BIRTHRIGHT CITIZENSHIP AND PRESIDENTIAL POWER

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I. INTRODUCTION

> Nobody can deny that the question of citizenship in a nation is of the most vital importance. It is a precious heritage, as well as an inestimable acquisition …. [T]he Fourteenth Amendment … on the other hand, does [not] arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this [g]overnment, are and must remain aliens.
>
> Chief Justice Melville W. Fuller[1]

As a practicing lawyer and historian, in my view, President Trump's executive order banning automatic birthright citizenship will be upheld as constitutional, with the issue of the Jurisdiction Clause eventually adjudicated by the United States Supreme Court.

Quite simply, the Fourteenth Amendment confers citizenship on any person who is both: (1) "born or naturalized in the United States" and (2) "subject to the jurisdiction thereof." Both requirements are absolutely necessary for citizenship. The "jurisdiction" wording in the second clause (the "Jurisdiction Clause") is the subject of current legal debate. This term referenced the historical notion of "ligeantia," signifying that an individual owes direct and exclusive allegiance to the sovereign nation, which must grant consent for the individual's presence. The Jurisdiction Clause specifies that the individual must be subject to the 'jurisdiction' of the United States, rather than its laws. *This distinction is monumental*. Consequently, it is unsurprising that the interpretation of that term in an amendment drafted 160 years ago could be misconstrued by both the judiciary and the public. As one Supreme Court justice explained, "the evident meaning of the words 'subject to the jurisdiction thereof' is not merely subject in some degree to the jurisdiction of the United States, but completely subject to their political jurisdiction … owing them direct and immediate allegiance."[2]

The effort to read the Fourteenth Amendment more broadly—to confer birthright citizenship on the children of those not subject to the full and sovereign jurisdiction of the United States—ignores historical context and the political theorem underpinning the Citizenship Clause. This erroneous interpretation also permits courts to intrude upon an exclusive plenary power assigned to the Executive Branch. It is time for the courts, and for the political branches as well, to have a clear and unequivocal interpretation of the Citizenship Clause, restoring to the constitutional mandate what its drafters

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[1] United States v. Wong Kim Ark, 169 U.S. 649, 727, 732 (1898) (Fuller, C.J., dissenting).

[2] Elk v. Wilkins, 112 U.S. 94, 102 (1884).

actually intended: that only a complete jurisdiction of the kind that brings absolute allegiance to the United States is sufficient to qualify for the grant of citizenship.

As this Article contends, the Fourteenth Amendment does not bestow citizenship upon the offspring of aliens, unlawfully residing in the United States. The Jurisdiction Clause, when accurately interpreted, indicates that children born in the United States to ambassadors or invading soldiers would not acquire citizenship under the Fourteenth Amendment, as they do not owe complete loyalty to the United States. They retain citizenship in their native nations, to which they owe at least some allegiance. Thus, allegiance is a reciprocal relationship contingent upon the stipulation that the individual must also be present with the sovereign's agreement. Undoubtedly, undocumented immigrants and their children are in the United States without authorization.

This Article also examines the historical context of the passage of the Fourteenth Amendment. The history of the Jurisdiction Clause begins with the Civil Rights Act of 1866, which stated: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[3] The senators who formulated the Jurisdiction Clause reasoned that children of "aliens" or anybody "owing allegiance to anyone else" would be ineligible for citizenship. This rationale persisted for decades following the enactment of the Fourteenth Amendment. Senator John Bingham, a primary architect of the Fourteenth Amendment, declared that "every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty" would be a citizen.[4] Consequently, the notion of complete loyalty to the United States is undermined if the parents (and consequently their child) possess any allegiance to their place of origin.

Debate on the Civil Rights Act and the Fourteenth Amendment confirmed that members of Congress at the time shared that understanding. Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, explained that the purpose of the Act was "to make citizens of everybody born in the United States who owe[d]

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[3] Brief of Members of Congress as Amici Curiae in Support of Defendants at 5, Washington v. Trump, No. 2:25-cv-00127-JCC (W.D. Wash. 2025) (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27) [hereinafter Brief of Members of Congress].

[4] *Id.* Although forgotten by most Americans, Representative John Bingham of Ohio is one of the most important figures in American constitutional history. Justice Hugo Black called him the "Madison … of the Fourteenth Amendment." Tom Donnelly, *John Bingham: One of America's Forgotten "Second Founders,"* CONST. L. CTR. (July 9, 2018), https://constitutioncenter.org/blog/happy-birthday-john-bingham-one-of-americas-forgotten-second-founders; CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866).

allegiance to the United States."[5] Trumbull explained that "subject to the jurisdiction thereof" meant "not owing allegiance to anybody else [and being] subject to the complete jurisdiction [of the United States]."[6] Jurisdiction was clearly understood as allegiance, excluding "persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers."[7] Representative John Broomall explained that the newly freed slaves were properly regarded as U.S. citizens by birth because they owed no allegiance to any foreign sovereign. Senator Reverdy Johnson agreed that "all that this Amendment provides is, that all persons born in the United States and not subject to some foreign Power … shall be considered as citizens."[8]

One of our most distinguished jurists, Judge Richard Posner,[9] an American legal scholar and retired United States Federal Circuit judge, echoed this view when he argued that the interpretation of absolute birthright citizenship "makes no sense."[10] Judge Posner doubted "it was correct even under existing caselaw because many aliens present in the United States owe no allegiance to it."[11] He observed that hundreds of thousands of foreign individuals have arrived in the United States exclusively to give birth, with no indication of any allegiance to this country. "[T]here is a huge and growing industry in Asia," Posner writes, "that arranges tourist visas for pregnant women so they can fly to the United States and give birth to an American. Obviously, this was not the intent of the Fourteenth Amendment; *it makes a mockery of citizenship*."[12] [emphasis added]

Yet, some legal scholars insist that the President's Citizenship Executive Order (EO) disrupts established legal principles. This maximalist interpretation conflicts with established law and is contradictory with the Supreme Court's seminal ruling in *Elk v. Wilkins*: that the children of Tribal Indians did not fall within the Citizenship Clause, even though they were subject to the regulatory

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[5] Edward J. Erler, *The Citizenship Clause of the Fourteenth Amendment: The Congressional Debate*, AM. MIND (Nov. 6, 2018), https://americanmind.org/feat-ures/the-case-against-birthright-citizenship/the-citizenship-clause-of-the-fourteenth-amendment-the-congressional-debate/.

[6] Brief of Members of Congress, *supra* note 3, at 12.

[7] *Id.* at 6–7 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866)).

[8] *Id*; CONG. GLOBE, 39th Cong., 1st Sess. 573 (1866).

[9] Richard A. Posner is an American legal scholar and retired United States circuit judge who served on the U.S. Court of Appeals for the Seventh Circuit from 1981 to 2017; *see* Richard A. Posner, *Senior Lecturer in Law (retired)*, UNIV. CHI. L. SCH., https://www.law.uchicago.edu/faculty/posner-r.

[10] Brief of Members of Congress, *supra* note 3, at 15; Oforji v. Ashcroft, 354 F.3d 609, 621 (7th Cir. 2003).

[11] Brief of Members of Congress, *supra* note 3, at 15; *Oforji*, 354 F.3d at 621.

[12] Brief of Members of Congress, *supra* note 3, at 15 (quoting Oforji v. Ashcroft, 354 F.3d 609, 621 (7th Cir. 2003)).

power of the United States.[13] Opponents of the EO rely almost exclusively on the Supreme Court's decision in *United States v. Wong Kim Ark (1868)*.[14] As explored in this Article, that Court was careful to narrow its actual holding to the children of those with a "permanent domicile and residence in the United States."[15] In fact, the Court in *Wong Kim Ark* did not suggest in any manner that it was overturning *Elk* or jeopardizing the 1866 Civil Rights Act.[16]

II. EXECUTIVE ORDERS

A. Historical Context

Historically, executive orders are promulgated by the President of the United States as the head of the executive branch, instructing a federal agency to undertake or abstain from a specific course of action. These orders are enforceable insofar as they constitute a legitimate exercise of the President's authority (that is, the action must fall within the constitutional powers of the President).[17] Although the United States Constitution does not contain a particular provision for executive orders, it mandates that the President "shall take Care that the Laws be faithfully executed."[18] This clause emphasizes the President's obligation to guarantee that laws are not merely documented but are actively implemented.[19]

Since George Washington, Presidents have promulgated numerous executive orders, along with presidential memoranda and proclamations. The State Department began numbering EOs in 1907, working from files going back to 1862.[20] Today, close to 14,000 executive orders have been issued.[21] According to The Heritage Foundation, "approximately 1,500 unnumbered executive orders have also been compiled … [and] there may be as many as 50,000 unnumbered orders."[22] Over the past fifty years, Presidents have issued between a maximum of 381 executive orders (Ronald Reagan, 1981-1989) and a

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[13] Elk v. Wilkins, 112 U.S. 94, 102 (1884).

[14] *See* United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

[15] *Id.* at 653.

[16] *Id.* at 704.

[17] *Executive Orders*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/.

[18] U.S. CONST. art. II, § 3.

[19] *See id.*

[20] *Executive Orders*, AM. PRESIDENCY PROJECT (last updated Mar. 16, 2026), https://www.presidency.ucsb.edu/stat-istics/data/executive-orders.

[21] *Executive Orders*, HERITAGE FOUND., https://www.heritage.org/political-process/heritage-explains/executive-orders (last visited Apr. 19, 2026).

[22] *Id.* (citation modified).

minimum of 166 (George H.W. Bush, 1989-1993).[23] Franklin Roosevelt (1931-1945) issued more executive orders than any other president, totaling 3,721.[24] Other presidents include Dwight Eisenhower (484), Lyndon Johnson (325), Richard Nixon (346), Jimmy Carter (320), Bill Clinton (364), George W. Bush (291), and Barack Obama (276).[25]

B. The President's 'EO'

The President's EO is an integral part of the Executive Branch's broader effort to repair the United States's immigration system and to address the ongoing crisis at the southern border.[26] As the President has argued, individuals unlawfully in this country "present significant threats to national security and public safety."[27] The severity of this threat warrants a full panoply of immigration measures. Some of these threats are related to the Biden Administration's policy of recognizing near-universal birthright citizenship. President Trump has contended that "the nation's current policy of universally granting birthright citizenship to individuals who lack any meaningful ties to the United States provides substantial opportunities for abuse by motivated enemies."[28]

As proffered, the EO seeks to correct the prior misreading of the Citizenship Clause. In its present form, the Order identifies only two circumstances in which a person born in the United States is not automatically extended the privilege of United States citizenship: "(1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth."[29]

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[23] *Id.* Since the writing of this article, President Trump has surpassed Ronald Reagan, issuing a total of 473 executive orders as of March 20, 2026. AM. PRESIDENCY PROJECT, *supra* note 20.

[24] HERITAGE FOUND., *supra* note 21.

[25] *Id.*; *see* AM. PRESIDENCY PROJECT, *supra* note 20.

[26] *See, e.g.*, Exec. Order No. 14,165, 90 Fed. Reg. 8467 (Jan. 20, 2025); Proclamation No. 10,886, 90 Fed. Reg. 8327, (Jan. 20, 2025); Exec. Order No. 14,159, 90 Fed. Reg. 8443, (Jan. 20, 2025).

[27] Exec. Order No. 14,159, 90 Fed. Reg. 8443 (Jan. 20, 2025).

[28] Amy Swearer, *The Political Case for Confining Birthright Citizenship to Its Original Meaning*, HERITAGE FOUND. (Sept. 6, 2019), https://www.heritage.org/the-constitution/report/the-political-case-confining-birthright-citizenship-its-original-meaning.

[29] Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

Specifically, Section 2(a) of the EO directs the Executive Branch: (1) not to issue documents recognizing U.S. citizenship to persons born in the United States under the conditions described in Section 1, and (2) decline acceptance of documents issued by state, local, or other governments purporting to recognize United States citizenship of such persons. The EO makes clear that its provisions do not "affect the entitlement of other individuals, including children of lawful permanent residents, to obtain documentation of their United States citizenship."[30] The EO further directs the "Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Commissioner of Social Security" to take "all appropriate measures to ensure that the regulations and policies of their respective departments and agencies are consistent with this order," and not to "act, or forbear from acting, in any manner inconsistent with this order."[31] It further directs the heads of all federal agencies to issue public guidance within thirty days "regarding this order's implementation with respect to their operations and activities."[32]

The current EO supplements the President's previous executive orders on Immigration Reform. On January 25, 2017, President Trump issued an executive order directing federal agencies "to deploy all lawful means to secure the Nation's southern border."[33] To "prevent illegal immigration, drug and human trafficking, and acts of terrorism," the Order required agencies to "take all appropriate steps to immediately plan, design and construct a physical wall along the southern border," including "[i]dentify and, to the extent permitted by law, allocate all sources of Federal funds" to that effort.[34]

C. Declaring a National Emergency at the Southern Border

On February 15, 2019, President Trump issued a proclamation declaring that "a national emergency exist[ed] at the southern border of the United States."[35] The President determined that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency."[36] On April4, 2018, Trump issued a memorandum to the Secretary of Defense, Secretary of Homeland Security, and the Attorney General entitled, "*Securing the Southern*

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[30] *Id.*
[31] *Id.*
[32] *Id.* at 8450.
[33] Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).
[34] *Id.* at 8793–94.
[35] Proclamation No. 9,844, 84 Fed. Reg. 4949 (Feb. 15, 2019).
[36] *Id.*

Border of the United States."[37] The President claimed that "[t]he security of the United States is imperiled by a drastic surge of illegal activity on the southern border" and pointed to the "anticipated rapid rise in illegal crossings," as well as "[t]he combination of illegal drugs, dangerous gang activity, and extensive illegal immigration."[38] The President determined that the southern border had "reached a point of crisis" that "calls for the National Guard to help secure our border and protect our homeland."[39] Trump directed the Secretary of Defense to support the Department of Homeland Security (DHS) in "securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens into this country."[40]

In March 2019, the President canceled a joint Congressional resolution that would have ended his declaration of a national emergency. The President cited numbers from U.S. Customs and Border Protection (CBP) and recent statements from the Secretary of Homeland Security to emphasize the national emergency along the southern border. Trump focused on three main factors: (1) the recent rise in the number of arrests along the southern border, including 76,000 CBP arrests in February 2019; (2) the seizure of more than 820,000 pounds of drugs by CBP in 2018; and (3) the arrests of 266,000 aliens who had been charged with or convicted of crimes in 2017 and 2018.[41] The President argued that border enforcement personnel and resources are stretched "to the breaking point" and concluded that the "situation on our border cannot be described as anything other than a national emergency, and our Armed Forces are needed to help confront it."[42]

D. Commander in Chief: Presidential Authority Over Foreign Affairs

Article II of the Constitution designates the President as Commander in Chief, Head of State, Chief Law Enforcement Officer, and Head of the Executive Branch. The President has the sole

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[37] Memorandum on Securing the Southern Border of the United States, 2018 DAILY COMP. PRES. DOC. 218 (Apr. 4, 2018).

[38] *Id.*

[39] Defendants' Motion to Dismiss Plaintiffs' Amended Complaint at 11–12, Rio Grande Int'l Study Ctr. v. Trump, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00720) (quoting Memorandum on Securing the Southern Border of the United States, 2018 DAILY COMP. PRES. DOC. 218 (Apr. 4, 2018)).

[40] *Id.*

[41] *Id.* at 12.

[42] *Id.* at 7 (quoting Veto Message to the House of Representatives for H.J. Res. 46, The White House (Mar. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/).

constitutional obligation to "take care that the laws be faithfully executed" and is granted broad discretion over federal law enforcement decisions.[43] "He has not only the power, but also the responsibility to see that the Constitution and laws are interpreted correctly," Heritage Foundation scholar Todd Gaziano has written.[44] The President's proper execution of these obligations grants him extensive authority to issue executive orders and other directions.[45]

The President derives two principal sources of authority for issuing executive orders: the Constitution and powers conferred by Congress. The powers were explicitly defined in *Youngstown Sheet and Tube Co. v. Sawyer*, a Supreme Court ruling authored by Justice Hugo Black: "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[46] "Article II, Section 1 of the Constitution vests executive powers in the President, requiring that the President 'shall take Care that the Laws be faithfully executed.'"[47] The President is also the "Commander in Chief of the Army and Navy of the United States," possessing extensive authority over the administration of the federal government, federal agencies, and international relations. Justice Felix Frankfurter's concurring opinion in *Youngstown* explained that the President possesses the "vast share of responsibility for the conduct of our foreign relations."[48]

Congress may also confer supplementary authority on the President through legislation, including the issuance of executive orders to accomplish objectives. For instance, pursuant to 8 U.S.C. Section 1182(f), titled "Aliens and Nationality," Congress has conferred power to the President "to suspend the entry of all aliens or any class of aliens" if the President "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States."[49] By its terms, 8 U.S.C. vests discretion

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[43] AM. PRESIDENCY PROJECT, *supra* note 20; U.S. CONST. art. II. § 3.

[44] Todd Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, HERITAGE FOUND. (Feb. 21, 2001), https://www.heritage.org/political-process/report/the-use-and-abuse-executive-orders-and-other-presidential-directives.

[45] HERITAGE FOUND., *supra* note 21.

[46] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

[47] Scott Bomboy, *Defining the President's Constitutional Powers to Issue Executive Orders,* NAT'L CONST. CTR. (Jan. 29, 2025) https://constitutioncenter.org/blog/defining-the-presidents-constitutional-powers-to-issue-executive-orders (quoting U.S. Const. art II § 1).

[48] *Youngstown*, 343 U.S. 579 at 610.

[49] Bomboy, *supra* note 47; 8 U.S.C. § 1182(a)(3)(F) ("Association with terrorist organizations: Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the

in the President to suspend entry or impose such conditions of entry as the President "may deem appropriate" "for such period as he shall deem necessary."[50]

Consequently, judicial reevaluation of the President's Executive Order represents an unacceptable encroachment on the Executive's constitutional prerogative regarding foreign affairs, national security, and immigration.[51] Judicial bodies are notably unprepared to evaluate the President's assessment of national security issues. Policy decisions about how to "confront evolving threats [are] an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."[52] In contrast to the President, courts often do not have access to top secret, sensitive information regarding the threats presented by terrorist organizations in specific countries or their attempts to infiltrate the United States.

Any assertion that the judiciary can investigate the President's discretionary authority under Section 1182(f) concerning foreigners is inherently faulty. In *Kleindienst v. Mandel*, the Supreme Court determined that even when the alleged rights of citizens are affected by Executive action, (not applicable to the President's Executive Order) "when the Executive exercises [immigration authority] on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion."[53] (Justice Kennedy noted *Kleindienst's* "reasoning has particular force in the area of national security."[54]) Consequently, the extensive criticism by some scholars raises significant separation-of-powers issues by attempting to exam the President's subjective intentions in regard to foreign policy.[55]

The President's EO was issued pursuant to Congress's authority to the Executive branch to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the

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United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.").

[50] 8 U.S.C. § 1182(f).

[51] *See* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (holding that it is "not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien"); *see also* Immigr. & Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999); Dep't of Navy v. Egan, 484 U.S. 518, 529–30 (1988).

[52] Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010).

[53] Kleindienst v. Mandel, 408 U.S. 753, 760–70 (1972); *cf.* Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (noting that "reasoning has particular force in the area of national security").

[54] *Kerry*, 135 S. Ct. at 2140.

[55] United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature.").

entry of aliens any restrictions he may deem to be appropriate."[56] This explicit delegation, together with the President's Article II powers concerning national security, amplifies the President's authority to its fullest extent, encompassing both his inherent powers and those delegated by Congress.[57]

Thus, the President's EO aligns with what Congress granted the Executive Branch authority to exercise under 8 U.S.C. § 1182 (f): the power to prevent any group of illegal aliens from coming to the United States.[58] Previous presidents have consistently utilized this ability to prohibit the immigration of specific categories of aliens, including based on nationality. Furthermore, in the realm of immigration, the Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[59]

In *Mathews v. Diaz*, the Supreme Court held that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[60] The *Mathews* court ruled that the equal protection aspect of the Due Process Clause does not constrain the federal government's authority to regulate immigration or citizenship.[61]

Although "normally Congress supplies the conditions of the privilege of entry into the United States," "because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power" without raising delegation concerns.[62] The delegation of authority to restrict entrance to specific categories of aliens are encompassed within the President's broad powers under Article II concerning foreign affairs.[63] Thus, simply put, the Supreme Court has consistently determined that Article II grants the President

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[56] 8 U.S.C. § 1182(f).

[57] Louhghalam v. Trump, 230 F. Supp. 3d 26, 37 (D. Mass. 2017).

[58] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 187 (1993) ("It is perfectly clear that 8 U.S.C. § 1182(f) grants the President ample power to establish [by Executive Order] a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores.") (footnote omitted).

[59] Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 210 (1953).

[60] Mathews v. Diaz, 426 U.S. 67, 81–82 (1976).

[61] *See id.* at 86–87.61; Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)

[62] *Knauff*, 338 U.S. at 543.

[63] Trump v. Hawaii, 585 U.S. 667, 683 (2018); *see* U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief …. He shall have power … to make Treaties … and appoint Ambassadors."); U.S. CONST. art. II, § 3 (giving the President the power to receive ambassadors).

extensive powers in this area: foreign affairs, national security, and immigration.[64]

III. LEGAL PRINCIPLES OF U.S. CITIZENSHIP

A. Historical Context: Birthright Citizenship's Original Meaning

The Fourteenth Amendment is one of three amendments to the Constitution established during the post-Civil War Reconstruction period: the Thirteenth (abolishing slavery and indentured servitude), the Fourteenth (bestowing citizenship and civil rights upon freed blacks), and the Fifteenth (expanding voting rights to former slaves). The United States House of Representatives approved the 14th Amendment in May 1866. It was later transmitted to the Senate, where modifications were made and then returned to the House, which agreed to the Senate's alterations on June 18, 1868. The primary objective was to grant citizenship rights to newly freed slaves and other African Americans in alignment with the Thirteenth Amendment, which abolished slavery. According to one scholar, the Amendment served as a strong rebuke to the reprehensible *Dred Scott* decision of 1857, which held that African Americans were not citizens of the United States.[65]

On May 23, 1866, Senator Benjamin Wade, a Republican from Ohio, requested that a "strong and clear" definition of citizenship be incorporated into the proposed Fourteenth Amendment, emphasizing the significance of the privileges and immunities granted to United States citizens. He suggested this precise language: "persons born in the United States or naturalized by the laws thereof."[66] On May 30, 1866, Senator Howard, a Republican from Michigan, presented a proposal formulated by the Joint Committee on Reconstruction, which ultimately became the initial sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[67]

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[64] *Trump*, 585 U.S. at 683; U.S. CONST. art. II, §§ 2, 3.

[65] Diane Rufino, *Birthright Citizenship: Does the 14th Amendment Really Recognize it for Illegal Aliens?*, FOR LOVE OF GOD & COUNTRY (Nov. 17, 2018), https://forloveofgodandcountry.com/2018/11/17/birthright-citizenship-does-the-14th-amendment-really-recognize-it-for-illegal-aliens.

[66] Edward J. Erler, *The Citizenship Clause of the Fourteenth Amendment: The Congressional Debate*, AM. MIND (Nov. 6, 2018), https://americanmind.org/features/the-case-against-birthright-citizenship/the-citizenship-clause-of-the-fourteenth-amendment-the-congressional-debate/.

[67] *See* Brief of Members of Congress, *supra* note 3, at 6; Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J.L. & PUB. POL'Y 310, 347, 350 (2024).

Both Howard and the Joint Committee emphasized the significance of the authority clause–which stipulated that not all individuals born in the United States were automatically citizens; they also had to be subject to the authority of the United States.[68] "I do not propose to say anything on that subject," Howard explained, "except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion."[69] He concluded:

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. *This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons*. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States.[70]

Congressional debate over the Civil Rights Act and the Fourteenth Amendment also confirmed that children born in the United States to non-resident aliens lacked a right to U.S. citizenship because they are not subject to U.S. jurisdiction. Representative James Wilson argued during a debate over the Civil Rights Act that, under "the general law relating to subjects and citizens recognized by all nations," a "person born in the United States" ordinarily "is a natural-born citizen."[71] But he recognized exceptions to that general rule for "children born on our soil to temporary sojourners or representatives of foreign Governments."[72]

More importantly, the precursor to the Fourteenth Amendment, the Civil Rights Act, provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens."[73] Senator Lyman Trumbull, a key figure in the drafting of the Fourteenth Amendment, summarized that provision as follows: "The Bill declares 'all persons'

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[68] Linda Chavez, *Q&A: Birthright Citizenship*, NAT'L IMMIGR. F. (June 7, 2025), https://immigrationforum.org/article/qa-birthright-citizenship/.

[69] Rufino, *supra* note 65.

[70] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (emphasis added).

[71] *Id.* at 1117.

[72] CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

[73] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

born of parents domiciled in the United States, except untaxed Indians, to be citizens of the United States."[74]

Trumbull further clarified that "subject to the jurisdiction" of the United States meant subject to its "complete" jurisdiction—"[n]ot owing allegiance to anybody else."[75] Senator Jacob Howard, who introduced the language of the Jurisdiction Clause in the Senate, agreed with Trumball, contending that it should be construed to mean "a full and complete jurisdiction … the same jurisdiction in extent and quality as applies to every citizen of the United States [under the 1866 Act]."[76] Hence, Trumball concluded, "the children of Indians who still 'belong[ed] to a tribal relation' and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause."[77]

This view was subsequently adopted by the Supreme Court in the landmark 1884 case addressing a claim of Indian citizenship, *Elk v. Wilkins*. Drawing explicitly on the language of the 1866 Civil Rights Act, the Court declared:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[78]

Historically, then, the Citizenship Clause aimed to confer citizenship upon recently emancipated slaves and other free blacks, rather than to establish a standard that would constrain the discretion of political branches over citizenship status. The political branches also delineated the citizenship status of individuals residing in U.S. territories. In the Supreme Court case of *National Bank v. County of Yankton (1879)*, the court held that: "It is certainly now too late to doubt the power of Congress to govern the Territories."[79] The Court

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[74] Mark Shawhan, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 YALE L.J. 1351, 1352–53 (2009).

[75] CONG. GLOBE, 39th Cong., 1st Sess. 2892–97 (1866).

[76] *Id.* at 2895.

[77] John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 960–61 (2008).

[78] Elk v. Wilkins, 112 U.S. 94, 102 (1884).

[79] First Nat'l Bank v. Yankton, 101 U.S. 129, 132 (1879).

acknowledged the power vested in Congress to do for "the Territories what the people, under the Constitution of the United States, may do for the States."[80]

Thus, throughout our history, the political branches have exercised wide discretion, without interference by the Courts, concerning whether, when, and how to offer citizenship.[81]

B. Early Case Law Supporting 'Subject to its Jurisdiction'

In *Calvin's Case*, Lord Coke elucidated the criteria that rendered an individual amenable to the jurisdiction of English courts.[82] "He noted that 'it is *nec cœlum*, *nec solum*, neither the climate nor the soil, but *ligeantia* [allegiance] and *obedientia* [obedience] that make' one 'subject' to the laws of the country."[83] Coke insisted that jurisdiction, in this context, is determined not merely by an individual's presence within the territory or subjection to its laws, but rather by their allegiance to the sovereign.[84] As one court has explained, *Calvin's Case* means "[t]hose born 'within the King's domain' and 'within the obedience or *ligeance* of the King' were subjects of the King, or 'citizens' in modern parlance."[85]

Lord Coke referenced multiple precedents to support his thesis. The most significant instance was the case of Perkin Warbeck, in which a Dutchman proclaimed himself the legitimate heir to the English throne and then journeyed to England in an effort to seize the crown.[86] Warbeck was captured, but the English court concluded he "'could not be punished by the common law' because he was not subject to the civil courts' jurisdiction."[87] "There was no state of war between the countries, but his mere presence was unlawful, and thus he had never been under the 'protection of the King, nor ever owed any manner of *ligeance* unto him.'"[88]

Numerous other court decisions have similarly interpreted the "Jurisdiction Clause" of the Fourteenth Amendment. In 1892, the Supreme Court decided *Nishimura Ekiu v. United States*, holding that as a "sovereign nation," the United States has the constitutional power

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[80] *Id.* at 133.

[81] Brief of Edward J. Erler et al. as Amici Curiae Supporting Respondents, at 3, Tuaua et al. v. United States, 2016 WL 2866093 (2016) (No. 15-981), at 3.

[82] Brief of Members of Congress, *supra* note 3, 3; *see* Calvin's Case, 77 Eng. Rep. 377, 385 (1608).

[83] *Calvin's Case*, 77 Eng. Rep. at 384.

[84] Brief of Members of Congress, *supra* note 3, at 4

[85] *Id.* at 3 (quoting Calvin's Case, 77 Eng. Rep. 377, 378 (1608)).

[86] Brief of Members of Congress, *supra* note 3, at 4.

[87] *Id.*

[88] *Id.*

"to forbid the entrance of foreigners within its dominions, or to admit them only in such cases upon such conditions as it may see fit to prescribe."[89] In 1909, the Supreme Court determined that to provide birthright citizenship for the offspring of illegal immigrants subverts constitutional authority, holding that no perpetrator should "profit [out of] his own wrong" by unlawfully entering the United States.[90]

Moreover, the Supreme Court has refrained from interpreting the Citizenship Clause in a way that would restrict the political branches' capacity to respond to "problems attendant on dual nationality."[91] Although the United States accepts dual citizenship in specific circumstances, it has "long recognized the general undesirability of dual allegiances."[92] The Supreme Court of New Jersey similarly associated birthright citizenship with parental residence in *Benny v. O'Brien.*[93] In a passage that was later quoted in *United States v. Wong Kim Ark*,[94] the Court interpreted the Citizenship Clause to establish "the general rule that, *when the parents are domiciled here*, birth establishes the right of citizenship."[95] But the Court held that the Citizenship Clause's jurisdictional element excludes "those born in this country of foreign parents who are temporarily traveling here" because "[s]uch children are, in theory, born within the allegiance of [a foreign] sovereign."[96]

C. The Fourteenth Amendment: "Jurisdiction" in the Citizenship Clause

Under the common law, a person owes a form of "allegiance" to the country in which he is "domiciled."[97] This historical context substantiates the Fourteenth Amendment's assertion that children born in the U.S. to citizens are granted citizenship by birth, whereas children born to parents who are either illegal, or lawfully present on a transitory basis, are not entitled to such citizenship. Under common law, "[t]wo things usually concur to create citizenship; [f]irst, birth locally within the dominions of the sovereign; and, secondly, birth … within the *ligeance* of the sovereign."[98] The phrase "born … in the

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[89] Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

[90] Liu v. SEC, 591 U.S. 71, 80 (2020).

[91] Rogers v. Bellei, 401 U.S. 815, 831 (1971).

[92] Savorgnan v. United States, 338 U.S. 491, 500 (1950).

[93] Benny v. O'Brien, 58 N.J.L. 36, 40 (1895).

[94] United States v. Wong Kim Ark, 169 U.S. 649, 692 (1898).

[95] *Benny*, 58 N.J.L. at 40 (emphasis added).

[96] *Id.* at 39.

[97] Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154 (1872) ("[A] person domiciled in a country owes … allegiance….").

[98] *Wong Kim Ark,* 169 U.S. at 659; Declaration of Lane Polozola in Support of Plaintiff's Motion for Temporary Restraining Order at 297a, Washington v. Trump, et

United States" codifies the traditional requirement of "birth within the territory," and the phrase "subject to the jurisdiction thereof,"[99] sustains the traditional requirement of birth "in the allegiance" of the country.[100]

Drawing from the same tradition, Emmerich de Vattel, one of the founding era's foremost experts on the law of nations, maintained that citizenship under international law is determined by both the child's birthplace and the political status of the parents.[101] "[N]atural-born citizens," Vattel wrote, include "those born in the country, of parents who are citizens."[102] Citizenship also extended to the children of "perpetual inhabitants" of that country, whom Vattel regarded as "a kind of citizen[]."[103] According to Vattel, citizenship does not extend to children of those foreigners who lack "the right of perpetual residence" in the country.[104] Esteemed Supreme Court Justice Joseph Story[105] agreed with Vattel, clarifying that birthright citizenship required more than mere physical presence:

> Persons, who are born in a country, are generally deemed citizens and subjects of that country. A reasonable qualification of this rule would seem to be, that it should not apply to the children of parents, who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business.[106]

Subsequent to the implementation of the Citizenship Clause, the Supreme Court clarified its scope in the noted *Slaughterhouse*

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al., 2025 WL 404390 (W.D. Wash. filed Jan. 15, 2025) (No. 2:25-cv-00127); U.S. CONST. amend. XIV, § 1.

[99] Declaration of Lane Polozola in Support of Plaintiff's Motion for Temporary Restraining Order at 297a, Washington v. Trump, 2025 WL 404390 (W.D. Wash. Jan. 15, 2025) (No. 2:25-cv-00127) [hereinafter Declaration of Lane Polozola in Support]; U.S. CONST. amend. XIV, § 1.

[100] Declaration of Lane Polozola in Support, supra note 99, at 297a; U.S. CONST. amend. XIV, § 1.

[101] EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND THE AFFAIRS OF NATIONS AND SOVEREIGNS 101, 101 (Joseph Chitty ed., 6th ed. 1844); Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 254 (2019).

[102] VATTEL, *supra* note 101.

[103] *Id.*

[104] *Id.*

[105] *Joseph Story*, SUP. CT. HIST. SOC'Y, https://civics.supremecourthistory.org/article/joseph-story/ (last visited Mar. 11, 2026) ("In 1810, Associate Justice William Cushing died, creating a vacancy on the Supreme Court. After much consideration, President James Madison nominated thirty-two-year-old Joseph Story to the Supreme Court. Confirmed by the Senate in November 1811 and taking the oath of office in February 1812, he remains the youngest Associate Justice to serve in Supreme Court history.").

[106] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 48, at 48 (1834).

Cases: "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."[107] This compelling and authoritative legal precedent aligns with the President's current Citizenship Executive Order.

In 1885, Secretary of State Frederick T. Frelinghuysen issued an opinion denying a passport to an applicant who was "born of Saxon subjects, temporarily in the United States."[108] Frelinghuysen explained that the applicant's claim of birthright citizenship was "untenable" because the applicant was "subject to [a] foreign power," and "the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship."[109] Later the same year, Secretary Frelinghuysen's successor, Thomas F. Bayard, issued a subsequent opinion denying a passport to an applicant born "in the State of Ohio" to "a German subject" "domiciled in Germany."[110] Bayard admitted that the applicant "was no doubt born in the United States, but he was on his birth 'subject to a foreign power' and 'not subject to the jurisdiction of the United States.'"[111]

Being subject to jurisdiction does not merely imply, as is often posited today, adherence to American laws or courts. It signifies a singular political loyalty to the United States, reinforcing the Clause's jurisdictional element. The Clause provides that persons born in the United States and subject to its jurisdiction "are citizens of the United States and of the States wherein they reside."[112] The Clause uses the term "reside[nce]" synonymously with "domicile."[113] Consequently, the Clause affirms that citizenship derives from legitimate residence.

Thus, if the Citizenship Clause is viewed as a codification of common law, as explicitly stated by its sponsors, then it can be reasonably argued that there is no constitutional obligation to confer U.S. citizenship to children born in the United States to illegal aliens. None of the fundamental components of common law birthright

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[107] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872).

[108] Declaration of Lane Polozola, *supra* note 99, at 301a (citing FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, §183, at 397 (2d ed. 1887)).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] U.S. CONST. amend. XIV, § 1.

[113] M.A. Lesser, *Citizenship and Franchise*, 4 COLUM. L. TIMES, 145, 146 n.3 (1891) (explaining the term "resident . . . is applied exclusively to one who lives in a place and has a fixed and legal settlement") (quoting Spragins v. Houghton, 3 Ill. 377, 396 (1840)); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 754 (Bos., Little, Brown & Co., 4th ed. 1878); Robertson v. Cease, 97 U.S. 646, 650 (1878) (explaining that state citizenship requires "a fixed permanent domicile in that State").

citizenship are present.[114] Simply stated, a U.S. born child of an undocumented immigrant mother is born on sovereign territory but lacks allegiance. It is irrational to claim that an illegal immigrant has an obligation of allegiance, including obedience, to the United States, when such allegiance is fundamentally lacking. The undocumented immigrant demonstrates a type of defiance against United States law that is inherent: violating United States law by remaining within its borders, unable to fulfill, even briefly, the duty of obedience that is essential to citizenship.[115] As one federal circuit has held, "birthright citizenship does not simply follow the flag … rather, the evident meaning of the words 'subject to the jurisdiction thereof' is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[116]

In the years subsequent to the ratification of the Fourteenth Amendment, the Supreme Court construed the Jurisdiction Clause as including more than merely the progeny of ambassadors and foreign soldiers, asserting that "jurisdiction" was a technical term signifying a specific relationship between the individual and the sovereign.[117] In 1872, four years post-ratification, the Supreme Court ruled that the wording "subject to its jurisdiction" excluded "children of ministers, consuls, and citizens or subjects of foreign states born within the United States."[118] This was undoubtedly dicta, although it illustrated the dominant understanding that the Jurisdiction Clause was not a restricted exception solely for "ministers," "consuls," and invading armies, but also encompassed children whose parents maintained citizenship in an alternative country. All these groups demonstrated a lack of commitment and allegiance to the United States.[119]

One year subsequent to the enactment of the Fourteenth Amendment, the U.S. Attorney General, who was a Senator throughout the discussions on the Amendment, rendered an official opinion declaring that "[t]he word 'jurisdiction' must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment."[120]

The next year, the House of Representatives issued a report stating that "[t]he United States have not recognized a 'double

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[114] Charles Wood, *Losing Control of America's Future the Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 506–07 (1999).

[115] *Id.*

[116] Brief of Members of Congress, *supra* note 3, at 2.

[117] *Id.* at 2, 9.

[118] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872).

[119] Brief of Members of Congress, *supra* note 3, at 9.

[120] *Id.*

allegiance.' By *our* law a citizen is bound to be 'true and faithful' alone to our Government."[121] This precept correlated citizenship with the notion of complete allegiance, rather than just partial allegiance by the individual. In 1881, Alexander Porter Morse authored *A Treatise on Citizenship*, an essential work on citizenship and immigration.[122] Morse agreed with the Attorney General's view that "[a]liens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only to a limited extent," and thus their children would not be citizens.[123]

Some scholars have further opined that "jurisdiction" possesses two fundamental interpretations: one restrictive and one more comprehensive. Francis Wharton's seminal 1881 edition of *A Treatise on the Conflict of Laws* acknowledged that "[i]n one sense" a child born in the United States is necessarily subject to its jurisdiction in the simple sense that "[a]ll foreigners are bound to a local allegiance to the state in which they sojourn."[124] "Yet the term 'subject to the jurisdiction,'" Wharton concluded, "must be construed in the sense in which the term is used in international law as accepted in the United States as well as in Europe."[125] Wharton argued that:

> [B]y this law the children born abroad of American citizens are regarded as citizens of the United States, with the right, on reaching full age, to elect one allegiance and repudiate the other, such election being final. The same conditions apply to children born of foreigners in the United States.[126]

George Collins, subsequently designated as amicus in *United States v. Wong Kim Ark*, articulated a similar interpretation when he wrote in 1884 that "[t]he phrase … 'subject to the jurisdiction thereof' does not mean territorial jurisdiction, as has been held in some cases, but means national jurisdiction; that is the jurisdiction which a nation possesses over those who are its citizens or subjects as such."[127]

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[121] H.R. Rep. No. 43-784, at 23 (1874).

[122] ALEXANDER PORTER MORSE, A TREATISE ON CITIZENSHIP § 198, at 237–38 (Bos., Little, Brown & Co. 1881).

[123] Brief of Members of Congress, *supra* note 3, at 9 (quoting MORSE, *supra* note 122, at 237–38). This authoritative treatise comprehensively covers citizenship by birth and naturalization. Drawing on the law of nations, the Roman civil law, the law of the United States, and the law of France, the author provides a complete and in-depth analysis of citizenship.

[124] FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW § 10, at 34–35 (2d ed. 1881).

[125] *Id.*

[126] *Id.*

[127] Brief for Members of Congress, *supra* note 3, at 15 (quoting George D. Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831, 837 (1884)).

Thus, in the final analysis, the President's interpretation of the Fourteenth Amendment's Jurisdiction Clause is the only one that fully explains the Supreme Court's judicial precedents on citizenship by birth in the United States.

IV. ALIEN ENEMIES ACT

The President's EO has called for the invocation of the Alien Enemies Act (AEA) to "remove all known or suspected gang [m]embers, drug dealers, or [c]artel [m]embers from the U.S."[128] Section 21 provides:

> Restraint, regulation, and removal. Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.[129]

As a brief history, the AEA was adopted in 1798 in response to a perceived threat of invasion by France, which was then undergoing the French Revolution. The Department of Justice explained that:

> [O]ne of the measures of protection found by every nation to be most necessary in time of war is the guarding against internal enemies whose operations are more insidious, and

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[128] George Fishman, *The 225-Year-Old 'Alien Enemies Act' Needs to Come Out of Retirement. They Don't Write 'Em Like They Used To*, CTR. FOR IMMIGR. STUD. (Oct. 10, 2023), https://cis.org/Report/225yearold-Alien-Enemies-Act-Needs-Come-Out-Retirement; *see* 50 U.S.C. § 21.

[129] 50 U.S.C. § 21.

> therefore, more dangerous … in many cases, than are the active maneuvers of military forces …. An army of spies, incendiaries, and propagandists may be more dangerous than an army of soldiers.[130]

Is the AEA applicable for the detention and removal of foreign gang and cartel members? Two fundamental legal criteria must be satisfied: initially, the actions of the gangs or cartels must be deemed a "invasion" or "predatory incursion" into the United States.[131] First, an "invasion" requires that "[t]he United States … shall protect each of [the States] against [i]nvasion."[132] Secondly, the AEA may be activated by a formal declaration of war, an invasion, or an incursion by a foreign nation or government.[133]

It is reasonable to contend that criminal activities in the United States perpetrated by foreign gangs and drug cartels may be regarded as actions conducted by foreign nations or governments. Legal scholar Moisés Naím[134] maintains that the rise of "mafia states," nations in which "criminals have penetrated governments to an unprecedented degree … blur the conceptual line between state and nonstate actors."[135] Naim asserts that it may be persuasively established that gang and cartel-related offenses in the United States have been committed by foreign governments.[136]

A. History of the Act

The President has asserted that one of our most overlooked immigration enforcement laws is also the most ancient. President John Adams signed "[a]n Act respecting Alien Enemies" into law on July 6, 1798.[137] The AEA prepared America for a feared invasion by France, which was then in the throes of the French Revolution. As legal scholar and noted author Gregory Fehlings has explained, the AEA

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[130] Fishman, *supra* note 128; 50 U.S.C. § 21.

[131] Fishman, *supra* note 128; 50 U.S.C. § 21.

[132] Fishman, *supra* note 128; 50 U.S.C. § 21.

[133] Fishman, *supra* note 128; 50 U.S.C. § 21.

[134] MOISÉS NAÍM, THE END OF POWER: FROM BOARDROOMS TO BATTLEFIELDS AND CHURCHES TO STATES, WHY BEING IN CHARGE ISN'T WHAT IT USED TO BE (Basic Books, 2013); MOISÉS NAÍM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY (Anchor Books, 2006); *see also* EFECTO NAÍM (DirecTV Broadcast 2011) (featuring global trends, visuals, and interviews with world leaders, widely viewed in Latin America). Naím gained international recognition through the re-launch of *Foreign Policy* and served as editor from 1996 to 2010, transforming it into a leading publication on global affairs.

[135] Fishman, *supra* note 128.

[136] *Id.*; Moisés Naím, *Mafia States: Organized Crime Takes Office*, 91 COUNCIL ON FOREIGN RELS. 100, 100–01 (2012).

[137] *Alien & Sedition Acts (1798)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/alien-and-sedition-acts (last visited Feb. 9, 2026).

"authorize[s] the President to arrest, indefinitely detain, and remove alien enemies *en masse*, without hearing" during wartime.[138] This component of the "Alien and Sedition Acts" is unique in that it has neither been repealed nor permitted to expire.

Moreover, even the staunchest critics of the other Acts, such as Thomas Jefferson and James Madison, regarded the AEA as both essential and constitutional. In fact, the constitutionality of the AEA has been consistently sustained by federal courts. The Supreme Court noted in *Ludecke v. Watkins* that it "has remained the law of the land, virtually unchanged since 1798."[139]

At the time of its passage, the AEA garnered substantial bipartisan support, notably from Jefferson and Madison, who were staunch opponents of the other Acts (Alien and Sedition Acts):

> The AEA is still good law, providing that "[w]henever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government . . . all natives, citizens, denizens, or subjects of the hostile nation or government [at least 14 years old and not having become naturalized U.S. citizens] … shall be liable to be apprehended, restrained, secured, and removed as alien enemies.[140]

The federal government employed the Act during the War of 1812 and World Wars I and II, when the United States interned thousands of enemy aliens and expelled many more. Multiple federal courts, including the Supreme Court, have affirmed the validity of the AEA.[141] As Fehlings argues, "while the [AFA] allowed the President to expel selectively those aliens who posed a threat and provided a hearing at the alien's request, the [AEA] authorized the President to arrest, indefinitely detain, and remove alien enemies *en masse*, without hearing."[142]

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[138] George Fishman, *Iran and the Alien Enemies Act*, CTR. IMMIGR. STUD. (May 7, 2024), https://cis.org/Report/Iran-and-Alien-Enemies-Act; 50 U.S.C. § 21.

[139] Ludecke v. Watkins, 335 U.S. 160, 162 (1948); 50 U.S.C. § 21.

[140] Fishman, *supra* note 128 (quoting 50 U.S.C. § 21).

[141] *Id.*; Katherine Yon Ebright, *The Alien Enemies Act, Explained*, BRENNAN CTR. FOR JUST. (May 1, 2025), https://www.brennancenter.org/our-work/research-reports/alien-enemies-act-explained; 50 U.S.C. § 21.

[142] Fishman, *supra* note 128.

B. Federal Courts on the Constitutionality of AEA

One scholar, J. Gregory Sidak,[143] has written that the AEA represents one of the most extensive delegations of authority to the President observed in any context. The extensive scope of the AEA was quickly acknowledged by American courts in *DeLacey v. United States*:

> It is a provision for the public safety, which may require that the alien should not be removed but kept in the country under proper restraints …. It is never to be forgotten that the main object of the law is to provide for the safety of the country from enemies who are suffered to remain within it. In order to effect this safety, it might be necessary to act on sudden emergencies …. The President, being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accordingly, we find that the powers vested in him are expressed in the most comprehensive terms.[144]

The Federal Circuit Court for the District of Pennsylvania also laser focused on the AEA's expansive scope in 1817, concluding in *Lockington v. Smith* that:

> [T]he power of the president … to establish … rules and regulations for apprehending, restraining, securing, and removing alien enemies, under the circumstances stated in the [AEA], appears to me to be as unlimited as the legislature could make it. He alone is authorised to direct the conduct to be observed on the part of the United States towards such alien enemies, and to prescribe the manner and degree of restraint to which they should be subject; to declare in what cases, and on what terms, their residence should be permitted, and to provide for the removal of those whom he should not permit to remain in the United States, and who should refuse or neglect to depart.[145]

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[143] J. Gregory Sidak, founder and chairman of Criterion Economics, L.L.C., Washington, D.C., and Ronald Coase Professor of Law and Economics, Tilburg University, The Netherlands, is an internationally recognized expert on antitrust, intellectual property, regulation of network industries, and complex economic litigation.

[144] Fishman, *supra* note 128 (quoting DeLacey v. United States, 249 F. 625, 627 (9th Cir. 1918)); *see* J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1422–23 (1992).

[145] Fishman, *supra* note 128 (quoting Lockington v. Smith, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817)); Sidak, *supra* note 144, at 1422–23.

In *Brown v. United States*, a case concerning the seizure of enemy property during wartime, Justice John Marshall echoed this principle, authoring a monumental opinion for the Supreme Court:

> That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will.[146]

Sidak further contends that the constitutionality of the AEA was not significantly challenged at the time by either Jefferson or Madison, the two most notable critics of the Federalists' AFA, nor has it been by the majority of any court thereafter.[147] Similarly, Judge Moore has explained that "[d]espite the controversy surrounding and the ultimate repeal of the contemporaneous Alien and Sedition Acts, the Supreme Court has upheld the [AEA] and it remains the law today."[148] In *Lopez-Aguilar v. Marion County Sheriff's Dep't (2017)*, the United States District Court for the Southern District of Indiana noted: "The constitutionality of the [AEA], unlike its sister acts, was not seriously questioned, apparently because [it was] understood to be predicated on the Congressional war-making power."[149] Four years later, in *Johnson v. Eisentrager,* the Supreme Court elaborated on this authority:

> The essential pattern for seasonable Executive constraint of enemy aliens, not on the basis of individual prepossessions for their native land but on the basis of political and legal relations to the enemy government, was laid down in the very earliest days of the Republic and has endured to this day. It was established by the [AEA] … [and] was never repealed. Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security.[150]

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[146] Fishman, *supra* note 128 (quoting Brown v. United States, 12 U.S. (8 Cranch) 110, 122 (1814)); Sidak, *supra* note 144, 1422–23.

[147] Fishman, *supra* note 128; Sidak, *supra* note 144, at 1407–08.

[148] Fishman, *supra* note 128.

[149] *Id.;* Lopez-Aguilar v. Marion County Sheriff's Dep't Cnty, 296 F. Supp. 3d 959, 978 n.14 (S.D. Ind. 2017)

[150] Fishman, supra note 128; Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

The *Eisentrager* Court noted that: "It is certain that in the white light which beat about the subject in 1798, if there had been the slightest question in the minds of the authors of the Constitution or their contemporaries concerning the constitutionality of the [AEA], it would have appeared. None did."[151]

Consequently, the courts have consistently affirmed the validity of the AEA.[152]

C. What Constitutes an 'Invasion'?

The exact meaning and interpretation of the term 'invasion' has been the subject of much current debate.[153]

The AEA may be triggered "[w]henever … any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States."[154] While not specifically defined in the statute, the term, presumably, has the same meaning as delineated in the Constitution.[155] "Article IV, § 4 provides in part that "[t]he United States ... shall protect each of [the States] against [i]nvasion" (the "Invasion Clause"), and Article I, § 10 provides in part that "[n]o State shall, without the Consent of Congress … engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." (the "State Self-Defense Clause").[156]

Perhaps, the most concise definition of 'invasion' was articulated by Arizona Attorney General Mark Brnovich in a 2022 opinion: "In the 1990s, states and counties, including Arizona, sued the federal government under the Invasion Clause, argu[ing] that out-of-control levels of illegal immigration constituted an 'invasion' … that triggered the federal government's duty to protect the states."[157] Brnovich argued that the courts determined the question to be non-justiciable, rendering their statements regarding what constitutes an invasion as dicta.[158] He also contended that these decisions:

> [N]ever reached the issue of organized cartel activities or the State Self-Defense Clause …. [T]he U.S. Constitution established a dual protection against invasion through both the Invasion Clause and the State Self-Defense Clause. There are no grounds to conclude that this protection applies only to hostilities by foreign states and not to those by non-state

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[151] Fishman, *supra* note 128; *Eisentrager*, 339 U.S. at 775 n.6.
[152] Fishman, *supra* note 128.
[153] *See id.*
[154] 50 U.S.C. § 21.
[155] Fishman, *supra* note 128.
[156] *Id.*
[157] *Id.* (quoting Ariz. Op. Att'y Gen. No. 122-001 (2022)).
[158] *Id.*

> actors such as cartels and gangs …. [The court] decisions … focused on "invasion" by unauthorized aliens themselves. They thus provide no analysis of the meaning of the word "invasion" in the context of non-state hostile actors, such as organized cartels and gangs. They also failed to address more broadly the meaning of "invasion" in the context of security concerns at a State's border.[159]

Thus, as rationally argued by Arizona's Governor, "[c]artel and gang violence . . . falls within the[] broad definition[] of 'invade' … [as] cartel and gang members are entering Arizona in a hostile manner that attacks, encroaches on, and violates Arizona law."[160] "It would be nonsensical," Brnovich contends, "to conclude that either [constitutional] power is artificially limited to invasion by foreign states as opposed to hostile nonstate actors, as it would render the State defenseless in the absence of federal support."[161]

Texas Governor Greg Abbott similarly contends that his state, Texas, is being invaded "by the Mexican drug cartels" in light of his claim that the Biden Administration did not safeguard Texas from invasion as outlined in the Invasion Clause, compelling Texas to defend itself (the State Self-Defense Clause):[162]

> The U.S. Constitution won ratification by promising the States, in Article IV, § 4, that the federal government "shall protect each of them against [i]nvasion." By refusing to enforce the immigration laws enacted by Congress, including 8 U.S.C. §1325(a)(1)'s criminal prohibition against aliens entering the United States between authorized ports of entry, your Administration has made clear that it will not honor that guarantee. The federal government's failure has forced me to invoke Article I, § 10, Clause 3 of the U.S. Constitution, thereby enabling the State of Texas to protect its own territory against invasion by the Mexican drug cartels.[163]

Both governors embraced James Madison's interpretation of the statute that "invasion" applies to hostile non-state actors.[164] In *The Federalist No. 43*, Madison argued the Invasion Clause protects a state when faced with armed aggression from another political entity, "foreign hostility" or "ambitious or vindictive enterprises" on the part of

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[159] *Id.* (quoting Ariz. Op. Att'y Gen. No. 122-001 (2022)).

[160] *Id.* (quoting Ariz. Op. Att'y Gen. No. 122-001 (2022)).

[161] Ariz. Op. Att'y Gen. No. 122-001 (2022).

[162] Fishman, *supra* note 128; Letter from Greg Abbott, Governor of Texas, to Joseph R. Biden, Jr., President of the United States 1, 1 (Nov. 16, 2022).

[163] Letter from Greg Abbott, *supra* note 162, at 2.

[164] *See id.*; Ariz. Op. Att'y Gen. No. 122-001 (2022).

other foreign nations.[165] And thus, the State Self-Defense Clause reserves to States the sovereign right to use force to defend themselves against the activities of transnational cartels and gangs operating in the State's territory at its border. Consequently, the State Self-Defense Clause grants States the sovereign authority to employ force in order to protect themselves from the actions of international drug cartels and violent gangs operating within their territory.[166]

In further support of the President's EO and documentation of an ongoing 'invasion,' a detailed affidavit was filed by Robert L. Cerna, Acting Field Office Director of Enforcement and Removal Operations (ERO) at U.S. Immigration and Customs Enforcement (ICE) within the U.S. Department of Homeland Security (DHS), which stated in part:

> I, Robert L. Cerna, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:
>
> 1. I am aware that the instant lawsuit has been filed regarding the removal of Venezuelan members of Tren de Aragua ("TdA") pursuant to the Alien Enemies Act (AEA).
> 2. On March 15, 2025, President Trump announced the Proclamation *Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua*, stating that "Evidence irrefutably demonstrates that TdA has invaded the United States and continues to invade, attempt to invade, and threaten to invade the country; perpetrated irregular warfare within the country; and used drug trafficking as a weapon against our citizens" (the Proclamation) (https://www.whitehouse.gov/presidential-actions/20-25/03/invocation-of-the-alien-enemies-act-regarding-the-invasion-of-the-united-states-by-tren-de-aragua/) ….
> 3. Members of TdA pose an extraordinary threat to the American public. TdA members are involved in illicit activity to invoke fear and supremacy in neighborhoods and with the general population. This has been evident from investigations throughout the nation where TdA members coalesce to conduct their criminal acts. For example, TdA's takeover of Denver apartment buildings stoked fear in the tenants when TdA committed burglaries, narcotics, and weapons violations. Other inquiries into the actions of members of TdA have

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[165] THE FEDERALIST NO. 43 (James Madison).

[166] *See* Fishman, *supra* note 128.

> resulted in criminal investigations and prosecution of cases of human trafficking, to include trafficking of women from Venezuela; bank fraud; federal narcotics violations; extortion of human smuggling victims; and homicide, to name a few. This, along with the myriad state violations and investigations of groups of TdA members committing crimes throughout the nation, are evidence of their criminal enterprise.
>
> 4. It was critical to remove TdA members subject to the Proclamation quickly. These individuals were designated as foreign terrorists.
> 5. However, even though many of these TdA members have been in the United States only a short time, some have still managed to commit extremely serious crimes. A review of ICE databases reveals that numerous individuals removed under the AEA have arrests and convictions in the United States for dangerous offenses, including an individual alleged to have committed murder; an individual with pending state charges for aggravated assault with weapon and who was identified by state authorities related to an armed home invasion and kidnapping; an individual with a state arrest for harassment, and indecent assault where he entered the room of a fourteen-year-old victim, tried to lift her shirt, grabbed her thigh, and rubbed his penis on her; an individual who was arrested for fourth-degree grand larceny and resisting arrest who was encountered in a home with other gang members, three automatic rifles, two handguns, and extended magazines; … an individual arrested at a TdA-run brothel and charged with evading arrest, promoting prostitution, possession of fentanyl, and possession of marijuana ….[167]

D. The AEA Used Against Drug Cartels

The United States is indeed—for purposes of the Invasion and State Self-Defense Clauses of the AEA—experiencing a massive invasion at its southern border. Thus, the AEA may be used to detain and remove "non-state hostile actors, such as organized cartels and gangs" and "known or suspected gang members, drug dealers, or cartel

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[167] Declaration of Robert L. Cerna at 1–2, Trump v. J.G.G., 604 U.S. 670 (2025) (No. 24A931), 2025 WL 840407.

members."[168] Neither the AEA nor Title 50 provides specific definitions for a "foreign nation" or a "foreign government." Yet, it can be assumed that this was not merely a congressional oversight, but rather an acknowledgment that there is a common understanding of what nations and governments entail. The term "foreign government" has been defined multiple times in the U.S. Code for specific purposes. For instance, *Title 18 ["Crimes and Criminal Procedure"], Section 11* provides that "the term "foreign government," as used in this title "except in [certain] sections . . . includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States." Section 798(a) further provides that:

> The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States.[169]

While Title 50 does not contain a tangible definition of "foreign government," it does contain a definition of "foreign power" for purposes of allowing the President to authorize electronic surveillance to secure foreign intelligence without a court order:

> (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; (6) an entity that is directed and controlled by a foreign government or governments; or (7) an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.[170]

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[168] Fishman, *supra* note 128.
[169] 18 U.S.C. § 798(b).
[170] Fishman, *supra* note 128; 50 U.S.C. § 1801(a).

The origins of this language can be traced back to the *Foreign Intelligence Surveillance Act* of 1978. A report from the Senate Judiciary Committee indicated that the category of "foreign government" encompasses foreign embassies, consulates, factions and similar official foreign governmental establishments situated within the United States:

> [It] is intended to include factions of a foreign nation or nations which are in a contest for power over, or control of the territory of a foreign nation or nations. The faction must be foreign-based and controlled from abroad. Specifically excluded from this category is any faction of a foreign government or government[s] which is substantially composed of permanent resident aliens or citizens of the United States.[171]

E. Ludecke v. Watkins: War Powers

Kurt Ludecke, a German national, was ordered removed from the United States on January 18, 1946, eight months after Germany's surrender in World War II.[172] Whether or not the President had the authority to summarily deport German nationals under the Alien Enemy Act (even after the War was over) was addressed in the Supreme Court's 1948 historic decision:

> The war power … validly supports the power given to the President by the [AEA] in relation to alien enemies …. The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights …. [W]e hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it—on the President …. *The Founders in their wisdom made him not only the Commander-in chief … with the disposition of alien enemies during a state of War. Such a page of history is worth more than a volume of rhetoric.*[173]

The Supreme Court's ruling in *Ludecke* serves as the most recent authoritative precedent, indicating that "war" persists even after hostilities cease.[174] The Supreme Court's decision centered on the Alien Enemy Act of 1798. Nearly all cases contesting the Act during

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[171] Fishman, *supra* note 128.

[172] Ludecke v. Watkins, 335 U.S. 160, 162–63 (1948).

[173] *Id.* at 171–73; *see* Fishman, *supra* note 128 (emphasis added).

[174] Steven I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SEC. L. & POL'Y 53, 54 (2006); *Ludecke,* 335 U.S. at 167.

World War I and World War II focused on the interpretation of the terms "natives, citizens, denizens, or subjects."[175] But when certiorari was granted in an Alien Enemy Act case for the first time in *Ludecke*, Justice Frankfurter, writing for the majority, held that the Alien Enemy Act precluded judicial review of the removal order, for "[t]he very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion."[176] Frankfurter observed that "[w]ar does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops."[177]

V. A 'POLITICAL' QUESTION

A. The President's Executive Order: A Nonjusticiable Political Question

Judicial bodies that have addressed this matter have consistently determined that a presidential declaration of a national emergency constitutes a nonjusticiable political question. Since the enactment of the National Emergencies Act (NEA) in 1976, approximately sixty national emergencies have been declared by seven presidents. Notably, in the rare cases where these declarations have faced legal challenges, no court has assessed their merits.[178]

The separation-of-powers doctrine and the principle of judicial self-restraint necessitate that federal courts avoid interference in matters designated by the Constitution to the Legislative and Executive Branches of Government. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[179] The Supreme Court's decision in *Baker v. Carr* sustained this principle:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinated political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind

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[175] Vladeck, *supra* note **Error! Bookmark not defined.**, at 78.

[176] *Id.*

[177] *Id.*

[178] Defendant's Motion to Dismiss at 18–19, Alvarez v. Trump, (No. 19-cv-00404 (TNM)), 2019 WL 1474717 (D.D.C. dismissed Apr. 22, 2019); National Emergencies Act (NEA) of 1976, 50 U.S.C. §§ 1601–1651.

[179] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

> clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made.[180]

The *Baker* court specifically ruled that any one of these factors indicates a 'political' question not appropriate for the courts.[181] Some legal analysts argue that the situation along the southern border does not constitute a national emergency and does not meet these factors. Congress deliberately refrained from defining the term "national emergency," delegating that determination to the President while allowing for Congressional oversight. Thus, the NEA lacks criteria for the Court to assess the President's actions or to ascertain whether a particular issue meets the definition of a national emergency.[182]

Critics of the President's EO have requested the Courts to replace the President's foreign policy decisions regarding the southern border. Yet, the Courts are neither equipped nor obligated to resolve this issue "without first fashioning out of whole cloth some standard for when" a national emergency "is justified."[183] Courts would be required to make numerous political judgments regarding the influence of the current security crisis at the border, on immigration policy, foreign relations, public safety, and national security, without any judicial standards to guide them. As the Supreme Court has noted, "the judiciary lacks the capacity for such a task."[184]

Moreover, any such determinations would require precisely the sort of "policy determination of a kind clearly for nonjudicial discretion" that the Supreme Court has indicated is a hallmark of a political question.[185] The President's Executive Order addresses various foreign affairs challenges related to the ongoing border crisis by declaring a national emergency and utilizing the specific powers granted to the Executive by Congress. In these circumstances, judicial review of the President's foreign policy decisions is unwarranted. "Decisions about how best to enforce the nation's immigration laws in order to minimize the number of illegal aliens crossing our borders patently involve policy

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[180] Baker v. Carr, 369 U.S. 186, 217 (1962).

[181] Defendant's Motion to Dismiss, *supra* note 178, at 19; *Baker*, 369 U.S. at 217; National Emergencies Act (NEA) of 1976, 50 U.S.C. §§ 1601–51.

[182] Defendant's Motion to Dismiss, *supra* note 178, at 17, 19; National Emergencies Act of 1976, 50 U.S.C. §§ 1601–51; United States v. Spawr Optical Research, Inc., 685 F.2d 1076, 1080 (9th Cir. 1982).

[183] El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 845 (D.C. Cir. 2010).

[184] *Id.* at 845.

[185] *Baker*, 369 U.S. at 217.

judgments about resource allocation and enforcement methods."[186] These "issues fall squarely within a substantive area clearly committed by the Constitution to the political branches; they are by their nature peculiarly appropriate to resolution by the political branches of government both because there are no 'judicially discoverable and manageable standards for resolving' them."[187] In *Sadowski v. Bush*, the court reiterated this principle: "[D]eciding how to best enforce existing immigration laws and policies and how to keep out illegal immigrants requires making policy judgments that are suited for nonjudicial discretion."[188]

The President's Executive Order should be deemed nonreviewable as it constitutes a nonjusticiable political question. Policy decisions are the responsibility of the political branches, rather than the judiciary. "[T]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government."[189] The Supreme Court has explained:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the federal government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.[190]

"Our cases have long recognized," the court ruled, that "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[191] Moreover, "[t]he political branches are far better equipped (and more accountable to the people) for making the types of decisions that arise in the military setting," and "[j]udges have long respected this allocation of powers."[192]

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[186] New Jersey v. United States, 91 F.3d 463, 470 (3d Cir. 1996).
[187] *Id.* (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
[188] Sadowski v. Bush, 293 F. Supp. 2d 15, 19 (D.D.C. 2003).
[189] Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).
[190] Mathews v. Diaz, 426 U.S. 67, 81 (1976).
[191] Fiallo v. Bell, 430 U.S. 787, 792 (1977).
[192] Doe 2 v. Shanahan, 917 F.3d 694, 719 (D.C. Cir. 2019) (Williams, J., concurring).

Thus, the President's declaration of a national emergency and subsequent petition for an executive order constitutes a fundamental foreign policy decision, appropriately situated within the political branch, as it pertains to immigration, foreign relations, and national security issues.[193] The courts should not seek to replace their judgment with that of the President regarding sensitive issues that are nonjusticiable political questions.[194]

Moreover, in *Baker v. Carr*, the Supreme Court clearly delineated the analysis that underpins the political question doctrine:

> In this case, *the issue of protection of the States from invasion implicates foreign policy concerns which have been constitutionally committed to the political branches*. The Supreme Court has held that the political branches have plenary powers over immigration …. For this Court to determine that the United States has been "invaded" when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the Court making an ineffective non-judicial policy decision …. [E]ven if the issue were properly within the Court's constitutional responsibility, there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion. The Court notes that the other Circuits that have addressed the issues before us in similar suits against the

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[193] Defendant's Motion to Dismiss, *supra* note 178, at 20; United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States . . . ."); Defs. of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 129 (D. D.C. 2007) (construction of the border barriers "pertains to both foreign affairs and immigration control—areas over which the Executive Branch traditionally exercises independent constitutional authority.").

[194] Defendant's Motion to Dismiss, *supra* note 178, at 20; Defendant's Motion to Dismiss Plaintiffs' Amended Complaint, *supra* note 182, at 21; *see also* Soudavar v. Bush, 46 F. App'x 731, 731 (5th Cir. 2002) (per curiam) (affirming dismissal of challenge to executive orders as nonjusticiable political question); *see also* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 579 (C.C.P.A. 1975) (stating courts will not review President's determination that a national emergency exists); Chichakli v. Szubin, No. 3:06-CV-1546-N, 2007 WL 9711515, at 4 (N.D. Tex. June 4, 2007), *aff'd in part, vacated in part*, 546 F.3d 315 (5th Cir. 2008); Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1194–95 (D. Mass. 1986); Sardino v. Fed. Rsrv. Bank of N.Y., 361 F.2d 106, 109 (2d Cir. 1966); Veterans and Reservists for Peace in Viet. v. Reg'l Comm'r of Customs, Region II, 459 F.2d 676, 679 (3d Cir. 1972); Santiago v. Rumsfeld, No. CV04–1747–PA, 2004 WL 3008724, at 3 (D. Or. Dec. 29, 2004), *aff'd*, 403 F.3d 702 (9th Cir. 2005), and *aff'd,* 407 F.3d 1018 (9th Cir. 2005); United States v. Groos, 616 F. Supp. 2d 777, 789 (N.D. Ill. 2008).

> United States have reached the same conclusions that we do.[195]

Moreover, the court explained that any other interpretation ignores the conclusion set forth by our Founders.[196]

VI. *WONG KIM ARK* REVISITED

A. Birthright Citizenship: Misreading the Holding

The 1898 Supreme Court case of *United States v. Wong Kim Ark* is frequently understood to establish that individuals born on American soil are entitled to automatic birthright citizenship. A careful reading of the case reveals its true holding: to acquire citizenship at birth under the Citizenship Clause, an individual must be born within the geographic confines of the United States to a person who, at the time of birth, meets the necessary criteria–*residing with permission in the United States*.[197]

Critics of the President's EO rely heavily on *Wong Kim Ark,* but they misread that precedent. *Wong Kim Ark* did not concern the status of children born in the United States to parents who were illegal aliens or temporary visitors. To the contrary, the Court precisely identified the specific question presented:

> [W]hether a child born in the United States, of parents of Chinese descent, who at the time of his birth, are subjects of the emperor of China, *but have a permanent domicile and residence in the United States*, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States.[198]

At issue in *Wong Kim Ark* was whether a son born to Chinese subjects while they were lawfully residing in the United States was a citizen at birth by virtue of the Citizenship Clause. The Court determined that he was but included a significant proviso:

> Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of

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[195] Fishman, *supra* note 128 (citing California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997)) (emphasis added).

[196] *Id.*

[197] Brief for Immigration Reform Law Institute as Amicus Curiae Supporting Defendants and in Opposition to Injunctive Relief at 3, N.H. Indonesian Cmty. Support v. Trump, 157 F.4th 29 (1st Cir. 2025) (No. 25-1348), 2025 WL 945433 [hereinafter Brief for Immigration Reform Law Institute]; *see* United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898).

[198] *Wong Kim Ark*, 169 U.S. at 653 (emphasis added).

> and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens [lawfully] residing in the United States.[199]

The phrase "subject to the jurisdiction thereof," then, refers not merely subjecting one to the laws of the United States. Rather, it signifies being under the political jurisdiction of the nation and "owing it direct and immediate allegiance."[200] As the Court earlier had held, in a passage cited in *Wong Kim Ark*:

> Chinese laborers, … like all other aliens residing in the United States for a shorter or longer time, are entitled, *so long as they are permitted by the government of the United States to remain in the country,* to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person of property, and to their civil and criminal responsibility.[201]

As the court alluded to, "reside" was "defined in the 1890 edition of *Webster's Dictionary* as 'to dwell permanently or for a considerable time; to have a settled abode for a time; to abide continuously; to have one's domicile or home."[202] *Black's Law Dictionary* defines "permission" as "[a] license to do a thing; leave to do something which otherwise a person would not have the right to do."[203] Ignoring the Court's holding that permission to reside in the country is necessary for being subject to U.S. jurisdiction would substantially weaken the rationale for its ruling, disregard judicial precedents, and render its opinion inconsequential.

The Supreme Court's ruling implied that "an illegal alien, subject to apprehension, detention, and removal at all times, is hardly within the 'protection' of the United States, as the phrase 'allegiance and protection' has always been understood." The *Wong Kim Ark* court

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[199] Brief for Immigration Reform Law Institute, *supra* note 197, at 4 (quoting United States v. Wong Kim Ark, 169 U.S. 649, 694 (1898)); *see* Brief of Amici Curiae Members of Congress in Support of Defendants at 10–13, Washington v. Trump, 764 F. Supp. 3d 1050 (W.D. Wash. 2025) (No. 2:25-cv-00127-JCC) 2025 WL 404390; *see also So Long As,* THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (7th ed. 1919) (defining "so long as" as "with the proviso, on the condition, that").

[200] *Wong Kim Ark*, 169 U.S. at 694 (citing Elk v. Wilkins, 112 U.S. 94, 102 (1884)); Brief for Immigration Reform Law Institute, *supra* note 197, at 3.

[201] Brief for Immigration Reform Law Institute, *supra* note 197, at 4 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893)); *Wong Kim Ark*, 169 U.S. at 694.

[202] Brief for Immigration Reform Law Institute, *supra* note 197, at 4; *Reside*, WEBSTER'S INT'L DICTIONARY OF THE ENGLISH LANGUAGE (1890).

[203] Brief for Immigration Reform Law Institute, *supra* note 197, at 4; *Permission*, BLACK'S LAW DICTIONARY (4th ed. 1968).

cited an earlier Supreme Court precedent, *Minor v. Happersett,* where the Court had ruled that "the very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection."[204]

Wong Kim Ark did not clarify whether individuals born in the United States to parents lacking lawful status are deemed birthright citizens solely based on the lawful residency of Wong Kim Ark's parents. The criteria established by the Court demonstrates that individuals born in this country to illegal aliens, tourists, and others lacking legitimate residency do not qualify as birthright citizens. This tenet was integral to the Court's ruling, notwithstanding the conclusion that Wong Kim Ark met that criterion.[205]

Yet, *Wong Kim Ark* never purported to overrule any part of *Elk v. Wilkins*.[206] The Supreme Court has recognized *Wong Kim Ark*'s limited scope. In another seminal case, *Kwock Jan Fat v. White*, the Court cited *Wong Kim Ark* for the proposition that a person is a U.S. citizen by birth if "he was born to [foreign subjects] when they were permanently domiciled in the United States."[207] A decade after *Wong Kim Ark* was decided, the Department of Justice declared that the decision "goes no further" than addressing children of foreigners "domiciled in the United States."[208] The DOJ argued that:

> [I]t has never been held, and it is very doubtful whether it will ever be held that the mere act of birth of a child on American soil, to parents who are accidentally or temporarily in the United States, operates to invest such child with all the rights of American citizenship.[209]

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[204] Brief for Immigration Reform Law Institute, *supra* note 197, at 4 (quoting Minor v. Happersett, 88 U.S. 162, 165–66 (1875)).

[205] *Id.* at 5.

[206] *See Wong Kim Ark*, 169 U.S. at 682.

[207] Kwock Jan Fat v. White, 253 U.S. 454, 457 (1920) (citing United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898)).

[208] U.S. DEP'T OF JUST., Spanish Treaty Claims Comm'n, Report of William Wallace Brown 121 (1910).

[209] *Id*. at 124; *see* JOHN WESTLAKE, INTERNATIONAL LAW 219–20 (1st ed. 1904) ("[W]hen the father has domiciled himself in the Union . . . his children afterwards born there . . . are citizens; but . . . when the father at the time of the birth is in the Union for a transient purpose his children born within it have his nationality."); *see* HANNIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW 220 (1901) ("[C]hildren born in the United States to foreigners here on transient residence are not citizens, because by the law of nations they were not at the time of their birth 'subject to the jurisdiction.'").

In short, only "those portions of [an] opinion necessary to the result . . . are binding, whereas dicta is not."[210] The *Wong Kim Ark* Court itself warned that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."[211] The only question that was presented and settled in *Wong Kim Ark* concerned children of parents with "a permanent domicile and residence in the United States."[212] The phrase "subject to the jurisdiction thereof," then, as used in the Citizenship Clause, refers not merely to being subject to the laws of the United States. Rather, it connotes being subject to the nation's political jurisdiction and "owing them direct and immediate allegiance."[213]

Contemporary scholars have expressed concurrence with the government's interpretations of the Jurisdiction Clause as articulated in *Wong Kim Ark*. Professor Estreicher, a nationally renowned scholar, has stated that reliance on *Wong Kim Ark* for applying automatic birthright citizenship to children of illegal aliens is "misplaced."[214] Estreicher argues that "*Wong* by its facts (and some of its language) is limited to children born of parents who at the time of birth were in the United States lawfully and indeed were permanent residents."[215] As Estreicher explains:

> The circumstances of *Wong Kim Ark* differ from the unlawful immigration context. Wong's parents were clearly permitted to be within the United States at the time of his birth. A second respect in which the facts of the case differ is that, unlike for children of unlawful immigrants, there was no U.S. prohibition of Wong's presence at time of his birth. His birth and presence within the United States was entirely lawful.[216]

Modern legal scholarship has rejected the notion that the Jurisdiction Clause is limited to determining merely whether the child

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[210] Arcam Pharm. Corp. v. Faria, 513 F.3d 1, 3 (1st Cir. 2007) (citing Rossiter v. Potter, 357 F.3d 26, 31 (1st Cir. 2004)).

[211] *Wong Kim Ark*, 169 U.S. at 679.

[212] *Id.* at 653, 705.

[213] Brief as Amicus Curiae in Support of Defendants and in Opposition to Plaintiff's Motion for Injunction Relief at 4, Washington v. Trump, 764 F. Supp. 3d 1050 (W.D. Wash. 2025) (No. 2:25-cv-00127-JCC) 2025 WL 404390; *Wong Kim Ark*, 169 U.S. at 680.

[214] Brief of Members of Congress as Amici Curiae in Support of Application for Stays at 9, Trump v. Casa, Inc., 606 U.S. 831 (2025) (No. 24A884, No. 24A885, No. 24A886) 2025 WL 1171739; Samuel Estreicher & David Moosmann, *Birthright Citizenship for Children of Unlawful U.S. Immigrants Remains an Open Question*, JUST SECURITY (Nov. 20, 2018), https://www.justsecurity.org/61550/birthright-citizenship-children-unlawful-u-s-immigrants-remains-open-question/.

[215] Brief of Members of Congress as Amici Curiae in Support of Applications for Stays, *supra* note 214, at 9; Estreicher & Moosmann, *supra* note 214.

[216] Estreicher & Moosmann, *supra* note 214.

is subject to U.S. law. The D.C. Circuit has concluded that "the concept of allegiance is manifested by the Citizenship Clause's mandate that birthright citizens not merely be born within the territorial boundaries of the United States but also 'subject to the jurisdiction thereof.'"[217] The clear interpretation of the phrase "subject to the jurisdiction thereof" indicates not a limited submission to the jurisdiction of the United States, but rather a complete submission to their political authority.[218]

A plethora of influential scholarship has reiterated that jurisdiction meant a reciprocal relationship, with the individual owing total allegiance to the sovereign, which consented to that person's presence. Therefore, becoming a citizen of the United States is a political privilege that cannot be assumed by anyone not born in the country without its consent in some form.[219]

B. The Dissent

Chief Justice Melville W. Fuller's dissenting opinion in *Wong Kim Ark* is both illuminating and cogent. "Nationality is essentially a political idea," he wrote, "and belongs to the sphere of public law."[220] Before the Revolution, Fuller explained, these same views had been set forth by the imminent political philosopher, Emmerich de Vattel (1714-67), author of *The Law of Nations*:

> The … natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this …. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent …. I say that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country. The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage …. The place of birth produces no change in the rule that children

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[217] Tuaua v. United States, 788 F.3d 300, 305 (D.C. Cir. 2015) (citing United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898)).

[218] *Id.* (citing Elk v. Wilkins, 112 U.S. 94, 102 (1884)).

[219] *Id.* (citing Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 B.Y.U. J. PUB. L. 35, 72 (2011)) (citing G.M. Lambertson, *Indian Citizenship*, 20 AM. L. REV. 183, 185 (1866)).

[220] United States v. Wong Kim Ark, 169 U.S. 649, 707 (1898) (Fuller & Harlan, JJ., dissenting).

> follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction.[221]

Fuller's opinion affirmed Vattel's argument that:

> [C]onsidering the circumstances surrounding the framing of the constitution, I submit that it is unreasonable to conclude that 'natural-born citizen' applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible to the presidency, while children of our citizens, born abroad, were not.[222]

Fuller also cited Supreme Court Justice Joseph Story's work on *Conflict of Laws* (Section 48), treating the issue as one of public law:

> Persons who are born in a country are generally deemed to be citizens of that country. A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were in itinere in the country, or who were abiding there for temporary purposes, as for health or curiosity or occasional business. It would be difficult, however, to assert that, in the present state of public law, such a qualification is universally established. *Undoubtedly, all persons born in a country are presumptively citizens thereof, but the presumption is not irrebuttable*.[223]

Fuller referenced Justice Miller's remarks in his notable treatise, *Lectures on Constitutional Law*:

> If a stranger or traveler passing through or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our government, has a child born here, which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction.[224]

"In analyzing the first clause," Miller wrote, quoting Justice Story, "observe that 'the phrase "subject to the jurisdiction thereof"' was

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[221] *Id.* at 708 (Citing VATTEL, supra note 101, at 102).

[222] *Id.* at 715.

[223] *Id.* at 718 (citing SAMUEL F. MILLER, LECTURES ON CONSTITUTIONAL LAW § 48) (emphasis added).

[224] *Id.* at 718–719.

intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states, born within the United States."[225] Fuller maintained that:

> [T]his section contemplates two sources of citizenship, and two sources only—birth and naturalization: "The persons declared to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, *but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." . . .To be "completely subject" to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government.*[226]

Justice Fuller insisted, in no uncertain terms, that:

> The Fourteenth Amendment was not designed to accord citizenship to persons so situated, and to cut off the legislative power from dealing with the subject. The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of a country is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.[227]

One final but important note: Supreme Court Justice John Marshall Harlan—an advocate for a color-blind interpretation of the Constitution and the only dissenter in *Plessy v. Ferguson*—aligned himself with Chief Justice Fuller's equal protection dissent in *Wong Kim Ark*, arguing that Wong "never became and is not a citizen of the United States."[228]

VII. CONCLUSION

A. The Supreme Court

One hundred and fifty years after the establishment of the Citizenship Clause, the issue of birthright citizenship is set to be adjudicated by the Supreme Court. The historical record and contemporary scholarship should indicate to the High Court that the Jurisdiction Clause encompasses more than the mere determination of an individual's subjection to U.S. laws. The Fourteenth Amendment

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[225] *Wong Kim Ark*, 169 U.S. at 723 (Fuller, C.J., dissenting) (citing SAMUEL F. MILLER LECTURES ON THE CONSTITUTION 279 (Albany, NY: Banks & Co., 1891)).

[226] *Id.* at 724–25 (emphasis added).

[227] *Id.* at 726.

[228] *Id.* at 732; Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

does not grant citizenship to the children of aliens who are unlawfully present in the United States. "Because of this, '[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress.'"[229] Consequently, other branches of government are restricted from granting citizenship independently, a constraint that the Executive Order guarantees is adhered to within the executive branch. As *INS v. Pangilinan* has held, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations."[230]

As the Supreme Court has previously recognized, executive officials must have "broad discretion" to manage the immigration system... "undoubted power over the subject of immigration and the status of aliens."[231] Thus, ruling that the President's EO is unconstitutional would mark a severe intrusion into this core executive authority. Some legal scholars equate "jurisdiction" with regulatory power, contending that children of illegal aliens are subject to the jurisdiction of the United States because they must comply with U.S. laws. But that interpretation is fundamentally flawed. It conflicts with both binding and persuasive Supreme Court precedent as to the provision's original meaning.[232]

The Fourteenth Amendment's historical origin provides additional support for the conclusion that while children born here of U.S. citizens and permanent residents are entitled to U.S. citizenship by birth, children born of parents whose presence is either unlawful or lawful but temporary are not. It would have been easy enough for the drafters of the Fourteenth Amendment to state in plain terms "subject to the laws" of the United States. Instead, they intentionally chose a distinctly different and legalistic term: "jurisdiction." 'Jurisdiction' invokes a nuanced historical understanding. However, legal critics of the President's EO have never provided an adequate response to why the drafters failed to use precise language if they intended 'jurisdiction' as merely being subject to U.S. laws.[233]

Perhaps the esteemed Jurist, Judge Richard Posner, synthesized the citizenship debate best when he concluded:

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[229] Brief of Amici Curiae Members of Congress, *supra* note 3, at 1, (citing United States v. Ginsberg, 243 U.S. 472, 474 (1917)

[230] INS v. Pangilinan, 486 U.S. 875, 885 (1988).

[231] Arizona v. United States, 567 U.S. 387, 394, 396 (2012).

[232] *See* Opposition to Plaintiffs' Motions for Preliminary Injunction at 1, Washington v. Trump, No. 2:25-cv-00127-JCC (W.D. Wash. 2025) 2025 WL 404331.

[233] Brief of Congress in Support of Defendants at 15–16, Washington v. Trump, No. 2:25-cv-00127-JCC (W.D. Wash. 2025).

> That is one rule that Congress should rethink … awarding citizenship to everyone born in the United States (with a few very minor exceptions) …. This rule … makes no sense. "The Federation for American Immigration Reform estimates that 165,000 babies are born each year in the United States to illegal immigrants …." "[T]here is a huge and growing industry in Asia that arranges tourist visas for pregnant women so they can fly to the United States and give birth to an American. Obviously, this was not the intent of the 14th Amendment; it makes a mockery of citizenship."[234]

Posner further contends:

> We should not be encouraging foreigners to come to the United States, solely to enable them to confer U.S. citizenship on their future children. But the way to stop that abuse of hospitality is to remove the incentive by changing the rule on citizenship …. A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it.[235]

Finally, then, the United States-born child of an illegal immigrant is not born "under the protection and control" of the United States or its jurisdiction. The limited protection provided to undocumented parents is not a right derived from their commitment to the United States, but rather a matter of reciprocal obligation.[236]

Furthermore, illegal aliens may be considered as not "in amity" with the United States, a condition noted by the *Wong Kim Ark* Court in its explanation of the "fundamental principle of the common law [concerning] English nationality."[237] Citing *Calvin's Case*, unauthorized immigrants are present in the country against the wishes of the American public, existing in a continuous state of noncompliance with United States law, despite the government's efforts to deport them.[238]

Thus, instead of equating "jurisdiction" with regulatory authority, the Supreme Court has persuasively ruled that a person is "subject to the jurisdiction" of the United States under the Citizenship Clause if he is born "in the allegiance and under the protection of the country."[239] The Court has further held that allegiance to the United

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[234] Oforji v. Ashcroft, 354 F.3d 609, 619–21 (7th Cir. 2003) (Posner, J., concurring).
[235] *Id.* at 621.
[236] Wood, *supra* note 114, at 513.
[237] United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898).
[238] *See id.* at 656–66.
[239] *See id.* at 662–64.

States must be "direct," "immediate," and "complete," unqualified by "allegiance to any alien power."[240] In other words, a person is subject to the jurisdiction of the United States within the meaning of the Clause only if: (1) "that person is *not* subject to the jurisdiction of a foreign power and (2) the 'nation' has 'consent[ed]' to him becoming part of its own 'jurisdiction.'"[241]

B. Amending the Constitution

On January 29, 2025, United States Senators Lindsey Graham (R-South Carolina), Ted Cruz (R-Texas), and Katie Britt (R-Alabama) proposed legislation aimed at imposing restrictions on "one of the biggest magnets for illegal immigration into the United States."[242] As proposed, *The Birthright Citizenship Act of 2025*:

> [S]tops the practice of granting citizenship to both the children of illegal immigrants and the children of non-immigrants in the [United States] on temporary visas, also known as birthright citizenship …. The exploitation of birthright citizenship is a major pull factor for illegal immigration and a weakness for our national security. The United States is one of only 33 countries in the world with no restrictions on birthright citizenship.[243]

Senator Graham argued:

> It is long overdue or the United States to change its policy on birthright citizenship because it is being abused in so many ways …. One example is birth tourism, where wealthy individuals from China and other nations come to the United States simply to have a child who will be an American citizen. When you look at the magnets that draw people to America, birthright citizenship is one of the largest …. It is time for the United States to align itself with the rest of the world and restrict this practice once and for all.[244]

Senator Britt asserted that:

> The promise of American citizenship should not incentivize illegal migration, but that's exactly what has happened for

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[240] Elk v. Wilkins, 112 U.S. 94, 101–02 (1884).

[241] Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812) (explaining a nation's "jurisdiction . . . must be traced up to the consent of the nation itself").

[242] *Graham, Cruz, and Britt Introduce Bill to Restrict Birthright Citizenship*, LINDSEY GRAHAM U.S. SEN., https://www.lgraham.senate.gov/public/index.cfm/2025/1/graham-cruz-and-britt-introduce-bill-to-restrict-birthright-citizenship (Jan. 29, 2025).

[243] *Id.*

[244] *Id.*

> far too long. . . . It's time to fix this. Senator Lindsey Graham's and my Birthright Citizenship Act would codify President Trump's commonsense stance and end the abuse of birthright citizenship that I do not believe is consistent with the original meaning of the Fourteenth Amendment's Citizenship Clause. This will protect our nation's sovereignty, disincentivize illegal migration, and ensure America's citizenship practices are stronger and better aligned with peer countries around the globe.[245]

A similar bill has been introduced in the House of Representatives. Congressman Brian Babin, Chairman of the House Science, Space, and Technology Committee, introduced the Birthright Citizenship Act to reaffirm the original intent of the Fourteenth Amendment and address the misapplication of birthright citizenship. Babin's legislation stipulates that automatic citizenship is conferred solely to children born in the United States if at least one parent fulfills one of the specified criteria:

> (1) A citizen or national of the United States;
> (2) A lawful permanent resident whose residence is in the United States; or
> (3) A lawful immigrant performing active service in the United States Armed Forces.[246]

According to Babin:

> The introduction of this bill aligns with President Donald Trump's commitment to make birthright citizenship reform a top priority. Granting automatic citizenship to children of illegal immigrants is based on a flawed interpretation of the 14th Amendment, which was originally intended to ensure recently freed slaves gained full rights as Americans. It was never intended to confer citizenship to children of individuals who enter or remain in the United States illegally.[247]

Babin cited the Center for Immigration Studies (CIS):

> [O]ne out of every ten births in the United States is to an illegal immigrant mother. Additionally, nearly 400,000 expectant mothers cross the border illegally each year intending to give birth in the United States. Once granted

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[245] *Id.*

[246] *Congressman Brian Babin Introduces Legislation to End Birthright Citizenship for Children of Illegal Immigrants*, press release, U.S. CONGRESSMAN BRIAN BABIN (Jan. 21, 2025), https://babin.house.gov/news/document-single.aspx?DocumentID=14088.

[247] *Id.*

> automatic citizenship, these children can initiate chain migration, opening pathways for extended family members to gain legal residency. This practice has also fueled a global birth tourism industry, which takes advantage of the current loophole in U.S. immigration laws.[248]

Efforts to alter birthright citizenship via legislative measures have gained popularity in both chambers. However, enacting a statute alone may be inadequate and a constitutional amendment may be necessary for such a significant transformation. In fact, amending the constitution to restrict the Citizenship Clause and eliminate automatic birthright citizenship would be exceedingly challenging. Out of nearly 12,000 attempts to modify the Constitution since 1789, a paltry twenty-seven have been successful. Nonetheless, efforts have been, and should be, made to modify the Fourteenth Amendment to bring absolute clarity to the continuing birthright citizenship debate.[249]

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[248] *Id.*

[249] Katherine Nesler, *Resurgence of the Birthright Citizenship Debate*, 55 WASH. U.J.L. & POL'Y 215, 240 (2017).

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