Legal Memorandum
Published by The Heritage Foundation
No. 18
March 30, 2006

From Feudalism to Consent: Rethinking Birthright Citizenship

John C. Eastman, Ph.D.

It is today routinely believed that under the Citizenship Clause of the Fourteenth Amendment, mere birth on U.S. soil is sufficient to obtain U.S. citizenship. However strong this commonly believed interpretation might appear, it is incompatible not only with the text of the Citizenship Clause (particularly as informed by the debate surrounding its adoption), but also with the political theory of the American Founding.

It is time for Congress to reassert its plenary authority and make clear, by resolution, its view that the "subject to the jurisdiction" phrase of the Citizenship Clause has meaning of fundamental importance to the naturalization policy of the nation.

The Original Understanding of the Citizenship Clause

The Citizenship Clause of the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[1] As manifest by the conjunctive "and," the clause mandates citizenship to those who meet both of the constitutional prerequisites: (1) birth (or naturalization) in the United States and (2) being subject to the jurisdiction of the United States.

The widely held, though erroneous, view today is that any person entering the territory of the United States—even for a short visit; even illegally—is considered to have subjected himself to the jurisdiction

Talking Points

- The view that mere birth on U.S. soil is sufficient to obtain citizenship is mistaken. The Constitution requires that those born or naturalized in the United States must in addition be "subject to the jurisdiction of the United States," and the original meaning of that provision meant complete or sole jurisdiction.
- The Supreme Court erroneously interpreted this provision in *United States v. Wong Kim Ark*. Using the Court's expansive language to confer birthright citizenship not only ignores the text, history, and theory of the Citizenship Clause, but also permits the Court to intrude upon a plenary power assigned to Congress itself.
- Congress should reassert its plenary authority and make clear its view that the "subject to the jurisdiction" phrase of the Citizenship Clause has meaning of fundamental importance to the naturalization policy of the nation.

This paper, in its entirety, can be found at:
www.heritage.org/research/legalissues/lm18.cfm

Produced by the B. Kenneth Simon Center for American Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

of the United States, which is to say, subjected himself to the laws of the United States. Surely one who is actually born in the United States is therefore "subject to the jurisdiction" of the United States and entitled to full citizenship as a result, or so the common reasoning goes.

Textually, such an interpretation is manifestly erroneous, for it renders the entire "subject to the jurisdiction" clause redundant. Anyone who is "born" in the United States is, under this interpretation, necessarily "subject to the jurisdiction" of the United States. Yet it is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be interpreted to create redundancy unless any other interpretation would lead to absurd results.[2]

The "subject to the jurisdiction" provision must therefore require something in addition to mere birth on U.S. soil. The language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment was derived, provides the key to its meaning. The 1866 Act provides: "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."[3] As this formulation makes clear, 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 by the 1866 Act.

The jurisdiction clause of the Fourteenth Amendment is somewhat different from the jurisdiction clause of the 1866 Act, of course. The positively phrased "subject to the jurisdiction" of the United States 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 modern understanding. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading.

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," for example, 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."[4] And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now"[5] (i.e., under the 1866 Act). That meant that the children of Indians who still "belong[ed] to a tribal relation" 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 explicitly to exclude "Indians not taxed," as the 1866 Act had done, was rejected as redundant.[6]

The interpretative gloss offered by Senators Trumbull and Howard was also accepted by the Supreme Court—by both the majority and the dissenting justices—in *The Slaughter-House Cases*.[7]

1. U.S. Const. Amend. XIV, § 1.
2. See, e.g., *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 562 (1995) ("this Court will avoid a reading which renders some words altogether redundant"); see also Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case. W. Res. L. Rev. 179 (1989).
3. 14 Stat. 27, ch. 31 (April 9, 1866).
4. *Congressional Globe*, 39th Cong., 1st Sess., 2893 (May 30, 1866).
5. *Id.*, at 2890.
6. *Id.*, at 2892–97; see also Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* 72–89 (1985).

The majority in that case correctly noted that the "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*."[8] Justice Steven Field, joined by Chief Justice Chase and Justices Swayne and Bradley in dissent from the principal holding of the case, likewise acknowledged that the clause was designed to remove any doubts about the constitutionality of the 1866 Civil Rights Act, which provided that all persons born in the United States were as a result citizens both of the United States and of the state in which they resided, provided they were not at the time subjects of any foreign power.[9]

Although the statement by the majority in *Slaughter-House* was dicta, the position regarding the "subject to the jurisdiction" language advanced there was subsequently adopted as holding by the Supreme Court in *Elk v. Wilkins*.[10] John Elk was born on an Indian reservation and subsequently moved to non-reservation U.S. territory, renounced his former tribal allegiance, and claimed U.S. citizenship by virtue of the Citizenship Clause. This Court held that the claimant was not "subject to the jurisdiction" of the United States at birth, which required that he be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[11] Elk did not meet the jurisdictional test because, as a member of an Indian tribe at his birth, he "owed immediate allegiance to" his tribe and not to the United States. Although "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states," "they were alien nations, distinct political communities," according to the Court.[12]

Drawing explicitly on the language of the 1866 Civil Rights Act, the Court continued:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[13]

Indeed, if anything, American Indians, as members of tribes that were themselves dependent upon the United States (and hence themselves subject to its jurisdiction), had a stronger claim to citizenship under the Fourteenth Amendment merely by virtue of their birth within the territorial jurisdiction of the United States than did children of foreign nationals. But the Court in *Elk* rejected even that claim and in the process necessarily rejected the claim that the phrase, "subject to the jurisdiction" of the United States, meant merely territorial jurisdiction as opposed to complete, political jurisdiction.

Such was the interpretation of the Citizenship Clause initially given by the Supreme Court, and it was the correct interpretation. As Thomas Cooley noted in his treatise, "subject to the jurisdiction" of the United States "meant full and complete jurisdic-

7. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).
8. *Id.*, at 73 (emphasis added).
9. *Id.*, at 92–93 (Field, J., dissenting).
10. *Elk v. Wilkins*, 112 U.S. 94 (1884).
11. *Id.*, at 102.
12. *Id.*, at 99.
13. *Id.*, at 102.

tion to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government."[14]

The Supreme Court's Wrong Turn in *Wong Kim Ark*

Despite the clear holding of *Elk* and the persuasive dicta from *Slaughter-House* that mere birth on U.S. soil is not sufficient to meet the constitutional prerequisites for birthright citizenship, the Supreme Court held otherwise in *United States v. Wong Kim Ark*,[15] with expansive language even more broad than the holding of the case itself. It is that erroneous interpretation of the Citizenship Clause, adopted 30 years after the adoption of the Fourteenth Amendment, that has colored basic questions of citizenship ever since.

In *Wong Kim Ark*, Justice Horace Gray, writing for the Court, held that "a child born in the United States, of parents of Chinese descent, who at the time of his birth were subjects of the emperor of China, but have a permanent domicile and residence in the United States," was, merely by virtue of his birth in the United States, a citizen of the United States as a result of the Citizenship Clause of the Fourteenth Amendment.[16] Justice Gray correctly noted that the language to the contrary in *The Slaughter-House Cases* was merely dicta and therefore not binding precedent.[17] He found the *Slaughter-House* dicta unpersuasive because of a subsequent decision, in which the author of the majority opinion in *Slaughter-House* had concurred, holding that foreign consuls (unlike ambassadors) were "subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside."[18]

Justice Gray appears not to have appreciated the distinction between partial, territorial jurisdiction, which subjects all who are present within the territory of a sovereign to the jurisdiction of that sovereign's laws, and complete political jurisdiction, which requires allegiance to the sovereign as well.

More troubling than his rejection of the persuasive dicta from *Slaughter-House*, though, was the fact that Justice Gray also repudiated the actual holding in *Elk*, which he himself had authored. After quoting extensively from the opinion in *Elk*, including the portion, reprinted above, noting that the children of Indians owing allegiance to an Indian tribe were no more "subject to the jurisdiction" of the United States within the meaning of the Fourteenth Amendment than were the children of ambassadors and other public ministers of foreign nations born in the United States, Justice Gray simply held, without any analysis, that *Elk* "concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country."[19]

By limiting the "subject to the jurisdiction" clause to the children of diplomats, who neither owed allegiance to the United States nor were (at least at the ambassadorial level) subject to its laws merely by virtue of their residence in the United States as the result of the long-established international law fiction of extraterritoriality by which the sovereignty of a diplomat is said to follow him wherever he goes, Justice Gray simply failed to appreciate what he seemed to have understood in *Elk*, namely, that there is a difference between territorial jurisdiction, on the one hand, and the more complete, allegiance-obliging jurisdiction that the Fourteenth Amendment codified, on the other.

Justice Gray's failure even to address, much less appreciate, the distinction was taken to task by

14. Thomas Cooley, *The General Principles of Constitutional Law in America* 243 (2001) (1880).

15. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

16. 169 U.S., at 653.

17. *Id.*, at 678.

18. *Id.*, at 679 (citing, e.g., *In re Baiz*, 135 U.S. 403, 424 (1890)).

19. *Id.*, at 681–82.

Justice Fuller, joined by Justice Harlan, in dissent. Drawing on an impressive array of legal scholars, from Vattel to Blackstone, Justice Fuller correctly noted that there was a distinction between the two sorts of allegiance—"the one, natural and perpetual; the other, local and temporary."[20] The Citizenship Clause of the Fourteenth Amendment referred only to the former, he contended. He noted that the absolute birthright citizenship urged by Justice Gray was really a lingering vestige of a feudalism that the Americans had rejected, implicitly at the time of the Revolution and explicitly with the 1866 Civil Rights Act and the Fourteenth Amendment.[21]

Quite apart from the fact that Justice Fuller's dissent was logically compelled by the text and history of the Citizenship Clause, Justice Gray's broad interpretation led him to make some astoundingly incorrect assertions. He claimed, for example, that "a stranger born, for so long as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason."[22] And he was compelled to recognize dual citizenship as a necessary implication of his position,[23] despite the fact that ever since the Naturalization Act of 1795, "applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects."[24]

Finally, Justice Gray's position is incompatible with the notion of consent that underlay the sovereign's power over naturalization. What it meant, fundamentally, was that foreign nationals could secure American citizenship for their children merely by giving birth on American soil, whether or not their arrival on America's shores was legal or illegal, temporary or permanent.

Justice Gray stated that the children of only two classes of foreigner nationals were not entitled to the birthright citizenship he thought guaranteed by the Fourteenth Amendment.

First, as noted above, were the children of ambassadors and other foreign diplomats who, as the result of the fiction of extraterritoriality, were not even considered subject to the territorial jurisdiction of the United States.

Second were the children of members of invading armies who were born on U.S. soil while it was occupied by the foreign army. But apart from these two narrow exceptions, all children of foreign nationals who managed to be born on U.S. soil were, in Justice Gray's formulation, citizens of the United States. Children born of parents who had been offered permanent residence but were not yet citizens, and who as a result had not yet renounced their allegiance to their prior sovereign, would become citizens by birth on U.S. soil. This was true even if, as was the case in *Wong Kim Ark* itself, the parents were, by treaty, unable ever to become citizens.

Children of parents residing only temporarily in the United States on a student or work visa would also become U.S. citizens. Children of parents who had overstayed their temporary visas would likewise become U.S. citizens, even though born of parents who were now in the United States illegally. And, perhaps most troubling from the "consent" rationale, even children of parents who never were in the United States legally would become citizens as the direct result of the illegal action by their parents. This would be true even if the parents were nationals of a regime at war with the United States and even if the parents were here to

20. *Id.*, at 710.

21. *Id.*, at 707; see also Edward J. Erler, "Immigration and Citizenship: Illegal Immigrants, Social Justice and the Welfare State," in Gerald Frost, ed., *Loyalty Misplaced: Misdirected Virtue and Social Disintegration* 71, 81 (1997).

22. *Id.*, at 693.

23. *id.*, at 691.

24. *Id.*, at 711 (Fuller, J., dissenting) (citing Act of Jan. 29, 1795, 1 Stat. 414, c. 20).

commit acts of sabotage against the United States, at least as long as the sabotage did not actually involve occupying a portion of the territory of the United States. The notion that the framers of the Fourteenth Amendment, when seeking to guarantee the right of citizenship to former slaves, also sought to guarantee citizenship to the children of enemies of the United States who were in its territory illegally is simply too absurd to be a credible interpretation of the Citizenship Clause.

Although hard to sustain under the broad language used by Justice Gray, the actual holding of *Wong Kim Ark* is actually much more narrow, and the case need not be read so expansively as to produce such absurd results. Because of the Chinese Exclusion Acts,[25] Wong Kim Ark's parents were ineligible for citizenship even if they had renounced their Chinese citizenship and subjected themselves to the exclusive jurisdiction of the United States. As such, Wong Kim Ark arguably would have been entitled to citizenship because, like his parents, he would in fact have been "subject to the jurisdiction" of the United States in the complete, allegiance-obliging sense intended by the phrase.[26]

This is not to say that Congress could not, pursuant to its naturalization power, choose to grant citizenship to the children of foreign nationals.[27] But thus far it has not done so. Instead, the language of the current naturalization statute simply tracks the minimum constitutional guarantee—anyone "born in the United States, and subject to the jurisdiction thereof," is a citizen.[28] Indeed, Congress has by its own actions with respect to Native Americans—both before and after this Court's decision in *Wong Kim Ark*—rejected the claim that the Citizenship Clause itself confers citizenship merely by accident of birth.[29] None of these citizenship acts would have been necessary—indeed, all would have been redundant—under the expansive view of the Citizenship Clause propounded by Justice Gray.

A Citizenship of Consent, not Feudal Allegiance

Once one considers the full import of Justice Gray's language in *Wong Kim Ark*, it becomes clear that his proposition is simply incompatible not only with the text of the Citizenship Clause, but with the political theory of the American Founding as well.

At its core, as articulated by Thomas Jefferson in the Declaration of Independence, that political theory posits the following: Governments are instituted among particular peoples, comprised of naturally equal human beings, to secure for themselves certain unalienable rights. Such governments, in order to be legitimate, must be grounded in the consent of the governed—a necessary corollary to the self-evident proposition of equality.[30] This consent must be present, either explicitly or tacitly, not just in the formation of the government, but also in the ongoing decision whether to embrace others within the social compact of the particular people. As formulated in the Massachusetts Bill of Rights of 1780:

25. E.g., 22 Stat. 58 (1882).

26. Cf. *In re Look Tin Sing*, 21 F. 905, 907 (C.C. Cal. 1884) (Field, Circuit Justice) (concluding that the American-born son of Chinese immigrants, who had taken up permanent residence in the United States pursuant to a treaty with China that recognized the right of man to change his home and allegiance as "inherent and inalienable," because he, like his parents, was at the time of his birth subject to the "exclusive" jurisdiction of the United States).

27. See U.S. Const. Art. I, § 8, cl. 4 ("The Congress shall have power…To establish a uniform Rule of Naturalization").

28. 8 U.S.C. § 1401(a).

29. See Act of July 15, 1870, 16 Stat. 361, ch. 296, § 10 (cited in *Elk*, 112 U.S., at 104) (extending the jurisdiction of the United States to any member of the Winnebago Tribe who desired to become a citizen); Act of March 3, 1873, 17 Stat. 632, ch. 332, § 3 (cited in *Elk*, 112 U.S., at 104) (same offer of citizenship to members of the Miami tribe of Kansas); Indian Citizenship Act of 1924, 43 Stat. 253, 8 U.S.C. § 1401(b) (granting citizenship to Indians born within the territorial limits of the United States).

30. Decl. of Ind. ¶ 2.

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights…. The body-politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good.[31]

Thus, as Professor Edward Erler has noted:

> [T]he social contract requires reciprocal consent. Not only must the individual consent to be governed, but he must also be accepted by the community as a whole. If all persons born within the geographical limits of the United States are to be counted citizens—even those whose parents are in the United States illegally—then this would be tantamount to the conferral of citizenship without the consent of "the whole people."[32]

In other words, birthright citizenship is contrary to the principle of consent that is one of the bedrock principles of the American regime.

Such a claim of birthright citizenship traces its roots not to the republicanism of the American Founding, grounded as it was in the consent of the governed, but to the feudalism of medieval England, grounded in the notion that a subject owed perpetual allegiance and fealty to his sovereign.[33] A necessary corollary of the feudal notion of citizenship was the ban on expatriation, embraced by England and described by Blackstone as follows:

> Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection…. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, canceled, or altered, by any change of time, place, or circumstance…. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrence act of that prince to whom it was first due.[34]

Thus, when Congress passed as a companion to the Fourteenth Amendment the Expatriation Act of 1868, which provided simply that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," it necessarily rejected the feudal birthright citizenship doctrine of medieval England as fundamentally incompatible with the principles of the Declaration of Independence. As Representative Woodward of Pennsylvania noted on the floor of the House of Representatives: "It is high time that feudalism were driven from our shores and eliminated from our law, and now is the time to declare it."[35]

Such remnants of feudalism were rejected by our nation's Founders when they declared to a candid world that they no longer owed allegiance to the king of their birth. They were rejected again

31. Mass. Const. of 1780, Preamble (emphasis added).

32. Erler, *Immigration and Citizenship*, at 77; see also Thomas G. West, *Vindicating the Founders*, at 166–67.

33. See *id.*, at 81.

34. William Blackstone, 1 *Commentaries on the Laws of England* 357–58 (1979) (1765).

35. *Congressional Globe*, 40th Cong., 2nd Sess., at 868 (1868); see also *id.*, at 967 (Rep. Baily) (describing birthright citizenship as "the slavish feudal doctrine of perpetual allegiance"); *Wong Kim Ark*, 169 U.S., at 707 (Fuller, J., dissenting) (describing the rule adopted by the majority as "the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due was that of liege men to their liege lord").

by the Congress in 1866 and by the nation when it ratified the Fourteenth Amendment.

Reviving Congress's Constitutional Power Over Naturalization

It is time for the courts, and for the political branches as well, to revisit Justice Gray's erroneous interpretation of the Citizenship Clause, restoring to the constitutional mandate what its drafters actually intended: that only a complete jurisdiction, of the kind that brings with it a total and exclusive allegiance, is sufficient to qualify for the grant of citizenship to which the people of the United States actually consented.

Of course, Congress has in analogous contexts been hesitant to exercise its own constitutional authority to interpret the Constitution in ways contrary to the pronouncements of the courts. Even if that course is warranted in most situations so as to avoid a constitutional conflict with a co-equal branch of the government, it is not warranted here for at least two reasons.

First, as the Supreme Court itself has repeatedly acknowledged, Congress's power over naturalization is "plenary," while "judicial power over immigration and naturalization is extremely limited."[36] While that recognition of plenary power does not permit Congress to dip below the constitutional floor, it does counsel against any judicial interpretation that provides a broader grant of citizenship than is actually supported by the Constitution's text.

Second, the gloss that has been placed on the *Wong Kim Ark* decision is actually much broader than the actual holding of the case. Congress should therefore adopt a narrow reading of the decision that does not intrude on the plenary power of Congress in this area any more than the actual holding of the case requires. Wong Kim Ark's parents were actually in this country both legally and permanently, yet were barred from even pursuing citizenship (and renouncing their former allegiance) by a treaty that closed that door to all Chinese immigrants. They were therefore as fully subject to the jurisdiction of the United States as they were legally permitted to be, and under those circumstances, it is not a surprise that the Court would extend the Constitution's grant of birthright citizenship to their children. But the effort to read *Wong Kim Ark* more broadly than that, as interpreting the Citizenship Clause to confer birthright citizenship on the children of those not subject to the full and sovereign (as opposed to territorial) jurisdiction of the United States, not only ignores the text, history, and theory of the Citizenship Clause, but also permits the Court to intrude upon a plenary power assigned to Congress itself.

—John C. Eastman, Ph.D., is Professor of Law at Chapman University School of Law and Director of The Claremont Institute Center for Constitutional Jurisprudence. This memorandum stems from an amicus *brief filed by the Center for Constitutional Jurisprudence in support of respondents in* Hamdi v. Rumsfeld.

36. See, e.g., *Miller v. Albright*, 523 U.S. 420, 455 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 769–770 (1972); *Galvan v. Press*, 347 U.S. 522, 531 (1954).