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The Citizenship Clause: A "Legislative History"

Garrett Epps
gepps@ubalt.edu

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The Citizenship Clause: A "Legislative History"

THE CITIZENSHIP CLAUSE: A “LEGISLATIVE HISTORY”

GARRETT EPPS*

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* Professor of Law, *University of Baltimore*; formerly Hollis Professor of Law, *University of Oregon*. Correspondent: *theatlantic.com*. Email: gepps@ubalt.edu. I am grateful to the Center for the Study of Constitutional Originalism at the University of San Diego and to its director, Professor Michael Rappaport, as well as to Center member Professor Michael Ramsey for their work organizing a conference on works in progress in February 2010. I am also honored to have been a participant along with Larry Alexander, Jack Balkin, Randy Barnett, Robert Bennett, Laurence Claus, Michael Kent Curtis, Jim Fleming, John Harrison, Kurt Lash, Yale Kamisar, Kurt Lash, Thomas H. Lee, Thomas Merrill, Miranda McGower, Jack N. Rakove, Maimon Schwarzschild, Lawrence Solum, Keith Whittington, Laurence Claus, and Bryan Wildenthal, and am grateful for the chance to profit by their wisdom. Michael Ramsey in particular had the task of responding to this paper and made extremely useful suggestions based on his area of expertise. I also acknowledge the generosity and intellectual enterprise of Dean John C. Eastman of the Chapman University School of Law, with whom I conducted a lively debate on this issue at a conference on Immigration and Citizenship in January 2008 hosted by the University of Oregon’s Wayne Morse Center for Law & Politics, where I was Resident Scholar for 2007–08. Dean Eastman’s attempts to clarify his thoughts on this issue should not be held ineffectual simply because they may at points have failed to get through to me. I am grateful also to Kevin Johnson and Hiroshi Motomura for their reactions to the debate and their contributions to the conference. Rennard Strickland and Gerald Torres were valuable consultants on questions of federal Indian law and policy. My ideas about the Fourteenth Amendment arise out of colloquia I have participated in at Duke University School of Law, the University of North Carolina, the Washington College of Law of the American University, and the Washington University St. Louis School of Law. I also received cogent comments from Gariel J. (Jack) Chin, Paul Haagen, Michelle McKinley, Adell Amos, Ibrahim Gassama, Merle Weiner, Tom Lininger, Robert Tsai, Elizabeth Samuels, C.J. Peters, William Van Alstyne, Matthew Lindsay, Will Hubbard, and Nienke Grossman. Research assistance was provided by Christina Sutt, Michael Harmon, Colleen O’Brien, Adam Lynn, Julianna Bell, Sarah Razaq, Samantha Schnitzer, and Mark Anderson. Copyright © 2010 by Garrett Epps. All rights reserved.

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INTRODUCTION: THE CITIZENSHIP CLAUSE AND HUMAN MIGRATION

Since before the dawn of recorded history, human civilizations have been built, destroyed, and reshaped by the ceaseless movement of peoples from one place to another over the course of decades and centuries. Like the advance and retreat of glaciers, and the clash of tectonic plates, the human urge to migrate is a force that civilizations may hope to understand and partially mitigate, but can never abolish or control.

The United States as a nation owes its existence to the inexorability of this urge. Five hundred years of forced and voluntary migration have made this country what it is. The American law of immigration can best be viewed as a partial response to the implacable pressure of migration. American immigration laws are not aimed at, and only very remotely shape, this long-term historical force. Constitutional and legal norms may influence how migration affects our society in the present, but they do not create the force of migration and, no matter how altered, cannot abolish it. To focus immigration policy on somehow doing away with migration is likely to prove as futile as would be a climate policy based on outlawing the retreat of the Arctic icecap.

Nonetheless, current policy debate on immigration is influenced by the illusion that we can somehow defuse the surge of immigration. So it should hardly be surprising that at a time like this, we are experiencing an upsurge of interest in the Citizenship Clause of the Fourteenth Amendment, which is the central engine of the legal assimilation of new immigrant populations into the United States.

Because of the Citizenship Clause, “all persons born . . . in the United States, and subject to the jurisdiction thereof” are American citizens. In the case of *United States v. Wong Kim Ark*,¹ the United States Supreme Court held that this guarantee applies to children of foreigners present on American soil, even if their parents are not American citizens and indeed are not eligible to become U.S. citizens.² The Court has not re-examined

1. 169 U.S. 649 (1898).

2. *Id.* at 705.

this issue since the concept of “illegal alien” entered the language,³ but as a practical matter, the American-born children receive recognition of their citizenship regardless of the immigration status of their parents.⁴

As a matter of text, this result is straightforward. A child of illegal aliens, if “born” in the United States, is in a commonsense way surely at the moment of birth “subject to the jurisdiction” of the United States. Any power the law has over children of American citizens at the moment of their birth on American soil, it also has over American-born children of aliens, regardless of the parents’ immigration status. Such a child may be, for example, taken into custody as part of a child abuse investigation, detained indefinitely, placed in foster care, and made adoptable by an appropriate action to strip her parents of parental rights.⁵ Any assets belonging to her, if made subject the subject of a civil dispute, are subject to attachment by the courts under the proper circumstances. The criminal justice system has as much access to her as it does to any child of citizen parents.

This seemingly straightforward application of constitutional text is now under attack. One strand of the attack arises out of simple (and, it must be said, ugly) nativist anger at the impact of immigrants, legal or otherwise, on society. In August 2006, the television news commentator Lou Dobbs “polled” the viewers of his Cable News Network show with the following question: “Do you believe illegal aliens who have anchor babies in the United States should be immune from deportation?”⁶ Ninety-three percent of those responding, he reported, voted “no.”⁷ Recently, Senator

3. The term “illegal alien” pops up in the federal reports in 1950. See *Waisbord v. United States*, 183 F.2d 34, 35 (5th Cir. 1950). “Illegal immigrant” first appears in United States caselaw in 1954, but in a context that refers to British attempts to stop the flow of Jewish refugees to Palestine. *Derecktor v. United States*, 128 F. Supp. 136, 139 (Ct. Cl. 1954). As a term from United States immigration law, it enters the caselaw in 1957, when the Ninth Circuit considered an appeal by a defendant of his conviction for assaulting an immigration officer who, having been informed that illegal entrants from Mexico were present in a Pico, California, bar, had entered the bar and begun asking customers for their place of birth. *Amaya v. United States*, 247 F.2d 947, 948 (9th Cir. 1957). The court stated that “[s]triving to stem the swelling tide of ‘wetbacks’—illegal immigrants from Mexico—that is sweeping into the United States, for years American immigration authorities have progressively tightened their vigilance over the ramparts they watch.” *Id.* at 947.

4. See 8 U.S.C. § 1401 (2006) (codifying birthright citizenship in the United States).

5. See *In re Adoption of Peggy*, 767 N.E.2d 29, 32, 35–36 (Mass. 2002) (holding that the immigration status of a child has no effect on the authority of the state’s child protection agency to exercise jurisdiction over the child); S. Adam Ferguson, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 89 (2007) (“Federal immigration law specifically recognizes state jurisdiction over custody determinations of children who have been abused or neglected, regardless of the child’s immigration status.”).

6. Ken Auletta, *Mad As Hell*, THE NEW YORKER, Dec. 4, 2006, at 72.

7. *Id.* Note the intricate manipulateness of the question. To begin with, it implies

Lindsey Graham denounced aliens who, like livestock, “come here to drop a child. It’s called ‘drop and leave.’”⁸

But, another strand is far more respectable intellectually. This is a legal argument that the interpretation of the Citizenship Clause as covering the children of “illegal” immigrants is inconsistent with the “original intent” of the Framers of the Fourteenth Amendment. This claim is obviously of vast practical consequence. If the Clause is not peremptory in its meaning, then Congress could vote to withhold citizenship from native-born children based on their parents’ immigration status—which, if upheld by the courts, would quickly produce a large population of native non-citizens (possibly stateless as well) within our borders.⁹

Beyond that practical importance, however, the argument is an interesting opportunity to review the nature of “originalism” as a method of constitutional interpretation. Originalism is often advanced as a methodology that holds promise for clarifying unclear portions of constitutional text or for filling lacunae in the document. That is not the use to which it is being put in the context of the Citizenship Clause. Here, the originalist claim is in essence that seemingly clear words mean something other than what they say; that the language was adopted with mental reservation or qualification that should prevent our giving them their plain meaning. In essence, the claim is that the Framers did not really mean what they said. They could not have.

The intellectual framework of this critique of the current law derives from *Citizenship Without Consent* by Peter Schuck and Rogers M. Smith, a book that outlines two conceptions of citizenship, “ascriptive” and “consensual.”¹⁰ In this analysis, citizenship that attaches by birth raises questions of legitimacy, for it involves no act of assent by the new citizen, and (if the citizen is born to a citizen of a different country) by her parents either. This concept is seen as medieval in origin and as contravening the

the existence of a non-existent legal norm; “illegal aliens” who have American-born children are *not* “immune from deportation,” though they may plead the hardship to their citizen children of deportation. Second, by verbal legerdemain it transforms human beings, innocent of crime, into objects made of lead, whose only significance is their utility in the offenses of lawbreakers. What would have been the result had the question been worded, “Should the United States government punish American citizens for the crimes of their parents?”

8. Andy Barr, *Graham Eyes “Birthright Citizenship”*, POLITICO, July 29, 2010, <http://www.politico.com/news/stories/0710/40395.html>.

9. The obsolete term for a “person whose status is midway between being an alien and a natural-born or naturalized subject” is “denizen.” BLACK’S LAW DICTIONARY 499 (9th ed. 2009).

10. PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 4 (1985).

trend of contemporary political theory about citizenship.¹¹ Advocates of abolishing or modifying birthright citizenship note also that many contemporary nations do not provide it, suggesting by implication that the Clause is an antiquated remnant of a former time without relevance to present demographic issues.¹²

Schuck and Smith's argument has been elaborated and refined into a legal argument, most prominently by one of the pioneers of contemporary "originalism," former United States Attorney General Edwin L. Meese, who helped coin the term during the 1980s. In 2004, Meese, as *amicus curiae*, submitted a brief in the case of *Hamdi v. Rumsfeld*,¹³ which turned on the issue of whether the United States Armed Forces could detain Yasser Esam Hamdi as an "enemy combatant" without affording him the procedures specified by the Constitution.¹⁴ The Meese brief argued that the Court should moot the issue by holding that Hamdi, the child of two Saudi citizens temporarily resident in the United States, was not a United States citizen within the proper interpretation of the Citizenship Clause.¹⁵ This claim is all the more constitutionally remarkable because Hamdi's parents, though aliens, were *legal* residents of Louisiana at the time of his birth, present on temporary visas.¹⁶

Counsel of record for the Meese Brief was Dean John C. Eastman of Chapman University.¹⁷ The brief argued that "the clear intent of the Framers who adopted and the people who ratified" the Citizenship Clause

11. See SCHUCK & SMITH, *supra* note 10, at 12 ("English law assumed from antiquity that all persons born within the dominions of the Crown . . . were English subjects.").

12. In the general debate on immigration policy, the originalist arguments for judicial or legislative re-interpretation of the Clause co-exist with a set of policy-based arguments that suggest that, regardless of the text or "intent" of the Clause, birthright citizenship is an antiquated and dangerous policy that should be revoked even if doing so requires amendment of the Clause by use of the Article V process. This argument was first prominently advanced by then-Governor Pete Wilson of California, who advocated restrictions of the rights of "illegal aliens" and non-recognition of their native-born children as citizens during his second term as governor and as a candidate for the Republican presidential nomination in 1996. See Natalie Smith, *Developments in the Legislative Branch: Bill Challenges Birthright Citizenship*, 20 GEO. IMMIGR. L.J. 325, 325 (2006) (summarizing legislative efforts to declare native-born children of "illegal aliens" non-citizens). Legislation by which Congress would declare children of "illegal aliens" no longer entitled to citizenship was introduced in 1997 and has re-emerged repeatedly since then.

13. 542 U.S. 507 (2004).

14. *Id.* at 509; Brief for The Claremont Institute Center for Constitutional Jurisprudence as Amicus Curia Supporting Respondents, *Hamdi*, 542 U.S. 507 (No. 03-6696) [hereinafter *Claremont Amicus Brief*].

15. *Claremont Amicus Brief*, *supra* note 14, at *5 ("Mere birth to foreign nationals who happen to be visiting the United States at the time, as was the case of Hamdi, is not sufficient for constitutionally-compelled citizenship.").

16. *Id.*

17. *Id.* at *20.

“should prevail”¹⁸ and that that “clear intent” of those authoritative Framers and ratifiers was “that only a complete jurisdiction, of the kind that brings with it a total and exclusive allegiance, is sufficient to qualify for the grant of citizenship to which the people of the United States actually consented when they ratified the Fourteenth Amendment.”¹⁹

The Court neither adopted nor addressed the arguments of the brief.²⁰ Dean Eastman, however, argues that the brief scored a victory because Justice Scalia, writing in dissent for himself and Justice Stevens, begins his separate opinion in *Hamdi* by calling the petitioner only a “presumed” citizen of the United States.²¹

Citizenship Without Consent has been subject to a good deal of scholarly criticism.²² Professor Gerald Neuman, in a review of the book at the time of publication, wrote that the authors “seek to *replace* the constitutional language with a meaning that they discern in the legislative history.”²³ But the book has been highly influential, and many other scholars and thinkers have echoed its reasoning. Charles Wood, former counsel to the Senate Judiciary Committee’s Subcommittee on Immigration, has proposed that Congress bar “illegal” aliens from the census count and, by statute, bar their native-born children from citizenship.²⁴ Relying on Schuck and Smith, among other sources, he reads the inclusive language of the Clause as in fact exclusive: “The clause certainly provides that some persons born

18. *Id.* at *i.

19. *Id.* at *16.

20. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 523 (2004) (plurality opinion) (“Justice Scalia largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone.”).

21. *Id.* at 554 (Scalia, J., dissenting). For Dean Eastman’s claim of partial victory in Justice Scalia’s choice of words, see *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 61 (2005) (prepared statement of John C. Eastman, Professor, Chapman University School of Law) (stating that Justice Scalia “declined to accept that Hamdi was actually a citizen”). Dean Eastman is speaking loosely here: Justice Scalia did not *decline to accept* anything. The statement, “I presume he is a citizen” is quite different from “I decline to accept that he is a citizen.” (Imagine the difference in tone if Henry Morton Stanley had strode out of the jungle and said, “I decline to accept that you are Dr. Livingstone.”).

22. See, e.g., Gerald L. Neuman, *Book Review: Back to Dred Scott?* 24 SAN DIEGO L. REV. 485, 496 (1987) (noting that Schuck and Smith’s “reading of the phrase ‘subject to the jurisdiction thereof’ cannot be seriously defended as an exercise in interpretation of the constitutional text.”).

23. *Id.* at 24; see also *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 104 (1995) (statement of Gerald L. Neuman, Professor, Columbia University Law School) (describing Schuck and Smith’s revisionist theory of the citizenship clause as “poorly reasoned,” “historically inaccurate,” and “completely circular”).

24. Charles Wood, *Losing Control of America’s Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465, 466–68 (1999).

in the United States are not citizens, namely those who at birth are not ‘subject to’ the jurisdiction of the United States.”²⁵ The estimable William Mayton has argued that “the historically unimagined fact of the huge number, perhaps twelve million or more, of persons unlawfully within the United States has stressed our understandings of birthright citizenship.”²⁶ Birthright citizenship, Mayton argues, cannot be a correct reading of the Clause, because

[a]t times *jus soli* now makes no sense at all. . . . [j]us soli can be unfair to those made a citizen by it. Citizenship carries with it burdens, such as loyalty, military service, and taxation, that are surely undue when imposed on a person of a relation to a nation no greater than a happenstance of birth on its soil.²⁷

25. *Id.* at 503. As a matter of logic, this interpretation is invalid. To say “if X then Y” does not mean that there exists a class of not-X that is not Y. “All people in this room are human beings” is not equivalent to “there are some people not in this room who are not human beings.”

26. William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 224 (2008).

27. *Id.* at 223. One answer to the “why?” question is that “the Constitution says they are.” The argument then becomes, “Why should the Constitution say that?” That perhaps is a valid center of argument. However, even if the next step is, “The Constitution *shouldn’t* say that,” the valid conclusion is not, “therefore the Constitution *doesn’t* really say that.” As for the burdens that voiding birthright citizenship will supposedly lift from the shoulders of native-born children, as long as they remain resident in the United States, legally or otherwise, they in fact *are* subject to taxation. As for military service, there is currently no conscription in the United States. However, the government has issued this warning:

ATTENTION, UNDOCUMENTED MALES & IMMIGRANT SERVICING GROUPS!

....

If you are a man ages 18 through 25 and living in the U.S., then you must register with Selective Service. It’s the law. You can register at any U.S. Post Office and do not need a social security number. When you do obtain a social security number, let Selective Service know. Provide a copy of your new social security number card; being sure to include your complete name, date of birth, Selective Service registration number, and current mailing address; and mail to the Selective Service System, P.O. Box 94636, Palatine, IL 60094-4636.

SELECTIVE SERVICE SYSTEM, <http://www.sss.gov> (last visited Sept. 24, 2010). The argument that birthright citizenship is unfair has no bearing on whether it reflects the Framers’ intent. Many constitutional provisions (e.g., Article I’s provision for equal representation in the Senate) are arguably unfair, but they are no less binding. See U.S. CONST. art. I, § 3, cl. 1 (amended 1913). In a larger sense, the unfairness argument proves too much. If the burdens and benefits of birthright citizenship are unprincipled when given to children of undocumented aliens, then they are just as unfair when showered upon the children of citizens and lawful residents. Professor Ayelet Shachar has recently written a penetrating study of this unfairness, comparing inherited citizenship to inequitable laws of property. See generally AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009). As she notes, “[t]he children of well-off polities have done nothing to merit more opportunities in life than the children of poorer nations, yet the current property/membership system grants the former ample privileges without imposing any

Mayton draws heavily on Schuck and Smith to argue that

birthright citizenship under the Fourteenth Amendment entails the gauge classically identified by Emer de Vattel. This gauge is the “moral relation of the parents to the state.” By this relation, the strands of commitment and contribution essential to the democratic community are strengthened. This relation includes fairness²⁸

For this reason, Mayton argues that citizenship should not be decided by courts as a matter of constitutional right, but under the plenary control of Congress.²⁹

Of all these legal and scholarly stirrings, most significant in a practical sense, perhaps, is the fact that Judge Richard Posner has all but invited a lawsuit before his court that would offer him a chance to hack birthright citizenship out of the Fourteenth Amendment.³⁰ Such a lawsuit may soon arise in another circuit. The sponsor of Arizona’s Senate Bill 1070, which attempted stepped-up enforcement against and exclusion of undocumented aliens,³¹ has now announced plans to introduce an even more punitive bill

corresponding obligations upon them to break down the concentration of wealth, security, and freedom that they have done nothing to earn.” *Id.* at 91. I have not heard any of the advocates of a restrictive reading of the Citizenship Clause call for stripping citizenship from the children of citizens. Neither set of children, however, has done anything to merit citizenship. Similarly, neither has done anything to forfeit it. Those who advocate treating them radically differently on the basis of their parents’ estate in life, I think, should bear the burden of explaining why.

28. Mayton, *supra* note 26, at 224–25.

29. *See id.* at 225 (contending that although the Fourteenth Amendment does not grant birthright citizenship to persons here illegally, Congress maintains the authority to grant birthright citizenship to these persons).

30. *See Oforji v. Ashcroft*, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring). Posner took the random opportunity of a challenge to the deportation of the alien mother of two natural-born children (in which there was no issue whatsoever about the citizenship of the children) to opine that really none of these people should be citizens at all:

Congress should rethink . . . awarding citizenship to everyone born in the United States (with a few very minor exceptions, such as the children of accredited foreign diplomats and of foreign heads of state on official visits to the U.S.), including the children of illegal immigrants whose sole motive in immigrating was to confer U.S. citizenship on their as yet unborn children. This rule, though thought by some compelled by section 1 of the Fourteenth Amendment . . . makes no sense. . . .

. . . A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it. . . . The purpose of the rule was to grant citizenship to the recently freed slaves, and the exception for children of foreign diplomats and heads of state shows that Congress does not read the citizenship clause of the Fourteenth Amendment literally. Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense. On May 5, 2003, H.R. 1567, a bill “To amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens,” was referred to the House Subcommittee on Immigration, Border Security, and Claims. I hope it passes.

Id. (internal citations omitted).

31. *See* 2010 ARIZ. SESS. LAWS 113. S.B. 1070 has been enjoined by the United States

that would attempt to strip American-born children of these aliens of their American citizenship.³²

This Article considers the meaning of the Citizenship Clause as a matter of constitutional history on the one hand and constitutional policy on the other. I recently published a book-length study of the legislative framing of the Fourteenth Amendment.³³ During the research and writing of the book, I was struck by the detail and sophistication of the congressional debate about immigration issues that accompanied passage of the Amendment. I have drawn on that research to assemble a picture of the “legislative history” of the Clause. My reading of this material impels me to a sharply different conclusion than that reached by advocates of a restrictive reading. In my view, the history of the Amendment’s framing lends no support to the idea that native-born American children should be divided into citizen and non-citizen classes depending on the immigration status of their parents.

I do not claim to have divined the “original intent” of the Framers of the Amendment as to this issue, which was one that was not precisely present in the law in 1866, the year of the framing. We simply cannot know how members of the Thirty-Ninth Congress would have responded to Lou Dobbs’s question. We can, however, investigate some things. First, and most readily accessible, is what the Framers said as they debated the clauses of the Fourteenth Amendment. Second is the intellectual and political background upon which they drew in the writing of the Amendment. Finally, we can understand the overall situation that gave rise to the Amendment—what recent events had occurred and what overall social concerns they sparked.

We can examine the intellectual history of nineteenth century anti-slavery thought for concepts relevant to the debates over immigration and

District Court for the District of Arizona pending a trial on the issue of whether it usurps federal authority over immigration. *United States v. Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

32. Adam Klawonn, *Arizona’s Next Immigration Target: Children of Illegals*, TIME, June 11, 2010, available at <http://www.time.com/time/printout/0,8816,1996064,00.html>.

33. GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006) [hereinafter *DEMOCRACY REBORN*]; see also Garrett Epps, *Interpreting the Fourteenth Amendment: Two Don’ts and Three Dos*, 16 WM. & MARY BILL RTS. J. 433 (2007) [hereinafter *Don’ts and Dos*]; Garrett Epps, Lecture, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895 (2006) [hereinafter *Second Founding*]; Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175 (2004) [hereinafter *Antebellum Political Background*]; Garrett Epps, *The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 411 (2004) [hereinafter *Undiscovered Country*].

its proper role in our society, and we can take notice of what the Framers of the Fourteenth Amendment said when the issue of immigration came before them. In so doing, it seems to me, we need not shoulder the burden of “demonstrating” that the Joint Committee on Reconstruction, if conjured before us,³⁴ would say, “Of course we meant that.” In the particular area in which we are working, we are faced with a claim by Dean Eastman and others that they have already communed with the dead, that an unclear reading was the Framers’ “clear intent.” The question in the first instance is not what the “original intent” was, but rather whether those who make “originalist” claims to have deduced it have borne *their* burden of proof.

As for the policy-based arguments, past history cannot provide determinate answers to present policy puzzles. However, we may be able to glean suggestions about desirable policies today from a study of failed and successful policies past. That the Fourteenth Amendment’s text evinces an intent to alter citizenship policy is evidence. The historical background of its writing may provide us with evidence of what constitutional flaw the Framers were addressing, and thus warn us not to repeat the mistakes that they felt impelled to fix.

In Part I of this Article, I provide a brief summary of the conclusions I reached during my study of the framing of the Amendment about the overall significance of the Amendment in the political and constitutional dispute that framed the Civil War and Reconstruction. I then summarize the “originalist” argument for a restrictive reading of the Clause. Part II offers my analysis of the actual legislative record of the framing of the Clause. Part III provides a brief summary of the citizenship status of American Indians in 1866, because that status formed an important part of the debate over the proper scope of the Clause. Part IV offers a look at the ideas of citizenship that arose out of the anti-slavery struggle and that formed the intellectual background of the Framers of the Fourteenth Amendment. Part V compares the situation those Framers faced with the immigration situation we face today. In my Conclusion, I examine the “constitutional policy” underlying the Fourteenth Amendment as a whole and suggest that birthright citizenship fits far better into the most plausible policies we can derive from the text and history of the Fourteenth Amendment.

I argue that the advocates for penalizing native-born children on the basis of their parents’ immigration status would drive a major hole through the important protections offered the American people by the Fourteenth

34. See generally Garrett Epps, *Of Constitutional Séances and Color-Blind Ghosts*, 72 N.C. L. REV. 401, 408 (1994).

Amendment. The mistake thus made would not be a novel error, but precisely the same mistake that was made at Philadelphia in 1787 and subsequently, as the antebellum order was constructed around legalized inequality and subordination of African Americans. The advocates of creating a new non-citizen status for native-born children, I argue, are in danger of (inadvertently) creating a modern analogue of the post-slavery subordination that was occurring during the months before the framing of the Fourteenth Amendment, and that the Framers of the Amendment had present in their minds as they constructed its provisions.

I. THINKING ABOUT THE FOURTEENTH AMENDMENT

In a recent article, I suggested that interpretation of the Fourteenth Amendment is improved by considering several positive and negative hypotheses that some other commentators do not share.³⁵ First, the positive assertions:

The Framers of the Fourteenth Amendment, and the generation of political thinkers from which they sprang, regarded the 1787 Constitution as profoundly flawed.³⁶

“[B]y giving the slave states disproportionate power in the federal government,” they believed, “[it] had created and empowered a complex political-social institution that the antebellum generation called the Slave Power.”³⁷

The Republican leadership in the Thirty-Ninth Congress found itself in an unexpected conflict with President Andrew Johnson, who sought to remove Congress from any influence on Reconstruction policy or postwar politics.³⁸ As a result, the leadership decided to write “a multi-part, compromise amendment whose parts are best understood as forming a whole that, while not entirely coherent, does have a certain underlying congruence of concern.”³⁹

The two negative propositions are:

35. For a more detailed explanation of these assertions, see generally *Don'ts and Dos*, *supra* note 33, at 441–57 (detailing the legislative history that led to the ratification of the Fourteenth Amendment).

36. *Id.* at 448–51 (explaining that the Fourteenth Amendment was drafted in an attempt to remedy problems found within the Constitution).

37. *Id.* at 451. See generally LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1861* 2 (2000) (describing the slave power thesis as a widely held “notion that a slaveholding oligarchy ran the country—and ran it for their own advantage”).

38. See Epps, *Don'ts and Dos*, *supra* note 33, at 455 (“Because of Congress’s refusal to seat members from the South, Johnson argued, plenary authority over Reconstruction rested with him and him alone.”).

39. *Id.* at 456.

The Fourteenth Amendment was *not* aimed solely at providing a minimum set of rights aimed only at racial discrimination against the freed slaves.⁴⁰ In fact, it creates “a broader set of rules for state politics and law,” which were inspired by the problems of immigrants and Southern Unionists.⁴¹

The Fourteenth Amendment was *not* designed to provide a constitutional foundation for the Civil Rights Act of 1866; nor was it offered because its sponsors considered the Civil Rights Act unconstitutional otherwise.⁴²

The “originalist” argument is that the legislative debates and (to a lesser extent) the overall history of American citizenship and political theory show a “clear intent” that birthright citizenship should extend only to children of American citizens and perhaps of lawful permanent residents, but not reach the children of foreign nationals temporarily resident in the United States, whether legally or illegally. In order to evaluate this argument, a reader need not accept my theses completely. Instead, the interpretive process should begin with the interpretation we have been offered by advocates of a restrictive reading of the Clause, and should use constitutional tools, of which history is a prominent one, to assess the correctness of the suggested interpretation.

The historical background cited by Dean Eastman is that sketched by Professors Schuck and Smith in their work on the theory of citizenship in Anglo-American legal theory. The thesis of this work, and of subsequent work relied upon by restrictionists, is that modern, as opposed to feudal, citizenship requires consent of the citizen and a willingness to subject herself to the complete dominance of the nation. Thus, children of temporary sojourners—and, for that matter, any persons retaining citizenship in more than one country at the same time—cannot be viewed as fulfilling the conditions for citizenship under a proper modern definition.

Citizenship Without Consent is the foundation of the argument for a restrictive reading and thus merits a close reading. That I disagree with its conclusions should not suggest that I deprecate its scholarly seriousness. But I will suggest that it has two shortcomings: (1) it produces seemingly valid conclusions from the wrong sources and (2) it shortchanges and misunderstands the actual legislative record of the Clause.

40. *Id.* at 441–42 (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976)) (noting that the Supreme Court “has recognized that the Fourteenth Amendment contains ‘a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves’”).

41. *Id.* at 442–43.

42. *Id.* at 445–48 (arguing that the Citizenship Clause was drafted “with a broad set of political and civil rights in mind”).

The authors begin by tracing the conflict between “ascriptive and consensual citizenship.”⁴³ Ascriptive citizenship, the condition of being a subject of the Crown by virtue of birth within the Realm, meant that a subject had neither the right to disobey nor to renounce citizenship even by expatriation.⁴⁴ The authors suggest that with the dawn of the Enlightenment, authors, most prominently John Locke, called into question the justice and validity of the ascriptive principle, suggesting instead that true allegiance and citizenship could be based only on reciprocal consent. For Locke, “[a] child . . . could not be a government’s subject because subjectship must be based on the tacit or explicit consent of an individual who had reached the age of rational discretion.”⁴⁵ For this reason, “Locke insisted: ‘*a Child is born a subject of no Country and Government.*’”⁴⁶ Locke “would have been astonished that children of illegal aliens might acquire membership in a country by birth.”⁴⁷

The authors note that Locke is generally agreed to be a significant influence on the thinking of the Framers of the 1787 Constitution. They further cite the work of G.J.A. Pocock as evidencing the importance for the Framers of the “Atlantic tradition” of republican thought stemming from the work of Niccolo Machiavelli.⁴⁸ In Atlantic republican thought, republican societies were thought to require small size, internal homogeneity, and restricted citizenship.⁴⁹

Citizenship restriction, they suggest, is Lockean as well as Machiavellian:

[T]he logic of Locke’s formulation of the social contract doctrine, like Rousseau’s, indicated that consent to membership must indeed be mutual, granted by the representatives of the existing citizenry as well as by the prospective citizen. Hence his view, as much as the republicans’, implicitly sanctioned the permissibility, if not the desirability, of restrictive membership policies, at least so long as those restrictions did not amount to active violations of one’s natural rights.⁵⁰

And they note that much of antebellum American law, most particularly the infamous Taney opinion in *Scott v. Sandford*⁵¹ (“*Dred Scott*”), relied

43. SCHUCK & SMITH, *supra* note 10, at 9–10.

44. See *id.* at 12, 17 (noting that expatriation was “considered contrary to natural law and therefore impossible”).

45. *Id.* at 25.

46. *Id.*

47. *Id.* at 25–26.

48. *Id.* at 27 (citing J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975)).

49. *Id.* at 27–29.

50. *Id.* at 30–31.

51. 60 U.S. (19 How.) 393 (1856).

heavily on a consensual model, holding that persons of African descent were forever barred from citizenship because the Framers had not consented to their acquisition of it by any means.⁵² Schuck and Smith further argue that American citizenship law before the Fourteenth Amendment showed an inability to decide between ascription and consent as the basis of citizenship:

American law's use of both ascriptive and consensual understandings of the birthrights of the native-born makes it difficult to know precisely what the framers of the Fourteenth Amendment's Citizenship Clause had in mind, a difficulty not altogether alleviated by their debates. It is therefore all the more important to recognize that the American Congress, courts, and statesmen had always drawn freely on both traditions, selecting among them largely on grounds of expediency.⁵³

They then proceed to a very brief discussion of the Citizenship Clause of the Fourteenth Amendment, and conclude that the "subject to the jurisdiction" language embodies a restrictive, consensual definition of citizenship.⁵⁴ The Amendment's "central political ideas were not ascription and allegiance but consent and individual rights," they contend.⁵⁵ They reach this conclusion because they assert the common wisdom that "Congress's purpose in proposing the Fourteenth Amendment . . . was to 'constitutionalize' the protections established by the [Civil Rights Act of 1866]" thus making the differences in wording between the Act and the Clause irrelevant.⁵⁶

To Schuck and Smith, the important question was what Senator Lyman Trumbull meant by the language. Trumbull was the drafter of the Civil Rights Bill; he played no role in the drafting of the Amendment. Thus, "subject to the jurisdiction," the Amendment's language, becomes equivalent to "not subject to any foreign power," the eventual language of the Civil Rights Bill. Subjection to a foreign power depended on allegiance, and, the authors contend, the Civil Rights "debates revealed that Trumbull understood *allegiance* not chiefly in Coke's terms, as stemming

52. Though the authors do not note this, the principle of *Dred Scott* is actually ascriptive in the highest, as not even the consent of *both* parties to the social contract—i.e., an aspiring citizen of African descent and a willing Congress making use of the naturalization power—could overcome the (unwritten or spoken) ascription by the Founding Generation of alien status to such people. See *id.* at 452 (declaring the Missouri Compromise unconstitutional, and holding that Dred Scott could not be made free by being brought to Missouri by his owner, even if his owner had the intention of becoming a permanent resident in Missouri).

53. SCHUCK & SMITH, *supra* note 10, at 71.

54. *Id.* at 85–87.

55. *Id.* at 73.

56. *Id.* at 75.

from the fact of protection at birth, but in a more consensualist fashion, as dependent upon the wills of the community and the individual.”⁵⁷

Little of this argument depends on the actual legislative history of the Fourteenth Amendment; but remarkably, a good deal of it arises out of the fact (which might as reasonably be ascribed to happenstance) that the Amendment was finally approved by the states during the Fortieth, not the Thirty-Ninth. The Fortieth Congress passed the first formal act permitting United States citizens to renounce their citizenship.

Congress could not have conceived of that obligation [of birthright citizenship] as perpetual or indissoluble on [the natural-born citizen’s] part. Only one day before the Fourteenth Amendment was ratified, Congress embraced the consensual conception of citizenship in a more direct and thoroughgoing way, affirming in the Expatriation Act of 1868 the fundamental right of all citizens voluntarily to withdraw their consent and to renounce their membership.⁵⁸

This is a remarkable conclusion to draw from the mere coincidence of time. Schuck and Smith gloss over the fact that Congress plays no part in ratification of Amendments, which is done by state legislatures and recorded (at that time) by the Secretary of State.⁵⁹ As legislative history goes, then, the Schuck and Smith argument is a fairly unusual one. It slights the actual language of the measure and the debates of the body that framed it, and insists on the primacy of (1) the language of and debates about a different measure (the Civil Rights Act) and (2) the unstated intentions of a different body (the Fortieth Congress). Schuck and Smith bolster their reading of the real meaning of the clause on a couple of grounds that are important to constitutional construction generally. The first might be called the argument for constitutional policy. In this case, they argue that the current reading of the Clause calls into question the underlying consistency and workability of the Constitution, and thus is potentially illegitimate:

America’s current circumstances confirm that birthright citizenship can create a problem of overinclusiveness, at least in consensual terms. In particular, automatic political membership for the native-born children of illegal aliens and nonimmigrants seems difficult to defend, especially when access to citizenship for other needy groups must be limited.⁶⁰

57. *Id.* at 80.

58. *Id.* at 86 (footnote omitted).

59. Thus, for example, the Twenty-Seventh Amendment, proposed by the First Congress in 1789, was finally ratified in 1992. Can the debates of the 102nd Congress then tell us something about the “intent” of the framers of the Twenty-Seventh Amendment?

60. SCHUCK & SMITH, *supra* note 10, at 89.

This policy argument is coupled with the common (and again, far from illegitimate when correctly made) argument that the Framers could not have foreseen current conditions:

The number of illegal aliens presently in the United States is a matter of great and continuing controversy; estimates that are described as “conservative” place the range at three and a half to six million as of 1980, with the number increasing by two hundred thousand annually. This reality and the fears that it has generated concerning its economic and social effects have transformed political discourse about American immigration policy in ways that neither [past courts] nor the Reconstruction framers of the Citizenship Clause could have anticipated.⁶¹

In particular, the authors suggest that children of illegal immigrants did not at the time of Framing, do not now, and should not fall within the meaning of “subject to the jurisdiction.” This is because the children carry at birth the taint of their parents’ criminality: “The parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law. They [the parents] are manifestly individuals, therefore, to whom the society has explicitly and self-consciously decided to deny membership.”⁶²

The Schuck and Smith argument thus considers (in roughly this order) (1) the intellectual background of American citizenship and the Citizenship Clause, in particular; (2) the circumstances and debate that surrounded its adoption; (3) the “constitutional policy” underlying its current application; and (4) the likelihood that the Framers foresaw something like the present circumstances. Each of their conclusions requires evidence to support it, and our task is to assess the nature and amount of evidence they have adduced for each.

Schuck and Smith, as noted above, provide a truncated and (it must be said) idiosyncratic reading of the Clause’s “legislative history.” Let’s consider a more thoroughgoing and disciplined version of this, offered by Dean Eastman.

[T]he language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment (like the rest of Section One of the Fourteenth Amendment) was derived so as to provide a more certain constitutional foundation for the 1866 Act, strongly suggests that Congress did *not* intend to provide for such a broad and absolute birthright citizenship.⁶³

61. *Id.* at 93.

62. *Id.* at 95.

63. John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left*

This language, as enacted, was “all persons born in the United States *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States.”⁶⁴

Dean Eastman claims that “this formulation makes clear, [that] any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child’s parents, remained a citizen or subject of the parents’ home country, was not entitled to claim the birthright citizenship provided in the 1866 Act.”⁶⁵ The relevance of this supposed clarity, of course, is not direct, because the aim is to interpret the language of the Fourteenth Amendment’s Citizenship Clause, which says that “[a]ll 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.”⁶⁶ Dean Eastman admits that this language lacks the alleged clarity of the language in the Act, and indeed “might easily have been intended to describe a broader grant of citizenship than the negatively phrased language from the 1866 Act—one more in line with the contemporary understanding . . . that birth on U.S. soil is sufficient for citizenship.”⁶⁷

This is an important admission, because to discern “clear intent” in language that “might easily” be read a different way requires strong evidence that the Framers intended one specific reading. To resolve this ambiguity, Dean Eastman turns to the legislative debates:

[T]he relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading. For example, when pressed about whether Indians living on reservations would be covered by the clause since they were “most clearly subject to our jurisdiction, both civil and military,” Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that “subject to the jurisdiction” of the United States meant subject to its “complete” jurisdiction, “[n]ot owing allegiance to anybody else.” Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean “a full and complete jurisdiction . . . the same

Because of Embarrassment Over Bush v. Gore? 94 GEO. L.J. 1475, 1485–86 (2006).

64. *Id.* at 1486 (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphasis added)).

65. *Id.*

66. U.S. CONST. amend. XIV, § 1.

67. Eastman, *supra* note 63, at 1486. This seems like a concession on Dean Eastman’s part—the “clear intent” must be deduced from unclear text, but it conceals a hidden premise—that the text is in fact ambiguous or unclear. The first necessity for a counterintuitive “originalist” reading is ambiguity in the text. If “all persons” really means “all persons” then the deployment of originalist machinery is hardly necessary, and if the machinery produces a different reading its very validity is questionable.

jurisdiction in extent and quality as applies to every citizen of the United States now" (i.e., under the 1866 Act). That meant that the children of Indians who still "belong[ed] to a tribe" and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the Clause. Because of this interpretative gloss provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin to explicitly exclude "Indians not taxed," as the 1866 Act had done, was rejected as redundant.⁶⁸

From this summary of the debate, Dean Eastman then concludes that the correct meaning of the Clause is that supplied by the majority in *The Slaughterhouse Cases*.⁶⁹ "[T]he 'main purpose' of the Clause 'was to establish the citizenship of the negro,' and that '[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.'"⁷⁰

This, then, is the "originalist" claim to establish the "clear intent" of the Framers and ratifiers. Thus, it would be significant if (as I suggest) the argument (1) misapprehends the contemporaneous intellectual background of the Clause; (2) mischaracterizes the relationship between the Civil Rights Act and the Clause; (3) distorts the tenor of (or simply neglects to quote) the legislative debates around the Clause itself; (4) offers an implausible reading of the constitutional policy embodied in the Amendment as a whole; and (5) fails to understand that, historically, the Framers of the Amendment faced a situation with regard to immigration policy that was in fact remarkably similar to, not radically different from, our current one. Weakness or invalidity in one or more of the stages of the argument, it seems to me, would suggest that proponents of a restrictive "intent" of the Clause have failed to carry their burden of proof.

II. THE FRAMING OF THE CLAUSE: BACKGROUND AND DEBATE

The quest for the "clear intent" of the Framers of the Clause ought to begin with what the Framers said, first in the text of the Clause and second during the debates over its adoption. The Thirty-Ninth Congress dealt with the issue of birth and citizenship in two different bills, first in the Civil Rights Act of 1866 and second in the Fourteenth Amendment. It is important to resist the temptation to treat these two measures and the

68. *Id.* (footnotes omitted).

69. 83 U.S. 36 (1872).

70. Eastman, *supra* note 63, at 1486–87.

debates over them as if they were one and the same.⁷¹ They originated with different sponsors and were buttressed by different constitutional theories.

The Civil Rights Act of 1866, which was adopted first, was sponsored by Senator Lyman Trumbull, chair of the Senate Judiciary Committee, and reported by that Committee for adoption by the Senate and then the House. The Act was a conservative measure, designed to conciliate President Johnson and gain his signature.⁷² According to its sponsor, the Act as a whole was enacted pursuant to section two of the Thirteenth Amendment, and the specific citizenship language was authorized by Congress's Naturalization Power.⁷³ The Act was designed to put the responsibility for enforcing civil rights in the hands of the federal courts.⁷⁴

But, despite its conservatism, Andrew Johnson vetoed it, in essence proclaiming himself opposed to any attempts to upset the antebellum political system of white rule and "states' rights." Johnson's veto of the Act, and of the Freedmen's Bureau Act, radicalized the political situation in Washington and convinced most of the Congressional leadership that no conciliation was possible. A mark of that radicalization is that Congress re-passed both bills over the President's veto—the first time in American history that a Presidential veto of a substantive bill had been overridden.⁷⁵

During this near-revolutionary period, the Fourteenth Amendment was drafted, not by Trumbull and the Judiciary Committee but by the considerably more radical Joint Committee of Fifteen on Reconstruction. That committee was seeking to wrest control of Reconstruction from Johnson. Because it was offering a constitutional amendment, it did not worry about the limits of congressional power under the Thirteenth Amendment; because a President has no veto power over a proposed constitutional amendment, it made no concessions to the President's conservative views. Neither in its language nor in the debates surrounding its passage is there any suggestion that, like the Civil Rights Bill, it was a "court bill."

For all these reasons, it seems at best reductive to *assume* that the citizenship language in both had identical meanings and "intentions." If that is to be a premise of the restrictive reading of the document, it must be

71. See *Don'ts and Dos*, *supra* note 33, at 445–57.

72. EPPS, *DEMOCRACY REBORN*, *supra* note 33, at 175–76.

73. U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power "to establish an uniform rule of naturalization").

74. *Democracy Reborn*, *supra* note 33, at 175 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 605 (1866)) (remarks of Sen. Trumbull) ("It is a court bill; it is to be executed through the courts, and in no other way.").

75. EPPS, *DEMOCRACY REBORN*, *supra* note 33, at 183.

subject to the same burden of proof as the other premises; the proponents have not even tried to bear that burden.

As originally written, Trumbull's Civil Rights Bill proclaimed that all persons of "African descent" resident in the United States were citizens. However, on January 30, Trumbull withdrew this language and offered an amendment to insert this language: "[A]ll persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States"⁷⁶

It is this Civil Rights Bill language that the proponents of a restrictive reading of the Clause regard as indicating the Fourteenth Amendment Framers' "intent" to limit birthright citizenship to, in essence, children whose parents had no other citizenship status elsewhere in the world. The argument is that children of foreign citizens temporarily resident in the United States are "subject to [the] foreign power" governing their parents' citizenship. Immediately after the new wording was offered, however, Trumbull engaged in a colloquy that sheds a considerably different light on this provision. Senator Edgar Cowan of Pennsylvania, a conservative Republican and one of Johnson's few remaining Republican supporters in Congress, archly asked Trumbull whether this language would naturalize the "children of Chinese and Gypsies born in this country?" Trumbull replied, "Undoubtedly."⁷⁷

What is the importance of this colloquy? Well, consider that in 1866, Chinese-born people resident in the United States were ineligible to naturalize as citizens. Under the Naturalization Act of 1790, naturalized citizenship was limited to "free white person[s]."⁷⁸ Thus, every immigrant from China was by definition not only an alien but a "subject" of the Chinese empire and thus not subject to the "full and complete jurisdiction" that originalists regard as important restrictive language.

But if this was the intended meaning of "not subject to a foreign power," how could it be "[u]ndoubtedly" true that children of Chinese were to be citizens under the Civil Rights Act? The answer seems nonsensical; and before we deal with the anomaly by suggesting that Trumbull simply did not understand what he was talking about, remember that Trumbull's is preeminent among those whose "clear intent" we are supposedly parsing.

The casual reference to "Gypsies" in Senator Cowan's question also foreshadowed a theme that would become quite important during the debate over the Citizenship Clause of the Fourteenth Amendment. Chinese

76. CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (1866).

77. *Id.*

78. An Act to Establish an Uniform Rule of Naturalization, 1 Stat. 103 (1790).

immigrants were present in the United States legally, and were (as we have seen) citizens of another nation. The “Gypsies” in the United States (assuming there were any) were the closest thing the United States had at that time to “illegal” immigrants—a shadow population that was considered to be living in defiance of American law.⁷⁹ Their status and the language used about them subsequently in the debate are quite suggestive.⁸⁰

Who, then, were those not subject to “the full and complete jurisdiction” of the United States? There were two classes. The first covered “children of public ministers”—what we would call diplomats today, who were covered by diplomatic immunity under international law. The second was a subset of the Native American population—those living under tribal government on reservations under treaties that recognized their tribes as separate sovereigns and those resident on the frontier in territory and among tribal groups that had not been reduced to federal control. The first group of Native people were “subject” to their tribal governments, which had treaty immunities to U.S. court jurisdiction. The second were not subject to U.S. jurisdiction at all—they were “wild Indians.”

Bear in mind that we are still discussing the Civil Rights Act. As eventually adopted, it read, “[a]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” This language is significant but does not directly demonstrate anything about the “clear intent” of the Citizenship Clause. First, it is a statute, enacted under the authority of some combination of the Naturalization Clause and the Thirteenth Amendment; the Fourteenth Amendment is a change to the Constitution, creating entirely new rights and providing government with new powers. Second, it is different in wording. Even if we were to conclude that “not

79. This is of course true as a statement of the relatively undeveloped federal law of immigration before the adoption of the Fourteenth Amendment. There were, however, other classes of people who were not supposed to be present in the specific states, and in the antebellum period they were subject to penalties under state law that echo some of those aimed at “illegal aliens” today. See Neuman, *supra* note 23, at 497–99. Professor Neuman also asks whether Schuck and Smith could possibly be suggesting that the Amendment does not recognize the citizenship of native-born children of African slaves imported in violation of the 1808 federal statute that prohibited importation of slaves. Those African slaves were in the country illegally, in the teeth of efforts to discourage their entry. See *id.*

80. Gypsies in 1866 existed mostly as a bugaboo in the mind of Nativists (like the phantom cases of leprosy frequently mentioned by Lou Dobbs or the “terror babies” being cleverly spawned in U.S. hospitals so that they can commit suicide bombings a generation from now). “For example in 1874, the American Cyclopaedia argued that it was ‘questionable whether a band of genuine Gypsies has ever been in America.’” BRIAN A. BELTON, QUESTIONING GYPSY IDENTITY: ETHNIC NARRATIVES IN BRITAIN AND AMERICA 85 (2005).

subject to any foreign power” had a more restrictive meaning than its sponsors appeared to give it, the language was superseded by the broader language of the Citizenship Clause. So even if we could demonstrate the “clear intent” of the Congress when it adopted the Act, that “clear intent” could not restrict what the Congress and the state legislatures did later in adopting the *Fourteenth Amendment*. And, finally, the evidence does not establish a “clear intent” to adopt a restrictive meaning. As I read the record, it points to an opposite intent; but even if my reading is contestable, I suggest that its plausibility establishes that the “originalists” have signally failed to bear their burden of proof *even as to this preliminary question*.

In fact, the meaning that matters in this context is that of the Citizenship Clause, which was framed by Congress two months after the final passage of the Civil Rights Act and ratified over the ensuing two years by the state legislatures. It has different wording; it emerged from a different political situation; it was adopted under different procedures and had different authors, and it was approved by different voting bodies.⁸¹ Its meaning must stand on its own. If its broad wording, which makes no mention of “foreign powers,” is to be read restrictively, it must be because of something in its text or adoption, not because it is viewed as a coded re-enactment of the Civil Rights Act.

The draft Fourteenth Amendment was introduced in the House of Representatives in May 1866, and adopted by the House without any citizenship language.⁸² The Journals of the Joint Committee of Fifteen thus shed no light on its drafting; neither do the initial debates on the draft amendment in the House, because the draft did not address citizenship when adopted by the House. The only debate that can shed light on its intent is that which took place on the Senate floor during the process of adoption and amendment of the citizenship language.⁸³

81. See EPPS, *DEMOCRACY REBORN*, *supra* note 33, at 183, 226–27 (illustrating the differences regarding motivation, political climate, and passage/ratification between the Civil Rights Act and the Fourteenth Amendment).

82. See *id.* at 225 (demonstrating that most of the House debate focused on representation and voting, not citizenship).

83. When the amended Joint Resolution was sent back to the House for concurrence, the only mention of the citizenship language was in the final remarks of Representative Thaddeus Stevens, the Radical leader of the House, the dominant member of the Joint Committee of Fifteen, and the primary sponsor of the proposed Amendment. See *id.* at 40–50 (providing a brief synopsis of Stevens’ tenure in Congress). On this occasion, Stevens described the effect of the draft amendment with no qualification for the jurisdictional language:

The first section is altered by defining who are citizens of the United States and of the States. This is an excellent amendment, long needed to settle conflicting decisions between the several States and the United States. It declares this great privilege to belong to every person born or naturalized in the United States.

When it came to the floor of the Senate on May 23, Senator Benjamin Wade proposed an amendment that would remove the word “citizen” from what became the “privileges or immunities” clause and substitute language barring states from abridging “the privileges or immunities of persons born in the United States or naturalized by the laws thereof.”⁸⁴ Wade explained,

the word “citizen” . . . is a term about which there has been a good deal of uncertainty in our Government. The courts have stumbled on the subject, and even here, at this session, that question has been up and it is still regarded by some as doubtful. I regard it as settled by the civil rights bill, and, indeed, in my judgment, it was settled before. I have always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States; but by the decisions of the courts there has been a doubt thrown over that subject; and if the Government should fall into the hands of those who are opposed to the views that some of us maintain, those who have been accustomed to take a different view of it, they may construe the provision in such a way as we do not think it liable to construction at the time, unless we fortify and make it very strong and clear.⁸⁵

This is an unmistakable reference to the restrictive reading of citizenship given by the Supreme Court in *Dred Scott*, and Wade’s change seemed to be designed to forestall a racial reading of citizenship by later judicial construction of the Civil Rights Act.⁸⁶ Wade’s definition of citizenship, in his words, was that “every person, of whatever race or color, who was born within the United States was a citizen of the United States.”⁸⁷

An instructive colloquy ensued between Wade and Senator William Pitt Fessenden of Maine, chair of the Joint Committee on Reconstruction. As reported by Wade, “[t]he Senator from Maine suggests to me, in an undertone, that persons may be born in the United States and yet not be citizens of the United States. Most assuredly they would be citizens of the United States unless they went to another country and expatriated themselves”⁸⁸

Fessenden then suggested the very question that concerns us today: “Suppose a person is born here of parents from abroad temporarily in this country.”⁸⁹ Wade answered,

CONG. GLOBE, 39TH CONG., 1ST SESS. 3148 (1866) (remarks of Rep. Stevens).

84. CONG. GLOBE, 39TH CONG., 1ST SESS. 2768 (1866) (remarks of Sen. Wade).

85. *Id.* at 2768–69.

86. Perhaps it might even be a sign of “clear intent” that a judicial construction of the Fourteenth Amendment would never narrow citizenship on similar grounds.

87. CONG. GLOBE, 39TH CONG., 1ST SESS. 2768 (1866) (remarks of Sen. Wade).

88. *Id.* at 2769 (remarks of Sen. Wade).

89. *Id.* (remarks of Sen. Fessenden).

The Senator says a person may be born here and not be a citizen. I know that is so in one instance, in the case of the children of foreign ministers who reside "near" the United States, in the diplomatic language. By a fiction of law such persons are not supposed to be residing here, and under that fiction of law their children would not be citizens of the United States, although born in Washington. I agree to that, but my answer to the suggestion is that that is a simple matter, for it 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.⁹⁰

Debate then turned to the meaning of other provisions of the draft amendment, particularly the language regarding apportionment of representation to states that restricted the franchise by race. After adjournment that day, Senate Republicans met in a private caucus to consider the issues that Wade's amendment had brought up.

When the measure returned to the floor on May 30, Senator Jacob Howard of Michigan, a member of the Joint Committee and the Senate sponsor of the draft amendment, proposed new language: "[A]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."⁹¹ The debate on this new language forms the core of the evidence for a restrictive reading of the Citizenship Clause; but read in full, the debate suggests precisely the opposite reading.

Howard explained the meaning of the new language as simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.⁹²

90. *Id.* (remarks of Sen. Wade).

91. *Id.* at 2890 (remarks of Sen. Howard).

92. *Id.* Professor Mayton reads this language as excluding the children of two classes of aliens from birthright citizenship: first, all "consular personnel," and, second, "aliens." Mayton, *supra* note 26, at 245. That is, we should construe Howard as meaning that the citizenship clause will exclude the "two classes," consisting in essence of (1) the children of *all* foreigners and (2) the children of *some* foreigners. *Id.* Professor Mayton considers his thesis confirmed because "at that time no objection was made." *Id.* The most logical inference to this reader is that no one objected because no one understood it in the strained way that Professor Mayton does. At this point in the inquiry, we are in danger of leaving the world of constitutional history and entering some kind of Da Vinci code alternate universe. That is, can we really suppose that this one ambiguous phrase spoken by one senator, no matter how read, can supply us with a code key to general language adopted by both Houses of Congress and the legislatures of two-thirds of the States? Rather than picking at coded meanings in disaggregated phrases, an interpreter would do better to

Once again, the irrepressible Senator Cowan rose to object that the proponents of the draft amendment could surely not mean that birthright citizenship would extend to children of Chinese immigrants or of “Gypsies”: “[I]s it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race? Are they to be immigrated out of house and home by Chinese? I should think not.” Further, his own state of Pennsylvania had to contend with

a certain number of people who invade her borders; who owe to her no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own—an *imperium in imperio*; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen, and perform none of the duties which devolve upon him, but, on the other hand, have no homes, pretend to own no land, live nowhere, settle as trespassers wherever they go I mean the Gypsies. . . . If the mere fact of being born in the country confers that right, then they will have it; and I think it will be mischievous.⁹³

Citizenship, in Cowan’s view, had two essential characteristics that the proposed amendment would obliterate. First, it was primarily under the control of the states, and no one could be a United States citizen who was not first recognized as such by a state.⁹⁴ Second, the rights of citizenships were properly drawn from “my own people, the people of my own blood and lineage, people of the same religion, people of the same beliefs and traditions,” rather than from “a society of other men entirely different in all those respects from myself.”⁹⁵

consider the entire debate in its context and Professor Mayton seems to have little interest in or understanding of political context in the 439th Congress. Later in his article, Professor Mayton cites statements by Senator Cowan as definitively explaining that the Amendment did not make children of foreigners citizens. *Id.* at 243. A reader would not know that Cowan was the speaker, however, that Cowan was an opponent of the draft Amendment, nor that Cowan was arguing against its adoption. Professor Mayton seizes upon the significance of statements made by opponents of a measure and gives them authoritative force; it is as if one were to consult the papers of Jefferson Davis for definitive exegesis of the Emancipation Proclamation. As it happens, Davis wrote that the Proclamation was intended as an “intimation to the people of the North that they must prepare to submit to a separation, now become inevitable, for that people are too acute not to understand that a restoration of the Union has been rendered forever impossible by the adoption of a measure which, from its very nature, neither admits of retraction nor can coexist with union.” See 6 J. OF THE CONG. OF THE CONFEDERATE STATES OF AMERICA 18 (1863).

93. CONG. GLOBE, 39TH CONG., 1ST SESS. 2890–91 (1866) (remarks of Sen. Cowan).

94. *Id.* at 2891.

95. *Id.*

The response on the floor was delivered by Senator John Conness of California, himself a naturalized citizen born in Ireland:

The proposition before us, I will say, Mr. President, relates simply to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. . . . I voted for the proposition to declare that the 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.⁹⁶

As for the danger of Gypsy hordes, Conness noted that “I have lived in the United States for now many a year, and really I have heard more about Gypsies within the last two or three months than I have heard before in my life.”⁹⁷

The debate quickly turned to the real question that hung over the “subject to the jurisdiction” language: the citizenship status of reservation and “wild” Indians. Here is where the advocates of a restrictive reading incompletely quote Trumbull. The evidence is overwhelming that the debate consisted of two strands—one made up of rhetorical points scored by Cowan and fellow opponents, the other made up of genuine concerns by supporters of the bill that it might inadvertently open citizenship to the group of Native Americans still living beyond the American legal system.

The Indian question arose when Senator James R. Doolittle of Wisconsin offered an amendment that would have added the words “excluding Indians not taxed” to the Clause. Doolittle, from a frontier state, told the Senate that

I moved this amendment because it seems to me very clear that there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States. All the Indians upon reservations within the several States are most clearly subject to our jurisdiction, both civil and military. . . . For instance, there are seven or eight thousand Navajoes [sic] at the moment under the control of General Carlton, in New Mexico, upon the Indian reservations, managed, controlled, fed at the expense of the United States, and fed by the War Department, managed by the War Department, and at a cost to this Government of almost a million and a half of dollars every year. . . . Are these six or seven thousand Navajoes [sic] to be made citizens of the United States? Go into the State of Kansas, and you find there any number of reservations, Indians in all stages, from the wild Indian of the plains, who lives on nothing but the meat of the buffalo, to those Indians who are partially

96. *Id.* (remarks of Sen. Conness).

97. *Id.* at 2892.

civilized and have partially adopted the habits of civilized life. So it is in other States. In my own state there are the Chippewas, the remnants of the Winnebagoes, [sic] and the Pottawatomies. There are tribes in the State of Minnesota and other States of the Union. Are these persons to be regarded as citizens of the United States, and by a constitutional amendment declared to be such, because they are born within the United States and subject to our jurisdiction? . . . Take Colorado; there are more Indian citizens of Colorado than there are white citizens this moment [sic] if you admit it as a State.⁹⁸

Doolittle pointed out that the Constitution as written in 1787 excluded “Indians not taxed” from the enumeration of the people for purposes of Congressional representation. His amendment, he suggested, would simply make explicit that this exclusion applied to citizenship as well. At this point, Senator Fessenden admitted that he was unsure about the effect of the proposed language, and asked Senator Trumbull, “who has investigated the civil rights bill so thoroughly,” for his views.⁹⁹

Here is where Trumbull gives his famous gloss on the words as meaning “subject to the complete jurisdiction thereof.”¹⁰⁰ In this context, he is discussing the question of the citizenship status of Native peoples in the United States.

What do we mean by “subject to the jurisdiction of the United States?” Not owing allegiance to anybody else. That is what it means. *Can you sue a Navajoe [sic] Indian in court?* Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them. If we want to control the Navajoes, [sic] or any other Indians of which the Senator from Wisconsin has spoken, how do we do it? Do we pass a law to control them? Are they subject to our jurisdiction in that sense? Is it not understood that if we want to make arrangements with the Indians to whom he refers we do it by means of a treaty?¹⁰¹

But not all Indian people were settled on reservations or still “wild.” Many lived within the normal bounds of non-reservation communities. “If they are there and within the jurisdiction of Colorado, and subject to the

98. *Id.* at 2892 (remarks of Sen. Doolittle).

99. *Id.* at 2893 (remarks of Sen. Fessenden). Note that Fessenden is not turning to Trumbull as the author of the measure (he wasn’t), nor does he say that the new language means exactly what the different language of the Civil Rights Bill meant. He turns to Trumbull because of his work on the question of citizenship. Trumbull himself immediately said, “Of course my opinion is not any better than that of any other member of the Senate.” *Id.* (remarks of Sen. Trumbull).

100. *Id.*

101. *Id.* (remarks of Sen. Trumbull) (emphasis added).

laws of Colorado, they ought to be citizens; and that is all that is proposed.”¹⁰²

The distinction implied by “subject to the jurisdiction,” Trumbull said, was that between Native people who lived under their own governments and outside of the legal and social system of the United States on the one hand and those who were settled in communities that were part of that system.¹⁰³ The “excluding Indians not taxed” language had been included in the Civil Rights Bill, and it was (as Senator Reverdy Johnson of Maryland now pointed out) included in section two of the draft amendment (and of course in Article I of the original Constitution).¹⁰⁴ Trumbull replied that the language in section two of the Amendment referred only to “Indians not taxed” within the borders of a state of the Union (since it pertained to apportionment of members of the House, who can only come from a State); if introduced into section one, it would “refer[] to persons everywhere, whether in the States or in the Territories or in the District of Columbia.”¹⁰⁵

If the “not taxed” language were moved outside of its apportionment context, Trumbull suggested, it might be read to refer to “the fact of taxation” rather than to “describe a class of persons.”¹⁰⁶ If that happened, “it would make of a wealthy Indian a citizen and would not make a citizen of one not possessed of wealth under the same circumstances.”¹⁰⁷ Because of that potential ambiguity, Trumbull said, “the language proposed in this constitutional amendment is better than the language in the civil rights bill.”¹⁰⁸

That language was sufficient to exclude those Native bands not yet under full national jurisdiction, he added:

They are not subject to our jurisdiction in the sense of owing allegiance solely to the United States; and the Senator from Maryland, if he will look into our statutes, will search in vain for any means of trying these wild Indians. A person can only be tried for a criminal offense in pursuance of laws, and he must be tried in a district which must have been fixed by law before the crime was committed. We have had in this

102. *Id.*

103. *Id.*

104. See U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.”); see also *id.* art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several states . . . according to their respective Numbers . . . excluding Indians not taxed.”)

105. CONG. GLOBE, 39TH CONG., 1ST SESS. 2894 (1866).

106. *Id.*

107. *Id.*

108. *Id.*

country and have to-day, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject to their own laws and regulations, and we do not pretend to interfere with them. They would not be embraced by this provision.”¹⁰⁹

Senator Thomas Hendricks of Indiana, a Democrat who had been a persistent foe of the Civil Rights Act, then suggested that Congress had the legal authority, if it chose, to extend its laws to the “wild Indians,” even if it lacked the physical power to enforce them at present.¹¹⁰ Trumbull replied rather tartly that Congress would have “the same power that it has to extend the laws of the United States over Mexico.”¹¹¹

Senator Jacob Howard, the Senate sponsor of the proposed constitutional amendment, now weighed in:

I concur entirely with the honorable Senator from Illinois, in holding that the word ‘jurisdiction,’ as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now. Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction.

....

The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe.¹¹²

After this, the “Indians not taxed” language was rejected¹¹³ and the debate moved on to the wording of the other sections of the draft amendment.

Here we have a preliminary “legislative history” of the Citizenship Clause. Unlike the rest of the drafting of the Fourteenth Amendment, none of this history takes place in committee, where a full record was not kept.¹¹⁴ What do we conclude from it in relation to the “intent” of its Framers about

109. *Id.*

110. *Id.* (remarks of Sen. Hendricks).

111. *Id.* (remarks of Sen. Trumbull). Senator Fessenden in fact insisted that Congress could do that as well if it chose. *Id.* (remarks of Sen. Fessenden).

112. *Id.* at 2895 (remarks of Sen. Howard).

113. *Id.* at 2897.

114. The Clause was first drawn up in a Republican caucus, and we have no record of its deliberations.

the application of the Clause to citizens born to alien parents present in the United States?

One is first struck by the applicability of the earliest colloquy to this precise question. Remember that Dean Eastman, at least, would construe the Clause to deny citizenship to Yasser Esam Hamdi and other children born to alien parents legally but temporarily resident in the United States.¹¹⁵ Those parents, I suggest, are in *precisely the same position* as were the Chinese nationals resident in California, who were allowed in for purposes of labor—and were thus present legally—but who were ineligible for citizenship on grounds of race. Their children, the debate makes clear, would, under the proponents' interpretation, be natural-born citizens under the Clause. The implication for Hamdi and others like him, as a matter of "original intent" is clear; it is the opposite of the "clear intent" restrictionists discern.

Second, the discussion of Gypsies provides about the closest thing we are likely to get to the issue of illegal immigration. Recall that at this time there was no federal category of illegal immigrant. But Lou Dobbs could not describe with greater disapproval the characteristics of an "illegal" population within United States borders—inassimilable, defiant, criminal, nomadic, ungovernable—than the description given by Senator Cowan of the Gypsy population of his state. The proponents of the amendment, on the evidence of the record, gave an unqualified affirmation of the citizenship of American-born Gypsy children. If we are disposed to infer intent analogically, I would suggest that the evidence more readily supports the broad reading of the Clause than the restrictive one.

The language relied upon by advocates of a restrictive reading was uttered entirely within the context of citizenship of tribal Indians. The language about "full and complete jurisdiction" refers to the legal immunities of these Indians, not in any way to immigrant populations within the United States. And the definition that the proponents offer of that "full and complete" jurisdiction is a practical one, owing little to notions of "ascription" or "consent." A person, Trumbull and Howard said, is subject to the jurisdiction if he or she can be summoned by and sued in an American court or if he or she can be prosecuted criminally for actions taking place on United States soil.¹¹⁶ "Wild" and reservation Indians had, in essence, a limited extraterritoriality while on their own territory, even though it was within the borders of the nation; they were, in Senator

115. See *supra* notes 14–19 and accompanying text.

116. See *supra* notes 101, 112 and accompanying text.

Trumbull's analogy, like Mexicans living in Mexico.¹¹⁷ There was, however, no racial or national-origin component to this exception—as Trumbull said, Indians born in Colorado and living in its borders as ordinary Coloradoans ought to be and would be citizens under the Clause.¹¹⁸

The analogous question, therefore, ought to be the following: If an “illegal alien,” or the American-born child of such an alien, commits a civil wrong—involvement in an automobile accident, say—on United States soil, can he or she be sued? If such a person commits a crime on United States soil, can he or she be tried and punished? The answers to these questions are self-evident. The only aliens who are immune from this civil and criminal jurisdiction are those who come here under explicit grants of diplomatic immunity—that is, the precise “public ministers” (and their children) whom Senator Howard, by any natural reading of his remarks on introducing the clause, indicated as the sole exceptions to its declaration.

If, then, it was the “clear intent” of the Framers that children of aliens not be covered by the clause, it seems reasonable to ask what would possibly be an *unclear* intent. The process of unearthing this putative “clear intent” calls to mind the remark attributed to Winston Churchill upon his defeat for re-election as Prime Minister in 1945. Churchill's wife suggested that the defeat might be “a blessing in disguise.”¹¹⁹ “At the moment,” he replied, “it seems quite effectively disguised.”¹²⁰

III. TRAVELS IN INDIAN COUNTRY

Many of the men (and they were all men)¹²¹ who actually framed the Fourteenth Amendment were highly accomplished lawyers. Lyman Trumbull, in particular, was one of the more accomplished appellate advocates of the Illinois bar,¹²² and William P. Fessenden, chair of the Joint Committee of Fifteen on Reconstruction, was among the small elite

117. See *supra* note 111 and accompanying text.

118. See *supra* note 102 and accompanying text.

119. DAVID REYNOLDS, IN COMMAND OF HISTORY: CHURCHILL FIGHTING AND WRITING THE SECOND WORLD WAR 5 (2005).

120. *Id.*

121. One of the most poignant aspects of reading accounts of the Thirty-Ninth Congress' translation of the ideals of the anti-slavery and Abolitionist movements into constitutional text is the alacrity with which these practical men abandoned the important thread of anti-slavery thought that challenged the legal and social subordination of women. See EPPS, DEMOCRACY REBORN, *supra* note 33, at 205–21.

122. See *id.* at 126; RALPH J. ROSKE, HIS OWN COUNSEL: THE LIFE AND TIMES OF LYMAN TRUMBULL 3 (1979) (describing Trumbull as a powerful and successful debater); MARK M. KRUG, LYMAN TRUMBULL: CONSERVATIVE RADICAL 24–28 (1965) (referring to Trumbull's reputation as an excellent and logical debater who prepared his cases with extreme care).

Supreme Court bar of his time.¹²³ Jacob Howard had been attorney general of Michigan¹²⁴—at that time a frontier state in which Indian relations were quite important. Benjamin Wade had been both a county prosecutor¹²⁵ and a state judge¹²⁶ before ascending to the Senate. When we hear these men debate jurisdictional issues, we are not listening to a theoretical debate about jurisdiction, sovereignty, and the theories of Grotius and Vattel, but the concerns of practical men about highly developed doctrines in American domestic law. As the foregoing debate illustrates, foremost in the minds of these Framers was the question of how the Citizenship Clause would affect the legal status of American Indians both within and without what was then called “Indian country.” We must be careful not to allow legal concepts of Indian status current in the twenty-first century to mislead us into believing that Indian law at the time was analogous to Indian law today.

The discussion of “subject to the jurisdiction” in the Citizenship Clause began as a discussion of whether it was an adequate substitute for “Indians not taxed,” the phrase used in Article I of the Constitution to exclude Indians from congressional apportionment and in the Civil Rights Bill to indicate all those covered by that bill’s citizenship provision. From 1789 until 1868, according to a standard work in the field,

[o]nly those few Indians who had severed their tribal relations and individually joined non-Indian communities were considered to be subject to ordinary laws in a manner that made it appropriate to count them in the apportionment of direct federal taxes or for representation in Congress.

....

[T]he phrase “Indians not taxed” was not a grant of tax exemption; it described an existing status.”¹²⁷

Indians who had not severed their ties with their tribes lived in “Indian country.” This phrase was not a general description but a term of art carefully defined by statute¹²⁸ as

123. Fessenden, a godson and legal associate of Daniel Webster, argued eight cases in front of the United States Supreme Court before and during his Senate service, including most notably *Swift v. Tyson*, 41 U.S. 1 (1842).

124. 2 WILLIAM HORATIO BARNES, *THE FORTIETH CONGRESS OF THE UNITED STATES: HISTORICAL AND BIOGRAPHICAL* 16 (1870).

125. See ALBERT GALLATIN RIDDLE, *THE LIFE OF BENJAMIN F. WADE* 89 (1888).

126. *Id.* at 109.

127. FELIX S. COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* 388–89 (Rennard Strickland et al. eds., The Michie Company 1982) (footnote omitted) [hereinafter COHEN’S *HANDBOOK*].

128. See Trade and Non-Intercourse Act of 1834, ch. 161 (1834) (in effect in 1866). The definition of “Indian Country” in contemporary federal law, though much changed from what it was during the Treaty era, is directly descended from the definition of the Act. See

all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state, to which the Indian title has not been extinguished[.]¹²⁹

Indians dwelling within “Indian country” were “considered to be members of separate political communities and not part of the ordinary body politic of the states or of the United States.”¹³⁰

The existence of “Indian country” had profound legal implications for the jurisdiction of state and federal governments, courts, and law-enforcement agencies. As the standard Indian law reference says, “[f]ederal policy from the beginning recognized and protected separate status for tribal Indians in their own territory.”¹³¹ In 1866, Indian relations were still largely governed by treaties between individual tribes and the United States, which treated the tribes as quasi-sovereign and accorded tribal members something much like extraterritoriality.¹³² For example, whites could not enter or remain on reservations without permission of the United States, buy weapons or hunting items from, or sell them to, tribal Indians, or purchase or lease lands from tribal Indians without federal permission.¹³³ Foreigners needed both a valid passport and federal permission to enter Indian country and were subject to removal if found to be attempting to conduct negotiations with tribal governments.¹³⁴ If tribal Indians stole the horses or property of whites—whether the depredation occurred on or off the reservation—the aggrieved party had no recourse against the thieves but had to apply to the United States to conduct diplomatic proceedings with the tribe to obtain recompense and persuade the tribe to punish the thieves.¹³⁵ If negotiations failed, the victim would be compensated by the United States, which might then conduct military operations against the tribe and apprehend and punish the raiders.¹³⁶ Finally, federal criminal statutes governing exclusive federal territory were in force within Indian country but did “not extend to crimes committed by one Indian against the person or property of another Indian.”¹³⁷

COHEN’S HANDBOOK, *supra* note 127, at 31.

129. Trade and Non-Intercourse Act of 1834, ch. 161.

130. COHEN’S HANDBOOK, *supra* note 127, at 641 (footnote omitted).

131. *Id.* at 28 (footnote omitted).

132. Congress by statute ended the president’s discretion to enter into formal treaties with tribes only in 1871. COHEN’S HANDBOOK, *supra* note 127, at 107.

133. *Id.* at 70, 76, 110.

134. *Id.* at 72, 112, 116.

135. *Id.* at 112, 117.

136. *Id.* at 112.

137. Trade and Non-Intercourse Act, ch. 161 (1834). This remained good law, see *Ex Parte Kan-Gi-Shun-oa* (Crow Dog), 109 U.S. 556 (1883), until the passage of the Major Crimes Act, 23 Stat. 385 (1885).

Relations with Indians in “Indian country” were, in 1866, governed as foreign affairs, subject to the Treaty Power. Treaties frequently recognized the sovereignty of Indian tribes, but numerous treaty provisions also attested to their status as dependent nations.¹³⁸ The fact that much of the early relationship between Indians and federal and state governments revolved around treaties illustrates that, at least in the first century of the United States’ existence, “Indian affairs were more an aspect of military and foreign policy, than a subject of domestic or municipal law.”¹³⁹ In fact, the administration of Indian affairs was originally assigned to the Department of War.¹⁴⁰ It was not until fifty years later that “all the acts of the Commissioner of Indian Affairs [of the War Department]” were officially moved to the newly formed Department of the Interior.¹⁴¹

The confusion over the quasi-sovereign character of tribes also extended to the citizenship status of individual Indians.¹⁴² Indians typically did not acquire citizenship simply by being born within the territory of the United States.¹⁴³ Moreover, prior to the Civil War, “[n]ative Americans were considered to be members of an alien, uncivilized race, whose values were antithetical to those of the dominant white civilization.”¹⁴⁴ Chief Justice Marshall provided a foundation for denying citizenship to Indians in *Worcester v. Georgia*.¹⁴⁵ The opinion implied that Native Americans who remained under the authority of tribal governments were citizens of those tribes rather than of the United States.¹⁴⁶ Professor Earl Maltz has suggested that Indians “were not even appropriately considered part of the people of the United States, let alone citizens.”¹⁴⁷ As a result of these important legal decisions on the tribes’ quasi-sovereign status, Indians would continue to be excluded from American citizenship.¹⁴⁸

Ten years after *Worcester*, Chief Justice Taney retreated from Marshall’s theory of Indian citizenship status in *United States v. Rogers*.¹⁴⁹ In the opinion, “Taney seemed to reject the proposition that tribal government

138. COHEN’S HANDBOOK, *supra* note 127, at 393.

139. *Id.* at 393–94 (footnote omitted).

140. Act of Aug. 7, 1789, ch. 7 § 1, 1 Stat. 49.

141. Act of Mar. 3, 1849, ch. 108 § 5, 9 Stat. 395.

142. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, 296–97 (1978).

143. Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 22 IMMIGR. & NAT’LITY L. REV. 625, 630 (2001).

144. *Id.* at 626.

145. 31 U.S. (6 Pet.) 515 (1832).

146. *Id.*

147. Maltz, *supra* note 143, at 627.

148. KETTNER, *supra* note 142, at 300.

149. 45 U.S. 567 (4 How.) (1846).

possessed any residual characteristics of sovereignty.”¹⁵⁰ While under Taney’s analysis Indians were still not considered citizens, “they were nonetheless to be considered subjects of the government of the United States.”¹⁵¹ Many Native Americans had no desire whatsoever to become a part of and be subject to the rules of white society.¹⁵² For those who did, naturalization was the only option, and opportunities for naturalization were few.¹⁵³ In *Dred Scott*, Chief Justice Taney had supplemented his remarks on the ineligibility of black people for citizenship by remarking that Indians were not citizens by virtue of the Constitution but that Congress could, if it chose, make them citizens by using its naturalization power.¹⁵⁴

However, “a number of treaties and statutes contemplated the possibility of Indian citizenship under certain conditions.”¹⁵⁵ Specifically, the Cherokee treaties of 1817 and 1819 provided that an Indian who left his tribe and received a land allotment in fee simple could thereby become a naturalized citizen.¹⁵⁶ However, the offer of citizenship often appeared to be more of a threat than a reward.¹⁵⁷ During the Indian Removal dispute, the federal government told the Cherokee that if they did not “denationalize” and become landholding citizens—thereby giving up their highly developed culture—their only alternative was removal west of the Mississippi River.¹⁵⁸ In the years following, similar treaties were

150. Maltz, *supra* note 143, at 627–28.

151. *Id.* at 628.

152. *Id.* at 626.

153. *See id.* at 630 (noting that Native Americans were generally ineligible for naturalization under the terms of the naturalization statutes).

154. 60 U.S. (19 How.) 393, 404 (1856). Taney explained:

It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

Id.

155. KETTNER, *supra* note 142, at 291–92.

156. *See* Treaty with the Cherokees, U.S.-Cherokees, art. 8, July 8, 1817, 7 Stat. 156, 159; Treaty with the Cherokees, U.S.-Cherokees, art. 2, Feb. 27, 1819, 7 Stat. 195, 196.

157. *See* William G. McLoughlin, *Experiment in Cherokee Citizenship, 1817–29*, 33 AM. Q. 3, 4 (1981) (noting that the threats resulted from the government’s program of requiring all Indians east of the Mississippi either to accept removal or to give up their Indian identity).

158. *Id.*

established between other tribes, often with individual Indians choosing between tribal membership (and removal), on the one hand, and American citizenship on the other.¹⁵⁹

Throughout the first half of the nineteenth century, both state and federal courts sustained the general view that individual Indians born within tribal society did not qualify as citizens by birth.¹⁶⁰ This lack of citizenship had a significant effect on their ability to convey and inherit real property.¹⁶¹ In 1823, for example, the New York Court of Errors overturned a lower court's decision that an Oneida Indian could inherit property as a citizen of the State of New York.¹⁶² In deciding that the Indian was not a citizen, Chancellor James Kent observed: "Though born within our territorial limits, the *Indians* are considered as born under the dominion of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us."¹⁶³ In a similar case a few years later, the South Carolina Court of Appeals rejected the citizenship and voting ability of an Indian who had served in the Continental army.¹⁶⁴ Although Marsh was a man of "excellent character," the judge held "with regret" that he was a citizen belonging to that "race of people, who have always been considered as a separate and distinct class, never having been incorporated into the body politic."¹⁶⁵

Even when a state purchased land from an individual Indian, the conveyance was often held void under state law. *Lee v. Glover*¹⁶⁶ firmly established that even in the event that an Indian was granted lands by the state as a reward for military services, "by the constitution and statute law of [the State of New York], no white person [could] purchase any title to land, from any one or more Indians, either individually or collectively, without the authority and consent of the legislature."¹⁶⁷

In criminal matters, as one Indian scholar has noted, the trend during the years before the Civil War "was away from a land sovereignty notion of jurisdiction and toward a concept based primarily on the citizenship of the parties."¹⁶⁸ The limits on the reach of courts into Indian country were

159. KETTNER, *supra* note 142, at 292–93.

160. *Id.* at 294.

161. *Id.*

162. See *Goodell v. Jackson*, 20 Johns. Rep. 693, 734 (N.Y. 1823).

163. *Id.* at 712.

164. See *State ex rel. Marsh v. Managers of Elections*, 17 S.C.L. (1 Bail.) 215, 216 (S.C. Ct. App. 1829); see also KETTNER, *supra* note 142, at 294–95.

165. *Marsh*, 17 S.C.L. (1 Bail.) at 216.

166. 8 Cow. 189 (N.Y. Sup. Ct. 1828) (per curia).

167. *Id.* at 190.

168. Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 955 (1975).

based on the idea, present in federal Indian law since Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*,¹⁶⁹ that Indian tribes were not subjects of state authority but "domestic dependent nations" that retained important aspects of sovereignty and could in a limited way continue to deal with the United States on a state-to-state basis.¹⁷⁰

State law had no reach within Indian Country in 1866.¹⁷¹ That doctrine did not begin to erode, even for criminal matters, until at least 1881, with the Supreme Court's decision in *United States v. McBratney*.¹⁷² It was not until the Termination Era of the 1950s that Congress by statute extended state jurisdiction over Indian reservations—and even then, some reservations were exempted.¹⁷³ As for civil jurisdiction, the question was at least equally muddled.¹⁷⁴ Even in modern times, as one scholar noted a

169. 30 U.S. (5 Pet.) 1 (1831).

170. *Id.* at 17.

171. William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 207–08 (1973).

172. 104 U.S. 621 (1881) (holding that although the federal court did not have jurisdiction over a white man accused of murdering another white man on Indian territory, the federal authorities were required to turn the accused over to state authorities for prosecution).

173. See Pub. L. No. 280-505, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1953)); see also Canby, *supra* note 171, at 211 (arguing that jurisdiction of tribal courts should be determined based on the subject matter of the case and reservation affairs rather than the race of the suing party).

174. In addition to lack of citizenship and land rights, a brief discussion of criminal liability of Indians and criminal jurisdiction over Indian lands is also warranted in establishing the legal status of Indians during this time period. See generally Clinton, *supra* note 168. Treaties from 1778 to approximately 1796 generally resolved the issue of criminal jurisdiction "through reliance on the Indians' sovereignty . . . as well as through negotiated arrangements predicated upon the citizenship of the defendant or victim." *Id.* at 953. However, the Treaty of January 9, 1789, also referred to as the Treaty of Fort Harmar, marked the beginning of the intrusion of United States jurisdiction into Indian sovereignty. See Treaty with the Wyandots, Delawares, Ottawas, Chippewas, Pattawatimas, and Sacs, Jan. 9, 1789, 7 Stat. 28. This treaty contained language that permitted territorial and state governments to prosecute Indians who committed the crimes of robbery and murder against non-Indians, regardless of whether the crime was committed in Indian territory. *Id.* art. V.

The following years witnessed a rapid decrease in Indian sovereignty over criminal matters. Clinton, *supra* note 168, at 955. By the mid-1820s, provisions granting tribes criminal jurisdiction had all but disappeared. *Id.* Moreover, federal jurisdiction, which had previously been limited to situations where the victim was a U.S. citizen, "was now extended to cases in which either the perpetrator or the victim was a citizen or resident of the United States." *Id.* Thirty years later, the Cherokees agreed to the establishment of a federal district court in Indian country. *Id.* at 956 (citing Treaty with the Cherokees art. VII, U.S.-Cherokees, July 19, 1866, 14 Stat. 799, 800–01 (stipulating that until a federal court was created, the closest federal court to the reservation would have jurisdiction). However, the Cherokees insisted that the treaty include a proviso ensuring that they could retain exclusive jurisdiction of "all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties." Treaty with the Cherokees art. VII, U.S.-Cherokees, July 19, 1866, 14 Stat. 799, 803; see also Clinton, *supra* note 168, at 956–57.

century after the framing of the Fourteenth Amendment, “[n]early every problem of Indian law has at its core a jurisdictional dispute.”¹⁷⁵

In short, tribal Indians were a large population resident within United States territory. Over-expansive draftsmanship of the Citizenship Clause would have had the unintended effect of making all of them United States citizens, voiding numerous treaties and presenting federal courts and law enforcement officials with all-but-insuperable problems of adjudication and enforcement. It should hardly be surprising, then, that the Framers of the Fourteenth Amendment would include language omitting them from the declaratory language of the Clause.

Of course, the Framers could have simply used the “Indians not taxed” language. However, there was one more category of persons inside the United States who did not acquire citizenship by birth. Children born to accredited diplomatic personnel, by treaty and by customary international law, are not “subject to the jurisdiction” of the receiving state and do not by birth become citizens of the United States. Neither they nor their parents can be sued in civil court, state or federal, for individual torts; nor, except in extraordinary cases, can they be arrested or tried for alleged crimes in American courts.

It hardly seems coincidental that this class of children is the one that everyone agrees the Framers were discussing prior to the segue into the discussion of Indians. In 1866, tribal Indians had some of the same characteristics of diplomats. Their off-reservation raids (like crimes or torts committed by diplomatic personnel or families) did not subject them to arrest by state authorities, and were in the first instance matters of direct government-to-government diplomatic negotiation. They had a sharply limited capacity to enter into contracts, buy and sell property, or sue or be sued in court. Unlike diplomatic personnel, however, tribal Indians were and had been since *Cherokee Nation v. Georgia* considered to be resident on American soil and under the national authority of the United States in external matters.

Many thinkers believed in 1866 that the United States could, if it chose, extinguish all remnants of Indian sovereignty and reduce tribal Indians to the status of subjects of both state and federal jurisdiction. But it had not done so. The reasons are many, but surely foremost among them was that the Indians themselves were in a position to offer violent and effectual military resistance to such a move, even against the military behemoth the United States had become. In 1866, the debacle at Little Big Horn was still a decade away. The last battle of the Indian Wars did not take place until

175. Canby, *supra* note 171, at 206.

1918. American jurisdiction over Indian country might be complete on the international plane; but domestically it seemed shaky indeed. Tribal Indians occupied thus a much different position than did, say, Chinese living in California.

If, as I contend, the phrase “full and complete jurisdiction” draws its meaning from the context of tribal Indians, it means something considerably different than mere dual nationality of parentage, which is the meaning that advocates of a restrictive reading claim to discern in it. Can “illegal aliens” be arrested, tried, and even executed? Can “illegal aliens” buy and sell property? Can they make contracts and incur liability for breach? Can they be sued in tort if they, for example, drive unsafely and injure or kill other motorists? The answer to these questions is clear. In short, “illegal aliens” in the twenty-first century have no similarity to tribal Indians in the nineteenth. Their children (unlike the children of tribal Indians) do not have, as a matter of *American* law, another nation upon whose protection they may call. Unlike tribal Indians, they are not guaranteed membership in any community other than the one into which they are born.

Proponents of restriction, however, find one flaw in these newborns. Not in themselves, actually, but in their parents, who are either lawbreakers or at the very least undesirables. “Blame the parents,” Arizona State Senator Russell Pearce said recently. “They’re breaking the law, and you can’t reward them.”¹⁷⁶ But in terms of defining an innocent person’s legal capacity, it is difficult to see what relevance the status of their parents has. It may be true that the United States has “tried” to exclude the parents from the community by “discouraging” their entry.¹⁷⁷ But the children have committed no crime at birth; have violated no law; have not transgressed the implied promise of a visa.

To punish babies, much less to proscribe and entirely outlaw them, because of the perceived sins of their parents is alien to our moral and ethical tradition. Guilt is not hereditary; it is individual.¹⁷⁸ We do not

176. Scott Wong, *Arizona State Sen. Russell Pearce Targets Immigrants’ Kids*, POLITICO, (Aug. 4, 2010), <http://www.politico.com/news/stories/0810/40675.html>.

177. I use the quotation marks because there is a compelling case to be made that, because the American economy depends on their labor, efforts to exclude or discourage “illegal aliens” are in fact ineffectual by design.

178. The principle that guilt is not hereditary is a foundational principle of the Western moral-legal tradition:

Yet say ye, Why? doth not the son bear the iniquity of the father? When the son hath done that which is lawful and right, and hath kept all my statutes, and hath done them, he shall surely live. The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall

impose legal disabilities on the children of felons, for example, no matter how heinous their parents' actions. The conscience revolts at the idea, and the Constitution itself rejects ancestral guilt as a basis for policy. However much we dislike undocumented aliens, they are surely not worse than traitors, those who "levy[] [w]ar against [the United States]," or "adher[e] to their Enemies, giving them Aid and Comfort."¹⁷⁹ And yet, even with the example of Benedict Arnold fresh in their minds, the Framers of the Constitution protected the children of these renegades from eating their parents' sour grapes: "[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."¹⁸⁰

To argue that American-born children are in some way not "subject to the jurisdiction" of the United States is not to argue that they benefit in some way from the immunities of extraterritoriality; it is to argue that they suffer all the liabilities of citizenship but are, because of actions of a third party, to be deprived of its advantages. Does it seem likely that the anti-slavery thinkers who devised the Citizenship Clause as a means of overruling *Dred Scott* intended at the same time to create a new class of persons who had no rights a citizen is bound to respect?

IV. THE INTELLECTUAL BACKGROUND OF NINETEENTH-CENTURY REPUBLICAN CITIZENSHIP

Citizenship Without Consent centers around a sophisticated reading of such Enlightenment figures as John Locke, Emmerich de Vattel, Jean-Jacques Rousseau, and Jean-Jacques Burlamaqui. The thought of these figures, as ably construed by the authors, gives substance to their contention that

birthright citizenship is something of a bastard concept in American ideology. For all its appealing simplicity, it remains a puzzling idea. . . . [I]t was fundamentally opposed to the consensual assumptions that guided the political handiwork of 1776 and 1787. In a polity whose chief organizing principle was and is the liberal, individualistic idea of consent, mere birth within a nation's border seems to be an anomalous, inadequate measure or expression of an individual's consent to its rule and a decidedly crude indicator of the nation's consent to the individual's admission to political membership.¹⁸¹

the father bear the iniquity of the son: the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him.
Ezekiel 18:19–20 (King James).

179. U.S. CONST. art. III, § 3, cl. 1. I thank Professor Laurence Claus of the University of San Diego for pointing this out to me.

180. *Id.* cl. 2.

181. SCHUCK & SMITH, *supra* note 10, at 2–3.

This analysis is admirable. But as it says, it applies the intellectual concepts of “1776 and 1787” to construe a constitutional amendment written in 1866. It implicitly assumes that the American conception of citizenship underwent no changes during eight decades of convulsive political struggle that culminated in a catastrophic Civil War and a constitutional revolution. And the elegant references to Burlamaqui and Vattel disguise the absence of any parsing of the more immediate intellectual background of the Amendment.

In fact, the index to *Citizenship Without Consent* contains no entries for the more relevant figures. Not only is there no reference to important nineteenth-century figures like Wendell Phillips, Francis Lieber, Edward Bates, Robert Dale Owen and Carl Schurz; there is no mention even of some of the immediate legislative forebears of the Fourteenth Amendment generally and the Citizenship Clause generally—names like John Bingham, Thaddeus Stevens, William P. Fessenden, and Benjamin Wade. Even those who are mentioned—figures like Senator Lyman Trumbull and Jacob Howard—are quoted only as to their remarks in the legislative debates, with no attempt to place their remarks in the context of their own thought or of the debate of their times. In short, without seeming to notice, the authors (and those whose interpretations depend on their work) make two fundamental interpretive errors. First, they insist on interpreting a nineteenth-century enactment exclusively in terms of eighteenth-century ideas; second, they treat an *amendment* to the Constitution, written in a time of revolutionary upheaval, as if it made either no change or at most only minimal change in the document it was amending. The result is an ahistorical and perverse reading of phrases whose meaning becomes far clearer when considered in their actual context.¹⁸²

182. In his subsequent intellectual history of American citizenship, Professor Smith notes that “[m]any have objected to our argument [in *Citizenship Without Consent*], and some of the objections have force.” ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 309 (1997). Nonetheless, he argues that permitting citizenship only to children of aliens lawfully present in the United States “produces the main results most framers endorsed: constitutional inclusion for blacks and permanent resident aliens like the Chinese, but no such inclusion for the tribes.” *Id.* This argument is of a type that appears in some “originalist” writings from at least the time of *Dred Scott*. Since we know what the Framers were thinking, it suggests, we can interpret their words to mean what they were thinking rather than what they said. The language of the Clause does not support a limitation to “blacks and resident aliens.” Professor Smith explains the language by interpreting the legislative debates to say that Trumbull and Howard “stress[ed] that the clause implicitly required ‘full and complete’ jurisdiction. Insofar as they clarified what that meant, however, they identified it with a lack of any divided political allegiance.” *Id.* This summary flatly mischaracterizes what was said. Trumbull and Howard *did* clarify what they meant: full subjection to the jurisdiction of United States courts.

The phrase “[i]nsofar as they clarified what that meant” is of a type that often appears in “originalist” writings. It has a good deal of utility as a means of discounting

Simply put, both American legal history and the intellectual history of the antislavery movement produced a rich body of material reformulating the idea of American citizenship—one that makes an inclusive reading of the Clause much more plausible and a restrictive one anomalous. In the area of legal history, another comprehensive survey of antebellum citizenship law concludes that birthright citizenship was the legal norm in American law during the first half of the nineteenth century.¹⁸³ While Schuck and Smith suggest that American law was ambivalent between “ascriptive” (birthright) citizenship and a consensual model, James H. Kettner concludes that birthright citizenship was an *unquestioned* principle of American law until the slavery controversy drove pro-slavery jurists to construct an alternative model of citizenship that could exclude American-born black people on the ground that the polity did not “consent” to their membership.¹⁸⁴ Before 1820, he writes,

Americans merely continued to assume that “birth within the allegiance” conferred [citizenship] and its accompanying rights. Natives were presumably educated from infancy in the values and habits necessary for self-government, and there was no need to worry about their qualifications for membership. To be sure, it might trouble some that the volitional, consensual character of birthright citizenship was in fact more theoretical than real owing to the lack of concrete legislation regulating the abstract right of expatriation; but this concern only led to agitation for laws that would allow citizens to withdraw from membership. It did not shake the presumption that membership was acquired automatically by all those born under the Republic.¹⁸⁵

As late as 1838, for example, one North Carolina court wrote that a freed slave must be a citizen, because “[s]laves manumitted here became freemen—and therefore if born within North Carolina are citizens of North Carolina—and all free persons born within the State are born citizens of the State.”¹⁸⁶ In Kettner’s account, the rule of citizenship by birth was the orthodox legal view. The sustained critique of birthright citizenship was the novel doctrine. Kettner writes that it was advanced by state courts and lawyers anxious to justify and legalize the removal and exclusion of Native

adverse authority gleaned from the statements of the very framers a conscientious “originalist” purports to be following. It is akin to the suggestion that seemingly clear text must be unclear. The framers, it turned out, were confused. They did not really know what they were “intending.” Thus subsequent scholars, who understand theory better, can by a kind of substituted judgment create their actual intent, whether they would have claimed it or not.

183. See KETTNER, *supra* note 142, at 287.

184. *Id.* at 287–88.

185. *Id.*

186. *Id.* at 317 (quoting *State v. Manuel*, 20 N.C. (4 Dev. & Bat.) 20, 25 (1838)).

Americans and the permanent subordination of slaves and free blacks.¹⁸⁷ That effort at doctrinal change bore fruit in the Supreme Court's decision in *Scott v. Sandford*, a decision that was seen as extreme at the time and takes little account of the weight of legal authority that favored birthright citizenship.

In fact, many American lawyers and lawmakers would have seen the Citizenship Clause as merely a declaration of what the law already was. Schuck and Smith seem to be interpreting the Fourteenth Amendment as if it had been written as a slight modification of cases like *Dred Scott*, rather than being designed to overturn them. It is as if interpreters were to read the United States Constitution as in some way a reaffirmation of the British Constitution, "intended" to make only minimal changes in British sovereignty over North America and the absolute sovereignty of Parliament. The Fourteenth Amendment is an *amendment*. A contextual history of the framing of the Fourteenth Amendment suggests that it was intended as a wide-ranging and fundamental change in the 1787 Constitution, not as a minor technical change leaving core concepts unchanged.

As noted above, my research to date has focused on the political ideas and debate immediately surrounding the adoption of the Amendment. Excellent scholars have delved more deeply than I into the general intellectual history of anti-slavery ideas during the forty years preceding the Civil War.¹⁸⁸ Even a cursory dip into their work and the documentary sources surrounding it produces God's plenty of evidence that, by 1865, the idea of citizenship had undergone a radical shift from the half-hearted, state-centered view enshrined in the original Constitution.

Jacobus tenBroek, one of the pioneers of modern Fourteenth Amendment scholarship, sets out his thesis early in his book *Equal Under Law*: "In some ways doctrinally and perhaps historically the most significant contribution made by the abolitionists in the constitutional development of the United States was their conception of paramount

187. KETTNER, *supra* note 142, at 288.

188. See, e.g., MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (arguing that the framers of the Fourteenth Amendment manifested their intent that the states were required to respect individual liberties in the privileges and immunities clause); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988) (discussing the philosophical development and academic interpretation of the Fourteenth Amendment from the time of adoption to present day); JACOBUS TENBROEK, EQUAL UNDER LAW (Collier Books 1965) (1951), *originally published as* THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (examining the origins of the Fourteenth Amendment and debate surrounding it to prove that a broad protection of civil rights was what the drafters intended).

national citizenship.”¹⁸⁹ This “paramount” notion took the idea of citizenship firmly out of the hands of the states. An American citizen, whether “natural born” or naturalized, was a citizen of the United States; citizenship arose out of the nation, under the Constitution, rather than as a derivative boon arising out of state citizenship. The paramount idea was also strikingly inclusive. It regarded birth itself as sufficient for citizenship, and saw membership in the American family as a right of the child’s quite independent of the qualities of his or her parents.

TenBroek cites Lysander Spooner and Joel Tiffany as the “principal spokesmen and most articulate exponents of the theory of paramount national citizenship.”¹⁹⁰ Spooner’s 1845 tract, *The Unconstitutionality of Slavery*,¹⁹¹ is concerned to prove that the guarantees of liberty in the Constitution applied to those then held as slaves: “The constitution [sic] of the United States recognizes the principle that all men are born free; for it recognizes the principle that natural birth in the country gives citizenship—which of course implies freedom. And no exception is made to the rule.”¹⁹²

Spoooner further argues that in American usage since the Revolution, the word “free person” and “citizen” are synonymous. Being born free, Spooner argued, those held as slaves are citizens by birth, regardless of any reluctance on the part of slave states to acknowledge their membership in the political community. (Note that this argument for slave citizenship antedates the Supreme Court’s decision in *Dred Scott*, and thus can hardly be regarded as an ad hoc response to it.)

The basic argument for slave citizenship arises out of the Constitution’s requirement that any individual elected President must be “a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution.”¹⁹³ This language, Spooner says,

is an implied assertion that *natural birth* in the country gives the right of citizenship. And if it gives it to one, it necessarily gives it to all—for no discrimination is made; and if all persons born in the country, are not entitled to citizenship, the constitution has given us no test by which to determine who of them are entitled to it.¹⁹⁴

Spoooner then confronts directly the eighteenth-century argument, carried on by Schuck and Smith, that mere birth slights the requirement of consent:

189. TENBROEK, *supra* note 188, at 94.

190. *Id.* at 108.

191. LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (1845).

192. *Id.* at 156 (footnote omitted).

193. U.S. CONST. art. II, § 1, cl. 4.

194. SPOONER, *supra* note 191, at 119.

It may, perhaps, be argued that the slaves were not parties to the constitution, inasmuch as they never, *in fact*, consented to it. But this reasoning would disfranchise half the population; for there is not a single constitution in the country—state, or national—to which one half of the people who are, *in theory*, parties to it, ever, *in fact and in form*, agreed. Voting for and under a constitution, are almost the only acts that can, with any reason at all, be considered a *formal* assent to a constitution. Yet a bare majority of the adult males, or about one tenth of the whole people, is the largest number of “the people” that has ever been considered necessary, in this country, to establish a constitution. And after it is established, only about one fifth of the people are allowed to vote under it, even where suffrage is most extended. So that no formal assent to a constitution is ever given by the people at large. Yet the constitutions themselves assume, and virtually *assert*, that *all* “the people” have agreed to them. They must, therefore, be construed on the theory that all have agreed to them, else the instruments themselves are at once denied, and, of course, invalidated altogether. No one, then, who upholds the validity of the constitution, can deny its own assertion, that all “the people” are parties to it.

. . . .

The consent, then, of “the people” at large is *presumed*, whether they ever have really consented, or not. Their consent is presumed only on the assumption that the rights of citizenship are valuable and beneficial to them, and that if they understood that fact, they would willingly give their consent in form.¹⁹⁵

Joel Tiffany, in his *A Treatise on the Unconstitutionality of American Slavery*,¹⁹⁶ asserted that persons of African descent born in the United States were in fact citizens even though their parents, brought here as slaves after the Revolution, were not eligible for naturalization; the fact of birth in the United States was enough. His analysis specifically sets out a definition for determining when a child is “subject to a foreign power,” a phrase that is crucial to the “originalist” argument. The Naturalization Act, he writes

does not exclude from the benefits of citizenship those colored persons who, prior to [its passage] had ceased to be aliens either to the National or State Governments. Neither does it affect the rights of those who were born within the jurisdiction of the Federal Government and who consequently, never were aliens, and stand in no need of naturalization;

195. LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 184–85 (enlarged ed. 1860) (1845).

196. JOEL TIFFANY, *TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT* (Mnemosyne Publishing Co. 1969) (1849).

and inasmuch as all are citizens or natural born subjects, who are not aliens, hence all colored persons, who are born in the United States, whether their parents are citizens or aliens, become citizens by birth; and there is no Constitutional power any where, to declare or treat them as aliens. *They are not born under the protection of any foreign power, and they owe no allegiance [sic] to any; consequently they cannot be required to take any oath of renunciation of allegiance [sic].*¹⁹⁷

As tenBroek suggests, these theories arising out of the anti-slavery movement had an influence on practical politicians as well as on political activists. tenBroek himself appends a lengthy 1857 speech by Representative John Bingham, who a decade later was one of the most important forces in the drafting and adoption of the Fourteenth Amendment. The Bingham speech is important because it makes clear that the anti-slavery idea of birthright citizenship was not a woolly rhetorical notion. Bingham, an accomplished lawyer, in fact is delivering his view of birthright citizenship within the context of an extremely *restrictive* view of the political rights of non-citizens.

The occasion was the proposed admission of the Oregon Territory to the Union under a constitution written by white Oregonians at a convention in Salem, Oregon, in 1857. Bingham strenuously objected to two distinct provisions of the draft constitution, and both objections were informed by his view of the national nature of citizenship. The first provision permitted white immigrants who were not naturalized citizens to take up residence in the new state and exercise full voting rights; the second proclaimed it illegal for “free Negroes or mulattoes” to enter or remain within the state at any time.¹⁹⁸ Bingham regarded both as unconstitutional, one because it was too inclusive and the other because it was too exclusive.

Bingham sets the stage of his two objections with a defense of birthright citizenship that directly addresses the Schuck and Smith notion of “ascription” as a remnant of medieval subjection:

Who are the citizens of the United States? Sir, they are those, and those only, who owe allegiance to the Government of the United States; *not the base allegiance imposed upon the Saxon by the Conqueror, which required him to meditate in solitude and darkness at the sound of the curfew*; but the allegiance which requires the citizen not only to obey, but to support and defend, if need be with his life, the Constitution of his country. All free persons born and domiciled within the jurisdiction of

197. *Id.* at 94 (emphasis added).

198. This language of course became legally inoperative upon the adoption of the Fourteenth Amendment.

the United States, are citizens of the United States from birth; all aliens become citizens of the United States only by act of naturalization¹⁹⁹

Of extending the vote to aliens, even those who had entered the naturalization process, Bingham said,

The Constitution very clearly imports that only persons born here or naturalized by law are citizens of the United States [C]itizens of the United States are the free inhabitants, born and domiciled with in the United states, or naturalized under the laws thereof, and that these alone are citizens, and when resident within the several States, constitute the body politic²⁰⁰

As for the exclusion of “free Negroes and mulattoes,” Bingham said, the persons thus excluded from the State by this section of the Oregon constitution, are citizens by birth of the several States, and therefore are citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States

. . . .

All free persons, then, born and domiciled in any State of the Union, are citizens of the United States

. . . .

It is, sir, the public law of the civilized world, that every free man is entitled to live in the land of his birth.²⁰¹

In short, Bingham’s theory of citizenship was a specifically republican one, drawing on the egalitarian ideology of nineteenth century liberalism and specifically distinguishing itself from the medieval ascriptive concept of subjection. It was a definition that insisted on a sharp distinction between the rights of aliens and those of citizens; and it was a definition that insisted the only prerequisite for “natural born” citizenship was legal freedom at birth. The definition specifically rejected the idea that citizenship could be further limited by “conventional” restrictions on “political rights” such as the right to vote or hold office.

The paramount theory of national citizenship by right of birth, in fact, was by 1866 an important part of the legal as well as the intellectual background of the Fourteenth Amendment. Of all the sources omitted by those favoring a restrictive reading of the Citizenship Clause, none is quite so adverse to their position as that of the opinion by Edward Bates, Lincoln’s Attorney General, on the citizenship of free black sailors engaged

199. John A. Bingham, *The Constitution of the United States and the Proslavery Provisions of the 1857 Oregon Constitution* (1859), reprinted in TENBROEK, *supra* note 188, at 320, 327 (emphasis added). The speech is being made after *Dred Scott* but well before the Framing of the Fourteenth Amendment.

200. *Id.* at 330.

201. *Id.* at 336–41.

in the coasting trade.²⁰² That opinion, rendered in 1862, represented the legal position of the United States at the time of the framing of the Fourteenth Amendment; it is hard to argue that it is not a salient part of the legal background. In the opinion, Bates responded to a request from Treasury Secretary Salmon P. Chase for an answer to a practical question: “Are *colored men citizens* of the United States, and therefore competent to command American vessels?”²⁰³

Bates drew on the theories of Spooner and Tiffany to answer that citizenship was the property of all persons born in the United States:

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.²⁰⁴

Bates admitted only one established exception to this rule: “the small and admitted class of the *natural born* composed of the children of foreign ministers and the like.”²⁰⁵ As for slaves, he explicitly refused to endorse the generally understood rule, derived from *Dred Scott*, that children of slaves were not citizens, “because it is not within the scope of your inquiry.”²⁰⁶ In addition, he was at pains to make clear a second point relevant to the current inquiry: that a child’s citizenship is not created by the legal status of his or her parents. “It is an error to suppose that citizenship is ever hereditary. It never ‘passes by descent.’ It is as original in the child as it was in his parents. It is always either born with him or given to him directly by law.”²⁰⁷

202. Citizenship, 10 OP. ATT’Y. GEN. 382 (1862).

203. *Id.* at 383 (emphasis in original).

204. *Id.* at 394.

205. *Id.* at 397.

206. *Id.*

207. *Id.* at 399.

Bates turned to the issue of “ascription” vs. “consent” by referring to a previous opinion, by former Attorney General William Wirt, that “free persons of color” residing in Virginia were not citizens of the United States.²⁰⁸ Wirt’s opinion had in part rested on the proposition that “[t]he allegiance which the free man of color owes to the State of Virginia is no evidence of citizenship, for he owes it not in consequence of an oath of allegiance.”²⁰⁹ Bates wrote,

This proposition surprises me; perhaps I do not understand it. I did verily believe that the oath of allegiance was not the cause but the sequence of citizenship, given only as a solemn guarantee for the performance of duties already incurred. But, if it be true that the oath of allegiance must either create or precede citizenship, then it follows, of necessity, that there can be no *natural-born citizens*, as the Constitution affirms, because the child must be born before it can take the oath.²¹⁰

A proper consideration of nineteenth century political thought—the thought that formed the real background of the Framing of the Citizenship Clause—furnishes strong evidence that the restrictive thesis, based on Locke and other Enlightenment thinkers, is at best implausible. Readily available evidence suggests that the thinkers who guided the Framing saw birthright citizenship as the norm, with the sole exception being children of diplomats—that they saw this as the state of affairs before the ratification of the Amendment, which made explicit a fact they believed to be already present in the Constitution. Readily available evidence suggests that this view was not ambivalent, ill-thought-out, or crudely based on medieval norms. It represented the fruit of the most advanced progressive social thought available to Americans in the year 1866.

The act of the Framing was embedded in a history, and a set of ideas, from which we pluck it at our peril. Those who would so isolate it from context must furnish a justification for that choice—one that is conspicuously missing from the “originalist” scholarship on this subject.

V. BIRTHRIGHT CITIZENSHIP AND CHANGED CIRCUMSTANCES

We have looked at the legislative debates surrounding the adoption of the Clause. They do not support a restrictive reading of the Clause. We have examined the legal background of the framing; the framing generation gave almost no weight to the questions of “consensualism,” and the polity’s right to exclude, that Schuck and Smith and others consider crucial.

208. *Id.* at 400 (1862) (discussing Rights of Free Virginia Negroes, 1 OP. ATT’Y. GEN. 506, 509 (1821)).

209. Free Virginia Negros, *supra* note 208, at 508.

210. Citizenship, *supra* note 202, at 403.

Two more arguments underlie the case for the restrictive reading. The first is that circumstances have changed; that the Framers could not have foreseen the unprecedented circumstances of America's immigration crisis. The second is one of constitutional policy. One of the arguments against birthright citizenship, remember, is that it is an "anomaly," contrary to the spirit of the Constitution, and that it threatens democratic legitimacy by forcing the polity to absorb the children of persons whom the majority has made clear it does not want.

The first argument has two parts: first, that as in 1866 there was no such legal category as "illegal immigrant,"²¹¹ the Framers could not have intended the Clause to apply to their children. As a matter of historical lexicography, this claim is hard to gainsay. But the lexicographical argument is simple-minded; it is akin to arguing that the Air Force is contrary to the Framers' intent because they only authorized an Army and a Navy.

The more sophisticated argument would be that there was nothing *like* an "illegal alien" at the time of the Framing. As a matter of historical analogy, that argument rests on dubious reasoning. The debates about the Civil Rights Act and the Citizenship Clause specifically address the situations of two different groups who might be considered to share the core characteristics of "illegal aliens."

The central concerns of advocates of immigration restrictionists prominently include, first, that "illegal aliens" in their presence and their conduct constitute a threat to the American system of law. They have come here without permission (or have remained after temporary permission has expired); they live here in defiance not only of entry restrictions but in evasion of domestic laws.²¹² They constitute a population that has deliberately chosen not to become part of the American system and that thus threatens the very American idea of assimilation.

211. See *supra* note 3 and accompanying text.

212. One common claim made about illegal aliens is that they "pay no taxes" and that they consume taxpayer dollars by accessing "welfare programs"; in fact, most "illegal" workers who remain here do so because they are working or their family members are working to support them. See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 1-8 (2006) (compiling several studies demonstrating the misguided nature of American attitudes toward the financial cost of "illegal" immigration). In addition, many of these workers pay more taxes than comparable legal workers because they can never expect to receive the income-tax refunds and Social Security benefits they are paying for. *Id.* As for the generous "welfare programs" that aliens access, I am still trying to figure out what they are. The single exception I am aware of lies in combined private, state and federal programs that provide reimbursement to hospital emergency rooms that must treat uninsured patients. This is not an inconsiderable cost, but one that could arguably be better addressed by a program of universal health care rather than by doing violence to the Constitution.

But as noted above, two groups that featured in the debates actually give us a very good gauge of what the Framers thought about these issues: children of Chinese workers and children of Gypsies. The Chinese, who had been present in large numbers in California and the West since the California Gold Rush of 1849, were barred from naturalization under the “white-only” terms of the Naturalization Act of 1790. Their presence in the United States was “legal” within the crude boundaries of antebellum immigration law, but they were not eligible for citizenship no matter how long or productive their residence in the United States. They were most particularly “subject to a foreign power” in that they remained subjects of the Chinese Empire; they were resented and opposed as competition with native-born citizens for laboring jobs in the goldfield and on the railroads; and they were the subject of an explicit and pointed refusal by the polity to grant its consent to their membership in the body politic.

Nonetheless, as noted above, the sponsors of the Fourteenth Amendment, when asked in clear terms about this case, were unwavering in their insistence that the Citizenship Clause was to cover their children. As an example of the Framers’ attitudes toward the children of those the polity spurns, this flat certainty is powerfully suggestive. Restrictive-reading proponents are harshly critical of the Supreme Court’s 1898 decision in *United States v. Wong Kim Ark*²¹³ that American-born children of Chinese immigrants are American citizens; but simply as a matter of reading the “intent” of the drafters, it seems unexceptionable.

The second example, of the Gypsies, is equally suggestive. Remember Senator Cowan’s description of these people as interlopers “who recognize no authority in [Pennsylvania’s] government; who have a distinct, independent government of their own—an *imperium in imperio*; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen.”²¹⁴ The reference to Gypsy people in the debates was far from random. Opponents of the Civil Rights Act and of the proposed Fourteenth Amendment had fixed on the specter of Gypsy citizenship in a way that eerily prefigures the contemporary Washington practice of generating hypothetical disasters as “talking points” in public policy debates. The idea of “the people called Gipsies[sic]” as a menace was specifically evoked by Andrew Johnson in his message vetoing the Civil Rights Act.²¹⁵

213. 169 U.S. 649 (1898).

214. CONG. GLOBE, 39TH CONG., 1ST SESS. 2890–91 (1866) (remarks of Sen. Cowan).

215. Andrew Johnson, *Veto of the Civil Rights Bill* (Mar. 27, 1866), in *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 74, 74–78 (Edward McPherson ed., Negro Universities Press 1969) (1875).

It is thus ahistorical to suggest that the Framers did not foresee the legal and social characteristics of what we today call “illegal” or “undocumented” immigrants. They did; and they rather categorically stated that these characteristics—ineligibility for citizenship, unacceptability as members of the body politic, isolation from American culture and systematic evasion of American law—would not constitute exceptions to the Amendment’s grant of birthright citizenship.

The second argument is one of scale. Writing thirty years ago, Schuck and Smith note that estimates of illegal immigration range between 3 and 6.5 million as of 1980. “This reality and the fears that it has generated concerning its economic and social effects have transformed political discourse about American immigration policy in ways that neither [nineteenth-century courts] nor the Reconstruction Framers of the Citizenship Clause could have anticipated.”²¹⁶ The absolute number of “illegal” aliens present in the United States today is obviously greater. Five years ago, a sophisticated estimate placed the number at 10.3 million.²¹⁷ As noted above, the presence of these immigrants (more than half of whom come from Mexico²¹⁸) constitutes a profound challenge to existing American institutions and norms, and has generated and continues to generate social change across the country.

That argument is strongly echoed today by writers such as Charles Wood, who writes,

The very ambiguity of the Fourteenth Amendment with respect to the census and birthright citizenship issues stems in large part from the fact that, at the time the Amendment was drafted in 1866, there was no such person as an illegal alien. Today, however, the number of illegal aliens is conservatively estimated at five million²¹⁹

Each generation imagines that its problems are different from those of all who have come before. We have no idea what America will look like in 2110; but we do know that the United States of 1866 survived to become the United States of 2010. It seems, then, that the changes *they* faced were less wrenching than those we face. They were guaranteed a happy ending; it is right there in the history textbook.

But that is a cast of mind, not a historical conclusion. America in 1866 was a nation as profoundly transformed by immigration as it is in 2010.

216. SCHUCK & SMITH, *supra* note 10, at 93.

217. JEFFREY S. PASSEL, PEW HISPANIC CTR., REPORT: ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1, 4 (March 21, 2005), <http://pewhispanic.org/files/reports/44.pdf>.

218. *Id.* at 2.

219. Wood, *supra* note 24, at 468–69.

Issues of language, culture, religion, social mores and other aspects of the American identity were as salient then as they were now. We would be making a profound historical error to imagine that the generation that framed the Clause was unaware that migration was a transformative and often destabilizing force in American society.

Simply as one fact, consider that during the Civil War years alone, the United States population increased by four million people—most them immigrants. That represented eleven percent of the population in 1866, when the Fourteenth Amendment debate took place.²²⁰ Foreign-born soldiers accounted for 20 percent of the Union Army's total strength during the war²²¹—an edge in numbers that, coupled with the enlistment of thousands of native-born black soldiers, gave the Union the edge of victory.

The explosion in foreign-born Americans was, however, not a wartime phenomenon: In 1850, the percentage of the U.S. population that was foreign born was 9.7 percent. By 1860, it was 13.2 percent, even before the influx noted above.²²² How does that compare with our situation today? The most recent census estimate places it at 12.4 percent.²²³ In other words, Americans in 1866, particularly those in the North, were at least as aware of immigration as we are today, when the issue is central to the domestic policy debate.

Further, the ongoing debate about assimilation of new immigrant populations—along with persistent fears that whichever group is entering the U.S. most recently brings with it new and insoluble differences of language, culture and loyalty—is quite literally as old as the Republic. The very first “national security” crisis in the American Republic—the “Quasi War” with France—sparked a panic that French immigrants were subversive, disloyal, and unassimilable.²²⁴ Similar strains of nativism resounded through the national debate from that moment until the end of the Civil War.

220. EPPS, *DEMOCRACY REBORN*, *supra* note 33, at 20.

221. *Id.*

222. Epps, *Don'ts and Dos*, *supra* note 33, at 443 (citing Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850–1990*, tbl. 13 (Population Div., U.S. Bureau of the Census, Working Paper No. 29, 1999), *available at* <http://www.census.gov/population/www/documentation/twps0029/tab13.html>).

223. See U.S. CENSUS BUREAU, *POPULATION BY SEX, AGE, NATIVITY, AND U.S. CITIZENSHIP STATUS: 2008* tbl. 1.1, *available at* <http://www.census.gov/population/socdemo/foreign/cps2008/tab1-2008.pdf>.

224. See generally JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956) (providing examples of political reactions of figures such as President Adams to the French in and around the summer of 1798).

Much of the formation of the infant Republican Party consisted of an attempt to marry the anti-slavery and anti-immigrant sentiments of much of the Midwestern and New England population with the free-labor loyalties of the immigrants themselves. Many important figures in the anti-slavery movement and the Republican Party were themselves immigrants, and a number of them played an important role in the intellectual ferment that produced the Fourteenth Amendment. Francis Lieber, the German-born social scientist, was the first figure publicly to suggest that the Constitution must be remodeled at the end of the Civil War, and his proposed amendments bear a distinct paternal resemblance to the eventual result.²²⁵ Carl Schurz, a confidant of Lincoln, was a native of Germany and a key figure in refuting the claims of American nativists that the influx of European immigrants in the 1840s and 1850s should be combated by legal restrictions. His official report from the defeated South was an important part of setting the stage for the Fourteenth Amendment.²²⁶ Robert Dale Owen, the influential radical who served in Congress and was a member of Lincoln's wartime American Freedmen's Inquiry Commission, was a naturalized citizen; he was the author, among other things, of the first draft of what emerged from the Joint Committee on Reconstruction as the "omnibus amendment" that became the Fourteenth Amendment.²²⁷ Senator John Conness, whose discussion of the citizenship of American-born children of Chinese immigrants is a key part of the record, was himself an immigrant from Ireland.²²⁸

In short, the idea that the Framers lived in a simpler world, that they could not have intended their handiwork to apply to a chaotic, multicultural America, does not pass the most superficial historical scrutiny.

225. FRANCIS LIEBER, AMENDMENTS OF THE CONSTITUTION SUBMITTED TO THE CONSIDERATION OF THE AMERICAN PEOPLE (1864) (suggesting that there be amendments to the Constitution that make every native of the United States entitled to the full protection of the law).

226. See EPPS, DEMOCRACY REBORN, *supra* note 33, at 34–38 (outlining how Schurz was selected to write the report); HANS L. TREFOUSSE, CARL SCHURZ: A BIOGRAPHY 153–61, 182 (1982) (detailing the reaction to Schurz's report).

227. See EPPS, DEMOCRACY REBORN, *supra* note 33, at 184–85 (describing a meeting between Owen and Thaddeus Stevens to discuss what was to become the Fourteenth Amendment); RICHARD WILLIAM LEOPOLD, ROBERT DALE OWEN: A BIOGRAPHY 360–69 (1940) (describing Owen's work with the American Freedmen's Inquiry Commission and providing the text of Owen's draft amendment).

228. *Biographical Directory of the United States Congress: Conness, John*, CONGRESS.GOV <http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000695>, (last visited Oct. 20, 2010).

CONCLUSION: CONSTITUTIONAL POLICY AND BIRTHRIGHT CITIZENSHIP

The final argument, as noted above, is one of constitutional policy. Is it a bad idea to extend birthright citizenship to all children born in the United States? Is it anomalous, undemocratic, or in some other way not in keeping with the underlying ideas of the Constitution? Does it portend the swamping or destruction of the American identity under a wave of alien invaders?

As I (and Schuck and Smith) have said, it may in fact have been anomalous to have a birthright rule in the republic set up by the Constitution of 1787. Much of the social theory we have absorbed to understand that document—an eighteenth century confederation of smaller, quasi-sovereign, elite-dominated “Atlantic republics”—rebels at the idea of uncritical inclusiveness, whether for purposes of citizenship, voting, or the exercise of basic civil rights.

But just as “we must never forget that it is a *Constitution* we are expounding,”²²⁹ we must also never forget that the Fourteenth Amendment is not the Fourteenth Reaffirmation. It is an *amendment* we are construing, one written by different Framers with nineteenth, not eighteenth, century views. They were willing to undertake the desperate political struggle required for an amendment because they perceived that the original Constitution had failed catastrophically. That catastrophic failure, moreover, was directly related to the issue of inclusion and exclusion in the body politic. The split between the sections was a dispute over the proper place in the national life of a population of persons of African descent. One side gradually came to believe that they were, and always had been, citizens within the correct meaning of the Constitution; the other insisted that they were never and could never be citizens, that they were a permanently inferior caste whose proper role was to serve the Constitution’s true beneficiaries. The direct and immediate purpose of the Citizenship Clause was to take the latter doctrine out of American law, where it had been written by Chief Justice Taney in *Scott v. Sandford*.

One of the most striking things about contemporary interpretation of the Fourteenth Amendment is its resolute unwillingness to confront the Amendment as a textual and conceptual whole. The standard method of interpretation, which a number of proponents of a restrictive reading of the Clause employ, is to disaggregate the Amendment, ignore all sections but the first, and then consider each phrase separately. It is as if the Framers are thought to have enacted a grocery list, randomly including milk, eggs,

229. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

flour, sugar, butter, baking powder, and vanilla flavoring. We could take each ingredient, research its significance in Western history, and then conclude that they have been jammed together randomly. But wouldn't it make more sense to consider it as a recipe for, say, a cake, in which each ingredient is to contribute something to the others?

Elsewhere I have suggested that the aim of the Amendment—deducible from its text and from the circumstances of its adoption—was to replace the loose confederation of exclusive republics with a nation that would finally redeem the promise of James Madison's decidedly un-Atlantic idea of an "extended republic,"²³⁰ comprehending a diversity of interests and passions, to create a society in which popular participation and the rights of political minorities would be protected from majoritarian oppression.

The 1787 Constitution, in the view of the Amendment's Framers, had signally failed to realize the advantages Madison foresaw. Instead, it had allowed the Southern states to create quasi-sovereign dictatorships in which Madison's nightmare²³¹ came true: "Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interest of the people."²³² As the anti-slavery Framers of the Fourteenth Amendment saw it, the "lords of the lash" had (with the connivance of the federal government) made themselves oligarchs and used their influence on the nation to subject the free population to the designs and ambitions of the Slave Power.²³³

A major tool of the Slave Power had been state control over citizenship, and insistence that human equality had no role to play in American life. Economic, social and political life depended upon the existence of a large, permanently subordinated class of non-citizens who could be exploited to produce wealth. The Citizenship Clause took this option away not only from the local elites but from the nation as a whole. From its enactment forward, the United States would be what the German American immigrants' rights advocate Carl Schurz called "the republic of equal rights, where the title of manhood is the title to citizenship."²³⁴

Citizenship was to be extended to all—not out of grace, but as a means of protecting the nation from those who would reinvent the Slave Power. Only radical civic equality could prevent the re-emergence of local

230. THE FEDERALIST NO. 10 (James Madison).

231. With apologies to Professor Peter Shane, who used this phrase, equally aptly, to describe the current executive branch. See PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009).

232. THE FEDERALIST NO. 10 (James Madison).

233. EPPS, DEMOCRACY REBORN, *supra* note 33, at 10.

234. *Id.* at 35.

oligarchy and systems of exploitation. Walt Whitman, who thought as deeply as any American about the causes and impact of the Civil War, wrote in its aftermath that “[o]f all dangers to a nation, as things exist in our day, there can be no greater one than having certain portions of the people set off from the rest by a line drawn—they not privileged as others, but degraded, humiliated, made of no account.”²³⁵

And if that view is valid, there is an alarming irony in the proposition that the United States should alter its constitutional system to create a large internal population of native-born non-citizens, a hereditary subordinate caste of persons who are subjected to American law but do not belong to American society. To one with a historical memory, the new proposed status, supposedly implicit in the Fourteenth Amendment, looks very much like an old status that was supposedly cured by the Thirteenth Amendment. There is a huge difference between a Republic in which all those born or naturalized are equal, and one in which all animals are equal but some are less equal than others. The idea of legalized inequality has a logic that history forbids us to deny; it leads toward forced labor, deportation, and concentration camps.²³⁶

To make legal equality, or even existence, dependent on blood has a chilling history worldwide. To the extent that other countries follow the *jus sanguinis* rule today, it can’t be said that their immigration policies are a thumping success either. As Professor Shachar notes, “strict interpretation of *jus sanguinis* perpetuates the exclusion of certain segments of the permanent population of a given polity by denying them full access to the rights and benefits of citizenship, based on the criterion of ancestry that they can neither choose nor change.”²³⁷ According to Shachar, “under such conditions, *jus sanguinis* constitutes a deeply objectionable system of legalized ascriptive hierarchy.”²³⁸

In the specific context of American history, if the children of “illegal aliens” are “illegal” themselves, then we have taken a giant step toward recreating slavery in all but name. If citizenship is the hereditary gift of the nation rather than the inheritance of its people, we are drifting back toward the discredited doctrine of *Dred Scott*. And if state governments arrogate

235. WALT WHITMAN, *Democratic Vistas*, in COMPLETE POETRY AND SELECTED PROSE 929, 949 (Justin Kaplan ed., Library of America 1982).

236. That logic is playing itself out at a remarkable speech in the current debate. See Associated Press, *Candidate Calls for ‘Camps’ for Illegal Immigrants*, NAPLESNEWS.COM (Aug. 12, 2010) <http://www.naplesnews.com/news/2010/aug/12/marg-baker-illegal-immigrants-camps/> (reporting that a candidate for the Florida House of Representatives wants to house illegal immigrants in “camps” until they can be deported).

237. SHACHAR, *supra* note 27, at 121.

238. *Id.*

to themselves the power to decide which groups within their borders “merit” citizenship, the central promise of the Amendment—paramount national citizenship—has been eviscerated.

The idea that these radical egalitarians “intended” to allow creation of a new hereditary and subordinate caste of laborers should, I think, stir the profoundest skepticism. That it is being taken seriously by prominent judges and academics is yet another melancholy illustration of Samuel Johnson’s saying that “reason by degrees submits to absurdity, as the eye is in time accommodated to darkness.”²³⁹ Like courtiers’ praise for the emperor’s new clothes, the repeated claims to discern an obscure intent in clear language can create confusion; as only the good could see the non-existent raiment, allegedly only the truly learned can see the invisible “intent” in the Clause.

It should be the goal of scholarship to dispel, not deepen, conceptual darkness. The work of many “originalist” scholars has added significantly to our understanding of the Constitution’s meaning and history. One need not accept all the conclusions of an “originalist” inquiry to feel grateful for the care and thoroughness with which it has been performed, and for the ideas and insights it has generated. But not all originalism is careful. The rhetoric of “clear intent” may make it easy to substitute anachronistic, results-oriented ideas for a systematic interpretation of text, structure, and history—which are required of all constitutional scholars of any school. A dubious claim of “clear intent” may be followed by a claim that this “discovery” closes down the contemporary work of interpretation. This rhetorical move disguises the fact that a contemporary interpretation is being imposed on constitutional text as surely as it might be by any radical “non-interpretivist.”

That the techniques and discourse of originalism can be misused to reach such a perverse result should give us some impetus to refine those techniques and sharpen that discourse.

239. SAMUEL JOHNSON, *The Rambler No. 8*, in *SELECTED POETRY AND PROSE* 159, 161 (Frank Brady & W. K. Wimsatt, eds., University of California Press, 1977).