An Originalist Case for Birthright Citizenship: The Inclusion of "Temporary Sojourners," Roma, and Chinese Immigrants

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The Trump administration and other opponents of birthright citizenship for the children of "unlawful immigrants" make the following originalist claim about the Fourteenth Amendment: Even if the clause meant birthright citizenship, it applies today only to "lawful immigrants," because the category of "unlawful immigrant" or "illegal immigrant" did not exist in the 1860s, when the clause was written and ratified. Opponents also argue that the citizenship clause originally implied "permanence," "loyalty," and "allegiance" requirements. These assertions would have sweeping implications, opening the door to deportation not only for the children of unlawful immigrants, but also the children of lawful residents later deemed to be "temporary." These assertions are also historically inaccurate.

To the contrary, the concept of "unlawful immigrants" existed in the 1850s and 1860s, and the congressional debates in 1866 indicated that birthright citizenship would extend to their children. This Article summarizes the early history of the political movement against Chinese immigrants in western states and territories—especially California—leading to state restrictions against Chinese immigrants. This rise of this powerful movement for more direct exclusion, demonstrates that the nation had notice of the modern category of "unlawful immigrants." In 1866, the congressional debates explicitly acknowledged these restrictions and confirmed that the text would grant citizenship to Chinese immigrants anyway. Similarly, the debates raised perncious stereotypes about Roma (Gypsy) and Chinese immigrants as "Coolies," a racist slur that referred to indentured servitude, loyalty to foreign masters, and only temporary plans to stay in the U.S. Nevertheless, members also confirmed that citizenship would extend to Chinese and Roma immigrants' children, regardless of parents' "allegiance," their allegedly temporary intent, or their legal status.

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INTRODUCTION

The Fourteenth Amendment's citizenship clause states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[1] The text seems clear in establishing birthright citizenship: "All persons born . . . in the United States," with only a narrow qualification: "subject to [U.S.] jurisdiction," apparently anyone subject to federal criminal or civil liability. The established exceptions are those who are not formally or practically "subject" to jurisdiction: "children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory" and "children of members of the Indian tribes."[2]

The Trump administration and opponents of birthright citizenship have asserted a three-step argument that "subject to U.S. jurisdiction" does not mean what its text would seem to mean. First, the Trump administration argued that the concept of "unlawful immigrants" did not exist in the 1860s during the drafting of the Fourteenth Amendment's citizenship clause, so the drafters of the clause could not have imagined or intended to cover this modern category.[3] Second, they argue that, as a historical matter, birthright citizenship required "permanent domicile," "allegiance," or "loyalty," and temporary residents were excluded.[4] Third, modern "unlawful immigrants" do not fulfill the requirements of "domicile," "residence," "allegiance," and "loyalty," and thus their children are not protected by the Fourteenth Amendment's original meaning.[5]

Four Justices adopted a mix of these arguments. Justice Brett Kavanaugh adopted this core argument about "new and unforeseen phenomena" in his separate opinion in *Trump v. Barbara*:

> [U]nder basic tenets of constitutional interpretation, other exceptions can be recognized when the new exceptions (i) are based on subsequent developments or circumstances that are new, i.e., largely unknown or unanticipated by the Framers of the Fourteenth Amendment, and (ii) are relevantly similar to the four previously recognized *Wong Kim Ark* exceptions…. Here, that interpretive principle would support additional exceptions for children born to foreign citizens unlawfully or temporarily in the country.[6]

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1. U.S. CONST. amend. XIV, § 1.

2. United States v. Wong Kim Ark, 169 U. S. 649, 693 (1898).

3. Brief for Petitioners at 29, Trump v. Barbara, No. 25-365 (U.S. Jan. 20, 2026). See infra Part I.A for more scholarship and legal briefing with such assertions.

4. *Id*. at 2–4, 11–12, 19–28, 33–34, 36, 41–42.

5. *Id*. at 29–31.

6. Trump v. Barbara, No. 25-365, slip op. at 7-8 (U.S. June 30, 2026) (Kavanaugh, J., concurring in the judgment, dissenting in part) (cleaned up).

Justices Thomas, Alito, and Kavanaugh adopted the arguments that the Citizenship Clause required "allegiance" and "domicile," leading to the same exceptons.[7] As a matter of both history and originalist methods, they are wrong.

Justice Jackson cited this Article (in draft form) to rebut these assumptions with the political context of anti-immigration sentiment circa 1866—and the congressional debates that rejected such exceptions to birthright citizenship.[8]

Contrary to Justice Kavanaugh's assumptions, the concept of the "unlawful immigrant" did exist in the 1850s and 1860s, most saliently in the legal and political movement against Chinese immigrants[9] and in England's historical exclusions against "Roma" immigrants (historically referred to as "Gypsy" immigrants).[10] Nevertheless, when Congress drafted and debated the Fourteenth Amendment's Citizenship Clause, no one raised such a question about "unlawful" status.[11]

Even though one of the most pernicious stereotypes about Chinese immigrant labor was that they were "coolies" loyal to Chinese masters and with only temporary plans to stay in the U.S., only one member of Congress raised a question about "allegiance" as a factor for their children's citizenship.[12] The debate shows no other support for such an interpretation, a broad rejection of this argument, and the explicit interpretation of the proposed clause as extending birthright citizenship to these groups.

If the debates in the 1860s either did not raise concerns about "domicile" and explicitly and overwhelmingly rejected objections to Chinese, Roma, and "temporary sojounrers," then it is implausible that these restrictions were part of the original public meaning of the Citizenship Clause.

Recent historical scholarship—especially on the state-by-state regulation of Chinese immigrants—disproves this longstanding historical assertion and rebuts this originalist argument.[13] One bottom line is that, for the framers and ratifiers of the Fourteenth Amendment, England's exclusions of Roma immigrants and American restrictions against Chinese immigrants already had established a concept of "illegal" or "unlawful" immigrants, whether in the Anglo-American past, the present, or the foreseeable future.[14] In fact, the

7. *See id.* slip op. at 1–3, 12-17 (Thomas, J., dissenting); *id.* slip op. at 1–3, 17–27 (Aliton, J., dissenting); *id.* slip op. at 1–3 (Gorsuch, J., dissenting).

8. *See id.* at 12–14, 13 n.44 (citing J. Shugerman, *An Originalist Case for Birthright Citizenship*, 77 U.C.L.J. (forthcoming 2026)).

9. *Infra* Part.IV.

10. *Infra* Part.III.

11. *Infra* Part.II.

12. *Id.*

13. I offered an initial form of this argument on a blog post: Jed Handelsman Shugerman, *Birthright Citizenship 4: The Concept of "Unlawful Immigrants" Existed in the 1850s-60s, and Americans Ratified Birthright Citizenship Without Worrying About It* (Feb. 21, 2025), https://shugerblogcom.wordpress.com/2025/02/21/birthright-citizenship-4-the-concept-of-unlawful-immigrants-existed-in-the-1850s-60s-and-americans-ratified-birthright-citizenship-without-worrying-about-it.

14. For more on the context of Gypsy restrictions in England and references to Gypsies in the 1866 debates, see Gerard N. Magliocca, *Without Domicile or Allegiance: Gypsies and Birthright Citizenship*, 49 HARV. J.L. &

debates explicitly acknowledged California's recent restrictions of the Chinese, and yet no one suggested a change to limit such a broad application or even asked follow-up questions about any potential ramifications of the exclusionary movement.

Another bottom line is that even though many Americans questioned these groups' "allegiance," only one member of Congress raised this question in the 1866 debates, and the "allegiance" qualification was overwhelmingly rejected.[15]

It is a well-known fact that nativism was a growing political movement since the mid-1840s with the rise of the American Party (or "Know-Nothings") and it also a well-known fact that the nativist movement in West sought restrictions against Chinese immigrants long before 1875. California and western territories adopted restrictions against Chinese immigrants in the 1850s and early 1860s.[16] Congress criminalized the "anti-Coolie" trade in 1862 and debated broader proposals to restrict Chinese immigration over the next few years, before drafting the Fourteenth Amendment.[17]

California passed statutes named, for example, "An Act to Prevent Further Immigration of Chinese or Mongolians to this State";[18] and "An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California," also known as the "Chinese Police Tax." [19] These measures established a recognizable category of illegal immigration and created a reasonable question about whether some Chinese immigrants were already in—or soon would be placed in—a category of unlawful or illegal status.[20] Chinese immigrants who did not comply with the deterrent taxes, fees, or licensing requirements or those who had entered illegally via trafficking were plausibly "unlawful immigrants." Then federal restrictions followed in the early 1860s, and both the U.S. Congress and the Confederacy debated broader restrictions, previewing anti-Chinese

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PUB. POL'Y (forthcoming 2026) (manuscript at 9), https://ssrn.com/abstract=5616890; Leslie F. Goldstein, *Technologies of Travel, "Birth Tourism," and Birthright Citizenship*, 79 MD. L. REV. 177, 186 (2019). On the common law background, see Keith E. Whittington, *By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States*, 49 HARV. J.L. & PUB. POL'Y 459, 535–36 (2026).

15. *See infra* Part.II.

16. *See infra* Subpart.IV.A.

17. *See infra* Subpart.IV.A; Anna O. Law, *The Civil War and Reconstruction Amendments' Effects on Citizenship and Migration,* 3 J. AM. CON. HIST. 111, 115–16 (2025).

18. An Act to Prevent Further Immigration of Chinese or Mongolians to this State of Apr. 26, 1858, ch. 529, 1858 Cal. Stat. 296 (repealed 1955); archived at http://librarysource.uchastings.edu/library/research/special-collections/wong-kim-ark/1858%20Cal.%20Stat.%20295.pdf; *see* KEVIN KENNY, THE PROBLEM OF IMMIGRATION IN A SLAVEHOLDING REPUBLIC: POLICING MOBILITY IN THE NINETEENTH CENTURY UNITED STATES 142 (2023); Stewart Chang, *Racial Contagion: Anti-Asian Nationalism, the State of Emergency, and Exclusion*, 9 BELMONT L. REV. 486, 492–93 (2022); ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 55 (1998).

19. An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (repealed 1939).

20. *See infra* Subpart.IV.A.

exclusion and adding to the concept or question of "unlawful" resident and "illegal" immigrant.[21] Whether one quibbles with whether these state and federal regulations clearly established a category of "illegal immigrant" versus "illegal conduct" or "illegal trafficking," the political movement, arguments, and enforcement functioned to create such a category and sufficiently established such a category as a given concept and a political agenda for the near future. Then, in the key moment of the 1866 congressional debates over the citizenship clause, in the shadow of these state and federal restrictions and a platform for even more directly "illegal" categorization, the question about Chinese immigrants was asked and answered.[22] The congressional debates explicitly confirmed that the text would grant citizenship to Chinese immigrants, without raising a concern about these restrictions, despite these potential restrictions.[23] Senator Conness of California, a supporter of birthright citizenship, explicitly mentioned the restrictive statutes California had enacted to limit Chinese immigrants—and while he noted that state courts had held some of them unconstitutional under the dormant commerce clause, the exchange indicated that questions about immigration restrictions were already salient.[24] If anyone thought the Fourteenth Amendment's citizenship clause would not apply to "unlawful" immigrants or those who were in the United States illegally, even under foreseeable future exclusions, then one would have expected more than this one limited acknowledgement of these laws and more of objection or a question.

If any substantial number of Americans believed "birthright citizenship" might not apply to those with a question of "loyalty" or "allegiance" to another nation, or of how temporary the immigrant's residence would be, then more than just one senator would have asked such questions. When that lone senator proposed narrowing citizenship along those lines against Chinese and Roma immigrants, he was explicitly and overwhelmingly rebuffed, even by those worried about the increase of such immigrant groups. Whereas the question of "illegal" immigrant was the proverbial dog that did not bark, the "allegiance" dog did bark, but that bark was plainly rejected.[25]

This originalist evidence addresses the gaps in the legal case for birthright citizenship based on precedent. As the *Barbara* dissenters note, the foundational 1898 precedent for birthright citizenship, *United States v. Wong Kim Ark*, ruled

21. *See infra* Subpart.IV.A.

22. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (Senator Cowan raising the question); *id*. at 2892 (Senator Conness answering the question, with no other objections or questions).

23. *See id.*; *infra* Part.II.

24. *See infra* Part.II.

25. For Senator Cowan's question, answered by California Senators Conness and Trumbull, see *infra* Part.II.

only on the citizenship of an individual born to *legal* and *permanently "domiciled"* non-citizen immigrants.[26]

I am not the first legal scholar to debunk the argument that Americans did not foresee mass temporary migrant labor and immigration restrictions circa 1866. Gerald Neuman put into context many facially neutral state laws as functional immigration restrictions by design and enforcement.[27] More recently, other legal scholars identified earlier restrictions against the slave trade and against people of African descent between 1803 and 1819.[28] Gabriel Chin and Paul Finkelman emphasized an 1819 statute that authorized the involuntary deportation of those who entered the U.S. in violation of those statutes.[29] Chin and Finkelman observed, "[T]his law is an early example of implementation of the immigration control technique of deportation."[30] This evidence should be sufficient in refuting this challenge, establishing a category of "unlawful immigrant" before the Civil War. Perhaps following Solicitor General Sauer's logic, one might claim that the purpose of the Fourteenth Amendment was to protect these enslaved African "immigrants," but not other kinds of immigrants.[31]

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26. *See* Trump v. Barbara, slip op. at 5, 45, 81–84 (Thomas, J., dissenting); *id*. slip op. at 27–28 (Alito, J., dissenting); *id*., slip op. at 2–3 (Gorsuch, J., dissenting); *see also* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 5 (1985); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 8 (2009); JOHN C. EASTMAN, FROM FEUDALISM TO CONSENT: RETHINKING BIRTHRIGHT CITIZENSHIP 4 (2006); Judge James Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the Fourteenth Amendment*, 9 GREEN BAG 2d 367, 374 (2006). Historians have also raised questions about when the terms *jus soli* and *jus sanguinis* came into use, even if birth and parentage had been relevant for citizenship status for a long time before the nineteenth century; Nathan Perl-Rosenthal & Sam Erman, *Inventing Birthright: The Nineteenth-Century Fabrication of Jus Soli and Jus Sanguinis*, 42 L. & HIST. REV. 421 (2024).

27. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19 (1996); *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1834 (1933); CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 28 (1994).

28. Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2225–32, 2235–36 (2021) (citing the Act of Feb. 28, 1803, ch. 10, 2 Stat. 205, which barred "the immigration of free people of African ancestry"; the Act of Mar. 2, 1807, ch. 22, *§* 4, that made illegally imported Africans "subject to any regulations . . . which the legislatures of the several states or territories at any time hereafter may make, for disposing of any such negro, mulatto, or person of colour"; and the Act of Mar. 3, 1819, ch. 101, 3 Stat. 532, which authorized the government to send "illegally trafficked slaves . . . to Africa.").

29. *Id.* at 2234–35 (citing Act of Mar. 3, 1819, ch. 101, 3 Stat. 532). Chin and Finkelman observed, "this law is an early example of implementation of the immigration control technique of deportation." *Id.* at 2235. "While the statute provided that the fate of these individuals was 'subject to the orders' of the President, it was clear that the President was to deport them." *Id.* at 2236.

30. *Id.* at 2235.

31. For another response, see Peter H. Schuck & Rogers M. Smith, *Trump Is Half-Right. Congress Can End Birthright Citizenship*, WASH. POST (Oct. 31, 2018) [hereinafter Schuck & Smith, *Trump Is Half-Right*], https://www.washingtonpost.com/outlook/2018/10/31/trump-is-half-right-congress-can-end-birthright-citizenship ("The 14th Amendment's citizenship clause did not even address, much less resolve, the question of citizenship for the U.S.-born children of undocumented immigrants [because] the federal government was not then restricting immigration. (The U.S. slave trade was banned by this time, but that was not immigration in any sense we think of it today.)").

Even if one accepts this counterargument with respect to African descendants, the historical restrictions against Roma and Chinese immigrants overcomes that counterargument. California passed a series of laws that restricted, regulated, or taxed Chinese immigrants, starting in 1852, and though courts initially struck down a direct restriction as unconstitutional, the direct taxes and other regulations stayed in place.[32] If a Chinese immigrant arrived and never paid the direct labor tax, it seems reasonable to suggest that they were in California "unlawfully," just as a person who could be eligible to enter the country but never completed a visa or overstayed a visa might be considered "unlawfully" in the state. Even if one can quibble with whether "unlawful" would apply to the person's status, this question was on the table, and the possibility of immigration bans was very much in the air in California, as the anti-Chinese political movement had won statewide political power.

Part I summarizes the opposition to birthright citizenship for the children of unlawful immigrants: the objection that the category of "unlawful immigrant" did not exist circa 1866-68 during the ratification of the Fourteenth Amendment (the "new category" challenge); and the objection that the parents' "allegiance" was a requirement for being "subject to U.S. jurisdiction." Both have serious textual and historical problems before even turning to the history of restricting Chinese immigrants. First, evidence in the briefs and in the scholarship is not probative of original public meaning because it is too early, too late, and too private, and the only evidence from the relevant time period is obviously taken out of context. Second, the "allegiance" or consent theory would have contradicted the basic goals of the Citizenship Clause: citizenship for ex-slaves (as well as citizenship for ex-Confederates).

Part II documents that the congressional debates over the Fourteenth Amendment's citizenship clause (and over the similar clause in the 1866 Civil Rights Act) explicitly discussed and approved of extending citizenship to Chinese immigrants' children, and rejected concerns about temporary residence and lack of "allegiance." Part III reviews England's bans and restrictions on Roma immigrants that were recorded in major treatises, many of which the framers of the Fourteenth Amendment would have encountered. Part IV shows that Congress's drafting and debates had followed state and federal restrictions and an anti-Chinese political movement that established a category of "unlawful immigrant" and put full exclusion in the national discourse in the years before the drafting of the 1866 Civil Rights Act and the Fourteenth Amendment. Despite these concepts' presence in the legal and political atmosphere, the historical sources record no concerns about citizenship applying to Chinese immigrants' children, to "unlawful" or excluded immigrants' children, or to the children of immigrants with questionable "allegiance" or "loyalty."

32. *See infra* Subpart.IV.A.

I. THE OPPOSITION'S ORIGINALISM PROBLEMS

A. THE MYTH

Justice Kavanaugh adopted a myth in his separate opinion: Mass temporary immigration and immigration restrictions were "new and unforeseen phenomena," "modern situations that were unknown or unanticipated by the Constitution's Framers."[33] First, it is worth noting the oddity of the label he chose for this opinion: "concurring in the judgment, dissenting in part," even though it is more accurately a concurrence, full stop. Even if it limited its agreement to the statutory cliam and did not join the majority on its interpretation of the Constitution, he concurred fully in the result, striking down the executive order. Nevertheless, he concluded on the Fourteenth Amendment (emphasis added):

> [T]he relevant principles— both the rules and exceptions alike—must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that *were unknown or unanticipated* by the Constitution's Framers. Stated otherwise, the "meaning of rules is constant. Only their application to new situations presents a *novelty*."[34]

This myth of novelty is itself not a novelty. In the 1980s, in the frequently-cited book *Citizenship Without Consent: Illegal Aliens in the American Polity*, Peter Schuck and Rogers Smith wrote: "When the framers of the Citizenship Clause adopted (in a significantly compromised form) the common-law rule of birthright citizenship, immigration to the United States was entirely unregulated."[35] Schuck and Smith revived this argument in 2018 during the first Trump administration.[36] A major treatise on immigration quotes this full

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33. Trump v. Barbara, No. 25-365, slip op. at 5 (U.S. June 30, 2026) (Kavanaugh, J., concurring in the judgment, dissenting in part) (cleaned up).

34. *Id.* at 5 (emphasis added).

35. SCHUCK & SMITH, supra note 26, at 92. The rest of the passage continues:

> The nation maintained a policy of completely open borders for almost another decade, when the first exclusion law, barring prostitutes and vagabonds, was enacted. Indeed, until well into the first decade of this century, birthright citizenship could plausibly be understood as one ingredient of an integrated national strategy to encourage immigration in order to populate a vast, essentially empty continent with the need for more laborers, mechanics, and farmers than American society itself could produce. An open-border policy was also celebrated as a way to serve liberal, humanitarian values, to make America an "asylum" for the "oppressed and persecuted of all Nations and Religions," as George Washington had urged at the outset. Today, of course, that strategy of open border is a distant memory, bearing about as much relationship to current immigration policy concerns as the horse-and-buggy does to contemporary modes of transportation.

Id. (citations omitted).

36. Schuck & Smith, *Trump Is Half-Right*, *supra* note 31; s*ee also* Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenship*, 2018 NAT'L AFFS. 50, 52.

passage.[37] Scholars and commentators have repeated this assertion over the past two decades.[38]

In the May 15, 2025 oral argument in *Trump v. CASA, Inc.*, the initial birthright citizenship case on remedies and nationwide injunctions, Solicitor General John Sauer opened with this argument: "First of all, our primary contention is that the Citizenship Clause related to the children of former slaves, not to illegal aliens who weren't even present as a discrete class at that time."[39] He repeated this argument at least once.[40] The government's brief in *Trump v. Barbara*, the case directly on the substantive question, reiterated:

> Though 19th-century commentators extensively discussed the citizenship of children of temporarily present aliens, *they had little occasion to discuss children of illegal aliens.* Congress enacted the first modern federal immigration statute only in 1875, and the first federal immigration quota only in 1921. Because most aliens could freely enter the United States and take up permanent residence here, questions concerning the citizenship of children of illegal aliens rarely arose. But the same logic that excludes children of temporarily present aliens from birthright citizenship extends to children of illegal aliens.[41]

Amicus briefs repeated the same claim.[42] This argument is seemingly plausible, if one assumes that the category of "unlawful immigrant" or "illegal immigrant" did not exist in the 1860s, and if one assumes that the category emerged only after 1875, when Congress passed the Page Act. This argument is so longstanding that one critic called it "a common refrain."[43]

The Trump administration and academic opponents of birthright citizenship also argue that the Fourteenth Amendment's term "subject to the jurisdiction" implied an "allegiance" requirement, so it applied only to long term

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37. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 33 (6th ed. 2008).

38. *See, e.g.*, EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 2 (1986); MILTON D. MORRIS, IMMIGRATION–THE BELEAGUERED BUREAUCRACY 50 (1985); DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE 6–8, 122 (1989); Lora L. Grandrath, *Illegal Immigrants and Public Education: Is There a Right to the 3 Rs?*, 30 VAL. U. L. REV 749, 758 n.64 (2011); David Hiller, *Immigration Policies of the Reagan Administration*, 44 U. PITT. L. REV. 495, 498 (1983); Ashley E. Mendoza, *Anchors Aweigh: Redefining Birthright Citizenship in the 21st Century*, 13 J. L. & FAM. STUD. 203, 209 (2011); Charles Wood, *Losing Control of America's Future–The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J. L. & PUB. POL'Y 465, 491 (1999); Amy Swearer, *Does the Constitution Mandate Universal Birthright Citizenship? Here's the Answer*, HERITAGE FOUND. (May 24, 2019), https://www.heritage.org/the-constitution/commentary/does-the-constitution-mandate-universal-birthright-citizenship-heres.

39. Transcript of Oral Argument at 8, Trump v. CASA, Inc., 145 S. Ct. 2540 (2025) (No. 24A884).

40. *Id.* at 43.

41. Brief for Petitioners, *supra* note 3, at 29 (emphasis added).

42. Brief for Senator Eric Schmitt & Representative Chip Roy as Amici Curiae Supporting Petitioners at 11, Trump v. Barbara, No. 25-365 (U.S. Jan. 23, 2026) ("[T]here were generally no laws at the time of the Fourteenth Amendment limiting immigration of foreigners into the United States (the first such law was the Chinese Exclusion Act of 1882).").

43. Gerard Magliocca, *Indians and Invaders, The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 513 (2008).

residents, not temporary workers or unlawful immigrants.[44] For example, the Trump Department of Justice (DOJ) argued in June 2025:

> Domicile was understood to confer a more substantial allegiance than mere presence, an allegiance akin to citizenship that subjected an individual to the complete jurisdiction of the country of domicile with corresponding rights and duties. Children of aliens here temporarily or illegally, whose only allegiance is the duty to obey the laws while here, lack sufficient allegiance to come within the United States' complete political jurisdiction.[45]

These assertions would have sweeping legal and social implications: If citizenship at birth required that the parents both be *lawful* residents and *permanent* residents,[46] then the door will open to question the citizenship of many Americans if the federal government alleges that their parents did not really intend to stay permanently—an inevitably subjective gray area that would lead to arbitrary deportations.

Parts II, III, and IV will debunk these myths.

B. THE ANTI-BIRTHRIGHT EVIDENCE: TOO EARLY, TOO LATE, NOT "ORIGINAL," NOT "PUBLIC," NOT "MEANING"

The recent challenges to birthright citizenship each have their own fundamental originalism problems about the limited evidence they have offered. One has a problem of relying too heavily too far into the future (on events long after the 1860s). The other has a problem of relying too heavily too far into the past (on events long before the 1860s).

Let's start with the argument that the unlawful immigrant category did not exist yet. This "new category" challenge has a problem more often associated with "the living constitution" and with non-originalist or anti-originalist arguments. Those who subscribe to "the living constitution" as opposed to originalism often argue that because times change and circumstances change, an original understanding becomes obsolete. Technology changes, norms change, rules change, and so the "original understanding" no longer applies, or a new circumstance needs to be interpreted differently (see, for example, equal protection applied to sex, expectations of privacy, reproductive rights, or the argument that new kinds of property or categories of property should change our applications of due process). Originalists sometimes make these kinds of

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44. Kurt Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. (forthcoming 2025/26) (manuscript at 86), https://ssrn.com/abstract=5140319; Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL'Y 315, 372 (2026); Richard A. Epstein, *The Hopeless Case for Birthright Citizenship: The Fourteenth Amendment Did Not Touch the Status of the Children of Illegal Aliens and Temporary Visitors to the United States*, May 14, 2025, at 1, https://ssrn.com/abstract=5254575.

45. Reply Brief for Appellants at 2, 3–4, 7, 10–12, N.H. Indonesian Cmty. Support v. Trump, 157 F.4th 29 (1st Cir. June 2025) (No. 25-1348).

46. *See* Brief for Petitioners, *supra* note 3, at 6–7 (defending Citizenship Order Sec. 1); Brief for Senator Eric Schmitt & Representative Chip Roy as Amici Curiae Supporting Petitioners, *supra* note 42.

arguments, but such arguments are usually limited to cases when the constitutional text seems deliberately open ended or ambiguous. For example, originalists update the First Amendment on "speech" and "press" when it comes to political spending;[47] Justice Scalia allowed for changing circumstances to update the meaning of a "taking" in the Fifth Amendment's Takings Clause;[48] and Justice Barrett, among others, updates the application of the Fourth Amendment's "unreasonable searches and seizures."[49]

All of these examples come from open-ended texts or flexible standards. However, originalists tend to be highly skeptical of such efforts to invoke "changing circumstances" when the constitutional language is more specific, legalistic, or technical. In this case, the Fourteenth Amendment's Citizenship Clause is much less open-ended: "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 amendment starts with a relatively explicit birthright rule: "All persons born." The contested phrase is "subject to the jurisdiction thereof." This wording is more of a legal term of art than an open-ended word like "speech" or "unreasonable." There is some common sense about why the phrase "subject to the jurisdiction thereof" would reflect the standard exceptions: children of diplomats, children of foreign invading soldiers, or those born on tribal lands considered as legally sovereign entities. The individuals in each of these categories (especially diplomats) have a more limited relationship with the jurisdiction of U.S. law enforcement. Invading soldiers are not subject to jurisdiction in any practical sense. Separate tribal sovereignty also is a standard jurisdictional separation, and tribal residents are subject to tribal jurisdiction. There is little reason to think that a person who enters the country without legal permission—or enters with permission but stays beyond that permission—and lives and works among the civilian population could not be held criminally or civilly liable under American law enforcement, and thus, there is little reason to think that he or she is not "subject to [U.S.] jurisdiction." Even if circumstances change with respect to "permission" or "unlawful" residence, the jurisdiction and liability would not change. Thus, even if one assumes that the category "unlawful resident" did not exist in the 1860s, it is not at all clear why that new category would be relevant to the meaning "subject to the jurisdiction." It is unclear why the "lawfulness" or "unlawfulness" of residents among the public would change their status as "subject to jurisdiction." But as Part III will show, the concept of an "unlawful immigrant" did exist in the 1860s.

47. *See, e.g.*, Citizens United v. FEC, 130 U.S. 876, 952 (2010).

48. *See, e.g.*, Lucas v. S.C. Coastal Council, 112 U.S. 2886, 2915 (1992).

49. *Confirmation Hearing on the Nomination of Hon. Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 155–56 (2020) (statement of Amy Coney Barrett, J., U.S. Ct. of Appeals for the Seventh Cir.).

The "allegiance" or "loyalty" challenge shares a similar problem and has an opposite problem. The similar problem is the relevance of the distinction to the phrase "subject to U.S. jurisdiction." Similarly to "lawful" versus "unlawful" residency, there is no reason why one's "allegiance" while in residence has any bearing on whether he or she is subject to U.S. jurisdiction. A resident who is arguably loyal to another nation or disloyal to the United States is still subject to U.S. jurisdiction criminally and civilly. Now here is the opposite problem: The "allegiance" argument is a relic of the distant past of monarchies and subjects, not republics and citizens. The argument relies too heavily on the distant past, too remote from the 1860s. These arguments rely on English sources long before 1800, and they lack historical support from the years when the Fourteenth Amendment was drafted (1866) and ratified (1867–68).

Whether or not one is an originalist, the more relevant timeframe for historical context is the window of drafting and ratification, and the most relevant sources are the debates about the constitutional text. For originalists, that timeframe and those sources are even more crucial—and often to the exclusion of sources too late and too early to be probative of the meaning and understanding of the public that ratified the text and made it law. It is remarkable that the government brief offers almost no evidence of anyone referring to "domicile," nor the problem of "sojourners" or of "temporary visitors" from the drafting or public ratification debates of the Fourteenth Amendment. The entire section of the brief titled "Ratification-era Evidence" does not even cover two full pages.[50] And almost none of it comes from the drafting or ratification debates. Meanwhile, the government brief's section "Post-ratification evidence" is over four pages, and almost all of the evidence is from 1881 to 1922, decades after ratification—too late to be probative of original public meaning.[51] The government brief titles its section on these sources "Contemporary commentators," but 1881 to 1922 is no more contemporary to the Fourteenth Amendment than commentaries from 1981 to 2022 would be "contemporary" with 1966-1968.

The only exchange the government cited from these debates is grossly exaggerated in the government brief. Here is the government brief's passage:

> Senator Benjamin Wade initially proposed a version of the Amendment that would have granted citizenship to "persons born in the United States" (without the requirement of being "subject to the jurisdiction"). But Senator William P. Fessenden objected that the proposal would extend citizenship to "a person [who] is born here of parents from abroad temporarily in this country."[52]

It is an overstatement to claim that Fessenden "objected." He was asking a question for clarification. Here is Fessenden's full sentence that the government

50. *See* Brief for Petitioners, *supra* note 3, at 23–24.

51. *Id.* at 24–29.

52. *Id.* at 24 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2768–69 (1866) (citation omitted).

cut back conveniently: "Suppose a person is born here of parents from abroad temporarily in this country."[53]

Conveniently enough, the government brief did not mention Senator Wade's clear answer of confirmation. Specifically, Wade answered that "a person may be born here and not be a citizen"—but recognized only a narrow exception: "the case of the children of foreign ministers" in the United States under a "fiction of law." Wade continued: This exception "could hardly be applicable to more than two or three or four persons; and it would be best not to alter the law for that case"; it "would make no difference in the result" to word around the category.[54]

Neither Fessenden nor any other Senator replied to Wade's answer to "object" (as the government claimed) or to ask about other kinds of temporary residents. Instead of evidence against birthright citizenship for children born to other types of temporary residents, the exchange confirms that Congress engaged the question of individuals "born here of parents from abroad temporarily in this country." The final wording of the citizenship clause added "subject to the jurisdiction," and from this exchange, it seems more plausible that these words were added to signal this kind of traditional, narrow brightline exception. There is no evidence that this wording was intended to mollify Senator Fessenden. It is difficult to understand why this wording would have clearly addressed Senator Fessenden's question of temporariness (temporary visitors are subject to criminal and civil jurisdiction). It is far more plausible that "subject to the jurisdiction" would signal limited application to foreign ministers and their children, who are protected from jurisdiction and legal liabilities.

The Fessenden-Wade exchange indicates that the question was asked and answered: The children of all other categories of "temporary" visitors or sojourners would be covered by the birthright citizenship rule. Crucially, there is no record of any actual objection after that answer. The government cited this exchange, but upon closer scrutiny, it is probative evidence *in favor* of the inclusion of temporary visitors. The government's reliance on this exchange reveals just how little evidence the anti-birthright side has to offer, even after searching wide and far, and it reveals the lack of intellectual credibility on the government side. To be clear: They had to resort to misrepresenting this exchange from the official records to manufacture evidence, because they do not have actual evidence of original public meaning.

The only other sources from between crucial years 1866 to 1868 are not related to the Fourteenth Amendment, but to the citizenship clause in the Civil Rights Act of 1866—a related clause, but not the same language. Moreover, this evidence about the separate statute—again, not even about the Fourteenth Amendment—was not from the debates themselves, but from a private letter

53. CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866) (statement of Sen. Fessenden).

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

(from Senator Trumble to President Johnson)[55] and a single newspaper.[56] The government brief cannot cite even a single American legal treatise from the 1860s in support of its claims.[57]

Other scholars challenging birthright citizenship also failed to find support for their interpretations from the actual drafting and ratification debates, despite having searched for anything. They broaden their search far beyond 1866 to 1868—from years long before and after the relevant window for public meaning. Some rely primarily on old English cases, like *Calvin's Case* from 1607, or on old English legal treatises.[58] In the first salvo of the challenge to birthright citizenship in 2025, in a *New York Times* opinion essay, Randy Barnett and Ilan Wurman claimed only one source from the nineteenth century (Attorney General Edward Bates's opinion from 1862). [59] However, Bates left the Lincoln administration after being passed over for a judicial appointment in 1864, so he was long gone before the drafting of the Fourteenth Amendment.[60] Bates was also no racial egalitarian: In 1863, he supported the Emancipation Proclamation on the condition of forced emigration (deportation) of freed slaves to Central America or Africa. A colleague recalled that Bates was "fully convinced . . . that the two races could not live and thrive in social proximity," and assimilation would be impossible.[61] Bates should be considered less sympathetic to inclusion and birthright citizenship than the drafters of the Fourteenth Amendment, and yet, his full opinion is consistent with a broad birthright citizenship rule.

Indeed, Barnett and Wurman misinterpreted the Bates opinion. In fact, their essay got its meaning backwards.[62] Even when Wurman took more time and space (ninety-four pages) to develop the evidence, he still offered no sources related to the drafting of the Fourteenth Amendment's text or its ratification. He again mistakenly relies on that same source, as well as other sources, about a

55. Brief for Petitioners, *supra* note 3, at 24 (citing Letter from Senator Lyman Trumbull to President Andrew Johnson (n.d.) (on file with Libr. of Cong., Andrew Johnson Papers, Reel 45).

56. *Id.* (citing CHI. REPUBLICAN, Mar. 30, 1866, at 4).

57. The only treatise cited in the Petitioner's Brief from the 1860s is H.W. HALLECK, INTERNATIONAL LAW (1861). The treatise was published in London and it was, at best, a tangential point, but more accurately, an entirely different question of conscription, not citizenship. Referring to the treatise, the Petitioner's Brief states: "And under traditional principles of the law of nations, "[d]omiciled foreigners" are subject to conscription." Brief for Petitioners at 20, *supra* note 3, at 20 (citing HALLECK, supra note 57, at 385).

58. *See, e.g.*, Brief for Prof. Ilan Wurman as Amicus Curiae Supporting Petitioners at 3–6, 9–10, 14, Trump v. Barbara, No. 25-365 (U.S. Jan. 27, 2026); Lash, *supra* note 44 (manuscript at 3).

59. Randy E. Barnett & Ilan Wurman, Opinion, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html.

60. DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 673–74 (2005).

61. *Id.* at 465–66.

62. Jed Shugerman, *Birthright Citizenship: Barnett & Wurman's NY Times Essay and Their Bates/Blackstone Double Backfire* (Feb. 16, 2025), https://shugerblogcom.wordpress.com/2025/02/16/birthright-citizenship-barnett-wurmans-ny-times-essay-and-their-bates-backfire; Jed Shugerman, *Birthright Citizenship, Again: Barnett and Wurman Misread Bates Again (And They Misread Ramsey and Me)* (Feb. 19, 2025), https://shugerblogcom.wordpress.com/2025/02/19/birthright-citizenship-again-barnett-wurman-misread-bates-again-and-they-misread-ramsey-and-me.

common law background understanding about parents who are "travelers and transient residents" or temporary residents,[63] but the specific text of the Fourteenth Amendment departed from those parental conditions by specifying "born" and the status of birth. Wurman offers no source to connect this historical background to the phrase "subject to U.S. jurisdiction." Of course, a temporary resident is still subject to U.S. jurisdiction, unless they are a diplomat or a child of a diplomat or some similar status. Late in his essay, Wurman essentially concedes that he has no evidence from the drafting and ratification of the Fourteenth Amendment from 1866 to 1868, as he is relying only on "traditional rules at common law related to jurisdiction" and other more remote sources.[64] This concession and the absence of sources on the specific meaning of the Fourteenth Amendment's "jurisdiction" circa 1866 to 1868 is a remarkable silence, perhaps described as deafening dogs that apparently did not bark.

Kurt Lash, in his ninety-five-page paper offering a similar "allegiance" argument, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*,[65] also relies on the same 1862 Bates opinion, and as others have explained, his reliance is similarly misplaced.[66] Lash also relies on the same *private* letter from Senator Trumbull to President Johnson *about the Civil Rights Act of 1866*—not even the original public meaning of the Fourteenth Amendment, and not even a public source at all.[67] (Original public meaning is evidence of democratic ratification; private letters might reflect a single author's "original intent," but that is not public meaning.)

Lash even uses a quotation from Senator Lyman Trumbull, the Senate's sponsor of the Citizenship Clause, as the epigraph to his essay: "[W]hat do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."[68] Unfortunately, this epigraph leaves out one of Trumbull's next sentences that provides sufficient context. To Lash's credit, he includes this sentence later in the body of his essay: "It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other

63. Wurman, *supra* note 44, at 360–61.

64. *Id.* at 424–26 ("What was the original meaning of the Citizenship Clause in the period from 1866 to 1868, when it was drafted and then ratified by the states? And what relationship did that meaning have to the common law? In a nutshell, it seems that the original meaning of the clause largely encapsulated the common law. All of the traditional rules at common law related to jurisdiction because . . . one generally had to be under the protection and within the allegiance of the sovereign to be subject to that sovereign's jurisdiction—and certainly to be subject to its complete jurisdiction. . . . It may be further objected that the analysis thus far is not consistent with originalist methodology more generally, focused as it is on legal history and on the framers' intent. Yet most originalists examine text, structure, intent, and early historical practice to ascertain the likely original meaning, or the range of plausible meanings, of a particular constitutional provision.").

65. Lash, *supra* note 44 (manuscript at 32).

66. Evan Bernick, *88 Problems for Kurt Lash* (Mar. 31, 2025, at 10:15 ET), https://reason.com/volokh/2025/03/31/88-problems-for-kurt-lash.

67. Lash, *supra* note 44 (manuscript at 44–45, 84).

68. *Id.* (manuscript at 8) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866)).

Government that he is 'subject to the jurisdiction of the United States.'"[69] The context of quotations from Trumbull (and Senator John Bingham)[70] on "allegiance" shows that they were simply giving an explanation for the standard formal exceptions: the children of diplomats, of invaders, and of sovereign tribes. Allegiance in those cases is an aspect of a formal and legalistic bright-line. What evidence is there that Trumbull or Bingham meant "allegiance" in more complicated case-by-case, or group-by-group circumstances? As a subjective standard about "loyalty" that obviously would be difficult to administer? Lash does not offer any.

He acknowledges that in other debates, when Trumbull was asked about the specific cases of Chinese and "Gypsies," Trumbull immediately clarified, "[u]ndoubtedly" in confirming the intent to grant citizenship to their children, without raising any question about their allegiance.[71] As I will show, if there was ever an opportunity for senators or members of the House or any other members of the public to raise an "allegiance" theory of citizenship, it was about the Chinese in a time of racial stereotype about "coolies" serving Chinese masters. And yet Lash offers no evidence of such a broader application of the "allegiance" explanation.

Richard Epstein's essay, *The Hopeless Case for Birthright Citizenship*, also does not have a single source from the 1860s articulating that "subject to the jurisdiction" would not apply to unlawful aliens, temporary visitors, or residents allegedly loyal to another nation.[72]

C. THE "ALLEGIANCE" OR "CONSENT" THEORY VERSUS THE BASIC PURPOSE OF THE 14TH AMENDMENT: BLACK CITIZENSHIP

The anti-birthright scholars and briefs fundamentally misunderstand these sources on the relationship between "citizenship" and "allegiance." Their

69. *Id.* (manuscript at 54) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866)). For a persuasive critique of Lash's use of Trumbull, see Evan Bernick, *Lash's Last Stand* (Apr. 1, 2025, at 11:28 ET), https://reason.com/volokh/2025/04/01/lashs-last-stand.

70. Lash, *supra* note 44 (manuscript at 8, 44, 47, 59) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham) ("[E]very human being born within the jurisdiction of the United States *of parents not owing allegiance to any foreign sovereignty* is, in the language of your Constitution itself, a natural-born citizen.")).

71. *Id.* (manuscript at 36) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull)).

72. *See* Epstein, *supra* note 47, at 6–7. Epstein's essay cites *Ludlam v. Ludlam*, 26 N.Y. 356 (1863) for the proposition that "[a]t common law, the duty of allegiance and the rights of citizenship passed by descent, the child following the condition of the father." Epstein, *supra* note 47, at 6–7. The proposition means that allegiance follows by descent, and citizenship follows by descent—not that citizenship follows allegiance. *Id.* Epstein relies on the 1790 Naturalization Act, but ignores the more relevant Civil Rights Act of 1866. *Id.* If Epstein assumes that the legal status of parents binds the status of the child, he has no answer for why both the text of the Civil Rights Act of 1866 and the Fourteenth Amendment focus on "birth" as its own legal condition, separate from the parent. There is an obvious textual problem in Epstein leaping from a claim about parentage to a text about the location of birth. Regardless of any default rule about parentage, the 1866 statute and the Fourteenth Amendment departed from any default rule by specifying birth, not parental status. Epstein offers no sources about the 1866 Act or the Fourteenth Amendment that would revert to parental status or parental allegiance.

assumptions reverse the causal arrows. They assumed "citizenship" followed from "allegiance," but the eighteenth- and nineteenth-century sources (for example, Attorney General Bates) had a more conventional, common-sense meaning that "allegiance" followed from "citizenship."

Let's revisit the sentence from the Attorney General Bates upon which the government brief and the anti-birthright scholars like Lash and Wurman relied.[73]

> [T]he Constitution uses the word "citizen" only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other.[74]

This sentence is ambiguous. It does not state explicitly that allegiance is a prerequisite for citizenship. Given this ambiguity, it is obvious that one should keep reading for more context. Lo and behold, soon after that ambiguous sentence, Bates has four paragraphs that unambiguously endorse birthright citizenship as "universal":

> As far as I know, Mr. Secretary, you and I have no better title to the citizenship which we enjoy than the "accident of birth"—the fact that we happened to be born in the United States. And our Constitution, in speaking of natural-born citizens, uses no affirmative language to make them such, but only recognizes and reaffirms the universal principle, common to all nations and as old as political society, that the people born in a country do constitute the nation, and, as individuals, are natural members of the body-politic.
>
> If this be a true principle—and I do not doubt it—it follows that every person born in the country is, at the moment of birth, prima facie a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the "natural-born" right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance.
>
> That nativity furnishes the rule, both of duty and of right, as between the individual and the government, is a historical and political truth so old and so universally accepted that it is needless to prove it by authority. Nevertheless, for the satisfaction of those who may have doubts upon the subject, I note a few books, which, I think, cannot fail
>
> l to remove all such doubts: Kent's Com., vol. 2, part 4, sec. 25; Bl. Com. [Blackstone's Commentaries], book 1, ch. 10, p. 365; 7 Co. Rep., Calvin's case; 4 Term Rep., p. 300, Doe v. Jones; 3 Pet. Rep., p. 246, Shanks v. Dupont; and see a very learned treatise, attributed to Mr. Binney, in 2 Am. Law Reporter, 193.
>
> In every civilized country the individual is born to duties and rights—the duty of allegiance and the right to protection; and these are correlative obligations,

73. Brief for Petitioners, *supra* note 3, at 17; Lash, *supra* note 44 (manuscript at 31); Wurman, *supra* note 44, at 360–61.

74. Citizenship, 10 Op. Att'ys. Gen. 382, 388 (1862); *see supra* Section I.B.

> the one the price of the other, and they constitute the all-sufficient bond of union between the individual and his country, and the country he is born in is, prima facie, his country[.] In most countries the old law was broadly laid down that this natural connection between the individual and his native country was perpetual—at least that the tie was indissoluble by the act of the subject alone.[75]

It is a *very serious problem* for the anti-birthright side that Bates made such a broad, detailed, and unambiguous endorsement of birthright citizenship as "universal." The government brief does not acknowledge that fact.

Lash and Wurman argued that birthright was only a default rule (a "prima facia" case), with an extra "allegiance" rule, or perhaps "non-allegiance" exception to that rule. They rely on that earlier single sentence as a reference to that rule or exception. First, they have no source in Bates or any other relevant document that explicitly spells out this rule and such a broad exception.

The rest of Bates's opinion shows that he did not have an "allegiance" requirement for granting citizenship. Bates never said that allegiance comes before citizenship or that allegiance was a prerequisite for citizenship. Citizenship causes a duty of allegiance. Lash, Wurman, and the government brief all have their causal sequence backward.

Their misinterpretation is that allegiance is a requirement for citizenship:

- Allegiance → Citizenship

To the contrary, Bates was arguing that citizenship creates duties of allegiance and rights from allegiance:

- Citizenship → Duty of Allegiance (and protection)

Moreover:

- Birthright → Citizenship → Duty of Allegiance and right of protection.

The bottom line is that, in an extended opinion on African American citizenship, Bates was discussing what rights and duties *follow from* citizenship, and the sentence was part of that extended discussion. Nowhere does Bates add support or context for an "allegiance" prerequisite, as if the causation would also run the opposite way.

Originalist Michael Ramsey offered a similar critique of their argument in The Originalism Blog:

> The Barnett/Wurman view misreads Bates. The English law, on which Bates relied, did rest on the idea of protection in return for allegiance. But this relationship did not arise from a compact made by the parents, and Bates nowhere says or implies that it did. Rather, the *jus soli* principle he was describing arose from a natural law relationship between the sovereign and the *child*. The sovereign owed protection and the child owed allegiance as a result of birth in sovereign territory, entirely apart from consent on either side. There may well have been people in nineteenth-century America who tried to

75. Citizenship, 10 Op. Att'ys. Gen. 382, 388–90 (1862) (citations omitted).

> restate the English natural law rule as one derived from social compact, but that isn't what Bates was doing.[76]

Bates's meaning is not complicated. The notion that citizenship entails both rights and duties is basic. From high school through law school, we discuss and debate what duties and rights are entailed from citizenship: Voting (a right and a duty)? Jury service (a right and a duty)? A duty to registering for the draft at eighteen years-old? And a right to protest against the draft? Bates was answering one question: What are the rights and duties that come from citizenship? He was not answering the question assumed by the government: Does citizenship come from allegiance and loyalty?

In the end, this question also is not complicated. Birthright citizenship is a simple rule, with very narrow exceptions from a common-sense reading of "subject to jurisdiction": Jurisdiction distinguished sovereign Native American tribes with separate jurisdiction; ambassadors and diplomats are subject to the jurisdiction of their home country; and invading armies do not make themselves subject to jurisdiction.

It is clear why Republicans in the middle of Reconstruction would demand a broad, simple bright-line rule of birthright citizenship, without gray areas about parents' allegiances or intentions. Their experience with the Confederacy and the subsequent Black Codes made it clear that they could not trust local officials with subjective and flexible stardards or gray areas. Their goal was to simply and clarify citizenship for all freed slaves, with no "allegiance" tests or oaths (or literacy tests, etc.), and no subjective standards about "domicile" and parents' intentions years ago—if not decades ago—as local procedural hurdles or obstacles that would be foreseeably manipulated to deny African-American citizenship and frustrate Reconstruction.

This is a huge originalist problem. If the core purpose of the Fourteenth Amendment's citizenship clause was to overturn *Dred Scott v. Sandford* and clarify citizenship for ex-slaves, the allegiance and consent theory presented an obvious problem: Ex-slaves and their children were born in the United States with no mutual consent and no mutual exchange of allegiance-for-protection, because obviously American law had denied their capacity for legal consent and legal protection for generations.

An "allegiance" or "loyalty" rule would have been an obvious invitation to ex-Confederate states to deny citizenship to ex-slaves case-by-case, just like those states used "Grandfather clauses," literacy tests, and poll taxes. Moreover, an "allegiance" or "loyalty" rule would have an obvious invitation to Republican officials to deny citizenship to the white children born during the Civil War in the Confederacy to "disloyal" parents.

The children of slaves and of Confederates are two big-dogs-that-didn't-bark problems: If anyone thought the Equal Protection Clause could imply an

76. Michael Ramsey, *Birthright Citizenship and the Bates Opinion* (Feb. 18, 2025, at 06:20 PT), https://originalismblog.com/birthright-citizenship-and-the-bates-opinionmichael-ramsey.

"allegiance" requirement, that would have created questions and problems for ex-slaves and their children (who never had received the allegiance-for-protection "contract") and Confederates (who rejected allegiance!) – and their children. If Lash, Wurman, and the government lawyers could not find a single person raising that question, either as a concern or a problem during the 14th Amendment ratification debates, then no one shared their interpretation or worried about it as an originalist matter. Even if these modern lawyers and professors might come up with their own legal solutions to the problems, they are giving post-hoc answers, instead of citing the questions and answers from the "original" drafters and ratifiers that would have been in the record if anyone had such questions back in 1866–1868.

The answer is simple—just as simple as the birthright citizenship rule was always intended to be. Republicans wanted a bright-line rule with few exceptions and little room for subjective applications and racist manipulation. That big picture answer from the originalist purposes of the Fourteenth Amendment is a lot simpler than the increasingly deep and convoluted hole the anti-birthright lawyers and scholars keep digging. Further, that digging produces evidence that, upon just a bit more reading in context, turns out to contradict their claims.

From an originalist perspective on original public meaning, the evidence in the anti-birthright briefs—and the deafening silence and deep gaps in those briefs—have only confirmed the strong originalist case for birthright citizenship.

II. CONGRESS ENDORSED ROMA ("GYPSY") AND CHINESE CITIZENSHIP AND REJECTED "ALLEGIANCE"

Given these laws and the ongoing fight in California to restrict Chinese immigration at the time, someone in Congress (or elsewhere in the historical record) would have raised this question of illegal or unlawful status if extending citizenship were controversial. Instead, when the congressional debate raised the question of how broad birthright citizenship would apply to Chinese immigrants, no one is recorded questioning their legal status or raising this question about such a foreseeable status of unlawful entry or broader exclusions.[77] In fact, the California senator who had concerns about Chinese immigration still explicitly interpreted the clause to extend citizenship to the children of any Chinese immigrants, and he embraced this consensus position on broad birthright citizenship.[78]

The question of Chinese immigrants' status arose first during the drafting of the 1866 Civil Rights Act, which covered the citizenship question on a statutory basis—as background context for the Fourteenth Amendment. The language of the 1866 Civil Rights Act was narrower, using the phrase "not subject to a foreign power," and not the Fourteenth Amendment's phrase

77. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890–99 (1866).
78. *Id.* at 2892 (statement of Sen. Conness).

"subject to the jurisdiction thereof."[79] One could imagine the statute's language being more exclusive: Some residents might be subject legally both to a foreign power and to U.S. jurisdiction. Dual citizens could be subject to a foreign power, while also subject to U.S. jurisdiction. A foreign student with a temporary visa could be subject to both. One can imagine other examples of more exclusive potential readings.

Nevertheless, the statute's drafters stated clearly that they intended the Act to extend citizenship to aliens' children (not including children of foreign diplomats). Senator Trumbull, a leading drafter, was asked if the Act would affirm citizenship for "the children of Chinese and Gypsies born in this country."[80] He answered, "undoubtedly," and added "the child of an Asiatic is just as much a citizen as the child of a European."[81]

Newspapers covered this exchange. *The Chicago Daily Tribune* reported: "Mr. Cowan, of Pa., called attention to the fact that this amendment would naturalize a great number of Chinese children in California. Mr. Trumbull said the children of Chinese parents born in this country were citizens. If this were not true, there were many counties in Pennsylvania so thickly inhabited by Germans that there must be very few citizens in them."[82]

President Andrew Johnson vetoed the Civil Rights Act of 1866, and one reason for his opposition was that the bill would extend citizenship to children of "the people called gypsies" and to Chinese immigrants' children: The bill "comprehends the Chinese of the Pacific States . . . [e]very individual of these races born in the United States is by the bill made a citizen of the United States."[83] Congress overrode President Johnson's veto on April 9, 1866.[84] At the end of that month, Congress began debating the Fourteenth Amendment.

The debate over the 1866 Civil Rights Act was consistent background for the Fourteenth Amendment's citizenship clause. On April 30, the Joint Committee of Fifteen on Reconstruction offered its draft of what would become the Fourteenth Amendment. It did not include a clause on birthright citizenship, but when the debate raised questions about *Dred Scott*'s continuing status as precedent, Senator Jacob Howard of Michigan introduced a proposal for what would become the citizenship clause: "All persons born or naturalized in the

79. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981).

80. CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull).

81. *Id.* (same). Trumbull later noted his "desire" to "make citizens of everybody born in the United States who owe allegiance to the United States. We cannot make citizens of the child of a foreign minister who is temporarily residing here." *Id.* at 572 (same).

82. *See* Expert Declaration of Beth Lew Williams, OCA-Asian Pac. Am. Advocs. v. Rubio, 1:25-CV-00287 (D.D.C.) (Jan. 30, 2025), at 18 n.47 (citing *Proceedings of Congress*, CHI. DAILY TRIB., Jan. 31, 1866). *See generally* BETH LEW WILLIAMS, THE CHINESE MUST GO.

83. Andrew Johnson, *March 27, 1866: Veto Messages on Civil Rights Legislation*, *in* 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3603 (James D. Richardson ed., 1897); *see* Magliocca, *supra* note 14 (manuscript at 2).

84. On April 6, 1866, the Senate overrode the veto by a 33 to 15 vote. S. JOURNAL, 39th Cong., 1st Sess. 317 (1866). On April 9, 1866, the House overrode the veto 122 to 41. H. JOURNAL, 39th Cong., 1st Sess. 528 (1866).

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[85]

Senator Doolittle moved to add further language expressly excluding "Indians not taxed."[86] That language had been in the 1866 Civil Rights Act. The drafters replied that the term "subject to U.S. jurisdiction" already implied that exception. As a legal matter, many Native tribes had treaties of independence that meant they were not fully subject to U.S. jurisdiction, as American precedents had long held.[87] As a practical matter, many tribal members lived so remotely from American authorities that they were not subject to U.S. jurisdiction in any meaningful sense.[88]

Senator Howard expanded on this narrow exception to "subject to U.S. jurisdiction," stating "[t]he Government of the United States have always regarded and treated the Indian tribes within our limits as foreign Powers, so far as the treaty-making power is concerned, and so far especially as the commercial power is concerned." [89] Later that day, he elaborated: "We have always recognized in an Indian tribe the same sovereignty over the soil which it occupied as we recognize in a foreign nation of a power in itself over its national domains."[90]

Senator Trumbull offered a similar explanation: "It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens." [91] This definition would include "unlawful immigrants" who are completely within U.S. jurisdiction and subject to American law, regardless of "allegiance." Trumbull continued:

> We have had in this country, and have to-day, a large region of the 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. They would not be embraced by this provision.[92]

These explanations show that Kurt Lash has misinterpreted their use of the word "allegiance," which was a narrower explanation for these specific exceptions, rather than a broader principle to create new exceptions.

The discussion of this exception opened the door to the topic of other exceptions. Members of Congress explicitly discussed the children born to immigrants on American soil, and specifically the children of Chinese

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

86. *Id.* at 2890.

87. *See* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 443–44 (2020).

88. *Id.* at 444.

89. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard); *see* Ramsey, *supra* note 87, at 428.

90. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard).

91. *Id.* at 2893 (statement of Sen. Trumbull).

92. *Id.* at 2894 (same).

immigrants. Senator Cowan renewed his similar objections from the Civil Rights Act from a month earlier, asking: "Is the child of a Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen?"[93] He called these groups "trespassers" who had "no allegiance" to the United States government.[94]

Senator Conness of California answered Cowan, declaring that "children of all parentage whatever" born in the U.S. would be citizens under the proposed clause. [95] The phrase "subject to U.S. jurisdiction" would mean granting citizenship for all "human beings born in the United States."[96] Conness was not even sympathetic to Chinese immigration. He conceded (unnecessarily and unfairly) that Chinese migrants "all return to their own country at some time or another," and he conceded that he shared concerns about the increase of Chinese immigration to California.[97] Nevertheless, he confirmed that he supported broad birthright citizenship, confirming the same position he had taken on the Civil Rights Act of 1866:

> 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 incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so. . . . [T]he children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States.[98]

Conness explicitly referred to California's "restrictive statutes as to the Chinese," specifying the various taxes, but "all such laws, when tested before the supreme court of the State of California . . . have been decided to be unconstitutional and void." Senator Howard added, "A very just and constitutional decision, undoubtedly."[99] Then Conness continued to explain the basis for these decisions was "violative of our treaty obligations, an interference with the commerce of the nation," that is, the dormant commerce clause doctrine.[100]

Senator Conness made it clear that he was acknowledging the Chinese as "a class of people" who were facing discrimination, and he addressed Senator Cowan directly:

> I beg my honorable friend from PA to give himself no further trouble on account of the Chinese in California or the Pacific coast. We are fully aware of the nature of *that class of people* and their influence among us, and feel

93. *Id.* at 2890 (statement of Sen. Cowan).
94. *Id.* at 2891 (same).
95. *Id.* (statement of Sen. Conness).
96. *Id.* at 2892 (same).
97. *Id.* at 2891 (same).
98. *Id.* (same).
99. *Id.*
100. *Id.* at 2892 (same).

> entirely able to take care of them and to provide against any evils that may flow from their presence among us.[101]

Kurt Lash, a scholar who interprets the Fourteenth Amendment to require "allegiance," acknowledges that Senator Conness referred explicitly to California's state laws, but in trying to parry this evidence of widespread awareness of these restrictions, Lash misunderstands the argument. I am pointing out that the drafters of the Fourteenth Amendment were aware of immigration restrictions and the anti-immigration movement in 1866.

Without acknowledging that he is conceding this core point, Lash replies, "The above comments of California Senator Conness, however, show precisely the opposite. Although members were made aware of such laws, they viewed such laws as invalid and that the proposed amendment would render such discriminatory laws against the Chinese unconstitutional."[102] To the contrary, Senator Conness never offered an equal protection argument or any other Fourteenth Amendment argument. Conness was responding at length to criticize Cowan's anti-Chinese bias. A full column and a half after moving on from the California laws and court decision, he was speaking generally about anti-Chinese discrimination when he concluded with the passage that Lash cited: "[T]he children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others."[103]

Lash took this conclusion out of context, cherry-picking from a different part of Conness's speech. Senator Conness never invoked the Equal Protection Clause as a legal basis to strike down anti-immigration laws. One can imagine Conness could have made that argument, but he did not. Instead, Conness referred to a treaty and the dormant commerce clause doctrine. Conness and the other Senators knew that Congress recently passed laws limiting Chinese immigration. If Congress passed tougher restrictions, the dormant commerce clause doctrine was no problem. With the benefit of hindsight, we know that this anti-Chinese political movement would lead to the Page Act of 1875 and the Chinese Exclusion Act of 1882, and we know that these laws would stand, despite treaties and the Fourteenth Amendment. Lash wrongly interpreted not only Senator Conness's speech, he also misunderstood the California cases and misjudged the relevance of the Fourteenth Amendment to this debate.

The point stands even more clearly after this exchange: The Senators were conscious of anti-Chinese stereotypes and of spreading support for anti-Chinese immigration restrictions. And yet no Senator disputed Conness's response or even wondered about the impact of state anti-immigration restrictions that another court might strike down for violating the dormant commerce clause; or

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101. *Id.* (same).

102. Lash, *supra* note 44 (manuscript at 52–53 n.272).

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

a federal restriction that might be neutral on race. No one argued that a future category of "illegality" might be a problem.

Moreover, no senator was recorded agreeing with Cowan on either restricting citizenship of Chinese or "Gypsies" or on the basis of permanent versus temporary residence or on the basis of "allegiance."[104] No senator was recorded as disagreeing with Conness's interpretation of the proposed birthright clause, including Howard, who had proposed the language.[105] No change was proposed or adopted to indicate a narrower application, and the Senate voted to approve Howard's language shortly afterward.[106] From these exchanges, Michael Ramsey concluded in *Originalism and Birthright Citizenship*, that the 14th Amendment's original public meaning was broad birthright citizenship: "It is hard to read this result other than as confirming Conness's (and Cowan's) understanding."[107]

As background, Senator Conness also had voted for the 1866 Civil Rights Act.[108] He further affirmed his interpretation of the clause: "[T]he children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States."[109] Conness acknowledged that many Chinese immigrants stayed only temporarily, and nevertheless, the clause would grant citizenship to their American-born children: Chinese immigrants "all return to their own country at some time or other, either alive or dead. . . . Those persons return invariably, while others take their places . . . ."[110]

Nevertheless, Senator Conness confirmed the citizenship clause would mean that all "human beings born in the United States shall be regarded as citizens of the United States."[111] The clause would grant Chinese children citizenship regardless of their parents' temporary status, and he supported the clause.[112] Again, the debates do not reflect any objection to Conness's broader affirmation. Newspapers around the country printed summaries of Conness's interpretation.[113]

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104. *Id.* at 2892–97.

105. *Id.*

106. *Id.* at 2897.

107. Ramsey, *supra* note 87, at 448.

108. S. JOURNAL, 39th Cong., 1st Sess. 317 (1866).

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

110. *Id.* (same).

111. *Id.* at 2892 (same).

112. BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA 228, 238, 240 (2018).

113. See Beth Lew Williams Declaration, at 26 n.68. Williams provides an example:

> For example, the *Daily Morning Chronicle* summarized Conness's response: 'Mr. Conness did not anticipate any great danger from this [the children of Chinese and gypsies]. It [the Amendment] only declared as citizens children born in the United States. He had already voted for a law to do this, and was not willing to make it the fundamental law of the land. . . . There were not as many Chinese children now in California as gypsy children in Pennsylvania, and the danger to be apprehended from

It is also notable that these exchanges in 1866 occurred *after* California, Oregon, and the territory of Washington had established anti-Chinese restrictions that established a practical concept or category of unlawful resident immigrants (for those who did not pay the targeted anti-Chinese deterrent taxes or meet other statutory requirements) and *after* the federal government had criminalized the "Coolie trade" as an anti-Chinese immigration measure. These debates occurred in the context of even more restrictive proposals and exclusionary rhetoric.[114] Thus, the category of "unlawful immigrant" was sufficiently salient in 1866, so that the evidence of original public meaning of the Fourteenth Amendment established a broad bright line rule applying to both lawful and unlawful immigrants. Given this context, one would expect someone to have either asked about or objected to such a broad rule applying to Chinese immigrants who had neither entered the country legally under recent federal law[115] nor complied with state law. If it is hard to find any reference to such a question about the Fourteenth Amendment's application to such immigrants, either in the congressional debates or anywhere else, it is implausible that many Americans even wondered if the citizenship clause would apply to unlawful immigrants.

III. ENGLISH EXCLUSION OF "GYPSY" IMMIGRANTS AS UNLAWFUL

The English had enacted restrictions, exclusions, and bans of "Gypsy" or "Roma" immigrants, as documented in treatises and legal sources like William Blackstone's *Commentaries* that would have been familiar to the framers and ratifiers of the Fourteenth Amendment.

When the recent critics of birthright citizenship reach back to the sixteenth century and early seventeenth century for sources on "allegiance" in their effort to limit birthright citizenship, they strain beyond the relevant originalist timeframe to cherry-pick. The history of the anti-Gypsy restrictions is more relevant to the 1860s because they were memorialized by Blackstone, arguably the most important source on English common law background for late-eighteenth and nineteenth century Americans.[116]

Blackstone's *Commentaries* listed anti-Romani laws with other "offenses against the public police or economy."[117] Blackstone stated those laws were still in effect: "Outlandish persons calling themselves *Egyptians*, or *gypsies*, are

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them existed only in the imagination of the Senator and others who deprecated so much the effect of this amendment.

"Senate," DAILY NAT'L INTELLIGENCER, May 31, 1866, at 1.

114. *See infra* Part.IV.

115. *See infra* Subpart.II.B on the Coolie Trade Prohibition Act of 1862.

116. *See* Jed Handelsman Shugerman, *Venality, a Strangely Practical Hstory Unremovable Offices and Limited Excutive Power*, 100 NOTRE DAME L. REV. 213, 220–21 (2024) (providing sources on Blackstone's significance in America); Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUMANS., 125, 152 (2022) (same).

117. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 161–62 (4th ed. 1770).

another object of the severity of some of our unrepealed statutes."[118] Blackstone described their expulsions from other countries and England's restrictions and exclusion with criminal penalties:

> [A] strange kind of commonwealth among themselves of wandering impostors and jugglers, who . . . have [ ] spread themselves all over Europe . . . [T]hey were expelled from France in the year 1560, and from Spain in 1591. And the government in England took the alarm much earlier: for in 1530, they are described by statute . . . as "outlandish people, calling themselves Egyptians . . . who have come into this realm and gone from shire to shire and place to place in great company, and used great, subt[le], and crafty means to deceive the people . . . and also have committed many heinous felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels.[119]

Blackstone also referred later acts of the seventeenth century that criminalized the importation of "such persons . . . into this kingdom."[120]

Commentators on Blackstone added more detail on the criminalization of Roma living in England. Editor Edward Christian added a footnote: "[G]ypsies are now only punishable under the vagrant act, which declares that 'all persons pretending to be gypsies, or wandering in the habit or form of Egyptians, shall be deemed rogues and vagabonds.'"[121] Serjeant Stephen's *New Commentaries on the Laws of England*, an updated commentary building on Blackstone's *Commentaries* in the 1840s, explained that the original anti-Roma statute was replaced by another that was less severe.[122]

H.T. Crofton's *Early Annals of the Gypsies in England* is a secondary source published in the 1880s confirming this history. Crofton described these laws as if they were anti-immigration laws: The Act of 1530, "[i]n order to stop further immigration," directed that "'[f]rom hensforth no such Psone be suffred to come within this the Kinge's Realme."[123] He recounted the arrests of a "large band of Gypsies" in 1544, after which they were "convicted and sentenced" and apparently deported to France.[124] Another group was deported to Norway a few months later.[125] According to Crofton, Queen Elizabeth's Act required the Roma to "quit England and Wales."[126] However, "[n]o natural born subjects . . . were to be compelled" to leave the country, "but only to leave their naughty ways . . . ."[127] Parliament later repealed these laws and replaced them with vagrancy

118. *Id.* at 165.

119. *Id.* at 165–66; *see also* H.T. Crofton, *Early Annals of the Gypsies in England*, 1 J. GYPSY LORE SOC'Y 5, 9 (1889).

120. BLACKSTONE, *supra* note 117, at 166.

121. *Id.* at 166 n.6 (quoting 17 Geo. c. 5, § II).

122. HENRY JOHN STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 309 (1845).

123. Crofton, *supra* note 119 (quoting 22 Hen. c. 10, § VII).

124. *Id.* at 10–11.

125. *See id.* at 11.

126. *Id.* at 16.

127. *Id.*

laws, so that eventually, by the eighteenth century, "the fact of being a Gypsy gradually ceased to be an offence."[128]

Even if the exclusions had been repealed by the drafting of the Fourteenth Amendment, the English themselves had established a category of "unlawful immigrant" or "unlawful resident." Those bans of Roma had still been preserved for American readers in Blackstone, the greatest commentaries on English law, and by other English legal commentators.

IV. RECENT HISTORICAL SCHOLARSHIP ON CALIFORNIA'S ANTI-CHINESE RESTRICTIONS

As soon as California became a state in 1850, many Californians mobilized for state-based legislation restricting Chinese immigration, leading to criminal sanctions and legally effective categories of "unlawful" and "illegal" immigration. From the 1850s through the 1870s, California enacted statutes targeting Chinese residents with a mix of civil and criminal penalties. California law restricted Chinese immigration itself and required Chinese immigrants to pay special licenses and special tax payments with criminal enforcement.

A. STATE AND TERRITORIAL RESTRICTIONS, 1850S-60S

During the Gold Rush after 1849, Chinese immigration to California increased sharply. Mae Ngai has documented a growing political movement in California against Chinese immigration from 1850, building towards total exclusion.[129] Ngai's Bancroft-prize winning book *The Chinese Question* shows California politicians and a nativist movement starting with incremental successes in the 1850s while explicitly campaigning for broader bans and exclusion, that is, a category of unlawful immigrants.[130] John Bigler, the third governor of California, serving from 1852 to 1856, rode anti-Chinese sentiment to office. His campaign trafficked in stereotypes about "coolies," that Chinese immigrant workers served masters in China who held their families "hostage" for the performance of their contract labor in California.[131] Bigler was the first California governor to serve an entire term and the first to be reelected, carried by the anti-Chinese vote in mining counties.[132] During Bigler's first and second terms, California enacted a series of statutes aiming to drive out Chinese immigrants.[133] Ngai observed, "Bigler's success in tarring the Chinese as a 'coolie race' gave California politicians a convenient trope that could be trotted out whenever conditions called for a racial scapegoat."[134] The "Coolie-ism"

128. *Id.* at 23.

129. MAE NGAI, THE CHINESE QUESTION: THE GOLD RUSHES, CHINESE MIGRATION, AND GLOBAL POLITICS 87 (2021).

130. *Id.*at 88.

131. *Id.* at 85.

132. *Id.* at 87.

133. *Id.* at 95–96. For more on these statutes' details, see *infra* remainder of Part.IV.

134. NGAI, *supra* note 129.

trope was understood as a campaign towards exclusion in the 1850s.[135] White miners' labor organizations adopted resolutions calling for bans on Chinese miners, warning of a "flood the state with degraded Asiatics, and fasten, without the sanction of law, the system of peonage on our social organization."[136]

As soon as California became a state in 1850, it enacted a Foreign Miners' Tax statute, which was enforced chiefly against Chinese miners.[137] This tax act was enforced so vigorously against Chinese immigrants that it accounted for almost a quarter of California's total revenue through 1870.[138] By 1853, California politicians frequently compared Chinese immigration to the "Negro slave trade"—a comparison to international human trafficking that had been illegal for forty-five years.[139]

In 1855, California enacted "An Act to Discourage the Immigration to this State of Persons Who Cannot Become Citizens Thereof," which meant non-whites, and specifically, Chinese immigrants. The Act included a Passenger Tax of $50.[140] In 1858, California enacted "An Act to Prevent Further Immigration of Chinese or Mongolians to this State."[141] In 1862, California enacted "An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California," also known as the "Chinese Police Tax," requiring anyone from "the Mongolian race" to pay a monthly tax of $2.50.[142]

The California Supreme Court declared some of these provisions unconstitutional,[143] but these statutes were not formally repealed until 1955.[144]

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135. *Id.* at 91–92, 95–96; Mae. M. Ngai, *Chinese Gold Miners and the "Chinese Question" in Nineteenth-Century California and Victoria*, 101 J. AM. HIST. 1082, 1097 (2015).

136. *Id.*

137. HYUNG-CHAN KIM, A LEGAL HISTORY OF ASIAN AMERICANS, 1790–1990 47 (1994); PING CHIU, CHINESE LABOR IN CALIFORNIA, 1850–1880: AN ECONOMIC STUDY 23 (1967); Ngai, *supra* note 135, at 1097 n.28; Chang, *supra* note 18, at 492; Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century American: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529, 536 (1984).

138. ADAM M. MCKEOWN, MELANCHOLY ORDER: ASIAN MIGRATION AND THE GLOBALIZATION OF BORDERS 126, 133–134 (2008); *see* GYORY, *supra* note 18, at 7; Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882–1924*, 21 J. AM. ETHNIC HIST. 36, 38 (2002).

139. Ngai, *supra* note 135 (citing Chiu, *supra* note 135).

140. An Act to Discourage the Immigration to this State of Persons who Cannot become Citizens Thereof of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194 (officially repealed, Act of Mar. 30, 1955, ch. 46, § 1, 1955 Cal. Stat. 487, 488); *see* KENNY, *supra* note 18.

141. An Act to Prevent Further Immigration of Chinese or Mongolians to this State of Apr. 26, 1858, ch. 529, 1858 Cal. Stat. 296 (repealed 1955); *see* KENNY, *supra* note 18; Chang, *supra* note 18; GYORY, *supra* note 18, at 26–28; Lyman, *supra* note 18.

142. An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (repealed 1939); *see* HIDETAKA HIROTA, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY 102 (2017); KENNY, *supra* note 18; Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 674, 686 (2005); Law, *supra* note 17.

143. People v. Downer, 7 Cal. 169, 171 (1857); Lin Sing v. Washburn, 20 Cal. 534, 552 (1862).

144. Gabriel J. Chin & Anna Ratner, *The End of California's Anti-Asian Alien Land Law: A Case Study in Reparations and Transitional Justice*, 20 ASIAN AM. L.J. 17, 78 (2022) (citing 1955 Cal. Stats. 767, 2831).

The California Supreme Court concluded that the 1862 Chinese Police Tax was "a measure of special and extreme hostility to the Chinese, and that the power asserted in its passage is the right of the State to prescribe the terms upon which they shall be permitted to reside in it."[145] Thus, the California Supreme Court had interpreted the regulation in terms of permitted and unpermitted residency, comparable to lawful versus unlawful domicile and to illegal immigration.[146]

Western territories also restricted Chinese immigration. Just before becoming a state in 1859, Oregon passed a similar law requiring Chinese miners and merchants to obtain monthly, four-dollar licenses.[147] In 1863, Washington Territory adopted "An Act to protect free White labor against competition with Chinese coolie labor, and to discourage the immigration of the Chinese into this territory," imposing a quarterly tax of $6 on every resident "Mongolian."[148]

These state-based restrictions were so salient and well known that the federal government and Chinese officials addressed them in Burlingame-Seward Treaty in 1868.[149] As a result of this awareness and these negotiations, the final treaty addressed anti-Chinese restrictions on the state level, although it did not include an explicit preemption clause to override state law.[150]

In 1870, soon after the ratification of the Fourteenth Amendment, California enacted more direct measures: licensing requirements for Chinese women to reside in the state (framed ostensibly as an anti-prostitution measure), with imprisonment for noncompliance.[151] Five years later, Congress enacted the Page Act that adopted some similar licensing requirements and restrictions that California had adopted.[152] Senator Conness's references to these measures of the 1860s indicate that they were salient in national politics and that they were understood in Congress in the mid-1860s.[153]

145. *Lin Sing*, 20 Cal. at 577.

146. For more, see NGAI, *supra* note 129, at 84–99; Hidetaka Hirota, *Exclusion on the Ground: Racism, Official Discretion, and the Quotidian Enforcement of General Immigration Law in the Pacific Northwest Borderland*, 69 AM. Q. 347, 358 (2017); Beth Lew-Williams, *Before Restriction Became Exclusion: America's Experiment in Diplomatic Immigration Control*, 83 PAC. HIST. REV. 24, 33–34 (2014).

147. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990 21 (1993).

148. LEW WILLIAMS, *supra* note 112, at 43; ROBERT E. WYNNE, REACTION TO THE CHINESE IN THE PACIFIC NORTHWEST, 47–53 (1978); HIROTA, *supra* note 142, at 88–91.

149. John Schrecker, *"For the Equality of Men–For the Equality of Nations": Anson Burlingame and China's First Embassy to the United States, 1868*, 17 J. AM.-EAST ASIAN REL. 9, 9–10, 29 (2010).

150. *Id.* at 29. "Articles three through seven aimed at correcting the injustices faced by the Chinese community on the West Coast and did so by underlining China's international equality." *Id.*

151. Abrams, *supra* note 142, at 674–75 (2005).

152. Page Act of 1875, ch. 141, 18 Stat. 477; *see* NEUMAN, *supra* note 27, at 217; Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 409, 461 (2005); Abrams, *supra* note 142, at 675, 690.

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

B. FEDERAL RESTRICTIONS AND PREVIEWS OF MORE DIRECT BANS

A federal statute in 1862, the Coolie Trade Prohibition Act,[154] regulated Chinese immigration by establishing criminal penalties for the American citizens involved with alleged "coolie labor."[155] Although it did not punish the Chinese immigrants themselves, it made the legal status of alleged "coolies" ambiguous—they would have been in the country illegally, and their status was arguably "illegal" or "undocumented." Historians have found that the federal government had applied anti-slavery laws to Chinese immigrants deemed "coolies" similar to a category of illegal immigration.[156]

The politics of the 1850s had previewed this prohibition. The Secretary of State had instructed the American commissioner to China, Peter Parker, to take public steps to curtail the "coolie" trade in 1856.[157] Parker issued a "public notification" in January 1856 denouncing the coolie trade as "replete with illegalities, immoralities, and revolting and inhuman atrocities, strongly resembling those of the African slave trade in former years, some of them exceeding the horrors of the 'middle passage . . . ' and the foreign name has been rendered odious by this traffic, hundreds and thousands of lives having been inhumanly sacrificed."[158] He and many journalists and politicians equated "coolies" with the banned African slave trade.[159]

In 1860, American diplomats lobbied for federal legislation to abolish and criminalized what they described as a new slave trade and to outlaw Chinese "coolies."[160] As the Civil War began, congressional leaders drafted a constitutional compromise amendment to preserve slavery south of the 36°30' parallel line and to abolish the "foreign slave trade," defined as "the importation of slaves, coolies, or persons held to service or labor, into the United States and the Territories from places beyond the limits thereof."[161] The Republicans in Congress followed up with statutes to ban Chinese coolies.[162] Around the same time, the Confederacy's constitutional convention in Alabama debated a parallel clause against "the importation of slaves, coolies, or persons held to service or labor into the Confederate States and their Territories, from any places beyond the limits thereof."[163] As Moon-Ho Jung has concluded, "Politicians on opposing sides of the secession crisis figured that the preemptive exclusion of

154. Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (repealed 1974).

155. Abrams, *supra* note 142, at 670; Law, *supra* note 17, at 116.

156. *See* MOON-HO JUNG, COOLIES AND CANE: RACE, LABOR, AND SUGAR IN THE AGE OF EMANCIPATION 14–15, 19–22, 24–25 (2006); Moon-Ho Jung, *Outlawing "Coolies": Race, Nation, and Empire in the Age of Emancipation*, 57 AM. Q. 677, 680 (2005) [hereinafter Jung, *Outlawing*]; KENNY, *supra* note 18, at 143.

157. Jung, *Outlawing*, *supra* note 156, at 686–87.

158. *Id.* at 686.

159. *Id.* at 693.

160. *Id.* at 693, 696; *Monthly Record of Current Events*, HARPER'S NEW MONTHLY MAG. 22 (April 1861).

161. Jung, *Outlawing*, *supra* note 156, at 695–96

162. *Id.*; CONG. GLOBE, 37th Cong., 2nd Sess. 350–52; LUCY M. COHEN, CHINESE IN THE POST-CIVIL WAR SOUTH: A PEOPLE WITHOUT A HISTORY 39–45 (1984).

163. Jung, *Outlawing*, *supra* note 156, at 695.

"coolies" would shore up slavery in the South."[164] Of the early 1860s restrictions that Congress passed, he concludes:

> For decades preceding and following the passage of the 1862 law, "coolies" occupied the legal and cultural borderland between slavery and freedom, signifying and enabling critical transitions in U.S. history. . . . What was, in effect, the last slave trade law would lead to a litany of immigration laws ostensibly targeting "coolies" (and prostitutes) in the name of "immigrants" and freedom, including the Page Law of 1875 and the Chinese Exclusion Act of 1882.[165]

CONCLUSION

Throughout the 1850s and 1860s, Americans portrayed Chinese immigrants as "Coolies," a racist slur that referred to indentured servitude and loyalty to a Chinese master. If anyone believed "birthright citizenship" might not apply to those who were suspected of "loyalty" or "allegiance" to another nation, someone would have asked.

Throughout the 1850s and 1860s, Americans on the state and federal level adopted anti-Chinese restrictions and deterrents. They proposed even more direct measures with exclusionary rhetoric. A movement had begun for broader bans and even total exclusion. If anyone thought the Fourteenth Amendment's citizenship clause did not apply to Chinese immigrants who were plausibly "unlawful" under current state and federal law, or would be even more explicitly "unlawful" under foreseeable future exclusions, someone would have asked. No one did.

If the public imagined that the citizenship clause might not apply to those with a question of "loyalty" or "allegiance" to another nation, or with a question of how temporary the immigrant's residence would be, then it is implausible that just one member of Congress was recorded raising such objections about Chinese immigrants. When he did, his colleagues explicitly and overwhelmingly rejected such a proposal. Even those who worried about increasing waves of immigration—like Senator Conness of California—still expressly endorsed citizenship regardless of "allegiance" or permanent "domicile." Thus, Justice Kavanaugh was doubly wrong in *Barbara*:[166] not only was mass immigration foreseeable, the Framers of the Fourteenth Amendment actually saw it—and endorsed granting citizenship to these immigrants' children.

Thus, the up-to-date historical record of original public meaning established a big, broad, bright-line birthright citizenship rule that applies to the children of unlawful immigrants, regardless of any doubt about "allegiance."

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164. *Id.* at 696.

165. *Id.* at 698.

166. Trump v. Barbara, No. 25-CV-365, slip op. at 7–8 (U.S. June 30, 2026) (Kavanaugh, J., concurring in the judgment, dissenting in part).

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