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# The Gestation of Birthright Citizenship, 1868-1898: States' Rights, The Law of Nations, and Mutual Consent

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# THE GESTATION OF BIRTHRIGHT CITIZENSHIP, 1868-1898:STATES' RIGHTS, THE LAW OF NATIONS, AND MUTUAL CONSENT

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During the late nineteenth century, following the passage of the Fourteenth Amendment, a series of debates were staged over the definition of "citizenship." These included controversies about the scope of citizenship by birth—whom it encompassed and what rights it conferred. Each participant in the discussion was obliged to contend with the language of the Fourteenth Amendment, which specified that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[1] Although the unequivocal establishment of birthright, or *jus soli*, citizenship[2]—a principle that found its fullest articulation in the landmark case *United States v. Wong Kim Ark*[3]—resolved debates about the application of the Fourteenth Amendment, this outcome did not appear inevitable from the vantage point of contemporary commentators.

Professors Schuck and Smith, arguing that birthright citizenship is an ascriptive principle anathema to the United States' otherwise consensually based political system, assert that "Birthright citizenship thus was formally ratified [by the Fourteenth Amendment] as the principal constitutive status of the American political community. Since that time, its legitimacy has not been seriously questioned."[4] This statement, however, omits from its scope the crucial thirty-year period that elapsed between the ratification of the

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1. U.S. CONST. amend. XIV, § 1.

2. In *Black's Law Dictionary*, *jus soli* (literally translated "right of the soil") is defined as "The rule that a child's citizenship is determined by place of birth." BLACK'S LAW DICTIONARY 868 (7th ed. 1999). It is generally contrasted with the *jus sanguinis* (or "right of the blood") method of determining citizenship, which *Black's* states designates "The rule that a child's citizenship is determined by the parents' citizenship." *Id.*

3. 169 U.S. 649 (1898).

4. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 2 (1985).

Fourteenth Amendment and the Supreme Court's lengthy justification of *jus soli* citizenship in the *Wong Kim Ark* case. Indeed, the authors of *Citizenship Without Consent* seem surprised that the Court found such a detailed explanation necessary; as they note, ". . . Congress understood itself to be extending birthright citizenship to the American-born children of Chinese . . . . It is all the more striking, then, that . . . when the Supreme Court first had occasion to consider the question directly in *United States v. Wong Kim Ark*, the majority required more than fifty pages of argument . . . ." The weight of controversy that underlies the Supreme Court's holding, however, becomes readily apparent from the number of articles in early law reviews and legal journals and the amount of space in legal treatises devoted to evaluating the nature of United States citizenship.[5]

Whereas Schuck and Smith argue that certain indications of a mutual consent-based theory of citizenship can be observed in Congressional debates and Supreme Court decisions, I will not focus exclusively on consent elements, but also examine the development of two other disparate—though sometimes convergent—arguments against birthright citizenship that were expounded during the period. Because Chinese immigration into California not only provided a focal point for these positions, but also represented the concatenation of certain empirical circumstances that would allow the two arguments to coexist, I will concentrate on this context.[6] The first of the arguments against the fact or desirability of *jus soli* citizenship is that the federal allotment of citizenship by birth deprives the states of the power they should possess over the substantive definition of citizenship.[7] The second claim is that the United States should follow the *jus sanguinis* tradition of the law of nations rather than its *jus soli* inheritance from the common law.[8] These positions were associated respectively with two notable figures—Alexander Porter Morse of Louisiana and George D. Collins of San Francisco. The former, who composed a *Treatise on Citizenship*,[9] was counsel for Louisiana in the landmark cases of *Plessy v. Ferguson*[10] and *Hans v. Louisiana*[11]—cases that the Supreme Court decided in ways that have often

5. See the references, *infra*, Sections II-V, and, in particular, *infra* note 74 (explaining the nature of these legal periodicals). The perspective provided by these treatises and other secondary sources from the latter part of the nineteenth century furnishes a useful context for the discussions of citizenship in cases of the period, and is not treated by other writers on the subject. Others have, however, treated the case-law more comprehensively. For a detailed catalogue of some relevant judicial decisions that have not been incorporated into this Essay, *see* Rogers M. Smith's monumental and magisterial *Civic Ideals*. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 286-409, 673-99 (1997).

6. *See infra*, Section I.

7. *See infra*, Section III.

8. *See infra*, Section IV.

9. Alexander Porter Morse, *A Treatise on Citizenship, by Birth and by Naturalization, with Reference to the Law of Nations, Roman Civil Law, Law of the united States of America, and the Law of France* (photo. reprint 1997) (1881).

10. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (citing Morse as lead counsel for Louisiana).

11. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (stating that Morse was on the brief for Louisiana).

been regretted in retrospect. The latter, an advocate of an internationalist approach to citizenship, served as an *amicus* in the California District Court habeas proceeding in *Wong Kim Ark*.[12] Their arguments, as well as those of other contemporary writers, do involve consensualist aspects, but these simply provide normative underpinnings at certain points and remain discrete from their assertions about what United States citizenship historically has been and become.

What emerges from juxtaposing the three arguments against birthright citizenship is that, while each may raise legitimate complaints, they tend to cancel each other out. For example, Morse himself becomes caught in the paradoxical pull of state autonomy, on the one hand, and international law, on the other; while the independence of states would dictate a permissible diversity of principles, concern for international consistency would lead towards intra-national unity. Likewise, whereas both the Morse and Collins positions downplay national sovereignty, Schuck and Smith's vision of mutual consent emphasizes precisely this aspect of national self-determination. Indeed, it seems not insignificant that Morse and Collins, striving against the power of the United States as nation, wrote at a time when that very strength was being consolidated, while Schuck and Smith are publishing in a time of increasing internationalization, during which the continued viability of national sovereignty itself has been thrown into question. As this Essay will conclude, the strong concept of national sovereignty that Schuck and Smith recognized and incorporated into their understanding of U.S. citizenship retains its force—at least for now—but the history of the nineteenth-century citizenship debates demonstrates that the *jus soli* approach is far superior to the modified *jus sanguinis* one upon which Schuck and Smith settle. As the Supreme Court's opinion in *United States v. Wong Kim Ark* resolved, the *jus soli* model secures the rights of the individual and the immigrant against the incursions of a federal sovereignty that must be acknowledged.

## I THE CASE OF THE CHINESE IN CALIFORNIA

The Chinese were the first group of Asians to enter the United States in large numbers.[13] Initially they were welcomed within California, their primary destination, as a source of cheaper labor. In 1864, Congress passed an act seeking to attract immigrant workers.[14] The statute was repealed in 1868, but that year also marked the ratification of the Burlingame Treaty with

12. *See In re* Wong Kim Ark, 71 F. 382 (1896).
13. Charles J. McLain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN L.J. 33, 35 (1995).
14. Act of July 4, 1864, 13 Stat. 385 (repealed 1868) (authorizing labor contracts whereby prospective immigrants could pledge their wages to obtain transportation).

China, which established a permissive immigration policy.[15] The Treaty appeared to reinforce the United States' commitment to freedom of expatriation that Congress had expressed in passing its Expatriation Act the day before.[16] Although anti-Chinese sentiment flourished in the western states—and, in particular, California and Nevada[17]—census figures showed that, by 1880, 105,463 Chinese individuals lived within the country.[18] The same year, the President signed a treaty allowing Congress to limit or suspend the immigration of Chinese laborers.[19] In 1882, Congress, following suit, passed the Chinese Exclusion Act, which prohibited additional Chinese laborers from entering the country for ten years.[20] The preamble stated as justification that, "in the opinion of the Government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof."[21] The Act then explained that, although new Chinese laborers would be forbidden to land, those who already resided in the United States could remain.[22] In addition, it provided procedures by which current Chinese residents could receive certificates demonstrating their status when they took trips outside the country so that they could re-enter on returning.[23]

Although Morse had expressed his certainty in 1880 that the Chinese population would diminish in future years,[24] in 1890, the census revealed a slight increase to 106,000 Chinese residents.[25] The Geary Act, passed in 1892, responded to this circumstance; it not only extended Chinese exclusion for an additional ten years, but also instituted extreme measures against those

15. *See* Burlingame Treaty, July 28, 1868, U.S.-China, 16 Stat. 739; *see also* SMITH, *supra* note 5, at 312 ("Partly in response to heavy lobbying by the affluent Chinese Six Companies in San Francisco, and to the dismay of many western Sinophobes, that treaty granted Chinese nationals unrestricted immigration to America, though not access to naturalization, in return for China receiving 'most favored nation' commercial privileges.").

16. Act of July 27, 1868, 15 Stat. 223. The Expatriation Act announced that expatriation was "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." *Id.* Article Five of the Burlingame Treaty also specified that "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." Burlingame Treaty, *supra* note 15, art. V.

17. *See* SMITH, *supra* note 5, at 358 ("In a California referendum, voters cast 154,638 ballots against Chinese immigration, 883 in favor, in 1879; Nevada voted 17,259 versus immigration, 183 for, in 1880."); *see also* Morse, *supra* note 9, at 174 ("It is not likely that the next census will show a large increase of Asiatics, for our people have made up their minds, with substantial unanimity, that immigration of that sort must be checked").

18. Morse, *supra* note 9, at 173-74.

19. *See* Treaty of November 17, 1880, U.S.-China, 22 Stat. 868.

20. Act of May 6, 1882, 22 Stat. 58.

21. *Id.*

22. *See id.* at 59.

23. *See id.* at 59-60.

24. *See supra* note 18.

25. R.G. Ingersoll & Thomas J. Geary, *Should the Chinese Be Excluded?*, 6 N. AM. REV. 52, 60 (1892).

Chinese laborers who already resided within the United States.[26] The Act specified that all such persons must obtain a certificate establishing their residence within the following year, that the burden of proving legitimate residence rested upon the Chinese defendant in any proceeding instituted against him, and that any Chinese laborer caught illegally in the United States be deported after one year of hard labor.[27] In attempting to rationalize the provisions of the law that he had sponsored, Representative Geary wrote that, "Of all the Chinese now here, more than one-third are not here by our invitation but contrary to our expressed wish."[28] Thus Geary supported continuing exclusion through reference to a consensualist model; his method of justification demonstrates one inherent danger in Schuck and Smith's consent-based concept of citizenship—that consent will be suddenly and arbitrarily revoked.

These revisions in immigration policy would have been even less effectual in excluding Chinese laborers had the United States permitted these individuals to be naturalized. Congress' first naturalization statute—passed in 1790—had specified that citizenship could be conferred only on "free white person[s]."[29] After the Civil War, this restriction became obsolete, but naturalization laws remained racially determined. During debates about the Naturalization Act of July 14, 1870,[30] Senator Sumner proposed an amendment that would eliminate the restriction of naturalization to those who were "white."[31] This immediately resulted in alarm about the possibility of Chinese naturalization. Senator Williams then proposed to insert at the end of the section, "Provided, [t]hat nothing in this act contained shall be construed to authorize the naturalization of persons born in the Chinese Empire.' "[32] A debate followed:

> Morton.—This amendment involves the whole Chinese problem. Are you prepared to settle it tonight?
>
> Stewart.—Without discussion.
>
> Morton.—And without discussion? I am not prepared to do it.
>
> Sumner.—The senator says it opens the great Chinese question. It simply opens the question of the Declaration of Independence, and whether we will be true to it. 'All men are created equal,' without distinction of color.[33]

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26. Act of May 5, 1892, 27 Stat. 25 (sanctions included imprisonment with a sentence of hard labor).
27. *See id.* § 6.
28. Ingersoll & Geary, *supra* note 25, at 60.
29. McClain, *supra* note 13, at 35; *see also* U.S. CONST. art. I, § 8, cl. 4 (giving Congress the power "[t]o establish an uniform Rule of Naturalization").
30. Act of July 14, 1870, 16 Stat. 254.
31. CONG. GLOBE, 41st Cong., 2d Sess. 949 (July 2, 1870) (statement of Sen. Sumner).
32. CONG. GLOBE, 41st Cong., 2d Sess. 955 (July 4, 1870) (statement of Sen. Williams).
33. Morse, *supra* note 2, at 229.

Adopting the side of the Chinese, Senator Fowler explained the venerable heritage of China and the education possessed by the Chinese, insisting that assimilation would be possible if the opportunity were provided.[34] Despite Morton's and Fowler's recommendations that the Chinese be subject to naturalization, the final language of the act simply extended the capacity to be naturalized to "aliens of African nativity and to persons of African descent."[35]

The subsequent refusal to extend naturalization to those Chinese persons who wished to assume United States citizenship was judicially challenged in *In re Ah Yup*, and upheld by the California Circuit Court, which decided that Chinese individuals did not fit within the designation of "white person" as specified by the naturalization statute.[36] According to the Fourteenth Amendment, however, citizens could either be naturalized or natural-born. The question then presented itself as to whether the children of Chinese residents could be considered citizens by birth. Although the issue did not achieve final resolution until the Supreme Court's 1898 decision in *United States v. Wong Kim Ark*, the possibility that these individuals were birthright citizens had been anticipated by Justice Stephen J. Field's 1884 decision for the Circuit Court of California in *In re Look Tin Sing*.[37]

Resting his decision on two grounds, the Fourteenth Amendment's Citizenship Clause and the persistent doctrines of the United States—in other words, a federal common law—Justice Field, who would subsequently uphold Chinese Exclusion on the grounds of Congress' federal sovereignty,[38] insisted upon the inalienable rights of Chinese individuals who were citizens by birth. Rejecting claims that Chinese children could not be born "subject to the jurisdiction" of the United States, as required by the Fourteenth Amendment, he specified that "They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them when obedience can be rendered . . . ."[39] Instead, he postulated, the phrase "subject to the jurisdiction thereof" was intended only to exempt the children of diplomats resident within the United States and to emphasize the country's liberal expatriation policies.[40] He similarly dismissed the idea that the ability to

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34. CONG. GLOBE, 41st Cong., 2d Sess. 575 (July 4, 1870). Fowler employed a very expressive analogy in describing how naturalized Chinese citizens would acclimate to the United States: "Sir, do you suppose that if one of their women were taken in childhood, and the bandages which envelop her feet in China were taken off, that the feet of the Chinese woman would not expand to the same dimensions as those of an American? Most assuredly they would." *Id.*

35. *See supra* note 32, at 958-59.

36. *In re* Ah Yup, 1 F. Cas. 223 (1878).

37. 21 F. 905 (1884) (known further as The Citizenship of a Person Born in the United States of Chinese Parents).

38. *See* Chae Chan Ping v. U.S. (The Chinese Exclusion Case), 130 U.S. 581 (1889); *see also* SMITH, *supra* note 4, at 367-68 (discussing Justice Field's opinion in the Chinese Exclusion Case).

39. *In re* Look Tin Sing, 21 F. at 906.

40. *Id.* at 906-07.

acquire citizenship by birth should be dependent on the extent of existing naturalization laws. Referring to how the Fourteenth Amendment Citizenship Clause had overturned Justice Taney's pre-Civil War decision for the Supreme Court in *Dred Scott v. Sandford*,[41] he explained that it had also eliminated the requirement of Congressional naturalization before citizenship could be conferred on African-Americans:

> The clause changed the entire *status* of these people. It lifted them from their condition of mere freedmen, and conferred upon them, equally with all other native-born, the rights of citizenship. When it was adopted, the naturalization laws of the United States excluded colored persons from becoming citizens, and the freedmen and their descendants, not being aliens, were without the purview of those laws. So the inability of persons to become citizens under those laws in no respect impairs the effect of their birth, or of the birth of their children, upon the *status* of either as citizens under the amendment in question.[42]

Finally, as a citizen, Look Tin Sing could not be prevented from reentering the United States except upon commission of a crime—"Exclusion for any other cause is unknown to our laws, and beyond the power of Congress."[43] Thus, Justice Field began to present birthright citizenship as a national phenomenon that would supercede even Congress' ability to determine who could and who could not become citizens. Only the Supreme Court's decision in *United States v. Wong Kim Ark* would, however, definitively establish his vision as a Constitutional mandate.

## II A FEDERAL COMMON LAW?

In 1904, Hudson Cary argued in the *Virginia Law Register* that the "recognition of the common law by the federal courts in civil cases (irrespective of the common law of the states), seems to have arisen out of necessity, as the very breath of the constitution itself," and that, "[u]nder [*Wong Kim Ark*] and numerous other decisions it is now well settled that the common law rules of interpretation must be looked to in interpreting the constitution."[44] These bold assertions of a federal common law controvert the currently

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41. 60 U.S. 393 (1857). In the *Dred Scott* case, Taney had connected the phrase "We, the people" from the Declaration of Independence with the current citizens of the United States; in his view, "every citizen is one of this people, and a constituent member of this sovereignty." *Id.* at 404. Since African-Americans were not part of this sovereign community, they could only become citizens through naturalization—a function which was the province of Congress. Thus, even if an African-American achieved state citizenship, such citizenship neither entailed federal citizenship nor recognition by other states. *Id.* at 405-06. *See also* PLESSY V. FERGUSON: A BRIEF HISTORY WITH DOCUMENTS 15 (Brook Thomas ed. 1997) (*discussing how Dred Scott's illiberal implications were couched in terms of very democratic-sounding language*).

42. *Look Tin Sing*, 21 F. at 909.

43. *Id.* at 911.

44. Hudson Cary, *Federal Common Law*, 10 VA. L. REG. 475, 482 (1904).

accepted doctrine that there neither is now nor ever has been such a thing.[45] How exactly did this notion come to be articulated in a reputable law review and why was it associated with the case of *Wong Kim Ark*? As my argument will suggest, it may be possible to distinguish between creating a set of common law doctrines on the federal level and the use of the English common law—or Supreme Court precedent—to interpret and cast light upon obscurities in the Constitution. While the former may never have occurred, the latter has, historically, been a mainstay of the U.S. Constitutional system.

Although the Constitution refers to citizens in several places, and specifies that "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President,"[46] it does not provide a definition either of the term "citizen" or of the phrase "natural born citizen." The clause asserting that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"[47] demonstrates that the citizens of the several states possess at least some "privileges and immunities," but it does not independently delimit their scope. Nor does the Constitution explain the distinction between citizenship within a state and within the United States, despite according to Congress the power "To establish an uniform Rule of Naturalization."[48] Because the term citizenship was never explicitly defined, the early Supreme Court used conventions of British common law to interpret its Constitutional meaning.[49] These principles were derived from *Calvin's Case*, decided in 1608, and, in particular, from Sir Edward Coke's report on the case.[50]

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45. *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("there is no federal general common law"). Even now, however, the Supreme Court does acknowledge some loopholes for areas in which a federal common law may persist. *See* Atherton v. FDIC, 519 U.S. 213, 218 (1997) (distinguishing between "what one might call 'federal common law' in the strictest sense, *i.e.*, a rule of decision that amounts to . . . the judicial 'creation' of a special federal rule of decision"—which would apply only in extremely limited instances and "an interpretation of a federal statute or a properly promulgated administrative rule"); Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("Absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases"). An argument can be made that these exceptions comprehend using the common law to interpret the Constitutional definition of citizenship—both because the common law is employed interpretively in this instance and because the subject matter involved has international implications and concerns the "rights and obligations of the United States."

46. U.S. CONST. art. II, § 1, cl. 3.

47. U.S. CONST. art. IV, § 2, cl. 1.

48. U.S. CONST. art. I, § 8, cl. 4.

49. *See* Jonathan Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 683-84 (1995) (discussing the "reaffirmation" of common law principles by the Supreme Court following adoption of the Constitution).

50. The following discussion relies on The Famous Case of Robert Calvin a Scots-Man, *in* The Reports of Sir Edward Coke, Lord Chief Justice of the Common Pleas And as it was Argued in Westminster hall by all the Judges of England, In the Reign of King James VI. of Scotland, and I. of

In *Calvin's Case*, the assembled Justices of England were asked to determine the status of the plaintiff, Robert Calvin, born in Scotland after 1603, the date when the English throne had devolved upon King James VI of Scotland as James I of England.[51] The question was whether or not Calvin, as one of the *postnati*, individuals whose nativity occurred after Scotland and England had been combined under James' sovereignty, should be considered an alien; if he were, he would be unable to inherit land or bring suit in England.[52] At the commencement of his report, Coke acknowledged the "weight and importance" of the issue,[53] which arose at a crucial point in the definition of modern nationhood, as James I attempted to consolidate his formerly separate countries into Britain.[54] The first case to demonstrate the close connection between crises in defining citizenship and struggles to delineate the scope and character of nations, *Calvin's Case* was not to be the last. Coke's analysis in *Calvin's Case* resolved the issue primarily through a discussion of "ligeance," or allegiance, and by invoking the doctrine of the two bodies of the king.[55] The argument against Calvin's subjecthood claimed that Calvin owed allegiance not to James' natural body—which ruled both England and Scotland—but instead to his two separate bodies politic. Coke, on the other hand, deemed that Calvin should be considered native born because he had been born within the allegiance of James VI of Scotland, who possessed the same natural body as James I of England.[56]

Emphasizing that the law of nature mandated such allegiance,[57] Coke also insisted that the King's reciprocal obligations protected the rights of any subject born within his domain.[58] Speaking of local allegiance, which he referred to as "wrought by the Law" when "an alien that is in amity cometh

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England (James Watson 1705) [hereinafter *Calvin's Case*] and Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73 (1997).

51. *See Calvin's Case*, *supra* note 50, at 4-5; *see also* Price, *supra* note 50, at 81.

52. *See Calvin's Case*, *supra* note 50, at 4. Under the common law, aliens were not permitted to acquire or hold land; this rule was superceded during the 1870s by a statute that placed aliens and natural-born subjects on an equal footing in this respect. Hugh Weightman, *The Land Law of Great Britain With Especial Reference to the Rights of Aliens*, 27 AM. L. REG. 465, 465 (1879). Parties in many of the important United States citizenship cases were also concerned about their ability to own land or to run for office. *See infra*, note 62.

53. *Calvin's Case*, *supra* note 50, at 4.

54. Although Professor Price does not discuss these implications of the case, she does acknowledge that, "In *Calvin's Case*, there are perhaps larger stories to be told, such as the development of ideas of nationhood and the impending constitutional crises between the English King and the Commons later in the seventeenth century." Price, *supra* note 50, at 79.

55. *See Calvin's Case*, *supra* note 50, at 6-13; *see also* Price, *supra* note 50, 83-86.

56. *See Calvin's Case*, *supra* note 50, at 11-13. Ernst Kantorowicz, in *The King's Two Bodies: A Study in Medieval Political Theology*, explains how the division between the king's body politic and natural body evolved through the middle ages, and remained crucial in the 17th-century conflicts leading up to the English Revolution. ERNST KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY 7-23 (7th ed. 1997) (1957).

57. This is one of the main points of Price's article, which also details the influences from outside England that contributed to Coke's perspective on allegiance. *See* Price, *supra* note 50 *passim*.

58. This is an important feature of Coke's opinion to remember; *see infra*, note 205 and accompanying text.

into England, because as long as he is within England, he is within the King's protection,"[59] Coke explained how the children of aliens could acquire birthright subjecthood precisely through this mutuality of obligation, mediated by the law. As he asserted,

> Concerning the local Obedience, it is observeable, that as there is a local Protection on the Kings part, so there is a local ligeance of the Subjects part . . . . [L]ocal Obedience, being but momentary and incertain, is strong enough to make a natural Subject; for if he hath Issue here, that Issue is a natural born subject.[60]

Thus, *Calvin's Case* established the precedent that even the child of an alien temporarily sojourning within the British Isles would become a subject at birth, and acquire the legal protections entailed by that status.

Courts in the early United States continued to follow the *jus soli* principles that Coke had articulated in *Calvin's Case*. Although many law review articles from the later 19th century, as well as Schuck and Smith's *Citizenship Without Consent*, invoke the decision in the 1844 case of *Lynch v. Clarke*[61] as the pivotal enunciation of birthright citizenship,[62] numerous federal and state cases discussed *Calvin's Case* well before that date. The issues raised in *Calvin's Case* were debated in the Supreme Court on several occasions, as the Justices considered whether those born before the Declaration of Independence who had allied themselves with Britain rather than the United States were natural born citizens, and could therefore inherit property within the U.S.[63] The argument for identifying these individuals as citizens was the mirror image of that adduced by Coke in *Calvin's Case*; since all had been born prior to the Revolution, and therefore subject to Britain, the claim was that they should be able to inherit land in the United States, which had only been formed after their nativity. In two of the cases, *Lambert's Lessee v. Paine*[64] and *M'Ilvaine v. Coxe's Lessee*,[65] the issue was fully argued but not decided—in the first case because another ground was adduced for the Court's opinion, and in the second because M'Ilvaine's status was covered by statute in New Jersey, where he had resided. The Court determined in the third case, *Dawson's Lessee v. Godfrey*,[66] that the analogy between Calvin's status and that of the plaintiffs was misplaced, and, since Dawson and his

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59. *Calvin's Case*, *supra* note 50, at 7.
60. *Id.*
61. 1 Sand. Ch. 583 (N.Y. Ch. 1844).
62. *See* Schuck & Smith, *supra* note 4, at 57-61; George D. Collins, *Are Persons Born Within the United States* Ipso Facto *Citizens Thereof?*, 18 AM. L. REV. 831, 831 (1884).
63. *See* M'Ilvaine v. Coxe's Lessee, 6 U.S. (2 Cranch) 280 (1805), M'Ilvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1808); Lambert's Lessee v. Paine, 7 U.S. (3 Cranch) 97 (1805); Dawson's Lessee v. Godfrey, 8 U.S. (4 Cranch) 321 (1807).
64. 7 U.S. (3 Cranch) 97 (1805).
65. 6 U.S. (2 Cranch) 280 (1805).
66. 8 U.S. (4 Cranch) 321(1807).

wife could never have "owed allegiance to a government which did not exist at their birth,"[67] they could not inherit land. However, the Court at the same time reaffirmed the principles of *Calvin's Case* in relation to those U.S. citizens who continued to hold land in Britain; "Community of allegiance once existing must . . . exist ever after. Hence it is that the *antenati* of America may continue to inherit in Great Britain, because we once owed allegiance to that crown."[68] In summation, Justice Johnson, writing for the court, asserted that "I know of no exception, at common law, which gives the right to inherit distinctly from the obligation of allegiance, existing either in fact or in supposition of law."[69]

Although not a federal case, *Gardner v. Ward*[70] vigorously reaffirmed the *jus soli* substrate of *Calvin's Case*, suggesting its force within the newly formed United States. Gardner, who resided in Salem from his birth there in 1747 until 1775, when he sojourned for several years in Newfoundland, and who returned to Salem again in 1781, brought suit in Massachusetts against those individuals who had prevented him from casting a ballot in a local election. Ruling that the plaintiff was, in fact, a citizen, and should have been allowed to vote, Judge Sewall maintained that "In determining this question, we are to be governed altogether by the principles of the common law," and summarized *Calvin's Case* as establishing that

> [A] man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance, which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign and to the other rights and advantages, which are included in the term citizenship. The place of birth is coextensive with the dominions of the sovereignty, entitled to the duty of allegiance: and it has been held, that in the event of a partition of these dominions, under distinct sovereignties, the natives remain attached and retain their rights of citizenship, with each portion of the sovereignty; upon this principle, that the right of citizenship in the native soil, and according to the condition of the government at the time of birth is a natural right, not affected by the after changes in the sovereignty.[71]

By avowing that a "natural right" of citizenship or subjecthood exists, regardless of whether or not a nation's sovereignty has altered, Sewell may have provided the strongest of the early interpretations of *jus soli* citizenship

67. *Id.* at 322.
68. *Id.* at 323.
69. *Id.* at 324.
70. *Reported in* Kilham v. Ward, 2 Mass. 236, 244 n.a (1806), *reprinted in* THE FOUNDERS' CONSTITUTION 589 (Philip B. Kurland & Ralph Lerner eds. 1987).
71. *Id.* at 590.

in the United States. At the same time, however, by emphasizing the mutuality of obligation that characterized the relation between citizen and sovereign, he rendered the doctrine of continued allegiance palatable to those who endorsed democratic principles and did not want to envision the subject as perpetually and irredeemably indebted to a King.

These prior treatments of Calvin's Case led to its favorable reception by the New York Chancery Court in *Lynch v. Clarke*.[72] The Assistant Vice-Chancellor was there faced with the question of whether or not Julia Lynch, born in the United States of parents who had never intended to remain, and resident in England since her age of majority, could be considered a U.S. citizen, and, therefore, be entitled to inherit land. Commencing from the premise that, "It is an indisputable proposition, that by the rule of the common law of England, if applied to these facts, Julia Lynch was a natural born citizen of the United States," the Vice-Chancellor proceeded to determine whether or not a federal common law was in force. Noting the national character of citizenship, and the need for a general determination throughout the states of how it could be conferred, he then reviewed those cases in which the applicability of English common law to the federal government had been debated. The Vice-Chancellor concluded that, "In my judgment there is no room for doubt, but that to a limited extent, the common law, (or the principles of the common law, as some prefer to express the doctrine) prevails in the United States as a system of national jurisprudence." He acknowledged, however, that this federal common law existed for certain purposes but not others; it was imperative in the attempt to decipher the Constitution and its terms—including the phrase "natural born citizen"—but it did not serve to grant federal courts jurisdiction over matters they would not otherwise decide.[73]

The language of the Fourteenth Amendment, declaring that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,"[74] appeared to many courts and commentators simply to constitutionalize the already recognized federal common law principle of *jus soli* citizenship. During the period following ratification of the Fourteenth Amendment, a great deal of writing on the law, both in treatises and law reviews, was devoted to considering the question of birthright citizenship. Articles on this and related topics appeared not only in the more established law journals, which devoted much of their space to summarizing developments in the law,

72. 1 Sandf. Ch. 583 (N. Y. 1844).

73. *Id.* This caveat—that the common law would not allow the federal courts to assume jurisdiction on the basis of it—is important, since the Supreme Court in *Erie* subsequently and similarly determined that, when deciding cases in diversity jurisdiction, federal courts could not appeal to a federal common law. Erie v. Tompkins R. Co, 304 U.S. 64, 78 (1938).

74. U.S. CONST. amend. XIV, § 1.

but also in the nascent university law reviews.[75] Courts too spoke in the language of *Calvin's Case*, viewing the doctrines of the common law as congruent with the Fourteenth Amendment.

In *McKay v. Campbell*,[76] the U.S. District Court for the district of Oregon considered whether the plaintiff could be deemed a U.S. citizen, and should be allowed to vote. The defendants argued that Mackay was British, since he was the child of a British subject, and had been born at a point when Britain and the United States had agreed—for the moment—to occupy the territory jointly.[77] Judge Deady, evaluating the case, narrowed the issue to that of birthright citizenship under the Fourteenth Amendment, which he interpreted in terms of the common law; as he asserted, eliding jurisdiction and allegiance, "The case turns upon the single point—was the plaintiff born subject to the jurisdiction of the United States—under its allegiance?"[78] Citing *Calvin's Case*, the Judge recalled Lord Coke's statement that "To make a subject born, the parents must be under the actual obedience of the king, and *the place of birth be within the king's obedience*, as well as within his dominion."[79] According to Judge Deady's reading of the Fourteenth Amendment, it is "nothing more than declaratory of the rule of the common law," and, therefore, the citizen's allegiance at birth must be evaluated.[80] In Mackay's case, "The child, although born on soil . . . subsequently acknowledged to be the territory of the United States, was not at the time of its birth under the power or protection of the United States, and without these the mere *place* of birth cannot impose allegiance or confer citizenship."[81] Since the United States did not possess exclusive control over the territory at the time of the plaintiff's birth, and Mackay would not have been susceptible to the reach of U.S. power, he could not be considered a *jus soli* citizen. The importance of the connection that Judge Deady drew between the common law concept of allegiance and the Fourteenth Amendment's discussion of jurisdiction is indicated by the fact that a summary of the case was published

75. Professor Lawrence M. Friedman explains the overlap between the two genres of journal. Law magazines—including the *Central Law Journal* and the *American Law Review* of St. Louis and the *American Law Register* of Philadelphia—"contained little essays and comments about the law; they also brought the profession news about recent, interesting cases." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 630 (2d ed. 1985). Although they still appeared in the 1880s, "their day was almost done." *Id.* They were replaced on the one hand by West's *National Reporter System*, and on the other by law-school-based reviews, such as the *Yale Law Journal*, launched in 1891. *Id.* at 631. This paper discusses materials gathered from both types of fora, although it focuses on articles that espouse a distinct perspective on citizenship law and generally avoids discussing law journals' case summaries.

76. 16 F. Cas. 161 (1871), *discussed in* W.L. Hill, *The Doctrine of Natural Allegiance*, 21 AM. L. REG. 69 (1873).

77. *Id.* at 70-71.

78. *Id.* at 72-73.

79. *Id.* at 75.

80. *Id.* at 76.

81. *Id.* at 70.

in *The American Law Register* under the heading "The Doctrine of Natural Allegiance."[82]

The authors of subsequent law review articles continued to comment on the persistence of common law principles. In his 1885 piece "Who Are Citizens," John A. Hayward indicated the continuity between the British definition of the subject and the United States understanding of the citizen. Speaking of the period following the Founding, Hayward asserted,

> As to who were citizens, must have been left to the common acceptation of the word. The word as used in the articles of confederacy and the constitution must have had the same acceptation and meaning as subject. The only difference being that a subject is under subjection to a monarch, and a citizen is under subjection to a government of which he is a component part. The rights and privileges a subject of Great Britain had under that government was the same as the rights and privileges the citizens possessed under the confederacy and the constitution.[83]

Thus he dismissed the idea that the difference between monarchical and democratic government should radically alter the "rights and privileges" of the subject-turned-citizen aside from giving him the right to vote and participate in politics. After reviewing those pre-Civil War cases that affirmed birthright citizenship, and explaining that "a child born within . . . territory and ligeance respectively" would be a citizen, he summarized that

> We have above a general idea of what constitutes citizenship, and it was the common law definition of citizens or subjects. What is the use of saying so often that there is no common law of the United States. The constitution and laws of the United States are filled with terms derived from the common law, and to that law we must look to define the terms contained in all our statutes.[84]

According to Hayward's account, the common law could provide a valuable tool for the interpretation of the Constitution as well as United States laws.

Moving to a discussion of citizenship after the Civil War, Hayward explained that the Fourteenth Amendment did not substantially alter the common law concept of birthright citizenship. Insisting that social or other status was irrelevant to the determination of citizenship, Hayward elaborated that, as long as an individual is born "subject to the jurisdiction of the United States," "He may be guilty of perjury, convicted and covered over with moral turpitude; he may be utterly unfit and wholly incompetent to exercise the elective franchise, unfit to sit in the jury box, yet he is still clothed with all the

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82. *Id.*
83. John A. Hayward, *Who Are Citizens?*, 2 AM. L.J. 315 (1885).
84. *Id.* at 317.

attributes of citizenship . . . ."[85] Like Judge Deady, Hayward parced this requirement of being "subject to the jurisdiction" as necessitating birth within the territorial limits and the allegiance of the United States. The child of a foreigner sojourning within the country would fulfill these criteria.[86] Hayward did, however, restrict his conception of birthright citizenship by refusing to apply *jus soli* principles to those whose parents could not become citizens themselves; as he declared, "all persons born in the United States of parents who might lawfully be naturalized are citizens of the United States, if subject to its jurisdiction."[87] Hayward provided no explanation for this caveat, nor did he attempt to reconcile it with common law principles. It would, however, have prevented him from advocating recognition of Wong Kim Ark as a citizen since his parents could not, as non-whites, have been naturalized.

Other endorsements of common law *jus soli* citizenship did not append similar limitations. In the year following the publication of Hayward's essay, Thomas P. Stoney of the San Francisco Bar produced an article entitled simply "Citizenship."[88] Stoney's essay commenced with a set of two principles, which he viewed as permitting few exceptions; as he wrote, "I. Children born in the United States of alien parents are citizens of the United States. II. Children born abroad of American parents are aliens."[89] He supported this thoroughgoing assertion of *jus soli* principles by reference to the Fourteenth Amendment. Emphasizing the autonomy of the United States as nation, he considered what the phrase "subject to the jurisdiction thereof" added to a territorial definition of birthright citizenship. He urged that the phrase should be construed in its ordinary sense, stating that "The word jurisdiction means authority, power, potential authority, actual power."[90] Understanding the term jurisdiction in this way meant, for the most part, falling back upon a territorial conception; as Stoney wrote, "The authority of a nation is co-extensive with its territory. The authority of a nation is limited to its territory. The authority of a nation is exclusive and supreme over persons and property within its own territory."[91] Anticipating the objection that such an interpretation would render the phrase "subject to the jurisdiction thereof" redundant, since the Fourteenth Amendment also required that a non-naturalized citizen be "born . . . in the United States," Stoney maintained that "certain well known and universally recognized exceptions to the rule of territorial jurisdiction and supremacy . . . rendered the qualification 'subject

85. *Id.* at 319.
86. *Id.*
87. *Id.*
88. Thomas P. Stoney, *Citizenship*, 34 AM. L. REG. 1 (1886).
89. *Id.*
90. *Id.* at 3.
91. *Id.*

to the jurisdiction thereof,' necessary to an accurate complete definition."[92] For example, a "fiction of extra-territoriality" immunized the children of foreign diplomats from acquiring citizenship by birth in the United States, and the children of aliens invading "under the authority of their own sovereign" could not be considered citizens since they were hostile occupants, attempting to usurp U.S. territory for their own sovereign.[93]

Stoney deviated from Hayward's interpretation of the Fourteenth Amendment in a crucial respect, however; he distinguished between jurisdiction and allegiance, arguing that although alien parents may owe allegiance to another nation, they are still subject to the territorial jurisdiction of the United States, and, thus, their children are birthright citizens.[94] Whereas "[n]ations have claims upon the allegiance and fidelity of their citizens, wherever they may be," jurisdiction is exercised locally, so that "[w]ithin its own territory the jurisdiction of a nation is supreme and exclusive."[95] Nor did he find opponents' arguments from the language of the Civil Rights Act that preceded the Fourteenth Amendment convincing. The superceded Civil Rights Act had read "not subject to any foreign power" rather than "subject to the jurisdiction thereof."[96] Others had argued that this phrase intended to exclude from citizenship the children of all those who were subjects of another nation—such as the Chinese. Stoney claimed instead that "One may be the subject *of* a nation and not subject *to* it. An alien, though the subject *of* another nation, is, nevertheless, subject to the authority and laws of the nation in whose territory he may be, and is not subject *to* the jurisdiction of his own nation."[97] By affirming the authority of the United States as nation to make foreigners subject to its power, Stoney reinforced the argument for Chinese birthright citizenship.

The contrast that Stoney drew between national allegiance and national jurisdiction did not respond to a common law interpretation of allegiance, but instead to an internationalist one, which would insist that the allegiance of the parent governs the child as well.[98] Thus, in separating jurisdiction from allegiance, he did not at the same time cast aside the common law connotation of allegiance. Instead, he reinforced the analogy between what Coke had called the "local ligeance" of aliens and the jurisdiction claimed by the United States. Stoney did though emphasize the importance of reading the Fourteenth Amendment according to its own terms without interpolating additional phrases that would obfuscate its clear meaning; speaking of the interpretation that he argued against, Stoney objected that, "It would render a

92. *Id.* at 4.
93. *See id.* at 4-5.
94. *See id.* at 7-9.
95. *Id.* at 8.
96. 14 Stat. 27, ch. 31, § 1 (Apr. 9, 1866).
97. Stoney, *supra* note 91, at 9. The majority opinion in *United States v. Wong Kim Ark* also raises this distinction. *See infra*, Section VI.
98. *See* Stoney, *supra* note 91, at 7-8; *see also infra*, Section IV.

provision which was intended to clearly and definitely settle the question of citizenship, and to remove the uncertainty which prevailed, as vague and uncertain as the pre-existing law on the subject."[99] By taking the Fourteenth Amendment on its own terms, Stoney thereby managed to perpetuate its underlying common law roots without sacrificing fidelity to the language of the Amendment itself.

One of the cases that Stoney referred to as containing the interpretation of the Fourteenth Amendment he endorsed was *In re Look Tin Sing*.[100] In D.H. Pingrey's 1888 "Citizens, Their Rights and Immunities," this case was similarly invoked as articulating the current state of the law on birthright citizenship, and confirming that the Fourteenth Amendment authoritatively declared the common law view held prior to the Civil War "that birth within the dominion and jurisdiction of the United States, of itself created citizenship," while at the same time extending the application of *jus soli* citizenship to African-Americans.[101] Other advocates of the common law view did not, however, uniformly acknowledge that it would give citizenship to those Chinese children born within the United States. Some writers instead sought elusive loopholes that might allow them to deny citizen status to such individuals.

Among these was Henry C. Ide, the author of the 1896 piece "Citizenship by Birth—Another View," a response to George Collins' internationalist and consensualist article "Citizenship by Birth."[102] Ide declared,

> Without insisting that there is a common law of the United States, it is sufficient for the present purpose to say that our new ship of state was launched in an ocean of common law, and that the legal principles which all its inhabitants had been accustomed to regard as fundamental would continue to control their national action until new principles were found necessary by new exigencies and added experiences.[103]

He then cited numerous statements of officers from the executive branch—including Secretaries of State, and Attorneys General—that affirmed the persistence of common law *jus soli* principles within the United States even after the Fourteenth Amendment had been ratified. He also urged that the policy of defining citizenship by birth was particularly appropriate in the United States since "We are a nation to which immigration comes, not one from which emigration flows. The children of [alien] inhabitants born in the United States, are in most cases as thoroughly identified with us as those born

99. *See* Stoney, *supra* note 91, at 8.
100. Recall discussion *supra*, notes 37-43 and accompanying text.
101. *See* D.H. Pingrey, *Citizens, Their Rights and Immunities*, 36 AM. L. REG. 539, 540 (1888).
102. Henry C. Ide, *Citizenship by Birth—Another View*, 30 AM. L. REV. 241 (1896).
103. *Id.* at 241.

of our own citizens . . . ."[104] Thus Ide upheld the persistence of the common law position on birthright citizenship.

In discussing the phrase "subject to the jurisdiction thereof," however, he introduced a qualification that would prohibit the children of Chinese laborers from being identified as citizens. Rather than simply following Stoney's logic and denying that anyone living in the United States could be "subject to any foreign power" even if a subject of another nation, Ide postulated a political tug-of-war between a parent's country of origin and the nation in which his child was born. First stating that the father's subjection to his native country must be at some point extinguished, even if that nation claimed sovereignty over its subjects' children, he then asserted—somewhat arbitrarily—that the United States' power became operative at the point of the child's birth. As he maintained, using the language of marking that characterized judicial decisions about segregation as well,[105]

> It is no answer to say that the child is born with the stamp of his father's nationality upon him. He is likewise born with the stamp, in case of domicile in the new country, of his father's actual domicile and intention never to renew or recognize his former allegiance and to adhere to the new one. Which stamp is the more indelible and controlling? Ultimately the latter controls in all cases.[106]

The competing stamp of the United States in this case is predicated on the father's domicile and his intention to remain within the country. Domicile, which "determines the status of an individual from the standpoint of international law,"[107] was generally defined as the place where someone resided without any fixed intention of departing.[108] Combining a father's domicile within the United States and his intention to retain allegiance to it as prerequisites for considering his child born subject to its jurisdiction would exclude from citizenship the offspring of Chinese laborers who resided only periodically in the United States.

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104. *Id.* at 246.

105. Professor Brook Thomas provides an illuminating analysis of the Supreme Court's use of metaphors of racial marking and their differing connotations. He focuses, in particular, on the paradoxical ways in which these metaphors have both served as agents of historical change and enshrined history in a fashion detrimental to arguments for affirmative action. Brook Thomas, *Stigmas, Badges, and Brands: Discriminating Marks in Legal History*, *in* LAW, HISTORY, AND MEMORY (Austin Sarat ed., 1999). In his dissent in *Plessy*, Justice Harlan maintained that the Thirteenth Amendment "not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude." 163 U.S. at 555. Moreover, he objected that the "state of the law" that the majority upheld upheld "puts the brand of servitude and degredation upon a large class of our fellow-citizens, our equals before the law." *Id.* at 567.

106. Ide, *supra* note 105. at 248.

107. Boyd Winchester, *Citizenship in its International Relation*, 31 AM. L. REV. 504, 507 (1897).

108. *See* Ide, *supra* note 105, at 248-49.

This was precisely what Ide imagined would result from his theory; stating that "the Chinese are not domiciled in the United States. They do not expect permanently to remain in this country. They all look forward to a return, sooner or later, to China. Their original allegiance has never been weakened," he concluded that "they may consistently be considered to stand upon an entirely different basis as to their children born here, from other nationalities."[109] Despite denying citizenship to the children of Chinese individuals sojourning within the United States, Ide did, however, admit that, if—despite his presumption otherwise—a Chinese subject had actually assumed a domicile within the United States, and intended to remain, his American-born child would be accepted as a citizen.[110]

Those who espoused even a modified version of that birthright citizenship derived from the common law, and believed that the Fourteenth Amendment perpetuated an earlier federal common law, confronted opposition on several fronts. Some objected that the very idea of a federal common law infringed on the autonomy of the states.[111] Others thought that the United States should conform itself to the law of nations, and adopt a civil law perspective on citizenship.[112] Another argument also surfaced—sometimes in conjunction with state sovereignty and internationalist ones. Proponents of this final position claimed that citizenship should be based upon mutual consent—involving the agreement of not only the immigrant, but of Congress as representative of the sovereign people of the United States.[113] According to this perspective, birthright citizenship represented a normatively undesirable relic, a principle incompatible with liberalism and the project of the United States.

## III STATE SOVEREIGNTY

In *Wheaton v. Peters*,[114] Justice M'Lean responded to the plaintiffs' argument that, if Henry Wheaton, the author of the Supreme Court digest known as "Wheaton's Reports," did not have a statutory copyright over this work, he possessed a common law one. In doing so, the Justice reaffirmed the absence of a federal common law. He suggested that imputing such a common law to the United States as nation would undermine the individual states' right to legislate and modify the common law as they wished. As he asserted,

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent

109. *Id.* at 250.
110. *Id.*
111. This is discussed in Section III.
112. This is discussed in Section IV.
113. This is discussed in Section V.
114. 33 U.S. 591 (1834).

> states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.[115]

One of the principal questions confronting the United States in the aftermath of the Civil War and the enactment of the Fourteenth Amendment, with its specification that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ,"[116] was whether or not the precarious balance between state and federal power had shifted. Those who endorsed a restrictive reading of the Privileges and Immunities Clause and urged that the states should retain substantial autonomy in distinguishing between classes of citizens often did not explicitly argue against birthright citizenship on the grounds of state sovereignty. However, their claims dismissed, by implication, the idea that the Fourteenth Amendment could enshrine a federal—common law—conception of birthright citizenship which would give such citizens more than nominal rights. Thus, by insisting on birthright citizenship as a national institution, the Supreme Court's opinion in *United States v. Wong Kim Ark* supported a broader federal determination in this area—one that was commensurate with the government's simultaneous attempt to bring naturalization under complete Congressional control and deny concurrent state jurisdiction. Representing one of the first declarations of an expanded national power under the Fourteenth Amendment, the *Wong Kim Ark* case presaged the role of the Fourteenth Amendment in expanding federal authority.[117]

One of the principal treatise-writers on citizenship during the period, Alexander Porter Morse also participated in both *Plessy v. Ferguson*,[118] the crucial case upholding a state statute that provided "separate railway carriages for the white and colored races,"[119] and *Hans v. Louisiana*, in which the Supreme Court articulated a strong concept of state sovereign immunity.[120] Although his main concern was with producing policies for naturalization rather than with birthright citizenship, Morse's take on the Fourteenth Amendment's Citizenship Clause followed the restrictive view of the *Slaugh-*

115. *Id.* at 658.
116. U.S. CONST. amend. XIV, § 1.
117. *See* Seminole Tribe v. Florida, 517 U.S. 44, 44-45 (1996) (holding that the States' immunity from suit by an individual could be abrogated only under the Enforcement Clause of the Fourteenth Amendment).
118. *See supra*, note 10 and accompanying text.
119. Plessy v. Ferguson, 163 U.S. 537 (1896).
120. *See supra*, note 11 and accompanying text.

*ter-House Cases*, and he endorsed the power of individual states—rather than the federal government—to fill in the substance of citizenship.[121]

In its 1873 decision in the *Slaughter-House Cases*, the Supreme Court ruled on the Thirteenth and Fourteenth Amendments for the first time.[122] Justice Miller, writing for the majority, responded to plaintiff butchers' claims that the Fourteenth Amendment Privileges and Immunities Clause provided greater protection for citizens' property rights than had existed before by articulating and reinforcing a separation between state and federal citizenship. Asserting that the Fourteenth Amendment did not "transfer the security and protection of all the civil rights . . . from the States to the Federal government," he stated that the relation between the two remained, for the most part, the same as before the Civil War, when "the entire domain of the privileges and immunities of citizens of the [States] lay within the constitutional and legislative power of the States, and without that of the Federal government."[123] In addition to affirming this distinction between the implications of citizenship of a State and of the United States, the majority also interpreted the Fourteenth Amendment's Citizenship Clause. As Justice Miller claimed,

> It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision[124] by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the Negro can admit of no doubt. The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.[125]

Thus Justice Miller, at the same time as acknowledging the enshrinement of birthright citizenship within the Fourteenth Amendment suggested that it retained a severely limited scope—not even including those children of "citizens or subjects of foreign states"—and evacuated federal citizenship itself of substance. This is particularly noteworthy since, as Justice Stephen J. Field's dissenting opinion demonstrates, the Privileges and Immunities Clause could have been given form by invoking a federal common law tradition—as was subsequently done with the Citizenship Clause.

Justice Field, originally from California,[126] opined instead, in his dissenting opinion, that the Privileges and Immunities clause referred to "the natural

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121. *See* Morse, *supra* note 9, at 44-130; *see also* Morse, *Citizenship by Naturalization*, 27 AM. L. REG. 593 & 665 (1879).

122. Thomas, *supra* note 41, at 18.

123. *Slaughter-House Cases*, 83 U.S. 36, 77 (1872).

124. *See* discussion and accompanying text, *supra* note 41.

125. *Slaughter-House Cases*, 83 U.S. at 73.

126. See FRIEDMAN, *supra* note 74, at 643 (". . . Stephen went to California during the gold-rush days. He became alcalde of Marysville, California; here he built a frame house and 'dispensed justice

and inalienable rights which belong to all citizens,"[127] and appealed to English common law in attempting to flesh these out. Observing that "The common law of England is the basis of the jurisprudence of the United States,"[128] he explained that it condemned incursions on the subject's natural right "to pursue for his maintenance and that of his family any lawful trade or employment."[129] One of the principal ways in which British subjects' freedom had been infringed was by state-sanctioned monopolies—exactly what the butchers objected to. Justice Field thus interpreted the Privileges and Immunities clause through reference to English legal tradition—as did many of those endorsing an expansive construal of birthright citizenship.[130] The view of birthright citizenship that Justice Field adopted also fell in line with his later decision—on a tour to the California Circuit—in *In re Look Tin Sing*, a case which, as we have seen, foreshadowed the outcome in *United States v. Wong Kim Ark*.[131] In the *Slaughter-House Cases*, he declared an inclusive principle of federal birthright citizenship and its supremacy over citizenship in the separate States, writing that the Citizenship Clause "recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State."[132]

Several texts on citizenship from the 1880s, including those written by Morse himself, treated the subject in accordance with the majority's opinion

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for the community, holding court behind a dry goods box, with tallow candles for lights.' He also made money in land speculation, fought or almost fought duels, rose to become justice of the California supreme court and from there was appointed to the United States Supreme Court").

127. *Slaughter-House Cases*, 83 U.S. at 96.

128. *Id.* at 104. It may be worth noting that Justice Field later denied the existence of a federal common law. Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368 (1893), was a diversity action centering on the issue the issue of whether the fellow servant doctrine of Ohio should be applied to bar recovery in a suit against the railroad, or whether a "general law"—or, in other words, a federal common law—should apply. Dissenting, Justice Field acknowledged that

> I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions to control a conflicting law of a State . . . . And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently . . . repeated the same doctrine.

*Id.* at 401.

He now deemed though that the independence of the States, preserved under the Constitution, had been violated by the propagation of such a "general law" on a federal level. *Id.* The circumstances of the *Baltimore & Ohio R.R.* case, however, can be distinguished from those involving claims of birthright citizenship; *Baltimore & Ohio R.R.* should be lined up on the side of *Erie* rather than that of *Lynch*. *See supra* notes 45 and 72.

129. *Slaughter-House Cases*, 83 U.S. 36, 96 (1872).

130. This includes Justice Gray writing for the majority in *Wong Kim Ark* itself. *See infra*, Section VI.

131. *See supra* notes 37-43 and accompanying text.

132. *Slaughter-House Cases*, 83 U.S. at 95.

in the *Slaughter-House Cases*. In Morse's *Treatise on Citizenship*, the author's views on birthright citizenship are not pellucidly clear, and in places seem almost contradictory.[133] It would probably be safe to say, however, that he endorsed the view expressed by the majority in the *Slaughter-House Cases* that citizenship in the United States rather than the individual States had been defined only by passage of the Fourteenth Amendment, and should therefore be construed restrictively.[134] He followed the dicta in the *Slaughter-House Cases* to the effect that "The words 'subject to the jurisdiction thereof' exclude [from birthright citizenship] the children of foreigners transiently within the United States, as ministers, consuls, or subjects of a foreign nation."[135] When categorizing the ways in which citizenship may be conferred, Morse also asserted that "[i]n many states *birth* is sufficient to confer [citizenship]; so that the child of an alien is a citizen from the fact of having been born within the territorial limits and the jurisdiction"[136] and footnoted this sentence to elaborate that "It is so in England and the United States [but the births must be "*within the jurisdiction*"]."[137] According to his account, however, the use of the phrase "subject to the jurisdiction" in the Fourteenth Amendment made the definition of citizenship "follow the analogy of the civil as well as public law;"[138] he thus rendered the guarantee of birthright citizenship almost nugatory by construing the Fourteenth Amendment as really adhering to the *jus sanguinis* model.[139]

Morse's discussions of the relationship between federal and state citizenship are much more comprehensive, but also follow the basic thrust of the *Slaughter-House Cases*. At several points, he distinguishes between two types of citizens, one endowed with political privileges and the other provided solely with civil rights. Although the latter may be "entitled to national protection, in return for the allegiance which they yield the state,"[140] they can be conceived of only as second-class citizens.[141] The separation between the two types of citizenship corresponds for Morse to a division between federal and state citizenship; as he states, "The distinction between political privileges (or rights) and civil rights, heretofore described, has been frequently noticed by the federal courts. The relation of the federal to the

133. At certain points, Morse furnishes quotes that support a more inclusive definition of birthright citizenship than he actually seems to espouse. For example, in a long citation from the Opinion of the Secretary of State to the President, he includes a passage specifying that "The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father." Morse, *supra* note 9, at 241.

134. Morse, *supra* note 9, at 31-32.

135. *Id.* at 248.

136. *Id.* at 7 (emphasis in original).

137. *Id.* at 7 n. 2 (brackets in original).

138. *Id.* at 32.

139. *See infra,* Sections IV and V.

140. It is perhaps significant that Morse here uses language echoing Coke's discussion of *jus soli* citizenship.

141. Morse, *supra* note 9, at 4-5.

state government in this connection has also been pointed out. Citizenship and the right to vote are neither identical nor inseparable."[142] While some states allowed non-citizens to vote in their elections, others restricted the voting privileges of even naturalized citizens.[143]

This division, which Morse deemed essential, was, he believed, in danger of erosion despite the decision in the *Slaughter-House Cases*. Indeed, he lamented the way in which the post-Civil War amendments had enhanced the power of the national government, and explained that he thought the states had been disserved by the trend toward federal definition of citizenship:

> [T]he relation heretofore existing between the several states, *qua* states, and the general government have [*sic*] undergone complete metamorphosis. One of the necessary and immediate consequences is a corresponding change in the character and nature of the obligations imposed upon the citizen in reference to the state and to the general government. The inevitable tendency of this policy must be to increase and exalt the dignity of the character of citizen of the United States,—if such a result be practicable or wise,—at the expense of the rights and privileges of the citizen of the state.[144]

Attempting to counter the move towards greater federal supremacy over the states, Morse enumerated at length the privileges that could only be conferred by the state,[145] noting, among other things, the possibility of discriminatory state legislation against the Chinese.[146] In addition, he included in his *Treatise* an entire section containing "provisions in the constitutions of the several states of the union in respect of citizenship."[147]

By the end of the 1880s, the Supreme Court's jurisprudence on the Fourteenth Amendment led writers to think that the pendulum had swung the other way, and that Morse's desire that the states achieve greater autonomy over declaring their citizens' privileges and immunities had been realized. In "The Sovereign State,"[148] A.H. Wintersteen discussed the implications of the liquor and oleomargarine cases (including *Mugler v. Kansas*,[149] *Kansas v. Ziebold*,[150] *Kidd v. Pearson*,[151] *Powell v. Pennsylvania*[152] and *Walker v. Pennsylvania*[153]), which had upheld restrictive state statutes against chal-

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142. *Id.* at 180-81.
143. *Id.* at 181.
144. *Id.* at 195.
145. *Id.* at 247-54.
146. *See id.* at 253 ("A state may legislate as to the rules of evidence, and may exclude Chinese from the right to testify where a white person is a party").
147. *Id.* at 258-91.
148. A.H. Wintersteen, *The Sovereign State*, 37 AM. L. REG. 129 (1889).
149. 123 U.S. 623 (1887).
150. *Id.*
151. 128 U.S. 1 (1888).
152. 127 U.S. 678 (1888).
153. 127 U.S. 699 (1888).

lenges under the Fourteenth Amendment Due Process Clause. He concluded that, in these cases, the Supreme Court had "recognized the broad functions of the States, as governments, to legislate concerning their own internal affairs, without antagonizing these specific restraints upon the impairment of individual rights."[154] Arguing that two "antithetical forces or tendencies are noticeable in the development of the law of constitutional limitations upon the States," the centripetal, and the centrifugal,[155] he asserted that the struggle for federal ascendancy had climaxed in the adoption of the Fourteenth Amendment.[156] Subsequently, the nation entered a centrifugal phase, which established "the broad sovereignty of the State within the Nation."[157] Simeon E. Baldwin[158] confirmed this basic thesis in his article "The Citizen of the United States," which appeared in the February, 1893 issue of the *Yale Law Journal*.[159] There he explained that neither the majority opinion in the *Slaughter-House Cases* nor Justice Field's dissenting one had entirely prevailed, and that the position of federal citizens had settled somewhere between the extremes that the two sides had articulated.[160]

With the 1896 decision in *Plessy v. Ferguson*, it seemed that Morse's declaration of a two-tiered citizenship—a lesser type granted by the federal government and a more substantive one given by the states—had reached its fulfillment. As Justice Harlan's eloquent dissent argued, the majority, by holding that the Louisiana law did not violate the Fourteenth Amendment, allowed the continuation of a caste system within the United States. As he stated, despite the fact that "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here," "it seems that we have yet, in some of the States, a dominant race—a superior class of citizens . . . ."[161] Although Morse had distinguished federal and state citizenship along the lines of civil and political rights, *Plessy* permitted the states to deny certain civil rights to those it considered second-class. As we will see, however, the *Wong Kim Ark* case, decided in the Supreme Court two years later, began heading citizenship back towards a stronger federal center of gravity.

Even during the centrifugal period, however, the federal government's successful attempts to centralize the law of immigration represented the first step towards nationalizing all definitions of citizenship. Morse himself, a strong believer in the right of expatriation who desired to enhance the comity

154. Wintersteen, *supra* note 151, at 130.
155. *Id.* at 131.
156. *Id.* at 133.
157. *Id.* at 140.
158. A professor of Constitutional law at Yale, Baldwin wrote the first article to appear in the Yale Law Journal and was the "prime mover" in forming the American Bar Association. *See* FRIEDMAN, *supra* note 78, at 631 & 650.
159. Simeon E. Baldwin, *The Citizen of the United States*, 2 YALE L.J. 85 (1893).
160. *Id.* at 90.
161. Plessy v. Ferguson, 163 U.S. 537, 560 (1896)

between nations, reminded readers that, according to the Constitution, Congress was entitled to establish a uniform rule of naturalization.[162] In 1875, the Supreme Court—which had acted similarly in 1849[163]—again invalidated several state attempts to regulate immigration.[164] In *Chy Lung v. Freeman*, the Supreme Court struck down a California statute that forced non-citizen passengers from abroad whom the California Commissioner of Immigration deemed "lunatic, idiotic, deaf, dumb, blind, crippled, or infirm" or a "lewd or debauched woman"—as petitioner had been adjudged—to pledge a five hundred dollar bond in order to enter California.[165] Suggesting that the statute was arbitrarily and discriminatorily applied against the Chinese,[166] Justice Miller, writing for the Court, held the law unconstitutional, on the grounds that Congress possessed the sole power "To regulate Commerce with foreign Nations."[167] In 1882, Congress finally passed a national immigration law, the Immigration Act of August 3, 1882,[168] which gave the Treasury Secretary authority to administer the immigration laws, but left enforcement to state boards or officers chosen by the Secretary. Thus, Congress began to assert its general power over immigration and naturalization more forcefully during the period preceding the *Wong Kim Ark* case.

## IV THE INTERNATIONALIST ARGUMENT

Some contemporary commentators who refused to endorse birthright citizenship did not eschew the idea of a federal common law simply because it diminished state power but instead because its principles differed from those of civil law countries, and from what they designated the "law of nations." Claiming that the law of nations provided for citizenship by blood—*jus sanguinis*, as opposed to *jus soli* citizenship—these critics insisted both that the internationalist criterion was superior and that it was imperative that the United States adopt a standard consistent with that espoused by the rest of the world. Those who defended birthright citizenship against such attacks countered by insisting upon its merits, and asserting that the sovereignty of the United States as a nation depended upon its ability to determine who was or was not a citizen autonomously, without pressure from external influences. They also relied on the empirical claim that the law of nations did not prevail in all nations, and that inconsistency was thus inevitable, whether or not the United States followed a *jus sanguinis* model. Although determining citizenship by *jus sanguinis* principles does not bear

162. Morse, *supra* note 9 at 116.
163. *See* Smith v. Turner, 481 U.S. 203 (1849).
164. *See* Chy Lung v. Freeman, 92 U.S. 275 (1875); Henderson v. Mayor of New York, 92 U.S. 259 (1875).
165. *Chy Lung*, 92 U.S. at 276-78.
166. *Id.* at 278-79.
167. U.S. CONST. art. I, § 8, cl. 3.
168. Act of August 3, 1888, 22 Stat. 153.

an essential relation to defining it by consent, George Collins discussed these two modes of producing citizenship together. Similarly, Morse, an advocate of state sovereignty, showed some predilections toward *jus sanguinis* principles—despite acknowledging the *jus soli* basis of citizenship in the United States—probably in part because he endorsed free naturalization and in part because Louisiana had inherited the civil law from its French roots. The several perspectives conjoined in these writings will, however, be treated separately to indicate the fundamental independence of the arguments.

The phrase "the law of nations," often used in this period to designate international law, referred both to a set of writings on international law and to principles generally derived from Roman civil law. Not only providing a set of policies, the law of nations was thought by many to be an outgrowth of reason itself. As Morse quoted Justice Marshall, "The law of nations . . . is a law founded on the great and immutable principles of equity and natural justice."[169] The following were included among the numerous works on the subject cited in treatises and articles on citizenship: Bar, *International Law*; Field, *International Code*; Foelix, *Droit International Prive*; Savigny on Private International Law;[170] Phillimore, International Law;[171] Story, *Conflict of Laws*;[172] and Vattel, *Law of Nations*. As Morse also explained and as is indicated by the titles *International Code* and *Conflict of Laws,* the law of nations followed a specific body of rules; "The Roman civil law has been resorted to for the regulation of international affairs, and is regarded and respected by all nations alike, as containing the soundest and purest code for the adjustment of conflicts of laws."[173] Although this Roman civil law deviated from the actual practice of many continental nations,[174] the fact of their general congruence with this law was used to urge compliance. Writing of nations' obligations to give effect to foreign laws and reduce the conflict of laws, Morse approvingly cited Twiss' statement in his *Law of Nations* that "Certain jurists have contended that [it] . . . rests on a deeper foundation, and that it is not so much a matter of comity or courtesy as a matter of paramount

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169. Morse, *supra* note 9, at 33.

170. According to Morse, the issue of naturalization belonged to this area; as he quoted from Foelix, "Private international law (*jus gentium privatum*) designates the collection of rules according to which conflicts between the private rights of different nations are determined; in other words, private international law is composed of the rules relating to the civil or criminal laws of a state in the territory of a foreign state." Morse, *supra* note 9, at 45.

171. This work is cited throughout Morse's *Treatise*. Indeed, Morse's book itself is dedicated "To the Right Honorable Sir Robert Phillimore, D.C.I., Whose Accomplishments as Jurist and Scholar Have Long Been Recognized and Whose More Recent Labors in the Field of International Jurisprudence Have Advocated the Policy and Illustrated the Wisdom of the System that Teaches that "There Should Be a Harmony and not a Conflict of Laws." Morse, *supra* note 9.

172. *See id.* at 31.

173. Morse, *supra* note 9, at 31. Professor John Henry Merryman elaborates that "The civil law was the legal tradition familiar to the Western European scholar-politicians who were the fathers of international law." JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICAN 3 (2d ed. 1985).

174. *See, e.g., id.* at 10 (discussing the influence of Roman civil law on European nations and indicating their deviations from it).

moral duty."[175] Indeed, at this point of increasing internationalization of labor and capital, reconciling disparities in law—at least to the point where nations could agree to disagree—was, in fact, crucial.

George Collins consistently articulated his objections to birthright citizenship by tarring the concept as a product of the common law and antithetical to the law of nations. He began his 1884 essay, "Are Persons Born Within the United States Ipso Facto Citizens Thereof?,"[176] written years before his participation in *United States v. Wong Kim Ark*, by opining that the decision in *Lynch v. Clarke* should be dispensed with since "It is well settled that the common law is not part of the jurisprudence of the United States,"[177] and claiming that the common law definition of subject should not be used to illuminate the meaning of the term "citizen" in the Constitution.[178] Instead, he wrote, indulging in a little word play, "the subject of citizenship being national, questions relating to it are to be determined by the general principles of the law of nations."[179] Citing various authorities on international law, he concluded that the law of nations dictated that "the political *status* of the father is impressed upon the child where legitimate, and that of the mother where illegitimate."[180] This *jus sanguinis* rule he considered as affording the best policy for establishing citizenship.[181]

In justifying the superiority of *jus sanguinis* principles, however, Collins immediately appealed to anti-Chinese racist sentiments. Arguing from the vantage point of cultural difference, Collins suggested through his rhetoric that the Chinese should either be analogized with the subjects of an invading foreign power or be equated with Native Americans, whom the courts had long considered not to be citizens although resident within the territory of the United States since theoretically subject to a separate sovereignty.[182] Not content with asserting that "they segregate themselves from the mass of people and establish a colony according to Oriental ideas in order that they may live in a manner similar to those in China," he even claimed that "they are antagonistic to our civilization."[183] Rather than resting his argument on contentions about which nation should retain sovereignty over these individuals, Collins referred to a cultural difference that he saw as unalterable. According to his racialized account,

175. Morse, *supra* note 9, at 49-50.
176. Collins, *supra* note 62.
177. *Id.* at 831.
178. *Id.* at 832.
179. *Id.* In his later article "Citizenship by Birth," Collins explained more fully his belief that citizenship was a national rather than municipal matter. George D. Collins, *Citizenship by Birth*, 29 AM. L. REV. 385, 386 (1895). In this context, he continued to insist that "as the subject of citizenship is national . . . the constitution is to be interpreted in conformity with the principles of international law." *Id.* at 388.
180. Collins, *supra* note 62, at 833.
181. *See id.*
182. *See* SMITH, *supra* note 5, at 318-20.
183. Collins, *supra* note 62, at 834.

> [Chinese] children born upon American soil are Chinese from their very birth in all respects, just as much so as though they had been born and reared in China; they inherit the same prejudices, the same customs, habits, and methods of their ancestors; in short, they are subject to the same civilization and adhere to it with as much tenacity as did their forefathers.[184]

Whereas others might have postulated subjection to the emperor as immutable, Collins envisioned the power of the empire as internalized into its subjects, making the Chinese civilization itself inescapable. This type of cultural racism grew naturally out of *jus sanguinis* arguments, which needed to provide reasons why the children, and even the grandchildren of people who had left China—or other countries—when very young should still be defined by blood-based allegiance.

In response to arguments like those of Collins, critics claimed that the law of nations was not, in fact, uniformly implemented in all nations. Ide, answering Collins' essay "Citizenship by Birth" in "Citizenship by Birth—Another View," explained that, until the Code Napoleon, Europe itself had granted citizenship by birth.[185] Although now France and "Germany, Austria, Sweden and Norway adopt the doctrine that national character follows parentage alone," at the same time, in "England, Portugal, Denmark and Holland and in the larger number of South American States, generally speaking, children born of foreigners are regarded as citizens of the countries in which they are born."[186] From this disparity, Ide drew the conclusion that "It is therefore clear that our government, in its action upon this question, has violated no generally received doctrine of international law, and may consistently retain the principle that has been approved by English-speaking people the world over."[187] Marshall Woodworth similarly suggested in "Citizenship Under the Fourteenth Amendment,"[188] that simply bringing the United States into conformity with the international law policy would not be sufficient to reconcile conflicts throughout the world; commenting on the problem of dual citizenship,[189] he observed that "The doctrine of international law *if followed by all nations*, would lead to no such incongruities. But the one important requisite to its successful operation is that it should be followed by *all*

184. *Id.*
185. Ide, *supra* note 105, at 244-45.
186. *Id.* at 245.
187. *Id.* at 245-46.
188. Marshall B. Woodworth, *Citizenship Under the Fourteenth Amendment*, 30 AM. L. REV. 535 (1896). This article commented, in part, on the California District Court's decision in the case of *Wong Kim Ark*.
189. The specter of dual citizenship—or "dual allegiance"—represented a thing of unspeakable monstrosity to several writers of the period. In Webster's *Treatise on the Law of Citizenship*, he spoke of dual allegiance as the product of the "solemn jugglery" permitted by English law. PRENTISS WEBSTER, A TREATISE ON THE LAW OF CITIZENSHIP OF THE UNITED STATES 51 (photo. reprint 1891).

countries; otherwise conflicts must result."[190] To obviate these problems, he urged "the growing necessity of a conference, or international congress, between the civilized countries of the earth, so that some uniform, definite and sound rule may be adopted and followed everywhere."[191]

Woodworth also insisted that, although elements of the *jus sanguinis* approach might seem appealing, it was not, in fact, the one that the United States had selected, and that the country's sovereign decision should be respected. He claimed that "Who shall, and who shall not, be citizens is a matter which every country has the paramount right—a right inherent in its sovereignty—to determine for itself"[192] and that "the United States has the inherent right to adopt any law or prescribe any rule to determine the political status, in this country, of persons who are born here of foreign parents."[193] This view was shared by others who followed the progress of Wong Kim Ark's case. An anonymous reporter, recounting the details of the arguments and decision in the California trial of *United States v. Wong Kim Ark*, expressed approval for the law of nations perspective and yet explained that the positive law of the United States must be followed:

> The doctrine of the law of nations, that the child follows the nationality of the parents, and that citizenship does not depend upon mere accidental place of birth, is undoubtedly more logical, reasonable, and satisfactory, but this consideration will not justify a court in declaring it to be the law against controlling judicial authority.[194]

As the following section will demonstrate, Schuck and Smith's argument for mutual consent likewise appeals to national sovereignty in making its case—but for eliminating rather than for preserving birthright citizenship.

## V THE IDEOLOGY OF MUTUAL CONSENT

In *Citizenship Without Consent*, Schuck and Smith argue that the history of how American citizenship has been defined should be reinterpreted as arising out of the concatenation of an ascriptive view "that one's political identity is automatically assigned by the circumstances of one's birth"[195] and a consensual notion, which posits the consent of both individual and state as a prerequisite to citizenship.[196] This dichotomy, which Schuck and Smith present as even more fundamental than the division between *jus soli* and *jus*

190. *Id.* at 551.
191. *Id.* at 554.
192. *Id.* at 545.
193. *Id.* at 555.
194. 42 CENT. L.J. 299, 300 (1896). Although the commentator does not mention that this is a quotation, the language is taken from the decision in *Wong Kim Ark*.
195. SCHUCK & SMITH, *supra* note 4, at 13.
196. *Id.* at 5-6.

*sanguinis* conceptions of citizenship, still surfaces as a subsidiary framework in Smith's *Civic Ideals*. According to *Citizenship Without Consent*, the Fourteenth Amendment itself incorporates both elements; while the specification of "All persons born . . . in the United States" is ascriptive, Schuck and Smith view the phrase "subject to the jurisdiction thereof" in a consensual light, contravening its established interpretation.[197] The argument for consent was, in fact, voiced during the period of ferment between ratification of the Fourteenth Amendment and the decision in *United States v. Wong Kim Ark*. In his 1891 *Treatise on the Law of Citizenship in the United States, Treated Historically*, Prentiss Webster articulated a consensual stance on citizenship in terms quite similar to those employed by Schuck and Smith themselves.[198] Although Webster's treatise invoked the support of writers who espoused the *jus sanguinis* principles of the civil law and the law of nations, his argument did not supercede its states' rights and internationalist counterparts but simply stood alongside them, sometimes incorporating threads from their bundles. Nor did it prove more effectual than they did within its contemporary context. Indeed, as a practical matter, Webster was obliged to fall back upon an (ascriptive) *jus sanguinis* principle as a default—a model which seems to pervade *Citizenship Without Consent* despite the authors' protestations to the contrary.

Like Schuck and Smith, Webster engaged in both historical and theoretical justifications for basing citizenship upon consent. For him, however, these two derivations of consent-based citizenship coalesced around principles of natural law. Positing ancient Rome as the civic ideal, Webster claimed that

> The relation of members to the Roman body politic was based on the principle of jus naturale [natural law] . . . . [I]t was by man that the body politic was organized, and in entering the organization with his fellow men, man followed the exercise of his natural rights, and became an ingredient of the society of which he, with others, became members.[199]

While humanistically emphasizing the centrality of man, Webster expressed the reciprocal relation between the individual and society and the mutuality of consent. According to his account, however, a fall from this state of natural law was precipitated by the invasion of Rome by "barbarians." Then, "the principles of jus naturale as had been known throughout the empire, gave way to the principles of feudalism as introduced by the invaders."[200] The feudal relation of subject and prince, entailing the indissoluble allegiance of

197. *Id.* at 5-6, 72-89.

198. WEBSTER, *supra* note 193 (Prentiss Webster was a member of the Boston Bar and, according to a genealogy web site, was born in Lowell, Massachusetts in 1851 and died there in 1898. *See Long Island Genealogy Surname Information*, *at* http://www.longislandgenealogy.com/greene/fam02349.htm (Sept. 1, 2000)).

199. WEBSTER, *supra* note 193, at 2.

200. *Id.* at 4.

the former to the latter, was adopted elsewhere in Europe—including England—by "imitation."[201]

As Webster explained, these feudal states still acknowledged the natural right of departure—which we would term expatriation,—but considered the exercise of the right unlawful if the departing subject lacked the consent of the prince.[202] He then adduced principles articulated by several continental thinkers (including Grotius, Puffendorf, Burlamaqui, and Vattel) to support this theory.[203] Schuck and Smith emphasize, by contrast, Coke's rhetoric in *Calvin's Case*, where he asserted, "[s]eing then that faith, obedience and ligeance, are due by the Law of nature, it followeth that the same cannot be changed or taken away."[204] Although Schuck and Smith's discussion may apply better to the English context than Webster's, Webster's comments about the possibility of expatriation with the consent of the prince raise a problem inherent in Schuck and Smith's account.

Throughout *Citizenship Without Consent*, the authors emphasize that consent must not be one-sided.[205] The problems arising from this necessity for a mutual consent in the case of expatriation suggest a more general difficulty with their theory. At several points, the authors raise the specter of unlimited expatriation, both as an incentive towards ensuring more mutual consent and as a possible drawback of their own position.[206] This unlimited expatriation could occur only if the consent of the sovereign body—which could be destroyed through such emigration—were not required. Thus, despite their emphasis upon the symmetrical relation of political body and

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201. *Id.* at 4-5.

202. *Id.* at 11. "The sanction of the prince was essential to the exercise of the right. That is, the departure in itself was not punishable; it was the departure without his consent which was punishable. The right of departure was recognized as a right in and of man; but at the same time it could not be exercised legally by the subject without the assent of the prince, under whom the subject lived, and to whom he occupied a personal relation." *Id.*

203. *Id.* at 13-17. In subsequently treating the problems of expatriation arising from the American Revolution and the creation of the United States, Webster confirmed that he believed England had followed the same principles; as he stated, "In case the change [of citizenship from English to United States] was made without the declaration of the intent to make the change to the government of England, then a complete change of citizenship was not effected for reason that it lacked the essential element of consent express or implied of the English king, by which allegiance was absolved." *Id.* at 64.

204. *Calvin's Case*, *supra* note 50, at 14.

205. *See* SCHUCK & SMITH, *supra* note 4, at 5 ("We shall propose . . . a reinterpretation of the Fourteenth Amendment's Citizenship Clause to make birthright citizenship for children of illegal and temporary visitor aliens a matter of congressional choice rather than constitutional prescription"); *see also id.* at 5-6 ("[W]e shall argue that the phrase 'subject to the jurisdiction thereof' in the Citizenship Clause (what we call the 'jurisdiction requirement') expresses a constitutional commitment to citizenship based on mutual consent—the consent of the national community as well as that of the putative individual member").

206. Speaking of the 1868 Expatriation Act, they maintain that "this unequivocal right of self-expatriation was eventually understood to have created a fundamental asymmetry in the nature of American citizenship, one in which an individual citizen could *always* sever the political relationship by withdrawing his consent at any time, but the government could *never* do so." *Id.* at 87. Elsewhere, they acknowledge that a pure principle of individual consent entails "a problem of unlimited expatriation." *Id.* at 38.

citizen and their insistence that consensual principles should govern both joining and detaching from a nation, Schuck and Smith cannot avoid both prioritizing the moment of entry into the polity over that of exit, and the consent of the individual over that of the state. Acknowledging that a pure principle of mutual consent would allow the United States to evict its members at will would demonstrate the arbitrary exercise of power that actually is entailed in the concept of the state's consent—a type of tyranny resembling the absolute power of the King that Coke himself had sought to deny.[207] Indeed, the consent of the prince, as envisioned by Webster, could be withheld at the sovereign's whim, thereby annihilating the will of the individual who wished to depart.

At the point when Webster's exposition reached the United States, he elaborated the contemporary importance of the question of citizenship in terms that alluded to the increasing mobility of populations, and to the importance of labor. As he stated,

> [D]uring the past quarter of a century . . . commercial relations have necessitated the departure of citizens of one country to reside permanently or temporarily in other countries, not alone for the good of the country from which they departed, but, also, for the benefit of the country to which they migrated, and last but not least, for such advantage and happiness as man might seek and find for himself and family.[208]

Thus the status of Chinese laborers, although not mentioned explicitly in Webster's treatise,[209] was implicitly comprehended within the set of issues prompting his work.

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207. As David S. Schwartz observed in his review of *Citizenship Without Consent*,

> "[I]t is absurd to lump together Coke and Filmer as both believing in unlimited sovereign authority. Attributing this viewpoint to Coke flies in the face of his theory of common law and ignores his role in the leading political controversies of the early 1600s. For Coke, the personal and official power of the monarch was limited by the 'immemorial' common law, which was prior in both time and authority to the monarchy, and which conferred rights upon Englishmen that could not be abrogated by the monarch."

David S. Schwartz, *The Amorality of Consent*, 74 CAL. L. REV. 2143, 2146 (1986). Although Schwartz limits himself to critiquing the generalizations about Coke in *Citizenship Without Consent* rather than applying his comments to *Calvin's Case* specifically, Coke's stance in *Calvin's Case* can be interpreted as part of his larger project of securing individual rights through establishing an "ancient constitution"—created by the common law—which could not be altered even by the King's commands. *See supra*, note 58 and accompanying text.

208. WEBSTER, *supra* note 193, at 19.

209. Webster mentioned the question of Chinese citizenship only once, when discussing how the *jus sanguinis* rule that he believed to be the United States default principle applied in relation to China. At that point, he referred to the case of John Fredrick Pearson, the son of an American businessman who had lived in China for many years and had married a Chinese woman. Since Pearson's father was American, Webster believed that Pearson could have exercised a right of election when he reached the age of majority; but since he failed to do so, "the exercise of the right could be denied him . . . by Congress." *Id.* at 126-27. Webster's discussion of this case is interesting, since it indicates how the *jus sanguinis* rule could be applied liberally as well as restrictively.

In his treatment of United States citizenship, Webster's historical account merged with his deduction of the principles of citizenship; he identified the Declaration of Independence with the form of the social compact[210] and the government of the United States with the realization of natural law-based models that had remained dormant since the fall of the Roman Empire.[211] Beginning from the standpoint of the freedom of man, Webster asserted that "the control of one's own self and the exercise of this control . . . is the right nature has given to man."[212] Individuals, banding together, can exercise this control by founding the state; "Man in his compact with his fellow man, by which society is formed, institutes the form of government, by which and under which he will best enjoy life, liberty and the pursuit of happiness."[213] Not unintentionally, the language Webster employed to describe this institution of the state echoed that of the Declaration of Independence, which specified "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."[214] This social compact reasoning requires man to abdicate some of his freedom by subjecting himself to restrictions "which the citizens, of which he is one, deem necessary should exist for the welfare of society," the principal of which is positive law.[215] Thus, according to Webster, the law is imposed upon the individual only following his voluntary creation of the state.

This relation to the law subsists not only for the original constituents of the society but for each person who opts into it subsequently. Indeed, in Webster's view, the individual's entrance into citizenship mirrors in almost every respect the group's initial constitution of the state.[216] The principal difference is that mutuality of consent can no longer be assumed, and must instead be established; in Webster's words, "A society can receive whomsoever it pleases; but there is no obligation by which it can be compelled to receive those whom it does not want."[217] Although Webster did not elaborate upon this proposition, it contained the seeds of Schuck and Smith's argument for eliminating birthright citizenship and requiring congressional consent.

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210. *See id.* at 21-22.
211. *Id.* at 31-32.
212. *Id.* at 20.
213. *Id.* at 34.
214. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
215. WEBSTER, *supra* note 193, at 41.
216. He again insisted upon the importance of free will, writing that "Man's act in joining society and his act in withdrawing therefrom, must be peculiarly his own. They must be acts of his own volition. He must join society of his own free will and must withdraw legally of his own free will." *Id.* at 43. He also reminded the reader that citizenship involves both rights and duties, and that a member of society will be constrained by positive law. *Id.* at 44-46.
217. *Id.* at 43-44.

Like Schuck and Smith, Webster emphasized the difference between the nature of a subject and that of a citizen. Only through becoming a citizen could one acquire complete membership within the society created by compact; as he described it, "Full citizenship is the enjoyment of all the rights and privileges which the laws of a society allow to its members when at home, and equal protection when abroad."[218] Furthermore, Webster's very definition of citizenship revealed that it could apply solely to members of a representational democracy—one characterized, like the United States, by separation of powers. For Webster, citizenship involved

> First . . . . the privilege accorded to members of participating in the legislative branch of the government, of legislating and being represented in the legislative department.
>
> Second. Subjection to the executive branch.
>
> Third. The right to have rights determined and wrongs redressed in the judiciary department.
>
> Fourth. There being no grades or degrees of citizenship, the privilege to call for protection from his government when abroad equally with other citizens of the state of which he is a member.[219]

Among these privileges, all except those of participating in the legislative branch and being protected when abroad would be shared by alien visitors or those residing within the country. To a certain extent, then, aliens retained the status of subjects within Webster's polity, while citizens enjoyed an enhanced and participatory position.

In *Citizenship Without Consent*, Schuck and Smith insist upon a similar distinction between subject and citizen from the outset. As they assert on the first page of their book,

> Before the Revolution, the Americans had been the subjects of a royal sovereign, and they inherited their political status as English subjects along with their other patrimonies. By throwing off their allegiance to the Crown, however, they resolved to become something very different—citizens of a new state constituted solely by the aggregation of their individual consents. Voluntary adherence rather than a passive, imputed allegiance was the connective tissue that would bind together the new polity.[220]

This contrast plays out in the authors' understanding of the jurisdiction requirement and its respective application to aliens and citizens. By interpreting the phrase "subject to the jurisdiction thereof" as requiring "more than

218. *Id.* at 48.
219. *Id.*
220. SCHUCK & SMITH, *supra* note 4, at 1.

simply the individual's subjection to the government's police power and criminal jurisdiction,"[221] and instead mandating a "*political*" connection between citizen and state, they continue to define citizenship—and its difference from alienage—along the lines that Webster sketched.

Most prominent among those of Webster's contemporaries who believed the phrase "subject to the jurisdiction thereof" should be construed as a political rather than simply territorial requirement was George Collins himself. As we have already seen, he adopted an internationalist perspective in arguing against the existence of a federal common law; his claims were also, however, cloaked in the rhetoric of consent. Insisting in "Citizenship by Birth" upon the dissimilarity of citizens of a republic and subjects of a monarch,[222] Collins articulated the consequences of this distinction in terms of a contrast between municipal or territorial and national or political jurisdiction. First defining citizenship, he claimed that "[C]itizenship exclusively appertains to national character and not to municipal status;—the one is an attribute of national sovereignty, the other is but an incident of the internal administration of municipal law; the one is essentially political, the other is entirely judicial . . . ."[223] This distinction between the judicial system—of which aliens could presumably avail themselves—and a more "political" system resembles that which Webster drew between the rights of citizens and those of aliens.

Reaching further than Webster, however, Collins insisted that citizenship in a republic could be identified with sovereignty itself. Whereas Webster emphasized the lawmaking capacity conferred by citizenship, Collins maintained that the rights of sovereign citizenship exceeded even lawmaking; as he suggested,

> [T]he law . . . is derivative and of a special and limited origin, and passed in pursuance of a restricted and delegated authority and not at all commensurate or co-extensive with the sovereignty of the nation; whereas citizenship under our form of government is of the very essence of sovereignty and of course, co-extensive therewith . . . It is true, law emanates from sovereignty, but its creation is only an attribute of sovereignty . . . .[224]

What, then, might be more fundamental to sovereignty than lawmaking?

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221. *Id.* at 86.

222. Collins, *Citizenship by Birth*, *supra* note 183, at 387 ("[I]n England, because of the monarchical form of government, the king was deemed to possess the political attribute of nationality, and instead of the status of citizenship being conferred on an Englishman, which would have had the effect of placing him on an equality with his king, he was relegated to the subordinate status of subject and thus became a subject of the king instead of a citizen of the nation").

223. *Id.* at 386.

224. *Id.* at 392.

This question is partly answered by Collins' statements on "political jurisdiction." Under Collins' consensualist vision, being born subject to the jurisdiction of the law—a manifestation of sovereignty subsidiary to it—should not alone allow an individual to become a citizen. Criticizing Justice Field's legal interpretation of "subject to the jurisdiction thereof" in *In re Look Tin Sing*, Collins presented an alternative construction of the phrase as denoting "political jurisdiction." Delineating the nature of this "political jurisdiction," he wrote,

> The jurisdiction of the United States is by no means confined to legislation; it extends to all matters of external sovereignty, not embraced within the scope of legislation, and which confer powers commensurate with the status of the country as a nation, and fix and define its relation and the relation of its citizens to other nations and to aliens. It is that jurisdiction, the "political jurisdiction" to which the constitution refers, and such is the decision of the Supreme Court of the United States, hereinafter cited.[225]

Thus, the essence of sovereignty consists not only in citizenship itself, but also in the ability to relate externally with other nations,[226] and, above all, to determine who is an alien or a citizen. Only an individual already subject to the United States' political jurisdiction, which includes the ability to separate alien from citizen, can be a citizen. This conception of what constitutes United States sovereignty underlies *Citizenship Without Consent* as well.

Both Collins' and Schuck and Smith's accounts can be opposed to a vision of sovereignty that relies less on the identification of sovereignty with the citizen and more on the centrality of the Constitution as the fundamental law of the land. A legal reading of "subject to the jurisdiction thereof" more convincing than the one that Collins dismissed would construe the phrase as designating not simply subjection to laws passed by Congress but, more importantly, subjection to the constraints of the Constitution itself. In fact, this interpretation derives support from the currently official form of the—definitively consensual—act of naturalization. The oath of allegiance performed as part of the process of naturalization requires individuals to swear to "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same." Thus, allegiance is not explicitly mandated to the political body composed of citizens, but instead to the Constitution and those laws passed in accordance with it. Although the federal government did not promulgate an official text for the oath of allegiance until 1929, and first attempted to standardize the quite disparate naturalization procedures imple-

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225. *Id.* at 390.

226. This aspect of the definition integrates Collins' internationalist focus with his consensualist one.

mented by different courts in 1906, the crucial element of allegiance to the Constitution had already surfaced in the Naturalization Act of 1802.[227]

These normative definitions of consensual citizenship led those thinkers who espoused them to reject as contradictory the idea that the United States, a republic, might, in fact, have embraced the English concept of birthright citizenship. The paradoxes thought to arise from adhering to birthright citizenship in the United States assumed several specific forms; the codification of the right of departure in the Expatriation Act of 1868 and the fact that children of U.S. citizens born abroad were given citizenship by statute were adduced as proof that the fundamental principles of republican democracy controverted any claims of birthright citizenship. Webster, arguing that birthright citizenship could not be conceived of in the absence of perpetual allegiance, deemed the U.S. acknowledgement that individuals could renounce their citizenship proof that birthright citizenship had never furnished the American rule; as he asserted,

> The right of expatriation as being a natural and inherent right in man, has been advanced by the publicists in the United States ever since the inception of its government. The advocacy of this principle was clearly in contradiction of the common law principle which governed in England. Had the common law principle as recognized in England been adopted in the United States, the right of expatriation on the part of a citizen of the United States could not have been advocated by the publicists. The exercise of such a right, as it was maintained to exist in a citizen of the United States, bore within it a refutation of the adoption of the English common law rule.[228]

Schuck and Smith follow a similar logic, relying primarily on the fact that the Expatriation Act of 1868 was passed a day before the ratification of the Fourteenth Amendment.[229] This Expatriation Act, which codified a view that had been applied—with certain exceptions—since the Founding, specified, along the lines described by Webster, that expatriation was a "natural and inherent right of all people."[230] According to Schuck and Smith, in the 1868 Expatriation Act, "Congress embraced the consensual conception of citizenship in a more direct and thoroughgoing way."[231] Viewing birthright citizenship as only viable when linked with perpetual allegiance, however, is to suggest that it was only for the benefit of the King, and his retention of subjects, that the *jus soli* rule was developed; as we have seen, this

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227. *See* Naturalization Act of April 14, 1802, 2 Stat. 153; *see also* INS History, Genealogy, and Education, *available at* http://www.ins.usdoj.gov/text/aboutins/history/articles/OATH.htm (visited Aug. 1, 2000) (for a discussion of the history of the oath of allegiance).

228. WEBSTER, *supra* note 193, at 95.

229. SCHUCK & SMITH, *supra* note 4, at 86.

230. 15 Stat. 223 (Act of July 27, 1868).

231. SCHUCK & SMITH, *supra* note 4, at 86.

assumption is erroneous.[232] Furthermore, the link between expatriation and naturalization is closer than that between expatriation and birthright citizenship, and the possibility of naturalization—the mirror image of expatriation—was enshrined in the Constitution at the same time as *jus soli* citizenship based upon the common law was recognized.

Similarly, laws permitting individuals born abroad to American fathers to be considered U.S. citizens introduced another disparity from the common law view, and raised the dreaded prospect of dual allegiance.[233] One contemporary of Webster, Marshall B. Woodworth, citing Collins' endorsement of an internationalist perspective with approbation, and yet concluding that the Fourteenth Amendment did ensconce *jus soli* citizenship within the Constitution, suggested a compromise between the two principles which would also avoid problems of dual allegiance.[234] Viewing each doctrine individually as leading to "extreme" results for children born to alien parents within the United States,[235] Woodworth argued that an intermediate position should be adopted, one that would arise from the Fourteenth Amendment and yet not involve any echoes of perpetual allegiance. As he wrote, "the international law doctrine still has its application, in subordination, however, to the rule of citizenship promulgated in the country of birth."[236] Acknowledging that it might be irrational for a child who happened to be born in the United States, but whose parents had no intention of raising him there, to be subject to the obligations placed upon U.S. citizens, he asserted that, in such instances, the practice had always been to exempt such individuals from citizenship and follow, *de facto*, the international rule.[237] At the same time, he recognized the absurdity of applying the international principle absolutely,

232. *See supra*, notes 58-60 and accompanying text.

233. *See supra*, note 187.

234. Woodworth discussed the issues arising from *U.S. v. Wong Kim Ark* at least twice, once before the Supreme Court's 1898 decision, and once after. *See* Marshall B. Woodworth, *Who Are Citizens of the United States? Wong Kim Ark Case—Interpretation of Citizenship Clause of the Fourteenth Amendment*, 32 AM. L. REV., 554, 554-561 (1898); Woodworth, *supra* note 192, at 535-55. In his articles, he reminded the reader that the issue in *Wong Kim Ark* should not be whether the internationalist or common law view is superior, but instead what the Fourteenth Amendment mandates. Woodworth's first essay stated that "whatever may have been the trend of judicial declarations prior to the Fourteenth Amendment, the question which now confronts the courts is not, primarily, what constitutes citizenship under the common law, or by the law of nations, but it is confined to the meaning of the words employed in the Fourteenth Amendment." Woodworth, *Citizenship Under the Fourteenth Amendment*, at 540. In concluding his second article, which largely summarized the Supreme Court's decision in *Wong Kim Ark*, he recapitulated in the same vein: "With respect to the superiority of the international law doctrine over that of the common law, it may be conceded that while the rule of international law, that the political status of children follows that of the father, and of the mother, when the child is illegitimate, may be more logical and satisfactory than that of the common law, which makes the mere accidental place of birth the test, still if the Fourteenth Amendment is declaratory of the common law doctrine, it is difficult to see what valid objection can be raised thereto . . . ." Woodworth, *Who Are Citizens of the United States?*, at 561. In both contexts, he referred to Collins' position as argued with "much plausibility" or "very plausibly", despite disagreeing with its applicability in interpreting the Fourteenth Amendment. *Id.* at 544, 555.

235. Woodworth, *supra* note 192, at 547.

236. *Id.* at 546.

237. *Id.* at 546.

since it would mean that "every child born here of foreign parents would, on becoming of age, have to be naturalized in order to become a citizen of this country."[238] As an alternative to both of these extremes, he suggested the possibility of election, the model allowing the greatest degree of latitude for the individual in his exercise of consent and the least for the state. According to this view,

> [T]he question of the citizenship of a person born here of foreign parents resolves itself, practically, into a question of intention or election, to be exercised by the parents during the minority of the child, or by the person himself when he arrives at the age of majority; a failure to make such election to be deemed tantamount to claiming the citizenship of this country by virtue of birth here.[239]

This version of a consent-based theory of citizenship demonstrates that a normative vision of consent cannot subsist on its own, and must instead be supported by a practical framework relying on either *jus soli* or *jus sanguinis* principles.

Thus, even though both Webster and Schuck and Smith base their theses about citizenship on the idea of mutual consent, they espouse, in practice, a basic *jus sanguinis* model. This proves necessary since pure mutual consent would mean that members of society would be have to be naturalized at the age of majority—as though engaging in a religious ceremony akin to confirmation or a *bar mitzvah*—and the government could at that point approve or dismiss candidates for citizen. Instead of endorsing this idea—which could hardly seem viable—Webster settled on a *jus sanguinis* account, asserting that "The rule acquisition of citizenship by descent or extraction is a natural law, one which governs all mankind all the world over,"[240] and that "[T]he citizenship of the child follows that of the parent, and changes whenever the parent sees fit to make a change."[241] Although Webster's slant on *jus sanguinis* citizenship incorporated the consent of a child's parents, it did not take into account the child's own volition, which a thoroughgoing consensualism should require. Nor does Schuck and Smith's model. By proposing a reinterpretation of the Citizenship Clause—combined with Congressional policies—which would envision it as providing citizenship to children on the basis of their parents' status rather than the territorial location of their birth, Schuck and Smith endorse a *jus sanguinis* stance.[242] Although they insist upon liberally allowing such children to expatriate themselves

238. *Id.* at 547.
239. *Id.* at 548.
240. WEBSTER, *supra* note 196, at 109.
241. *Id.* at 127.
242. See their proposals for granting provisional citizenship to individuals born to citizen parents, to legally resident aliens, and to children born of American citizenship abroad. SCHUCK & SMITH, *supra* note 4, at 116-129.

once they reach maturity,[243] Schuck and Smith construe U.S. citizenship law according to a *jus sanguinis*—and ascriptive—default. This ascription thus characterizes both systems equally, and cannot be identified simply as a remnant of feudal allegiance. It derives instead from the very fact that a child can never decide in advance whether he or she would prefer to be born within one or another particular society. Thus, the dichotomy that Schuck and Smith attempt to draw between ascription and consent proves ephemeral at best, leaving the reader still to choose a *jus sanguinis* or *jus soli* basis.

## VI CONCLUSION: *UNITED STATES V. WONG KIM ARK*

In 1895, Wong Kim Ark, a twenty-two year old laborer born in San Francisco of Chinese parents, attempted to re-enter the United States after a brief visit to China.[244] Since the Geary Act[245] remained in force, the customs collector refused to allow him to land. In response, Wong Kim Ark petitioned for a writ of habeas corpus in the Northern District of California. Following Justice Field's holding in *In re Look Tin Sing*,[246] Judge Morrow dismissed George Collins' internationalist argument for the United States[247] and determined, in *In re Wong Kim Ark*, that the petitioner was a natural born citizen, and, therefore, could not be excluded. The Judge was not, however, overly enthusiastic about reaching this outcome, holding as he did principally because existing precedents demanded it. The United States then appealed, and the Supreme Court affirmed the lower court's decision in a manifesto occupying more than fifty pages.[248] The preceding sections should, however, have demonstrated that the length of the decision in *Wong Kim Ark* was not unreasonable given the number and detail of the contemporary arguments the majority was obliged to refute.

Controverting the internationalist view, Justice Gray, writing for the majority, declared on the one hand that there was no settled rule of international law as to citizenship when the Constitution was adopted,[249] and on the other that "it [cannot] be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to citizenship."[250] He also denied the argument based on mutual consent, rejecting the idea that Congress' power to prescribe a uniform rule of naturalization could or should be extended to allow Congress to take away citizenship or its rights:[251] "The

243. *See id.* at 122-24.
244. *Wong Kim Ark*, 169 U.S. 649, 652-63 (1898).
245. *See supra*, notes 26-28 and accompanying text.
246. *Wong Kim Ark*, 71 F. 382, 385, 389, 392.
247. *Id.* at 384-85.
248. *Wong Kim Ark*, 169 U.S. 649 (1898).
249. *Id.* at 607.
250. *Id.* at 668.
251. *Id.* at 703.

fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship."[252] On the other side, Chief Justice Fuller's dissent, with which Justice Harlan concurred, opposed the idea of a federal common law on both internationalist and state sovereignty grounds.[253] It also raised the specter of dual allegiance, contending that Chinese subjects born in the United States, forever unable to expatriate themselves from China, would be torn between the two countries.[254]

It is the rhetoric that the majority and dissent employed in discussing the implications of the common law, however, that casts greatest illumination upon the relationship between national sovereignty and citizenship. This rhetoric centers on the term "subject," which Justice Gray used in several seemingly disparate contexts—as compared with "citizen," and as distinguished from "subject to." Early in his opinion, Justice Gray asserted that British common law precedent was necessary to understand Constitutional comments on citizenship, and proceeded to write about the meaning of "natural-born citizen" for the founding fathers.[255] Here he juxtaposed discussions of the monarchical "subject" with those of the American "citizen," leading to the conclusion that the two were, in fact, the same. Complicating this preliminary understanding of the "subject," he finally—more than twenty pages later—treated the Fourteenth Amendment phrase "subject to the jurisdiction thereof,"[256] and differentiated between the employment of "subject" in this expression and the former situation, maintaining that an individual can be a "subject" of one government and still "subject to the jurisdiction" of another. This contrast established an essential difference between what one is "subject of," and what one is "subject to." Finally, he took up the dissenters' claim that "subject to the jurisdiction thereof" denotes the same thing as the Civil Rights Act's "and not subject to any foreign power."[257] The locution of the Civil Rights Act raised the issue of how the United States could consider those of Chinese descent citizens, since the Chinese emperor also maintained that they were still his subjects, and Justice Gray arrived full circle back at the initial division between the respective political situations of "citizen" and "subject."

By the end of Justice Gray's progressive contextualizations of "subject" and the conclusion of his opinion, "subject of" and "subject to" had in some senses infected each other, despite the supposedly clear distinction established between them. Even from the beginning, with the abrupt transition that

252. *Id.* at 703.
253. *Id.* at 706-11.
254. *Id.* at 720-26.
255. *Id.* at 653-54.
256. *Id.* at 675.
257. *Id.* at 688.

Justice Gray executed between the words of the Fourteenth Amendment and the language of the original Constitution and British common law, the two connotations were mutually implicated through their proximity. Likewise, as Justice Fuller and Justice Harlan contended in their dissent, the "subject to" of the Civil Rights Act could be interpreted to mean "subject of;" they insisted that

> The words 'not subject to any foreign power' do not in themselves refer to mere territorial jurisdiction, for the persons referred to are persons born in the United States. All such persons are undoubtedly subject to the territorial jurisdiction of the United States, and yet the act concedes that nevertheless they may be subject to the political jurisdiction of a foreign government.[258]

These resonances were not overtones that rang completely outside Justice Gray's range, however, as his approach to the case was two-tiered; on a first level attempting to separate out the implications "subject to" and "subject of," which he saw the other side as conflating, he simultaneously on a second level demonstrated their imbrication, and why that interweaving should allow Wong Kim Ark citizenship. In fact, through introducing the common law, and asserting that the "subject" of the British king had become the "citizen" of the United States, while then reinforcing the power of the United States within its jurisdiction ("subject to the jurisdiction thereof"), he posited a U.S. force equivalent to the bonds asserted by the Chinese emperor that could bring Wong Kim Ark over to the side of U.S. citizenship.

Making birthright citizenship seem a necessity in order for the country to retain exclusive governmental authority and be able to enforce the laws, Justice Gray wrote that "the jurisdiction of every nation within its own territory is exclusive and absolute, and is susceptible of no limitation not imposed by the nation itself; that all exceptions to its full and absolute territorial jurisdiction must be traced up to its own consent, express or implied."[259] This idea of an "absolute" authority that could only be abrogated by a type of contractual "consent" suggests a Hobbesian absolute monarchy, which subjects its citizens in return for protection. Through positing such a strong national government, Justice Gray could maintain that even aliens had to be considered "subject to the jurisdiction thereof," and that their children were thus born subject to the United States rather than a foreign government; as he asserted "Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."[260]

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258. *Id.* at 720.
259. *Id.* at 686.
260. *Id.* at 693.

The creation of a monolithic state, subjecting all its citizens, was rhetorically crucial for Justice Gray since he needed to establish U.S. authority over Chinese subjects as definitively as the Chinese government could claim them. This requirement emanated partly from the contemporary fear of dual citizenship, a specter that appeared in—among other places—Justice Fuller's dissent. Whereas the United States, as a participatory democracy, had previously announced that its citizens possessed the right of expatriation, since they could remove their consent at any time from their hypothetical contract with the government, the story went that China still operated on *jus sanguinis* principles, and claimed that its subjects had no recourse in attempting to divorce themselves from association with it. By maintaining that the United States alone could "consent" to deny its jurisdiction within territorial limits, however, Justice Gray created an area in which its authority could equal that of the Chinese emperor. Thus, in order to argue for the equal citizenship of those of Chinese descent at this moment of national consolidation, Justice Gray had to assimilate the United States to an absolute sovereignty, like China, a feat he accomplished through invoking English common law.