced racial segregation. When it had an opportunity to correct that profound error, it did so narrowly. See *Brown v. Bd. of Ed.* (1954). It then used that very decision to justify busing American children to different schools based on their race. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, (1971). And, until recently, this Court continued to selectively enforce our colorblind Constitution, including by allowing state-coerced racial discrimination in public education, *Grutter v. Bollinger* (2003), and compelling States to draw political districts on the basis of race, *Allen v. Milligan* (2023).

Meanwhile, the Court has repurposed the Fourteenth Amendment to protect its own set of preferred rights that the Reconstruction Congress never contemplated and that cannot find support in its text. Today, the Court does so again by recognizing a constitutional right to citizenship for the children of all foreign birth tourists and illegal aliens.

VII

I am not sure that today's opinion will stand the test of time. The Citizenship Clause "added greatly to the dignity and glory of American citizenship." *Plessy* (Harlan, J., dissenting). Today's opinion devalues that citizenship. I respectfully dissent.

* * *

JUSTICE ALITO, dissenting.

This is one of the most important decisions in the history of the Court, and in my judgment, the Court has made a serious mistake. As interpreted by the Court today, the Fourteenth Amendment confers citizenship on virtually everyone who happens to be born in this country, including the children of "birth tourists," women who come here solely for the purpose of giving birth to a child and then promptly return home. Careful analysis of the text of the Fourteenth Amendment and the process that led to its adoption shows that it does not degrade the concept of United States citizenship in this way. Instead, the Fourteenth Amendment confers citizenship on only those children who, at birth, owe allegiance solely to this country.

Respecting this interpretation would not require uprooting the millions of children who were born here to mothers who entered or remained in this country illegally. Those children are not responsible for their parents' violation of our immigration laws, and their plight is the result of a long period during which a coterie of actors—Executive Branch officials, States and cities, and a variety of private groups—sent the message to would-be immigrants that our immigration laws should not be taken too seriously. This message, coupled with ineffective or unenthusiastic enforcement, spurred massive illegal immigration and the growth of a large contingent of people who were born here to mothers unlawfully present in this country. Some members of this group have lived here for years, and they have a strong moral claim to be able to remain in the land where they grew up.

Congress can and should address their situation. The Fourteenth Amendment dictates who *must* be a citizen, but it does not address who *may* be a citizen by Act of Congress. Congress has conferred citizenship on many people who are not made citizens by the Fourteenth Amendment, including children born abroad to American citizen parents. These people and the millions of immigrants who have been naturalized are no less American than those who are fortunate enough to be born here.

For these reasons, the original meaning of the Fourteenth Amendment does not require inhumane results, and we should not adopt an erroneous interpretation of

the Fourteenth Amendment simply out of fear of the consequences of “rocking the boat” or as a reaction to current immigration policy.

Nor should we take the position that our hands are tied by dicta in a sprawling 19th-century opinion that is, to put the point gently, very far from a model of careful judicial craftsmanship. Too much is at stake.

United States citizenship is precious. Anyone who has attended a ceremony where citizens are naturalized can see that message on the faces of those who take the citizenship oath. Before saddling the Nation with a medieval rule, we had better be certain the Constitution requires it.

The Court’s account of the birthright-citizenship rule in American law is roughly as follows. After American independence, the British rule of birthright subjecthood was modified in just one way (to take account of Indians who lived under tribal governance), but otherwise the rule was transplanted intact to American soil. As modified, the rule was that a child born in this country is automatically an American citizen unless the child is born to tribal Indians or to a diplomat with immunity from legal process. During the period before the Civil War, the rule’s status was firm. After the war, Congress codified the rule in § 1 of the Fourteenth Amendment. And in *United States v. Wong Kim Ark* (1898), this Court issued a binding precedent confirming what Congress had done.

Every step of this story is incorrect. The Declaration of Independence repudiated the foundation on which the British rule was based. From 1776 until the eve of the Civil War, the status of the rule in this country was unsettled. There is no evidence establishing that the Constitution’s references to citizens incorporated the British rule, and until the eve of the Civil War, there was little litigation about the meaning of American citizenship. After the war, Congress finally adopted a constitutional provision, § 1 of the Fourteenth Amendment, making certain persons citizens at birth, but that provision differed substantially from the British rule. It specified that a person born here is not a citizen unless his allegiance to the United States is unimpaired by any obligations to a foreign power. And while *Wong Kim Ark* included dicta suggesting that the Fourteenth Amendment incorporates the British rule, its actual holding was much narrower, and under that interpretation, respondents’ challenge to Executive Order No. 14160, Protecting the Meaning and Value of American Citizenship.

I

A

According to the Court, the Fourteenth Amendment’s Citizenship Clause codified the British rule of birthright subjecthood with only one new exception, which was needed to accommodate the unique status of American Indians. That is a curious claim, and it is ironic that the Court should embrace it only days before we celebrate the 250th anniversary of our Declaration of Independence, which emphatically renounced the foundation on which the British rule rested.

That rule did not concern “citizenship.” There was no such thing as a “citizen” of England, Scotland, or Ireland. The inhabitants of the British Isles were the King’s

“subjects.” As Sir Edward Coke explained in *Calvin’s Case* (K. B. 1608), they acquired that status automatically at birth, and they retained it, like it or not, until they died. This status arose from a feudal understanding of the origin of governmental authority and the relationship between those who govern and those who are governed. . . . In this system of soil and servitude, the Court sees “emancipation.” But our Founders disagreed. The Declaration of Independence emphatically rejected the British theory of government. It proclaimed that governments “deriv[e] their just powers from the consent of the governed,” not divine right. And it “[a]bsolved” the people of the United States “from all Allegiance to the British Crown.”

With its foundation blown away, the British rule of birthright subjecthood was not suited for easy incorporation into American law. In addition to the incompatibility of its theoretical foundation, two distinctively American practical problems stood in the way.

The first was the problem of slavery and, more broadly, of race. In England itself, the number of slaves had never approached American dimensions. Just four years before the American Colonies declared independence, Lord Mansfield’s decision in *Somerset v. Stewart* (K. B. 1772), denied that slavery had any common-law foundation. And it would soon disappear. In the United States, on the other hand, nearly 700,000 lived in slavery—roughly one-fifth of the country’s population—according to the first census in 1790. And since the contemporary definition of a citizen was a “freeman of a city; . . . not a slave,” 1 S. Johnson, *A Dictionary of the English Language* (4th rev. ed. 1773), it was obvious that neither the Articles of Confederation nor the Constitution, both of which allowed slavery to continue, recognized the members of this sizeable population as citizens.

Even for the free black population of the United States, there was substantial opposition to application of the British rule. Many States, both in the South and Midwest, restricted the rights traditionally associated with citizenship—such as the ability to settle, vote, and serve as a witness in court—to white residents. And there was some federal support for this understanding of citizenship.⁵ In Britain, on the other hand, as the Court notes, the common law did not take account of race.

The second problem was the unique legal status of Indian tribes in the United States. Under the Clause of the Constitution allocating seats in the House of Representatives and Presidential electors, “Indians not taxed” were excluded from the body politic and thereby denied citizenship. Art. I, § 2, cl. 3. This provision did not require census takers to determine whether individual Indians owed or paid taxes. Instead, the phrase referred to those Indians who retained their traditional way of life. They lived in their own communities under tribal law and enjoyed the “privilege of total immunity from State taxation.” It is hard to find estimates of the size of this segment of the population at the end of the 18th century, but it was certainly significant.

5. Under the Naturalization Act of 1790, only a “free white person” could become a citizen.

The existence of these two big carveouts refutes any argument that the British rule was transplanted without modification to American soil. And any attempt to plant some version of that rule here also faced the problem of applying it to a Nation that, unlike Britain, had a written Constitution and a federal system. . . .

The important point for present purposes is that during the antebellum period, there was no settled understanding about the meaning of citizenship under the Constitution. And there certainly was no settled understanding about the citizenship of a child born on United States soil to parents whose presence in the country was unlawful. That was a situation that could not have occurred. . . .

2

The Court interprets “subject to the jurisdiction thereof ” differently. In its view, the phrase simply means subject to the laws that apply to everyone who is present within the country’s borders. That interpretation, however, presents fatal problems.

First, it gives the Fourteenth Amendment’s citizenship test a meaning that plainly differs from that in the Civil Rights Act, even though it is beyond any reasonable dispute that Congress did no such thing. To justify its departure from the Civil Rights Act, the Court argues that the Act “raises more questions than answers” and that the Fourteenth Amendment “ ‘better’ expresses the views of the Reconstruction Congress.” But, as I see it, deciding whether someone is “subject to any foreign power” raises far fewer questions than deciding whether that person is “subject to the jurisdiction” of the United States. The Court’s commitment to avoiding the straightforward text of the Civil Rights Act strongly suggests that something is amiss.

Second, the Court cannot explain why the Fourteenth Amendment did not confer citizenship on children born in the United States to tribal Indians. As explained, federal law governed those children and their parents to the extent the Federal Government wished. If the Court were right that the Citizenship Clause applies to anyone who is born here and is subject to our laws, then the Fourteenth Amendment would have conferred citizenship on all tribal Indians. But the exception for tribal Indians was well-established at the time and remained until Congress eliminated it by statute.

Third, the Court cannot explain why the phrase “subject to the jurisdiction” of the United States applies to naturalized citizens. All naturalized citizens, like everyone else who is present in this country, must obey the law, so if that phrase meant what the Court thinks, it is superfluous. By contrast, if it means not being “subject to any foreign power,” it serves an identifiable purpose and explains why the naturalization statutes, both before and after the adoption of the Fourteenth Amendment, required those seeking naturalization to renounce allegiance to any other country.

For these reasons, the Court’s interpretation of the Fourteenth Amendment’s Citizenship Clause fails on textualist grounds.

As a result of the events of the past 50 years, the United States now has a huge contingent of people who entered or remained in this country illegally, as well as a large group of people who were born here to such parents. The Court's interpretation of the Fourteenth Amendment makes all the members of this latter group citizens. Many of those who have grown up here now have a strong moral claim to be allowed to remain, but that is a matter that the Fourteenth Amendment, when properly interpreted, leaves to Congress. . . .

V

. . . A great many persons who are born here to illegal immigrant parents fail this test because at birth they are automatically made nationals of their parents' native country and, as a result, incur duties to that country. This means that they are "subject to a foreign power" and are thus not "subject to the jurisdiction" of the United States within the meaning of the Fourteenth Amendment. . . .

In all likelihood, the Executive Order is also constitutional as applied to nationals from a great many other countries, but no such showing is needed here.

Indeed, showing merely that the Executive Order is valid as applied to a child born to a birth tourist would be enough to defeat respondents' facial claim. That is why the Court goes out of its way to hold that even a child born to a mother who is here for only a brief time is a citizen under the Fourteenth Amendment.

The Court's interpretation is not only contrary to the original meaning of the Fourteenth Amendment, it produces grotesque results. While foreigners who wish to immigrate lawfully must sometimes wait for many years, a child born here to a birth tourist is automatically a citizen. . . . The Court's interpretation saddles this country with an ancient British rule that even the United Kingdom has abandoned, as have other countries whose legal systems share the same pedigree.

The Court's interpretation preserves a powerful incentive to enter or remain in this country illegally. Immigrants naturally prefer affluent countries where economic opportunities are available. Other than Canada, the United States will be the only affluent nation where birth alone is enough to establish citizenship.

If the Fourteenth Amendment required these results, the country would have to live with them or amend the Constitution. But the Fourteenth Amendment does not include the rule the Court now imposes on the country. In my judgment, the Court has made a mistake that will seriously affect the country's future.

JUSTICE GORSUCH, dissenting.

At the heart of today's dispute lie two competing views of the Fourteenth Amendment's Citizenship Clause. On one account, the Clause incorporated the English common law rule of *jus soli* (literally, the "right of the soil"). That rule, developed in feudal times, had more to do with being a subject than a citizen. It was based on the notion that a "man owed personal service to the lord of the soil, the same as his master owed it to the king; and it was born with the child and only ended in the grave." On the other account, the Clause adopted a distinctly

American settler's view of citizenship. One that promises the full "dignity and glory of American citizenship" to any child born in this country to parents who have made this Nation their permanent home, regardless of their race, religion, or national origin. *Plessy v. Ferguson* (1896) (Harlan, J., dissenting). To my eye, the latter understanding better accords with the Clause's original public meaning and that leads me to join Justice Thomas's dissent. . . .

Finally, just because the executive order has some lawful applications and can survive a facial challenge does not mean it is lawful across the board and immune from narrower legal challenges. Besides addressing temporary visitors, the order also denies the benefits of citizenship to children born in this country to parents who make their permanent home here, but do so in defiance of federal immigration laws. . . . Is a child born here to parents who have long chosen to make this Nation their permanent home not a citizen under the Fourteenth Amendment solely because his parents' presence violates statutory law? If those parents are not domiciled here, then where are they domiciled? And if the answer is nowhere, how can we reconcile that conclusion with this Court's longstanding recognition that every person is domiciled somewhere? Because the executive order is not facially invalid, these questions may not be properly before us. But their answers are undeniably important to a Nation committed to a view of citizenship open to all children born here to parents who can call this country their home.

2. Evidence of Original Meaning

In this section we separate four different types of evidence about the original meaning of the text: (a) the analysis of the text itself; (b) the context provided by the Civil Rights Act of 1866, which the Citizenship Clause "constitutionalized"; (c) the Congressional debate over the wording of the Citizenship Clause; and (d) the subsequent practice of the executive branch. The Supreme Court commonly relies on each type of evidence to identify the original public meaning of the text. We separated how the Justices discuss each type of evidence to allow you to more easily decide which side has the strongest originalist argument.

a. Textual Analysis

Trump v. Barbara – Part II 609 U.S. __ (2026)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

The Citizenship Clause mirrored the common law's criteria for citizenship. The Clause starts, like the common law, with territory—a child must be "born . . . in the United States," not elsewhere (even to American parents). And the Clause ends, again like the common law, with sovereign power—a child must be "subject to the jurisdiction" of the United States, unlike (say) the families of foreign

ministers. A child born on American soil and subject to American law was made an American citizen.

Even the *language* of the Clause is that of the common law. *Lynch* [v. *Clarke*] held that American citizenship extended to “all persons born within the jurisdiction of the United States.” So did Chancellor Kent. So did the first legal treatise on the rights of free black Americans. And so did the famed antebellum lawyer Horace Binney. Little wonder, then, that the Citizenship Clause’s principal author would explain that its language was “simply declaratory of . . . the law of the land already.”

That law was clear. Any child who was born “under the protection of” the United States—that is, any child for whom no extraterritorial fiction applied—was made a citizen, for he owed a natural “allegiance” (and thus “obedience”) to the Nation. . . .⁶

Even putting the common law to one side, the Citizenship Clause’s key phrase—“subject to the jurisdiction”—requires the same result. The word “jurisdiction” was hardly unknown to the drafters and ratifiers of the Fourteenth Amendment. Congress chose to use an established legal term and the Clause must be interpreted in that light.

In 1868, as today, “jurisdiction” (in the context of a sovereign) refers to the “[p]ower of governing or legislating.” To be “subject to” the jurisdiction of the United States, then, is to “liv[e] under” its “dominion,” a meaning reinforced by the Clause’s territorial focus on those born “in” the United States. The Citizenship Clause uses jurisdiction in its ordinary sense—referring to the power of the United States to govern those within its territory. . . .

The ordinary legal meaning of the text of the Clause thus neatly captures the common law rule, with its broad reach and narrow exceptions. The same groups included (and excluded) by *jus soli* [of the soil] were included (and excluded) by the conventional understanding of jurisdiction. Excluded by both were the children of foreign ministers and members of 19th-century Indian tribes over whom the United States had ceded a part of its territorial jurisdiction to preserve its relationship with a foreign sovereign (or quasi-sovereign).

No such intersovereign concerns apply to children born of parents unlawfully or temporarily present in the United States; no foreign sovereign would “have any motive for wishing” them outside this Nation’s authority. Those children are

6. The Government briefly contends that *Elk v. Wilkins* (1884) adopted its unconventional understanding of jurisdiction. That is mistaken. *Elk* addressed the citizenship of a child “born a member of one of the Indian tribes.” And *Elk* hewed to the very same common law rule announced by Chancellor Kent in 1823—indeed, it even cited him. The Court reasoned that tribal members were “no more ‘born in the United States and subject to the jurisdiction thereof’ ” than “children born within the United States, of ambassadors or other public ministers of foreign nations.” In both contexts, after all, the United States had voluntarily “cede[d] . . . a part of its territorial jurisdiction” to another sovereign (or quasi-sovereign). As the Court later confirmed, *Elk* “concerned only members of Indian tribes within the United States.” Beyond that unique intersovereign relationship, the Court’s decision “had no tendency to deny citizenship to children born in the United States of foreign parents . . . not in the diplomatic service of a foreign country.”

thus subject to the jurisdiction of the United States. They satisfy both elements of the Citizenship Clause: they are “born . . . in the United States” and “subject to the jurisdiction thereof.” Under the Constitution, they are citizens at birth. . . .

If Congress intended to limit American citizenship to the children of those domiciled in the United States, nothing in the succinct language of the Citizenship Clause conveyed that design. Words appearing frequently in the Executive Order—“mother,” “father,” “lawful,” “temporary”—are absent from the Clause. For a simple reason: they did not matter. And while the Clause does ensure state citizenship attaches for U. S. citizens in “the State wherein they reside,” Amdt. 14, §1, the explicit invocation of residence for state citizenship only highlights its absence from the criteria for U. S. citizenship. See *Slaughter-House Cases*, 16 Wall. 36, 74 (1873) (a person can “be a citizen of the United States without being a citizen of a State”).

When the principal dissent does grapple with the operative legal text—“subject to the jurisdiction” of the United States—it has little to say. It argues only that a person is “subject to the jurisdiction of the government of his domicile.” But that is not the question. The question is whether a person is “subject to the jurisdiction” of the government of the country in which he is physically present, even if he is only there temporarily. He is (unless he falls under one of the familiar exceptions, such as for ambassadors). . . .

The scope of that power was well settled in 1868, largely by “the celebrated case” of *Schooner Exchange v. McFaddon* (1812). Expounding on “general principles,” Chief Justice Marshall explained that “jurisdiction” referred to “the full and complete power of a nation within its own territories.” That “absolute” power was “susceptible of no limitation not imposed” by the nation itself. All sovereigns, however, were understood to have impliedly waived their jurisdiction in “certain peculiar circumstances”—in essence, where exercising jurisdiction would “degrade the dignity” of “foreign sovereigns.” As in the context of *jus soli*, those peculiar circumstances arose most frequently in the case of “foreign ministers.” “[E]very sovereign would hazard his own dignity,” after all, if his officials abroad were made to “owe temporary and local allegiance to a foreign prince.” The limits of that exception were carefully defined. Still within the United States’ power were the “private individuals” of a foreign nation who had “spread themselves through [our territory] as business or caprice may direct.” “[I]t would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction,” Chief Justice Marshall explained, “if such individuals or merchants . . . were not amenable to the jurisdiction of the country.” . . . Just like *jus soli*, a sovereign’s jurisdiction made no exception for those only temporarily present within the sovereign’s territory. Instead, nearly everyone within the territorial boundaries of the United States was “amenable to” the Nation’s jurisdiction.

To avoid these problems, the principal dissent spends much of its time on the text of the Civil Rights Act. (JUSTICE ALITO does the same—albeit in service of a different result.) [Chief Justice Roberts’ critique of Justices Thomas and Alito’s reliance on the Civil Rights Act appears below.—Eds]

JUSTICE THOMAS, with whom Justice Gorsuch joins, dissenting. . . .

The constitutional text supports the conclusion that the Citizenship Clause requires domicile. . . . The Citizenship Clause guarantees citizenship to persons who were both born in the United States and “subject to the jurisdiction thereof.” Amdt. 14, § 1. At the time that the Citizenship Clause was adopted, the phrase “subject to the jurisdiction” referred to the legal relationship that a person had to the government of his domicile. That legal relationship included the government’s power over the domiciliary’s personal affairs, power to regulate his conduct everywhere, and power to impose personal taxes on him. It also included the reciprocal relationship of protection abroad and primary allegiance. A government lacked the powers associated with this relationship, and thus lacked complete jurisdiction, over temporary visitors. Temporary visitors remained subject to the jurisdiction of their home country. Hence, a person was “subject to the jurisdiction” of the government where he was domiciled. . . .

This interpretation accords with the contemporaneous evidence that would have informed the public meaning of the text. It is consistent with the Civil Rights Act’s requirement that citizens be “not subject to any foreign power.” A person born in the United States to temporary visitors was subject to a foreign power—namely, the power of his home country in which he retained his domicile. It is consistent with the early American law of state and national citizenship, which turned on domicile. It overrules *Dred Scott* because it restores the rule of decision under which Scott should have won—namely, that he was entitled to sue as a “citizen” of Missouri because he had a “permanent domicil in the State.” *Dred Scott* (McLean, J., dissenting). It excludes tribal Indians because they remained first and foremost subject to their separate nations, which alone had complete jurisdiction over them. And, it ensures that the freedmen, who were clearly American, would not be denied citizenship based on a racial caste system.²

In other words, the phrase “subject to the jurisdiction” meant what the drafters and ratifiers said that it meant: “‘complete jurisdiction’” (statement of Sen. Trumbull); “fully and completely subject to the jurisdiction of the United States” (statement of Sen. Williams); “the jurisdiction of the United States in every sense”; and a “full and complete jurisdiction,” “coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now,” (statement of Sen. Howard).

The phrase thus also had the implication that the drafters and ratifiers said that it had: The children of temporary visitors were not citizens. The Citizenship Clause, they said, “w[ould] not, of course, include persons born in the United

2. Some have asked whether freed slaves were domiciled here given that their ancestors were brought here against their wills. It was firmly established that freed slaves were domiciled here. Those who argue that blacks were not domiciled in the United States would have concurred in the judgment in Chief Justice Taney’s opinion in *Dred Scott*, the outcome of which turned on whether Dred Scott was domiciled in Missouri.

States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers.” (statement of Sen. Howard). After all, “we would have no right to make citizens” of “persons temporarily resident” in the United States. (statement of Sen. Trumbull). . . .

[T]he Court does not even identify anyone who expressed the feudal principle in the relevant language—“not subject to any foreign power” or “subject to the jurisdiction” of the United States. The closest that it comes is *Lynch v. Clarke*’s use of the phrase “within the jurisdiction,” language that denotes “territorial jurisdiction,” *Schooner Exchange v. McFaddon* (1812). But, Congress conspicuously chose not to use that broader territorial phrase in the Citizenship Clause. Notably, the Fourteenth Amendment elsewhere says that no State may “deny to any person *within its jurisdiction* the equal protection of the laws.” § 1 (emphasis added). The Citizenship Clause does not use that territorial phrase. See Brief for Professor Richard A. Epstein as *Amicus Curiae* (explaining that the Equal Protection Clause refers to all persons “*within its jurisdiction*” and that “the phrase ‘subject to the jurisdiction thereof’ means something other than ‘within the jurisdiction’”). Thus, while “jurisdiction” can refer to mere territorial jurisdiction, which a government of course exercises over temporary visitors, the Citizenship Clause did not adopt that sense of jurisdiction.

I would not interpret “subject to the jurisdiction” to refer to the exclusion of three bespoke categories of persons whose relationship to the sovereign was not described in those terms. There is a simpler interpretation of the text that was expressly endorsed by those closer in time to ratification: Children born to diplomats, hostile alien occupiers, and Indians in tribes were not citizens because they were not subject to the complete jurisdiction of the United States. For the same reason, the children of foreign temporary visitors, who were also not subject to the complete jurisdiction of the United States, were also not citizens.

JUSTICE ALITO, dissenting. . . .

After the Civil War, Congress faced enormous challenges, and one of these was ensuring that all black Americans, both the newly freed slaves and those who were free before the war, would be treated as citizens of the United States and of the States in which they lived. Congress addressed that issue in the landmark Civil Rights Act of 1866 and then again in the Fourteenth Amendment. For the first time in the Nation’s history, these enactments provided a national rule on citizenship, and the meaning of that rule is the question that the Court now addresses.

In tackling that question, an avowedly textualist Court should start by carefully examining the text of the Citizenship Clause of the Fourteenth Amendment.

That Clause states: “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.”

Thus, birthright citizenship has two separate elements. First, a person must be “born in the United States,” and second, he or she must be “subject to the

jurisdiction thereof.” It is therefore critical to ascertain the meaning of “subject to the jurisdiction thereof.” And that is no easy task because, as we have often remarked, jurisdiction is a term of many meanings. *Wilkins v. United States* (2023). We must therefore determine which one applies here.

If “subject to the jurisdiction” of the United States had been a term of art during Reconstruction, we would presumably hold that the phrase has that meaning in the Fourteenth Amendment. But that phrase was not a term of art, and the Court does not claim it was.

If the Citizenship Clause set out specifically named exceptions to the general rule of citizenship by birth, our job would be easy; we would follow those exceptions. But the Citizenship Clause is framed differently. It sets out a general rule: Citizenship is not conferred upon a person born in the United States unless that person is also “subject to the jurisdiction” of the United States. By its terms, that rule applies across the board. And when a legislative body chooses to adopt a generally worded rule, we apply it in all circumstances that fall within the rule, not just those that were on the minds of the legislators at the time of adoption. We approach constitutional interpretation similarly.

So what does the phrase “subject to the jurisdiction thereof ” mean? Unfortunately, the text of the Fourteenth Amendment does not provide a definitive answer, but it supplies two valuable clues.

First, § 1 of the Fourteenth Amendment uses the word “jurisdiction” twice—once in the Citizenship Clause and once in the Equal Protection Clause—and the wording of the two clauses differs. The Citizenship Clause applies to those “*subject to the jurisdiction*” of the United States, whereas the Equal Protection Clause applies to “any person *within* [a State’s] jurisdiction.” When Congress uses disparate language (especially in the same provision), we presume that the difference matters. Therefore, we must presume that the scope of the two provisions is different.

Second, the phrase “subject to the jurisdiction” of the United States applies not only to those who are born in this country but also to those who are “naturalized.” After all, Congress would not include both qualifiers unless they were both doing some work. Accordingly, there must be some people who are naturalized but are not “subject to the jurisdiction” of the United States. In other words, whatever “subject to the jurisdiction” of the United States means, it must mean something that is not inherent in naturalization. . . .

The Court does not confront these problems because it pays little attention to the constitutional text. Instead of performing its own textual analysis, the Court leans on precedent that glosses the text. But none of the cases it cites analyzed the text of the Fourteenth Amendment’s Citizenship Clause. . . .

b. Contextual Evidence: The Civil Rights Act of 1866

The Civil Rights Act of 1866 declared that “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.” Moreover, “such citizens, of every race and color” would have the rights, which were widely considered to be the “privileges or immunities” of citizenship. It was clear enough that under the statute, people born as slaves would be citizens, and would be entitled to these rights. This was contrary to the holding of *Dred Scott*. But could Congress reverse a constitutional ruling of the Supreme Court by a statute? Some in Congress had their doubts even after super majorities of both houses overruled President Johnson’s veto of the Civil Rights Act on constitutional grounds.

To ensure its constitutionality—and also prevent its repeal by a future Congress—the protections of the Civil Rights Act were added to the Constitution by the Fourteenth Amendment. Yet its Citizenship Clause employed different language. The Citizenship Clause in Section 1 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.” Was there a difference between “not subject to any foreign power” and “subject to the jurisdiction thereof”? Scholars have debated why the language had changed and what, if any, difference it made. One theory is that because “not subject to any foreign power” did not extend to tribal “indians not taxed,” the broader “subject to the jurisdiction thereof” embraced tribal Indians as well as diplomats and invading armies.

It was clear enough that people born as slaves were “not subject to any foreign power” and were not “subject to the jurisdiction” of the United States. But what about children born to immigrants? Did it matter if immigrant parents were domiciled in the United States or had any foreign allegiances? Were the children of temporary visitors to the United States citizens?

The next excerpt of *Barbara* will focus on the original meaning of the Civil Rights Act of 1866 and how it may have informed the original meaning of Section 1 of the Fourteenth Amendment.

STUDY GUIDE

- Does the language of the Civil Rights Act of 1866 refer to domicile?
- Under the Civil Rights Act of 1866, would children born to temporary visitors become citizens? Do the congressional debates for this statute shed light on this question?
- Can a person who is “subject to any foreign power” be domiciled in the United States?
- What is the difference between “*subject to the jurisdiction thereof*” in the Citizenship Clause and “*within its jurisdiction*” in the Equal Protection Clause? Why was different wording used in the same section of the Amendment?
- How does the majority understand the relationship between the Citizenship Clause of the Civil Rights Act of 1866 and the Citizenship Clause of the Fourteenth Amendment? What is the significance of the different wording? Why do Justices Thomas and Alito contend these provisions had a similar meaning?

Trump v. Barbara – Part III
609 U.S. __ (2026)

CHIEF JUSTICE Roberts delivered the opinion of the Court. . . .

The Reconstruction Congress did not start from scratch. In the midst of the Civil War, President Lincoln’s Attorney General, Edward Bates, had issued a landmark opinion that sought to displace *Dred Scott* in favor of the common law. Citing the key authorities (among them *Calvin’s Case* and Kent’s Commentaries), Bates rejected the premise that “citizenship is ever hereditary.” “[E]very person born in the country,” he wrote, “is, at the moment of birth, *prima facie* a citizen . . . without any reference to race or color, or any other accidental circumstances.” He acknowledged that there were some limits—hence “*prima facie*,” not “conclusive.” But those exceptions were “few,” simply “the small and admitted class of the *natural-born* composed of the children of foreign ministers and the like.” To Bates, it was soil—not blood—that “furnishes the rule, both of duty and of right.”

A year after General Lee’s surrender at Appomattox, Congress sought to turn Bates’s opinion into law. The result was the Civil Rights Act of 1866. The Act declared that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby . . . citizens of the United States.” To the Reconstruction Congress, the Act was simply assumed to invoke the common law rule—as Bates had in his “ablest and most exhaustive opinion,” and as the New York Court of Chancery had “[i]n the great case of *Lynch vs. Clarke*.” Indeed, the bill’s sponsor, Senator Lyman Trumbull, enthusiastically agreed with the bill’s critics that it would make citizens of “the children of Chinese and Gypsies born in this country.” “[E]ven the infant child of a foreigner born in this land is a citizen” under this bill, Trumbull declared.

The specter of *Dred Scott*, however, loomed over Congress’s efforts. Opponents of the Act contended that Congress could not grant such expansive citizenship (and set aside this Court’s precedent) by statute alone. To quiet those concerns—and to permanently enshrine the common law in the Constitution—Congress turned to the Fourteenth Amendment. . . . What the Civil Rights Act began, the Fourteenth Amendment would finish. Like the Act, the Fourteenth Amendment was intended to repudiate *Dred Scott*. This time, however, the goal was even grander—to put the “great question of citizenship” “beyond the legislative power” altogether, to settle the issue once and for all.

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR joins as to the introduction and Part I, concurring. . . .

The Civil Rights Act of 1866—the predecessor to the Citizenship Clause—was initially drafted as a spot treatment. Senator Lyman Trumbull’s first proposal homed in on the freedmen and provided merely that “all persons of African descent born in the United States are hereby declared to be citizens of the United States.” If that language had prevailed, the view Justice Thomas asserts today might be well founded.

But Senator Trumbull changed his mind. The day after he submitted that first proposal, he requested to “withdraw [the original] and . . . offer another in lieu of it to the same purport, changing the phraseology.”

Consistent with the views espoused by activists, Trumbull’s new proposal adopted a distinctly universalist register: “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 any distinction of color.” This is the language Congress would eventually enact as part of the Civil Rights Act of 1866. And the Civil Rights Act of 1866 would go on to become the basis for the Fourteenth Amendment’s Citizenship Clause.

Senator Trumbull’s progression from specific to universal was more than mere word choice. In the face of the virulent anti-immigrant—and, in particular, the anti-Chinese and the anti-Romani—sentiment of that era, language targeting just freed former slaves would have been the path of least (or less) resistance. But Senator Trumbull, along with those colleagues who took up the same mantle during the ratification debates, expressly rejected that narrow framing. . . .

JUSTICE THOMAS, with whom Justice Gorsuch joins, dissenting. . . .

The Civil Rights Act of 1866 confirmed that former slaves were citizens, but it did not extend citizenship to foreign temporary visitors or Indians who were still within their tribes. . . .

The Civil Rights Act guaranteed citizenship only to persons born here and “not subject to any foreign power.” In full, the citizenship provision of the Civil Rights Act, which formed the basis for the Citizenship Clause at issue in this case, stated:

“That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”

Temporary visitors domiciled in a foreign country remained subject to a foreign power. The Civil Rights Act therefore “intentionally excluded” children of foreign temporary visitors. Brief for Former United States Attorney General Edwin Meese III.

The congressional debates were clarifying on this score. When Senator Trumbull introduced the Civil Rights Act’s citizenship provision, he stated that the language excluded “persons temporarily resident” in the United States, whom “we would have no right to make citizens.” He had considered limiting the Civil Rights Act’s citizenship provision to persons “owing allegiance” to the United States, but he abandoned that terminology because temporary visitors owed a *partial* allegiance to the United States—and he wanted to make clear that the Act excluded them. Likewise, when Representative James Wilson spoke in support of the Act in the House, he explained “that every person born in the United States is a natural-born citizen,” except, “it may be,” “children born on our soil to temporary sojourners.”

Others confirmed that the Civil Rights Act excluded the children of temporary visitors. Representative Bingham described the Civil Rights Act as “simply

declaratory” of pre-existing law, which, he had already explained, required that a citizen be both “born and domiciled” in the United States. Bingham understood the Act to grant citizenship only to children “of parents not owing allegiance to any foreign sovereignty.” Representative Martin Thayer agreed that the Act required that a person “not ow[e] allegiance to a foreign Power.” Of course, temporary visitors and their children owed allegiance to their home country. Unsurprisingly, then, the public interpreted the Act to guarantee citizenship to “all persons born in the United States,” except “those subject to foreign governments,” a class which included those born to “foreign parents temporarily sojourning in this country.” K. Lash, *Prima Facie Citizenship*, 101 *Notre Dame L. Rev.* 101, 147 (2026). . .

The Civil Rights Act also excluded from citizenship “Indians not taxed.” This provision was intended to exclude Indians in tribes, but to recognize the citizenship of Indians who had left those tribes and joined the body politic. In Senator Trumbull’s words, it excluded Indians who “belong to the Indian tribes.” But, it included Indians who were “no longer connected with their tribes” and instead lived and “earn[ed] a livelihood in the white settlements.” Tribal Indians were “[c]onsidered virtually as foreigners,” but “[w]henver they [we]re separated from those tribes, and c[a]me within the jurisdiction of the United States so as to be counted, they [we]re citizens of the United States.”

Like temporary visitors, tribal Indians were not completely subject to the jurisdiction of the United States. The United States did not have the right to impose personal taxes on them—hence, “Indians not taxed.” *Elk v. Wilkins* (1884). Their personal affairs remained subject to the jurisdiction of their tribal nation. . . . Tribal Indians did not owe the United States primary allegiance and did not receive from it complete protection.

Indians in tribes were not covered by the Civil Rights Act’s exclusion of persons “subject to any foreign power” because Indian tribes were not “foreign.” They were “domestic dependent nations.” *Cherokee Nation v. Georgia* (1831). Thus, to preserve the status quo that tribal Indians were not citizens, Congress used the clause “not subject to any foreign power, excluding Indians not taxed.” . . .

Although the Civil Rights Act by its terms overruled *Dred Scott*, the Reconstruction Congress could not be sure that it would endure. Some questioned whether Congress had the constitutional power to enact the Civil Rights Act and thus feared that a hostile court might neuter it. Others worried that “as soon as the Democrats came into power,” they would repeal the Act. Thus, when it passed the Civil Rights Act, the Reconstruction Congress was already drafting the Fourteenth Amendment. K. Lash, *The Origins of the Privileges or Immunities Clause*, Part II, 99 *Geo. L. J.* 329, 349 (2011). Two months later, Congress would formally propose the Citizenship Clause of the Fourteenth Amendment to the States. The States ratified the Amendment in 1868.

The Citizenship Clause of the Fourteenth Amendment constitutionalized the Civil Rights Act’s citizenship provision. The “main object” of the Clause was to settle “the citizenship of freed [slaves].” In full, the Citizenship Clause

provided: “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.” Amdt. 14, § 1. . . . The “Citizenship Clause ‘forever closed the door on *Dred Scott*’ and ‘constitutionalized the Civil Rights Act of 1866’” by foreclosing a racial criterion for citizenship. *Vaello Madero* (Thomas, J., concurring) (quoting K. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* 171 (2014)); *Slaughter-House Cases* (Field, J., dissenting).

The Citizenship Clause did not change the Civil Rights Act’s rule. The Clause and the Act were passed by the same Congress during the same session. Senator Howard, who proposed the Citizenship Clause, believed that it hardly warranted discussion because Congress had just enacted the same rule in the Civil Rights Act. The Senate had “so fully discussed” “the question of citizenship” as “not to need any further elucidation.” He also stated that the Citizenship Clause “is simply declaratory of what I regard as the law of the land already.” Senator Trumbull, who had introduced the Civil Rights Act’s citizenship provision, confirmed that “[t]he object to be arrived at is the same.” *Id.*, at 2893–2894. Senator Johnson had “no doubt” that “all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power” are “citizens of the United States.” To be a “citizen,” Senator Howard said, meant to be “not a subject of a foreign Power.”

The phrase “subject to the jurisdiction” was a familiar way to describe the relation of a domiciliary to his home nation. Lawyers in America would have known that a person was “subject to the jurisdiction” of the place of his domicile. Congressmen confirmed that the Clause should not be construed to refer to the bare territorial power that a sovereign exercises over all persons in its territory. “I understand the words here, ‘subject to the jurisdiction of the United States,’” Senator Reverdy Williams said, “to mean fully and completely subject to the jurisdiction of the United States.” “[T]he word ‘jurisdiction,’ as here employed,” Senator Howard explained, “ought to be construed so as to imply a full and complete jurisdiction”—“the same jurisdiction in extent and quality as applies to every citizen of the United States now.” The Citizenship Clause, Senator Trumbull agreed, “means ‘subject to the *complete* jurisdiction thereof.’” So, although, “in one sense, all persons born within the geographical limits of the United States are subject to the jurisdiction of the United States,” Senator Williams explained, some were not covered by the Citizenship Clause because they “are not subject to the jurisdiction of the United States in every sense.” Each of these descriptions precluded applying the Citizenship Clause to the children of temporary visitors, who—unlike children domiciled here—were not subject to the jurisdiction of the United States in every sense. . . .

The Citizenship Clause, just like the Civil Rights Act, also excluded from citizenship the children of tribal Indians—meaning Indians whose tribes retained sovereign authority over them. “Certainly,” Senator Howard said, “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.” As Senator

Trumbull saw it, tribal Indians were excluded because they, like temporary visitors, retained a primary allegiance to, and therefore were subject to, their tribal nation: “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.’” He concluded: “It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens.” Congress was satisfied that its language accomplished that result with the phrase “subject to the jurisdiction thereof.” As Senator Williams explained, “I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States. But I am satisfied that, giving to the amendment a fair and reasonable construction, it does not.”

The Citizenship Clause used different wording from the Civil Rights Act only to resolve an uncertainty that had arisen out of the Act’s “Indians not taxed” language. Senator Trumbull explained that the category of “Indians not taxed” was an attempted proxy for the Indians over whom the United States lacked complete jurisdiction: The Civil Rights Act was supposed to “designate a class of persons who were not a part of our population,” so it was supposed to exclude tribal Indians while including Indians who “come within the jurisdiction of the United States.” The former could not be “taxed,” in the sense of personal taxes. But, the phrase “excluding Indians not taxed,” Trumbull realized, could be misunderstood to encompass Indians who had left their tribal community and permanently settled outside of it, but were not taxed for other reasons—such as because they were “not possessed of wealth.” Similarly, making citizenship depend on taxation could allow States to manipulate citizenship eligibility by changing their tax practices.

The phrase “subject to the jurisdiction” solved the problem because it avoided excluding from citizenship the children of nontribal Indians who for whatever reason were not taxed. Tribal Indians were not in “any sense” “subject to the complete jurisdiction of the United States.” Like temporary visitors, tribal Indians were “not subject to our jurisdiction in the sense of owing allegiance solely to the United States.” Their internal affairs—including marriages, family matters, intestacy, and payment of personal taxes—were regulated by their tribes. . . .

With respect to temporary visitors from foreign nations, the phrase was believed to accomplish the same object as the Civil Rights Act’s exclusion of those “subject to” a foreign power. Children born to temporary visitors owed allegiance to another government—the country of their domicile—so they were not subject to the jurisdiction of the United States. “[T]he 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’).” Brief for Sen. Eric Schmitt et al. as *Amici Curiae*. . . .

The Court also suggests that my interpretation of the Citizenship Clause is not consistent with the Civil Rights Act’s “not subject to any foreign power” requirement because a foreign nation can purport to exercise power over its original citizens even after they establish a domicile here. But, the Court’s interpretation of the Citizenship Clause does not even attempt to be consistent with the Civil

Rights Act's requirement, since the children of temporary visitors are clearly subject to the foreign power of their homeland. Regardless, the Court is wrong about domiciliaries' remaining "subject to" the foreign power of their country of birth. Although their nation of origin might purport to exercise jurisdiction over them, the United States would not have had to recognize that authority as lawful once those persons were domiciled here.

JUSTICE ALITO, dissenting.

Although the text of the Fourteenth Amendment provides . . . clues, we must look beyond *that text* to find a full explanation of the phrase "subject to the jurisdiction" of the United States. The terms of the 1866 Civil Rights Act (CRA) provide that explanation. The CRA includes its own citizenship clause, and the circumstances surrounding Congress's adoption of the CRA and the Fourteenth Amendment make clear that the two provisions were understood to be substantively the same.

The 39th Congress debated the CRA [Civil Rights Act] from January to March 1866, when it was passed and sent to President Johnson for his signature.⁸ Congress debated the Fourteenth Amendment from April to June 1866, when it was adopted and sent on to the States. Thus, during a 6-month period, the same Congress debated two provisions that addressed the very same question and adopted them both. Those circumstances in themselves make it highly unlikely that the two provisions differed in substance.

In addition, one of the chief reasons for the adoption of the Fourteenth Amendment was to prevent the CRA from being held unconstitutional. (President Johnson had cited the unconstitutionality of the CRA as one of the reasons why he vetoed it.) If the CRA had granted birthright citizenship to persons who were not entitled to citizenship by birth under the Fourteenth Amendment, there would still have been doubts about the CRA's constitutionality. So at a minimum, the Fourteenth Amendment's text had to be at least as generous as its CRA counterpart. Moreover, following the ratification of the Fourteenth Amendment, Congress reenacted the CRA in 1870. That reenactment would have been pointless if the CRA's test for birthright citizenship were less generous than the Fourteenth Amendment's. For all these reasons, it is abundantly clear that the tests for birthright citizenship in the Fourteenth Amendment and the CRA were substantively identical.

I therefore turn to the text of the CRA's citizenship provision. It provided 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."

That language preserved two exceptions that were well-known and well-accepted at the time. The first was for the children of diplomats. The second was for Indians who had not left their traditional way of life and continued to live with other members of their tribes under the governance of tribal leaders.

8. President Johnson vetoed the bill, but Congress overrode the veto in April 1866.

The exclusion of these “tribal Indians” from citizenship followed from Article I’s Apportionment Clause, which says that congressional “Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers . . . excluding Indians not taxed.” § 2, cl. 3. In the Constitution, just as during the Revolution, taxation and representation went hand in hand. Indians who lived apart under tribal rule were not considered part of the political community. As Chief Justice Marshall explained, Indian tribes were “domestic dependent nations.” *Cherokee Nation v. Georgia* (1831). . . . Because Indians who lived apart under tribal rule were not considered part of the political community, they did not receive representation, and they were not taxed. Due to this status, it appears to have been accepted that tribal Indians and their children, although born on U. S. soil, were not citizens.

The other exception—for the children of diplomats—was one that had been recognized under the British rule and was endorsed by leading authorities on the law of nations. E. de Vattel, *The Law of Nations* (1797). This was a minuscule category at best, and Congress could have preserved the exception with narrow language applicable only to the members of that group. For example, it could have said something like this: “[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed **and the children of foreign diplomats**, are hereby declared to be citizens of the United States.” Congress did not take that approach. It chose instead to identify what it understood to be the characteristic that called for the exception and to deny birthright citizenship to anyone who shares that characteristic. That characteristic, as Congress saw it, was being “subject to any foreign power.” . . .

With this understanding of the CRA’s citizenship test in mind, we may return to the text of the Fourteenth Amendment. When Congress framed the citizenship test in the Fourteenth Amendment, it consolidated the CRA’s two exceptions to citizenship by birth—for “Indians not taxed” and those “subject to any foreign power.” The Fourteenth Amendment used the phrase “subject to the jurisdiction” of the United States to cover both of those exceptions. Therefore, a person who is “subject to any foreign power” is not “subject to the jurisdiction” of the United States within the meaning of the Fourteenth Amendment. This unique formulation uses the term “jurisdiction” in a very specific sense. It refers to a form of jurisdiction that is exclusive, that is not in any way limited by any power possessed by any foreign country.

The children of diplomats were not subject to this complete jurisdiction because they were citizens or subjects of the countries represented by their fathers and thus bore duties to those countries. Likewise, tribal Indians were not subject to the United States’ exclusive jurisdiction because they were bound to obey tribal law. But they were certainly subject to the jurisdiction of the United States in a different sense of the concept. That is, they were subject to regulation by the Federal Government. After all, their tribes were “domestic *dependent* nations,” *Cherokee Nation*, and even though the Government allowed tribes a large measure of self-government, it consistently asserted its jurisdiction to intervene. . . .

Thus, tribal Indians were subject to the jurisdiction of the United States in the sense that they could be and were governed by federal law, but they were not

subject exclusively to federal law because they were also governed by tribal law. For that reason, their children did not become citizens at birth.

This understanding of the phrase “subject to the jurisdiction thereof ” also explains why naturalized citizens must foreswear all other allegiances when they become United States citizens. From the earliest days of our Republic until now, Congress has required naturalized citizens to “renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen.” Such an oath would not be necessary if the Constitution permitted anything less than exclusive jurisdiction.

In sum, the Fourteenth Amendment confers citizenship on a person who is born in this country or naturalized only if that person is also “not subject to any foreign power.” . . .

. . . [I]n reading the [majority] opinion, it is hard to escape the conclusion that it aimed to divert as much attention as possible from what those provisions [the Civil Rights Act of 1866 and Section 1 of the Fourteenth Amendment] actually say. The discussion of those provisions is broken up and interspersed with disquisitions on other matters.

When the opinion finally turns to the text of the Fourteenth Amendment, it summarily concludes that “‘subject to the jurisdiction thereof ’” in the Citizenship Clause has the same meaning as the phrase “‘within its jurisdiction’” in the Equal Protection Clause.” But the opinion makes no effort to explain why Congress might have chosen to use different language in two places within the same provision to express the same concept. As we have often noted, we usually presume that “‘differences in language . . . convey differences in meaning.’”

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

[Here we include Chief Justice Roberts’s response to the dissenters with regard to the meaning of the Civil Rights Act of 1866 and the Citizenship Clause of the Fourteenth Amendment. —Eds.]

. . . [T]he principal dissent spends much of its time on the text of the Civil Rights Act. (Justice Alito does the same—albeit in service of a different result. The Civil Rights Act made citizens of “all persons born in the United States and not subject to any foreign power.” The principal dissent contends that a person is “not subject to any foreign power” if (and only if) he is “domiciled in” the United States, for it is then (and only then) that “his home nation” is forbidden from regulating his conduct. Justice Alito contends that a person is “not subject to any foreign power” if (and only if) no other country would “automatically” make him a “national[],” whether he is domiciled here or not.

Neither theory works. As to the principal dissent, it is simply not true that domicile in a new nation severs one’s ties to the old one. If the test truly is whether a person is “amenable to the laws” of two governments at once then it is a test that every child born to a foreign parent fails—a result that even the principal dissent cannot stomach. Justice Alito seems to recognize this bind, so he would create an ad hoc exception for those whose parents have “done everything within their power . . . to become Americans.” He does not explain how

that exception can be squared with his view of the text, which (to repeat) is that anyone “automatically” made a “national[]” of his “parents’ native country” was not entitled to citizenship under the Civil Rights Act.⁶ In our estimation, the Act raises more questions than answers—and was replaced by the Fourteenth Amendment, which “better” expresses the views of the Reconstruction Congress anyway. . . .

The ordinary legal meaning of the text of the Clause thus neatly captures the common law rule, with its broad reach and narrow exceptions. The same groups included (and excluded) by *jus soli* [right of the soil] were included (and excluded) by the conventional understanding of jurisdiction. Excluded by both were the children of foreign ministers and members of 19th-century Indian tribes over whom the United States had ceded a part of its territorial jurisdiction to preserve its relationship with a foreign sovereign (or quasi-sovereign).

No such intersovereign concerns apply to children born of parents unlawfully or temporarily present in the United States; no foreign sovereign would “have any motive for wishing” them outside this Nation’s authority. Those children are thus subject to the jurisdiction of the United States. They satisfy both elements of the Citizenship Clause: they are “born . . . in the United States” and “subject to the jurisdiction thereof.” Under the Constitution, they are citizens at birth. . . .

ASSIGNMENT 6

c. Congressional Debate Over the Fourteenth Amendment

Trump v. Barbara – Part IV 609 U.S. __ (2026)

CHIEF JUSTICE Roberts delivered the opinion of the Court.

The congressional debates over the Civil Rights Act of 1866 and the Fourteenth Amendment confirm our view. The principal dissent (and the Government) lean heavily on a handful of ambiguous floor statements referencing “temporary sojourners” and “foreigners.” Far more frequent and explicit, however, were statements embracing the common law. And the debates make clear that no member of Congress seriously grappled with a domicile-based carveout to the “fixed, certain, and intelligible rule[]” of the common law.

For a Congress intent on putting the question of citizenship “once and forever [to] rest,” a domicile-based qualification would have introduced significant

6. Justice Kavanaugh proposes a similar ad hoc exception to his own interpretation of the Citizenship Clause. Under his rule, the Clause generally does not promise citizenship to children whose parents are “not U. S. citizens.” Yet it *must* grant citizenship under the “facts and circumstances” presented in *Wong Kim Ark*—even though Wong’s parents were not U. S. citizens. Like the exception proposed by Justice Alito, Justice Kavanaugh’s exception is at war with his supposedly “unifying” principle of the Clause.

uncertainty. Unlike the easy-to-apply common law, it would be “difficult, if not impossible, to lay down any general rule” of domicile-based citizenship, as domicile “often depend[s] upon the circumstances of each case, the combinations of which are infinite.”

If Congress intended to hinge citizenship on each individual’s domicile—a question that “is sometimes a matter of great difficulty to decide”—it is reasonable to expect there would have been at least *some* discussion of the topic. Yet the word “domicile” appears just twice in the discussion of the relevant provision of the Civil Rights Act. And it appears in only one speech from the Citizenship Clause debates—as part of an explanation of why State citizenship is distinct from national citizenship under the Constitution. . . .

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR joins as to the introduction and Part I, concurring. . . .

Throughout the mid-19th century, Chinese immigrants to America were often portrayed as “‘coolies,” a racist slur implying indentured servitude and allegiance to a Chinese master. Some Members of Congress brought that sentiment to the Civil Rights Act’s citizenship-related debates. Notably focusing his attention beyond freed former slaves, Senator Edgar Cowan, for example, argued that German immigrants’ children born in Pennsylvania should be citizens, but Chinese immigrants’ children should not—because Germans and Chinese were different. In response, Senator Trumbull emphasized that the law he had drafted drew no such distinctions. Undeterred, Senator Cowan would warn again—this time during debates on the Fourteenth Amendment—that the Citizenship Clause would let Chinese immigrants “overrun” California and “double or treble the population” of that State. Senator John Conness of California, where anti-Chinese sentiment was arguably most pronounced, responded that “the children begotten of Chinese parents in California . . . shall be citizens.” In fact, he said, the Civil Rights Act had already declared “that the children of all parentage whatever . . . should be regarded and treated as citizens of the United States.” No Senator rose to agree with Senator Cowan or dispute what Senator Conness had said. And no Senator said what the principal dissent says today: that the text at issue conferred citizenship only on freed Blacks and those in analogous situations.

The debates went similarly with respect to the Roma people, who were referred to at the time as “gypsies.” When asked whether native-born Romani children would be birthright citizens of the United States under the proposed Civil Rights Act, Senator Trumbull replied: “Undoubtedly.” President Andrew Johnson apparently agreed. In his message vetoing the Act, Johnson noted with disapproval that, under the law, “the Chinese of the Pacific States, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks,” would be birthright citizens. Without making any changes to the bill or responding that Johnson was mistaken in his understanding of it (or otherwise capitulating to Johnson’s views in any respect), Congress overrode that presidential veto.

During the ratification debates, Senator Cowan took aim at the Roma people too, characterizing them as undeserving of birthright citizenship because they

“wander[ed] in gangs,” “infest[ed] society,” and “impos[ed] upon the simple and weak everywhere.” And again, Senator Conness dismissed Senator Cowan’s prejudices: “The only invasion of Pennsylvania within my recollection was an invasion very much worse and more disastrous to the State, and more to be feared and more feared, than that of Gypsies. It was an invasion of rebels [at Gettysburg].” . . .

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting
 . . . Congressmen believed that the Clause fixed in place the rule of the Civil Rights Act. Senator Trumbull stated that the Citizenship Clause, like the Civil Rights Act, would still exclude all persons subject to a foreign power: “What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else. That is what it means.” Senator Howard agreed that the Citizenship Clause “w[ould] not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors [sic] or foreign ministers accredited to the Government of the United States.” And, shortly before the Citizenship Clause was introduced, Senator William Fessenden, a supporter of the Amendment, explained that “persons may be born in the United States and not be citizens of the United States,” then gave the example of “a person [who] is born here of parents from abroad temporarily in this country.” Lash, 101 Notre Dame L. Rev., at 151–152.

JUSTICE ALITO, dissenting.
 The interpretation of the Fourteenth Amendment’s Citizenship Clause set out above is based entirely on the text and legal context of that Amendment and the Civil Rights Act of 1866. It does not depend in any way on the record of the debates on those two enactments. But to the extent that congressional debates on the Fourteenth Amendment and the Civil Rights Act are probative, they strongly support my textual interpretation.

The clearest evidence was provided when the Fourteenth Amendment’s Citizenship Clause was presented in the Senate. As originally drafted, the Fourteenth Amendment did not define citizenship. Senator Jacob Howard introduced an amendment that remedied that problem. Senator Lyman Trumbull, the author of the citizenship clause in the Civil Rights Act, explained just what the new amendment meant: “The provision is, that ‘all persons born in the United States, and subject to the jurisdiction thereof, are citizens.’ That 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.*” This language, he said, was “better than the language in the civil rights bill,” but the “object to be arrived at is the same.” Senator Howard “concur[red] entirely” in Senator Trumbull’s interpretation. Thus, the authors of the two major provisions defining United States citizenship agreed that birthright citizenship required complete allegiance.

Other senators quickly agreed. Senator Doolittle called the Civil Rights Act the “forerunner of this constitutional amendment” and said the “civil rights

bill undertook to do this same thing” as the Fourteenth Amendment. Senator Reverdy Johnson, a member of the Joint Committee on Reconstruction and former Attorney General, pointed out that “all 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.” So too Senator Williams remarked that he understood “the words here, ‘subject to the jurisdiction of the United States,’ to mean fully and completely subject to the jurisdiction of the United States.”⁶ Public commentary on the Citizenship Clause exhibited a similar understanding. K. Lash, *Prima Facie Citizenship*, 101 *Notre Dame L. Rev.* 101, 161 (2026).

Those who disagree with this interpretation have not found any statement in which another Senator expressly disputed Senator Howard’s and Senator Trumbull’s interpretation of the amendment. They muster a collection of statements that provide some support for their position, but it is a mistake to attribute too much weight to extemporaneous oral statements, which are often phrased in ways that are not precise. And a single member’s interpretation of a provision may not be shared by a majority.

I do not suggest that we should base our decision in this case on statements made during the legislative debates on the Fourteenth Amendment and the Civil Rights Act. Reliance on any form of legislative history is always problematic for reasons that are familiar. See A. Scalia, *A Matter of Interpretation* (1997). “[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.” *SW General*. Here, the only form of legislative history we have consists of floor statements.

We should base our decision on the firm ground provided by the constitutional text, but if we look beyond the text, the congressional debates and public commentary confirm that the Citizenship Clause requires complete allegiance.

d. Post-Ratification Executive Branch Practice

The original public meaning of the Citizenship Clause was fixed in 1868 upon the ratification of the Fourteenth Amendment. After that time, the political branches would have implemented this new constitutional guarantee. Practice subsequent to ratification cannot change the original meaning of the text. However, in *Trump v. Barbara*, Justices Thomas and Alito contended that this post-enactment “tradition” confirmed, or at least clarified, the original meaning of the text. By contrast, Chief Justice Roberts, writing for the majority, rejected the relevance of how the executive branch implemented the Citizenship Clause. He would have stopped his originalist analysis in 1868.

6. There was no substantive debate on the Citizenship Clause in the House of Representatives.

STUDY GUIDE

- What is the relevance of actions taken after the enactment of the Fourteenth Amendment to the original meaning of the Citizenship Clause? Should this practice be considered a constitutional “tradition”? Does the Court consider post-enactment tradition in other originalist cases we have studied?
- The Enforcement Act of 1870 re-enacted the Civil Rights Act of 1866. The 1866 and 1870 statutes both limited birthright citizenship to children “not subject to any foreign power.” How should the 1870 statute affect the Court’s understanding of the Citizenship Clause of the Fourteenth Amendment?
- Chief Justice Roberts relies on a single instance of executive branch practice: a 1872 Attorney General opinion concerning a child born of Austrian parents who were “temporarily residing” in New York City. Was that child deemed a citizen? How does Justice Thomas respond to this evidence?
- Does Chief Justice Roberts think that the executive branch simply misread the Citizenship Clause in the decades following ratification? Why would the Court today have a better sense of the meaning of the Fourteenth Amendment than those who lived through its adoption and ratification?

Trump v. Barbara—Part V
609 U.S. __ (2026)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

For nearly two decades after the Fourteenth Amendment’s ratification, the Executive Branch viewed the Citizenship Clause as “simply an affirmation of the common law of England and of this country.” Memorandum of Secretary of State H. Fish to Mr. Marsh (May 19, 1871). Under that view, “the status of citizenship” was “fixed by the place of nativity, irrespective of parentage”—with the limited exception of “the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality.” *Ibid.*

In 1872, for instance, Attorney General George Williams was called upon to determine the citizenship of a child born of Austrian parents only “temporarily residing” in New York City. Citing the Citizenship Clause (and Bates’s 1862 opinion), Williams explained that “a person born in this country, though of alien parents who have never been naturalized, is, under our law, deemed a citizen of the United States by reason of the place of his birth.” Thus the child “is a native of this country,” Williams concluded, “and as such was originally clothed with American nationality.” Secretary of State Hamilton Fish agreed. So did federal courts. Like the Executive Branch, they saw the Clause as merely “declaratory of the rule of the common law.”

As the era of Reconstruction faded, however, so too did the promise of birthright citizenship. Uncertainty came with the first Chinese Exclusion Act of 1882 and the election of President Cleveland, the first Democrat to hold the office since the Civil War. It was around this time that the State Department began to

deny citizenship to those with “dual or doubtful allegiance,” and it was around this time that several scholars proposed a new theory of the Clause, one based on “international law.”

This new theory focused on the *parents’* status, not the *child’s*. It was only if a child’s parents were “domiciled in the United States,” they argued, that the child was “*internationally* subject to the jurisdiction of the United States,” as the Citizenship Clause (they said) required. These writers acknowledged that the common law took a different view, and acknowledged “that the language of the [F]ourteenth [A]mendment . . . is very broad.” But they insisted that *jus soli* had been “universally” rejected by other nations and had not been made part of the Constitution. . . .

Perhaps recognizing the absence of ratification-era support for a domicile-based rule of national citizenship, the Government and principal dissent both emphasize sources from after the ratification of the Fourteenth Amendment. . . .

In any case, postenactment history cannot override the text. If Congress intended to limit American citizenship to the children of those domiciled in the United States, nothing in the succinct language of the Citizenship Clause conveyed that design. Words appearing frequently in the Executive Order—“mother,” “father,” “lawful,” “temporary”—are absent from the Clause. For a simple reason: they did not matter. And while the Clause does ensure *state* citizenship attaches for U. S. citizens in “the State wherein they reside,” Amdt. 14, § 1, the explicit invocation of residence for *state* citizenship only highlights its absence from the criteria for *U. S.* citizenship. . . .

[Here we include Chief Justice Roberts’s response to the dissenters’ reliance on post-1884 scholars and Executive Branch practice.—Eds.]

They turn to the same international law treatises that underpinned the Government’s attempts to limit birthright citizenship in the 1880s. This fundamentally revisionist scholarship—and the post-1884 Executive Branch actions that relied upon it—do not put in doubt the understanding of the Citizenship Clause at the time of (and after) its ratification. As Senator Trumbull explained in 1871, the Citizenship Clause recognized that “[e]very person born within the jurisdiction” of the Nation was “a citizen of the United States,” as had been true under “the common law of this country as well as of England.” . . .

Justice Thomas, with whom Justice Gorsuch joins, dissenting

. . . . The evidence from the decades following ratification confirms that the Citizenship Clause was understood to exclude the children of temporary visitors. There was frequently expressed, enduring, and widespread agreement, from the Reconstruction Congress through the end of the 19th century (and even into the 20th), that the Citizenship Clause did not guarantee citizenship to persons not domiciled here. The Executive Branch, Congress, courts, States, lawyers, scholars, and commentators generally shared this understanding.

a

The Executive Branch understood the Citizenship Clause to exclude the children of temporary visitors. In 1873, President Grant’s Attorney General George

Williams interpreted it to apply only to persons over whom the United States had complete jurisdiction: “[T]he word ‘jurisdiction’ must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment.” It therefore excluded “[a]liens” over whom the United States had “only” a “limited” jurisdiction, even if they were “born here.”¹¹

Across administrations, the Executive Branch took the same position. A child born on American soil was not an American citizen when he was “domiciled in” a foreign country. By virtue of his foreign domicile, he was “on his birth ‘subject to a foreign power’ and ‘not subject to the jurisdiction of the United States.’” “A child born in this country to a foreign father, when taken by his father abroad, acquires the father’s domicil and nationality.” These statements were not mere abstract positions, but the Executive Branch’s operating rule of decision for decades.

When the children of temporary visitors born on American soil claimed to be citizens based on the Citizenship Clause, the Executive Branch repeatedly denied their claims to citizenship . . . These children were not born to diplomats. They were not part of invading armies or Indian tribes. They were simply foreigners, born on American soil but not domiciled here. And, they were all denied citizenship under the Citizenship Clause—by those in a better position to know its original meaning than we are today.¹² . . .

b

Congress understood the Citizenship Clause to exclude the children of temporary visitors. Just two years after the Fourteenth Amendment was ratified, Congress passed the Enforcement Act of 1870. The Act implemented the Citizenship Clause with the same language that the Civil Rights Act had used, limiting the right to citizenship to persons born here and “not subject to any foreign power.” The 1870 Act thus incorporated language that expressly excluded the children of temporary foreign visitors, who were subject to the power of the foreign countries in which they were domiciled. If the Citizenship Clause included the children of temporary visitors—who clearly fall outside the reach of the Enforcement Act—then the Reconstruction Congress would have violated its own Citizenship Clause in an Act designed to enforce it. See Brief for Professor Richard Epstein as *Amicus Curiae*. The parties point to no one who suggested that the 1870 Act was unconstitutional. . . .

Practice and precedent immediately and long following ratification support the same conclusion. In constitutional law, this Court often pays close attention

11. This interpretation was shared by Ebenezer Hoar, a prior Attorney General for President Grant. Hoar too believed that, under the Citizenship Clause, “a child born within the United States of parents who are not citizens” is not himself a citizen unless “domiciled” in the United States.

12. Sometimes, children born to lawful foreigners could “elect one allegiance and repudiate the other” upon “reaching full age” by becoming domiciled in the United States. But, they were not guaranteed citizenship by birth alone, and they were not guaranteed citizenship without domicile.

to how government officials interpreted and applied a constitutional provision shortly after its enactment. See *Stuart v. Laird* (1803); *Trump v. Slaughter* (2026). Here, the Executive Branch, Congress, and the Judiciary all largely interpreted the Citizenship Clause to require domicile in the decades following ratification. . . .

1

The Executive Branch regularly denied citizenship to the children of temporary visitors under the Citizenship Clause.

The Executive Branch’s position, from the outset, was that the Citizenship Clause excluded the children of aliens who were not subject to the “complete jurisdiction” of the United States. Therefore, a child born in the United States but “domiciled” abroad was “on his birth ‘subject to a foreign power’ and ‘not subject to the jurisdiction of the United States.’” Many executive decisions under the Citizenship Clause denied citizenship to children born but not domiciled here. In recorded, reasoned decisions, the Hayes, Cleveland, and Harrison administrations—in accordance with the opinion of President Grant’s Attorney General—all denied citizenship to children born in the United States but not domiciled here (who also did not satisfy any of the exceptions to the Court’s rule). On the Court’s account, each of these administrations—Republican and Democratic, over the course of multiple decades, and close in time to ratification—acted in defiance of the Constitution, seemingly without objection.

Against this settled course of practice, the Court can find only a single executive decision from the entire 19th century that it believes supports its interpretation. But, in that case, the Executive Branch ultimately ruled that the claimant—Francois Heinrich—was not a citizen. Heinrich was born on American soil and did not fall into any of the Court’s three exceptions, but Secretary of State Hamilton Fish still concluded that he was “not an American citizen” because he resided in Austria. The Court understands the Executive Branch to have concluded that Heinrich was “originally clothed with American nationality” but then lost that citizenship upon returning to his domicile abroad. Even the Court is thus forced to embrace an interpretation of the Citizenship Clause that allows the political branches to deny citizenship to persons born here to temporary visitors. On that interpretation, the political branches can deny citizenship to such persons once they return home.

Beyond that single case, the Court does not dispute that the many other 19th-century executive decisions were incompatible with its view. And, it has found no examples of the Executive Branch actually affording the privileges of citizenship under the Citizenship Clause to a person born here while domiciled abroad. The Executive Branch instead repeatedly took the position that the Citizenship Clause required domicile.

2

Congressional practice supports the same conclusion. “[E]arly congressional enactments provide contemporaneous and weighty evidence of the Constitution’s

meaning.” *Utah v. Evans* (2002) (Thomas, J., concurring in part and dissenting in part). Congress could have enacted a statute that referred to the Court’s three categories of exceptions. Instead, in 1870, the Reconstruction Congress reenacted the Civil Rights Act, which expressly excluded all persons “subject to any foreign power.” Once again, a foreigner who was not domiciled here remained subject to a foreign power—namely, his home country. Nobody in Congress, as far as I am aware, argued that this exclusionary language violated the Citizenship Clause.

Congress left the language excluding persons “subject to any foreign power” in place until 1940. It was the governing rule for the first 72 years after ratification. “[S]uch contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions.” *Printz v. United States* (1997).

The Court has no explanation for the Reconstruction Congress’s 1870 decision to exclude from citizenship all persons “subject to any foreign power.” It appears to concede that it cannot reconcile its interpretation of the Citizenship Clause with that statute. And, the Court recognizes that “every child born to” temporary visitors was subject to a foreign power. According to the Court, then, Congress defied the Citizenship Clause immediately after enacting it.

3

. . . The Court does not attempt to match this postratification evidence. To the contrary, the Court acknowledges that—at least by the 1880s—the Citizenship Clause was understood to require domicile by the “Government,” the “Executive Branch,” the “State Department,” “scholars,” and “treatises.” The Court, though, proposes that this widespread understanding was not evidence of the original public meaning of the Citizenship Clause, but a rebellion against it. The scholars, courts, and government officials who held that domicile was required, the Court says, were engaged in a law-reform effort. Their motive, the Court seems to say, was to deny citizenship to Chinese immigrants, especially around “the election of President Cleveland, the first Democrat to hold the office since the Civil War.” On this basis, the Court suggests ignoring the considerable postratification practice and scholarship that is incompatible with its view.

The Court’s account does not make sense. To begin, the postratification evidence against the Court’s view begins not “nearly two decades after the Fourteenth Amendment’s ratification,” but immediately. Well before the Court has any explanation for a departure from its view, all three branches of the Federal Government had already rejected it. In 1870, Congress interpreted the Citizenship Clause to require that a child born here be “not subject to any foreign power.” In 1873, the Supreme Court interpreted the Citizenship Clause to “exclude from its operation children of . . . citizens or subjects of foreign States born within the United States.” *Slaughter-House Cases*. And, the same year, President Grant’s Attorney General interpreted the Citizenship Clause to exclude the children of “[a]liens” over whom the United States had “limited” jurisdiction even though they were “born here.” . . .

The more likely explanation for why so many Americans stated that the Citizenship Clause required domicile is that the Citizenship Clause required domicile. . . .

3. The Chinese Exclusion Act and Post-Ratification Judicial Interpretations

In the decades after Fourteenth Amendment's ratification, the Supreme Court would discuss the Citizenship Clause in several cases. The *Slaughter-House Cases* (1873), for example, stated that the Citizenship Clause would "exclude from its operation children of . . . citizens or subjects of foreign States born within the United States." In *Elk v. Wilkins* (1884), the Court interpreted the Citizenship Clause to require that a person be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to [its] political jurisdiction," "owing [it] direct and immediate allegiance," and "owing no allegiance to any alien power." And in *Plessy v. Ferguson* (1896), Justice John Marshall Harlan wrote in his canonical dissent that the Citizenship Clause "gave citizenship to all born or naturalized in the United States and residing here." These opinions would have excluded from citizenship those children whose parents had an allegiance to a foreign nation or who were not domiciled in the United States. These decisions seemed to read the Citizenship Clause of the Fourteenth Amendment in a consistent fashion with the Civil Rights Act of 1866, which limited citizenship to children whose parents were "not subject to any foreign power."

However, the Supreme Court appeared to change course in the landmark case of *United States v. Wong Kim Ark* (1898). Under the Chinese Exclusion Act of 1882, Chinese nationals already residing in the United States were permitted to continue living and working in the country, but they could not become citizens. The aliens could be domiciled in the United States, but they remained subjects of the Chinese emperor and thus had a foreign allegiance. Such was the case for Wong Kim Ark, who was born to Chinese parents who were domiciled in California. Would a child born to such Chinese alien parents be a citizen at birth? Or stated differently, would the child at birth be "subject to the jurisdiction" of the United States?

The Court in *Wong Kim Ark* split 6-2. The majority opinion by Justice Gray, ruled that Wong Kim Ark was a citizen at birth. The dissent by Chief Justice Fuller, joined by Justice Harlan, ruled that Wong Kim Ark was not a citizen at birth. The precise holding of *Wong Kim Ark* would remain subject to some debate. Did the Court issue a broad decision affecting all children born in the United States, or was the holding limited to the children of parents who were domiciled in the United States. We include a short excerpt from the majority and dissent in *Wong Kim* to establish how the law stood at the turn of the twentieth century.

STUDY GUIDE

- Were Wong Kim Ark's parents domiciled in the United States at his birth? Was that fact relevant, or essential, to the majority's holding?
- How does the Court explain the relationship between the language used in the Civil Rights Act of 1866 ("not subject to any foreign power") and the language used in the Fourteenth Amendment ("subject to the jurisdiction" of the United States)? Did the same Congress that drafted both provisions intend to convey the same or different conceptions of citizenship?
- How does the majority connect the issue of birthright citizenship with *Yick Wo v. Hopkins* (1886)?

U.S. v. Wong Kim Ark
169 U.S. 649 (1898)

MR. JUSTICE GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873, in the city of San Francisco, in the state of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the emperor of China. They were at the time of his birth domiciled residents of the United States, having previously established and are still enjoying a permanent domicile and residence therein at San Francisco. They continued to reside and remain in the United States until 1890, when they departed for China; and, during all the time of their residence in the United States, they were engaged in business, and were never employed in any diplomatic or official capacity under the emperor of China.

Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom. In 1890 (when he must have been about 17 years of age) he departed for China, on a temporary visit, and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about 21 years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit, and with the intention of returning to the United States; and he did return thereto, by sea, in August, 1895, and applied to the collector of customs for permission to land, and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of congress known as the 'Chinese Exclusion Acts,' prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him. The question presented by the record is whether 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, by virtue of the first clause of the fourteenth amendment of the constitution: '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.' . . .

By the civil rights act of 1866, 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed,' were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, 'not subject to any foreign power,' were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children or foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the civil rights act, 'not subject to any foreign power,' gave way, in the fourteenth amendment of the constitution, to the affirmative words, 'subject to the jurisdiction of the United States.' . . .

The only adjudication that has been made by this court upon the meaning of the clause 'and subject to the jurisdiction thereof,' in the leading provision of the fourteenth amendment, is *Elk v. Wilkins* (1884), in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized or taxed or in any way recognized or treated as a citizen, either by the United States or by the state, was not a citizen of the United States, as a person born in the United States, 'and subject to the jurisdiction thereof,' within the meaning of the clause in question. . . .

The decision in *Elk v. Wilkins* concerned 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.

The real object of the fourteenth amendment of the constitution, in qualifying the words 'all persons born in the United States' by the addition 'and subject to the jurisdiction thereof,' would appear to have been to 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, — both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. *Calvin's Case*. . .

In *Yick Wo v. Hopkins* (1886), the decision was that an ordinance of the city of San Francisco, regulating a certain business, and which, as executed by the board of supervisors, made an arbitrary discrimination between natives of China, still subjects of the emperor of China, but domiciled in the United States, and all other persons, was contrary to the fourteenth amendment of the constitution. . . . The decision in *Yick Wo v. Hopkins*, indeed, did not directly pass upon the effect of these words in the [Citizenship Clause of the] fourteenth amendment, but turned upon subsequent provisions of the same section. But, as already observed, it is impossible to attribute to the words, 'subject to the jurisdiction thereof' (that is to say, of the United States), at the beginning, a less comprehensive meaning than to the words 'within its jurisdiction' (that is, of the state), at the end of the same section; or to hold that persons, who are indisputably 'within the jurisdiction' of the state, are not 'subject to the jurisdiction' of the nation.

It necessarily follows that persons born in China, subjects of the emperor of China, but domiciled in the United States, having been adjudged, in *Yick Wo v. Hopkins*, to be within the jurisdiction of the state, within the meaning of the concluding sentence, must be held to be subject to the jurisdiction of the United States, within the meaning of the first sentence of this section of the constitution; and their children, 'born in the United States,' cannot be less 'subject to the jurisdiction thereof.' . . .

Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. . . . [I]t is expressly agreed that [Wong Kim Ark's] residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about 17 years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States. . . . The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether 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. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, dissenting. . . .

Two months after the [Civil Rights Act] statute was enacted, on June 16, 1866, the fourteenth amendment was proposed, and declared ratified July 28, 1868. The first clause of the first section reads: '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 act was passed and the 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.

The jurists and statesmen referred to in the majority opinion, notably Senators Trumbull and Reverdy Johnson, concurred in that view, Senator Trumbull saying: '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 Senator Johnson: 'Now, all that this amendment provides is that all persons born within 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.' This was distinctly so ruled in *Elk v. Wilkins*; and no reason is perceived why the words were used if they apply only to that obedience which all persons not possessing immunity therefrom must pay the laws of the country in which they happen to be. . . .

These considerations lead to the conclusion that the rule in respect of citizenship of the United States prior to the fourteenth amendment differed from the English common law rule in vital particulars, and, among others, in that it did not recognize allegiance as indelible, and in that it did recognize an essential difference between birth during temporary and 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. . . .

In other words, 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; nor, on the other hand, does it arbitrarily make 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. Tested by this rule, *Wong Kim Ark* never became and is not a citizen of the United States, and the order of the district court should be reversed. I am authorized to say that Mr. Justice HARLAN concurs in this dissent.

In *Trump v. Barbara*, the majority and dissents vigorously disagreed about what *Wong Kim Ark* held. Chief Justice Roberts, writing for the majority, viewed *Wong Kim Ark* as stating a broad rule of birthright citizenship subject to narrow exceptions. Justices Thomas and Alito in dissent viewed *Wong Kim Ark* as limited to the facts of the case where the parents were domiciled in the United States. This disagreement was not merely a contest about stare decisis.

STUDY GUIDE

- *Wong Kim Ark* was decided three decades after the ratification of the Fourteenth Amendment. Does this decision provide evidence of the original meaning of the Citizenship Clause?
- *Wong Kim Ark* was decided two years after *Plessy v. Ferguson*. Justice John Marshall Harlan dissented in both cases. Should Courts today find more persuasive the views of Justice Harlan, or those of the Justices who joined the *Plessy* majority?
- Was *Wong Kim Ark* correctly decided? The government did not ask the Court to overrule this precedent.
- How does Justice Kavanaugh think old texts should be applied to new circumstances?

Trump v. Barbara – Part VI
609 U.S. __ (2026)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

In *Wong Kim Ark*, this Court rejected that view, concluding that no “rule of international law” had qualified “the ancient rule of citizenship by birth within the dominion.”

At issue was the citizenship of Wong Kim Ark, born in San Francisco to Chinese parents. In Wong’s telling, the case was not close. “[T]here can be no just doubt,” he argued, “that the Amendment was intended to be based upon the doctrine derived from the common law, that the character of a natural born citizen is incidental to birth only.” The Government disagreed. It admitted that “the opinions of the Attorneys-General, the decisions of the Federal and State courts, and, up to 1885, the rulings of the State Department all concurred in the view that birth in the United States conferred citizenship,” based on “the common law doctrine of allegiance” and “the authority of the decision of Chancellor Sandford in *Lynch v. Clarke*.” But the Executive no longer endorsed that view. “[T]he common-law doctrine of England,” it argued, had in fact never been “the doctrine of the United States,” and was not made the law by virtue of the Citizenship Clause.

In an opinion by Justice Gray, the Court rejected the Government’s position. Justice Gray explained that the Fourteenth Amendment was merely “declaratory” of the “fundamental rule of citizenship by birth” that prevailed at common law. That “same rule,” he wrote, “was in force in all the English Colonies”—“and continued to prevail under the Constitution.” And its contours were clear. It excluded those recognized as exempt “from the jurisdiction of this country”—the “children of ambassadors” and other representatives of foreign sovereigns, as well as those born in the “alien nations” of Indian tribes.

All others were citizens at birth, whether born to permanent residents or temporary visitors. Indeed, Justice Gray noted, no one had even “contested” this

conclusion for “more than fifty years after the adoption of the Constitution”—until the matter was “elaborately argued” before the New York Court of Chancery in *Lynch v. Clarke*. And there the question was “decided upon full consideration by [Assistant] Vice Chancellor Sandford in favor of their citizenship.” “The same doctrine was repeatedly affirmed in the executive departments,” Justice Gray wrote, not to mention by Kent and Binney—each of whom affirmed that “[t]he child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen.” In adopting the common law, Justice Gray explained, the Citizenship Clause adopted this same rule. . .

Justice Gray then turned to *Schooner Exchange* to confirm what the common law made clear. “The words . . . ‘subject to the jurisdiction thereof,’” he wrote, “must be presumed to have been understood and intended by the Congress . . . in the same sense in which the like words had been used by Chief Justice Marshall in the well known case of *The Exchange*.” On that understanding, aliens who traveled to the United States for “business or pleasure” received no “exemption from the jurisdiction of the country.” To the contrary, they were subject to that jurisdiction for as long as they remained here—and any children born to them were American citizens under the Fourteenth Amendment.

What the Court held in *Wong Kim Ark* was simple: the Citizenship Clause incorporated the common law and granted citizenship to nearly all children born in the United States. Not surprisingly, then, in the 128 years since, we have repeatedly understood the rule of *Wong Kim Ark* to guarantee citizenship to all children born in the United States and subject to its power. We see no reason to depart from that view today. . . .

For the dissents and the Government, *Wong Kim Ark* is essentially irrelevant. They attempt to narrow that precedent by noting that the Court’s opinion repeatedly referred to the domicile of Wong’s parents. That is true. But “the reasoning underlying” the holding of *Wong Kim Ark* cannot be squared with a domicile requirement of the sort the Government envisions. As we have already explained, the Court exhaustively canvassed the text and history of the Citizenship Clause. It traced an unbroken line from the English common law, into the founding and antebellum eras, and through the debates, to the Clause’s ratification. Yet at no point did the Court identify any evidence in the historical record that the ratifiers of the Fourteenth Amendment thought themselves to be imposing a domicile limitation.

In the end, it is the *dissent* in *Wong Kim Ark* that makes the strongest case for a domicile-based theory of American citizenship. There, Chief Justice Fuller resisted the application of the English common law rule because it “recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents.” He admitted that, in England, “the question of domicil[e] is entirely distinct from that of allegiance” because “[t]he one relates to the civil, and the other to the political, status.” But he believed that “a different view as to the effect of permanent abode on nationality ha[d] been expressed in this country.” Under this different view, the Fourteenth Amendment “prevent[ed] the acquisition of citizenship by” “the children of aliens, whose parents owed local

and temporary allegiance merely, remaining subject to a foreign power.” The Government and today’s dissenters agree. But this view commanded only a dissent in 1898, and neither time nor circumstance has changed the fact that it is not the law.

JUSTICE KAVANAUGH, concurring in the judgment and dissenting in part. . . .

In 1898, . . . *Wong Kim Ark* interpreted the Fourteenth Amendment’s “subject to the jurisdiction” language to provide a general right of birthright citizenship of part of our territory” and “children of members of the Indian tribes.” Importantly, *Wong Kim Ark* indicated that the four exceptions were a closed set—meaning that there can be no additional exceptions recognized based on subsequent circumstances or developments. And the decision has consistently been read that way, including by plaintiffs and the Court today.

But *Wong Kim Ark*’s treatment of the exceptions as a “closed set” is incorrect, in my view. Considering the four exceptions as a permanently frozen or closed set as of the Fourteenth Amendment’s ratification in 1868—such that there can be no subsequent exceptions recognized based on new developments after 1868—is inconsistent with the Court’s longstanding approach to constitutional interpretation in a variety of areas.³

To spell that out: The Constitution is an enduring document, and its principles were designed to, and do, apply to modern conditions and developments. The original constitutional principles do not change absent a constitutional amendment, but the relevant principles—both the rules and exceptions alike—must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown or unanticipated by the Constitution’s Framers. Stated otherwise, the “meaning of rules is constant. Only their application to new situations presents a novelty.” A. Scalia & B. Garner, *Reading Law* 86 (2012); see also *Heller v. District of Columbia*, 670 F. 3d 1244, 1275 (CA DC 2011) (Kavanaugh, J., dissenting); A. Scalia, *A Matter of Interpretation* 45 (1997) (courts apply “original meaning” to “new and unforeseen phenomena”).

In Fourth Amendment cases, for example, courts apply the reasonableness requirement to searches of cars even though cars did not exist in 1791 or 1868. In First Amendment cases, courts apply free speech protections to the Internet notwithstanding that the Internet did not exist in 1791 or 1868. See, e.g., *Moody v. NetChoice LLC* (2024). In Second Amendment cases, this Court applies the Amendment to semi-automatic handguns even though those did not exist in 1791 or 1868. Cf. *District of Columbia v. Heller* (2008). From the other direction, moreover, this Court recognizes constitutional exceptions based on new circumstances when the new exception is relevantly similar to those exceptions that existed in 1791 or 1868. This Court’s constitutional precedents do not treat

3. In my view, to be clear, the result in *Wong Kim Ark* was correct given the facts and circumstances in that case.

the 1791 or 1868 exceptions as a closed set “trapped in amber.” *United States v. Rahimi* (2024).

So ordinarily, both the relevant constitutional rule and the constitutional exceptions (as of 1787, 1791, or 1868, as the case may be) apply to new circumstances. As the Court has said before, “[d]iscerning and developing the law in this way is a commonplace task for any lawyer or judge.” *Id.* . . .

The Citizenship Clause of §1 of the Fourteenth Amendment should be no different. The Court’s 1898 decision in *Wong Kim Ark* recognized four exceptions that existed as of the Fourteenth Amendment’s ratification in 1868. Therefore, under basic tenets of constitutional interpretation, other exceptions can be recognized when the new exceptions (i) are based on subsequent developments or circumstances that are new, i.e., largely unknown or unanticipated by the Framers of the Fourteenth Amendment, and (ii) are relevantly similar to the four previously recognized *Wong Kim Ark* exceptions.

Here, that interpretive principle would support additional exceptions for children born to foreign citizens unlawfully or temporarily in the country.

First, significant illegal immigration into the United States is a new circumstance that was largely unknown as of 1868 and that the Framers of the Fourteenth Amendment could not have fully anticipated. And the Framers likely would not have anticipated (and presumably would not have intended) the odd result of granting a substantial birthright citizenship benefit to (i) those foreign citizens who violate U. S. immigration law and illegally enter or overstay and then have children in the United States over (ii) those foreign citizens who follow U. S. immigration law and have children in their home countries while seeking to lawfully immigrate to the United States. Nor presumably would they have wanted to grant constitutional birthright citizenship to children of foreign citizens unlawfully in the country while simultaneously denying constitutional birthright citizenship to children of tribal American Indians. So too, the issue of temporary visitors who give birth in the United States presents a new and different circumstance than in 1868 given the significant changes in immigration laws and travel.

And second, those two categories of foreign citizens—namely, those unlawfully or temporarily in the country—are relevantly similar to the four categories of persons recognized as exceptions in *Wong Kim Ark*. The only apparent principle unifying the four disparate exceptions listed by the Court in *Wong Kim Ark*—especially in light of the exception for tribal American Indians—is that the parents in all of those varied circumstances were not U. S. citizens and were citizens of other nations, whether tribal or foreign. An exception for those born in the United States to foreign parents unlawfully or temporarily in the country is consistent with that principle and therefore with the Fourteenth Amendment.⁶ . . .

6. Plaintiffs’ only proposed unifying principle for the four exceptions is what they call the “fiction of extraterritoriality.” The Court today seemingly embraces that same principle. It is not clear what the “fiction of extraterritoriality” means here. And it certainly does not support treating the four exceptions as a permanently closed set. If plaintiffs’ point is to indulge the “fiction,” to use their word, that certain foreign citizens such as diplomats should be considered as being back in

JUSTICE THOMAS, with whom Justice Gorsuch joins, dissenting.

This Court long agreed that the Citizenship Clause did not apply to persons born here to children of temporary visitors. Just five years after the Citizenship Clause was ratified, this Court explained that the phrase “subject to the jurisdiction” excluded persons not domiciled here: “The phrase ‘subject to its jurisdiction,’” the Court explained, “was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States.” *Slaughter-House Cases*.

Then, in *Elk*, the Court again interpreted the Clause to require complete jurisdiction, not just bare territorial authority. The Court held that to satisfy the Citizenship Clause, a person must not only be “born within the territorial limits of the United States,” but must be “completely subject” to the United States’ “political jurisdiction” at birth. The Citizenship Clause’s “evident meaning,” this Court said, “is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to [its] political jurisdiction, and owing [it] direct and immediate allegiance.” The Citizenship Clause thus granted citizenship at birth only to persons who “ow[ed] no allegiance to any alien power.” Of course, the children of temporary visitors were not completely subject to the United States’ political jurisdiction, did not owe the United States direct and immediate allegiance, and did owe allegiance to an alien power.

Justice Harlan dissented in *Elk*, but he agreed that the Citizenship Clause referred to the same “complete jurisdiction.” He dissented only because he thought that someone born in the territorial United States could become a citizen even if he became subject to its complete jurisdiction later in life. On Justice Harlan’s view, which was not uncommon at the time, the Citizenship Clause did not require that the person be born *while* subject to the complete jurisdiction of the United States. Instead, a person could be born in the United States while not subject to its jurisdiction—as John Elk was because he was a member of an Indian tribe at birth—but become subject to its jurisdiction later—as Elk did by “abandoning his tribe.” On Justice Harlan’s view, following the law of domicile, persons became subject to the jurisdiction of the United States “by becoming bona fide residents of States” and “subject to taxation” there. Every Justice in *Elk* thus agreed that the Citizenship Clause did not refer to bare territorial authority.

The most celebrated Fourteenth Amendment opinion is Justice Harlan’s dissent in *Plessy v. Ferguson*. In that dissent, Justice Harlan disagreed with the *Plessy* Court’s conclusion that the Constitution tolerated state-imposed segregation. Justice Harlan took the position, to be vindicated decades later, that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among

their home countries for purposes of birthright citizenship, why does that not also apply to those in the United States unlawfully or temporarily? And most starkly, plaintiffs cannot convincingly explain their view that the children of tribal American Indians are not constitutionally entitled to birthright citizenship, while the children of foreign citizens unlawfully or temporarily in the country are constitutionally entitled to birthright citizenship.

citizens.” He also took a view on whom the Citizenship Clause applied and did not apply to. According to Justice Harlan, the Citizenship Clause did not apply to persons born here who resided abroad. Instead, it “gave citizenship to all born or naturalized in the United States *and residing here*.” . . .

In *United States v. Wong Kim Ark*, 169 U. S. 649, this Court interpreted the Citizenship Clause to apply to a person born and domiciled here.

The case, and the arguments made in it, arose out of the unique circumstances of Chinese immigration in the late-19th century. Hundreds of thousands of Chinese immigrated to the United States during this time. They were met with considerable hostility. By statute, Chinese settlers could not be naturalized. Congress then banned Chinese immigration in the Chinese Exclusion Act of 1882. Meanwhile, if a Chinese person renounced his allegiance to China, the Chinese Government could behead him upon his return, sell his family as slaves, and banish his relatives. See *Wong Kim Ark*; Justice John Marshall Harlan: Lectures on Constitutional Law, 1897–98, Lecture No. 27 (May 7, 1898), in 81 Geo. Wash. L. Rev. Arguendo 12, 345 (B. Frye, J. Blackman, & M. McCloskey eds. 2013). Given the era’s concern with dual citizenship, *supra*, this policy made it even more difficult for Chinese immigrants to fully settle in the United States.

Unlike other settlers, then, the Chinese—even those who lived here and wished to remain—had no path to citizenship and no means of freeing themselves from the grasp of China. The Executive Branch took the view that because domicile no longer ensured full integration into the American body politic, the Citizenship Clause’s phrase “subject to the jurisdiction” must require more than domicile. That view would entail that a child born to Chinese parents domiciled in this country was not a citizen. Instead, the Executive Branch sought to replace the requirement of domicile, which would make any child of domiciled Chinese immigrants a citizen, with the requirement that a person’s parents already be citizens. Acting on this view, the Government in 1895 denied citizenship to a man domiciled in the United States from birth.

The stipulated facts were these. Wong Kim Ark was born in San Francisco in 1873, and his legal home was California. His parents were not temporary visitors. They were not illegal aliens. Instead, Wong’s parents “had done everything within their power to express their desire and intent to become Americans.” *Post* (Alito, J., dissenting). They came to settle in America. After Wong traveled to China in 1890, he returned and was admitted to the United States as a citizen. But, after his second trip to China in 1894, the American customs collector denied him permission to re-enter. The Government claimed, for the first time, that Wong was not a citizen.

This Court’s decision in *Wong Kim Ark* concerned only persons already domiciled in the United States. . . . The Court was not persuaded and ruled that Wong, born in the United States to parents domiciled here, was a citizen.

The Court found it so important that Wong and his parents were domiciled in the United States at the time of his birth that it gratuitously insisted upon that fact throughout its opinion. The Court’s introductory paragraph stated seven different ways that Wong was domiciled in the United States. . . .

The opinion itself was filled with meandering dicta. The Court's interpretation of the Citizenship Clause evolved over the course of the opinion, before landing on an interpretation that limited citizenship at birth to persons domiciled here. At first, the opinion stated that the rule of American citizenship was the feudal principle of birth on the soil with only two exceptions: (1) "the child of an ambassador or other diplomatic agent of a foreign State" and (2) the child of "an alien enemy in hostile occupation." Then, after considering more evidence and arguments, the opinion reformulated the rule to include a third exception: (1) "children of members of the Indian tribes," (2) "children born of alien enemies in hostile occupation," and (3) "children of diplomatic representatives of a foreign State." Then, after discussing more "considerations and authorities," the opinion reformulated the rule with at least five exceptions and a residence requirement: "[A]ll children here born of *resident* aliens," with "the exceptions or qualifications" of (1) "children of foreign sovereigns," (2) children of foreign "ministers," (3) children "born on foreign public ships," (4) children "of enemies within and during a hostile occupation of part of our territory," and (5) "children of members of the Indian tribes owing direct allegiance to their several tribes." Then, the Court concluded by reiterating an explicit domicile requirement: Outside of these five categories, the Citizenship Clause covers "all other persons, of whatever race or color, *domiciled within the United States*." So, although these various statements are both dicta and irreconcilable—as is much of the opinion's reasoning—the Court's most complete rule statement was limited to persons, like Wong, born and domiciled in the United States.

Chief Justice Fuller's dissent, joined by Justice Harlan, did not accept the Government's primary theory that, to qualify for birthright citizenship, a child born in this country must also be born to citizen parents. Such a position, after all, was in tension with Justice Harlan's twice-stated view that the Citizenship Clause turned on "complete jurisdiction," *Elk* (dissenting opinion), or "resid[ence]," *Plessy* (dissenting opinion)—two terms that corresponded to domicile. Chief Justice Fuller's dissent instead took the position that the Citizenship Clause "recognize[d] an essential difference between birth during temporary, and birth during permanent, residence." On his account, the Citizenship Clause excluded children "born of aliens whose residence was merely temporary."

Chief Justice Fuller nonetheless dissented because he rejected the premise that Wong's parents were domiciled here at the time of his birth. He explained that because Chinese law purported to bind Wong's family even after they had settled here, the family "cannot . . . acquire a permanent home here, no matter what the length of their stay may be." Justice John Marshall Harlan: Lectures on Constitutional Law, in 81 Geo. Wash. L. Rev. Arguendo, at 345. Thus, Chief Justice Fuller and Justice Harlan dissented because, in their view, Wong and his parents were not actually domiciled in the United States at the time of his birth. . . .

JUSTICE GORSUCH, dissenting. . . .

[T]he understanding Justice Thomas and I share of the Citizenship Clause is consistent with this Court's holding in *United States v. Wong Kim Ark*. That

case involved parents born in China who had made their home in this country lawfully, even though they never became naturalized citizens and statutes then in effect made that impossible. The question the Court faced was whether the parents' child, born in this country, was himself a citizen. The government argued that the child was not a citizen because his parents were not. Throughout history, many other nations have restricted citizenship by birth to the children of citizens. But the American settler's view of citizenship reflected in the Citizenship Clause is not so parsimonious. What matters isn't whether a child's parents are citizens. What matters is whether they (and, by law, their child at birth) have made this place their home and are thus "domiciled within the United States." . . .

JUSTICE ALITO, dissenting.

. . . After the ratification of the Fourteenth Amendment, Supreme Court cases quickly acknowledged the interpretation set out above. In the *Slaughter-House Cases* (1873), the Court wrote that the Amendment's Citizenship Clause "was intended to exclude from its operation *children of . . . citizens or subjects of foreign States born within the United States.*"; *Minor v. Happersett* (1875) (expressing "doubts" about the citizenship of children who are born to non-citizen parents). And in *Elk v. Wilkins* (1884), Justice Gray's opinion for the Court held that the Citizenship Clause requires "not merely" that a person born in the United States be "subject in some respect or degree to the jurisdiction of the United States," but that he be "*completely subject to [the United States'] political jurisdiction*" and owe the country his "*direct and immediate allegiance.*" . . .

That was the state of the Court's case law until *Wong Kim Ark* turned it in a different direction. That case provides the strongest support for today's decision, but its holding is not controlling, and I would not allow the meaning of American citizenship to be forever dictated by the opinion's dubious dicta. *Wong Kim Ark* cautioned against assigning too much weight to dicta, and it is appropriate to apply that same advice to the opinion in *Wong Kim Ark* itself.

The Court leans heavily on *Wong Kim Ark*, which certainly displayed the fruit of considerable research on a range of subjects. But it showed little respect for precedent. Justice Gray, the author of *Elk*, also wrote *Wong Kim Ark*, but he brushed *Elk* aside on the flimsy ground that it "concerned only members of the Indian tribes" and thus had no bearing on other children. . . .

[*Wong Kim Ark*] speculates that Congress might have thought that "not subject to any foreign power" trimmed the birthright-citizenship rule too much and that this accounts for Congress's use of different language in the Fourteenth Amendment. That suggestion flies in the face of all the reasons previously mentioned why the citizenship tests in the Civil Rights Act and the Fourteenth Amendment must be understood to be substantively identical.

That is the extent of *Wong Kim Ark*'s analysis of the terms of the Fourteenth Amendment's citizenship test, and I would not carve an interpretation of the Citizenship Clause in stone based on such dubious dicta.

And dicta it is. Sometimes it is not easy to determine the exact contours of a decision's holding, but the opinion in *Wong Kim Ark* obviates that problem. At the end of the opinion, the Court clearly spells out exactly what it held:

“[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 domicil 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.”

Thus, the holding of the case was limited to a child born in the United States to parents who were not citizens but had established “a permanent domicil and residence” here. Many other key passages in the opinion confirm this fact. . . .

The Court dismisses these pointed and repeated references to domicile, arguing that domicile was merely an incidental fact and not an element of the holding. But Justice Gray had a good reason for pointing out that *Wong Kim Ark*’s parents had established their domicile here. A person’s domicile is the place where he or she intends to live indefinitely. Therefore, the fact that they had established domicile here meant that they wanted to make the United States their home. . . .

When we understand the situation Wong Kim Ark and his parents faced, their domicile in the United States takes on a special meaning. If they had been white or black, they could have applied for naturalization. But because they were Chinese, the law forbade their naturalization. By establishing domicile, they had done everything within their power to express their desire and intent to become Americans. If the Court had not interpreted the Citizenship Clause in the way set out in the holding, the result would have been a population permanently caught in limbo. The Chinese immigrants who were lawfully present before the enactment of the Chinese Exclusion Act in 1882, as well as all their descendants, could never become citizens no matter how much they wanted to be Americans, no matter how deep their roots in this country, and no matter how substantial their contributions to our society.

Wong Kim Ark is therefore best understood as holding that people who are lawfully present here, establish the United States as their intended permanent home, and do everything within their power to become United States citizens can be seen as no longer subject to any foreign power.¹⁵ Thus, their children are born citizens under the Fourteenth Amendment. That interpretation of *Wong Kim Ark* is consistent with the decision’s statement of its holding; it can be reconciled with the language of the Fourteenth Amendment and the Civil Rights Act; and for the Chinese Americans of Wong Kim Ark’s time, it was the interpretation that best implemented the Fourteenth Amendment’s promise of racial equality.

15. The majority accuses me of creating an ad hoc exception to the rule of complete allegiance for those who have done everything in their power to become United States citizens. But that is a surprising line of attack for the majority. After all, this exception comes from *Wong Kim Ark*—a decision the majority fully embraces. *Wong Kim Ark*, in turn, had to recognize this exception to effectuate the Fourteenth Amendment’s protections in the face of the discriminatory Chinese Exclusion Act. Regardless, as far as exceptions are concerned, the Court has more to explain than I do. The Court has not offered any satisfactory explanation for how the feudal rule it champions coheres with the new, distinctly American situations regarding Indians, slaves, and free blacks.

4. Can Congress Reverse the Holding of *Trump v. Barbara* by Statute?

In *Trump v. Barbara*, a majority of five Justices concluded that the President's executive order was unconstitutional. Four Justices maintained the order was constitutional (at least on its face). One of these four Justice—Justice Kavanaugh—contended that the executive order violated the Immigration and Nationality Act of 1952. According to Kavanaugh's reasoning, Congress could authorize the executive orders by revising that statute. Assuming his reading of the Act is correct, how is that possible?

All agree that the Naturalization Clause empowers Congress to *expand* citizenship beyond the original meaning of the Citizenship Clause. Justice Kavanaugh wrote that Congress did exactly this when it enacted the Immigration and Nationality Act of 1952. In effect the statute provided that there were four and only four categories of persons who were not eligible for birthright citizenship, which extends citizenship beyond the original meaning of the Clause. On his analysis, Congress may cut back on its own expansion of citizenship by enacting a statute returning to the original meaning of the Fourteenth Amendment. No other Justice accepted Justice Kavanaugh's reading of the 1952 statute. Indeed, Justices Thomas and Gorsuch expressly rejected Kavanaugh's statutory argument.

STUDY GUIDE

- Do you find it plausible that Congress adopted a more expansive application of birthright citizenship when it used the exact same language as the Amendment?

Trump v. Barbara – Part V 609 U.S. __ (2026)

JUSTICE KAVANAUGH, concurring in the judgment and dissenting in part.

Executive Order No. 14160 establishes new exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country. The Court today holds that the Order violates the Fourteenth Amendment to the Constitution. I respectfully disagree with the Court's constitutional holding. In my view, the Executive Order does not violate the Fourteenth Amendment. But the Order does contravene a federal statute, 8 U. S. C. § 1401(a). Congress could—consistent with the Fourteenth Amendment—amend § 1401(a) or otherwise enact new legislation establishing exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country. But Congress has not yet done so.

This Court's 1898 *Wong Kim Ark* decision interpreted the “subject to the jurisdiction” language of the Fourteenth Amendment. That decision adopted a general rule of birthright citizenship for those born in the United States—with four disparate exceptions for “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 “children of members of the Indian tribes.” Importantly, the *Wong Kim Ark* decision treated those four exceptions as a closed set for constitutional purposes, meaning that Congress could not create other exceptions to birthright citizenship. . . .

In 1940 and 1952, Congress employed the exact language from the Fourteenth Amendment—“subject to the jurisdiction thereof”—in comprehensive new immigration and naturalization laws that provided for birthright citizenship. The relevant provisions are now codified at 8 U. S. C. §1401(a).

Because §1401(a) uses the same language as the Fourteenth Amendment, the statute has long been interpreted to adopt *Wong Kim Ark*’s general rule of birthright citizenship, subject to the exceptions identified in that case. . . . [F]rom the time of those statutory enactments in 1940 and 1952 all the way through 2025, the Executive Branch consistently interpreted §1401(a) to encompass only those *Wong Kim Ark* exceptions to birthright citizenship. (The Government here does not contest that historical point.) That long and consistent Executive Branch interpretation further indicates that §1401(a) incorporates only those exceptions. See *Loper Bright Enterprises v. Raimondo* (2024) (“interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute’s meaning”).

If Congress in 1940 or 1952 wanted to create new exceptions—and thereby test *Wong Kim Ark*’s statement treating the four exceptions as a closed set—Congress presumably would not have repeated the precise language that this Court had interpreted in *Wong Kim Ark* to contain only those four exceptions. Stated more doctrinally, Congress “must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.”

In 2025, however, Executive Order No. 14160 sought to add two new exceptions to birthright citizenship for children born to foreign citizens who are either illegally or temporarily in the United States. In doing so, the Executive Order goes beyond what §1401(a) authorizes. For the Executive Order to be lawful, therefore, Congress would need to amend §1401(a) or otherwise enact new legislation to encompass those two new exceptions. . . .

[T]he Executive Order does not violate the Fourteenth Amendment. But the Order does contravene 8 U. S. C. §1401(a). Consistent with the Fourteenth Amendment, Congress could amend §1401(a) or otherwise enact new legislation establishing exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country. But Congress has not yet done so.

JUSTICE THOMAS, with whom JUSTICE GORSUCH JOINS, dissenting.

Before concluding, I briefly address plaintiffs’ argument that even if the Citizenship Order has at least some lawful applications consistent with the Citizenship Clause, it is not consistent with the statutory citizenship provision in force today. The Court gives no independent import to the statutory citizenship provision, and I would not, either. . . .

The Nationality Act's citizenship provision codified the Civil Rights Act's "not subject to any foreign power" requirement and the Citizenship Clause's "subject to the jurisdiction" requirement. It did so by borrowing language from the Citizenship Clause, which granted citizenship to all persons "born in the United States, and subject to the jurisdiction thereof." By using language that tracked the Citizenship Clause, Congress did not clearly change the law. "It would be surprising to discover that Congress departed from the constitutional standard by enacting the exact constitutional language." S. Menashi, *The Birthright Citizenship Debate*, 49 Harv. J. L. & Pub. Pol'y 301, 313 (2026).