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The Significance of “Domicile” in *Wong Kim Ark*

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Candidate Trump’s pledge during his 2015–2016 campaign for President to “End Birthright Citizenship,”¹ and *President* Trump’s October 2018 assertion in an interview with Axios on HBO that he could end birthright citizenship by executive order,² has brought the dispute over the meaning of the Fourteenth Amendment’s Citizenship Clause³ back to the forefront of our national discourse. The current perception among many (perhaps most) Americans, whether they agree with it or think it foolish, is that mere birth on U.S. soil results in automatic citizenship for the child, no matter the circumstances of the child’s parents’ presence in the United States—whether temporary or permanent, lawful, or unlawful. This common perception is bolstered by majority academic opinion, which contends that the question was settled by the Supreme Court

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¹ *Immigration Reform That Will Make America Great Again*, TRUMP: MAKE AMERICA GREAT AGAIN! 1, 4 (2015), <https://web.archive.org/web/20151231034321/https://www.donaldjtrump.com/images/uploads/Immigration-Reform-Trump.pdf> [http://perma.cc/D6T4-D7m9].

² Jonathan Swan & Stef W. Kight, *Exclusive: Trump targeting birthright citizenship with executive order*, AXIOS (Oct. 30, 2018), <https://www.axios.com/trump-birthright-citizenship-executive-order-0cf4285a-16c6-48f2-a933-bd71fd72ea82.html> [http://perma.cc/TT3C-6R46].

³ U.S. CONST. amend. XIV, § 1, cl. 1.

over a century ago in the 1898 *Wong Kim Ark* case,⁴ in which the Court held that a child born on U.S. soil to Chinese parents who were not citizens (and because of a treaty between the U.S. and China could not become citizens) was nevertheless a citizen by virtue of the Fourteenth Amendment.⁵

I have argued extensively elsewhere—in briefing before the Supreme Court,⁶ in legislative testimony,⁷ in articles both scholarly⁸ and popular,⁹ and in numerous media appearances¹⁰—why I believe

⁴ United States v. Wong Kim Ark, 169 U.S. 649 (1898).

⁵ See, e.g., Garrett Epps, *The Citizenship Clause: A Legislative History*, 60 AM. U. L. REV. 331, 332–33 (2010).

⁶ See generally Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

⁷ *Birthright Citizenship: Is it the Right Policy for America?, Hearing Before the Subcomm. on Immigration and Border Security of the Comm. on the Judiciary of the H.R.*, 114th Cong. 13 (2015) (statement of John C. Eastman), <https://docs.house.gov/meetings/JU/JU01/20150429/103384/HHRG-114-JU01-Transcript-20150429.pdf> [<http://perma.cc/B2EV-3LLK>]; *Birthright Citizenship State Compact Bill: Hearing Before S. Appropriations Comm.*, 50th Sess. (Ariz. Feb. 22, 2011) (statement of John C. Eastman), <https://www.azleg.gov/archivedmeetings/?Year=2011> [<http://perma.cc/R7CC-ARJX>]; *Birthright Citizenship State Compact Bill: Hearing Before S. Judiciary Comm.*, 50th Sess. (Ariz. Feb. 7, 2011) (statement of John C. Eastman), <https://www.azleg.gov/archivedmeetings/?Year=2011> [<http://perma.cc/R7CC-ARJX>]; *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary of the H.R.*, 109th Cong. 57–59 (Sept. 29, 2005) (statement of John C. Eastman), <https://www.govinfo.gov/content/pkg/CHRG-109hrg23690/html/CHRG-109hrg23690.htm> [<http://perma.cc/6SYZ-U6ED>].

⁸ See generally John C. Eastman, *From Plyler to Arizona: Have the Courts Forgotten About Corfield v. Coryell?*, 80 U. CHI. L. REV. 165 (2013); John C. Eastman & Ediberto Roman, *Debate on Birthright Citizenship*, 6 FLA. INT'L U. L. REV. 293 (2011); John C. Eastman, *Born in the U.S.A.? Re-assessing Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167 (2007) (reprinting congressional testimony); John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUND. (Mar. 30, 2006), <https://www.heritage.org/the-constitution/report/feudalism-consent-rethinking-birthright-citizenship> [<http://perma.cc/Q4U9-ZVF5>].

⁹ See generally John C. Eastman, *Trump is Right on Birthright Citizenship*, DAILY CALLER (Nov. 2, 2018, 8:00 AM), <https://dailycaller.com/2018/11/02/trump-right-birthright-citizenship/> [<http://perma.cc/34LK-2RZ3>]; John C. Eastman, *Revoking birthright citizenship would enforce the Constitution*, N.Y. POST (Oct. 30, 2018, 6:55 PM), <https://nypost.com/2018/10/30/revoking-birthright-citizenship-would-enforce-the-constitution/> [<http://perma.cc/LF3K-XFMK>]; John C. Eastman & Linda Chavez, *Birthright Citizenship: Debate*, CRB DIGITAL (Feb. 10, 2016), <http://www.claremont.org/crb/basicpage/birthright-citizenship/> [<http://perma.cc/P5EG-VZRB>]; John C. Eastman, *We Can Apply the 14th Amendment While Also Reforming Birthright Citizenship*, NAT'L REV. (Aug. 24, 2015, 8:00 AM), <https://www.nationalreview.com/2015/08/birthright-citizenship-reform-it-without-repealing-14th-amendment/> [<http://perma.cc/NF85-QHD9>].

¹⁰ See, e.g., *The California Report: Trump Considers Executive Order to End Birthright Citizenship* (KQED radio broadcast Oct. 30, 2018), <https://www.kqed.org/news/11702317/calexico-mayor-calls-trumps-response-to-migrant-caravan-alarmist> [<http://perma.cc/XC7E-BTNP>]; Steve Harman, *Bye-Bye Baby: Trump Aims to End Birthright Citizenship*, VOICE OF AM. (Oct. 30, 2018, 9:43 AM), <https://www.voanews.com/a/trump-aims-to-end-birthright-citizenship/4634978.html> [<http://perma.cc/E56D-QESS>]; *AirTalk Hosted by Larry Mantle: Can Trump end birthright citizenship – and should it end?* (KPCC radio broadcast Oct. 30, 2018), <https://www.scpr.org/programs/airtalk/2018/10/30/63847/can-trump-end-birthright-citizenship-and-should-he/> [<http://perma.cc/4H82-WKN5>]; *All Things Considered: Trump Claims He Will*

the predominate modern understanding of the Citizenship Clause is incorrect. The short version? The Citizenship Clause actually contains two components for automatic citizenship: 1) birth on U.S. soil; and 2) being “subject to the jurisdiction” of the United States.¹¹ Contrary to the modern understanding, the phrase “subject to the jurisdiction” is not synonymous with “subject to the laws,” which for those who drafted and ratified the Fourteenth Amendment was merely a partial or territorial jurisdiction. Rather, for them, “subject to the jurisdiction” meant subject to the “complete” jurisdiction, “[n]ot owing allegiance to anybody else.”¹² In other words, as the Supreme Court noted when it first addressed the clause in 1872, just four years after the Amendment’s adoption: “The phrase, ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.”¹³

Admittedly, that language in the Supreme Court’s 1872 *Slaughter-House* decision was not necessary to the case’s holding and is therefore *dicta*. But it became a holding a decade later in a case involving John Elk, a Native American born in the United States who later renounced his tribal allegiance and claimed citizenship by virtue of the Citizenship Clause.¹⁴ The Supreme Court rejected his claim, holding that Elk was not at the time of his birth “subject to the jurisdiction” of the United States, 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,

End Birthright Citizenship Through Executive Order (NPR radio broadcast Oct. 30, 2018, 4:30 PM), <https://www.npr.org/2018/10/30/662253537/trump-claims-he-will-end-birthright-citizenship-through-executive-order> [http://perma.cc/GC4H-NMS7]; *The Larry Elder Show* (KRLA-Salem Radio Network radio broadcast Oct. 30, 2018), <https://www.larryelder.com/show-archive/page/6/> [http://perma.cc/P575-DX3R]; *The Ingraham Angle* (Fox News Channel television broadcast Oct. 30, 2018), <https://video.foxnews.com/v/5855619416001/?#sp=show-clips> [http://perma.cc/EGV2-5Y3A]; *The Dennis Prager Show: Truth vs. Leftism* (KRLA-Los Angeles radio broadcast Nov. 1, 2018), <https://pragertopia.com/2018/11/01/prager-20181101-1-truth-vs-leftism/> [http://perma.cc/2LLE-W2RX]; James Ho & John C. Eastman, *Birthright Citizenship and the 14th Amendment* (C-SPAN television broadcast Oct. 16, 2015), <https://www.c-span.org/video/?328772-1/discussion-birthright-citizenship> [http://perma.cc/C3Y6-AL8U]; *Doug McIntyre Show* (WCBS-New York radio broadcast Aug. 20, 2015); *McIntyre in the Morning* (KABC-Los Angeles radio broadcast Aug. 20, 2015); *On Point*, (NPR radio broadcast Aug. 9, 2010); Interview with Ji-Eun Lee (Munhwa Broadcasting Corp. broadcast Feb. 12, 2009); *Special Report with Brit Hume* (Fox News Channel television broadcast Dec. 14, 2007); *The Paula Zahn Show* (CNN television broadcast Dec. 31, 2005). See also Press Conference at the National Press Club (Aug. 10, 2010) (participating media outlets included Politico, Federal News Service, Congressional Quarterly, Amnesty International, Fox News, Talk Radio News, Congressional Quarterly, Center for American Progress, Dallas Morning News, Human Events, GAO, World Journal, Think Progress, Eagle Forum, and Voice of America).

11 U.S. CONST. amend. XIV, § 1, cl. 1.

12 CONG. GLOBE, 39th Cong., 1st Sess., 2893 (1866) (statement of Sen. Lyman Trumbull).

13 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872) (emphasis added).

14 *Elk v. Wilkins*, 112 U.S. 94 (1884).

and owing them direct and immediate allegiance”—a test he could not meet because, at his birth, Elk “owed immediate allegiance” to this tribe and not to the United States.¹⁵

The Citizenship Clause therefore bestowed automatic citizenship on those born in the United States who were subject not merely to the partial, territorial jurisdiction applicable to anyone physically present within our borders (save for diplomats and invading armies), but who were subject to the complete, political jurisdiction, in the sense of owing allegiance to the United States. As Thomas Cooley, the leading treatise writer of the era, described it, “subject to the jurisdiction” of the United States “meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government.”¹⁶ That would seem to have settled the matter.

But fourteen years after the decision in *Elk*, and thirty years after adoption of the Fourteenth Amendment, the Supreme Court ruled that Wong Kim Ark, who had been born in 1873 to parents of Chinese origin who were still subjects of the Emperor of China and not U.S. citizens, was a citizen because he had been born on U.S. soil.¹⁷ My goal here is not to revisit the correctness of that decision, or to review the extensive evidence that I believe demonstrates that Chief Justice Fuller had the better of the argument in his dissent, but rather to focus on one critically important aspect of the case that rather dramatically limits the scope of the case’s *holding* (as opposed to its more expansive *dicta*) in a way that is directly relevant to the current dispute about whether the Fourteenth Amendment mandates automatic citizenship for the children of parents unlawfully present in the United States.

That critical aspect of the case is the word “domicile,” which appears twenty-four times in the majority opinion and introductory statement of facts, and another four times in the dissent.¹⁸ The “question presented,” as stated by Justice Gray,

[I]s whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, *but have a permanent domicile and residence in the United States*, and are there carrying on business, and are not employed in

¹⁵ *Id.* at 94, 99, 102.

¹⁶ THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 243 (The Lawbook Exch., Ltd. 2001) (1880).

¹⁷ *United States v. Wong Kim Ark*, 169 U.S. 649, 653, 704 (1898).

¹⁸ The words “resident” or “residence” appear an additional thirty-two times in the majority opinion, and twelve times in the dissent. *See generally id.*

any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution: “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.”¹⁹

The fact that Wong Kim Ark’s parents were “*domiciled residents* of the United States” at the time of Wong Kim Ark’s birth in 1873, “and had established and enjoyed a *permanent domicile* and residence therein at said city and county of San Francisco,” California, was explicitly part of the agreed-upon facts on which the case had been submitted to the U.S. District Court for the Northern District of California for decision.²⁰ Justice Gray repeated that factual stipulation at the outset of his opinion: “They [Wong Kim Ark’s parents] were at the time of his birth *domiciled residents* of the United States, having previously established and are still *enjoying a permanent domicile* and residence therein at San Francisco.”²¹ He also noted, per the factual stipulation, that Wong Kim Ark, himself,

ever since his birth, has had but one residence, to wit, in California, within the United States and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States.²²

Although Justice Gray used the word “residence” rather than “domicile” when describing Wong Kim Ark’s circumstances, it was (and is) well established, as Justice Joseph Story noted in his *Commentaries on the Conflict of Laws*, that “the place of birth of a person is considered as his domicil[e], if it is at the time of his birth the domicil[e] of his parents.”²³

“Domicile” is, of course, a legal term of art. According to *Black’s Law Dictionary*, it is “[t]hat place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent

¹⁹ *Id.* at 653 (emphasis added).

²⁰ *Id.* at 650–51 (emphasis added).

²¹ *Id.* at 652 (emphasis added).

²² *Id.*

²³ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 46, at 44 (Boston, Hilliard, Gray, & Co. 1834) (emphasis added).

home.”²⁴ “It is his *legal residence*, as distinguished from his temporary place of abode.”²⁵ “Legal residence” is in turn defined as “the term applied to the place a person spends most of his time and is *the home that is recognised by law*.”²⁶ Or, as the Seventh Circuit put it in *In re Garneau*, it is the place where a person “exercises his political rights.”²⁷

Thus, by repeatedly describing Wong Kim Ark’s parents as “domiciled” in the United States, the actual holding in the case addressed only children born in the United States to parents who are *domiciled* in the United States, which is to say, have their “legal residence” in the United States.²⁸

Chief Justice Fuller, joined by Justice Harlan, contested even this in his dissent.²⁹ Though “domiciled” in the United States, Wong Kim Ark’s parents (and hence Wong Kim Ark himself) could not be “subject to the jurisdiction” of the United States in the complete, political sense intended by the Fourteenth Amendment, he argued, because by treaty they were not allowed to become citizens but remained “subjects” of the Emperor of China, to whom they therefore continued to owe allegiance.³⁰ Whether or not Chief Justice Fuller was correct on that score (and I contend that he was), the majority opinion could not extend further than the facts of the case warranted, namely, that children born to parents who are *domiciled* in the United States are sufficiently “subject to the jurisdiction” of the United States that the Fourteenth Amendment bestows on them automatic citizenship upon birth.³¹ As Justice Gray himself noted when discounting the contrary language in the *Slaughter-House Cases* cited above:

[I]t is well to bear in mind the often-quoted words of Chief Justice Marshall: ‘It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the

²⁴ *Domicile*, BLACK’S LAW DICTIONARY (2d ed. 1910) (citing *In re Garneau*, 127 F. 677 (7th Cir. 1904)).

²⁵ *Id.* (emphasis added) (citing *Town of Salem v. Town of Lyme*, 29 Conn. 74 (1860)).

²⁶ *Legal Residence*, THE LAW DICTIONARY, <https://thelawdictionary.org/legal-residence/> [<http://perma.cc/5MLZ-FWP7>] (emphasis added).

²⁷ *In re Garneau*, 127 F. at 678.

²⁸ Had Justice Gray considered the full scope of the requirements for “domicile,” including that it is the place where one exercises “political rights,” he might have realized that the treaty prohibition on Chinese immigrants exercising political rights would have prevented them from being deemed “domiciled” in the United States. Nevertheless, the actual holding of the case is limited to those who are so “domiciled.”

²⁹ See *United States v. Wong Kim Ark*, 169 U.S. 649, 706–10 (1898) (Fuller, C.J., dissenting).

³⁰ *Id.* at 725–26.

³¹ One could even argue that the actual holding is narrower still, limited to those domiciled in the United States who were barred by treaty from ever becoming citizens.

case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.³²

Chief Justice Marshall’s long-standing distinction between *holding* and *dicta*³³ is particularly germane in assessing the scope of *Wong Kim Ark*’s holding, because language in Justice Gray’s opinion that appears to apply more broadly than to those domiciled in the United States is, at times, patently wrong—errors that likely would have not been made had the precise issue been before the Court. In one glaring example, Justice Gray quoted Justice Joseph Story for the proposition that “[p]ersons who are born in a country are generally deemed citizens and subjects of that country,”³⁴ but he omitted the very next sentence in Justice Story’s treatise, namely, that a “reasonable qualification of the rule would seem to be, that it should not apply to the children of parents, who were *in itinere* [traveling] in the country, or who were abiding there for temporary purposes, as for health, or curiosity, or occasional business.”³⁵ Although Justice Story acknowledged that “[i]t would be difficult . . . to assert, that in the present state of public law such a qualification is universally established,”³⁶ Justice Gray’s omission of the qualification altogether erroneously implies that the opposite was universally established.

Justice Story’s caveat directly addresses several of the modern issues that might well be, but have not previously been, presented to the Court. Does “subject to the jurisdiction” cover children born to those who are in the United States lawfully but only temporarily, such as those on tourist, student, or work visas (temporary sojourners, to use the language of the day)? Does it also extend to children born to those who have overstayed their visas and become unlawfully present in the United States? And can it possibly also extend to children born to those who were never lawfully admitted into the United States in the first place? Honest scholars who argue for such a broad interpretation of the Citizenship Clause

³² *Wong Kim Ark*, 169 U.S. at 679 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

³³ See, e.g., Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) (discussing accuracy as being the “primary virtue” for Chief Justice Marshall’s dicta-holding distinction).

³⁴ *Wong Kim Ark*, 169 U.S. at 661 (quoting STORY, *supra* note 23, § 48).

³⁵ STORY, *supra* note 23, § 48.

³⁶ *Id.* Great Britain, for example, did not recognize the qualification that Story recognized was otherwise nearly universally accepted.

concede that the Supreme Court has never *held* that such individuals are citizens.³⁷

Another example: Justice Gray claimed that the English common law rule of *jus soli* “was in force” not only “in all the English colonies upon this continent down to the time of the Declaration of Independence,” as it clearly was, but also “in the United States afterwards, and continued to prevail under the constitution as originally established.”³⁸ The latter point is patently erroneous. The English common law rule, accurately described by Justice Gray, is that:

[E]very person born within the dominions of the crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England.³⁹

Being an “English subject” also meant under the law of *jus soli*, owing “*permanent* allegiance to the crown.”⁴⁰ The Declaration of Independence is not just a thorough repudiation of that old feudal idea of “permanent allegiance,” but perhaps the most eloquent repudiation of it ever written.

³⁷ See, e.g., Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 500 n.5 (2008) (noting that the principle that any child born on U.S. soil (save to diplomats) “does not rest on any judicial holding. It is based instead on dictum from the *Wong Kim Ark* case and longstanding practice”); Ronald Rizzo, *Born in the USA but Not A Citizen? How the Birth Visa Can Solve Today’s Immigration Challenges*, 27 J. CIV. RTS. & ECON. DEV. 393, 403 (2014) (“*Wong Kim Ark* made absolutely no holding regarding children born to illegal aliens and temporary visitors on U.S. soil.”); David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT’L L. 278, 280-81 (1985) (likewise noting that language in *Wong Kim Ark* extending beyond children of lawfully domiciled parents is “*dictum*”); Katherine Nesler, *Resurgence of the Birthright Citizenship Debate*, 55 WASH. U. J.L. & POL’Y 215, 235 (2017) (“[T]he Supreme Court has not addressed a case directly on whether children born to undocumented immigrants on United States soil are automatically granted citizenship by virtue of birth within United States.”); Katherine Pettit, *Addressing the Call for the Elimination of Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons to Keep Birthright Citizenship Intact*, 15 TUL. J. INT’L & COMP. L. 265, 268 (2006) (“The Supreme Court has yet to decide specifically whether this principle applies to a person whose parents are in the United States illegally.”); Alberto R. Gonzales, *An Immigration Crisis in A Nation of Immigrants: Why Amending the Fourteenth Amendment Won’t Solve Our Problems*, 96 MINN. L. REV. 1859, 1868 (2012) (“[T]he Supreme Court has yet to rule on birthright citizenship or the interpretation of ‘subject to the jurisdiction’ in the context of a child born in the United States to unauthorized immigrants.”).

³⁸ *Wong Kim Ark*, 169 U.S. at 659.

³⁹ *Id.* at 657 (quoting LORD CHIEF JUSTICE COCKBURN, COCKBURN ON NATIONALITY 7).

⁴⁰ *Id.* (quoting A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 173–77, 741 (n.p., Sweet & Maxwell 1896)).

The Declaration begins with a statement that it had become necessary for the American people “to dissolve the political bands which ha[d] connected them” to the English people.⁴¹ It then asserts as a “self-evident” truth:

That whenever any Form of Government becomes destructive of [the end of securing the unalienable rights with which the people are endowed by their Creator], it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.⁴²

And if it were not clear enough from those two statements that the Americans were repudiating the notion that they owed perpetual allegiance to the English crown, the language of the closing paragraph is unmistakable, declaring that “these United Colonies are, and of Right ought to be Free and Independent States; *that they are Absolved from all Allegiance to the British Crown*, and that all political connection between them and the State of Great Britain is, and ought to be totally dissolved”⁴³ The notion that the English common law of *jus soli* therefore continued unabated after the Declaration of Independence could not be more mistaken.

Much of the evidence Justice Gray marshalled in support of his conclusion likewise suffers from a lack of care that might not have been the case had the broader question actually been at issue. By way of example, Justice Gray cited several cases for the unobjectionable proposition that “[t]he interpretation of the [C]onstitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history.”⁴⁴ What he failed to mention is that the general rule about using the common law as a rule of interpretation only applies to the extent that the common law was compatible with the principles of the American Revolution. As Justice Story noted in his 1829 opinion in *Van Ness v. Pacard*, “The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted

⁴¹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁴² *Id.* at para. 2.

⁴³ *Id.* at para. 32 (emphasis added).

⁴⁴ *Wong Kim Ark*, 169 U.S. at 655 (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888)); see also *id.* at 654–55 (citing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874); *Ex parte Wilson*, 114 U.S. 417, 422 (1885); *Boyd v. United States*, 116 U.S. 616, 624–25 (1886); *Smith v. Alabama*, 124 U.S. 465, 478 (1888); and *Moore v. United States*, 91 U.S. 270, 274 (1875)).

only that portion which was applicable to their situation.”⁴⁵ Indeed, long before Justice Gray treated the common law as an obligatory and indisputable governing principle in the United States, the California Supreme Court had much more accurately described that the rule was just the opposite.⁴⁶ There was, that court claimed:

[N]o doctrine better settled, than that such portions of the law of England as are not adapted to our condition, form no part of the law of this State. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason, to a case where that reason utterly fails. *Cesante ratione legis cessat ipsa lex*. [The reason for a law ceasing, the law itself ceases].⁴⁷

In short, “[t]he principles of the common law have been adopted in this country only so far as applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions.”⁴⁸ They are not applicable

⁴⁵ Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829); *see also* Shively v. Bowlby, 152 U.S. 1, 52 (1894); Webster v. Reid, 52 U.S. (11 How.) 437, 455 (1850); Murray v. Chi. & N.W. Ry. Co., 62 F. 24, 27 (1894) (“[W]hen the [C]onstitution of the United States was adopted, the general rules of the common law, *in so far as they were applicable to the conditions then existing in the colonies, and subject to the modifications necessary to adapt them to the uses and needs of the people*, were recognized and were in force in the colonies” (emphasis added)); United States v. Reid, 53 U.S. (12 How.) 361, 363 (1851) (“The colonists who established the English colonies in this country, undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, *so far as they were applicable to the situation and local circumstances of the colony*.” (emphasis added)); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 31–32 (The Lawbook Exch., Ltd. 1999) (1883); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 537 (Fred B. Rothman Publ’ns 1999) (1873) (“[T]he common law, *so far as it is applicable to our situation and government*, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, *as far as it was applicable*” (emphasis added)).

⁴⁶ *See* Crandall v. Woods, 8 Cal. 136 (1857).

⁴⁷ *Id.* at 142–43 (quoting Starr v. Child, 20 Wend. 149 (N.Y. 1838) (Bronson, J., dissenting)).

⁴⁸ Pierson v. Lane, 14 N.W. 90, 92 (Iowa 1882); *see also, e.g., Ex parte Holman*, 28 Iowa 88, 126 (1869) (“The courts of this country unite in holding that the common law, *so far as it is suited to the condition of our people and accords with our institutions*, is the law of the land.” (emphasis added)); Wagner v. Bissell, 3 Iowa 396, 403 (1856) (“[W]here [the common law] has been varied by custom, not founded in reason, or not consonant to the genius and manners of the people, it ceases to have force.”); Brief for Respondents at 316, *People v. Van Rensselaer*, 9 N.Y. 291 (1853) (“There is this necessary limitation implied [upon adoption of the common law by British subjects in new territories], that they carry with them all the laws applicable to their situation, and not repugnant to the local and political circumstances in which they are placed.”); Brief for Plaintiff at 117, *Whitney v. Powell*, 2 Pin. 115, 117 (Wis. 1849), 1849 WL 3235, at *2 (“The common law of England is not to be taken in all respects to be that of America.”); *Ex parte Hickey*, 12 Miss. (4 S. & M.) 751, 776–77 (1845) (“The United States have not taken, in all respects,

otherwise, and the common law *jus soli* principle of perpetual and irrevocable allegiance is simply incompatible with the doctrine of consent explicated in the Declaration of Independence.

Chief Justice Fuller correctly noted in his dissent this significant caveat about the general applicability of the common law in the United States when he stated,

Manifestly, when the sovereignty of the crown was thrown off, and an independent government established, every rule of the common law, and every statute of England obtaining in the colonies, in derogation of the principles on which the new government was founded, was abrogated.⁴⁹

But Justice Gray chose not to engage him on the point, simply asserting, without any of the necessary nuance that the subject deserved (and directly contrary to the express language of the Declaration of Independence), that the English common law rule of *jus soli* was “in force” after the Declaration “and continued to prevail under the Constitution as originally established.”⁵⁰ Such manifest errors on matters collateral to the holding of a case is precisely why John Marshall’s old maxim about *dicta* is so important. As Justice Gray himself noted:

The reason of [John Marshall’s] maxim [regarding *dicta*] is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.⁵¹

Viewed through that lens, much of the case authority relied on by Justice Gray is irrelevant to the issues that remain to be addressed. That “citizenship by birth was the law of the English colonies in America” and during the time that New York City was under British occupation during the war—the issue confronted by the Court in *Inglis v. Sailors’ Snug Harbor*⁵²—tells us nothing about whether, or the extent to which, the principles of the Declaration repudiated the common law of *jus soli*. Indeed, another aspect of that case, built on the uncertainty about the

the common law of England. So much only of its general principles are claimed and adopted which is applicable to our situation, institutions and form of government.”); *Lynch v. Clarke*, 1 Sand. Ch. 583, 646 (N.Y. Ch. 1844) (noting that the colonists “brought with them as a birth-right and inheritance, so much of the common law as was applicable to their local situation and change of circumstances”); Brief for Executor at 205, *Gilbert v. Heirs of Richards*, 7 Vt. 203 (1835) (“Such part only of the common law of England, is adopted here ‘as is applicable to the local situation and circumstances’ of this state.”).

⁴⁹ *Wong Kim Ark*, 169 U.S. at 709 (1898) (Fuller, C.J., dissenting).

⁵⁰ *Id.* at 658 (majority opinion).

⁵¹ *Id.* at 679 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821)).

⁵² *Id.* at 659 (citing *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830)).

timing of the John Inglis's birth,⁵³ demonstrates that the rule set down in the majority opinion in *Inglis* is just the opposite of that which was attributed to it by Justice Gray's *dicta*. Addressing the period of time between the Declaration of Independence in July 1776, and the occupation of New York by the British army in September 1776 (i.e., when the City was "in the United States" and not under occupation by a foreign army), the Court held:

If born after the 4th of July 1776, and before the 15th of September of the same year, when the British took possession of New York, his infancy incapacitated him from making any election for himself, and *his election and character followed that of his father*, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remains a British subject, and disabled from inheriting the land in question.⁵⁴

The italicized language is inaccurate under the pure form of *jus soli* claimed by Justice Gray, for the status of the father is irrelevant if the child is born on the soil of the sovereign. To repeat the prior language of Lord Chief Justice Cockburn, quoted by Justice Gray earlier in the opinion:

By the common law of England, every person born within the dominions of the crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England.⁵⁵

Justice Gray similarly ignored a key component of Justice Swayne's decision in *U.S. v. Rhodes*⁵⁶ while riding circuit. The issue in that case was the constitutionality of the 1866 Civil Rights Act, which, as Justice Swayne noted, provided that anyone "born in the United States, *and not subject to any foreign*

⁵³ *Inglis*, 28 U.S. (3 Pet.) at 120–21 (noting that whether John Inglis was born before or after July 4, 1776 was essential to the Court's decision).

⁵⁴ *Id.* at 126 (emphasis added). Language to the contrary in the concurring opinion of Justice Johnson was based on the fact that the State of New York had expressly adopted the common law (including the rule of *jus soli*), not that the rule applied after the Declaration of Independence absent any such adoption by the positive law. *See id.* at 135–36 (Johnson, J., concurring) ("By the twenty-fifth article of the constitution of New York of 1777, the common law of England is adopted into the jurisprudence of the state. By the principles of that law, the demandant owed allegiance to the king of Great Britain, as of his province of New York. By the revolution that allegiance was transferred to the state, and the common law declares that the individual cannot put off his allegiance by any act of his own.")

⁵⁵ *Wong Kim Ark*, 169 U.S. at 657 (quoting LORD CHIEF JUSTICE COCKBURN, COCKBURN ON NATIONALITY 7).

⁵⁶ 27 F. Cas. 785, 786 (C.C.D. Ky. 1866).

power,” was a citizen and therefore able to testify in court.⁵⁷ Nancy Talbot was, Justice Swayne held, “a citizen of the United States of the African race, having been born in the United States, and not subject to any foreign power.”⁵⁸ His later description of the common law of *jus soli* is therefore pure *dicta*.

Most egregious, though, was Justice Gray’s reliance on the New Jersey Supreme Court’s decision in *Benny v. O’Brien*⁵⁹ as support for his broad claim that “[t]he [F]ourteenth [A]mendment affirms the ancient and fundamental rule of citizenship by birth within the territory” for all children here born of resident aliens except diplomats and occupying armies.⁶⁰ *Benny*, like *Wong Kim Ark* itself, involved parents who were “domiciled” in the United States,⁶¹ and so its holding is likewise limited to that context. But the New Jersey Supreme Court was also quite explicit in noting that the Fourteenth Amendment did not provide automatic citizenship beyond that. “Two facts must concur” for there to be automatic citizenship, it held.⁶² “[T]he person must be born here, and he must be subject to the jurisdiction of the United States according to the [F]ourteenth [A]mendment, which means, according to the [C]ivil [R]ights [A]ct, that the person born here is not subject to any foreign power.”⁶³ The two provisions—that is, the Civil Rights Act and the Citizenship Clause of the Fourteenth Amendment—“by implication concede that there may be instances in which the right to citizenship does not attach by reason of birth in this country,” the court stated.⁶⁴ And contrary to Justice Gray’s claim, those exceptions involved not just the children of diplomats or invading armies: “Persons intended to be excepted are only those born in this country of *foreign parents who are temporarily traveling here*, and children born of persons resident here in the diplomatic service of foreign governments.”⁶⁵

The New Jersey Supreme Court’s acknowledgement that the phrases “subject to the jurisdiction” and “not subject to any foreign power” were both intended to exclude temporary visitors confirms that the phrases meant complete, political jurisdiction, not a partial, territorial jurisdiction. And it comports with a key

⁵⁷ *Id.* at 786 (emphasis added) (quoting An act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication, ch. 31, 14 Stat. 27 (1866)).

⁵⁸ *Id.* at 785.

⁵⁹ 32 A. 696 (N.J. 1895).

⁶⁰ *Wong Kim Ark*, 169 U.S. at 693.

⁶¹ *Benny*, 32 A. at 696.

⁶² *Id.* at 697.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 698 (emphasis added).

discussion during the debates over the Fourteenth Amendment in the Senate. Shortly after Senator Howard introduced the language that was to become the Citizenship Clause, Senator Cowan asked: “Is the child of the Chinese immigrant in California a citizen [under the language of the proposed amendment]? Is the child of a Gypsy born in Pennsylvania a citizen? If so, what rights have they? *Have they any more rights than a sojourner in the United States?*”⁶⁶ Senator Conness responded that the amendment would grant citizenship to the children of Chinese living in California and Gypsies living in Pennsylvania,⁶⁷ but his response must be read in light of the distinction that Senator Cowan himself had made between the Chinese and Gypsies to whom he was referring and “sojourners.” In other words, by asking whether children of the Chinese and Gypsies were to be given “more rights than a sojourner,” Senator Cowan was necessarily referring to Chinese and Gypsies who were *not* mere sojourners (temporary visitors), but who were instead permanently domiciled in the United States and not owing allegiance to any foreign power. Far from establishing that the Citizenship Clause guarantees citizenship to everyone born on U.S. soil no matter the circumstances of their parents, as several scholars have claimed,⁶⁸ this important colloquy therefore demonstrates just the opposite. Citizenship would not be limited to white Europeans, as prior naturalization acts had done, but neither would it be extended to the children born on U.S. soil to parents who were merely temporary visitors—sojourners—to the United States.⁶⁹

This is precisely the interpretation of the Fourteenth Amendment given by the New Jersey Supreme Court, Justice Gray’s claims notwithstanding: “The [F]ourteenth [A]mendment, by the language, ‘all persons born in the United States and subject to the jurisdiction thereof,’ was intended to bring all races, without distinction of color, within the rule, which, prior to that time, pertained to the white race,” stated the court.⁷⁰ It therefore extended to a child “of alien parents, who at the time of his birth were *domiciled* in this country.”⁷¹ But it did not extend

⁶⁶ CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (emphasis added) (remarks of Sen. Edgar Cowan).

⁶⁷ *Id.* at 2892 (remarks of Sen. John Conness).

⁶⁸ See, e.g., Epps, *supra* note 5, at 356; James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367, 368 (2d ed. 2006).

⁶⁹ In any event, if Senator Conness’s comments can be read to suggest that anyone born on U.S. soil were to become citizens no matter the circumstances of their parents, it is significant that none of the other supporters of the Citizenship Clause embraced that position.

⁷⁰ *Benny*, 32 A. at 698.

⁷¹ *Id.*

to “those born in this country of foreign parents who are temporarily traveling here.”⁷²

The Executive Branch of the federal government likewise recognized—both before and for two-thirds of a century after the decision in *Wong Kim Ark*—that more than mere birth on U.S. soil was required for the grant of automatic citizenship. With the exception of wartime, when passports could be issued to non-citizen members of the military who took an oath of allegiance,⁷³ only American citizens have been eligible for passports since 1856, so proof of citizenship has been required when applying for a passport.⁷⁴ But shortly after the Court’s decision in *Elk v. Wilkins*, the passport office adopted a form for use by any “native citizen” applying for a passport that required, *inter alia*, the following information: 1) city, state, and date of birth in the United States; 2) whether the father was a native or naturalized citizen; 3) confirmation that the individual was domiciled in the United States, including the city and state of permanent residence; and 4) an oath of allegiance to the United States.⁷⁵ Information about the father’s status continued until it was inexplicably dropped as a requirement in 1967.⁷⁶ If birth on United States soil alone was sufficient for citizenship, the information about the father’s citizenship status would not have been necessary.

Similarly, as Chief Justice Fuller noted in his *Wong Kim Ark* dissenting opinion, Secretary of State Frederick Frelinghuysen rendered an opinion in 1885 that a child born on U.S. soil to Saxon parents who were “temporarily in the United States” was not a citizen because, through his parents, he was subject to a foreign power.⁷⁷ Moreover, Frederick Frelinghuysen’s successor as Secretary of State, Thomas Bayard, rendered the same opinion in

⁷² *Id.*

⁷³ An Act For enrolling and calling out the national Forces, and for other Purposes, ch. 75, § 1, 12 Stat. 731, 731 (1863) (exempting from the citizen requirement foreign-born males between the ages of twenty and forty-five “who shall have declared on oath their intention to become citizens” and who were therefore obligated to military service by An Act for enrolling and calling out the national Forces, and for other Purposes).

⁷⁴ An Act To regulate the Diplomatic and Consular Systems of the United States, ch. 127, § 23, 11 Stat. 52, 60–61 (1856).

⁷⁵ GAILLARD HUNT, *THE STATE DEPT., THE AMERICAN PASSPORT: ITS HISTORY AND A DIGEST OF LAWS, RULINGS, AND REGULATIONS GOVERNING ITS ISSUANCE BY THE DEPARTMENT OF STATE* 64 (Wash., Gov’t Printing Office 1898).

⁷⁶ See 22 C.F.R. § 33.23 (1938) (requiring for “native citizen” applications, *inter alia*, “the name, date and place of birth, and place of residence of the applicant’s father”); *but see* 22 C.F.R. § 51.43 (1967) (requiring only proof of birth in the United States).

⁷⁷ Frederick Frelinghuysen, *Hausding’s Case: Frelinghuysen, Sec’y of State, to Kasson, 1885*, 2 Wharton’s Digest 399 (1885) in *CASES AND OPINIONS ON INTERNATIONAL LAW* 222–23 (Boston, The Bos. Book Co. 1893).

Richard Greisser's case. Greisser was born in Ohio in 1867 to a father who was a German subject and domiciled in Germany.⁷⁸ Greisser was therefore not a citizen, according to Secretary of State Bayard, because he was "subject to a foreign power,' and 'not subject to the jurisdiction of the United States.'"⁷⁹

In sum, the distinction between sojourners and those permanently domiciled in the United States was made during the debates over the Fourteenth Amendment, in state court judicial opinions, and by the actual practice of the passport office. These distinctions indicate that the mandate of automatic citizenship was not understood to apply to children of temporary visitors to the United States. Of course, if the Citizenship Clause does not mandate automatic citizenship for children born to parents who are temporarily, but lawfully, visiting the United States, it necessarily does not extend citizenship to the children of those who are unlawfully visiting the United States. In both cases, the parents are subject only to the partial, territorial jurisdiction of the United States in the sense that they must comport with the laws while physically present within the borders of the United States. But they are not subject to the jurisdiction of the United States in the broader sense intended by the Fourteenth Amendment because they are not subject to the complete, political jurisdiction. For their temporary sojourn to the territory of the United States brings with it only a temporary obligation to obey her laws, not a full allegiance to her sovereignty.

One might well argue that even children whose parents are "domiciled" in the United States, but who remain subjects or citizens of a foreign power, do not meet the test of the Citizenship Clause as it was originally understood, and that even the more limited *holding* of *Wong Kim Ark* was therefore incorrect. But it should be acknowledged that the treaty between the United States and the Emperor of China that gave rise to the *Wong Kim Ark* case was ignoble because it refused to afford to Chinese subjects the same inalienable right to reject their prior allegiance that Americans had claimed as an unalienable, natural right in 1776.⁸⁰ Perhaps Justice Gray was doing no more than counter-balancing the pernicious effects of that treaty, acknowledging that because Chinese parents who had become lawfully and permanently domiciled in the United States had demonstrated their allegiance to their adopted country as much as the treaty allowed them to do,

⁷⁸ United States v. Wong Kim Ark, 169 U.S. 649, 719 (1898) (Fuller, C.J., dissenting) (internal citation omitted).

⁷⁹ *Id.* (Fuller, C.J., dissenting) (internal citation omitted).

⁸⁰ See *id.* at 701–02.

any children born to them on U.S. soil should enjoy the benefits of citizenship. But that concern no longer exists—“*Cessante Ratione Legis, Cessat Ipsa Lex*” (the reason for a law ceasing, the law itself ceases).⁸¹ Thus, to extend the mandate of automatic citizenship to the entirely different context of temporary visitors, and even further to the context of those who have entered this country illegally, pushes well beyond any such sentiment, and certainly beyond the actual *holding* of *Wong Kim Ark*.

⁸¹ *Crandall v. Woods*, 8 Cal. 136 (1857).

