

BIRTHRIGHT CITIZENSHIP, ILLEGAL ALIENS, AND THE ORIGINAL MEANING OF THE CITIZENSHIP CLAUSE

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I. INTRODUCTION¹

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Ms. X, a Mexican citizen, enters the United States illegally, and gives birth to a child on American soil. Ms. X is a civilian, and is not a diplomat. Is her child constitutionally entitled to American citizenship at birth? The thesis of this Article is that, under the original meaning of the Citizenship Clause of the Fourteenth Amendment, the correct answer to this question is “Yes.”

For many constitutional lawyers, this answer merely restates the obvious. After all, the Citizenship Clause plainly declares that “All persons born . . . in the United States . . . are citizens of the United States,” and only excludes those not “subject to the jurisdiction” of the United States at birth.² “Jurisdiction” is conventionally understood to mean “sovereign authority,” or “[a] government’s general power to exercise authority over all persons and things within its territory”³ Hence, under this “orthodox interpretation,” the Clause’s “jurisdiction

Report from Daniel Webster, Sec’y of State, U.S., to Millard Fillmore, President, U.S. (Dec. 23, 1851), in 6 THE WORKS OF DANIEL WEBSTER 521 (Boston, Little & Brown 11th ed. 1858) [hereinafter Webster].

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2 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SER. III (Washington, D.C., Gov’t Printing Office 1899) [hereinafter RECORDS].

Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509 (2007).

David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991).

2. U.S. CONST. amend. XIV, § 1, cl. 1 (“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.”).

3. BLACK’S LAW DICTIONARY 927 (9th ed. 2009).

requirement”⁴ only excludes children of diplomats, children born to invading alien enemies in enemy-occupied territory, and children born aboard a foreign sovereign’s ships.⁵ Even though Ms. X is an illegal alien, her child remains subject to U.S. sovereign authority.⁶ Thus, the child is entitled to birthright citizenship.⁷

Yet for those concerned with the “original meaning” of the Constitution, the answer to the above question may be less clear. Recently, some have contended that, under the original meaning of the jurisdiction requirement, a child’s parents needed to have federal permission for their presence on American soil.⁸ In addition, these parents had to owe “undivided allegiance”⁹ to the United States, via “the absence of any [foreign] allegiance”¹⁰ Under this interpretation, the Citizenship Clause would not apply to Ms. X’s child because Ms. X owes allegiance to Mexico and is in the United States without federal consent.¹¹ Instead, such children would either follow the nationality of their parents via *jus sanguinis*,¹² or suffer statelessness. Unsurprisingly,

4. SCHUCK & SMITH, *supra* note 1, at 5-6 (employing this label for the Clause’s qualifier).

5. *See* United States v. Wong Kim Ark, 169 U.S. 649, 682-86 (1898).

6. *See, e.g.*, Epps, *supra* note 1, at 333 (discussing various ways in which an illegal alien’s child is subject to sovereign power). This Article uses the phrase “illegal alien,” not to disparage non-citizens unlawfully present in the United States, but “because it is the most common one in public discourse.” Magliocca, *supra* note 1, at 499 n.3. *See also* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 899 (2d ed. 1995) (“*Illegal alien* is not an opprobrious epithet: it describes one present in a country in violation of the immigration laws (hence ‘illegal’).”).

7. *See, e.g.*, U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1111(d) (2009) (“All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth **even if their parents were in the United States illegally at the time of birth.**”) (emphasis in original).

8. *See* SCHUCK & SMITH, *supra* note 1, at 86 (“In the public law view . . . [parents’] consent was . . . taken provisionally to stand for that of the child.”); *id.* (suggesting that children received birthright citizenship only when “the government consented to the individual’s presence and status . . .”).

9. Sutherland, *supra* note 1 (stating that an alien owes “undivided allegiance to the United States” when he “renounces all allegiance to his homeland . . .”).

10. SCHUCK & SMITH, *supra* note 1, at 86.

11. *See id.* at 94 (“[Illegal aliens] are . . . individuals whose presence within the jurisdiction of the United States is prohibited by law. They are manifestly individuals . . . to whom the society has explicitly and self-consciously decided to deny membership.”); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 8 (2009) (concluding that a parental allegiance requirement would “exclude birthright citizenship for the children of legal resident aliens and, *a fortiori*, of illegal aliens.”).

12. *See* BLACK’S LAW DICTIONARY 941 (9th ed. 2009) (defining *jus sanguinis* as, “The rule that a child’s citizenship is determined by the parents’ citizenship.”); Mayton, *supra* note 1, at 247 (“[T]he child can be expected to absorb the habits of allegiance and affiliation of his or her parents.”). Of course, this assumes that the laws of an illegal alien’s homeland confer derivative citizenship upon that alien’s U.S.-born children.

this “consensualist interpretation” has gained currency among critics of illegal immigration, including political commentators,¹³ think-tanks,¹⁴ legal scholars,¹⁵ judges,¹⁶ and legislators seeking to restrict birthright citizenship via statute.¹⁷

This Article contends that the orthodox interpretation accurately reflects the original public meaning¹⁸ of ‘jurisdiction,’ and that, consequently, the consensualist interpretation is incorrect on originalist grounds. By way of supporting this contention, this Article also seeks to advance the debate regarding the Citizenship Clause in several ways. Although this Article, like others,¹⁹ relies upon the Clause’s legislative history for evidence of original meaning, when analyzing that history this Article also considers 1) the framing-era context of federal Indian law; and 2) the distinction between “original meaning” and “original expected application.”²⁰ Moreover, in seeking relevant originalist

13. See, e.g., Sutherland, *supra* note 1; George F. Will, Op-Ed., *An Argument to be Made About Immigrant Babies and Citizenship*, WASH. POST, Mar. 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032603077.html>.

14. See, e.g., Brief for The Center for American Unity et al. as Amici Curiae Supporting Respondents at 9-15, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); Brief for The Claremont Institute for Constitutional Jurisprudence as Amicus Curiae Supporting Respondents at 5-9, *Hamdi*, 542 U.S. 507 (No. 03-6696); Brief for Eagle Institute Education & Legal Defense Fund as Amicus Curiae Supporting Respondents at 4-7, *Hamdi*, 542 U.S. 507 (No. 03-6696); EASTMAN, *supra* note 1, at 2-8; FEERE, *supra* note 1, at 6-11.

15. See, e.g., EASTMAN, *supra* note 1, at 2-8; SCHUCK & SMITH, *supra* note 1, at 72-86; Mayton, *supra* note 1, at 241-53; Abrahms, *supra* note 1, at 477-87.

16. See *Oforji v. Ashcroft*, 354 F.3d 609, 621 (7th Cir. 2003) (Posner, J., concurring) (“A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it.”).

17. See, e.g., 154 CONG. REC. H446 (daily ed. Jan. 23, 2008) (statement of Rep. Poe) (“[Illegal aliens are] not subject to the jurisdiction of the country when they fraudulently came in here. They’re subject to the jurisdiction of the country that they came from.”). See also 153 CONG. REC. H2287 (daily ed. Mar. 7, 2007) (statement of Rep. Bilbray); 147 CONG. REC. 1202 (2001) (statement of Rep. Stump); 137 CONG. REC. 27090 (1991) (statement of Rep. Galleghy). One such proposal is the Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. § 2 (2011). See also MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., RL33079, U.S. CITIZENSHIP OF PERSONS BORN IN THE UNITED STATES TO ALIEN PARENTS 11-13 (2007) (analyzing such proposals).

18. By “original public meaning,” I am referring to “the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.” Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999). Because basing constitutional interpretation on framers’ intent is methodologically problematic, Solum, *supra* note 1, at 14-15, this Article accords weight to such “original intentions” only insofar as they “reflect or illuminate the likely public understanding of the proposed constitutional text.” Lash, *supra* note 1, at 1248.

19. See, e.g., Epps, *supra* note 1, at 349-62; Magliocca, *supra* note 1, at 518-22.

20. Balkin, *supra* note 1, at 296 (“Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art).”); Solum, *supra* note 1, at 20 (“The meaning of a text is one thing; expectations about the application of that meaning to future cases are a different thing.”).

evidence, this Article looks to the heretofore-neglected Fourteenth Amendment ratification debates, and the periods preceding and following the Clause's enactment.

Given the ongoing controversy regarding originalism's normative value,²¹ a brief justification for this Article's originalist focus may be warranted. First, because both originalists and non-originalists agree that original meaning is relevant to constitutional adjudication,²² ascertaining the Citizenship Clause's original meaning is worthwhile regardless of one's position in the aforementioned controversy. Second, courts at various levels have shown an interest in original meaning when deciding constitutional questions.²³ Third, because consensualists often label their interpretation "originalist,"²⁴ fully responding to their challenge requires direct engagement of their originalist arguments. Finally, if consensualists are indeed wrong as a matter of original meaning, it is incumbent upon other originalists to highlight and refute such errors as a matter of intellectual honesty.

This Article proceeds in five parts, of which this Introduction is the first. Part II describes the antebellum linguistic context that preceded the Citizenship Clause. Part III presents evidence showing that "subject to the jurisdiction" originally meant "subject to sovereign authority."²⁵

21. See, e.g., Solum, *supra* note 1, at 22-24 (discussing this controversy).

22. Compare Lash, *supra* note 1, at 1247 ("[Original public meaning] originalism has been embraced by a wide range of constitutional historians of various ideological persuasions . . ."), with Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) ("[W]e can all care about . . . original public meaning without being originalists."), and Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1187 (conceding originalism's legitimacy as "one form of interpretation among others . . .").

23. See, e.g., *McDonald v. Chicago*, 130 S. Ct. 3020, 3058-83 (2010) (Thomas, J., concurring) (Privileges or Immunities Clause); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment); Report & Recommendation on Defendant's Motion to Dismiss Count 14 at 13, *United States v. Boffil-Rivera*, No. 08-20437-CR-GRAHAM/TORRES (S.D. Fla. Aug. 12, 2008) (denying Second Amendment's applicability to illegal aliens), *aff'd*, 607 F.3d 736 (11th Cir. 2010).

24. See, e.g., EASTMAN, *supra* note 1, at 8 (suggesting that the judiciary "restor[e] to the [Citizenship Clause] what its drafters actually intended: that only a complete jurisdiction, of the kind that brings with it a total and exclusive allegiance, is sufficient to qualify for [birthright citizenship] . . ."). This consensualist focus on "original intent" is odd, given the well-known problems with "original intent originalism." See, e.g., Solum, *supra* note 1, at 14-15. However, if the framers did intend to constitutionalize consensualism, presumably they employed words whose meanings were consistent with this goal. Thus, consensualists' claims regarding framers' intent imply a consensualist original meaning for the jurisdiction requirement.

Some consensualists instead deem the Clause's language "ambiguous." SCHUCK & SMITH, *supra* note 1, at 117. Given the evidence presented by this Article, I leave it for the reader to judge the accuracy of such claims.

25. Or, even more colloquially, "subject to the civil and criminal laws of the land."

Part IV critiques various consensualist arguments. Part V, the Conclusion, summarizes this Article's findings.

II. THE CITIZENSHIP CLAUSE IN CONTEXT

In antebellum common law, a child was a citizen at birth if born within the territory of a sovereign and under the sovereign's authority.²⁶ This was true even if the child's parents were aliens.²⁷ It was this "common-law rule" that the framers sought to constitutionalize,²⁸ via the

26. See, e.g., *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting) ("[T]he party must be born within a place where the sovereign is at the time in full possession and exercise of his power . . ."); *GLOBE*, *supra* note 1, at 527 (statement of Sen. Trumbull, R-Ill.) ("[A]ll these persons born in the United States and under its authority . . . are citizens without any act of Congress."); *id.* at 2765 (statement of Sen. Howard, R-Mich.) ("A citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws."); Shawhan, *Virtue*, *supra* note 1 (manuscript at 8) (noting the "territory and authority criteria" of the common-law rule). Subjection to authority also implied allegiance. Cf. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 138-39 (1812) (noting that, absent diplomatic immunity, an ambassador "would owe temporary and local allegiance to a foreign prince . . ."). Hence, writers referred to birth under the "exercise of [a sovereign's] power" as birth "within the allegiance" or "within the ligeance of the sovereign." *Inglis*, 28 U.S. (3 Pet.) at 155. See, e.g., *United States v. Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151); *Kilham v. Ward*, 2 Mass. 236, 238, 1 Tyng 221, 223 (1806); *Lynch v. Clarke*, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844); 2 KENT, *supra* note 1, at *39. *But see* Charles, *supra* note 1 (manuscript at 8-9) (asserting that "within the allegiance" implies a consent requirement).

Note that Story dissented in *Inglis* because he "differ[ed] from [the opinion] of the Court" regarding "the nature and effect of a devise" in a will. *Inglis*, 28 U.S. (3 Pet.) at 154; compare *id.* at 112-20 (majority opinion) (deeming the devise valid, and a corporation devisee), with *id.* at 145-54 (Story, J., dissenting) (deeming the devise invalid, and concluding that heirs are entitled to the estate). However, Story's view regarding "the alienage of the demandant . . . coincide[d] generally with that of the majority of the Court . . ." *Id.* at 145. The majority's failure to dispute Story's explication of the common-law rule, and the consistency of Story's views with those of other authorities, also militate in favor of relying on Story's explication. See *id.* at 120-27 (majority opinion); *infra* note 27.

27. See *Inglis*, 28 U.S. (3 Pet.) at 164; *Munro v. Merchant*, 28 N.Y. 9, 40 (1863); *Ludlam v. Ludlam*, 26 N.Y. 356, 371 (1863); *Munro v. Merchant*, 26 Barb. 383, 400 (N.Y. 1858), *rev'd on other grounds*, 28 N.Y. 9 (1863); *Lynch*, 1 Sand. Ch. at 663; *Town of Lyndon v. Town of Danville*, 28 Vt. 809, 816 (1856) (Opinion of Isham, J.); 10 Op. Att'y Gen. 328, 328 (1862); 10 Op. Att'y Gen. 329, 330 (1862); 9 Op. Att'y Gen. 373, 374 (1859); BINNEY, *supra* note 1, at 22 n.*; 2 KENT, *supra* note 1, at *39; RAWLE, *supra* note 1, at 86; William L. Marcy, Letter to the Editor, *Native Sons of Alien Parents*, N.Y. TIMES, Mar. 20, 1854, at 3.

In 1863 William Lawrence suggested that children "born here of foreign parents" were not citizens; but the communiqué Lawrence cited was silent regarding the citizenship of such children. Compare HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 903 (William Beach Lawrence ed., Boston, Little, Brown & Co. 2d ed. 1863), with Letter from William H. Seward, Sec'y of State, U.S., to William Stuart, Charge d'Affaires, U.K. (Aug. 20, 1862), in MESSAGE OF THE PRESIDENT OF THE UNITED STATES 283, 283 (Washington, D.C., Gov't Printing Office 1862).

28. See, e.g., *GLOBE*, *supra* note 1, at 2890 (statement of Sen. Howard, R-Mich.) (noting that the Clause "is simply declaratory of what I regard as the law of the land already . . ."). Because the

Citizenship Clause's two-fold requirement of birth "in the United States, and subject to the jurisdiction thereof."²⁹ In drafting the Fourteenth Amendment, the framers drew on preexisting legal terminology.³⁰ Hence, if "jurisdiction" originally meant "sovereign authority" at the framing, we should expect to see this meaning used in antebellum discourse. A variety of sources demonstrate that it was.

For instance, the orthodox interpretation was often employed by antebellum legal commentators. In his path-breaking disquisition, St. George Tucker wrote, "each state . . . retains an uncontrolled jurisdiction over all cases of municipal law"³¹ William Rawle, in his *View of the Constitution*, observed that, "The geographical limits of the United States and those of the territories, are subject to the jurisdiction of all the courts of the United States"³² In his *Commentaries on the Constitution of the United States*, Justice Joseph Story noted that the federal judiciary was "authorized to exercise jurisdiction to the full extent of the Constitution, laws, and treaties of the United States"³³ James Kent, in his *Commentaries on American Law*, wrote, "ambassadors were exempted from all local jurisdiction, civil and criminal"³⁴

The orthodox interpretation also appears in 1860s federal court cases. A federal slave trade case described a defendant as being "held subject to the jurisdiction of this court"³⁵ A federal district court noted a defendant's argument that a particular boat "was not therefore subject to the jurisdiction of this court, as a court of admiralty, at the time of her seizure and arrest."³⁶ In an insurance dispute, a federal circuit court rejected arguments that Aetna was "not subject to the

39th Congress drafted the Fourteenth Amendment, this Article provides the state and party affiliation for each of its members, to help place their statements in context.

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

30. See Lash, *supra* note 1, at 1246 (noting that the framers' "use of particular phrases and concepts reflected legal meanings and ideas that had emerged in antebellum judicial cases and legal commentary . . .").

31. 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 152 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803). For similar usage, see also *id.* at 285, 313.

32. RAWLE, *supra* note 1, at 236. For similar usage, see also *id.* at 201, 207, 252.

33. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1646, at 451 (William S. Hein & Co. 1994) (1833). For similar usage, see also *id.* § 1662, at 464; *id.* § 1665, at 465.

34. 1 KENT, *supra* note 1, at *15. For similar usage, see also *id.* at *26, *45, *103, *130, *341.

35. *United States v. Corrie*, 25 F. Cas. 658, 659 (C.C.D.S.C. 1860) (No. 14,869).

36. *McAllister v. The Sam Kirkman*, 15 F. Cas. 1204, 1205 (S.D. Ohio 1860) (No. 8,658).

jurisdiction of this court, in controversies with citizens of Ohio.”³⁷ When discussing a prior Supreme Court case, another circuit court noted a railroad’s contention that “certain persons were . . . not subject to the jurisdiction of the court.”³⁸

State courts showed similar usage. A Louisiana decision observed that a deceased debtor “was subject to the jurisdiction of the courts of Mississippi”³⁹ before his death. An Iowa case considered, and rejected, an appellant’s argument that a piece of property was “not subject to the jurisdiction of”⁴⁰ the city of Mount Pleasant. In 1862, the California Supreme Court noted the defendants’ argument that a given claim “was not subject to the jurisdiction of the United States board of land commissioners”⁴¹ A Minnesota case considered whether “a foreign corporation [should] be subject to the jurisdiction of the courts of this state when it has property therein”⁴² A Pennsylvania case denied the reach of summary power over “[o]utside parties who in none of the recognised modes have previously become subject to the jurisdiction of the court”⁴³ An Illinois decision denied that a soldier was “subject to the jurisdiction of the United States, and not to that of the State of Illinois.”⁴⁴ Other cases likewise employed the orthodox interpretation.⁴⁵

In the years leading up to the Fourteenth Amendment, members of Congress also equated “jurisdiction” with “sovereign authority.” For example, during the 1861 secession crisis, Sen. John Crittenden asserted that only arsenals, navy yards, and dock yards in the seceding states were “specially subject to the jurisdiction of the United States in the States”⁴⁶ In 1862, Sen. John Hale labeled an army without commissioned officers “a mob, not even subject to the jurisdiction to

37. *Lee v. Aetna Ins. Co.*, 15 F. Cas. 141, 142 (C.C.N.D. Ohio 1861) (No. 8,181).

38. *McCloskey v. Cobb*, 15 F. Cas. 1278, 1280 (C.C.S.D. Ohio 1866) (No. 8,702).

39. *Mandeville v. Huston*, 15 La. Ann. 281, 282 (1860).

40. *Burlington & Mo. River R.R. Co. v. Spearman*, 12 Iowa 112, 114-15 (1861).

41. *Leese v. Clark*, 20 Cal. 387, 411 (1862).

42. *Broome v. Galena, D., D. & Minn. Packet Co.*, 9 Minn. 239, 244 (1864).

43. *The Allegheny Bank’s Appeal*, 48 Pa. 328, 333 (1864).

44. *Huggins v. People*, 39 Ill. 241, 245 (1866).

45. *See, e.g.*, *Golden v. Cockril*, 1 Kan. 259, 270 (1862); *Nutter v. Russell*, 60 Ky. 163, 166 (1860); *Ludeling v. Vester*, 16 La. Ann. 450, 452 (1862); *Templeton v. Morgan*, 16 La. Ann. 438, 441 (1862); *Poutz v. Bistes*, 15 La. Ann. 636, 637 (1860); *Norton v. Sterling*, 15 La. Ann. 399 (1860); *Hood v. Hood*, 93 Mass. 196, 200 (1865); *Cahoon v. Harlow*, 89 Mass. 151, 152 (1863); *Moody v. Gay*, 81 Mass. 457 (1860); *Chilvers v. People*, 11 Mich. 43, 56 (1862) (Martin, C.J., dissenting); *Sullivan v. La Crosse & Minn. Steam Packet Co.*, 10 Minn. 386, 391 (1865); *Richard v. Mooney*, 39 Miss. 357, 358 (1860); *Steele ex rel. Milroy v. Farber*, 37 Mo. 71, 78 (1865); *Hunt v. Mayberry*, 29 N.J.L. 403, 407 (1862); *Moore v. Fields*, 42 Pa. 467, 472 (1862); *Horner v. Hasbrouck*, 41 Pa. 169, 179 (1862).

46. CONG. GLOBE, 36TH CONG., 2d SESS. 1377 (1861) (statement of Sen. Crittenden).

which Peter the Hermit was”⁴⁷ In 1864, Sen. Reverdy Johnson suggested that intra-state property over which the federal government exercised eminent domain “ought not to be subject to the jurisdiction of the States.”⁴⁸ In 1865, Rep. James Ashley argued that “the territory [of the rebel States] and the citizens residing therein are subject to the jurisdiction of Congress the same as citizens in any Territory of the United States.”⁴⁹ Finally, when defending the Citizenship Clause in 1866, Rep. Jehu Baker argued that “Persons born or naturalized in the United States, and subject to its jurisdiction, subject to taxation, to military service . . . ought . . . to receive in turn . . . the *status* of citizenship.”⁵⁰

Unsurprisingly, this consistent usage was reflected in antebellum American dictionaries. For example, Bouvier’s widely-used *Law Dictionary* gave the following definition: “A power constitutionally conferred upon a judge or magistrate, to take cognizance of, and decide causes according to law, and to carry his sentence into execution.”⁵¹ Giles Jacob’s *Law Dictionary* defined “jurisdiction” as “[a]n authority or power, which a man hath to do justice in causes of complaint brought before him”⁵² According to Noah Webster’s classic reference

47. CONG. GLOBE, 37TH CONG., 2d SESS. 1881 (1862) (statement of Sen. Hale).

48. CONG. GLOBE, 38TH CONG., 1st SESS. 1479 (1864) (statement of Sen. Johnson).

49. CONG. GLOBE, 38TH CONG., 2d SESS. 140 (1865) (statement of Rep. Ashley). *See also id.* at 223 (statement of Rep. Pendleton) (“He holds that an act of secession . . . destroys . . . [a State’s] form of Government, leaving [its people] subject to the jurisdiction of the Federal Government and its absolute sovereignty with all the rights of local government . . .”).

50. GLOBE, *supra* note 1, app. at 256 (statement of Rep. Baker, R-Ill.). *See also id.* app. at 100 (statement of Sen. Yates, R-Ill.) (asserting that “it is not only our right but our duty to extend the suffrage to every American citizen in every State, and to all the country subject to the jurisdiction of the United States.”); *id.* at 2853 (statement of Sen. Morrill, R-Me.) (“While the colonies were integral parts of Great Britain they were, of course, subject to the jurisdiction of Great Britain, and it was idle to talk about sovereignty in colonies.”); *id.* at 1472 (statement of Rep. Dumont, R-Ind.) (“Those who entertain this theory call it being out of the Union, though the territory of the State and the people are still subject to the jurisdiction of the Federal Government.”); *id.* at 3821 (statement of Rep. Eldredge, D-Wis.) (“I desire to raise the question of order, whether the gentlemen named in the third resolution of the majority of the committee were subject to the jurisdiction of that committee.”); *id.* at 3580 (statement of Sen. Saulsbury, D-Del.) (“[W]ould it not be competent then for Congress to cede the District to Maryland and Virginia if it saw proper, or must it forever retain these ten miles square subject to the jurisdiction of Congress?”).

51. 1 BOUVIER, *supra* note 1, at 683. Regarding the prominence of Bouvier’s dictionary, see Mary Whisner, Bouvier’s, Black’s, and Tinkerbell, 92 LAW LIB. J. 99 (2000) (quoting MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 412 (9th ed. 1989)) (“For almost a hundred years, the numerous editions of John Bouvier’s *A Law Dictionary* were most popular among American lawyers.”).

52. 3 GILES JACOB & T. E. TOMLINS, THE LAW DICTIONARY 564 (Philadelphia & New York, P. Byrne & I. Riley 1811).

work, “jurisdiction” meant “[p]ower of governing or legislating”⁵³ Dictionaries by Samuel Johnson and J.J.S. Wharton gave similar definitions.⁵⁴

Compiling this “Framer’s Lexicon”⁵⁵ is important for two reasons. First, it shows that the consensualist reading of “jurisdiction” has no basis in antebellum terminology; on the contrary, the leading nineteenth-century legal dictionary observed that “the consent of parties, cannot, therefore, confer [jurisdiction]”⁵⁶ Second, the consistent antebellum equation of “jurisdiction” with “sovereign authority” creates a presumption that both drafters and ratifiers employed this meaning when considering the Fourteenth Amendment.⁵⁷ Nevertheless, it remains possible that the Citizenship Clause presaged a change in the definition of “jurisdiction.”⁵⁸ Thus, it is necessary to examine the Clause’s legislative history and determine whether such a shift may have occurred. As discussed below, however, no such shift is evident in that history, or in the later debates surrounding the Fourteenth Amendment’s ratification.

III. INDIANS, ALIENS, AND THE ORIGINAL MEANING OF “SUBJECT TO THE JURISDICTION THEREOF”

Evidence from the framing and ratification of the Fourteenth Amendment also suggests that “jurisdiction” originally meant “sovereign authority.” First, members of Congress employed this meaning when debating the Citizenship Clause. Second, this meaning is consistent with original expected applications expressed in those debates. Finally, the Fourteenth Amendment’s ratification debates

53. CHAUNCEY A. GOODRICH, NOAH PORTER & NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 732 (Springfield, G. & C. Merriam 1865). Other definitions included “[t]he legal power or authority of hearing and determining causes;” and “extent of power or authority.” *Id.*

54. SAMUEL JOHNSON ET AL., A DICTIONARY OF THE ENGLISH LANGUAGE 411 (London, William Pickering 2d ed. 1828); J.J.S. WHARTON, THE LAW LEXICON, OR DICTIONARY OF JURISPRUDENCE 525 (photo reprint, Fred B. Rothman & Co. 1987) (1848).

55. Green, *supra* note 1, at 44 (using this label to denote a similar compilation illustrating framing-era usage of “protection of the laws”).

56. 1 BOUVIER, *supra* note 1, at 683.

57. See Lash, *supra* note 1, at 1246 (“Understanding the antebellum [definitions] thus illuminates both how the members of Congress understood the development of [a proposed constitutional provision] and how the public at large likely understood the final version of that text.”).

58. See H. Jefferson Powell, *Rules For Originalists*, 73 VA. L. REV. 659, 679 (1987) (emphasis added) (“[D]efining’ the meaning of the founders’ language is always a matter of considering both the vocabulary they inherited *and that which they created.*”).

support the orthodox interpretation, as do many post-ratification authorities.

A. Federal Indian Law and the Original Meaning of “Jurisdiction”

At the time of the Fourteenth Amendment, American law excluded American Indians’ native-born children from birthright citizenship.⁵⁹ Although this exclusion was eventually abolished via statute,⁶⁰ in 1866 it still commanded strong support.⁶¹ As such, when the Senate debated the Citizenship Clause, Fourteenth Amendment supporters had to explain why the Clause, as written, would exclude the children of Indians from its coverage. Their opponents argued that the jurisdiction requirement would not exclude Indians, and that adding the phrase “excluding Indians not taxed” was therefore necessary.⁶² In response, supporters successfully⁶³ argued that, because Indians were not “subject to the jurisdiction” of American law, no specific textual exclusion was required.

Although this argument may strike contemporary observers as unusual, it was quite understandable in context, because most⁶⁴ mid-

59. See, e.g., Act of Apr. 9, 1866, Ch. 31, § 1, 14 Stat. 27 (excluding “Indians not taxed” from citizenship); KETTNER, *supra* note 1, at 293-300 (discussing Indians’ antebellum exclusion).

60. See Act of Jun. 2, 1924, Ch. 233, 43 Stat. 253. Current law grants birthright citizenship to any “person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe . . .” 8 U.S.C. § 1401(b) (2006).

61. See, e.g., GLOBE, *supra* note 1, at 2895 (statement of Sen. Howard, R-Mich.) (“I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages . . . are to become my fellow-citizens . . .”); *id.* at 2897 (statement of Sen. Doolittle, R-Wis.) (deeming Indians “utterly unfit to be citizens of the United States . . .”). Although one scholar argues that the framers also excluded Indians out of respect for tribal autonomy, in fact several framers proposed discarding Indian treaties and directly governing Indians via federal law. Compare Magliocca, *supra* note 1, at 515-21 (making this argument), with GLOBE, *supra* note 1, at 1488 (statement of Sen. Trumbull, R-Ill.) (questioning “whether our whole policy in regard to the Indians in making what we call treaties with them is not wrong, and whether we ought not to take them under our care, and by legislation, without attempting to get up treaties in any shape, bring them within our jurisdiction, and extend our laws over them.”), and *id.* at 1488 (statement of Sen. Sherman, R-Ohio) (“Until that idea [of making treaties with Indians] is abandoned, you cannot make any regular system for these Indian tribes.”).

62. GLOBE, *supra* note 1, at 2890 (statement of Sen. Doolittle, R-Wis.).

63. The “excluding Indians not taxed” language was defeated 30-10. See *id.* at 2897.

64. Although no precise numbers are available, several sources suggest that, in 1866, the vast majority of Indians were “Indians not taxed” exempt from federal jurisdiction. The 1870 census counted 25,731 “civilized Indian[s]” and 357,981 “Indians not taxed.” Compare WALKER, *supra* note 1, at 18 tbl.VI, with *id.* at 21 tbl.VII. In 1860, the corresponding numbers were 36,662 and 294,431. Compare JOS. C. G. KENNEDY, U.S. DEP’T OF THE INTERIOR, PRELIMINARY REPORT ON THE EIGHTH CENSUS, 1860 app. 135 tbl.2 (Washington, D.C., Gov’t Printing Office 1862), with *id.* app. at 136 tbl.3. Moreover, beyond these admittedly-underinclusive results, an 1891 report noted that, before 1887, only “3,072 members of various tribes had, by special laws and treaties,

nineteenth century Indians (like diplomats) were largely immune from the federal and state “sovereign authority” that applied to non-Indians. In “Indian country,”⁶⁵ where these Indians lived, federal criminal jurisdiction only extended to crimes involving non-Indians.⁶⁶ Intra-Indian crimes were expressly exempted, and left to tribal law.⁶⁷ Indians were also exempt from the federal courts’ civil jurisdiction.⁶⁸ Nor did state jurisdiction extend to Indian country.⁶⁹ Thus, unlike native-born children of citizens or aliens, an Indian born in Indian country was substantially immune from U.S. sovereign authority.

With this special legal context in mind, Fourteenth Amendment supporters argued that because Indians in Indian country⁷⁰ were largely

previously become citizens.” T.J. MORGAN, U.S. DEP’T OF THE INTERIOR, SIXTIETH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 21 (Washington, D.C., Gov’t Printing Office 1891).

65. According to Felix Cohen, “[Indian country] may perhaps be most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable.” COHEN, *supra* note 1, Ch. 1, § 3, at 5. In 1866, Indian country consisted of “all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished” Act of June 30, 1834, Ch. 161, § 1, 4 Stat. 729, 729. This definition still applied in 1866. *See* COHEN, *supra* note 1, Ch. 1, § 3, at 6.

66. *See* 1 PRUCHA, *supra* note 1, at 104 (“[I]t was not until 1817 that Congress ordained punishment for Indians who committed crimes against whites within the Indian country.”). Even this limited jurisdiction did not apply to Indian perpetrators punished by tribal law before federal prosecution. *See* Act of Mar. 27, 1854, Ch. 26, § 3, 10 Stat. 269, 270.

67. *See* Act of June 30, 1834, Ch. 161, § 25, 4 Stat. 729, 733 (“*Provided*, The [federal criminal laws] shall not extend to crimes committed by one Indian against the person or property of another Indian.”); MATTHEW CARPENTER, EFFECT OF THE FOURTEENTH AMENDMENT UPON INDIAN TRIBES, S. REP. NO. 41-268, at 10 (1870) (“[T]he [United States] Government has carefully abstained . . . from punishing crimes committed by one Indian against another in the Indian country.”); H. EVERETT, REGULATING THE INDIAN DEPARTMENT, H.R. REP. NO. 23-474, at 13 (1834) (“It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, at any place within their own limits.”); 1 PRUCHA, *supra* note 1, at 107 (noting that “offenses among Indians within the tribe or nation were tribal matters that were to be handled by the tribe,” and that “crimes committed by Indians against other Indians did not fall within the scope of the intercourse laws.”). Note that Matthew Carpenter did not become a Senator until 1869, after the Fourteenth Amendment’s ratification. CARPENTER, *Matthew Hale, (1824 - 1881)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000171> (last visited July 25, 2011).

68. *See, e.g.*, GLOBE, *supra* note 1, at 571 (statement of Sen. Doolittle, R-Wis.) (“If you make [Indians] citizens They will not only have to right to sue, but they will be liable to be sued.”); 2 PRUCHA, *supra* note 1, at 678-81 (discussing unsuccessful late-nineteenth-century proposals to extend civil jurisdiction over Indians).

69. *See, e.g.*, *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); COHEN, *supra* note 1, Ch. 6, § 1, at 116.

70. Both supporters and opponents limited their discussions to these Indians. *See* GLOBE, *supra* note 1, at 2892 (statement of Sen. Doolittle, R-Wis.) (“[T]here are seven or eight thousand

exempt from U.S. sovereign power, the jurisdiction requirement would exclude Indians from birthright citizenship. Thus, responding to opponents, Senate Judiciary Chairman Lyman Trumbull rhetorically asked, “Can you sue a Navajoe Indian in court?”⁷¹ He also noted the lack of federal authority over intra-Indian crimes: “Does the Government of the United States pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another? Are they subject to our jurisdiction in any just sense? They are not subject to our jurisdiction.”⁷² He then reiterated his point at greater length:

. . . [T]he Senator from Maryland, if he will look into our statutes, will search in vain for any means of trying these wild Indians. . . . We have had in this country, and have to-day, a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject to their own laws and regulations, and we do not pretend to interfere with them.⁷³

Because Indians were thus immune from federal sovereign authority, they were not “subject to our laws,” and did not “come completely within our jurisdiction”⁷⁴ As such, Trumbull concluded, “[t]hey would not be embraced by [the Citizenship Clause,]”⁷⁵ unless they were “brought under our jurisdiction” via some

Navajoes . . . in new Mexico, upon the Indian reservations Go into the State of Kansas, and you find any number of reservations So it is in other States. . . . Are these persons to be regarded as citizens of the United States . . . ?”); *id.* at 2894 (statement of Sen. Trumbull, R-Ill.) (referring to “a large region of country within the territorial limits of the United States, unorganized, over which we do not pretend to exercise any civil or criminal jurisdiction, where wild tribes of Indians roam at pleasure, subject to their own laws and regulations, and we do not pretend to interfere with them.”); *id.* at 2894 (statement of Sen. Hendricks, D-Ind.) (raising the possibility that the United States might “go into the Indian territory and subjugate the Indians to the political power of the country”). When Sen. Howard noted that “The United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe,” Sen. Fessenden clarified, “Within the [Indian] territory.” Howard answered, “Yes sir.” *Id.* at 2895 (statement of Sen. Howard, R-Mich.); *id.* (statement of Sen. Fessenden, R-Me.). *But see* Shawhan, *Virtue*, *supra* note 1 (manuscript at 65-66) (noting that Howard’s and Trumbull’s statements, read literally, could encompass Indians residing outside Indian country).

71. GLOBE, *supra* note 1, at 2893 (statement of Sen. Trumbull, R-Ill.).

72. *Id.*

73. *Id.* at 2894.

74. *Id.*

75. *Id.*

“special provision” authorizing federal punishment of intra-Indian crimes.⁷⁶

Sen. Jacob Howard, the Clause’s author and Amendment’s floor manager,⁷⁷ likewise focused on Indians’ exclusion from federal jurisdiction. He first equated “jurisdiction” with sovereign power, i.e., “a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department”⁷⁸ Howard then explained that “an Indian belonging to a tribe, although born within the limits of a State,” was not “subject to this full and complete jurisdiction,” because such an Indian “is subject for crimes committed against the laws or usages of the tribe to the tribe itself, and not to any foreign or other tribunal.”⁷⁹ Hence, “[b]ecause the jurisdiction of the [Indian] nation intervenes and ousts . . . [the] jurisdiction of the United States,” federal courts could not “punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe.”⁸⁰ Thanks to these jurisdictional exemptions,⁸¹ an Indian was not subject to the same “extent and quality” of sovereign power applicable “to every citizen of the United States,”⁸² and was therefore ineligible for birthright citizenship.

76. *Id.* at 2893. *But see* Charles, *supra* note 1 (manuscript at 18) (asserting that Trumbull’s statement implied consensualism).

77. Aynes, *supra* note 1, at 129, 130 n.292.

78. GLOBE, *supra* note 1, at 2895 (statement of Sen. Howard, R-Mich.).

79. *Id.*

80. *Id.*

81. These exemptions did not apply to citizens. *See, e.g.*, Act of June 30, 1834, Ch. 161, § 25, 4 Stat. 729, 733 (exempting from federal jurisdiction only “crimes committed by one Indian against the person or property of another Indian.”). *See also* Act of Mar. 3, 1843, Ch. 101, § 7, 5 Stat. 645, 647 (deeming all Stockbridge Indians “citizens of the United States . . . subject to the laws of the United States and of the Territory of Wisconsin, in the same manner as other citizens of said Territory”); Act of Mar. 3, 1839, Ch. 83, § 7, 5 Stat. 349, 351 (similar); Treaty with the Wyandotts, U.S.-Wyandotts, Jan. 31, 1855, art. 1, 10 Stat. 1159 (similar). Admittedly, Felix Cohen states that a naturalized Indian “does not lose his [Indian] identity . . . within the meaning of federal criminal jurisdictional acts” COHEN, *supra* note 1, Ch. 1, § 2, at 3. Cohen, however, only cites post-ratification authorities for support; thus, it is not clear whether this view of citizenship applied at the framing. *See id.* Ch. 1, § 2, at 3 n.11.

82. GLOBE, *supra* note 1, at 2895 (statement of Sen. Howard, R-Mich.). One consensualist argument contends that “‘Extent and quality’ denotes contributive responsibilities . . . of commitment, service, and bearing of social costs as is expected of ‘every citizen.’” Mayton, *supra* note 1, at 246 (quoting GLOBE, *supra* note 1, at 2895 (statement of Sen. Howard, R-Mich.)). Yet Howard nowhere equates “extent and quality” with such duties; more likely, the phrase simply meant that jurisdictional exemptions rendered Indians less subject to U.S. sovereign authority than citizens.

Sen. George Williams took another tack in explaining Indian immunities, by analogizing to diplomats' children. He noted that if "the child of an ambassador" commits a crime, "to a certain extent he is subject to the jurisdiction of the United States, but not in every respect . . ."⁸³ He then added, "[A]nd so [it is] with these Indians."⁸⁴ Although such persons, when residing "within a judicial district," were "in one sense . . . subject to the jurisdiction of the court in that district," they were not "in every sense subject to the jurisdiction of the court," because they were not liable to be "brought, by proper process, within the reach of the power of the court."⁸⁵ Because Indians and diplomatic families were immune from federal judicial jurisdiction,⁸⁶ they were not "fully and completely subject to the jurisdiction of the United States."⁸⁷ Hence, jurisdiction requirement excluded them from citizenship.

Even opponents of the Clause equated "jurisdiction" with aspects of "sovereign authority." Sen. Hendricks worried that some future Congress might "extend our laws over the Indians and compel obedience," such that they were "subject to the jurisdiction of the country"⁸⁸ and therefore entitled to citizenship. Sen. Johnson claimed that Indians would "become citizens by virtue of this amendment," because Congress already had "authority to legislate" over them.⁸⁹ Sen. Doolittle argued that the jurisdiction requirement would not exclude Indians because they were partially subject to federal authority via

83. GLOBE, *supra* note 1, at 2897 (statement of Sen. Williams, R-Or.). Williams' claim that an ambassador's child is "to a certain extent . . . subject to the jurisdiction of the United States, but not in every respect" is consistent with the orthodox interpretation. *Id.* (emphasis added). Williams also stated that "All persons living within a judicial district may be said, in one sense, to be subject to the jurisdiction of the court in that district . . ." *Id.* This suggests that the italicized text simply referred to the child's residence in the United States. Alternately, Williams could have meant that the child was "punishable" via non-judicial expulsion for violations of American law. Finally, Williams could have been referring to such a child's obligation to obey the law, despite that child's immunity from judicial process. See HENRY W. HALLECK, INTERNATIONAL LAW Ch. 9, § 19, at 218 (New York, D. Van Nostrand 1861) ("For offenses against the laws of the country to which [an ambassador] is accredited, the government of that country may not only dismiss the minister and send him out of the country, but may demand justice and punishment of his own country . . ."); *id.* Ch. 9, § 20, at 222 ("[A] minister is held responsible . . . for the conduct of his dependents . . .").

84. GLOBE, *supra* note 1, at 2897 (statement of Sen. Williams, R-Or.).

85. *Id.*

86. See BLACK'S LAW DICTIONARY 929 (9th ed. 2009) (defining "judicial jurisdiction" as "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly before it."); 1 BOUVIER, *supra* note 1, at 683 (defining "jurisdiction" as "[a] power constitutionally conferred upon a judge or magistrate, to take cognizance of, and decide causes according to law, and to carry his sentence into execution.").

87. GLOBE, *supra* note 1, at 2897 (statement of Sen. Williams, R-Or.).

88. *Id.* at 2894 (statement of Sen. Hendricks, D-Ind.).

89. *Id.* at 2893 (statement of Sen. Johnson, D-Md.).

“military commanders in the neighborhood of the reservations,” and “civil agents who have a control over [Indians] on behalf of the Government.”⁹⁰ The opponents agreed that “jurisdiction” meant “sovereign authority”; they only disputed supporters’ contention that “subject to the jurisdiction” required subjection to *all* aspects of sovereign power.

Thus, when defining “jurisdiction,” the framers of the Fourteenth Amendment did not shift away from the term’s antebellum meaning. On the contrary, the framers’ (and their opponents’) usage provides further evidence that “jurisdiction” originally meant “sovereign authority.”

B. *Original Expected Applications as a “Test Suite” of Original Meaning*

Also indicative of original meaning are “original expected applications”: the outcomes the framers expected the Citizenship Clause to produce when applied to specific nationality questions.⁹¹ Of course, expectations alone do not establish that the Clause originally applied to illegal aliens’ children, because meaning is not the same as expectation,⁹² and because the framers never discussed such children.⁹³ Nevertheless, expected applications do provide a valuable “test suite”⁹⁴

90. *Id.* at 2892 (statement of Sen. Doolittle, R-Wis.).

91. “Original expected applications” may be defined as “how people living at the time the [Constitutional] text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art).” Balkin, *supra* note 1, at 296. Regarding the relevance of original expected applications to original meaning, see, for example, *id.* at 303 (acknowledging that original expected application “helps us understand the original meaning of the text” and “is important . . . as an aid to interpretation”); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378 (2007) (“[I]t is hard to ascertain what constitutional provisions mean without reference to expected applications. . . . [S]ome of the best evidence of that meaning would be the expected applications, especially when widely held.”); Solum, *supra* note 1, at 20 (“*Expected applications* may be evidence about *meanings*, even if they are not decisive evidence.”).

92. See Solum, *supra* note 1, at 20.

93. Admittedly, illegal aliens did have analogues in the mid-nineteenth century, including violators of state immigration laws, and “illegal slaves” unlawfully brought into the United States. See NEUMAN, *supra* note 1, at 176-80. However, “[i]t is not enough to analogize from the [framing-era] practices that did exist because . . . any two things are both similar to one another and different from one another in a countless number of ways.” Brian T. Fitzpatrick, *Originalism and Summary Judgement*, 71 OHIO ST. L.J. 919, 927-28 (2010).

94. This phrase refers to an error-checking method used in computer programming. See EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW* 22 (3d ed. 2007) (“A test suite is a set of cases that programmers enter into their programs to see whether the results look right.”); *id.* (“If all the test cases yield the correct result, then the programmer can have some confidence that the program works.”).

against which candidate definitions for original meaning may be compared. The logic of such “testing” is simple: insert a Proposed Definition for “jurisdiction” into the Citizenship Clause, and consider the outcomes that interpretation would have yielded in the framing era. Then compare those outcomes with the original expected applications; if the former are inconsistent with the latter, then the Proposed Definition is probably not the original meaning of “jurisdiction.”⁹⁵ Applying this methodology to the Citizenship Clause, we find that the orthodox interpretation yields outcomes consistent with expected applications, but the consensualist interpretation does not.

1. Original Expected Applications for Aliens, “Illegal Slaves,” and “Renegade” Indians

In the legislative history of the Citizenship Clause, the framers expressed or implied several original expected applications. In addition, because the Clause constitutionalized the citizenship provision in the Civil Rights Act of 1866,⁹⁶ we can therefore impute that provision’s expected applications to the Clause itself.⁹⁷ The following discussion

95. See Greenberg & Litman, *supra* note 1, at 612-13 (comparing the extrapolation of original meaning from expected application to the scientific method of comparing hypotheses with data).

96. Act of Apr. 9, 1866, Ch. 31, § 1, 14 Stat. 27 (“[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . .”).

97. See GLOBE, *supra* note 1, at 2896 (statement of Sen. Howard, R-Mich.) (“We desired to put this question of citizenship . . . beyond the legislative power of [opponents of the Civil Rights Act of 1866] . . .”); *id.* at 3069 (statement of Rep. Van Aernam, R-N.Y.) (stating that the Fourteenth Amendment’s first section as “[g]iv[es] constitutional sanction and protection to the substantial guarantees of the civil rights bill . . .”). See also CONG. GLOBE, 39TH CONG., 2d SESS. app. at 82 (statement of Rep. Miller, R-Pa.) (“The first section thereof makes all persons born or naturalized in the United States and subject to the jurisdiction thereof citizens . . . This is in effect ingrafting the civil rights bill . . .”).

Given these statements, the original meaning of “appropriate legislation,” U.S. CONST. amend. XIV, § 5, probably did not authorize statutes inconsistent with the Clause’s original meaning because such statutes would vitiate the citizenship guarantee that the Clause sought to insulate from legislative repeal. Arguments that Section 5 authorizes statutory exclusion of illegal aliens’ children, Charles, *supra* note 1 (manuscript at 20 n.118, 42), merely beg the question of whether or not the Clause’s original meaning includes such children.

Admittedly, Garrett Epps rightly cautions against “*assum[ing]*” that the citizenship language in both [the Fourteenth Amendment and the Civil Rights Act] had identical meanings and ‘intentions.’” Epps, *supra* note 1, at 350 (emphasis added). This Article does not claim, however, that the original meaning of the Fourteenth Amendment is *confined* to the meaning of that statute. Rather, it merely notes that constitutionalization of the Act was *among* the original expected applications of the Fourteenth Amendment; and that, as such, it is proper to equate the Act’s expected applications with the Citizenship Clause’s.

draws from both of these sources to enumerate the Citizenship Clause's original expected applications.

The framers expected the Citizenship Clause to apply to native-born children of non-diplomatic aliens. Both Sen. John Conness, who supported the Clause, and Sen. Edgar Cowan, who opposed it, read the Clause in this manner.⁹⁸ Sen. Trumbull had the same expectation of the Civil Rights Act's citizenship provision; so also did President Andrew Johnson, who vetoed that statute.⁹⁹ In addition, supporters stated that each of these provisions merely codified pre-existing citizenship law.¹⁰⁰ Supporters understood that law as granting birthright citizenship to aliens' U.S.-born children.¹⁰¹

98. See GLOBE, *supra* note 1, at 2891 (statement of Sen. Cowan, R-Pa.) (interpreting the Clause to mean that “everybody who shall be born in the United States shall be taken to be a citizen of the United States . . .”); *id.* (statement of Sen. Conness, R-Cal.) (“[I]t is proposed [that children begotten of Chinese parents in California] shall be citizens. We have declared that by [the Civil Rights Act of 1866]; now it is proposed to incorporate that same provision in the fundamental instrument of the nation. I am in favor of doing so.”). That no other Senator disagreed with Cowan and Conness’ reading suggests that it was generally accepted. See Wildenthal, *supra* note 1, at 1588 (“Lack of dispute, in a deliberative body, in the face of a view clearly and repeatedly articulated within that very same body on a plainly important matter, is inherently confirmatory of such a view.”).

99. Compare GLOBE, *supra* note 1, at 498 (statement of Sen. Trumbull, R-Ill.) (stating that the Civil Rights Act would “[u]ndoubtedly” grant birthright citizenship to U.S.-born children of Chinese and Gypsy aliens), with *id.* at 1679 (stating that the Civil Rights Act “comprehends the Chinese of the Pacific States . . . the people called Gypsies, and [black freedmen]. Every individual of those races, born in the United States, is by the bill made a citizen of the United States.”). But see EASTMAN, *supra* note 1, at 2 (“[A]ny child born on U.S. soil to parents who were temporary visitors to this country . . . was not entitled to claim the birthright citizenship provided by the 1866 Act.”).

100. Regarding the Citizenship Clause, see, for example, GLOBE, *supra* note 1, at 2890 (statement of Sen. Howard, R-Mich.). Regarding the Civil Rights Act, see *id.* at 600 (statement of Sen. Trumbull, R-Ill.) (“[T]he [Civil Rights Act] now under consideration is but declaratory of what the law now is . . .”); *id.* at 1115 (statement of Rep. Wilson, R-Iowa) (“This [citizenship] provision [of the Civil Rights Act], I maintain, is merely declaratory of what the law now is.”).

101. See, e.g., *id.* at 498 (statement of Sen. Trumbull, R-Ill.) (“[U]nder the naturalization laws, children who are born here of parents who have not been naturalized are citizens.”); *id.* at 1832 (statement of Rep. Lawrence, R-Ohio) (quoting *Lynch v. Clarke*, 1 Sand. Ch. 583, 584 (N.Y. Ch. 1844)) (stating that the Civil Rights Act’s citizenship provision is “only declaratory of what is the law,” and observing that “In the great case of *Lynch vs. Clarke*, it was conclusively shown that . . . all ‘children born here are citizens without regard to the political condition or allegiance of their parents.’”). Sen. Cowan argued (incorrectly) that existing law excluded Chinese and Gypsy children from birthright citizenship; but even he admitted that “[t]he children of German parents are citizens . . .” *Id.* at 498 (statement of Sen. Cowan, R-Pa.).

One consensualist argument suggests that Trumbull’s mention of “Naturalization laws” probably referred to the 1790 Act . . . and its provision of birthright citizenship to immigrants.” Mayton, *supra* note 1, at 243 n.94 (citation omitted) (quoting GLOBE, *supra* note 1, at 498 (statement of Sen. Trumbull, R-Ill.)). This seems unlikely, however, because antebellum law did

The Clause was also expected to naturalize all native-born freedmen.¹⁰² This included U.S.-born children of the tens of thousands who entered the United States as slaves, despite the federal statute prohibiting such immigration.¹⁰³ Although these slaves entered the United States involuntarily, Gerald Neuman rightly notes that “immigration” may be “[c]onceived broadly as the migration of individuals into a state” and “encompasses both voluntary and involuntary movement.”¹⁰⁴ Hence, because these “illegal slaves” were non-citizens whose presence upon American soil violated federal law, their native-born children were, effectively, descendants of illegal aliens.¹⁰⁵ The framers were probably aware that “illegal slaves” existed;¹⁰⁶ but nobody suggested that illegality of presence excluded the children of these slaves from citizenship.

not interpret the naturalization *statutes* as granting birthright citizenship to U.S.-born children of aliens. *See infra* Part IV.A.

102. *See* GLOBE, *supra* note 1, at 497 (emphasis added) (noting Trumbull’s proposal to make citizens of “*all persons of African descent born in the United States . . .*”); *id.* at 498 (statement of Sen. Trumbull, R-Ill.) (noting that the Civil Rights Act’s citizenship provision had “the same purport” as his original proposal); *id.* at 1679 (emphasis added) (“This [citizenship] provision [of the Civil Rights Act of 1866] comprehends . . . the *entire race* designated as blacks, people of color, negroes, mulattoes, and persons of African blood. Every individual of those races, *born in the United States*, is by the bill made a citizen of the United States.”); CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 4-6 (1997) (noting that both supporters and opponents expected this).

103. *See* Act of Mar. 2, 1807, Ch. 22, 2 Stat. 426 (banning the importation of slaves). Several sources estimate the quantity of “illegal slave[s]” at “54,000 for 1808-61 . . .” PHILIP D. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS 74-75* (1969); *see also* 1 STANLEY L. ENGERMAN & ROBERT WILLIAM FOGEL, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 25 (1974) (estimating total slave imports at 10,000 per decade - or 50,000 total - between 1810 and 1860); David Eltis, *The U.S. Transatlantic Slave Trade, 1644-1867: An Assessment*, 54 *CIV. WAR HIST.* 347, 353 (concluding that an “estimate of 1,000 a year from 1810 to 1860 based on census data is much more likely to reflect reality,” and thus implying that 50,000 “illegal slaves” entered during that period). Admittedly, in the 1870 census, “Colored Population” exceeded “Native Colored Population” by only 9,645. *Compare* WALKER, *supra* note 1, at 12 tbl.III (putting 1870 U.S. “Colored Population” at 4,880,009), *with id.* at 388 tbl.XIII (putting 1870 U.S. “Native Colored Population” at 4,870,364). Yet as Warren Howard observes, illegally-imported slaves did have an incentive to “conceal their origin,” because “the Fourteenth Amendment gives federally protected citizenship rights to ‘all persons born or naturalized in the United States,’ but not to illegal immigrants smuggled in by stealth.” WARREN S. HOWARD, *AMERICAN SLAVERS AND THE FEDERAL LAW* 303 n.22 (1963) (quoting U.S. CONST. amend. XIV, § 1, cl. 1).

104. NEUMAN, *supra* note 1, at 39.

105. *See* 37 *ANNALS OF CONG.* 557 (1820) (statement of Rep. Smyth) (“Slaves are aliens. Alienage was the first foundation of slavery.”); 7 *Op. Att’y Gen.* 746, 749 (1856) (“[A] slave, it is clear, cannot be a citizen.”); NEUMAN, *supra* note 1, at 177 (“[The] central connotation [of ‘illegal alien’] is an alien whose presence in this country involves a violation of the law that has not been cured.”).

106. This was likely, given the antebellum slave trade’s notoriety. Lincoln’s first inaugural address characterized “[t]he foreign slave trade” as “imperfectly suppressed . . .” ABRAHAM

The framers did not expect, however, that the Clause would apply to children of diplomats. Senator Howard explicitly stated that the Clause “will not, of course, include persons born in the United States . . . who belong to the families of ambassadors”¹⁰⁷ Senators Trumbull and Williams expressed similar sentiments.¹⁰⁸ Moreover, when supporters stated that the Clause codified existing law, they necessarily implied the exclusion of diplomats’ children because that exclusion was a well-known feature of antebellum law.¹⁰⁹

Nor was the Clause deemed applicable to children of “renegade” Indians who belonged to no tribe.¹¹⁰ Because the framers knew of these Indians and opposed birthright citizenship for their children, when drafting the Civil Rights Act the framers rejected language that only excluded Indians belonging to a tribe.¹¹¹ Instead, they employed

LINCOLN, FIRST INAUGURAL ADDRESS - FINAL TEXT (1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 269 (Roy P. Basler ed., 1953). *See also* W.E.B. DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA 1638-1870, at 115-20, 126-29, 159-61, 178-83 (New York, Longmans, Green, & Co. 1896) (discussing the inadequacy of federal enforcement efforts and the continuation of slave smuggling through the 1850s).

107. *See* GLOBE, *supra* note 1, at 2890 (statement of Sen. Howard, R-Mich.). Regarding consensualist attempts to misread this statement as applying to non-diplomatic aliens, see *infra* Part IV.B.2.

108. *See* GLOBE, *supra* note 1, at 2897 (statement of Sen. Williams, R-Or.) (noting that “the child of an ambassador” was “subject to the jurisdiction of the United States” only “to a certain extent . . . but not in every respect.”); *id.* at 572 (statement of Sen. Trumbull, R-Ill.) (“We cannot make a citizen of the child of a foreign minister who is temporarily residing here.”).

109. *See, e.g.,* *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting); *Lynch v. Clarke*, 1 Sand. Ch. 583, 658 (N.Y. Ch. 1844); GLOBE, *supra* note 1, at 2769 (statement of Sen. Wade, R-Ohio) (“[A] person may be born here and not a citizen. I know that is so . . . in the case of the children of foreign ministers . . .”).

110. *See* Williams, *supra* note 1, at 834 (employing this label to refer to Indians who lacked tribal ties and were exempt to federal jurisdiction).

111. *Compare* GLOBE, *supra* note 1, at 526 (statement of Sen. Conness, R-Cal.) (complaining that, although some Indians on California reservations had “no capacity for citizenship,” they would not be excluded by language regarding “tribal authority,” because they were “not under the direction of any tribal authority whatever.”), *id.* at 572 (statement of Sen. Trumbull, R-Ill.) (opposing citizenship for “Indians not subject to tribal authority . . . of whom the authorities of the United States took no jurisdiction.”), *id.* at 572 (statement of Sen. Doolittle, R-Wis.) (“Although some of these Indians may be disconnected from their tribes, and may be wandering in bands and in families . . . I do not think they are yet in a condition to be . . . citizens of the United States . . .”), *id.* at 573 (statement of Sen. Williams, R-Or.) (“[T]hese Indians . . . are collected upon reservations; they are not subject to tribal authority . . . but they are no more competent or qualified to vote than they were when they existed as original tribes.”), *id.* at 574 (statement of Sen. Ramsey, R-Minn.) (opposing citizenship for “large bodies of Indians not subject to tribal authority . . .”), *and id.* at 574 (statement of Sen. Lane, R-Kan.) (opposing citizenship for “the very lowest class of Indians, the vagrant Indians who have separated themselves from their tribal authority.”), *with id.* at 504 (statement of Sen. Lane, R-Kan.) (proposing a citizenship provision which read, “All persons born in the United States, and not subject to any foreign Power or tribal authority, are hereby declared to

terminology that encompassed all Indians—tribal and “renegade”—not subject to federal sovereign authority.¹¹² Although “renegade” Indians were never explicitly discussed during the Citizenship Clause debates, several Senators who strongly opposed their citizenship were present for those debates. Yet, not only were these opponents unconcerned that the Clause might encompass “renegade” Indians; they also rejected as redundant the proposal to explicitly exempt “Indians not taxed” from the Clause.¹¹³ Thus, it appears the framers expected the jurisdiction requirement to exclude “renegade” Indians from birthright citizenship.¹¹⁴

2. Expected Applications and Original Meaning

Having established the Citizenship Clause’s various original expected applications, we now consider whether they are more consistent with the outcomes arising from the orthodox interpretation, or with those produced by the consensualist interpretation.

be citizens of the United States . . .”), *id.* at 526 (statement of Sen. Pomeroy, R-Kan.) (“I move to insert the words ‘tribal authority’ after the word ‘Power.’”), *id.* at 572 (statement of Sen. Henderson, R-Mo.) (proposing the exclusion of Indians “not owing allegiance to any tribe.”), *and id.* at 574 (statement of Sen. Henderson, R-Mo.) (“I move to amend [the citizenship provision of the Civil Rights Act] by striking out the words ‘not taxed’ and inserting the words ‘not subject to tribal authority.’”).

112. After Trumbull added “excluding Indians not taxed” to the Civil Rights Act’s citizenship provision, Conness stated, “That will do,” and Ramsey noted that this had “overcome” his concerns about “renegade” Indians. *Id.* at 527 (statement of Sen. Trumbull, R-Ill.); *id.* (statement of Sen. Conness, R-Cal.); *id.* at 571 (statement of Sen. Ramsey, R-Minn.). Trumbull noted that Constitution used “Indians not taxed” to refer to “Indians who do not recognize the government of the United States at all, who are not subject to our laws . . . whom we do not pretend to . . . punish for the commission of crimes one upon the other . . .” *Id.* at 527 (statement of Sen. Trumbull, R-Ill.).

113. *Compare id.* at 2897 (listing Senators Conness, Lane, Ramsey, Trumbull, and Williams as voting against Doolittle’s proposed “excluding Indians not taxed” amendment), *with id.* at 526 (statement of Sen. Conness, R-Cal.) (opposing “renegade” Indians’ citizenship), *id.* at 572 (statement of Sen. Trumbull, R-Ill.) (similar), *id.* at 573 (statement of Sen. Williams, R-Or.) (similar), *id.* at 574 (statement of Sen. Lane, R-Kan.) (similar), *and id.* at 574 (statement of Sen. Ramsey, R-Minn.) (similar).

114. *See Williams, supra* note 1, at 836 n.256 (noting that “[n]o-one mentioned the fear that nontribal ‘renegade’ Indians might become citizens under the amendment,” because “the fourteenth amendment excluded all those not subject to the United States, and the renegades were presumably subject to U.S. jurisdiction no more than tribal Indians.”).

Admittedly, one scholar does suggest that, under the Citizenship Clause, “members of Tribes were not citizens but . . . individual Native Americans *who were not members of Tribes* would be considered citizens.” Magliocca, *supra* note 1, at 520-21 (emphasis added); *see also* Elk v. Wilkins, 112 U.S. 94, 112 (1884) (Harlan, J., dissenting) (“[T]he [Civil Rights] act of 1866 reached Indians not in tribal relations.”). This suggestion, however, overlooks the controversy that “renegade” Indians provoked during the Civil Rights Act debates, as well as the framers’ understanding that both Act and Clause would exclude such Indians from citizenship. *See GLOBE, supra* note 1, at 526-27, 572-74.

Under the orthodox interpretation, “jurisdiction” originally meant “sovereign power”; thus, in determining the outcomes associated with that interpretation, we must determine the extent of framing-era federal authority over the various aforementioned categories. In antebellum law, children of non-diplomatic aliens were subject to the sovereign power of the federal government.¹¹⁵ The same was true of slaves, both native- and foreign-born.¹¹⁶ On the other hand, long-standing federal law exempted diplomats’ families from federal and state jurisdiction.¹¹⁷ Similarly, Indian immunities applied to children of tribal and “renegade” Indians alike because Indian status was based on parentage, not tribal membership.¹¹⁸ Hence, in the framing era, federal sovereign power applied to persons whom the Citizenship Clause was originally expected to encompass, and those exempt from the Clause’s operation were substantially immune from federal authority. It follows that the outcomes associated with the orthodox interpretation are consistent with the expected applications of the Citizenship Clause.

The same cannot be said, however, of the consensualist interpretation. Under that interpretation, children of both non-diplomatic aliens and “illegal slaves” would have been excluded because both categories of alien parents lacked “undivided allegiance” to the United

115. For example, in 1830 Joseph Story noted that “the children even of aliens born in a country while the parents are resident there . . . are [citizens] by birth.” *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 164 (1830) (Story, J., dissenting). He also stated birthright citizenship required a person to be “born within a place where the sovereign is at the time in full possession and exercise of his power” *Id.* at 155. It follows that Story considered aliens’ native-born children to be subject to American sovereign authority at birth. So also did Sen. Trumbull in 1866. Compare *GLOBE*, *supra* note 1, at 498 (statement of Sen. Trumbull, R-Ill.) (“[C]hildren who are born here of parents who have not been naturalized are citizens.”), with *id.* at 527 (“[P]ersons born in the United States and under its authority . . . are citizens . . .”).

116. See Act of Sept. 18, 1850, Ch. 60, 9 Stat. 462 (authorizing federal assistance in capturing fugitive slaves); *United States v. Amy*, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14,445) (“As a person, [a slave] is bound to obey the law, and may, like any other person, be punished if he offends against it; and he may be embraced in the provisions of the law, either by the description of property or as a person, according to the subject-matter upon which congress [sic] or a state is legislating.”); 2 Op. Att’y Gen. 693, 695 (1834) (noting that federal jurisdiction covered crimes committed in Indian country by a non-Indian’s slave).

117. See 5 Op. Att’y Gen. 69, 70 (1849) (“The laws of the United States . . . vindicate the principles of the extra-territoriality of the minister, his family, and other persons attached to the legation, securing to their persons and personal effects perfect immunity from arrest, seizure, or violence . . .”).

118. See *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (“[T]he exception [excluding intra-Indian crimes from federal jurisdiction] is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally—of the family of Indians”); *United States v. Sanders*, 27 F. Cas. 950, 951 (C.C.D. Ark. 1847) (No. 16,220) (defining Indian status using a rule of matrilineal descent); *People v. Dean*, 14 Mich. 406, 433 (1866) (defining Indian status via patrilineal descent).

States.¹¹⁹ Moreover, as Gerald Neuman rightly notes, “[i]f . . . consent does not extend to the children of parents not lawfully admitted to the United States, then the fourteenth amendment did not constitutionally mandate American citizenship for the children of illegally imported slaves.”¹²⁰ On the other hand, “renegade” Indians lacking any tribal allegiance *would* have owed “undivided allegiance” to the United States.¹²¹ Because no federal law excluded these Indians from American soil, their children would have received birthright citizenship under the consensualist interpretation.¹²² The only expectation that consensualism can account for is the exclusion of diplomats’ children.¹²³

119. Although some consensualists suggest that the Citizenship Clause applies to children of legal aliens, SCHUCK & SMITH, *supra* note 1, at 78, they do not explain how alien parents with a foreign allegiance fulfill the “undivided allegiance” requirement. Others consensualists concede that “U.S.-born children of legally resident aliens are not citizens at birth [under the consensualist interpretation].” Sutherland, *supra* note 1.

120. See NEUMAN, *supra* note 1, at 179. Although a consensualist might argue that “illegally imported slaves . . . constituted a *de minimus* exception to the mutual consent principle that cannot be applied to the much greater number of illegal immigrants arriving now,” Magliocca, *supra* note 1, at 514, this objection erroneously conflates “the expected application of constitutional texts, which is not binding law, and the original meaning, which is.” Balkin, *supra* note 1, at 293. If “jurisdiction” originally meant “sovereign authority,” and the framers decided to use “jurisdiction” because they expected future illegal immigration to remain low, this original meaning would remain the same *even if* the framers’ expectations about future illegal immigration proved mistaken.

121. Admittedly, a consensualist might respond that, because the consensualist interpretation also requires subjection to sovereign power, SCHUCK & SMITH, *supra* note 1, at 86, the jurisdictional exemptions of federal Indian law would exclude “renegade” Indians under a consensualist Citizenship Clause. As noted above, however, consensualists usually exclude Indians on the basis of their tribal allegiances, and overlook the alternative explanation provided by federal Indian law. See *id.* at 79-86. It thus seems fair to neglect Indian immunities when applying consensualism to “renegade” Indians.

Nor can consensualists cite *Goodell v. Jackson ex dem. Smith*, 20 Johns. 693, 710 (N.Y. 1823) (Kent, C.J.) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 583 (1832) (McLean, J., concurring), to argue that “renegade” Indians lacked allegiance to the United States because these opinions concerned only *tribal* Indians. Admittedly, as with diplomats, “renegade” Indians’ absence of allegiance can be attributed to their immunities under federal law. Cf. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 139 (1812) (noting that diplomatic immunity eliminates the temporary allegiance a foreign ambassador would otherwise owe to a receiving state). But if consensualists are going to overlook Indian immunities, they must also ignore the lack of allegiance resulting from those immunities.

122. If, alternately, naturalization statutes—and not immigration laws—were deemed conclusive evidence of consent, then the 1802 Naturalization Act’s limitation to “free white person[s]” would have excluded “renegade” Indians. Act of Apr. 14, 1802, Ch. 28, § 1, 2 Stat. 153; see also 2 KENT, *supra* note 1, at *72 (doubting whether the naturalization laws encompassed “the copper-colored natives of America . . .”). This approach, however, would also have denied citizenship to native-born freedmen, because the statute “exclude[d] the inhabitants of Africa, and their descendants . . .” 2 KENT, *supra* note 1, at *72.

123. See SCHUCK & SMITH, *supra* note 1, at 85 (“Diplomatic families, owing allegiance to their home countries, bore an attachment to the United States . . . even less extensive than that borne by

Thus, the Citizenship Clause's original expected applications are entirely consistent with the orthodox interpretation, but they are largely incompatible with the consensualist alternative. This result suggests that the orthodox interpretation is indeed correct,¹²⁴ and that "jurisdiction" originally meant "sovereign power." It also suggests that the consensualist interpretation is wrong as a matter of original meaning.

C. *The Citizenship Clause During Ratification*

The ratification debates surrounding the Fourteenth Amendment basically recapitulated its legislative history, at least as far as the Citizenship Clause was concerned. Thus, although the Clause drew relatively little attention during the ratification process,¹²⁵ what evidence does exist supports the orthodox interpretation.

First, between the Fourteenth Amendment's drafting in 1866 and its ratification in 1868, both federal and state courts continued to read "jurisdiction" as meaning "sovereign authority" alone.¹²⁶ Given the orthodox interpretation's continued dominance in legal circles, it seems likely that this definition also prevailed among the ratifying public when they were considering the Citizenship Clause. Second, the public did not expect the Clause to abolish birthright citizenship. Supporters noted that the Clause would grant citizenship to those who were "native-born"¹²⁷ or "born here [in the United States]"¹²⁸ Opponents evinced

Indians Moreover, this privileged status of diplomats was one to which both governments consented").

124. This is not to say, of course, that complete consistency with expected applications is a *sine qua non* of original meaning; as Greenberg and Litman rightly note, "it is always possible that, for a given set of practices, there is no rule that is both fully consistent and principled." Greenberg & Litman, *supra* note 1, at 614. Yet even they agree that a term's original meaning should be consistent with "most" expected applications. *Id.* at 615.

125. See BOND, *supra* note 1, at 8 ("[T]he debates did not focus primarily on Section 1").

126. See *In re Kyler*, 14 F. Cas. 887 (S.D.N.Y. 1868) (No. 7,956); *In re Reynolds*, 20 F. Cas. 592, 609 (N.D.N.Y. 1867) (No. 11,721); *Stone v. Brooks*, 35 Cal. 489, 494 (1868); *Steele v. Steele*, 35 Conn. 48, 55 (1868); *Stephenson v. Davis*, 56 Me. 73, 75 (1868); *Smith v. Mut. Life Ins. Co. of N.Y.*, 96 Mass. 336, 342 (1867); *Gemmell v. Rice*, 13 Minn. 400, 403 (1868); *Guernsey v. Am. Ins. Co.*, 13 Minn. 278, 286 (1868) (Wilson, C. J., dissenting); *City of St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580, 587 (1867); *Shann v. Jones*, 19 N.J. Eq. 251, 252 (N.J. Ch. 1868); *State v. Rankin*, 44 Tenn. 145, 147 (1867); *Martin v. Crow*, 28 Tex. 613, 616 (1866).

127. *American Citizenship*, CHI. TRIB., Oct. 10, 1866, at 2 (emphasis added) (noting that the Citizenship Clause "declares that . . . a citizen, *native-born* or naturalized, of the United States, shall also be a citizen of the state wherein he resides."). See also *Massachusetts, The Constitutional Amendment-The Legislative Committee Divided Upon the Question of Adoption-The Minority and Majority Reports-The Colored Member, Mr. Walker, Against Adoption*, N.Y. TIMES, Mar. 2, 1867, at 5 ("It is already well established law . . . that all native-born inhabitants . . . without distinction of color or sex, are citizens of the United States. . . . [I]f this matter should come before the present

the same expectation.¹²⁹ In addition, when ratification of the Fourteenth Amendment was ongoing, Congressional debates regarding the Expatriation Act of 1868¹³⁰ assumed that birthright citizenship would continue to exist.¹³¹

Third, the Clause's expected application to aliens' native-born children was effectively conveyed to the ratifying public. When Sen. Conness expressed this expectation during Senate debate, his statement

Supreme Court as a new question under this amendment, there would be no danger of an adverse decision.”); *The Constitutional Amendment*, CHI. TRIB., Aug. 14, 1866, at 2 (“The amendment declares that all persons born in the United States . . . shall be citizens of the United States . . .”); *The Objections to the Amendment*, CHI. TRIB., Oct. 16, 1866, at 2 (emphasis added) (noting that opponents “object to the first clause by saying that to make *all men born* in the United States citizens, is to place all men upon a political equality. The Clause in the proposed Amendment does not make all men politically equal. It makes them equal in all civil and legal rights pertaining to citizenship.”).

128. *Senator Trumbull In Chicago*, in CAMPAIGN SPEECHES, *supra* note 1, at 6, col. 3 (noting that, under the Clause, “[A]ll who were born here . . . were to be deemed citizens of the United States . . .”). See also *In the Opera House*, CHI. TRIB., Aug. 2, 1866, at 4 (similar); *Nomination of Ashley in the Tenth District*, in CAMPAIGN SPEECHES, *supra* note 1, at 19, col. 1 (similar); *Speech of Governor Morton*, in CAMPAIGN SPEECHES, *supra* note 1, at 35, col. 3 (similar); *Speech of Hon. Columbus Delano, at Coshocton, Ohio, August 28*, in CAMPAIGN SPEECHES, *supra* note 1, at 23, col. 3 (similar); *Speech of Hon. Schuyler Colfax, at Indianapolis, August 7*, in CAMPAIGN SPEECHES, *supra* note 1, at 14, col. 5 (similar); *The Reconstruction Scheme of Congress Passed Over to the States*, N.Y. HERALD, June 15, 1866, at 4 (similar).

129. See *Speech of C.L. Vallandigham*, in CAMPAIGN SPEECHES, *supra* note 1, at 42, col. 5 (“[B]y this amendment it is proposed that all persons shall be citizens, not only of the United States, but of the State in which they reside.”); *The Hon. Geo. H. Pendleton’s Speech*, in CAMPAIGN SPEECHES, *supra* note 1, at 4, col. 3 (similar).

130. Act of July 27, 1868, Ch. 249, 15 Stat. 223.

131. See, e.g., CONG. GLOBE, 40TH CONG., 2d SESS. 869 (1868) (statement of Rep. Pile) (expressing support for “a specific assertion of that doctrine [of expatriation] as applied to persons born within the jurisdiction of the United States.”); *id.* at 986 (statement of Rep. Judd) (criticizing language granting “naturalized citizens” a lesser degree of governmental protection abroad than “the native-born citizen”); *id.* at 1018 (statement of Rep. Woodward) (“By naturalization the foreigner becomes an American citizen . . . as truly as if he was ‘native to the manor born.’”); *id.* at 1102 (statement of Rep. Ashley) (“[P]rotection is due from this government to every citizen foreign born as well as native-born.”); *id.* at 1105 (statement of Rep. Clarke) (“[O]ur laws know no distinction between the rights of a native-born and naturalized citizen . . .”); *id.* at 1156-57 (statement of Rep. Jenckes) (“I do not admit that there is any difference in the quality of citizenship once acquired, whether it be by birth within the jurisdiction of the United States or by the naturalization of persons born in any other part of the earth.”); *id.* at 1804 (statement of Rep. Van Trump) (emphasis added) (“A government has the right to say who, *other than those who are native-born*, shall become its citizens . . .”); *id.* at 4211 (statement of Sen. Howard) (emphasis added) (noting “the duty of the Government to see to it that [a naturalized citizen] is as well protected . . . as a citizen of the United States *as if he were born in this country*.”); *id.* at 4353 (statement of Sen. Yates) (emphasis added) (“[W]herever the American flag floats, there will float protection to the American citizen . . . whether he be *born in this country* or any other land.”); *id.* at 4355 (statement of Sen. Howard) (emphasis added) (“[T]he provision most likely to work out the vindication everywhere of American citizens, be they *home born* or adopted . . . will be adopted.”).

was widely publicized throughout the nation.¹³² Similarly, Ohio Republican Rep. Benjamin Eggleston noted that, under the Clause, “children born here of parents coming to our shores from Germany, Ireland, and other countries, [would] never be denied the . . . character of citizens”¹³³ Another Fourteenth Amendment supporter implicitly admitted that the Clause would grant birthright citizenship to children of Gypsy aliens, when he noted that Gypsies’ pro-Union sentiment made their children worthy of citizenship.¹³⁴ Moreover, in both northern and southern states, Section 1 of the Fourteenth Amendment was viewed as constitutionalizing the Civil Rights Act.¹³⁵ This is significant because the public was well aware that the Act extended citizenship to aliens’ U.S.-born children.¹³⁶

132. See, e.g., *Congressional*, PHILADELPHIA INQUIRER, May 31, 1866, at 1 (“Mr. CONNESS (Cal.) spoke in favor of Mr. Howard’s Amendment. The progeny of [Chinese immigrants] in California was very small in number, and the proposed amendment would but very slightly affect the citizenship of California.”); *Thirty-Ninth Congress*, DAILY AGE, May 31, 1866, at 1 (similar); *Thirty-Ninth Congress*, DAILY NAT’L INTELLIGENCER, May 31, 1866, at 2 (similar); *Thirty-Ninth Congress*, N.Y. TIMES, May 31, 1866, at 1 (similar); *Thirty-Ninth Congress*, N.Y. HERALD, May 31, 1866, at 1 (similar); *Thirty-Ninth Congress*, N. AM. & U.S. GAZETTE, May 31, 1866, at 1 (similar); *XXXIXth Congress*, N.Y. TRIB., May 31, 1866, at 1 (similar); *XXXIXth Congress-First Session*, PUB. LEDGER, May 31, 1866, at 1 (similar). See also *Senator Conness on Reconstruction*, SACRAMENTO DAILY UNION, July 25, 1866, at 2.

133. *Speech of the Hon. Benjamin Eggleston*, in *CAMPAIGN SPEECHES*, *supra* note 1, at 37, col. 3.

134. Madison, Letter to the Editor, *The National Question. The Constitutional Amendments - National Citizenship*, N.Y. TIMES, Feb. 2, 1866, at 1.

135. See BOND, *supra* note 1, at 56-58 (North Carolina); *id.* at 80 (Louisiana); *id.* at 105 (Alabama); *id.* at 123-24 (South Carolina); *id.* at 148-49 (Virginia); *id.* at 234 (Georgia); HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 153 (1908) (“[T]he general opinion held in the North. . . . was that the Amendment embodied the Civil Rights Bill”); *id.* at 149 (Indiana); *id.* at 149 n.35 (New York); GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* ¶ 279, at 290 (Washington, W.H. & O.H. Morrison 1868) (Amendment’s first section “[d]efines national citizenship, and thus makes organic what had already been declared law by the first section of the Civil Rights Bill.”); *Speech of Hon. John Sherman*, in *CAMPAIGN SPEECHES*, *supra* note 1, at 39, col. 3 (similar).

136. See *Bose’s Resolutions*, SACRAMENTO DAILY UNION, Jan. 11, 1868, at 2 (“By the common law all persons born in the country and not subject to a foreign Power are citizens. This was affirmed by William L. Marcy to be the American law Attorney General Bates was of this opinion. So were all the best lawyers in Congress when the Civil Rights bill was passed That Act simply declared the law on this point.”); *Citizenship*, SACRAMENTO DAILY UNION, Jan. 18, 1868, at 2 (“[Great Britain] claims as citizens all children born in that country even though of foreign parents. Our law is the same as to the citizenship of native-born persons. It attaches to them at birth, without regard to race or color The Civil Rights bill was merely declaratory of this fact. . . . It merely states the old and recognized law regarding citizenship”); *Senator Conness on Reconstruction*, SACRAMENTO DAILY UNION, July 25, 1866, at 2 (Act grants birthright citizenship to native-born children of Chinese aliens); *The Civil Rights Bill*, DAILY ALTA CAL., Mar. 15, 1866, at 2 (similar); *The Civil Rights Bill*, SACRAMENTO DAILY UNION, Mar. 29, 1866, at 2 (similar).

Even in California,¹³⁷ where Chinese immigration had long aroused opposition, Fourteenth Amendment supporters affirmed that the Citizenship Clause would apply to Chinese immigrants' native-born children.¹³⁸ Sen. Conness explicitly stated that, under the Citizenship Clause, "children begotten of Chinese parents in California . . . shall be citizens."¹³⁹ Other Californian supporters affirmed that the Clause applied to native-born children of all races,¹⁴⁰ but did not address birthright citizenship for Chinese specifically. Yet even these supporters implicitly echoed Conness when they argued that only foreign-born Chinese would be denied citizenship, or that explicit disfranchisement—not denials of birthright citizenship—would exclude Chinese from voting.¹⁴¹

137. Although California did not ratify the Amendment until 1959, its 1866-1868 ratification debate remains valuable because it illustrates how the ratifying public understood the Clause's original meaning and expected applications.

138. Indeed, they clung to the orthodox interpretation even at the cost of their political careers. See Robert Denning, *A Fragile Machine: California Senator John Conness*, CAL. HIST., Sept. 2008, at 26, 44 (emphasis added) ("The Fourteenth Amendment was one of the most controversial Reconstruction acts among Californians because it threatened to grant rights to Chinese immigrants that the state had denied to them for almost two decades: citizenship, due process, equal opportunity, and possibly suffrage."); *id.* at 45 (noting that, in 1867, "the Democratic Party ended its political exile and retook the state legislature on a platform opposing Chinese citizenship and civil rights."). As Michael Ramsey has noted, these kinds of admissions against interest provide "important evidence" of original meaning. See Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 989 (2008).

139. *Senator Conness on Reconstruction*, SACRAMENTO DAILY UNION, July 25, 1866, at 2.

140. See, e.g., *Democratic Fairness*, SACRAMENTO DAILY UNION, Mar. 24, 1868, at 2 ("[E]very man, woman and child may be a citizen by natural birthright in any country Moreover, this provision of the amendment is already the law of the land by the Civil Rights Act Nor was it less the law before the Civil Rights Act was passed; for it has always been the doctrine of our statesmen . . . that all free persons born in the country are citizens The Civil Rights Act is simply declaratory of that proposition, and the proposed amendment only places it in the Constitution"); *Suffrage and Citizenship*, SACRAMENTO DAILY UNION, Aug. 22, 1867, at 2 (emphasis added) ("Section 1 will . . . make 'citizens' . . . of the two classes referred to - all persons born in the United States, *regardless of their color*, and all persons naturalized - the 'white' complexion being an indispensable requisite under the law.").

141. See *Democratic Fairness*, SACRAMENTO DAILY UNION, Mar. 24, 1868, at 2 (parrying opponents' "cry of negro and Chinese suffrage" by noting that "suffrage is a privilege always limited by statute law."); *Suffrage and Citizenship*, SACRAMENTO DAILY UNION, Aug. 22, 1867, at 2 (asserting that, because "Chinese cannot be naturalized," the Fourteenth Amendment "would therefore leave our Chinese population precisely where they are at present - 'persons' but not 'citizens' . . ."). The latter editorial's reference to naturalization laws suggests that, by "Chinese," the editorial was apparently referring only to foreign-born Chinese, not their native-born children (who were born citizens under the Amendment, and not in need of naturalization). It seems unlikely that supporters would, on the one hand, speak of granting birthright citizenship "regardless of their color," *id.*, while simultaneously excluding a particular group—Chinese immigrants and their children—on the basis of "color." *Id.* Indeed, by contending that Chinese were "persons" within

Admittedly, reliance upon the Fourteenth Amendment ratification debates is potentially problematic because the record of these debates is incomplete.¹⁴² That said, insofar as these debates address the Citizenship Clause, they are consistent with the thesis that “jurisdiction” originally meant “sovereign authority.”

D. *The Citizenship Clause After Ratification*

Further support for the orthodox interpretation of “jurisdiction” can be found in post-ratification authorities that discussed the Citizenship Clause. First, many legal commentators accepted the orthodox interpretation, even though it foreclosed their preferred rule of *jus sanguinis*.¹⁴³ Second, executive branch officials routinely affirmed birthright citizenship for aliens’ native-born children.¹⁴⁴ Third, when

the meaning of the Amendment’s apportionment provision, the editorial implicitly acknowledged that “persons” in the Clause was likewise race-neutral. *Id.*

Although the editorial may have been assuming that native-born Chinese were not citizens at birth, this seems improbable, because antebellum law did not exclude Chinese from birthright citizenship. When Chancellor Kent doubted whether “the Asiatics” could be deemed “white persons’ within the purview of the law,” he was not referring to birthright citizenship, but rather to the naturalization statutes. 2 KENT, *supra* note 1, at *72 (alteration in original) (quoting Act of Apr. 14, 1802, Ch. 28, § 1, 2 Stat. 153). The disparagement of Chinese citizenship in *People v. Hall*, 4 Cal. 399, 404-405 (1854), was “pure dictum . . .” Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 538 n.46 (1984). *But see* Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 687-89 (1995) (arguing that antebellum law denied birthright citizenship to Asian-Americans).

142. *See* BOND, *supra* note 1, at 8 (absence of state-level legislative journals necessitates reliance upon “newspaper and other accounts” that are sometimes “lost” and “fragmentary,” and that “may not accurately reflect the range of views . . .”).

143. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *49 n.1 (O. W. Holmes, Jr. ed., Boston, Little, Brown, & Co. 12th ed. 1873) (deeming “nationality of the parent” the “true” criterion of birthright citizenship, and calling the Citizenship Clause “objectionable” for not adopting such a test); Editorial, 5 AM. L. REV. 780 (1871) (expressing sympathy for “making parentage and not place the test of nationality by birth,” but concluding that the Citizenship Clause “makes the place of birth alone determine the duties of citizenship.”); Thomas P. Stoney, *Citizenship*, 34 AM. L. REG. 1, 3 (1886) (“The word jurisdiction means authority, power, potential authority, actual power.”); Marshall B. Woodworth, *Citizenship of the United States Under the Fourteenth Amendment*, 30 AM. L. REV. 535, 543 (1896) (“Persons born in this country of alien parents . . . are certainly subject to the jurisdiction of the United States; they are subject to its laws and regulations.”).

144. *See, e.g.*, Letter from Alvey A. Adee, Acting Sec’y of State, U.S., to Bartlett Tripp, Ambassador to Austria, U.S. (July 23, 1895), in U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 22, 22 (Washington, D.C., Gov’t Printing Office 1896); Letter from James O. Broadhead, Ambassador to Switz., U.S., to W.Q. Gresham, Sec’y of State, U.S. (Aug. 16, 1893), in U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 656, 661 (Washington, D.C., Gov’t Printing Office 1895); Letter from William M. Evarts, Sec’y of State, U.S., to Michael J. Cramer, Ambassador to Denmark, U.S. (Nov. 12, 1880), in 2 WHARTON, *supra* note 1, § 183, at

judges interpreted the Clause, they generally equated “jurisdiction” with “sovereign authority.”¹⁴⁵ Fourth, dictionaries of the time continued to define “jurisdiction” conventionally.¹⁴⁶

The Supreme Court likewise embraced the orthodox interpretation. *Elk v. Wilkins*¹⁴⁷ endorsed birthright citizenship generally,¹⁴⁸ but excluded Indians from the privilege. Explaining this exclusion, the Court noted that Indians were not subject to taxation or ordinary federal laws.¹⁴⁹ Thus, “Indians born within the territorial limits of the United States” did not meet the jurisdiction requirement because they were no more “subject to [U.S.] political jurisdiction” than “the children of subjects of any foreign government born within the domain of that

397; Letter from William M. Evarts, Sec’y of State, U.S., to Edward F. Noyes, Ambassador to Fr., U.S. (Dec. 31, 1878), *in* 2 WHARTON, *supra* note 1, § 183, at 396, 397; Fish, *supra* note 1, at 1192; Letter from Hamilton Fish, Sec’y of State, U.S., to Charles Lederer, Minister to the U.S., Austria (Dec. 24, 1872), *in* 2 WHARTON, *supra* note 1, § 183, at 395; Letter from Hamilton Fish, Sec’y of State, U.S., to George P. Marsh, Ambassador to Italy, U.S. (May 19, 1871), *in* 2 WHARTON, *supra* note 1, § 183, at 394; Letter from W.Q. Gresham, Sec’y of State, U.S., to James O. Broadhead, Ambassador to Switz., U.S. (Sept. 6, 1893), *in* U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 667, 667 (Washington, D.C., Gov’t Printing Office 1895); Letter from W.Q. Gresham, Sec’y of State, U.S., to Theodore Runyon, Ambassador to Germany, U.S. (Apr. 19, 1895), *in* U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 536, 536 (Washington, D.C., Gov’t Printing Office 1896); Letter from Frederick W. Seward, Acting Sec’y of State, U.S., to Nicholas Fish, Ambassador to Switz., U.S., (Aug. 20, 1878), *in* 2 WHARTON, *supra* note 1, § 183, at 396. *Cf.* 13 Op. Att’y Gen. 89, 91 (1869) (acknowledging the common-law rule).

145. *See* Fong Yue Ting v. United States, 149 U.S. 698, 716 (1893); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 95 (1872) (Field, J., dissenting); *Gee Fook Sing v. United States*, 49 F. 146, 147-48 (9th Cir. 1892); *In re Wy Shing*, 36 F. 553 (C.C.N.D. Cal. 1888); *In re Yung Sing Hee*, 36 F. 437, 438 (C.C.D. Or. 1888); *Ex parte Chin King*, 35 F. 354, 355 (C.C.D. Or. 1888); *In re Look Tin Sing*, 21 F. 905, 906 (C.C.D. Cal. 1884); *United States v. Anthony*, 24 F. Cas. 829, 830 (C.C.N.D.N.Y. 1873); *In re Rodriguez*, 81 F. 337, 353 (W.D. Tex. 1897); *In re Wong Kim Ark*, 71 F. 382, 386 (N.D. Ca. 1896), *aff’d sub nom.* *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *United States v. Osborn*, 2 F. 58, 61 (D. Or. 1880); *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877) (No. 15,048); *McKay v. Campbell*, 16 F. Cas. 161, 165 (D. Or. 1871) (No. 8,840); *In re MacFarlane*, 11 Haw. 166, 175 (1897); *Stadtler v. School Dist. No. 40*, 73 N.W. 956, 959 (Minn. 1898); *State v. Jackson*, 80 Mo. 175, 177 (1883); *State v. Ah Chew*, 16 Nev. 50, 58 (1881). *Cf.* *Town of New Hartford v. Town of Canaan*, 5 A. 360, 361-64 (Conn. 1886) (affirming the common-law rule).

146. *See, e.g.*, 1 JOHN BOUVIER, A LAW DICTIONARY 769-70 (Philadelphia, J.B. Lippincott & Co. 14th ed. 1878); HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 663 (St. Paul, West Publishing Co. 1891); WILLIAM C. COCHRAN, THE STUDENTS’ LAW LEXICON 156-57 (Cincinnati, Robert Clarke & Co. 1888); J. KENDRICK KINNEY, A LAW DICTIONARY AND GLOSSARY 410 (Chicago, Callaghan & Co. 1893); 1 ROBERT L. LAWRENCE & STEWART RAPALJE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 702-03 (Jersey City, Frederick D. Linn & Co. 1888).

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

148. *See id.* at 109 (quoting *United States v. Osborn*, 2 F. 58, 61 (D. Or. 1880)) (emphasis added) (deeming U.S. citizenship “a political privilege which no one *not born to* can assume without [the United States’] consent in some form.”).

149. *See id.* at 99-100.

government, or the children born within the United States of ambassadors”¹⁵⁰ *United States v. Wong Kim Ark*¹⁵¹ extended this reasoning to native-born children of aliens. Because these children were born subject to American sovereign power, the Clause therefore entitled them to birthright citizenship.¹⁵²

E. The Original Meaning of “Jurisdiction”

In sum, the bulk of the available evidence supports the orthodox interpretation of the Citizenship Clause. Both antebellum sources and the Clause’s legislative history strongly suggest that the original meaning of “jurisdiction” was “sovereign authority.” This conclusion is also consistent with the Clause’s original expected applications and with evidence from the Fourteenth Amendment’s ratification debates. Further support for this conclusion can be found in post-ratification commentary regarding the Clause, and a long line of judicial decisions endorsing the orthodox interpretation.

IV. CRITIQUING THE CONSENSUALIST INTERPRETATION

Besides the copious evidence favoring the orthodox reading of “jurisdiction,” there are other reasons to reject a consensualist interpretation of the Citizenship Clause.¹⁵³ First, consensualism finds little support in antebellum citizenship law. Nor do the legislative histories of the Citizenship Clause and Civil Rights Act buttress the consensualist reading. Finally, most of the evidence from during and after ratification cuts against the consensualist interpretation.

150. *Id.* at 102. *But see* FEERE, *supra* note 1, at 10 (quoting *Elk*, 112 U.S. at 102) (suggesting that “that government” referred to the U.S. government, not a foreign government).

151. *Wong Kim Ark*, 169 U.S. 649.

152. *See id.* at 687-88 (embracing the orthodox interpretation on the basis of prior precedent); *id.* at 693 (concluding that, under this interpretation, the Clause granted birthright citizenship to native-born children of non-diplomatic aliens).

153. Owing to space constraints, this article primarily focuses on consensualist arguments not previously addressed in NEUMAN, *supra* note 1, at 171-80; Epps, *supra* note 1, at 361-62, 370-72; James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the Fourteenth Amendment*, 9 GREEN BAG 2d 367, 372-77 (2006); Magliocca, *supra* note 1, at 524-25; Shawhan, *Virtue*, *supra* note 1 (manuscript at 30 n.99, 38 n.138, 44-54, 68 n.246).

A. *Consensualism and Antebellum Citizenship Law*

As noted above, antebellum law generally accepted¹⁵⁴ the common-law rule that the Citizenship Clause constitutionalized. In a novel challenge to this conventional understanding, a recent consensualist article contends that 1) the common law granted birthright citizenship only to children of citizens; and 2) aliens' children received birthright citizenship via the 1802 Naturalization Act.¹⁵⁵ Another argues that under antebellum law, individual consent to U.S. allegiance by alien parents was a prerequisite of their child's birthright citizenship.¹⁵⁶ However, none of these contentions is correct.

First, although some antebellum commentators favored *jus sanguinis* for all native-born persons, such views were rejected by the

154. The only exceptions to this rule were slaves, southern free blacks, and "American *ante nati*" born before the Revolutionary War ended. See *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 120-27 (1830) (American antenati); *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 334 (1822) (free blacks); 7 Op. Att'y Gen. 746, 749 (1856) (slaves). Of course, free blacks' exclusion was criticized for its inconsistency with the common-law rule. See, e.g., *Amy*, 11 Ky. (1 Litt.) at 337-38 (Mills, J., dissenting).

Indians' exclusion from birthright citizenship was consistent with the common-law rule, because Indians' immunities meant that they were not born under the sovereign power of the United States. See *Goodell v. Jackson ex dem. Smith*, 20 Johns. 693, 710, 712 (N.Y. 1823) (Kent, C.J.) (emphasis added) (listing various laws to which Indians were not subject, and then concluding that U.S.-born Indians "are not our subjects, *born within the purview of the law*, because they are not born in obedience to us."). One consensualist argument suggests that federal law's limited protection of Indians made this exclusion inconsistent with the common-law rule. See SCHUCK & SMITH, *supra* note 1, at 64. However, if the common-law rule could exclude diplomats' children, despite the protection they received from federal law, then federal protection did not necessarily imply birthright citizenship for Indians. See Act of Apr. 30, 1790, Ch. 9, § 28, 1 Stat. 112, 118 (authorizing the imprisonment of "any person [who] shall assault, strike, wound . . . or . . . offer[] violence to the person of an ambassador or other public minister . . .").

155. See Mayton, *supra* note 1, at 234-35 ("*Jus sanguines* was the underlying and organic rule of United States citizenship."); *id.* at 252 n.134 ("[C]hildren of [alien] parentage routinely gained birthright citizenship under the Immigration and Naturalization Act of 1790."). The obvious implication of this thesis is that, if the Clause codified the common-law, it codified a rule of *jus sanguinis*.

Note that, although the 1790 Act was repealed, its provision automatically naturalizing minor children was reenacted by its 1802 successor. Compare Act of Apr. 14, 1802, Ch. 28, § 4, 2 Stat. 153, 155, with Act of Mar. 26, 1790, Ch. 3, § 1, 1 Stat. 103, 104.

156. See Charles, *supra* note 1 (manuscript at 9) (birthright citizenship requires parental allegiance); *id.* (temporary allegiance requires an oath). He labels this consent "personal subjection," which, in modern law, supposedly occurs via compliance with immigration laws. *Id.* at 29 (allegiance required "some form of personal subjection to government, not mere presence."); *id.* at 42 ("[U]nlawful immigrants . . . have not personally subjected themselves to the jurisdiction of the United States, [or] acquired the requisite temporary or local allegiance by complying with the immigration laws . . .").

common law.¹⁵⁷ In two 1830 decisions, the Supreme Court did employ *jus sanguinis*, but only to determine the nationality of persons who were minors when the American Revolution ended.¹⁵⁸ Moreover, the Court specifically limited these precedents to situations in which “a revolution occurs; a dismemberment takes place; new governments are formed; and new relations between the government and the people are established.”¹⁵⁹ In the 1863 decision of *Ludlam v. Ludlam*,¹⁶⁰ the New York Court of Appeals did remark that “permanent allegiance,” or “allegiance by birth,” depended upon “parentage,” and had to be

157. Compare 1 J. J. BURLAMAQUI, PRINCIPLES OF NATURAL AND POLITIC LAW Ch. 5, § 9, at 213 (Thomas Nugent trans., Boston, John Boyle, Benjamin Larkin & James White 4th ed. 1792) (1748) (endorsing *jus sanguinis* for native-born children), 4 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW Ch. 131, art. 2, § 8, at 700 (Boston, Cummings, Hillard & Co. 1824) (similar), 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 994 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688) (similar), JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 48, at 59 (Boston, Hilliard, Gray & Co. 5th ed. 1857) (similar), and 3 VATTTEL, *supra* note 1, bk. 1, § 212, at 87 (similar), with *Lynch v. Clarke*, 1 Sand. Ch. 583, 673-83 (N.Y. Ch. 1844) (rejecting the *jus sanguinis* proposals of these commentators).

158. In general, persons who lived during the Revolution were allowed “a reasonable time” to elect between “remain[ing] subjects of the British Crown, or to becom[ing] members of the United States.” *Inglis*, 28 U.S. (3 Pet.) at 160 (Story, J., dissenting). However, because a minor was deemed incapable of making such a choice, “his election [i.e., choice of nationality] and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority” *Id.* at 126 (majority opinion). See also *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 245 (1830) (noting that a minor during the Revolution “might well be deemed . . . to hold the citizenship of her father . . .”).

In his *Inglis* dissent, Joseph Story rejected this use of *jus sanguinis*, and cited that principle only to buttress a conclusion he deemed fully-supported by English law. Compare *Inglis*, 28 U.S. (3 Pet.) at 126 (majority opinion), with *id.* at 170 (Story, J., dissenting) (“[I]f [Inglis] was born after the 4th of July 1776, and before the 15th of September 1776, he was born an American citizen . . . whether or not parents had at the time of his birth elected to become citizens”), and *id.* at 169-70 (citation omitted) (“Vattel considers the general doctrine to be that children generally acquire the national character of their parents, and it is certain, both by the common law and the statute law of England, that the demandant would be deemed a British subject.”). But see *Mayton*, *supra* note 1, at 230 n.41 and accompanying text (representing Story’s citation of Vattel as an endorsement of *jus sanguinis* generally).

Note also that *Shanks* deemed place of birth relevant to eligibility for American citizenship and British subjectship. See *Shanks*, 28 U.S. (3 Pet.) at 245, 247. But see *Mayton*, *supra* note 1, at 236 (deeming *Shanks* “consistent with *jus sanguines*.”).

159. See *Inglis*, 28 U.S. (3 Pet.) at 120 (majority opinion). See also *Lynch v. Clarke*, 1 Sand. Ch. 583, 683 (N.Y. Ch. 1844) (noting such cases’ focus upon “the anomalous state of allegiance produced by the Revolution”). The “right of election” did reappear following some U.S. territorial acquisitions. See Treaty with Russia, U.S.-Russ., Mar. 30, 1867, art. 3, 15 Stat. 539, 542 (permitting Alaska inhabitants to elect American or Russian nationality); Treaty with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, art. 8, 9 Stat. 922, 929 (similar for Mexican Cession inhabitants).

160. *Ludlam v. Ludlam*, 26 N.Y. 356 (1863).

“transmitted from the parents to the child, or it could not exist.”¹⁶¹ Yet this reasoning only applied to U.S. citizens’ foreign-born children.¹⁶² For births on American soil, the common-law rule remained in force.¹⁶³

Second, the 1802 Naturalization Act did not grant birthright citizenship to native-born children of aliens. A provision of this law did automatically naturalize a minor resident child whenever one of his parents underwent naturalization.¹⁶⁴ However, this provision was silent regarding its applicability to native-born children,¹⁶⁵ and antebellum authorities consistently applied this provision only to children born abroad.¹⁶⁶ Moreover, even assuming this provision did naturalize native-

161. *Id.* at 364. Note that, although such reasoning explained how citizens’ foreign-born children might obtain birthright citizenship, it did not rule out the possibility that “the nature of permanent allegiance” might permit native-born children to acquire “natural allegiance” via other means (e.g., the common-law rule’s emphasis on place of birth and sovereign authority). *Id.* at 364-65.

162. Before these remarks about allegiance and parentage, the court rhetorically inquired, “Now, upon what ground can allegiance *in such cases* be claimed?” *Id.* at 364 (emphasis added). The “cases” in question concerned “children of English parents, though born abroad . . .” *Id.* The Court construed American common law on the basis of its English predecessor. *Id.* at 362.

163. *See id.* at 371 (acknowledging that, “by the law of England the children of alien parents, born within the kingdom, are held to be citizens.”); *id.* at 376 (“If we assume that the laws of Peru are similar to ours on the subject of citizenship, there is no doubt that [a child born there of a U.S. citizen] would be . . . regarded as a citizen of Peru.”). *See also* *Munro v. Merchant*, 28 N.Y. 9, 40 (1863) (stating that a plaintiff “born in this state of non-resident alien parents . . . is *prima facie* a citizen . . .”).

One consensualist suggests that *Ludlam* rejected *Calvin’s Case*, (1608) 77 Eng. Rep. 377 (K.B.), a celebrated English precedent that endorsed the common-law rule. Mayton, *supra* note 1, at 235, 239. In fact, however, *Ludlam* specifically stated that its “conclusion [regarding the nationality of citizens’ foreign-born children] needs no other support than the principles laid down in *Calvin’s case*.” *Ludlam*, 26 N.Y. at 365.

164. *See* Act of Apr. 14, 1802, Ch. 28, § 4, 2 Stat. 153, 155 (“[C]hildren of persons duly naturalized under any of the laws of the United States . . . being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States . . .”).

165. *See* Mayton, *supra* note 1, at 233 (emphasis added) (“It mattered not whether these children had been born *in the United States* or abroad”).

166. *See* 10 Op. Att’y Gen. 329, 329-30 (1862) (emphasis added) (citation omitted) (citing Act of Apr. 14, 1802, Chap. 28, § 4, 2 Stat. 153) (“Under the 4th section of the act of April 14, 1802, to establish a uniform rule of naturalization . . . such children [of aliens who undergo naturalization], if dwelling in the United States, are declared citizens. . . . *The section, of course, refers to children born out of the United States, since the children of such persons, born within the United States, are citizens without the aid of statutory law.*”). *See also* *Campbell v. Gordon*, 10 U.S. (6 Cranch) 176, 183 (1810); *Vint v. King*, 28 F. Cas. 1200, 1216 (W.D. Va. 1853) (No. 16,950); *State v. Penney*, 10 Ark. 621, 630 (1850); *O’Connor v. State*, 9 Fla. 215, 234-35 (1860); *Lynch v. Clarke*, 1 Sand. Ch. 583, 679-80 (N.Y. Ch. 1844); *West v. West*, 8 Paige Ch. 433 (N.Y. Ch. 1840); *Young v. Peck*, 21 Wend. 389, 391 (Sup. Ct. N.Y. 1839); *In re Morrison*, 22 How. Prac. 99 (N.Y. Ct. Com. Pl. 1861); *Sasportas v. De La Motta*, 31 S.C.Eq. (10 Rich.Eq.) 38, 46 (S.C. App.Eq. 1858); *In re Conway*, 17 Wis. 543, 545 (1863).

born children, the resultant status still wouldn't amount to "birthright citizenship" because antebellum naturalization was not retroactive to the moment of birth.¹⁶⁷

Third, individual consent by alien parents, via "announcing of one's presence and taking an oath,"¹⁶⁸ was not a prerequisite of birthright citizenship. Admittedly, some antebellum authorities conditioned birthright citizenship of an alien's child upon the alien's "temporary allegiance" to the United States.¹⁶⁹ However, under antebellum law, temporary allegiance was "imposed upon [an alien] by the mere fact of his residence," and was not conditioned upon "domiciliation . . . [or] taking of an oath of allegiance"¹⁷⁰ Hence, during the Civil War, Secretary of State William Seward characterized "the expediency of requiring oaths [of allegiance] from" aliens in Union-occupied rebel territory as both "doubtful" and unnecessary since even without such oaths, "[f]oreigners owe temporary allegiance to the authorities wherever they reside."¹⁷¹ President Abraham Lincoln likewise noted that "all aliens residing in the United States" were obliged "to submit to and obey the laws and respect the authority of the Government," but "cannot be required to take an oath of allegiance to this Government . . .

167. For example, *Priest v. Cummings*, 20 Wend. 338 (N.Y. 1838), denied that "the effect of naturalization under the general acts of congress . . . can retroact so as to divest rights which have been acquired by others previous to such naturalization." *Id.* at 345. See also *People v. Conklin*, 2 Hill 67, 70 (N.Y. Sup. Ct. 1841); *Keenan v. Keenan*, 41 S.C.L. (7 Rich.) 345, 350-51 (S.C.App.L. 1854); *Vaux v. Nesbit*, 6 S.C.Eq. (1 McCord Eq.) 352, 372-73 (S.C.App. 1826). Executive-branch rulings also denied naturalization's retroactivity. See, e.g., 3 A DIGEST OF INTERNATIONAL LAW § 401, at 424 (John Bassett Moore ed., 1906).

168. Charles, *supra* note 1 (manuscript at 9).

169. See *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 164 (1830) (Story, J., dissenting) (emphasis added) ("[A]t the common law . . . the children even of aliens born in a country, while the parents are resident there . . . and owing a temporary allegiance thereto, are subjects by birth."); BLACK'S LAW DICTIONARY 87 (9th ed. 2009) (defining "temporary allegiance" as "[t]he impermanent allegiance owed to a state by a resident alien during the period of residence."). But see *Lynch v. Clarke*, 1 Sand Ch. 583, 663 (N.Y. Ch. 1844) (deeming "the situation of [a child's] parents" irrelevant to birthright citizenship); 10 Op. Att'y Gen. 382, 399 (1862) (similar).

170. Webster, *supra* note 1, at 526. Because Webster also viewed the "duty of obedience to the laws," as "arising from local and temporary allegiance," *id.*, fulfilling that duty could not have been a prerequisite for that allegiance. But see Charles, *supra* note 1 (manuscript at 9) (suggesting that someone who "violated any federal statute" could not owe temporary allegiance). Although Webster mentioned "residence," Webster, *supra* note 1, at 526, in antebellum law U.S. domicile required U.S. "residence and the intention that it be permanent[.]" but not lawful presence, Shawhan, *Domicile*, *supra* note 1, at 1359. This implies that lawful presence was not a condition precedent of U.S. residence either. But see Charles, *supra* note 1 (manuscript at 42) (asserting that "lawful residence" required "complying with the immigration laws . . .").

171. Letter from William H. Seward, Sec'y of State, U.S., to Edwin M. Stanton, Sec'y of War, U.S. (Jun. 24, 1862), in RECORDS, *supra* note 1, at 172.

.¹⁷² Hence, even assuming *arguendo* that alien parents' temporary allegiance was a prerequisite of their native-born child's birthright citizenship, individual consent still would have been irrelevant to that citizenship. Such irrelevance, and the Clause's declaratory nature,¹⁷³ makes it unlikely that the framers deemed consent to be part of the jurisdiction requirement.¹⁷⁴

B. *Consensualism and Legislative History: Indians, Aliens, and the Citizenship Clause*

As noted above, the legislative histories of the Citizenship Clause and the Civil Rights Act contain many statements consistent with the orthodox interpretation.¹⁷⁵ By way of response, consensualists cite excerpts from these histories in an attempt to buttress the consensualist interpretation.¹⁷⁶ However, when these excerpts are read in context, they provide little support for consensualism.

1. Lyman Trumbull and Allegiance

When discussing tribal Indians, Trumbull seemingly defined the jurisdiction requirement as "not owing allegiance to anybody else."¹⁷⁷ Consensualists cite this statement as proof that the Citizenship Clause excludes children of persons owing a foreign allegiance.¹⁷⁸ This seems unlikely, however, given Trumbull's previous equation of "jurisdiction" with "sovereign power," and his endorsement of birthright citizenship for aliens' children.¹⁷⁹ More likely, when Trumbull mentioned

172. Abraham Lincoln, General Orders, No. 82 (Jul. 21, 1862), in RECORDS, *supra* note 1, at 234, 235.

173. *See supra* note 28.

174. *But see* Charles, *supra* note 1 (manuscript at 18) (arguing that the Clause required "personal subjection" or consent).

175. *See supra* Parts III.A-B.

176. *See, e.g.,* SCHUCK & SMITH, *supra* note 1, at 74-83.

177. GLOBE, *supra* note 1, at 2893 (statement of Sen. Trumbull, R-Ill.) ("What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else."). *See also id.* at 2894 (statement of Sen. Trumbull, R-Ill.) ("[Indians] are not subject to our jurisdiction in the sense of owing allegiance solely to the United States.").

178. *See, e.g.,* SCHUCK & SMITH, *supra* note 1, at 81-82.

179. *See* GLOBE, *supra* note 1, at 498 (statement of Sen. Trumbull, R-Ill.) (noting that the Civil Rights Act granted birthright citizenship to Chinese immigrants' children); *id.* at 1488 (statement of Sen. Trumbull, R-Ill.) (suggesting that the United States ought to "by legislation, without attempting to get up treaties in any shape, bring [Indians] within our jurisdiction, and extend our laws over them.") Notably, when Trumbull proposes bringing Indians "within our jurisdiction," he doesn't mention demanding allegiance of them or making them citizens; rather, he proposes "extend[ing]

“allegiance,” he was referring to what the Supreme Court, in *Elk v. Wilkins*, subsequently labeled the “immediate allegiance” of Indians to their tribes.¹⁸⁰ Ordinarily, “immediate allegiance” was the allegiance owed by persons directly subject to U.S. sovereign power;¹⁸¹ and was either the permanent allegiance of citizens within U.S. territory, or the temporary allegiance of resident aliens.¹⁸² However, because a tribal Indian’s child was also partially subject to the tribe’s sovereign power, the child owed a “partial [tribal] allegiance” that was an “[immediate] allegiance [owed] to anybody else.”¹⁸³ Therefore, he was excluded from birthright citizenship.

By contrast, although an alien’s U.S.-born child may owe permanent allegiance to his parent’s country of origin,¹⁸⁴ in the United

our laws over them.” *Id.* This implies an orthodox interpretation of “jurisdiction,” not a consensualist one.

180. See *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) (“[M]embers of those [Indian] tribes owed immediate allegiance to their several tribes . . .”).

181. See *Elk*, 112 U.S. at 102 (noting that persons “completely subject to [the United States’] political jurisdiction . . . ow[e] them direct and immediate allegiance.”); Green, *supra* note 1, at 34 (“[I]n English and American political thought . . . [t]he government has a duty to protect those in its jurisdiction, and the subject has a duty to maintain allegiance to the government . . .”).

One scholar argues that “immediate allegiance” is an “assumptive take on allegiance [that] ignores federal plenary authority over immigration and foreign affairs.” Charles, *supra* note 1 (manuscript at 40). However, “immediate allegiance” is consistent with both Supreme Court precedent, *Elk*, 112 U.S. at 102, and antebellum law, see *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 139 (1812). Moreover, the framers *intended* to restrict governmental power over citizenship, in order to prevent future legislative denials of black citizenship. See GLOBE, *supra* note 1, at 2896 (statement of Sen. Howard, R-Mich.) (“We desired to put this question of citizenship . . . beyond the legislative power of [opponents], who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.”).

Nor does the orthodox interpretation limit federal power “to exclude non-citizens,” Charles, *supra* note 1, (manuscript at 40), because courts have consistently affirmed deportations of illegal alien parents with U.S. citizen children. See Amanda Colvin, Comment, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution*, 53 ST. LOUIS U. L.J. 219, 226-27 (2008) (discussing such precedents); Jessie M. Mahr, Comment, *Protecting Our Vulnerable Citizens: Birthright Citizenship and the Call for Recognition of Constructive Deportation*, 32 S. ILL. U. L.J. 723, 730-35 (2008) (similar).

182. See BLACK’S LAW DICTIONARY 87 (9th ed. 2009) (defining “permanent allegiance” as “[t]he lasting allegiance owed to a state by its citizens or subjects,” and “temporary allegiance” as “[t]he impermanent allegiance owed to a state by a resident alien during the period of residence.”).

183. GLOBE, *supra* note 1, at 2893 (statement of Sen. Trumbull, R-Ill.) (emphasis added) (“It cannot be said of any Indian who owes allegiance, *partial allegiance if you please*, to some other Government that he is ‘subject to the jurisdiction of the United States.’”); Green, *supra* note 1, at 34 (noting that an individual owed allegiance in exchange for the protection provided by his subjection to a sovereign’s power). Although the child of a “renegade,” non-tribal Indian did not owe tribal allegiance, the child did not owe “immediate allegiance” to the United States either, because of his immunities. See *supra* note 121.

184. Of course, this assumes the availability of derivative citizenship to such children.

States the child is not subject to that country's sovereign power. Hence, the child's foreign allegiance is not an "immediate allegiance," and is not a proper analogue to Indians' tribal allegiance. Barring diplomatic immunity, on American soil that child is only subject to U.S. sovereign authority; thus, his only "immediate allegiance" is his natural allegiance to the United States.¹⁸⁵ Because aliens' native-born children do "not ow[e] [immediate] allegiance to anybody else,"¹⁸⁶ Trumbull's gloss on the jurisdiction requirement does not exclude them from birthright citizenship.

Nor did Trumbull exclude transient aliens' children from citizenship when he mentioned "a sort of allegiance . . . due . . . from persons temporarily resident . . . whom we would have no right to make citizens . . ." ¹⁸⁷ Indeed, he had previously *endorsed* birthright citizenship for children of transient Chinese.¹⁸⁸ In context, "persons . . . whom we would have no right to make citizens"¹⁸⁹ clearly refers to those who were *already* aliens under then-existing law. Because children of transient aliens were citizens at birth,¹⁹⁰ Trumbull could not have been referring to them. Antebellum law did, however, exclude children of diplomats;¹⁹¹ and Trumbull had previously mentioned "the child of a

185. See BLACK'S LAW DICTIONARY 87 (9th ed. 2009) (defining "natural allegiance" as "[t]he allegiance that native-born citizens or subjects owe to their nation.").

186. GLOBE, *supra* note 1, at 2893 (statement of Sen. Trumbull, R-Ill.).

187. *Id.* at 572 (statement of Sen. Trumbull, R-Ill.) (emphasis added). *But see* FEERE, *supra* note 1, at 7 (quoting GLOBE, *supra* note 1, at 572 (statement of Sen. Trumbull, R-Ill.)) ("The 'sort of allegiance' owed by an alien 'temporarily resident' in the United States, legally or illegally, would seem to include a duty to follow basic laws, but not the duty of loyalty demanded of a citizen.").

188. See GLOBE, *supra* note 1, at 498 (statement of Sen. Trumbull, R-Ill.) (stating that such children would "Undoubtedly" be citizens at birth); *id.* at 2891 (statement of Sen. Conness, R-Cal.) ("The habits of [Chinese immigrants], and their religion, appear to demand that they all return to their own country Those persons return invariably, while others take their places . . .").

This original expectation—which other framers shared, *supra* note 98—undercuts arguments that the Clause excluded children of transient aliens, Charles, *supra* note 1 (manuscript at 26), or children of aliens lacking a U.S. domicile, Shawhan, *Domicile*, *supra* note 1, at 1353. Under antebellum American law, U.S. domicile required "the intention of making [this country] one's permanent residence," *id.*, which the framers probably did not impute to putatively-transient Chinese aliens.

189. GLOBE, *supra* note 1, at 572 (statement of Sen. Trumbull, R-Ill.).

190. See, e.g., *Lynch v. Clarke*, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844); 10 Op. Att'y Gen. 328, 328 (1862). *But see* Charles, *supra* note 1 (manuscript at 14) (asserting that under antebellum law, "persons born of parents temporarily present could not . . . possess citizenship by birth.").

191. See, e.g., *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting).

foreign minister who is *temporarily residing* here.”¹⁹² This suggests that Trumbull was referring to diplomatic dependents.¹⁹³

What of Trumbull’s reference to “a sort of allegiance”?¹⁹⁴ It was well understood that diplomats owed no allegiance to the United States,¹⁹⁵ so it seems unlikely that Trumbull would imply otherwise. Even with diplomatic immunity, however, an ambassador and his household were still obliged to obey a receiving state’s laws, on pain of nonjudicial expulsion.¹⁹⁶ Because public discourse closely linked this obligation with “allegiance,”¹⁹⁷ it is not surprising that Trumbull would associate “allegiance” with diplomats’ duty to obey American law. Baldly labeling this duty “allegiance” would be incorrect, because diplomats owed no allegiance; but by mentioning “a *sort of* allegiance,”¹⁹⁸ Trumbull could avoid this error, and simultaneously acknowledge diplomats’ obligation to obey the American law.

192. GLOBE, *supra* note 1, at 572 (statement of Sen. Trumbull, R-Ill.) (emphasis added).

193. See SCHUCK & SMITH, *supra* note 1, at 80.

194. GLOBE, *supra* note 1, at 572 (statement of Sen. Trumbull, R-Ill.).

195. See 1 KENT, *supra* note 1, at *38 (“Ambassadors . . . are exempted absolutely from all allegiance . . .”).

196. See 3 VATTEL, *supra* note 1, bk. 4, § 93, at 377 (noting that an ambassador’s diplomatic immunity “does not release him from the duty of conforming in his external conduct to the customs and laws of the country in all that does not relate to his character as ambassador; he is independent, but he has not the right to do whatever he pleases.”); *id.* § 94, at 378 (“If [an ambassador] injures the subjects of the State . . . the injured persons should apply to their sovereign, who will demand justice from the ambassador’s master, and, in case it is refused, will order the unruly minister to leave his domains.”).

197. See, e.g., Opinions of the Justices of Supreme Judicial Court, 44 Me. 505, 545 (1857) (Appleton, J., concurring); *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 157 (1830) (Story, J., dissenting); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 13 (Windham, John Byrne 1795); Webster, *supra* note 1, at 526. See also GLOBE, *supra* note 1, at 1832 (statement of Rep. Lawrence, R-Ohio) (“Citizenship . . . imposes the duty of allegiance and obedience to the laws.”); *id.* at 2799 (statement of Sen. Stewart, R-Nev.) (“Protection and allegiance are reciprocal. It is the duty of the Government to protect; of the subject to obey.”); CONG. GLOBE, 39TH CONG., 2d SESS. app. at 81 (statement of Rep. Miller, R-Pa.) (“[N]o rebellious act on the part of the rebels could dissolve their allegiance to the government of the United States, and consequently they are amenable to its laws and can be tried and punished for their treason . . .”).

This close association probably explains Trumbull’s concern that a provision defining citizenship in terms of allegiance might be construed to encompass diplomatic families. See GLOBE, *supra* note 1, at 572 (statement of Sen. Trumbull, R-Ill.).

198. GLOBE, *supra* note 1, at 572 (statement of Sen. Trumbull, R-Ill.) (emphasis added).

2. Jacob Howard and Other Framers

Other framers also made statements that, at first glance, might seem to support consensualism. Upon closer examination, however, their statements support the orthodox interpretation instead.

For example, although Sen. Howard did state that the Citizenship Clause would exclude “persons born in the United States who are *foreigners, aliens*, who belong to the families of ambassadors or foreign ministers,”¹⁹⁹ the italicized text did not refer to native-born children of non-diplomatic aliens.²⁰⁰ Howard’s statement expressed what he deemed “the law of the land already,”²⁰¹ and although the common-law rule excluded children of diplomats from birthright citizenship, this exclusion did not extend to *all* US-born children of aliens. Thus, it seems likely that Howard simply omitted an “or” between “foreigners, aliens” and that each term was synonymous with “[persons] who belong to the families of ambassadors or foreign ministers”²⁰² Moreover, even assuming Howard intended to exclude aliens outside diplomatic families, the descriptive connotation of his words suggests that “foreigners, aliens”²⁰³ referred to the common-law rule’s second exclusion: children born to invading alien enemies in enemy-occupied territory.²⁰⁴ This exclusion was consistent with the orthodox interpretation because American law exempted invading armies from the invaded country’s jurisdiction.²⁰⁵

Another seemingly-consensualist statement came from House Judiciary Chairman Rep. James Wilson, who noted that “children born on our soil *to temporary sojourners* or representatives of foreign

199. *Id.* at 2890 (statement of Sen. Howard, R-Mich.) (emphasis added).

200. *But see* FEERE, *supra* note 1, at 8.

201. GLOBE, *supra* note 1, at 2890 (statement of Sen. Howard, R-Mich.).

202. *Id.* In the same way, I might refer to a group of Marine combat veterans by saying, “These men are Marines, combat veterans, who have served their country in wartime.” In that sentence, “men,” “Marines,” “combat veterans,” and “who” all refer to the same category of persons.

203. *Id.*

204. *See, e.g.,* Inglis v. Trustees of Sailor’s Snug Harbor, 28 U.S. (3 Pet.) 99, 156 (1830) (Story, J., dissenting); *Craw v. Ramsey*, (1670) 124 Eng. Rep. 1072, 1075 (C.P.); *Calvin’s Case*, (1608) 77 Eng. Rep. 377, 399 (K.B.); 2 KENT, *supra* note 1, at *42.

205. During the Mexican War, the United States deemed persons belonging to its invading armies exempt from Mexican jurisdiction. *See* 2 JUSTIN H. SMITH, THE WAR WITH MEXICO 229 (1919) (“Mexican tribunals were entirely free in dealing with Mexican affairs, though no one connected with our [United States] army could be tried by them”); *id.* at 70-71 (discussing Gen. William Worth’s concession, to Mexican courts, of jurisdiction over American soldiers, and Gen. Winfield Scott’s overriding of Worth’s action). Judicial recognition of this principle came after the Civil War. *See, e.g.,* *Coleman v. Tennessee*, 97 U.S. 509, 516 (1878).

Governments” were not “natural-born citizen[s] of [the United] States”²⁰⁶ Although it is possible that the italicized text referred to alien sojourners’ children, this seems unlikely, given Wilson’s many approving citations to the common-law rule, and the fact that the common-law rule’s leading antebellum precedent explicitly endorsed birthright citizenship for such children.²⁰⁷ More likely, “temporary sojourners” and “representatives of foreign Governments” referred to the same class of persons: diplomats, who were, after all, temporarily present in the United States.²⁰⁸

Likewise, when Sen. Howard mentioned “natural law” in the context of the Citizenship Clause, he was referring to the common-law rule, not consensualism.²⁰⁹ Nor was Sen. Johnson implying consensualism when he endorsed citizenship for children “born of parents . . . subject to the authority of the United States.”²¹⁰ Because

206. GLOBE, *supra* note 1, at 1117 (statement of Rep. Wilson, R-Iowa). Rather, Wilson deemed such children “native-born citizens of the United States.” *Id.* It is unclear what Wilson meant by this phrase. Although Wilson distinguished “native-born citizens” from “natural-born citizens,” ordinarily the two terms were used interchangeably. *Compare id.*, with 1 BOUVIER, *supra* note 1, at 231 (“Citizens are either native born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office . . . except the office of president and vice-president.”). Possibly Wilson was recognizing that, if children of diplomats later underwent naturalization, they would indeed become citizens who were “native-born,” because they had been born on U.S. soil; however, they could never be deemed “natural-born citizens,” because they had not been citizens at birth.

207. *See Lynch v. Clarke*, 1 Sand. Ch. 583, 638 (N.Y. Ch. 1844) (concluding that “Julia Lynch was born in [New York state], of alien parents, during their temporary sojourn.”); *id.* at 663 (“I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen.”). *See also* GLOBE, *supra* note 1, at 1116 (statement of Rep. Wilson, R-Iowa) (quoting 10 Op. Att’y Gen. 382-83 (1862)); *id.* (“The English law made no distinction on account of race or color in declaring that all persons born within its jurisdiction are natural-born subjects This law bound the colonies before the Revolution, and was not changed afterwards.”); *id.* at 1117 (quoting RAWLE, *supra* note 1, at 86); *id.* (quoting *State v. Manuel*, 20 N.C. 144, 150, 4 Dev. & Bat. 20, 26 (1838)); *id.* (citing 2 KENT, *supra* note 1, at *25). *But see* Mayton, *supra* note 1, at 244 (suggesting that Wilson intended to exclude children of alien sojourners from birthright citizenship).

208. GLOBE, *supra* note 1, at 1117 (statement of Rep. Wilson, R-Iowa).

209. *Compare* GLOBE, *supra* note 1, at 2890 (statement of Sen. Howard, R-Mich.) (emphasis added) (“[E]very person born within the limits of the United States, and subject to their jurisdiction, is by virtue of *natural law* and national law a citizen of the United States.”), with *id.* at 2765 (statement of Sen. Howard, R-Mich.) (emphasis added) (noting that “national law, or rather . . . *natural law* . . . recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country.”). *But see* Edward J. Erler, *From Subjects to Citizens: The Social Compact Origins of American Citizenship*, in *THE AMERICAN FOUNDING AND THE SOCIAL COMPACT* 163, 168 (Ronald J. Pestritto & Thomas G. West eds., 2003) (suggesting that Howard was referring to “the social compact basis of citizenship . . .”).

210. GLOBE, *supra* note 1, at 2893 (statement of Sen. Johnson, D-Md.). *But see* FEERE, *supra* note 1, at 9 (suggesting that Johnson endorsed consensualism).

Johnson did not require undivided parental allegiance, his proposal would not have excluded children of illegal aliens. On the contrary, it would have *included* them because illegal aliens are subject to federal sovereign authority via taxation,²¹¹ Selective Service obligations,²¹² liability for treason,²¹³ criminal law,²¹⁴ and (of course) immigration law.²¹⁵

211. See STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUD., *THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET* 25 (2004), available at <http://www.cis.org/articles/2004/fiscal.pdf> (“In 2002, illegal households paid a total of nearly \$16 billion to the federal government.”); ERIKA LUNDER, CONG. RESEARCH SERV., RS21732, *FEDERAL TAXATION OF ALIENS WORKING IN THE UNITED STATES AND SELECTED LEGISLATION* 3 (2008) (“[Illegal aliens] are subject to federal taxes and classified for tax purposes as either resident or nonresident aliens.”).

212. See OFF. OF PUB. & INTERGOVERNMENTAL AFF., *SELECTIVE SERV. SYS., WHO MUST REGISTER CHART* (2009), available at <http://www.sss.gov/PDFs/WhoMustRegisterChart.pdf> (stating that “Undocumented (illegal) aliens” are required to register with Selective Service).

213. This liability arises from illegal aliens’ obligation of “local allegiance” to the United States. See *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154-55 (1872) (holding that aliens owing “local and temporary allegiance” to the United States “were amenable to the laws of the United States prescribing punishment for treason . . .”); *Janusis v. Long*, 188 N.E. 228, 231 (Mass. 1933) (emphasis added) (“Aliens unlawfully within the country are subject to the criminal law and may be prosecuted and punished for its infraction according to the law of the land. To that extent they owe allegiance to the laws of the government.”); CLEMENT L. BOUVE, *A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES* 426 (1912) (“[Illegal aliens’] temporary allegiance to the United States [is] complete and [gives] rise to reciprocal protection on the part of the state, unaffected by the fact that in order to enjoy and exercise the rights and duties incident thereto they [have] violated the immigration law.”). *But see* Abrahms, *supra* note 1, at 483 (suggesting, without support, that “[I]llegal aliens cannot . . . be tried for treason against the United States government.”).

Although a federal magistrate judge recently asserted that “illegal aliens . . . lack . . . allegiance to the government of the United States,” Report & Recommendation on Defendant’s Motion to Dismiss Count 14 at *33, *United States v. Boffil-Rivera*, 2008 U.S. Dist. LEXIS 84633 (S.D. Fla. Aug. 12, 2008) (No. 08-20437-CR-GRAHAM/TORRES) (emphasis added), this opinion may have been using “allegiance” to mean either “permanent allegiance” or, more colloquially, “loyalty.” Even if *Boffil-Rivera* was denying illegal aliens’ “local allegiance,” such a novel claim appears unworthy of much weight because it was neither supported by reasoned argument or citations of authority, nor accepted by most other courts. See, e.g., *United States v. Portillo-Munoz*, 643 F.3d 437, 441 (5th Cir. 2011); *United States v. Flores*, No. 10-178, 2010 U.S. Dist. LEXIS 120847, at *1-3 (D. Minn. Nov. 15, 2010); *United States v. Luviano-Vega*, No. 5:10-CR-184-BO, 2010 U.S. Dist. LEXIS 98432, at *5-7 (E.D.N.C. Sept. 19, 2010). *But see* *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 U.S. Dist. LEXIS 8166, at *18-19 (D. Kan. Jan. 28, 2010) (quoting *Boffil-Rivera* with approbation).

214. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-646R, *INFORMATION ON CERTAIN ILLEGAL ALIENS ARRESTED IN THE UNITED STATES* 18 (2005), available at <http://www.gao.gov/new.items/d05646r.pdf> (noting that, in fiscal year 2003, federal prisons incarcerated at least 18,581 illegal aliens who had previously been arrested 185,168 times).

215. See Magliocca, *supra* note 1, at 513 n.68 (“[I]llegal aliens are illegal precisely because they are subject to the jurisdiction of the authorities under federal immigration law.”).

Nor did Sen. Williams imply consensualism when he argued that tribal Indians' exclusion from "the basis of [congressional] representation,"²¹⁶ in Section 2 of the Fourteenth Amendment,²¹⁷ implied their exclusion from the Clause. One consensualist argues otherwise²¹⁸ because an 1867 treatise by Timothy Farrar supposedly limited "persons," in both Section 2 and the Clause, to "citizens or aliens, natural-born or legally admitted"²¹⁹ However, Williams' 1866 statement never mentioned Farrar. Also, Farrar actually limited Section 2 apportionment to citizens,²²⁰ and (unsurprisingly) failed to equate "persons" in Section 2 with "persons" in the Clause.²²¹ Additionally, Farrar's distinction between "natural-born" and "legally admitted" suggests that both terms modify "citizens," with "legally admitted" meaning "naturalized" and the unmodified "aliens" including both legal and illegal aliens.²²² Hence, even if the Clause only applied to children of "citizens or aliens, natural-born or legally admitted,"²²³ it would still grant birthright citizenship to illegal aliens' U.S.-born children.

Finally, Rep. Samuel Shellabarger never suggested that enslavement somehow "naturalized" illegally-imported slaves, such that they and their native-born children received citizenship via the Clause's naturalization language.²²⁴ When referring to the

216. GLOBE, *supra* note 1, at 2897 (statement of Sen. Williams, R-Or.).

217. U.S. CONST. amend. XIV, § 2 (exempting "Indians not taxed" from congressional apportionment).

218. See Charles, *supra* note 1 (manuscript at 19-20).

219. FARRAR, *supra* note 1, at 214.

220. See *id.* at 403 (excluding "Indians" and "natural-born aliens" from "the basis of representation"). Farrar's mention of "citizens or aliens, natural-born or legally admitted," *id.* at 214, pertained to the original Constitution's apportionment provision, U.S. CONST. art. I, § 2, cl. 3, which Section 2 of the Fourteenth Amendment replaced.

221. FARRAR, *supra* note 1, at 401-03 (discussing both provisions, but not drawing such a connection). Equating "persons" with "citizens" makes the Clause a tautology. Also, if an "alien" was "[o]ne born out of the jurisdiction of the United States, who has not since been naturalized," 1 BOUVIER, *supra* note 1, at 91, then by definition he could never be characterized as "born . . . in the United States and subject to the jurisdiction thereof," U.S. CONST. amend. XIV, § 1, cl. 1.

222. FARRAR, *supra* note 1, at 214. If "legally admitted" instead meant "compliant with immigration laws," and modified only "aliens," then "natural-born" would only modify "citizens . . ." *Id.* Such a reading would (bizarrely) exclude naturalized citizens from apportionment.

223. *Id.* If both "natural-born" and "legally admitted" only modify "aliens," *id.*, then at least some U.S.-born children of illegal aliens would fall under the Clause because "natural-born" "aliens," *id.*, would include any illegal alien who was an alien at birth, see *Lambert's Lessee v. Paine*, 7 U.S. (3 Cranch) 97, 122 (1805) (argument of counsel) (using "natural-born aliens" in this manner).

224. See U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons . . . naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States . . ."); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 582 n.59 (1997) ("[A]ll whom the law had treated as American-owned slaves, whether illegally imported or not, were

freedmen whom the Civil Rights Act made citizens, Shellabarger did categorize these freedmen as “subjects” who occupied an “intermediate position” between citizens and aliens.²²⁵ However, he did not say that the Act made citizens of *all* “subjects,” and he never mentioned “illegal slaves.”²²⁶ In addition, even if “illegal slaves” became “subjects” when they entered the United States, this receipt of “subject” status could not be deemed “naturalization” because “naturalization” in antebellum America only referred to grants of *citizenship*.²²⁷ Moreover, if the Clause did indeed naturalize “illegal slaves,” why did Sen. Charles Sumner introduce an 1867 bill allowing black naturalization, and why didn’t opponents decry Sumner’s proposal as redundant?²²⁸

C. *Consensualism During and After Ratification*

The consensualist interpretation finds little support in the Fourteenth Amendment ratification debates.²²⁹ Several newspapers reported Trumbull as saying that “Indians living in tribes . . . were not subject to the complete jurisdiction of the United States.”²³⁰ However, because these reports lacked any mention of “allegiance,” this statement

American ‘subjects,’ either by birth or by the brutal ‘naturalization’ that enslavement worked upon them. Thus all former slaves, foreign- as well as native-born, were declared U.S. citizens by the Fourteenth Amendment . . .”).

225. GLOBE, *supra* note 1, at 1160 (statement of Rep. Shellabarger, R-Ohio).

226. *Id.*

227. *See, e.g., id.* (“[T]hese subjects not owing any foreign allegiance, no individual act of theirs is required in order to [sic] their naturalization . . . no additional individual act of the subject is required in order to [sic] his citizenship.”); 2 BOUVIER, *supra* note 1, at 200 (emphasis added) (defining “naturalization” as “The act by which an alien is made a *citizen* of the United States of America.”).

228. *See* CONG. GLOBE, 40TH CONG., 1st SESS. 728 (1867) (statement of Sen. Sumner); *id.* (statement of Sen. Edmunds); *id.* (statement of Sen. Sherman). Sumner was inspired by “a very hard case of a colored person who has been an inhabitant . . . for more than twenty-five years . . .” *Id.* (statement of Sen. Sumner).

229. Admittedly, according to one newspaper report “Senators Conness and Howard . . . den[ie]d” Sen. Cowan’s claim that “the children of gypsies, Indians and Mongols . . . would be elevated into American citizens . . .” *The Reconstruction Resolutions*, N.Y. HERALD, May 31, 1866, at 1. However, in the very next column of that issue, an account of the proceedings clarified that Conness said no such thing, and that Howard’s denial was confined to Indians. *Thirty-Ninth Congress*, N.Y. HERALD, May 31, 1866, at 1.

230. *See Congressional*, PHILADELPHIA INQUIRER, May 31, 1866, at 1; *Thirty-Ninth Congress*, DAILY AGE, May 31, 1866, at 1; *Thirty-Ninth Congress*, DAILY NAT’L INTELLIGENCER, May 31, 1866, at 2; *Thirty-Ninth Congress*, N.Y. TIMES, May 31, 1866, at 1; *Thirty-Ninth Congress*, N.Y. HERALD, May 31, 1866, at 1; *Thirty-Ninth Congress*, N. AM. & U.S. GAZETTE, May 31, 1866, at 1; *XXXIXth Congress*, N.Y. TRIB., May 31, 1866, at 1; *XXXIXth Congress-First Session*, PUB. LEDGER, May 31, 1866, at 1.

likely referred to Indians' jurisdictional exemptions. Similarly, when John Bingham publicly stated that the Clause excluded native-born persons who "ow[e] allegiance to a foreign Power,"²³¹ he was probably referring to the foreign allegiance of diplomats' children.²³²

Nor did the Expatriation Act of 1868 "embrace[] the consensual conception of citizenship"²³³ by endorsing the right to renounce one's nationality. Although English law equated birthright citizenship with perpetual, lifelong allegiance,²³⁴ the framing generation understood that "[perpetual allegiance] does not stand upon the same reason or principle as the common law doctrine of allegiance by birth, and does not follow from the adoption of the latter."²³⁵ Hence, even though the Act's drafters rejected perpetual allegiance, they accepted birthright citizenship.²³⁶ Congress passed this statute not as "a [consensualist] companion to the Fourteenth Amendment,"²³⁷ but in response to other nations' contention that American naturalization did not sever a person's preexisting foreign allegiance. The Act's repudiation of "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of

231. *The Constitutional Amendment, Discussed by its Author*, CIN. COM., Aug. 27, 1866, at 1. See also *Speech of Senator Wilson, of Massachusetts*, in CAMPAIGN SPEECHES, *supra* note 1, at 34, col. 3 (similar); *Speech of Sen. Lane*, in CAMPAIGN SPEECHES, *supra* note 1, at 13, col. 6 (similar).

232. Cf. GLOBE, *supra* note 1, at 1152 (statement of Rep. Thayer, R-Pa.) (emphasis added) ("[E]very man born in the United States, and *not owing allegiance to a foreign Power*, is a citizen of the United States."). Because Thayer endorsed the common-law rule, the italicized text probably didn't refer to non-diplomatic aliens' native-born children. See *id.* ("[T]hey who are born upon the soil are the citizens of the State.>").

233. SCHUCK & SMITH, *supra* note 1, at 86.

234. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *357 (footnotes omitted) ("Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. . . . Natural allegiance . . . cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature.>").

235. *Lynch v. Clarke*, 1 Sand. Ch. 583, 657 (N.Y. Ch. 1844). Some consensualists suggest that *Lynch* rejected expatriation. SCHUCK & SMITH, *supra* note 1, at 60-61 (arguing that *Lynch*'s endorsement of birthright citizenship "was based essentially on the feared practical consequences of purely volitional citizenship—particularly a right of expatriation—for the stability of government.>"). In fact, however, *Lynch* suggested that "the common law rule of perpetual allegiance did not prevail" in the Founding era, *Lynch*, 1 Sand. Ch. at 657-58, and only rejected an "unqualified right of throwing off allegiance by birth . . ." *Id.* at 673 (emphasis added).

236. Compare CONG. GLOBE, 40TH CONG., 2d Sess. 1102 (1868) (statement of Rep. Ashley) ("[T]he doctrine of perpetual allegiance is entirely indefensible . . ."), *id.* at 1104 (statement of Rep. Orth) ("In this country we utterly repudiate the common-law doctrine of allegiance."), *id.* at 1105 (statement of Rep. Clarke) (characterizing "the claim of perpetual allegiance or citizenship" as "one of those absurd contradictions to the necessities of our modern civilization which lingering feudalism has left in our midst."), and *id.* at 1801 (statement of Rep. Van Trump) (condemning the "slavish doctrine of perpetual allegiance."), with *supra* note 131.

237. EASTMAN, *supra* note 1, at 7.

expatriation²³⁸ aimed to strengthen President's hand vis-à-vis these nations, by foreclosing their inconvenient argument that American judicial decisions rejected expatriation.²³⁹ Finally, the timing of the law's passage was the result of factors other than consensualism: the end of the Civil War,²⁴⁰ constitutional affirmation of "the primacy of national over state citizenship",²⁴¹ and an angry American public, which was inflamed by British claims that naturalized Americans arrested as Fenians owed perpetual allegiance to Britain.²⁴²

Nor do post-ratification authorities provide much support for consensualism.²⁴³ Consensualist commentators were strongly opposed by proponents of the orthodox interpretation.²⁴⁴ Isolated consensualist-

238. Act of July 27, 1868, Ch. 249, § 1, 15 Stat. 223, 224.

239. See, e.g., CONG. GLOBE, 40TH CONG., 2d SESS. 867 (1868) (statement of Rep. Donnelly) ("[W]e can never expect foreign governments to recognize our doctrine of expatriation . . . unless we adopt a declaratory statute upon this subject."); *id.* at 868 (statement of Rep. Woodward) ("[I]t is not a matter of surprise to me that the English government should quote against us our own practice and precedents . . ."); *id.* app. at 7 (Message of the President) ("British judges cite courts and law authorities of the United States in support of [perpetual allegiance] against the [pro-expatriation] position held by the . . . United States. . . . I . . . respectfully appeal to Congress to declare the national will unmistakably upon this important question.").

This argument had some basis in reality. See, e.g., *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830) ("The general doctrine is that no persons can by any act of their own, without the consent of the government, put off their allegiance and become aliens.").

240. TSIANG, *supra* note 1, at 83 (noting the Lincoln administration's concern that vigorously defending expatriation abroad might lead to European recognition of the Confederacy; and American displeasure at "naturalized Americans calling upon the United States for protection from conscription in their native lands when they had just returned to their country of origin for the purpose of evading the American draft.").

241. KETTNER, *supra* note 1, at 342; see also *id.* at 343-44.

242. See CONG. GLOBE, 40TH CONG., 2d SESS. 865 (1867) (statement of Rep. Donnelly) (noting "the arrests which are almost daily taking place of American citizens in the British islands . . ."); *id.* at 4207 (statement of Sen. Conness) (similar); TSIANG, *supra* note 1, at 85 (noting the "mounting indignation in the United States over the severity of the British authorities in dealing with naturalized Irish-Americans who . . . were arrested in Ireland as Fenians and political agitators.").

243. *But see* Mayton, *supra* note 1, at 247-53; Abrahms, *supra* note 1, at 483-86.

244. Compare THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA Ch. 14, § 1, at 243 (Boston, Little, Brown, & Co. 1880), 2 WHARTON, *supra* note 1, at § 183, 393-94, GEORGE MERRILL, STUDIES IN COMPARATIVE JURISPRUDENCE AND THE CONFLICT OF LAWS 4, 4 n.1, 5 (Boston, Little, Brown & Co. 1886), SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 279 (New York & Albany, Banks & Bros. 1893), George D. Collins, *Citizenship By Birth*, 29 AM. L. REV. 385, 391-92 (1895), George D. Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831, 837-38 (1884), and Alexander Porter Morse, Letter to the Editor, *Citizenship of Children of Aliens Born in the United States*, 30 ALB. L.J. 519 (1884), with *supra* note 143.

Other commentators limited the Clause to children of U.S.-domiciled parents, but did not condition domicile upon compliance with immigration laws. See, e.g., Henry C. Ide, *Citizenship by*

friendly dicta contrasted with far more numerous judicial holdings equating “jurisdiction” with “sovereign authority.”²⁴⁵ Secretaries of State Thomas Bayard and Frederick Frelinghuysen endorsed consensualism, but their successors revived the State Department’s original embrace of the orthodox interpretation.²⁴⁶ When an 1873 Attorney General opinion stated that “[a]liens . . . are subject to the jurisdiction of the United States only to a limited extent” because “[p]olitical and military rights and duties do not pertain to them,”²⁴⁷ it was probably referring to certain aliens’ exclusion from conscription and voting rights,²⁴⁸ not consensualism. When Secretary of State Hamilton Fish wrote that the Clause “makes personal subjection to the jurisdiction of the United States an element of citizenship,”²⁴⁹ “personal subjection” likely meant a person’s subjection to U.S. sovereign authority, not individual consent to allegiance.²⁵⁰

*Elk v. Wilkins*²⁵¹ was not a consensualist holding. The Court’s statement that “no one can become a citizen of a nation without its consent” referred to Indian naturalization, not birthright citizenship.²⁵² When the Court defined the jurisdiction requirement as “completely subject to [the United States’] political jurisdiction and owing them direct and immediate allegiance,”²⁵³ the phrase “political jurisdiction”

Birth—Another View, 30 AM. L. REV. 241, 250 (1896); Boyd Winchester, *Citizenship in its International Relation*, 31 AM. L. REV. 504, 504 (1897); cf. Shawhan, *Domicile*, *supra* note 1, at 1353, 1359 (noting the irrelevance of governmental consent to domicile in antebellum law). *But see* Charles, *supra* note 1 (manuscript at 21, 31-34) (deeming such compliance a prerequisite for domicile and birthright citizenship).

245. Compare *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872), and *Benny v. O’Brien*, 32 A. 696, 698 (N.J. 1895), with *supra* note 145.

246. Compare Letter from Thomas F. Bayard, Sec’y of State, U.S., to Boyd Winchester, Ambassador to Switz., U.S. (Nov. 28, 1885), in 2 WHARTON, *supra* note 1, at 399, 400 (denying the birthright citizenship of an alien’s U.S.-born child), and Letter from Frederick T. Frelinghuysen, Sec’y of State, U.S., to John A. Kasson, Ambassador to Germany, U.S. (Jan. 15, 1885), in 2 WHARTON, *supra* note 1, at 397, 398 (similar), with *supra* note 144.

247. See 14 Op. Att’y Gen. 295, 300 (1873). This opinion also endorsed birthright citizenship. *See id.* (noting that “[p]ersons born in the United States” were to be “regarded as aliens” only after “becom[ing] subjects or citizens [of a foreign country] . . .”).

248. These were limited to aliens who had declared their intention to seek naturalization. See Act of Mar. 3, 1863, Ch. 75, § 1, 12 Stat. 731 (extending conscription to “persons of foreign birth who shall have declared on oath their intention to become citizens . . .”); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 33, 104-05 (2000) (discussing declarant alien voting and its linkage to conscription).

249. Fish, *supra* note 1, at 1189.

250. *But see* Charles, *supra* note 1 (manuscript at 22) (asserting that Fish meant consent).

251. *Elk v. Wilkins*, 112 U.S. 94 (1884). *But see* SCHUCK & SMITH, *supra* note 1, at 84 (suggesting that *Elk* implicitly endorsed consensualism).

252. *Elk*, 112 U.S. at 103.

253. *Id.* at 102.

referred to sovereign power, not consensualism.²⁵⁴ Because owing “direct and immediate allegiance” to the United States was *an effect of—* not *a prerequisite for—* “complete[] subject[ion] to . . . political jurisdiction,” *Elk* unsurprisingly grouped these two concepts together.²⁵⁵ Similarly, by mentioning tribal Indians’ “immediate allegiance to, one of the Indiana [sic] tribes,”²⁵⁶ *Elk* was not stating the reason for Indians’ exclusion from birthright citizenship. Rather, *Elk* was merely noting an obligation incidental to the exclusion’s actual cause: Indians’ immunity from federal sovereign power,²⁵⁷ which created a power vacuum that allowed their tribe to exercise sovereign authority over them.

*United States v. Wong Kim Ark*²⁵⁸ is likewise inconsistent with consensualism. The Court excluded “children born of alien enemies in hostile occupation” because occupation of American territory temporarily interrupted federal jurisdiction over that territory.²⁵⁹ By labeling allegiance and protection of the laws “reciprocal obligations,”²⁶⁰ the Court simply restated the traditional American understanding that “[t]he government has a duty to protect those in its jurisdiction, and the

254. Other rulings evinced similar usage. See, e.g., *McAllister v. United States*, 141 U.S. 174, 187 (1891); *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 540 (1885); *Burbank v. Conrad*, 96 U.S. 291, 312 (1877); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 610 (1857) (Curtis, J., dissenting); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 510 (1854); *Booth v. Clark*, 58 U.S. (17 How.) 322, 334 (1854); *Hill v. Tucker*, 54 U.S. (13 How.) 458, 466 (1851); *Townsend v. Jemison*, 50 U.S. (9 How.) 407, 414 (1850); *Passenger Cases*, 48 U.S. (7 How.) 283, 422 (1849); *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 722 (1836); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 592 (1832); *New York v. Connecticut*, 4 U.S. (Dall.) 1, 4 n.3 (1799); *Mellus v. Thompson*, 16 F. Cas. 1334, 1335 (C.C.D. Mass. 1858) (No. 9,405); *United States v. Gratiot*, 26 F. Cas. 12, 13 (C.C.D. Ill. 1839) (No. 15,249); *Spooner v. McConnell*, 22 F. Cas. 939, 945-46 (C.C.D. Ohio 1838) (No. 13,245); *Moore v. Shaw*, 17 Cal. 199, 218-19 (1861); *Johnson v. Gordon*, 4 Cal. 368, 373 (1854); *Hayden v. Noyes*, 5 Conn. 391, 395 (1824); *Haight v. City of Keokuk*, 4 Iowa 199, 213 (1856); *Gibson v. Armstrong*, 46 Ky. (7 B. Mon.) 481, 512 (1847); *Stevens v. Thatcher*, 39 A. 282, 283 (Me. 1897); *Lincoln v. Davis*, 19 N.W. 103, 108 (Mich. 1884); *State v. Oleson*, 5 N.W. 959, 960 (Minn. 1880) (Cornell, J., concurring); *Petersen v. Chemical Bank*, 32 N.Y. 21, 42 (1865); *Whitford v. Panama R.R. Co.*, 23 N.Y. 465, 471 (1861); *Clark v. Hills*, 2 S.W. 356, 357 (Tex. 1886); *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93, 103 (1860).

255. *Elk*, 112 U.S. at 102. As recognized in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 139 (1812), immunity from American sovereign power eliminated one’s allegiance to the United States. It follows that persons lacking such immunity would owe immediate allegiance.

256. *Elk*, 112 U.S. at 102.

257. *Id.* at 99-100 (noting Indians’ exemption from federal and state taxation, as well as from “[g]eneral acts of Congress . . .”).

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

259. *Id.* at 682-83 (citing *United States v. Rice*, 17 U.S. (4 Wheat.) 246, 254 (1819)). But see Abraham, *supra* note 1, at 485 (quoting *Wong Kim Ark*, 169 U.S. at 682) (“[T]hose who are there against the will of the sovereign, or in the Court’s words ‘the children of alien enemies,’ are not included [in the Citizenship Clause’s grant of birthright citizenship].”).

260. See *Wong Kim Ark*, 169 U.S. at 655, 679 (quoting *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 166 (1874)) (internal quotation marks omitted).

subject has a duty to maintain allegiance to the government²⁶¹ In discussing Wong Kim Ark's U.S. residence and his temporary visits to China, the Court was explaining why Wong Kim Ark had not expatriated himself.²⁶² In none of these instances was the Court endorsing consensualism; only Justice Fuller's dissent did so.²⁶³

V. CONCLUSION

Judging by recent scholarship, originalists rely upon various types of evidence to ascertain a constitutional provision's original public meaning. First, to shed light on the vocabulary from which the framers drew their terms, originalists try to reconstruct what the provision's words and phrases meant before they were written into the Constitution.²⁶⁴ Second, originalists consult legislative history, to uncover what the provision meant to those who created it.²⁶⁵ Third, originalists examine the debates surrounding the provision's ratification, to determine whether ratifiers assigned the same meaning as the drafters.²⁶⁶ Finally, originalists may consider post-ratification

261. Green, *supra* note 1, at 34. Of course, except for diplomats and others with immunity, *supra* note 154, individuals in the United States normally "derive[d] protection from . . . the sovereign" via subjection to the "exercise of [the sovereign's] power," *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting). *But see* Abrahms, *supra* note 1, at 485 (suggesting that "the government too must assent to the relationship [of allegiance and protection].").

262. *See Wong Kim Ark*, 169 U.S. at 704 ("Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth."). *But see* Mayton, *supra* note 1, at 252 (suggesting that this discussion was consistent with consensualism).

263. *See Wong Kim Ark*, 169 U.S. at 725 (Fuller, J., dissenting). Notably, Fuller's dissent was joined by Justice John Marshall Harlan, whose dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), had stated that members of "the Chinese race" were not "permit[ted] . . . to become citizens of the United States." *Id.* at 561 (Harlan, J., dissenting). Although this statement may have referred to the exclusion of Chinese from naturalization, it may have also foreshadowed Harlan's later vote in *Wong Kim Ark*. *Cf.* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156, 158-59 (1996) (linking Harlan's *Plessy* statement to his stance in *Wong Kim Ark*).

264. *See* Green, *supra* note 1, at 44 (noting that analysis of such usage "supplies particularly overwhelming evidence of what [a word or phrase] expressed when it was included in the Fourteenth Amendment."); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 460-77 (2010) (discussing usage of "due process of laws" in antebellum judicial decisions and public discourse).

265. *See, e.g.,* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57-91 (1986) (arguing that the Fourteenth Amendment's legislative history supports incorporation of the Bill of Rights against the states).

266. *See* Aynes, *supra* note 1, at 86-98 (analyzing the Fourteenth Amendment ratification debates using mid-nineteenth-century speeches); David T. Hardy, *Original Popular Understanding*

interpretations of the provision, to “provide a cross-check upon our reading of [original] meaning.”²⁶⁷

This Article has drawn from all of the above categories to show that “jurisdiction,” as used in the Citizenship Clause, originally meant “sovereign authority.” This conclusion is consistent with antebellum usage of “jurisdiction,” and with the Clause’s legislative history. It is further buttressed by sources from the Fourteenth Amendment ratification debate, and the bulk of post-ratification evidence. By contrast, the consensualist interpretation finds relatively little support in antebellum law, legislative history, the ratification debates, or post-ratification sources. With the bulk of originalist evidence favoring the orthodox interpretation, we can therefore conclude that “jurisdiction” originally meant “sovereign authority.” U.S.-born children of illegal aliens are subject to the sovereign power of the United States; as such, they are entitled to birthright citizenship under the original meaning of the Citizenship Clause.

of the 14th Amendment As Reflected in the Print Media of 1866-68, 30 WHITTIER L. REV. 695 (2009) (similar); Wildenthal, *supra* note 1, at 1589-1615 (similar).

267. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1569 (2002). *But see* Aynes, *supra* note 1, at 100 (observing that “post-ratification statements are of little or no weight. . .”).