"SUBJECT TO THE JURISDICTION THEREOF": THE INDIAN LAW CONTEXT

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Section 1 of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Much of the debate over the meaning of this provision in the nineteenth century, especially what it meant to be "subject to the jurisdiction" of the United States, concerned the distinctive status of Native peoples—who were largely not birthright citizens even though born within the borders of the United States. It is unsurprising, then, that the Trump Administration and others have seized on these precedents in their attempt to unsettle black letter law on birthright citizenship.

But their arguments that this history demonstrates that jurisdiction meant something other than its ordinary meaning at the time—roughly, the power to make, decide, and enforce law—are anachronistic and wrong. They ignore the history of federal Indian law.

For most of the first century of the United States, the unique status of Native nations as quasi-foreign entities was understood to place these nations' internal affairs beyond Congress's legislative jurisdiction. By the 1860s, this understanding endured within federal law, but it confronted increasingly vocal challenges. The arguments over the Fourteenth Amendment, then, recapitulated this near century of debate over Native status. In crafting the citizenship clause, Congress largely agreed that jurisdiction meant the power to impose laws; where they heatedly disagreed was whether Native nations were, in fact, subject to that authority. Most concluded they were not, and in 1884, in Elk v. Wilkins*, the Supreme Court affirmed the conclusion that Native nations' quasi-foreign status excluded tribal citizens from birthright citizenship.*

But the "anomalous" and "peculiar" status of Native nations, in the words of the nineteenth-century Supreme Court, means that the law governing tribal citizens cannot and should not be analogized to the position of other communities—or at least any communities who lack a quasi-foreign sovereignty and territory outside most federal and state law but within the borders of the United States. Indeed, the Court in Wong Kim Ark *expressly rejected the attempt to invoke* Elk v. Wilkins *to deny birthright citizenship to a Chinese immigrant born of non-citizen parents, ruling that the decision "concerned only members of the Indian tribes within the United States." The analogy has no more validity today than it did then, and the current Court should continue to reject it.*

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INTRODUCTION

In the wake of the Civil War, the United States enshrined birthright citizenship in the U.S. Constitution. Section 1 of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[1] On the first day of his second presidency, President Trump sought to redefine that constitutional guarantee. Executive Order 14160 provides that birthright citizenship excludes children born in the United States if their mothers are either "unlawfully present in the United States" or their mothers' presence is "lawful but temporary" (such as on a student visa), and their fathers are neither citizens nor permanent residents at the time of their birth.[2]

At the time of the Fourteenth Amendment's adoption, the ordinary and legal meaning of jurisdiction was similar to its meaning today: the power to make, decide, and enforce the law.[3] The government nonetheless argues that

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1 U.S. CONST. amend. XIV, § 1.

2 Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

3 Relying solely on dictionaries to understand the meaning of historical terms can omit important context, but contemporaneous dictionaries are strikingly consistent in how they defined jurisdiction. *See* ALEXANDER M. BURRILL, A LAW DICTIONARY AND GLOSSARY 112 (2d ed. 1867) ("Authority to judge, or administer justice; power to act judicially; power or right to pronounce judgment. The right by which judges exercise their power. . . . In a more general sense—power to make law; power to legislate or govern; power or right to exercise authority."); 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 769 (12th ed. 1868) ("The authority by which judicial officers take cognizance of and decide causes. Power to hear and determine a cause. . . . It includes power to enforce the execution of what is decreed."); HYDE CLARKE, NEW AND COMPREHENSIVE DICTIONARY OF THE ENGLISH LANGUAGE 215 (5th ed. 1869) ("legal authority; district of a court"); 2 JOHN CRAIG, THE UNIVERSAL ENGLISH DICTIONARY 16

"subject to the jurisdiction thereof" does not in fact mean "subject to the jurisdiction thereof" based on something we have examined throughout our academic careers: federal Indian law. In response to the many lawsuits challenging the order, the President's lawyers rely heavily[4] on an 1884 Supreme Court decision, *Elk v. Wilkins*, holding that John Elk, a Ho-Chunk (Winnebago) man born in Iowa was not a citizen under the Fourteenth Amendment.[5] The Trump Administration argues that the "United States' political connection to children of aliens present temporarily is far weaker than its relationship with children of 'members of Indian tribes,'" so if the link to tribal members does not create birthright citizenship, "the weaker link of aliens present temporarily even more obviously does not" do so.[6] Further, they claim, because the Supreme Court today holds that the United States has "plenary" authority with respect to Indian tribes, jurisdiction does not mean regulatory jurisdiction, but instead requires "allegiance" to the United States.[7]

(1869) ("Legal authority; extent of power: the power or right of exercising authority; the limit within which power may be exercised."); NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 239 (1868) ("1. Legal power or authority. 2. Power of governing or legislating. 3. Limit within which power may be exercised.").

4 *See, e.g.*, Brief for Appellants at 1, 9, 14, 15, 17, 24, 25, 35, Washington v. Trump, No. 25-807 (9th Cir. Mar. 7, 2025) [hereinafter Washington Appellants' Brief] (discussing *Elk v. Wilkins*, 112 U.S. 94 (1884)); Brief for Appellants at 1, 10, 11, 16, 17, 19, 28, 29, CASA, Inc. v. Trump, No. 25-1153 (4th Cir. Mar. 2025) [hereinafter CASA Appellants' Brief] (same).

5 *Elk*, 112 U.S. at 109.

6 Washington Appellants' Brief, *supra* note 4, at 24; CASA Appellants' Brief, *supra* note 4, at 29–30.

7 *See* Washington Appellants' Brief, *supra* note 4, at 15–17. The order has inspired some defenders. *See, e.g.*, Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. (forthcoming 2025/26) (manuscript at 83), https://ssrn.com/abstract=5140319 [https://perma.cc/X272-E6DZ] (relying heavily on the Indian exception to argue that the Amendment incorporates a concept of "allegiance" that somehow includes children of Confederates at war with the Union but excludes children of undocumented immigrants and those without permanent legal status in the United States); Ilan Wurman, *Jurisdiction and Citizenship* 7–8 (Minn. Legal Stud. Rsch. Paper No. 25-27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5216249 [https://perma.cc/3HB3-4P6Q] (arguing that birthright citizenship depends on the voluntary action of the undocumented immigrant as well as the sovereign's consent, or perhaps must be adjudicated on a case-by-case basis for children of non-domiciliaries because certain rules of domestic relations apply based on domicile). These efforts have inspired a wealth of responses pointing out their flaws as a matter of history and logic. *See, e.g.*, Evan D. Bernick, Paul A. Gowder & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 CORNELL L. REV. ONLINE 101 (2025); Evan D. Bernick, *88 Problems for Kurt Lash*, VOLOKH CONSPIRACY (Mar. 31, 2025, 10:15 AM), https://reason.com/volokh/2025/03/31/88-problems-for-kurt-lash/ [https://perma.cc/3TS7-AESW]; Ilya Somin, *Birthright Citizenship - A Response to Barnett and Wurman*, VOLOKH CONSPIRACY (Feb. 15, 2025, 4:59 PM), https://reason.com/volokh/2025/02/15/birthright-citizenship-a-response-to-barnett-and-wurman [https://perma.cc/92SS-VJHW]. Professor Amanda Frost, a leading scholar on birthright citizenship, has also addressed the order in testimony before Congress. *"Subject to the Jurisdiction Thereof": Birthright Citizenship and the Fourteenth Amendment: Hearing Before the Subcomm. on the Const. and Ltd. Gov't*, 119th Cong. (2025)

This interpretation is anachronistic and wrong. The drafters of the citizenship clause insisted that it excluded Native people not because of some kind of "connection" to or "consent" of the United States, but because "Indians" were not fully subject to U.S. jurisdiction in the ordinary sense of the word.[8] Although some senators objected to this interpretation, it was not because they understood jurisdiction to mean something different, but because they believed that the United States already enjoyed complete jurisdiction over Native people.[9]

What made Native status so difficult for the Reconstruction Congress was one of the key challenges of federal Indian law—the fact that Native nations defied the familiar categories that Anglo-Americans attempted to slot them into.[10] In many ways, as the drafters of the Fourteenth Amendment repeatedly argued, Native nations were akin to foreign nations: They were both sovereign and outside U.S. jurisdiction. But this dominant framing provides little support that the children of unauthorized or temporary migrants were not birthright citizens: If Native peoples were quasi-foreign, then they had no more claim to be birthright citizens of the United States than people born in France.

Yet Native nations were not foreign; as critics of the Amendment's jurisdictional language pointed out, they were "within the United States."[11] This complex territorial status is what makes analogies to Native peoples so tempting for those attempting to uproot settled understandings of birthright citizenship—Native peoples were both within U.S. borders and still not born as citizens. There are two problems, however, with this analogy between Native peoples and the children of immigrants from foreign countries. First, none of the congressmen debating birthright citizenship made it. Immigrants did appear in the debates: Some critics of the Citizenship Clause argue that the children of Chinese and Roma lacked sufficient allegiance to the United States and so should not be citizens; but both sides seemed to concede that these groups, unlike Native nations, were "subject to the jurisdiction" of the United States, and so anticipated that they would be citizens under the clause.[12] Some in Congress, however, did make a separate and telling

(statement of Amanda Frost, Professor of L., Univ. of Va. Sch. of L.). Two decades ago, Earl Maltz wrote a brief essay on Natives and the Fourteenth Amendment. Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENTARY 555, 555 (2000). Gerard Magliocca similarly critiqued the use of Native history to attack birthright citizenship, although with less focus on the jurisdictional debates. Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 501–03 (2008).

8 *See infra* Part II.B.

9 *See infra* Part II.B.

10 Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 25 (2019).

11 CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866); *see also id.* at 2893 ("within the limits of the United States"); *id.* ("within the territorial limits of the United States").

12 *Infra* Part II.A.

analogy: They compared Native peoples to the children of foreign ambassadors and ministers. Legally, what united these two disparate groups was jurisdictional immunity even on U.S. soil.[13]

The second problem with the analogy is that the conundrum of Native sovereignty embedded within the United States was a familiar problem in nineteenth-century Indian law jurisprudence that had yielded a clear answer: Native nations were exceptional. "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence," Chief Justice Marshall opined in *Cherokee Nation* in 1832, which explicitly rejected the claim that Native nations were "foreign."[14] "[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."[15]

Indian law scholars have long debated whether this exceptionalism is good for federal Indian law, given the ways courts have sometimes used the language of exception to harm Native communities. But, whatever we may think about whether Native peoples were properly characterized as sui generis, it is clear that nineteenth-century Anglo-Americans believed they were. Moreover, these statements captured the reality that Native status was not akin to other groups'—or at least any other group that was not a self-governing, independent sovereign whose powers did not derive from the U.S. Constitution and yet still lay within the territorial borders of the United States. If fidelity to historical understandings is going to be the touchstone of our jurisprudence, then we should reject efforts to concoct analogies between nineteenth-century Native status and the position of other communities.

Indeed, when confronted with the question of Natives' birthright citizenship in *Elk v. Wilkins*, the Supreme Court pointed to the unique status of tribes as "distinct political communities" and the resulting limits on jurisdiction over Native people.[16] In light of this status, the Court held, tribal members "although in a geographical sense born in the United States," were "no more 'born in the United States and subject to the jurisdiction thereof,'" under the Fourteenth Amendment "than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."[17]

Implicitly, by contrast, children of subjects of a foreign government born within the domain of the United States *were* birthright citizens.

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13 *See infra* Part II.B.

14 Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831).

15 *Id.*

16 Elk v. Wilkins, 112 U.S. 94, 99–100 (1884).

17 *Id.* at 102.

Nevertheless, opponents of birthright citizenship for children of Chinese immigrants quickly sought to rely on *Elk* to support their claims. The Supreme Court shut such opponents down in *United States v. Wong Kim Ark*: "The decision in *Elk v. Wilkins* concerned only members of the Indian tribes within the United States," it ruled, "and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country."[18]

Like the attorneys who lost in *Wong Kim Ark*, modern-day opponents of birthright citizenship once again rely on *Elk v. Wilkins* to challenge the well-settled meaning of the Fourteenth Amendment. This Essay sets forth the history that reveals the flaws in this attempt. Part I outlines the status of Native peoples from the Founding to the eve of Reconstruction, showing how this status resulted in limited state and federal jurisdiction and lack of birthright citizenship. Part II discusses Reconstruction, and how exclusion of Indians from birthright citizenship under the Civil Rights Act of 1866 and the Fourteenth Amendment emerged from the unique jurisdictional and political status of Native people within the United States. Part III discusses *Elk v. Wilkins*, the understanding of that decision in *United States v. Wong Kim Ark*, and the extension of birthright citizenship to Native people by statute.

I
NATIVE STATUS, JURISDICTION, AND CITIZENSHIP IN THE ANTEBELLUM UNITED STATES

At the time of the Founding, Anglo-Americans regarded "Indian tribes" as separate and independent polities.[19] This separate political status was reflected in the text and understanding of the Constitution as well as its implementation.[20] There was considerable debate about the precise status of Native sovereignty under the law of nations, especially whether Native nations within U.S. borders could claim full international legal personalities.[21] But for domestic purposes, federal policymakers urged, "the

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18 169 U.S. 649, 682 (1898).

19 Haaland v. Brackeen, 599 U.S. 255, 310 (2023) (Gorsuch, J., concurring) ("[T]he Constitution that followed reflected an understanding that Tribes enjoy a power to rule themselves that no other governmental body—state or federal—may usurp."); *see also id.* at 307 (under the "Indian-law bargain struck in our Constitution[,] . . . Indian Tribes remain independent sovereigns with the exclusive power to manage their internal matters").

20 *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1083 (2015); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1086 (2014); W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1595 (2023) [hereinafter Allread, *The Specter of Indian Removal*]; Gregory Ablavsky & W. Tanner Allread, *We The (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243 (2023).

21 *See* Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and*

independent nations and tribes of [I]ndians ought to be considered as foreign nations, not as the subjects of any particular state."[22] The Supreme Court recognized this unique quasi-foreign status in *Cherokee Nation v. Georgia*, declaring the relationship of tribes to the United States "unlike that of any other two people in existence."[23] Under this status, tribes could not "with strict accuracy, be denominated foreign nations," but they were "domestic dependent nations," with a separate political existence even within U.S. borders.[24] This separate status had important consequences for both jurisdiction and citizenship.

A. The Antebellum Law of Jurisdiction

Native nations' quasi-foreign status had an important legal consequence: They were outside the legislative jurisdiction of the United States.[25] The federal government could, and did, regulate U.S. citizens' and other non-Natives' "trade and intercourse" under the Indian Commerce Clause. By contrast, Congress could not govern Native nations themselves directly through statute.

Federal officials repeatedly stressed this point. "There can be no doubt, that all the laws of Congress . . . are, in their operation coextensive with the Territory of the United States, and obligatory upon every person therein," U.S. Attorney General William Bradford opined in 1795, "except independent Nations & Tribes of Indians residing on Indian lands."[26] U.S. representatives negotiating the 1815 Treaty of Ghent with Great Britain similarly stated, "the Indians residing within the United States are so far independent that they live under their own customs, and not under the laws of the United States."[27] And in 1822, Secretary of War John C. Calhoun reported to Congress, "We have always treated [Native peoples] as an independent people; and, however insignificant a tribe may become, and

International Law, 1783–1795, 106 J. AM. HIST. 591, 591 (2019) (describing how the Founders used concepts sounding in international law to subordinate Native communities).

22 Letter from Henry Knox to President Washington (July 7, 1789), *in* THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 138 (W.W. Abbot ed., 2008), https://rotunda.upress.virginia.edu/founders/default.xqy?keys=GEWN-print-05-03-02-0066%20GEWN-print-05-03-02-0067#GEWN-05-03-02-pb-0134 [https://perma.cc/KS3J-4WYY].

23 30 U.S. 1, 16 (1831).

24 *Id.* at 17.

25 *See* Gregory Ablavsky, *Structural Federal Indian Law After* Brackeen, 67 ARIZ. L. REV. 291, 309–16 (2025); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 129–43 (2002).

26 Letter from the Att'y Gen. to the Sec'y of the Treasury (June 19, 1795), *in* 2 TERRITORIAL PAPERS OF THE UNITED STATES 520, 520 (Clarence Edwin Carter ed., 1934).

27 Letter from the American to the British Ministers (Sept. 9, 1814), *in* 3 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 715, 716 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

however surrounded by a dense white population, so long as there are any remains, it continues independent of our laws and authority."[28]

Yet this well-established principle of Native legal independence was controversial and unpopular—especially in the South, where white residents demanded new lands to expand the region's cotton economy. By the 1820s, Southern states argued that Native nations within their borders could be regulated by state law, notwithstanding federal treaties.[29] In *Cherokee Nation v. Georgia*, the state tested that authority, contending that these tribes were summarily "subject to the jurisdiction of that state."[30] The same phrase—that Southern states were claiming that Native nations were "subject to the jurisdiction" of the surrounding states—was used eighteen times during the era's congressional debates over Removal to describe state assertions of legislative and regulatory authority.[31]

In the end, Southern states' political campaign to expel Native nations succeeded, resulting in the mass deportations symbolized by the Cherokee Nation's Trail of Tears.[32] But their *legal* argument failed: In *Worcester v. Georgia*, the Supreme Court decisively rejected the argument that states enjoyed jurisdiction over Indian country.[33]

The Court's ruling that Native lands lay outside the scope of state legislative jurisdiction endured through the Civil War. Indeed, in 1866, even as Congress debated what became the Fourteenth Amendment and its citizenship provision, the Supreme Court reaffirmed *Worcester* in two significant rulings in tax cases affirming that Native nations lay outside state jurisdiction.[34]

Meanwhile the debate concerning *federal* jurisdiction over Native

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28 John C. Calhoun, *Condition of the Several Indian Tribes* (Feb. 8, 1822), *in* 6 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 275, 275–76 (Walter Lowrie & Walter S. Franklin eds., 1834); *see also* John C. Calhoun, *Exchange of Lands with the Indians* (Jan. 9, 1817), *in* 6 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 123, 124 (Walter Lowrie & Walter S. Franklin eds., 1834) ("Those tribes have been recognised so far, as independent communities, as to become parties to treaties with us, and to have a right to govern themselves without being subject to the laws of the United States.").

29 *See* Allread, *The Specter of Indian Removal*, *supra* note 20, at 1554–56.

30 30 U.S. 1, 73 (1831) (Thompson, J., dissenting).

31 *See* 2 REG. DEB. 1606 (1826); 6 REG. DEB. 1050, 1051, 1053, 1055 (1830); 7 REG. DEB. lxxiv (1831); 9 REG. DEB. 309 (1833).

32 *See generally* CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (2020) (discussing forced removal of Native nations).

33 31 U.S. 515, 561 (1832) (holding that the Cherokee nation is a "distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress").

34 *See In re* Kan. Indians, 72 U.S. (5 Wall.) 737, 755–56 (1866); *In re* The N.Y. Indians, 72 U.S. (5 Wall.) 761, 771 (1866).

nations persisted. In 1834, Congress considered legislation that would have created a Native territorial government, but John Quincy Adams opposed this claim of authority over Native peoples. "What constitutional right had the United States to form a constitution and form of government for Indians?" he queried.[35] The legislation failed.[36] An 1846 Supreme Court case, *United States v. Rogers*, subsequently asserted (without citation) that "the Indian tribes residing within the territorial limits of the United States are subject to their authority," but did not clarify whether "authority" here had its now-familiar meaning of paramount U.S. sovereignty or implied a novel claim of legislative jurisdiction.[37] When the Executive Branch sought to use the ambiguous dicta from *Rogers* to justify legislation creating federal jurisdiction over crimes between Indians in Indian country, that effort also failed.[38]

The Trump Administration asserts that it was "well settled" that Native nations in the antebellum United States were "subject to the regulatory power of the United States."[39] For support, the Administration mostly invokes cases long post-dating the Fourteenth Amendment, but it also cites the jurisdictional language in *Rogers* as well as *dicta* from another antebellum case, *United States ex rel. Mackey v. Coxe*.[40] We have explored these two cases in detail in prior work, noting their ambiguity as well as the fact that *neither* case actually involved the exercise of federal legislative jurisdiction over Indians.[41] That would have been difficult, since the antebellum Congress did not regulate tribes' internal affairs through legislation, instead relying on treaties.

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35 10 REG. DEB. 4763 (1834).

36 *See* 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 306–07 (1984) (noting that Congress rejected this bill as well as subsequent efforts to create a federal territory out of the Indian Territory).

37 45 U.S. (4 How.) 567, 572 (1846).

38 *See* Bethany R. Berger, *"Power over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2015–16 (2004) (discussing President Polk's request for legislation and Commissioner of Indian Affairs Medill's argument that Rogers supported it).

39 Brief for Appellants at 14–15, New Hampshire Indonesian Community Support v. Trump, No. 25-1348 (1st Cir. May 29, 2025) [hereinafter NHICS Appellants' Brief]; Reply Brief for Appellants at 6–7, New Hampshire Indonesian Community Support v. Trump, No. 25-1348 (1st Cir. June 30, 2025) [hereinafter NHICS Appellants' Reply Brief].

40 United States *ex rel.* Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855) (holding that letters of administration granted under Cherokee law should be given full faith and credit). Oddly, the Administration also argues that *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 416–18 (1866), authorized Congress to regulate "Indian commercial activities," NHICS Appellants' Brief, *supra* note 39, at 15, even though the case involved the prosecution of non-Indians for the sale of liquor *to* Indians. But, consistent with U.S. jurisdiction over its own citizens, federal law had established jurisdiction over *non-Indians* for crimes against Indians since 1790. Trade and Intercourse Act of 1790, ch. 33, § 5, 1 Stat. 137, 138 (1790).

41 Ablavsky, *supra* note 25, at 317–18; Berger, *supra* note 38, at 1960, 2042–43 n.441.

The problem with the Administration's argument is not that the opposite principle—the Founding-era view of Native jurisdictional independence—was well-settled either. The problem is that, by the time of the Civil War, the question of Native jurisdictional autonomy had become *unsettled*, with lots of debate on all sides. The Administration cannot retroactively "settle" this dispute by picking out the arguments from the side it finds congenial. Besides distorting the past, this fake consensus renders the congressional debates over the Fourteenth Amendment's jurisdictional language nonsensical. What is more, it embraces the position of the citizenship provision's *opponents*—whose arguments failed to persuade Congress—while disregarding the conclusions of the language's drafters and proponents, who, as we shall see, forcefully defended Native peoples' independence.

B. The Antebellum Law of Indian Citizenship

There was another consequence of Native peoples' separate status: Tribal members were not U.S. citizens absent express federal action.[42]

The earliest U.S. laws reflect the non-citizen status of tribal people. Article I of the Constitution, for example, excluded "Indians not taxed" from the population for apportionment of representatives.[43] Early treaties between the United States and Native nations routinely distinguished between Indians and U.S. citizens.[44] The Trade and Intercourse Acts similarly distinguished between "citizens" and "Indians" in setting forth jurisdictional and settlement rules.[45]

The first case to seriously examine Native rights to citizenship concerned whether an Oneida man could alienate his property to a non-Indian.[46] New York's penultimate court initially concluded that the legislature "exercise[d] entire and perfect control over [the Oneida Nation],"

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42 *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 17.01[2] (Nell Jessup Newton et al. eds., 2024) [hereinafter COHEN'S] (discussing Native non-citizenship in this period); Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1054–58 (2018) (same); Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1197–98 (2016) [hereinafter Berger, *Birthright Citizenship*] (same).

43 U.S. CONST. art. I, § 2, cl. 3.

44 *See, e.g.*, Treaty of Peace and Friendship, Cherokee Nation-U.S., art. IV, July 2, 1791, 7 Stat. 39 (describing the "boundary between the citizens of the United States and the Cherokee nation"); Treaty with the Chickasaw arts. IV–VI, Jan. 10, 1786, 7 Stat. 24 (providing rules for conduct of any "citizen of the United States" with respect to Chickasaws).

45 *E.g.*, Trade & Intercourse Act of 1802, §§ 3–10, 14, 2 Stat. 139 (1802) (providing rules for conduct of a "citizen, or other person" with respect to Indians and Indian land); Trade & Intercourse Act of 1793, §§ 3–6, 11, 13, 1 Stat. 329 (1793) (contrasting "Indians" with "citizens of the United States" or "citizens or inhabitants of the United States").

46 *See* Goodell v. Jackson, 20 Johns. Cas. 693, 710 (N.Y. 1823), *rev'g*, Jackson, *ex dem.* Smith v. Goodell, 20 Johns. Cas. 188, 193 (N.Y. Sup. Ct. 1822).

and "the jurisdiction is in the state, and, consequently, upon the principles of the common law, they must be citizens."[47] New York's highest court reversed.[48] In an opinion by Chancellor James Kent, *Goodell v. Jackson* rejected the notion that the Oneida were "completely the subjects of our laws."[49] Instead, "[t]hey have always been, and are still considered by our laws as dependent tribes, governed by their own usages and chiefs."[50] The United States as well "ha[s] constantly treated with them as dependent nations, governed by their own usages, and possessing governments competent to make and to maintain treaties."[51] Therefore they were not citizens.[52]

As *Goodell* shows, sovereignty, citizenship, and jurisdiction were intertwined. Indeed, throughout this period, the United States sought to extend U.S. citizenship as a tool of assimilation.[53] Removal treaties offered land and citizenship to those willing to separate from their tribes and remain in the east.[54] Later treaties offered citizenship to those who would swear an oath of allegiance to the United States and could prove that they had "adopted the habits of civilized life,"[55] some explicitly providing that accepting citizenship would "dissolve their tribal relations."[56]

Consequently, while some Native people sought citizenship, others resisted it. In 1831, when the Cherokee Nation sued Georgia in the U.S. Supreme Court, the Nation's attorneys "insisted that individually they are

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47 Jackson, *ex dem.* Smith v. Goodell, 20 Johns. Cas. 188, 192–93 (N.Y. Sup. Ct. 1822).

48 *Goodell*, 20 Johns. Cas. at 734.

49 *Id.* at 710 (quoting *Jackson ex dem. Smith*, 20 Johns. Cas. at 193). The Trump Administration oddly reads Kent's reversal as evidence that Indians were not citizens notwithstanding being subject to New York's jurisdiction. NHICS Appellants' Reply Brief, *supra* note 39, at 12. On the contrary, as the quoted language demonstrates, Kent *rejected* the lower court's view that the state enjoyed jurisdiction over Indians. The lower court's reasoning was part of the broader state effort to claim jurisdiction over Indians rejected in *Worcester v. Georgia*. *See supra* text accompanying notes 29–31; Allread, *The Specter of Indian Removal*, *supra* note 20, 1554, 1568–72.

50 *Goodell*, 20 Johns. Cas. at 710.

51 *Id.* at 714.

52 *Id.* at 710.

53 *See* Bethany R. Berger, *The Anomaly of Citizenship for Indigenous Rights*, *in* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 217, 219 (Shareen Hertel & Kathryn Libal eds., 2011) [hereinafter Berger, *Anomaly*].

54 *See, e.g.*, Treaty with the Cherokee art. VIII, July 8, 1817, 7 Stat. 156 (removal treaty promising 640 acres and citizenship to those who wished to remain east of the Mississippi); Treaty with the Choctaw art. XIV, Sept. 27, 1830, 7 Stat. 333 (removal treaty promising the same).

55 *See* Treaty with the Kickapoo art. III, June 28, 1862, 13 Stat. 623; Treaty with the Potawatomi art. III, Nov. 15, 1861, 12 Stat. 1191.

56 Treaty with the Delawares art. IX, July 4, 1866, 14 Stat. 793; *see also* Treaty with the Sioux art. VIII, June 19, 1858, 12 Stat. 1037 (providing "all the rights, privileges, and immunities . . . of citizens of the United States" for Indians "who may be desirous of dissolving their tribal connection and obligations, and of locating beyond the limits of the[ir] reservation").

aliens, not owing allegiance to the United States."[57] Moreover, after receiving citizenship under an 1843 act, many Stockbridge Indians refused to accept it and persuaded Congress to revoke the legislation and restore their original status.[58]

States also drew links between citizenship, jurisdiction, and assimilation. During the Removal period, many Southern states sought to declare Native peoples as state citizens precisely so that they could assert legislative and judicial jurisdiction over them.[59] Other states, especially in the Midwest, embraced the possibility of Native state citizenship, but only for Native peoples who had expatriated from their nations and embraced the trappings of "civilization."[60]

Even the infamous *Dred Scott v. Sandford* recognized that while tribal members were not birthright citizens, they could become so by federal action.[61] Chief Justice Taney declared that, in contrast to African Americans, "Indian Governments were regarded and treated as foreign Governments."[62] As a result, Indian people

> may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.[63]

Taney then qualified the breadth of this statement. The federal naturalization statute applied only to "free white person[s],"[64] and given the Indians' "untutored and savage state," "the word white was not used with any particular reference to them."[65] Similarly, the year before *Dred Scott*, U.S. Attorney General Caleb Cushing had concluded that Native peoples could not naturalize absent a specific congressional act or treaty because they

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57 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

58 Treaty with the Stockbridge Tribe pmbl., Nov. 24, 1848, 9 Stat. 955; *see also* Berger, *Anomaly*, *supra* note 53, at 220 (discussing resistance of Wyandotte and Kickapoo to treaties making them citizens).

59 *See* Frederick E. Hoxie, *What Was Taney Thinking? American Indian Citizenship in the Era of Dred Scott*, 82 CHI.-KENT L. REV. 329, 339–40 (2007) ("During the 1820s, as the debate over removal spread across Georgia, Alabama, and Mississippi, local politicians turned repeatedly to state citizenship as a tool for forcing removal.").

60 WIS. CONST. art. III, § 1 (1848) (enfranchising "[c]ivilized persons of Indian descent, not members of any tribe"); MICH. CONST. art. VII, § 1 (1850) (enfranchising "every civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe").

61 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857).

62 *Id.*

63 *Id.*

64 Naturalization Law of 1802, ch. 28, 2 Stat. 153, 153.

65 *Dred Scott*, 60 U.S. at 419–20.

were neither foreigners (since their nations were "domestic") nor white.[66]

Although Taney and Cushing endorsed racial exclusions from citizenship, radical Republicans saw exclusion from birthright citizenship as a matter of tribal sovereignty. In 1862, for example, Ohio Representative John Bingham passionately argued that the Constitution already extended citizenship to all born in the United States, regardless of race or color.[67] Indians were the one exception from the general rule because tribes had been "recognized at the organization of this Government as independent sovereignties. They were treated as such; and they have been dealt with by the Government ever since as separate sovereignties."[68]

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In short, on the eve of Reconstruction, two things were true: Tribal members were not U.S. citizens without express federal action; and federal and state jurisdiction over them were significantly limited. Both principles reflected recognition of tribal sovereignty and federal obligations to protect it.

II
RECONSTRUCTION, INDIANS, AND CITIZENSHIP

Reconstruction saw renewed debates over Native status. Some in Congress worried that the treaty system only facilitated fraud and abuse.[69] In addition, with the end of conflict over the slave or free status of new territories, Congress encouraged settlers and railroads to expand into tribal territories in the West.[70] But many leaders of the Reconstruction Congress were committed to protecting the sovereign rights of Native people. As Gerard Magliocca and Linda Kerber have examined, for abolitionists and radical Republicans, Georgia's usurpation of Cherokee land and sovereignty was, like slavery, a powerful example of state abuses.[71] Radical Republican Thaddeus Stevens, for example, invoked Georgia's abuses of the Cherokee to oppose a bill that would have extended state law over Kansas Indians, declaring "[t]hat is the manner in which the Indians are treated whenever they are put out of the protection of the United States, and placed under the

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66 Relation of Indians to Citizenship, 7 Op. Att'y Gen. 746, 749–50 (1856).

67 CONG. GLOBE, 37th Cong., 2d Sess. 1639–40 (1862).

68 *Id.* at 1639.

69 JOINT SPECIAL COMM. OF THE TWO HOUSES OF CONG., CONDITION OF THE INDIAN TRIBES, S. REP. NO. 39–156, at 8 (1867); COHEN'S, *supra* note 42, § 2.03[7].

70 *See* Berger, *Birthright Citizenship*, *supra* note 42, at 1200.

71 *See* GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 88–93, 118–23 (2007); Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 907–14 (2003); *see also* Linda K. Kerber, *The Abolitionist Perception of the Indian*, 62 J. AM. HIST. 271, 278–79 (1975).

control of the State laws."[72]

Republican leaders also insisted on the limits of federal authority in Indian affairs. When Congress debated a bill to establish a consolidated Native government in the Indian territory, for example, Senator Howard of Michigan objected that it "proposes a complete revolution in the principles which lie at the bottom of our Indian policy. Hitherto the United States ha[s] not assumed to possess political power over the Indian tribes."[73] Senator Foster of Connecticut agreed that the proposal exceeded federal authority. "We have no more right to legislate for these Indians than we have to legislate for the people of Mexico, or of any European nation," he opined.[74] These commitments to tribes' separate jurisdictional status—and the challenges to it—shaped the debates on Native citizenship.

At the same time, despite their disagreements, congressional advocates and critics of Reconstruction shared highly dismissive views of Native people and culture. Their racism and commitment to Indigenous dispossession colored their debates over Native status.[75] Native peoples had their own complicated views on U.S. citizenship,[76] but they had no voice in the congressional debates.[77] As one of us has argued elsewhere,[78] Native perspectives should be relevant to constitutional interpretation, but we do not undertake that project in this short piece.

A. The 1866 Civil Rights Act

The Reconstruction Congress's first attempt to protect birthright citizenship came in the Civil Rights Act of 1866.[79] Senator Lyman

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72 CONG. GLOBE, 39th Cong., 1st Sess. 1684 (1866) (debate on HB 259); *see also* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1172–73 (2010) (discussing other condemnations of abuses of Indians by the Reconstruction Congress).

73 CONG. GLOBE, 38th Cong., 2d Sess. 1308 (1865).

74 *Id.* at 1309.

75 *See* Stephen Kantrowitz, *White Supremacy, Settler Colonialism, and the Two Citizenships of the Fourteenth Amendment*, 10 J. CIV. WAR ERA 29, 32 (2020) (noting that "policy-makers" imagined Native citizenship as "an instrumental afterthought in the midst of continuing conquest and a way of imagining a palatable resolution to the problem of the Indian future").

76 *See, e.g.*, STEPHEN KANTROWITZ, CITIZENS OF A STOLEN LAND: A HO-CHUNK HISTORY OF THE NINETEENTH-CENTURY UNITED STATES (2023) [hereinafter KANTROWITZ, CITIZENS] (discussing the Ho-Chunk people's use of claims to American citizenship to prevent their removal from their homelands); DAVID J. SILVERMAN, RED BRETHREN: THE BROTHERTOWN AND STOCKBRIDGE INDIANS AND THE PROBLEM OF RACE IN EARLY AMERICA 187 (2010) ("Indians knew that citizenship would leave them without contiguous tribal territory or exclusive control over their own affairs . . . [and] called their acceptance of citizenship 'turning white' . . . .").

77 Elizabeth Hidalgo Reese, *Tribal Representation and Assimilative Colonialism*, 76 STAN. L. REV. 771 (2024).

78 *See generally* Ablavsky & Allread, *supra* note 20.

79 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866). For an overview of the debates over Native citizenship in drafting the 1866 Civil Rights Act, see generally Stephen Kantrowitz, *Jurisdiction, Civilization, and the Ends of Native American Citizenship: The View from 1866*, 52

Trumbull's first proposal for the Act was a narrow rebuke of *Scott v. Sandford*, providing only that "all persons of African descent born in the United States are hereby declared to be citizens of the United States."[80] But Trumbull quickly amended the proposed language to read "all persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color."[81] Opponents objected that this would encompass the children of Chinese and "Gypsies" (Roma), and Trumbull declared it "[u]ndoubtedly" would.[82] But much of the debate over this provision's meaning focused on Native peoples.

As soon as Trumbull proposed the broader citizenship provision, senators asked whether he intended "to naturalize all the Indians of the United States."[83] Trumbull repeatedly insisted that the "intention is not to embrace them": "Our dealings with the Indians are with them as foreigners, as separate nations. We deal with them by treaty, and not by law."[84] Senator Reverdy Johnson of Maryland disputed this account of Native status, arguing that the federal government could govern Native nations through ordinary legislation, and therefore they were not a "foreign [p]ower."[85] Johnson—the lawyer who had successfully argued against African American citizenship in *Scott v. Sandford*[86]—made his remarks as part of a longer speech questioning the wisdom of the entire Civil Rights Act,[87] and his opposition did not carry the day.

Other parts of the debate focused on the distinctive statuses of Native communities in different parts of the country. In Kansas and the Midwest, for instance, some Native nations had agreed to allot their lands, anticipating later federal policy.[88] Senator Lane of Kansas unsuccessfully proposed adding language that would explicitly affirm allottees' citizenship.[89] (Lane's interest in the question was financial: The Kansas Supreme Court had held that because these allottees were citizens, they were subject to state taxes.[90]

W. HIST. Q. 189 (2021).

80 *See* CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866).

81 *Id.* at 498.

82 *See id.* (discussion between Senator Trumbull and Senator Edgar Cowan of Pennsylvania).

83 *Id.*

84 *Id.*

85 *Id.* at 506.

86 LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER 305 (2010).

87 CONG. GLOBE, 39th Cong., 1st Sess. 506 (1866).

88 *See id.* (remarks of Senator Lane of Kansas).

89 *See id.* at 522.

90 *Id.* at 506 ("[T]he act of accepting the allotments makes them citizens so far as to subject the allotments to taxation."); *see* Blue-Jacket v. Johnson Cnty. Comm'rs, 3 Kan. 299, 364 (1865) (holding "Shawnees who hold their lands in severalty under patents from the government . . . are subject to taxation . . . [and] are not so exempt"); Miami Cnty. Comm'rs v. Wan-zop-pe-che, 3 Kan. 364, 371 (1865) (interpreting treaties between the State and Native nations to mean land held by Native nations are taxable under Kansas law).

The U.S. Supreme Court would overturn this ruling only months later.[91]) For their part, California's and Oregon's representatives expressed concern that Native communities living on reservations within their states were "not subject to tribal authority" because the tribal governments were "broken up and destroyed."[92] They were describing the consequences of an ongoing genocide waged by state and federal governments against the region's Native peoples.[93] Anglo-Americans had long been virulently hostile toward California's so-called "Digger Indians," whom white Californians routinely derided, as Senator Conness did in this debate, as "the lowest class known of Indians."[94] Their racism blinded them to the persistence of tribal authority even in the midst of these campaigns,[95] although Congress and the Supreme Court would later acknowledge these governments' continued existence.[96]

Trumbull expressed frustration at how the debate on the Civil Rights Act had been derailed. "I wish this whole Indian question was out of the way," he observed.[97] "It is not the great object of the bill."[98] He urged using the language of "Indians not taxed" from the U.S. Constitution to exclude Native peoples from citizenship.[99] Senator Doolittle from Wisconsin endorsed this view because it reflected the Constitution's view that the tribes were "independent nations, to some extent, existing in our midst but not constituting a part of our population."[100] Ultimately, the Senate agreed to this

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91 The Kan. Indians, 72 U.S. (5 Wall.) 737, 761 (1866).

92 CONG. GLOBE, 39th Cong., 1st Sess. 573 (1866); *id.* at 526 ("They are cut off from all connection with their tribes. . . . They are in all respects subject to the authority of the agents of the government.").

93 For forceful historical arguments that California's campaign of extermination constituted a genocide, see BRENDAN C. LINDSAY, MURDER STATE: CALIFORNIA'S NATIVE AMERICAN GENOCIDE, 1846–1873 (2012); BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846–1873 (2016). The Governor of California acknowledged these actions as a genocide in 2019. Jill Cowan, *'It's Called Genocide': Newsom Apologizes to the State's Native Americans*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/newsom-native-american-apology.html [https://perma.cc/SHM2-5EQD]. On Oregon, see generally GRAY H. WHALEY, OREGON AND THE COLLAPSE OF *ILLAHEE*: U.S. EMPIRE AND THE TRANSFORMATION OF AN INDIGENOUS WORLD, 1792–1859 (2010).

94 CONG. GLOBE, 39th Cong., 1st Sess. 526 (1866).

95 *See* DAMON B. AKINS & WILLIAM J. BAUER, JR., WE ARE THE LAND: A HISTORY OF NATIVE CALIFORNIA 154 (2021) (noting that, although "[b]y the late 1860s, California Indians' world was out of balance," Native leaders continued to resist).

96 *See* COHEN'S, *supra* note 42, § 2.08[4][d]; Act of Jan. 12, 1891, chs. 64, 65, 26 Stat. 712, 714 (1891) (setting aside land in California for "each band or village" and permitting limited contracts with "the tribe [or] band"). *See generally* William Wood, *The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherías*, 44 TULSA L. REV. 317 (2009).

97 CONG. GLOBE, 39th Cong., 1st Sess. 574 (1866).

98 *Id.*

99 *Id.* at 527.

100 *Id.* at 571.

amendment, thirty-one to ten.[101] The final version of the law thus encompassed "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[102] The phrase, Congress's debate underscores, recognized the distinct political status of Native peoples even while within the borders of the United States.

B. The Fourteenth Amendment

Less than two months after Congress passed the Civil Rights Bill over President Johnson's veto, Senator Jacob Howard of Michigan proposed what became the Birthright Citizenship Clause of the Fourteenth Amendment.[103] The Civil Rights Bill had been drafted with the (ultimately unsuccessful) hope to placate President Johnson and emerged from the legally cautious Judiciary Committee.[104] The Fourteenth Amendment, in contrast, was drafted by the more radical Joint Committee on Reconstruction and was not cabined by concerns of veto or constitutional limits on congressional power.[105] Therefore, although the language and debate over the amendment are similar to those over the Bill, they meaningfully diverged, especially because the Fourteenth Amendment's citizenship provision introduced the complicated question of jurisdiction over Indians.

Senator Howard's proposal read: "[A]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside."[106] This language, he explained, would exclude those "who belong to the families of [a]mbassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."[107]

Because this language differed from the 1866 Civil Rights Act, some worried that it might inadvertently encompass tribal citizens. Just as in the debates only months earlier, everyone in Congress remained committed to ensuring that tribal citizens would *not* become birthright citizens. But heated disagreements nonetheless followed over whether this language

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101 *Id.* at 575.

102 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

103 *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (proposing amendment that declares that "all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside").

104 *See* Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331, 349 (2010) ("The Act was a conservative measure, designed to conciliate President Johnson and gain his signature.").

105 *Id.* (noting that the Committee of Fifteen was "considerably more radical" and that "because a President has no veto power over a proposed constitutional amendment, it made no concessions to the President's conservative views").

106 CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

107 *Id.*

accomplished that goal. It is tempting to read those arguments about fights over the meaning of jurisdiction. But in fact, the two sides largely agreed that jurisdiction meant federal legislative authority. Their more substantial and fundamental argument unsurprisingly fixated on the legal question that had dominated federal Indian law for the past eighty years: whether Congress could in fact regulate Native nations through laws rather than treaties.

1. The Meaning of "Jurisdiction"

Both critics and proponents of the Amendment's jurisdictional language were quite explicit about what they thought it meant. "[W]hat does it mean when you say that a people are subject to the jurisdiction of the United States?" Senator Doolittle, a skeptic of the provision, queried.[108] He responded to his rhetorical question: "Subject, first, to its military power; second, subject to its political power; third, subject to its legislative power . . . ."[109] Senator Henricks, another opponent, agreed with this definition of jurisdiction. For him, "the question [was] whether, under the Constitution, under the powers of this Government, we may extend our laws over the Indians and compel obedience, as a matter of legal right, from the Indians."[110] He continued: "If the Indian is bound to obey the law he is subject to the jurisdiction of the country; and that is the question . . . ."[111] In other words, these senators agreed that "subject to the jurisdiction thereof" meant subject to legal authority.

Proponents of the Amendment interpreted the term to mean legal authority as well. The President's lawyers have seized on snippets of remarks by Senator Trumbull to argue that jurisdiction means something other than

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108 *Id.* at 2896. Senator Doolittle, like others in these debates, combined his claims with racist arguments about the fitness of Native people for citizenship. *Id.* at 2892–93 (explaining his view that many Native Americans were not suited for United States citizenship and would "degrade . . . that citizenship" if included). Doolittle was motivated by parochial interest as well: In his state of Wisconsin, what he called the "remnants of the Winnebagoes" were successfully using claims of citizenship to resist removal from their homelands. *Id.* at 2892; *see* KANTROWITZ, CITIZENS, *supra* note 76, at 11–12 (describing how Ho-Chunk claimed to have been naturalized to thwart efforts to remove them from their land). Of course many congressmen—supporters of birthright citizenship in general among them—harbored similar convictions of the superiority of white people and white civilization over Native people and their rights. *See, e.g.*, CONG. GLOBE 39th Cong., 1st Sess. at 526 (Senator Conness, in discussing the Civil Rights Act, referring to the "Digger Indians . . . perhaps the lowest class known of Indians, and utterly and totally unfit to become citizens, apart from their being taken care of by the Government"). Although Doolittle's arguments did not carry the day regarding the Fourteenth Amendment, such sentiments shaped efforts to make Indians "fit" for citizenship and other devastating aspects of federal Indian policy. *See generally* COHEN'S, *supra* note 42, § 2.08 (discussing assimilation policy).

109 CONG. GLOBE, 39th Cong., 1st Sess. 2896 (1866).

110 *Id.* at 2894.

111 *Id.*

legislative authority.[112] Pressed on whether the jurisdictional language would inadvertently include "the wild Indians," Trumbull responded: "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."[113] Trumbull subsequently observed, "It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is 'subject to the jurisdiction of the United States.'"[114]

Taking these references to allegiance out of context is deceptive. Because of their centrality here, Trumbull's remarks are worth quoting at length:

> What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means. Can you sue a Navajoe Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them. If we want to control the Navajoes, or any other Indians of which the Senator from Wisconsin has spoken, how do we do it? Do we pass a law to control them? Are they subject to our jurisdiction in that sense? Is it not understood that if we want to make arrangements with the Indians to whom he refers we do it by means of a treaty?[115]

Trumbull's later remarks had a similar context:

> It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is 'subject to the jurisdiction of the United States.' Would the Senator from Wisconsin think for a moment of bringing a bill into Congress to subject these wild Indians with whom we have no treaty to the laws and regulations of civilized life? Would he think of punishing them for instituting among themselves their own tribal regulations? Does the Government of the United States pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another? Are they subject to our jurisdiction in any just sense? They are not subject to our jurisdiction. We do not exercise jurisdiction over them. It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens . . . .[116]

In full context, these quotes speak for themselves. Trumbull defined jurisdiction the same way Doolittle and Hendricks did: as the authority to

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112 *See* Washington Appellants' Brief, *supra* note 4, at 20 (taking Senator Trumbull's remarks out of context to equate that "subject to our jurisdiction" with one's parents immigration status or domicile); CASA Appellants' Brief, *supra* note 4, at 24 (same).

113 CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

114 *Id.*

115 *Id.*

116 *Id.*

"subject [Native peoples] to our laws."[117]

Allegiance was relevant to the question of Native status because "allegiance" in the legal sense hinged in part on jurisdiction. At the time, the term signified the obligations automatically owed by those within a sovereign's power and protection.[118] "Local allegiance" was owed by foreigners passing through a sovereign's territory, while "natural allegiance" applied to those born within it.[119] It depended not on individual loyalties but on the scope of the sovereign's authority.[120]

A revealing exchange between Senators Edgar Cowan of Pennsylvania and John Conness of California underscores that the subjective loyalties or acceptance of government authority did not defeat birthright citizenship in the view of its proponents. Cowan (who opposed birthright citizenship for non-whites generally)[121] railed that the proposed amendment would make citizens of "Gypsies" and others who, he claimed, owed the state "no allegiance; who pretend to owe none; who recognize no authority in her government."[122] He then interrogated Conness on the impact of birthright citizenship for children of Chinese immigrants in California. Conness seemed to accept Cowan's accounts of the immigrants' loyalties: He described the Chinese immigrants in the state as temporary residents and acknowledged that California had attempted to restrict Chinese immigration.[123] Nonetheless, he stressed, under the amendment "the children

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117 *Id.*

118 *See* Nathan Perl-Rosenthal & Sam Erman, *Inventing Birthright: The Nineteenth-Century Fabrication of Jus Soli and Jus Sanguinis*, 42 L. & HIST. REV. 421, 424–27 (2024) (explaining that theorists in early modern France and England "identified a sovereign's 'domination' or 'protection' as the overarching principles that created a bond of allegiance and a relation of subjecthood").

119 Bouvier's Law Dictionary offered a tripartite division of allegiance, which it defined as "[t]he tie which binds the citizen to the government." BOUVIER, *supra* note 3, at 151. "Acquired allegiance" bound "a citizen who was born an alien, but has been naturalized." *Id.* "Local allegiance is that which is due from an alien while resident in a country, in return for the protection afforded by the government." *Id.* Finally, "[n]atural allegiance is that which results from the birth of a person within the territory and under the obedience of the government." *Id.* at 151–52; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 366 (Phila. J.B. Lippincott Co. 1893) ("Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king . . . .").

120 *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 38 & n.a (1848) (explaining that "jurisdiction and allegiance" attached on birth in the United States "without any regard . . . to the political condition or allegiance of their parents, with the exception of the children of ambassadors"); Calvin v. Smith, 77 Eng. Rep. 377, 388 (K.B. 1608) ("[T]he protection and government of the King is general over all his dominions and kingdoms, as well in time of peace by justice, as in time of war by the sword, and that all be at his command, and under his obedience.").

121 CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (arguing that the Citizenship Clause would result in mingling "all the various families of men, from the lowest form of the Hottentot up to the highest Caucasian").

122 *Id.*

123 *See id.* at 2891–92 (noting that custom required Chinese immigrants to eventually return to

of all parentage whatever . . . should be regarded and treated as citizens of the United States"—including both the children of "Gypsies" and Chinese immigrants.[124] What this exchange revealed was that—for the provision's proponents like Conness—subjective political allegiance, permanent residence, and what we would now term "immigration status" did not matter because they did not change the obedience the United States could demand from such immigrants.

But Native peoples were different. Their distinctive status meant that they were not fully under the obedience of the government and so therefore did not owe it "natural allegiance."[125] Nor did they plausibly owe "local allegiance" to a sovereign if they lay outside its jurisdiction.[126] For Native peoples, allegiance and jurisdiction were thus twinned.

The jurisdictional significance of "allegiance" is underscored by the other group discussed during the debates alongside Indians as excluded from birthright citizenship: the children of ambassadors.[127] Though the histories and situations of the two groups were sharply different, they shared a distinctive jurisdictional status. In both instances, it was not mere membership in another sovereign that limited the allegiance that Indians or ambassadors owed the United States even within its borders.[128] It was, instead, their jurisdictional immunity from U.S. law.

In short, both the citizenship provision's proponents and critics interpreted "subject to the jurisdiction thereof" in the same way: as the power to subject people within the sovereign's territory to its laws. We must not only ignore the Amendment's text but also sideline what the drafters actually

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China and that California had enacted various laws to restrict Chinese immigration and labor).

124 *Id.* at 2891.

125 *See* BOUVIER, *supra* note 3, at 151. In his 1856 opinion on Indian non-citizenship, U.S. Attorney General Cushing asserted without citations that Indians were "in our allegiance, without being *citizens* of the United States." Relation of Indians to Citizenship, 7 Op. Att'y Gen. 746, 749 (1856). But this assertion is inconsistent with Senator Trumbull's statements that Native people were not in allegiance with the United States, CONG. GLOBE, 39th Cong., 1st Sess. at 2893, and Senator Howard declared that "Attorney General Cushing . . . takes great liberties with the Constitution in speaking of the Indian as being a subject of the United States." *Id.* at 2895.

126 Although the federal government routinely spoke about offering "protection" to Native nations in the era's international-law sense, the United States did not, in fact, afford individual Natives protection in the ways that it did the Chinese and other immigrants. Conness, for instance, spoke in detail about the need for California's criminal law to guard the Chinese, even if he acknowledged that that protection had often been thwarted by the prior prohibition on Chinese testimony. CONG. GLOBE, 39th Cong., 1st Sess. at 2892. By contrast, U.S. law placed the punishment of Indian-on-Indian crimes under tribal authority, as Trumbull, Howard, and others repeatedly emphasized. *Id.* at 2893, 2895.

127 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866) (statement of Sen. George Henry Williams) (noting that the child of an ambassador "to a certain extent . . . is subject to the jurisdiction of the United States, but not in every sense; and so with these Indians").

128 As Chancellor Kent pointed out in his Commentaries, under long-standing English common-law ambassadors "owe not even a local allegiance to any foreign power," and so did not fall within its jurisdiction. KENT, *supra* note 120, at 50.

said to conclude that jurisdiction meant something other than jurisdiction.

2. *Debating Native Peoples' Jurisdictional Status*

Agreement that jurisdiction meant legislative authority did not avoid debate about Native status. On the contrary, the senators sharply disagreed about whether the United States possessed that power. In other words, just as federal officials and judges had debated for years, the senators disagreed about whether Congress could subject Native peoples to federal statutes.

Current black letter law is clear: Congress may subject Native nations to federal statutes as long as it does so unambiguously.[129] But projecting present law backward onto the nineteenth century is anachronistic. In 1866, this question was far from settled; indeed, it became the crux of the debate over birthright citizenship and Native peoples.

On the one hand were those, like Senator Doolittle, who thought that Congress already had legislative authority over Native peoples. Doolittle claimed that the "Indian population" was "most clearly subject to our jurisdiction, both civil and military."[130] Other skeptics of the proposed jurisdictional language agreed. "[O]ver all the Indian tribes within the limits of the United States, the United States may—that is the test—exercise jurisdiction," Senator Reverdy Johnson opined.[131] "[T]he question as to the authority to legislate is one, I think, about which, if we were to exercise it, the courts would have no doubt . . . ."[132] For this reason, Doolittle moved to reintroduce the words "excluding Indians not taxed" to make it clear that the citizenship provision did not apply to tribal citizens.[133]

The drafters and proponents of the amendment opposed this proposal, which they thought confusing, given its reliance on taxation as the boundary

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129 Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1694 (2023) (noting that Congress may abrogate tribal sovereign immunity if it conveys "its intent to abrogate in unequivocal terms"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 60 (1978) (holding "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," but "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

130 CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866).

131 *Id.* at 2893.

132 *Id.*

133 *Id.* at 2890. Similar questions had emerged over the Fourteenth Amendment's remaking of apportionment, which excluded "Indians not taxed" from enumeration and congressional representation. Pressed in this context as to "why not, as we are amending the Constitution, embrace the Indian as a man and a brother?", Thaddeus Stevens—a Radical Republican who was one of the foremost proponents of Black citizenship—replied, "Because they are a tribal race, have their own separate governments, and, as a general rule, are not citizens." *Id.* at 376. On Stevens's background, see BRUCE LEVINE, THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE (2022).

for citizenship.[134] They instead argued that Doolittle's proposal was superfluous: The amendment's jurisdictional language *already* excluded Native peoples because Native nations were not subject to federal law. Senator Howard, for instance, resisted Doolittle's proposal:

> I hope that amendment to the amendment will not be adopted. Indians born within the limits of the United States, and who maintain tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and have always been in our legislation and jurisprudence, as being *quasi* foreign nations.[135]

Howard reiterated this point elsewhere in the debate. Native peoples were not subject to the "full and complete jurisdiction" of the United States, he argued—"that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States."[136] The United States had "always regarded and treated the Indian tribes within our limits as foreign Powers" for constitutional treaty-making and commerce power, and even before the Constitution, had regarded them as "independent nations, with whom the other nations of the earth have held treaties."[137] He further noted that, under the "uniform course of decision," Indians who committed crimes against other Indians lay outside federal jurisdiction and were subject only "to the tribe itself, and not to any foreign or other tribunal"—in clear contrast to other "foreign" groups within the United States, who were subject to ordinary federal and state criminal jurisdiction.[138]

Senator Williams of Oregon concurred with Howard's reading, noting that Native peoples remained jurisdictionally distinct even if the United States could claim limited authority over them in some circumstances. "In one sense," he stressed, "all persons born within the geographical limits of the United States are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense."[139] Even an ambassador's child, for instance, could be tried for murder, but he was still not subject to U.S. jurisdiction "in every respect; and so with these Indians."[140]

In the end, by a vote of thirty to ten, the Senate rejected Doolittle's proposal to add "Indians not taxed" to the Fourteenth Amendment's citizenship provision.[141] The vote fell almost on exact party lines, with

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134 CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (calling application of the phrase "very uncertain").

135 *Id.* at 2890.

136 *Id.* at 2895.

137 *Id.*

138 *Id.*

139 *Id.* at 2897.

140 *Id.*

141 *Id.* at 2893.

Republican supporters of Reconstruction and the Amendment all voting against the Doolittle amendment. As a result, the Fourteenth Amendment as ratified limited birthright citizenship to those "subject to the jurisdiction of the United States."[142]

In light of the debates, this outcome implicitly endorsed the view advanced by Trumbull, Howard, and others that Native peoples did not fall under federal legislative authority. All senators agreed that tribal members born in the United States should not automatically be citizens under the Fourteenth Amendment. They also agreed that "subject to the jurisdiction thereof" meant subject to U.S. jurisdiction. By rejecting additional language to explicitly exclude tribal people from birthright citizenship, they affirmed that such people were not subject to U.S. jurisdiction in that sense.

Further confirmation of this view came two years after the Amendment was ratified. A Senate resolution charged the Senate Judiciary Committee with clarifying whether the Amendment had, in fact, made Indians citizens, and thereby nullified existing treaties with tribal nations. The Committee responded with an unambiguous no, concluding that the Fourteenth Amendment "has no effect whatever upon the status of the Indian tribes within the limits of the United States."[143] The reason was clear:

> [T]he Constitution and the treaties, acts of Congress, and judicial decisions above referred to, all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term *jurisdiction* is employed in the fourteenth amendment [sic] to the Constitution.[144]

All these sources, the committee reasoned, demonstrated that the Indian tribes lay outside the "municipal [that is, national] jurisdiction of the United States."[145] Indeed, because the Constitution itself placed Indian tribes among the "rank of nations capable of making treaties," the committee concluded that, "an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be

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142 U.S. CONST. amend. XIV, § 1.

143 S. REP. NO. 41-268, at 1 (1870).

144 *Id.* at 9.

145 *Id.* Here, the Committee was using the term "municipal" in its international law meaning of "national" rather than "international." *See id.* at 3 (describing tribal status as consistent with "their character as a nation or political community, because the treaty stipulates for many acts to be thereafter performed by the Delawares, which can only be performed by a separate community, independent of external municipal jurisdiction," and citing international law authorities). *See generally* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 10, at 16 (Richard Henry Dana Jr., ed., 8th ed. 1866) (distinguishing the "law of nations" or "external public law," from "the internal public law of a particular State," which includes "the municipal law of each particular nation").

unconstitutional and void."[146]

C. Making Sense of the Reconstruction Debates

The evidence from the debates surrounding the 1866 Civil Rights Act, the Fourteenth Amendment, and Native peoples establishes the meaning of "subject to the jurisdiction thereof." The drafters and ratifiers of the Fourteenth Amendment's Citizenship Clause understood jurisdiction to mean jurisdiction—that is, the ability of the United States to enact and enforce its laws against Native communities. Some thought that the federal government might have that power; most concluded that it did not. But no one argued that the term had some arcane other special meaning. That would have been especially odd given that the question of the scope of federal and state jurisdiction—in the standard sense of the term as regulatory, legislative, and judicial authority—had been the core question in debates over Native status for the better part of a century.

The drafters discussed allegiance in this context because the legal definition of allegiance required obedience to the territorial sovereign. Native peoples were not subject to obedience in this legal sense. This situated Native peoples differently from immigrants; except for ambassadors, immigrants' "allegiances" did not create immunity from federal law, especially the sort of criminal law immunity that dominated debates around jurisdiction over Native peoples.

Indeed, a clear negative inference can be drawn from the voluminous debates over Native status that Trumbull found so tedious. Native peoples drew so much attention precisely because they were the edge cases. If, as the President's lawyers claim, the citizenship status of the children of temporary residents or those who entered the United States in violation of federal or state law were equally uncertain, why did they not attract similar attention? The problem of people who had entered the United States in contravention of state and federal law already existed,[147] but they did not feature nearly so prominently. There are always dangers in interpreting historical silence, but here the contrast between the extensive deliberation over Native status and the relative absence of debate regarding other potentially ambiguous groups seems unmistakable and meaningful.

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146 S. REP. NO. 41-268, at 9.

147 *See, e.g.*, HIDETAKA HIROTA, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY (2019) (discussing state exclusions of immigrants); Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021) (discussing the numerous people illegally imported as slaves who became citizens under the 1866 Civil Rights Act and Fourteenth Amendment); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866) (statement of Sen. John Conness) (noting that "the State of California has undertaken, at different times, to pass restrictive statutes as to the Chinese").

III
ELK V. WILKINS AND STATUTORY CITIZENSHIP

The original understanding of the requirement that birthright citizens be "subject to the jurisdiction" of the United States, then, was that this language excluded Native peoples, whose distinctive status within U.S. boundaries limited the scope of federal jurisdiction. In *Elk v. Wilkins*,[148] decided sixteen years after ratification, the Supreme Court reached the same conclusion. This reaffirmation of the drafters' intent was significant for two reasons: It persisted despite growing claims of federal power over Native peoples, and it settled a contested question about whether individual Natives could self-naturalize by expatriating from their tribes.

In the years following the ratification of the Fourteenth Amendment, Congress began to assert more power over Indian tribes, notwithstanding the 1870 Senate Report suggesting that it lacked that authority. That same year the Supreme Court ruled in *Cherokee Tobacco* that the federal government *could* impose a tobacco tax within the Cherokee Nation.[149] Then, in 1871, Congress, through an appropriations rider, ended the practice of treaty-making, despite serious questions about this action's constitutionality then and now.[150] Meanwhile, the Bureau of Indian Affairs (BIA) began to lobby Congress to extend federal criminal jurisdiction over Indian-on-Indian crime—the paradigmatic example, recall, of federal jurisdictional limits in the debates over Indian citizenship. Congress refused, but the BIA helped bring a test prosecution of the killing of one Lakota man by another. In *Ex parte Kan-gi-shun-ca (Crow Dog)*, the Supreme Court rejected this attempt, arguing that such jurisdiction required a "clear expression of the intention of Congress."[151] But this phrasing implied that Congress could constitutionally enact such a law, and *Crow Dog* helped create the impetus for such a statute.[152]

These claims of federal power coincided with efforts to naturalize Native peoples. Beginning in 1874, Congress repeatedly debated a bill that would allow individual Indians to become citizens if they proved they had "adopted the habits of civilized life."[153] Congress rejected the bills, motivated

148 112 U.S. 94 (1884).

149 78 U.S. (11 Wall.) 616, 621 (1870).

150 Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified at 25 U.S.C. § 71); *see* United States v. Lara, 541 U.S. 193, 218 (2004) (Thomas, J., concurring) (calling the measure "constitutionally suspect"); David P. Currie, *Indian Treaties*, 10 GREEN BAG 2D 445, 451 (2007) (discussing legislative debates and calling the measure "flatly unconstitutional").

151 109 U.S. 556, 572 (1883).

152 *See, e.g.*, SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 134, 138–39 (Frederick Hoxie & Neal Salisbury eds., 1994) (discussing the ways the Executive Branch used *Crow Dog* to make the case for federal jurisdiction).

153 COLUMBUS DELANO, LETTER FROM THE SECRETARY OF THE INTERIOR, TRANSMITTING A

both by tribal opposition and by the negative effects of citizenship on tribes subject to it.[154]

Some reformers, however, argued that Indians, even if not born under federal jurisdiction, became U.S. citizens when they expatriated themselves from their tribes. This issue had emerged during the debates over the 1866 Civil Rights Act, with Senator Trumbull arguing that the legally significant moment was birth and not subsequent changes in status—but Congress did not definitively resolve the question.[155] As a result, uncertainty about whether Native people could, in essence, self-naturalize by subjecting themselves to U.S. authority persisted. The Land Office concluded that Indians became citizens when they "voluntarily dissolved all connection with [their] tribe."[156] Yet lower court decisions reached the opposite conclusion, ruling that even though Indians had the right to leave their tribes, they did not become citizens absent some act of naturalization.[157] Ultimately the question reached the U.S. Supreme Court in the 1884 case of *Elk v.*

DRAUGHT OF A BILL TO ENABLE INDIANS TO BECOME CITIZENS OF THE UNITED STATES, H.R. EXEC. DOC. NO. 43-228, at 2 (1874).

154 *See, e.g.*, REMONSTRANCE OF THE SEMINOLE AND CREEK DELEGATES AGAINST THE PASSAGE OF SENATE BILL NO. 107, TO ENABLE INDIANS TO BECOME CITIZENS OF THE UNITED STATES, S. MISC. DOC. NO. 45-18, at 3 (1878) (expressing tribal opposition because "if all the Creeks and Seminoles were to become citizens, the Creek Nation and the Seminole Nation would cease to exist"); MEMORIAL OF DELEGATES AND AGENTS OF THE CHOCTAW AND CHICKASAW NATIONS OF INDIANS, REMONSTRATING AGAINST THE PASSAGE OF SENATE BILL NO. 107, TO ENABLE INDIANS TO BECOME CITIZENS, S. MISC. DOC. NO. 45-8, at 2 (2d Sess. 1877) (objecting to Senate Bill No. 107 because citizenship of the United States would mean an individual "ceases to be a citizen of the Choctaw or Chickasaw Nation"); 6 CONG. REC. 551–53 (1877) (statements by Sens. Hoar, Thurman, and Maxey). Although Congress did not pass the general bill, it did enact several similar measures with respect to particular tribes. Act of Mar. 3, 1873, ch. 332, 17 Stat. 631 (Miami Indians); Act of July 15, 1870, ch. 296, § 9, 16 Stat. 335, 361 (1870) (Winnebago Indians in Minnesota); Act of Mar. 3, 1865, ch. 127, § 4, 13 Stat. 541, 562 (Stockbridge Indians).

155 When the prospect of Native self-naturalization came up during these debates, Senator Johnson queried, "[T]o what period does the phrase 'not subject to any foreign Power or tribal authority' relate? Does it mean at the time of the birth, or the time the controversy arises?" CONG. GLOBE, 39th Cong., 1st Sess. 506 (1866). Senator Trumbull offered an unambiguous answer: "When born," which suggested that Native peoples born as tribal members would not become birthright citizens even when they later expatriated. *Id.* This view displeased Kansas's Senator Lane, who hoped allotment and citizenship would lead to taxation, but Johnson acknowledged that Trumbull's interpretation likely required a formal act of naturalization before Indians became citizens. *Id.* The debate moved on without further discussion.

156 HENRY N. COPP, PUBLIC LAND LAWS, PASSED BY CONGRESS FROM MARCH 4, 1869, TO MARCH 3, 1875, at 283 (1875).

157 *See* United States v. Osborn, 2 F. 58, 59–61 (D. Or. 1880) ("[A]n Indian cannot make *himself* a citizen . . . without the consent and co-operation of the government. . . . [T]hat he has abandoned his nomadic life or tribal relations . . . may be a good reason why he should be made a citizen . . . but does not of itself make him one."); *see also* McKay v. Campbell, 16 F. Cas. 161, 167 (D. Or. 1871) ("Being born a member of 'an independent political community'—the Chinook [Indian tribe]—he was not born subject to the jurisdiction of the United States—not born in its allegiance. . . . [He] can only become [a citizen] by complying with the laws for the naturalization of aliens.").

Wilkins.

Elk v. Wilkins squarely presented the question of Native self-naturalization.[158] Elk's petition alleged that a year prior "he had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States," and was now a resident of Omaha, Nebraska.[159] In 1880, he had sought to register to vote, but was refused on grounds of non-citizenship.[160] His lawyers immediately brought suit arguing that the Fourteenth Amendment allowed an individual Indian to expatriate from his nation and thereby become a citizen.[161]

Neither the opinion nor the record said anything about Elk's tribe or his origins—the opposing brief in the Supreme Court dryly noted that he seemed "to have been dropped from the clouds to raise this question."[162] But newspaper accounts of the case reported that he was Winnebago,[163] and an 1880 census states that although he was then a laborer living in a wigwam on the banks of the Missouri River in Omaha, Nebraska, he was born in Iowa in 1845, to parents born in Wisconsin.[164] This suggests that he was born in Indian country on the "Neutral ground" on the Ioway River,[165] in the midst of repeated forced relocations of the Ho-Chunk (Winnebago) people.[166]

The Court's ruling in *Elk v. Wilkins* affirmed the political and jurisdictional distinctness of tribal nations and rejected John Elk's argument. The Court began with the separate status of tribal nations even on U.S. soil:

> The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation.[167]

The shift from treaty-making to legislation, moreover, simply changed

158 Evidence suggests that the litigation was brought as part of a test case by assimilationist reformers. *See* Berger, *Birthright Citizenship*, *supra* note 42, at 1211–15.

159 Elk v. Wilkins, 112 U.S. 94, 95–96 (1884).

160 *Id.*

161 *See* Berger, *Birthright Citizenship*, *supra* note 42, at 1215.

162 *Id.* at 1234 (quoting Brief and Argument of Defendant in Error at 7, *Elk*, 112 U.S. at 94).

163 *See, e.g.*, *The Indian's Vote*, HERALD: OMAHA, Jan. 12, 1881, at 5.

164 U.S. DEP'T OF THE INTERIOR, CENSUS OFF., TENTH CENSUS OF THE UNITED STATES 1880: SCHEDULE OF INHABITANTS FOR NEBRASKA, DOUGLAS CNTY., SUPERVISOR'S DIST. NO. 2, ENUMERATION DIST. NO. 20, at 34.

165 *See* Treaty with the Winnebago, U.S.-Winnebago Nation of Ind., art. II, Sept. 15, 1832, 7 Stat. 370.

166 Berger, *Birthright Citizenship*, *supra* note 42, at 1215–18 (discussing repeated relocations of the Ho-Chunk). Professor Stephen Kantrowitz details these relocations, and how Ho-Chunk in Wisconsin claimed citizenship to prevent their forced removal from their homelands. *See* KANTROWITZ, CITIZENS, *supra* note 76, at 2–3 (describing 1873 citizenship petition as "a carefully crafted bid to overcome" American conquest).

167 Elk v. Wilkins, 112 U.S. 94, 99 (1884).

the form of action, not the force of existing treaties.[168] Indeed, between 1866 and 1885, Congress did not enact any general statutes that sought to regulate Native nations' internal affairs.[169] It did pass a series of tribe-specific laws that scholars have labeled as "treaty substitutes," which either codified prior agreements with tribes or explicitly required tribal consent to take effect.[170]

The *Elk* Court also affirmed the continuing difference of jurisdictional rules in Indian affairs: "Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[171]

Tribal citizens were therefore not birthright citizens under the Fourteenth Amendment. "[S]ubject to the jurisdiction thereof," the Court reasoned, meant "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"[172]—a near-verbatim recapitulation of the arguments that Howard and Trumbull had made during the drafting process referencing the scope of federal power over Native nations.

Modern-day advocates of limits on birthright citizenship claim the references to "allegiance" in *Elk v. Wilkins* support their argument. But the opinion used "allegiance" in the same way Trumbull and others had deployed the term during the debates over the Fourteenth Amendment: to describe the unique political and jurisdictional status of tribal citizens even while on U.S. soil. The Court found that Indians born members of an Indian tribe, "an alien, though dependent, power," although "in a geographical sense" born in the United States, for purposes under the Fourteenth Amendment were like "children of subjects of any foreign government *born within the domain of that government*, or the children born within the United States, of ambassadors or other public ministers of foreign nations."[173] Implicitly, in contrast, children of subjects of a foreign government born *within* the United States were fully "subject to the jurisdiction" of the United

168 *See id.* at 107.

169 *See* 1 INDIAN AFFAIRS: LAWS AND TREATIES 1–32 (Charles J. Kappler ed. 1904). The "permanent general laws relating to Indian affairs" that Congress had ever enacted prior to 1885 only filled thirty-two pages. *Id.* Most of these statutes regulated federal bureaucracy as well as how U.S. citizens and residents interacted with Native communities. *Id.*

170 CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 8 (1987); *see also* Ablavsky, *supra* note 25, at 319 ("[F]or years after the 1871 Act, Congress implicitly assumed that Native consent was still necessary for federal law to govern internal Native issues."); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 312–26 (1994).

171 *Id.* at 99–100.

172 *Id.* at 102.

173 *Id.* (emphasis added).

States as the Constitution provided.

The Court then turned to the issue that the earlier debates had left unresolved: whether Indians could become citizens if they subjected themselves to the jurisdiction of the United States after they were born. The answer, it concluded, was no. The Fourteenth Amendment's "words relate to the time of birth," and thus, "Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized"—which had not happened.[174] The Department of Justice's briefs quote a phrase from this discussion, the statement that "no one can become a citizen of a nation without its consent," as evidence that the birthright citizenship does not extend to children of those who enter the United States illegally.[175] In context, of course, the phrase stands for nothing more than the commonplace proposition that if one is not born a citizen, formal action by the sovereign is required to become one.

Justice Harlan dissented at length, but his dissent only emphasizes the expansive grant of the citizenship clause. He agreed that the clause encompassed all those "subject to the complete jurisdiction of the United States, which could not be properly said of Indians in tribal relations."[176] But he argued that "the friends of the [amendment] . . . intended to include in the grant of national citizenship Indians" like John Elk who had left their tribes, and thereby came "within the jurisdiction of the States, and subject to their laws, because such Indians would be completely under the jurisdiction of the United States."[177] The amendment would be "robbed of its vital force by a construction which excludes from such citizenship those who, although born in tribal relations, are within the complete jurisdiction of the United States."[178] In other words, Justice Harlan agreed that the scope of the clause turned on the extent of jurisdiction, but he believed that if an Indian was born in the United States, he became a citizen as soon as he became subject to state jurisdiction.

Elk v. Wilkins was arguably an easy case under the law of the time, since it largely reiterated the interpretations of the Fourteenth Amendment that the drafters themselves had pressed. Subsequent cases, like the legal status of John Elk's children, would have presented the Court with harder issues. Moreover, *Elk v. Wilkins* was decided *before* Congress had asserted meaningful legislative jurisdiction over tribes' internal affairs.[179] Only later

174 *Id.*

175 CASA Appellants' Brief, *supra* note 4, at 10 (quoting *Elk*, 112 U.S. at 103).

176 *Elk*, 112 U.S. at 117 (Harlan, J., dissenting).

177 *Id.*

178 *Id.* at 120.

179 *See also* Alexandra Fay, *Citizenship and Empire in* Elk v. Wilkins, 102 WASH. U. L. REV. 1839, 1845–46 (2025) (describing *Elk* as occurring at a moment "in which the constitutional relationships between the federal government, Indian tribes, and individual tribal members were

would Congress begin to claim "plenary" federal power over Indians in ways that were sharply at odds with the understandings of the drafters of the Fourteenth Amendment.

What actually happened is that Congress quickly changed the rules. In 1885, Senator Dawes of Massachusetts proposed a bill that effectively abrogated the holding in *Elk.*[180] This proposal was ultimately incorporated in the 1887 General Allotment Act, which provided that any Indian who had received an allotment or "who has voluntarily taken up . . . his residence separate and apart from any tribe of Indians . . . and has adopted the habits of civilized life" was a U.S. citizen.[181] In the coming decades, Congress passed an array of statutes grappling with the question of Indian citizenship in a host of different circumstances, with the result that ever-greater numbers of Natives became citizens under these and other congressional actions.[182] One Native leader complained: "There has been so much confusing legislation on this matter, that I do not believe there is a learned judge in these United States who can tell an Indian's exact status without a great deal of study, and even then he may be in doubt."[183] Finally, in 1924 Congress resolved this uncertainty by declaring all Indians born within the United States to be citizens in the Snyder Act.[184]

This welter of congressional action reflected the broader reality that the late nineteenth century was a time of enormous change and uncertainty in federal Indian law, as both Congress and the Supreme Court reexamined foundational principles. What counted as the distinctive jurisdictional space of "Indian country" remained hotly contested and uncertain.[185] Which Native communities enjoyed federal recognition, and who decided that question, was similarly in flux,[186] as was the scope of *state* power in Indian country.[187]

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rapidly shifting").

180 DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., Annual Report of the Commissioner of Indian Affairs, at VII–VIII (1885).

181 Dawes Allotment Act of 1887, ch. 119, § 6, 24 Stat. 388.

182 *See* JOSEPH E. OTIS, THE INDIAN PROBLEM: RESOLUTION OF THE COMMITTEE OF ONE HUNDRED APPOINTED BY THE SECRETARY OF THE INTERIOR AND REVIEW OF THE INDIAN PROBLEM, H.R. DOC. NO. 68–149, at 6 (1924) (reporting that by 1924, about two-thirds of Indians had become citizens through allotment and other measures).

183 KANTROWITZ, CITIZENS, *supra* note 76, at 156.

184 Act of June 2, 1924, ch. 233, 43 Stat. 253.

185 *See* Gregory Ablavsky, *Too Much History:* Castro-Huerta *and the Problem of Change in Indian Law*, 2022 SUP. CT. REV. 293, 322–26 (2023) (recounting the doctrinal debates over the definition of Indian country); *see also* Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250, 268–73 (2021) (discussing shifting understandings of jurisdictional boundaries, Indian country, and reservation over the late nineteenth century).

186 *See, e.g.*, William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331 (1990).

187 *Compare* United States v. McBratney, 104 U.S. 621 (1881) (holding states had sole jurisdiction to prosecute crimes between non-Indians in Indian country), *and* Utah & N. Ry. v.

Allotment and other federal actions during this period created a chaotic jurisdictional jumble that courts are still resolving nearly 150 years later.[188]

Perhaps most significantly, only two years after *Elk*, *United States v. Kagama* upheld the constitutionality of the 1885 Major Crimes Act, for the first time approving legislation regulating crimes between Indians on reservations.[189] *Kagama* expressly acknowledged the issue's novelty: "Congress," the Court observed, "has determined upon a new departure—to govern [Native peoples] by acts of Congress."[190] The constitutionality of *Kagama* and similar intrusions on tribal sovereignty continues to be challenged.[191] Nonetheless, both in *Kagama* itself,[192] and in later cases, the Court continued to affirm the inherent sovereignty of Native peoples,[193] as well as the distinct jurisdictional and interpretive rules it created.[194] The Court also held that U.S. citizenship did not affect these rules,[195] and courts have repeatedly rejected state arguments that U.S. citizenship expanded state jurisdiction over Native people.[196]

Although *Elk v. Wilkins* had little direct impact on Native people, opponents of birthright citizenship for children of immigrants almost immediately began using it to bolster their claims. In particular, the decision became fuel for the ongoing campaign to exclude ethnic Chinese from the United States.[197] This effort reached the Supreme Court in *United States v.*

Fisher, 116 U.S. 28 (1885) (holding territory could tax railroad property within reservation), *with* United States v. Kagama, 118 U.S. 375 (1886) (rejecting argument that state sovereignty limited federal jurisdiction over Indians on reservations), *and* United States v. Winans, 198 U.S. 371 (1905) (holding state property rights did not limit tribal treaty fishing rights outside reservations).

188 *See, e.g.*, Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6 (1995) (describing how allotment's impact lives on in cases diminishing tribal sovereignty and territory); *see also* McGirt v. Oklahoma, 591 U.S. 894 (2020) (noting the jurisdictional uncertainty in Oklahoma over a century after statehood, and resolving that the Muscogee reservation remained Indian country).

189 118 U.S. 375 (1886).

190 *Id.* at 382.

191 *See, e.g.*, Haaland v. Brackeen, 599 U.S. 255, 318–26 (2023) (Gorsuch, J., concurring) (arguing that the Constitution does not support plenary power over Indian affairs); M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 328 (2018) ("One clear conclusion, regardless of the type of originalist lens used to examine the constitution, is that the contemporary version of the congressional plenary power doctrine is *not* valid.").

192 *Kagama*, 118 U.S. at 381–82, 384 (reiterating that Native people "could not be subjected to the laws of the State and the process of its courts," and Native nations' status "as a separate people, with the power of regulating their internal and social relations").

193 *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that Cherokee power to prosecute was inherent and therefore not controlled by the Fifth Amendment).

194 *See, e.g.*, United States v. Winans, 198 U.S. 371 (1905) (interpreting treaty to preempt state property law).

195 United States v. Nice, 241 U.S. 591 (1916), *overruling In re* Heff, 197 U.S. 488 (1905).

196 *See, e.g.*, Bethany R. Berger, Williams v. Lee *and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1505–09 (2011) (discussing Arizona's arguments that citizenship should subject Navajos to state jurisdiction in *Williams v. Lee*, 358 U.S. 217 (1959)).

197 *See generally* BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND

Wong Kim Ark, in which the United States argued that a man born in San Francisco to non-citizen Chinese parents was not a citizen under the Fourteenth Amendment.[198]

Wong's Supreme Court brief noted that "[i]n the briefs of the appellant the greatest reliance seems to be placed upon the case of *Elk v. Wilkins*."[199] Both Solicitor General Holmes Conrad and San Francisco lawyer George D. Collins, who had urged the Attorney General to litigate the case and filed his own brief in an "of counsel" capacity to the United States,[200] argued that *Elk* meant that the Chinese citizenship of Wong's parents somehow passed to their U.S. born child.[201] Wong responded that *Elk* reflected the independent status of tribal nations even within the United States, a status that meant that "[t]he Indian Elk was not in the position of Wong Kim Ark, but of Wong Kim Ark's father."[202] In other words, as the Court stated in *Elk*, the non-citizenship of Native people born in tribal relations rested on their unique status even while on U.S. soil—a status that for immigrants was the equivalent of being born on foreign soil.[203]

The Supreme Court agreed with Wong. The Court held that "[t]he decision in *Elk v. Wilkins* concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent, not in the diplomatic service of a foreign country."[204] Notably, Justice Horace Gray, who authored *Wong Kim Ark*, had also authored *Elk v. Wilkins* and presumably knew what it did and did not mean.

As *Wong Kim Ark* recognized, *Elk* rested on the unique status of tribal peoples. This status, like the status of diplomats, meant that they were subject to distinct jurisdictional rules even within U.S. territory and therefore were not fully "subject to the jurisdiction thereof" as the Fourteenth Amendment's framers intended.

THE MAKING OF THE ALIEN IN AMERICA (2018) (discussing campaign against ethnic Chinese).

198 169 U.S. 649 (1898).

199 Brief of the Appellee at 15, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 449).

200 Brief on Behalf of the Appellant at 1, 39, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 904); Lucy E. Salyer, Wong Kim Ark*: The Contest Over Birthright Citizenship*, *in* IMMIGRATION STORIES 65 (David A. Martin & Peter H. Schuck eds., 2005) (discussing George Collins's role).

201 Brief on Behalf of the Appellant at 26–27, 30, 38, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 904) (citing Elk v. Wilkins, 112 U.S. 94 (1884)); Brief for the United States at 40–41, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 449).

202 Brief of the Appellee at 15–16, United States v. Wong Kim Ark, 169 U.S. 649 (No. 449).

203 *See Elk*, 112 U.S. at 102 (comparing Indians born in tribal relations to "children of subjects of any foreign government born within the domain of that government").

204 *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898).

CONCLUSION

The history of American Indian citizenship has been key to the legal attacks on birthright citizenship for undocumented immigrants and others for an obvious reason: Native peoples were and are born within the United States and seem to be subject to federal legislative and regulatory authority—and yet were not birthright citizens. Therefore, the reasoning goes, "jurisdiction" must have meant something *other* than its usual meaning of governmental power or authority. As the Trump Administration puts it, "any interpretation of the phrase 'subject to the jurisdiction thereof' needs a coherent account of why tribal Indians are subject to the jurisdiction of the United States less completely than individuals who are granted citizenship under the Clause."[205]

This interpretation ignores an obvious "coherent account": the history of federal Indian law. Whether Native nations are "subject to the jurisdiction" of the United States *today* under the term's original meaning raises interesting questions. The complex twentieth-century history of Native citizenship and federal Indian law lies outside of this Essay's focus, but it remains hard to say that tribal citizens are now subject to "the same jurisdiction in extent and quality as applies to every [other] citizen of the United States,"[206] as Senator Howard urged.

Regardless of the proper interpretation of Native status today, the answer in 1868 was clear. Jurisdiction in the Fourteenth Amendment, it turns out, largely meant jurisdiction in the traditional sense: that is, the power to directly subject Native peoples to federal law and authority. No one, then or now (least of all the President's lawyers), argues that temporary or unauthorized immigrants or their children are immune from, say, state or federal criminal law. But as Justice Gorsuch recently traced, the Founding-era understanding was that Native nations were *not* subject to this sort of federal legislative jurisdiction.[207] The federal government could regulate Native peoples' intercourse with U.S. citizens under the Indian Commerce Clause; as for Native nations themselves, the federal government could regulate them only through treaties.

By the 1860s, this Founding-era understanding was under renewed attack, with some arguing that the federal government *did* enjoy authority over Native nations. The drafters, advocates, and critics of the Fourteenth Amendment's Birthright Citizenship Clause all interpreted the jurisdictional

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205 NHICS Appellants' Reply Brief, *supra* note 39, at 6.

206 CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866).

207 *See* Haaland v. Brackeen, 599 U.S. 255, 326 (2023) (Gorsuch, J., concurring) ("The framers appreciated, too, that they possessed no more authority to delegate to the national government power to regulate the [T]ribes directly than they possessed authority to delegate power to the federal government over other peoples who were not part of the federal union." (quotations and citations omitted)).

language in light of these long-standing debates about the scope of federal power over Native peoples. They did not disagree about what "jurisdiction" meant—they understood it as the power to impose and enforce laws, which is why they repeatedly invoked criminal prosecution as the clearest and most explicit form of jurisdiction. The debate, rather, concerned whether this language would, in fact, exclude Native peoples given the continued uncertainty about the extent of federal jurisdiction over Native nations. *Elk v. Wilkins* settled that debate without seeming to find the question especially hard; the more contested question was whether Native peoples could self-naturalize through expatriation.

It is, of course, tempting to draw analogies between Native peoples and other communities, because the drafters of the Fourteenth Amendment had lots to say about Indians and much less to say about the status of the children of parents who entered the nation without legal authorization. But the Reconstruction Congresses spent so much time arguing about Native peoples precisely because they had an exceptional legal status under U.S. law. Congress's routine deployment of the term "quasi-foreign," and its intense disagreement over the scope of federal jurisdiction over Native nations, underscore just how confused and unsettled Indian law remained. Even as the *Kagama* Court announced the existence of federal legislative authority in 1886, it continued to insist on Native distinctiveness. "The relation of the Indian tribes living within the borders of the United States . . . to the people of the United States has always been an anomalous one and of a complex character," it opined.[208] Dozens of federal court decisions, including U.S. Supreme Court rulings, have subsequently cited this language.[209]

Although the analogy between Native peoples and unauthorized or temporary immigrants is historically untenable, history still arguably has some relevance to the current debate. To the extent we focus on the text's original meaning, the debates around the Fourteenth Amendment emphasize that jurisdiction in fact meant jurisdiction, not federal consent, or submission, or anything else. Indeed, the extensive debates and litigation around Native status underscore that the implications of the Fourteenth Amendment, especially its jurisdictional language, were not a casual, unexamined afterthought when it was adopted. Even though nearly everyone in Congress agreed that tribal citizens should *not* become birthright citizens, they still argued extensively about whether the Amendment's language might inadvertently encompass Native peoples. If Congress and the courts were similarly unsure whether other groups were encompassed and similarly sought to exclude them, then might they not have said so?

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208 United States v. Kagama, 118 U.S. 375, 381 (1886).

209 *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 173 (1973).