Wong Kim Ark's Ship Comes to Port

Justice Horace Gray's miscarriage of justice

BY WILLIAM BUCHANAN

The citizenship clause of the 14th Amendment reads: "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."

Thanks to a decision by the Supreme Court in *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898), which largely ignored that clause, female illegal aliens in the U.S. now give birth to 300,000–400,000 infants annually, who are automatically U.S. citizens.

It doesn't end there. In fiscal year (FY) 2010, we had 160 million legal non-immigrant admissions. They included tourists and short-term admissions across our Mexican and Canadian borders. They included longer-term entrants like students and temporary workers and their spouses and children. We don't know how many individual persons were admitted — many admissions are of the same person — but among all of them are bound to be tens of millions of women of child-bearing age. It would be unrealistic to imagine that deliberately or serendipitously there are not a great many who bear children during their time here.

These children are U.S. citizens, not immigrants. They have the same political rights and welfare eligibilities as all other Americans plus the option, eventually, to bring in their foreign-born relatives. Moreover, they are likely to be citizens of their mother's country, as well — a gold-plated advantage in a global economy (and a convenience for potential terrorists).

Finally, these births far understate the potential. Any woman on Earth who can manage to get here and deliver can join the "anchor baby" club. This absurd arrangement threatens American sovereignty.

Justice Horace Gray's opinion in *U. S. v. Wong Kim Ark* reasonably granted citizenship to Wong Kim Ark based on his birth here to domiciled, non-diplomat parents. I will try to mark out how he severely overstepped when he then extended citizenship to anyone born on American soil based on what I call the Coke catechism.

Part I Pre-Civil War Citizenship

Membership. It was convenient, even plausible, that Justice Gray found membership whether as subject or citizen to be equivalent products of English common law and the English notion of perpetual allegiance to a king. This was a compound of two elements: the right to inherit and Calvin's Case.

Right to Inherit. Like other countries in the seventeenth century, England denied aliens — persons born outside the king's allegiance or realm — the right to own and inherit land. Under a fading feudal system, kings still had a kind of property in their subjects. In return for the king's protection at the time of birth on the king's soil, the child owed the king allegiance for life (allegiance in exchange for protection). A privilege of such allegiance was the right to own and inherit land.

Calvin's Case codified this relationship. In 1608, a Scottish lad, Robert Calvin (actually Colville), inherited land in England, land that was quickly claimed by two Englishmen, Richard and Nicholas Smith. They claimed Calvin's birth in Scotland made him an alien and not eligible to inherit in England. However, Calvin was born a subject of James I, king of both England and Scotland. The king, being desirous that the two kingdoms should be joined, wished his courts to allow the inheritance.

Sir Edward Coke (pronounced Cook) noted the case was "[H]eard by the Chancellor and all the Judges of England." He reported that by reason of natural law, Robert Calvin was a subject of the king by birth on the king's soil and that that subjectship was perpetual:

> Whatsoever is due by the law or constitution of man, may be altered; but natural ligeance or obedience to the Sovereign cannot be altered ... Again, whatsoever is due by the Law of Nature, cannot be altered ... ligeance and obedience of the subject to the Sovereign

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> is due by the Law of Nature; ergo it cannot be altered.

Thus was born the two-part Coke catechism.

1. Subject status in England and Scotland based solely on place of birth without regard to the status of the parents (*jus soli)*, and

2. Permanent and perpetual allegiance to the English king for life based on "natural law."

Coke did allow for two exceptions: children born on the king's land to a diplomat or born on king's land occupied by an enemy.

In 1766 William Blackstone began publication of what became his four-volume "Commentaries on the Laws of England." When completed it would detail English common law. Blackstone elaborated on Coke's maxim:

> 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. Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, canceled, or altered, by any change of place or circumstance, nor by anything but the united concurrence of the legislature.

How permanent was this relationship? In 1746, Aeneas MacDonald was convicted of high treason. Born in England but raised, educated, and employed as a banker in France, MacDonald's counsel argued he was not really English anymore. Permanent allegiance, they argued, went out with the Revolution of 1688, and so, captured in the Jacobite Rising of 1745, he was no more than a prisoner of war. But the court ruled that no one could by himself "shake off" his allegiance to the king. Only a pardon from the king and some technicalities helped MacDonald avoid a date with a rope.

Historian Gordon Wood criticized this relationship with its "implications of humiliation and dependency." English monarchy, he said, "implied a society of dependent beings, weak and inferior, without autonomy or independence, easily cowed by the pageantry and trappings of a patriarchal king."

According to Wood, pre-war America was a pathetic imitation of a class society, in which one's inferior might be polishing your shoes while you were polishing the shoes of someone a notch up the ladder from you. By the time of the Revolution these arrangements had been hollowed out.

The American Revolution. With the revolution, the old system exploded. Wood quotes a 1789 statement by doctor and historian David Ramsay. People changed:

> from subjects to citizens [and] the difference is immense. Subject … means one who is under the power of another; but a citizen is an unit of a mass of free people, who, collectively, possess sovereignty. Subjects look up to a master, but citizens are so far equal, that none have hereditary rights superior to others. Each citizen of a free state contains, within himself, by nature and the constitution, as much of the common sovereignty as another.

Prior to July 4, 1776, colonists, like their English cousins, were born subjects of the English king for life based on the common law. Upon separation, part 2 of Coke's catechism, permanent and perpetual allegiance, died. But somehow part 1, membership based solely upon place of birth without reference to the parents, lingered and, thanks to Justice Gray, gained an iron grip on America's throat.

Justice Horace Gray

Like the motherland, new American states allowed only American citizens to inherit. When separation was agreed to, Great Britain set the date of election at the Treaty of Peace, September 3, 1783. After that date, if one still dwelt on American soil, he/she must ***elect*** to remain a British subject — and do so quickly.

For Americans, whether someone was a member / citizen was more complicated. This might be awarded based on one's presence here on July 4, 1776, or the date the state one resided in formally declared its independence. It could depend upon the way your state's declaration was written. What you did during the war might mark you one way or the other.

American citizenship initially grew out of a series of inheritance cases. Want to inherit? First, prove you're a citizen. Fairness dictated a complex search for the way the common law, treaties, and American state constitutions and colonial laws might interact. Who might be a citizen based on birth on American soil was still more complicated.

Four pre-Civil War citations. Some early state constitutions based law on English common law, statutes of Parliament, colonial laws, and any laws the new state might sub-sequently pass. Other states continued to make do with their old charters. I'd like to begin by reviewing four antebellum Supreme Court cases cited by Justice Horace Gray. Gray's goal, it is obvious, was to elevate English common law and the Coke catechism and make them the sole basis for American citizenship.

***The Charming Betsey (1804*).** Here we meet Jared Shattuck, born in Connecticut and taken as a child to St. Thomas (then, a colony of Denmark). There he grew up, married, and took an oath of allegiance to the Danish king. At some point, Shattuck purchased an American ship, the "Anne." He reregistered it as a Danish ship and renamed it "The Charming Betsey." Loading the ship with cargo, he headed for the French colony of Guadeloupe and was nabbed by an American warship. If Shattuck was still an American citizen, he had violated a U.S. embargo on trade with France.

It is not surprising that Gray would seek out an opinion by Chief Justice John Marshall, the pre-eminent legal thinker of the age, to support his position. Apparently unable to find one, he relied on this opinion by Marshall:

> Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law is a question which it is not necessary at present to decide.

Gray ginned up his common-law detector:

> In the early case of The Charming Betsey (1804), it appears to have been assumed by this court that all persons born in the United States were citizens of the United States....

Assumed? What a sorry testimonial! Citizenship issues were a snakepit, shunned by courts. John Marshall was a Virginian where defining citizenship was a vexed issue.

***McCreery v. Somerville (1824*).** Justice Joseph Story was second only to Marshall as an early legal thinker. With this opinion, Gray tried to paint Story as agreeable to his point of view. William McCreery died leaving his estate, Clover Hill, to devisees represented by one Henry Somerville. The will proved defect-ive, but the Maryland state legislature passed a bill to fix it. However, William McCreery had a brother, Ralph, an alien who, according to Story's syllabus had three "native born" citizen daughters. One of them, Isabella McCreery, sued to claim a one-third share of the estate.

Maryland was one of the four states that included the English common law and statutes as part of its legal structure. Story therefore began his opinion by invoking English law: "… the statute of 11 and 12 Wm. III, Ch. 6, is admitted to be in force in Maryland…." And Gray rightly concluded: "[I]t was assumed that children born in that State of an alien who was still living, and who had not been naturalized, were 'native-born citizens of the United States….'" To Gray, this put Story on record applying English law to an American situation and recognizing Coke's catechism, part 1.

However, Ralph McCreery was not an alien just "passing through" but a *domiciled* alien like Wong Kim Ark's parents. He'd fathered three daughters who were old enough to rent, to marry, and to sue in court. Story would shortly suggest a distinction between domiciled parents and aliens just "passing through."

Sailors' Snug Harbor (1830). Richard Randall left all his wealth for the establishment of "Sailors' Snug Harbor," a refuge for "aged, decrepid, and worn out sailors." Justice Smith Thompson in his majority opinion found Randall's will proof against an inheritance claim by John Inglis. Similar beliefs were echoed in opinions by justices Joseph Story and William Johnson. Judges on the court of appeals, however, had differed over Inglis' claim to be an American citizen. So all three justices added an opinion exploring the question of when and under what circumstances one became a New York state citizen.

Thompson reduced the question to a series of "ifs." If Inglis was born in the Colony of New York, he was a British subject; if he was born between July 4, 1776, and September 15, he was a citizen; if he was born on or after September 15 when his birthplace, New York City, was occupied by British forces, he was a Brit. Since Inglis' birth date was unknown and his father clearly elected to remain a British subject, the only remaining questions (the wild card) were: did John Inglis upon reaching his majority *elect* to be an American citizen, and was he still one at the time "descent cast" in 1801. Gray quoted Justice Thompson:

> It is universally admitted both in the English courts and in those of our own country, that all persons born within the Colonies of North America, whilst subject to the Crown of Great Britain are natural-born British subjects….

For Thompson, this statement was merely a point

of departure, but how would you know, since Gray didn't complete the quote.

> and it must necessarily follow that that character was changed by the separation of the colonies from the parent state and the acknowledgement of their independence.

John Inglis' citizenship hung on whether he elected it. "[The] right of election," said Thompson, "must necessarily exist in all revolutions like ours, and is so well established by adjudged cases that it is entirely unnecessary to enter into an examination of the authorities." He cited Emer de Vattel, past Supreme Court decisions, and James Kent's recently published Commentaries.

John Inglis' father, Charles Inglis, remained in New York City during the British occupation and returned with his son to Great Britain before the British evacuated in November of 1783. A witness described Charles as a royalist. A New York State law of 22 October 1779 confiscated the estates of "enemies of the state" and named Charles Inglis, among others, "convicted and attainted."

Because John was a child, his father elected British subject status for him. John Inglis failed to make his own election upon reaching adulthood. Thompson concluded, John Inglis was not a citizen and remained a British subject. Justice Joseph Story's concurring opinion included a detailed one-page repetition of Coke's common law catechism of perpetual allegiance and ending with this little gem:

> 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.

This quote by Gray is widely hailed. But Story intended it only to establish a solid point of departure.

Since the common law admitted no right on the part of subjects to change their allegiance without the consent of the king, or a law, Story found it a poor guide in determining who was an America citizen. Like Thompson, Story decided Inglis could be a citizen only if born here between July 4 and September 15. Not knowing when Inglis was born, Story founded his opinion denying citizenship on a New York State Convention resolution of July 16, 1776:

> Resolved unanimously that all persons abiding within the state of New York and deriving protection from the laws of the same owe allegiance to the said laws and are members of the state….

"By 'abiding' in the ordinance," said Story, "is meant not merely present inhabitants, but present inhabitancy coupled with an intention of permanent residence." This is apparent from the next clause, where it is declared:

> That all persons passing through, visiting, or making a temporary stay in said state, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same, allegiance thereto.

"'[T]temporary stay,'" said Story, "is manifestly used in contradiction to 'abiding'…." Story confirmed this with the opinion of New York Chief Justice Ambrose Spencer regarding that law:

> [P]ersons who were resident here without any intention of permanent residence were not to be regarded as members of the state.

Gray never got around to mentioning that both Thompson and Story denied Inglis' was a citizen! He did, however, record Justice Johnson's minority opinion that Inglis *was* a citizen thanks to the New York state constitution's adoption of the common law. Johnson argued:

> By the twenty-fifth article [it was actually the thirty-fifth] of the Constitution of New York of 1777, the common law of England is adopted into the jurisprudence of the state. By the principles of that law, [John Inglis] owed allegiance to the king of Great Britain … By the Revolution, that allegiance was transferred to the state, and the ***common law declares that the individual cannot put off his allegiance by any act of his own.*** (Emph. added)

It's the common law! It's Coke's catechism, part 1! Or is it? Let's look at Article 35.

> And this convention doth … ordain, determine, and declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such ***alterations*** and provisions as the legislature of this State

> shall, from time to time, make concerning the same. (Emphasis added)

The State Convention resolution of July 16, 1776, quoted above, which distinguished between residents 'abiding' and those 'passing through,' was one of those "alterations." Gray misstated Justice Story's carefully argued opinion and repeated Justice Johnson's error. He quoted only the parts of the three opinions that elevated Coke and English common law.

Shanks v. Dupont. Ann Scott was born in South Carolina before the Revolutionary War and was therefore a British subject by birth. She married Joseph Shanks, a British officer, while Charleston was occupied by British forces and removed with him to England when the British evacuated Charleston. She bore him five children and passed away in 1801.

When a piece of land in South Carolina, originally owned by Ann's father, was sold, her children demanded half of the sale price. They, the plaintiffs, argued that Ann Scott Shanks was a British subject and her (and their) right to the land by descent was protected by the Jay Treaty of 1794. Justice Story ruled in the plaintiffs' favor, and this was an opportunity for Gray to misquote from what many regard as Story's most important work: "Conflict of Laws."

> Persons who are born in a country are generally deemed to be citizens and subjects of that country."

However, Justice Story immediately provided a caveat that Gray omitted:

> A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were *in itinere* [traveling] in the country, or who were abiding there for temporary purposes, as for health or curiosity, or occasional business.

Story admitted that this was not a universally accepted idea. However, it appears he was developing a theory based on domiciled parents and how their status might play a role in determining citizenship.

Mr. Binney. Naturalization acts of 1790 and 1795, which admitted immigrants to full membership in American society, also provided that "children of citizens of the United States that may be born beyond Sea, or out of the limits of the United States, shall be considered as natural born citizens." A law of 1802 ended that practice. Thereafter, children born abroad to U.S. citizens, came home aliens. Late in 1853, Horace Binney published a 30-page pamphlet seeking a remedy.

Binney was the quintessential "Philadelphia Lawyer." He was a brilliant legal craftsman, relentless in investigation and supremely gifted in the arts of persuasion. His pamphlet detailed English common law precedents. Gray cited the pamphlet four times.

After a search through the dust bin of English archives, Binney found that the common law never provided subject status for English children born overseas. He observed, however, that where English interests were involved, parliament by law relaxed the common law's "principle of allegiance."

Gray cited Binney in an effort to assert the continuing role of the common law, but he didn't explain that Binney's pamphlet was a kind of lawyer's brief, designed to make a case for changing a particular law.

Binney's brief, moreover, was hardly disinterested commentary. In his preface, Binney related he wished a change in the law on behalf of "fellow-citizens and friends" whose children were born aliens overseas. Indeed, a biography written by his son, averred that "one of Mr. Binney's own grandsons was alien-born." Congress amended the law in 1855.

More important, these laws undermine Gray's argument. As we shall see shortly, if a child was born on American soil, the states decided whether he or she was a citizen. The acts of 1790, 1795, 1802, and 1855 show that the federal government decided who was a citizen if born on foreign soil. Without a qualm, they based it on the status of the father – he had to be a U.S. citizen! In 1855, Congress declared children born abroad over a 53-year period and classified as "aliens" became overnight U.S. citizens if their father was a U.S. citizen! This law was passed by voice vote with no House or Senate member speaking in opposition.

Chancellor James Kent. Gray next introduces us to James Kent, the avatar of the common law in America. Kent was a lawyer, judge, Chancellor of the New York State Court of Chancery, and finally professor of law at Columbia College. In this last capacity he delivered 67 lectures on every conceivable issue of law. He published these in four volumes between 1826 and 1829 and, starting in 1832, published a new edition every four years. It was a brilliant achievement.

The first six editions 1826-1848 were written "under his hand." Kent, too, liked to cite inheritance cases when discussing citizenship issues. Three are worth a look.

McIlvaine v. Coxe. Daniel Coxe was born in the Colony of New Jersey. Following independence, Coxe avoided honoring his allegiance. He served British forces in many capacities. New Jersey declared him a traitor and took his estate by forfeit. He returned to England

after the war and was awarded a pension. But when his aunt, Rebecca Coxe, died intestate at Trenton, NJ, the question was: could Daniel Coxe inherit? Which is to say: was he, despite all, a citizen of New Jersey?

Three Philadelphia lawyers argued the case before the Supreme Court. Charles Ingersoll and William Tilghman claimed Coxe was no citizen and could not inherit. William Rawle, on the other hand, argued in favor of Coxe's citizenship on common law grounds. Rawle studied law at one of London's legal Inns. He was apparently dazzled by the work of Sir Edward Coke. In his 30-page brief, Rawle invoked Coke eight times, three times calling him "my lord Coke."

Rawle referenced Calvin's case seven times and tried assiduously to inject the spirit of the common law/Calvin's case into the argument for Coxe's citizen status. "The rule of the common law," he said, "is that all persons may hold lands, except aliens." And "That the place of birth, should determine the condition of the subject, is both reasonable and natural." Since Coxe was once charged with treason, Rawle thought New Jersey's use of common law language to describe it might move the justices to his side. Said Rawle:

> [T]he common law doctrine of allegiance has been expressly enacted into our code by the legislature of New Jersey. The treason act adopts the common law definition and division of allegiance in its very language and terms.

However, when the court finally ruled three years later that Coxe was a citizen and could inherit by descent, it said:

> The court entertains no doubt that after October 4, 1776, he [Coxe] became a member of the new society, entitled to the protection of its government and bound to that government by the ties of allegiance.
>
> This opinion is predicated upon a principle which is believed to be undeniable — that the several states which composed this union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states....

Rawle won — Coxe was a citizen. But Rawle's common law grounds were rebuffed. It was New Jersey's sovereignty and its laws, not the common law, that made Daniel Coxe a citizen. Rawle also appeared embarrassingly out of touch when he asserted that all men were free to emigrate, but that:

> By the common law, expatriation is ... distinctly prohibited [because] by the common law, allegiance is perpetual. Bracton, Coke, Hale, Foster, and Blackstone [all pre-Revolution English jurists] consider this as a fundamental principle of that law.

Poor Rawle! Coke's catechism, part 2, had no sway in America. Starting in 1790, 15 years prior to Rawle's petition[!] applicants for naturalization were required to:

> [E]ntirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly by name, the prince, potentate, state, or sovereignty whereof he was before a citizen or subject…;

We openly promoted what can only be called expatriation – in unlimited numbers. It's no wonder that Gray never cited Rawle.

Talbot v. Janson. Kent handled expatriation a lot better, citing the early case of *Talbot v. Janson,* 3 U.S. 133 (1795). All the justices agreed that this was a particularly noxious case of fraudulent privateering. However:

> It was contended on one side, that the abstract right of individuals to withdraw from the society of which they were members, was antecedent and superior to the law of society, and recognized by the best writers on public law, and by the usage of nations, that the law of allegiance was derived from the feudal system, by which men were chained to the soil on which they were born and converted from free citizens, to be vassals of a lord or superior....

All six justices rendered opinions sympathetic to the idea of expatriation, only suggesting that countries of origin might reasonably pass laws to require those wishing to expatriate to honor societal obligations like paying money owed, answering to criminal charges, or fulfilling military draft requirements.

Kent accepted that perpetual allegiance, Coke's catechism, part 2, was common law which had been overturned. End of story.

Lynch v. Clarke. Common law restored? In his sixth edition, published posthumously in 1848 by his son, William, Kent recorded for the sixth time: "Natives are all persons born within the jurisdiction and allegiance of the United States." Now, for the first time,

he embroidered this with a footnote: "This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents."

For evidence of the continued role of common law place of birth subjection (Coke catechism part 1), the 81-year-old Kent returned to his old stomping grounds to exult in the 1844 New York State Court of Chancery case of *Lynch v. Clarke*. This was an inheritance case which hung on a question of citizenship but not based upon a Revolutionary War scenario. This was Calvin's case redux. And, in its naked absurdity, it must elicit smiles from those who favor unlimited birthright citizenship.

Bernard and Patrick Lynch, British subjects domiciled in Ireland, came to America in 1815 assisted by their brother Thomas Lynch. The latter, with partner John Clarke, was to become wealthy as a producer and retailer of mineral waters. Bernard and Patrick never manifested an intention to become citizens and returned to Ireland in 1819, carrying with them Patrick's daughter, Julia, born that same year.

However, when Thomas Lynch died in 1833, intestate and without issue, Bernard and Julia returned to America. Bernard naturalized in 1839 and claimed Thomas Lynch's holdings with net profits now running $20,000 per year. Julia claimed, instead, that she was a natural born citizen and that she was the rightful heir to all of Thomas Lynch's holdings.

New York's Court of Chancery was its highest equity court. Kent, as we've noted, had earlier been its Chancellor — New York state's highest ranking judicial officer. Established in 1701, the Court of Chancery would be abolished in 1846, two years after this case was decided. Appointees to this court were judges of great experience. The hearing included 54 pages of testimony from six attorneys.

Assistant Vice Chancellor Lewis H. Sandford, heard the case. He was very learned in the law and very, very learned in the common law. He rendered an impressive 47-page opinion, supporting his arguments with references to a large array of English common law precedents and American court decisions.

"By the common law," said Sandford, "all persons born within the legiance of the crown of England were natural born subjects without reference to the status or condition of the parents." If the common law applied to Julia, she would be a citizen and could inherit.

Sandford expressed surprise "there was no judicial decision upon this question." He did not seem to know courts shied away from dealing with citizenship questions.

Sandford reasoned that the language of the U.S. Constitution was based on an understanding of English common law and statutes. Here he introduced a considerable list of words and court functions found there – impeachment, felony, bankruptcy, cases in equity, attainder, grand jury, bail, bribery, indictment, writ of habeas corpus – but defined only in the common law. But "citizen" is a word that has no place or definition in the common law.

Sandford noted that colonial charters always provided for rapid naturalization of foreigners. True. That states willingly granted this power to naturalize to the national government, he thought, suggested a wish that citizenship be defined nationally. "State laws," said Sandford, "could not ... define, abridge, or enlarge the important privilege of citizenship in the United States. It [citizenship] was purely a national right...."

"It is inconceivable," said Sandford, "that the representatives of the thirteen sovereign states, assembled in convention for the purpose of framing a confederation and union for national purposes should have intended to subvert the long established rule of law government of their constituents on a question of such great moment to them all, without solemnly providing for the change in the Constitution."

To Sandford, the very absence of a definition for citizenship in the Constitution was proof that the common law prevailed — it was taken for granted. Sandford, I believe, was wrong on all counts. Citizenship was not a national right but a power states would not grant to the feds.

Having convinced himself, Sandford opined: "Upon principle, therefore, I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen." He concluded: "I entertain no doubt but that Julia Lynch was a citizen of the United States…." Justice Gray was very pleased.

The common law, permanent? In Lecture 28, "of Husband and Wife," James Kent concluded: "The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person [the husband] and her legal existence and authority in a degree lost or suspended." This was the common law principle of coverture. Anyone arguing coverture today would be laughed out of court, evidence of how the common law easily gives way to new statutes and new ideas. Citizenship based on the status of the parents was another idea that seemed to be gaining headway.

Justice Story. As evidence of America's move away from *jus soli,* I cited the *Snug Harbor* opinion of Justice Joseph Story and the distinction he drew in *Conflict of Laws* between citizenship of children born to domiciled alien parents and those born to parents just passing through.

Emer de Vattel. Enlightenment philosopher Emer de Vattel in his "Law of Nations" (1758) resurrected the Roman concept of citizenship by blood or descent (*jus sanguinis*). For him, a child's membership was determined by the parents' loyalties regardless of the happenstance of the child's place of birth:

> The natives, or natural-born citizens, are those born in the country of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens....

Declaration of Independence. Americans broke from the English design. Thomas Jefferson advanced the notion of citizens as equal members of a republic, whose leaders derive "their just powers from the consent of the governed ..." in a land absolved "from all Allegiance to the British Crown." Thus did we express our repugnance for monarchy.

Naturalization/Expatriation. Just as important was the subversive effect of our naturalization policies, alluded to above. People were on the move and America was their favored destination. Among the first significant laws adopted by Congress were the Naturalization Acts of 1790 and 1795, by means of which immigrants became U.S. citizens, entitled to all rights enjoyed by native-born citizens. However, candidates had to first renounce all former loyalties. This infuriated the Brits. It turned their common law world upside down.

Foreign Secretary William Grenville complained to our minister, Rufus King:

> No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part.

Naturalization law. Congress in 1855 specified that children born overseas to fathers having the status of American citizens were themselves American citizens.

Moreover, our naturalization laws revealed our attitudes on ***limits*** to citizenship. Prior to 1870, each limited naturalizations to **"free white persons."** Think what that means! By law, Asian and African immigrants could not naturalize. This had to reflect that de jure or de facto all or some states denied citizenship to children born to Asians and Africans.

St. George Tucker, professor of law at William and Mary, confirmed this. In 1803 he published the first detailed study of English and American law. While he regarded blacks as equals and advocated for emancipation, he observed that even free blacks were denied citizenship by the state of Virginia.

> With us, we have seen that emancipation does not confer the rights of citizenship on the person emancipated; on the contrary, both he and his posterity, of the same complexion with himself must always labour under many civil incapacities.

Dred Scott. No event declared limits on citizenship like the infamous *Dred Scott* decision. Blacks whether slave or free could not be citizens. In the typical pattern in which Gray supported his case with trivial observations while ignoring crucial ones, he cited Justice Benjamin Curtis' dissent. Finding the Constitution (Art. II, Sec. 1) required the president to be a "natural born citizen" Curtis argued: "It thus assumes that citizenship may be acquired by birth." The key word here is "may." Curtis, after an exhaustive search of the Constitution, followed this with a far more profound observation:

> The Constitution has left to the States the determination what persons born within their respective limits, shall acquire by birth citizenship of the United States.

Prior to 1776, blacks, mulattoes, and Indians were all born subjects of the king for life — for all the good it did them. Upon independence, however, many states decided they could not be citizens. There can be little doubt that had states wished, they could have limited birth citizenship to children born to citizen parents.

Except for a few holdouts like Sandford and Kent, the common law understanding of membership (the Coke catechism) seemed destined for the trash heap. Subject status based on place of birth seemed destined to give way to citizen status by descent. Could the world of 1608, the world of liege lords, serfdom, dubbing, and Divine Right, be revived in the world's first modern state?

Part II The Fourteenth Amendment

There were at least four reasons for adoption of the 14th Amendment's citizenship clause.

1. Embarrassment that 79 years after ratification,

the U.S. Constitution still contained no definition of membership — even though our founding instrument required presidents, senators, and representatives be citizens.

2. Concern that many states viewed their power to say who was a citizen by birth as a power to deny citizenship based on race and color. Further, this power, this monopoly over who was and was not a citizen, was integral to the idea that states had a right to secede. Republicans wanted to end this monopoly.

3. The obligation Republicans undertook for integrating enslaved Americans they'd emancipated; gratitude Republicans felt for the 200,000 black soldiers whose valor, many thought, had made victory possible.

4. Fears the Civil Rights Act Republicans had passed just two months before might be declared unconstitutional or be repealed once the South was readmitted. We must plant a definition of "citizen" in the Law of the Land.

A 15-member Joint Committee on Reconstruction was appointed to take testimony from Southern witnesses and develop language for laws and constitutional amendments.

Defining American citizenship was a difficult, some said impossible, task. John C. Calhoun, for example, had warned in an 1836 debate:

> I do not deem it necessary to follow my colleague and the Senator from Kentucky, in their attempt to define or describe a citizen. Nothing is more difficult than the definition, or even description, of so complex an idea; and hence, all arguments resting on one definition in such cases almost necessarily lead to uncertainty and doubt."

In 1862, Treasury Secretary Salmon P. Chase asked Attorney General Edward Bates: "Are colored men citizens of the United States?" In contradiction to the *Dred Scott* decision, Bates detailed his opinion that mere birth on American soil made one a citizen. However, he admitted:

> I have often been pained by the fruitless search in our law books and the records of our courts for a clear and satisfactory definition of the phrase *citizen of the United States*. I find no such definition, no authoritative establishment of the meaning of the phrase ... For aught I see to the contrary, the subject is now as little understood in its details and elements, and the question as open to argument and to speculative criticism, as it was at the beginning of the government. Eighty years of practical enjoyment of citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word, or the constituent elements of the thing we prize so highly.

Any legislator who did not already know got a taste of the difficulty debating the Civil Rights Act of 1866. An exasperated Senator Lyman Trumbull, its author, remarked:

> [I] desire to arrive at the same point precisely, and that is to make citizens of everybody born in the United States who owes allegiance to the United States ... There is difficulty in framing the amendment so as to make citizens of all the people born in the United States who owe allegiance to it.

Now let's meet the cast of characters who will animate the Senate debate.

William Pitt Fessenden (R-ME) was a statesman of great power and insight. Many thought him the Senate's finest orator. He was a longtime opponent of slavery and a founder of the Republican Party. He was chairman of the Joint Committee on Reconstruction and his report, delivered to Congress on April 30, 1866, was a savage indictment of the South. At about this time, a lingering illness began sapping Fessenden of his strength and he became less capable of dominating debates.

Lyman Trumbull (R-IL), chairman of the Senate Judiciary Committee and author of the 13th Amendment and the Civil Rights Act of 1866, knew citizenship issues better than most. Trumbull descended from a long line of artists, lawyers, and governors, including Jonathan Trumbull, the only British governor to side with the Americans, and John Trumbull, four of whose historical paintings are installed in the Capitol rotunda.

Jacob Howard (R-MI) was far and away the most active Joint Committee member, taking testimony from 64 witnesses — 44 percent of the total. Over and over he asked witnesses about the treatment of blacks and the loyalty of whites. He repeatedly heard the opinion that citizenship was for states to determine and that states had a right to secede.

Reverdy Johnson (D-MD) was the ranking Democrat on the Senate Judiciary Committee and a member of the Joint Committee. A leading attorney, he served as Zachary Taylor's Attorney General. In 1865, he defended Mary Surratt, later convicted of conspiracy in the Lincoln assassination. Johnson was opposed to slavery and a key figure in the effort to keep Maryland from seceding from the Union.

James Doolittle (R-WI) was chairman of the Indian Affairs Committee. He opposed citizenship for what he called: "the wild Indians of the plains."

Edgar Cowan (R-PA) opposed the Civil Rights Act and the 14th Amendment because he feared they would open the floodgates for immigration from China and of Gypsies, etc. He was denounced as a racist, but his opposition statements did press the ideas of limits and restraint.

Members of the Joint Committee were frustrated. Their Amendment resolution, H. R. No. 51, had failed on March 9 to gain the required two-thirds vote. A promising proposal by Robert Dale Owen had had to be withdrawn in the face of mounting opposition. H. R. No. 127, fitted out from bits and pieces of earlier proposals, passed overwhelmingly in the House on May 10. But it remained on the table while senators argued over the advantages of further delay — delay when the Washington summer, party conventions, and fall elections argued for adjournment.

Sen. Howard finally got to introduce the Amendment on May 23. So controversial was the issue of citizenship, however, and so difficult was it to find an appropriate definition that the proposal did not include a citizenship clause. The Joint Committee had met 22 times and considered dozens of proposals. Not one dealt with citizenship.

This lack of a definition distressed Howard. He, too, noted that the Constitution required presidents, senators, and representatives to be citizens, but never defined who was a citizen. Now Section 1 of the proposed amendment would protect the "privileges or immunities" of these same undefined citizens.

What were these privileges and immunities? To Howard they were the Bill of Rights. Howard detailed them, beginning with freedom of speech and the press and ending with the prohibition against cruel and unusual punishment. The Bill of Rights, he expected, would now apply to the states.

Recognizing that these protections were only available to citizens of the nation and not of the states and that nothing in the Constitution permitted Congress to enforce them on the states, Howard pointed with evident pride to Section 5: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Said Howard:

> The power which Congress has under this amendment, is derived ... from the fifth section, which gives it authority to pass laws appropriate to the attainment of the great object of the amendment.

There was a good reason for Section 5. Willis Lago, a "free man of color," had been indicted by a Kentucky grand jury for assisting an enslaved woman to escape. Lago fled to Ohio. In *Kentucky v. Dennison,* 65 U. S. 66 (1860), Kentucky appealed to the Supreme Court to enforce Article IV, Section 2 of the U.S. Constitution which provided for the return of "Persons charged in any State with Treason, Felony, or other crime." The court ruled that the Constitution lacked any mechanism for enforcing that section of the Constitution.

That's why amendments 13, 14, 15, 19, 23, 24, and 26 all have "enforcement by appropriate legislation" clauses.

Sen. Benjamin Franklin Wade (R-OH), though never a member of the Joint Committee, introduced his own omnibus amendment with a difference in section one that would force the Joint Committee's hand. Where the latter's proposal began:

> Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of ***citizens of the United States***; (Emphasis added)

Wade's proposal began:

> Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of ***persons born in the United States*** or naturalized by the laws thereof.... (Emphasis added)

Wade used the word "person" in place of "citizen." He had "always believed that every person, of whatever race or color, who was born within the United States, was a citizen." And, in a clever twist, he now raised the issue of citizenship by native birth. Then, suddenly, he turned on Fessenden:

> The Senator from Maine, suggests to me, in an undertone, that persons may be born in the United States and yet not be citizens of the United States.

Fessenden responded to his old enemy:

> Suppose a person is born here of parents from abroad temporarily in this country?

This remark, a "status-of-the-parents" remark, a remark that echoed that of Justice Story 33 years earlier, and one that would not be out of place in today's debate, suggests Fessenden was familiar with the literature of the day and cloakroom debates on citizenship. But what was needed was effective legislative language.

Further demands for amendments were now voiced by Sens. Wilson, Clark, and Buckalew. In spite of all the

labors that had gone into the many proposals, a loss of control at this point could derail the whole process.

A majority of Republicans now caucused over the next five days. The doors were locked, reporters were excluded, and members were sworn to secrecy. Nobody, including the fly on the wall, ever reported what was said during the caucus, but it appears that the Republicans came out of it with an agreement on amendment issues. They were not going to lose this one!

On Tuesday, May 29, 1866, Sen. Howard introduced a rough draft of the citizenship clause. By the time of Senate passage it read:

> 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.

Here for the first time was a proposal to define U.S. citizenship. No longer would it depend on state citizenship and a mishmash of conflicting court rulings and divergent scholarly opinions. A citizen of the United States, moreover, became a citizen of a state simply by residing in it.

Questions. What did that unique limitation "subject to the jurisdiction thereof" mean? Could these words define U.S. citizenship?

On the following day, May 30, Sen. Howard introduced the citizenship clause for debate.

Wisconsin Senator James Doolittle, as expected, demanded insertion of the phrase: "excluding Indians not taxed." This language, he pointed out, was included in the Constitution and the Civil Rights bill. It was even included in Section 2 of the very amendment under discussion.

Indians, whose land we were stealing and with whom we'd been at war for over 200 years, were born in many ways subject to the jurisdiction of the United States. Pass this amendment without the exception clause, Doolittle argued, and the courts would surely decide all Indians were citizens. Chaos would surely ensue. Doolittle's amendment lost by a vote of 30 to 10.

Loyalty. I speculate Doolittle's proposal had been arranged by the caucus to supply Fessenden and his cohorts with an opportunity to hammer home their definition of "subject to the jurisdiction thereof." This was a demand for loyalty, a loyalty senators feared might never be reborn in the hearts of defeated Confederates, but which might at least be expected of their newborns.

The war had driven home the importance of loyalty. The comfortable belief that a masterful constitution, abundant freedom, and land for the taking would guarantee allegiance had been shattered. Subjects of a king, such as lived in the thrall of King James I, were little to be feared. Citizens, however, could vote, run for office, demand a law officer produce a warrant, peaceably assemble to demand redress of grievances, publish a paper, blog or tweet, and press for secession.

Sen. Trumbull, focused on the limiting phrase:

> Subject to the jurisdiction thereof means subject to the complete jurisdiction thereof ... What do we mean by subject to the jurisdiction of the United States? Not owing allegiance to anybody else. That is what it means.

Sen. Howard agreed: "subject to the jurisdiction thereof" was broad enough to deny citizenship to tribal Indians without naming them. He defined the operative word:

> I concur entirely with the honorable Senator from Illinois, in holding that the word "jurisdiction" ***as here employed***, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States.... (Emphasis added)

Sen. George Henry Williams (R-OR), another member of the Joint Committee, opined:

> I understand the words here, 'Subject to the jurisdiction of the United States,' to mean fully and completely subject to the jurisdiction of the United States.

Democratic Senator Reverdy Johnson even suggested that parents played a critical role.

> …I know of no better way to give rise to citizenship than 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.

The amendment gained a two-thirds vote in the Senate on June 8. The House followed suit on June 13 with grumbling but no debate.

We and the European nations all seemed to be headed in the direction of membership by descent. But the Senate debate did not go quite that far. However, just as important as paeans to loyalty and allegiance were the things that were not said. No one in debate argued that mere birth on American soil made one a citizen. Noticeably absent, was any mention of Coke, Blackstone, Vattel, Kent, Story, Calvin's case, or the common law.

Republicans were determined to extend citizenship to blacks and establish national citizenship as paramount. Following a bloody civil war and continuing

evidence of disloyalty here at home, it's not surprising to find senators wanted a clean break with the past.

"Subject to the [full and complete] jurisdiction" and "not owing allegiance to anybody else" denied citizenship to children born here to a broad class of persons deemed not completely loyal. Children born to ambassadors and "Indians not taxed" were included in that class. Who else might be included, they couldn't say. Limits on immigration, illegal immigration, births to illegal aliens, "birth tourism," and the massive welfare state were all in the future.

Framers of the 14th Amendment hoped sections 1 and 5 would perfect our great defining document and repair the wounds imposed on it by slavery. But these men were not dreamers. They'd just spent great draughts of blood and treasure to save the Union and all had suffered dead and wounded in their families.

Our Constitution charts broad policy outlines and leaves details to be filled in by statute — as provided for by Section 5. I believe these lawmakers expected future legislators to pass citizenship laws when needed. Justice Gray fired his 1608 matchlock at this possibility.

Part III Post-Civil War

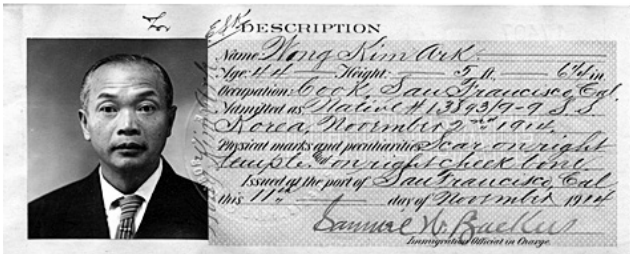
America should have been the experimental station for the citizenship concept. Blackstone's common law was surely used as a reference in fashioning our Constitution, but it was diced and spiced to suit our needs. To repeat, what is supposed to be special about the common law, judge-made law, is its malleability, its ability to change with the times. But Justice Gray was determined to lock us down in judge-made law from 1608.

The Chinese Exclusion Acts had denied Chinese laborers the right to immigrate or to naturalize. The question before Gray's court was: could these laws be stretched to also deny citizenship to children born on American soil to domiciled Chinese parents. They could not, said Gray and the court. Gray based Wong Kim Ark's citizenship on the status of his parents and concluded with this holding:

> [A] child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution.

Wong Kim Ark was a citizen because he chose his parents well. His parents were not illegal aliens, or temporary residents, they were *domiciled* residents, as near to being "legal permanent residents" (LPRs) as a non-citizen could be in 1873. So important to Gray was the concept of "domicil" that he used forms of that word 21 times in his decision. A person may have many residences, but can have only one domicile. Black's Law Dictionary describes domicile as:

> The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home….


DESCRIPTION
Name Wong Kim Ark
Age 44 Height 5 ft. 6½ in.
Occupation Cook, San Francisco, Cal.
Naturalized as Native #13243/9-9 S. S.
Korea, November 2nd 1901.
Physical marks and peculiarities Scar on right temple & on right cheek bone.
Issued at the port of San Francisco, Cal.
this 11th day of November 1914
Samuel W. Backus
Immigration Officer in Charge.

ABOVE: Wong Kim Ark's certificate of identity from 1914. A native-born Chinese American citizen, Wong Kim Ark was denied reentry into the United States after a trip to China. He appealed, and his case eventually went to the U.S. Supreme Court, which affirmed that all persons born in the United States, including Chinese whose parents themselves were ineligible for citizenship, were birthright citizens under the 14th Amendment.

In many countries, domicile was a necessary step in the naturalization process. It was seen as evidence of a commitment to change allegiance — evidence of loyalty. I do believe Gray sneaked a peek at the Senate debate and decided he had to show that Wong's parents were loyal — domiciled. The briefs of both the government and Wong's attorneys agreed in advance that his parents were "domiciled" residents at the time of his birth.

Many aspects of domicile are explored in the 1869 case of Udny v. Udny. Not considered there, however, is the pertinent question: Can an alien be domiciled in a country that denies his/her right to live there? The question is possibly answered for legal non-immigrants. Many visa categories specify that the alien must have "a residence in a foreign country which he has no intention of abandoning" — he must have a domicile in some other country.

As noted above, *Wong Kim Ark* would qualify as a citizen under proposed legislation to limit birthright citizenship (H.R. 140 and S. 723 in the 112th Congress).

But Gray threw judicial restraint to the wind, and established America as a common law, place of birth nation. He restored us to 1608 and replaced the permanence of Sir Edward Coke's natural law with the stolid fixedness of the U.S. Constitution.

Addressing the 14th Amendment, Gray argued that to construe an act of Congress, even a constitutional amendment ratified by the states, one had to consult prior history — what came *before* the act. Finding no definition of "citizen" in the Constitution, Gray declared:

> In this and other respects, [citizenship] must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.

In 1866, however, after 79 years of law-making, the 14th Amendment was a product of American law. Gray, quite willing to find sources in the common law, found no light in the Senate debate. He dismissed it! He said:

> Doubtless, the intention of the Congress which framed and of the States which adopted this Amendment of the Constitution must be sought in the words of the Amendment; and ***the debates in Congress are not admissible as evidence to control the meaning of those words.*** (Emphasis added)

Old Precedents. In Gray's mind, a 1608 decision in the English Court of Exchequer Chamber was decisive. This court, the top rung on the judicial ladder at the time, was abolished in 1873. But its decisions were gold to Gray. He returned repeatedly to the instrumentalities of Calvin's case. He referenced it eight times. "Lord Coke" came up three times, and Blackstone four times.

According to Gray's citations, our fate was set for us by the opinions of Lords Ellesmere, Hale, Kenyon, and Malmesbury. (I'm sure they'd all be astonished.) He managed to figure in Howell's State Trials, and Hargrove's Law Trials, as well. Old parliamentary laws: 5 Edward III (1331); 17 Edward III (1343); 25 Edward III (1351); 29 Charles II (1677); 11 12 William III (1700); 7 Anne (1708); 13 George III (1773); and even a cryptic entry in the 1583 Yearbook of Richard III were crucial determinants — but not the U.S. Senate debate.

Oliver Wendell Holmes, who replaced Gray on the court, was known for his thoughtful opinions and his deference to the acts of elected legislatures. He surely did not win any points with Gray when he wrote in his 1881 classic *The Common Law*: "Precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten."

The pre-Civil War intellectuals Gray admired, Kent and Sandford, addressed citizenship issues raised by philosophers Grotius, Vattel, Burlamaqui, Puffendorf, and Locke. Gray never mentioned them in his opinion.

Three Supreme Court decisions preceding *Wong* dealt with 14th Amendment issues. Gray reviewed each of them.

The Slaughter-House Cases (1873), was a 5 to 4, 14th Amendment decision that came shortly after ratification. In his majority opinion, Justice Samuel Miller devoted one paragraph to evaluate the citizenship clause:

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

A case that deals with the "privileges or immunities of citizens" was a logical place to describe who might be "citizens." Miller may have talked to the authors of the amendment or, maybe, he actually read the Senate debate — Sen. Howard's introductory remarks and the statements of Fessenden, Trumbull, Howard, Doolittle, Johnson, Cowan, and Williams.

Justice Stephen Field's dissent went furthest in denouncing the majority's decision — for exaggerating the extent of state police powers, for allowing Louisiana to create a monopoly, and for so limiting citizens' "privileges or immunities." In his powerful 28-page dissent, Field devoted just one sentence to what may or may not be a criticism of Miller's definition of the citizenship clause:

> The first clause of the fourteenth amendment ... recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry.

Gray landed hard on this scrap of possible dissent. But read it over as many times as you like and the only worthy speculation on its meaning is Field's belief that

the citizenship clause recognized blacks as citizens or created black citizens, ignoring the laws of states and the non-citizen ancestry of blacks. If Field thought the "first clause of the fourteenth amendment" had anything to do with *jus soli* — no parents, he obviously never read the debate.

Minor v. Happersett. In 1874, the year following *Slaughter-House*, Virginia Minor's suit against Reese Happersett reached the high court. His refusal to register her, she claimed, violated her 14th amendment right to vote. Happersett argued he was just enforcing Missouri law, which limited the vote to men.

In his 14-page unanimous decision, Chief Justice Morrison Waite agreed that Minor was a citizen and noted that as a citizen she could sue and be sued, inherit property, and purchase land under the Homestead Act. As a citizen, moreover, the 14th Amendment protected her "privileges or immunities." Neither the U.S. Constitution nor the 14th Amendment, however, equated citizenship with a right to vote. Waite added that state constitutions generally limited the vote to men.

Citizenship, Waite opined, made one a "member" of a nation. Members owed it allegiance and were entitled to its protection.

People are called "subject, inhabitant or citizen," he said, based upon their relationship to a state. According to Waite, "Citizen...has been considered better suited to the description of one living under a republican government...." A different relationship; a different name! In fact, Waite reads a lot like Wood and Ramsay (see above).

So why would Gray be interested in this case? According to Gray: "In *Minor v. Happersett*, Chief Justice Waite, when construing, in behalf of the court, the very provision of the 14th Amendment now in question, said:

> The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that.

"And he proceeded to resort to the common law as an aid in the construction of this provision." However, in his one reference to the common law, ***his only reference to the common law***, Waite appeared to take exception to Gray's ideas. He noted:

> At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country ***of parents who were its citizens*** became themselves, upon their birth, citizens also. These were natives or natural-born citizens as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. (Emphasis added.)

According to Waite, the language of the common law led the Framers to believe that children born to parents who were citizens were themselves citizens. He described them as "natives or natural-born citizens," distinguishing them from "aliens and foreigners."

Waite also found that "some authorities" (Kent and Sandford?) thought mere birth on American soil was enough to make one a citizen. Waite did not suggest he agreed with those authorities.

If the Framers had doubts about whether alien parents' could have citizen children merely by bearing them on American soil, what doubts might the Framers have entertained about children born here to illegal alien mothers — a class that did not even exist in the time of the Framers — or Waite — or Gray? It appears the status of the parents had always played some role in determining citizenship.

Elk v. Wilkins**,** (1884). Without changing paragraphs, Gray now slipped into *Elk v. Wilkins*. John Elk was an American Indian born on American soil but in an active Indian tribe. He had renounced his membership in the tribe and tried to register to vote based on his claim that he was an American citizen by birth on American soil thanks to the 14th Amendment. The registrar, Charles Wilkins, believing Elk was not a citizen, denied his application. The court ruled that Elk's claim to be a citizen was not valid.

There is room to argue that tribal Indians have a special relationship with the United States. However, there are three things to be said about the court's 7 to 2 decision against Elk.

1. In *Wong*, Gray never admitted that he was the one who wrote the opinion in *Elk*.

2. In *Elk*, Gray confirmed it was ***the status of Elk's parents*** — he was born to parents who were loyal to their tribe and not the United States — that denied him citizenship despite his birth on American soil.

3. Some of Gray's language in *Elk* paraphrases Howard's and Trumbull's definition of "subject to the jurisdiction thereof" and contradicts his decision in *Wong*: "The evident meaning," he said, "is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate

allegiance." Maybe Gray took another peek at the Senate debate.

Lord Chief Justice Cockburn. Gray opined that children born on English soil and on the soil of its American colonies were all subjects of the king and citizenship was just a knock-off of common law subjectship. For what he intended as ammunition, he introduces us next to the Right Honorable Sir Alex Cockburn, Lord Chief Justice of England, who, in an 1869 report on nationality, said:

> By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning in the country, was an English subject; save only children of diplomats and those born on occupied land, of course.

Gray didn't tell us that Cockburn's comment was in a 217-page report, part of which was a relentless denunciation of *jus soli* subjection by place of birth and in favor of *jus sanguinis* descent by blood. He took due notice of the unflagging determination of the British government to deny Englishmen the right to naturalize in other countries even to the point of making war [on the U.S.] and how the Brits had had to modify this common law.

In Cockburn's report, Sir Edward Coke and Calvin's case came in for harsh criticism:

> The reasons given for this law by Lord Coke in Calvin's Case are conceived in the narrow spirit of exclusion before referred to, and while they can hardly fail to provoke a smile, may serve as an example of the curious reasoning with which our ancient sages sometimes satisfied themselves in expounding the law.

And Sir William Blackstone?

> Blackstone, who, however great may be his merits, is ever ready, it must be acknowledged, with an apology for a bad law....

Thus does Sir Alex sully the memory of Gray's heroes! Somebody is liable to get the idea that these great men were human beings, men of their time, and that their common law and natural law pronouncements were not so well founded after all. In fact, now might be a good time to speculate on the purposes of membership law as rendered by Coke and Blackstone.

King James I of England had much earlier been proclaimed King James VI of Scotland. At the time he was just one year old! Soon after, his father, Henry Stuart, was murdered. At about the same time his mother, Mary, Queen of Scots, was imprisoned and never saw her son again. James suffered through four regencies. He would always fear for his life. He became King of England because he was a Protestant with royal blood and available.

I have the greatest respect for Sir Edward Coke. He was a great civil libertarian. He defended habeas corpus, the right to confront one's accuser, and the rule of law — and he suffered for it. He elevated the status of Magna Charta. His Reports and Institutes are considered foundations of the common law. It was observed, however, that he sometimes put his own opinions in his reports rather than those of the court.

James loved being King of England — England was so much richer and more orderly than Scotland. However, believing he was appointed by God and answerable to no man, James could not abide the orderly parliament and courts of law when they disagreed with what he wanted to do. For King James, Coke was Tower-bait, a thorn in his side.

James wanted to be King of Great Britain but the parliament balked at that. With Calvin's case came an opportunity to butter him up. It would surely have been enough to declare that a Scottish lad could inherit in England since James was also king of Scotland. But Coke, always on the edge of the king's displeasure, may have added those bits about "permanent allegiance" based on immutable "natural law."

Blackstone's "apology for a bad law" relates to his "allegiance for protection" *quid pro quo* — that birth in the king's domain imposed a permanent and perpetual allegiance to the king in exchange for the king's protection during one's helpless condition at birth – regardless of the status of the parents. This was a sop to the king's dynastic needs.

Is it even necessary to mention that it is always the parents who protect the new-born child? They do it day after day, whether in a strange land or, much better, at home in the parent's land of membership. Surely, Sir William knew that.

What were the Lord Chief Justice's feelings about membership by descent versus place of birth, (*jus soli* v. *jus sanguinis*)?

> The nations of Continental Europe have decided in favor of descent.
>
> The place of birth is an accident; the associations connected with it are fleeting and un-

> certain while the domestic ties and the relations of family and kindred are powerful and enduring. Descent, therefore affords the true rule for determining nationality.

Royal Commission. Cockburn's report coincided with another by a Royal Commission. Ten lawyers and nobles were selected to make recommendations regarding the viability of the requirement that the "allegiance of the natural-born British subject is regarded by the Common Law as perpetual" (Coke catechism, part 2). On February, 20, 1869, the Commission delivered its 369-page report, most of which was dedicated to endless varieties in the ways nations relate to their members and to each other and some short histories. Only 17 pages were set aside for Commission comments, including this one in answer to the Commission's purpose:

> The allegiance of a natural-born British subject is regarded by the common law as indelible. We are of the opinion that this doctrine of the common law is neither reasonable nor convenient.

The Commission recognized, moreover, that once permanent allegiance was abandoned, limits on holding and inheriting land were no longer tenable, and recommended that Great Britain allow aliens to hold and inherit land as was permitted in most European countries.

Regarding membership by blood or descent, the Commission noted that most European nations had adopted laws similar to the Code Napoleon, which established citizenship by descent. However, the Commission was not prepared to recommend it. Membership by place of birth (Coke catechism, part 1) had "solid advantages." It was easy to prove, its uniform application avoided racial injustice, subjects readily accepted it, and it avoided problems in Great Britain's diverse and far-flung empire.

Three of the ten commissioners registered opposition on this score. Commissioners George Bramwell and Mountague Bernard, in a joint complaint, argued that the common law granting of British subject to the child of an alien leads to the undesirable result that he can partake of two allegiances, possessing all the rights and benefits of being a British subject while performing none of the duties.

Commissioner Vernon Harcourt commented:

> By the law of all modern nations, the condition of the child primarily depends on that of the father. But the doctrine of deriving nationality from the locality of birth makes it depend on the accidental situation of the mother; and by this rule, a child may become a subject of a country in which his father not only never made his home, but which he never even entered.

Ironically, in our present-day situation, the father may be superfluous, while the mother's residence here may be anything but an "accident." "The rule of determining nationality by locality of birth," said Harcourt, "was purely of feudal origin…."

Our British cousins seemed headed intellectually in the direction European nations were trending.

British Nationality Act. In 1983, Great Britain, relieved of its empire, passed the British Nationality Act. The common law practice of determining nationality by place of birth succumbed to that of descent. Australia, New Zealand, and Ireland eventually followed suit. Thanks to the *Wong Kim Ark* decision, we are stuck in ***their*** past.

Individual opinions like those of Alex Cockburn and Horace Binney are sprinkled about Gray's opinion to convince readers that intellectual opinion is on his side. He broadcasted them like seedlings and hoping they would blossom — and also hoping no one would look too closely.

Expatriation Act. With passage of the Expatriation Act of 1868, Congress declared that denying, restricting, or impairing the right of expatriation was "inconsistent with the fundamental principles of this government." However, this law, a list of broad generalities, failed to define a policy for implementation.

In 1873, President Grant asked each of his cabinet officers to answer eight questions regarding this law. All the questions were about expatriation, and, I think it's safe to say, all were generated by suspicions that people might manipulate the new law. Grant's Question 7 asked if ***children born abroad*** to Americans who have expatriated themselves (***who are no longer Americans***) are entitled to the protections accorded American citizens.

Gray thought Hamilton Fish's answer was entitled to "much weight" — Fish was Secretary of State, after all. "The child born of alien parents in the United States," replied Fish, "is held to be a citizen thereof and to be subject to duties with regard to this country which do not attach to the father." Apparently, Ham Fish had not read the Senate debate. It's clear he didn't understand Grant's question, either.

Gray would have had to concede that the opinions of Grant's Attorney General, George Henry Williams, carried "greater weight" than those of his Secretary of State. Williams had been a Senate Republican, a member of the Joint Committee on Reconstruction that draft-

ed the citizenship clause, and (you'll remember) had actually spoken on its behalf!

Grant's Question 8 asked how might an American who had assumed the obligations of a citizen or subject of another country, become once again an American citizen. Williams' reply was powerful:

> Section 1 of the fourteenth amendment to the Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." But the word "jurisdiction" must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment.

Do you suppose Gray mentioned Williams' quote in his opinion? He did not.

According to Gray the Civil Rights Act of 1866 excluded citizenship for children of "Indians not taxed," because of their "peculiar relationship to the National Government, ***unknown to the common law.***" (Emphasis added.) Dare we repeat that the common law also found no place or definition for "citizen"?

And then Gray landed this clunker:

> The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words…the two classes of cases — children born of enemies in hostile occupation and children of diplomatic representatives of a foreign state – both of which, as has already been shown, by the law of England and by our own law from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.

Can you believe it?! It's still 1608 and the common law, no longer malleable, is fixed, rock-hard, in our Constitution. The citizenship passions aroused by the Civil War have been de-fanged. The close-order political drills, the agonized effort to get beyond 79 years without a definition of citizen — in the first nation to have citizens — the fears of disloyalty, the fresh Senate debate with no references to the past. Overturning *Dred Scott* and seeking equality for emancipated blacks. And the real object of the "subject" phrase? Drum roll!! Coke's 1608 exceptions! Gray, asked to pick from a orchard full of luscious plums, comes up with one prune.

Kinds of Jurisdiction. Gray tried to tease out the meaning of "subject to the jurisdiction thereof" by relating it to a case in which both words, "subject" and 'jurisdiction," come up. He seemed to want us to believe there is only one definition for the word "jurisdiction."

So Gray considered John Marshall's opinion in *The Exchange v. McFaddon*, which associated the two words four times.

> A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity....
>
> ...private ships entering without special license become subject to the local jurisdiction….
>
> ...subject his army or his navy to the jurisdiction of a foreign sovereign
>
> ...subjecting that property to the territorial jurisdiction….

All these quotes deal with leaders of friendly nations and the status of their warships in American ports. None of these quotes deal with American citizenship. In Gray's mind, any case, however distant, has more to do with defining citizenship than the Senate debate.

Gray tried another tack:

> But, as already observed, it is impossible to attribute to the words, "subject to the jurisdiction thereof," that is to say, "of the United States," at the beginning a less comprehensive meaning than to the words "within its jurisdiction," that is, "of the State," at the end of the same section; or to hold that persons, who are indisputably "within the jurisdiction" of the State, are not "subject to the jurisdiction" of the Nation.

Confused? Let me explain. Gray claimed the word "jurisdiction" in the first and last clauses of Section I of the 14th Amendment are equivalent terms only differing in that the first refers to national jurisdiction and the last to state jurisdiction.

It is well to remember that the first and last clauses of Section 1 were introduced a week apart. Each clause uses distinctly different meanings of the word "jurisdiction."

In the **citizenship clause**, "[Born] subject to the jurisdiction thereof," "jurisdiction" refers to a condition, a limit, a qualification for what ought to be our most precious gift: American citizenship. Sen. Howard, who introduced the citizenship clause, was at pains to dra-

matize the special meaning: "the word 'jurisdiction' ***as here employed***, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States."

In the **equal protection clause**, "jurisdiction" refers to a place, a locality, the laws of which must apply equally to all persons: black, white, Chinese, Russian, citizen, alien, male, female.

If you can't make that distinction, you can't understand what the Senate framers so earnestly debated.

***Benny v. O'Brien*.** In the New Jersey case of *Benny v. O'Brien*, you get a picture of how shaky citizenship law was even in 1898. Allan Benny was born here to domiciled, but not naturalized, Scottish parents. He was elected to the Town Council of Bayonne, New Jersey. O'Brien took the election to court, claiming Benny could not be a citizen (and member of the Town Council) since he was born to parents who were not citizens. The Hudson Circuit Court actually agreed! but was overruled by the New Jersey Supreme Court. Justice Gray quoted the opinion of the New Jersey Supreme Court in full.

> The object of the Fourteenth Amendment, as is well known, was to confer upon the colored race the right of citizenship. It, however, gave to the colored people no right superior to that granted to the white race. The ancestors of all the colored people then in the United States were of foreign birth, and could not have been naturalized, or in any way have become entitled to the right of citizenship. The colored people were no more subject to the jurisdiction of the United States, by reason of their birth here, than were the white children born in this country of parents who were not citizens. The same rule must be applied to both races; and unless the general rule, that ***when the parents are domiciled here*** birth establishes the right of citizenship, is accepted, the Fourteenth Amendment has failed to accomplish its purpose, and the colored people are not citizens. The Fourteenth Amendment, by the language, "all persons born in the United States, and subject to the jurisdiction thereof," was intended to bring all races, without distinction of color, within the rule which prior to that time pertained to the white race." (Emphasis added)

Judges of the N.J. Supreme Court, it is plain, believed that prior to the ratification of the 14th Amendment, children born to non-citizen whites were not born citizens. Benny was a citizen because if he were not, then the 14th amendment had failed in its goal to make citizens of black Americans. "Colored people" can't have more rights than white people, therefore the 14th Amendment makes Benny a citizen by birth. Moreover, the judges believed the amendment allowed non-citizen parents to bear citizen children, but only if they were domiciled aliens.

Smith v. Alabama. In still another effort to establish common law roots for the citizenship clause, Gray cited this 1888 case. An Alabama law required railroad engineers to be licensed by the state. Plaintiff Smith got caught without a license. He claimed to be operating in interstate commerce and was therefore bound by the Commerce clause of the Constitution, not by the laws of Alabama. In finding against Smith, the court had to interpret the Commerce clause in light of the Constitution. Gray focused his attention on this paragraph in the court's opinion:

> There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of English common law, and are to be read in the light of its history.

There's nothing exceptional about the court's admission that we used parts of the common law in fashioning our Constitution. However, any argument relating to the Commerce clause in the original Constitution is irrelevant to the development of the citizenship clause, which by 1866 was a tortured effort to break with the past based on 79 years experience with American statute law.

Now Gray runs through the Chinese suits. These cases arose out of questions raised by the Chinese Exclusion Acts. For our purposes, we need look at only one, *In Re Look Tin Sing*.

The Supreme Court is no ivory tower. Its members are ambitious, often brilliant legal thinkers, and passionate about the law — as they interpret it. Justice Stephen Field was a powerful advocate for protecting business prerogatives using what came to be called "substantive due process." We can see some of this in his dissent in *Slaughter-House*. An unrelated part of that dissent, you recall, had to do with his one-sentence review of the majority's definition of the citizenship clause.

Eleven years later, in 1884, while riding circuit with his Ninth Circuit Court, Field and his judges were confronted with a case identical to that of Wong Kim

Ark. Look Tin Sing was born in Mendocino, CA to domiciled Chinese immigrants who were never employed by the Chinese government. Like Wong, Look was denied entry when he returned from a visit to China. He was a Chinese laborer, and, it was claimed, an alien, and therefore inadmissible.

Field declared Look Tin Sing to be an American citizen by birth. He cited Kent and Sandford. In his own headstrong way, Field decided all children born in the United States were citizens. The exceptions? You guessed it: children born to diplomats, tribal Indians, and those born on land occupied by an enemy. For Field, the citizenship clause, Senate debate, and the *Slaughter-House* opinion never happened. Field's foray was a perfect fit for Gray's opinion fourteen years later.

Sovereignty. Benjamin Franklin in a 1751 letter complained: "I am not against the Admission of Germans in general, for they have their Virtues, their industry and frugality is exemplary…." However, "... unless the stream of their importation could be turned from this to other colonies ... they will soon so outnumber us, that all the advantages we have will not in My Opinion be able to preserve our language, and even our Government will become precarious."

Between 1776 and 1787, naturalizations were processed by each individual state. Justice Joseph Story, in his Commentaries, found transferring that power to the federal government a wise decision because: "If aliens might be admitted indiscriminately to enjoy all the rights of citizens at the will of a single state, the Union might itself be endangered by an influx of foreigners, hostile to its institutions, ignorant of its powers and incapable of a due estimate of its privileges."

The "Red Scare" and high unemployment following World War I were used to justify the Emergency Quota Act (1921) and the 1924 Immigration Act, which, for the first time, set numerical limits on immigration. More fundamental was the fear that immigration numbers would continue to grow, outstripping America's capacity for assimilation and ultimately threatening our sovereignty.

Gray's interpretation of the citizenship clause — as interpreted today — is that every woman on earth, all three billion of them, can have a U.S. citizen baby if they can manage to get here and deliver. That this child can be a dual citizen; that this child could come here at the age of 25, speak no English, and vote, that this child could be an insurance policy for his family, presages an end to American sovereignty. Justice Gray surely did not intend this.

Conclusions

U.S. v. Wong Kim Ark was a case decided by a 6 to 2 vote of the Supreme Court in 1898 when immigration was virtually unlimited.

From the start, it appears, Justice Horace Gray was determined to define American citizenship for all time. Since American law descended from English common law, he reasoned, a citizen was just a subject with a new dress. The definition of subject was determined for all time in Calvin's case of 1608, and therefore our citizenship clause simply reformulated the 1608 definition.

Allegiance was based on birth within the king's domain without reference to the parents. American citizenship mirrored this English strait jacket. And its permanence and immutability, formerly supplied by "natural law," springs from the fact that the Supreme Court says it is so.

America was the first modern nation. Logically, our nation would be the laboratory for the new concept: citizenship. For Gray, however, it was a dead end. And he dead-ended it!

There was intellectual ferment on the issue of citizenship. Enlightenment philosopher Emer de Vattel in his highly influential and often cited "Law of Nations" had long ago posited the idea that the citizenship of the child was based on the nationality of its parents. European nations took the hint and were adopting citizenship by descent based on the Napoleonic Code.

In the infamous 7 to 2 *Dred Scott* decision, Justice Taney had declared blacks whether free or slave could not be citizens — an odd decision if Coke's catechism still prevailed. Justice Curtis in his dissent noted that citizenship by birth was entirely up to states to determine. Blacks, mulattoes, and Indians were born subjects of the king prior to the Revolution, but most states denied them membership after the Revolution. Any state could decree only they were citizens who were born to citizens. Coke got no respect in opinion or dissent.

Naturalization, a rarely used parliamentary prerogative in England, was a favored process in America and required applicants to expatriate — to renounce all previous allegiances. This was a decidedly subversive idea to the English, for it knocked common law practice on its ear. The First Congress approved this in 1790, kissing much common law goodbye without a parting glance.

Our early naturalization laws limited naturalization to whites. This could only have been the federal reflection of states' power to limit who could be a citizen. At the same time, the federal government reserved

the power to make citizens of children born overseas. It limited this right, by law, to children born to fathers who were U.S. citizens.

Early courts would not touch citizenship questions except when confronted with Revolutionary War inheritance cases. Sandford, in fact, seemed genuinely unaware of this when he expressed surprise that there were no court precedents to guide him in deciding *Lynch v. Clarke* in 1844.

When courts did construe American citizenship out of a welter of possibilities, they typically claimed our citizenship came from our own sovereignty and laws and not from the English parliament or the common law.

"I am not against the Admission of Germans in general, for they have their Virtues, their industry and frugality is exemplary...." However, "... unless the stream of their importation could be turned from this to other colonies ... they will soon so outnumber us, that all the advantages we have will not in My Opinion be able to preserve our language, and even our Government will become precarious."

—Benjamin Franklin, 1751

Gray obviously admired Justice Story but ignored instances where Story moved beyond the common law, sometimes favoring state laws dealing with citizenship issues and quoting Vattel. And sometimes Gray misquoted Story by not finishing his quotes.

Coincident with the time when the 14th Amendment passed, British Lord Chief Justice Alex Cockburn reported on Coke in a way favorable to Gray's position. However, Gray ignored Cockburn's real purpose: a lengthy and trenchant criticism of place of birth membership and support for nationality based on the status of the parents.

Pursuant to his censure, Cockburn criticized Sir Edward Coke's report on Calvin's case and the opinion of Sir William Blackstone. This didn't stop Gray from making Coke and Blackstone centerpieces of his opinion.

Gray cited three Supreme Court decisions or dissents that in some manner dealt with the citizenship clause and which he thought were favorable to his opinion. They are unconvincing in their support for citizenship based on mere birth on American soil. Gray's plumbing of *The Exchange v. McFadden, Smith v. Alabama*, and *Benny v. O'Brien* can only be described as desperate ploys.

Citizenship was a painful issue for a Congress that was dealing with a surfeit of painful issues. That they simply wanted to restore a medieval status quo is nonsense. The Senate debate made it clear that "subject to the jurisdiction" limited membership/citizenship to children born loyal to the United States and to no other nation — a logical concern for lawmakers dealing with the aftermath of a brutal and divisive Civil War.

It is a reasonable surmise that the framers of the 14th Amendment expected that future congresses would pass legislation on citizenship based on the citizenship clause and using Section 5. And that these, too, would be revised from time to time. However, until recently Gray's all-encompassing opinion made legislators fear to tread there.

Gray did not consider the Senate debate. He tells us straight up that he dismissed it. The inconvenient dialogue that attended Senate passage of the citizenship clause was simply ignored by Justice Gray. Since when does a court have the right to dismiss legislative debate when evaluating a piece of legislation — especially a Constitutional Amendment?

Citizenship based on mere birth on American soil promotes illegal immigration. Literally millions of families in America consist of an illegal parent or parents and a mix of citizen children and out-of-status children. In this game of dysfunctional arrangements there can be no satisfactory outcomes.

"Birth tourism" reminds us that there are no numerical limits on who can play. If "A nation without borders is not a nation," the same can be said of a nation with unlimited birthright citizenship.

Black's Law Dictionary defines sovereignty as "The supreme political authority of an independent state." In a republic, that power resides with the people.

The job of a constitution, first and foremost, is to defend a nation's sovereignty. People line up daily at the Archives to view a man-made sealed cavern wherein rests the U.S. Constitution. There they see the law that a sovereign people rely on to maintain their sovereignty. These viewers would be shocked to find it was just a piece of paper, that thanks to the Supreme Court it had become what Justice Robert Jackson insisted it was not: a "suicide pact." It is ***not*** a suicide pact and Justice Gray surely did not intend it to be. But his interpretation of the citizenship clause augurs an end to American sovereignty.

Gray's opinion came in two packages.

- Package one granted citizenship to Wong Kim Ark based on a careful set of rules:.

Place of Birth — American soil.

Status of Parents — citizens or domiciled legal immigrants, not employed by a foreign government.

It covered all the necessary bases laid out in current proposals like H.R. 140 and S. 723.

Gray seemed to like the idea of "domicil." He used it 21 times in various forms in his opinion. Alas, he threw judicial restraint to the wind to come up with package two.

• Package two was the Coke catechism, part 1. This was a regression to common law sub-servience to a king, the slag end of a repellent system we fought a war to rid ourselves of. Gray supported his opinion with a mess of misquotes and a determined effort to ignore the Senate debate — citizenship based on loyalty only to the United States. Moreover, nothing in that debate suggested in any way that Gray's opinion was an exercise in judicial supremacy, of judicial overreach. It's time for the Supreme Court to revisit the citizenship clause.

• Section 5 of the 14th Amendment provides Congress with the power to pass legislation to limit citizenship so long as it promotes loyalty and protects our sovereignty. It's time for Congress to pass legislation limiting citizenship by birth to children born to at least one parent who is a citizen or legal immigrant. ■

The Fourteenth Amendment

Section 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.