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It is my considered opinion that Congress has authority under Section 5 of the Fourteenth Amendment to define the jurisdiction of the United States. Indeed, it is my contention that Congress has exercised that power on many occasions, most recently in the Immigration Reform and Control Act of 1986.

Senator Jacob Howard, the author of the citizenship clause in the Fourteenth Amendment, defined who would fall within the "jurisdiction of the United States":

> [E]very person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. 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. This has long been a great desideratum in the jurisprudence and legislation of this country.

Clearly, the author of the citizenship clause intended to count "foreigners," "aliens," and those born to "ambassadors or foreign ministers" as outside the "jurisdiction of the United States." Senator Howard knew, as his reference to natural law indicates, that the republican basis for citizenship is consent. This is the natural law principle of the Declaration of Independence that proclaims that legitimate governments derive "their just powers from the consent of the governed."

Senator Lyman Trumbull, Chairman of the Judiciary Committee and a powerful supporter of the Fourteenth Amendment, remarked on May 30th, 1866, that the jurisdiction clause includes those "Not owing allegiance to anybody else. . . It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens." This was familiar language. The Civil Rights Act of 1866 had defined citizens of the United States as "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." It is universally agreed that the immediate impulse for the passage of the fourteenth amendment was to constitutionalize the Civil Rights Act of 1866. This was an attempt to put the question of citizenship and matters of Federal civil rights beyond the reach of simple congressional majorities. Thus it is clear that the idea of allegiance ("not subject to any foreign power") was somehow central to understanding the jurisdiction clause of the fourteenth amendment.

Much of the debate about the jurisdiction clause in the Congress centered on the status of Indians. The immediate question was whether the fourteenth amendment would confer citizenship upon the Indians as well as upon the newly freed slaves. The former slaves, of course, had been born in the United States and had always been subject to its jurisdiction. Was the same true of Indians? Indians were surely born in the United States, but were they subject to its jurisdiction in the sense of "[n]ot owing allegiance to anybody else?" Senator Trumbull noted that "[t]he provision . . . that all persons born in the United States, and subject to the

jurisdiction thereof, are citizens'. . . means subject to the complete jurisdiction thereof." Trumbull proceeded to deny that Indians were "in any sense subject to the complete jurisdiction of the United Sates . . . We make treaties with them, and therefore they are not subject to our jurisdiction. . . . It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is subject to the jurisdiction of the United States'."

The author of the citizenship clause, Senator Howard, emphatically agreed with Trumbull's assessment that Indians would not become citizens of the United States as a result of the passage of the fourteenth amendment:

> the word jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now. Certain, gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction.

Clearly, insofar as Indians owed tribal allegiance they were not within the jurisdiction of the United States, even though there were born within its territorial limits and in many instances subject to its laws. It is important to note here that jurisdiction does not mean simply subject to the laws of the United States. Rather, it refers specifically to political jurisdiction in the sense of allegiance. Aliens in the United States are properly subject to the laws of the United States and the jurisdiction of its courts; but this is not the same as owing allegiance to the United States. Aliens subject to the laws of the United States still owe allegiance to another country and are thus not within the political jurisdiction of the United States the only jurisdiction contemplated by the fourteenth amendment.

In 1870, the Senate directed the Judiciary Committee to "report to the Senate the effect of the fourteenth amendment to the Constitution upon the Indian tribes of the country; and whether by the provisions thereof the Indians are not citizens of the United States." The Committee report noted that "[t]he inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. The report's conclusion was unequivocal:

> those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legislatures which adopted it, understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, "and subject to the jurisdiction," and that such has been the universal understanding of all our public men since the amendment became a part of the Constitution.

Thus it seems to be beyond cavil that the jurisdiction clause of the fourteenth amendment was intended by its framers to have independent force; not all persons born in the geographical limits of the United States are within the jurisdiction of the United States. To be within the jurisdiction of the United States means to be within its political jurisdiction. Those who today advocate birth-right citizenship for children of illegal aliens born within the geographical boundaries of the United States believe that the fourteenth amendment extends to these children what the framers of the fourteenth amendment said did not extend to Native Americans.

As the Supreme Court said in **Elk v. Wilkins** (1884), "[t]he evident meaning of [the jurisdiction clause] is, not merely subject in some respect or degree to the to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance . . . 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,' . . . 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." In this case, Elk had renounced his tribal allegiance and had lived for some years apart from the tribe. But the Court was adamant that the ascription of citizenship could not be a unilateral or self-selected act. "The alien and dependent condition of the members of the Indian Tribes could not be put off at their own will, without the action or assent of the United States" signified either by treaty or legislation. Neither "the Indian Tribes" nor "individual members of those Tribes," no more than "other foreigners" can "become citizens of their own will." It must be emphasized that no individual can be made a citizen against his will or consent. Yet, self-selected citizenship is not enough; it must be ratified by those are already members of the political community. As the Court concluded, the jurisdiction requirement of the fourteenth amendment embodied "the principle that no one can become a citizen of a nation without its consent."

The Supreme Court in Elk noted that several congressional acts had been passed subsequent to the fourteenth amendment to bring various Indian tribes within the jurisdiction of the United States, acts "which would have been superfluous if they were or might become, without an action of the government, citizens of the United States." In this regard, the Court mentions the "Act of July 15, 1870," extending the jurisdiction of the United States to any member of the Winnebago tribe who desired to become a citizen. A similar act was passed on March 3, 1873, extending jurisdiction to members of the Miami tribe of Kansas. Indeed, this was the method used by Congress exercising its section 5 powers to enforce the provisions of the fourteenth amendment to bring various members of Indian tribes within the jurisdiction of the United States. General legislation was passed in the Indian Citizenship Act of 1924 which provided that "all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States." Most recently, the amnesty provision of the Immigration Reform and Control Act of 1986 extended the jurisdiction of the United States to include illegal aliens residing in the United States for a specified period. Thus, Congress has a long history of exercising its section 5 powers to define who falls within the jurisdiction of the United States.

In the case of the children born to aliens illegally in the United States, their citizenship would follow the citizenship of their parents or be determined by the laws of the country in which the parents hold citizenship. The fact that illegal aliens have violated laws of the United States precludes any possibility that they can be properly said to be within the jurisdiction of the United States as the aliens surely have demonstrated that they do not believe themselves to be subject to the laws of the United States, or are only partially subject. Contrary to a currently fashionable argument, the denial of birth-right citizenship to children of illegal aliens does not punish the children for the sins of the parents because the children don't have a right to citizenship in the first place they are being denied nothing that is rightfully theirs. It would, of course, be a different matter for the children born of legal aliens who have been admitted by the laws of the United States. Whether their children would be citizens at birth or upon the attainment of citizenship by the parents would be a matter for Congress to determine.

Congress, of course, has plenary power, under terms of Article I, Section 8 of the Constitution, "to establish an uniform Rule of Naturalization." By necessary inference, Congress has the power to regulate immigration and set the terms by which those who are legally admitted can remain in the country. It certainly can establish the standards for which the contract of citizenship can be offered and the qualifications of those to whom it will be proffered. I believe that Congress is fully competent, under the fourteenth amendment, to pass legislation defining those who are "subject to the jurisdiction" of the United States. It does not require a constitutional amendment to withhold citizenship from children born in the United States of illegal alien parents. Their parents are not "subject to the jurisdiction" of the United States and they seek citizenship for their children without the consent of the nation. It defies logic to insist that an illegal act on the part of parents can confer the boon of citizenship upon their children. The nation has specified the terms of its consent in the uniform rules for naturalization and laws governing immigration.

The argument for birth-right citizenship is, of course, more suitable to feudalism than it is to republicanism.

Under the feudal concept of citizenship, anyone born under the protection of the sovereign owed perpetual allegiance or fealty to the sovereign. It is hardly credible that the framers of the American Constitution would have contemplated a basis for citizenship that had its origins in the feudal regime. Indeed, in basing citizenship on the consent of the governed, the obligations of citizenship were placed on an entirely new and republican basis. The Reconstruction Congress recognized this point when it passed the Expatriation Act of 1868. This act a companion piece to the fourteenth amendment was an explicit rejection of birth-right citizenship as the ground for American citizenship. It simply declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." Thus the English common law doctrine of birth-right citizenship was decisively rejected as incompatible with the principles of consent embodied in the Declaration of Independence. After all, the Declaration of Independence announced to the world that Americans no longer considered themselves to be British citizens. If Americans held to the notion of birth-right citizenship, they would have been incapable of declaring their independence from Britain!

Senator Howard, the author of the fourteenth amendment's citizenship clause, stated in his support of the Expatriation Act that the principles of the Declaration of Independence necessarily mean that "the right of expatriation. . .is inherent and natural in man as man. . ." The notion of birth-right citizenship was frequently described as an "indefensible feudal doctrine of indefeasible allegiance." One member of the House of Representative gave expression to the general sense of the Congress when he concluded that "[i]t is high time that feudalism were driven from our shores and eliminated from our law, and now is the time to declare it."

Blackstone had described the allegiance required by the English doctrine of birth-right citizenship in these terms:

> Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection . . . . Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, canceled, or altered, by any change of time, place, or circumstance . . . For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrence act of that prince to whom it was first due.

The English common law became a part of the American system only insofar as it was consistent with the principles of republican government. James Madison wrote that one "fundamental principle of the revolution" was the assertion of the competence of American legislatures to pass legislation independently of the common law. In some cases, aspects of the common law were accepted as a matter of convenience, in others it was rejected outright as incompatible with the principles of a free and self-governing nation. Surely the notion of birth-right citizenship, with its requirement of indefeasible allegiance to a king, was one of those aspects of the common that was rejected by the principles of the Declaration of Independence.

Among a host of other considerations, birth-right citizenship denies that the people always retain the natural right to revolution, a right that is the fundamental right of rights described in the Declaration of Independence. As Representative Norman B. Judd remarked on the floor of the House in the debate over the Expatriation Act, "the English common law was not adopted. . . except so far as applicable to our situation and our form of government. . . . The very origin and nature of our institutions utterly forbid the idea that the doctrine of perpetual allegiance' is consistent with our institutions." Representative Judd further specified the precise sense in which the common law doctrine of birth-right citizenship was inconsistent with the principles of "our institutions:" "The right of expatriation is clearly implied as inalienable in the enumeration of rights in the Declaration of Independence, and its obstruction was one of the wrongs charged by the colonies against the English crown." There can be no doubt whatsoever that the fortieth Congress that passed the Expatriation Act believed that it contained a thoroughgoing repudiation of the English common law

notion of birth-right citizenship and its attendant requirement of perpetual allegiance. Since this Act was contemporaneous with the adoption of the fourteenth amendment, there can be little doubt that it also embraced the principle of citizenship that was embodied in the amendment. Reciprocal consent is the principle of citizenship embraced in the fourteenth amendment and the Expatriation Act is a confirmation of that principle.

Chief Justice Fuller remarked in his dissenting opinion in **United States v. Wong Kim Ark** (1898), that in the American Revolution "when the sovereignty of the Crown was thrown off and an independent government established, every rule of the common law and every statute of England obtaining in the colonies, in derogation of the principles on which the new government was founded, was abrogated." It was emphatically the case, Fuller rightly argued, "that the rule making locality of birth the criterion of citizenship because creating a permanent tie of allegiance, no more survived the American Revolution than the same rule survived the French Revolution." Indeed, the consensual basis of citizenship, so far from creating a permanent and indissoluble allegiance to the sovereign, maintains "the general right of expatriation, to be exercised in subordination to the public interests and subject to regulation."

The majority decision in **Wong Kim Ark** failed to make an adequate case for American adoption of the English common law basis of citizenship. Wong Kim Ark's parents were legal residents of the United States but were rendered ineligible for citizenship by both statutes and treaty; and they still maintained their allegiance to China. The Court nevertheless held wrongly in my view that Wong Kim Ark, having been born within the territorial limits of the United States, had birth-right citizenship. The majority opinion failed to see that the English common law of birth-right citizenship was not only contrary to the principles of the founding, but had been explicitly rejected by the fourteenth amendment and the Expatriation Act. In any case, there has never been a Supreme Court opinion holding that the children of ***illegal aliens*** are entitled to American citizenship by virtue of their birth within the geographical limits of the United States. Jurisdiction is not a geographical concept; it is a matter of political allegiance. Birth-right citizenship has no place in republican government; it is the relic of monarchy and should be recognized as such once again by Congress.