

# Originalism and Birthright Citizenship

MICHAEL D. RAMSEY\*

*The first sentence of 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.” This language raises two substantial questions of scope. First, what does it mean to be born “in” the United States? Does that include birth in U.S. overseas possessions, territories, bases, or places under temporary U.S. occupation? Second, what does it mean to be born “subject to the jurisdiction” of the United States? Does that include persons born in the United States to parents who are only temporary visitors or parents not lawfully present in the United States?*

*The original meaning of the Citizenship Clause’s text indicates a broad scope for constitutional birthright citizenship as to both places and persons. At the time of enactment, places subject to permanent U.S. sovereign authority were considered “in” the United States without regard to whether they were territorially contiguous or culturally integrated into the U.S. political system. In mid-nineteenth-century terminology, persons born within U.S. territory were “subject to [its] jurisdiction” unless excluded legally by international rules of immunity or practically by military or political realities.*

*But these originalist solutions in turn raise a challenge for originalism as a theory of modern constitutional interpretation. There is little evidence that the Amendment’s enactors considered or could have foreseen the modern implications of either question. The United States had no material overseas possessions when the Amendment was drafted and ratified. Restrictive federal immigration laws did not materially take hold in the United States until the late nineteenth century. Application of the Citizenship Clause thus requires originalism to confront the role (or lack thereof) of intent in modern originalist theory. Most modern originalists claim to be bound by the original meaning of the text rather than the original intent of the enactors. But in the case of the Citizenship Clause, the text’s resolution of key questions of its scope appears to be accidental. The Citizenship Clause presses originalism to explain why original meaning should be binding in modern law when it does not reflect the enactors’ policy choices. As the Article discusses, explanations are*

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\* Hugh and Hazel Darling Foundation Professor of Law, University of San Diego School of Law. © 2020, Michael D. Ramsey. Thanks to Larry Alexander, Allan Erbsen, Andrew Hyman, Matthew Ing, Andrew Kent, Thomas H. Lee, Catherine Powell, Lisa Ramsey, Michael Rappaport, John Vlahoplus, and participants at Fordham Law School’s Faculty Colloquium for helpful comments, and to Jessica Bade and Ellen Atkinson for research assistance.

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#### INTRODUCTION

The first sentence of the Fourteenth Amendment declares: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>1</sup> This language raises two substantial questions of scope. First, what does it mean to be born “in” the United States? Does that include birth in U.S. overseas possessions, territories, bases, or places under temporary U.S. occupation? Second, what does it mean to be born “subject to the jurisdiction” of the United States? Does that include persons born in the United States to parents who are only temporary visitors or parents not lawfully present in the United States?

Modern law curiously gives a narrow answer to the first question and a broad answer to the second. Birth “in” the United States, for constitutional purposes, means only birth in one of the states or an “incorporated” territory such as the District of Columbia. It excludes U.S. overseas territories such as Puerto Rico and American Samoa, whose inhabitants are not constitutional citizens (people born in Puerto Rico have birthright citizenship by statute while those born in American Samoa do not).<sup>2</sup> But long-standing practice broadly recognizes constitutional citizenship for almost all persons born “in” the United States in this narrow sense, including children of temporary visitors and undocumented migrants.<sup>3</sup>

Both propositions have come into recent dispute. Cases brought by natives of American Samoa have challenged the Citizenship Clause’s geographic scope, with (so far) inconsistent results,<sup>4</sup> and the American Samoans’ claim has received substantial academic support.<sup>5</sup> The constitutional citizenship of U.S.-

1. U.S. CONST. amend. XIV, § 1.

2. *See Tuaua v. United States*, 788 F.3d 300, 307–08 (D.C. Cir. 2015) (discussing citizenship status of persons born in “unincorporated” U.S. territories); SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* 122–43 (2019) (discussing Puerto Ricans’ failure to obtain constitutional citizenship and the 1917 legislation giving them statutory citizenship).

3. U.S. DEP’T OF STATE, 8 FOREIGN AFFAIRS MANUAL § 301.1-1(d) (2018) (“All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth . . . .”); Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 721–23 (2012) (discussing modern practice).

4. *Compare Tuaua*, 788 F.3d at 302–06 (rejecting U.S. citizenship claims of persons born in American Samoa), *with Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196–97 (D. Utah 2019) (finding that persons born in American Samoa are entitled to constitutional citizenship), *appeal filed*, No. 20-4017 (10th Cir. Feb. 11, 2020).

5. *See, e.g.*, Brief of Citizenship Scholars as *Amici Curiae* in Support of Plaintiffs-Appellees and Affirmance at 31, *Fitisemanu*, No. 20-4017 (10th Cir. May 12, 2020) (supporting American Samoans’

born persons whose parents are neither U.S. citizens nor lawful permanent residents has likewise been sharply disputed, including recently by the President of the United States.<sup>6</sup> Like the campaign to expand the Clause's geographic scope, the campaign to narrow the Clause's application has received notable academic support.<sup>7</sup>

Originalism, increasingly a prominent approach to constitutional interpretation,<sup>8</sup> appears to provide answers to both questions. As described below, the Amendment's text, given its public meaning at the time of enactment, directed a relatively broad scope for constitutional birthright citizenship as to both places and persons. At the time of enactment, places subject to permanent U.S. sovereign authority were considered "in" the United States without regard to whether they were territorially contiguous or culturally integrated into the U.S. political system. The idea of territory formally possessed by, but not fully within, the United States for constitutional purposes was an atextual and ahistorical concept the Supreme Court created over thirty years after the Amendment's ratification. Similarly, in mid-nineteenth-century terminology, persons born within U.S. territory were "subject to [U.S.] jurisdiction" unless excluded legally by national or international law concepts of jurisdiction or practically by military or political realities; it seems apparent that this meaning was adopted in the Fourteenth Amendment.

But these originalist solutions raise a puzzle for originalism as a theory of modern constitutional interpretation. Although application of the text's original meaning to core modern questions of constitutional citizenship seems relatively

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claim to constitutional citizenship); ERMAN, *supra* note 2, at 8–26 (arguing that the Fourteenth Amendment extended citizenship to natives of island territories such as Puerto Rico); Rose Cuisson Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 130–31, 134–36 (2018) (describing the American Samoa citizenship litigation); John Vlahoplus, *Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories*, 27 WM. & MARY BILL RTS. J. 401, 401–02 (2018) (criticizing the *Tuaua* decision).

6. See Patrick J. Lyons, *Trump Wants to Abolish Birthright Citizenship. Can He Do That?*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html>; *Trump Says He Is Seriously Looking at Ending Birthright Citizenship*, REUTERS (Aug. 21, 2019, 12:43 PM), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-he-is-seriously-looking-at-ending-birthright-citizenship-idUSKCN1VB21B> [<https://perma.cc/A87U-DKLV>]. As discussed in Section I.C, the President has suggested making the change by executive order rather than by legislation.

7. For challenges to a broad view of birthright citizenship in academic and political commentary, see generally PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985); Patrick J. Charles, *Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L.J. 211 (2012); John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167 (2007); and William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008). For academic defenses, see generally GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FOUNDATIONAL LAW* 165–87 (1996); Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331 (2010); James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367 (2006); Ing, *supra* note 3, at 725–68; Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008).

8. See generally ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* (2017) (outlining the history and basic principles of originalism).

straightforward, there is little evidence that the Amendment's enactors considered or foresaw the resolution of either question regarding the Clause's scope. As to the consequences of birth in overseas possessions, the United States had no material overseas possessions when the Amendment was drafted and ratified. The assumption had generally been and remained as of the 1860s that U.S. territories (apart from the constitutionally unique District of Columbia) would be settled by people from the existing states and would become states themselves.<sup>9</sup> Acquisition of imperial possessions—raising the question of what counted as “in” the United States for citizenship purposes—did not begin until the Spanish–American War.<sup>10</sup>

Similarly, restrictive federal immigration laws did not materially take hold in the United States until the late nineteenth century. The U.S. federal government long claimed some power to exclude aliens (at least enemy aliens), and immigration restrictions existed throughout the nineteenth century at the state level.<sup>11</sup> It was possible in theory for persons to be born in the United States to parents not lawfully present, but there is little evidence that anyone recognized the issue in the 1860s, much less that the Amendment's enactors thought they had resolved it by the Citizenship Clause.

Application of the Citizenship Clause thus requires originalism to confront the role (or lack thereof) of intent in modern originalist theory. Most modern originalists claim to be bound by the original meaning of the text rather than the original intent of the enactors.<sup>12</sup> But in the Citizenship Clause, the text's resolution of these key modern questions of its scope appears to be accidental. Application of the original meaning to these questions would not resolve core modern policy issues in accordance with the enactors' design—because such resolution was not part of the original design other than by accident. The Citizenship Clause presses originalism to explain why original meaning should be binding in modern law when it does not reflect policy choices of the enactors.<sup>13</sup> As this Article discusses, explanations are available, but they may take originalist approaches away from some of their apparent common ground.

The Article proceeds in three parts. Part I reviews the development of U.S. citizenship law in the eighteenth and nineteenth centuries and introduces the questions of the Citizenship Clause's scope. Part II argues that the Clause's original

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9. See ERMAN, *supra* note 2, at 12.

10. See *id.* at 8–26; GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 103–28 (2004).

11. See NEUMAN, *supra* note 7, at 19–20.

12. See generally WURMAN, *supra* note 8, at 11–24 (discussing the evolution of originalist theories); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 *NW. U. L. REV.* 1371 (2019) (discussing principles of modern originalism). For approaches focused on original intent, see, for example, Larry Alexander, *Originalism, The Why and the What*, 82 *FORDHAM L. REV.* 539 (2013) and Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* 703 (2009).

13. See Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 *U. PA. J. CONST. L.* 1363, 1364–65 (2009).

public meaning indicates a broad scope, both as to places “in” the United States and persons “subject to [its] jurisdiction.” Part III illustrates the enactors’ inability to foresee key policy questions of constitutional citizenship and considers the implications of these conclusions for theories of originalism.

### I. BACKGROUND: U.S. CITIZENSHIP IN HISTORICAL CONTEXT

This Section provides an overview of legal developments relating to the definition and scope of U.S. citizenship, as well as key modern controversies. As it recounts, the Constitution adopted in 1789 alluded to but did not define U.S. citizenship, leaving its articulation to state and federal statutes and common law.<sup>14</sup> Particularly as a result of the uncertain citizenship status of freed slaves after the Civil War, Congress adopted first a statute (the Civil Rights Act of 1866) and then the Fourteenth Amendment (ratified in 1868) declaring that, with some exclusions, persons born in the United States are U.S. citizens.<sup>15</sup> These provisions confirmed the citizenship of the freed slaves, but subsequent developments raised issues about the inclusion of other groups that persist to modern times. Specifically, as this Section describes, doubts arose about the citizenship of persons born in U.S. overseas territories and of persons born in the United States to noncitizen parents.

#### A. CITIZENSHIP IN THE ORIGINAL CONSTITUTION AND AFTERWARDS

The original Constitution was curiously unsystematic regarding citizenship. Its text assumed (without expressly declaring) that there was a concept of citizenship, both citizenship of the United States and citizenship of the individual states. As to U.S. citizenship, the three eligibility clauses (for the House, the Senate, and the presidency) referred to the length of time one must be a “Citizen of the United States” to hold the different offices.<sup>16</sup> Article I, Section 2 made it seven years for the House, and Article I, Section 3 made it nine years for the Senate; for the presidency, Article II, Section 1 provided that only “a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution” was eligible.<sup>17</sup> Article I, Section 8 also gave Congress power to “establish a uniform Rule of Naturalization.”<sup>18</sup> Naturalization was then understood as power to confer citizenship legislatively;<sup>19</sup> as a power of the national Congress, this clause presumably granted the power to create U.S. citizenship by statute (though the Constitution did not say so in so many words).

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14. *Cf.* U.S. CONST. art. I, §§ 2–3; *id.* art. II, § 1; *id.* art. III, § 2; *id.* art. IV, § 2.

15. *See id.* amend. XIV, § 1; Civil Rights Act of 1866, ch. 31, 14 Stat. 27. For a chronological summary of the enactment of the Act and the Amendment, see David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 394–407 (2008).

16. U.S. CONST. art. I, § 2, cl. 2 (House); *id.* art. I, § 3, cl. 3 (Senate); *id.* art. II, § 1, cl. 5 (President).

17. *Id.* art. I, §§ 2–3; *id.* art. II, § 1; *see* Michael D. Ramsey, *The Original Meaning of “Natural Born,”* 20 U. PA. J. CONST. L. 199, 234–40 (2017) (discussing the presidential eligibility clause).

18. U.S. CONST. art. I, § 8, cl. 4.

19. *See* Ramsey, *supra* note 17, at 236 (discussing the original scope of Congress’s naturalization power).

Article III, meanwhile, contained several references to citizens of individual states:

The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State;—between Citizens of different states;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>20</sup>

Likewise, the Comity Clause of Article IV provided that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>21</sup> Although perhaps one could read these references to “Citizens” to mean U.S. citizens resident in a particular state, they seem better understood to envision a distinct concept of state citizenship.<sup>22</sup>

These provisions exhaust the original Constitution’s treatment of citizenship, and they left substantial questions. Apart from naturalization, how did one become a citizen of the United States? To what extent did state citizenship differ from U.S. citizenship? What limits, if any, existed on states’ ability to define state citizenship? As discussed below, these questions became sharply disputed in the early- to mid-nineteenth century.

Initially, however, development of citizenship law went fairly smoothly, though it remained somewhat undertheorized. Congress, pursuant to its naturalization power, enacted the first national naturalization statute in 1790,<sup>23</sup> and a federal statutory law of naturalization remained part of U.S. law, with various repeals, replacements, and amendments, through the time of the Fourteenth Amendment. Though U.S. statutory naturalization law thus varied in details over time, during this period it remained consistent in basic principles: (1) children born abroad of U.S.-citizen parents were (subject to some limitations) U.S. citizens at birth; (2) aliens born abroad could become U.S. citizens through a process that involved maintaining U.S. residence for a period of time and taking formal allegiance to the United States; and (3) persons born in the United States, regardless of the circumstances of their parents, were not covered by the federal citizenship statutes.<sup>24</sup>

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20. U.S. CONST. art. III, § 2, cl. 1.

21. *Id.* art. IV, § 2.

22. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 255–61 (1978) (discussing historical interpretations of Article IV).

23. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

24. See KETTNER, *supra* note 22, at 236–46 (discussing the development of U.S. naturalization law in this period). For most of the nineteenth century, the basic outlines of naturalization were set by the Naturalization Act of 1802 with various modifications. *Id.* at 246 n.92; see Act of Apr. 14, 1802, ch. 28, 7 Stat. 153.

The 1802 Act had two ambiguities relating to foreign-born children of U.S. citizens. First, it was not clear whether it required both parents, either parent, or just the father to be a U.S. citizen. Second, it arguably did not apply to children whose parents were born after 1802, because it applied only to “children of persons who are now, or have been citizens of the United States.” 1802 Act § 4; see *Ludlam v. Ludlam*, 31 Barb. 486, 490–91 (N.Y. Gen. Term 1860), *aff’d*, 26 N.Y. 356 (1863) (assuming that the

Without comprehensive federal law in the Constitution or federal statutes, citizenship law (apart from naturalization) remained, as it was before 1789, a combination of state statutes and common law. Many states had citizenship statutes dating from the pre-Constitution period, but (like the post-1789 federal laws) they were typically not comprehensive.<sup>25</sup> As a result, citizenship law was often common law. In particular, courts invoked a common law of citizenship to answer two early questions.

The first of these questions was how to treat persons born during the Revolution in areas under British occupation and persons born in the American colonies before the Revolution who had not fully supported the revolutionary side. For example, *Gardner v. Ward* concerned the citizenship of a person born in Massachusetts prior to 1775 who lived outside the American colonies during the war and returned in the 1780s.<sup>26</sup> *Inglis v. Trustees of the Sailor's Snug Harbour* similarly addressed the citizenship of a person born in the colonies prior to 1783, but who had lived in New York City during the British occupation and departed for England when the British withdrew.<sup>27</sup> These cases generated a range of technical answers whose significance diminished as the nineteenth century progressed and the Revolution became more distant. They are important, however, in revealing a common law baseline that persons born within a nation's territory were citizens (or subjects) of that nation—with some limitations, and with some uncertainty as to the effect of the change in sovereignty accompanying U.S. independence.<sup>28</sup>

A second question was the citizenship status of persons born in the United States to noncitizen parents. In theory, there were two main ways one could approach this question. One, associated with European writers and European practice, was that citizenship derived from one's parents (typically one's father). Under this view, called *jus sanguinis*, children of aliens born in a foreign country

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1802 Act did not apply to a foreign-born child whose U.S.-citizen father was born after 1802). The 1855 Naturalization Act resolved both ambiguities by providing that the child's father had to be a U.S. citizen and that there were no limitations on when the father was a citizen. See Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604.

25. See, e.g., *Lynch v. Clarke*, 1 Sand. Ch. 583, 648, 665–68 (N.Y. Ch. 1844) (discussing various colonial and state statutes); *Barzizas v. Hopkins*, 23 Va. (2 Rand.) 276, 280–85 (1824) (discussing and applying Virginia's citizenship statutes); see also KETTNER, *supra* note 22, at 213–24 (discussing state citizenship laws).

26. 2 Mass. (1 Tyng) 244, 253 (1805) (holding that the claimant was entitled to U.S. citizenship).

27. 28 U.S. (3 Pet.) 99, 120, 126–27 (1830) (holding that the claimant was not entitled to U.S. citizenship). For similar cases, see, for example, *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830); *Dawson's Lessee v. Godfrey*, 8 U.S. (4 Cranch) 321 (1808); *McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209 (1808).

28. Thus, in *Gardner*, for example, the baseline assumption was that persons born in Massachusetts prior to the Revolution were British subjects and then became U.S. citizens upon U.S. independence. The difficult question was whether *Gardner's* physical absence and failure to support the Revolution created an exception; the court held it did not. See 2 Mass. (1 Tyng) at 245, 253; see also KETTNER, *supra* note 22, at 173–209 (discussing these cases); Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868–1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519, 528–30 (2001) (emphasizing these cases as associating citizenship with birth within sovereign territory).

would not be citizens or subjects of that country (unless naturalized).<sup>29</sup> English law and practice were sharply to the contrary, however. Birth in England made a person an English subject regardless of the parents' circumstances. Blackstone explained:

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors.<sup>30</sup>

Blackstone's account continued, "[n]atural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection. . . . Natural allegiance is therefore a debt of gratitude."<sup>31</sup> It followed that the parents' status as subjects or aliens was irrelevant to the child's status: "The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such."<sup>32</sup>

After independence, there was general (though not universal) agreement among U.S. courts and commentators that the English idea of subjectship by birth within the nation's territory (*jus soli*) became the citizenship law of the United States. As discussed, this idea formed the baseline in cases such as *Gardner* and

29. See, e.g., EMER DE VATTTEL, *LE DROIT DES GENS OU, PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUITE & AUX AFFAIRES DES NATIONS & DES SOUVERAINS* [THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS] bk. I, ch. XIX, § 212 (trans., 1797) (1758); see also Ramsey, *supra* note 17, at 224–26 (discussing Vattel).

30. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 354–55 (Oxford, Clarendon Press 1765).

31. *Id.* at 357 (footnote omitted).

32. *Id.* at 361–62. In stating this rule, Blackstone followed principles described by Edward Coke more than a century earlier in *Calvin's Case*:

Concerning the local obedience it is observable, that as there is a local protection on the King's part, so there is a . . . local ligeance of the subject's part. . . . [L]ocal obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is . . . a natural born subject. . . .

[1608] 77 Eng. Rep. 377, 384; 7 Co. Rep. 1 a, 6 b; see KETTNER, *supra* note 22, at 17–28 (discussing *Calvin's Case*); Meyler, *supra* note 28, at 528–29 (same); Vlahoplus, *supra* note 5, at 404–07 (same). The rule likely long predates Coke. See *Lynch v. Clarke*, 1 Sand. Ch. 583, 639 (N.Y. Ch. 1844) ("It is an indisputable proposition" that "[b]y the common law, all persons born within the ligeance of the crown of England, were natural born subjects, without reference to the *status* or condition of their parents. . . . This was settled law in the time of Littleton, who died in 1482. And its uniformity through the intervening centuries, may be seen by reference to the authorities, which I will cite without further comment." (citation omitted)).

*Inglis* in assessing the effects of U.S. independence on citizenship. Shortly after the Constitution's ratification, James Madison observed:

It is an established maxim that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States. . . .<sup>33</sup>

Importantly, the U.S. baseline was commonly stated in Blackstonian terms as turning on the place of birth irrespective of the citizenship status of the parents. William Rawle wrote in 1829:

Therefore every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution. . . . Under our Constitution the question is settled by its express language, and when we are informed that, excepting those who were citizens, (however the capacity was acquired,) at the time the Constitution was adopted, no person is eligible to the office of president unless he is a natural born citizen, the principle that the place of birth creates the relative quality is established as to us.<sup>34</sup>

Similar statements can be found, for example, in works by Zephaniah Swift (1795)<sup>35</sup> and James Kent (1827).<sup>36</sup>

Nineteenth-century court opinions were generally to the same effect. In *Inglis*, Justice Story (in dissent, but consistent with the majority on this point) followed Blackstone, writing:

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33. M. ST. CLAIR CLARKE & DAVID A. HALL, *CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE* 33 (Washington, Gales & Seaton 1834) (remarks made during the first session of the first Congress in 1789). The context was a debate over William Smith's eligibility to serve in Congress, which turned upon whether and when he had become a U.S. citizen. *See id.*

For a possible contrary view, see DAVID RAMSAY, *A DISSERTATION ON THE MANNER OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN OF THE UNITED STATES* 6 (n.p. 1789) (appearing to adopt a *jus sanguinis* view of citizenship); Ramsey, *supra* note 17, at 227–28 n.96 (discussing Founding-Era views of *jus sanguinis* citizenship).

34. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 86 (Portage Publications, Inc. 2d ed. 2011) (1829).

35. 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 163, 167 (Windham, John Byrne 1795) (describing “natural born subjects” as those “born within the state” and later specifically saying that the children of aliens “born in this state” are natural born subjects); *id.* at 164–65 (explaining the *jus soli* rule as based on allegiance to the territorial sovereign at birth in return for protection, closely tracking Blackstone).

36. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 33, 43 (New York, O. Halsted 1827) [hereinafter 2 KENT (6th ed.)] (distinguishing between “natives” and “aliens,” and concluding that “[n]atives are all persons born within the jurisdiction of the United States” while an “alien is a person born out of the jurisdiction of the United States”). A later edition added in a footnote: “This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent.” 2 *id.* at 38 n.a (6th ed. 1848) (citing *Calvin's Case*, [1608] 77 Eng. Rep. 377, 384; 7 Co. Rep. 1 a, 6 b).

Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to the sovereign, as such, *de facto*.<sup>37</sup>

Earlier, in *McCreery's Lessee v. Somerville*, Story (writing for the Court) observed without discussion that the U.S.-born daughters of an Irish citizen were “native born citizens of the United States.”<sup>38</sup> Somewhat later, in *Lynch v. Clarke*, a New York state case, the court concluded:

[B]y the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen. . . . I am bound to say that the general understanding of the legal profession, and the universal impression of the public mind, so far as I have had the opportunity of knowing it, that the birth in this country does of itself constitute citizenship.<sup>39</sup>

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37. 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting). Story disagreed on the outcome of the case on other grounds, but his general statement of citizenship rules was not contested. *Accord* *Kilham v. Ward*, 2 Mass. (1 Tyng) 236, 264–65 (1806) (opinion of Sewall, J.) (“The doctrine of the common law is, that every man born within its jurisdiction is a subject of the sovereign of the country where he is born . . . .”); *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 144, 151 (1838) (“[A]ll free persons born within the State are born citizens of the State.”); *Barzizas v. Hopkins*, 23 Va. (2 Rand.) 276, 278 (1824) (“The place of birth, it is true, in general, determines the allegiance.”). In his *Commentaries*, Story repeated the rule that “[p]ersons, who are born in a country, are generally deemed citizens and subjects of that country” but added that the rule should perhaps not apply to children of temporary visitors. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 48, at 48 (Boston, Hilliard, Gray & Co. 1834); *see also* *Hardy v. De Leon*, 5 Tex. 211, 237 (1849) (quoting Story’s *Commentaries*). This general rule was also reflected in state statutes; for example, the Virginia citizenship statute of 1783 provided that “all free persons born within the territory of this Commonwealth . . . shall be deemed citizens of this Commonwealth.” *Barzizas*, 23 Va. (2 Rand.) at 282–83 (quoting this statute).

38. 22 U.S. 354, 354 (1824).

39. 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844); *see* 2 KENT (6th ed.), *supra* note 36, at 49 n.a (favorably citing and discussing *Lynch*). The issue in *Lynch* was whether persons born in the United States to noncitizen parents who were only temporary visitors were U.S. citizens; the court answered in the affirmative. *See* *Leake v. Gilchrist*, 13 N.C. (2 Dev.) 73, 75–76 (1829) (argument of counsel) (noting that citizenship arose from birth in the United States even as to “accidental” birth of a person whose parents “belong to another country”); KETTNER, *supra* note 22, at 287 (“Americans [in the early nineteenth century] merely continued to assume that ‘birth within the allegiance’ conferred the status [of citizenship] and its accompanying rights.”). *But see* *Hardy*, 5 Tex. at 237 (observing that, although Story “d[id] not undertake to assert that in the present state of public law such a qualification [as to temporary visitors] is universally established, its propriety does not appear to have been questioned; and its adoption in the present case seems to be fully sanctioned by law and demanded by every consideration of humanity and justice”); STORY, *supra* note 37 (expressing doubts about the rule later adopted in *Lynch* as to temporary visitors). In *Ludlam v. Ludlam*, the New York courts held—in considerable tension with *Lynch*—that by common law the foreign-born child of a U.S. citizen temporarily residing overseas was a U.S. citizen. 31 Barb. 486, 500 (N.Y. Gen. Term 1860), *aff’d*, 26 N.Y. 356 (1863).

Despite these broad statements identifying U.S. citizenship with birth within U.S. territory, there were some evident exceptions. First, it was generally understood that slaves were not citizens, because the condition of slavery was in its nature inconsistent with citizenship.<sup>40</sup> Second, tribal Native Americans were not considered citizens even though born in U.S. territory because they owed immediate allegiance to their respective tribes. James Kent held in *Goodell v. Jackson*: “Though born within our territorial limits, the Indians are considered as born under the dominion of their tribes. . . . They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities.”<sup>41</sup> Third, following long-standing exceptions recognized by English law, U.S.-born persons without even temporary obligations to U.S. law, such as children of foreign diplomats or foreign military forces, were excluded from citizenship.<sup>42</sup>

Thus, the early nineteenth century appeared to develop a general consensus on U.S. citizenship. Persons born outside the United States were treated according to the federal naturalization law. Persons born in the United States were citizens under common law (and sometimes state statutes), with exceptions for those born to slaves, tribal Native Americans, diplomats, and foreign military personnel (and with some uncertainty at the margins).<sup>43</sup>

#### B. CITIZENSHIP, THE CIVIL WAR, AND AFTERWARDS

The early-century consensus was sharply upset, however, by the developing issue of the citizenship of free persons of African descent, which itself became part of the broader sectional conflict over slavery. Initially many Northern states—and even some Southern states—recognized such persons as citizens (though often with greatly reduced rights).<sup>44</sup> But as the slave economy expanded and sectional disputes heightened, Southern states increasingly did not want to treat free Blacks as citizens—and in particular they did not want to treat free Blacks from other states as entitled to Article IV’s privileges-and-immunities protection.<sup>45</sup> Whether states could refuse such protections depended on a range of issues, including whether citizenship was a matter of state or federal law. The debate was theoretically complex and need not be fully examined here;

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40. See KETTNER, *supra* note 22, at 300–01.

41. 20 Johns. Ch. 693, 712 (N.Y. Ch. 1823) (emphasis omitted); see also KETTNER, *supra* note 22, at 294–95 (discussing the exclusion of Native American tribes from citizenship during this period). Some tribes were granted citizenship by treaty or statute, but this was uncommon. *Id.* at 296–97.

42. See *Inglis*, 28 U.S. (3 Pet.) at 155 (Story, J., dissenting) (noting these exceptions); 2 KENT (6th ed.), *supra* note 36, at 39 (noting exceptions for foreign diplomats).

43. For example, despite the holding in *Lynch*, it seems fair to say that the issue of temporary visitors remained somewhat unsettled in the mid-nineteenth century. See *supra* note 39 (discussing post-*Lynch* cases); see also Mayton, *supra* note 7, at 225–40 (finding uncertainty in pre-Civil War citizenship law, and noting that *Lynch* was the only case directly confronting the issue of temporary visitors).

44. See, e.g., *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 209 (1836); *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 144, 150–51 (1838); *Fisher’s Negroes v. Dabbs*, 14 Tenn. (6 Yer.) 119, 126 (1834); see also KETTNER, *supra* note 22, at 316–17 (discussing cases).

45. See KETTNER, *supra* note 22, at 311–24.

most significantly, it reached its greatest prominence in the Supreme Court's decision in *Dred Scott v. Sandford*, with Chief Justice Taney concluding that, as a constitutional matter, persons of African descent could not be citizens.<sup>46</sup> Taney's conclusion became an immediate flashpoint; Justices McLean and Curtis ridiculed it in dissent,<sup>47</sup> and the emerging Republican Party directly renounced it.<sup>48</sup>

After the Civil War and the Thirteenth Amendment, it became critical to address the citizenship status of the newly freed slaves. The first federal Civil Rights Act, passed in April 1866 over President Johnson's veto, 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."<sup>49</sup> But Taney's conclusion in *Dred Scott* that persons of African descent could not be citizens made the Civil Rights Act constitutionally dubious as applied to freed slaves. Recognizing this problem, Congress added what became the first sentence of the Fourteenth Amendment (drafted in 1866, ratified in 1868), using similar though somewhat distinct language: "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."<sup>50</sup>

It is common ground, and has been since their enactment, that the Act and the Amendment made citizens of the freed slaves and overruled *Dred Scott* as applied to persons of African ancestry generally.<sup>51</sup> The Amendment also, by its plain language, nationalized the idea of citizenship: state citizenship was linked directly to national citizenship, and states would not have power to deny state citizenship to national citizens living within the state.<sup>52</sup>

But because the Amendment's description of national citizenship was qualified in two respects, it opened two new debates that remain active today. By its text,

46. 60 U.S. (19 How.) 393, 404–05 (1857). Taney argued, implausibly but consistent with common Southern views on the matter, that the Framers of the Constitution intended that no persons of African descent could be citizens. *Id.*; see also *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 332–33 (1822) (similarly holding that persons of African descent could not be citizens). Although the multiple opinions in *Dred Scott* are difficult to assess, it appears that only two other Justices concurred in this part of Taney's opinion. See 60 U.S. (19 How.) at 404–05.

47. See 60 U.S. (19 How.) at 531 (McLean, J., dissenting); *id.* at 582–83 (Curtis, J., dissenting). Justice Curtis restated the common view of *jus soli* citizenship: "Undoubtedly, as has already been said, it is a principle of public law, recognised by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship." *Id.* at 578. He also showed at length that, in the Founding Era, there was no exception to this rule for free persons of African descent in a substantial number of states, *id.* at 572–76, while acknowledging that states had the power to alter the common law rule (including as to free persons of African descent) by statute, *id.* at 579.

48. See, e.g., Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857) (transcript available at <https://teachingamericanhistory.org/library/document/speech-on-the-dred-scott-decision> [<https://perma.cc/EMY2-CYCW>]).

49. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27; see Currie, *supra* note 15, at 394–99 (discussing enactment of the Act).

50. U.S. CONST. amend. XIV, § 1. The Amendment's drafting history is discussed in greater detail in Section II.B.2, *infra*.

51. See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873) (discussing the Citizenship Clause's purpose to overrule *Dred Scott*).

52. See U.S. CONST. amend. XIV.

to be a constitutional citizen a person must be born or naturalized (1) “in the United States” and (2) “subject to [U.S.] jurisdiction.”<sup>53</sup> As to naturalization, these requirements seem straightforward: naturalization procedures occur in U.S. territory and naturalized persons expressly accept U.S. jurisdiction over them. It does not seem likely that there would be any category of purportedly naturalized U.S. citizens not naturalized in the United States or not subject to its jurisdiction. For potential born citizens, the issues may be more difficult.

First, what did it mean to be born “in the United States”? For most births this would be clear, but not for all. Are U.S. overseas territories and possessions, bases, areas subject to disputed sovereignty, or under U.S. leases or temporary occupation “in” the United States?<sup>54</sup> Second, what was meant by “subject to the jurisdiction” of the United States? This text appears to create a category of persons born in the United States but *not* subject to U.S. jurisdiction.

For the most part, in the immediate post-ratification period the first issue was not contested. Contiguous territories were understood as part of the United States and ultimately destined for statehood. The United States lacked material overseas possessions or territories. The only material permanent noncontiguous U.S. territory of the time was Alaska (purchased in 1867), but the acquisition treaty acknowledged Alaskans’ U.S. citizenship; Alaska’s indigenous population was excluded from citizenship by the same theory that excluded tribal Native Americans in the contiguous states and territories, and in any event the non-Native population was extremely small and not expected to grow.<sup>55</sup> Although the United States contemplated further acquisitions,<sup>56</sup> none was completed for thirty years after the Amendment.

The Spanish–American War (1898) changed the picture entirely. As a direct consequence, the United States acquired Puerto Rico, Guam, and the Philippines; the nation’s sudden global outlook encouraged other acquisitions including Hawaii (1898), American Samoa (1900), and the U.S. Virgin Islands (1917). These acquisitions raised broader constitutional issues—not

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53. *Id.*

54. See Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1188–97 (2011) (discussing the ambiguity of places “in” the United States).

55. On the status of Alaska after acquisition, see LAWSON & SEIDMAN, *supra* note 10, at 105–08. Pursuant to congressional authorization, the United States in the nineteenth century also took possession of various uninhabitable “guano” islands. See *Jones v. United States*, 137 U.S. 202, 209–12 (1890) (discussing and upholding this authorization). See also Erbsen, *supra* note 54, at 1226–27 n.220 (discussing this authorization); *id.* at 1229 n.226 (discussing the 1857 acquisition of the remote Howland Island under this authorization). It does not appear that any permanent settlement was imagined on these islands.

56. President Grant pushed strongly for acquisition of the Dominican Republic, even signing a treaty to that effect, but the Senate refused its consent. See RON CHERNOW, *GRANT* 691–99, 719–20 (2017). As Professor Erman recounts, in congressional debates and other commentary of this period, it was broadly assumed that birthright citizenship would apply to new acquisitions. An argument against further acquisitions—particularly associated with congressmen and commentators from the South—was that acquisitions would substantially increase the number of nonwhite citizens. See ERMAN, *supra* note 2, at 12–13 (discussing post-Amendment assumptions).

just the citizenship of their inhabitants but the Constitution's application within their territory.<sup>57</sup>

In the post-war *Insular Cases*, the Supreme Court developed a compromise. "Unincorporated" territories, it said, were not fully subject to the Constitution, while "incorporated" territories were fully subject to it. Which territories were and were not "incorporated" was a matter for Congress. Thus, territories not incorporated by Congress were not fully part of the United States for constitutional purposes.<sup>58</sup> Though the *Insular Cases* did not directly address the question of citizenship,<sup>59</sup> Congress and the Executive Branch treated the outcome as indicating that persons born in unincorporated territories were not constitutional citizens, while over time, Congress extended birthright citizenship to most of these areas by statute.<sup>60</sup> But the understanding remained that the Constitution did not require U.S. citizenship for persons born in unincorporated territories. And curiously, Congress failed to extend statutory birthright citizenship to persons born in American Samoa, who are to this day designated "U.S. nationals" but not U.S. citizens (unless they go through the statutory naturalization process as adults).<sup>61</sup>

In contrast to this narrow view of who was born "in" the United States for constitutional purposes, law and practice settled on a broad view of who was born "subject to the jurisdiction" of the United States. That resolution was initially in some doubt. Just five years after ratification of the Fourteenth Amendment, the Supreme Court appeared to take a restrictive view in the *Slaughter-House Cases*, observing (in an aside) that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from [the Clause's] operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."<sup>62</sup> But a decade later, the Court (again in an aside) suggested a broader

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57. LAWSON & SEIDMAN, *supra* note 10, at 108–18.

58. See ERMAN, *supra* note 2, at 53–55, 85–87; LAWSON & SEIDMAN, *supra* note 10, at 194–97. The principal cases were *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Gonzales v. Williams*, 192 U.S. 1 (1904); and *Dorr v. United States*, 195 U.S. 138 (1904). Depending on how one counts, there were as many as twenty such cases. See *infra* Section II.A.4 (discussing these cases in greater detail).

59. In *Gonzales*, in which the parties directly raised the issue of Puerto Ricans' citizenship status, the Court held only that natives of Puerto Rico were not "aliens" under the relevant federal statute and expressly declined to reach the constitutional citizenship issue. 192 U.S. at 12; see ERMAN, *supra* note 2, at 87 (noting that the Court "found it more profitable to evade classification of the citizenship status of Puerto Ricans").

60. See 8 U.S.C. § 1406 (2018) (granting U.S. citizenship to persons born in the U.S. Virgin Islands); *id.* § 1407 (granting U.S. citizenship to persons born in Guam); Jones–Shafroth Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917) (granting U.S. citizenship to persons born in Puerto Rico); ERMAN, *supra* note 2 (discussing the status of Puerto Rico after the *Insular Cases*).

61. See Nationality Act of 1940, Pub. L. No. 76-853 § 204, 54 Stat. 1137, 1139 (designating American Samoans as noncitizen "nationals" of the United States); *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1170–74 (D. Utah 2019) (discussing status of American Samoans), *appeal filed*, No. 20-4017 (10th Cir. Feb. 11, 2020).

62. 83 U.S. (16 Wall.) 36, 73 (1873). As discussed in Section II.B.3, the issue in the *Slaughter-House Cases* had nothing to do with the "subject to the jurisdiction" language, and there was no dispute about the citizenship status of the claimants.

view in *Elk v. Wilkins*.<sup>63</sup> *Elk* principally confirmed the pre-Amendment rule that tribal Native Americans lacked birthright citizenship under the Amendment, but in the course of its discussion, the Court observed that such Native Americans were no more subject to the jurisdiction of the United States than “the children born within the United States, of ambassadors or other public ministers of foreign nations”<sup>64</sup> (thus arguably implying that other U.S.-born children of aliens were U.S. citizens).<sup>65</sup> Ultimately the Court faced the issue directly in *United States v. Wong Kim Ark* in 1898, holding that the U.S.-born child of lawful Chinese resident immigrants was born “subject to the jurisdiction” of the United States and thus was a U.S. citizen under the Fourteenth Amendment.<sup>66</sup>

Meanwhile the U.S. Executive Branch had moved somewhat in the opposite direction. In an early post-ratification opinion, Secretary of State Hamilton Fish (in the Grant Administration) concluded that even children of temporary visitors were born citizens under the Amendment.<sup>67</sup> But later administrations backed off that conclusion,<sup>68</sup> and in the 1890s, the McKinley Administration argued—including in the *Wong Kim Ark* case—that U.S.-born children of Chinese immigrants were not citizens.<sup>69</sup> After the Supreme Court rejected the latter conclusion in *Wong Kim Ark*, the Executive Branch reverted to a broad view of the Clause, concluding that the Clause conveyed citizenship not only to children of permanent residents but also to children of temporary visitors and (when the issue emerged)

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63. 112 U.S. 94 (1884).

64. *Id.* at 102.

65. As with the *Slaughter-House Cases*, the Court in *Elk* was not called upon to resolve the meaning of the “subject to the jurisdiction” language. The parties agreed that persons born into tribes lacked constitutional citizenship at birth; the question was whether a member of a tribe could become a U.S. citizen by renouncing his tribe and integrating into the larger society. *Id.* at 98. The Court held that tribal members could not subsequently become citizens other than through naturalization. *Id.* at 109.

66. 169 U.S. 649, 704–05 (1898). Chief Justice Fuller, joined by Justice Harlan, dissented. *Id.* at 705.

67. *See id.* at 689–90 (“The Fourteenth Amendment [Citizenship Clause] . . . is simply an affirmation of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification ‘and subject to the jurisdiction thereof,’ was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality.” (quoting Statement from Hamilton Fish, U.S. Sec’y of State, to George Perkins Marsh, Am. Minister to It. (May 19, 1871), in 2 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES TAKEN FROM DOCUMENTS ISSUED BY PRESIDENTS AND SECRETARIES OF STATES 394, 394 (Francis Wharton ed., Gov’t Printing Office 1887))); accord OPINIONS OF THE PRINCIPAL OFFICERS OF THE EXECUTIVE DEPARTMENTS, AND OTHER PAPERS RELATING TO EXPATRIATION, NATURALIZATION, AND CHANGE OF ALLEGIANCE 18 (Washington, Gov’t Printing Office 1873) (“The child born of alien parents in the United States is held to be a citizen thereof . . . .” (opinion of Secretary of State Fish)). *But see* Charles, *supra* note 7, at 231–45 (finding early Executive Branch views more ambiguous).

68. *See Wong Kim Ark*, 169 U.S. at 719 (Fuller, C.J., dissenting) (noting opinions of Secretaries of State Frelinghuysen and Bayard); Charles, *supra* note 7, at 231–45 (discussing Executive Branch views); Mayton, *supra* note 7, at 247 (same).

69. *Wong Kim Ark*, 169 U.S. at 649–50. The Executive Branch view had some support in commentary. *See generally* Meyler, *supra* note 28 (discussing competing post-Amendment views).

to children of persons not lawfully present in the United States.<sup>70</sup>

### C. MODERN CHALLENGES

Though both the narrow view of “in the United States” and the broad view of “subject to [U.S.] jurisdiction” remained largely uncontested for many years, they have recently been challenged. As noted, the first issue is immediately relevant only to persons born in American Samoa because Congress over time extended statutory birthright citizenship to persons born in other overseas territories (apart from the Philippines, which gained independence after World War II). In the 2000s, a campaign began to declare American Samoans constitutionally entitled to U.S. citizenship; in 2015, the D.C. Circuit held—principally on the basis of the *Insular Cases*—that American Samoa is not “in” the United States for purposes of the Citizenship Clause.<sup>71</sup> Then in 2019, a Utah District Court rejected the D.C. Circuit’s conclusion and held the Samoans entitled to U.S. citizenship under the Fourteenth Amendment (the litigation remains ongoing).<sup>72</sup> The Samoans’ claim has been supported by some academic writing, both specifically on the citizenship question<sup>73</sup> and more broadly as attacks on the underlying theory of the *Insular Cases*.<sup>74</sup> And the broader implications of the *Insular Cases* have been challenged in other litigation regarding the constitutional status of Puerto Rico.<sup>75</sup>

Modern arguments for a narrower scope of “subject to [U.S.] jurisdiction” began with the 1985 book by Peter Schuck and Rogers Smith, *Citizenship Without Consent*.<sup>76</sup> Adopting what they called a “consensual” position, Schuck

70. See U.S. DEP’T OF STATE, *supra* note 3 (“All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth . . . .”); Ing, *supra* note 3 (discussing modern practice).

71. *Tuaua v. United States*, 788 F.3d 300, 310 (D.C. Cir. 2015). As a textual matter, the court found the phrase “in the United States” to be ambiguous. *Id.* at 303. The court also found it persuasive that the government of American Samoa opposed U.S. citizenship. *Id.* at 309–10 (finding it “anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives”).

72. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196 (D. Utah 2019), *appeal filed*, No. 20-4017 (10th Cir. Feb. 11, 2020). The court found that the *Insular Cases* did not control the outcome; instead it based its conclusion on *Wong Kim Ark* and that case’s reliance on the traditional common law of *jus soli* citizenship. See *id.* In the court’s view, that common law encompassed citizenship for all persons born within U.S. sovereign territory, regardless of its status as incorporated or unincorporated.

73. ERMAN, *supra* note 2, at 8–13 (arguing for a broad scope of the Citizenship Clause to include birth in all U.S. territories).

74. See LAWSON & SEIDMAN, *supra* note 10, at 197 (concluding that “[t]he doctrine of ‘territorial incorporation’ that emerged from *The Insular Cases* is transparently an invention designed to facilitate the felt needs of a particular moment in American history”); *id.* at 196 (describing “a torrent of academic criticism of *The Insular Cases*”). Lawson and Seidman specifically found the *Insular Cases* indefensible as a matter of the Constitution’s original meaning. See *id.* at 196–97.

75. See Adriel I. Cepeda Derieux, *The Supreme Court Has a Chance to Bring Constitutional Equality to Puerto Rico*, SLATE (Oct. 10, 2019, 3:28 PM), <https://slate.com/news-and-politics/2019/10/puerto-rico-constitutional-rights-supreme-court.html> (discussing the recent U.S. Supreme Court case *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment LLC*, 140 S. Ct. 1649 (2020), which raised the question whether the Appointments Clause applies to Puerto Rican-related entities).

76. SCHUCK & SMITH, *supra* note 7.

and Smith argued that the Citizenship Clause should be read to extend citizenship only to U.S.-born children of parents who (if not themselves citizens) had become part of the U.S. political community as lawful permanent residents.<sup>77</sup> Their term “consensual” invoked the proposition that the sovereign should consent to the person’s integration into U.S. society by admission of the parents as lawful permanent residents. Thus, while accepting the result in *Wong Kim Ark*, their view excluded from citizenship both children of temporary visitors and children of persons not lawfully resident.<sup>78</sup>

Schuck and Smith were not entirely clear whether they intended their account as a claim about the Clause’s original meaning or as an argument for a reinterpretation of the Clause in light of modern conditions. More recent academic commentary has, however, cast the argument specifically in terms of the Clause’s original meaning and intent, contending that the “consensualist” view of citizenship was adopted by the Clause’s enactors and is reflected in the text’s requirement of birth “subject to the jurisdiction” of the United States.<sup>79</sup> Indeed, some academic authorities would go further. Professor John Eastman, for example, has expressly argued that *Wong Kim Ark* was wrongly decided:

Justice Gray [in *Wong Kim Ark*] appears not to have appreciated the distinction between partial, territorial jurisdiction, which subjects all who are present within the territory of a sovereign to the jurisdiction of its laws, and complete, political jurisdiction, which additionally requires allegiance to the sovereign. . . .

...

. . . Justice Gray simply failed to appreciate . . . that there is a difference between territorial jurisdiction and the more complete, allegiance-obliging jurisdiction that the Fourteenth Amendment codified.<sup>80</sup>

Thus, Professor Eastman argues that the extent of constitutional citizenship should be restored to what the “drafters [of the Fourteenth Amendment] actually intended, that only a complete jurisdiction, of the kind that brings with it a total and exclusive allegiance, is sufficient to qualify for the grant of citizenship to which the people of the United States actually consented.”<sup>81</sup>

Versions of this argument have been adopted by political leaders and persist to the present. Various bills have been introduced without success in Congress over the course of recent decades to narrow or eliminate birthright citizenship for U.S.-born children of temporary visitors or of persons not

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77. See generally *id.*

78. *Id.* at 85, 117–19.

79. See generally, e.g., Eastman, *supra* note 7 (elaborating on this point); Mayton, *supra* note 7 (same). But see Ing, *supra* note 3, at 749–67 (critiquing this view).

80. Eastman, *supra* note 7, at 175–76.

81. *Id.* at 178.

lawfully present.<sup>82</sup> Most recently, President Trump called (unofficially) for a narrow view of birthright citizenship.<sup>83</sup> Trump, moreover, suggested altering the rule by executive order rather than going through Congress;<sup>84</sup> presumably the approach would be to direct the relevant agency to reinterpret current U.S. citizenship law.<sup>85</sup> Former Trump advisor Michael Anton elaborated the argument for the narrow view of constitutional citizenship in the *Washington Post* and at greater length in the *Claremont Review of Books*;<sup>86</sup> the position has been advocated by prominent policy organizations such as the Heritage Foundation<sup>87</sup> and in leading political commentary.<sup>88</sup>

Both the Samoans' argument and the President's argument rest to a substantial extent on claims about the original meaning of the Fourteenth Amendment. A central point of the first argument is that the Constitution's original meaning contains no distinction between incorporated and unincorporated territories<sup>89</sup>—a distinction invented by the Supreme Court over thirty years later in the *Insular Cases*. At the time of the Amendment, the Samoans argued, all U.S. territories were “in” the United States. Similarly, the argument for restricting constitutional citizenship to the children of citizens and lawful permanent residents rests on claims about the text's original meaning and the enactors' understandings and intentions—specifically, the intended meaning of the phrase “subject to the jurisdiction” of the United States. Anton, for example, labeled his arguments

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82. See generally *Legislation Denying Citizenship at Birth to Certain Children Born in the U.S.*, 19 Op. O.L.C. 340 (1995) (statement of Walter Dellinger, Assistant Attorney Gen.) (discussing proposals in the 1990s).

83. Lyons, *supra* note 6; *Trump Says He Is Seriously Looking at Ending Birthright Citizenship*, *supra* note 6.

84. Jonathan Swan & Stef W. Kight, *Exclusive: Trump Targeting Birthright Citizenship with Executive Order*, AXIOS (Oct. 30, 2018), <https://www.axios.com/trump-birthright-citizenship-executive-order-0cf4285a-16c6-48f2-a933-bd71fd72ea82.html> [<https://perma.cc/GP25-JMSC>].

85. The Immigration and Nationality Act repeats the language of the Citizenship Clause without elaboration. See 8 U.S.C. § 1401(a) (2018). The long-standing Executive Branch interpretation is that this language includes U.S.-born children of temporary visitors and of parents not lawfully present. See U.S. DEP'T OF STATE, *supra* note 3.

86. See Michael Anton, *Birthright Citizenship: A Response to My Critics*, CLAREMONT REV. BOOKS (July 22, 2018), <https://claremontreviewofbooks.com/digital/birthright-citizenship-a-response-to-my-critics> [hereinafter Anton, *Response*]; Michael Anton, *Citizenship Shouldn't Be a Birthright*, WASH. POST (July 18, 2018), [https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146b0b\\_story.html](https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146b0b_story.html).

87. See Amy Swearer & Hans A. von Spakovsky, *9 Things to Know About Birthright Citizenship*, THE HERITAGE FOUND. (Oct. 31, 2018), <https://www.heritage.org/immigration/commentary/9-things-know-about-birthright-citizenship> [<https://perma.cc/WP7Q-ES8M>] (arguing that “[u]niversal birthright citizenship is a misinterpretation of the 14th Amendment . . . and is inconsistent with the intent of the amendment's framers” and that “[t]he president has the constitutional authority to direct executive agencies to act in accordance with the original meaning of the Citizenship Clause, and to direct agencies to issue passports, Social Security numbers, etc., only to those whose status as citizens is clear under the current law”).

88. See, e.g., Edward J. Erler, *Trump's Critics Are Wrong About the 14th Amendment and Birthright Citizenship*, NAT'L REV. (Aug. 19, 2015, 8:00 AM), <https://www.nationalreview.com/2015/08/birthright-citizenship-not-mandated-by-constitution> [<https://perma.cc/6EVR-N6M3>] (arguing that “‘subject to the jurisdiction’ . . . means owing exclusive political allegiance to the U.S”).

89. Cf. U.S. CONST. amend. XIV, § 1.

“originalist” and relied heavily on the Amendment’s drafting debates.<sup>90</sup> However, though the debate over the scope of birthright citizenship has been wide-ranging and largely framed in originalist terms, there is no comprehensive account of the Clause’s original meaning. The next Part turns to developing such an account.

## II. THE ORIGINAL MEANING OF THE CITIZENSHIP CLAUSE

This Part addresses the original meaning of the two contested parts of the Citizenship Clause: “born . . . in the United States” and “subject to the jurisdiction thereof.” It concludes that in both cases the original meaning is relatively clear. Birth “in” the United States meant birth in territory under permanent U.S. sovereign authority, without regard to the extent to which that territory was geographically, politically, or culturally integrated within the United States. Birth “subject to the jurisdiction” of the United States meant birth to parents who were neither legally nor practically exempt from U.S. sovereign authority. That is, in terms of modern debates, it concludes that in each case the broader view of the Clause accords with the original meaning.

A brief comment should be made here about methodology. This Article adopts an “original public meaning” approach, asking what the Constitution’s text meant when it was adopted.<sup>91</sup> In this sense, it departs somewhat from previous scholarship on the Citizenship Clause, which has focused more upon the drafters’

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90. See Anton, *Response*, *supra* note 86 (invoking statements by Senators Jacob Howard, Lyman Trumbull and Reverdy Johnson, among others, in the Amendment’s drafting debates); see also, e.g., Erlar, *supra* note 88 (invoking drafters of the Fourteenth Amendment); Swearer & von Spakovsky, *supra* note 87 (invoking the “original meaning of the Citizenship Clause”). Counterarguments as well have focused principally on originalist and textualist claims. See, e.g., Garrett Epps, *The Citizenship Clause Means What It Says*, ATLANTIC (Oct. 30, 2018), <https://www.nationalreview.com/2015/08/birthright-citizenship-not-mandated-by-constitution> (responding to Anton).

91. Originalist methodology takes a variety of approaches, and a definitive account is beyond the scope of this Article. For further discussion, see Vasam Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1127–34 (2003) (describing methodology of “original meaning textualism”); Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment’s Original Meaning*, 49 CONN. L. REV. 1069, 1108–12 (2017) (discussing original meaning specifically in the context of interpreting the Fourteenth Amendment); and *id.* at 1108 (describing original public meaning as “the meaning that a reasonable person would have attached to the words of the Amendment when the Amendment became effective”); and see also WURMAN, *supra* note 8, at 11–24 (discussing the evolution of originalist approaches). For a more complete statement of my own approach, see Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 970–77 (2008). As I outlined there:

[H]istorical textualism is fundamentally focused on finding the most plausible meaning of the actual words and phrases [of the Constitution]. It is not sufficient, in this formulation, to say merely that one’s interpretative approach “starts with the text”: the question is wholly conceived as asking what the text (that is, its words and phrases) meant. More important than starting with the text (although that is of course the right starting point) is *ending with the text*. That is, in a historical textualist approach, the conclusion should be rendered as: phrase “X” has meaning “Y.” As described below, quite a few things beyond the document’s actual words and phrases may contribute to that conclusion, but the conclusion should always be brought back to a particular clause or set of clauses.

*Id.* at 971–72.

objectives, intents, and expectations. To an original meaning approach, the drafters' subjective intentions are not decisive, although the drafters' commentary may be relevant to the question of textual meaning.<sup>92</sup> The touchstone of the inquiry, however, is the historical meaning of the text, and accordingly that is the focus of this Article.

In conducting this inquiry, the ensuing discussion addresses three distinct time periods. The first is the period prior to the drafting and enactment of the constitutional language. In many respects, this may be the most probative period. The meaning and usage of relevant words and phrases before the drafting period, particularly in legal and political commentary, establishes the linguistic background from which the constitutional language arose. This earlier period also reflects background assumptions that provided context for the subsequent drafting and enactment.<sup>93</sup> The second period is the immediate time of drafting and ratification. As noted, this period is examined not to establish the subjective intent or policy objectives of any particular person or body but rather to evaluate what specific meaning educated and engaged speakers of the period gave to the relevant language.<sup>94</sup> Finally, the discussion examines post-ratification legal and political commentary, again with the objective of evaluating specifically the meaning of the relevant language at the time of enactment.<sup>95</sup>

This Part does not imply any conclusion about how the Clause should be interpreted in modern law. That question is taken up from an originalist perspective in Part III below.

#### A. "BORN . . . IN THE UNITED STATES"

This Section begins with the question of what it meant to be born "in the United States." As discussed above, current law holds that birth in outlying U.S.

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92. See Maggs, *supra* note 91, at 1110 (noting that, in an original public meaning analysis, the Fourteenth Amendment's legislative history "provide[s] what has been called 'publicly available context of constitutional communication'" and thus "show[s] how people in 1866 talked about the subjects covered by the Fourteenth Amendment" (quoting Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1939)); see also Kesavan & Paulsen, *supra* note 91, at 1148–64 (discussing the relevance of comments in the drafting process of the original Constitution). As I have described earlier, this approach

focuses upon the meaning of words and phrases, and thus is interested in direct evidence of how those words and phrases were actually used, or indirect evidence of how the historical sources seemed to assume they would be used. In contrast, general statements of goals, values or expectations, especially where not tied to any specific language, seem much less probative. Drafting, ratifying and post-ratification history are not ends in themselves, but only evidence of what a particular phrase may have meant.

Ramsey, *supra* note 91, at 975.

93. See Ramsey, *supra* note 91, at 974–75 (expanding on these points).

94. *Id.* at 975.

95. See *id.* (expressing reasons for caution in using post-ratification sources). In addition, the ensuing discussion focuses particularly on meaning in political and legal discourse. See generally John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018) (justifying such a focus on the basis of the Constitution's status as a legal document employing a distinctive legal language).

territories does not come within this constitutional phrase (so that persons born in U.S. outlying territories depend on statutory grants of citizenship or—in the case of American Samoa—are not citizens at all). That result is difficult to square with the Citizenship Clause’s original meaning.

### 1. Pre-enactment Meaning: What Was “in” the United States in the Nineteenth Century?

One might say, from the Clause’s literal language, that “in the United States” meant only “in” one of the component states whose union forms “the United States”—that is, that territories were not fully “in” the United States until they were “admitted . . . into this Union” as states pursuant to the Constitution’s Article IV.<sup>96</sup> This narrow reading, however, is contrary both to the way the phrase “in the United States” was used in pre-Amendment nineteenth-century legal discourse and to the goals and history of the Amendment.

Courts and other nineteenth-century authorities commonly referred to U.S. territories as “in” the United States. *Loughborough v. Blake*,<sup>97</sup> for example, concerned Congress’s power to impose taxes in the District of Columbia. In affirming Congress’s power, Chief Justice Marshall observed: “[The United States] is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania.”<sup>98</sup>

Marshall’s view—that territories were “within” the United States—was adopted with regard to territories acquired in the mid-nineteenth century. In *Cross v. Harrison*, the Court considered the validity of U.S. tariffs on goods imported into California after Mexico ceded California to the United States in 1848 and before California became a state in 1850.<sup>99</sup> Neither the Court nor the U.S. Executive Branch doubted that California was part of the United States after the cession, such that U.S. goods brought there were not subject to U.S. tariffs but foreign goods potentially were.<sup>100</sup>

96. U.S. CONST. art. IV, § 3. See Erbsen, *supra* note 54, at 1186–88 (noting this possible ambiguity). This approach would seem to have the odd result that the District of Columbia would not be “in” the United States, but perhaps that difficulty could be overcome by the Constitution’s express provision for creating the District from land ceded by existing states. See U.S. CONST. art. I, § 8, cl. 17.

97. 18 U.S. (5 Wheat.) 317 (1820).

98. *Id.* at 319; see also *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J.) (“The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed.”). *Canter* concluded that the Florida territory, upon acquisition from Spain, became part of the United States subject to Congress’s power to make rules for the territories. *Canter*, 26 U.S. (1 Pet.) at 540; see U.S. CONST. art. IV, § 3, cl. 2. The opinion also found that Congress’s Article IV power included power to create territorial courts outside Article III, *Canter*, 26 U.S. (1 Pet.) at 546, a conclusion open to doubt on originalist grounds, see LAWSON & SEIDMAN, *supra* note 10, at 146–49.

99. 57 U.S. (16 How.) 164 (1853).

100. See *id.* at 197 (“By the ratifications of the treaty [of Guadalupe Hidalgo], California became a part of the United States . . .”); *id.* (concluding that the provision of U.S. tariff laws that “ships coming from foreign ports into the United States were not to be permitted to land any part of their cargoes in any

Moreover, specifically as a matter of citizenship law, courts and commentators recognized that birth in U.S. territories constituted birth in the United States. As discussed in Section I.A., the U.S. nineteenth-century common law generally followed the British idea of *jus soli* that birth within sovereign territory established subjectship (in Britain) or citizenship (in the United States).<sup>101</sup> It followed from the *jus soli* principle that persons born in U.S. territories were U.S. citizens under common law only if the territories were “in” the United States. Pre-Amendment common law and commentary held that they were.<sup>102</sup> Notably, at no point in the pre-Civil War period did Congress make any provision for the citizenship of persons born or residing in the territories, even though Congress provided that persons born abroad to parents who were U.S. citizens at birth.<sup>103</sup> Presumably Congress assumed that persons born in the territories were U.S. citizens under common law and so a statutory provision was unnecessary; had there been doubt on the issue, there would have been considerable pressure to resolve it by statute, as was done for children of U.S. citizens born abroad.

## 2. The Drafting History and the Territorial Scope of the Citizenship Clause

Although the issue of territorial scope did not arise directly in the debates over Section 1 of the Fourteenth Amendment, participants in the debates appeared to assume an expansive territorial scope, consistent with earlier legal authorities. Michigan Senator Jacob Howard introduced what became the Citizenship Clause as an amendment to the existing draft on May 29, 1866,<sup>104</sup> with the Senate

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other than in a port of delivery” applied to non-U.S. goods imported into California). The U.S. Executive Branch took a similar view. *See id.* at 185 (quoting Letter from James Buchanan, U.S. Sec’y of State, to William Voorhees (Oct. 7, 1848)) (concluding that California was “within the territory of the United States” and therefore no duties could be imposed in California on products of the rest of the United States, or vice versa, as a result of the Constitution’s Uniform Duties Clause).

The difficult question in *Cross* was whether the U.S. military governor of California had authority to impose tariffs on non-U.S. goods after the end of the war and prior to authorization of a territorial government by Congress. The Court held that he had this authority, *see id.* at 198, a conclusion that has been sharply questioned, *see* LAWSON & SEIDMAN, *supra* note 10, at 152–82. But that issue did not turn on any claim that California was not part of the United States.

101. *See supra* Part I.A.

102. *E.g.*, *Picquet v. Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.) (“A citizen of one of our territories is a citizen of the United States . . . .”); *Lynch v. Clarke*, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844) (“[E]very person born within the dominions and allegiance of the United States . . . is a natural born citizen.”); RAWLE, *supra* note 34 (“[E]very person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution . . . .”); *see also* *Corp. of New-Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94–95 (1816) (assuming that a resident of the Mississippi territory was a “citizen”); *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 453 (1805) (assuming that residents of the District of Columbia were “citizens”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1688, at 566 (Boston, Hilliard, Gray & Co. 1833) (discussing *Hepburn* and *Winter*). For an engaging discussion of citizenship issues that arose from the competing U.S. and U.K. claims to the Oregon territory between 1818 and 1846, *see* Vlahoplus, *supra* note 5, at 412–23.

103. *See, e.g.*, Act of Apr. 14, 1802, ch. 28, 7 Stat. 153; Act of Mar. 26, 1790, ch. 3, 1 Stat. 103; *see also* KETTNER, *supra* note 22, at 236–46 (discussing eighteenth- and nineteenth-century naturalization statutes).

104. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). The original draft of Section 1 of the Amendment began by guaranteeing the “privileges or immunities of citizens of the United States”

debating it on May 30.<sup>105</sup> Most of the Senate debate focused on whether Howard's proposal excluded tribal Native Americans on reservations or on the western frontier.<sup>106</sup> Senators wanted them excluded from citizenship (consistent with prior practice). Howard thought his language accomplished the exclusion, but Wisconsin Senator James Doolittle disagreed and moved to add clarifying language.<sup>107</sup>

Debate over Doolittle's motion addressed whether tribes were excluded by Howard's "subject to the jurisdiction" requirement. Doolittle himself argued that Howard's language would cover "Indians of the Territories" as well as tribes within states, specifically referencing Colorado (then a territory).<sup>108</sup> Illinois Senator Lyman Trumbull, defending Howard's language, observed that "the first section [of the proposed amendment] refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia" but argued the tribes were not subject to U.S. jurisdiction.<sup>109</sup> Trumbull gave the specific example of the Navajo Tribe (located in territories that later became Arizona, New Mexico,

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without a definition of "citizens." *See id.* at 2765. Senator Benjamin Wade objected that the meaning of citizen might be contested and proposed instead to "strike out the word 'citizen,' and require the States to give equal rights and protection of person and property to all persons born in the United States or naturalized under the laws thereof." *Id.* at 2768–69. Howard undertook to address Wade's concern with an amendment to the draft that clarified the meaning of "citizen," adopting Wade's language in part. *See id.* at 2890.

105. *Id.* at 2890–97 (debate and final vote adopting Howard's proposal). On the relevance of drafting history to original meaning analysis, see *supra* note 92. On the use of the *Congressional Globe* as an authority, see Maggs, *supra* note 91, at 1075 (describing it as an "accurate and reliable source," and noting that it was "widely available almost immediately after every debate" and that "[t]he debates over the Fourteenth Amendment were therefore neither secret nor difficult for interested outsiders to follow"). Discussion of congressional debates over the Citizenship Clause necessarily focuses on the Senate. As noted, the Clause was introduced in the Senate as an amendment to the House draft; the House subsequently acceded to the Senate amendments with little comment on the Citizenship Clause. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3144–49 (1866) (House debate on Senate amendments); *id.* at 3148 (remarks of Representative Stevens) (describing the Citizenship Clause, without further meaningful elaboration, as "an excellent amendment, long needed to settle conflicting decisions between the several States and the United States").

106. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–97 (1866).

107. *Id.* at 2890.

108. *Id.* at 2892.

109. *Id.* at 2894. Trumbull contrasted Section 1 of the proposal with Section 2 (addressing representation in Congress), which he said "refers to no persons except those in the States of the Union." *Id.* He continued:

We have had in the country, and have to-day, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject to their own laws and regulations, and we do not pretend to interfere with them.

*Id.* Trumbull argued that these "wild Indians" in the unorganized territories were excluded from birthright citizenship because they were not subject to U.S. jurisdiction—but for that point to matter, he necessarily assumed that unorganized territories were "in" the United States. *See id.* Howard, the drafter of the relevant language, agreed with Trumbull that tribes were excluded by the "subject to the jurisdiction" language without addressing the territorial scope. *Id.* at 2895.

and Utah).<sup>110</sup> All Senators who spoke seemed to assume that the Howard proposal encompassed the territories (including unorganized frontier territories); their disagreement was whether the “subject to the jurisdiction” language excluded Native tribes within those territories.<sup>111</sup>

Moreover, given the purpose of the Citizenship Clause, there is no reason to suppose that its drafters would have used language that excluded territories. The central purpose, all agree, was to overturn *Dred Scott*’s citizenship holding and confirm U.S. citizenship for freed slaves and other persons of African descent.<sup>112</sup> It would make no sense to exclude such persons from this protection because they happened to be born in the territories (and the drafters would have been particularly cognizant of freed slaves in the territories as the *Dred Scott* case itself involved the status of a slave who had been taken into the western territories).

### 3. Pre-enactment Usage: What Was Not “in” the United States?

Thus, it seems clear that U.S. territories were ordinarily considered “in” the United States in the nineteenth century, including during the drafting of the Fourteenth Amendment. Might it have been the case, though, that some areas under U.S. authority were nonetheless considered outside the United States, so that even if most territories were “in” the United States, some were not? Indeed, the compound nature of the Amendment’s Citizenship Clause indicates that some places were “subject to the jurisdiction” of the United States yet not “in” the United States; otherwise, the Amendment could simply have granted citizenship to persons born subject to U.S. jurisdiction.<sup>113</sup> If being under U.S. jurisdiction was not sufficient, what was the test for calling a territory “in” the United States?

110. *Id.* at 2893. This debate retraced the Senate’s debate earlier in the year over the Citizenship Clause of the 1866 Civil Rights Act. Senator Trumbull proposed that the Act’s Clause read: “All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States. . . .” *Id.* at 498. This set off debate as to whether Native Americans were excluded, prompting the Senate to add the additional language “excluding Indians not taxed.” *Id.* at 569. As with the debate over the Amendment, the debate over the Act assumed that Native Americans—including those in the territories—were “born in the United States,” with the question being whether they were excluded by subsequent restrictions. *See id.* at 498–504, 522–30, 569–78.

111. After debate, the Senate voted against Doolittle’s motion (apparently satisfied that Howard’s language excluded the tribes without needing further adjustment) and then approved Howard’s proposal without further discussion. *See id.* at 2897.

Though ratification materials do not address the Amendment’s scope systematically, speakers likewise assumed a broad territorial scope. For example, Schuyler Colfax, the Speaker of the House of Representatives, in an 1866 speech explaining the Amendment, observed that it “declares that every person—every man, every woman, every child, born under our flag or nationalized under our laws, shall have a birthright in this land of ours.” Hon. Schuyler Colfax, Speaker, House of Representatives, “My Policy” Reviewed: Necessity of the Constitutional Amendment, Speech at Indianapolis (Aug. 7, 1866), in *The Questions of the Hour*, CIN. COM., Aug. 8, 1866, <http://www.tifis.org/sources/Colfax.jpg> [<https://perma.cc/CU25-ASYV>].

112. *See, e.g.*, Maggs, *supra* note 91, at 1083–84, 1087.

113. Reinforcing this point, the Thirteenth Amendment forbids slavery “within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1 (emphasis added). The Eighteenth Amendment (prohibiting “intoxicating liquors”) had a similar reference to places “within” the United States and (in addition) “all territory subject to the jurisdiction thereof.” *Id.* amend. XVIII, § 1 (repealed 1933). *See* Erbsen, *supra* note 54, at 1221–24 (discussing the reach of these Amendments).

The Supreme Court considered this issue directly in the mid-nineteenth century case *Fleming v. Page*,<sup>114</sup> with important implications for the Citizenship Clause. *Fleming*, like *Cross*, was a tariff case. It concerned the Mexican city of Tampico, which the U.S. military occupied during the Mexican War; the question was whether owners of goods shipped from Tampico to New York during the occupation had to pay U.S. tariffs upon landing the goods in New York.<sup>115</sup> The importers argued not, because (they said) Tampico was “in” the United States during the military occupation and thus tariffs on foreign products did not apply.<sup>116</sup> The Court thought otherwise. The Court acknowledged that Tampico at the time was “subject to the sovereignty and dominion of the United States” under international law.<sup>117</sup> But it further concluded that, as a matter of U.S. law, Tampico was not part of the United States because the occupation was temporary and there had not been a formal cession or annexation.<sup>118</sup> The Court strongly implied, however, that if there were a formal annexation or cession, Tampico would become part of the United States, at least for constitutional purposes. Chief Justice Taney’s opinion is worth quoting at length on this point:

The United States, it is true, may extend its boundaries by conquest or treaty . . . . But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. . . . [H]is conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. . . . As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was

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114. 50 U.S. (9 How.) 603 (1850).

115. *Id.* at 605.

116. *Id.* at 606.

117. *Id.* at 614.

118. *Id.* at 616.

occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.<sup>119</sup>

Crucially, *Fleming* did not turn on the fact that Tampico was not contiguous territory or that it was culturally or politically distinct from the United States (or that it had not been admitted as a state). Taney's central point was that no treaty or annexation had "enlarge[d] the boundaries of this Union." The strong implication was that if Tampico had been annexed by treaty or legislation it would, by that act, have become part of the United States. (This is consistent with what the Court said in *Cross* four years later about California.)<sup>120</sup> *Fleming* thus marks a clear boundary as to when a territory comes within the United States.

It is true that the United States did not then have any material noncontiguous territories (until the purchase of Alaska in 1867), so early legal and political commentary does not directly say that geographically remote territories are "in" the United States, for citizenship purposes or otherwise.<sup>121</sup> However, British law did face this question, and there was no doubt about its resolution. Under the British law of subjectship, all persons born in the monarch's dominions were British subjects, including those born in areas outside the British Isles and indeed including areas (such as the parts of India under direct British sovereign control) that had populations not of British descent.<sup>122</sup> As descendants of the colonists in British North America, nineteenth-century Americans were familiar with this doctrine;

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119. *Id.* at 614–16. In a separate holding, the Court also found that even if Tampico had been within the United States for constitutional purposes, it was not within the United States for purposes of the tariff laws because Congress had not established U.S. customs there. *Id.* at 616–17.

120. See *Cross v. Harrison*, 57 U.S. (16 How.) 164, 197 (1853) (stating that California became part of the United States as a result of cession by treaty).

121. Presumably no one supposed that people born in Tampico (or elsewhere in Mexico) during U.S. military occupation were born "in" the United States for citizenship purposes, but that was because of the temporary occupation rule described in *Fleming*. In contrast, it appears to have been assumed that Alaska residents were "in" the United States upon formal acquisition of the territory. The treaty of acquisition with Russia provided that inhabitants of Alaska "shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." LAWSON & SEIDMAN, *supra* note 10, at 106 (quoting Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, Russ.-U.S., art. III, Mar. 30, 1867, 15 Stat. 539, 542).

122. See H. S. Q. HENRIQUES, *THE LAW OF ALIENS AND NATURALIZATION: INCLUDING THE TEXT OF THE ALIENS ACT, 1905*, at 29–31 (1906); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 *YALE J.L. & HUMAN.* 73, 86–87 (1997).

under it, their colonist ancestors were British subjects at birth despite being born in outlying British territories.<sup>123</sup>

As a result, when the Amendment was adopted, common legal discourse understood a person to be born “in” the United States if that person was born in territory subject to permanent U.S. sovereignty. As *Fleming* explained, places under temporary U.S. occupation would not be considered “in” the United States even though they were under U.S. control (and thus subject to temporary U.S. jurisdiction), but once the United States asserted permanent sovereignty by treaty or legislation, the boundaries of the United States were (as *Fleming* said) thereby extended to include the new territory.

#### 4. Post-enactment History: The *Insular Cases*

As discussed, the constitutional status of noncontiguous U.S. territories arose in the aftermath of the Spanish–American War in the series of Supreme Court decisions collectively known as the *Insular Cases*, in which the Court created the idea of “unincorporated” territories not fully within the United States for all constitutional purposes.<sup>124</sup> In modern law, these decisions have been taken to indicate that outlying territories are not “in” the United States for purposes of the Citizenship Clause,<sup>125</sup> although the Supreme Court never adopted this specific proposition. More significantly for the present discussion, however, the *Insular Cases* strongly suggest that the Citizenship Clause’s original meaning did not direct this result—because the Court’s rationale did not rest on a textual or historical distinction among types of territories. Rather, the multiple and somewhat incoherent opinions in the *Insular Cases* indicate that the constitutional text was clear but the Justices for policy reasons were uncomfortable with its implications.

The Court started out well enough in *De Lima v. Bidwell*, in which a narrow majority found (relying on *Fleming* and *Cross*) that Puerto Rico after the U.S. acquisition was “domestic” rather than “foreign” territory for tariff purposes.<sup>126</sup> In the majority’s view, the key was that Spain had formally ceded Puerto Rico to the United States: “[B]y the ratification of the treaty of Paris the island became territory of the United States.”<sup>127</sup>

123. See *Inglis v. Trs. of the Sailor’s Snug Harbour*, 28 U.S. (3 Pet.) 99, 120 (1830) (“It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects . . .”).

124. See *supra* note 58 and accompanying text.

125. See *Tuaua v. United States*, 788 F.3d 300, 303, 306 (D.C. Cir. 2015). *But see* *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196–97 (D. Utah 2019) (rejecting that analysis), *appeal filed*, No. 20-4017 (10th Cir. Feb. 11, 2020).

126. *De Lima v. Bidwell*, 182 U.S. 1 (1901).

127. *Id.* at 196; see also *id.* at 182–86 (relying heavily on *Cross* and *Fleming*). The dissent argued that, despite the cession, Puerto Rico should be regarded as “foreign” specifically for tariff purposes until Congress directly addressed the matter. See *id.* at 200–19 (McKenna, J., dissenting). The dissent’s position seems flatly contrary to both executive and judicial assumptions regarding California after the Mexican War, as reflected in *Cross*, although it drew support from the Court’s alternative holding in *Fleming*. See *supra* note 119. In any event, however, the dissent did not deny that, for general purposes, Puerto Rico was part of the United States after the cession. See *De Lima*, 182 U.S. at 201–02.

Congress dealt with the specific matter of tariffs in the Foraker Act in 1900, which established statutory duties on goods brought to the U.S. mainland from Puerto Rico.<sup>128</sup> The problem, though, was the Constitution's Uniformity Clause, which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States."<sup>129</sup> In *Downes v. Bidwell*, importers argued that the Foraker Act violated this Clause by imposing duties on Puerto Rican goods that did not apply to goods from elsewhere in the United States (again, consistent with what both the Court and the Executive Branch had assumed regarding California in *Cross*).<sup>130</sup>

*De Lima* should have resolved *Downes*: if Puerto Rico was U.S. territory after the cession, it would seem obviously to be a part of the United States for purposes of the Uniformity Clause (and four of the five Justices from the *De Lima* majority reached that conclusion). But *Downes* was much more than a tariff case, as one commentary explains:

[T]hese cases were generally understood to be a broad referendum on the freedom of Congress to deal with the island territories in ways at least facially prohibited by the Constitution. More specifically, the larger question lurking in the background was whether all the provisions in the Bill of Rights concerning civil and criminal procedure had to be fully extended to territories populated, in the pointed and revealing words of Justice Henry Brown, "by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought."<sup>131</sup>

The Justices in the *Downes* majority openly acknowledged their policy-driven concerns over potential U.S. citizenship for island natives; although that issue was not directly presented in *Downes*, the Justices knew it would follow from a holding that insular territories such as Puerto Rico—and by implication the Philippines—were part of the United States for constitutional purposes. Justice Brown observed:

[T]he consequences [of extending the Constitution to the insular territories] will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States.<sup>132</sup>

Similarly, Justice Edward White wrote that the power of annexation "could not be practically exercised if the result would be to endow the [territory's] inhabitants with citizenship of the United States" and objected to the "immediate

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128. Ch. 191, 31 Stat. 77 (1900).

129. U.S. CONST. art. I, § 8, cl. 1.

130. See 182 U.S. 247–49 (1901).

131. LAWSON & SEIDMAN, *supra* note 10, at 195 (quoting *Downes*, 182 U.S. at 287).

132. *Downes*, 182 U.S. at 279–80.

bestowal of citizenship on those absolutely unfit to receive it” as members of “an uncivilized race.”<sup>133</sup>

Brown (who delivered the opinion of the Court in *De Lima*) switched his vote in *Downes*, joining the four *De Lima* dissenters to conclude that Congress could establish a special tariff status for Puerto Rico. But what would be the theory? The five-Justice majority produced three opinions. Of them, Justice White’s concurrence provided the ultimate solution. According to White, some U.S. territories are “incorporated” into the United States and some are not; incorporated territories receive the full benefit of the Constitution and unincorporated territories do not.<sup>134</sup> Notably, White (and later the Court) did not wholly exclude island territories from the Constitution; “fundamental” constitutional rights would still apply there.<sup>135</sup> But the Constitution would not fully apply there, and the Court would establish the extent to which it did or did not apply.

These doctrinal innovations allowed the Court to finesse the question of the citizenship of persons born in Puerto Rico. Unlike prior acquisition treaties, the treaty with Spain did not address the citizenship of people in the ceded territories. The issue came to the Court in *Gonzales v. Williams*,<sup>136</sup> but the Justices declined to decide it, holding in an obvious evasion that the Puerto Rican claimant had a right to enter the U.S. mainland because she was in any event not an alien within the meaning of the applicable statute.<sup>137</sup>

The policy-driven evasiveness of the *Insular Cases* respecting Puerto Rico and the Philippines contrasts sharply with the Court’s forthright treatment of Cuba, in which the Court confidently applied the doctrine of *Fleming*.<sup>138</sup> Spain also formally surrendered Cuba after the war, but unlike Puerto Rico and the Philippines, Cuba was never formally annexed by the United States. Rather, it was held under U.S. military jurisdiction pending its independence, which it

133. *Id.* at 306 (White, J., concurring). As Professor Erman explains, the overriding concern was more the Philippines than Puerto Rico. See ERMAN, *supra* note 2, at 54–55.

134. See *Downes*, 182 U.S. at 288, 305–06, 343–44 (White, J., concurring). Brown, writing only for himself, argued that the Constitution applied to the territories “only when and so far as Congress shall so direct.” *Id.* at 279 (opinion of Brown, J.). A majority of the Court adopted White’s idea in *Dorr v. United States*, rejecting the full application of the bill of rights—especially jury trial—in the island territories but retaining the idea that “fundamental” constitutional rights did apply there. See 195 U.S. 138, 147–49 (1904).

135. *Dorr*, 195 U.S. at 147–49; *Downes*, 182 U.S. at 288 (White, J., concurring).

136. 192 U.S. 1 (1904).

137. See *id.* at 15; see also *id.* at 12 (“We are not required to discuss . . . the contention of Gonzales’ counsel that the cession of Porto Rico accomplished the naturalization of its people.”). The implications of the *Insular Cases* for the modern law of citizenship as a matter of precedent seem murky. The Court expressly reserved the question of insular citizenship in *Gonzales* and did not return to it. See *id.* at 12. But *Gonzales* confirmed that Puerto Rico, and presumably the other insular territories, were part of the United States for some constitutional purposes, and the doctrine of incorporation (however dubious as an original matter) holds that fundamental constitutional rights extend to the unincorporated island territories. See *Dorr*, 195 U.S. at 148–49. Citizenship might seem like one of those fundamental rights. But see *Tuaua v. United States*, 788 F.3d 300, 303–08 (D.C. Cir. 2015) (relying on the *Insular Cases* to reject claims of constitutional citizenship by American Samoans, specifically finding citizenship not to be a fundamental right).

138. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 614–16 (1850).

obtained in 1902.<sup>139</sup> In the interim, the question was whether Cuba was “in” the United States. Under *Fleming*, it plainly was not because it had not been formally annexed—and the Court duly (and unanimously) so held.<sup>140</sup>

For an original meaning assessment, the central attribute of the *Insular Cases* is their non-originalist analysis, founded on the ahistorical judicially invented doctrine of incorporation. Justice Harlan, dissenting in *Downes*, wrote: “I am constrained to say that this idea of ‘incorporation’ has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.”<sup>141</sup> A modern assessment concludes:

[T]here is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired. Nor is there anything in the Constitution that marks out certain categories of rights or powers as more or less “fundamental” than others. . . . The doctrine of “territorial incorporation” that emerged from *The Insular Cases* is transparently an invention designed to facilitate the felt needs of a particular moment in American history.<sup>142</sup>

Had there been a clear textual or historical understanding that geographically or culturally distant territories were not “in” the United States, the Court presumably would have invoked it. The Court’s failure to do so—and its reliance instead on half measures and race-based policy arguments—indicates the lack of textual and historical foundation for its conclusions. Thus, despite their results, the *Insular Cases* confirm the textual and historical analysis set forth above. Under the Fourteenth Amendment’s original meaning, territories formally acquired by the United States were “in” the United States for citizenship purposes; the Justices in the majority were unable to develop textual and historical arguments for a contrary position.

## 5. Modern Applications

In sum, at the time of its enactment the Citizenship Clause’s phrase “born . . . in the United States” most likely referred to birth in territory under permanent U.S. sovereignty. The distinction between incorporated and unincorporated territory was a subsequent policy-driven judicial invention that lacked foundation in original materials. Rather, the key distinction at the time of the Amendment’s enactment was the one identified in the mid-century decisions in *Fleming* and *Cross*: formal cession or annexation, as opposed to temporary occupation.

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139. See Andrew Kent, Boumediene, Munaf, and the Supreme Court’s Misreading of the *Insular Cases*, 97 IOWA L. REV. 101, 152, 154 (2011) (discussing the status of post-war Cuba).

140. See *Neely v. Henkel*, 180 U.S. 109, 119 (1901) (unanimously finding that Cuba was not “a part of the territory of the United States,” with Justice Harlan, who had dissented sharply in *Downes*, writing for the Court); see Kent, *supra* note 139, at 148–50 (discussing *Neely*).

141. 182 U.S. 244, 391 (1901) (Harlan, J., dissenting).

142. LAWSON & SEIDMAN, *supra* note 10, at 196–97; see also ERMAN, *supra* note 2, at 47–66 (highlighting racial overtones in the *Insular Cases*).

That conclusion would not resolve all difficult issues of application. It is not entirely clear how this meaning would apply to territories annexed with the understanding that they would eventually receive independence (such as the Philippines) or to places under long-term or indefinite lease or occupation by the United States, such as Guantánamo Bay or the Panama Canal Zone.<sup>143</sup> But the original meaning would apply the Citizenship Clause to persons born in Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands—all of which are under permanent U.S. sovereignty pursuant to formal acquisitions and thus are “in the United States” under the original meaning of the Fourteenth Amendment.

B. “SUBJECT TO THE JURISDICTION THEREOF”

This Section turns to the second requirement of the Fourteenth Amendment’s Citizenship Clause. By its text, the Clause requires that, in addition to being born “in the United States,” a person must (presumably at birth)<sup>144</sup> be “subject to the jurisdiction thereof” to qualify for constitutional citizenship. The core question for this Section, therefore, is what categories of persons were understood as in the United States but not subject to its jurisdiction.<sup>145</sup> As with the previous Section, this Section begins with the meaning of the key phrase “subject to the jurisdiction” in the period prior to drafting and enactment of the Amendment. It next examines how that meaning fits with the debates and commentary in the enactment period and the immediate post-enactment period. Finally, it applies the Clause’s original meaning to modern controversies.

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143. In the 1903 Hay–Bunau–Varilla Treaty, Panama granted to the United States “in perpetuity the use, occupation and control” of the canal and land immediately on each side of the canal. Convention Between the United States and the Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, Pan.-U.S., art. II, Nov. 18, 1903, 33 Stat. 2234. In a 1903 agreement with Cuba, the United States acquired a lease over the Guantánamo Bay facility that allowed the United States to “exercise complete jurisdiction and control over and within said areas” while also “recogniz[ing] the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas.” Agreement Between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, Cuba-U.S., art. III, Feb. 23, 1903, T.S. No. 428; *see also* Erbsen, *supra* note 54, at 1194 (questioning whether “embassies, military bases on foreign soil, U.S.-flagged ships, and the exclusive economic zone that extends 200 miles from the U.S. coast” are “in” the United States for constitutional purposes).

144. The timing issue was central to *Elk v. Wilkins*, in which a person born in the United States but not subject to U.S. jurisdiction at birth (because he was born a member of a tribe) claimed he could obtain U.S. citizenship by submitting to U.S. jurisdiction as an adult. The Court rejected that claim (over Justice Harlan’s dissent). 112 U.S. 94, 109 (1884). This Article assumes without more discussion that the Court’s conclusion was correct as a matter of the Clause’s original meaning.

145. As indicated above, *supra* note 91 and accompanying text, this Article addresses the original meaning of the text in the legal and political context in which it was adopted. The drafters’ understanding is a supplemental, not a primary, aspect of this inquiry. Accordingly, the appropriate starting point is the meaning of the relevant phrase in pre-Amendment discourse.

### 1. Pre-enactment Meaning: Who Was “Subject to [U.S.] Jurisdiction” in the Mid-Nineteenth Century?

The most common meaning of “jurisdiction” is associated with courts, meaning a court’s power over a case or a litigant.<sup>146</sup> That meaning fits poorly with the Citizenship Clause, which invokes the jurisdiction of the United States. The Clause’s language instead invokes the idea that, in addition to “jurisdiction to adjudicate” (the familiar jurisdiction of courts), nations have jurisdiction (meaning authority) to prescribe and enforce laws—legislative and executive jurisdiction.<sup>147</sup> This idea of legislative and executive jurisdiction—a nation’s jurisdiction—comes from pre-Amendment international law and was also found in ordinary dictionaries of the time. According to the 1865 edition of Webster’s dictionary, jurisdiction as applied to nations meant the “[p]ower of governing or legislating,” “the power or right of exercising authority,” the “limit within which power may be exercised,” or “extent of power or authority.”<sup>148</sup> Thus, while the term “jurisdiction” was often associated with a court’s power over a litigant or an issue, more broadly it encompassed a lawmaker’s power to prescribe rules for a person or territory (legislative jurisdiction) and an executive’s power to enforce rules against a person or within a territory (executive jurisdiction).

The dictionary definition reflects the nineteenth-century international law of sovereignty, which (like modern international law) used “jurisdiction” to mean the scope of a sovereign’s authority. The leading U.S. international law writer of the pre-Civil War period, Henry Wheaton, directly used “jurisdiction” in this way: he equated a nation’s “sovereign power of municipal legislation . . . within its territory” to its “territorial jurisdiction.”<sup>149</sup> He added that ships on the high seas “are subject to the jurisdiction of the state to which they belong” (meaning they are subject to that state’s sovereign authority)<sup>150</sup> and noted (in an exception

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146. *See, e.g.*, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819–20 (1824) (discussing jurisdiction of federal courts); 1 JOHN BOUVIER, *A LAW DICTIONARY* 683 (Philadelphia, George W. Childs 11th ed. 1862) (defining “jurisdiction” as “[a] power constitutionally conferred upon a judge or magistrate, to take cognizance of, and decide causes according to law, and to carry his sentence into execution”); *see also* Ing, *supra* note 3, at 725–29 (discussing judicial jurisdiction).

147. *See* SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 319–22, 335–38 (3d ed. 2018) (discussing jurisdiction to prescribe, adjudicate, and enforce in international law).

148. NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 732 (Chauncey A. Goodrich & Noah Porter eds., Springfield, G. & C. Merriam 1865); *see also* Ing, *supra* note 3, at 726–29 (reviewing sources and finding a “consistent antebellum equation of ‘jurisdiction’ with ‘sovereign authority’”). This use is found in the Fourteenth Amendment’s Equal Protection Clause, U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”), and as noted above, in the Thirteenth and Eighteenth Amendments, *id.* amend. XIII, § 1 (slavery shall not exist in “any place subject to [U.S.] jurisdiction”); *id.* amend. XVIII, § 1 (banning sales of alcohol within “all territory subject to [U.S.] jurisdiction”) (repealed 1933). On modern usage in this sense, *see* Ho, *supra* note 7, at 368–69 (noting usage meaning “subject to U.S. sovereign authority and laws”).

149. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE* 100 (Philadelphia, Carey, Lea & Blanchard 1836). On Wheaton’s influence, *see generally* ELIZABETH FEASTER BAKER, *HENRY WHEATON, 1785-1848* (1937).

150. WHEATON, *supra* note 149, at 107.

explored below) that ambassadors resident in a foreign country are “exempt from the local jurisdiction.”<sup>151</sup> Thus in Wheaton’s terms, “subject to the jurisdiction” of the United States meant under U.S. sovereign authority.

In nineteenth-century international law, a nation’s sovereign authority was closely linked to territory. A sovereign had almost complete authority over (almost) every person and thing within its territory, but authority over almost nothing outside its territory except the actions of its own citizens.<sup>152</sup> The idea of territorial “jurisdiction” (meaning territorial authority) is set forth most clearly in the early nineteenth-century Supreme Court case *Schooner Exchange v. McFaddon*,<sup>153</sup> in which Chief Justice Marshall explained foreign sovereign immunity. Marshall began: “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.”<sup>154</sup> But, he continued, “all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.”<sup>155</sup> Although Marshall went on to discuss exceptions to territorial jurisdiction, he noted that the exceptions did not encompass foreign private citizens traveling or residing in a nation:

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it.<sup>156</sup>

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151. *Id.* at 106.

152. *See id.* at 100–08; accord Vattel, *supra* note 29, bk. II, ch. VII, § 84, at 166 (“The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognisance of the crimes committed, and the differences that arise in the country.”); *see also* STORY, *supra* note 37, § 539, at 450 (approvingly quoting this passage from Vattel). As discussed in Section II.A.3, a nation might have temporary jurisdiction over occupied territory without that territory being formally “in” the nation. *See Fleming v. Page*, 50 U.S. (9 How.) 603, 614–16 (1850).

153. 11 U.S. (7 Cranch) 116 (1812). The issue in *Schooner Exchange* was whether a French warship in a U.S. port came within one of the exceptions. *Id.* at 122.

154. *Id.* at 136. Marshall overstated slightly here because territorial jurisdiction was not “exclusive” as to aliens present in U.S. territory; as discussed below, a nation retained authority over its citizens or subjects abroad. *See infra* note 165.

155. 11 U.S. (7 Cranch) at 136.

156. *Id.* at 144; accord STORY, *supra* note 37, §§ 541–42, at 452–53 (noting a sovereign’s authority over temporary visitors); Vattel, *supra* note 29, bk. II, ch. VIII, §§ 99, 101, at 171–72 (same, and concluding that “foreigners who pass through or sojourn in a country, either on business, or merely as

The equation of “jurisdiction” with “sovereign authority” in this passage is unmistakable—amounting to the unsurprising proposition that visitors to a country ordinarily must obey that country’s laws and courts while within its territory.

Marshall identified three exceptions to territorial sovereignty: foreign rulers themselves and their property, foreign diplomats, and foreign military forces.<sup>157</sup> These, he said, even when coming within the sovereign’s territory, are not “within the jurisdiction of the sovereign” and thus are immune from local laws and local adjudication.<sup>158</sup> In the particular case, he concluded that a French warship had such an immunity from U.S. jurisdiction.<sup>159</sup>

Wheaton’s widely read international law treatise discussed ambassadors’ immunities in similar terms, specifically using the phrase “subject to jurisdiction.”<sup>160</sup> Ambassadors and their families and staff were, Wheaton said, “entitled to an entire exemption from the local jurisdiction.”<sup>161</sup> But this exemption itself had exceptions, including: if the ambassador “is a citizen or subject of the country to which he is sent . . . he remains still subject to its jurisdiction,” and if the ambassador “is at the same time in the service of the power who receives him as a minister . . . he continues still subject to the local jurisdiction.”<sup>162</sup> Thus Wheaton used “subject to the jurisdiction” of a nation to mean not having immunity from that nation’s “power of governing or legislating” (as Webster’s dictionary defined “jurisdiction”)<sup>163</sup> in the same way Marshall used “amenable to” jurisdiction in *Schooner Exchange*.<sup>164</sup>

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travellers” are “subject to the laws” of that country because “[t]he sovereignty is the right to command the whole country; and the laws are not simply confined to regulating the conduct of the citizens towards each other, but also determine what is to be observed by all orders of people throughout the whole extent of the state”).

157. *Schooner Exch.*, 11 U.S. (7 Cranch) at 137–40.

158. *Id.* at 138. Marshall noted an exception that certain crimes might “forfeit the privileges annexed to [the ambassador’s] character” and make him “amenable to the local jurisdiction.” *Id.* at 139.

159. *Id.* at 145–46.

160. See WHEATON, *supra* note 149, at 177.

161. *Id.* at 176; *see also id.* at 178 (stating that embassy secretaries have an “exemption from the local jurisdiction”); *id.* at 179 (stating that ambassadors’ families have an “exemption from the local laws and jurisdiction”); *id.* (stating that personal effects of the ambassador “are entirely exempt from the local jurisdiction . . . but any other real property, or immoveables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction”). The influential eighteenth-century international law authority Vattel wrote in similar terms. Diplomatic personnel, he stated, “must be independent of the sovereign authority and of the jurisdiction of the country, both in civil and criminal matters,” and thus their service as diplomatic agents should not “subject them to a foreign authority.” VATTEL, *supra* note 29, bk. IV, ch. VII, § 92, at 471; *see also id.* bk. IV, ch. VIII, § 110, at 488 (denying that an ambassador is “subject, in civil cases, to the jurisdiction of the country where he resides”); *id.* bk. IV, ch. VIII, § 113, at 491 (considering “what circumstances [an ambassador’s] property may be subjected to, and by what others it may be exempted from, the jurisdiction of a country”); *id.* bk. IV, ch. VIII, § 115, at 493 (concluding that an ambassador’s immoveable property is “subject to the jurisdiction of the state in which it lies” because no immunity for it should be recognized).

162. WHEATON, *supra* note 149, at 177; *see also id.* at 181 (concluding that unlike ambassadors, consuls lack diplomatic immunity and thus “are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state”).

163. *See supra* notes 149–52 and accompanying text.

164. *See supra* notes 154–56 and accompanying text.

Based on widely read authorities such as Webster's dictionary, Wheaton's *Elements of International Law*, and Marshall's *Schooner Exchange* opinion, we can conclude that "subject to the jurisdiction [of the United States]" had a clear meaning and scope in nineteenth-century language. It meant within the United States' power of "governing or legislating"; and it included all persons in U.S. territory (because ordinarily territorial jurisdiction was "absolute"), except those with diplomatic and other legal immunities (most notably ambassadors and their families and staff) and foreign military forces.

Importantly, as discussed in Section II.A, in nineteenth-century terms some persons and territory could be subject to U.S. jurisdiction and yet not be "in" the United States. Although there are loose statements in nineteenth-century sources that a nation's jurisdiction could not extend beyond its territory, jurisdiction over citizens abroad was well established.<sup>165</sup> Further, and importantly for the Citizenship Clause, territory might be controlled temporarily by the United States, as in an armed occupation, and yet not be "in" the United States; that territory would thus be (temporarily) subject to U.S. jurisdiction although not part of the United States. As previously described, the Court noted this situation with respect to the Mexican port of Tampico in *Fleming*.<sup>166</sup> Thus, "in the United States" and "subject to its jurisdiction" described two substantially overlapping but distinct categories.

As a final textual point, it does not appear that there were competing definitions of "subject to the jurisdiction" in the pre-Amendment period. Prior scholarship has discussed at length competing ideas of citizenship (of which there were many),<sup>167</sup> but the central question in assessing the Citizenship Clause's original textual meaning is not pre-Amendment abstract conceptions of citizenship; it is the pre-Amendment meaning of the key constitutional phrase. On that point it does not appear that there was any dispute on basic principles (although, as reflected for example in *Schooner Exchange*, there might be disputes on particular applications).<sup>168</sup>

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165. See, e.g., *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (opinion of Story, J.) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."); STORY, *supra* note 37, § 540, at 451 ("[N]ations generally assert a claim to regulate the rights, duties, obligations, and acts of their own citizens, wherever they may be domiciled."); WHEATON, *supra* note 149, at 100–01. As noted, Wheaton also said that a nation's jurisdiction extended to its ships on the high seas. *Id.* at 107.

166. See *supra* Section II.A.3.

167. See, e.g., SCHUCK & SMITH, *supra* note 7, at 25–48; Edward J. Erler, *From Subjects to Citizens: The Social Compact Origins of American Citizenship*, in *THE AMERICAN FOUNDING AND THE SOCIAL COMPACT* 163, 163–97 (Ronald J. Pestritto & Thomas G. West eds., 2003); Mayton, *supra* note 7, at 225–28.

168. It is true that there were different sources of a nation's jurisdiction. Citizens/subjects were subject to their nation's permanent jurisdiction wherever they went, including outside sovereign territory. In some accounts, this connection could not be renounced by the individual without the sovereign's consent. In contrast, noncitizen visitors or residents were subject to temporary jurisdiction arising from presence in sovereign territory, which persisted only so long as that presence continued. See, e.g., *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812) (discussing visitors' "temporary and local allegiance"). Some modern authorities contend that the Citizenship Clause refers

## 2. The Drafting History and “Jurisdiction” in the Citizenship Clause

We should now consider how the ordinary pre-Amendment meaning of “subject to the jurisdiction” fits with the Citizenship Clause’s context, purposes, and drafting history.<sup>169</sup> The starting point, as before, is that the Clause’s central purpose was to guarantee constitutional citizenship to freed slaves and other U.S.-born persons of African descent. That purpose, however, would be achieved by the Clause’s opening phrase “born . . . in the United States.”<sup>170</sup> The “subject to the jurisdiction” language, in the Amendment’s structure, was a restriction on the general rule of *jus soli* citizenship adopted by the phrase “born . . . in the United States.” The question then is: of those born “in” the United States, whom did the Amendment seek to exclude from citizenship?

### *a. Maintaining Prior Exceptions: Diplomats*

A bedrock principle of *jus soli* citizenship was that it did not grant citizenship to children of diplomats and their families and staff. Long-standing English law was clear on this point: children of foreign diplomatic households born in England were not English subjects, and correspondingly children of English diplomats born abroad were English subjects (despite the common law rule that foreign-born children of subjects were aliens).<sup>171</sup> As discussed in Section I.A., pre-Amendment U.S. sources commonly referred to this exception.<sup>172</sup>

We may readily conclude that one purpose of the “subject to the jurisdiction” exclusion was to align the Citizenship Clause with the existing common law of citizenship regarding diplomats.<sup>173</sup> Diplomats and their dependents might be “in”

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only to the former, not the latter. *See, e.g.*, Eastman, *supra* note 7, at 175–78; Mayton, *supra* note 7, at 225. But the pre-enactment meaning does not suggest that limitation. As discussed, authorities such as Marshall and Wheaton used the phrase “subject to” (or “amenable to”) jurisdiction to mean both kinds of sovereign authority. *See supra* notes 149–65 and accompanying text.

169. On the role of the Amendment’s legislative history in original meaning analysis, *see supra* notes 91–92.

170. It is likely that some freed slaves were not born in the United States. Congress prohibited the slave trade in 1808. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (effective Jan. 1, 1808). Some elderly former slaves in 1868 might have been brought to the United States prior to that date. Moreover, some illegal slave imports continued after 1808. *See* NEUMAN, *supra* note 7, at 178–79. However, there is no record that these possibilities were discussed in the debates; the Amendment’s drafters and ratifiers appeared to assume former slaves were all born in the United States, or at least that there would be no practical way to show otherwise.

171. 1 BLACKSTONE, *supra* note 30, at 361–62; HENRIQUES, *supra* note 122, at 29–30.

172. *See supra* Section I.A.; *see, e.g.*, *Inglis v. Trs. of the Sailor’s Snug Harbour*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting) (“So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince.”); *Lynch v. Clarke*, 1 Sand. Ch. 583, 658 (N.Y. Ch. 1844) (noting exception as to citizenship of “the children of ambassadors, (who are deemed to be born within the allegiance of the sovereign represented,)”); 2 KENT (6th ed.), *supra* note 36, at 49.

173. As noted, the original drafter of the Clause, Senator Howard, said he understood the Clause as “declaratory of what I regard as the law of the land already.” CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

the United States,<sup>174</sup> but as Marshall explained in *Schooner Exchange*, they were not under U.S. sovereign authority—that is, they were not subject to U.S. jurisdiction. Thus, the Clause’s exclusion of persons not “subject to [U.S.] jurisdiction” kept in place the exclusion from citizenship of U.S.-born children of foreign diplomatic personnel. Drafting evidence confirms that this was, in part, the point of the “subject to the jurisdiction” requirement, as Senators directly mentioned diplomatic families as being excluded by it.<sup>175</sup>

It is worth noting, moreover, that the categorical exclusion from citizenship of children born under diplomatic immunity was not insubstantial. By the mid-nineteenth century, a number of countries had diplomatic missions to the United States. And the nineteenth-century diplomatic immunity extended not just to ambassadors themselves, but also to their staff and servants,<sup>176</sup> who might also have families with them. Thus, it was quite likely that there would be children of this description born in the United States but not subject to U.S. jurisdiction.<sup>177</sup>

*b. Maintaining Prior Exceptions: Native Americans*

Although not self-evident, the Citizenship Clause’s drafting history and other surrounding circumstances show that the “subject to the jurisdiction” phrase had another important purpose: to exclude from citizenship most members of Native American tribes. As discussed, in pre-Amendment law most Native Americans within the United States were not U.S. citizens.<sup>178</sup> When Senator Howard first proposed the Amendment’s Citizenship Clause, Senator Doolittle objected that it would change this status (because tribal members were born “in the United States”); Doolittle moved to add an additional textual exclusion of “Indians not taxed.”<sup>179</sup> This objection set off an extended debate in which the Clause’s

174. Foreign diplomats were sometimes said by a legal fiction not to be “in” the host country, even when they physically were. See WHEATON, *supra* note 149, at 176. But, because their children would be literally “born . . . in the United States,” it would have been unwise for the drafters to rely on a legal fiction to exclude them. See CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866) (remarks of Sen. Wade) (acknowledging that his earlier proposal extending rights to persons “born in the United States” without the jurisdiction requirement might include children of ambassadors).

175. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (remarks of Sen. Howard) (observing that the proposed language would not include persons “who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States”); *id.* at 2897 (remarks of Sen. Williams) (noting that the “child of an ambassador” is not fully subject to U.S. jurisdiction and thus would be excluded from citizenship by the Clause); see also Ing, *supra* note 3, at 739 nn.107–09 (collecting comments).

176. WHEATON, *supra* note 149, at 176.

177. In keeping with *Schooner Exchange*, the “subject to the jurisdiction” requirement would also exclude children of foreign sovereigns and of parents in foreign armies, although these categories seem not to have been of much practical concern. See *Inglis*, 28 U.S. (3 Pet.) at 156 (Story, J., dissenting) (“Thus the children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens.”).

178. KETTNER, *supra* note 22, at 293–300; see *supra* note 41 and accompanying text.

179. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). As explained below, the “Indians not taxed” language came from the 1866 Civil Rights Act and ultimately from Article I, Section 2 of the Constitution (excluding such persons from enumeration for purposes of representation in Congress). This language excluded both the reservation tribes, who were not taxed by treaty, and the frontier tribes,

defenders pointed to the “subject to the jurisdiction” requirement as excluding most Native Americans.<sup>180</sup>

The exclusion rested on two grounds. Many tribes at the time had treaties with the United States that confirmed a degree of self-government and independence from U.S. interference in internal tribal matters. These tribes thus were (or could be described as) not fully subject to U.S. jurisdiction, because in many matters it was the tribe, not the U.S. government, that had prescriptive and law enforcement authority.<sup>181</sup> They would be subject to U.S. jurisdiction if Congress chose to override the treaties and legislate on internal tribal matters<sup>182</sup>—but in 1866 the treaty relationship was the governing law as between the tribes and the U.S. government. As discussed in Section I.A. above, in pre-Amendment nineteenth-century law, tribal members’ exclusion from citizenship was explained in exactly this way: “They are not our subjects, born within the purview of the law, because they

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who were not taxed as a practical matter because they were beyond U.S. authority. The Fourteenth Amendment carried over the exclusion of “Indians not taxed” as to representation, but not as to citizenship. *See* U.S. CONST. amend. XIV, §§ 1–2.

180. CONG. GLOBE, 39th Cong., 1st Sess. 2890–97 (1866); *supra* Section II.A.

181. *See* 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 107–08 (1984) (“The sovereignty of an Indian tribe, no matter how it might be circumscribed in other respects, was certainly considered to extend to the punishment of its own members. Up to the mid-nineteenth century, indeed, there were no laws or treaty provisions that limited the powers of self-government of the tribes with respect to internal affairs.”); *see also* Ing, *supra* note 3, at 730–35 (noting the connection between the quasi-sovereign status of the tribes and their exclusion from citizenship under the Fourteenth Amendment); Magliocca, *supra* note 7, at 520–21 (same). The tribes’ partial exclusion from U.S. jurisdiction was frequently and expressly confirmed in treaties. *See, e.g.*, Treaty Between the United States of America and the Creek Nation of Indians, Creek Nation-U.S., art. X, June 14, 1866, 14 Stat. 785 (affirming Creek Nation’s self-government, including that congressional legislation “shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs”). In contrast, U.S. law governed tribal members in external matters, particularly as to offenses committed against U.S. citizens. *See* 1 PRUCHA, *supra*, at 102–07.

This relationship persisted after adoption of the Fourteenth Amendment while coming under pressure for legislative reform. *See* 2 PRUCHA, *supra*, at 676–81; *see also Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) (holding that the United States lacked jurisdiction to punish a member of the Sioux Tribe for murder of another tribal member); *id.* (“[S]emi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.” (quoting *United States v. Joseph*, 94 U.S. 614, 617 (1876))). And the “semi-independent” status of the tribes was used—consistent with the understanding of the Amendment’s drafters—to continue to deny U.S. citizenship to tribal members in the post-Ratification period. *See* 2 PRUCHA, *supra*, at 683 (describing an 1870 Senate report to this effect).

182. Congress shifted to a primarily statutory rather than treaty-based regime for tribal relations beginning in 1871, when it prohibited further treaties with the tribes. *See* 1 PRUCHA, *supra* note 181, at 531–32. Beginning in the 1880s, Congress extended U.S. law to certain internal tribal matters, including crimes of one tribal member against another. *See* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385; *see also United States v. Kagama*, 118 U.S. 375, 383–85 (1886) (upholding Congress’s power to enact this legislation). The new approach ultimately led to statutory recognition of all U.S.-born Native Americans as citizens. *See* 2 PRUCHA, *supra* note 181, at 686 n.66.

are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent on us . . . .”<sup>183</sup>

In addition, some tribes or other Native groups were, as a practical matter, beyond U.S. authority because they lived in unsettled and largely uncharted areas in the West. As a technical legal matter, they might be considered subject to U.S. jurisdiction (because no treaty excluded it), but the United States was unable to exercise that jurisdiction other than by force of arms. The situation of these tribes had a rough analogue in the international law of jurisdiction: occupying armies. It was common ground that hostile armies were not subject to U.S. jurisdiction when within U.S. territory as a result of their practical condition as beyond U.S. civil authority.<sup>184</sup> Thus the Amendment’s legal background already contained the idea that tribes and other unassimilated Native Americans were not (fully) “subject to the jurisdiction” of the United States for citizenship purposes.

Proponents of the Citizenship Clause specifically linked the exclusion of tribal members from citizenship with the Clause’s jurisdiction requirement on these grounds, and opposed Doolittle’s motion as redundant.<sup>185</sup> Doolittle’s motion was eventually defeated, presumably for this reason.<sup>186</sup>

In sum, in addition to adopting the long-standing common law exclusion of children of diplomats, the “subject to the jurisdiction” language was widely understood to adopt the (somewhat more dubious but also long-standing) exclusion of tribal and unassimilated Native Americans. As with the exclusion of children of diplomats, that understanding followed directly from pre-Amendment legal discourse, which explained the tribes’ exclusion from citizenship in terms of their exclusion from ordinary U.S. jurisdiction.<sup>187</sup>

183. *Goodell v. Jackson*, 20 Johns. Ch. 693, 712 (N.Y. Ch. 1823); see also KETTNER, *supra* note 22, at 294–95 (discussing the pre-Amendment legal justifications for excluding Native Americans from citizenship).

184. See *Inglis v. Trs. of the Sailor’s Snug Harbour*, 28 U.S. (3 Pet.) 99, 156 (1830) (Story, J., dissenting) (noting that “the children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens”); Magliocca, *supra* note 7, at 502 (tracing this rule to *Calvin’s Case*, and concluding that “[t]his exception [for birth under hostile occupation] was widely accepted here [in the United States] when the Fourteenth Amendment was ratified”).

185. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (remarks of Sen. Trumbull) (“Does the Government of the United States pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another? . . . [T]hey are not subject to our jurisdiction.”); *id.* at 2895 (remarks of Sen. Howard) (“[A]n Indian belonging to a tribe, although born within the limits of a State” is not “subject to this full and complete jurisdiction [of the United States]” because that person “is subject for crimes committed against the laws or usages of the tribe to the tribe itself, and not to any foreign or other tribunal.”); *id.* at 2897 (remarks of Sen. Williams) (equating persons subject to tribal authority to diplomats, neither of whom were “fully and completely subject to the jurisdiction of the United States”); see also Epps, *supra* note 7, at 357–59 (discussing this part of the drafting history); Ing, *supra* note 3, at 732–33 (same).

186. See CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).

187. The claim that tribal Native Americans were not subject to U.S. jurisdiction in 1866 seems odd to modern ears because the tribes—especially the reservation tribes—were under ultimate U.S. sovereign authority. This was exactly Doolittle’s point. See *id.* at 2892–93 (remarks of Sen. Doolittle); *id.* at 2897 (remarks of Sen. Williams, in agreement). But the Senate majority, led by Howard and Trumbull, saw the matter differently: in their view, although the United States had authority over the

*c. Categories Not Excluded: Children of Aliens*

Consistent with the ordinary meaning of “subject to the jurisdiction,” the drafting history indicates two substantial categories of persons excluded from constitutional citizenship, despite being born “in” the United States: children of diplomatic households and of tribal or unassimilated Native Americans. Original meaning and drafting history further indicate an important category of persons the text appears not to have excluded: U.S.-born children of aliens. In particular, the drafting debates focused on the U.S.-born children of Chinese immigrants on the West Coast—the issue that eventually reached the Supreme Court in *Wong Kim Ark* in 1898.

Spurred by the Gold Rush and the transcontinental railroad, Chinese immigration in the West accelerated in the mid-nineteenth century and was becoming an issue in the 1860s. (It became a much greater issue soon afterward.)<sup>188</sup> Modern commentators on the Citizenship Clause emphasize the drafting debates in exploring this issue, with one side contending that the drafters understood the Clause to extend citizenship to U.S.-born children of aliens<sup>189</sup> and the other side arguing that such children were excluded by the Clause’s “subject to the jurisdiction” language, similar to the Native tribes.<sup>190</sup> Although undoubtedly important, the drafting debates should be neither the starting point nor the touchstone of the inquiry into original meaning. Two points are of greater significance.

First, the prevailing pre-Amendment common law view was that, as a general matter, U.S.-born children of aliens were U.S. citizens at birth. As recounted above, that was the view of leading commentators such as Story, Rawle, and Kent; it was the view of leading judicial decisions, including *Lynch v. Clarke*; and (as the court in *Lynch* discussed) it was a general assumption in practice.<sup>191</sup> That this approach existed in common law does not prove the Fourteenth Amendment adopted it. But its existence makes it plausible that the Amendment adopted it, if (as Howard stated) the Amendment sought largely to

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tribes as entities, it typically did not claim ordinary jurisdiction over individual tribal members (at least as to internal government). *See, e.g., id.* at 2893. Thus, the United States did not exercise “full and complete” jurisdiction over the individual members, which was sufficient to put the individual members outside the scope of the Citizenship Clause. *See supra* note 185.

188. Efforts to curtail Chinese immigration began at the state level, especially in California, and first reached the Supreme Court in 1875. *See Chy Lung v. Freeman*, 92 U.S. 275, 276, 281 (1875) (holding that state exclusions infringed the federal foreign relations power). Beginning in the 1880s, the federal government began sharply limiting Chinese immigration through treaties and legislation, which the Court generally upheld. *See Duncan B. Hollis, Treaties in the Supreme Court, 1861–1900, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 55, 68–69 (David L. Sloss et al. eds., 2011); Thomas H. Lee & David L. Sloss, *International Law as an Interpretive Tool in the Supreme Court, 1861–1900, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, supra*, at 124, 154–55.

189. *E.g., Epps, supra* note 7, at 333, 339; *Ing, supra* note 3, at 735–36.

190. *See, e.g., Charles, supra* note 7, at 227–28 (quoting Senators Howard, Trumbull, and Johnson in the debates); *Anton, Response, supra* note 86 (same). For further discussion, see *infra* text accompanying notes 207–20.

191. *See supra* Section I.A.

constitutionalize existing practice.<sup>192</sup>

Second, as a textual matter, it is hard to understand how U.S.-born children of aliens could be not “subject to the jurisdiction” of the United States. As discussed, the prevailing understanding of national jurisdiction—as explained by Wheaton and Marshall—was primarily territorial. With narrow exceptions such as those for ambassadors, a sovereign’s jurisdiction extended to all persons in sovereign territory. That jurisdiction plainly included aliens, who, it was said, owed a “temporary allegiance” to the territorial sovereign while present in that sovereign’s territory.<sup>193</sup> Put in practical terms, aliens in the United States were bound by the ordinary laws, enforcement power, and judicial orders of U.S. authorities to the same extent as citizens.

The exception for ambassadors and their families and staff illustrates the point. Foreign diplomatic personnel were not “subject to the jurisdiction” of the United States (that is, they were not governed by ordinary U.S. sovereign authority despite being in U.S. territory) because they had diplomatic immunity under international law.<sup>194</sup> This immunity arose not because they were aliens but because they were aliens *and* ambassadors. Had they merely been alien visitors or immigrants, they would not have had this immunity and they would come within U.S. sovereign authority (“jurisdiction”) while in U.S. territory, as Marshall explained in *Schooner Exchange*.<sup>195</sup>

It is true that aliens (and typically their U.S.-born children) also owed allegiance to a foreign sovereign even while in the United States. As discussed, international law recognized the authority of sovereigns to govern activities of their citizens/subjects abroad. Moreover, many nations claimed the allegiance of foreign-born children of their citizens/subjects, either because the nation followed the European rule of *jus sanguinis* or because (like Britain) the nation had special statutory rules for subjects’ foreign-born children.<sup>196</sup> Thus, U.S.-born children of nondiplomat aliens were not subject to the *exclusive* jurisdiction of the United States; they were subject to overlapping jurisdiction to the extent they were citizens/subjects of one sovereign in the territory of another.<sup>197</sup> But the Citizenship Clause’s text does not require one to be subject to *exclusive* U.S. jurisdiction to claim U.S. citizenship.<sup>198</sup>

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192. The drafting debates indicate that congressmen generally recognized the pre-Amendment common law rule as including as citizens the U.S.-born children of aliens. See Ing, *supra* note 3, at 737 n.101. Representative Lawrence of Ohio, for example, cited *Lynch* for the proposition that “children born here are citizens without any regard to the political condition or allegiance of their parents.” *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence)).

193. See *supra* Section I.A.

194. See *supra* notes 157–64 and accompanying text.

195. See 11 U.S. (7 Cranch) 116, 144 (1812).

196. See Ramsey, *supra* note 17, at 213–26.

197. This was not uncommon. For example, as the enactors surely recognized, children born in Britain to U.S.-citizen parents would be both British subjects (under Britain’s strict *jus soli* subjectship law) and U.S. citizens under U.S. naturalization laws (which since 1790 gave U.S. citizenship to U.S. citizens’ foreign-born children).

198. Cf. U.S. CONST. amend. XIV, § 1. *But see* Eastman, *supra* note 7, at 170–78 (arguing that the Clause should be read to require exclusive U.S. jurisdiction, relying in part on the drafters’ treatment of

Modern proponents of a narrow reading of the Citizenship Clause argue that the debates reflect an understanding of “jurisdiction” referring only to persons born to U.S. citizens (and perhaps to lawful resident aliens). But before turning to the drafting history, we should conclude that: (1) the text strongly indicates that the U.S.-born children of aliens (other than diplomatic personnel) were made U.S. citizens by the Clause because they were “subject to [U.S.] jurisdiction”; and (2) this reading is plausible because it adopts the prevailing common law view of U.S. citizenship prior to the Amendment. Evidence from the drafting history must be especially strong to overcome this textual conclusion. As described below, that evidence is at most ambiguous—though in fact it seems to favor the position indicated by the text’s ordinary meaning.

The question of U.S.-born children of immigrants (especially Chinese immigrants) arose directly in the Amendment’s drafting debates. As discussed, after Senator Howard proposed adding the language that became the Citizenship Clause, Senator Doolittle moved to add further language expressly excluding “Indians not taxed.”<sup>199</sup> Technically, the debate proceeded on Doolittle’s motion, but Pennsylvania Senator Cowan interjected a long speech questioning the broader wisdom of Howard’s proposal.<sup>200</sup> Specifically, he asked (rhetorically, it seems) about its extension of U.S. citizenship to the children of Chinese immigrants and to “Gypsies” (whom he described as wandering bands that did not respect the local laws or customs).<sup>201</sup> California Senator Conness responded specifically on the issue of the U.S.-born children of Chinese immigrants, acknowledging that Howard’s proposal would make them U.S. citizens and arguing in favor of that result.<sup>202</sup>

Although we should not overread the drafting history, this exchange strongly indicates the Senators’ general understanding of the Clause. Cowan asked if “the child of the Chinese immigrant in California [is] a citizen” under the proposed clause (and argued sharply, in overtly racial terms, against the wisdom of such a result).<sup>203</sup> Conness responded:

The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to

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Native Americans). As discussed, with respect to the Native American tribes the drafters and other commentary emphasized that they were not subject to *complete* U.S. jurisdiction (or, put another way, they were only partially subject to U.S. jurisdiction), and thus were excluded from citizenship. *See supra* Section II.B.2.b. Nondiplomat aliens, however, were not subject to only partial jurisdiction in this way. They were subject to complete U.S. jurisdiction while in U.S. territory. *See Epps, supra* note 7, at 364–66, 369–70 (discussing this distinction).

199. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866); *see supra* notes 107–11 and accompanying text.

200. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866).

201. *See id.*

202. *Id.* at 2891–92.

203. *Id.* at 2890–91.

incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so.<sup>204</sup>

No Senator was recorded disagreeing with Conness's view of the Clause's effect, including Howard, who had proposed the language.<sup>205</sup> No change was proposed or adopted to indicate a narrower application, and the Senate voted to approve Howard's language shortly afterward. It is hard to read this result other than as confirming Conness's (and Cowan's) understanding.<sup>206</sup>

Three statements in the debates are commonly raised to the contrary. First, Senator Howard, in proposing the Clause, stated that it "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."<sup>207</sup> This statement, though, seems only to describe the well-understood exclusion of children of persons with diplomatic immunity: "foreigners, [that is,] aliens, who belong to the families of ambassadors."<sup>208</sup> Some commentators instead read Howard's statement to exclude "persons born in the United States who are foreigners, aliens, [or] who belong to the families of ambassadors."<sup>209</sup> However, that reading is redundant (and ungrammatical): if Howard meant to exclude all children of aliens, he would not have needed to add the reference to families of ambassadors. The only reason to refer to families of ambassadors would be if the children of aliens were covered by the Clause *unless* they were part of diplomatic families.<sup>210</sup>

204. *Id.* at 2891; *see also* Epps, *supra* note 7, at 356–57 (discussing this exchange); Ing, *supra* note 3, at 737 & n.98 (same).

205. *See* *United States v. Wong Kim Ark*, 169 U.S. 649, 699 (1898) ("It does not appear to have been suggested, in either House of Congress [during the drafting debates], that children born in the United States of Chinese parents would not come within the terms and effect of the leading sentence of the Fourteenth Amendment."); *see also* Maggs, *supra* note 91, at 1114 (noting that in the context of legislative history "[a] lack of objection may suggest general agreement"). One reason for the minimal debate on the issue may have been that it had already been discussed in connection with the 1866 Civil Rights Act (enacted in early April 1866, just under two months before the debate on the Howard proposal). As discussed below, *infra* Section II.B.2.d, congressmen appeared to understand the Act's similar language as granting citizenship to U.S.-born children of alien immigrants, including Chinese immigrants.

206. In the ratification debates, the Amendment's supporters generally expressed its scope in broad terms. *E.g.*, Colfax, *supra* note 111; *see also* Ing, *supra* note 3, at 743–47 (describing the ratification debates). Specific discussion of the Clause was sparse, although it arose (unsurprisingly) in California, where commentary indicated that the proposed Amendment would make citizens of Chinese immigrants' children. *See* Ing, *supra* note 3, at 746 (noting criticism of the proposed Amendment on this ground and California Senator Conness's response). Perhaps for that reason, California initially failed to ratify the Amendment in the 1860s (ultimately ratifying it in 1959). *See* Alex Vassar, *California's Ratification of the 14th*, ONE VOTER PROJECT (June 29, 2015), <https://www.onevoter.org/2015/06/29/14th-amendment> [<https://perma.cc/RRP5-FKTL>].

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

208. *Id.*

209. *E.g.*, Mayton, *supra* note 7, at 24; *accord* Anton, *Response*, *supra* note 86.

210. *See* Epps, *supra* note 7, at 355 n.92. U.S. citizens employed by foreign diplomatic missions did not have diplomatic immunity, so read this way Howard's statement is not redundant. Only foreigners—

As noted, Howard did not object when Conness subsequently said that Howard's proposal included U.S.-born children of alien Chinese immigrants.<sup>211</sup> And Howard also stated that the Citizenship Clause constitutionalized existing law;<sup>212</sup> as discussed, pre-Amendment common law generally extended citizenship to U.S.-born children of aliens (other than children of foreign diplomats).

Second, in the argument over the Clause's application to Native Americans, Senator Trumbull stated: "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else."<sup>213</sup> This language can be read to exclude aliens' U.S.-born children (who often would also owe allegiance to the country of their parents' nationality). But Trumbull likely spoke imprecisely, meaning instead (as he also said repeatedly) those over whom the United States did not have "complete" jurisdiction, as the full context of his comment indicates:

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." Now, does the Senator from Wisconsin [Doolittle] pretend to say that the Navajoe Indians are subject to the complete jurisdiction of the United States? What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anybody else.

...

... It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens . . .<sup>214</sup>

Howard, speaking shortly afterward, stated:

I concur entirely with the honorable Senator from Illinois [Trumbull], in holding that the word "jurisdiction," as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States. . . . Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject

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that is, aliens—could claim diplomatic immunity. *See* WHEATON, *supra* note 149, at 176–77. Howard's statement was wrong in one respect, as he quickly acknowledged: his proposal excluded children of tribal Native Americans as well as children of diplomats. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866).

211. *See supra* text accompanying notes 202–06.

212. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

213. *See id.* at 2893; *see also* Anton, *Response, supra* note 86 (relying on this quote). Trumbull later said to similar effect: "[Indians] are not subject to our jurisdiction in the sense of owing allegiance solely to the United States." CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866). Trumbull's point, in response to Doolittle's motion, was that tribal Native Americans were already excluded from constitutional citizenship by Howard's proposal.

214. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866). Trumbull argued at length that the tribes were substantially outside U.S. jurisdiction and excluded by Howard's language. *See id.*

to this full and complete jurisdiction.<sup>215</sup>

This is consistent with the way others, including Senators Trumbull and Howard, used the phrase as it related to the tribes: the requirement as they understood it was that persons be *fully* subject to U.S. jurisdiction (which tribal members were not).<sup>216</sup> In any event, here and in related passages Trumbull was discussing the application of the Citizenship Clause to the Native tribes and was not directly considering the children of aliens. Like Howard, Trumbull did not object when Conness stated that the Clause included the U.S.-born children of aliens, and as discussed below, Trumbull thought that the related provisions of the 1866 Civil Rights Act gave U.S.-born children of aliens U.S. citizenship.<sup>217</sup>

Third, Maryland Senator Reverdy Johnson stated: “Now, all 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.”<sup>218</sup> This statement seems to exclude (most) U.S.-born children of aliens, who would often be subject to the “foreign power” of their parents’ nationality. But Johnson went on to explain a few sentences later that the Clause recognized citizenship based on “birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States.”<sup>219</sup> Nondiplomat aliens in U.S. territory were plainly “subject to the authority of the United States.”<sup>220</sup> Johnson nowhere specifically stated that U.S.-born children of aliens were excluded from the Clause, and like Howard and Trumbull, he did not

215. *Id.* at 2895. Howard added (in defense of his own language):

The Indian who is still connected by his tribal relation with the government of his tribe is subject for crimes committed against the laws or usages of the tribe to the tribe itself, and not to any foreign or other tribunal. . . . The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe.

*Id.* This relationship is not analogous to nondiplomat aliens within U.S. territory, who as discussed above were indisputably subject to U.S. jurisdiction in such circumstances. *See supra* notes 152–56 and accompanying text.

216. *See Epps, supra* note 7, at 358–60. It is important to distinguish between exclusive jurisdiction and “full and complete” jurisdiction. The United States lacked “full and complete” jurisdiction over the tribes, as Trumbull and Howard understood it, because U.S. laws did not extend in all respects to them. The United States did not have exclusive jurisdiction over nondiplomat aliens within U.S. territory, but it did have “full and complete jurisdiction” over them in the sense Howard and Trumbull used the phrase because those aliens did not have any immunity from U.S. sovereign authority. *But see Anton, Response, supra* note 86 (appearing to equate “complete” and “exclusive” jurisdiction).

217. *See infra* Section II.B.2.d.

218. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866); *see Anton, Response, supra* note 86 (relying on this quote). As discussed in Section II.B.2.d, Johnson, in the first quoted sentence, repeated the language of the 1866 Civil Rights Act, which he may have understood in a broader sense than its literal language may suggest. *See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27* (“[A]ll persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States.”).

219. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

220. *Id.*

object to Senator Conness's statement that they were included. Thus, it is at most unclear what Johnson had in mind.

In sum, the leading quotes from the drafting debate that are mentioned in support of a narrow view of the Clause are at best ambiguous. Particularly when taken with drafting and ratifying commentary extending the Clause to aliens' U.S.-born children,<sup>221</sup> they seem insufficient to overcome the Clause's apparent textual meaning.

*d. The Citizenship Clause and the 1866 Civil Rights Act*

It is also appropriate to consider the relationship between the Citizenship Clause and its statutory predecessor in the 1866 Civil Rights Act. As described above, the Act was passed (over President Johnson's veto) in the spring of 1866 by the same Congress that drafted the Citizenship Clause roughly a month later.<sup>222</sup> The Act had a Citizenship Clause with terms similar to but distinct from the Amendment: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."<sup>223</sup>

Modern proponents of a narrow reading of the Citizenship Clause argue that the Act appears to exclude from citizenship not only Native tribes ("Indians not taxed")<sup>224</sup> and diplomats but also all (or at least most) U.S.-born children of aliens. Even apart from diplomatic families, most U.S.-born children of aliens would be "subject to a foreign power" in the sense that their parents' home nation would likely claim them as citizens/subjects—either by the rule of *jus sanguinis* or (as with the United States and Britain) by statutory exceptions to *jus soli*—and make them subject to that nation's extraterritorial authority. As a result, those U.S.-born children would be excluded from U.S. citizenship under the Act. And the Amendment, it is said, should be read in the same way.<sup>225</sup>

221. See *supra* notes 201–06 and accompanying text (discussing exchange between Senators Conness and Cowan).

222. Senator Trumbull introduced the Act in the Senate on January 5, 1866; it passed the Senate on February 2 and the House on March 13. See CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866) (introduction of Act); *id.* at 606–07 (passage in the Senate); *id.* at 1367 (passage in the House). President Johnson vetoed it, but the veto was overridden on April 6 (in the Senate) and April 9 (in the House). *Id.* at 1679 (veto message); *id.* at 1809 (Senate override); *id.* at 1861 (House override); see also Currie, *supra* note 15, at 394–99 (recounting this chronology).

223. Civil Rights Act of 1866 § 1. The initial draft of the Act had no definition of citizenship; Senator Trumbull first proposed to add a clause addressed only to the citizenship of persons of African descent. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). After various objections, Trumbull modified it first to declare citizenship for "[a]ll persons born in the United States and not subject to any foreign power," *id.* at 498, and later to exclude "Indians not taxed." *Id.* at 569; see Epps, *supra* note 7, at 350 (discussing the evolution of the proposed language).

224. "Indians not taxed" were those in tribes governed by treaty arrangements (which generally precluded U.S. taxes on tribal members) or those on the unsettled frontier, who were not taxed for obvious practical reasons. See CONG. GLOBE, 1st. Sess., 569–78 (1866) (recording debates on this provision).

225. See, e.g., Charles, *supra* note 7, at 223–25; Eastman, *supra* note 7, at 171–72.

It might be that the Amendment narrowed the Act's exclusion such that U.S.-born children of aliens had birthright citizenship under the Amendment even though they did not have it under the Act.<sup>226</sup> Indeed, ordinarily one might think that differences in language should convey different meanings. However, in the case of the Citizenship Clause, the Amendment's drafters (who were also the Act's drafters) said that the Amendment constitutionalized the Act's citizenship provisions, indicating that although the words differed they should be read to the same effect.<sup>227</sup> This view seems natural with respect to Native tribes and foreign diplomatic personnel but is puzzling for the children of nondiplomat aliens, for whom arguably the two clauses point in different directions. A narrow reading of the Amendment would produce parallel meanings and resolve this difficulty. Specifically, adding the word "exclusive" to the Amendment's Citizenship Clause so that it requires birth "subject to the *exclusive* jurisdiction" of the United States would align the Clause with the Act's literal text ("not subject to any foreign power")<sup>228</sup> and explain the drafters' common claim that the two meant the same thing.

But this approach faces daunting objections. First, it is not clear why the Senators' claim that the clauses meant the same thing should be decisive. The Senators may have been wrong about the Act's meaning. Perhaps its text inadvertently did not include the U.S.-born children of aliens, but the Senators thought it did (or that it should have); perhaps, then, in subsequently discussing the Amendment they either did not see the difference between the two or sought to cover it up (because the narrative of the Amendment's supporters was that it merely constitutionalized the Act).<sup>229</sup> The touchstone of the present inquiry is the original meaning of the Amendment, not what some Senators thought (or said they thought) about its relationship to a prior Act.

Second, as discussed, a narrow reading of the Amendment is strongly contrary to both its language and the interpretation Senators gave it. U.S.-born children of nondiplomat aliens are subject to U.S. jurisdiction in the ordinary sense of being subject to U.S. law, U.S. law enforcement, and U.S. courts (so long as they are present in the United States). A narrow reading depends on adding the word "exclusive," which does not appear in the Amendment. Moreover, Senate debate on the Amendment's Citizenship Clause strongly indicates a broad assumption

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226. See Epps, *supra* note 7, at 350–51 (noting that one should not assume the Act and the Clause had parallel meanings).

227. Howard, for example, said upon introducing the Amendment's language that it was "declaratory of what I regard as the law of the land already," which would include the previously enacted Civil Rights Act. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). He later expressly described the Amendment as constitutionalizing the Act with regard to citizenship. *Id.* at 2896; see Ing, *supra* note 3, at 736 & n.97 (collecting additional quotations).

228. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

229. Trumbull, the author of the Act's Citizenship Clause, admitted difficulty in finding the right language to express his intent and proposed or considered various formulations before settling on the one ultimately adopted. See CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866). We can presume that Howard, author of the Amendment's Citizenship Clause, was not fully satisfied with Trumbull's version and thus used different language in the Amendment, but it is hard to discern exactly why Howard did so.

that the Clause would make citizens of the children of alien immigrants such as the Chinese on the West Coast<sup>230</sup>—indicating that whatever Senators said about the Act, they did not take a narrow view of the Amendment.

Third, even if one accepts a need to align the Act and the Amendment, it is not clear that it should be done by reading the Amendment narrowly. To the contrary, it appears that the Act’s drafters understood it, like the Amendment, to include U.S.-born children of aliens. Senator Trumbull introduced what became the Act’s Citizenship Clause (with the “not subject to any foreign power” language), leading to the following exchange:

Mr. COWAN. I will ask whether [Trumbull’s proposal] will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?

Mr. TRUMBULL. Undoubtedly.<sup>231</sup>

Cowan then argued at length (in expressly racist terms) against adopting Trumbull’s proposed language.<sup>232</sup> Trumbull repeated his understanding later in the debate:

I have already said that in my opinion birth entitles a person to citizenship, that every free-born person in this land is, by virtue of being born here, a citizen of the United States, and that the bill now under consideration is but declaratory of what the law now is; but, inasmuch as some persons deny this, I thought it advisable to declare it in terms in the statute itself.<sup>233</sup>

No one was recorded disputing the effect of Trumbull’s proposal; the question the Senators debated was whether it was a good idea.<sup>234</sup> Thus it appears that when

230. See *supra* Section II.B.2.c; see also Ing, *supra* note 3, at 737 & nn.98–101 (recounting congressional debate).

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

232. See *id.* at 498–99. Cowan and Trumbull disagreed on whether existing law extended U.S. citizenship to the U.S.-born children of Chinese immigrants, see *id.* at 498, but they agreed on the effect of Trumbull’s proposed clause while disagreeing on its wisdom. Cowan acknowledged (when pressed by Trumbull) that preexisting law extended U.S. citizenship to U.S.-born children of European immigrants, but he thought nonwhite immigrants were (or at least should be) treated differently, a point Trumbull denied. See *id.*

233. *Id.* at 600.

234. See Ho, *supra* note 7, at 373 (“[P]roponents and opponents of birthright citizenship alike consistently interpreted the Act . . . to cover the children of aliens.”). In addition to the Cowan–Trumbull exchange, Senator Morrill, for example, observed that “the grand principle of both nature and nations, both of law and politics, [is] that birth gives citizenship of itself . . . [B]irth by its inherent energy and force gives citizenship.” CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (discussing the Act). In the subsequent Cowan–Conness exchange regarding the constitutional citizenship of U.S.-born children of Chinese immigrants, Senator Conness observed: “We have declared that by law” (presumably meaning in the Civil Rights Act). CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866); see *supra* note 204 and accompanying text. Comments in the House of Representatives on the Act’s citizenship provision similarly indicated that it included the U.S.-born children of aliens. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1262 (1866) (remarks of Representative Broomall); *id.* at 1266 (remarks of Representative Raymond).

Senators said that the Amendment had the same effect as the Act, they took a broad view of the Act (rather than a narrow view of the Amendment). They may have been wrong about what the Act actually meant, but that does not affect the analysis of the Amendment. The key is that Senators said the Amendment meant the same as *what they thought the Act meant*—and they thought the Act conveyed citizenship on the U.S.-born children of aliens.<sup>235</sup> President Johnson shared that understanding as well. His veto message objected, among other things, that the Act “comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks. . . . Every individual of those races, born in the United States, is by the bill made a citizen of the United States.”<sup>236</sup>

In any event, the 1866 Civil Rights Act does not seem sufficient to overcome the textual meaning of the Citizenship Clause. No account of the Act is entirely free from difficulties; thus it does not point conclusively to an alternate meaning of the Amendment.

### 3. Post-ratification Interpretations

The apparent clarity of the Citizenship Clause’s text is somewhat undercut by what happened after ratification. The scope of the “subject to the jurisdiction” exception remained unsettled until the Supreme Court’s decision thirty years later in *United States v. Wong Kim Ark*.<sup>237</sup> First, as discussed, the Court initially took a narrow view of the Clause in the *Slaughter-House Cases* in 1873;<sup>238</sup> second, the

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235. Trumbull observed that his goal was “to make citizens of everybody born in the United States who owe allegiance to the United States” with the exception that “[w]e cannot make a citizen of the child of a foreign minister who is temporarily residing here.” CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866). He added that he had considered drafting the Clause to read “[t]hat all persons born in the United States and owing allegiance thereto are hereby declared to be citizens,” but he decided against it because “upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens.” *Id.* The “sort of allegiance” invoked here is probably the limited duty of persons with diplomatic immunity not to take actions threatening to the security of the nation. See WHEATON, *supra* note 149, at 177; see also VATEL, *supra* note 29, bk. IV, ch. VII, § 97, at 476 (discussing the standard of conduct for diplomats in foreign nations). Taken with his earlier statements, it seems likely that Trumbull intended the “not subject to any foreign power” language simply to reflect the long-standing exception to birth citizenship for children of diplomats. See CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866).

236. CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

237. 169 U.S. 649 (1898).

238. See 83 U.S. (16 Wall.) 36, 73 (1873); *supra* Section I.B. In a subsequent series of lectures published posthumously, Justice Miller, the author of the majority opinion, took a more ambiguous view:

If a stranger or traveller passing through or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government, has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction.

SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 279 (New York, Banks & Brothers 1891). This is a much narrower view of the exception than Miller expressed in the *Slaughter House Cases* (it would appear, for example, not to exclude from citizenship the U.S.-born children of alien permanent residents). But it remains unclear what Miller meant by a stranger “who claims to owe no allegiance to our Government”: as discussed, temporary visitors (other than diplomats)

Executive Branch, after initially taking a broad view of the Clause, reverted to a narrow view in the 1880s and 1890s and argued in the *Wong Kim Ark* case that U.S.-born children of legal permanent residents were not citizens under the Clause;<sup>239</sup> and third, as Bernadette Meyler has shown, post-ratification commentary took a range of views of the Clause, some insisting on narrow interpretations of its scope.<sup>240</sup>

As to the Court, a complete account favors the broader view of the Clause. In the *Slaughter-House Cases*, the majority observed (in dicta, because the case did not involve the Clause) that the Clause's purpose was to confirm citizenship to persons of African descent and added: "The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."<sup>241</sup> That view would exclude aliens' U.S.-born children contrary to the textual argument developed above.

But shortly after the *Slaughter-House Cases*, the Court retreated. In *Minor v. Happersett* in 1874, it observed that the scope of birthright citizenship remained uncertain (apart from U.S.-born children of U.S. citizens, whom it thought were obviously citizens).<sup>242</sup> Then in *Elk v. Wilkins* in 1884, the Court appeared to link the "subject to the jurisdiction" exception only to Native tribes and diplomats, not to U.S.-born children of aliens generally:

[Tribal members], although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.<sup>243</sup>

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owed temporary allegiance while in U.S. territory. See *supra* Section II.B.1. Miller may have simply been mistaken on this point.

239. See 169 U.S. at 649–50; *id.* at 719 (Fuller, C.J., dissenting).

240. See Meyler, *supra* note 28, at 532–59 (discussing post-ratification arguments); see also Charles, *supra* note 7, at 232–38 (emphasizing disagreements on this point in the post-ratification era).

241. 83 U.S. (16 Wall.) at 73. The issue was whether New Orleans's slaughterhouse monopoly violated the Amendment's Privileges or Immunities Clause. *Id.* at 43.

242. 88 U.S. (21 Wall.) 162, 167–68 (1874). The issue was whether a woman born in the United States had a right to vote. *Id.* at 165. The Court held that she was undoubtedly a citizen by birth, because her parents were also citizens, but citizenship did not convey voting rights. *Id.* at 170–71.

243. 112 U.S. 94, 102 (1884). Of course, the Court's list of categories excluded by the phrase "subject to the jurisdiction" was not necessarily exclusive (and was dicta in any event). But the contrast with the *Slaughter-House Cases* is notable at least in suggesting that the Court was no longer sure whether the Citizenship Clause excluded U.S.-born children of aliens. Significantly, Justice Gray wrote both *Elk* and *Wong Kim Ark* but had not been on the Court for the *Slaughter-House Cases*.

The *Elk* Court—echoing discussion of the tribes in the drafting debates—emphasized that the Citizenship Clause required "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction." *Id.* Some modern commentators have found this statement supportive of a narrow view of the Clause, but it is not. As discussed, the "completely subject" understanding encompassed persons subject to territorial jurisdiction, who were completely subject to U.S. jurisdiction while in the United States (apart from diplomatic personnel, who were not). See *supra* note 214 and accompanying text.

Finally, in *Wong Kim Ark*, the Court, over a dissent, found that the Clause gave constitutional citizenship to Chinese immigrants' U.S.-born children.<sup>244</sup>

Ordinarily, one might favor the earlier judicial interpretation as the best indicator of original meaning. But the *Slaughter-House* opinion gave no foundation for its view of the Citizenship Clause. In particular, it did not explain how the "subject to the jurisdiction" language supported its suggestion.<sup>245</sup> As noted, the comment was an aside—the case in no way turned on the meaning of the Citizenship Clause. And later cases did not regard it as conclusive.<sup>246</sup>

The opinions in *Wong Kim Ark*, though more remote from ratification, seem more suggestive of the Clause's original meaning. Justice Gray, for the majority, directly made the textual and historical argument described above that U.S.-born children were (with exceptions for diplomats and Native tribes) subject to U.S. jurisdiction in the sense of being under U.S. sovereign authority irrespective of the nationality of their parents; that this reading constitutionalized the prior *jus soli* common law inherited from Britain; and that the drafting history and subsequent interpretations confirmed the Clause's application to U.S.-born children of Chinese immigrants.<sup>247</sup>

In contrast, Chief Justice Fuller's dissent is difficult to follow and failed to base its conclusions in text and historical meaning. In particular, Fuller did not adequately explain the historical meaning of "subject to the jurisdiction" and did not explain in what sense aliens' U.S.-born children were not subject to U.S. jurisdiction. Moreover, Fuller apparently would have recognized birthright citizenship for U.S.-born children of European immigrants but not of other races—a distinction that is extraordinarily difficult to draw from the Amendment's text and background.<sup>248</sup> Despite wide-ranging discussion early in his dissent, at the end Fuller principally invoked the need to give Congress and the treaty-makers

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244. 169 U.S. 649, 704–05 (1898).

245. See 83 U.S. (16 Wall.) at 73.

246. See, e.g., *Wong Kim Ark*, 169 U.S. at 678 (describing the comment in the *Slaughter-House Cases* as "unsupported by any argument, or by any reference to authorities; and . . . not formulated with the same care and exactness, as if the case before the court had called for an exact definition of the phrase").

247. See *id.* at 655–705. Specifically, as to aliens being "subject to [U.S.] jurisdiction," Justice Gray wrote:

It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides. . . . [I]t is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations.

*Id.* at 693–94 (internal quotations omitted). The majority also invoked the Senate drafting debates, specifically the Cowan–Conness exchange on the U.S.-born children of Chinese immigrants, "as contemporaneous opinions . . . upon the legal meaning of the words [of the Amendment] themselves." *Id.* at 699.

248. See *id.* at 731–32 (Fuller, C.J., dissenting).

flexibility in regulating Chinese immigration.<sup>249</sup> Ultimately, he seemed to rest on current policy and practical implications rather than original meaning.

As to the Executive Branch, as discussed above, its initial reading of the Clause under President Grant was a broad one, encompassing the U.S.-born children of aliens; when that position shifted, it did so without a full explanation.<sup>250</sup> Moreover, the Executive Branch's position initially rested on strong textual foundations; it shifted to a narrower view, perhaps as anti-immigrant (and especially anti-Chinese) sentiment arose in the 1880s and 1890s.<sup>251</sup> Thus, although the executive was not consistent in reading the Clause, its views tend to support the broader view of the original meaning.

Finally, without surveying the whole range of post-ratification commentary, one can say that commentary taking a narrow view of citizenship had the same flaw as the *Slaughter-House Cases* majority and the *Wong Kim Ark* dissent. None of it adequately explains how the "subject to the jurisdiction" requirement produces a narrow scope for the Clause (apart from the well-accepted exceptions for diplomats and Native tribes).<sup>252</sup>

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249. See *id.* at 729–32. Fuller emphasized the treaties and statutes limiting Chinese immigration and restricting the ability of Chinese immigrants to become naturalized citizens, arguing:

I insist that it cannot be maintained that this Government is unable through the action of the President, concurred in by the Senate, to make a treaty with a foreign government providing that the subjects of that government, although allowed to enter the United States, shall not be made citizens thereof, and that their children shall not become such citizens by reason of being born therein.

A treaty couched in those precise terms would not be incompatible with the Fourteenth Amendment, unless it be held that that amendment has abridged the treaty-making power.

*Id.* at 729. However, the core question was whether the Fourteenth Amendment, given its original meaning, did "abridge the treaty-making power" to this extent, and Fuller offered no reason to think it did not, aside from his desire to protect the political branches' anti-Chinese policies. *Id.*

250. See *supra* note 67 and accompanying text (describing opinions of Secretary of State Hamilton Fish in the Grant Administration).

251. Rising anti-Chinese sentiment was particularly reflected in the so-called Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943), which banned Chinese immigration for ten years, and the Geary Act of 1892, ch. 60, 27 Stat. 25 (repealed 1943), which extended the exclusion. President Hayes had previously negotiated a treaty with China removing earlier agreements not to restrict immigration. See Treaty Between the United States and China, Concerning Immigration, China-U.S., Nov. 17, 1880, 22 Stat. 826 (known as the Angell Treaty); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 717–18 (1893) (discussing these developments).

252. See Meyler, *supra* note 28, at 532–59 (discussing leading post-ratification arguments). Professor Eastman points in particular to the statement in Thomas Cooley's constitutional law treatise that "subject to the jurisdiction" in the Fourteenth Amendment "meant that full and complete jurisdiction to which citizens generally are subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government." THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 243 (Boston, Little, Brown & Co. 1880); see Eastman, *supra* note 7, at 174 (relying on this quote as disproving constitutional citizenship for the U.S.-born children of aliens). Cooley's statement in context is ambiguous, however; he went on to discuss Native American tribes (and, in the third edition, children of foreign sovereigns and ambassadors, children born on foreign ships, and children born under hostile occupation) as being excluded by the "subject to the jurisdiction" requirement; he did not mention other potentially excluded categories, such as children of aliens. See COOLEY, *supra*; THOMAS M. COOLEY & ANDREW C. MCLAUGHLIN, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270 (Boston, Little,

In sum, the Amendment did not conclusively resolve the debate over citizenship. But, on the whole, the post-ratification history tends to confirm the broad original meaning of the Clause advanced above. Advocates for a narrower view of the Clause were unable to rest their claims firmly on text or history. In particular, commentary advancing the narrow view did not explain *why* the Amendment's text failed to grant birthright citizenship: it did not give a plausible meaning of "subject to the jurisdiction" that excluded aliens' (or just non-European aliens') U.S.-born children.<sup>253</sup> (Commentators did say that "subject to the jurisdiction" meant "subject to *exclusive* jurisdiction"—but that does not explain the text; it adds a word that is not there.) This suggests that the broad view, as a matter of original meaning, is the correct one.

#### 4. Modern Applications

The foregoing discussion confirms that the Citizenship Clause applies to the two principal categories of persons whose status modern debates have questioned: U.S.-born children of temporary visitors and U.S.-born children of persons not lawfully present in the United States. It is true that the Court in *Wong Kim Ark*, which considered the citizenship of a U.S.-born child of lawful permanent residents, did not directly face or resolve these questions.<sup>254</sup> It is also true that extending constitutional citizenship to U.S.-born children of temporary visitors and U.S.-born children of persons not lawfully present in the United States raises policy issues that do not apply, or do not apply to the same extent, to constitutional citizenship for U.S.-born children of U.S. citizens or lawful permanent residents.<sup>255</sup> And it also may be true, as discussed below,<sup>256</sup> that the

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Brown, & Co. 3d ed. 1898). The categories Cooley specifically mentioned were not analogous to U.S.-born children of aliens in this respect, so it is not clear what Cooley thought of the latter. In any event, what Cooley—a respected but fallible authority—thought years after ratification is not definitive.

253. One argument advanced for reading the Clause narrowly is that in the nineteenth century there was a long-standing view of citizenship, associated with European scholars and European practice, incompatible with granting it on merely the accident of birth. Vattel, who thought citizenship should turn mostly on parents' ancestry rather than birthplace, is just one example. See *Wong Kim Ark*, 169 U.S. at 708–09, 731 (Fuller, C.J., dissenting) (discussing Vattel); *Lynch v. Clarke*, 1 Sand. Ch. 583, 601–02 (N.Y. Ch. 1844) (argument of complainant's counsel) (same). But this argument shows only that the Amendment's drafters *might* have picked citizenship criteria other than mere birth within U.S. territory and under U.S. sovereign authority, not that they did so. Vattel and related writers represented one approach to citizenship, but there was an equal, if not stronger, tradition favoring citizenship by birth: the long-standing English rule, adopted by prominent U.S. courts and commentators, as a matter of common law in the early nineteenth century. See *supra* Section I.A. Moreover, nothing ties the narrower view of citizenship to the Amendment's text: there were competing pre-1866 views of citizenship, but there were no competing pre-1866 views of what it meant to be "subject to the jurisdiction" of the United States.

254. See 169 U.S. at 693 (referring to the Amendment's application to "children here born of resident aliens"); *id.* at 705 (ruling that the claimant was a U.S. citizen because he was born in the United States of parents with a "permanent domicile and residence in the United States"). See generally John C. Eastman, *The Significance of "Domicile" in Wong Kim Ark*, 22 CHAP. L. REV. 301 (2019) (arguing that *Wong Kim Ark* should be read only to establish constitutional citizenship for the children of lawful permanent residents).

255. See SCHUCK & SMITH, *supra* note 7, at 36–48 (discussing these policy issues).

256. See *infra* Section III.A.

Amendment's enactors did not consider those policy questions because those questions were not clearly presented at the time of enactment. However, for an analysis based purely on the Clause's original meaning, these considerations should not matter. The question is simply whether the Amendment's language, given the meaning it had at enactment, includes the disputed categories.

Posed in this way, the question seems easily answered. The only material issue is whether persons in those categories are born "subject to the jurisdiction" of the United States as that phrase was understood at the time of enactment. The analysis developed above shows that they are. The U.S. jurisdiction (in the sense of sovereign power) extended to all persons within U.S. territory, with exceptions only for (1) diplomats, foreign sovereigns, and foreign armies, who were exempt from ordinary U.S. jurisdiction under international law; (2) members of Native tribes excluded from ordinary U.S. jurisdiction by treaties; and (3) members of tribes or unorganized bands on the frontier, who were not under U.S. authority as a practical matter. That is, persons not subject to U.S. jurisdiction were those to whom U.S. sovereign authority did not extend, as a legal or practical matter.

The U.S.-born children of temporary visitors or parents not lawfully present fit within none of these exceptions, and they are not materially analogous to any historical exception. As to temporary visitors, Chief Justice Marshall in *Schooner Exchange* specifically identified temporary visitors as "amenable to" U.S. jurisdiction under international law's rule of territorial sovereignty.<sup>257</sup> Moreover, as a practical matter U.S. lawmaking and enforcement authority is applied to temporary visitors in the United States in the same manner as to resident aliens. The point of diplomats' exemption from U.S. jurisdiction is that diplomats are *not* treated like ordinary temporary visitors in terms of submission to U.S. sovereign authority.<sup>258</sup>

The same considerations apply to persons not lawfully present. Like temporary visitors, they are governed by U.S. sovereign authority as a matter of territorial jurisdiction. Nothing in international law suggests any exemption from U.S. jurisdiction—they can be punished for crimes and otherwise placed under U.S. lawmaking and law enforcement authority. (They also might be deported, but that does not make them any less subject to U.S. jurisdiction.)<sup>259</sup> Although distinct from U.S. citizens and noncitizen permanent residents in various respects, they are not distinct for purposes of U.S. sovereign authority while within U.S. territory.

Counterarguments depend either on adding words to the Clause's text or interpreting the text to mean something it did not mean in the nineteenth century. One

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257. 11 U.S. (7 Cranch) 116, 144 (1812).

258. See WHEATON, *supra* note 149, at 176–77.

259. Perhaps unlawful bands of marauders in frontier areas might be regarded as akin to "wild Indians" and beyond U.S. jurisdiction as a practical matter. However, the modern condition of persons not lawfully present in the United States is not analogous. Typically, they act (or attempt to act) as ordinary members of U.S. society, under the same laws and law enforcement as U.S. citizens as a legal and practical matter. See Magliocca, *supra* note 7, at 522–26 (considering and rejecting this analogy).

might say that U.S.-born children of aliens who are not permanent residents are not subject to the *exclusive* jurisdiction of the United States (because, at least typically, they would also be subject to the jurisdiction of the country of their parents' nationality).<sup>260</sup> As noted above, there is little basis for adding the word "exclusive" to the Citizenship Clause. Moreover, the children of resident aliens are (like the children of nonresident or unlawfully present aliens) often not subject to the *exclusive* jurisdiction of the United States (for the same reasons—they are typically also subject to the jurisdiction of their parents' home countries, at least to some extent). An argument resting on the supposed need for exclusive U.S. jurisdiction must reject *Wong Kim Ark* and contend that no children of aliens have constitutional citizenship—an unlikely outcome for reasons discussed in prior Sections.<sup>261</sup>

A second approach, developed initially by Peter Schuck and Rogers Smith in *Citizenship Without Consent*, argues that citizenship rests on mutual consent of the individual and the sovereign.<sup>262</sup> This view has roots in the nineteenth-century debate over renunciation of citizenship (or subjectship): the British view was that a subject could not renounce subjectship unilaterally, a view that was initially accepted but increasingly rejected in the United States. It also looks to natural law writers such as John Locke and Jean-Jacques Burlamaqui, who emphasized the idea of citizenship by mutual consent.<sup>263</sup> Schuck and Smith argued that, if citizenship depends on consent, only those whom the sovereign admits to the political polity could be citizens.<sup>264</sup> Schuck and Smith's point was principally to exclude from birthright citizenship the children of persons not lawfully present in the United States; their position would accept the citizenship of lawful permanent residents (as in *Wong Kim Ark*).<sup>265</sup>

But Schuck and Smith, like others, offered no plausible explanation of the original meaning of "subject to the jurisdiction" of the United States. In nineteenth-century terms, children of lawful residents and children of persons not lawfully present would be "subject to the jurisdiction" of the United States in exactly the same way. That is, they are subject to U.S. territorial jurisdiction while in the United States (while also likely subject to extraterritorial jurisdiction of their parents' home country). Indeed, it is not clear that Schuck and Smith were even making an argument about original meaning, rather than an argument about the meaning the Clause should have in modern times. Their claim may be better understood to be that (1) the Amendment's enactors did not think about U.S.-

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260. See Anton, *Response*, *supra* note 86 (relying on the supposed need for exclusive jurisdiction).

261. See *supra* Sections II.B.1–3. Some advocates of a narrow view of birthright citizenship do argue that even children of alien lawful permanent residents are not entitled to birthright citizenship. See, e.g., Eastman, *supra* note 7, at 174–78.

262. SCHUCK & SMITH, *supra* note 7.

263. See *id.* at 42–48.

264. *Id.* at 86. For discussion and response, see NEUMAN, *supra* note 7, at 166–80.

265. See SCHUCK & SMITH, *supra* note 7, at 78–79, 118. Schuck and Smith also argued that children of temporary visitors lack sovereign consent (even if admitted lawfully) because they are not admitted into the nation's political polity in the same sense that lawful permanent residents are. *Id.* at 118.

born children of people unlawfully present in the United States; and (2) if the enactors had thought about such persons, they would have adopted different language, because of the enactors' views of consensual citizenship.<sup>266</sup> This claim, however, is based not on the text's original meaning but rather on the hypothetical intent of the enactors.<sup>267</sup>

With an original meaning approach, we need not (at this stage) resolve debate over Schuck and Smith's suggested modern reinterpretation. What matters here is what the words meant, not what unexpressed ideas the enactors may have had (or would have had if they had understood the issue). Even if the enactors had an idea of citizenship based only on mutual consent, they did not choose language that incorporated this idea. For an original meaning analysis, that is all we need to know.

### III. ORIGINALISM AND THE ORIGINAL MEANING OF THE CITIZENSHIP CLAUSE

This Part turns to the implications of the conclusions set forth above for originalism and modern law. At the risk of some oversimplification, originalism is the view (perhaps better described as a category of views) that the Constitution's original meaning, where it can be fairly discerned, should bind modern governmental actors (known as the "constraint principle").<sup>268</sup> As described in the preceding Part, the Citizenship Clause's original meaning can be identified in two respects central to modern disputes: the geographical scope of birth "in" the United States and persons excluded by the phrase "subject to the jurisdiction" of the United States. Specifically, the original meaning indicates that persons born in U.S. overseas territories are born "in" the United States and that U.S.-born children of persons not lawfully present in the United States are born "subject to the jurisdiction" of the United States.<sup>269</sup> Originalism's "constraint principle" would seem to require modern governmental actors to recognize U.S. citizenship of persons in these categories.

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266. *See id.* at 95 (noting that the issue of unlawful entry was not fully understood in 1868 because the nation lacked restrictive immigration laws).

267. Schuck and Smith are unclear on this point. Elsewhere they suggest that "subject to the jurisdiction" did (or perhaps could) incorporate their idea of consensual citizenship, although they do not explain how it could do so consistent with its ordinary meaning. *See id.* at 86. *But see* NEUMAN, *supra* note 7, at 169 (criticizing this claim).

268. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 2 (Apr. 3, 2019) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215) [<https://perma.cc/DPC8-6NEW>]) [hereinafter Solum, *Constraint Principle*] ("Originalism is a family of constitutional theories, almost all of which agree that the original meaning of the constitutional text should constrain constitutional practice." (emphasis omitted)). Professor Solum finds that originalist theories share a second core principle he calls the "fixation thesis"—that constitutional text has a fixed meaning at the time of its enactment. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015). The present discussion assumes the fixation thesis principle without elaboration. The discussion also leaves aside issues involving the relationship between originalism and precedent. For a discussion of this relationship, see generally John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).

269. *See supra* Part II.

This originalist outcome may, however, seem peculiar. The Citizenship Clause's enactors likely did not understand that their constitutional language would resolve either question. Neither question was at the forefront—or even in the background—of nineteenth-century debates over citizenship. The originalist resolution is therefore in some sense accidental: the enactors could have chosen other language to accomplish their goals that might have resolved these modern debates differently (or left them unresolved). Nonetheless, modern originalist approaches founded on the constraint principle would appear to insist that the constitutional language be enforced today with its original meaning, even if that leads to entirely accidental results.<sup>270</sup>

The broader question, then, is why that should be so. What justifications for originalism explain enforcing outcomes that enactors of a provision did not contemplate? This Part takes up that challenge.

#### A. THE CONSTITUTION'S ACCIDENTAL CITIZENSHIP RULES

Originalism is often explained as enforcing policy choices of a law's enactors, as reflected in the text. The puzzle of the Citizenship Clause is that, in the situations discussed here, the text does not reflect policy choices of the Clause's enactors. Rather, it involves subsequently arising policy questions that are resolved by the fortuity of the language chosen. In particular, it involves constraints placed upon current political actors arising from the accident of the language chosen rather than the enactors' decision to impose such constraints.

During the Fourteenth Amendment's drafting and ratification, the United States had no material overseas territories. The territories it had previously acquired had been, for the most part, lightly populated (apart from Native tribes), and the inhabitants had been designated U.S. citizens in the treaties of acquisition (again leaving aside Native peoples, who were excluded from citizenship by the same principle applied to Native tribes in the original United States).<sup>271</sup> That approach also applied to Alaska, the first material noncontiguous U.S. territory, which was acquired in 1867 after the Amendment was drafted and during its

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270. See Solum, *Constraint Principle*, *supra* note 268, at 16–25. An exception, discussed below, is some version of original intent. This Article is more addressed to forms of original meaning originalism, which have become more common among modern academics and judges. See WURMAN, *supra* note 8, at 11–24 (discussing the evolution of originalist theories).

Because the Citizenship Clause's application to modern debates is both clear and unexpected, the discussion avoids two important controversies within modern originalism. The first is the use of constitutional construction as a method of resolving vague or ambiguous texts. See generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013). The second is the relevance (or irrelevance) of “original expected applications”—that is, the effects people in the enactment era expected the enactment to have. See Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 24–25 (Grant Huscroft & Bradley W. Miller eds., 2011) (discussing this issue). As to the second controversy, there were no original expected applications on the key issues here because the issues were not foreseen.

271. See LAWSON & SEIDMAN, *supra* note 10, at 86–102 (discussing pre-Civil War acquisitions).

ratification campaign and which, in any event, had a tiny population that was not expected to grow.<sup>272</sup>

It is true that, in the early and mid-nineteenth century, the United States had contemplated acquiring overseas territories. In particular, expansionist forces had eyed Cuba, then a Spanish territory, as a target. But they assumed Cuba, or other acquisitions, would become states through the Article IV process—like Texas, Louisiana, and Florida. Indeed, that was a central point of the project: before the Civil War, acquisitions were favored by Southern interests to increase the number of slave states represented in Congress.<sup>273</sup> The idea of overseas acquisitions did not fully abate with the South's defeat. For example, shortly after the Amendment's adoption, President Grant pushed for annexation of Santo Domingo (now the Dominican Republic).<sup>274</sup> But again, the assumption was that Santo Domingo would become a state (Grant liked the idea in part because he thought its voters would favor the Republican Party).<sup>275</sup> The idea of imperial possessions—places, as the Supreme Court described in the *Insular Cases*, owned by but not fully within the United States—was not part of pre- or post-Civil War thinking.<sup>276</sup>

Thus, the Amendment's enactors likely did not think they were resolving the issue of citizenship in imperial possessions because it was not an issue at the time. Nonetheless, as described above, they picked language that happened to resolve it because, at the time, the phrase “in” the United States included territories under the permanent sovereignty of the United States, without distinctions.<sup>277</sup>

The same can be said of including as citizens U.S.-born children of persons not lawfully present in the United States. Citizenship of such persons was not an issue at the time of enactment. Materially restrictive federal immigration law did not begin until the 1880s.<sup>278</sup> It is true that some aliens were excludable under existing federal law, specifically the Alien Enemies Act, which allowed exclusion of nationals of countries at war with the United States.<sup>279</sup> States also typically

272. See *id.* at 105–08 (discussing Alaska). As discussed, the United States had previously acquired a number of uninhabited “guano islands.” See *supra* note 55.

273. See SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 313–19 (5th ed. 1965) (discussing U.S. efforts to acquire Cuba before the Civil War).

274. See CHERNOW, *supra* note 56, at 691.

275. See *id.* at 691–99, 719. Similarly, opposition to Grant's project, especially from Southern Democrats, focused on the negative (from their perspective) prospect of extending citizenship to nonwhites. See ERMAN, *supra* note 2, at 8–26.

276. See ERMAN, *supra* note 2, at 8–26; *supra* Section II.A.4. But see Vlahoplus, *supra* note 5, at 420–22 (showing in connection with discussions on the status of the Oregon territory that some congressmen considered holding distant territories as colonies, reservations for nonwhites, or military or commercial bases rather than states).

277. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 614–16 (1850); *supra* Section II.A. One might argue, though, that the concept of imperial possessions of other powers, especially Britain, was well understood at the time, and thus the Amendment adopted the expansive British approach to subjectship.

278. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 714–20 (1893) (discussing and upholding anti-Chinese immigration laws); *Chae Chan Ping v. United States*, 130 U.S. 581, 589, 611 (1889) (same).

279. See Act of July 6, 1798, ch. 66, 1 Stat. 577; NEUMAN, *supra* note 7, at 40–41. The federal government also briefly regulated aliens in the controversial Alien Friends Act, which was passed in 1798 and expired in 1800. See Act of June 25, 1798, ch. 58, 1 Stat. 566; NEUMAN, *supra* note 7, at 40–

excluded certain classes of persons, such as vagrants and sometimes free persons of African descent.<sup>280</sup> But the Alien Enemies Act does not appear to have been invoked broadly to exclude aliens; exclusion from a state was not the same as exclusion from the United States, and in any event, the question of excluded persons' U.S.-born children appears to have been entirely hypothetical at most.<sup>281</sup>

In this respect, the category of U.S.-born children of persons not lawfully present is distinct from another modern debated category: U.S.-born children of temporary visitors. The issue of temporary visitors was well understood in the nineteenth century. Although international travel was nowhere near its modern volume, it was not negligible. Chief Justice Marshall specifically referred to jurisdiction over temporary visitors in *Schooner Exchange*, and the citizenship of a temporary visitor's U.S.-born child was the immediate question in the mid-century New York case *Lynch v. Clarke*—which itself was cited in the Citizenship Clause's drafting debates.<sup>282</sup> When the enactors picked the phrase “subject to the jurisdiction,” they can be understood to have deliberately resolved the question of temporary visitors' U.S.-born children. Those visitors and their children were part of the existing citizenship debate, and they were undoubtedly subject to U.S. jurisdiction in the meaning of that phrase at the time, as Marshall indicated directly in *Schooner Exchange*.<sup>283</sup> Enforcing the phrase's original meaning in modern law regarding these children enforces the enactors' deliberate policy choice.

The phrase “subject to the jurisdiction” equally includes the U.S.-born children of persons not lawfully present. But in contrast, we cannot conclude that enforcing the phrase's original meaning in modern law regarding those children enforces a policy choice of the enactors. As Professor Cristina Rodríguez asks:

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41; see also John Vlahoplus, *Apportionment, Allegiance, and Birthright Citizenship*, BRIT. J. AM. LEGAL STUD. (forthcoming) (manuscript at 3–5) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3727525](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727525)) (discussing other early immigration restrictions).

280. See NEUMAN, *supra* note 7, at 20–43.

281. See *id.* at 41–43, 176–77. Compare SCHUCK & SMITH, *supra* note 7, at 95 (concluding, with some overstatement, that “no illegal aliens existed at [the] time [of the Fourteenth Amendment], or indeed for some time thereafter”), with NEUMAN, *supra* note 7, 176–80 (disputing this argument). Professor Neuman argues that the category of persons not lawfully present in the United States was actually larger because it included slaves brought into the United States illegally after the slave trade's prohibition in 1808. NEUMAN, *supra* note 7, at 178–79. Such persons undoubtedly existed, but their relevance is doubtful. First, they were brought involuntarily and so are not analogous to modern undocumented immigrants. Their illegality pertained to their status as slaves, not to their presence in the United States. Second, the Clause's drafters seem deliberately to have ignored them. The Clause's central purpose, as everyone understood, was to ensure that freed slaves were citizens. Yet the Clause plainly did not give citizenship to slaves brought to the United States illegally after 1808, because they were not born in the United States. No one addressed or attempted to resolve this problem. It seems that the drafters chose to treat all former slaves as born in the United States (a reasonable practical solution as it would have been difficult to distinguish the categories in practice).

282. See CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (statement of Rep. Lawrence) (quoting *Lynch* for the proposition that “children born here are citizens without any regard to the political condition or allegiance of their parents”); see also *id.* at 2769 (statement of Senator Fessenden) (specifically raising the question of the citizenship of children of temporary visitors).

283. See 11 U.S. (7 Cranch) 116, 144 (1812); *supra* notes 153–56 and accompanying text.

[H]ow do we treat the original meaning of a constitutional provision when the source of constitutional debate today stems from a set of facts that could only have been perceived dimly, if they were considered at all, at the time the provision was drafted and ratified (whether the Clause extends to children of unauthorized immigrants—a category of persons that did not exist in 1868)?<sup>284</sup>

The Citizenship Clause is distinct from several related situations that are sometimes thought to be problematic for originalism but in fact are not. One is when the original meaning does not address a contentious modern issue because that issue was not recognized at the time of enactment. Some versions of constitutional interpretation might suggest that we attempt to resolve the issue as the enactors would have, had they thought about it. The argument in this situation is that the text does not go as far in constraining modern governmental actors as the Framers would have wanted it to, had they understood modern conditions.<sup>285</sup> But, even apart from the extreme practical difficulty of this approach, it does not seem required by or consistent with originalism's constraint principle. If a text's original meaning does not address an issue, the correct conclusion (from an originalist perspective) is that the issue is left to the political process. The Citizenship Clause is different because its original meaning *does* address and resolve the key issues by requiring the political branches to recognize certain categories of people as U.S. citizens. The challenge is not that the language fails to resolve the issue; the challenge is that the language resolves the issue accidentally.

The puzzle of the Citizenship Clause is also distinct from the issue of general language adopted in response to a specific problem. Justice Scalia and Bryan Garner described that issue as follows:

Some think that when courts confront generally worded provisions, they should infer exceptions for situations that the drafters never contemplated and did not intend their general language to resolve. These people want courts to approach general words differently from how they approach words that are narrow and specific. Traditional principles of interpretation reject this distinction because the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions. It is true that literal meaning is more readily discernible when the provisions are concrete and specific than when they are abstract and general, and one is right to hesitate and ponder before deciding that a specific factual situation falls

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284. Rodríguez, *supra* note 13.

285. An arguable example is thermal imaging for purposes of law enforcement. The Constitution does not appear to restrict police observation of private property from public streets. That policy choice does not address highly intrusive methods of observation, such as thermal imaging, of which the enactors were unaware. In *Kyllo v. United States*, Justice Scalia, writing for the Court, nonetheless found constitutional protection against thermal imaging under the Fourth Amendment. 533 U.S. 27, 40 (2001). But arguably the better originalist view is that the Constitution did not address the issue and so left it to the political branches. See Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1963–64 (2017) (discussing *Kyllo*).

within the coverage of a general provision. But in the end, general words are general words, and they must be given general effect.<sup>286</sup>

On first reading, this “general-terms canon”<sup>287</sup> seems to encompass the Citizenship Clause, which—though motivated by the condition of the freed slaves—was written in general terms. Closer attention reveals that there are actually two distinct situations, one more difficult than the other.

All the examples Scalia and Garner give of the general-terms canon are ones in which the general application was understandable to and foreseeable by the enactors. As one illustration, they argue that, under the general-terms canon, the term “persons” in the Fourteenth Amendment’s Equal Protection Clause applies to all persons, not just to persons of African ancestry or to men.<sup>288</sup> Similarly, they approve of a case holding that the phrase “any property, including money” in a forfeiture statute meant real as well as personal property.<sup>289</sup> These examples seem correct (even self-evident). But they are unlike the Citizenship Clause because they involve issues known to and foreseeable by the enactors. Whether all persons should be given equal protection, or whether forfeitable property should include real property, would have been part of ordinary legal discourse at the time of enactment. One may be unable to prove the enactors thought about the specific consequences of their general language as to these situations, but ordinary usage would extend to them. Thus, the explanation Scalia and Garner suggest—that choosing general language indicates a choice to generally resolve questions without considering them individually—makes sense and allows us to say that we are resolving matters in accord with the enactors’ choices. In the case of the Citizenship Clause, however, the general language is asked to cover situations unlike anything generally understood or foreseeable at the time of enactment. Scalia and Garner’s opening discussion seems to include such extensions as well, but their supporting discussion does not appear to recognize the distinction or justify the further extension.<sup>290</sup>

The Citizenship Clause also differs from the application of original meaning to changed technology. For example, one might question the First Amendment’s application to speech over the Internet or the Second Amendment’s application to modern firearms. Originalists, including Justice Scalia, have dismissed such objections with an explanation similar to the justifications for the general-terms canon.<sup>291</sup> Enactors know that technology will change, and they do not suppose

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286. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101, 103 (2012).

287. *Id.*

288. *Id.* at 101–02.

289. *Id.* at 103 (citing *United States v. S. Half of Lot 7 & Lot 8*, 910 F.2d 488 (8th Cir. 1990) (en banc)).

290. *See id.* at 101–02.

291. *See* *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (rejecting arguments “bordering on the frivolous” that arms not in existence in the eighteenth century are not protected by the Second Amendment).

that their enactments will lose relevance as a result of that change. The general principle that the enactment reflects remains applicable and appropriate. Resolving the issues presented by the new technology is not accidental. It follows from the general language adopted (as in the ordinary application of the general-terms canon). The Citizenship Clause, in contrast, entails a new factual issue whose resolution is a fortuity of the language selected.<sup>292</sup>

#### B. ORIGINALISM AND ACCIDENTAL OUTCOMES

We can now turn to the central question of this Part, which is how originalism justifies adherence to the constraint principle where the rule provided by the Constitution's text does not reflect a policy choice (explicit or implicit) of the enactors. To be clear, these are situations—as with the Citizenship Clause—in which the text's original meaning constrains the political branches even though the constraint in question was neither understood by the enactors nor foreseeable by the people of the enactment era; that is, the constraint is an accidental result of language selected for other reasons.

Several common justifications for originalism seem unhelpful here. Although perhaps less common in modern academic writing, a frequent claim in political commentary is that modern law should respect the wisdom of the Framers. A more sophisticated version invokes the framework in which the Constitution was adopted. For example, John McGinnis and Michael Rappaport argue that the supermajority process required to adopt constitutional provisions tends to produce good results.<sup>293</sup> A related idea is that adopting or amending the Constitution occurs in an atmosphere in which people undertake unusually thoughtful reflection on long-term goals and structures, in contrast to ordinary short-term political thinking.<sup>294</sup>

Though somewhat distinct, these approaches share a common feature: they suppose that adherence to original public meaning produces (on balance) desirable substantive outcomes due to the way the text was adopted as law. Invoking the constraint principle against the policy preferences of modern political actors is justified by the results. But this justification seems inadequate in situations where the enactors did not choose the constraint that is now applied. In the case of the Citizenship Clause, for example, it seems likely that the enactors did not understand the policy questions involving birth in overseas territories or birth to persons not lawfully present in the United States. Invoking the constraint principle to resolve these policy questions (instead of leaving them to the political branches) is difficult to justify on the basis of the enactors' wisdom or the

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292. As discussed in the next Section, however, the line between these categories may not always be clear. For example, it is not clear that the general-terms canon adequately resolves the development of previously unimaginable paradigm-shifting technology.

293. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 33 (2013); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 710 (2002).

294. See generally 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

enactment's structural advantages. The text's resolution of the policy questions arises from fortuity, not choice.

A second family of justifications for originalism is rooted in popular sovereignty. Regardless of the desirability of the enactors' choices, those choices should (it is said) be honored because they were made through a democratic process encompassing the people's will. Professor Michael McConnell argues that "[t]he people's representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves, as reflected directly through text and history, or indirectly through long-standing practice and precedent."<sup>295</sup> Or as Professor Ilan Wurman puts it:

"We the People" enacted the Constitution in a public act of ratification, and because the Constitution is thus clothed with the consent of the governed, we must continue to adhere to it today. We may, of course, always call for another constitutional convention or pursue the amendment process to enact constitutional change. Until the Constitution is changed in one of those two ways . . . we owe it our obedience because "We the People" consented to it.<sup>296</sup>

Again, though, it is not clear why modern political actors should be bound to outcomes not deliberately chosen by "We the People" at the time of enactment. Professor McConnell refers to "constitutional precommitments of the people," but presumably he means *deliberate* constitutional precommitments of the people rather than inadvertent and accidental ones.<sup>297</sup> At least for purposes of this discussion, however, we are proceeding on the understanding that "We the People" in adopting the Fourteenth Amendment did not foresee (and could not have foreseen) that they were adopting any substantive resolution of key modern debates over the Citizenship Clause's scope (namely its extension to insular territories and U.S-born children of undocumented immigrants). "We the People" adopted text that, given its original meaning, would resolve those debates, but that outcome is a fortuity of the language chosen, not a deliberate constitutional precommitment.

That being so, it is not clear why modern opponents of broad readings of the Citizenship Clause have become mired in detailed examination of the Amendment's drafting debates. Why is their argument not that original meaning originalism's constraint principle should apply only to situations in which the

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295. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1291 (1997); see also, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997) (making similar arguments).

296. WURMAN, *supra* note 8, at 59. For a defense of popular sovereignty justifications for originalism, see KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 110–60 (1999).

297. See McConnell, *supra* note 295.

enactors made a deliberate policy choice?<sup>298</sup> One might say that the best originalist way to effectuate the Framers' enactment is to apply it to constrain the political branches only in the paradigm situations the enactors understood and confronted.<sup>299</sup> Thus, in the case of the Citizenship Clause, one might say that it should be read to have guaranteed citizenship only to the paradigm categories of freed slaves, children of U.S. citizens, and (probably) U.S.-born children of lawful permanent residents, while leaving further extensions or nonextensions to the political branches. And why should that argument not be persuasive?<sup>300</sup>

We may identify at least two related reasons why it is not. The first is modern originalism's core commitment to rule of law values—specifically (in the case of a written document) to the rule of written law. Professor Solum discusses this commitment at length in justifying the constraint principle.<sup>301</sup> Rule of law values such as stability, objectivity, and predictability are served by following the text's original meaning even if that meaning constrains modern political actors in ways not foreseeable by the enactors.<sup>302</sup>

Originalism's rule of law commitment also arises from formalistic understandings of what the law is. This commitment underlies Justice Scalia's pioneering

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298. As noted, Professors Schuck and Smith seemed to rely centrally on the novelty of undocumented immigration as a modern issue in support of reinterpreting the Citizenship Clause. See SCHUCK & SMITH, *supra* note 7, at 95. But, perhaps reflecting modern originalism's shift to original meaning analysis, more recent arguments for narrowly reading the Citizenship Clause strongly focus on historical understandings of the text. See, e.g., Eastman, *supra* note 7, at 170–78 (focusing on the history of the Citizenship Clause); Mayton, *supra* note 7, at 240–53 (same); Anton, *Response*, *supra* note 86 (same).

299. This position might be especially attractive to approaches that combine originalism with a strong element of judicial restraint or deference to the political branches. See generally, e.g., J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012).

300. The argument might be persuasive to the earlier version of originalism focused on original intent rather than original public meaning. Robert Bork, for example, argued that we should “take from the [Constitution] rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 17 (1971). Although this intent-based version of originalism retains modern adherents, see, e.g., Alexander, *supra* note 12; Kay, *supra* note 12, it has been widely supplanted by the idea of original textual meaning. As a result, the present discussion focuses on the Clause's challenges under the original meaning approach.

It is also not clear that original intentions originalism solves the challenge of the Citizenship Clause. Typically, original intentions are deployed to resolve ambiguities. But the Citizenship Clause is not ambiguous (as to the central points made above), and its drafters apparently intended it to have the meaning that it had at the time. The problem is that they did not understand how their intended meaning would resolve a future policy debate that they did not anticipate. In these circumstances, it is not clear that a lack of intent would overcome unambiguous language.

A competing answer might be that we can discern a broader principle of egalitarianism or inclusivity in the Amendment that should lead us to broad readings of the Citizenship Clause. See Epps, *supra* note 7, at 389–90; Rodríguez, *supra* note 13, at 1365. These arguments are likewise incompatible with the methodology of original meaning originalism.

301. See Solum, *Constraint Principle*, *supra* note 268, at 54–72. Notably, Professor Solum puts little weight on consequentialist or popular sovereignty justifications. See *id.* at 81–82.

302. See WURMAN, *supra* note 8, at 37 (identifying “[p]redictability, fairness, consistency, and stability” as values that are “served by treating the meaning of the words as authoritative”).

shift from original intentions to original meaning. The law, he insisted, is what was enacted—namely, the text, not the intentions.<sup>303</sup> A formalist conception of law requires that the text be applied to the full extent of its meaning even if that goes beyond (or not as far as) the enactors' design.<sup>304</sup>

Originalism's commitment to formalism and the rule of law is not incompatible with commitments to the wisdom of the Framers, the structure of the enactment process, or the idea of popular sovereignty. In many—perhaps most—cases, the justifications will run in parallel. Commitment to the text's original meaning does commonly validate these other justifications because the text is (usually) the best evidence of the enactors' understandings. But as the Citizenship Clause indicates, original meaning and the enactors' design will sometimes diverge. At that point, rule of law considerations appear to dominate and justify public meaning originalism's adherence to the text without exception.

An important practical concern reinforces categorical adherence to original meaning in these situations. To this point, we have assumed that it is possible to clearly separate the situations in which the enactors deliberately resolved a modern policy choice and the situations in which they resolved it only accidentally. For example, it seems reasonably likely that the Citizenship Clause's enactors understood the issue of U.S.-born children of temporary visitors and deliberately resolved it (albeit through general language) but that they could not foresee (and therefore did not deliberately resolve) the issue of U.S.-born children of persons not lawfully present. But even these situations may not be so easily characterized. The enactors may not have fully appreciated the issue of U.S.-born children of temporary visitors (although such children undoubtedly existed at the time), and some authorities argue that the enactors did understand (or could have understood) the question of U.S.-born children of persons not lawfully present.<sup>305</sup> The Citizenship Clause's application to U.S. overseas territories may be even harder to categorize. This Article's preceding discussion argues that the idea of "unincorporated" possessions was not understood, and therefore not deliberately resolved, by the enactors.<sup>306</sup> But Professor Sam Erman, a leading authority in this field, can be read as arguing that the idea was at least implicitly understood and rejected by the enactors.<sup>307</sup>

Moving beyond the Citizenship Clause, the categorization difficulties become even more apparent. What if the enactors deliberately chose to constrain the political branches in a certain way, but new policy considerations, not present at the time of enactment, arise to suggest that the policy decision has additional dimensions the enactors could not foresee? For example, assume that the original

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303. See Antonin Scalia, *Original Meaning*, Speech Before the Attorney General's Conference on Economic Liberties (June 14, 1986), in SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 180, 184–85 (Christopher J. Scalia & Edward Whelan eds., 2017).

304. See *id.*; see also Kesavan & Paulsen, *supra* note 91, at 1127–33 (discussing the primacy of text in modern originalist theory).

305. NEUMAN, *supra* note 7, at 176–80; Vlahoplus, *supra* note 283.

306. See *supra* Section II.A.

307. See ERMAN, *supra* note 2, at 8–26.

meaning of Congress's power to declare war constrains the President from initiating military hostilities without Congress's approval.<sup>308</sup> But perhaps aspects of military conflict (or of Congress) have changed so that the same policy questions are not presented today as they were in the eighteenth century. One might say the enactors did not make a deliberate choice to constrain the President as to military situations unlike anything they could foresee and therefore that the Constitution leaves the question of presidential war power to the political branches and the political process.

Pursuing such inquiries necessarily injects considerable uncertainty and subjectivity into the interpretive process. Originalism applied with such qualifications may come to resemble non-originalism and may cease to provide any dependable constraint on judges or the political branches. Originalism's commitment to rule of law values will sharply oppose such moves as undermining objectivity, stability, and predictability; originalism's formalism will insist that the solution is the (relatively) concrete rule of original textual meaning, irrespective of whether that meaning reflects a deliberate policy choice of the enactors.

Again, this approach is compatible with other justifications for originalism. Those who rest originalism on the Framers' wisdom may believe that, on balance, the best way to effectuate the Framers' wisdom is to apply the Framers' text categorically, even to situations in which it may appear that the Framers did not make a deliberate policy choice. The alternative is case-by-case evaluation of the text's compatibility with the Framers' choices, which, in addition to being unstable and unpredictable, may—due to institutional limitations and bias—not deliver superior results. Thus, other justifications for originalism may combine with and complement originalism's formalism, rather than stand as an alternative to it. But as the Citizenship Clause indicates, formalism is originalism's core.

#### CONCLUSION

This Article seeks to make three contributions to the debate over constitutional citizenship. First, it provides an original meaning account of the disputed parts of the Fourteenth Amendment's Citizenship Clause. The Clause may seem unclear as to its geographic scope (what counts as "born . . . in the United States") and its jurisdictional exclusion (which persons, though born in the United States, are not born "subject to the jurisdiction thereof").<sup>309</sup> An original meaning approach, focused in particular on the meaning of these phrases prior to the Amendment's enactment, provides a clear resolution. Places were considered "in" the United States if they were under formal permanent U.S. sovereignty; this understanding did not, however, extend to places under temporary or conditional occupation.<sup>310</sup> Persons were "subject to the jurisdiction" of the United States if they were within U.S. territory, with exceptions for those legally or practically excluded from U.S.

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308. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1545–46 (2002) (making this argument).

309. See U.S. CONST. amend. XIV, § 1.

310. See *supra* Section II.A.

sovereign authority—most notably, diplomatic personnel, who were exempt from local territorial jurisdiction under international law, and Native American tribes, who were (partially) exempted from U.S. jurisdiction by treaties or practicalities.<sup>311</sup>

The Citizenship Clause's history and purpose confirm its textual meaning. Its central purpose was, of course, to overrule *Dred Scott* and confirm U.S. citizenship for the recently freed slaves and other Americans of African ancestry. But its drafters deliberately wrote in general terms to provide, as House Speaker Colfax said during the ratification process, "that every person—every man, every woman, every child—born under our flag, or nationalized under our laws, shall have a birthright in this land of ours."<sup>312</sup> They saw themselves continuing the common law of *jus soli* citizenship that prevailed before the Amendment (and confirming it to people of African descent)—hence the common observation that the Clause constitutionalized existing law. And when they discussed exceptions to the broad rule, they focused on the two well-established ones in pre-Amendment law: diplomatic personnel and unassimilated Native Americans.<sup>313</sup> In contrast, when opponents of the proposed clause objected that it would confirm citizenship for U.S.-born children of Chinese immigrants, supporters did not dispute that reading, which was consistent with the pre-enactment common law view that aliens' U.S.-born children were U.S. citizens without regard to the status of their parents.<sup>314</sup>

Leading counterarguments rely on debatable excerpts from the drafting debates, philosophical arguments about the nature of citizenship, and policy-based arguments about the difficulties arising from broad interpretations of the Clause. But these arguments neither provide an alternate account of the Clause's textual meaning nor call the most evident textual meaning into substantial doubt. In an original meaning approach, they do not appear sufficient to overcome the apparent textual meaning, either as to the geographic scope of the Clause or as to its jurisdictional exclusion.

This Article's second point is that the Clause's original meaning provides a definite solution to contested modern issues. As to geographic scope, the original meaning indicates that the Clause extends to birth in U.S. overseas territories (if they are under U.S. permanent sovereignty), contrary to the conclusion of recent litigation.<sup>315</sup> As to the jurisdictional exclusion, the original meaning indicates that the Clause does not exclude U.S.-born children of temporary visitors or of persons not lawfully present in the United States.<sup>316</sup> In the nineteenth-century

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311. See *supra* Section II.B. As discussed, foreign sovereigns and foreign armies were also exempt from local jurisdiction as a matter of international law, and Native Americans on the frontier, even if not part of treaty arrangements, were as a practical matter beyond U.S. jurisdiction. See *supra* Section II.B.

312. Colfax, *supra* note 111.

313. See *supra* Sections II.B.2.a–b.

314. See *supra* Section II.B.2.c.

315. *Supra* Section II.A; see also *Tuaua v. United States*, 788 F.3d 300, 310 (D.C. Cir. 2015) (rejecting U.S. citizenship claims of persons born in American Samoa).

316. *Supra* Section II.B.

meaning, these persons were “subject to the jurisdiction” of the United States as a result of their presence in U.S. territory, and they do not fall within (nor are they analogous to) excluded categories recognized at the time of enactment. Some modern commentary has argued that original meaning analysis cannot provide definite answers to contested modern questions.<sup>317</sup> The Citizenship Clause thus appears to provide a counterexample.

It may be true that the policy implications of broad readings of the Citizenship Clause have changed substantially since ratification—a point emphasized by the Supreme Court in the *Insular Cases* with respect to overseas territories and by modern commentators with respect to U.S.-born children of persons not lawfully present in the United States. It is likely also true that the enactors of the Citizenship Clause did not directly consider either of these matters; the United States had no material overseas possessions at the time the Amendment was drafted, and restrictive federal immigration law did not as a material matter arise for several decades afterward. Original meaning analysis, however, does not regard these points as relevant. The decisive inquiry is the original meaning of the text and the application of that meaning to the modern issues—not the consequences of that application.

That conclusion leads to the Article’s final point. Original meaning analysis seems to call for application of the text’s original meaning even in situations in which the enactors did not foresee (and could not foresee) that their text would be decisive.<sup>318</sup> “Accidental outcomes” of original rules raise a substantial challenge in justifying the adoption of original meaning as the modern constitutional rule.<sup>319</sup> Some justifications for original meaning—particularly those resting on the enactors’ wisdom or authority—seem to fit poorly with enforcing such accidental outcomes. This Article concludes that originalism’s willingness to enforce accidental outcomes rests on formalist rule of law values of stability, foreseeability, and objectivity.

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317. *E.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH 141–55 (2018).

318. *Supra* Part III.

319. To be clear, asking how original meaning would resolve a modern debate and asking whether original meaning is the best way to resolve modern debates are separate questions. *See* WURMAN, *supra* note 8, at 5 (noting this distinction).