

JURISDICTION AND CITIZENSHIP: A REPLY

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Newton's laws of physics work most of the time here on earth because of earth's weak gravitational field and relatively slow velocity. But those laws do not explain every phenomenon of the observable universe. Most famously, they do not explain the orbit of Mercury. And so we know that the true law of the universe, at least so far as we understand things, is the law of general relativity. That law explains both the orbit of Mercury and other otherwise inexplicable phenomena, as well as Newton's laws, which are just an approximation of general relativity given the conditions here on earth. In *By Birth Alone*, Keith Whittington argues that the rule of birthright citizenship at common law was that mere birth on the sovereign's soil conferred citizenship.¹ He cites some sources that say so.² But, as this short Essay will show, stating the common law rule in this way is much like reciting Newton's laws. Such statements are sufficient to explain the rule as applied to most situations because they are good approximations given the parameters that usually exist. But they do not explain all observable phenomena—particularly the situation of ambassadors and invaders. One needs a theory of general relativity, which is to say, one needs a more precise rule. And that rule happens to have been birth on the sovereign's soil to parents under the sovereign's protection. That distinction makes all the difference and may have radical implications for the citizenship questions with which modern-day observers are confronted.³

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1 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).

2 *Id.* at 531–35.

3 As this Essay will also explain, Professor Whittington appears to have softened his claim that birth alone on the territory was the relevant criterion; rather, he acknowledges that birth on the sovereign's soil and subject to the sovereign's governing authority—and perhaps even to the sovereign's “tolerance”—was the relevant test. If so, as he seems to have acknowledged, there is nothing *compelling* the United States to exercise its authority over temporary visitors or unlawfully present aliens. Thus, he seems to agree, the Fourteenth

In *Birthright Citizenship Re-examined*,⁴ Michael Ramsey addresses not the common law but the jurisdictional phrase of the Fourteenth Amendment's Citizenship Clause.⁵ He argues that being subject to the jurisdiction of the United States means being subject to its legislative, executive, and judicial authority.⁶ That is correct. Ramsey goes wrong, however, or so I shall argue, in his application of that rule to modern-day questions. One might be subject to the criminal jurisdiction of the United States, but it does not follow that one is completely subject to the jurisdiction of the United States. In particular, the common law concept of protection was intimately connected to jurisdiction. If one came contrary to the sovereign's consent, one was not under the sovereign's protection; and that meant, moreover, that one could not sue or be sued in the sovereign's courts. The law of nations also provides rules restricting the exercise of jurisdiction over temporary sojourners to at least some degree.

This Essay elaborates on these points, at times responding also to the majority's analysis in *Trump v. Barbara*.⁷ First, it briefly summarizes—and at times clarifies—the argument of my own long article on the question of birthright citizenship.⁸ Second, the Essay responds to Professor Whittington's main points, articulated in his article. The Essay will then take the opportunity to respond to the intervention of Gerard Magliocca, who has written a related essay on the status of the Roma people (also known as gypsies) and the implications for birthright citizenship.⁹ Although Magliocca's intervention was short, it was impactful: it appears to have led the Supreme Court to conclude that at common law, even the children born of "excludable" aliens qualified for birthright subjectship.¹⁰ The evidence does not bear that out. Finally, the Essay responds to Professor Ramsey.¹¹ In short, this Essay reaffirms the conclusions of my earlier article: that the common law rule, when precisely stated, was birth on the sovereign's soil to

Amendment's language does not compel the result that aliens unlawfully present or temporarily visiting must always and necessarily have the benefit of "constitutional" birthright citizenship. See *infra* Part II.C.

4 Michael D. Ramsey, *Birthright Citizenship Re-examined*, 101 NOTRE DAME L. REV. 191 (2026).

5 U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

6 Ramsey, *supra* note 4, at 194–202.

7 *Trump v. Barbara*, 146 S. Ct. 2438 (2026).

8 Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL'Y 315 (2026).

9 Gerard N. Magliocca, *Without Domicile or Allegiance: Gypsies and Birthright Citizenship*, 49 HARV. J.L. & PUB. POL'Y 539 (2026).

10 *Barbara*, 146 S. Ct. at 2446.

11 See *infra*.

parents under the sovereign's protection; that protection required the sovereign's consent to be in the realm; and that protection was a precondition to jurisdiction, or at least to a complete jurisdiction.

I. RECAPITULATION

The common law rule has never been mere birth on soil. The rule has always been birth on soil to parents who were under the protection of the sovereign and thus, in exchange, owed the sovereign allegiance. That is why, Sir Edward Coke explained in *Calvin's Case*, birthright subjectship did not apply to a child born to an invading soldier, despite that child having been "born upon [the king's] soil."¹² And it is why, William Blackstone explained, birthright subjectship did not apply to ambassadors.¹³ As Justice Joseph Story described the rule in his concurring opinion in a prominent U.S. Supreme Court case: "Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, *while the parents are resident there under the protection of the government*, and owing a temporary allegiance thereto, are subjects by birth."¹⁴

It was because the parents were under the sovereign's protection that the sovereign owed their children protection, which protection would then create obligations of subjectship on the part of the child.¹⁵ As Coke explained, a natural-born subject was one who was born "under the ligeance of a subject" and "under the protection of the King."¹⁶ That is, one had to be born *to another subject*. Aliens could qualify: some were subjects of the king because they entered into a mutual compact exchanging a local and temporary allegiance for a local and temporary protection. "[L]ocal obedience," wrote Coke, although "momentary and

12 Wurman, *supra* note 8, at 331–33; *Calvin's Case* (1608) 77 Eng. Rep. 377, 384; *see also id.* (It is "nec coelum, nec solum, neither the climate nor the soil," that makes a subject, but rather being born "under the ligeance of a subject" and "under the protection of the King." (emphasis omitted)).

13 Wurman, *supra* note 8, at 377–79; 1 WILLIAM BLACKSTONE, COMMENTARIES *361 ("[T]he children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent, so, with regard to the son also, he was held . . . to be born under the king of England's allegiance, represented by his father, the ambassador."). Allegiance is what is owed in exchange for the sovereign's protection. *See id.* at *359.

14 *Inglis v. Trs. of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 164 (1830) (Story, J., concurring in part and dissenting in part) (emphasis added).

15 On the duty owed by the child because of this protection at birth, see BLACKSTONE, *supra* note 13, at *357 ("Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves.").

16 *Calvin's Case*, 77 Eng. Rep. at 384.

uncertain, is yet strong enough to make a natural subject.”¹⁷ That is why their children born in the realm received protection and were themselves natural-born subjects.¹⁸

For much of English history, for an alien to come under the king’s protection seems to have required either a royal safe-conduct or statutory permission to enter the realm.¹⁹ As Blackstone wrote of safe-conducts, “[D]uring the continuance of any safe-conduct, either express or implied, the foreigner is *under the protection* of the king and the law.”²⁰ In one statutory example, the Magna Carta granted foreign merchants “safe and secure conduct”—that is, protection—“unless they have been previously and publicly forbidden.”²¹ And a 1353 statute in the reign of Edward III provided that “to give Courage to Merchant Strangers to come with their Wares and Merchandises into the Realm,” they “may safely and surely *under our Protection and safe-conduct* come and dwell in our said Realm.”²²

Coke and Blackstone could presume that aliens from friendly countries—aliens who came in amity—had permission to be in the realm and were under the protection of the sovereign, *and therefore* any of their children born in the realm were natural-born subjects. Even if protection did not require any express permission for friendly aliens by Coke’s and Blackstone’s eras, their safe-conduct was at most “implied.”²³ Neither history nor logic supplies a reason for supposing that an alien without permission to enter the realm—and certainly an alien “previously and publicly forbidden”²⁴—whether from a friendly or enemy country, would have been under such implied protection or safe-conduct. As Chancellor Kent stated in a case stemming from the War of 1812, “A lawful residence implies protection.”²⁵ An unlawful residence does not. By the common law, it would seem that any child born to such aliens would have fallen outside the scope of the rule.

As to temporary sojourners, they were under the protection of the sovereign and any children born were arguably birthright subjects at common law.²⁶ In an age of increasing international travel and the

17 *Id.*; see also THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 23 (London, E. & R. Nutt & R. Gosling 3d ed. 1724) (“Aliens living in England, are Subjects.”).

18 *Calvin’s Case*, 77 Eng. Rep. at 384 (“local obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is a natural born subject”).

19 *Id.* at 337–43.

20 4 WILLIAM BLACKSTONE, COMMENTARIES *69 (emphasis added).

21 MAGNA CARTA, ch. 30 (1297).

22 Ordinance of the Staple 1353, 27 Edw. 3 stat. 2 c. 2 (Eng.) (emphasis added).

23 BLACKSTONE, *supra* note 20, at *69.

24 MAGNA CARTA, *supra* note 21, at ch. 30.

25 *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813).

26 *Wurman*, *supra* note 8, at 361–65.

resulting dual allegiances, however, several judges, writers, and other authorities argued that temporary visitors were or should be excluded from the common law rule.²⁷ That was the suggestion of one antebellum treatise by Justice Story²⁸ and another by Henry St. George Tucker.²⁹ In one particularly compelling context, the military authorities in Louisiana had to decide during the Civil War whether they could conscript the children born there to French subjects.³⁰ They concluded they could do so only if their parents had been domiciled.³¹ And during the American Revolution, the joint occupation of Oregon, temporary enemy occupation, and forced wartime removal, any child born followed the allegiance and domicile of the father, irrespective of which sovereign had practical control of the territory of birth.³² In the debate over the Civil Rights Act of 1866, which the Fourteenth Amendment intended to constitutionalize, several drafters and other representatives suggested its birthright citizenship provision would exclude the children born to temporary visitors.³³

Finally, the phrase “subject to the jurisdiction thereof” in the Fourteenth Amendment appears to have been intended to have similar legal effect to the common law but to clarify a point about the exclusion of the Indian tribes. Although the Indian tribes were subject to U.S. jurisdiction, including to its criminal jurisdiction,³⁴ they were not subject to the “full and complete” jurisdiction of the United States in the sense of the amendment because the United States did not regulate all

27 *Id.* at 365–72.

28 See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 48, at 48 (Bos., Hilliard, Gray & Co. 1834) (A “reasonable qualification” to the rule of birthright citizenship is “that it should not apply to the children of parents, who were *in itinere* in the country, or abiding there for temporary purposes, as for health, or occasional business.”).

29 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 57 (Winchester, Republican 1836) (“[T]hough a child be born in the country, yet if both his parents were strangers not designing a permanent change of country, it would be sufficiently obvious, that, as he must follow the condition and succeed to the rights of his parents, he would on the principles of natural reason be considered as much a stranger to the country as his father.”).

30 Wurman, *supra* note 8, at 370.

31 *Id.* at 370–72.

32 *Id.* at 343–61.

33 *Id.* at 416–20. These included the chairmen of the judiciary committees, Senator Lyman Trumbull and Representative James Wilson. *Id.*

34 For example, the General Crimes Act of 1817 established federal court jurisdiction over crimes committed within tribal territory in which one of the parties was a non-tribal member. General Crimes Act of 1817, ch. 92, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152). As did the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729, 733 (“*And be it further enacted*, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.”).

of their municipal rights and relations.³⁵ The Indian tribes continued to regulate the contract and property rights among their own members, for example, and to punish crimes committed by one member against another.³⁶ That is also why, Chancellor Kent wrote in a case involving the Oneida Indians, they were not birthright citizens by common law: because they were under the *protection* of the United States in only some respect, not in all respects, and the United States exercised only a limited jurisdiction over them.³⁷ Importantly, as Elias Neibart has recently shown, shortly after the adoption of the Fourteenth Amendment, judges considering claims to birthright citizenship from children born to Indian parents did not appear to deem the precise place of birth—on or off the reservation—relevant.³⁸ Rather, the parents belonged to an “independent political community” and therefore fell outside the scope of the rule.³⁹

Both temporary sojourners and unlawfully present aliens might not be subject to the complete jurisdiction of the United States in the relevant sense. Some post-ratification writers and executive officials thought temporary visitors were not subject to complete U.S. jurisdiction.⁴⁰ One possible reason why is the point about conscription: Temporary visitors and their children cannot be conscripted, at least not without violating the law of nations.⁴¹ Another sense in which they are not subject to the complete jurisdiction of the United States is that

35 As Senator Jacob Howard stated, the phrase referred to a “full and complete jurisdiction,” a jurisdiction “coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.” CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (statement of Sen. Jacob Howard).

36 See *id.* (Senator Howard states that tribal members were excluded because “although born within the limits of a State,” they were not “subject to this full and complete jurisdiction” because, for example, “[t]he United States courts have no power to punish an Indian who is connected with a tribe for a crime committed by him upon another member of the same tribe.”).

37 *Goodell v. Jackson*, 20 Johns. 693, 710 (N.Y. 1823). “They have always been, and are still considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection, and subject to our coercion, so far as the public safety required it, and no farther,” Chancellor Kent stated. *Id.* “Though born within our territorial limits, the *Indians* are considered as born under the dominion of their tribes.” *Id.* at 712. Chancellor Kent continued: neither the states nor the United States interfere “with the disposition, or descent, or tenure of their property, as between themselves,” or “prove their wills,” or apply the school and poor laws, or subject them to the “laws of marriage and divorce” or to the “laws of the *United States*, against high treason.” *Id.* at 710.

38 Elias Neibart, *Indians and Citizenship: Territorial Birth & Parental Status in Contemporaneous Caselaw*, HARV. J.L. & PUB. POL’Y: PER CURIAM, Winter 2026, No. 3, at 1, 2.

39 See *id.* at 3 (quoting *McKay v. Campbell*, 16 F. Cas. 161, 167 (D. Or. 1871) (No. 8,840)).

40 See Wurman, *supra* note 8, at 435–38.

41 See *id.* at 445.

citizens and domiciled foreigners are subject to the general jurisdiction of its courts even when abroad; temporary visitors are not, of course, subject to the general jurisdiction of the courts once they have left.⁴² Still another possibility is that, under the law of nations, the hosting nation had no legislative jurisdiction over the personal status rights (such as marriage and legitimacy) of foreigners temporarily within its physical jurisdiction.⁴³

As for unlawfully present aliens, there are three senses in which they might not be subject to the complete jurisdiction of the United States, at least as a constitutional default. The first is that U.S. jurisdiction comes with benefits, too, including the right to sue in its courts. In the War of 1812 case mentioned earlier, Chancellor Kent wrote that “[a] lawful residence implies protection, *and a capacity to sue and be sued*.”⁴⁴ Being under the sovereign’s protection is *why* the alien could access the sovereign’s courts and sue on his contracts. In other words, a lawful residence implies protection, which implies *amenability* to U.S. jurisdiction—including the right to access courts. Still another sense in which unlawfully present aliens may not have been subject to complete U.S. jurisdiction is that it was a violation of the law of nations to enter another sovereign’s realm without that sovereign’s permission.⁴⁵ This suggests that international law could govern the case rather than municipal law, much like how martial law and not municipal law governed enemy aliens.⁴⁶ Unlike martial law, however, there is no well-developed body of international law dealing with unlawful migration. Third and finally, unlawfully present aliens may not be subject to the complete jurisdiction to the extent they can be classified as temporary visitors—a question that Justices Thomas and Gorsuch, in dissent in *Barbara*, deferred to another day.⁴⁷

II. WHITTINGTON AND THE COMMON LAW

Nothing in the responses and articles of Professors Whittington, Magliocca, and Ramsey has undermined the conclusions reached by my prior article, although all make important contributions. My disagreement with Professor Ramsey is quite narrow, a sentiment he shares. My disagreement with Whittington is much more fundamental,

42 *Id.* at 442; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile . . .”).

43 Wurman, *supra* note 8, at 432–41.

44 *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813) (emphasis added).

45 Wurman, *supra* note 8, at 448 n.503.

46 *Id.* at 377–78 (discussing enemy aliens).

47 *Trump v. Barbara*, 146 S. Ct. 2438, 2505–06, n.10 (2026) (Thomas, J., dissenting); *id.* at 2546–47 (Gorsuch, J., dissenting).

although a recent exchange has led me to conclude that Whittington does not actually believe the rule was “birth alone” on territory controlled by the sovereign, despite the title of his article.⁴⁸ Both Whittington and Magliocca focus on the common law, so this reply starts with them.

As to Whittington’s argument, this Part makes three principal points.⁴⁹ First, Whittington’s statement of the common law rule is incorrect. The rule was not birth on the sovereign’s territory alone, but rather birth to parents under the sovereign’s protection. Second, Whittington fails to appreciate the connection between permission to enter and the extension of the sovereign’s protection. Third, a subsequent exchange has revealed that Professor Whittington believes that the applicability of the Fourteenth Amendment’s birthright rule is contingent upon the particular laws of Congress that exist and the extent to which they demonstrate a “tolerance” of the alien’s presence. On this view, the differences between our two approaches diminish significantly.

A. The Common Law Rule

Whittington describes the general birthright rule as “birth alone” on the sovereign’s territory. To explain why ambassadors and invaders are “exceptions” to the rule of subjectship by “birth alone,” Whittington then relies on the fiction of extraterritoriality—the ambassador is always “at home,” for example.⁵⁰ For this argument, Whittington relies on Emerich de Vattel’s *The Law of Nations*, in which he wrote that

48 THE FEDERALIST SOCIETY, [LIVE] *Birthright Citizenship in Context: Law, History, and Contemporary Debate*, at 5:06–12:42, (YouTube, Feb. 19, 2026), https://www.youtube.com/watch?v=PS0F_PNIsSo [<https://perma.cc/PR4V-RFQL>] (on file with the Federalist Society); see also *infra* Part II.C.

49 As an initial matter, it must also be noted that much of Whittington’s article targets an older set of arguments about birthright citizenship and whether the framers of the Fourteenth Amendment intended to adopt a more consensualist understanding of citizenship and to reject the common law. See generally Whittington, *supra* note 1; PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985); see also PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 207–16 (1998); Edward J. Erler, *American Citizenship and Postmodern Challenges*, in EDWARD J. ERLER, THOMAS G. WEST & JOHN MARINI, *THE FOUNDERS ON CITIZENSHIP AND IMMIGRATION* 25–73 (2007); John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 958–66 (2008). Surprisingly little of Whittington’s article is devoted to responding to new scholarship, including to the thrust of my own prior article which is about the scope of the common law rule itself, and which does not argue the framers intended to abandon the common law. Wurman, *supra* note 8, at 321–22.

50 Whittington, *supra* note 1, at 478, 479 (“The ambassador in the king’s service is ‘at home,’ even when he is abroad.” *Id.* at 479.).

children born out of the country, in the armies of state, or in the house of its minister at a foreign court, are reputed born in the country; for, a citizen who is absent with his family, on the service of the state, but still dependent on it, and subject to its jurisdiction, cannot be considered as having quitted its territory.⁵¹

Thus, Whittington concludes that the “exceptions” to birthright subjectship are limited to being “in service of a foreign prince.”⁵²

There are several problems with this account. To start, Vattel, although informative, is not a common law writer.⁵³ And if one is to rely on Vattel, one must explain why his rule of extraterritoriality is to be followed but his rule of citizenship by descent should be ignored.⁵⁴ In any event, a fiction of extraterritoriality is not how the common law sources describe the rule. It is not even clear how the rule would apply to invading armies, which are on the *king’s* soil, not their own. “[I]f enemies should come into the realm, and possess town or fort, and have issue there,” Coke explained, “that issue is no subject to the King of England, *though he be born upon his soil*, and under his meridian, for that he was not born under the ligeance of a subject, nor under the protection of the King.”⁵⁵

The reason, then, that invaders were excluded was because although they were on the king’s soil, they were not under the king’s *protection*. They were not in a “mutual compact” with the king, reciprocally exchanging allegiance and protection.⁵⁶ That is also how Blackstone, as noted above, described the rule with respect to ambassadors.⁵⁷ Blackstone used the counterpart to protection, “allegiance,” and the context was the English king’s ambassadors abroad:

[T]he children of the king’s ambassadors . . . [are] natural subjects [because] the father, though in a foreign country, owes not even a

51 *Id.* at 468 (quoting MONSIEUR DE VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* § 217, at 102 (Joseph Chitty, ed., Phila., T. & J.W. Johnson, 6th ed. 1844) (1758)).

52 *Id.* at 478; *see also id.* at 513 (stating another exception for “being actively in the service of a foreign power at the time and place of the child’s birth”); *id.* at 523 (“It is acting in the service of a foreign state that puts one outside the jurisdiction of the laws.”).

53 *See DE VATTEL, supra* note 53, at v.

54 *Id.* at § 212, at 101 (“The natives, or natural-born citizens, are those born in the country, of parents who are citizens.”).

55 *Calvin’s Case* (1608) 77 Eng. Rep. 377, 384 (emphasis added).

56 *Id.* at 382 (describing this “mutual bond and obligation”); BLACKSTONE, *supra* note 13, at *354 (describing the origins of this exchange in the “mutual trust or confidence” of lord and vassal); *Inglis v. Trs. of Sailor’s Snug Harbour*, 28 U.S. (3 Pet.) 99, 124–25 (1830) (“the doctrine of allegiance . . . rests on the ground of a mutual compact between the government and the citizen or subject,” and “is the tie which binds the governed to their government, in return for the protection which the government affords them”).

57 *See supra* note 13 and accompanying text.

local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held . . . to be born under the king of England's allegiance, represented by his father, the ambassador.⁵⁸

There is no fiction of extraterritoriality in Blackstone.

Once it is clear that the sources rely on allegiance and, in particular, protection, and not on any fiction of extraterritoriality, service to a foreign prince always excludes one from birthright citizenship because such persons are not under the protection, and therefore not within the allegiance, of the local sovereign. But that might, or might not, exhaust the set of individuals who are not under the sovereign's protection. Whittington does not seriously grapple with the finding of my own scholarship that in England protection was extended to at least some groups of friendly aliens through grants of safe-conduct or statutory permission to enter.⁵⁹ Why would entering the realm without the king's permission—indeed, contrary to the sovereign's laws—have necessarily extended the king's protection to an alien? Whittington relies on modern presuppositions to assume that they would be protected.⁶⁰ The evidence from the safe-conducts suggests otherwise: Such individuals are unlikely to have been under the king's protection at common law.

Whittington also recognizes an important exception to his rule, which would not be an exception under the more precise rule involving the mutual compact between parent and sovereign. Whittington recognizes that in occupied territory, any child born of an *invader* would be alien born, but there was significant authority for the proposition that a child born to a *loyal subject* would still be considered a natural-born subject of the king's.⁶¹ That view makes no sense if the rule was

58 BLACKSTONE, *supra* note 13, at *361.

59 See *supra* notes 12–18 and accompanying text.

60 Certainly, he presumes that children born on U.S. controlled territory are automatically entitled to protection, irrespective of the status of the parents. Whittington, *supra* note 1, at 527–30. But that ignores that the relevant question was whether the parents were under the sovereign's protection, as explained further presently.

61 *Id.* at 481–82. Story described the common law rule as follows:

[T]he children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens; but the children of the natives, born during such temporary occupation by conquest, are, upon a reconquest or reoccupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy.

Inglis v. Trs. of Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 156 (1830) (Story, J., concurring in part and dissenting in part). If, however, the parents of the natives were actually adhering to the enemy, then they would be considered to be under the protection of the enemy. Because John Inglis's "parents were under the protection of, and adhering to the British government de facto," John "was to all intents and purposes an alien born." *Id.* at 167. Kent restated the

birth on territory controlled by the sovereign. But it makes perfect sense if the parents are still in the mutual compact with their sovereign, at least until a permanent acquisition of territory.⁶² And under Whittington's view, it is unclear whether the children born in seceded states during the Civil War should have been considered citizens if the government of the United States did not exercise practical control over the territory.⁶³

The protection and allegiance view also better explains the exclusion of the Indian tribes. Whittington argues that the "subject to the jurisdiction" language was intended to address the "peculiar situation of the Indian tribes," whose members "were both within the territory of the United States and yet treated as foreign nations for many purposes."⁶⁴ Exactly right. Whittington recognizes that the territorial theory does not work here.⁶⁵ What Whittington does not say here explicitly is that the foreign service theory also does not work. Tribal members are not "in service" to a foreign prince in the same way as are ambassadors or foreign armies. They are simply governed, to some degree, by their tribal authorities. They are, as Chancellor Kent wrote, under the protection of the United States—and thus subject to its jurisdiction—*only to a certain extent*.⁶⁶

A related problem with Whittington's account is that it generally ignores the significant evidence for the proposition that the relevant protection was that of the parents, not the child. Whittington relies on casual statements about "birth alone," and suggests that "rule" is mere

rule from Story's opinion. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *42, at 41 (New York, William Kent, 5th ed., 1844).

62 See Wurman, *supra* note 8, at 402–03.

63 In contrast, Professor Ramsey recognizes that although the United States "could not effectively enforce that jurisdiction through much of the South for a period of time, . . . that should not matter any more than the fact that sometimes ordinary criminals cannot be apprehended." Ramsey, *supra* note 4, at 220.

64 Whittington, *supra* note 1, at 506.

65 See *id.* at 506. He later qualifies that "the land is doing the important work" because "Indian land is within the territory of the United States but is not governed by the United States." *Id.* (emphasis omitted). On this account, though, one could just as well say an ambassador is "within the territory of the United States but is not governed by the United States," and so the extraterritorial fiction Whittington deploys earlier would be entirely unnecessary. *Id.* Both examples make more sense under the traditional common law conception: Indian tribes and ambassadors are not under the protection of the United States in the relevant sense. Additionally, the descriptive point is empirically wrong: The United States did govern tribes to some degree, for example in the General Crimes Act of 1817 and subsequently the Major Crimes Act of 1885. They were not, however, fully subject to U.S. law. See *supra* notes 27–32 and accompanying text.

66 Goodell v. Jackson, 20 Johns. 693, 710 (N.Y. 1823) ("They have always been, and are still considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection, and subject to our coercion, so far as the public safety required it, and no farther.").

birth on soil, irrespective of parental status.⁶⁷ Whittington here recognizes that protection was relevant, but argues that protection flows automatically to any child born on the sovereign's soil and under the sovereign's control.⁶⁸ Yet, crucially, Whittington provides no example—and I know of none—in which a child was under the protection of the sovereign even though the parent was not. And it would be surprising to find such an example: It would be surprising if the common law ignored the natural relation of parent and child. The sovereign's protection extends *through* the parents. Because the parents are under the sovereign's protection, so is any child born to them.

Indeed, numerous common law sources explain that the relevant question was whether the parents were under the protection of the sovereign. As noted previously, here is Coke: Though a child born to an invader "be born upon [the king's] soil," he was not a birthright subject because "he was not born under the ligeance of a subject, nor under the protection of the King."⁶⁹ That is, the child had to be born to a *subject*—temporary or permanent—of the king's, meaning to parents who were under the protection and therefore within the allegiance of the king. And Blackstone: A child born to an ambassador is said "to be born under the king of England's allegiance, *represented by his father*, the ambassador."⁷⁰ And Story: "Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, *while the parents are resident there under the protection of the government*, and owing a temporary allegiance thereto, are subjects by birth."⁷¹

Senator Reverdy Johnson, whom Whittington cites, also relied on parental status. Whittington describes and quotes him as follows: "Johnson agreed with the purpose of the proposed language—which was to settle the traditional rule that citizenship followed from the 'the fact of birth within the territory of the United States, born *of parents who* at the time were subject to the authority of the United States.'"⁷² Of course, if *children born* are not subject to the authority of the United States, it is because of the status *of their parents*.

67 Whittington, *supra* note 1, at 512–13 (citizenship "depends most fundamentally not on the circumstances of the *parent* but on the circumstances of the *child* at the moment of birth."); *id.* at 529 ("The text of the Fourteenth Amendment is primarily concerned with the status of children born in the United States and not their parents. The rule quite literally refers only to the child . . .").

68 See *id.* at 512–13, 529.

69 Calvin's Case (1608) 77 Eng. Rep. 377, 384.

70 BLACKSTONE, *supra* note 13, at *361 (emphasis added).

71 *Inglis v. Trs. of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 164 (1830) (Story, J., concurring in part and dissenting in part) (emphasis added).

72 Whittington, *supra* note 1, at 504 (emphasis added) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Reverdy Johnson)).

Further, all of the revolutionary right of election cases, and the temporary occupation, joint occupation, and forced removal cases relied on the domicile or allegiance of the parents.⁷³ And, contrary to Whittington's suggestion, *Lynch v. Clarke* was not to the contrary.⁷⁴ The case reaffirmed that the *political* status of the parents—that is, whether the parents were themselves *citizens* or *aliens*—was irrelevant.⁷⁵ That was entirely consistent with the common law rule that alien parents could produce natural-born subjects. The case did not hold that parental status generally was irrelevant. It would have been flatly inconsistent with the longstanding common law rule to hold that whether the parents were under the protection of the sovereign, and thus owed the sovereign allegiance, was irrelevant.⁷⁶

B. *Permission and Protection*

Whittington makes two arguments against the specific proposition that unlawfully present aliens are not covered by the birthright rule. He first rejects the claim, suggested by me and a coauthor in an opinion piece, that aliens who come illegally do not come in “amity” and therefore do not fall under Coke's rule in *Calvin's Case* that aliens who come in amity are under the protection of the king and their children born in the realm are birthright subjects.⁷⁷ Whittington writes, correctly, that the world of Coke divided aliens into *amicus* and *inimicus*—alien friends and alien enemies—and the latter were aliens

73 See, e.g., Wurman, *supra* note 8, at 343–70.

74 See *Lynch v. Clarke*, 1 Sand Ch. 583 (N.Y. Ch. 1844); Whittington, *supra* note 1, at 487.

75 See *Lynch*, 1 Sand Ch. at 639, 655–56; Wurman, *supra* note 8, at 364–65.

76 Thus, it is beside the point when Whittington writes:

[T]he entire history of the common-law rule emphasized that children born of aliens were natives, despite the fact that their parents were neither natives nor subjects themselves and continued to be under foreign allegiances. Despite the alien status of the parents, the native-born child was under the protection of the local government, and it was that extension of jurisdiction by the local government over the infant within its territory that created the bonds of allegiance that determined a natural-born citizen.

Whittington, *supra* note 1, at 513. To be sure, Whittington, as noted, may simply be responding to older claims about foreign allegiance. The claim of my article, however, was that although the political status (citizen or foreigner) of the parent was irrelevant at common law, the parents still had to be under the protection of the sovereign, which itself required permission to enter. See Wurman, *supra* note 8, at 364–65.

77 See Whittington, *supra* note 1, at 514–27; 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/HAA4-9WJ6].

whose nations were at war with England.⁷⁸ Unlawfully present aliens, Whittington writes, are not alien enemies.⁷⁹

That is true. And for that reason, the opinion piece should not have used the word “amity” without further elaboration. The point, however—which was elaborated significantly in the longer article—was that in Coke’s world, alien friends were under the protection of the sovereign *because that is what the then-existing statutes provided*.⁸⁰ And even if protection was “implied” without express statutory or individual permission, implications can be negated by statutory or individual prohibitions.⁸¹ Coke and Blackstone could say that aliens who came in amity were under the protection of the sovereign because that is what the Magna Carta, other charters, and the statutes of Edward III said as to merchants,⁸² and because of the apparent eventual presumption that friendly aliens generally had a right to be in the realm.⁸³

Thus, alien friends were under the protection of the king, but alien enemies were not, unless the latter received express (or implied) permission to enter through a safe-conduct.⁸⁴ But just as an enemy alien could come under the king’s protection with a safe-conduct, an alien friend might fall *outside* the king’s protection without permission to enter. Certainly, it is unclear why any alien would have been under the king’s protection if such alien came *contrary* to the sovereign’s express declaration in statute or otherwise—if, as the Magna Carta stated, the alien had been “previously and publicly forbidden.”⁸⁵ Whether one describes that alien as coming in “amity,” or instead conjures a third

78 Whittington, *supra* note 1, at 531.

79 *See id.*

80 *See supra* note 17 and accompanying text.

81 *See supra* notes 22, 25 and accompanying text.

82 *See supra* notes 25–27 and accompanying text. For another charter extending protection, see CARTA MERCATORIA, in NORMAN GRAS, THE EARLY ENGLISH CUSTOMS SYSTEM 258–59 (1918).

83 In a still more recent paper, Whittington and a co-author, Benjamin Keener, argue that the statutes and charters dealt only with merchants, which were a special category governed by their own legal rules. *See* Benjamin Keener & Keith E. Whittington, Demystifying Birthright Citizenship 60–70 (July 11, 2026) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6948480 [<https://perma.cc/S6AR-LYUR>] They argue that the common law rule generally provided protection, and the laws respecting merchants merely “supplement[ed]” that rule. *Id.* at 65, 60–70. It remains the case, however, that it appears to have been widely believed that some categories of aliens required express permission to enter, and that, indeed, if they were “previously or publicly forbidden” then they would not have been under the sovereign’s protection. *See supra* notes 21–27 and accompanying text. And merchants, after all, are not ambassadors or invaders. The historical record respecting merchants strongly suggests that the general rule of protection depended on the sovereign’s consent, and that that consent—whether explicit or implicit—could be revoked.

84 *See supra* notes 15–16 and accompanying text.

85 *See* MAGNA CARTA, *supra* note 23, at ch. 30 (1297).

category to describe the situation, is immaterial so long as one understands that one could be an alien from a friendly nation but not under the protection of the king.

Whittington next argues that it would be radical to suggest that alien friends were not under the protection of the sovereign even if they did not have permission to enter.⁸⁶ He argues that, if that were true, then Americans would be able to kill illegal aliens with impunity.⁸⁷ The argument is exaggerated for several reasons. Ambassadors are not under the “protection” of the local sovereign in the sense of the birthright rule.⁸⁸ Yet under the law of nations, it is obviously the case that the local sovereign must provide *protection of the laws* to the ambassador; they cannot allow ambassadors to be injured by local citizens with impunity. In Blackstone’s passage on safe-conducts, he distinguished between the protection *of the king* and the protection *of the law*.⁸⁹ Analogously, the states must still guarantee all aliens the *protection of the laws* under the Equal Protection Clause.⁹⁰ At a minimum that includes protection from physical violence.⁹¹ Whether they are under the full protection of the United States government—whether they can sue and be sued in its courts, for example—is another matter. Chancellor Kent’s dictum suggests not.⁹² Similarly, the Oneida Indians (to draw from another Chancellor Kent case) were under the partial protection and subject to the partial coercion of the United States, but not under the complete protection and not subject to the nation’s full jurisdiction.⁹³

To summarize, Whittington’s *By Birth Alone* overstates its case because the common law rule was not “birth alone,” and “foreign service” and “extraterritoriality” were not the exceptions. Nor was the status of the parents irrelevant. Rather, the rule was birth on the soil to parents under the protection of the sovereign. That rule generally covered aliens with permission to be in the realm but excluded ambassadors and invaders. And it might exclude other categories, such as children born of parents without permission to be in the country or

86 See Whittington, *supra* note 1, at 527.

87 See *id.* at 528.

88 See *supra* note 13 and accompanying text.

89 See BLACKSTONE, *supra* note 22, at *69.

90 U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

91 See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 3 (2008) [hereinafter Green, *Pre-Enactment History*]; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 222 (2009) [hereinafter Green, *Subsequent Interpretation*].

92 See *supra* note 21 and accompanying text.

93 See Wurman, *supra* note 8, at 390; *Goodell v. Jackson*, 20 Johns. 693, 710 (N.Y. 1823).

at least who came *contrary* to the sovereign's will. It is true that several sources summarize the rule as being "by birth alone," or say that "*nativity* furnishes the rule."⁹⁴ But such statements work most of the time because of the parameters in which those statements are invoked. Just as Newton's laws cannot explain Mercury's perihelion precession, however, "birth alone" cannot explain several anomalies. Just as in physics, we need a new rule. At common law, the relevant rule was not nativity *simpliciter*, but rather birth on the sovereign's soil to parents under the sovereign's protection.

C. *The Defeasibility of the Constitutional Rule*

The final point about Whittington's view is inspired by a recent exchange.⁹⁵ In that exchange, Whittington acknowledged that Congress may deem arriving aliens to be outside U.S. territory.⁹⁶ But if Congress can create this fiction for arriving aliens, Congress should be able to apply that fiction to all aliens who enter without admission. Whittington acknowledged that whether that fiction is sufficient to derogate from the birthright rule, or whether Congress can take other actions to withdraw its jurisdiction, depends on how much U.S. governing authority is applied.⁹⁷ He thus effectively acknowledges that the rule was not actually "birth alone," despite the title of his work. The sovereign does not *have* to subject all within its territory to its jurisdiction, and the persons to whom it can choose to act in this manner are not limited to foreign soldiers and ambassadors. Whittington suggested that the constitutional default may not apply to aliens being

94 See, e.g., Whittington, *supra* note 1, at 466.

95 See THE FEDERALIST SOCIETY, *supra* note 50.

96 See *id.* at 36:09–36:30.

97 Whittington stated:

I think the crucial issue for alien enemies and alien friends is there is discretionary authority under the common law about how to treat them. And there is some default assumptions about how they will be treated. But relative to the subject of jurisdiction language, I actually do think it's true that this does not perpetually constitutionalize particular classes as being subject to the jurisdiction. It's a question of how Congress is actually exercising—how the federal government is actually exercising—its governing authority. And that can be withdrawn as well as extended.

Id. at 36:16–36:41. Later he explained about the rule that "it's not just birth, it's birth subject to jurisdiction, and then the question is what's the scope and meaning of subject to the jurisdiction, and I think the Court would make a mistake to say that was somehow fixed in stone. Subject to jurisdiction is itself a function of governmental practices and conduct." *Id.* at 50:34–50:49.

actively removed from the country because the sovereign is no longer tolerating their presence.⁹⁸

This exchange is significant for two reasons. First, it suggests that even on Whittington's view, the Supreme Court was wrong to conclude that the Fourteenth Amendment *compels* birthright citizenship to anyone born in the United States. Rather, citizenship depends on other features of the legal system—particularly the extent to which Congress gives the aliens the benefits of U.S. law and whether the United States can be said to be tolerating the alien's presence. And if so, the argument that "birth alone" creates citizenship is inaccurate. Even on Whittington's view, it is not birth alone, but rather birth on U.S. soil with the tolerance of the sovereign. Second, tolerance is similar, if not quite identical, to consent. The differences between our views thus diminish significantly. On my account, the Fourteenth Amendment does not compel birthright citizenship to unlawfully present aliens, but Congress can always subject those aliens to the full benefits and burdens of U.S. protection and jurisdiction. On Whittington's account, the Fourteenth Amendment compels birthright citizenship for unlawfully present aliens, unless the government stops tolerating their presence sufficiently forcefully. Our points of departure are different, but our destinations, though not identical, are very near one another.

III. MAGLIOCCA AND THE ROMA PEOPLE

Professor Magliocca's piece relating to the status of the Roma people (also known as gypsies) at common law⁹⁹ is an important contribution but does not establish that birth on soil alone was the criterion for birthright subjectship and that permission to be in the realm was irrelevant. As I understand Magliocca's argument, it makes two points: first, that Roma were illegally present in England and yet

98 Whittington explained that the rule respecting enemy aliens was that "if we tolerate your presence within the country then we will continue to exercise governing authority over you" and "we will continue to offer protection to you." *Id.* at 24:53–24:58. And if the king "does not take active steps to remove you" then the alien will continue to be subject to the "governing authority." *Id.* at 25:30–25:36. Whittington then extends this rule to all unlawfully present aliens in the United States and argues that:

If you are not being actively removed from the country, then you are still expected to play by the rules of the local jurisdiction, and the governance will continue to both place demands on you and also expect that you will abide by local laws until the moment comes when we choose to actually take action to deport you.

Id. at 28:40–29:08. Whittington thinks this condition does not appertain today because the government does in practice "tolerate" the presence of unlawfully present aliens in part because of enforcement priorities. *Id.* at 29:08–29:35. He later reiterates that aliens actively being deported are arguably not being tolerated. *Id.* at 52:17–52:35.

99 See Magliocca, *supra* note 9.

their children were treated as natural-born subjects;¹⁰⁰ and second, that Roma in America had no domicile and yet the proponents of the Citizenship Clause thought they would be included within its rule.¹⁰¹ The majority in the *Barbara* case appears to have found the first claim persuasive, arguing that the rule of birth on the sovereign's soil "applied to children born in the realm of parents subject to expulsion."¹⁰² The "children of 'gypsies' . . . born in the realm," the Court asserted, "were natural-born subjects, notwithstanding that British law at the time 'directed' the Roma people 'to avoid the realm' under 'pain of imprisonment' or even death."¹⁰³ The evidence does not bear out that interpretation.

A. *The Roma in England*

Magliocca focuses on a statute from the reign of Queen Elizabeth that treated their children born in the realm as subjects.¹⁰⁴ The claim is that the statute of 1563 provided that any of the gypsies born in the realm could not be expelled from the realm, and the right against expulsion was a central right of natural-born subjects.¹⁰⁵ Even if Magliocca is correct that that is what the statute does, it would be a classic reversible reference that can stand for the proposition Magliocca maintains, or for the opposite proposition.¹⁰⁶ The statute was enacted, Magliocca recognizes, because of "scruple and doubt" about the status of children born in England who were found in the company of unlawfully present gypsies.¹⁰⁷ The Act merely stated that a law punishing Roma vagrants and allowing their deportation "shall not extend to compel any person or persons born within any of the Queen's Majesty's Dominions to depart out of this Realm of England or Wales."¹⁰⁸ Instead, Magliocca explains, quoting the statute, such persons were encouraged "to leave their said naughty idle and ungodly life and

100 See Magliocca, *supra* note 9.

101 See Magliocca, *supra* note 9.

102 *Trump v. Barbara*, 146 S. Ct. 2438, 2446 (2026).

103 *Id.* (quoting BLACKSTONE, *supra* note 13, at *166 (1769), and citing Brief for Gerard N. Magliocca as Amicus Curiae Supporting Respondents at 2–4, *Barbara*, 146 S. Ct. 2438 (No. 25-365)).

104 See Magliocca, *supra* note 9, at 545–46.

105 *Id.*

106 On reversible references generally, see DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 44 (1970) (describing a reversible reference as "a chameleonlike statement which changes its color with its context and which might variously be used to prove the proposition that *X* is the case or that not-*X* is the case, as the author wishes").

107 Magliocca, *supra* note 9, at 545, 545–46; An Act for the Punishment of Vagabonds, Calling Themselves Egyptians 1563, 5 Eliz., c. 20 (Eng.) (English modernized).

108 5 Eliz., c. 20.

company and to place themselves in some honest service, or to exercise themselves at home with their parents or elsewhere honestly in some lawful work trade or occupation.”¹⁰⁹

Even if the statute is referencing children born to Roma parents, the statute’s language is hardly declaratory of the common law. It does not state that it is conferring natural-born status on the children born in the realm or recognizing that preexisting status.¹¹⁰ It merely provides that those individuals were not to be deported by virtue of their being among the Roma. It resolves the “scruple and doubt” about deportability by simply avoiding the question and declaring all persons among the gypsies of whatever provenance to be punishable by death.¹¹¹ Blackstone refers to this statute in his chapter on penal law, not in his chapter on birthright subjectship.¹¹²

Still more problematic is the fact that the statute was likely centrally concerned with *English* children found in the company of the Roma, and it has been so understood by scholars. Magliocca writes that Blackstone described “native-born subjects” being among the Roma people, and the Court relied on this passage.¹¹³ The reference is most naturally interpreted as referring to native-born subjects who adopt a gypsy lifestyle. Blackstone first references “the Egyptians themselves” who “remain one month in this kingdom,” and then adds, “or if any person, being fourteen years old, (whether natural born subject or stranger) which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them”¹¹⁴ The Elizabethan statute similarly referred to persons born within the realm “and are *or shall become* of the Fellowship or Companie” of the Gypsies “by transforming or disguising themselves in their apparel or in a certain counterfeit speech or behavior.”¹¹⁵ A statute enacted subsequently in Elizabeth’s reign concerned itself with “persons . . .

109 Magliocca, *supra* note 9, at 545–46 (quoting 5 Eliz., ch. 20).

110 Magliocca writes that sparing deportation suggests natural-born status. Magliocca, *supra* note 9, at 542, 546. That does not affect the reversible reference problem. And as explained further below, the statute appears to have been aimed at English-born children found in the company of the Roma.

111 See David Cressy, *Trouble with the Gypsies in Early Modern England*, 59 HIST. J. 45, 56 (2016).

112 The relevant chapter is in the fourth volume of Blackstone, whereas birthright subjectship is discussed in the first volume. Compare BLACKSTONE, *supra* note 22, at *166, with BLACKSTONE, *supra* note 13, at *359–61.

113 Magliocca, *supra* note 9, at 544; Trump v. Barbara, 146 S. Ct. 2438, 2446 (2026).

114 BLACKSTONE, *supra* note 22, at *166.

115 An Act for the Punishment of Vagabonds, Calling Themselves Egyptians 1563, 5 Eliz., c. 20 (Eng.) (English modernized) (emphasis added).

wandering and pretending themselves to be Egyptians or wandering in the habit, form, or attire of counterfeit Egyptians.”¹¹⁶

The English historian John Morgan has argued that the Elizabethan statute was enacted not to carve out natural-born subjects from the penalties against gypsies, but rather to capture fully all those individuals behaving as “Egyptians,” even if they were native born.¹¹⁷ The prior statutes had emphasized that these vagabonds were aliens or strangers, meaning it was difficult to punish those found in their company who were not foreign born; the Elizabethan statute sought to add to the categories of those who could be punished.¹¹⁸ The Privy Council was well aware that some of the Queen’s “natural born subjects, *and some of them descended of good parentage*,” were engaging in a gypsy lifestyle, having been warned by the Yorkshire Justices in 1560.¹¹⁹ Thus, “[t]he Elizabethan statutes turned a personified crime, related to alien status, into one of behaviour and social status,”¹²⁰ and “itinerancy rather than outlandishness became legislators’ primary identifier.”¹²¹ When “scruple and doubt” had arisen about whether the penal laws involving gypsies “being Strangers borne and transported into this Realme of Englande” could be applied to native-born subjects, Morgan concludes that “[t]he Statute’s definitive answer to whether this was possible was ‘yes’”—not, as Magliocca argues, “no.”¹²²

To be sure, some persons found among the Roma would have been born in England to Roma parents. It is hard to imagine that the authorities would have treated them differently than they would have treated natural-born subjects who subsequently joined the Roma. The point is only that the statute was not principally concerned with them, and we do not know how the English would have addressed themselves to the problem had they confronted it specifically. The Supreme Court and Professor Magliocca therefore relied on sparse and disconnected passages from Blackstone and the statute of 1563 to paint an overall impression that is not borne out by the evidence. The Roma example simply cannot bear the weight that the Court attributed to it.

B. *The Roma in America*

Turning to the Roma in America, about whom there was a brief discussion during the legislative debates over the Fourteenth

116 The Vagabonds Act 1597, 39 Eliz., c. 4. (Eng.) (English modernized).

117 John Morgan, *‘Counterfeit Egyptians’: The Construction and Implementation of a Criminal Identity in Early Modern England*, 26 *ROMANI STUD.*, 105, 111–15 (2016).

118 *Id.*

119 *Id.* at 118 (emphasis added).

120 *Id.* at 115.

121 *Id.* at 116.

122 *Id.* at 117.

Amendment, Magliocca writes that “the inclusion of the Roma within the Citizenship Clause’s grant of citizenship destroys the argument that domicile is a requirement for birthright citizenship” because “Gypsies had no domicile.”¹²³ “The one adjective that almost everyone used to describe [gypsies],” Magliocca adds, “was some form of ‘wandering.’”¹²⁴

Even if the short debate in the legislative history is dispositive on the question of whether the Roma would have been included in birthright citizenship, the analogy is inapposite.¹²⁵ Even if the Roma people were itinerant, it does not follow that they were not domiciled in the United States. After all, they were itinerant *within* the United States, and often within a particular state.¹²⁶ Vagrants are itinerants, yet no one would say that the child born of an American vagrant in America was not a citizen. The distinction was between temporary visitors in the United States and those lawfully and permanently there. Magliocca gives no reason to think that the Roma people were either illegally or merely transiently present in the United States. They had no known foreign domicile or foreign allegiance and were not under the protection of some foreign government.¹²⁷

Magliocca ends his contribution with a quotation from John Bingham: “If a man is not a citizen of the country in which he was born, in God’s name of what country is he a citizen? If he may not live there, where has he a right to live?”¹²⁸ Of course, that kind of thinking is quite anachronistic: Most countries today adopt the contrary rule of citizenship-by-descent, and even in the nineteenth century and before all European nations, including the United Kingdom, had elements of both principles.¹²⁹ Nor does the rule necessarily make sense in the modern age, particularly with respect to tourists and other transient visitors who take their American-born children back home for the rest of their childhood.

But putting all that aside, one must recall the context in which Bingham was speaking. He was advocating for citizenship for the freed people—no more, no less. Indeed, in the debates over the Civil Rights Act, Bingham gave a more comprehensive definition of birthright citizenship: The Act, he said, was “simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign

123 Magliocca, *supra* note 9, at 550.

124 *Id.* (citing sources).

125 For my earlier discussion of the Roma, see Wurman, *supra* note 8, at 413–16.

126 *See id.*

127 *See* Magliocca, *supra* note 9, at 550.

128 Magliocca, *supra* note 9, at 552 (quoting *Speech of Hon. John A. Bingham at Cleveland, SUMMIT CNTY. BEACON*, Sept. 26, 1867, at 1).

129 Wurman, *supra* note 8, at 338–39.

sovereignty is, in the language of your Constitution itself, a natural-born citizen.”¹³⁰ Note here two important features: The relevant status was that of the *parents*, and the desideratum was not owing *any* allegiance to a foreign sovereignty—which would include the freed people but might exclude temporary visitors and unlawfully present aliens.¹³¹ And in 1859 he declared that “all free persons born *and domiciled* within the United States” were citizens.¹³² The statement seems to suggest the parents had to be domiciled, since the domiciliary of the child followed that of the parent.¹³³

IV. RAMSEY AND JURISDICTION

I turn, finally, to Professor Ramsey’s account of jurisdiction. I agree with Ramsey that our disagreement is quite narrow. In his original article on birthright citizenship¹³⁴ and in his more recent essay, Ramsey adopts a version of the territorial birthright rule: The United States must have actual practical control and sovereignty over the territory in question.¹³⁵ Ramsey explains that “a person was subject to a nation’s jurisdiction if that person was under that nation’s lawmaking, law enforcement, and law adjudication authority.”¹³⁶ That would exclude enemy invaders, but it would also seem to exclude a sovereign’s own subjects living in occupied territory—a point that Ramsey does not address.¹³⁷ And it would exclude ambassadors because there is an

130 CONG. GLOBE, 39th Cong., 1st Sess. at 1291 (1866) (statement of Rep. John Bingham).

131 As noted in *Jurisdiction and Citizenship*, lawful permanent residents, particularly those who had declared an intent to naturalize, were treated for all intents and purposes the same as citizens. Wurman, *supra* note 8, at 404.

132 CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859) (statement of Rep. John Bingham) (emphasis added).

133 STORY, *supra* note 19, at 44 (“[T]he place of birth of a person is considered as his domicil, if it is at the time of his birth the domicil of his parents. . . . [M]inors are generally deemed incapable . . . of changing their domicil during their minority; and therefore retain the domicil of their parents; and if the parents change their domicil, that of the infant children follows it . . .”).

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

135 See Ramsey, *supra* note 4, at 193, 233–34, 251–52 (describing the “wild Indians,” *id.* at 233, as “beyond the practical reach of U.S. authority,” *id.* at 252).

136 *Id.* at 214.

137 However, Ramsey does suggest that the seceded states were still subject to U.S. authority:

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.

Id. at 220.

international law exception to the exercise of a complete sovereignty over foreign ambassadors.¹³⁸ Ramsey recognizes that his proposition is substantially similar to the argument of my own article, which argues that one is not subject to the “complete” jurisdiction of the United States if there is an international law exception to the exercise of sovereignty or the application of domestic law.¹³⁹ In this respect, both Ramsey and I seem to diverge more from the Supreme Court than from each other.¹⁴⁰

The narrow disagreement is mostly of application:¹⁴¹ The law of nations *also* provides exceptions to the complete exercise of sovereignty over temporary visitors. And complete jurisdiction means not only complete sovereign power, but also the right of the alien to access the *benefits* of the municipal jurisdiction, and particularly its courts. “A lawful residence implies protection,” Kent wrote, and therefore even an enemy alien with permission to remain is allowed to sue and be sued and enforce his contracts.¹⁴² Whether aliens without such permission are under the sovereign’s “protection” in this sense, and therefore fully “subject to the jurisdiction,” can at least be doubted.

A. *Jurisdiction as a Spectrum*

Before elaborating upon these applications, it is necessary to understand the rule Ramsey articulates. He does not focus on the common law, but rather on antebellum sources defining the word “jurisdiction.”¹⁴³ He writes: “[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.”¹⁴⁴ It is true, of course, that individuals in foreign service are not subject to the jurisdiction of the nation. And it is true that many

138 See *id.* at 222–23.

139 See *id.* at 237–48.

140 The majority in *Barbara* held that anyone born on American soil and “subject to American law” was a citizen. *Trump v. Barbara*, 146 S. Ct. 2438, 2449 (2026). This formulation cannot account for the Indian tribes who, as noted above, were subject to U.S. law. See *supra* note 36. The Court gets around this problem by including Indian territory within its fiction of extraterritoriality. That fiction is questionable, but for present purposes, Ramsey does not consider the Indian tribes to have been outside the territory of the United States, neither as a factual nor as a fictional matter. See also *infra* note 155 and accompanying text.

141 Ramsey agrees: “The disagreements are instead about particular applications.” Ramsey, *supra* note 4, at 211–12. As noted below, however, the refinement on the test proposed by *Jurisdiction and Citizenship* may affect the question of unlawfully present aliens. See *supra* note 130 and accompanying text.

142 *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813).

143 See Ramsey, *supra* note 4, at 196.

144 *Id.* at 196.

antebellum sources describe the nation's "jurisdiction" as its sovereign power.¹⁴⁵

Yet this does not compel the results that Ramsey suggests, for two reasons. First, the examples of ambassadors and armies are drawn from international law and all are rooted in the nation's own consent to abide by those international law rules. Ramsey relies on the famous *Schooner Exchange* case for the proposition that "foreign sovereigns, diplomats, and armies" were not subject to U.S. jurisdiction.¹⁴⁶ But Chief Justice Marshall explained that these exemptions were rooted in the consent of the local sovereign and the comity and practice among nations.¹⁴⁷ Marshall did not give, nor does Ramsey give, any reason to think that international law *limits* these exemptions from sovereign authority to diplomats and armies. International law might also say something about how a local sovereign is to treat illegally present aliens and temporary visitors. Indeed, it would be surprising if international law said nothing about either situation.¹⁴⁸

Second, the U.S. does exercise *some* degree of "sovereign authority" over diplomats and armies. The extent to which is simply governed by the law of nations. The United States has total physical and practical control over prisoners of war, for example. Under the law of nations, those prisoners are not subject to U.S. municipal law—neither its benefits nor its burdens.¹⁴⁹ As for the Indian tribes, Ramsey recognizes that the United States exercised some sovereign power over the tribes; it was not, however, a complete sovereign power.¹⁵⁰ In other words, sovereign authority—jurisdiction—was a spectrum.

145 See Ramsey, *supra* note 4, at 196–97.

146 *Id.* at 196 (citing *Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 147 (1812)).

147 *Schooner Exch.*, 11 U.S. (7 Cranch) at 125.

148 Marshall in fact stated that as a rule of international law, temporary visitors are generally "amenable" to the jurisdiction of the country. See *Schooner Exch.*, 11 U.S. (7 Cranch) at 144. Thus, international law and the practice of nations do say something about the matter. Whether such visitors, however, are fully subject to that jurisdiction in the sense of the Fourteenth Amendment is of course something that Marshall could not have addressed.

149 See Wurman, *supra* note 8, at 377–78.

150 See, e.g., Ramsey, *supra* note 4, at 231 ("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."); *id.* at 232 ("[The debate] shows senators wrestling with an ambiguity that arose where the United States exercised partial but not complete sovereign authority."); *id.* at 136 ("[The debates] only show that the drafters were not sure how to treat a situation of partial jurisdiction (meaning partial sovereign authority).").

B. *Temporary Visitors*

The question is therefore whether the nation exercises a “complete” sovereign power over temporary visitors in the sense required by the Fourteenth Amendment. Recall that Ramsey accepts that “a person was subject to a nation’s jurisdiction if that person was under that nation’s lawmaking, law enforcement, and law adjudication authority.”¹⁵¹ Would it have been legitimate under the law of nations to conscript temporary visitors? The Louisiana military authorities in the Civil War thought not—and even excluded the children born in Louisiana to temporary visitors.¹⁵² Temporary visitors were at least arguably, in this sense, not subject to the complete legislative and executive jurisdiction of the nation. And consider that the nation’s courts exercised a general jurisdiction over persons domiciled in the forum even if those persons were absent from the territory—a jurisdiction the courts would not exercise over non-domiciled persons.¹⁵³

As for legislative jurisdiction, the same treatise on which Ramsey relies for his discussion of jurisdiction under international law suggested that, under the law of nations, one nation had no right to legislate over the personal status rights (such as marriage, legitimacy, and indeed the citizenship) of temporary visitors, which followed instead the place of domicile.¹⁵⁴ Ramsey describes this as a choice of law rule.¹⁵⁵ But the application of martial law against enemy aliens or prisoners of war is a “choice of law” rule, too. Why does that choice of law rule negate the idea that prisoners of war are subject to U.S. jurisdiction, but not the choice of law rule respecting the personal status rights of temporary visitors?

This choice of law rule was also described in the leading source as being an exercise of a sovereign’s legislative jurisdiction extraterritorially.¹⁵⁶ Ramsey criticizes this view, however, on the grounds that it erroneously demands that the United States exercise *exclusive* sovereignty.¹⁵⁷ True, exclusive sovereignty is not the criterion; complete jurisdiction is the criterion, whether or not another foreign sovereign maintains a competing claim to jurisdiction. The point is different. Under international law, the local sovereign did not apply its

151 *Id.* at 214.

152 *See supra* notes 24–25 and accompanying text.

153 *See supra* note 35 and accompanying text.

154 *See Ramsey, supra* note 4, at 246

155 *See id.* at 250.

156 *See* 2 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 100 (Phila., Carey, Lea & Blanchard 1836); *see also* H.W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 87 (Phila., J.B. Lippincott & Co 1866).

157 Ramsey, *supra* note 4, at 252–53.

own laws to the situation, just as it did not apply its own laws to foreign ambassadors or foreign soldiers. Thus, the local sovereign was foreclosed under international law from exercising its full legislative jurisdiction over not only ambassadors and armies, but also temporary visitors. Of course, the United States could choose to ignore this rule, as it could choose to ignore any other rule of international law including those respecting ambassadors. That does not make it any less true that temporary visitors were not subject to the full and complete jurisdiction of the United States.¹⁵⁸

In summary, there is no reason to suppose that the different treatment of temporary visitors noted above—the impermissibility of conscription, of exercising a general judicial jurisdiction, and of legislating with respect to their personal status rights—are materially distinguishable from the different treatment of the Indian tribes. If the Framers meant a complete jurisdiction, it is unclear why these jurisdictional exemptions are too small to count but the tribal ones are sufficiently significant.

C. Unlawful Presence

As for unlawful presence, it is necessary to emphasize that Ramsey's discussion of jurisdiction and in particular the *Schooner Exchange* case omits relevant materials relating to enemy aliens. Such aliens were from nations at war with the United States (or England); they were not foreign sovereigns, diplomats, and armies.¹⁵⁹ They were simply individuals, unconnected to a foreign army, but whose nations were at war with the United States. And yet in two cases stemming from the War of 1812, Chancellor James Kent and the Chief Justice of Pennsylvania both suggested that, without permission to remain, they would not have been *amenable* to the jurisdiction of the United States. That is, they would not have been allowed to access the courts, sue on their contracts, or possess rights of due process.¹⁶⁰ As the Pennsylvania Chief Justice stated, an enemy alien without permission to remain "has

158 It is true that post-adoption writers and officials did not articulate the theory I have just laid out. But many did, Ramsey acknowledges, think domicile was relevant, even though they did not quite explain why they thought so. *Id.* at 241. And Ramsey does not dispute that leading drafters and proponents of the Civil Rights Act of 1866 seemed to think that temporary visitors would be excluded. Ramsey, *supra* note 4, at 221. The theory I have articulated at least explains why so many seem to have thought temporary but not domiciled foreigners remained "subject to [a] foreign power" and subject to the complete jurisdiction of the United States. *See id.* at 203 & n.54 (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).

159 See Wurman, *supra* note 8, at 343.

160 As has been repeated many times in this reply: "A lawful residence implies protection, and a capacity to sue and be sued." *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813).

no municipal rights to expect from us” because “[w]e gave him no invitation, and promised him no protection.”¹⁶¹

It is of course possible that the law presumed that all such individuals could be in service of the foreign army. But the language used was permission, lawful residence, invitation, and protection. Enemy aliens were initially *presumed* to be present without permission and, therefore, outside the sovereign’s protection. The rule eventually evolved to provide that even enemy aliens were presumed lawfully present *unless* ordered to remove.¹⁶² The rule always, however, depended on the presumption of consent and therefore protection. That rule is easily extended to aliens from friendly nations without permission to be present, and certainly to aliens from friendly nations who come *despite* a prohibition on doing so. To repeat, there is an argument that throughout English history such individuals would not have been under the king’s protection—the lynchpin of the common law rule of birthright subjectship.¹⁶³

To summarize the disagreement on this point: Ramsey asks whether there are any exceptions to the sovereign’s exercising its sovereign authority over an alien.¹⁶⁴ In my view, to be subject to the complete jurisdiction of the United States in the sense of the amendment *also* requires that one be *amenable* to that jurisdiction—to the benefits of that jurisdiction. Hence what Ramsey describes as a “refinement” in the traditional originalist account,¹⁶⁵ one that centers the applicability of municipal law rather than “sovereign authority,” has real bite in this context. An alien not under the sovereign’s protection may be subject to some of its jurisdiction—military, criminal—but that does not make the alien amenable to sue and be sued generally and give a general right to access the sovereign’s courts.

CONCLUSION

It is true, as Ramsey writes, that nothing in *Jurisdiction and Citizenship* (and surely nothing in this responsive essay) is “conclusive” of the modern-day questions regarding unlawfully present aliens or

161 Wurman, *supra* note 8, at 387 (emphasis added) (quoting Lockington’s Case, 1 Brightly 269, 276 (Pa. Nov. 23, 1813), *aff’d*, Lockington v. Smith, 15 F. Cas. 758 (C.C.D. Pa. 1813)).

162 *See id.* at 387.

163 *See supra* notes 17–21 and accompanying text.

164 *See id.*

165 Ramsey, *supra* note 4, at 144 ([A] focus “on the sovereign’s authority under international law to apply its own law (in international law terms, its municipal law) . . . may represent something of a refinement of the traditional broad view, but it does not seem an incompatible approach.”).

temporary visitors.¹⁶⁶ But nothing about the conventional account is conclusive. The conventional view is plausible and perhaps correct. Maybe “foreign service” is the only exception. Maybe “birth alone” is the test. But anyone who understands the evidence about safe-conducts, the contestation regarding temporary sojourners both before and after the amendment’s adoption, U.S. authority over the Indian tribes, and the various ways one might not be subject to the complete jurisdiction of the United States ought to recognize that the whole provision is open to competing interpretations at least as applied to the two categories of persons currently in controversy.

And, if that is true, an ambiguous provision is “triable by its consequences,” as James Madison once said.¹⁶⁷ Perhaps the Framers, through their use of the “subject to the jurisdiction” language, did more than the common law seems to have required with respect to illegal presence. Perhaps it settled a question about temporary visitors that appears to have been contested in the antebellum period. Perhaps it really did more than the drafters and proponents seem to have thought the Civil Rights Act accomplished. And perhaps it really did go well beyond what was necessary to give citizenship to the freed people. But it would be astonishing if that were true, all through the use of a jurisdictional phrase intended to clarify a point about the Indian tribes. And, to the extent the phrase is genuinely ambiguous—does it refer merely to sovereign power, or also to amenability to the sovereign’s courts, for example—should not modern-day Americans interpret it sensibly, to empower the political branches to address circumstances the Framers could not have foreseen?

166 Ramsey, *supra* note 4, at 238 ([A] focus “on the sovereign’s authority under international law to apply its own law (in international law terms, its municipal law) . . . may represent something of a refinement of the traditional, broad view, but it does not seem an incompatible approach.”).

167 James Madison, The Bank Bill (Feb. 2, 1791), *reprinted in* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-13-02-0282> [<https://perma.cc/KAQ6-ZK4F>].