

BIRTHRIGHT CITIZENSHIP RE-EXAMINED

*Michael D. Ramsey**

*In 2020, I argued in *Originalism and Birthright Citizenship* that the original meaning of the Fourteenth Amendment's Citizenship Clause guaranteed U.S. citizenship to almost everyone born in the United States apart from the children of foreign diplomats and (at the time it was adopted) tribal Native Americans. President Trump's 2025 executive order purporting to exclude from birthright citizenship the U.S.-born children of temporary visitors and of persons not lawfully present in the United States has brought the issue to the forefront and inspired prominent originalist counterarguments. In particular, two leading originalist-oriented scholars—Kurt Lash and Ilan Wurman—separately argue that the original meaning's citizenship guarantee is narrower than I contended.*

This Article responds to these new originalist assessments of the Citizenship Clause. Notably, although these scholars both reject the broadest reading of the Citizenship Clause, they disagree between themselves as to the Clause's correct reading and scope. Professor Lash's account would exclude U.S.-born children of parents unlawfully present in the United States (thus defending the executive order only in part). Professor Wurman argues that the Clause may guarantee citizenship to U.S.-born children of alien parents only if the parents are lawful permanent residents; this approach would find the President's executive order consistent with the Clause's original meaning.

Evaluating each of these contentions in turn, this Article concludes that neither of them is persuasive. Rather, this Article reaffirms the conclusion that the Citizenship Clause's broad language ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .") encompasses all U.S.-born persons over whom the United States exercised sovereign authority at birth.

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* Warren Distinguished Professor of Law, University of San Diego School of Law. Thanks to Kurt Lash and Ilan Wurman for helpful comments, and to the *Notre Dame Law Review* for encouraging this dialogue.

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INTRODUCTION

In 2020, I argued in *Originalism and Birthright Citizenship* that the original meaning of the Fourteenth Amendment's Citizenship Clause guaranteed U.S. citizenship to almost everyone born in the United States apart from the children of foreign diplomats and (at the time it was adopted) tribal Native Americans.¹ President Trump's 2025 executive order purporting to exclude from birthright citizenship the U.S.-born children of temporary visitors and of persons not lawfully present in the United States² has brought the issue to the forefront and inspired prominent originalist counterarguments. In particular, two leading originalist-oriented scholars—Professors Kurt Lash and Ilan Wurman—separately argue that the original meaning's citizenship guarantee is narrower than I contended.³

This Article responds to these originalist citizenship claims. Notably, although these scholars both reject the broadest reading of the Citizenship Clause, they disagree between themselves as to the Clause's correct reading and scope. Professor Wurman argues that the Clause may guarantee U.S. citizenship to U.S.-born children of alien parents only if the parents are lawful permanent residents.⁴ Under that reading, the President's executive order might be consistent with the

1 Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020).

2 Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (“Protecting the Meaning and Value of American Citizenship”).

3 Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance, and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. 77 (2026); Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL'Y 315 (2026). Other recent originalist defenses of a narrow reading of the Clause include Richard A. Epstein, *The Hopeless Case for Birthright Citizenship: The Fourteenth Amendment Did Not Touch the Status of the Children of Illegal Aliens and Temporary Visitors to the United States* (May 14, 2025) (unpublished manuscript), <https://ssrn.com/abstract=5254575> [<https://perma.cc/6HRG-AG4D>]; Samuel Estreicher & Rudra Reddy, *Revisiting the Scope of Constitutional Birthright Citizenship*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming 2026), <https://ssrn.com/abstract=5223361> [<https://perma.cc/9Z5R-BTFF>]; and Andrew T. Hyman, *Originalism, Illegal Immigration, and the Citizenship Clause*, 13 BRIT. J. AM. LEGAL STUD. 1 (2024). For earlier narrow originalist readings, see, for example, Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 TEX. REV. L. & POL. 135 (2019); John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955 (2008); and William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008). The classic earlier work arguing for a narrow reading of the Clause is PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

4 Wurman, *supra* note 3, at 444–49; see Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), <https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html> [<https://perma.cc/U5FZ-MWKH>] (expressing a similar defense of the executive order); see also Hyman, *supra* note 3 (adopting a lawfully-domiciled-alien-only view on different grounds).

Clause's original meaning. Professor Lash adopts a narrower reading that would exclude only the U.S.-born children of parents unlawfully present in the United States.⁵

Evaluating these contentions in turn, this Article concludes that neither is persuasive. Rather, this Article reaffirms the conclusion that the original meaning of the Citizenship Clause's broad language ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States"⁶) encompasses all U.S.-born persons over whom the United States exercised sovereign authority at birth.

The Article proceeds in five Parts. Part I briefly restates the argument for a broad reading of the Citizenship Clause's original meaning. Part II provides an overview of the new originalist scholarship and its relationship to the broad reading. Parts III and IV address, respectively and in more detail, the arguments of Professors Lash and Wurman. These Parts conclude that neither of the new accounts provides a satisfactory originalist defense of a narrow reading of the Clause. A concluding Part V revisits the case for a broad originalist reading and demonstrates that the broad reading is not materially undermined by the newly advanced originalist arguments against it.

I. THE ORIGINALIST ARGUMENT FOR BROAD BIRTHRIGHT CITIZENSHIP

The Fourteenth Amendment's Citizenship Clause, adopted in 1868, provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."⁷ The core constitutional question, as applied to persons indisputably born "in the United States,"⁸ is therefore the meaning of "subject to the jurisdiction thereof." The conventional, broad reading of this phrase, as applied until recently by the U.S. executive branch and accepted by most scholars, is that it excludes children born into families of foreign diplomats, and perhaps some other categories of persons excluded from U.S.

5 Lash, *supra* note 3, at 182–88. Professor Lash finds the citizenship of children of lawful temporary visitors to be a close question, resolved only by his adoption of a presumption in favor of citizenship. *Id.* at 178–82; *see also* Robert G. Natelson, *Cutting the Gordian Knot of Birthright Citizenship*, LAW & LIBERTY (Sep. 1, 2025), <https://lawliberty.org/cutting-the-gordian-knot-of-birthright-citizenship/> [<https://perma.cc/7WCC-WCTN>] (favoring a similar result on originalist grounds).

6 U.S. CONST. amend. XIV, § 1.

7 *Id.*

8 On the question of what constitutes "in the United States" for purposes of the Citizenship Clause, *see* Ramsey, *supra* note 1, at 425–36.

domestic jurisdiction under international law, but does not exclude U.S.-born children of lawful temporary visitors and persons not lawfully present in the United States.⁹ As briefly summarized below, the Clause's text, history, and original meaning support that interpretation.¹⁰

A. Text

In early to mid-nineteenth-century language, a nation's "jurisdiction" meant its sovereign authority. The 1865 edition of Webster's Dictionary defined the jurisdiction of nations as the "[p]ower of governing or legislating," "the power or right of exercising authority," the "limit within which power may be exercised," or the "extent of power or authority."¹¹ Nineteenth-century sovereigns had authority ("jurisdiction") principally based on geography. As Marshall wrote for the U.S. Supreme Court in *The Schooner Exchange v. McFaddon*, "The jurisdiction of the nation within its own territory is necessarily exclusive and

9 See, e.g., BEN HARRINGTON, CONG. RSCH. SERV., LSB10214, THE CITIZENSHIP CLAUSE AND "BIRTHRIGHT CITIZENSHIP": A BRIEF LEGAL OVERVIEW (2018).

10 The discussion in this Part is adapted from Michael D. Ramsey, *The Originalist Basis of Birthright Citizenship*, LAW & LIBERTY (Feb. 13, 2025), <https://lawliberty.org/the-originalist-basis-of-birthright-citizenship/> [<https://perma.cc/AUM8-E7A6>] (used with permission), which in turn rests on my 2020 article, see Ramsey, *supra* note 1, at 436–61. A classic short version of the broad originalist interpretation is James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367, 373–74 (2006). For recent accounts of the pre-ratification history, see Keith E. Whittington, *By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States*, 49 HARV. J.L. & PUB. POL'Y 459 (2026); and John Vlahoplus, *Alliance, Treason, and Birthright Citizenship*, 57 LOY. U. CHI. L.J. ONLINE (forthcoming 2026), <https://ssrn.com/abstract=5236741> [<https://perma.cc/T77E-K4NA>]. The Clause's drafting history is the focus of earlier articles by Garrett Epps and Matthew Ing. See Garrett Epps, *The Citizenship Clause: A "Legislative History"*, 60 AM. U. L. REV. 331 (2010); Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719 (2012). For additional discussion in support of the broad historical understanding of the Clause, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 165–87 (1996); and Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 521 (2008).

11 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 732 (Springfield, G & C. Merriam 1865). Other dictionaries from the period are to the same effect. See Gregory Ablavsky & Bethany Berger, *"Subject to the Jurisdiction Thereof": The Indian Law Context*, 100 N.Y.U. L. REV. ONLINE 201, 202 n.3 (2025) (listing additional examples). To be sure, there were other meanings of "jurisdiction," such as Article III, Section 2's use of "original jurisdiction" and "appellate jurisdiction" to refer to the Supreme Court's power over a case, or the Fourteenth Amendment's direction that no state shall deny equal protection to "any person within its jurisdiction"—which may suggest a purely geographical reference. See U.S. CONST. art. III, § 2; *id.* amend. XIV, § 1. But being "subject to the jurisdiction" of a sovereign had the distinct meaning of being under sovereign authority.

absolute.”¹² Chief Justice Marshall identified three exceptions to this otherwise absolute territorial sovereignty: foreign sovereigns and their property, foreign diplomats, and foreign military forces.¹³ These, he said, even within sovereign territory are not “within the jurisdiction of the sovereign.”¹⁴ But, he noted, these exceptions did not extend to private noncitizens within sovereign territory—even those there only temporarily. “When private individuals of one nation spread themselves through another as business or caprice may direct,” Chief Justice Marshall wrote, they are “amenable to the jurisdiction of the country.”¹⁵

Marshall used the phrase “amenable to jurisdiction”; subsequently Henry Wheaton—the leading mid-nineteenth-century American writer on international law¹⁶—used the equivalent phrase “subject to jurisdiction.”¹⁷ Wheaton described a nation’s “sovereign power of municipal legislation . . . within its territory” as its “territorial jurisdiction.”¹⁸ That extended, he added, to ships on the high seas, which were “subject to the jurisdiction of the state to which they belong[ed].”¹⁹ And as to diplomatic immunity, Wheaton wrote that ambassadors and their families were “entitled to an entire exemption from the local jurisdiction,” except that if a diplomat “is a citizen or subject of the country to which he is sent . . . he remains still subject to its jurisdiction.”²⁰

In sum, the Amendment’s framers chose a phrase that was well-defined in pre-enactment law. “Subject to the jurisdiction” of a nation meant under sovereign authority, and it included essentially everyone within sovereign territory apart from foreign sovereigns, diplomats, and armies. As used in the Citizenship Clause, according the phrase its

12 *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

13 *Id.* at 137–39.

14 *Id.* at 138.

15 *Id.* at 144.

16 On Wheaton’s influence, see generally ELIZABETH FEASTER BAKER, HENRY WHEATON: 1785–1848 (1937).

17 *E.g.*, HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE 107 (Philadelphia, Carey, Lea & Blanchard 1836).

18 *Id.* at 100.

19 *Id.* at 107.

20 *Id.* at 176–77. Wheaton’s language followed from the great eighteenth-century writer Emer de Vattel, whose work (in English translations) used “subject” and “jurisdiction” in this manner in discussing diplomatic immunity. *See, e.g.*, EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS §§ 92, 110, 113 (London, G.G. & J. Robinson, new ed. 1797) (1758) (diplomatic personnel “must be independent of the sovereign authority, and of the jurisdiction of the country” in which they serve, and so their presence should not “subject them to a foreign authority”); *id.* § 115 (noting that, notwithstanding such immunity, an ambassador’s immoveable property is “subject to the jurisdiction of the state in which it lies”); *see also* Ramsey, *supra* note 1, at 439 & n.161 (providing additional examples of usage by Wheaton and Vattel).

standard definition makes perfect sense: It excluded from birthright citizenship those people—such as foreign diplomatic personnel—who were not under the authority of the territorial sovereign despite being within sovereign territory.²¹

B. Historical Background

The broad view of citizenship by birth, indicated by the foregoing textual reading, followed from the longstanding English common law rule, which, as explained by Edward Coke and William Blackstone, made everyone born in England an English subject—even those with non-English parents. As Blackstone wrote, “[t]he children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such.”²² Coke likewise declared, in the famous *Calvin’s Case*, that “if [an alien] hath issue here, that issue is a natural born subject.”²³ Blackstone noted the exception for children of diplomats, who were not under local authority as a result of their international law immunity.²⁴

American common law generally followed the English rule in the pre-Civil War period, substituting citizenship for subjectship. Constitutional lawyer William Rawle wrote in 1829: “[E]very person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the

21 Some commentators persist in describing this straightforward reading as making “subject to the jurisdiction” superfluous, because a sovereign’s authority extended throughout sovereign territory, and so anyone “born . . . in the United States” was also “subject to the jurisdiction thereof.” But of course that is not true, as Marshall, Wheaton, and Vattel (and many others) demonstrate: Although territorial sovereignty was the rule, international law provided narrow categorical exceptions, including foreign sovereigns and foreign diplomats (as well as a few other categories to be discussed below). *E.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 147 (1812) (holding that a French warship in Philadelphia harbor was not subject to U.S. jurisdiction). Thus it was entirely possible to be in the United States but not subject to its jurisdiction. Moreover, U.S. jurisdiction extended to places and people outside the United States, including to U.S. citizens abroad, *see The Apollon*, 24 U.S. (9 Wheaton) 362, 370 (1829), and to places under temporary U.S. military occupation, *see Fleming v. Page*, 50 U.S. (9 How.) 603, 614–15 (1850) (finding that parts of Mexico under U.S. military occupation during the Mexican War were “subject to the sovereignty and dominion of the United States” yet “not a part of this Union”). Thus one could be outside the United States yet subject to its jurisdiction. There is no redundancy from either perspective.

22 1 WILLIAM BLACKSTONE, COMMENTARIES *361–62.

23 *Calvin’s Case* (1608) 77 Eng. Rep. 377, 384; 7 Co. Rep. 1a, 6a (footnote omitted); *see* Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMANS. 73, 75 (1997).

24 BLACKSTONE, *supra* note 22, at *361–62; *see* H.S.Q. HENRIQUES, THE LAW OF ALIENS AND NATURALIZATION 29–30 (1906) (describing English law).

Constitution”²⁵ An 1844 New York case, *Lynch v. Clarke*, specifically found that U.S.-born children of temporary visitors were U.S. citizens, observing that “every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen.”²⁶ In an earlier Supreme Court case, *M’Creery’s Lessee v. Somerville*, Justice Story, writing for the Court, noted that the U.S.-born daughter of Irish subjects was a “native born citizen[] of the United States.”²⁷

Thus the background of the Citizenship Clause was the general common law rule of citizenship by birth within U.S. territory. This broad view of citizenship did not extend to children of slaves, tribal Native Americans, or persons with diplomatic or other international law immunities.²⁸ In the period prior to the Civil War, some states began denying citizenship to native-born free persons of African descent—a practice upheld by Taney in the 1857 *Dred Scott* case.²⁹ And, as discussed below, Chief Justice Taney’s ruling in turn directly inspired the Fourteenth Amendment’s drafters to restore and constitutionalize the common law of citizenship as they understood it. The historical background is therefore entirely consistent with a broad reading of the Clause as establishing a general rule of citizenship by

25 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 86 (Philadelphia, Philip H. Nicklin, 2d ed. 1829). The mid-century edition of James Kent’s influential *Commentaries* stated that “[n]atives are all persons born within the jurisdiction and allegiance of the United States,” adding in a footnote: “This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent.” 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 38 & n.a (New York, William Kent, 6th ed. 1848); see also Ramsey, *supra* note 1, at 413–16 (citing additional authorities); Whittington, *supra* note 10, at 484–88 (discussing additional examples).

26 *Lynch v. Clarke*, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844) (relying heavily on Coke and Blackstone); see also, e.g., *Kilham v. Ward*, 2 Mass. (1 Tyng) 236, 264–65 (1806) (opinion of Sewall, J.) (“The doctrine of the common law is, that every man born within its jurisdiction is a subject of the sovereign of the country where he is born”); Ramsey, *supra* note 1, at 414–16 (discussing additional cases). As discussed below, *infra* Part III, some doubts emerged in this period over the citizenship of the U.S.-born children of temporary visitors. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 48, at 60 (Boston, Charles C. Little & James Brown, 3rd ed. 1846) (stating that “[p]ersons, who are born in a country, are generally deemed to be citizens and subjects of that country,” but adding that this rule perhaps should not apply to children of temporary visitors).

27 *M’Creery’s Lessee v. Somerville*, 22 U.S. (9 Wheat.) 354, 354 (1824).

28 See JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 294–301 (1978); Ramsey, *supra* note 1, at 410–16.

29 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1857) (Taney, C.J.); see KETTNER, *supra* note 28, at 311–24; Ramsey, *supra* note 1, at 416–17.

birth within sovereign territory, subject to exceptions for persons not under sovereign authority (such as ambassadors).

C. *Drafting History*

The Clause's drafting history confirms the textual and historical analysis. Michigan Senator Jacob Howard, who formally proposed the Clause's language, observed that he saw it as "declaratory of what I regard as the law of the land already" (except in that it overruled *Dred Scott*).³⁰ Howard further explained—acknowledging the general common law principle and its exception for ambassadors—that the Clause "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."³¹

The drafters directly discussed whether Howard's language appropriately included children of noncitizens. Pennsylvania Senator Edgar Cowan objected that the proposed language would include children of Chinese workers on the West Coast.³² California Senator John Conness responded: "The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. . . . I am in favor of doing so."³³ No other senator (including Howard) dissented from Conness's reading.³⁴ Thus the senators seem to have agreed on the Clause's effect, only disagreeing on its wisdom.

The drafters also apparently understood that the language Howard proposed would exclude children of foreign diplomatic personnel³⁵—and that is of course consistent with the meaning of "subject to

30 CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Jacob Howard).

31 *Id.* This quote is sometimes taken to mean that Howard understood all children of aliens to be excluded. *See, e.g.,* Lash, *supra* note 3, at 177–78 (noting this possible reading). If that is what Howard meant, however, he would not have needed to mention children of ambassadors specifically, and he would not have seen his language as declaratory of the prior law (which, as discussed, undoubtedly included the children of aliens as a general matter). Further, as discussed immediately below, Howard did not object when subsequently senators read the language to include children of aliens.

32 CONG. GLOBE, 39th Cong., 1st Sess. 2890–91 (1866) (statement of Sen. Cowan).

33 *Id.* at 2891 (statement of Sen. John Conness). The Cowan-Conness exchange replicated a similar exchange between Cowan and Illinois Senator Lyman Trumbull over related language in the 1866 Civil Rights Act. Cowan asked if the Act would convey citizenship on children of noncitizen Chinese immigrants, to which Trumbull replied, "Undoubtedly." *Id.* at 498 (statement of Sen. Trumbull).

34 *See id.* at 2892 (recording no dissent from the reading Cowan and Conness advanced).

35 *See, e.g., id.* at 2890 (statement of Sen. Howard); *id.* at 2897 (statement of Sen. George Williams) (noting that the "child of an ambassador" would be excluded from

the jurisdiction” in the pre-Amendment nineteenth century.³⁶ As discussed, while authorities such as Chief Justice Marshall’s *The Schooner Exchange* opinion generally described aliens within U.S. territory as under U.S. jurisdiction, they noted that international law immunity gave diplomats an exception to U.S. jurisdiction.³⁷ Again, the drafting history is consistent with the broad reading of the text—the “subject to the jurisdiction” language would exclude children of diplomats but not children of aliens generally, which was the common law rule the drafters sought to constitutionalize.

The drafters’ assessment of tribal Native Americans confirms their understanding of “subject to the jurisdiction.” Persons living in tribes were not citizens under antebellum common law,³⁸ and senators wanted to continue that exclusion. Howard and others assured them that his language did, because U.S. law generally did not govern intra-tribal offenses—typically due to treaties establishing exclusive tribal authority in such matters and consistent with the common antebellum view that the tribes represented separate entities.³⁹ As Howard explained, “an Indian belonging to a tribe” is not “subject to this full and complete jurisdiction” of the United States because that person “is subject for crimes committed against the laws or usages of the tribe to the tribe itself, and not to any foreign or other tribunal.”⁴⁰ Senator George Williams in support equated tribal members to foreign diplomats, neither being “fully and completely subject to the jurisdiction of the United States.”⁴¹ Senator Lyman Trumbull added that because the U.S. government could not “pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another,” persons in tribes “are not subject to our jurisdiction.”⁴²

This discussion shows that senators understood being subject to U.S. jurisdiction to mean being under U.S. sovereign authority with respect to, for example, ordinary crimes—which (to repeat) was the

citizenship by the Clause); see also Ing, *supra* note 10, at 739 nn.107–09 (collecting additional comments).

36 See *supra* Section I.B.

37 See *supra* Section I.A.

38 See KETTNER, *supra* note 28, at 293–300.

39 See CONG. GLOBE, 39th Cong., 1st Sess. 2890–97 (1866); see also Ramsey, *supra* note 1, at 442–44 (discussing this debate); Ablavsky & Berger, *supra* note 11, at 205 (discussing the understandings of tribal sovereignty).

40 CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Howard).

41 *Id.* at 2897 (statement of Sen. Williams).

42 *Id.* at 2893 (statement of Sen. Lyman Trumbull). As discussed below, some senators questioned whether Native Americans were actually outside U.S. sovereign authority, but they did not have a different understanding of jurisdiction. See *infra* Section III.D.

case for essentially everyone in the United States other than diplomats and tribes.

D. *Post-Ratification*

After adoption of the Amendment, a consensus on the Citizenship Clause's meaning failed to develop.⁴³ The executive branch initially endorsed a broad interpretation of the Amendment. In 1871, Secretary of State Hamilton Fish, confirming the citizenship of U.S.-born children of temporary visitors, wrote:

[The 14th amendment] is simply an affirmance of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification, "and subject to the jurisdiction thereof," was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality.⁴⁴

But some authorities began to point the other way. Justice Miller's 1873 Supreme Court opinion in the *Slaughter-House Cases* in dicta suggested a narrow reading confined to children of citizens.⁴⁵ Subsequent executive branch interpretations reflected a variety of views.⁴⁶ As anti-immigrant feelings surged toward the century's end, the executive branch took the position that U.S.-born children of Chinese workers were not citizens under the Clause.⁴⁷ This led in 1898 to the Supreme Court examining the question directly in *United States v. Wong Kim Ark*.⁴⁸ Relying heavily on the longstanding common law rule and the Clause's drafting history (especially the Cowan-Conness exchange

43 See Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868–1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519, 519–20 (2001).

44 Letter from Sec'y of State Hamilton Fish to Minister George Perkins Marsh (May 19, 1871), as reprinted in 2 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES § 183, at 394, 394 (Francis Wharton ed., D.C., W.H. Lowdermilk & Co. 1886) (quoting U.S. CONST. amend. XIV, § 1).

45 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873). Justice Miller did not explain how he reached this conclusion. See *id.* Subsequent judicial decisions seemed to take a broader view, however. See *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (emphasizing exceptions to citizenship for tribal Native Americans and foreign diplomats without identifying more extensive exceptions); *In re Look Tin Sing*, 21 F. 905, 906–09 (C.C.D. Cal. 1884) (Field, Circuit Justice) (noting exceptions to citizenship for children of foreign diplomats and persons serving on foreign ships in U.S. waters without suggesting more extensive exceptions and confirming the U.S. citizenship of a U.S.-born child of Chinese immigrants because "[h]e is not within any of the classes of persons excepted from citizenship," *id.* at 908).

46 See *infra* Section IV.B.

47 See *In re Wong Kim Ark*, 71 F. 382, 383 (N.D. Cal. 1896), *aff'd*, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

48 *Wong Kim Ark*, 169 U.S. at 653.

described above), the Court rejected the *Slaughter-House* dicta and the (new) executive branch position, instead adopting the earlier view of Secretary Fish: U.S.-born children of noncitizens (except diplomats and others with immunity) were citizens.⁴⁹

The Court described the parents in *Wong Kim Ark* as lawful permanent residents,⁵⁰ so strictly speaking the Court's decision did not resolve the Clause's application to temporary visitors or persons not lawfully present in the United States. But its analysis tracked the originalist argument presented above: "[S]ubject to the jurisdiction" meant under sovereign authority, which included everyone born in sovereign territory other than children of unassimilated Native Americans and foreign diplomats (and presumably others with international law immunities); this scope in turn tracked the common law rule derived from Coke and Blackstone and applied in the United States prior to the Civil War.⁵¹

Thus the post-ratification evidence is mixed but in any event does not establish a consensus different from the Clause's apparent original meaning. As a result, that original meaning should prevail in an originalist analysis.

E. Counterarguments

A few notable counterarguments have traditionally been raised to the preceding originalist analysis, but they seem unpersuasive. First, as noted, *Wong Kim Ark* addressed the child of lawful permanent residents. Children of temporary visitors and persons unlawfully present are different, one might say, because they (and their parents) lack legal U.S. residence. As discussed below, this is a central claim of several important, recent originalist arguments.⁵² However, the conventional view responds, this is not a relevant difference under the text and history of the Citizenship Clause. The textual question is the meaning of "subject to the jurisdiction." There is no sense in which lawful alien permanent residents are subject to U.S. jurisdiction but temporary visitors or persons lacking lawful status are not. As explained above, all persons, including all noncitizens other than those with international law immunities, in sovereign territory were under sovereign authority, and thus within the nineteenth-century meaning of "subject to the jurisdiction" of the sovereign. Moreover, neither the principal pre-war

49 *Id.* at 704–05.

50 *See id.* at 705.

51 *Id.*

52 *See* Wurman, *supra* note 3, at 431–44; Hyman, *supra* note 3.

common law authorities nor the drafting debates distinguished between permanent residents and others with respect to citizenship.⁵³

Second, one might say that unlike children of U.S. citizens, U.S.-born children of aliens are not subject to the “exclusive” jurisdiction of the United States (or, one might say, they do not owe exclusive allegiance to the United States).⁵⁴ It is true that children of aliens may also be subject to the jurisdiction of their parents’ home country, as that country might claim them as citizens or subjects as a result of their parentage.⁵⁵ But the Clause does not require exclusive jurisdiction—only jurisdiction. Further, the “exclusive jurisdiction” argument would require a different outcome in *Wong Kim Ark* and run counter to the drafters’ understanding that the Amendment gave citizenship to children of Chinese immigrants.⁵⁶

Third, one might say that the Amendment requires “complete” jurisdiction.⁵⁷ It is true that the drafters thought tribal Native Americans were excluded, even though the United States had partial jurisdiction over them, on this ground.⁵⁸ But that does not alter the result for the categories at issue in the present debate, because temporary visitors and persons not lawfully present are subject to the complete jurisdiction of the United States while in U.S. territory. They are not

53 As discussed below, *infra* Section III.C, and as acknowledged in prior scholarship, see Ramsey, *supra* note 1, at 416 & n.43, some pre-war authorities expressed doubt about the citizenship of temporary visitors. However, no doubt was expressed that temporary visitors (other than diplomatic personnel) were subject to U.S. jurisdiction (that is, under U.S. sovereign authority) while in the United States. Arguments seeking to distinguish between lawful permanent residents and other aliens for purposes of the Citizenship Clause are discussed at greater length in Parts III–IV, *infra*.

54 See Eastman, *supra* note 3, at 963–65 (disagreeing with *Wong Kim Ark* on this ground); Epstein, *supra* note 3, at 46 (same). Such arguments may invoke the 1866 Civil Rights Act, which granted citizenship only to those “not subject to any foreign power.” Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27. While this language could be read to exclude U.S.-born children of aliens from birth citizenship—because they would be potentially subject to the sovereign of their parents’ home nation—that is obviously not how the drafters read the Clause. See *supra* notes 32–34 and accompanying text (describing the exchange between Senators Cowan and Trumbull confirming that U.S.-born children of Chinese immigrants would be citizens under the Act).

55 In the nineteenth century, countries commonly treated the foreign-born children of their citizens or subjects as citizens or subjects. See Michael D. Ramsey, *The Original Meaning of “Natural Born,”* 20 U. PA. J. CONST. L. 199, 213–24 (2017) (describing British practice); *id.* at 224–26 (citing DE VATTEL, *supra* note 20, §§ 213–14) (describing the usual civil law approach).

56 See *supra* Sections I.C–D. Some originalist accounts contest the holding of *Wong Kim Ark*, but as discussed below, both Professors Lash and Wurman reject that view and provide evidence against it. Lash, *supra* note 3, at 178; Wurman, *supra* note 3, at 320 n.5.

57 Swearer, *supra* note 3, at 140. As discussed below, this is the centerpiece of Professor Wurman’s article. See *infra* Section II.B.

58 See *supra* Section I.C.

equivalent to nineteenth-century tribes, over whose intratribal relationships the United States claimed no authority.⁵⁹

Finally, an argument that carries some originalist weight arises from intent.⁶⁰ The Amendment's framers likely did not have in mind persons not legally present in the United States (although they did understand the issue of temporary visitors). The United States had no material restrictive immigration laws, at least at the federal level, in 1868.⁶¹ Thus it may be difficult to say that the framers intended to give citizenship to children of persons not lawfully present.⁶² And it may be especially difficult to speculate about what the framers would have done, had they considered the question. Thus an originalist concerned with the framers' intent might hesitate on this issue, perhaps to the point of thinking the matter should be left to the political branches.⁶³

Modern originalism is, however, predominantly concerned with the text's original meaning, not the framers' intent.⁶⁴ In this approach, the law is the text that was adopted, not the intent or expectations (or lack thereof) of any drafters or ratifiers.⁶⁵ On that understanding of originalism, the text's original meaning seems clear. In nineteenth-century language, "subject to the jurisdiction" of a nation meant under that nation's sovereign authority. The nineteenth-century idea of territorial sovereignty made everyone within sovereign territory subject to sovereign authority, except those with jurisdictional immunities such as diplomats. That reading of the Clause conforms to the pre-Amendment common law, which gave U.S.-born children citizenship without regard to their parents' status as aliens. It also conforms with the views of the drafters, the immediate post-ratification executive branch, and the Court in *Wong Kim Ark*, which all read the Clause broadly. As a result, a reading of the Clause that excludes from citizenship the U.S.-born children of temporary visitors and persons unlawfully present is contrary to the Clause's original meaning.

59 See *infra* Section IV.C (discussing and responding to Professor Wurman's extension of this argument).

60 See Swearer, *supra* note 3, at 145–48 (invoking the drafters' intent as principally to redress the situation of freed slaves and others of African descent).

61 See NEUMAN, *supra* note 10, at 19–20 (noting that some restrictions also existed at the state level).

62 But see Jed Handelsman Shugerman, *An Originalist Case for Birthright Citizenship: The Inclusion of "Temporary Sojourners" and of Chinese and Roma*, 77 U.C. L.J. (forthcoming 2026) (manuscript at 3), <https://ssrn.com/abstract=5278199> [<https://perma.cc/25PF-LC7S>] (arguing that some immigrants were unlawfully present under state law in the relevant period).

63 See Ramsey, *supra* note 1, at 461–71 (discussing this argument).

64 See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467 (2013).

65 See *id.*

* * *

The foregoing account sets forth, in relatively summary form, the conventional, originalist defense of a broad reading of the Citizenship Clause. As described at the outset, that account has been substantially challenged, in connection with the President's 2025 executive order, by two prominent originalist scholars, Professors Lash and Wurman. The ensuing Parts take up those challenges.

II. THE NEW ORIGINALIST ACCOUNTS: AN OVERVIEW

As noted at the outset, two major recent accounts by leading originalist scholars challenge the broad view of the Citizenship Clause described in the previous Part. Professor Wurman's *Jurisdiction and Citizenship* argues that the Clause does not grant U.S. citizenship to the U.S.-born children of temporary visitors or persons not lawfully present in the United States.⁶⁶ Professor Lash's *Prima Facie Citizenship* argues with greater confidence that the children of persons not lawfully present are excluded; it finds the children of temporary visitors to be a close case, potentially resolved by its presumption in favor of citizenship.⁶⁷ Although various other recent essays and articles have disputed the broad view from a range of perspectives, the lengthy and detailed accounts by Professors Wurman and Lash—two of the most prominent modern originalist scholars⁶⁸—represent the most comprehensive current originalist thinking on the matter. This Part briefly summarizes each article. The subsequent Parts provide more detailed assessment and criticism, concluding that neither account requires substantial rethinking of the broad originalist reading of the Citizenship Clause.

66 Wurman, *supra* note 3, at 444–49.

67 Lash, *supra* note 3, at 178–188.

68 Ilan Wurman is the author of *ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* (2017); and *ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* (2020), and numerous articles on originalist topics relating to the 1788 Constitution and the Fourteenth Amendment. *See, e.g.*, Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885 (2023); Ilan Wurman, *Reversing Incorporation*, 99 NOTRE DAME L. REV. 265 (2023); Ilan Wurman, *Non-delegation at the Founding*, 130 YALE L.J. 1490 (2021); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020); Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815 (2020). Kurt Lash is the editor of *THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS* (Kurt T. Lash ed., 2021) and is a similarly prolific originalist writer. *See, e.g.*, Kurt T. Lash, *Becoming the “Bill of Rights”: The First Ten Amendments from Founding to Reconstruction*, 110 VA. L. REV. 411 (2024); Kurt T. Lash, *The State Citizenship Clause*, 25 U. PA. J. CONST. L. 1097 (2023); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439 (2022); Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591 (2019); Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389 (2018).

A. Prima Facie Citizenship

Of the two accounts, Professor Lash's *Prima Facie Citizenship*, although reaching a somewhat broader view of the Citizenship Clause, is the more fundamental departure from the conventional textualist/originalist framework. In terms of methodology and presentation, it is primarily historical rather than textual. It begins with a lengthy historical account of citizenship, from antebellum common law⁶⁹ through the Civil War and the Fourteenth Amendment's drafting and ratifying debates,⁷⁰ with a relatively brief discussion of post-ratification interpretations.⁷¹ The bulk of this discussion focuses on the 1866 debates in the Senate over the Amendment's Citizenship Clause and the related citizenship provision in the Civil Rights Act of 1866.⁷²

A final section of *Prima Facie Citizenship* develops an originalist reading of the Clause from this history and applies it to a range of categories.⁷³ It concludes first that the Clause's original understanding undoubtedly guaranteed U.S. citizenship to U.S.-born children of U.S. citizens and of alien permanent residents.⁷⁴ On the latter point, its conclusion rests principally on comments in the Senate debates, noted above, indicating the drafters' consensus that the Clause generally extended to U.S.-born children of aliens.⁷⁵ Further, this section argues that considerable ambiguity surrounds the Clause's treatment of the children of lawful temporary visitors, both because the pre-drafting common law treatment of such children was unsettled and because the drafters' comments on the matter are scattered and inconclusive.⁷⁶ It finds that, because the Clause can be read to establish a presumption of citizenship (the "prima facie citizenship" of its title), an originalist account can treat children in this category as citizens under the Clause's original meaning.⁷⁷ Finally, *Prima Facie Citizenship* concludes that U.S.-born children of parents who entered the United States illegally are not U.S. citizens under the Clause's original understanding due to the parents' "intentional refusal to formally present themselves

69 Lash, *supra* note 3, at 87–107.

70 *Id.* at 107–44.

71 *Id.* at 144–165.

72 *Id.* at 113–39.

73 *Id.* at 165–188.

74 *Id.* at 185–89.

75 *Id.* at 186–88 (citing Trumbull's comments on the Civil Rights Act and the comments on the Citizenship Clause by Conness noted in Section I.C, *supra*); see CONG. GLOBE, 39th Cong., 1st Sess. 2891–92 (1866) (statement of Sen. John Conness); *id.* at. 498 (statement of Sen. Lyman Trumbull); *supra* notes 32–34 and accompanying text.

76 Lash, *supra* note 3, at 180–82.

77 *Id.* at 178–82.

to the sovereign authority of the people whose country they unlawfully entered.”⁷⁸

In developing its originalist account, *Prima Facie Citizenship* employs two principal themes. The first is, as the title indicates, a presumption in favor of citizenship. It derives this formulation from an 1862 legal opinion by Attorney General Edward Bates, which stated that “every person born in the country is, at the moment of birth, *prima facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disenfranchisement strong enough to override the ‘*natural-born*’ right as recognized by the Constitution.”⁷⁹ In *Prima Facie Citizenship*’s account, this presumption—prominently expressed in the immediate pre-drafting period—can be used, consistent with an originalist approach, to resolve ambiguities in the Citizenship Clause. Thus, as noted above, *Prima Facie Citizenship* argues that while the Clause’s treatment of the U.S.-born children of temporary visitors is ambiguous, the presumption may indicate that they should be treated as citizens.⁸⁰

This theme, although not emphasized in the broad originalist reading of the Citizenship Clause, is not materially inconsistent with it. Because, as discussed above, the broad reading does not find the Clause’s original meaning ambiguous regarding the principal disputed categories, it has not systematically considered how to resolve ambiguity.⁸¹ Using the idea of *prima facie* citizenship to resolve ambiguities may be a plausible addition to the broad reading of the Clause.⁸² In any event, however, the theme of *prima facie* citizenship in itself is not incompatible with the broader originalist reading, although in

78 *Id.* at 187.

79 Citizenship, 10 Op. Att’y Gen. 382, 394 (1862); see Lash, *supra* note 3, at 108–113. Although Bates’s opinion was issued before the Amendment’s drafting, *Prima Facie Citizenship* finds it to have been influential on the Amendment’s drafters. See *id.* at 172.

80 Lash, *supra* note 3, at 178–82. *Prima Facie Citizenship* appears not to claim that the presumption is required by the Clause’s original meaning, only that “a constructed jurisprudence attentive to the history of [the Clause’s] adoption may appropriately place the burden of proof on those challenging otherwise presumptive allegiance.” *Id.* at 172; cf. Solum, *supra* note 64 (discussing constitutional construction in relation to originalist analysis). It seems unclear to what extent this analysis would permit an alternative approach that did not employ the presumption.

81 *Supra* Part I.

82 A textualist/originalist approach might hesitate to adopt the *prima facie* presumption as part of the Clause’s original meaning because the presumption is not firmly anchored in the Clause’s text. Given the prominence of Bates’s opinion, however, it might be accepted as a background understanding. As noted, the drafters emphasized their understanding of the Clause as constitutionalizing existing law (minus *Dred Scott*), and one might say that the presumption was part of the preexisting common law as they understood it. See *supra* Section I.C.

application *Prima Facie Citizenship* finds greater ambiguity—and thus greater scope for the presumption—than the broad originalist reading.

Although *Prima Facie Citizenship* gives its prima facie presumption prominence in its title, the presumption is actually not the article's main analytical framework. Rather, *Prima Facie Citizenship* centrally argues that the Clause is best understood through the idea of allegiance, which forms its second and most important theme. In particular, it argues that the limitation on birthright citizenship expressed by the phrase "subject to the jurisdiction thereof" excludes persons who show "refused allegiance or counterallegiance" to the United States.⁸³ *Prima Facie Citizenship* finds that this concept best explains the drafters' view of the Clause, particularly as expressed in the Senate debates and especially as the senators understood its application to tribal Native Americans (whom they agreed were not granted U.S. citizenship by the Clause).⁸⁴ Applying this interpretation, *Prima Facie Citizenship* then finds that it excludes the children of unlawful entrants, whose parents showed "refused allegiance or counterallegiance" by their refusal to present themselves to sovereign authorities upon entry.⁸⁵

Unlike the theme of prima facie citizenship, this second theme of "refused allegiance or counterallegiance" directly challenges the broad textualist/originalist reading of the Clause. It not only leads to different specific results as to at least one major category, but it also offers a distinct version of the test for citizenship that the Clause adopted. In adopting its test, *Prima Facie Citizenship* rejects the conclusion, fundamental to the broad reading of the Clause, that "subject to the jurisdiction" means simply under sovereign authority.⁸⁶ In sum, *Prima Facie Citizenship* in effect asks us to substitute "owing allegiance thereto" for "subject to the jurisdiction thereof," with "allegiance" indicating some degree of voluntary acceptance of U.S. sovereign authority.

B. Jurisdiction and Citizenship

Professor Wurman's *Jurisdiction and Citizenship* presents an originalist analysis in many respects closer to the broad reading of the Clause, while reaching conclusions that are more divergent from it.⁸⁷

83 Lash, *supra* note 3, at 83–84.

84 *Id.* at 113–121.

85 *Id.* at 185–88.

86 *See id.* at 170 n.504 (specifically taking issue with the analysis expressed in my prior accounts). Part III *infra* elaborates on this disagreement and criticizes the "refused allegiance or counterallegiance" approach.

87 Wurman, *supra* note 3.

Jurisdiction and Citizenship argues that the Citizenship Clause may not grant U.S. citizenship to the U.S.-born children of either temporary visitors or unlawful entrants. But its theory of the Clause's meaning, based substantially on the extent of sovereign power under international law, is generally consistent with the broad originalist reading. Ultimately, it differs principally on the question of what the drafters meant by "complete" jurisdiction.

Like Professor Lash's account, *Jurisdiction and Citizenship* is heavily historical. It starts even earlier in time—initially with Coke and Blackstone,⁸⁸ but then looking as far back as the fair of St. Ives in 1110 and various sources from the 1300s.⁸⁹ The main point here seems to be that the English law of subjectship arose from an exchange of obedience for protection. As it quotes Coke in *Calvin's Case*, "when an alien that is in amity cometh into England . . . he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance."⁹⁰ And the "ligeance," albeit temporary, makes a locally born child a subject: "[L]ocal obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if [the alien] hath issue here, that issue is a natural born subject."⁹¹

Jurisdiction and Citizenship then continues the historical account through the American antebellum experience and the Civil War.⁹² It recounts that the English approach largely carried over to American law, with some adjustments but with a similar foundation: "[B]irthright subjectship or birthright citizenship depended largely, even if not exclusively, on the status of the parents as being within the allegiance and under the protection of the sovereign."⁹³ It notes (like *Prima Facie Citizenship*) that some American authorities began to doubt whether the children of temporary visitors, even though they owed local obedience and were under local protection, should be treated as citizens.⁹⁴

The account next turns to ideas of jurisdiction, which it finds to be related to the foregoing ideas of obedience and protection, and also to the international law rules of sovereign authority. As *Jurisdiction and Citizenship* explains:

88 *Id.* at 328–37.

89 *Id.* at 338–42.

90 *Id.* at 331–32 (quoting *Calvin's Case* (1608) 77 Eng. Rep. 377, 383; 7 Co. Rep. 1a, 5b).

91 *Id.* at 332 (quoting *Calvin's Case* (1608) 77 Eng. Rep. 377, 384; 7 Co. Rep. 1a, 6a); see also *id.* at 337 (discussing Blackstone to this effect). The point of *Jurisdiction and Citizenship*'s earlier sources appears to be that initially the sovereign's protection was extended to aliens by safe conducts, while in later years it was presumed.

92 See *id.* at 343–72.

93 *Id.* at 372.

94 *Id.* at 361–72.

[I]n the nineteenth century and earlier, it appears that being outside the protection of the sovereign—and outside the sovereign’s allegiance—made one not “subject to the jurisdiction” of the sovereign. One might be within the territory of the sovereign and might even be subject to the sovereign’s power, including the reach of its courts. But the jurisdiction to which such an individual was subject was that of the law of nations, not to the sovereign’s municipal or domestic jurisdiction.⁹⁵

Jurisdiction and Citizenship illustrates this relationship through examples of categories of persons who were outside the sovereign’s municipal (i.e., domestic law) jurisdiction under international law.⁹⁶ The most obvious of these categories, of course, was ambassadors and other diplomatic personnel, who had international law immunity from local law; sovereign power over foreign ambassadors, to the extent it existed at all, arose from the international law governing ambassadors.⁹⁷ Similar points are made for categories such as invading armies, distressed ships, and shipwrecks, which were outside local jurisdiction as a matter of international law,⁹⁸ and ordinary alien visitors and residents, who were not.⁹⁹ In sum, it concludes, being subject to a sovereign’s jurisdiction meant not being excluded from a sovereign’s municipal law by a rule of international law.¹⁰⁰

Jurisdiction and Citizenship uses its next section, on the drafting and ratifying debates, to establish its second core proposition: that a person must be *completely* subject to U.S. municipal law to be “subject to [U.S.] jurisdiction” in the meaning of the Citizenship Clause.¹⁰¹ As explored further below, this idea arose from the unusual position of tribal Native Americans, who were subject to U.S. law to some extent, but to some extent also lived within quasi-independent entities with their own internal laws.¹⁰² The drafters concluded that these Native Americans were not granted citizenship by the Clause because U.S. jurisdiction over them was not complete.¹⁰³ Finally, the last historical section examines post-ratification practice and commentary, principally to

95 *Id.* at 373.

96 *See id.* at 373–405.

97 *See id.* at 377–79.

98 *Id.* at 377–79, 393–97.

99 *Id.* at 379–88 (relying heavily on Chief Justice Marshall’s opinion in *The Schooner Exchange*).

100 *See id.* at 405.

101 *Id.* at 406–28.

102 *See infra* Section III.D.

103 Wurman, *supra* note 3, at 413–16.

demonstrate that (as in earlier times) the citizenship of the U.S.-born children of temporary visitors was unsettled.¹⁰⁴

In its conclusion, *Jurisdiction and Citizenship* applies its general rule—that one must be entirely subject to municipal jurisdiction to claim the benefit of the Citizenship Clause—to raise doubts about the children of temporary visitors and unlawful entrants.¹⁰⁵ Its principal claim is that people in these categories lacked a legal permanent residence or domicile in the United States, and as a result their municipal rights and duties were determined in part by the law of their home country.¹⁰⁶ Thus they might be understood to be not completely subject to U.S. jurisdiction and excluded on that ground.¹⁰⁷ As to unlawful entrants, *Jurisdiction and Citizenship* further suggests that their children might be excluded from citizenship because the sovereign had not consented to their presence, and thus they had not entered into an “exchange of allegiance and protection.”¹⁰⁸

These specific conclusions are, of course, contrary to the broad originalist reading of the Citizenship Clause, which finds these categories of persons within the Clause’s grant of citizenship. But *Jurisdiction and Citizenship*’s general account is largely consistent with the broad reading. Like the broad reading, it associates sovereign “jurisdiction” with sovereign authority as bounded by international law. Thus it finds aliens generally to be subject to U.S. jurisdiction while in the United States because international law generally recognized a sovereign’s authority to extend its municipal law throughout its territory. And it finds ambassadors (and others similarly exempted) to be outside U.S. jurisdiction because international law precluded the territorial sovereign from applying its municipal law to them. Although *Jurisdiction and Citizenship* provides a richer account of the history and of the relationship between citizenship and the international law of jurisdiction, nothing it says as a general matter seems in substantial tension with the broad originalist reading of the Citizenship Clause. As discussed above, for example, the broad reading identifies children of ambassadors as excluded by the phrase “subject to the jurisdiction” because ambassadors had international law immunity from the territorial sovereign’s municipal jurisdiction.¹⁰⁹ The disagreements are instead about particular

104 *Id.* at 431–44.

105 *See id.* at 444–49.

106 *See id.* at 445.

107 *See id.* at 446–47.

108 *Id.* at 447.

109 *See supra* Part I; Ramsey, *supra* note 1, at 441–42. The broad reading’s framework also indicates that other categories *Jurisdiction and Citizenship* discusses (sailors, shipwrecks, invading armies) would also have been excluded by the original meaning of “subject to the jurisdiction.”

applications, which will be taken up in a subsequent Section.¹¹⁰ Most centrally to its conclusion, *Jurisdiction and Citizenship* asks us to accept an analogy between tribal Native Americans and nondomiciled aliens as being not subject to “complete” U.S. jurisdiction.¹¹¹

C. *Summary: Agreements and Disagreements*

In sum, the new, originalist accounts of the Citizenship Clause confirm the prior broad reading in some respects and diverge in others. The most important area of agreement is that the Clause generally guarantees U.S. citizenship to U.S.-born children of aliens (with disagreement as to the possible exclusion of some categories of aliens). Thus there is convergence on the view that the Supreme Court’s result (though perhaps not all the reasoning) in *Wong Kim Ark* was correct as an original matter.¹¹² The point is significant because some originalist writing challenges *Wong Kim Ark*’s holding and because some drafting-era commentary, if read out of context, may suggest a general exclusion of aliens’ children.¹¹³ The new articles reject this view and reinforce a key baseline for interpreting the Clause: that it embraces citizenship by birth in the United States for the children of noncitizens, at least to some material extent.

Second, Professor Wurman’s *Jurisdiction and Citizenship* confirms in most material respects the broad reading’s analytical framework. “[S]ubject to the jurisdiction,” in its view, primarily referred to the sovereign’s municipal lawmaking and law enforcement authority as limited by international law. The broad reading of the Clause rests on a similar assessment.¹¹⁴ While there may be incidental divergences, the basic frameworks are compatible, and little in *Jurisdiction and Citizenship*’s rich historical account is likely to draw material objections from

110 See *infra* Part IV.

111 See Wurman, *supra* note 3, at 416–24.

112 See Lash, *supra* note 3, at 158; Wurman, *supra* note 3, at 435. As discussed, *Wong Kim Ark* held that the U.S.-born child of Chinese immigrants was a U.S. citizen under the Clause. *United States v. Wong Kim Ark*, 169 U.S. 649, 704–05 (1898).

113 See Ramsey, *supra* note 1, at 421–24 (collecting examples). The point is significant for modern adjudication, because if *Wong Kim Ark* were incorrectly decided as an original matter, some originalist theories of modern adjudication might accept it as precedent but insist that it not be extended to situations it did not clearly contemplate.

114 See *supra* Part I; cf. Ablavsky & Berger, *supra* note 11, at 202 (equating jurisdiction with “the power to make, decide and enforce the law”). In this respect *Jurisdiction and Citizenship* is more in tension with *Prima Facie Citizenship* than with the broad account of the Citizenship Clause.

advocates of the broad originalist reading.¹¹⁵ The broad reading's principal divergence from *Jurisdiction and Citizenship* arises from the idea of "complete" jurisdiction, and in particular the relevance of the drafters' understanding that tribal Native Americans were excluded from citizenship because they were not subject to "complete" jurisdiction. *Jurisdiction and Citizenship* sees temporary visitors and illegal entrants as analogous to tribal Native Americans in this respect, while the broad reading of the Clause does not.

Professor Lash's *Prima Facie Citizenship* diverges from the broad reading more fundamentally. It would substitute the idea of allegiance—and especially the idea of "refused allegiance or counter-allegiance"—for the Citizenship Clause's "jurisdiction" (which it regards as ambiguous). This substitution allows it to reach differing views on the status of children of temporary visitors (which it regards as ambiguous) and on children of unlawful entrants (whom it regards as excluded from citizenship). As with *Jurisdiction and Citizenship*, much of its divergence from the broad reading rests on the drafters' discussion of unassimilated Native Americans, which in *Prima Facie Citizenship*'s analysis supports the focus on "refused allegiance or counter-allegiance."

III. PROFESSOR LASH AND THE LAWFUL ENTRY REQUIREMENT

This Part examines Professor Lash's *Prima Facie Citizenship* in greater detail,¹¹⁶ beginning with two thematic concerns. First, *Prima Facie Citizenship* seems insufficiently tied to the Constitution's text to be considered textualist originalism. As reflected by its emphasis on the drafting and ratifying history, it is much more devoted to what the framers may have thought about their enterprise. As such, it is more a counterpart to Garrett Epps's classic article on the drafting¹¹⁷ than to more textualist-influenced accounts. As a result, it fails to undermine the broad textualist/originalist interpretation of "subject to [U.S.] jurisdiction" that is the centerpiece of the broad reading of the Clause. Second, *Prima Facie Citizenship* relies heavily on the idea of "allegiance" as a substitute for the textual term "jurisdiction" (which it finds ambiguous). While allegiance, properly defined, does have a connection with jurisdiction and citizenship, *Prima Facie Citizenship* goes astray in developing an account of allegiance that does not connect with the historical meaning of jurisdiction.

115 As discussed in Part IV, *infra*, the principal historical concerns are that it overstates the disagreement in the antebellum period over the children of temporary visitors and that it overstates consensus on that point in the post-ratification period.

116 Lash, *supra* note 3.

117 Epps, *supra* note 10.

This Part next turns to *Prima Facie Citizenship*'s specific applications. As discussed, *Prima Facie Citizenship* departs from the broad reading of the Citizenship Clause in finding first that U.S.-born children of temporary visitors have an ambiguous status under the Clause, and second that U.S.-born children of unlawful entrants are excluded from its guarantee of citizenship.¹¹⁸ Here I conclude that *Prima Facie Citizenship* does little to undermine the contrary, text-based assessment of these categories, largely because *Prima Facie Citizenship* does not principally address them on textual terms. Instead, its rather brief analyses depend on intent and extrapolations from the idea of allegiance. Finally, this Part considers *Prima Facie Citizenship*'s reliance on the original status of Native Americans under the Clause. It finds that the drafters' extensive discussion of Native Americans does not establish what *Prima Facie Citizenship* needs it to establish.

A. Text and Intent

Despite its contrary claims,¹¹⁹ *Prima Facie Citizenship* is not a textualist, originalist account. It does not confront (or even really acknowledge) the most apparent meaning of the crucial phrase "subject to the jurisdiction." As described above, in nineteenth-century legal sources a person was subject to a nation's jurisdiction if that person was under that nation's lawmaking, law enforcement, and law adjudication authority.¹²⁰ That is why Chief Justice Marshall, in *The Schooner Exchange*, described aliens in the United States as generally being under U.S. jurisdiction but found that ambassadors and other agents and instrumentalities of foreign sovereigns were not.¹²¹ The international law rules of jurisdiction held that, as a general matter, all persons in sovereign territory were under sovereign authority, but they recognized exceptions for foreign sovereigns and their representatives.¹²² Moreover, this was quite literally the dictionary definition of "jurisdiction."¹²³ There is simply no doubt that this was, at minimum, *one* meaning of being "subject to the jurisdiction" of a nation in the relevant period.

Prima Facie Citizenship does not address or contest this historical meaning. It only briefly mentions *The Schooner Exchange*, and it discusses the international law of sovereign jurisdiction not at all. So the

118 Lash, *supra* note 3, at 174–78.

119 See *id.* at 165 (describing its account as a "Textual Originalist Theory").

120 See *supra* Part I.

121 *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812); see *supra* Section I.A.

122 See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137.

123 See WEBSTER, *supra* note 11 (definition of "jurisdiction").

textual starting point should be that this meaning—under sovereign authority—is a plausible one to attribute to the Citizenship Clause. Perhaps the Clause’s textual structure and context could suggest that this apparent meaning of the key phrase is actually not plausible as the Clause uses it.¹²⁴ But *Prima Facie Citizenship* also does not make this argument, and it seems unlikely that it could. One can easily imagine the Clause’s framers establishing a general rule of citizenship by territorial birth, with exceptions for people that international law excluded from the territorial sovereign’s lawmaking and law enforcement authority (such as ambassadors). Indeed, that was at least the leading view (if not the consensus view) of the common law of citizenship in the pre-drafting period.¹²⁵ Thus *Prima Facie Citizenship* does not meaningfully contest either that there was a common legal meaning of “subject to the jurisdiction” in the relevant period or that this meaning fits with the text, structure and context of the Citizenship Clause.¹²⁶

Of course, there might also have been competing meanings of the key phrase in common use in the drafting period. But *Prima Facie Citizenship* makes no argument in this direction either. It points to no alternative meaning of “subject to the jurisdiction” in common legal or popular use at the relevant time. Instead, it preemptively declares the phrase ambiguous simply because one could imagine various alternative meanings,¹²⁷ and because in its view some of the drafting discussion is ambiguous.¹²⁸

Rather than a close focus on the text, *Prima Facie Citizenship*’s attention is principally devoted to discerning how the Clause’s drafters and ratifiers (especially the Senate in the Thirty-Ninth Congress) intended their language to operate.¹²⁹ To be sure, how the drafters and

124 For example, a colloquial meaning of “jurisdiction” may be simply sovereign territory. But that obviously does not fit with the Clause. There is not a sense in which someone would be “subject to” sovereign jurisdiction in this sense (although one might say someone is “within” a sovereign’s jurisdiction). Further, this meaning of “jurisdiction” in the Clause would be redundant with birth within U.S. territory.

125 See Whittington, *supra* note 10, at 474–88.

126 *Prima Facie Citizenship*’s principal—perhaps only—argument against the broad meaning is that it is inconsistent with the way the drafters understood the Clause’s application to Native Americans. Lash, *supra* note 3, at 170 n.504. Its long footnote specifically responds to my textualist assessment. Although it says that there are “multiple problems” with my position, the footnote identifies only one, which is that I supposedly understate the degree to which Native American tribes were under U.S. sovereign authority in the antebellum period. See *id.* Section III.D *infra* responds directly to this claim. In brief, I think there is no material disagreement on the facts, and the facts show that the drafters used the same meaning of jurisdiction that I do.

127 See Lash, *supra* note 3, at 165.

128 See *id.* at 132.

129 See *id.* at 166–68; see also *id.* at 113–39 (devoting over twenty pages to painstaking recounting of the debates).

ratifiers appeared to understand their language is important evidence of original meaning. But a textualist, originalist account starts with the text. It looks to the commentary of drafters and ratifiers to confirm or call into question the text's apparent historical meaning, and to resolve textual ambiguities. Drafting commentary is not its primary focus, particularly where the text seems clear; clear text may be said to create a *prima facie* case (if I may borrow that term) that it is what the drafters intended.¹³⁰

B. *Jurisdiction and Allegiance*

In place of the Citizenship Clause's actual text, *Prima Facie Citizenship* substitutes a different word: "allegiance."¹³¹ Its historical account establishes that the concept of allegiance was often tied to jurisdiction and citizenship, and that this terminology carried over into the drafting debates.¹³² As a result, it uses allegiance as its central theme, with the question posed by the Citizenship Clause becoming (in its view) whether U.S.-born persons (or rather, their parents) had allegiance to the United States, or instead had "refused allegiance or counter-allegiance to the American sovereign."¹³³

There is nothing fundamentally mistaken about the focus on allegiance in this context. *Prima Facie Citizenship* is right that the term was often used in connection with jurisdiction and citizenship, both in the drafting debates and earlier.¹³⁴ But it is crucial to get the right meaning of allegiance in this context. For this we need to look back to the English law of subjectship, about which *Prima Facie Citizenship* says relatively little. Recall that Coke and Blackstone tied birth subjectship to a particular kind of allegiance.¹³⁵ As Blackstone explained, there were two types of allegiance: the allegiance of the subject, which was permanent and arose from the subject's relationship to the sovereign; and the "temporary allegiance" of the alien who was present in the sovereign's territory, and which persisted only while in sovereign territory.¹³⁶ Both

130 In making this assessment, I hope to avoid the longstanding debate among originalist scholars between original intent and original meaning. See John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019).

131 See Lash, *supra* note 3, at 167 (finding that "the debates establish an allegiance-based meaning of the Fourteenth Amendment's Citizenship Clause").

132 See *id.* at 113–39.

133 *Id.* at 84.

134 See *supra* notes 25–26 and accompanying text; see also Ramsey, *supra* note 1, at 445–49.

135 See *supra* Section I.B; see also Wurman, *supra* note 3, at 328–43 (discussing the English common law view of allegiance).

136 BLACKSTONE, *supra* note 22, at *359, *354–59.

types of allegiance thus represented a duty of obedience to the sovereign, arising from the condition of the person.¹³⁷ That duty was not something that could be accepted or rejected by the person, but rather was imposed upon them by their condition.¹³⁸

Coke and Blackstone directly tied this form of allegiance (or ligenance) to subjectship.¹³⁹ Subjectship by birth arose from being born into allegiance to the sovereign. That was linked to birth within the sovereign's territory, because everyone (with exceptions to be discussed), whether alien or not, was in allegiance to the territorial sovereign (that is, owed a duty of obedience) while in sovereign territory.¹⁴⁰ That is why, in the English view of the matter, it was irrelevant to a child's subjectship whether a child's parents were subjects or aliens.

This framework also explained the exceptions, both to allegiance and to birth subjectship. Ambassadors, for example, were not in allegiance to the territorial sovereign (meaning that they did not have a duty to obey sovereign commands and were not subject to sovereign punishments). That was because international law established an exception to the territorial sovereign's authority for ambassadors and other diplomatic personnel. Diplomats owed their allegiance (that is, their duty of obedience) to their home sovereign only, in contrast to other aliens, who owed both a duty of obedience to their home sovereign (as subjects) *and* a duty of obedience to the local sovereign (as a result of presence in the sovereign's territory).

It followed that diplomats' children, though born in England, were outside the English rule of territorial birth subjectship. Subjectship arose from the duty to obey the territorial sovereign. Diplomats, lacking the duty to obey, correspondingly did not acquire subject status for their children. Again the contrast with nondiplomat aliens is informative—because nondiplomat aliens did have the duty of obedience, they were in allegiance and so their children acquired subjectship.

Understood this way, allegiance fits with the idea of jurisdiction and indeed is another way of describing it. A person under sovereign authority (subject to sovereign jurisdiction) owed a duty of obedience to the sovereign. Thus they were in allegiance to the sovereign in the sense described above. And their children were born subjects because they were born within allegiance, or (meaning the same thing) born within the jurisdiction of the territorial sovereign.

137 See *id.* at *354–59.

138 See *id.*

139 See *supra* notes 90–91 and accompanying text.

140 See BLACKSTONE, *supra* note 22, at *354–59; Calvin's Case (1608) 77 Eng. Rep. 377, 384; 7 Co. Rep. 1a, 6a.

Again the ambassador exception is illustrative. Ambassadors were not under the local sovereign's authority (not "subject to the jurisdiction") because they had international law immunity. That means they did not owe a duty of obedience, which means they did not have allegiance. And so their children were not subjects, because they were born outside the sovereign's jurisdiction (authority).

In short, the concept of allegiance is entirely consistent with the ordinary meaning of "subject to the jurisdiction"; indeed, it is another way of saying the same thing. The problem is that allegiance can have other connotations that do not fit with the idea of jurisdiction. Colloquially we might say that one "swears allegiance" or undertakes allegiance, or conversely that one denies or rejects allegiance. This formulation suggests a voluntary component—a willing submission to sovereign authority. To be sure, that is *one* meaning of allegiance. But it is not the appropriate meaning in the context of jurisdiction and subjectship/citizenship. Being subject to sovereign jurisdiction was not voluntary. Sovereign jurisdiction (authority) covered everyone in the territory, except those such as ambassadors with international law exemptions, whether one accepted it or not. And allegiance, as used to mean a duty of obedience, also was not voluntary but arose from presence in sovereign territory.¹⁴¹

141 As John Vlahoplus has demonstrated, this understanding of allegiance carried over into nineteenth-century American law. See Vlahoplus, *supra* note 10 (manuscript at 9–13) (discussing the law of treason). As he quotes then-Secretary of State Daniel Webster:

But, independently of a residence with intention to continue such residence, independently of any domiciliation, independently of the taking of an oath of allegiance or of renouncing any former allegiance, it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations; but this duty of obedience to the laws, arising from local and temporary allegiance, ceases, of course, the moment he transfers himself back to his original country.

Letter from Sec'y of State Daniel Webster to President Millard Fillmore (Dec. 23, 1851), in 6 DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 521, 526 (Boston, Little, Brown & Co., 9th ed. 1856)). As Vlahoplus further notes, the Supreme Court shortly after ratification observed to similar effect:

"The rights of sovereignty," says Wildman, in his *Institutes on International Law*, "extend to all persons and things[] not privileged[] that are within the territory. They extend to all strangers therein[,] not only to those who are naturalized[] and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection."

This is where *Prima Facie Citizenship* goes substantially astray. Instead of pursuing the original meaning of “subject to the jurisdiction,” it substitutes allegiance, because people in the relevant time often used allegiance in connection with jurisdiction.¹⁴² But then it seems to shift to a different meaning of allegiance. While *Prima Facie Citizenship* does not precisely explain what it means by allegiance, it seems to understand the term, at least to some extent, in its voluntary sense.¹⁴³

This understanding appears to underlie the article’s central concept of “refused allegiance or counterallegiance.”¹⁴⁴ In assessing persons who may or may not be included within the Citizenship Clause, it seems to ask whether their conduct shows submission to sovereign authority, or whether instead they have refused to accept sovereign authority.¹⁴⁵ If *Prima Facie Citizenship* stayed more closely within a textual analysis, instead of substituting allegiance for jurisdiction, it would see that this understanding of allegiance does not fit with the Citizenship Clause. There is no sense of territorial jurisdiction (meaning sovereign authority) in which it can be accepted or rejected. Territorial sovereign authority arises from the laws governing its exercise, not from what its objects think about it.

In sum, while there is nothing inherently wrong with thinking about jurisdiction in terms of allegiance, the problem arises from the way *Prima Facie Citizenship* approaches it. By substituting a form of allegiance with a connotation of voluntariness, it introduces a subjective test into the Citizenship Clause that the text does not contain. This then leads to mistaken analysis of the Clause’s application to particular categories of people, as explained below.

C. *Applications: Temporary Visitors and Unlawful Entry*

Both of the problems noted above—lack of attention to text and focus on allegiance in lieu of jurisdiction—trouble *Prima Facie Citizenship*’s discussion of the Citizenship Clause’s specific applications.¹⁴⁶ Its conclusions, even with regard to undisputed categories, may seem

Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154 (1873) (footnote omitted) (quoting 1 RICHARD WILDMAN, INSTITUTES OF INTERNATIONAL LAW 40 (London, William Benning & Co. 1849) (footnotes omitted)).

142 See Lash, *supra* note 3, at 83–84.

143 See *id.* at 84.

144 See *id.* As best I can determine, the “refused allegiance or counterallegiance” formulation is *Prima Facie Citizenship*’s invention, rather than a concept expressed in those terms in the relevant historical period. See *id.* (introducing the phrase without direct quotation from historical sources). People in the relevant period spoke of allegiance, see *supra* notes 25–26 and accompanying text, but it is not clear that this is what they had in mind.

145 See Lash, *supra* note 3, at 85.

146 See *id.* at 176–88 (applying the general analysis to specific situations).

hard to follow, and its treatments of children of temporary visitors and unlawful entrants seem difficult to reconcile with the Clause's text.

1. Criminality and Rebellion

To begin, *Prima Facie Citizenship* confirms that the children of parents who refuse to obey the law are not on that ground excluded from birth citizenship.¹⁴⁷ That seems obvious under the original meaning of the text, which links exclusions to exceptions from jurisdiction. A criminal does not become exempt from jurisdiction by declaring a refusal to follow the law. To the extent the criminal can be apprehended, the sovereign power will be exercised and sovereign punishment imposed. That is what it means to be subject to jurisdiction, and the criminal's willingness or unwillingness to accept sovereign authority is not a factor.

But once *Prima Facie Citizenship* introduces the idea of "refused allegiance," it is less clear why this conclusion follows. One can think of criminal activity as refusal to accept sovereign commands. That is particularly true of the most extensive organized refusal known immediately to the Clause's framers: the Confederacy during the Civil War. Many people in the seceded states expressly renounced their allegiance to the United States and vowed allegiance to its hostile opponent, the Confederate States of America. If willing allegiance is the criterion, it is not obvious why their children, if born during this period of refused allegiance, were not excluded from citizenship. Of course in practice everyone assumed these children were not excluded, and *Prima Facie Citizenship* agrees, but without much explanation apart from that being what everyone at the time believed.¹⁴⁸

Reading "subject to the jurisdiction" to mean under sovereign authority makes the matter clearer. The United States claimed sovereign authority over the seceded states, whose secession it did not recognize.¹⁴⁹ True, it could not effectively enforce that jurisdiction through much of the South for a period of time, but that should not matter any more than the fact that sometimes ordinary criminals cannot be apprehended. In the view of the United States, people in the South were subject to its jurisdiction because the United States sought to impose its sovereign authority upon them. The fact that many of those people resisted the jurisdiction and refused allegiance did not alter the fact that (from the United States' perspective) those people were under its

147 *Id.* at 176.

148 *See id.*

149 *See Texas v. White*, 74 U.S. (7 Wall.) 700, 726 (1869) ("[Texas] did not cease to be a State, nor her citizens to be citizens of the Union.")

jurisdiction. Thus it is no surprise that the framing generation found this an easy case.¹⁵⁰

2. Lawful Alien Residents

Prima Facie Citizenship finds the children of lawful resident aliens to be citizens under the Clause almost entirely on the basis of statements by its drafters.¹⁵¹ As it recounts, this evidence—especially the Cowan-Conness exchange and an earlier exchange between senators Cowan and Trumbull over the Civil Rights Act of 1866¹⁵²—does seem conclusive that the drafters understood their language as including (at least) lawful resident aliens.¹⁵³ *Prima Facie Citizenship* says little, though, about *why* this was so.

The difficulty is that aliens—even resident aliens—retain their allegiance to their home sovereign. By entering and remaining in U.S. territory, they undertake “local” allegiance to the United States as well. *Prima Facie Citizenship* says that part of the test is whether a person shows “counterallegiance,” without adequately defining that term.¹⁵⁴ Apparently retaining allegiance to a foreign sovereign is not counter-allegiance, but it is not clear why not. The difficulty is compounded by the fact that some drafting statements on which *Prima Facie Citizenship* relies expressly described the test as “[n]ot owing allegiance to anybody else” or similar phrases.¹⁵⁵ Again, that would seem to cover aliens, even resident aliens.

Presumably *Prima Facie Citizenship* understands “counterallegiance” to mean something more like “refused allegiance” (with which it is often paired). Resident aliens do not seem to have refused allegiance. But elsewhere *Prima Facie Citizenship* makes the extraordinary statement that “[a]s the framers repeatedly explained to their colleagues and to the public, the text excluded children born to parents who failed to dissolve a prior foreign allegiance and initiate a process

150 *Prima Facie Citizenship* says that “neither obedience to, nor disregard for, municipal law has any necessary connection to determining whether one is born ‘subject to the jurisdiction’ of the United States.” Lash, *supra* note 3, at 175. That is true, but it is unclear why, in *Prima Facie Citizenship*’s assessment, it would be true. If “refused allegiance” is a criterion of exclusion from jurisdiction, the Confederates would seem to have refused. In the ordinary meaning of jurisdiction, the answer is that one is subject to jurisdiction regardless of whether one wants to be.

151 *See id.* at 176–78.

152 *See id.* at 176–77; CONG. GLOBE, 39th Cong., 1st Sess. 2890–92 (1866); *id.* at 498.

153 In the key comments, the senators did not distinguish between permanent residents, temporary residents and temporary visitors. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Conness).

154 *See, e.g.,* Lash, *supra* note 3, at 83.

155 *See id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull)).

of naturalizations.”¹⁵⁶ It seems dubious that the framers in fact commonly explained the text in these terms.¹⁵⁷ But if that is what the text meant, then most resident aliens would be excluded, and in any event their inclusion would depend on investigation of individual circumstances. Moreover, that view would seem to exclude children of Chinese immigrants, whom the drafters thought were obviously included: Their parents were excluded from naturalization by statute.¹⁵⁸

In short, “allegiance” complicates what should be an easy case. There is no doubt that lawful resident aliens are under U.S. sovereign authority (that is, subject to U.S. lawmaking, law enforcement and adjudication) while in U.S. territory. They may also be under the authority of their home sovereign to some extent, because that sovereign likely claims some ability to regulate its citizens/subjects abroad, as the United States does.¹⁵⁹ But that would not make them any less subject to the authority of the territorial sovereign as well. Using “allegiance” instead of jurisdiction unsettles the analysis because there may be an implication that one cannot have allegiance to two sovereigns. But if one uses allegiance in the sense it was used for citizenship and jurisdiction, there is no mystery. As discussed, persons outside their home country owed obedience to (and thus allegiance to) both the home sovereign and the local sovereign.¹⁶⁰ And this is simply another way of saying both sovereigns had jurisdiction over them.

What, then, of drafting statements that seemed to require exclusive allegiance to the United States?¹⁶¹ They may have simply misread the text or spoken imprecisely. This is a problem with placing too much weight on particular framing-era statements without relating them to the text. But they also can be read consistently with the text if they are read to mean “not owing allegiance to anybody else *in place of the United States*”—that is, as excluding people who did not owe temporary allegiance to the United States despite being in U.S. territory, such

156 *Id.* at 173.

157 *Prima Facie Citizenship* is paraphrasing rather than quoting here and provides no specific citation in support of the paraphrase. *See id.*

158 *See* Naturalization Act of 1802, ch. 28, § 1, 2 Stat. 153, 153; Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

159 *See* *Blackmer v. United States*, 284 U.S. 421, 436 (1932) (“While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country.”).

160 *See supra* Section III.B.

161 *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull).

as ambassadors. Perhaps this is what *Prima Facie Citizenship* means by “counterallegiance,”¹⁶² but it would be better to put it in terms of jurisdiction. Ambassadors owed allegiance to the ambassador’s home country and *not* to the United States under the jurisdictional rules of international law. Thus the United States lacked jurisdiction over the ambassador, and the ambassador was excluded from the Citizenship Clause.

3. Lawful Temporary Visitors

Prima Facie Citizenship finds the status of U.S.-born children of temporary visitors ambiguous under the Clause’s original meaning.¹⁶³ It resolves the ambiguity by deploying the “prima facie citizenship” of its title.¹⁶⁴ Derived from Attorney General Bates’s 1862 legal opinion,¹⁶⁵ this approach presumes citizenship from birth in U.S. territory, with the possibility of rebutting the presumption if the person falls into one of the excluded categories. As to children of temporary visitors, *Prima Facie Citizenship* finds the presumption not rebutted and thus concludes that they can be treated as citizens under an originalist approach.¹⁶⁶

That conclusion accords with the broad reading of the Citizenship Clause, but the analysis conflicts with a textualist approach, which would not find this situation ambiguous. *Prima Facie Citizenship* begins by noting that in the antebellum period there was some dispute whether the U.S.-born children of temporary visitors should be treated as citizens.¹⁶⁷ To this end it aggressively downplays the impact of the *Lynch* case, which held in 1844 that U.S.-born children of temporary visitors were citizens,¹⁶⁸ and emphasizes Justice Story’s rather tentative suggestion in his commentaries that they should not be.¹⁶⁹ *Prima Facie Citizenship* then turns to the drafting debates and post-ratification commentary, where it finds scattered observations in both directions. It concludes with this puzzling paragraph:

162 Although *Prima Facie Citizenship* uses Senator Trumbull’s explanation “[n]ot owing allegiance to anybody else” several times, it does not explain how the quote fits with *Prima Facie Citizenship*’s view of allegiance or with *Prima Facie Citizenship*’s conclusion that the Clause guaranteed citizenship to lawful resident aliens. See, e.g., Lash, *supra* note 3, at 80, 188 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Lyman Trumbull)).

163 See *id.* at 178–82.

164 *Id.* at 181.

165 See Citizenship, 10 Op. Att’y Gen. 382, 394 (1862); Lash, *supra* note 3, at 107–13.

166 See Lash, *supra* note 3, at 181–82.

167 See *id.* at 178–82.

168 *Lynch v. Clarke*, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844).

169 See Lash, *supra* note 3, at 179 (quoting STORY, *supra* note 26, § 48, at 60).

Absent evidence to the contrary, even temporarily present noncitizens who have presented themselves to federal authorities upon arrival in the United States may ultimately decide to seek permanent residence and naturalization. Accordingly, granting citizenship to children born to temporarily present noncitizen parents who have legally entered the United States may be the best application of the Citizenship Clause, even if not clearly required by the original understanding. In the end, both constructions seem textually and historically plausible.¹⁷⁰

This analysis is problematic in several respects. First, it is entirely unclear why it matters that temporary visitors “may ultimately decide to seek permanent residence and naturalization.” That they might make this decision seems wholly disconnected from the textual requirement that they be subject to U.S. jurisdiction. It also seems wholly speculative as applied to any particular visitor; presumably most visitors return home, and even those who decide to stay might not seek naturalization. There is no sense of “jurisdiction” that turns on whether a person might decide to remain in sovereign territory,¹⁷¹ and *Prima Facie Citizenship* provides no explanation.

Further, *Prima Facie Citizenship* does not attempt to apply its own test of “refused allegiance or counteralliance,” which seems to produce a clear result. Understanding allegiance as duty of obedience, temporary visitors accept that duty by entering sovereign territory. There is no sense in which they can or do refuse this duty.¹⁷² Even if one thinks of allegiance as to some extent a voluntary submission, that submission is established by the voluntary decision to enter sovereign territory. Perhaps instead one should think of temporary visitors as excluded because they continue to owe allegiance to their home sovereign, which may perhaps count as “counteralliance.” But this is also true of alien permanent residents, which *Prima Facie Citizenship* previously decided were unambiguously covered.¹⁷³ Thus it seems that temporary visitors should be included even under *Prima Facie Citizenship*’s own test, although its continued invocation of allegiance greatly confuses the matter.

170 *Id.* at 181–82 (footnotes omitted).

171 An ambassador might also decide to remain in the country and seek naturalization (especially if the regime that sent the ambassador is overthrown), but surely that does not make the ambassador subject to local jurisdiction before that decision is made.

172 See *supra* Section III.B. See also Lash, *supra* note 3, at 178 (acknowledging that “[a]t common law, all visiting foreign nationals were presumed to have a ‘local’ allegiance to the host sovereign”).

173 See Lash, *supra* note 3, at 176–78.

Prima Facie Citizenship also does not explain why the more textual approach, focused on jurisdiction instead of allegiance, is not the right one to apply to temporary visitors. Returning to the antebellum era, *Prima Facie Citizenship* may be correct that the citizenship status of temporary visitors' U.S.-born children was not fully settled (although it may overstate in this regard).¹⁷⁴ To a textual analysis, however, the key question is whether temporary visitors were described as subject to U.S. jurisdiction in this period. It is undisputed that they were (and *Prima Facie Citizenship* does not attempt to dispute it).¹⁷⁵ That was a central part of Chief Justice Marshall's analysis in *The Schooner Exchange*, in which he specifically discussed temporary visitors.¹⁷⁶ It also follows from the consensus that diplomatic personnel were specifically exempted from local jurisdiction. Diplomatic personnel were a special case of temporary visitors; if temporary visitors as a whole were exempted there would be no need for a special exemption for ambassadors. And again, this assessment is entirely consistent with the ordinary meaning of jurisdiction. Temporary visitors were subject to local jurisdiction because the local laws, law enforcement, and adjudication applied to them as a result of the temporary duty of obedience (allegiance) they owed the territorial sovereign. Ambassadors were not subject to local jurisdiction because the local laws, law enforcement, and adjudication did not apply to them.

Further, it is important to add that while there may (or may not) have been some doubt in the antebellum period about the citizenship of temporary visitors' U.S.-born children, that doubt did not rest on uncertainty whether they were subject to jurisdiction. For example, Story, in suggesting that citizenship should not extend to them, did not say that was because they were not subject to U.S. jurisdiction.¹⁷⁷ Thus it ultimately does not undermine the case for U.S.-born children of temporary visitors that their citizenship status was (or may have been) unsettled in the antebellum period. The Clause's drafters used a phrase with an established meaning that included temporary visitors. That is at least very strong evidence of the Clause's original meaning.

Against this, *Prima Facie Citizenship's* evidence of ambiguity is extraordinarily weak. As to drafting and ratifying history, it cites (only) two ambiguous statements by Trumbull, one ambiguous comment by a House member, and one newspaper article describing not the

174 See *id.* at 178–82. But see Whittington, *supra* note 10, at 474–78.

175 See Lash, *supra* note 3, at 181–82 (not addressing jurisdiction over temporary visitors); *supra* Section I.A.

176 See *supra* Section I.A.; *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812).

177 See STORY, *supra* note 26, § 48, at 60.

citizenship clause but the 1866 Civil Rights Act.¹⁷⁸ As to post-ratification evidence, it cites only Samuel Miller's *Lectures on the Constitution of the United States*, published in 1891.¹⁷⁹ If one seeks only evidence of specific intent, perhaps this is enough to cast doubt. As *Prima Facie Citizenship* also says, the evidence on the other side is also a bit thin; temporary visitors were generally not discussed specifically.¹⁸⁰ But taking text as the best evidence of meaning, the meaning is not ambiguous, and the few statements cited by *Prima Facie Citizenship* seem insufficient to overcome it.

4. Unlawful Entry

Prima Facie Citizenship's most important departure from the broad reading of the Citizenship Clause relates to U.S.-born children of persons not lawfully present in the United States. It would exclude such persons from constitutional citizenship categorically.¹⁸¹ But it is not clear why.

Almost all of *Prima Facie Citizenship*'s analysis in this regard rests on an analogy to Native Americans who lived outside of formal tribal arrangements.¹⁸² The relationship of Native Americans to other aspects of the citizenship debate is discussed below.¹⁸³ Leaving that analogy aside for now, there is little else to support *Prima Facie Citizenship*'s conclusion or even to explain its analysis.

Prima Facie Citizenship declares that the Clause excludes

[c]hildren born in the United States to noncitizen parents who have intentionally entered the United States without formally dissolving any prior allegiance and presenting themselves to federal authorities as required by law

. . . The problem involves an intentional refusal to formally present themselves to the sovereign authority of the people whose country they unlawfully entered.¹⁸⁴

This formulation does nothing to show that unlawful entrants are not subject to U.S. jurisdiction. As before, the statement about "dissolving any prior allegiance" seems a non sequitur. It would be relevant if one believed that the Clause excluded everyone with allegiance to a

178 Lash, *supra* note 3, at 179–80.

179 *Id.* at 180. In fact, the post-ratification evidence against temporary visitors is somewhat stronger, as discussed below. See *infra* Section IV.B.

180 See Lash, *supra* note 3, at 181–82.

181 *Id.*

182 *Id.*

183 *Infra* Section III.D.

184 Lash, *supra* note 3, at 187.

foreign sovereign, but, as discussed, *Prima Facie Citizenship* does not make that argument.¹⁸⁵ That argument would exclude both temporary visitors and resident aliens, at least the latter of which *Prima Facie Citizenship* thinks are clearly not excluded.¹⁸⁶

That leaves the unlawful entrants' violation of law by entering illegally and failing to present themselves to sovereign authorities. *Prima Facie Citizenship* has already said (correctly) that violation of law is not reason for exclusion from citizenship,¹⁸⁷ so it is hard to see why violation of this particular law should be different. Further, *Prima Facie Citizenship* does not tie this "problem" to a meaning of jurisdiction (or even to allegiance). As discussed, by entering sovereign territory, lawfully or not, a person became subject to the laws of the territorial sovereign, unless (like an ambassador) that person was exempt from them on some internationally recognized ground.¹⁸⁸ There was no international law exemption for those who entered unlawfully.¹⁸⁹ It is not a defense (and surely would not have been a defense in the nineteenth century) that because a person entered unlawfully, that person was not bound by local law (in contrast, it is a defense—as it was in the nineteenth century—that because a person is an ambassador, that person is not subject to local law).

Although *Prima Facie Citizenship* does not expressly put it this way, its analysis seems to understand this situation as one of "refused allegiance." Because of the unlawful entrants' "intentional refusal to formally present themselves to the sovereign authority," they have refused allegiance, which (in *Prima Facie Citizenship*'s formulation) puts them outside the Clause.¹⁹⁰ By contrast, *Prima Facie Citizenship* would presumably say lawful entrants (temporary or permanent) do accept sovereign authority by such formal presentation.

This might be a good distinction on policy grounds, but it is hard to see how it connects to jurisdiction. Jurisdiction, understood as sovereign authority, is not voluntary. As discussed, it does not depend on a person accepting it in a formal way.¹⁹¹ Again, this is why getting away from the textual phrase "subject to the jurisdiction" is a problem for *Prima Facie Citizenship*. Once one gets away from the text, it is not clear what matters.

The short of it is that unlawful entrants are subject to the lawmaking, law enforcement, and law adjudication of the United States while

185 See *supra* Section III.C.2.

186 Lash, *supra* note 3, at 176–78.

187 *Id.* at 185.

188 See *supra* Section III.B.

189 See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

190 See Lash, *supra* note 3, at 187.

191 See *supra* Section III.B.

present in U.S. territory, in the same sense as lawful temporary visitors and alien permanent residents. There is no plausible argument that they are not. That makes them “subject to the jurisdiction” of the United States, in the historical meaning of that phrase. *Prima Facie Citizenship* provides no argument to the contrary. Reframing the question as whether unlawful entrants have “allegiance” to the United States, should not change the analysis. “Allegiance” in this sense meant simply the duty of obedience; persons entering the United States, whether lawfully or not, necessarily undertake a duty of obedience to the United States (unless they have an international law immunity). Their presence in sovereign territory is what makes them subject to the law-making, law enforcement, and law adjudication of the United States. Whether they accept that duty is irrelevant to its existence.

D. Native Americans

Prima Facie Citizenship depends heavily on Native Americans, and particularly on its assessment of how the Citizenship Clause’s drafters understood the Clause’s effect upon them. As noted, *Prima Facie Citizenship* is most centrally about the drafting and ratifying debates, especially the debate in the Senate over the 1866 Civil Rights Act and the Fourteenth Amendment. And within that debate, it focuses most centrally on the debates over the status of Native Americans.

In particular, two essential components of its argument rest almost entirely upon the perceived status of Native Americans. First, its only material objection to equating jurisdiction with sovereign authority rests on the legal treatment of Native tribes.¹⁹² As it explains, Native tribes were undoubtedly subject to U.S. sovereign authority to some extent.¹⁹³ The United States claimed ultimate authority over the tribes.¹⁹⁴ It restricted the tribes to specified geographic areas, and it shifted those geographic areas more or less unilaterally as it chose.¹⁹⁵ It regulated relationships and interactions between tribal members and members of U.S. society.¹⁹⁶ And it even sometimes regulated, to some extent, relations among tribal members.¹⁹⁷ And yet the drafters agreed, after considerable debate on the matter, that the tribes were not subject to the jurisdiction of the United States in the meaning of

192 See Lash, *supra* note 3, at 170 n.504.

193 See *id.* at 101–05.

194 See *id.*

195 See 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 193 (1984).

196 See *id.* at 102–08.

197 See Lash, *supra* note 3, at 98–101.

the Clause.¹⁹⁸ That being so, *Prima Facie Citizenship* contends, the drafters must have understood “jurisdiction” to mean something other than its obvious meaning of sovereign authority, because the tribes were under U.S. sovereign authority.¹⁹⁹

Second, as noted, *Prima Facie Citizenship*’s principal specific conclusion—that children of unlawful entrants are not granted citizenship by the Clause—rests mostly on an analogy to a particular category of Native Americans.²⁰⁰ Most Native Americans of the time lived in tribes recognized by the United States, either formally by treaty or at least tacitly by informal arrangement.²⁰¹ But some did not. These included those on the remote frontier, which was still largely untouched by U.S. settlement and control in the 1860s, and those who had broken off from recognized tribes and lived outside of the authority of either the tribes or the United States.²⁰² Their distinguishing characteristic for present purposes, according to *Prima Facie Citizenship*, was that (unlike tribes having treaty relations with the United States) they had not formally recognized U.S. sovereign authority.²⁰³ They were also understood by the drafters as not subject to U.S. jurisdiction for purposes of the Citizenship Clause.²⁰⁴ And, *Prima Facie Citizenship* continues, in that respect they are analogous to unlawful entrants, who also have not formally recognized U.S. sovereign authority.²⁰⁵

Whether general principles should be derived from the drafters’ views of Native Americans may be doubted.²⁰⁶ The situation of the Native tribes at the time was in many senses *sui generis*. As Chief Justice Marshall put it: “The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence”—later repeating that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.”²⁰⁷

Native Tribes were treated somewhat as distinct sovereigns (including relations with them being governed largely by treaties), even

198 See *supra* notes 38–42 and accompanying text.

199 See Lash, *supra* note 3, at 170 n.504.

200 See *id.* at 185–88.

201 Cf. PRUCHA, *supra* note 195, at 44–50.

202 See *id.* at 278.

203 Lash, *supra* note 3, at 187.

204 See *supra* notes 38–42 and accompanying text.

205 Lash, *supra* note 3, at 187.

206 For criticism on this ground, see Ablavsky & Berger, *supra* note 11; and Evan D. Bernick, Paul Gowder & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 CORN. L. REV. ONLINE 101, 118–20 (2025).

207 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); see also Ablavsky & Berger, *supra* note 11, at 205 (describing nineteenth-century American view of the Tribes’ status as “*sui generis*”).

though they were located within the geographic boundaries of the United States.²⁰⁸ Sometimes the United States aggressively managed relations with them, or some of them, and at other times it exercised only limited control.²⁰⁹ There were many tribes and many U.S. tribal policies, both at any one time and over the course of the century.²¹⁰ And nothing in the Anglo-American common law of citizenship or allegiance had any direct application to their situation because nothing comparable existed in England. Thus it is appropriate to proceed here with great caution.

But even accepting that the tribes' status and treatment can provide some general markers, neither of *Prima Facie Citizenship's* points seems persuasive. As to the first, it is obviously the case that the United States exercised some degree of authority over tribes, with the amount varying by tribe and over time. But it also seems clear that, at least for many tribes, much of the time, the United States did not exercise general legislative, law enforcement, or adjudication authority over intra-tribal matters.²¹¹ And that was because, at least in theory and to some extent in practice, the United States understood the tribes as independent sovereigns with their own internal sovereign authority. James Kent observed: "[The Tribes] have always been . . . governed by their own usages and chiefs . . ." ²¹² As *Prima Facie Citizenship* itself describes

208 See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17; PRUCHA, *supra* note 195, at 44–50.

209 See also Ablavsky & Berger, *supra* note 11, at 215 (noting the "distinctive statuses of Native communities in different parts of the country").

210 See *id.* at 215–16.

211 PRUCHA, *supra* note 195, at 107–08; see *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883) (holding that the United States lacked jurisdiction to punish a member of the Sioux Tribe for murder of another tribal member and observing that "semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals"); see also Ramsey, *supra* note 1, at 443 & n.181 (noting additional sources).

Prima Facie Citizenship does not seriously dispute this. It says only that "Indian Tribes and their members . . . had long been subject to the sovereign authority of the United States including occasional legal oversight of intra-tribal crimes and civil actions." Lash, *supra* note 3, at 170 n.504 (emphasis added). The central point, of course, is that the U.S. assertion of intratribal authority was only "occasional" (that is, not frequent). *Id.* It was not a general claim of jurisdiction. *Prima Facie Citizenship* adds that "a number of post-Civil War treaties imposed federal regulatory authority over intra-tribal affairs." *Id.* Again this is true (though surely only those prior to the drafting should count), but it does not show a claim of general authority, as the treaties address particular tribes and particular points.

212 *Goodell v. Jackson*, 20 Johns. 693, 710 (N.Y. 1823); see Ablavsky & Berger, *supra* note 11, at 207–10 (discussing this relationship as well as the nineteenth-century debate over whether this relationship was a matter of right or could be altered by Congress).

the situation, the tribes were “allowed a range of autonomy as ‘quasi-foreign’ sovereigns.”²¹³

The question is what to make of this. The United States exercised some jurisdiction (meaning sovereign authority) over the tribes but did not exercise jurisdiction (meaning sovereign authority) over significant aspects of their internal affairs. Put another way, the United States exercised partial, but not complete, jurisdiction. And so the question then is whether that made the tribes subject to U.S. jurisdiction or not subject to U.S. jurisdiction within the meaning of the Citizenship Clause.

As *Prima Facie Citizenship* itself recounts, the drafters in the Senate saw the problem in exactly these terms.²¹⁴ First they understood “jurisdiction” in their draft as meaning sovereign authority over the tribes.²¹⁵ Then, after considerable back-and-forth, they reached a consensus that the exercise of jurisdiction over the tribes was only partial.²¹⁶ Then they concluded (likely more on the basis of wanting to get to a particular result than on the basis of necessary meaning) that the Clause required “complete” jurisdiction.²¹⁷ Thus the tribes were excluded. This is exactly how *Prima Facie Citizenship* puts it:

Although Trumbull [who led the defense of the Clause] might have initially been unaware of the full scope of federal jurisdiction over tribal affairs, his colleagues quickly brought him up to speed. . . . [Trumbull] simply clarified that the houses of Congress lacked ‘*complete*’ or general jurisdiction over tribes and their members. Such jurisdiction was incomplete in the sense that Congress in general . . . lacked ordinary policy making authority over tribal Indians.²¹⁸

For present purposes, the principal conclusion is that this episode does not even begin to show what *Prima Facie Citizenship* says it shows. *Prima Facie Citizenship* says that it shows that “jurisdiction” in the

213 Lash, *supra* note 3, at 170 n.504. The tribes’ partial exclusion from U.S. jurisdiction was frequently and expressly confirmed in treaties. *See, e.g.*, Treaty with the Creek Indians, Creek Nation-U.S., art. X, June 14, 1866, 14 Stat. 785, 788 (affirming Creek Nation’s self-government, including that congressional legislation “shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs”).

214 *See* Lash, *supra* note 3, at 113–21.

215 *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard).

216 *See id.* at 2890–95.

217 *See id.* It was in this context that Trumbull said the Clause meant “[n]ot owing allegiance to anybody else.” *Id.* at 2893 (statement of Sen. Trumbull). As discussed, he most likely meant not owing allegiance (meaning not having a duty of obedience) to anybody else in place of the United States. *See supra* Section III.B.

218 Lash, *supra* note 3, at 170 n.504.

Citizenship Clause did not mean under sovereign authority.²¹⁹ In fact, the debate confirms that it did. The Senate's entire debate as to the tribes turned on whether the tribes were or were not subject to U.S. jurisdiction, by which senators meant under U.S. sovereign authority. Trumbull and his allies defending the draft said the tribes were not subject to U.S. jurisdiction because the United States did not exercise sovereign authority over them.²²⁰ Critics objected that in fact the United States did exercise some sovereign authority over them, so tribes would be considered subject to its jurisdiction.²²¹ And Trumbull replied that in any event the United States did not exercise "complete" authority, so tribes were not subject to complete jurisdiction.²²²

This does not show senators rejecting the sovereign authority meaning of jurisdiction; it shows senators wrestling with an ambiguity that arose where the United States exercised partial but not complete sovereign authority. As such, it confirms that senators understood and applied the ordinary meaning of jurisdiction—it just further shows they were not sure how to apply it to the ambiguous case of Native Americans.²²³ Thus, far from undermining the broad reading's understanding of "subject to the jurisdiction," the Senate debate confirms it.

The Senate debate should likely also be taken to resolve the ambiguity. The senators concluded that because the United States refrained from exercising substantial sovereign authority over internal tribal matters, the tribes were not "subject to the jurisdiction" of the United States under the Clause, even though the tribes were, as *Prima*

219 *Id.* at 135, 170 n.504. It concludes instead that "jurisdiction" meant "allegiance." *Id.* at 135. But even accepting this reformulation, the analysis should not materially change. The tribes owed partial allegiance, meaning a duty of obedience, to the United States at least as to external matters.

220 See CONG. GLOBE, 39th Cong., 1st Sess. 2893–94 (1866) (statement of Sen. Lyman Trumbull).

221 *E.g., id.* at 2896 (statement of Sen. Doolittle) (arguing that "subject to the jurisdiction of the United States" meant "[s]ubject, first, to its military power; second, subject to its political power; third, subject to its legislative power"); *id.* at 2894 (statement of Sen. Hendricks) ("If the Indian is bound to obey the law he is subject to the jurisdiction of the country . . .").

222 *Id.* at 2893 (statement of Sen. Trumbull); *accord id.* at 2895 (statement of Sen. Howard); see also *id.* at 2893 (statement of Sen. Johnson) (concluding that the draft granted citizenship based on "birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States" but expressing concern that tribes might be understood to be within this language); *supra* Section I.C. (integrating the drafters' discussions into the broad reading of the Clause).

223 See Ablavsky & Berger, *supra* note 11, at 218–22. Professors Ablavsky and Berger conclude of this debate that "both the citizenship provision's proponents and critics interpreted 'subject to the jurisdiction thereof' in the same way: as the power to subject people within the sovereign's territory to its laws." *Id.* at 221.

Facie Citizenship says, subject to U.S. jurisdiction to some extent.²²⁴ The drafters decided that “subject to the jurisdiction” meant complete jurisdiction (that is, complete sovereign authority), in a sense that excluded the tribes. This conclusion should likely be treated as part of the Clause’s original meaning.²²⁵

Although this conclusion will become important later,²²⁶ it does not help *Prima Facie Citizenship* at all. *Prima Facie Citizenship* does not rely anywhere on the idea of complete jurisdiction. And its claim that the debates rejected the equation of “subject to the jurisdiction” with sovereign authority in the context of the tribes is incorrect. To the contrary, the debates accepted that equation of meaning but concluded that people partially outside U.S. sovereign authority—as the tribes were, to a substantial extent, as to internal matters—were excluded from the Clause.

Prima Facie Citizenship’s second claim relating to Native Americans fares only a little better. Again, the claim is that unlawful entrants resemble nontribal Native Americans in their failure to acknowledge sovereign authority.²²⁷ On close examination, the analogy is unpersuasive.

To begin, there were (at least) two categories of Native Americans living outside recognized tribes. One category lived in hostility to, or at least in disregard of, the United States. Some of these had left their recognized tribes to live on their own, while others lived on the remote frontier where the United States had little practical presence or control.²²⁸ The drafters called these people the “wild Indians.”²²⁹ Another category had left their tribes to become integrated into U.S. civil society.²³⁰ *Prima Facie Citizenship* to some extent collapses the categories, but it is important to keep them separate.

The drafters agreed that the “wild Indians” should be excluded from citizenship, and the question was whether the “subject to the

224 See Lash, *supra* note 3, at 170 n.504.

225 Unlike the 1787 drafting debates, the 1866 drafting debates were fairly comprehensively recorded and widely disseminated prior to ratification. See Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment’s Original Meaning*, 49 CONN. L. REV. 1069, 1074–82 (2017); David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 WHITTIER L. REV. 695, 696–97 (2009). Thus, especially on matters where the text was ambiguous, an unambiguous consensus of the drafters on a textual meaning should likely be given considerable weight.

226 See *infra* Part IV.

227 Lash, *supra* note 3, at 178–82.

228 See PRUCHA, *supra* note 196, at 278.

229 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866) (statement of Sen. Trumbull).

230 See, e.g., Lash, *supra* note 3, at 101–04.

jurisdiction” exclusion was sufficient.²³¹ Trumbull, defending the draft, argued that it was and eventually persuaded the others. The “wild Indians,” he said, are “not subject to our laws.”²³² *Prima Facie Citizenship* paraphrases that to mean that “they had not formally submitted themselves to the general legislative jurisdiction of the United States.”²³³ That, though, goes beyond what Trumbull said. Trumbull’s point seems more a practical one: The “wild Indians” were not subject to U.S. authority because they were akin to a hostile military force.²³⁴ They were dealt with, if at all, with military measures.

Prima Facie Citizenship’s analogy between “wild Indians” and unlawful entrants seems a considerable stretch. At least in the modern context, unlawful entrants do not exist in a state of military hostility to the United States. They are not outside U.S. authority as a practical matter (unlike what Trumbull said about the “wild Indians”). Rather, they are integrated into U.S. civil society, living under U.S. sovereign authority—quite possibly in full compliance with U.S. civilian law apart from their unlawful entry, and in any event fully governed by that law and its associated law enforcement and adjudication. Their circumstance could not be more different from that of the “wild Indians.”²³⁵

In contrast, Native Americans who left their tribes to integrate into U.S. civil society may be more analogous to unlawful entrants. For example, the important post-ratification case *Elk v. Wilkins* involved John Elk, who left his tribe to settle in Nebraska, and thereafter claimed U.S. citizenship.²³⁶ In the *Elk* case, the Court rejected his claim on the ground that he had not been born subject to U.S. jurisdiction, even if

231 CONG. GLOBE, 39th Cong., 1st Sess. 527–28, 2890–97 (1866).

232 *Id.* at 527 (statement of Sen. Lyman Trumbull) (“Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws . . . to be the subjects of the United States in the sense of being citizens.”).

233 Lash, *supra* note 3, at 187.

234 As noted, invading armies were understood as not subject to the territorial sovereign’s municipal law because under international law they were governed by the laws of war. See *supra* Section II.B. Accordingly, children born to invading armies were not citizens/subjects by birth. It is perfectly sensible to think of the “wild Indians” as analogous, but civilians who cross the border illegally to join U.S. civil society are entirely distinct. See generally Magliocca, *supra* note 10 (considering and rejecting this analogy).

235 One can imagine unlawful entrants who would be more analogous to “wild Indians.” Bands of pirates or adventurers who crossed the U.S. border and lived autonomously, without material contact with U.S. civil society, could perhaps be said to exist outside U.S. jurisdiction, particularly if they lived in geographic areas only nominally controlled by the United States. Indeed, it is plausible that such bands did exist in the nineteenth century. Modern unlawful entrants are obviously quite distinct.

236 *Elk v. Wilkins*, 112 U.S. 94, 95 (1884); see Ablavsky & Berger, *supra* note 11, at 227–28 (discussing the background of *Elk* and related cases).

he subsequently became subject to U.S. jurisdiction.²³⁷ The Court pointed out that treaties had provided ways for Native Americans who wished to join U.S. civil society to become naturalized citizens, but Elk had not followed this process.²³⁸

Whether someone like Elk is analogous to unlawful entrants, and what the implications of that analogy would be, remain obscure. It is far from clear that Elk had done anything illegal. No one in the *Elk* case said that he had; he simply had not done enough to become a citizen.²³⁹ And even if he had acted illegally in leaving his tribe, it is far from clear that his children (if he had any) would not have been constitutional citizens.²⁴⁰ Further, the drafting debates are vague in their application to people in Elk's situation, as they were principally concerned with tribal Native Americans and "wild Indians."²⁴¹ Thus, while Elk is at least somewhat more analogous to unlawful entrants than the "wild Indians," it is hard to find any consensus about how his children

237 *Elk*, 112 U.S. at 102. Consistent with the conventional exclusion of Native tribes, persons born abroad, and U.S.-born children of ambassadors, the Court observed:

[Tribal members], 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.

Id. (quoting U.S. CONST. amend. XIV, § 1). Justice Harlan dissented on the ground that the Clause's "subject to the jurisdiction" requirement did not refer to the time of birth but to the time citizenship was claimed. *Id.* at 110–12, 115 (Harlan, J., dissenting). In his view, Elk, by joining U.S. civil society, became subject to U.S. jurisdiction and thus satisfied the Clause's requirements. *Id.*

238 *Id.* at 100–01 (majority opinion).

239 *See id.* at 99 (finding the case to turn on Elk's status at the time of his birth). As noted, the dissent found that Elk was subject to U.S. jurisdiction at the time he claimed citizenship. *Id.* at 110–12 (Harlan, J., dissenting). The majority did not contest this proposition; the majority just thought it irrelevant. *See id.* at 99 (majority opinion).

240 *Prima Facie Citizenship* provides no authority addressing this point. *See Lash, supra* note 3, at 154–57. Moreover, it is highly unclear how *Elk* would be representative of "refused allegiance," were that to be the test. The whole point of the *Elk* case was that Elk claimed citizenship *because* he accepted allegiance to the United States instead of allegiance to his tribe. *See id.* at 99; *id.* at 110–12 (Harlan, J., dissenting). Thus he did not pursue naturalization, not because he refused allegiance, but because (in his view) he did not need to. *See id.* at 99 (majority opinion). In any event, the textual question was not whether Elk "refused allegiance" but whether he was "subject to [U.S.] jurisdiction." *Id.* at 102. Both the majority and the dissent understood this; they merely disagreed on *when* he had to be "subject to [U.S.] jurisdiction." And neither doubted that he was subject to U.S. jurisdiction at the time of the case. *See id.* at 98; *id.* at 110 (Harlan, J., dissenting).

241 *See, e.g., CONG. GLOBE*, 39th Cong., 1st Sess. 2890–95 (1866). In assessing children of unlawful entrants, *Prima Facie Citizenship* does not rely on anything in the debates relating to people who would be in Elk's situation. *See Lash, supra* note 3, at 117–18 & nn.206–10 (discussing and citing debates only as relating to "wild Indians," *id.* at 117).

would have been treated. As a result, the drafters' view of nontribal Native Americans does not seem to give much guidance as to unlawful entrants. And it should be recalled that *Prima Facie Citizenship*'s conclusion as to unlawful entrants rests almost entirely on the analogy to Native Americans,²⁴² which now appears inapposite.

In sum, *Prima Facie Citizenship*'s extensive discussion and heavy reliance on the drafters' views of the Native American conundrum ultimately provide it little support. The drafters' discussion of and conclusions about tribal Native Americans do not show a nonstandard use of the phrase "subject to the jurisdiction" as meaning something other than under sovereign authority. They only show that the drafters were not sure how to treat a situation of partial jurisdiction (meaning partial sovereign authority). And the drafters' discussion of unassimilated Native Americans (the "wild Indians") does not provide a useful analogy for the modern category of unlawful entrants. These Native Americans might be analogous to unlawful entrants who choose to live apart from and in hostility to U.S. civil society, but they seem distinct from unlawful entrants who are integrated into civil society and thus live fully under U.S. jurisdiction.

* * *

Prima Facie Citizenship makes little headway in undermining the broad textual account because it is itself not a textual account. It quickly declares the text ambiguous and instead develops the concept of "refused allegiance or counteralliance." But these concepts obscure rather than further the analysis, and even with their assistance its specific applications seem thin and difficult to understand.

The short of it is that unlawful entrants and their children are subject to the jurisdiction of the United States, as that phrase was understood in the nineteenth century, while they are in U.S. territory. Territorial sovereignty was absolute and extended over all aliens in the territory, except where international law, and perhaps practicalities, created exceptions. When an exception applied—as in the case of ambassadors—the territorial sovereign did not assert power over the person, and the person was said to be not subject to the territorial sovereign's jurisdiction. *Prima Facie Citizenship* provides no material reason to doubt that this simple formulation was the original meaning of the Citizenship Clause. And there was and is no international law exception to territorial jurisdiction for illegal entrants, nor is there any doubt that a territorial sovereign could and did (and does today) exercise sovereign authority over them.

242 See Lash, *supra* note 3, at 178–82.

IV. PROFESSOR WURMAN AND THE CITIZENS/DOMICILED-ALIENS-ONLY VIEW

This Part turns to a critique of Professor Wurman's *Jurisdiction and Citizenship*.²⁴³ As noted above, disagreements between *Jurisdiction and Citizenship* and the broad originalist reading of the Citizenship Clause mostly concern applications to particular categories of persons.²⁴⁴ Its historical account is largely consistent with a broad reading of the Clause. To the extent its historical account can be faulted, there are three principal points to be made. First, like *Prima Facie Citizenship*, *Jurisdiction and Citizenship* sometimes seems to misuse the concept of allegiance to suggest a voluntary relationship in connection with jurisdiction. Second, again like *Prima Facie Citizenship*, *Jurisdiction and Citizenship*'s account of temporary visitors in the antebellum period emphasizes the unsettled view of citizenship over the settled view of jurisdiction. Third, it seems to overstate the extent to which the post-ratification history favors an exclusion of the U.S.-born children of temporary visitors. But again, these are minor points. Overall, *Jurisdiction and Citizenship*'s account deepens the understanding of why and how citizenship related to jurisdiction, in a way that supports rather than undermines the broad reading of the Clause.

This critique therefore emphasizes the applications rather than the theory. Ultimately, *Jurisdiction and Citizenship* argues that its historical account indicates that only U.S.-born children of U.S. citizens or U.S. domiciled aliens are guaranteed citizenship by the Clause's original meaning.²⁴⁵ This conclusion rests on two propositions: (1) that "subject to the jurisdiction" meant "subject to the *complete* jurisdiction"; and (2) that aliens lacking a lawful U.S. domicile were not understood to be subject to the *complete* jurisdiction of the United States because, under international conflicts of law rules, some aspects of their personal lives were governed by their home-country law and not by U.S. law.²⁴⁶ While the first is correct at least as the drafters understood it to apply to Native tribes (as discussed above), the second seems questionable on several grounds.

243 Wurman, *supra* note 3.

244 See *supra* Section II.B.

245 See Wurman, *supra* note 3, at 425. Legal commentator Andrew Hyman argues for exclusion of U.S.-born children of nondomiciled aliens on somewhat distinct grounds. See Hyman, *supra* note 3, at 2–6 (emphasizing the textual requirement that persons born in the United States and subject to the jurisdiction thereof are "citizens of the United States and of the State wherein they reside," *id.* at 2 (quoting U.S. CONST. amend. XIV, § 1)). Assessment of this argument is beyond the scope of this Article.

246 Wurman, *supra* note 3, at 444–49.

A. *The Historical Account through Ratification*

Most of *Jurisdiction and Citizenship* is a historical account of the development of those two concepts from English common law through the U.S. experience up to and beyond the Fourteenth Amendment.²⁴⁷ This account substantially confirms the account underlying the broad originalist reading of the Citizenship Clause. In particular, it confirms that (1) English common law recognized the English born children of aliens (even if temporary visitors) as English subjects, with several exceptions—most notably for children of ambassadors and invading armies;²⁴⁸ (2) antebellum American common law generally carried over the English rule, adapted to citizenship rather than subjectship;²⁴⁹ (3) the framers of the Citizenship Clause generally sought to constitutionalize that approach by describing citizenship as arising from birth in U.S. territory, with exceptions for those not subject to U.S. jurisdiction;²⁵⁰ and (4) those not subject to U.S. jurisdiction were those not governed by U.S. domestic (municipal) law, principally as a result of an international law restriction on sovereign authority (as in the case of ambassadors).²⁵¹

Jurisdiction and Citizenship argues that its approach is distinct from the broad view because it does not adopt a “law enforcement” or “sovereign power” theory of jurisdiction; rather, it focuses on the sovereign’s authority under international law to apply its own law (in international law terms, its municipal law).²⁵² This may represent something of a refinement of the traditional, broad view, but it does not seem an incompatible approach. The broad reading understands jurisdiction as sovereign authority, including sovereign authority as limited by international law.²⁵³ It is not clear that these formulations differ substantially.²⁵⁴

247 See *id.* at 324–25. *Jurisdiction and Citizenship* overlaps considerably in these sections with Professor Lash’s *Prima Facie Citizenship*, discussed above. See Lash, *supra* note 3; *supra* Section III.A. While they do not appear to differ substantially in their historical accounts, they develop different meanings of the Clause from the history. *Jurisdiction and Citizenship* principally relies on international law to explain exceptions to jurisdiction/citizenship, while *Prima Facie Citizenship* relies on the concept of “refused allegiance or counter-allegiance.” See *supra* Sections II.B, III.B.

248 Wurman, *supra* note 3, at 328–37 (relying principally on Coke and Blackstone).

249 See *id.* at 343–72.

250 See *id.* at 406–28.

251 See *id.* at 373–405; *supra* Part I (making a version of these points in support of the broad originalist view); Ramsey, *supra* note 1, at 436–61 (same).

252 See Wurman, *supra* note 3, at 379–405.

253 See Ramsey, *supra* note 1, at 436–61.

254 For example, invading armies: As *Jurisdiction and Citizenship* says, invading armies were subject to the international laws of war, not to the territorial sovereign’s civilian law; a

Two points about the history echo criticisms of *Prima Facie Citizenship* made above. First, *Jurisdiction and Citizenship* also invokes the idea of allegiance as an aspect of jurisdiction (and thus as an aspect of citizenship).²⁵⁵ Allegiance is a troublesome concept in much writing on citizenship,²⁵⁶ but it should not be. Allegiance, as discussed above, simply meant a duty of obedience. Citizens/subjects had an ongoing duty of obedience (thus, allegiance) to their sovereign. Aliens, by entering sovereign territory, generally undertook a temporary duty of allegiance (obedience) to the territorial sovereign. But some aliens did not, because they were exempted from their duty of allegiance by international law: ambassadors, invaders, etc.²⁵⁷ Allegiance/obedience was simply another way of stating the scope of the territorial sovereign's authority/jurisdiction. Again, this is consistent with the broad view of jurisdiction and citizenship by birth in sovereign territory. Non-diplomat aliens as a general matter were not exempt from local jurisdiction while in foreign territory, and thus they had a duty of obedience (allegiance) and were subject to local jurisdiction under the international rules of territorial sovereignty. The exceptions *Jurisdiction and Citizenship* discusses prove the rule.

territorial sovereign was not entitled to prosecute invaders for murder or destruction of property committed in the course of the invasion (so long as the invader acted consistent with the laws of war). Wurman, *supra* note 3, at 377–79. That explains why invaders were described as not subject to local jurisdiction and, relatedly, excluded from common law birth citizenship. *Id.* As a less well-known example, international law of the time required that persons shipwrecked in a foreign country not be subject to local law but be returned to their home country. *See id.* at 393–94. Similarly, under international law, sailors on ships docked in foreign harbors were governed by the law of the ship's nationality, not the law of the local sovereign. *Id.* at 395. Again, *Jurisdiction and Citizenship* is right that people in those categories were described as not subject to the territorial sovereign's jurisdiction because of the international law exceptions and because of the link between jurisdiction and citizenship, a child born in a foreign country under such circumstances likely could not claim citizenship. The broad originalist view fully explains these situations in similar terms. *Jurisdiction and Citizenship* is right to note that previous versions of the broad reading, including mine, have not acknowledged all these likely exceptions. *Id.* at 372. But these exceptions are easily integrated into the broad view as directly analogous to ambassadors. My previous account is clear that ambassadors were excluded from jurisdiction (and their children were therefore excluded from territorial birth citizenship) because ambassadors had an international law immunity from local municipal law. *See Ramsey, supra* note 1, at 437–42. In short, *Jurisdiction and Citizenship's* attempt to materially distinguish its historical account from the conventional historical account fails. In describing various international law categories that were not subject to local municipal law, it follows the conventional account (although it rightly notes that there are some additional categories not previously addressed). Thus it confirms the traditional understanding of jurisdiction and citizenship, adding considerable rich detail but not materially altering basic premises.

255 *E.g.*, Wurman, *supra* note 3, at 328–58.

256 *See supra* Section III.B (discussing allegiance as presented in *Prima Facie Citizenship*).

257 *See supra* Section III.B (discussing this point in the context of Professor Lash's article).

Jurisdiction and Citizenship gets this generally right, so its account of allegiance jurisdiction is generally compatible with the broad view of the Citizenship Clause but sometimes slips into an account of allegiance as containing a subjective element.²⁵⁸ Again as discussed, allegiance sometimes does have this connotation of voluntariness. But it is important to avoid this connotation in discussing allegiance as it relates to jurisdiction. Jurisdiction did *not* have a subjective element. International law marked the scope of sovereign authority (jurisdiction), whatever anyone concerned thought about it. So again, it is better to focus on jurisdiction (the textual term) rather than allegiance, and *Jurisdiction and Citizenship*'s extensive discussion of allegiance may obscure the extent to which its history is consistent with the broad view of the clause.

This point relates to a second point about *Jurisdiction and Citizenship*'s history. *Jurisdiction and Citizenship* joins *Prima Facie Citizenship*²⁵⁹ in finding that some authorities in the antebellum period suggested that U.S.-born children of temporary visitors should be excluded from birth citizenship, although that was (it concedes) not a consensus view.²⁶⁰ As with *Prima Facie Citizenship*, even if correct this point lacks force. Again, the key is not whether there was an antebellum consensus on citizenship; the key is whether there was a consensus on jurisdiction. On this matter, *Jurisdiction and Citizenship* does not show a lack of consensus and indeed confirms that there was one. International law did not as a general matter exclude nondomiciled aliens from local municipal jurisdiction, and *Jurisdiction and Citizenship* does not say that it did.²⁶¹ The general category of temporary visitors was in this respect wholly distinct from the narrower categories of specific kinds of temporary visitors who (as *Jurisdiction and Citizenship* rightly explains) were exempt from municipal jurisdiction: diplomats, sailors, people forced into the territory by storms.²⁶² Again, these exceptions prove the broader rule: Temporary visitors were subject to local jurisdiction *unless* they were in one of the exempted categories.

258 See e.g., Wurman, *supra* note 3, at 344–45.

259 See *supra* Section III.C.

260 Wurman, *supra* note 3, at 361–72.

261 See *id.* at 380–83 (discussing categories of persons exempted from local law).

262 See *id.* at 375–405. Again, this is the central point of Chief Justice Marshall's opinion in *The Schooner Exchange*, which *Jurisdiction and Citizenship* explains in these terms and does not dispute. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); Wurman, *supra* note 3, at 383 (discussing *The Schooner Exchange*). Countries could and sometimes did make treaties excluding their citizens from local jurisdiction—but the very need for such treaties showed that the background international law rule was the contrary. See also *supra* Section I.B (discussing the consensus on jurisdiction over aliens as part of the core argument for the broad reading of the Clause).

To be sure, the case for the broad reading of the Citizenship Clause would be even stronger if it could show a consensus as to the citizenship status of U.S.-born children of temporary visitors in the antebellum period. Some originalist accounts have made that case.²⁶³ But the broad reading does not depend on it. The broad reading depends only on there being a common meaning and application of *jurisdiction* in the pre-ratification period.

B. Post-Ratification History

Jurisdiction and Citizenship identifies nothing conclusive in the drafting or pre-drafting history that describes nonresident aliens as being not subject to U.S. jurisdiction. While some authorities in the pre-drafting period questioned whether U.S.-born children of nonresident aliens should be entitled to U.S. citizenship, they did not link that doubt to an absence of U.S. jurisdiction.²⁶⁴ Nor did anyone in the drafting period conclusively argue that nonresident aliens were not subject to U.S. jurisdiction within the meaning of the Clause.²⁶⁵ *Jurisdiction and Citizenship*'s argument—that nonresident aliens were excluded because they were not completely subject to U.S. jurisdiction—seems not to have occurred to anyone in the drafting period.

The post-ratification story is more complicated. Although not a central focus of *Jurisdiction and Citizenship*, this period may provide its strongest support. Drawing on earlier accounts,²⁶⁶ it points to commentary and executive branch statements suggesting that the Citizenship Clause contained a domicile requirement, and concludes that “[a]fter the adoption of the Amendment, the view that domicile was required appears to have become somewhat conventional.”²⁶⁷ While post-ratification commentary should be treated with caution in an original meaning analysis, it cannot be dismissed: Here it indicates at minimum that the domicile theory of the Citizenship Clause had some roots relatively near the Clause's adoption.

Nonetheless, the post-ratification evidence *Jurisdiction and Citizenship* supplies is inconclusive. First, the cited sources provided no consistent theory as to why or how the Clause created a domicile requirement—they simply asserted that there was (or might be) one.²⁶⁸

263 See generally Whittington, *supra* note 10 (finding a general consensus in support of citizenship, with some outliers).

264 See Wurman, *supra* note 3, at 359–72 (discussing pre-drafting history).

265 See *id.* at 406–28 (discussing drafting history).

266 *Id.* at 432 n.451 (citing Justin Lollman, Note, *The Significance of Parental Domicile Under the Citizenship Clause*, 101 VA. L. REV. 455 (2015)).

267 *Id.* at 432, 437.

268 See *id.* at 935–38. As to treatises, see 1 FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW 41 (stating without explanation that

Jurisdiction and Citizenship attempts to construct such a theory based on the need for “complete” jurisdiction,²⁶⁹ but does not show that the post-ratification commentators generally held that theory.²⁷⁰ Moreover, post-ratification sources expressed various versions of the exclusion, including that U.S.-born children might elect U.S. citizenship on maturity by returning to the United States—again, with no explanation of how the Clause led to this result.²⁷¹ Thus the commentary seems more to seek a reasonable policy rather than to seek the best reading of the Clause’s original meaning.

Second, the post-ratification sources are more divergent than *Jurisdiction and Citizenship* suggests.²⁷² As noted above,²⁷³ an early executive branch interpretation, by Secretary of State Fish in 1872, adopted the broad reading of the Clause, concluding that the Clause was “simply an affirmation of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage.”²⁷⁴ Fish added, again in terms entirely consistent with the broad reading of the Clause, that the “subject to the jurisdiction” requirement “was probably intended to exclude the children of foreign ministers, and of others persons who may be within our territory with rights of extraterritoriality.”²⁷⁵

persons “born of Chinese non-naturalized parents, such parents not being here domiciled, are not citizens of the United States”); A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, *supra* note 44, § 183, at 393–94 (saying only that “it may be argued” that U.S.-born children of temporary visitors are excluded by the Clause because their parents are not subject to U.S. jurisdiction, *id.* at 393); ALEXANDER PORTER MORSE, A TREATISE ON CITIZENSHIP, BY BIRTH AND BY NATURALIZATION 248 (Boston, Little, Brown & Co. 1881) (stating without further explanation that “[t]he words ‘subject to the jurisdiction thereof’ exclude the children of foreigners transiently within the United States”); and SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 279 (New York, Banks & Bros. 1891) (stating without further explanation that a child of a temporary visitor is not a citizen “because it was not subject to its jurisdiction”). As to executive branch statements, see Letter from Sec’y of State Frederick Frelinghuysen to Rep. John Kasson (Jan. 15, 1885), in A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, *supra* note 44, § 183, at 397, 397–99 (determining that the U.S.-born child of temporary visitors was not a citizen); and Letter from Sec’y of State Thomas Bayard to Ambassador Boyd Winchester (Nov. 28, 1885), in A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, *supra* note 44, § 183, at 399, 399–400 (demonstrating the determination of Secretary of State Bayard to the same effect). Additional authorities of possible relevance are collected in Estreicher & Reddy, *supra* note 3, at 20–29.

269 See *infra* Section IV.C.

270 See Wurman, *supra* note 3, at 438–39 (acknowledging this point).

271 See Letter from Thomas Bayard to Boyd Winchester, *supra* note 268.

272 See Meyler, *supra* note 43 (discussing the divergent views).

273 *Supra* Section I.D.

274 Letter from Hamilton Fish to George Perkins Marsh, *supra* note 44.

275 *Id.* See also 14 Op. Atty Gen. 154 (1872) (concluding that a person born in New York to Austrian temporary residents was born a U.S. citizen and stating that “[a]s a general rule,

But some post-ratification sources appeared to understand the Clause as applying only to U.S. citizens and not (as *Jurisdiction and Citizenship* would read it) to domiciled aliens. Another early executive branch interpretation came from Attorney General George Williams, who concluded that “[T]he word ‘jurisdiction’ [in the Citizenship Clause] must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment.”²⁷⁶ Similarly, Justice Samuel Miller, writing for the Supreme Court in the *Slaughter-House Cases*, observed in dicta that the Clause “was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.”²⁷⁷ Thus the post-ratification sources point to no consensus, either on meaning or effect, sufficient to overcome the Clause’s original meaning as understood from text, drafting, and pre-drafting evidence.

C. Domicile and Complete Jurisdiction

This Section turns to *Jurisdiction and Citizenship*’s application of its theory of jurisdiction. To repeat, its theory, based on international law limits to local sovereign authority, is largely consistent with the broad originalist reading of the Citizenship Clause: Subject to the jurisdiction of the United States meant within the authority of U.S. municipal (domestic) law, and not excluded from the reach of municipal law by international law (as in the case of ambassadors). One would think that this formulation would readily include nondomiciled aliens as subject to U.S. jurisdiction. As discussed, nondomiciled aliens (like domiciled aliens) were governed by U.S. law while in U.S. territory unless they fell into one of the excluded categories.²⁷⁸ But *Jurisdiction and Citizenship* reaches a narrower view (excluding the U.S.-born children of nondomiciled aliens) in two steps: that the Clause requires *complete* jurisdiction,

a person born in this country, though of alien parents who have never been naturalized, is under our law deemed a citizen of the United States by reason of the place of birth”).

276 Letter from Att’y Gen. George H. Williams to President Ulysses S. Grant (Aug. 20, 1873), in 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1216, 1219 (D.C., Gov’t Printing Off. 1873). Williams’ meaning here is somewhat obscure, as he earlier had indicated a broad view of the clause. See *supra* n. 275.

277 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873); see also THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 243 (Boston, Little, Brown & Co. 1880) (also appearing to limit citizenship under the Clause to children of citizens).

278 See *supra* Part III.

and that nondomiciled aliens were not subject to complete jurisdiction.²⁷⁹

Jurisdiction and Citizenship begins with the undisputed proposition (discussed above) that members of Native tribes were excluded from the Citizenship Clause because, although “born in the United States,” they were understood to be not “subject to [U.S.] jurisdiction.”²⁸⁰ But, it points out, also as discussed above, the tribes were surely subject to U.S. jurisdiction to some extent: Among other things, U.S. law regulated interactions between tribes and U.S. citizens, and the United States claimed ultimate sovereignty over the tribes.²⁸¹ Thus tribes were partly subject to U.S. jurisdiction but not *completely* so. And the Clause’s framers acknowledged and relied on this point.²⁸²

Jurisdiction and Citizenship next argues that home-country law governed some aspects of aliens’ personal relations even for aliens physically located in the United States.²⁸³ As a result, it says, “the United States did not exercise a ‘complete’ legislative jurisdiction over nondomiciled foreigners.”²⁸⁴ And the example of the tribes shows that the Clause required *complete* jurisdiction.

There are at least four central problems with this conclusion. First, nondomiciled aliens were not like tribes in critical respects. Tribes, the drafters concluded, were not subject to U.S. jurisdiction within the meaning of the Citizenship Clause because ordinary U.S. law (criminal law, tort law) generally did not extend to their intratribal relations—typically as a result of treaties specifically limiting U.S. jurisdiction.²⁸⁵ The tribes were in this sense quasi-sovereign entities with their own municipal laws that applied to their members, to the exclusion of U.S. municipal law, even within what would otherwise be U.S. territorial jurisdiction.²⁸⁶

279 See Wurman, *supra* note 3, at 439–49. *Jurisdiction and Citizenship* adds some additional brief speculation about whether unlawful entry might itself exclude one’s children from citizenship under the Clause, *id.* at 447–49, but this is not developed and thus is not addressed at length here. Briefly, *Jurisdiction and Citizenship* suggests that unlawful entry in the nineteenth century might have resulted in a status akin to an enemy alien, who lacked protection from the territorial sovereign. However, even if true, this would not show that the territorial sovereign lacked jurisdiction over the unlawful entrant—even in the nineteenth century, and certainly not today.

280 *Id.* at 430; see *Elk v. Wilkins*, 112 U.S. 94, 109 (1884); Ramsey, *supra* note 1, at 442–44.

281 *Supra* Section III.D.

282 *Supra* Section III.D.

283 Wurman, *supra* note 3, at 439–41.

284 *Id.* at 440.

285 *Supra* Section III.D.

286 *Supra* Section III.D.

In contrast, nondomiciled aliens were governed by U.S. municipal law as to most matters while in the United States (unless they had a special exemption such as for ambassadors), including as to intra-alien crimes and torts. And conflicts of law rules did not preclude local courts from exercising jurisdiction over nondomiciled aliens; they only provided that the local sovereign's courts would sometimes use home-country law to resolve disputes.²⁸⁷ It is entirely speculative to suggest that the Clause's framers, or anyone at the time, would have thought that nondomiciled aliens stood on the same ground as the tribes in this respect, given these immense differences.

Second, as *Jurisdiction and Citizenship*'s own sources indicate, the rule that persons outside their home country remained to some extent governed by home-country law also applied to alien permanent residents.²⁸⁸ Thus, if nondomiciled aliens were excluded on this ground, domiciled aliens would likely have been as well. But, as discussed, there seems no doubt that the framers understood at least U.S.-born children of U.S. domiciled aliens to be guaranteed citizenship by the Clause²⁸⁹ (and *Jurisdiction and Citizenship* does not argue otherwise).

Third, it is doubtful that territorial sovereigns had an international law obligation to defer to home-country law on any matter regarding nondomiciled (or domiciled) aliens. Territorial sovereignty as to aliens (whether domiciled or not) was described as "absolute" (again, with the exception of ambassadors and others with specific immunities).²⁹⁰ The territorial sovereign's courts, when asserting jurisdiction over aliens present in sovereign territory, might appropriately use an alien's home-country law to resolve some kinds of disputes as a matter of comity, in the absence of contrary sovereign direction. But aliens, when present in foreign sovereign territory, were not outside the territorial sovereign's jurisdiction, whether thought of as prescriptive (lawmaking) jurisdiction or judicial jurisdiction. And again, as Chief Justice Marshall made clear in *The Schooner Exchange*, the point of ambassadorial and other kinds of foreign sovereign immunity was that those with immunity—unlike ordinary nondomiciled aliens—were

287 See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). See generally STORY, *supra* note 26.

288 See H.W. HALLECK, *ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR* ch. VII, § 7, at 87 (Philadelphia, J.B. Lippincott & Co. 1866) (noting that certain home-country laws "travel with [subjects] wherever they go, and attach to them in whatever country they are resident"); WHARTON, *supra* note 268, § 163, at 350 (noting that home-country law as to certain "civil conditions and personal capacity" applies to citizens/subjects "when resident in a foreign country" (quoting WHEATON, *supra* note 17, at 100)).

289 See *supra* Section I.C (discussing agreement among drafters that children of Chinese immigrants would be guaranteed citizenship by the Clause).

290 *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

outside the territorial sovereignty in a sense that nonexempted aliens (even if nonresident) were not.²⁹¹

Indeed, *Jurisdiction and Citizenship* seems to acknowledge this point:

There was no question under the law of nations that local sovereigns could exercise a legislative jurisdiction in such circumstances [that is, as to the personal status rights of aliens], even if they usually did not. Justice Story's treatise on the conflict of laws, for example, generally supports the proposition that a local sovereign does not legislate over the personal status rights of non-domiciled foreigners, . . . but he makes clear this is a matter of comity.²⁹²

Fourth, and perhaps most important, *Jurisdiction and Citizenship* provides no examples of pre-drafting, drafting, or ratification materials pointing to an analogy between tribes and nondomiciled aliens.²⁹³ And it does not identify any materials suggesting a consensus that children of nondomiciled aliens would be excluded from the Clause's citizenship guarantee.²⁹⁴

To the contrary, the drafting materials generally suggest that senators did not distinguish between domiciled and nondomiciled aliens for purposes of the Clause. For example, the Conness-Cowan exchange regarding the children of Chinese immigrants, described above, did not distinguish between temporary and permanent Chinese immigrants.²⁹⁵ Both senators—and presumably their audience—thought the Clause applied generally to Chinese immigrants. But presumably some Chinese subjects present on the U.S. West Coast were temporary visitors, in the sense of not intending a permanent domicile (and some may have been illegally present).²⁹⁶ No one raised this point,

291 *See id.*

292 Wurman, *supra* note 3, at 440. This seems correct. *Jurisdiction and Citizenship* goes on to say, "That does not defeat the larger point, however, because whether or not to exercise jurisdiction over ambassadors was also understood to be a matter of the nation's own consent and comity." *Id.* at 440–41. To the contrary, however, ambassadorial immunity seems better understood as an obligation sovereigns undertook under international law, not merely a voluntary accommodation as implied by comity.

293 *See id.* at 406–28. As discussed above, *supra* Section III.D, nineteenth-century Americans generally regarded the Natives' situation as exceptional and not analogous to other relationships, including relationships with foreign nations and foreign citizens.

294 *See id.* at 431 (identifying only scattered suggestions to this effect). As noted, Professor Lash identifies a few drafting-era sources that can be read to require domicile, but he finds them inconclusive, and in any event they do not rely on the idea of "complete" jurisdiction. *See supra* Section III.C.3.

295 *Supra* Section I.C.

296 *See* Shugerman, *supra* note 62 (manuscript at 35).

suggesting that the drafters did not see a crucial difference between temporary and permanent residence.

Further, the drafters' frequent invocation of the exception for ambassadors undercuts a broader exclusion of nondomiciled aliens. Ambassadors and their families were obviously nondomiciled aliens: They would typically return to their home country once their service was completed. An exclusion for nondomiciled aliens would necessarily exclude ambassadors and their families. There would be no need for a specific exclusion of ambassadors. Yet the drafters—following the prior common law—repeatedly said ambassadors in particular were excluded because of their special status as holders of diplomatic immunity.²⁹⁷ This discourse makes no sense if the drafters understood the Clause to exclude all nonresident aliens. But it is perfectly consistent with—and indeed reflective of—the conventional international law discourse, which said ambassadors were not subject to territorial jurisdiction but other nondomiciled aliens were.

Jurisdiction and Citizenship identifies nothing conclusive in the drafting or pre-drafting history that describes nonresident aliens as being not subject to U.S. jurisdiction. While some authorities in the pre-drafting period questioned whether U.S.-born children of nonresident aliens should be entitled to U.S. citizenship, they did not link that doubt to an absence of U.S. jurisdiction.²⁹⁸ And while a few scattered comments in the drafting period might suggest an exclusion of foreign visitors, these were not linked to an idea of “complete” jurisdiction (or otherwise explained in any detail). *Jurisdiction and Citizenship's* argument—that nonresident aliens were excluded from the Clause because they were not completely subject to U.S. jurisdiction—seems not to have occurred to anyone in the drafting period.²⁹⁹

* * *

In sum, *Jurisdiction and Citizenship* provides magnificent history and a doubtful specific conclusion. Its history, none of which is materially disputed here, largely confirms the broad reading of the Citizenship Clause (or at least is not inconsistent with it). In particular, its focus on international law exemptions to local law as the exemptions from both jurisdiction and birth citizenship (and allegiance) tracks the broad reading of the Clause.

Its specific conclusion—that nonresident aliens are excluded from the Clause because they are not completely subject to local

297 See *supra* Section I.C.

298 See Wurman, *supra* note 3, at 359–73 (discussing pre-drafting history).

299 See *id.* at 406–24 (discussing drafting history). As discussed, some commentators in the post-ratification period advocated a domicile requirement, but that period does not reflect a consensus on this point. See *supra* Section IV.B.

municipal law even while in sovereign territory—does not depend on, or arise from, the article’s lengthy historical exposition. It rests instead on the proposition, derived from the drafting debates, that to come within the Clause one must be *completely* subject to the jurisdiction of the United States. This is how the drafters explained the exclusion of tribal Native Americans, who—despite being ultimately dependent sovereigns within U.S. territory—exercised their own internal lawmaking, law enforcement, and adjudication authority to the exclusion of U.S. authority. But nonresident aliens are entirely unlike the tribes. Nonresident aliens within U.S. territory are governed by U.S. lawmaking, law enforcement, and adjudication authority, even as to matters between themselves, so long as they are in U.S. territory. To be sure, international choice-of-law principles may suggest that the territorial sovereign, in exercising its territorial sovereignty over them, may defer to their home-country law on some specific matters. This is not an exemption from *jurisdiction*. And it is entirely unlike the partial exemption from U.S. jurisdiction enjoyed by the Native tribes.

V. SUMMARY AND CONCLUSION

Professors Lash and Wurman have given us two rich and detailed accounts that greatly deepen our understanding of the history of the Fourteenth Amendment’s Citizenship Clause. Neither account, however, should prompt retreat from a broad reading of the Clause’s original meaning. That broad reading, as described at the outset of this Article, holds that the Clause grants U.S. citizenship to everyone born in U.S. territory except for those born outside of U.S. sovereign authority (that is, not “subject to [U.S.] jurisdiction”).³⁰⁰

Professor Lash, in *Prima Facie Citizenship*, says this is not the right way to approach the Clause’s scope. The drafters and ratifiers, his article contends, understood the Clause in a different sense as depending on a person’s “allegiance” and excluding those who exhibited “refused allegiance or counter-allegiance.”³⁰¹ Although the terms are not fully explained (and do not appear themselves to have been used in the framing-era sources), “refused allegiance or counter-allegiance” seems to refer to failure to deliberately acknowledge, and place oneself under, sovereign authority. As a result, *Prima Facie Citizenship* finds that the Clause grants citizenship to U.S.-born children of lawful permanent residents, because their parents accepted U.S. sovereign authority, but that it does not grant citizenship to U.S.-born children of people who entered unlawfully. Unlawful entrants, it says, are excluded

300 U.S. CONST. amend. XIV, § 1; see *supra* Part I.

301 Lash, *supra* note 3, at 184; see *supra* Section II.A.

because they “refus[ed] to formally present themselves to the sovereign authority of the people whose country they unlawfully entered.”³⁰² Thus they exhibit “refused allegiance” and so are outside the Clause’s protection.³⁰³ Curiously, *Prima Facie Citizenship* further finds that the Clause does not clearly encompass the U.S.-born children of lawful temporary visitors to the United States, even though their parents did “formally present themselves” to U.S. authorities. Although it finds these children to be citizens under the Clause, it does so only by applying a presumption of citizenship (the “prima facie citizenship” of its title).³⁰⁴

The central problem with this account is that it is not tied to an original meaning of the text.³⁰⁵ It does not show that the ordinary meaning of “subject to the jurisdiction” as under sovereign authority is mistaken, or that a different meaning of “subject to the jurisdiction” can be found in sources of the relevant era. It does not show why the “refused allegiance or counter-allegiance” test is a better one than the common meaning of “subject to the jurisdiction.” It does not show why persons living or traveling in U.S. territory, temporarily or after entering unlawfully, and governed by U.S. law during their time present in the United States, are not “subject to the jurisdiction” of the United States, in the original meaning of that term, even if they do not display sufficient voluntary allegiance. That is, *Prima Facie Citizenship* does not show why jurisdiction requires a voluntary submission to sovereign authority (which might be implied by allegiance) rather than merely the sovereign’s legitimate assertion of its authority (which seems to be the ordinary meaning of jurisdiction).

In contrast, most of Professor Wurman’s approach in *Jurisdiction and Citizenship* is compatible with a broad reading of the Citizenship Clause.³⁰⁶ Like the broad reading, *Jurisdiction and Citizenship* understands “subject to the jurisdiction” to refer to sovereign authority as bounded by international law. Thus it parallels the broad reading in saying that generally aliens are “subject to the jurisdiction” of the United States because they are governed by U.S. domestic law, and that foreign ambassadors are not “subject to the jurisdiction” of the United States because ambassadors have international law immunity from local jurisdiction.

Jurisdiction and Citizenship differs from the broad reading principally because it says the Clause requires one to be subject to the *complete* jurisdiction of the United States to have constitutional citizenship.

302 Lash, *supra* note 3, at 187.

303 *Id.* at 185–88.

304 *Id.* at 178.

305 See *supra* Part III.

306 *Supra* Section II.B.

Although nondomiciled aliens are generally subject to local jurisdiction (unless they have an exemption), they may be governed as to certain personal status matters by their home-country law rather than the local law. This might be enough, *Jurisdiction and Citizenship* speculates, to take them out of the coverage of the Clause.³⁰⁷

The central problem with this account is that it lacks direct framing-era support for its reading of the Clause's text. In the pre-drafting period, nondiplomat aliens—including temporary visitors—were described as subject to the territorial sovereign's jurisdiction (meaning its authority) while they were present in sovereign territory.³⁰⁸ As a matter of comity and choice of law practice, the local sovereign's courts might defer to the home-country sovereign on a few minor matters, but that did not make the territorial sovereign's jurisdiction less complete. And *Jurisdiction and Citizenship* does not identify pre-ratification sources saying that aliens were not subject to U.S. jurisdiction on this ground.

Both new accounts attempt to draw support from observations that in the antebellum period there was some doubt about the citizenship status of the U.S.-born children of temporary visitors, and in the post-ratification period some authorities read the Clause to exclude U.S.-born children of temporary visitors.³⁰⁹ The first point does not undermine a broad reading of the Clause. While there may (or may not) have been some uncertainty on citizenship,³¹⁰ there was no uncertainty that nondiplomat aliens in U.S. territory were described as subject to U.S. jurisdiction. Indeed, this was the foundation of the rule, repeated in many sources and not seriously contested, that ambassadors were *not* subject to U.S. jurisdiction because international law gave them immunity—because without that immunity they, like other aliens temporarily in the U.S. territory, would be subject to its jurisdiction.³¹¹ The second point is acknowledged by proponents of the broad reading to be somewhat problematic.³¹² Post-ratification commentary and practice did not coalesce around a broad reading of the Clause until after the Supreme Court's decision in *Wong Kim Ark* in 1898.³¹³ If the Citizenship Clause's text were unclear, that might be reason to doubt that the broad reading reflects the original meaning. But earlier accounts

307 See Wurman, *supra* note 3, at 438–49.

308 *Supra* Section I.A.

309 Lash, *supra* note 3, at 150–64; Wurman, *supra* note 3, at 361–72, 431–44.

310 Cf. Whittington, *supra* note 10 (finding general consensus on citizenship in this period).

311 See *supra* Section I.B.

312 See Ramsey, *supra* note 1, at 454–58; Meyler, *supra* note 43.

313 *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); see Meyler, *supra* note 43.

have shown that the text is clear, and the new accounts do not show that it is not.

Both accounts also rest heavily on the way the Clause's drafters understood their language to apply to unassimilated Native Americans.³¹⁴ They both note that the status of Native Americans in the drafting period presents a puzzle, because tribal Native Americans were under U.S. authority—and thus subject to U.S. jurisdiction in the ordinary meaning of that phrase—to some extent, and yet the Clause's drafters thought these Native Americans were excluded from citizenship.³¹⁵ This assessment is correct, but the attempts to draw general conclusions from the unique quasi-sovereign status of Native Americans are not persuasive.

For Professor Lash's *Prima Facie Citizenship*, the puzzle of the Native Americans is cause to abandon the ordinary meaning of "subject to the jurisdiction" and substitute the idea of "refused allegiance or counter-allegiance," which it says explains the drafters' exclusion of them.³¹⁶ For Professor Wurman's *Jurisdiction and Citizenship*, the puzzle of the Native Americans supports a requirement not merely of jurisdiction but of complete jurisdiction, meaning (apparently) that no part of a person's activities can be beyond U.S. law.³¹⁷

Neither of these generalizations is necessary to explain the condition of Native Americans. As the Clause's drafters discussed, Native Americans of the time were unique in that the United States claimed ultimate sovereignty over them but—either under treaties or as a result of practicalities—for the most part did not attempt to govern their internal affairs. The drafters concluded that in this situation, where the Native Americans were not "subject to our laws" to such a large extent, they should not be classified as "subject to [U.S.] jurisdiction."³¹⁸

This does not require a complete rethinking of the meaning of jurisdiction in the Clause, as *Prima Facie Citizenship* suggests. The drafters used an ordinary meaning of jurisdiction as sovereign authority; they simply were unsure at first how that meaning applied to Native Americans, who were partly under U.S. sovereign authority but to a large extent independent from it. There is no need to shift to an idea of "refused allegiance or counter-allegiance" to explain it; the drafters merely decided that the sort of incomplete sovereign authority exercised over Native American tribes was insufficient to overcome their status as quasi-sovereign entities.³¹⁹ And in any event the Native

314 See *supra* Sections III.D, IV.C.

315 See *supra* Sections III.D, IV.C.

316 See *supra* Section III.D.

317 See *supra* Section IV.C.

318 *Supra* Section III.D.

319 See *supra* Section III.D.

Americans, whether living in recognized tribes or beyond the practical reach of U.S. authority, were not at all analogous to alien visitors—whether lawful entrants or not—who live within ordinary U.S. civil society subject to ordinary U.S. laws, law enforcement, and adjudication.

Jurisdiction and Citizenship is closer to the mark in saying that the situation of the Native Americans gave rise to the idea of “complete” jurisdiction. It is true that, in deciding that Native Americans were excluded, the Clause’s drafters rested on the idea that the United States did not exercise complete jurisdiction over them. But *Jurisdiction and Citizenship* then would apply this phrase to the entirely distinct category of temporary visitors. This leap is not justified by any consensus that can be found in the drafting and ratifying materials, which said little directly about temporary visitors, nor is it justified by the pre-drafting materials, which said that sovereign authority over aliens in sovereign territory was “absolute.”³²⁰ And it is not justified by closely analogous conditions, because the conditions of the two groups were not analogous. That temporary visitors might have a small part of their status governed by their home-country law instead of U.S. law, perhaps merely as a matter of comity on the United States’ part, is wholly distinct from the Native Americans’ condition as members of quasi-autonomous quasi-sovereign entities over which the United States exercised only limited internal control. A suggestion that the original meaning incorporated an analogy between such different groups is mere speculation that the drafters might have reached this conclusion, had they thought about it.

In sum, *Jurisdiction and Citizenship* and *Prima Facie Citizenship* are serious challenges reflecting prodigious research and careful thought. They rightly inspire a re-examination of the broad originalist reading of the Citizenship Clause. But in the end, they do not compel a different reading.

320 See *supra* Section I.B.