

Immigration Policy

Children Born in the United States to Aliens Should Not, by Constitutional Right, Be U.S. Citizens

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“[T]HE INESTIMABLE HERITAGE OF CITIZENSHIP IS NOT TO BE CONCEDED TO THOSE WHO SEEK TO AVAIL THEMSELVES OF IT UNDER PRESSURE OF A PARTICULAR EXIGENCY....”

CHIN BAK KAN v. UNITED STATES, 186 U.S. 193, 200 (1902)

EXECUTIVE SUMMARY

For the whole of the Twentieth Century, it was commonly assumed that children born in the United States to alien parents were constitutionally entitled to be United States citizens. This assumption is based upon a U.S. Supreme Court case, United States v. Wong Kim Ark, 169 U.S. 649 (1898), which held that a child who had been born of alien parents, lawfully in the United States, was entitled to citizenship under the Fourteenth Amendment based on its terms that “[a]ll persons born in the United States ... and subject to the jurisdiction thereof, are citizens of the United States”

The Supreme Court’s decision in Wong Kim Ark was based upon an inapplicable British common law rule that an individual, born on British soil, owed allegiance to the British sovereign who not only governed the land, but owned it. Such a rule is wholly unsuitable to America, a nation whose sovereign is the people and whose land is owned by no man.

Not only did the Supreme Court fail to recognize the unsuitability of an old British rule, it failed to apply the original and historical

meaning of the Fourteenth Amendment. To be born “subject to the jurisdiction” of the United States is not just to be physically present within the nation’s boundaries. Rather, to be “subject” is to evidence allegiance and fidelity to the American nation. Children of alien parents are not entitled to an irrebuttable constitutional presumption of such loyalty just because they are born on American soil. Indeed, children born to alien parents who defiantly enter or remain illegally in the United States are in no sense “subject” to the jurisdiction of the nation.

To date, no court decision has carefully analyzed and determined that the Wong Kim Ark decision should apply to children born of such illegal aliens. Such an issue is too important never to have been litigated and competently decided. The Wong Kim Ark rule ought either be (i) limited to its facts and applied only to resident aliens lawfully admitted to residence in the United States, or better yet (ii) overruled, leaving it to Congress to determine citizenship of such children by statute pursuant to its constitutional power to establish the nation’s naturalization policy.

INTRODUCTION

Smugglers are bringing pregnant women into this country to give birth so that they can bestow upon their children American citizenship.¹ Why does the federal government declare the child of an alien mother — illegally smuggled and dumped into a U.S. hospital — to be a citizen of the United States of America? Is this result commanded by the Constitution, or just a policy preference of the federal government? What does the Constitution state about who is born a citizen of the United States? And what does it mean to be a citizen of the United States?²

This paper will examine briefly the changing nature of U.S. citizenship. It will then examine in greater detail the origin of the current standards for the acquisition of U.S. citizenship based upon birth within the borders of the United States, and suggest strategies to achieve modification of those standards.

Our conclusion is that U.S. citizenship properly should not be constitutionally granted to the children of aliens based upon their birth within the United States.

I. ORIGINS OF CITIZENSHIP IN THE UNITED STATES

Before the Declaration of Independence, under the British common law, individuals born in the British American colonies (and the British isles), whether born of British subjects or aliens, became by birth British subjects.³ Such allegiance was personal to the king and his heirs, not to the state or to the throne.⁴ While no natural-born subject could unilaterally expatriate himself,⁵ each subject was entitled to certain “inherent rights and privileges” as Englishmen.⁶

It was under this claim of right as “free and natural-born subjects” that led the British

American colonists initially to resist taxation by the Parliament, and other claimed violations of the “British constitution.”⁷ With the Declaration of Independence, however, the American colonists turned to “the laws of nature and of nature’s God” as their authority to declare their independence from the mother country and equal status as a new nation. Thereby, they declared that they were no longer “British subjects,” under the authority of the British government. Rather they were American citizens, entitled to certain unalienable rights and subjects⁸ of a new nation, the United States of America composed of Free and Independent States.⁹ Thus a dual citizenship was established under the Declaration — citizenship of the nation concurrent with that of the constituent states.

II. TWO CITIZENSHIPS

Although the Declaration recognized this dual citizenship, during the period between July 4, 1776, and the state-by-state conventions called to consider the ratification of the United States Constitution, Americans exercised only their new citizenship as a member of one of the original thirteen States. In that capacity, the people of eleven of the original states formed new constitutions for their civil governments, the people of Connecticut and Rhode Island remaining content to be governed under their respective colonial charters. At the national level, representatives chosen by the state governments adopted the Articles of Confederation, which recognized citizenship in the States, but not citizenship in the United States.

As a consequence of the failure of the people of the United States to form a civil government for the nation, recognition or rejection of claims of state citizenship determined citizenship in the United States. State citizenship was obtained either through operation of the Declaration of Independence, or by means of

naturalization under state statute.¹⁰ Those present in the colonies at the time the Declaration was published,¹¹ or when hostilities commenced (i.e., April 19, 1775),¹² who demonstrated allegiance to the state, were recognized as citizens.¹³ Between the Declaration of Independence and the Constitution, several states passed statutes addressing the status of residents or former residents who adhered to the cause of King George III. For example, Massachusetts passed a Statute of Treasons in 1777.¹⁴ New York in 1776,¹⁵ and Virginia in 1779,¹⁶ passed statutes defining who was a citizen.

It would be a mistake, however, to assume from this early history that United States Citizenship was merely derivative from state citizenship. With the ratification of the United States Constitution came the first formal recognition of United States citizenship.¹⁷ That such citizenship existed independently from the power of the states is clearly evidenced by the provision in Article II, Section 1, establishing that a “natural born citizen”¹⁸ of the United States was eligible to hold the office of President of the United States.¹⁹

Not only did the United States Constitution recognize a United States citizenship independent from state citizenship, but it gave formal recognition to an equally independent state citizenship.²⁰ Until 1808, each State even controlled its own immigration policy, so that it could confer state citizenship upon whomever it permitted to migrate into the State. But a State could not confer United States Citizenship on such immigrants, the power “[t]o establish a uniform rule of naturalization” having been granted to Congress by Article I, Section 8.²¹ Congressional power to “naturalize” citizens of the United States did not, however, dictate state “naturalization” policy with respect to state citizenship.²² But States could not, through that process, confer United States citizenship, and thus, physical admission into the United States. To do so would conflict with the Supremacy

Clause and the command that the naturalization policy be uniform throughout the United States.²³

But there was no uniformity requirement with respect to state citizenship either with respect to native-born persons, recognized as state citizens, or persons admitted to live within the geographic borders of the United States and naturalized as state citizens. Such residual power in the States to confer or recognize state citizenship had national significance, conferring upon persons so recognized the equal privileges and immunities of the citizens of the several states and access to federal court. Eventually, this reserved power in the States would lead to a case that would lead to a significant constitutional change in American dual citizenship.

III. CONSTITUTIONALLY SECURED CITIZENSHIP

The notorious case of Dred Scott v. Sandford began when slave Dred Scott filed suit in federal circuit court, claiming jurisdiction on the basis of diversity of state citizenship, Scott being a citizen of Missouri, and Sandford a citizen of New York. The U.S. Supreme Court reversed the decision of the trial court on the merits, dismissing the case on the grounds that the federal courts lacked jurisdiction, because Scott was not a citizen of Missouri. Speaking for the Court, Chief Justice Roger Taney acknowledged the power of a state to confer “the **rights of citizenship ... within its own limits,**” but claimed that by that act a state could not confer “the **rights of citizenship as a member of the Union.**”²⁴ Because Scott was a slave, the Chief Justice continued, Scott could not be a native-born citizen, slaves having not been recognized as part of the “people of the United States” at the time of the founding of the nation. Therefore, Scott could not claim a “natural” right to be recognized as a state citizen, entitled to any rights as such under the United States Constitution. As for any claim that Scott might

have as a “naturalized” state citizen, the Chief Justice concluded that, as Congress had the **exclusive power** of “naturalization” in relation to the rights of state citizens conferred by the federal constitution, “no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States.”²⁵

From these two premises, the Chief Justice insisted that Scott, even if a naturalized State citizen, was entitled only to rights **within** the State of Missouri, not to any rights **under** the United States Constitution. Thus, Dred Scott was not entitled to sue in federal court. This conclusion was unprecedented, not only depriving freedmen from access to the federal courts under Article III, but from enjoying the privileges and immunities of state citizenship of Article IV, Section 2.

Not surprisingly, Congress, after the Civil War, took action against Chief Justice Taney’s ruling in Dred Scott. First, it enacted the **Civil Rights Act of 1866**, which provided that “all persons born in the United States **and not subject to any foreign power**, excluding Indians not taxed, are **citizens** of the United States.”²⁶ (Emphasis added.) By “naturalizing” all of the newly freed slaves, Congress conferred upon them all the privileges of national citizenship.

Concerns that this Act might be repealed by a later Congress, and might even be found unconstitutional,²⁷ led to ultimately to the Fourteenth Amendment. Concerns about the lack of definition of citizenship led to the version ultimately adopted: “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.” (Emphasis added.) The author of this version, Senator Jacob Howard, Republican of Michigan, explained:

This is simply declaratory of what I regard as the law of the land already, that every person born within 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.²⁸

Senator Howard also expressed what he meant by the word “jurisdiction”:

‘jurisdiction’ as here employed, ought to be construed so as to imply a **full and complete jurisdiction** on the part of the United States ... that is to say, the **same jurisdiction in extent and quality** as applies to every **citizen** of the United States now.²⁹

Senator Trumbull, chairman of the Judiciary Committee, concurred with Senator Howard regarding his characterization of the meaning of “jurisdiction”:

That means “subject to the complete jurisdiction thereof”.... Not owing allegiance to anybody else. That is what it means....

It cannot be said of any [person] who owes allegiance, partial allegiance if you please, to some other Government that he is “subject to the jurisdiction of the United States.”

...

It is only those persons who completely within our jurisdiction, who are subject to our laws, that we think of making

citizens; and there can be no objection to the proposition that such persons should be citizens.³⁰

Senator Cowan specifically expressed concern that the amendment not be interpreted to grant citizenship to Chinese immigrant workers in California and went on to discuss the rights of travelers in the United States from foreign nations:

If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault and battery on him, I apprehend. He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptance of the word.³¹

As the debate drew to a close on Senator Howard's addition of the "subject to the jurisdiction thereof" language, Senator Saulsbury concisely stated the Senate's object with regard to this amendment, and in so doing, removed all doubt as to the limited purpose of the amendment as drafted:

I do not presume that any one will pretend to disguise the fact that the object of this first section is simply to declare that negroes shall be citizens of the United States.³²

Senator Howard's explanations mirrored the Dred Scott dissenting opinion of Justice Benjamin Curtis, which observed that the law of citizenship was based upon "a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship ... that allegiance and citizenship spring from the place of birth."³³ This view was more precisely

explained by Justice Peter Daniel, concurring in Dred Scott.

'The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As society cannot perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their parents, and succeed to all their rights.' Again: 'I say, **to be of the country, it is necessary to be born of a person who is a citizen; for if he be born there of a foreigner, it will be only the place of his birth, and not his country.** The inhabitants, as distinguished from citizens, are foreigners who are permitted to settle and stay in the country.' (Vattel, Book 1, cap. 19, p. 101.) [Id., at 476-77, emphasis added.]

Early judicial opinions incorporated this understanding of the Fourteenth Amendment. In the "Slaughterhouse Cases,"³⁴ the Supreme Court ruled 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." In Minor v. Happersett,³⁵ the Court stated:

The Constitution does not, in words, say who shall be natural-born citizens. [This is after the enactment of the Fourteenth Amendment.] Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that **all children born in a country of parents who were its citizens** became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, **as distinguished from aliens or foreigners.** Some authorities go further and include as citizens

children born within the jurisdiction **without reference** to the citizenship of their **parents**. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that **all children born of citizen parents within the jurisdiction are themselves citizens**. [88 U.S. at 167-68, emphasis added.]

In Elk v. Wilkins, 112 U.S. 94 (1884), the Supreme Court addressed the citizenship status of an American Indian who had severed his relationship with his native tribe. Although the matter is not free from doubt, the Court appeared to believe that children born to noncitizens were not citizens.

The **main object** of the **opening sentence of the fourteenth amendment** was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes, (Scott v. Sandford, 19 How. 393) and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and **owing no allegiance to any alien power**, should be citizens of the United States and of the state in which they reside. [112 U.S. at 101, emphasis added.]

IV. AMERICAN CITIZENSHIP: A BRITISH HYBRID

The law of citizenship by birth was dramatically changed by the U.S. Supreme Court only a few years later. In 1895, an American-born son of Chinese parents was refused re-entry into the United States. Mr. Ark filed a writ of habeas corpus, arguing that, under the

Fourteenth Amendment, he was a citizen of the United States by birth. The U.S. attorney replied that Mr. Ark was “not entitled to land in the United States, or to be or remain therein, because he does not belong to any of the privileged classes enumerated in any of the acts of congress, known as the ‘Chinese Exclusion Acts,’....” United States v. Wong Kim Ark.³⁶ Ignoring the Slaughterhouse and Minor precedents, the High Court looked to the constitutional text for a definition of natural-born citizens, and found none:

The constitution of the United States, as originally adopted, uses the words ‘citizen of the United States’ and ‘natural-born citizen of the United States.’... **The constitution nowhere defines the meaning of these words**, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.’ Amend. art. 14. In this, as in other respects, **it must be interpreted in the light of the common law**, the principles and history of which were familiarly known to the framers of the constitution. [169 U.S. at 654, emphasis added.]

The Court then turned its attention to discovering the common law of the matter. It cited Smith v. Alabama, where Mr. Justice Matthews, delivering the judgment of the court, had said:

‘There is **no common law of the United States**, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own

statutes.’ ‘There is, however, one clear exception to the statement that there is no national common law. **The interpretation of the constitution 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 the light of its history.**’ 124 U.S. 478³⁷

After reviewing British precedents and some U.S. federal court decisions which did not directly address the question,³⁸ the Court concluded that “it is **beyond doubt** that, before the enactment of the civil rights act of 1866 or the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether **children of citizens** or of **foreigners**, excepting only children of ambassadors or public ministers of a foreign government, were **native-born citizens** of the United States.” *Id.*, at 674-75, emphasis added.

After coming to this conclusion, the Wong Kim Ark Court finally examined its prior decision in Elk v. Wilkins, describing it as the “**only** adjudication that has been made by this court upon the meaning of the clause ‘**and subject to the jurisdiction thereof,**’ in the ... fourteenth amendment.” *Id.*, at 680, emphasis added. The Court acknowledged that the holding in Elk was that an Indian “who did not appear to have been naturalized or taxed or **in any way recognized or treated as a citizen, either by the United States or by the state**, was **not** a citizen of the United States, as a person born in the United States, ‘and subject to the jurisdiction thereof,’ within the meaning of the clause in question.” *Id.*, emphasis added.

Unable to distinguish the rule in Elk, the Court distinguished it on the facts. Since Ark was not an Indian born in the U.S., but instead the child of aliens, the Court’s “only adjudication that has been made by this court upon the

meaning of the clause ‘and subject to the jurisdiction thereof,’” was not binding. Then the Court reviewed an 1812 decision defining jurisdiction over diplomats,³⁹ and asserted that “[t]he words ‘in the United States, and subject to the jurisdiction thereof,’ in the first sentence of the fourteenth amendment of the constitution, **must be presumed** to have been understood and intended by the congress which proposed the amendment, and by the legislatures which adopted it, in the same sense” that diplomatic jurisdiction must have been referenced by the Fourteenth Amendment.⁴⁰ *Id.*, at 683-87, emphasis added.

Finally, the Wong Kim Ark Court argued that the term “jurisdiction” in the first sentence of section 1 of the Fourteenth Amendment was identical to the term “jurisdiction” in the equal protection provision appearing later in the same amendment:

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Since the jurisdiction in the latter clause would be the boundaries of the state, so the Court argued that the citizenship clause must also refer to any children born within the boundaries of the United States.⁴¹

V. CONSTITUTIONAL CITIZENSHIP: AN AMERICAN ORIGINAL

In dissent, Chief Justice Fuller observed that, from 1795, no United States court had followed the English (i.e., British) common law rule that no British subject could ever renounce his allegiance to the crown. And for good reason, observing that the British common law rule arose out of feudal practice where individuals could be bought and sold with the

property they farmed. Therefore, the Chief Justice questioned why British practice should be the model for U.S. law.

Textually addressing the qualifications for the presidency found in Article II, Section 1, Chief Justice Fuller observed:

Considering the circumstances surrounding the framing of the constitution, I submit that it is **unreasonable** to conclude that ‘naturalborn citizen’ applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the **children of foreigners, happening to be born to them while passing through the country** ... were eligible to the presidency, while children of our citizens, born abroad, were not. [Id., at 715, emphasis added]

From this observation, the Chief Justice concluded that the jurisdictional limitation placed by the Fourteenth Amendment upon United States Citizenship must be read in like manner:

If a **stranger or traveler passing through** or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our government, has a child born here, which goes out of the country with its father, such child is **not a citizen** of the United States, because it was not subject to its jurisdiction. [Id., at 718-19, emphasis added.]

Such a reading, Chief Justice Fuller maintained, was consistent with the language of the Fourteenth Amendment’s forerunner, the Civil Rights Act of 1866 — “not subject to any foreign power.”⁴² And that language could not have meant what the majority had concluded:

If the act of 1866 had not contained the words ‘and not subject to any foreign power,’ the children neither of public ministers nor of aliens in territory in hostile occupation would have been included within its terms on any proper construction, for their birth would not have subjected them to ties of allegiance, whether local and temporary, or general and permanent.

There was no necessity as to them for the insertion of the words, although they were embraced by them.

But there were others in respect of whom the exception was needed, namely, the **children of aliens**, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanent allegiance, which they had not severed by formal abjuration or equivalent conduct, and some of whom were not permitted to do so if they would.

And it was to prevent the acquisition of citizenship by the **children of such aliens** merely by birth within the geographical limits of the United States that the words were inserted. [Id., at 721, emphasis added.]

While the Chief Justice’s dissent focused mainly upon the textual and historical difficulties with the majority opinion, he had argued that the British common law defining who was a British subject was ill-suited to define American citizenship. As pointed out in Blackstone’s Commentaries, the British common law definition was based upon a principle totally foreign to the American polity. In Britain, a “natural-born subject” owed allegiance to the king because he was born on British soil, of which the king was not only sovereign, but the sole proprietor. Thus, because a British subject’s relationship to the king was as tenant to landlord, anyone born on British soil, whether of

British parents or aliens, owed political allegiance to the king, and hence were British subjects.⁴³

VI. AMERICAN CITIZENSHIP: WON

Prior to Wong Kim Ark, and even prior to the Fourteenth Amendment, state courts had struggled to discover the rule defining native-born citizenship suitable to a nation, the sovereign of which was the people and the land of which was not owned by the government. Several state courts simply followed the British common law “territorial” birth rule.⁴⁴ Likewise, an early Virginia statute provided that “all free persons born within the territory of this Commonwealth...shall be deemed citizens of this Commonwealth.” Virginia Supreme Court Justice Coalter observed, however, that the provision of this statute would not apply to a Virginia-born child of “a citizen of London, not domiciled, but travelling here with his wife long before the Revolution” where the child “with his parents, ever after resided in London.”⁴⁵

In contrast, the Kentucky Supreme Court rejected the British rule, stating that, while the common law may define who is a British subject, “subject and citizen are evidently words of different import, and it indisputably requires something more to make a citizen than it does to make a subject.”⁴⁶ Justice Joseph Story agreed, writing in his treatise on Conflict of Laws that while the rule is that “persons who are born in a country are generally deemed to be citizens and subjects of that country ... , a reasonable qualification of this rule would seem to be that it should not apply to children of parents who were in itinere in the country or who were abiding there for temporary purposes.”⁴⁷

Had the Supreme Court attended to these relevant state precedents, instead of following the British common law, the result in Wong Kim Ark might well have been different. Indeed, had the

Court paid attention to its own statements that the only way United States citizenship may be lost was by the voluntary renunciation or abandonment by the citizen himself,⁴⁸ it might have found reason not to abide by the English common law rule defining a citizen. After all, according to English common law, a natural born British subject could not “divest by any act of his own” his “allegiance” to the British crown which was “intrinsic and perpetual.”⁴⁹ In America, however, even a native-born citizen had the right to emigrate, and thus to voluntarily change his national allegiance, without the consent of the government of the nation of his birth.⁵⁰

VII. AMERICAN CITIZENSHIP: LOST

Notwithstanding these weaknesses in Wong Kim Park, the Supreme Court has never revisited the issue of native-born citizenship. Rather, in a long line of cases, it has considered the Wong Kim Park rule to be settled law,⁵¹ and without analysis or authority, has even extended the rule to include a child born to alien parents who had lawfully entered the United States, but who had, by the time of the child’s birth, remained on American soil illegally. United States ex rel Hintopoulos v. Shaughnessy, 353 U.S. 72, 73 (1957). Not until 1982, did any Justice address the question whether a child born of aliens “whose entry [into the United States] was unlawful” was a citizen. In a footnote to his controversial opinion imposing upon the States an equal protection duty to provide educational benefits, Justice William Brennan took advantage of this judicial silence, proclaiming that under the geographic territorial principle of Wong Kim Ark , “no 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.” Plyler v. Doe, 457 U.S. 202, 211, n. 10 (1982).

The issue in Plyler, however, was whether the Equal Protection Clause applied to an alien who had entered into the United States. Only by repeating the argument in Wong Kim Ark that there is no distinction between the jurisdiction reference in that clause and the one in the citizenship clause, could Justice Brennan make the claim that he did. There is, however, a significant textual difference, as well as a policy one, that should lead to the court to refuse to extend the Wong Kim Ark rule to children other than those born of lawfully admitted and remaining alien residents, and even to consider overruling the Wong Kim Ark holding.

VIII. AMERICAN CITIZENSHIP: RESTORED

First, to be entitled constitutionally to United States citizenship, one must not just be “born...in the United States,” but be “subject to the jurisdiction thereof.” To claim that “it is impossible to construe the words ‘subject to the jurisdiction thereof’...as less comprehensive than the words ‘within its jurisdiction,’” as the Wong Kim Ark court did, is to disregard the significance of the word, “subject.” When used in relation to citizenship, the word means more than mere physical presence, but expresses an allegiance or fidelity to the nation within whose boundaries one found oneself.⁵² Thus, one does not lose one’s citizenship simply by removing oneself from within the physical boundaries of a nation, but only by acts demonstrating a breaking of allegiance or fidelity.⁵³ Indeed, the Wong Kim Ark court recognized that children born of aliens, whose presence in the United States is as a member of another nation’s diplomatic corps, were not “subject to the jurisdiction” of the United States, because their presence failed to demonstrate the necessary allegiance. Surely, should such aliens fail to claim diplomatic immunity, they would still be “within...jurisdiction” of the United States, and therefore, entitled to equal protection of the laws.

So the jurisdictional phrases in the Fourteenth Amendment are **not** equal, notwithstanding the assertion of the Wong Kim Ark court.

Nor does the application of the two jurisdictional rules have the same political and legal consequences. A person claiming citizenship, not only has the benefit of equal protection of the laws and due process of law, but has all the benefits that come with citizenship, including the right to vote and the right to remain within the physical boundaries of the United States, unless they have acted in such a way as to justify their expatriation. To illustrate this point, an Islamic couple who enter America illegally is surely entitled to equal protection of the laws or due process of law, but they are not entitled to vote or to remain in the country as if a citizen. Why should such a couple’s child be treated any differently, just because the child was born on American soil? There is no outward sign that the child would be raised in such a way as to give allegiance to the United States. To the contrary, a militant Islamic couple might very well raise the child, or leave it with other Islamic militants to be raised, in such a way as to consider the United States to be the “Great Satan.” Certainly neither the Fourteenth Amendment nor Wong Kim Ark support the proposition that such an individual is “subject to the jurisdiction thereof.”

Not only does the principle stated in Wong Kim Ark make no intrinsic sense when applied to children of aliens who have illegally entered, or remained, in the United States, the principle makes no extrinsic sense. According to Wong Kim Ark, a person born in the United States of alien parents is constitutionally entitled to American citizenship, whereas a person born outside the United States to United States citizens is entitled to such citizenship only by statute. Why should there be an irrebuttable legal presumption of allegiance in the former case, but not in the latter? Such discrimination against persons born of American citizens simply makes no sense.

IX. STRATEGIC CHOICES

Essentially the same Court that decided Wong Kim Ark had earlier decided Plessy v. Ferguson 163 U.S. 537 (1896) — the decision which sanctioned the establishment of “**separate but equal** accommodations” for individuals of different “races.” Just as Plessy was wrongly decided, imposing an indefensible discriminatory rule upon the nation, so was Wong Kim Ark.

Although a frontal attack could be waged to persuade the Supreme Court to overrule Wong Kim Ark, a more strategic alternative would be to limit it to its holding: children born of aliens lawfully admitted to residence in the United States are “born ... in the United States, and subject to the jurisdiction thereof...” Aliens who enter or remain illegally in the United States are, by that act, “defying” the jurisdiction of the United States, not “subjecting” themselves to it. The problem here is to find a party who has been legally injured by the application of the Wong Kim Ark rule. A State or local government official may be a potential plaintiff if required to furnish certain services or provided certain benefits because a person is considered a United States citizen.

In addition to court action, Congress could be enlisted in the battle. A joint resolution could be proposed stating the sense of Congress that the Wong Kim Ark rule, if extended to illegal aliens, is not only bad policy, but discriminatory against children born of parents overseas. Or a Congressional statute could be enacted, pursuant to Section 5 of the Fourteenth Amendment providing that children of illegal aliens are not within the constitutional provision of native-born citizenship. This could be challenged as unconstitutional, but such a statute would put the issue squarely before the court, backed up by legislative findings that demonstrate that the Wong Kim Ark principle is inconsistent with the constitutional text and history.

A constitutional amendment might be considered, but only as a last resort. The prospects of getting a two-thirds vote out of Congress to propose such an amendment and ratification of three-fourths of the state legislature are difficult, at best. Moreover, there is a serious question whether ratification of such an amendment could expatriate millions of “citizens” eligible under the Wong Kim Ark territorial principle.

CONCLUSION

American citizens have remained silent for too long on this issue. The promiscuous and improper grant of citizenship to children of aliens will affect our nation for generations to come. Now is the time for Americans to speak out, to guard our nation’s future.

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Leti Volpp, "Obnoxious To Their Very Nature": Asian Americans and Constitutional Citizenship, 8 Asian L.J. 71, May, 2001

BIOGRAPHIES OF THE AUTHORS

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ENDNOTES

1. U.S. Congress, House Subcommittee on Immigration and Claims, House Committee on the Judiciary, June 25, 1997 hearing on H.R. 7, the Citizenship Reform Act of 1997, page 2.
2. U.S. law actually recognizes three categories of individuals: (i) U.S. citizens, (ii) U.S. nationals who are not citizens, and (iii) aliens. 8 U.S.C. Sec. 1101. U.S. nationals are defined as “a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” 8 U.S.C. Sec. 1101(22)(B). Examples include individuals “born in an outlying possession of the United States on or after the date of formal acquisition of such possession” or “born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens.” 8 U.S.C. Sec. 1408. “Outlying possessions of the United States” are defined as American Samoa and Swains Island. 8 U.S.C. Sec. 1101(29).
3. William Blackstone, Commentaries on the Law of England § 499 (William Jones, ed., Claitor’s Publishing Division, Baton Rouge: 1976), pp. 507-08.
4. *Id.*, § 503, p. 514.
5. *Id.*, § 501, p. 512.
6. Declaration of the Stamp Act Congress (October 19, 1765) reprinted in Sources of Our Liberties 270-71 (William S. Hein & Co., Buffalo, NY: 1990).
7. Declaration and Resolves of the First Continental Congress (October 14, 1774) and Declaration of the Causes and Necessity of Taking up Arms (July 6, 1775), reprinted in Sources of Our Liberties at 286-89, 295-300.
8. See N. Webster, American Dictionary of the English Language (1828): “Subject ... Men in free governments, are subjects as well as citizens; as citizens they enjoy rights and franchises; as subjects, they are bound to obey the laws.”
9. See Adams, J.Q., “The Jubilee of the Constitution,” delivered April 30, 1839, reprinted in 6 J. Christian Juris. 1 (1987).
10. See, e.g., Kilham v. Ward, 2 Mass. 236 (1806).
11. Young v. Peck, 21 Wend. 389 (N.Y. Sup. Ct. 1839).
12. Barzizas v. Hopkins & Hodgson, 23 Va. 276 (1824).
13. New York Chancellor James Kent stated that only those persons residing in the United States at the time of the Declaration and who consented to being ruled under the newly formed civil governments became citizens of the new nation. II J. Kent, Commentaries on American Law Lecture XXV, 33-35 (1827), (Claitor’s Publishing Division, Baton Rouge: 1995).
14. Kilham v. Ward, supra.

15. Goodall v. Jackson, 20 Johns. 693 (N.Y. Sup. Ct. 1823).
16. Barzizas v. Hopkins & Hodgson, supra.
17. “No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a **Citizen of the United States**, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” (Article I, Section 2, emphasis added.)
- “No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a **Citizen of the United States**, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.” (Article I, Section 3, emphasis added.)
- “No Person except a **natural born Citizen**, or a **Citizen of the United States**, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.” (Article II, Section 1, emphasis added.)
18. According to James Kent the relationship of a person to a nation was, like the relationship between husband and wife, parent and child, “derived from the law of nature,” not from positive law. II J. Kent, Commentaries on American Law 5 (Claytor’s Pub. Unabridged Ed. 1827). Thus, a person born to parents whose covenant allegiance to a nation had previously been established was a “natural born citizen,” born into the civil covenant, just like a child born into the marriage covenant of his father and mother. Such a person need not swear allegiance to become a citizen, for his allegiance is determined by birth. In contrast, a person born to parents in covenant allegiance to another nation could become a “naturalized” citizen, but only by swearing allegiance to another nation. As Joseph Story observed in his Commentaries on the Constitution of the United States permitting a citizen, other than a natural born citizen, to be President of the United States was an exception to “the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties.” III J. Story, Commentaries on the Constitution of the United States Section 1473 (Boston: Little, Brown: 1833). This “fundamental policy,” in turn, was derived from the law of Moses which prohibited anyone, but a natural born citizen of Israel, from being king. Deuteronomy 17:14-15.
19. If one were not a “natural born citizen,” then one could hold the presidency only if a “Citizen of the United States, at the time of the Adoption of this Constitution ... and fourteen years a resident within the United States.” Unlike the citizenship eligibility requirements for members of Congress, there is no durational **citizenship** requirement for holding the office of President. Instead, there is a durational **residency** requirement. The Constitution’s drafters obviously intended that the office of President be occupied **initially** by a person who had demonstrated allegiance to the new nation longer than the seven and nine years required of a Representative and Senator, respectively. Had the fourteen year requirement been citizenship, rather than residency, no one alive at the time the Constitution was ratified could possibly have qualified, as United States citizenship did not predate the eleven year old Declaration of Independence.

20. “The judicial power shall extend ... to controversies ... between a State and **citizens of another State**, between **citizens of different States**, between **citizens of the same State** claiming lands under grants of different States, and between a State, or the **citizens thereof**, and foreign States, citizens or subjects.” (Article III, Section 2, emphasis added.)
- “The **Citizens of each State** shall be entitled to all Privileges and Immunities of **Citizens in the several States**.” (Article IV, Section 2, emphasis added.)
21. See Chirac v. Chirac, 15 U.S. 259 (1817).
22. E.g., Amy v. Smith, 11 Ky. 326 (1822); Stoner v. State, 4 Mo. 614 (1837); State v. Claiborne, 19 Tenn. 331 (1838). In State v. Manuel, 20 N.C. 144 (1838) the North Carolina Supreme Court determined that slaves born and emancipated in North Carolina thereby became citizens.
23. Collet v. Collet, 2 U.S. 294, 296 (1792). See Houston v. Moore, 18 U.S. 1, 48-49 (1820) (Story, J., dissenting).
24. 60 U.S. 393, 405, emphasis added.
25. *Id.*, 60 U.S. at 405, 406.
26. 14 Stat. 27.
27. Raoul Berger, *Government by Judiciary, The Transformation of the Fourteenth Amendment*, (Indianapolis, IN: Liberty Fund, 1997), p. 48. It had been widely believed that the Constitution by inference vested the states with the authority to define who is a natural born citizen of the United States — thus the Civil Rights Act, arguably, violated the Tenth Amendment.
28. Congressional Globe, Pt. 4, 1st Sess., 39th Cong., 2890, emphasis added. Sen. Howard’s statement suggests that he was conversant with existing legal precedent in the state courts.
29. Congressional Globe, 39th Cong., 1st Sess., 2893, quoted in Charles Wood, “Losing Control of America’s Future: The Census, Birthright Citizenship, and Illegal Aliens,” 22 *Harvard Journal of Law & Public Policy* 509 (1999), emphasis added.
30. Congressional Globe, 39th Cong, 1st Sess, 2893.
31. Congressional Globe, 39th Cong, 1st Sess, 2897.
32. Congressional Globe, 39th Cong, 1st Sess, 2890.
33. *Dred Scott v. Sandford*, supra, 60 U.S. at 578, 587. By conferring state citizenship by residency coupled with United States citizenship, however, the Fourteenth Amendment clearly changed state power in relationship to defining state citizenship from that described by Justice Curtis, as follows:

Under the Constitution of the United States, **each State has retained this power of determining the political status of its native-born inhabitants**, and no exception thereto can be found in the Constitution.... For, whatever powers the States may exercise to confer privileges of citizenship on persons not born on their soil, the Constitution of the United States does not recognise such citizens. As has already been said, it recognises the great principle of public law, that **allegiance and citizenship spring from the place of birth. It leaves to the States the application of that principle to individual cases.** [*Id.*, at 586-87, emphasis added.]

34. 83 U.S. 36, 73 (1872) (emphasis added).
35. 88 U.S. 162 (1874).
36. 169 U.S. 649, 650 (1898).
37. *Id.*, at 655, emphasis added.
38. Two cases discussed by the Court addressed the citizenship status of individuals born in the American colonies **before the Declaration of Independence**. No one would suggest that the individual **colonies, before independence**, enjoyed any authority to define who was a **British citizen** within their bounds, or that the British common law did not govern such cases.
39. The Exchange, 11 U.S. 116 (1812) addressing the grounds upon which foreign ministers are, and other aliens are, subject to the criminal jurisdiction of this country.
40. The Court, however, did not identify a single instance where The Exchange was cited in the Congressional debates preceding the passage of the Fourteenth Amendment. Furthermore, several 19th and 20th Century treatises addressing the intent behind the first sentence of the first section of the Fourteenth Amendment also never mention this case.
41. This confuses two different definitions of jurisdiction (e.g., a state could not deny equal protection of the laws to a foreign minister because he was incapable of being within its jurisdiction).
42. Chief Justice Fuller observed that:

The act was passed and the amendment proposed by the same congress, and it is not open to reasonable doubt that the words ‘subject to the jurisdiction thereof,’ in the amendment, were used as synonymous with the words ‘and not subject to any foreign power,’ of the act. [*Id.*]
43. I W. Blackstone, Commentaries on the Laws of England, C. 10.

44. *See, e.g.*, State v. Manuel, 20 N.C. 144 (1838); State v. Trustees of Delhi Township, 11 Ohio 24 (1841); Respublica v. Gibbs, 3 Yeates 429 (Pa. 1802).
45. Barzizas v. Hopkins & Hodgson, 23 Va. 276 (1824).
46. Amy v. Smith, 11 Ky. 326 (1822).
47. Quoted with approval in Hardy v. DeLeon, 5 Tex. 211, 237 (1849) and in support of a ruling that the citizenship of a child born to Texas citizens in 1836 outside the Republic of Texas followed the citizenship of the parents, not the location where the child was born.
48. Wong Kim Ark, *supra*, 169 U.S. at 704-05.
49. II J. Kent, *Commentaries*, *supra*, at 35-36.
50. *See id.* at 37-38. While this argument was forcefully pressed in several early cases, it was never embraced by any court opinion. *Id.* at 38-41. Congress settled the matter in 1868 by statute in favor of a distinct American right to renounce one's native-born citizenship.
51. Weedin v. Chin Bow, 274 U.S. 657, 660 (1927); Perez v. Brownell, 356 U.S. 44 (1957); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Rogers v. Bellei, 401 U.S. 815 (1971).
52. I W. Blackstone, *Commentaries*, *supra*, at C. 10.
53. *See, e.g.*, Perez v. Brownell, *supra*.