Summary Jury Trial Wrap-up
&
Constitutional Law with Professor A. Christopher Bryant, UC College of Law

~

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Cincinnati Bar Center

Birthright Citizenship

A Constitutional Imperative?

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Section 1 of the Fourteenth Amendment

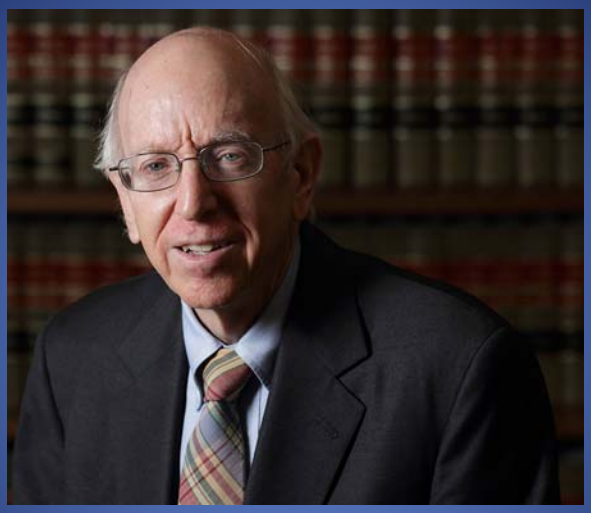
"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States . . ."

8 USC § 1401

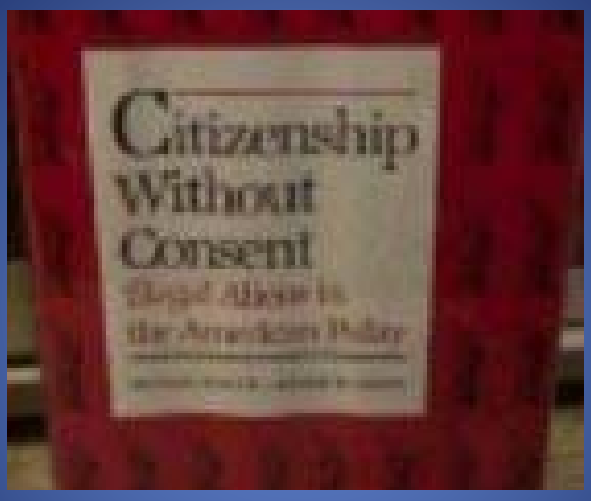
- Codifying section 1 of the Fourteenth Amend.
- Enumerating other paths to citizenship at birth

Donald Trump

Senator Rand Paul



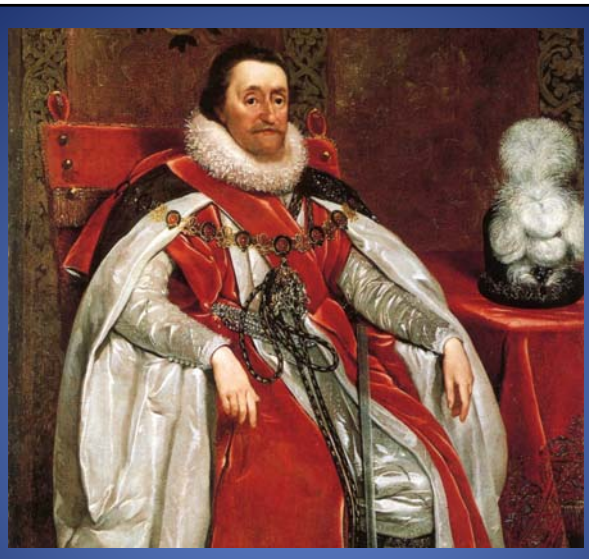
Chief Judge Richard Posner



Citizenship Without Consent (1985)

Historical Context

ENGLISH COMMON LAW BACKGROUND



King James VI and I
King of Scotland, then also England and Ireland

Calvin's Case (1608)

- Robert Calvin, born in Scotland c. 1606, inherited estates in England
- But his rights were challenged
  - as a Scot, he could not legally own English land
- The Court of King's Bench ruled in his favor
  - finding that he was not an alien and did have the right to hold land in England

Sir Edward Coke

Jus Soli

- Law of the Soil
- Feudal in origins and theory
- Based on mutuality of *indissoluble* obligations
  - Subject's of allegiance
  - Crown's of protection

Jus Soli – The Exceptions

- Children of foreign sovereigns
- Children of foreign ambassadors
  - extended to other diplomatic representatives
- Children of enemy alien combatants
  - in essence, invading armies

Jus Sanguinis

- Contrary Roman Law/Civil Law Rule
  - Citizenship by descent
- *Jus* ***Sanguinis***

Declaration of Independence

- Radically asserts right of expatriation
- Rejects feudal theory of perpetual obligation

Historical Context

ANTEBELLUM BACKGROUND

The Founders' Constitution & Citizenship

- Implicated in numerous provisions
- But nowhere expressly defined
- Arises in various courts and contexts

Antebellum Case Law

- Generally follows *Jus Soli*
- Key case: *Lynch v. Clarke*, (NY 1844), expressly and decisively reaffirms *Jus Soli*
- But then *Dred Scott*!
  - Excluded even free blacks from citizenship

Common Law History

- English Common Law: *Jus Soli*
  - Born within the realm = British subject
  - Exceptions for children of foreign sovereigns, their diplomatic reps, and invading armies
  - Generally followed by U.S. States in antebellum era
    - Questioned by some commentators
    - Slaves excepted by positive law
    - *Dred Scott* excluded free blacks from US citizenship

Historical Context

AND THE WAR CAME . . . and went.

Reconstruction and Recalcitrance

- Former confederate states pass "Black Codes"
  - impose disabilities on freedmen
  - limiting or denying their civil rights
- Congress responds w/ Civil Rights Act of 1866
  - enacted under Naturalization power &
  - Section 2 of the Thirteenth Amendment

Civil Rights Act of 1866

". . . 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; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

Civil Rights Act of 1866: Key Language

". . . 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 . . ."

The Fourteenth Amendment

- ALSO proposed in 1866, after CRA
- One purpose = supply an unquestionable foundation for the CRA of 1866
- First sentence largely tracks the language of the CRA of 1866

Sec. 1 of the Fourteenth Amendment

"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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

First Sentence

"All persons born . . . in the United States and *subject to the jurisdiction thereof*, are citizens of the United States . . . ."

Comparing the CRA & the Amendment

CRA of 1866

". . . 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 . . . ."

Fourteenth Amendment

"All persons born or naturalized in the United States *and subject to the jurisdiction thereof*, are citizens of the United States

Leg. History of the Fourteenth Amendment

- Discussions on the Senate floor of Chinese, "Gypsies," and Indians
- Sponsors state that the children born to the first two categories = U.S. citizens
- Reject citizenship for 2 classes of Indians
  - On reservation
  - "Wild Indians"

James Doolittle

Lyman Trumbull

Jacob Howard

HOWARD: "Full & Complete Jurisdiction"

"the word 'jurisdiction,' as here employed, ought to be construed so as to imply ***a full and complete jurisdiction on the part of the United States***, coextensive in all respects with the constitutional power of the United States, . . . that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now."

TRUMBULL: "Complete Jurisdiction"

"What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."

Indians (reservation and "wild") are not "subject to the complete jurisdiction of the United States. . . . They are not subject to our jurisdiction in the sense of owing allegiance solely to the United States."

Other Revisionist Evidence

- Expatriation Act of 1868
- Dicta in *The Slaughter-House Cases*
- The "holding" (?) of *Elk v. Wilkins*
- Thomas Cooley's treatise
- The DISSENT in *Wong Kim Ark*

Wong Kim Ark

United States v. Wong Kim Ark (1898)

"The real object of the fourteenth amendment of the constitution, in qualifying the words 'all persons born in the United States' by the addition 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country."

United States v. Wong Kim Ark (1898)

'and subject to the jurisdiction thereof,' =

Exclusion "by the fewest and fittest words (besides children of members of the *Indian tribes*, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—*children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state*" which had been long recognized in English and US common law.

Sec. 1 of the Fourteenth Amendment

"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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

First Sentence

"All persons born . . . in the United States

and *subject to the jurisdiction thereof*, are

citizens of the United States . . . ."

Second Sentence

"No State shall make or enforce any law which shall . . . deny to any person within its *jurisdiction* the equal protection of the laws."

Overview

Received "Wisdom"

- Common law background
- Ordinary meaning of "jurisdiction"
  - Plus use in second sentence
- *Wong Kim Ark*
  - & *Plyer v. Doe*
- Policy arguments

Revisionist Interpretation

- But feudal in origins
- But "not subject to any foreign power" in CRA
  - Plus Trumbull & Howard
- *Slaughter-House Cases*
  - & *Elk v. Wilkins*
- But policy arguments
  - Consent/republicanism

Questions?

Comments?

Constitutional Interpretation

"In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"

Constitutional Interpretation II

"Normal meaning may of course include an idiomatic meaning, but it excludes secret or *technical meanings that would not have been known to ordinary citizens* in the founding generation."

Under a Contrary Reading

- Who is excluded?
  - Those born to those here "illegally"
    - Would have arguably excluded thousands of freedmen
    - Lots of ways to be here "illegally"
  - Those here LEGALLY, but not permanently
    - Hamdi
  - Do we really want to open THIS can of worms???

NATIONAL REVIEW

On Citizenship, the 'Birthers' Are Right

Constitutional law, tradition, and fairness all argue in favor of birthright citizenship.

By John Yoo — August 22, 2015

Donald Trump stoked the immigration fires that are burning up the Republican party by proposing an end to birthright citizenship. This week he claimed that children of aliens who are born on U.S. territory "do not have American citizenship" and that their right is "not going to hold up in court."

Trump's argument runs headlong into the Constitution. His proposal shows, once again, that while he may be running as a Republican, he is not running as a conservative. Conservatives believe in following the Constitution's text, as understood by those who wrote and ratified it and with due regard for the course of American history and traditions. They reject the notion of a living Constitution whose meaning can change to fit the popular demands of the moment.

Trump's proposal to end birthright citizenship can survive only with a plastic, malleable Constitution. Those who just two months ago decried the Supreme Court's imposition of same-sex marriage throughout the nation should be the first to reject Trump. His eagerness to read native-born children out of the Fourteenth Amendment smacks of the same liberality toward the Constitution which afflicted the Supreme Court in *Obergefell v. Hodges.* The text, structure, and history of the Constitution all show that the 14th Amendment recognizes the citizenship of any child born on American territory.

First, the constitutional text. Section One of the 14th Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The constitutional text flatly states that children born in the U.S. are citizens, without reference to whether their parents are aliens or not.

Congress drafted and sent the amendment to the states for ratification not to change the

definition of citizenship, but to affirm American practice in effect ever since the Revolution. While the original Constitution mentions citizenship as a requirement for federal office, it does not define it. Borrowing from the English common law (which admittedly defined subjects rather than citizens), the United States has always filled this gap by following *jus solis* (citizenship defined by soil, i.e., birthplace) as opposed to *jus sanguinis* (citizenship defined by blood, i.e., citizenship of the parents).

Trump and his supporters (including some writers for NATIONAL REVIEW) may draw support from the phrase "and subject to the jurisdiction thereof." Some have argued that this language must exclude the children of aliens from citizenship, because aliens owe allegiance to another nation and hence are not under "the jurisdiction" of the United States. But the constitutional text requires only that the children born in the United States fall subject to American jurisdiction, which means that they are governed by American law. Almost all aliens in the United States, even citizens of other nations, still fall within our jurisdiction while they are in our territory: Otherwise they could commit crimes of all sorts without fear of punishment. Other uses of "jurisdiction" in the Constitution, such as in the 13th and 14th Amendments, also refer to the power to govern by law, not national allegiance.

Instead, "subject to the jurisdiction thereof" refers to certain discrete categories of people excluded from citizenship, even though they might be born on U.S. territory. These include the children of diplomats and enemy soldiers at war who are occupying territory. These individuals could be on U.S. territory, but are not subject to U.S. law. A third and obvious category was American Indians. At the time of the 14th Amendment, American Indians were still considered semi-sovereigns who governed themselves with their own laws and made treaties with the United States. But "subject to the jurisdiction thereof" did not grant Congress the power to pick and choose among different ethnic and national groups for citizenship. Instead, the phrase recognized a few narrow exceptions to the general principle of birthright citizenship that has prevailed throughout American history.

Second, constitutional history. There is only one blemish on the American tradition of birthright citizenship: *Dred Scott v. Sanford* (1857). In that notorious case, Chief Justice Roger Taney led a majority of the Supreme Court in striking down the Compromise of 1850, which limited slavery in the territories. Taney found that slaves were property and they, and their children, could never be citizens, even though born in the United States. *Dred Scott* helped precipitate the tragedy of the Civil War by preventing Congress from limiting the spread of slavery and reaching a compromise between North and South. Section One of the 14th Amendment directly overruled *Dred Scott*'s selective grant of citizenship to some races

but not others.

The universal nature of birthright citizenship was made clear in the amendment's drafting history. During congressional consideration, critics argued that the text would recognize as citizens the children of aliens. In particular, these opponents wanted to allow the western states to "deal with [the Chinese] as in their wisdom they see fit." Senator Edgar Cowan of Pennsylvania asked: "I am really desirous to have a legal definition of 'citizenship of the United States.' What does it mean?" Cowan asked: "Is the child of the Chinese immigrant in California a citizen? Is the child born of a Gypsy born in Pennsylvania a citizen?"

Supporters of the 14th Amendment agreed with Cowan's reading, even though it may have lost votes for their proposal. Senator John Conness of California replied to Cowan: "The provision before us . . . relates 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 incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so." Conness would lose his Senate seat because of his defense of the rights of Chinese immigrants, but the amendment would go to the states for ratification on the understanding that it granted birthright citizenship to the children of aliens.

Third, Supreme Court precedent. Ever since ratification of the 14th Amendment, the Supreme Court has consistently read Section One as granting birthright citizenship to the children of aliens on U.S. territory. The Supreme Court's reading of the Constitution does not automatically bind the other branches of government or the people — that is another lesson of the Civil War. Abraham Lincoln, for example, rose to prominence by attacking *Dred Scott* and pledging not to enforce the opinion beyond the parties to the case. But this is one decision of the Court with which he would have agreed.

In *United States v. Wong Kim Ark* (1898), the Supreme Court faced the birthright-citizenship question directly. *Ark* involved a child born to Chinese parents in San Francisco. The child left the United States for a trip but was barred from returning to the United States under the Chinese Exclusion Act. While the parents remained Chinese citizens, the child claimed U.S. citizenship under the birthright reading of the 14th Amendment. The Supreme Court upheld the child's citizenship by virtue of his birth in San Francisco. While Congress could block immigration entirely or control the process of naturalization, it could not alter the right of citizenship for all born within American borders.

The Court read the 14th Amendment to recognize the existing American practice of granting

citizenship based on birthplace. It saw no support for a new exclusion of the children of aliens. “The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and protection of the country, including all children here born of resident aliens.” The Justices explained that the phrase “and subject to the jurisdiction thereof” only codified the existing exclusions for children of “alien enemies in hostile occupation,” “diplomatic representatives of a foreign state,” and “members of the Indian tribes.” Only these categories “had been recognized exceptions to the fundamental rule of citizenship by birth within the country.” The Court explicitly rejected the claim made today by some that aliens, because they owed allegiance to a foreign nation, were not within “the jurisdiction” of the United States. Instead, the Court concluded that the amendment “in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.”

The Supreme Court has never seen fit to question its original judgment in *Wong Kim Ark*. In this case, unlike others (such as *Obergefell*), the Supreme Court read the constitutional text, structure, and history exactly right.

Of course, the American people can always amend the Constitution to change the principle of birthright citizenship. Putting to one side the waste of time and resources entailed, amending the Constitution would be a sorry mistake. Rather than being a misguided act of generosity, the 14th Amendment marks one of the great achievements of the Republican party. It was the Republican party that opposed *Dred Scott*. It was the Republican party that fought and won the Civil War. And it was the Republican party that drafted and ratified the 13th, 14th, and 15th Amendments, which did away with slavery and any distinction between Americans based on race. If we are to discard one of the greatest attributes of American exceptionalism, let it be the handiwork of nativist Democrats and candidates who appeal to the lesser angels of their nature.

— John Yoo is the Emanuel S. Heller Professor of Law at the University of California at Berkeley and a visiting scholar at the American Enterprise Institute. A former Bush Justice Department official, he is the author, most recently, of Point of Attack: Preventive War, International Law, and Global Welfare.

NATIONAL REVIEW

We Can Apply the 14th Amendment While Also Reforming Birthright Citizenship

By John C. Eastman — August 24, 2015

Birthright citizenship has exploded into the national discourse. The issue is generating a lot of heat on the Republican side of the aisle in particular, because it threatens to expose the long-standing rift between the party's base and its pro-crony-capitalism establishment.

Unfortunately, in arguing that the 14th Amendment requires citizenship for the children of illegal immigrants, some of the more prominent interlocutors are promoting an incorrect understanding of history. The *Wall Street Journal*'s recent editorial on the matter is a case in point, and my good friend John Yoo's NR essay repeats one of the same basic flaws.

The first clause of the 14th Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The *Journal* thinks the meaning is "straightforward": "Subject to the jurisdiction" covers everyone born on U.S. soil (except the children of diplomats and invading armies), because "'jurisdiction' defines the territory where the force of law applies and to whom — and this principle is well settled to include almost everyone within U.S. borders, regardless of their home country or the circumstances of their birth." It then states: "By the circular restrictionist logic, illegal immigrants could not be prosecuted for committing crimes because they are not U.S. citizens."

RELATED: Trump's Critics Are Wrong About the 14th Amendment and Birthright Citizenship

Professor Yoo makes the same claim (absent the ad hominem word "restrictionist"): "Almost all aliens in the United States, even citizens of other nations, still fall within our jurisdiction while they are in our territory: Otherwise they could commit crimes of all sorts without fear of punishment."

This claim plays off a widespread ignorance about the meaning of the word "jurisdiction." It

fails to recognize that the same word covers two distinctly different ideas: 1) complete, political jurisdiction; and 2) partial, territorial jurisdiction.

Think of it this way. When a British tourist visits the United States, he subjects himself to our laws as long as he remains within our borders. He must drive on the right side of the road, for example. He is subject to our *partial, territorial* jurisdiction, but he does not thereby subject himself to our *complete, political* jurisdiction. He does not get to vote, or serve on a jury; he cannot be drafted into our armed forces; and he cannot be prosecuted for treason if he takes up arms against us, because he owes us no allegiance. He is merely a "temporary sojourner," to use the language employed by those who wrote the 14th Amendment, and not "subject to the jurisdiction" of the United States in the full and complete sense intended by that language in the 14th Amendment.

RELATED: On Citizenship, the 'Birthers' Are Right

The same is true for those who are in this country illegally. They are subject to our laws by their presence within our borders, but they are not subject to the more complete jurisdiction envisioned by the 14th Amendment as a precondition for automatic citizenship. It is just silliness to contend, as the *Journal* does, that this is "circular restrictionist logic" that would prevent illegal immigrants from being "prosecuted for committing crimes because they are not U.S. citizens."

Moreover, contrary to Professor Yoo's contention, the text elsewhere in the 14th Amendment supports this distinction. Unlike the Citizenship Clause, which uses the phrase "subject to the jurisdiction," the Equal Protection Clause bars a state from "deny[ing] to any person *within its jurisdiction* the equal protection of the laws." (Emphasis added.) The phrase "within its jurisdiction" is territorial, whereas the phrase "subject to the jurisdiction" is political.

There were no restrictions on immigration in 1868 when the 14th Amendment was being drafted and ratified, so there was no debate on whether the Citizenship Clause confers automatic citizenship on the children of illegal immigrants. But we do have debate on the analogous circumstance of Native Americans who continued to owe allegiance to their tribes. One senator — exhibiting the same confusion today exhibited by the *Journal* — asked Senator Lyman Trumbull, a key figure in the drafting and adoption of the 14th Amendment, whether Indians living on reservations would be covered by the clause, since they were "most clearly subject to our jurisdiction, both civil and military."

RELATED: Not Hard to Read 14th Amendment As Not Requiring Birthright

Citizenship — And Nothing Odd About Reporting Such a Reading

Trumbull responded that "subject to the jurisdiction" of the United States meant subject to its "complete" jurisdiction, "not owing allegiance to anybody else." And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now" — that is, under the 1866 Civil Rights Act, which the 14th Amendment was intended to codify. That act made the point even more clearly: "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." (Emphasis added.) As the debate over the 14th Amendment makes clear, the shift in language from the 1866 Civil Rights Act to what became the Citizenship Clause of the 14th Amendment was not intended to provide citizenship to the children of illegal immigrants, but rather to shift away from the "not subject to any foreign power" language out of recognition that the Indian tribes were not foreign powers but domestic (albeit dependent) powers. As Senator Howard explained, the Citizenship Clause excludes not only Indians but "persons born in the United States who are foreigners, aliens, [or] who belong to the families of ambassadors or foreign ministers."

The leading treatise writer of the day, Thomas Cooley, confirmed this was the understanding of the 14th Amendment. As he wrote in his treatise, *The General Principles of Constitutional Law in America*, "subject to the jurisdiction" of the United States "meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government."

When the Supreme Court first addressed the Citizenship Clause in the 1873 *Slaughterhouse Cases*, both the majority and dissenting opinions recognized this same understanding. The majority in that case correctly noted that the "main purpose" of the clause "was to establish the citizenship of the negro" and that "the phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, *and citizens or subjects of foreign States born within the United States*." (Emphasis added).

That language in *Slaughterhouse* was dicta (a comment not strictly relevant to the decision), but it became holding a decade later in the 1884 case of *Elk v. Wilkins*. The Supreme Court

held in that case that the claimant — a Native American born on a tribal reservation — was not a citizen because he was not "subject to the jurisdiction" of the United States at birth, which required that he be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." Elk did not meet the jurisdictional test because, as a member of an Indian tribe at his birth, he "owed immediate allegiance to" his tribe and not to the United States. Although "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states," "they were alien nations, distinct political communities," according to the Court, thereby making clear that its holding was about allegiance and not the reservation's geographic territory. Then, drawing explicitly on the language of the 1866 Civil Rights Act from which the 14th Amendment was drawn, the Court continued: "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power), 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."

RELATED: What Conservatives Get Wrong about Birthright Citizenship and the Constitution

Professor Yoo is therefore simply mistaken in his claim that "the Supreme Court has consistently read Section One as granting birthright citizenship to the children of aliens on U.S. territory." In fact, it has never held that the children born on U.S. soil to parents who are in this country illegally are citizens. In the 1898 case of *Wong Kim Ark*, the Court simply held that a child born of Chinese immigrants who were lawfully and permanently in the United States — "domiciled" here, to use the Court's phrase — was a citizen. Language in the opinion that can be read as suggesting that birth on U.S. soil alone, no matter what the circumstances, confers automatic citizenship is pure dicta, because no claim was at issue in the case other than whether the child of lawful, permanent residents was a citizen.

Professor Yoo's contention to the contrary overlooks the Court's use of the word "domiciled" in describing the nature of Wong Kim Ark's relationship to the United States. "Domicile" is a legal term of art; it means "a person's *legal* home," according to Black's law dictionary, and is often used synonymously with "citizenship." Wong Kim Ark's parents were not allowed to become citizens because the U.S. had entered into a nefarious treaty with the Emperor of

China that refused to recognize their natural right to emigrate, but they were "domiciled" in the United States, which is to say, lawfully present in the United States. The *holding* of the case, as opposed to its broader dicta, does not mandate citizenship for children born to those who are unlawfully present in the United States, and it does not even mandate citizenship for those who are visiting the United States temporarily but lawfully. In both cases, the children, through their parents, retain allegiance to their parents' home country — to a "foreign power," to return to the language of the 1866 Civil Rights Act. They are therefore not "subject to the jurisdiction" of the United States in the way intended by the 14th Amendment, and therefore not automatic citizens.

RELATED: Good Faith Is Measured by the Constitution Not Predictions about the Supreme Court

As I said, no Supreme Court case has held otherwise. *Wong Kim Ark* did not so hold. Neither did *Plyler v. Doe* in 1982, contrary to the *Journal*'s assertion; the relevant language in that case is simply a footnote for comparison with the Equal Protection Clause, and pure dicta.

Professor Yoo's description of the debate between Senators Cowan and Conness likewise misses the point. Cowan asked whether the Citizenship Clause would confer citizenship upon the children of Chinese parents who were living in California, or the children of Gypsies living in Pennsylvania. "Have they any more rights than a sojourner in the United States?" he asked. He was attempting to draw a distinction based on race or ethnic background, not on lawful versus unlawful presence in the United States, or even on permanent versus temporary presence. It was for that reason that Conness began his reply by stating that he failed to see what relation Cowan's question had to do with the Citizenship Clause.

Conness then responded that automatic citizenship would be available to the "children begotten of Chinese parents in California" just as existed under existing law — that is, the 1866 Civil Rights Act, which extended citizenship to "all persons born in the United States, and not subject to any foreign power." That guarantee was available no matter the ethnic background of the parents — we were not extending citizenship only to the descendants of white Europeans — but his response did not suggest that the children of those who were not lawfully present in the United States, or who were mere temporary visitors, would be automatic citizens. Indeed, Cowan's own question — "Have [the children of Chinese or Gypsies domiciled in the United States] any more rights than a sojourner?" — demonstrates that he was also aware of the distinction between territorial and political jurisdiction. For the debate to support Professor Yoo's position, Conness would have had to respond that even the

children of sojourners would be entitled to automatic citizenship. There is not a hint in his response to suggest such an answer, nor in any other part of the entire debate.

So, truth be told, the 14th Amendment does not need to be repealed in order to fix the problem of birthright citizenship for the children of illegal immigrants. It just needs to be understood and applied correctly. The *Journal*'s contention that conservatives who insist upon this understanding of the law "are promising a GOP version of President Obama's 'illegal amnesty order'" could therefore not be further from the truth. Constitutional originalism requires that we give effect to the public meaning of the words actually used, even if the *Wall Street Journal* would wish the meaning were otherwise. And the *Journal*'s further contention that anyone who wishes to see the 14th Amendment faithfully applied is claiming "that some people are not real Americans and have no right to be," is simply another ad hominem attack and mischaracterization not worthy of an otherwise great newspaper.

RELATED: The Very Real Economic Costs of Birthright Citizenship

Finally, let me close with some agreement with Professor Yoo's soaring rhetoric at the end of his piece, much of which is entirely true. Yes, "rather than being a misguided act of generosity, the 14th Amendment marks one of the great achievements of the Republican party." And yes, "It was the Republican party that opposed *Dred Scott*." And yes, "It was the Republican Party that fought and won the Civil War." And definitely yes, "it was the Republican party that drafted and ratified the 13th, 14th, and 15th Amendments, which did away with slavery and any distinction between Americans based on race."

But the 14th Amendment did not do away with sovereignty. It did not do away with the importance of citizenship, or with the idea, rooted in the Declaration of Independence, that legitimate governments are grounded on the consent of the governed. Birthright citizenship, as currently practiced, allows those who continue to owe allegiance to a foreign power to demand American citizenship for their children, unilaterally and as a result of their illegal conduct. Those who oppose such an abuse do not support *Dred Scott*. They are drawing distinctions based not on race, but on the rule of law.

Professor Yoo need not worry, therefore, that applying the 14th Amendment faithfully would "discard one of the greatest attributes of American exceptionalism." The welcome mat to American citizenship is open to anyone in the world regardless of race or ethnic background, as long as they adhere to the legal rules set out by Congress for immigration to this country.

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