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The Green Bag
An Entertaining Journal of Law

Second Series ⋄ Summer 2006
Volume 9 ⋄ Number 4

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In response to increasing frustration with illegal immigration, lawmakers and activists are hotly debating various proposals to combat incentives to enter the United States outside legal channels. Economic opportunity is the strongest attraction, of course. But another magnet, some contend, is a long-standing provision of U.S. law that confers citizenship upon persons born within our borders.[1]

There is increasing interest in repealing birthright citizenship for the children of aliens – especially undocumented persons. According to one recent poll, 49 percent of Americans believe that a child of an illegal alien should not be entitled to U.S. citizenship (41 percent disagree).[2] Legal scholars including Judge Richard Posner contend that birthright citizenship for the children of aliens may be repealed by statute.[3] Members of the current Congress have introduced legislation and held hearings,[4] following bipartisan efforts during the 1990s led by now-Senate Minority Leader Harry Reid

Jim Ho will join the Dallas office of Gibson, Dunn & Crutcher LLP this fall. He has previously served as chief counsel of the U.S. Senate Judiciary Subcommittees on the Constitution and Immigration under the chairmanship of Senator John Cornyn (R-TX) and as a law clerk to Justice Clarence Thomas. Jim can be reached by e-mail at JamesCHo@stanfordalumni.org.

1 8 U.S.C. § 1401.

2 www.rasmussenreports.com/2005/Immigration%20November%207.htm.

3 Oforji v. Ashcroft, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring); John C. Eastman & Edwin Meese III, Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence, Hamdi v. Rumsfeld, No. 03–6696 (Eastman/Meese Brief) (see also www.fed-soc.org/pdf/birthright.pdf; www.heritage.org/Research/LegalIssues/lm18.cfm); Charles Wood, Losing Control of America's Future, 22 Harv. J.L. & Pub. Pol'y 465, 503–22 (1999); Peter Schuck & Rogers Smith, Citizenship Without Consent (1985).

4 E.g., H.R. 698; H.R. 3700, § 201; H.R. 3938, § 701; 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. (2005) ("2005 House Hearing"). In March, Senator Tom Coburn circulated an amendment in committee to repeal birthright citizenship (a vote was never taken), while Senator Charles Schumer, a proponent of birthright citizenship, asked now-Justice Samuel A. Alito for his views during his confirmation hearings.

and others.[5]

These proposals raise serious constitutional questions, however. Birthright citizenship is guaranteed by the Fourteenth Amendment. That birthright is protected no less for children of undocumented persons than for descendants of *Mayflower* passengers.

The Fourteenth Amendment begins: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Repeal proponents contend that this language does not apply to the children of aliens – whether legal or illegal (with the possible exception of lawful permanent residents) – because such persons are not "subject to [U.S.] jurisdiction." But text, history, judicial precedent, and Executive Branch interpretation confirm that the Citizenship Clause reaches most U.S.-born children of aliens, including illegal aliens.

One might argue that the Constitution's emphasis on place of birth is antiquated. The requirement that only natural born citizens may serve as President or Vice President has been condemned on similar grounds.[6] But a constitutional amendment is the only way to expand eligibility for the Presidency, and it is likewise the only way to restrict birthright citizenship.[7]

We begin, of course, with the text of the Citizenship Clause.

To be "subject to the jurisdiction" of the U.S. is simply to be subject to the authority of the U.S. government.[8] The phrase thus covers the vast majority of persons within our borders who are required to obey U.S. laws. And obedience, of course, does not turn on immigration status, national allegiance, or past compliance. All must obey.

Common usage confirms this understanding. When we speak of a business that is subject to the jurisdiction of a regulatory agency, it must follow the laws of that agency, whether it likes it or not.[9] When we speak of an individual who is subject to the jurisdiction of a court, he must follow the judgments and orders of that court, whether he likes it or not.[10] As Justice Scalia noted just a year ago, when a statute renders a particular class of persons "subject to the jurisdiction of the United States," Congress "has made clear its

5 E.g., S. 1351, 103rd Cong., § 1001 (1993); 139 Cong. Rec. 21709–12 (1993) (Sen. Reid); H.R. 3862, 103rd Cong., § 401 (1994); Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Joint Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. (1995); Citizenship Reform Act of 1997; and Voter Eligibility Verification Act: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 105th Cong. (1997).

6 E.g., James C. Ho, President Schwarzenegger – Or At Least Hughes?, 7 Green Bag 2d 108 (2004).

7 Constitutional amendments repealing birthright citizenship have been proposed. H.J. Res. 41, 109th Cong. (2005); H.J. Res. 64, 104th Cong. (1995). See also Michael Sandler, Toward a More Perfect Definition of 'Citizen', CQ Weekly, Feb. 13, 2006, at 388 (quoting Rep. Mark Foley, who supports repeal by constitutional amendment: "My view is the 14th Amendment was rather certain in its application … . Legislatively, I still am not comfortable with [the statutory approach]. I think a court could strike it down.").

8 E.g., Black's Law Dictionary defines "jurisdiction" as "[a] government's general power to exercise authority."

9 Sprietsma v. Mercury Marine, 537 U.S. 51, 69 (2002) (respecting recreational boats "subject to [the] jurisdiction" of the Coast Guard); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 544 (2001) (respecting electronic communications media "subject to the jurisdiction of the FCC").

10 Rumsfeld v. Padilla, 542 U.S. 426, 445 (2004) (respecting government officials "subject to [the] habeas jurisdiction" of a particular court).

intent to extend its laws" to them.[11]

Of course, when we speak of a person who is subject to our jurisdiction, we do not limit ourselves to only those who have sworn allegiance to the U.S. Howard Stern need not swear allegiance to the FCC to be bound by Commission orders. Nor is being "subject to the jurisdiction" of the U.S. limited to those who have always complied with U.S. law. Criminals cannot immunize themselves from prosecution by violating Title 18. Likewise, aliens cannot immunize themselves from U.S. law by entering our country in violation of Title 8. Indeed, illegal aliens are such *because* they are subject to U.S. law.

Accordingly, the text of the Citizenship Clause plainly guarantees birthright citizenship to the U.S.-born children of all persons subject to U.S. sovereign authority and laws. The clause thus covers the vast majority of lawful and unlawful aliens. Of course, the jurisdictional requirement of the Citizenship Clause must do something – and it does. It excludes those persons who, for some reason, are immune from, and thus not required to obey, U.S. law. Most notably, foreign diplomats and enemy soldiers – as agents of a foreign sovereign – are not subject to U.S. law, notwithstanding their presence within U.S. territory. Foreign diplomats enjoy diplomatic immunity,[12] while lawful enemy combatants enjoy combatant immunity.[13] Accordingly, children born to them are not entitled to birthright citizenship under the Fourteenth Amendment.

This conclusion is confirmed by history.

The Citizenship Clause was no legal innovation. It simply restored the longstanding English common law doctrine of *jus soli*, or citizenship by place of birth.[14] Although the doctrine was initially embraced in early American jurisprudence,[15] the U.S. Supreme Court abrogated *jus soli* in its infamous *Dred Scott* decision, denying birthright citizenship to the descendents of slaves.[16] Congress approved the Citizenship Clause to overrule *Dred Scott* and elevate *jus soli* to the status of constitutional law.[17]

When the House of Representatives first approved the measure that would eventually become the Fourteenth Amendment, it did not contain language guaranteeing citizenship.[18] On May 29, 1866, six days after the Senate began its deliberations, Senator Jacob Howard (R-MI) proposed language pertaining to citizenship. Following extended debate the next day, the Senate adopted Howard's language.[19] Both chambers

11 Spector v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169, 2194–95 (2005) (Scalia, J., dissenting). The statement was joined by Chief Justice Rehnquist and Justice O'Connor, and no justice took issue with it.

12 Abdulaziz v. Metropolitan Dade County, 741 F.2d 1328, 1329–31 (11th Cir. 1984).

13 United States v. Lindh, 212 F. Supp. 2d 541, 553–58 (E.D. Va. 2002).

14 Calvin v. Smith, 77 Eng. Rep. 377 (K.B. 1608).

15 Inglis v. Trustees of the Sailor's Snug Harbor, 28 U.S. 99, 164 (1830) (Story, J.) ("[n]othing is better settled at the common law" than *jus soli*); Lynch v. Clarke, 1 Sandford Ch. 583, 646 (N.Y. 1844); Polly J. Price, Natural Law and Birthright Citizenship in *Calvin's Case* (1608), 9 Yale J. L. & Humanities 73, 138–40 (1997).

16 Scott v. Sanford, 60 U.S. 393 (1857).

17 Saenz v. Roe, 526 U.S. 489, 502 n.15 (1999); In re Look Tin Sing, 21 F. 905, 909–10 (C.C. D. Cal. 1884).

18 Cong. Globe, 39th Cong., 1st Sess. 2545 (1866).

19 Id. at 2869, 2890–97.

Senator Jacob Howard of Michigan: "[E]very 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." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). Library of Congress, Brady-Handy Photograph Collection.

subsequently approved the constitutional amendment without further discussion of birthright citizenship,[20] so the May 30, 1866 Senate debate offers the best insight into Congressional intent.

Senator Howard's brief introduction of his amendment confirmed its plain meaning:

> Mr. HOWARD. … This amendment which I have offered is 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.*"[21]

This understanding was universally adopted by other Senators. Howard's colleagues vigorously debated the *wisdom* of his amendment – indeed, some opposed it precisely *because* they opposed extending birthright citizenship to the children of aliens of different races. But no Senator disputed the *meaning* of the amendment with respect to alien children.

Senator Edgar Cowan (R-PA) – who would later vote against the entire constitutional amendment anyway – was the first to speak in opposition to extending birthright citizenship to the children of foreigners. Cowan declared that, "if [a state] were overrun by another and a different race, it would have the right to absolutely expel them." He feared that the Howard amendment would effectively deprive states of the authority to expel persons of different races – in particular, the Gypsies in his home state of Pennsylvania and the Chinese in California – by granting their children citizenship and thereby enabling foreign populations to overrun the country. Cowan objected especially to granting birthright citizenship to the children of aliens who "owe [the U.S.] no allegiance [and] who pretend to owe none," and to those who regularly commit "trespass" within the U.S.[22]

In response, proponents of the Howard

20 Id. at 3042, 3149.

21 Id. at 2890 (emphasis added).

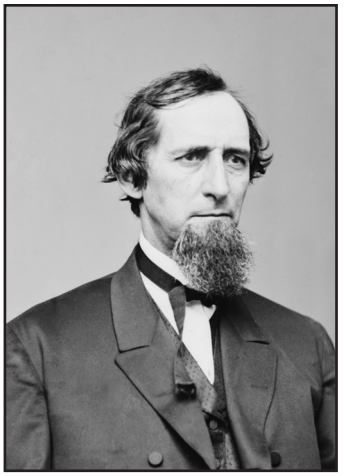
22 Space constraints, if nothing else, prevent me from quoting Cowan's racially charged remarks here in full, but see id. at 2890–91.

amendment *endorsed* Cowan's interpretation. Senator John Conness (R-CA) responded specifically to Cowan's concerns about extending birthright citizenship to the children of Chinese immigrants:

> The proposition before us … relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. … I am in favor of doing so. … We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.

Conness acknowledged Cowan's dire predictions of foreign overpopulation, but explained that, although legally correct, Cowan's parade of horribles would not be realized, because most Chinese would not take advantage of such rights although entitled to them. He noted that most Chinese work and then return to their home countries, rather than start families in the U.S. Conness thus concluded that, if Cowan "knew as much of the Chinese and their habits as he professes to do of the Gypsies, … he would not be alarmed."[23]

No Senator took issue with the consensus interpretation adopted by Howard, Cowan, and Conness. To be sure, one interpretive dispute did arise. Senators disagreed over whether the Howard amendment would extend birthright citizenship to the children of Indians. For although Indian tribes resided within U.S. territory, weren't they also sovereign entities not subject to the jurisdiction of Congress?

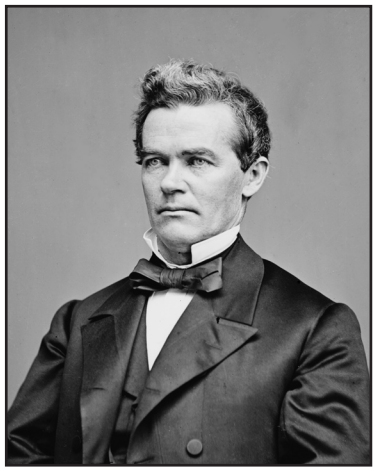


Senator Edgar Cowan of Pennsylvania: "[I]s it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race? Are they to be immigrated out of house and home by Chinese? … It is utterly and totally impossible to mingle all the various families of men, from the lowest form of the Hottentot up to the highest Caucasian, in the same society." Cong. Globe, 39th Cong., 1st Sess. 2890-91 (1866). Library of Congress, Brady-Handy Photograph Collection.

Some Senators clearly thought so. Howard urged that Indian tribes "always have been in our legislation and jurisprudence, as being *quasi* foreign nations" and thus could not be deemed subject to U.S. law. Senator Lyman Trumbull (D-IL) agreed, noting that "it would be a violation of our treaty obligations … to extend our laws over these Indian tribes with whom we have made treaties saying we would not do it." Trumbull insisted that Indian tribes "are not subject to our jurisdiction in the sense of owing allegiance solely to the United States," for "[i]t is only those persons who come completely within our jurisdiction, *who are subject to our laws*, that we think of making citizens."[24]

23 Id. at 2891. Like Cowan, Conness also had bad things to say about the Chinese. Id. at 2891–92. But to his credit, Conness at least recognized their need for civil rights protections. Id. at 2892.

24 Id. at 2890, 2895 (Sen. Howard); id. at 2893, 2894 (Sen. Trumbull) (emphasis added).



Senator John Conness of California: "The proposition before us … relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. … I am in favor of doing so." Cong. Globe, 39th Cong., 1st Sess. 2891 (1866). Library of Congress, Brady-Handy Photograph Collection.

Senators Reverdy Johnson (D-MD) and Thomas Hendricks (D-IN) disagreed, contending that the U.S. could extend its laws to Indian tribes and had done so on occasion.[25] Senator James R. Doolittle (R-WI) proposed to put all doubt to rest by adding the words "excluding Indians not taxed" (borrowing from language in Article I) to the Howard amendment.[26] But although there was virtual consensus that birthright citizenship should not be extended to the children of Indian tribal members,[27] a majority of Senators saw no need for clarification. The Senate ultimately defeated Doolittle's amendment by a 10–30 vote, and then adopted the Howard text without recorded vote.[28]

Whatever the correct legal answer to the question of Indian tribes, it is clearly beside the point. The status of Indian tribes under U.S. law may have been ambiguous to members of the 39th Congress. But there is no doubt that foreign countries enjoy no such sovereign status within U.S. borders. And there is likewise no doubt that U.S. law applies to their nationals who enter U.S. territory.

Repeal proponents contend that history supports their position.

First, they quote Howard's introductory remarks to state that birthright citizenship "will not, of course, include … foreigners."[29] But that reads Howard's reference to "aliens, who belong to the families of ambassadors or foreign ministers" out of the sentence. It also renders completely meaningless the subsequent dialogue between Senators Cowan and Conness over the wisdom of extending birthright citizenship to the children of Chinese immigrants and Gypsies.

Second, proponents claim that the Citizenship Clause protects only the children of persons who owe complete *allegiance* to the U.S. – namely, U.S. citizens. To support this contention, proponents cite stray references to "allegiance" by Senator Trumbull (a presumed authority in light of his Judiciary Committee chairmanship) and others, as well as the text of the 1866 Civil Rights Act.

But the text of the Citizenship Clause requires "jurisdiction," not "allegiance." Nor did Congress propose that "all persons born

25 Id. at 2893–94 (Sen. Johnson); id. at 2894–95 (Sen. Hendricks).

26 Id. at 2890, 2892–93, 2897.

27 Only Willard Saulsbury, Sr. (D-DE) expressed disagreement. Id. at 2897.

28 Id. at 2897.

29 Smith & Lungren; 2005 House Hearing at 3 (Rep. L. Smith); John C. Eastman, Constitution's Citizenship Clause Misread, Wall St. J., Dec. 7, 2005, at A19; John C. Eastman, Citizens by Right, or by Consent?, San Francisco Chron., Jan. 2, 2006, at B9.

to U.S. citizens are citizens of the United States." To the contrary, Senator Cowan opposed the Citizenship Clause precisely because it would extend birthright citizenship to the children of

> people who … *owe* [*my state*] *no allegiance*; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own …; 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.[30]

Moreover, Cowan's unambiguous rejection of "allegiance" formed an essential part of the consensus understanding of the Howard text. By contrast, the stray references by Trumbull and others to "allegiance" were made during the debate over tribal sovereignty, not alienage generally. Indeed, Trumbull himself confirmed that the Howard text covers all persons "who are subject to our laws."[31]

The 1866 Civil Rights Act likewise offers no support. Enacted less than two months before the Senate adopted the Howard amendment, the Act guarantees birthright citizenship to "all persons born in the United States and *not subject to any foreign power*, excluding Indians not taxed."[32] Repeal proponents contend that all aliens are "subject to a[] foreign power," and that this is relevant because the Fourteenth Amendment was ratified to ensure the Act's validity.

But in fact, proponents and opponents of birthright citizenship alike consistently interpreted the Act, just as they did the Fourteenth Amendment, to cover the children of aliens. In one exchange, Cowan, in a preview of his later opposition to the Howard text, "ask[ed] whether [the Act] will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?" Trumbull replied: "Undoubtedly. … [T]he child of an Asiatic is just as much a citizen as the child of a European."[33]

Finally, repeal proponents point out that our nation was founded upon the doctrine of consent of the governed, not the feudal principle of perpetual allegiance to the sovereign.[34] But that insight explains only why U.S. citizens enjoy the right of expatriation – that is, the right to renounce their citizenship – not whether U.S.-born persons are entitled to birthright citizenship.

History thus confirms that the Citizenship Clause applies to the children of aliens. To be sure, members of the 39th Congress may not have specifically contemplated extending birthright citizenship to the children of *illegal* aliens, for Congress did not generally restrict migration until well after adoption of the Fourteenth Amendment.[35]

30 Cong. Globe, 39th Cong., 1st Sess. 2891 (emphasis added).

31 Id. at 2893. See also id. at 2895 (Sen. Hendricks) (if "[w]e can make [a person] obey our laws, … being liable to such obedience he is subject to the jurisdiction of the United States").

32 14 Stat. 27, § 1 (emphasis added).

33 Cong. Globe, 39th Cong., 1st Sess. 498. Moreover, as John Eastman (a leading repeal proponent) has conceded, the Fourteenth Amendment's positively phrased text ("subject to … jurisdiction") "might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act" ("not subject to any foreign power"). 2005 House Hearing at 63; www.heritage.org/Research/LegalIssues/lm18.cfm. Eastman cites the legislative history of the Fourteenth Amendment to eliminate the gap – suggesting that the Act does little work for repeal proponents.

34 Edward J. Erler, From Subjects to Citizens: The Social Compact Origins of American Citizenship, in The American Founding and the Social Compact 163–97 (2003).

35 Kleindienst v. Mandel, 408 U.S. 753, 761 (1972) ("Until 1875 alien migration to the United States was unrestricted.").

But nothing in text or history suggests that the drafters intended to draw distinctions between different categories of aliens. To the contrary, text and history confirm that the Citizenship Clause reaches all persons who are subject to U.S. jurisdiction and laws, regardless of race or alienage.

The original understanding of the Citizenship Clause is further reinforced by judicial precedent.

In *United States v. Wong Kim Ark* (1898), the U.S. Supreme Court confirmed that a child born in the U.S., but to alien parents, is nevertheless entitled to birthright citizenship under the Fourteenth Amendment. Wong Kim Ark was born in San Francisco to alien Chinese parents who "were never employed in any diplomatic or official capacity under the emperor of China." After traveling to China on a temporary visit, he was denied permission to return to the U.S.; the government argued that he was not a citizen, notwithstanding his U.S. birth, through an aggressive reading of the Chinese Exclusion Acts.[36]

The U.S. government argued that Wong Kim Ark, though born in California, was not entitled to U.S. citizenship. Its reply brief noted that Chinese laborers are "apparently incapable of assimilating with our people" (p. 6, quoting Fong Yue Ting v. United States (1893)). The Court sided with Wong by a vote of 6–2. National Archives and Records Administration.

By a 6–2 vote, the Court rejected the government's argument:

> The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, *including all children here born of resident aliens*, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. … To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of *citizens or subjects of other countries*, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.[37]

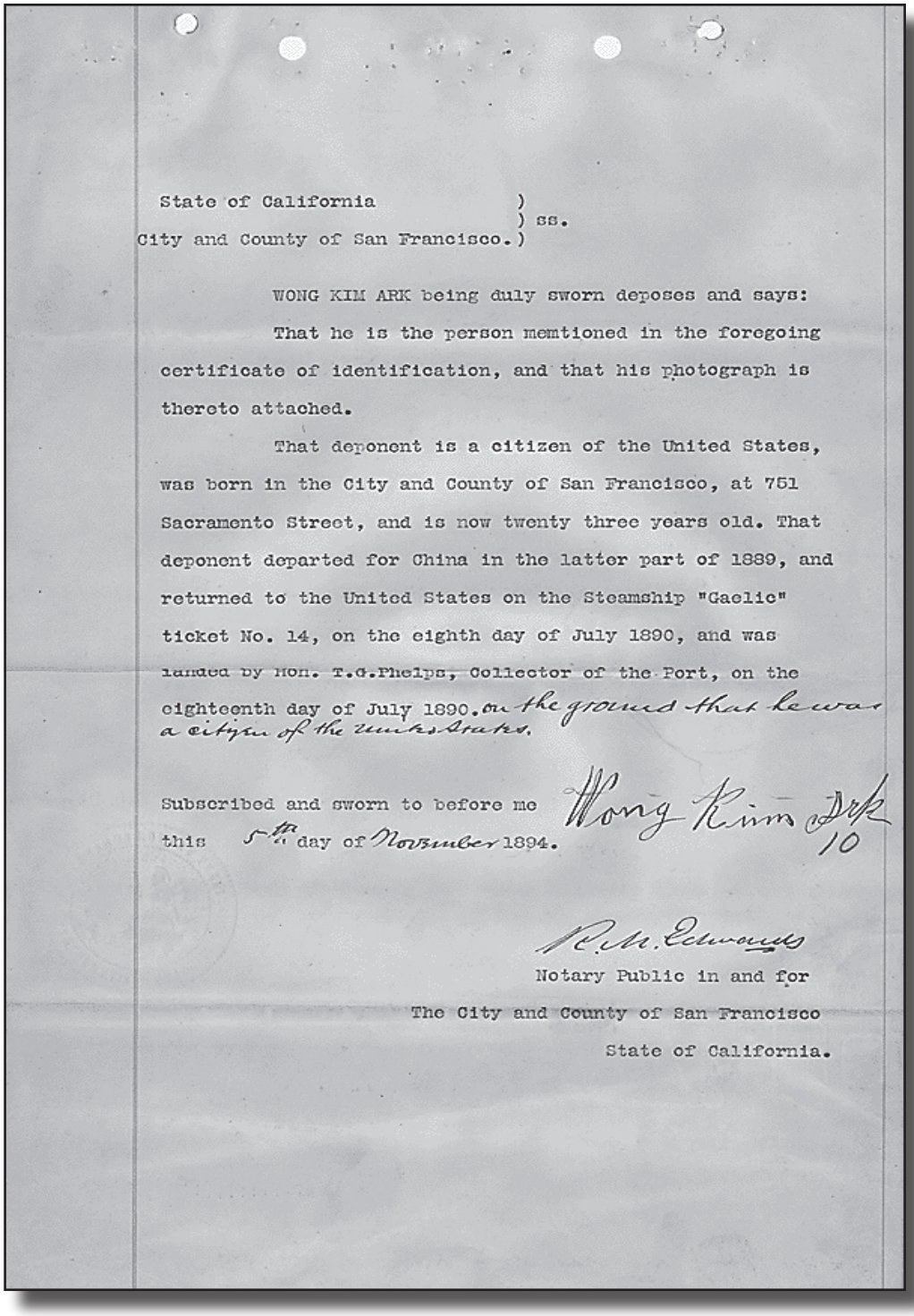
This sweeping language reaches all aliens regardless of immigration status.[38] To be sure, the question of illegal aliens was not explicitly presented in *Wong Kim Ark*. But any doubt was put to rest in *Plyler v. Doe* (1982).

Plyler construed the Fourteenth Amendment's Equal Protection Clause, which requires every State to afford equal protection of the laws "to any person *within its jurisdiction*." By a 5–4 vote, the Court held that Texas cannot deny free public school education to undocumented children, when it provides such education to others. But

36 169 U.S. 649, 652–53.

37 Id. at 693–94 (emphasis added); see also id. at 682.

38 The Heritage Guide to the Constitution 385 (2005) ("*Wong Kim Ark* is certainly broad enough to include the children born in the United States of illegal … immigrants").



State of California)
) ss.
City and County of San Francisco.)

WONG KIM ARK being duly sworn deposes and says:

That he is the person memtioned in the foregoing certificate of identification, and that his photograph is thereto attached.

That deponent is a citizen of the United States, was born in the City and County of San Francisco, at 751 Sacramento Street, and is now twenty three years old. That deponent departed for China in the latter part of 1889, and returned to the United States on the Steamship "Gaelic" ticket No. 14, on the eighth day of July 1890, and was landed by Hon. T.G.Phelps, Collector of the Port, on the eighteenth day of July 1890. on the ground that he was a citizen of the United States.

Subscribed and sworn to before me this 5th day of November 1894.

Wong Kim Ark
10

R.M. Edwards
Notary Public in and for
The City and County of San Francisco
State of California.

Wong Kim Ark's statement of citizenship.
National Archives and Records Administration.

although the Court splintered over the specific question of public education, *all nine justices agreed* that the Equal Protection Clause protects legal and illegal aliens alike. And all nine reached that conclusion precisely because illegal aliens are "subject to the jurisdiction" of the U.S., no less than legal aliens and U.S. citizens.

Writing for the majority, Justice Brennan explicitly rejected the contention that "persons who have entered the United States illegally are not 'within the jurisdiction' of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase 'within its jurisdiction.'" In reaching this conclusion, Brennan invoked the Citizenship Clause and the Court's analysis in *Wong Kim Ark*, noting that

> "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." … [*N*]*o plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.*[39]

The four dissenting justices – Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor – rejected Brennan's application of equal protection to the case at hand. But they pointedly expressed "no quarrel" with his threshold determination that "the Fourteenth Amendment applies to aliens who, *after their illegal entry into this country*, are indeed physically 'within the jurisdiction' of a state."[40]

The Court continues to abide by this understanding to this day. In *INS v. Rios-Pineda* (1985), Justice White noted for a unanimous Court that "respondent wife [an illegal alien] had given birth to a child, who, born in the United States, was a citizen of this country."[41] And in *Hamdi v. Rumsfeld* (2004), the plurality opinion noted that alleged Taliban fighter Yaser Hamdi was "[b]orn in Louisiana" and thus "is an American citizen," despite objections by various *amici* that, at the time of his birth, his parents were aliens in the U.S. on temporary work visas.[42]

Repeal proponents seek refuge in earlier judicial precedents. As detailed by the two

39 457 U.S. 202, 211 & n.10 (1982) (quoting Wong Kim Ark, 169 U.S. at 693) (emphasis added); see also 457 U.S. at 215.

40 Id. at 243 (emphasis added).

41 471 U.S. 444, 446. Cf. INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981) (upholding Attorney General's discretion not to suspend deportation for illegal aliens despite hardship for their U.S. citizen children); Johnson v. Eisentrager, 339 U.S. 763, 771 (1950) ("[T]he Court [has] held its processes available to 'an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here.'") (quoting Yamatayo v. Fisher, 189 U.S. 86, 101 (1903)).

42 542 U.S. 507, 510; Eastman/Meese Brief (cited in note 4). Repeal proponents hasten to note that, in dissent, Justices Scalia and Stevens referred to Hamdi as a "presumed" U.S. citizen. Id. at 554 (Scalia, J., dissenting); 2005 House Hearing at 61 (Prof. Eastman). But citizenship was likely "presumed" only because Hamdi might have renounced citizenship through his hostile conduct. 8 U.S.C. § 1481; Afroyim v. Rusk, 387 U.S. 253 (1967); In re Look Tin Sing, 21 F. at 906. In fact, Hamdi subsequently did renounce his citizenship, through a plea agreement that also reserved the possibility that he had renounced citizenship at an earlier time. http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html (paragraph 8). It is difficult in any event to believe that Justice Stevens, a member of the *Plyler* majority, agrees with repeal proponents.

dissenting justices in *Wong Kim Ark*, the Court did suggest a contrary view in the *Slaughter-House Cases* (1872), as well as in *Elk v. Wilkins* (1884).

First, repeal proponents cite a single sentence in *Slaughter-House*, stating 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."[43] But that case did not actually implicate the Citizenship Clause, so this passage is pure dicta. Moreover, the Court immediately backed away from this assertion just two years later in *Minor v. Happersett*.[44] That same year, Justice Field (a *Slaughter-House* dissenter) adopted *jus soli* while riding circuit in *In re Look Tin Sing*, wholly disregarding the *Slaughter-House* dicta.[45] And the Court itself, in *Wong Kim Ark*, disparaged the *Slaughter-House* statement as "wholly aside from the question in judgment, and from the course of reasoning bearing upon that question," and "unsupported by any argument, or by any reference to authorities."[46]

Elk v. Wilkins fares no better. *Elk* involved Indians, not aliens, and it merely confirmed what we already knew from the 1866 Senate debate: that Indians are not constitutionally entitled to birthright citizenship. Repeal proponents hasten to point out that references to "allegiance" can be found in *Elk*, just as they can be found in the Senate debate. But again, these stray comments do not detract from the analysis. To the contrary, *Elk* specifically endorsed the view, later adopted in *Wong Kim Ark*, that foreign diplomats are uniquely excluded from the Citizenship Clause.[47] That is unsurprising, for both *Elk* and *Wong Kim Ark* were authored by the same justice: Horace Gray. Repeal proponents thus find themselves in the awkward position of endorsing Justice Gray's majority views in *Elk* but distancing themselves from Justice Gray's majority views in *Wong Kim Ark*. Such tension can be avoided simply by taking *Elk* at face value – and by accepting *Wong Kim Ark* as the law of the land.

All three branches of our government – Congress, the courts, and the Executive Branch[48] – agree that the Citizenship Clause applies to the children of aliens and citizens alike.[49] But that may not stop Congress from repealing birthright citizenship. Pro-immigrant members might allow birthright citizenship legislation to be included

43 83 U.S. 36, 73 (emphasis added). This statement is awkward; why bother singling out "ministers" and "consuls," if all "citizens or subjects of foreign States" are excluded? Compare note 29 and accompanying text.

44 88 U.S. 162, 167–68 (1874).

45 21 F. 905.

46 169 U.S. at 678.

47 112 U.S. 94, 101–2.

48 Legislation Denying Citizenship at Birth to Certain Children Born in the United States, 19 Op. O.L.C. 340 (1995); see also Citizenship of Children Born in the United States of Alien Parents, 10 Op. Att'y Gen. 328, 328–29 (1862) (analyzing pre-Fourteenth Amendment common law); Citizenship, 10 Op. Att'y Gen. 382, 396–97 (1862) (same). See generally www.ilw.com/articles/2006,0502-endelman.shtm (collecting authorities in footnotes 21 and 27).

49 What about foreign governments? If "[n]early every industrialized country in the world requires at least one parent to be a citizen or legal immigrant before a child born there becomes a citizen," House Hearing at 3 (Rep. Smith), perhaps repeal proponents should demand that the Citizenship Clause be construed in light of foreign law and international consensus. Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) (noting various conservative foreign rulings not cited by the Court).

in a comprehensive immigration reform package – believing it will be struck down in court – in exchange for keeping other provisions they disfavor off the bill. Alternatively, opponents of a new temporary worker program might withdraw their opposition, if the children of temporary workers are denied birthright citizenship.[50] Stay tuned: *Dred Scott II* could be coming soon to a federal court near you. GB

50 Lynn Woolley, Myths, Realities of the 14th Amendment, Human Events Online, Mar. 7, 2006, available at www.humaneventsonline.com/article.php?id=13010.