

NOTES

THE SIGNIFICANCE OF PARENTAL DOMICILE UNDER THE CITIZENSHIP CLAUSE

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INTRODUCTION

IN Southern California, the lure of U.S. citizenship has given rise to a cottage industry of “birth tourism”—maternity hotels and travel agencies catering to foreign parents seeking U.S. citizenship for their soon-to-be-born children.¹ Under the United States’s system of *jus soli* citizenship, birth within the territory automatically confers U.S. citizenship.² Thus, with just a passport and tourist visa, foreign expectant-parents can effectively purchase U.S. citizenship for their future child.

This outcome is said to be the result of the Citizenship Clause of the Fourteenth Amendment, in particular, the Citizenship Clause as interpreted by the U.S. Supreme Court in *United States v. Wong Kim Ark*.³ To treat *Wong Kim Ark* as requiring this result, however, overlooks an important aspect of the Court’s opinion: *Wong Kim Ark* was born in the United States to parents domiciled in the United States.⁴ According to the Court, the question presented in *Wong Kim Ark* was “whether a child born in the United States, of [noncitizen] parents of Chinese descent, who at the time of his birth . . . have a permanent domicil and residence

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¹ Cindy Chang, On Family Plan: Southland’s ‘Maternity Hotels’ Cater to Expectant Mothers from Asian Nations Who Want an American-Citizen Newborn, *L.A. Times*, Jan. 4, 2013, at A1; Jennifer Medina, Arriving as Pregnant Tourists, Leaving with American Babies, *N.Y. Times*, Mar. 29, 2011, at A1; Keith B. Richburg, Consultants Offer Special U.S. Delivery: For Many Pregnant Chinese, American Passport Is Strong Lure, *Wash. Post*, July 18, 2010, at A1.

² See Immigration & Naturalization Serv., U.S. Dep’t of Justice, INS Interpretation Letter 301.1: United States Citizenship (2001), available at 2001 WL 1333852, at *1; U.S. Dep’t of State, Acquisition and Retention of U.S. Citizenship and Nationality, 7 Foreign Affairs Manual § 1110, at 1–3 (2014).

³ 169 U.S. 649, 705 (1898).

⁴ *Id.* at 652.

in the United States . . . becomes at the time of his birth a citizen of the United States."⁵ Throughout its opinion, the Court repeatedly referenced the domicile of Wong Kim Ark's parents, including, most notably, in its holding.⁶ Nevertheless, despite the Court's reference to this potential limiting factor, *Wong Kim Ark* has long been read unquestioningly as awarding citizenship to every person born in the United States, irrespective of the residency status or domicile of that person's parents. This interpretation of the Citizenship Clause not only glosses over crucial language in the Court's opinion, but also entirely overlooks the significance traditionally ascribed to parental domicile in citizenship law and theory. This Note argues that the Citizenship Clause is open to a narrower interpretation, one that does not bestow citizenship on persons born in the United States to nondomiciled, alien parents. Put differently, the Citizenship Clause only extends to persons born in the United States to parents, one of whom is either a U.S. citizen or a U.S.-domiciled alien. This reading not only finds support in the Clause's original meaning, but also, as this Note attempts to show, was the interpretation endorsed by the Supreme Court in *Wong Kim Ark*.

This Note proceeds in five parts. Part I outlines the basic structure and principles of the Citizenship Clause. This background information is crucial to understanding how a parental domicile requirement fits within the Supreme Court's established Citizenship Clause jurisprudence. This Part also discusses the way in which modern courts, commentators, and government agencies often entirely overlook the potential for a narrower, domicile-based interpretation of the Citizenship Clause.

Part II analyzes the Supreme Court's decision in *Wong Kim Ark*. Decided in 1898, *Wong Kim Ark* was, and remains today, the seminal case construing the Citizenship Clause of the Fourteenth Amendment. This Part lays out the argument for a narrower reading of the Court's opinion premised on the requirement of parental domicile.

Part III discusses the significance traditionally ascribed to parental domicile in citizenship law and theory. As this Part shows, the idea of conditioning birthright citizenship on parental domicile is nothing new. This Part reviews various historical authorities and precedents in order to show that the parental domicile requirement: (1) has a strong basis in the original meaning of the Citizenship Clause and (2) was a well-

⁵ Id. at 653 (emphasis added).

⁶ Id. at 652–53, 696, 705.

known and respected interpretation of the Citizenship Clause at the time of *Wong Kim Ark*.

Part IV evaluates the advantages of a parental domicile requirement from a policy perspective. Sound citizenship policy generally seeks, as nearly as possible, to align citizenship status with residency or social ties. Measured against this touchstone, an automatic rule of birthright citizenship is highly overinclusive. In today's mobile world, place of birth is an increasingly ill-suited metric for predicting whether a person will reside in or develop ties to a political society. As this Part argues, a parental domicile requirement offers a rough-and-ready means of limiting much of that overinclusiveness.

Part V concludes by discussing two important policy implications of this rule. First, this Part evaluates whether a parental domicile requirement would operate to exclude children born of illegal immigrants. Though advocates of restrictive immigration policies would likely try to use the requirement for such purposes, this Note argues that illegal immigrants are fully capable of establishing domicile sufficient to satisfy the Citizenship Clause. Second, this Part offers some preliminary suggestions as to how this requirement could be fairly and efficiently administered.

In addressing these issues, this Note seeks to fill a significant gap in the legal literature. To date, little scholarly attention has been paid to whether the Citizenship Clause, as interpreted in *Wong Kim Ark*, requires a showing of parental domicile. What is more, no scholar has ever actually analyzed, in any systematic way, how such a requirement would apply to the U.S.-born children of illegal immigrants.⁷ The requirement for which this Note argues is unique in two main respects. First, it works within the confines of the Constitution and existing precedent; that is, it requires neither a constitutional amendment, nor a significant rewriting

⁷ Of the few commentators that have considered this issue, most have simply assumed, without further analysis or consideration, that a parental domicile requirement would exclude children born to illegal immigrant parents. See Ashley E. Mendoza, Note, *Anchors Aweigh: Redefining Birthright Citizenship in the 21st Century*, 13 *J.L. & Fam. Stud.* 203, 212–13 (2011); see also William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 *Geo. Immigr. L.J.* 221, 253 (2008) (asserting that the Court's use of the term "domicile" in *Wong Kim Ark*'s holding limited birthright citizenship to children of lawfully present and permanently residing aliens). For the reasons explained in Part V, these assumptions are not only unfounded, they are likely flat wrong. To the best of the author's knowledge, this Note is the first to systematically analyze how a parental domicile requirement would apply to the U.S.-born children of illegal immigrants.

of existing case law. Second, this requirement charts what is in many respects a middle course in the modern debate over birthright citizenship; namely, it allows for a more restrictive, less arbitrary form of birthright citizenship without touching the hot-button issue of illegal immigration.

I. BACKGROUND

The Supreme Court's Citizenship Clause jurisprudence, at least as conventionally understood, is relatively straightforward. This Part provides a brief introduction to that jurisprudence in order to set the stage for the analysis that follows. This Part is divided into two sections. Section I.A starts by outlining the basic structure and principles of the Citizenship Clause and provides a basic thumbnail definition of the term "domicile" as used in this Note. Turning beyond these basic principles, Section I.B will then discuss the broad interpretation traditionally ascribed to the Citizenship Clause by courts, commentators, and government agencies.

A. *The Citizenship Clause: An Overview*

Broadly speaking, birthright citizenship comes in one of two forms: (1) *jus soli*, literally the "right of the soil," which determines citizenship based on a person's place of birth, and (2) *jus sanguinis*, literally the "right of blood," which awards citizenship derivatively, to persons born of citizen parents.⁸ The United States uses both standards. Adopting a *jus soli* principle, the Citizenship Clause of the Fourteenth Amendment bestows citizenship on "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof."⁹ As for *jus sanguinis*, Congress has legislatively bestowed citizenship on individuals born abroad to citizen parents, subject to certain requirements and limitations.¹⁰ This Note is primarily concerned with the Citizenship Clause, and will, therefore, generally use the term "birthright citizenship" to refer to *jus soli* citizenship.

The Citizenship Clause imposes two requirements on the acquisition of birthright citizenship: (1) birth within the territorial limits of the United States, and (2) "subject[ion] to the jurisdiction" of the United

⁸ Black's Law Dictionary 880 (8th ed. 2004).

⁹ U.S. Const. amend. XIV, § 1.

¹⁰ 8 U.S.C. § 1401(c)–(e), (g) (2012).

States.¹¹ In order for birthright citizenship to attach, these two requirements must be satisfied simultaneously—that is, one must be subject to the jurisdiction of the United States *at birth* in order to claim citizenship under the Amendment.¹² The latter of these two requirements is known as the jurisdictional element of the Citizenship Clause, and it is this requirement which this Note argues excludes children born to nondomiciled, alien parents. As conventionally understood, the jurisdictional element excludes only three categories of individuals: (1) children of ambassadors or other foreign diplomatic representatives, (2) children of foreign invading armies, and (3) children of members of Indian tribes.¹³ Notably, each of these categories of excluded persons is defined based on some characteristic of their parentage. This illustrates a crucial point: The Citizenship Clause looks to the characteristics of one's parents in deciding whether that person is born "subject to the jurisdiction" of the United States.

The term "domicile," as used in this Note, means that place "in which [a person's] habitation is fixed without any present intention of removing therefrom."¹⁴ This definition, taken from Justice Joseph Story's *Commentaries on the Conflict of Laws*, expresses the common meaning of the term both at the time of the Fourteenth Amendment's ratification and the Supreme Court's decision in *Wong Kim Ark*.¹⁵ To effect a change in domicile, the elements of residence and intent to remain must exist simultaneously.¹⁶ Once established, one's domicile continues until a new one is acquired.¹⁷ For present purposes, this definition is sufficient for evaluating the analysis which follows. Part V will, however, further

¹¹ U.S. Const. amend. XIV, § 1.

¹² *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).

¹³ See Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 Neb. L. Rev. 462, 469 (1991); see also *Wong Kim Ark*, 169 U.S. at 682 (explicitly recognizing the three excluded categories).

¹⁴ Joseph Story, *Commentaries on the Conflict of Laws* § 43 (Boston, Little, Brown & Co. 6th ed. 1865).

¹⁵ See, e.g., *Penfield v. Chesapeake, Ohio & Sw. R.R.*, 134 U.S. 351, 356 (1890) ("No length of residence, without the intention of remaining, constitutes *domicil*."); *Smith v. People ex rel. Frisbie*, 44 Ill. 16, 24–25 (1867) (discussing whether the appellant had an "unqualified intention" to change his domicile after temporarily sojourning in another state); *Shaw v. Shaw*, 98 Mass. 158, 160 (1867) ("The former *domicil* remains until both the intent and fact of change of actual residence to another place have concurred to establish a new *domicil* there.").

¹⁶ Story, *supra* note 14, § 44; 1 Francis Wharton, *A Treatise on the Conflict of Laws* 79 (George H. Parmele ed., 3d ed. 1905).

¹⁷ Story, *supra* note 14, § 47; 1 Wharton, *supra* note 16.

supplement and refine this definition, as necessary, in order to explain how the parental domicile requirement is likely to apply to the U.S.-born children of illegal aliens.

B. The Citizenship Clause's Broad, Conventional Interpretation

Today, courts, commentators, and government agencies often treat the Citizenship Clause as adopting a virtually automatic form of birthright citizenship. According to the U.S. Department of Justice, the “acquisition of citizenship [under the Fourteenth Amendment] is not affected by the fact that the alien parents are only temporarily in the United States at the time of the child’s birth.”¹⁸ This interpretation accords with the position of the U.S. State Department.¹⁹ Courts also often implicitly go along with this position, routinely making statements which seem to suggest that birth within the territory is alone sufficient to acquire citizenship under the Fourteenth Amendment.²⁰ To clarify, these statements do not in any way signal a rejection of the parental domicile requirement. Birthright citizenship is never a contested issue in these cases, and statements such as these are always made in passing and without further analysis or consideration.²¹ The Supreme Court has never revisited its decision in *Wong Kim Ark*. What is more, no court since has ever squarely addressed the question of whether the Citizenship Clause, or *Wong Kim Ark*, requires a showing of parental domicile. The paucity of case law in this area is a direct result of the executive branch having accepted a broad interpretation of the Citizenship Clause.²² Cases raising questions of citizenship status generally arise only where the government’s stance

¹⁸ Immigration & Naturalization Serv., *supra* note 2.

¹⁹ U.S. Dep’t of State, *supra* note 2, at 2–3.

²⁰ See, e.g., *Perkins v. Elg*, 307 U.S. 325, 329 (1939) (“[A] child born here of alien parentage becomes a citizen of the United States.”); *Dos Reis ex rel. Camara v. Nicolls*, 161 F.2d 860, 862 (1st Cir. 1947) (“When Camara was born in Massachusetts in 1921, he then became an American citizen, not by gift of Congress, but by force of the Constitution of the United States.”); *In re Gogal*, 75 F. Supp. 268, 271 (W.D. Pa. 1947) (“A person who is born in the United States, regardless of the citizenship of his parents, becomes an American citizen not by gift of Congress but by force of the Constitution.”).

²¹ Statements like these are mostly found in expatriation cases, that is, cases in which the government argues that a person has done something to renounce his or her U.S. citizenship. See, e.g., *Camara*, 161 F.2d at 861–62. For example, all of the cases in the preceding footnote are expatriation cases. See *supra* note 20. In situations like these, birthright citizenship is never an issue. Both sides agree that the person at issue was born a U.S. citizen; the only dispute is over whether that person has done some act that would constitute expatriation. *Id.*

²² See *supra* note 2 and accompanying text.

on the scope of a grant of citizenship is narrower than that taken by the person claiming citizenship.²³ This observation is most notably illustrated in *Wong Kim Ark* itself, a test case where the government purposely took an unusually narrow reading of the Citizenship Clause in order to seek Supreme Court review.²⁴ Persons treated as citizens by the government rarely seek a judicial declaration of their noncitizen status. For a person wanting to avoid classification as a citizen, it would generally be easier for that person to simply renounce his or her purported citizenship. As such, courts are rarely presented with the opportunity to address the scope of the Citizenship Clause or to reconsider the meaning of *Wong Kim Ark*.

While it is at least somewhat surprising that a case raising this question has evaded the courts, the fact that advocacy groups have overlooked the potential relevance of parental domicile is far more puzzling. Advocates for the restriction of birthright citizenship often seek to effect change through the political process, rather than the courts.²⁵ However, when restrictionists do turn to the courts, the reforms they seek are often far more extreme than that of a parental domicile requirement. For example, in *Hamdi v. Rumsfeld*, a case raising the question of whether a U.S. citizen has a due process right to challenge his or her status as an “enemy combatant,”²⁶ several advocacy organizations filed amicus briefs asking the Court to address the threshold question of whether Yaser Hamdi was in fact a U.S. citizen.²⁷ Hamdi was born in Louisiana in 1980.²⁸ At the time, his parents, both Saudi citizens, were in the Unit-

²³ See, e.g., *Wong Kim Ark*, 169 U.S. at 649–50; *Elk v. Wilkins*, 112 U.S. 94, 94–99 (1884).

²⁴ Lucy E. Salyer, *Wong Kim Ark: The Contest over Birthright Citizenship*, in *Immigration Stories* 51, 65–67 (David A. Martin & Peter H. Schuck eds., 2005).

²⁵ See, e.g., *Immigration Issues: Birthright Citizenship*, Fed’n for Am. Immigration Reform, <http://www.fairus.org/issue/birthright-citizenship> (last updated Aug. 2010) (calling on Congress “to adopt legislation clarifying the meaning of the 14th amendment” to correct the “anchor baby problem”).

²⁶ 542 U.S. 507, 533 (2004).

²⁷ Brief for Center for American Unity et al. as Amici Curiae Supporting Affirmance at *8–9, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 608887; Brief for Claremont Institute Center for Constitutional Jurisprudence as Amicus Curiae in Support of Respondents at 4–5, *Hamdi*, 542 U.S. 507 (No. 03-6696), available at http://www.pegc.us/archive/Supreme_Court/Hamdi_merits/govt_Claremont_amicus.pdf; Brief for Eagle Forum Education and Legal Defense Fund as Amicus Curiae in Support of Respondents at 2–3, *Hamdi*, 542 U.S. 507 (No. 03-6696), available at <http://www.eagleforum.org/briefs/HAMD1.pdf>.

²⁸ *Hamdi*, 542 U.S. at 510.

ed States on a temporary work visa.²⁹ While still a child, Hamdi moved with his parents to Saudi Arabia.³⁰ He returned to the United States in 2002, when, while in the custody of the U.S. government, he was transferred to a naval brig in Norfolk, Virginia.³¹ *Hamdi* presented a golden opportunity for restrictionists to argue for a narrower reading of the Citizenship Clause premised on the requirement of parental domicile. Yet, rather than taking this more modest approach, the amici largely rehashed arguments that the Court had explicitly rejected in *Wong Kim Ark*.³² Rather than working within the confines of this precedent, these amici effectively argued for the decision's overruling.

What can explain this lack of attention to the Citizenship Clause's potential for a narrower reading? The answer is likely political: A parental domicile requirement does not clearly deny citizenship to the children of illegal aliens. For restrictionists, the recent push to redefine birthright citizenship is but one plank in a broader effort to stem the tide of illegal immigration.³³ Given that the parental domicile requirement does not clearly speak to that concern, perhaps anti-immigration groups consider it an imperfect solution for addressing the so-called "anchor baby" problem.³⁴

Finally, as mentioned earlier, academics too have largely overlooked the potential relevance of parental domicile to birthright citizenship. This, however, has not always been the case. In the years immediately following *Wong Kim Ark*, several commentators read the Court's reference to domicile as actually doing work in the opinion.³⁵ As the *Yale*

²⁹ Brief for Claremont Institute, *supra* note 27, at 3.

³⁰ *Hamdi*, 542 U.S. at 510.

³¹ *Id.*

³² Brief for Center for American Unity et al., *supra* note 27, at *21–22, *24 (arguing that *Wong Kim Ark*'s "faulty" analysis "swung too broadly" and "cut down the jurisdiction requirement to something less than its authors and [the] Court's earlier cases intended"); Brief for Claremont Institute, *supra* note 27, at 8 (arguing that the Citizenship Clause's jurisdictional element "was intended to exclude from its operation children of . . . citizens or subjects of foreign States born within the United States"); Brief for Eagle Forum Education and Legal Defense Fund, *supra* note 27, at 4 ("There is no legitimate claim to birthright citizenship for foreigners under the Fourteenth Amendment.").

³³ See Fed'n for Am. Immigration Reform, *supra* note 25.

³⁴ See *id.* (referring to the "anchor baby" issue and calling on Congress to address this problem without mentioning a parental domicile requirement). But see Mendoza, *supra* note 7 (arguing that a parental domicile requirement should exclude children of illegal aliens).

³⁵ See Henry Brannon, A Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States 25 (1901) ("[M]ere birth within American territory does not always make the child an American citizen. He must be born

Law Journal observed in its review of the decision, in order for birthright citizenship to attach “in this country, the alien must be permanently domiciled, while in Great Britain birth during mere temporary sojourn is sufficient to render the child a British subject.”³⁶ While this understanding played a significant role in the early literature, it is one that has long since faded into obscurity. Today, there is very little research in the literature questioning whether the Citizenship Clause or *Wong Kim Ark* requires parental domicile as a prerequisite to birthright citizenship. The reason for this is again likely political. Modern scholarly debate over the meaning of the Citizenship Clause has focused almost exclusively on whether the children of illegal immigrants are, or should be, entitled to birthright citizenship.³⁷ Given that a parental domicile requirement does not clearly address that concern, it has received little scholarly attention.³⁸

As this Section has shown, courts, commentators, and government agencies often unquestioningly take a broad reading of the Citizenship Clause. As will be shown in the analysis that follows, neither history nor the reasoning of *Wong Kim Ark* supports, much less requires, such a broad reading.

within allegiance to the United States, within its ‘jurisdiction.’ Such is the case with children of aliens born here while their parents are traveling or only temporarily resident, or of foreign ministers, consuls and attaches of foreign embassies.”); 1 Wharton, *supra* note 16, at 53 n.1 (“It has now . . . been definitively settled by the United States Supreme Court . . . that a child born in the United States of nonnaturalized Chinese parents, who had a permanent residence and domicile in the United States, is a citizen of the United States within the 14th Amendment . . .”); John W. Judd, *The XIV Amendment—Its History and Evolution*, 13 *Am. Law.* 388, 389 (1905) (“Under [*Wong Kim Ark*], although persons of the Mongolian race are not themselves entitled to naturalization under our laws, if they should be permanently domiciled here, their children born within our jurisdiction, are citizens of the United States . . .”).

³⁶ Comment, *Citizenship of Children of Alien Chinese*, 7 *Yale L.J.* 365, 367 (1898).

³⁷ See, e.g., Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* 5–7 (1985); Mayton, *supra* note 7; Mendoza, *supra* note 7.

³⁸ Unsurprisingly, what little research does exist has largely been done by a small number of commentators who draw on *Wong Kim Ark*'s references to domicile in order to devise arguments or theories which would allow for the denial of citizenship to the children of illegal immigrants. See *supra* note 7. As mentioned earlier, these commentators largely assume, with little analysis or consideration, that a parental domicile requirement would exclude the children of illegal immigrants.

II. *UNITED STATES V. WONG KIM ARK*

Wong Kim Ark is a multifaceted case, involving several important issues of Fourteenth Amendment citizenship. One such issue, often overlooked today, is the relevance of parental domicile. This Part will address the way in which parental domicile informed the Court's understanding of birthright citizenship, with particular emphasis on the Court's interpretation of the jurisdictional element of the Citizenship Clause. In particular, this Part attempts to show that the domicile of Wong Kim Ark's parents was dispositive to the Court's holding.

A. *The Opinion of the Court*

The relevant facts in *Wong Kim Ark* are straightforward. Wong Kim Ark was born in San Francisco to noncitizen, Chinese parents domiciled in the United States.³⁹ After traveling to China for a temporary visit, he was denied permission to reenter the country on the sole ground that he was not a U.S. citizen.⁴⁰ These facts, as simple as they were, raised several difficult questions of Fourteenth Amendment citizenship. In framing these issues, the Court stated the question presented as follows:

[W]hether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States . . . becomes at the time of his birth a citizen of the United States⁴¹

If we unpack this question, we find that it raises for consideration three potential limits on birthright citizenship. First, is a person who is born in the United States to noncitizen parents a citizen under the Fourteenth Amendment? Second, can a person who is born in the United States to noncitizen parents be denied U.S. citizenship, if, by virtue of a treaty or other legislation, his parents are precluded from naturalization (as was the case with Chinese immigrants at the time of *Wong Kim Ark*⁴²)? Third, if a person is born to noncitizen parents, must those parents be domiciled in the United States at the time of that person's birth in order for citizenship to attach?

³⁹ *Wong Kim Ark*, 169 U.S. at 652.

⁴⁰ *Id.* at 653.

⁴¹ *Id.*

⁴² *Id.* at 701.

In the course of its opinion, the Court explicitly rejected the potential limitations on birthright citizenship posed in the first two questions.⁴³ As for the third limitation, the Court's analysis repeatedly treated parental domicile as a decisive factor in establishing birthright citizenship.⁴⁴ To be sure, the Court did not explicitly announce that parental domicile was a necessary prerequisite to birthright citizenship.⁴⁵ Deciphering the Court's stance on this limitation is complicated by the fact that the limitation was actually satisfied in *Wong Kim Ark*.⁴⁶ Had Wong Kim Ark's parents not been domiciled in the United States, the Court's resolution of this issue would have yielded a clear and certain answer. Nevertheless, although the Court's opinion may lack a plain statement on the issue of parental domicile, its reasoning implicitly endorses this limitation.

The Court's analysis of precedent provides a clear example of the significance that it ascribed to parental domicile. After reviewing practically every significant American case on the issue of birthright citizenship, the Court drew the following conclusion:

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens The Amendment . . . includes the children born [in] . . . the United States, of all other persons, of whatever race or color, *domiciled within the United States*.⁴⁷

In this statement, the Court rejects the limitations discussed above in questions one (parental citizenship) and two (parents' capacity to naturalize), while at the same time endorsing the third limitation of parental domicile. This understanding of the Court's argument is corroborated in the next sentence of its opinion, in which the Court observes that "[e]very citizen or subject of another country, *while domiciled here*, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."⁴⁸ This statement is perhaps the most significant of the whole opinion. In giving substance to the jurisdictional element of the Citizenship Clause, the Court here interprets the phrase

⁴³ Id. at 694.

⁴⁴ Id. at 652–53, 693, 695–96, 705.

⁴⁵ Id. at 705.

⁴⁶ Id. at 652.

⁴⁷ Id. at 693 (emphasis added).

⁴⁸ Id. (emphasis added).

“subject to the jurisdiction” as synonymous with domicile.⁴⁹ If the Court truly believed that every person, all the way down to the temporary sojourner, was “subject to the jurisdiction” of the United States, it surely would not have inserted such limiting language into such an important aspect of its opinion.

This same limiting language can again be seen in the most crucial part of the Court’s opinion, its holding: “[A] child born in the United States, of [noncitizen] parents . . . who, at the time of his birth . . . have a permanent domicil and residence in the United States . . . becomes at the time of his birth a citizen of the United States.”⁵⁰ As will be shown in Part III, the idea of conditioning birthright citizenship on parental domicile was a common one at the time of *Wong Kim Ark* and one with which the Court was familiar. Aware of the significance of this limiting language, the Court almost certainly chose to include it for the purpose of restricting the scope of birthright citizenship under the Citizenship Clause.

The position of the parties and the district court on the issue of parental domicile further corroborates this understanding of the Court’s opinion. The only mention of domicile in the district court’s opinion came in its statement of facts and its question presented.⁵¹ Domicile did not play a role in either the court’s analysis or holding.⁵² On appeal before the Supreme Court, both parties argued that parental domicile should not serve as a requirement for birthright citizenship.⁵³ Arguing that only the children born of citizen parents were eligible for birthright citizenship, the government rejected, as “inexplicable,” any notion that birthright citizenship could attach on the basis of parental domicile: “The Constitution does not countenance any such theory, neither does international law An alien domiciled in the United States is just as much an alien as though he were merely in our territory *in transitu*.”⁵⁴ Similarly, although *Wong Kim Ark* could have prevailed under a rule of parental

⁴⁹ *Id.*

⁵⁰ *Id.* at 705.

⁵¹ *In re Wong Kim Ark*, 71 F. 382, 383–84 (N.D. Cal. 1896).

⁵² See generally *id.* at 383–92 (taking no notice of the issue of domicile in its analysis).

⁵³ See Brief on Behalf of the Appellant at 23, 29, *Wong Kim Ark*, 169 U.S. 649 (No. 904), *in* 14 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 3, 26, 32 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Landmark Briefs*]; Brief for the Appellee on Reargument at 87, *Wong Kim Ark*, 169 U.S. 649 (No. 449), *in* 14 Landmark Briefs, *supra*, at 171, 258.

⁵⁴ Brief on Behalf of the Appellant, *supra* note 53, at 29.

domicile, he too argued that citizenship under the Fourteenth Amendment could not “be made to depend . . . upon the ‘domicile’ of [one’s] parents at the time of [his or her] birth in the United States.”⁵⁵ Given that neither the parties nor the district court saw parental domicile as relevant to the question of birthright citizenship, the level of attention given to this issue by the Supreme Court further indicates that parental domicile was crucial to the Court’s holding.

B. The Dissent

Chief Justice Fuller’s dissent in *Wong Kim Ark* provides further support for a domicile-based understanding of the Court’s opinion. More so than the majority’s opinion, the dissent explicitly endorsed the idea of conditioning birthright citizenship on parental domicile. As the Chief Justice observed, compared to the English common law rule of birthright citizenship, which “recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents[,] . . . a different view as to the effect of permanent abode on nationality has been expressed in this country.”⁵⁶ That view, according to the Chief Justice, did not accord citizenship to “children born in the United States . . . of aliens whose residence was merely temporary.”⁵⁷ In making this argument, Chief Justice Fuller drew support from several eminent authorities, including Justice Story’s *Commentaries on the Conflict of Laws* and Justice Samuel Miller’s *Lectures on the Constitution of the United States*.⁵⁸

Though Chief Justice Fuller strongly supported a parental domicile requirement, that requirement was not, and could not reasonably have been, the basis for his dissent from the Court’s judgment. Rather, his dissent was premised on the argument that the political branches of the federal government possessed, and in this case had exercised, the power to limit the application of the Citizenship Clause by treaty or ordinary legislation.⁵⁹ At the time, treaties between the United States and China denied Chinese immigrants the right to become naturalized U.S. citizens.⁶⁰ Those treaties, according to the Chief Justice, placed Wong Kim

⁵⁵ Brief for the Appellee on Reargument, *supra* note 53.

⁵⁶ *Wong Kim Ark*, 169 U.S. at 718 (Fuller, C.J., dissenting).

⁵⁷ *Id.* at 729.

⁵⁸ *Id.* at 718–19.

⁵⁹ *Id.* at 731–32.

⁶⁰ *Id.* at 730–31.

Ark beyond the purview of the Citizenship Clause, notwithstanding the fact that his parents were domiciled in the United States at the time of his birth. Indeed, “the Fourteenth Amendment does not,” the Chief Justice argued, “arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens.”⁶¹ Thus, for the Chief Justice, not only did the jurisdictional element of the Citizenship Clause impose a baseline requirement of parental domicile, but also Congress possessed the power under the Fourteenth Amendment to impose additional restrictions on birthright citizenship.

Chief Justice Fuller’s dissent sheds light on our understanding of the Court’s opinion. In particular, it confirms that the Court was aware of the significance of parental domicile to birthright citizenship. Without the dissent, one could plausibly argue that the Court’s repeated references to domicile were simply dicta. If, for example, it had never occurred to the Court that parental domicile could serve as a limit on birthright citizenship, these repeated references to the domicile of Wong Kim Ark’s parents would look less like an essential part of the Court’s holding, and more like a simple reiteration of the facts of the case. The dissent’s opinion forecloses this argument. Given the dissent’s reasoning and the authorities it invoked, the Court must have been aware that many viewed the Citizenship Clause as incorporating a requirement of parental domicile. Nevertheless, the Court still chose to repeatedly reference this factor throughout many of the most crucial parts of its opinion.

C. Potential Counterarguments

This narrow reading of *Wong Kim Ark* is not without its flaws, and could be objected to on several potential grounds. The remainder of this Part will address three of the most apparent potential objections. First, one could point to the fact that later in its opinion the Court defines “subject to the jurisdiction thereof” as having the same meaning as the phrase “within its jurisdiction,” as used in the Equal Protection Clause.⁶² Today, the phrase “within its jurisdiction” does not depend on domicile, but rather has been interpreted as extending “the guarantee of equal protection to all within a State’s boundaries, and to all upon whom the State

⁶¹ Id. at 732.

⁶² Id. at 696.

would impose the obligations of its laws.”⁶³ This objection overlooks the fact that at the time the Court tied its interpretation of these provisions together the jurisdictional element of the Equal Protection Clause had not yet been given such an expansive interpretation. In making this analogy, the Court cited the case of *Yick Wo v. Hopkins*,⁶⁴ an equal protection case brought by a noncitizen, Chinese plaintiff.⁶⁵ In its analysis of *Yick Wo*, the Court in *Wong Kim Ark* was careful to point out that *Yick Wo* was “domiciled in the United States.”⁶⁶ “It necessarily follows,” the Court reasoned, “that persons born in China, subjects of the Emperor of China, *but domiciled in the United States*, having been adjudged, in *Yick Wo v. Hopkins*, to be within the jurisdiction of the State . . . must be held to be subject to the jurisdiction of the United States” under the Citizenship Clause.⁶⁷ This reasoning suggests that the *Wong Kim Ark* Court also read the jurisdictional element of the Equal Protection Clause as being premised on domicile. The fact that the modern Court has greatly expanded the scope of this jurisdictional element raises serious questions as to the continued validity of analogizing these two provisions. In hindsight, it is not at all clear that the Court in *Wong Kim Ark* would have offered such an analogy had it known that the jurisdictional element of the Equal Protection Clause would one day be given such a broad construction.

Next, one could object by pointing to the fact that the Court later provided a specific list of those areas where an individual born in the United States is not born “subject to the jurisdiction,” and that list does not include individuals born to nondomiciled, alien parents.⁶⁸ Specifically, the Court noted that the “real object” of the jurisdictional requirement was to exclude the “children of members of the Indian tribes, . . . children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state.”⁶⁹ Though persuasive, this argument overlooks an important and equally valid way of reading the Court’s opinion. Under the reading of *Wong Kim Ark* that this Note has sought to develop, the Court’s defining of “subject to the

⁶³ *Plyer v. Doe*, 457 U.S. 202, 214 (1982).

⁶⁴ 118 U.S. 356 (1886).

⁶⁵ *Wong Kim Ark*, 169 U.S. at 694–95.

⁶⁶ *Id.* at 694–96.

⁶⁷ *Id.* at 696 (emphasis added).

⁶⁸ *Id.* at 682.

⁶⁹ *Id.*

jurisdiction thereof” in terms of parental domicile sets out a baseline rule for defining the operation of the Citizenship Clause. Each of the above listed exceptions, however, is fully capable of satisfying this rule. Indeed, it is likely the case that many individuals falling within these categories would in fact satisfy a parental domicile requirement. That the Court thought it necessary, whether for historical or policy-based reasons, to specifically exclude the three categories of persons mentioned above does not undermine the fact that parental domicile functions here as a baseline rule. Accepting this reading does not vitiate the reasoning behind the parental domicile requirement. Rather, it merely suggests that domicile is not a fully satisfactory definition of what it means to be “subject to the jurisdiction” of the United States in every instance, as is the case in the extraordinary examples listed by the Court.

Finally, one could point to the fact that the dissent, compared to the majority’s opinion, more clearly and forcefully endorsed the idea of conditioning birthright citizenship on parental domicile, a fact which suggests that the majority was not fully in support of this requirement.⁷⁰ Although the dissent was certainly more straightforward in its endorsement of a parental domicile requirement, inferring the majority’s opposition to this requirement based solely on the dissent’s wholehearted endorsement reads too much into the dissent’s opinion. As mentioned in the preceding Section, the real disagreement between the majority and dissent centered on the question of whether birthright citizenship, under the Citizenship Clause, could be restricted by treaty or ordinary legislation.⁷¹ According to the dissent, it most certainly could:

I insist that it cannot be maintained that this Government is unable . . . to make a treaty with a foreign government providing that the subjects of that government, although allowed to enter the United States, shall not be made citizens thereof, and that their children shall not become such citizens by reason of being born therein.⁷²

Dissents and majorities need not disagree on every issue. The dissent’s strong endorsement of a parental domicile requirement tells us little, if anything, about the majority’s stance on this issue. There is nothing in the logic of either opinion that would forbid both the majority and dissent from embracing the idea of a parental domicile requirement.

⁷⁰ See *id.* at 718–20 (Fuller, C.J., dissenting).

⁷¹ Compare *id.* at 701, 703 (majority opinion), with *id.* at 729 (Fuller, C.J., dissenting).

⁷² *Id.* at 729 (Fuller, C.J., dissenting).

As an early commentator once observed of the Court's opinion in *Wong Kim Ark*, "It is of interest to note the frequency with which the term 'residence' and 'domicile' are used in connection with 'allegiance' and 'subject to the jurisdiction [thereof].'"⁷³ References to the domicile of Wong Kim Ark's parents pervade the Court's opinion. To treat these references as mere dicta not only goes against the logic of the Court's reasoning, but also robs this limitation of its then-contemporary significance. Although this Note's narrow interpretation of the Court's holding in *Wong Kim Ark* is not without its flaws, it is equally plausible and arguably more persuasive than the broad reading that is today ascribed to the Court's opinion.

III. THE COUPLING OF DOMICILE AND BIRTHRIGHT CITIZENSHIP: A HISTORICAL VIEW

The idea of conditioning birthright citizenship on parental domicile is nothing new. It was an idea well known both by the framers of the Fourteenth Amendment and the *Wong Kim Ark* Court. More generally, the status of domicile has long played an important role in citizenship law and policy. This Part analyzes the significance traditionally ascribed to parental domicile in citizenship law and theory during the latter half of the nineteenth century. The purpose of this analysis is to show that the parental domicile requirement: (1) has a strong basis in the original meaning of the Citizenship Clause, and (2) was a well-known and respected interpretation of the Citizenship Clause at the time of *Wong Kim Ark*.

A. Legislative History

For the Reconstruction Congress, there was nothing unusual about the idea of requiring parental domicile as a prerequisite to birthright citizenship. In debating the Citizenship Clause and its precursor, Section 1 of the 1866 Civil Rights Act, members of the Thirty-Ninth Congress made reference to such a requirement on several occasions. The Citizenship Clause was directly modeled on Section 1 of the 1866 Civil Rights Act, which bestowed citizenship on "all persons born in the United States and

⁷³ Clement L. Bouvé, *A Treatise of the Laws Governing Exclusion and Expulsion of Aliens in the United States* 423 (1912).

not subject to any foreign power.”⁷⁴ Though the wording of these provisions differed,⁷⁵ the Thirty-Ninth Congress intended that the Citizenship Clause have the same meaning as the 1866 Act,⁷⁶ and the Supreme Court has endorsed that interpretation.⁷⁷ As a result, the legislative history of the 1866 Act can serve as a valuable tool in interpreting the original meaning of the Citizenship Clause.⁷⁸

The following observation made by Iowa Representative James F. Wilson is illustrative of the role that parental domicile played during the debate over the 1866 Civil Rights Act:

It is in vain we look into the Constitution of the United States for a definition of the term “citizen.” It speaks of citizens, but in no express terms defines what it means by it. We must depend on the general law relating to subjects and citizens recognized by all nations for a definition, and that must lead us to the conclusion that every person born in the United States is a natural-born citizen of such States, *except it may be that children born on our soil to temporary sojourners* or representatives of foreign governments, are native-born citizens of the United States.⁷⁹

Senator Lyman Trumbull, sponsor of the 1866 Act, shared this understanding.⁸⁰ For Trumbull the goal of the Act was to “make citizens of everybody born in the United States who owe allegiance to the United

⁷⁴ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981 (2012)).

⁷⁵ Compare *id.* (using the phrase “not subject to any foreign power”), with U.S. Const. amend. XIV, § 1 (using the phrase “subject to the jurisdiction thereof”).

⁷⁶ E.g., Cong. Globe, 39th Cong., 1st Sess. 2893–94 (1866) (statement of Sen. Lyman Trumbull) (explaining that although “the language proposed in this constitutional amendment is better than the language in the civil rights bill[,] . . . [t]he object to be arrived at is the same”).

⁷⁷ See *Wong Kim Ark*, 169 U.S. at 676 (noting that the jurisdictional element of the Citizenship Clause “was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption”); *id.* at 721 (Fuller, C.J., dissenting); see also *Elk v. Wilkins*, 112 U.S. 94, 103 (1884) (relying on the language of the Civil Rights Act of 1866 to interpret the meaning of the Citizenship Clause).

⁷⁸ See, e.g., *Wong Kim Ark*, 169 U.S. at 697–99 (relying on the legislative history of the Civil Rights Act of 1866 to interpret the Citizenship Clause).

⁷⁹ Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. James F. Wilson) (emphasis added).

⁸⁰ *Id.* at 572 (statement of Sen. Lyman Trumbull).

States.”⁸¹ The difficulty, as Trumbull recognized, was in drafting a provision narrowly tailored to realize this end.⁸² He at one time considered phrasing the Act to provide “[t]hat all persons born in the United States and owing allegiance thereto are [thereby] declared to be citizens.”⁸³ He, nonetheless, rejected this construction after “it was found that a sort of allegiance was due to the country from persons temporarily resident in it.”⁸⁴ Thus, at least for Trumbull, the jurisdictional element of the 1866 Civil Rights Act was meant to exclude from its grant of citizenship children born to temporary alien residents. Trumbull confirmed this understanding in a letter written to President Andrew Johnson, summarizing the 1866 Act: “The Bill declares ‘all persons’ born of parents domiciled in the United States . . . to be citizens of the United States.”⁸⁵

To be sure, not all members of the Thirty-Ninth Congress shared in these views. Ohio Senator Benjamin Wade “believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States.”⁸⁶ Early in the debate over the Fourteenth Amendment—before the Citizenship Clause had even been proposed—Wade sought to amend the language of what would later become the Privileges and Immunities Clause, changing the words “citizens of the United States,” to “persons born in the United States or naturalized by the laws thereof.”⁸⁷ Although Wade personally believed these provisions to be synonymous, he recognized that the word “citizen” was “a term about which there [had] been a good deal of uncertainty.”⁸⁸ Not wanting one’s privileges and immunities to be subject to the whims of such uncertainty, Wade thought it necessary to “strike out the word ‘citizens,’” and instead use language that “put the question beyond all doubt.”⁸⁹ When pressed by Maine Senator William Fessenden whether his amendment would cover persons “born here of parents from abroad

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Mark Shawhan, Comment, *The Significance of Domicile in Lyman Trumbull’s Conception of Citizenship*, 119 *Yale L.J.* 1351, 1352–53 (2010) (quoting Letter from Sen. Lyman Trumbull to President Andrew Johnson, in *Andrew Johnson Papers*, Reel 45, Manuscript Div., Library of Congress, Washington, D.C.).

⁸⁶ *Cong. Globe*, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Benjamin Wade).

⁸⁷ *Id.* at 2764, 2768.

⁸⁸ *Id.* at 2768 (statement of Sen. Benjamin Wade).

⁸⁹ *Id.* at 2769.

temporarily in this country,”⁹⁰ Wade held to his position: “[M]y answer to the suggestion is that that is a simple matter, for it could hardly be applicable to more than two or three or four persons; and it would be best not to alter the law for that case.”⁹¹ For Wade, this issue came within the maxim of “*de minimis lex non curat*”⁹²—the “law does not concern itself with trifles.”⁹³

Wade and Fessenden’s exchange sheds light on the way in which birthright citizenship was understood during the framing of the Fourteenth Amendment. Although Wade believed that there should be no restrictions on birthright citizenship for persons born within the United States, he recognized that this view was not universally shared.⁹⁴ So uncertain was the scope of birthright citizenship that Senator Wade felt it necessary to avoid the concept entirely.⁹⁵ Wade’s proposal was ultimately never adopted.⁹⁶ Equally insightful was the way in which Wade responded to Fessenden’s objection. The fact that Wade saw birthright citizenship for the children of visiting aliens as a *de minimis* issue may explain why the issue of parental domicile was not more thoroughly discussed. Today, with the luxuries of modern transportation, far more people are born in the United States to visiting aliens than was likely the case in 1866. Whether this fact would have changed Wade’s beliefs—or, more importantly, the course of debate on the Senate floor—is an open question.

This same domicile-based interpretation of the Citizenship Clause reemerged in 1874, when Congress undertook legislation aimed at defining the phrase “subject to the jurisdiction thereof.” Proposed by Massachusetts Representative Ebenezer R. Hoar, House Bill 2199 provided that “a child born within the United States of parents who are not citizens, and who do not reside within the United States . . . shall not be regarded as a citizen thereof.”⁹⁷ The bill defined “domicile” and “reside”

⁹⁰ Id. (statement of Sen. William Fessenden).

⁹¹ Id. (statement of Sen. Benjamin Wade).

⁹² Id.

⁹³ Black’s Law Dictionary, *supra* note 8, at 464.

⁹⁴ See Cong. Globe, 39th Cong., 1st Sess. 2768–69 (1866) (statement of Sen. Benjamin Wade).

⁹⁵ See *id.*

⁹⁶ See U.S. Const. amend. XIV, § 1.

⁹⁷ 2 Cong. Rec. 3279 (1874). The bill did, however, allow a child born under such circumstances to acquire U.S. citizenship if: (1) the “child shall reside in United States”; (2) the child’s “father, or in the case of the death of the father his or her mother, [is] naturalized during the minority of [the] child”; (3) the child “within six months after becoming of age file[s]

synonymously as “implying a fixed residence at a particular place, with direct or presumptive proof of an intent to remain indefinitely.”⁹⁸ Though significant for our purposes, this requirement was a relatively minor part of the overall bill.⁹⁹ House Bill 2199’s main purpose was to provide an “easy and ready . . . means of determining whether persons [had] renounced their American nationality.”¹⁰⁰ Debate over House Bill 2199 focused almost exclusively on its expatriation provisions.¹⁰¹ Over the course of four days of debate, only one member of Congress, Representative Robert S. Hale, objected to the inclusion of a parental domicile requirement, arguing that it would result in a “change [of] existing law.”¹⁰² No other member of Congress objected to the bill on this ground, nor did any even mention this provision.¹⁰³ Even Hale described these perceived “changes” as potentially “unobjectionable,” stating that he was “not disposed to cavil at them.”¹⁰⁴ Nevertheless, despite the potential for consensus on this issue, Hoar later withdrew the bill in the face of mounting opposition to its expatriation provisions.¹⁰⁵

This bill, proposed less than six years after the Fourteenth Amendment’s ratification, illustrates just how closely linked parental domicile was with the meaning of the Citizenship Clause. With the exception of Hale’s comments, House Bill 2199’s parental domicile requirement generated no debate or controversy. House Bill 2199 originated out of the House Committee on Foreign Affairs, and was originally drawn up by the State Department.¹⁰⁶ The fact that so many prominent individuals shared this understanding of the Citizenship Clause less than six years after its ratification provides strong evidence of the clause’s original public meaning.

As this Section has shown, the idea of a parental domicile requirement featured prominently in Congress’s early understanding of the Citizenship Clause. As will be shown in the following Sections, this under-

in the Department of State . . . a written declaration of [his or her] election to become [a U.S.] citizen”; or (4) the child “become[s] naturalized under general laws.” *Id.*

⁹⁸ *Id.*

⁹⁹ See *id.*

¹⁰⁰ *Id.* at 3280 (statement of Rep. Ebenezer R. Hoar).

¹⁰¹ See *id.* at 3280–85, 3458–62, 3491–94.

¹⁰² *Id.* at 3460 (statement of Rep. Robert S. Hale).

¹⁰³ See *id.* at 3280–85, 3458–62, 3491–94.

¹⁰⁴ *Id.* at 3460 (statement of Rep. Robert S. Hale).

¹⁰⁵ *Id.* at 3563–64.

¹⁰⁶ *Id.* at 3279.

standing was not confined to the halls of Congress, but rather was an interpretation that resonated with several of the late nineteenth century's most prominent jurists, commentators, and government officials.

B. Case Law

At the time the Court decided *Wong Kim Ark*, the idea of a parental domicile requirement had already made its way into a handful of lower court opinions. *Benny v. O'Brien*, an 1895 case from the Supreme Court of New Jersey, was the first ever to explicitly interpret the Citizenship Clause as requiring parental domicile.¹⁰⁷ Decided less than three years before *Wong Kim Ark*, *Benny* raised the question of “whether a person born in this country of alien parents, who, prior to his birth, had their domicile here, is a citizen of the United States.”¹⁰⁸ Answering this question in the affirmative, the court construed the jurisdictional element of the Citizenship Clause as imposing a requirement of parental domicile:

Allan Benny, whose parents were domiciled here at the time of his birth, is subject to the jurisdiction of the United States, and is not subject to any foreign power. . . . Persons intended to be excepted [by the jurisdictional element of the Citizenship Clause] are only those born in this country of foreign parents who are temporarily traveling here, and children born of [ambassadors]. . . . [W]hen the parents are domiciled here, birth establishes the right to citizenship¹⁰⁹

Notably, in its analysis of precedent, the Court in *Wong Kim Ark* not only discussed *Benny*, but quoted at length from its domicile-based interpretation of the Citizenship Clause.¹¹⁰

Although *Benny* was the first case to adopt this interpretation of the Citizenship Clause, it was not the first to acknowledge the potential relevance of parental domicile to birthright citizenship. An early glimmer of this requirement can be seen in the 1860 New York case of *Ludlam v. Ludlam*.¹¹¹ Decided by the state's intermediate appellate court, *Ludlam* involved a dispute over the citizenship status of Maximo M. Ludlam.¹¹² Ludlam was born in Peru to a Chilean mother and a U.S.-citizen fa-

¹⁰⁷ 32 A. 696, 697–98 (N.J. 1895).

¹⁰⁸ Id. at 697.

¹⁰⁹ Id. at 697–98.

¹¹⁰ *Wong Kim Ark*, 169 U.S. at 692–93.

¹¹¹ 31 Barb. 486, 503–04 (N.Y. Gen. Term 1860).

¹¹² Id. at 487–88, 490.

ther.¹¹³ According to the court, Ludlam's father was only a temporary resident of Peru, meaning "that [his] residence was not perpetual or permanent, either in fact or in intention."¹¹⁴ *Ludlam* was decided before both the Fourteenth Amendment and the 1866 Civil Rights Act. While Congress had enacted a statute allowing for limited *jus sanguinis* citizenship, that statute was inapplicable to Ludlam.¹¹⁵ Without any statutory or constitutional law to guide its decision, the court was "necessarily driven to [decide the case based on] the doctrines of the common law."¹¹⁶ Based on these principles, the court held that the petitioner was a U.S. citizen:

By the common law when a subject is traveling or sojourning abroad . . . with the intention of returning . . . he retains the privileges and continues under the obligations of his allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, and are an exception to the rule which makes the place of birth the test of citizenship.¹¹⁷

The court acknowledged that this rule might increase the incidence of dual citizenship, yet downplayed the significance of this concern, reasoning that a country likely would not extend birthright citizenship to a child born of alien parents "when the residence of the parents was merely temporary, and when the child[] [was] removed before [reaching the age of] majority."¹¹⁸

Ludlam is significant for the way in which it interweaves the concept of parental domicile with birthright citizenship. The court did this in two distinct ways. First, it adopted what could best be described as a domicile-based rule of *jus sanguinis* citizenship. Under this rule, a person born abroad to citizen parents would acquire U.S. citizenship if that person's parents were only temporary residents of the foreign country at the time of his or her birth.¹¹⁹ Second, by arguing that other countries would be unlikely to grant *jus soli* citizenship to persons born of noncitizen,

¹¹³ Id. at 488.

¹¹⁴ Id. at 490.

¹¹⁵ Id. at 490–91.

¹¹⁶ Id. at 491.

¹¹⁷ Id. at 503.

¹¹⁸ Id. at 503–04.

¹¹⁹ Id. at 504.

temporary residents, the court explicitly assumed that those countries would impose their own parental domicile requirements.¹²⁰

To be sure, not all courts saw parental domicile as relevant to the issue of birthright citizenship. The clearest rejection of this principle can be found in the 1844 case of *Lynch v. Clarke*.¹²¹ In *Lynch*, the New York Chancery Court was asked to decide whether Julia Lynch, a woman “born in [New York], of alien parents, during their temporary sojourn,” was a U.S. citizen.¹²² At the time *Lynch* was decided there was no federal law, constitutional or otherwise, applicable to Lynch’s case that defined the term “citizen.”¹²³ Relying on common law principles, the court held that all persons born in the United States (excluding those born to foreign ambassadors) were citizens of the United States, “whatever were the status of his [or her] parents.”¹²⁴ The court explicitly rejected the idea that the domicile of one’s parents could serve to deprive that person of a claim to birthright citizenship.¹²⁵ Notwithstanding this outcome, *Lynch* still illustrates a crucial point: namely, that the idea of a parental domicile requirement was an important part of the public debate over birthright citizenship during the mid-nineteenth century. The parties’ arguments and the court’s opinion devoted significant attention to the issue of parental domicile.¹²⁶ Although the court ultimately rejected the idea of such a requirement, the level of attention given this issue underscores its then-contemporary significance.

These cases shed considerable light on our understanding of *Wong Kim Ark*, not merely through their value as precedent, but more importantly by showing that other courts understood parental domicile and birthright citizenship as interrelated concepts. In its lengthy analysis of precedent, the Court in *Wong Kim Ark* discussed both *Benny* and *Lynch*.¹²⁷ Although the Court did not dwell on these cases, the fact that it was aware of them and the significance they ascribed to parental domicile further suggests that parental domicile was crucial to the Court’s holding.

¹²⁰ Id. at 503–04.

¹²¹ 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844).

¹²² Id. at 638.

¹²³ Id. at 655.

¹²⁴ Id. at 663–64 (emphasis omitted).

¹²⁵ Id. at 663–64.

¹²⁶ See id. at 596–97, 632, 663–64, 674.

¹²⁷ *Wong Kim Ark*, 169 U.S. at 664, 669–70, 674, 692–93.

C. Executive Practice

In the years immediately following ratification of the Fourteenth Amendment, no branch of government grappled more with the meaning of the Citizenship Clause than the executive branch. As records from the period demonstrate, State Department officials clearly appreciated the significance of parental domicile as a limit on birthright citizenship. Before the Court's decision in *Wong Kim Ark*, the State Department, on at least two occasions, took the position that a person born in the United States to nondomiciled, alien parents was not entitled to birthright citizenship under either the Citizenship Clause or the 1866 Civil Rights Act.¹²⁸ The department first took this position in 1885, when, in an opinion letter by Secretary Fredrick T. Frelinghuysen, the department rejected the passport application of Ludwig Hausding.¹²⁹ Hausding was born to noncitizen parents "temporarily in the United States."¹³⁰ According to Frelinghuysen, birth under such circumstances "impl[ie]d alien subjection," thereby foreclosing any claim to birthright citizenship.¹³¹ In Frelinghuysen's view, a person born in the United States to nondomiciled, alien parents was not entitled to citizenship because that person was, at birth, "subject to a[] foreign power," within the meaning of the 1866 Civil Rights Act.¹³² Though Frelinghuysen analyzed this application under the 1866 Act, his answer would have been the same if analyzed under the Citizenship Clause, given that, as previously mentioned, these two provisions were intended to be, and have since been interpreted as, synonymous.¹³³

Later that same year, Secretary Thomas F. Bayard (Frelinghuysen's successor) relied on this same principle in rejecting the passport application of Richard Greisser.¹³⁴ Greisser was born in Ohio to a noncitizen fa-

¹²⁸ See Letter from Fredrick T. Frelinghuysen, U.S. Sec'y of State, to John A. Kasson (Jan. 15, 1885), in 2 *A Digest of the International Law of the United States* 397, 397-98 (Francis Wharton ed., 2d ed. 1887); Letter from Thomas F. Bayard, U.S. Sec'y of State, to Boyd Winchester (Nov. 28, 1885), in 2 *A Digest of the International Law of the United States*, supra, at 399, 399-400.

¹²⁹ Letter from Fredrick T. Frelinghuysen to John A. Kasson, supra note 128.

¹³⁰ Id. at 397.

¹³¹ Id. at 398.

¹³² Id. (referring to § 1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (codified as amended 42 U.S.C. § 1981 (2012))).

¹³³ See supra notes 76-78 and accompanying text.

¹³⁴ Letter from Thomas F. Bayard to Boyd Winchester, supra note 128.

ther who, at the time of his birth, was still domiciled in Germany.¹³⁵ In Bayard's view, these facts placed Greisser beyond the purview of the Citizenship Clause.¹³⁶ For Bayard, a person born to nondomiciled alien parents "was on his birth 'subject to a foreign power' and [thus] 'not subject to the jurisdiction of the United States' [within the meaning of the Citizenship Clause]."¹³⁷

As these excerpts demonstrate, the State Department understood the jurisdictional element of the Citizenship Clause as excluding children born to nondomiciled, noncitizen parents. The Court in *Wong Kim Ark* was aware of these opinion letters, and Chief Justice Fuller discussed them in his dissenting opinion.¹³⁸ That the Court was familiar with these letters and the significance they ascribed to parental domicile suggests, once again, that the Court's repeated reference to parental domicile was more than mere dicta.

D. Legal Scholarship

Throughout history, several prominent legal scholars have endorsed the idea of a parental domicile requirement. Indeed, as will be shown, by the time *Wong Kim Ark* was decided in 1898, the legal literature was replete with references to such an idea.

The intellectual roots of this requirement can be traced as far back as the eighteenth century. Christian Wolff, a German philosopher and pioneer in the area of international law, provided perhaps the earliest statement of what we would today consider a parental domicile requirement.¹³⁹ According to Wolff, a person's "native country," or country of citizenship, was that place "in which [a person's] parents [had] a domicile, when he [was] born."¹⁴⁰ For Wolff, parental domicile was the sole distinguishing factor between the concepts of "native country" on the one hand and mere "place of birth" on the other:

¹³⁵ Id. at 399. Bayard's letter does not include any information concerning the nationality of Greisser's mother. Id. at 399–400. It does, however, state that she, along with her son, joined Greisser's father in Germany when Greisser was less than two years old. Id.

¹³⁶ Id.

¹³⁷ Id. at 400.

¹³⁸ See *Wong Kim Ark*, 169 U.S. at 719 (Fuller, C.J., dissenting).

¹³⁹ Christian Wolff, 2 *Jus Gentium Methodo Scientifica Pertractatum* 77 (Joseph H. Drake trans., Clarendon Press 1934) (1764).

¹⁴⁰ Id.

[P]lace of birth, which is the place in which we have been born, differs from native country. When any one is born in his native country, a thing which usually happens, place of birth is synonymous with native country . . . but if any one is born on a journey or in a foreign land, where his parents are living on account of some business, his native country differs from his place of birth.”¹⁴¹

Across the Atlantic, American treatise writers were particularly drawn to the idea of a parental domicile requirement. Among these writers, Justice Joseph Story, the “father” of American conflict of laws,¹⁴² was the first, and perhaps most prominent, American legal scholar to endorse this requirement.¹⁴³ Writing in his *Commentaries on the Conflict of Laws*, Story argued that “[a] reasonable qualification o[n] the rule [of *jus soli* citizenship] would seem to be, that it should not apply to the children of parents, who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health, or curiosity, or occasional business.”¹⁴⁴ To be sure, this “reasonable qualification” was more normative than descriptive. Writing in 1834, well before the Fourteenth Amendment, Story readily acknowledged that this requirement was not then “universally established” under the “present state of the public law.”¹⁴⁵

Following ratification of the Fourteenth Amendment, many treatise writers construed the Citizenship Clause as incorporating Story’s “reasonable qualification.” Writing in 1881, fellow conflict of laws scholar Francis Wharton argued that persons “born of Chinese non-naturalized parents, such parents not being here domiciled, are not citizens of the United States.”¹⁴⁶ Wharton later expanded on this argument in his 1887 *A Digest of the International Law of the United States*, explaining that the jurisdictional element of the Citizenship Clause “exclude[d] children born in the United States to foreigners here on transient residence.”¹⁴⁷

¹⁴¹ Id.

¹⁴² Mary J. Davis, On Preemption, Congressional Intent, and Conflict of Laws, 66 U. Pitt. L. Rev. 181, 186 n.17 (2004).

¹⁴³ Story, *supra* note 14, § 48.

¹⁴⁴ Story, *supra* note 14, § 48; see also Black’s Law Dictionary, *supra* note 8, at 800 (describing *in itinere* as a Latin phrase for “[o]n a journey” or “on the way”).

¹⁴⁵ Joseph Story, *Commentaries on the Conflict of Laws* § 48 (Boston, Hilliard, Gray & Co. 1834).

¹⁴⁶ Francis Wharton, *A Treatise on the Conflict of Laws* 41 (Philadelphia, Kay & Brother 2d ed. 1881).

¹⁴⁷ 2 *A Digest of the International Law of the United States*, *supra* note 128, at 393–94.

Echoing this interpretation, Alexander Porter Morse, in his 1881 book *A Treatise on Citizenship*, argued that “[t]he words ‘subject to the jurisdiction thereof’ exclude[d] the children of foreigners transiently within the United States . . . as . . . subjects of a foreign nation.”¹⁴⁸ This interpretation can even be found in the writings of a then-recent Supreme Court Justice.¹⁴⁹ In his *Lectures on the Constitution of the United States*, Justice Samuel Miller observed that “[i]f a stranger or traveler passing through, or temporarily residing in this country . . . has a child born here which goes out of the country with its father, [that] child is not a citizen of the United States.”¹⁵⁰ Miller offered these remarks during a series of lectures delivered in 1890,¹⁵¹ approximately eight years before *Wong Kim Ark* was decided.

In addition to treatises, several law review articles published during the late nineteenth century endorsed the idea of a parental domicile requirement. M.A. Lesser’s 1891 article *Citizenship and Franchise* spoke of this requirement as though it were an established part of the Court’s Citizenship Clause jurisprudence: “Indians are no more,” Lesser explained, “born within the United States *and* subject to the jurisdiction thereof, within the meaning of the XIVth amendment, than the children of foreign subjects, born *while the latter transiently sojourn here*, or than the children of ambassadors or other public ministers”¹⁵² Similarly, in an 1896 article, Henry C. Ide, then-U.S. Chief Justice of Samoa, argued that domicile was a guarantor of birthright citizenship: “[W]here an alien is actually domiciled in [the United States] . . . his original nationality is so far weakened that our institutions ought not to consent that its inanimate shadow shall rest upon his offspring and deprive them of the inherent rights which are theirs by birth [in the United States].”¹⁵³ Finally, in an article published less than a year before *Wong Kim Ark* was decided, Boyd Winchester, a former U.S. Representative and then-ambassador, asserted that the jurisdictional element of the Citizenship Clause excludes “the children of persons passing through or temporarily

¹⁴⁸ Alexander Porter Morse, *A Treatise on Citizenship* 248 (Boston, Little, Brown & Co. 1881).

¹⁴⁹ Samuel Freeman Miller, *Lectures on the Constitution of the United States* 279 (New York, Banks & Bros. 1893).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at v.

¹⁵² M.A. Lesser, *Citizenship and Franchise*, 4 Colum. L. Times 145, 146 (1891) (second emphasis added) (internal quotation marks omitted).

¹⁵³ Henry C. Ide, *Citizenship by Birth—Another View*, 30 Am. L. Rev. 241, 249 (1896).

residing in this country who have not been naturalized, and who claim to owe no allegiance to the government of the United States, and take their children with them when they leave the country.”¹⁵⁴

As this Section has shown, the idea of a parental domicile requirement has a long pedigree in the legal literature. This scholarship not only sheds light on the original meaning of the Citizenship Clause, but also helps to clarify our understanding of the Court’s opinion in *Wong Kim Ark*. That Court was familiar with many of the authorities reviewed in this Section. Indeed, the dissent quoted at length from the same passages of Justice Story’s *Commentaries* and Justice Miller’s *Lectures* excerpted above. Aware of the significance then ascribed to parental domicile, the Justices did not shy away from this requirement—they embraced it.

E. The Use of Domicile in Other Citizenship Law Contexts

Thus far, this Part has focused exclusively on reviewing historical authorities that provide direct support for the idea of a parental domicile requirement. This final Section takes a broader view. Looking beyond the issue of birthright citizenship, this Section surveys the variety of other ways in which U.S. citizenship law has historically relied on domicile as a basis for allocating rights and imposing duties. In particular, this Section focuses on the importance of domicile in the areas of naturalization, expatriation, and treason. As this Section shows, the significance of domicile in these areas provides further support for a domicile-based interpretation of the Citizenship Clause.

1. Naturalization

Durational residency requirements have been part of U.S. naturalization law since the founding.¹⁵⁵ Today this requirement is set at five years; that is, an alien must reside in the United States for five years as a lawfully admitted permanent resident before he or she can apply for naturalization.¹⁵⁶ Congress has kept this requirement set at five years since 1802.¹⁵⁷ Though this requirement is today recognized as “perhaps the

¹⁵⁴ Boyd Winchester, *Citizenship in its International Relation*, 31 *Am. L. Rev.* 504, 504 (1897).

¹⁵⁵ See Act of Mar. 26, 1790, ch. 3, § 1, 1 *Stat.* 103, 103–04.

¹⁵⁶ 8 U.S.C. § 1427 (2012).

¹⁵⁷ Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 *Emory L.J.* 1243, 1299 n.333 (2013).

most easily justified of the criteria for naturalization,”¹⁵⁸ its inclusion in the Naturalization Act of 1790 generated considerable debate in the First Congress.¹⁵⁹ Supporters of this requirement argued that it was necessary to ensure an applicant’s “fidelity and allegiance” to the United States,¹⁶⁰ and, as then-Representative James Madison explained, to “guard against abuses” of the naturalization process:

When we are considering the advantages that may result from an easy mode of naturalization, we ought also to consider the cautions necessary to guard against abuses. . . . [Without a residency requirement], aliens might acquire the right of citizenship, and return to the country from which they came, and evade the laws intended to encourage the commerce and industry of the real citizens and inhabitants of America, enjoying at the same time all the advantages of citizens and aliens.¹⁶¹

Though U.S. immigration policy has changed dramatically since 1790, the rationale for this requirement has stayed the same. As the Court in *Rogers v. Bellei* observed, “residence in this country [i]s the talisman of dedicated attachment.”¹⁶²

Requiring parental domicile as a prerequisite to birthright citizenship is the functional equivalent of the five-year residency requirement for naturalization. Both of these rules rely on residency, in some form or another, as a prerequisite for acquiring citizenship, whether it be residence for a set number of years, or residence with the intent to remain indefinitely. Moreover, these rules both serve the same basic goal; namely, to ensure that the United States does not bestow the precious benefit of life-long citizenship on individuals who are unlikely either to reside in or to develop ties to this country. Madison’s concern for the need to “guard against abuses” of the naturalization process is equally applicable to birthright citizenship. Given that Congress has, since 1790, required residency as a prerequisite to naturalization, one would expect that the ratifiers of the Fourteenth Amendment meant for the Citizenship Clause to possess an equivalent safeguard.

¹⁵⁸ Peter J. Spiro, Questioning Barriers to Naturalization, 13 *Geo. Immigr. L.J.* 479, 508 (1999).

¹⁵⁹ See 1 *Annals of Cong.* 1109–25 (1790) (Joseph Gales ed., 1834).

¹⁶⁰ *Id.* at 1109 (statement of Rep. Thomas Hartley).

¹⁶¹ *Id.* at 1111 (statement of Rep. James Madison).

¹⁶² 401 U.S. 815, 834 (1971).

2. Expatriation

Historically, the status of domicile has played an important role in the law of expatriation. It was not until 1907 that Congress first enacted a statute specifying acts of expatriation (that is, specific actions that trigger a loss of U.S. citizenship).¹⁶³ Before that time, the State Department was forced to adjudicate these issues on an ad hoc, case-by-case basis.¹⁶⁴ Under those decisions, the acceptance of a foreign domicile was often regarded as strong, if not dispositive, evidence of expatriation.¹⁶⁵ Domicile's significance in this regard can be traced back to early Supreme Court dicta, stating that expatriation "[could not] be done without a bona fide change of domicil."¹⁶⁶ In 1873, President Ulysses S. Grant urged Congress to codify this State Department practice by providing "that residence in a foreign land without intent to return, shall of itself work expatriation."¹⁶⁷ Offering the constitutional justification for this rule, Secretary of State Hamilton Fish argued that those who "acquire[] a political domicile in a foreign country" are no longer subject to the jurisdiction of the United States within the meaning of the Citizenship Clause:

The fourteenth amendment . . . makes personal subjection to the jurisdiction of the United States an element of citizenship. The avowed, voluntary, permanent withdrawal from such jurisdiction would seem to furnish one of the strongest evidences of the exercise of that right

¹⁶³ Expatriation Act of 1907, ch. 2534, 34 Stat. 1228 (repealed 1940); see also Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 *San Diego L. Rev.* 853, 855 (1990) (summarizing the historical development of public policy on expatriation).

¹⁶⁴ See James, *supra* note 163, at 867–71.

¹⁶⁵ See, e.g., Letter from W.L. Marcy, U.S. Sec'y of State, to John Randolph Clay (May 24, 1855), *in* 2 *A Digest of the International Law of the United States*, *supra* note 128, at 447, 447 (explaining that citizens of the United States who are domiciled abroad should be presumed outside the protection of the United States); Letter from Frederick T. Freylinghuysen, U.S. Sec'y of State, to James R. Lowell, Minister to Eng. (Feb. 27, 1884), *in* 3 John Bassett Moore, *A Digest of International Law* 717, 717–18 (1906) (explaining that if an American citizen makes a permanent abode in a foreign country, manifesting no intent to return to the United States, then it is an open question "whether he has not voluntarily abandoned his right to such [U.S.] protection").

¹⁶⁶ *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 347–48 (1822).

¹⁶⁷ Ulysses S. Grant, Fifth Annual Message to the Senate and House of Representatives (Dec. 1, 1873), *in* 10 *A Compilation of the Messages and Papers of the Presidents* 4189, 4194 (New York, Bureau of Nat'l Literature, Inc. 1897).

[of expatriation] which Congress has declared to be the natural and inherent right of all people.¹⁶⁸

This argument is premised on the same domicile-based interpretation of the Citizenship Clause used to justify a parental domicile requirement. If, for expatriation purposes, acceptance of a foreign domicile renders one no longer “subject to the jurisdiction,” within the meaning of the Citizenship Clause, it stands to reason that birth to nondomiciled, alien parents is equally insufficient to satisfy this requirement. After all, as mentioned earlier, the Citizenship Clause looks to the characteristics of one’s parents—whether it be their status as foreign diplomats, or, as in this case, their domicile—to determine whether that person is born “subject to the jurisdiction” of the United States.¹⁶⁹ Accordingly, the law of expatriation, as it existed both at the time of the Fourteenth Amendment’s ratification and the Court’s decision in *Wong Kim Ark*, provides further support for interpreting the Citizenship Clause to require parental domicile as a prerequisite to birthright citizenship.

3. Treason

Finally, the law of treason is yet another area in which domicile and citizenship are treated as interrelated concepts. Treason is usually thought of as a crime committed by a citizen against his government. The offense, however, does not depend on citizenship status.¹⁷⁰ As the Supreme Court has long held, “[t]reason is a breach of allegiance,” not a breach of citizenship; it may, therefore, “be committed by [anyone] who owes allegiance either perpetual or temporary” to the United States.¹⁷¹ Under this definition, the Court held in *Carlisle v. United States* that “alien[s], whilst domiciled in the country, owe[] a local and temporary allegiance” to the United States, sufficient to render them “amenable to . . . punishment for treason.”¹⁷² Thus, under *Carlisle*, the bond of allegiance extends not only to citizens, but also domiciled aliens.

¹⁶⁸ Letter from Hamilton Fish, U.S. Sec’y of State, to President Ulysses S. Grant (Aug. 25, 1873), in 2 Papers Relating to the Foreign Relations of the United States, Transmitted to Congress, with the Annual Message of the President, December 1, 1873, at 1186, 1188–89 (Washington, Gov’t Printing Office 1873).

¹⁶⁹ See supra Section I.A.

¹⁷⁰ See *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 155 (1872).

¹⁷¹ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820).

¹⁷² *Carlisle*, 83 U.S. (16 Wall.) at 154–55.

Much like treason, birthright citizenship is also premised on the concept of allegiance.¹⁷³ As the Court in *Wong Kim Ark* explained, the Citizenship Clause “affirms the ancient and fundamental rule of citizenship by birth within the territory, *in the allegiance* and under the protection of the country.”¹⁷⁴ More to the point, the Court specifically interpreted the clause’s jurisdictional element as requiring allegiance, stating “[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.”¹⁷⁵ This holding embraces the same domicile-based theory of allegiance found in *Carlisle*. Under this rule, Wong Kim Ark was entitled to birthright citizenship because, at the time of his birth, his parents were “within the allegiance and the protection” of the United States.¹⁷⁶ How do we know that they were “within the allegiance” of this country? As the Court makes clear, their allegiance was premised on domicile.¹⁷⁷ Put more directly, without parental domicile, there would have been no bond of allegiance, and without allegiance, Wong Kim Ark would not have been born “subject to the jurisdiction” of the United States.¹⁷⁸ The law of treason, as established at the time of *Wong Kim Ark*, confirms this interpretation of the Court’s opinion.

Domicile has traditionally played an important role in the areas of naturalization, expatriation, and treason. Interpreting the Citizenship Clause to require parental domicile brings birthright citizenship into accord with this tradition, thereby harmonizing the larger body of U.S. citizenship law into a more complete and consistent whole. Viewed from this perspective, the idea of a parental domicile requirement is not only plausible—it makes complete sense.

Nailing down the original meaning of the Citizenship Clause is no easy task. As has often been observed, the clause was “something of an afterthought,” attracting relatively little attention or debate.¹⁷⁹ Neverthe-

¹⁷³ See *Wong Kim Ark*, 169 U.S. at 693.

¹⁷⁴ *Id.* (emphasis added).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 693–94.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 580 (1998).

less, as this Part has shown, what little evidence does exist indicates that the clause was not meant to bestow citizenship on persons born to non-domiciled, alien parents. Further, this historical evidence sheds light on our understanding of the Court's opinion in *Wong Kim Ark*. That Court was aware of the significance then ascribed to parental domicile in citizenship law and theory. Indeed, it was familiar with many of the authorities reviewed in this Part. The Court, therefore, knew that its references to parental domicile carried special significance, and it made those references anyway. Given this history, we should hesitate to accept any reading of the Court's opinion that robs this language of its likely intended significance.

IV. CITIZENSHIP THEORY AND THE PARENTAL DOMICILE REQUIREMENT

Notwithstanding the particulars of *Wong Kim Ark* or other historical authorities thus far discussed, the idea of conditioning birthright citizenship on a requirement of parental domicile makes sense from the perspective of sound citizenship policy. Citizenship denotes a person's "membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society."¹⁸⁰ Residence, in turn, is an essential feature of this relationship. Fixed residence in a society produces the sort of attachment that justifies one's claim for inclusion as a citizen.¹⁸¹ As an early commentator once observed, "If we judge of the country of a man by any other rule than that where his permanent residence is fixed, and to which he politically belongs by his own will, . . . we must establish a principle which will be partial and capricious."¹⁸² This Note, therefore, starts from the basic premise that sound citizenship policy should seek, as nearly as possible, to align citizenship status with residency or social ties.¹⁸³ In other words, a country should aim to bestow citizenship on those, and generally only

¹⁸⁰ *Luria v. United States*, 231 U.S. 9, 22 (1913).

¹⁸¹ See T. Alexander Aleinikoff & Douglas Klusmeyer, *Citizenship Policies for an Age of Migration* 11 (2002); Joseph H. Carens, *The Ethics of Immigration* 21, 96 (2013); Morse, *supra* note 148, at 47; Ayelet Shachar, *The Birthright Lottery* 168–69 (2009); Harald Bauder, *Domicile Citizenship, Human Mobility and Territoriality*, 38 *Progress in Hum. Geography* 91, 95, 101 (2014); Yaffa Zilbershats, *Reconsidering the Concept of Citizenship*, 36 *Tex. Int'l L.J.* 689, 710–12 (2001).

¹⁸² Morse, *supra* note 148, at 14.

¹⁸³ The idea that functional criteria, such as residency, should serve as the touchstones for conferring citizenship is a common one in the scholarly literature. See Shachar, *supra* note 181.

on those, with either a fixed residence within or strong social ties to that country. With this principle as a guide, this Part will discuss the policy advantages of a domicile-based system of birthright citizenship over a pure *jus soli* system.

Jus soli citizenship arose out of feudal principles, which saw individuals as owing perpetual allegiance to the land on which they were born.¹⁸⁴ Feudal society was highly immobile.¹⁸⁵ Few people moved beyond the localities in which they were born, much less to whole new countries.¹⁸⁶ For those “who lacked transportation facilities and were, for the most part, tied to the land, movement beyond the local was feared and forbidden.”¹⁸⁷ In such a society, *jus soli* citizenship made perfect sense.¹⁸⁸ *Jus soli* was a “natural outcome of the intimate connection in feudalism between the individual and the soil upon which he lived.”¹⁸⁹ For the vast majority of society, a person’s place of birth was a perfect proxy for future residence.¹⁹⁰

Today, society is far more mobile than it was in medieval Europe, and, as a result, *jus soli* citizenship has become increasingly overinclusive.¹⁹¹ An automatic *jus soli* rule bestows citizenship on persons born to parents whose stay within the country is purely temporary. Such overinclusiveness raises two principal concerns. First, and most obviously, it means that countries like the United States are bestowing citizenship on persons whose “only tie to the society is the geographic accident of their place of birth.”¹⁹² Such meager ties are unlikely to yield the sort of allegiance and engaged membership that traditionally characterize the bond of citizenship. Secondly, in developed countries, an automatic *jus soli* rule often incentivizes abusive immigration practices like birth tourism and, to a lesser extent, illegal immigration. Birth tourism, as mentioned earlier, is travel to a country that practices *jus soli* citizenship for the

¹⁸⁴ See *id.* at 113–15; Prentiss Webster, *A Treatise on the Law of Citizenship in the United States* 50–51 (Albany, Matthew Bender 1891).

¹⁸⁵ Tim Cresswell, *On the Move: Mobility in the Modern Western World* 10 (2006).

¹⁸⁶ See *id.*; John Westlake, *International Law: Part I*, Peace 220–21 (1910).

¹⁸⁷ Cresswell, *supra* note 185, at 10.

¹⁸⁸ See Westlake, *supra* note 186, at 220.

¹⁸⁹ William Edward Hall, *International Law* 186 (Oxford, Clarendon Press 1880); accord Shachar, *supra* note 181, at 114–15.

¹⁹⁰ See Cresswell, *supra* note 185, at 10; Westlake, *supra* note 186, at 220.

¹⁹¹ See Aleinikoff & Klusmeyer, *supra* note 181, at 10–12; Christian Joppke, *Comparative Citizenship: A Restrictive Turn in Europe?*, 2 *Law & Ethics of Hum. Rts.* 128, 134 (2008).

¹⁹² Aleinikoff & Klusmeyer, *supra* note 181, at 11 (emphasis added).

purpose of bearing citizen children there. In recent years, birth tourism has become a growing trend in the United States.¹⁹³ This practice is driven by a desire to take advantage of the rights and benefits that accompany U.S. citizenship, including, most notably, easier access to American schools and universities.¹⁹⁴ Such children, however, rarely grow up in or develop any significant ties to the United States.¹⁹⁵ Thus, for the children born of this practice, U.S. citizenship is often nothing more than a citizenship of convenience.

In light of such concerns, *jus soli* citizenship has long been the butt of criticism from commentators and policy makers alike. Today, many commentators favor wholly abandoning the birthright principle in favor of a more functional basis of awarding citizenship, such as domicile,¹⁹⁶ social ties,¹⁹⁷ or location of upbringing.¹⁹⁸ As for policy makers, both in the United States and abroad, the most popular limitation on the *jus soli* rule has been to limit birthright citizenship to children born of parents who are either citizens or legal permanent residents.

In the last decade, Congress has seen dozens of bills proposed that would limit birthright citizenship along these lines,¹⁹⁹ and around the world, every developed country that recognizes *jus soli* citizenship, with the exception of the United States and Canada, has adopted these, or similar, limitations.²⁰⁰

¹⁹³ Hans Schattle, *Globalization and Citizenship* 153–57 (2012).

¹⁹⁴ See, e.g., *id.* at 154–55 (discussing how many South Korean citizens are seeking American educational opportunities); Hannah Beech, *I Want an American Baby! Chinese Women Flock to the U.S. to Give Birth*, *Time* (Nov. 27, 2013), http://world.time.com/2013/11/27/chinese-women-are-flocking-to-the-u-s-to-have-babies/?hpt=hp_t2 (explaining that access to American universities motivates Chinese birth tourism).

¹⁹⁵ See Beech, *supra* note 194; Richard Chang, *American Benefits Beget Rise in ‘Birth Tourism,’ Sacramento Bee* (Sept. 24, 2012), available at <http://www.richardychang.com/wp-content/uploads/2014/09/American-benefits-beget-rise-in-birth-tourism.pdf>.

¹⁹⁶ See Bauder, *supra* note 181, at 92; John H. Wigmore, *Domicile, Double Allegiance, and World Citizenship*, 21 *Ill. L. Rev.* 761, 762 (1927).

¹⁹⁷ See Shachar, *supra* note 181, at 164–70 (proposing a *jus nexi* citizenship principle, which bestows citizenship based on one’s genuine connection to a society).

¹⁹⁸ See Aleinikoff & Klusmeyer, *supra* note 181, at 15; Theodore Baty, *The Interconnection of Nationality and Domicile*, 13 *Ill. L. Rev.* 363, 367 (1919).

¹⁹⁹ Congress.gov, <http://www.congress.gov/> (select “All Legislation” from the dropdown menu, then search “citizenship at birth,” then sort by “Date of Introduction – Newest to Oldest”) (last visited Nov. 23, 2014).

²⁰⁰ By developed countries, I am referring to the thirty-four countries categorized as developed by the CIA’s World Factbook. Cent. Intelligence Agency, *World Factbook: Appendix B*, available at <https://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html> (last visited Nov. 23, 2014). Of those thirty-four countries, only eight recognize some

Notwithstanding their differences, these proposals all further the same common goal: They all work, in one way or another, either to reduce the overinclusiveness of *jus soli* citizenship or to mitigate the consequences thereof. Conditioning *jus soli* citizenship on a requirement of parental domicile furthers this same objective. A parental domicile requirement more closely aligns citizenship status with residency and social ties. If a child is born in the country where his or her parents are domiciled, it stands to reason that that child will be more likely to reside in and develop ties to that country than a child born to nondomiciled alien parents. This requirement, therefore, eliminates much of the overinclusiveness that haunts *jus soli* citizenship.

A parental domicile requirement also serves to crack down on abusive immigration practices. Notably, this requirement virtually eliminates the practice of birth tourism. Given that birth tourists lack any semblance of domicile, the deterrent effect of this requirement would likely put a swift end to the birth tourism industry. Secondly, this requirement may also have the potential to curb illegal immigration. To clarify, this Note does not take the position that such a requirement will categorically deny birthright citizenship to the children of illegal aliens. Rather, to the extent that birthright citizenship is a magnet for illegal immigration, a parental domicile requirement will dampen the strength of that magnet.²⁰¹ Though it is often said that an individual can change domiciles in an instant,²⁰² actually proving a change of national domicile is no easy task.²⁰³

form of *jus soli* citizenship, and six of those eight restrict *jus soli* citizenship by imposing some additional requirements (the other two being the United States and Canada). 8 U.S.C. § 1401(a) (2012); Australian Citizenship Act 2007 (Cth) s 12 (Austl.); Citizenship Act, R.S.C. 1985, c. C-29 (Can.); Code Civil [C. civ.] art. 21-7 (Fr.); Staatsangehörigkeitsgesetz [StAG] [Nationality Act], May 21, 1999, Bundesgesetzblatt [BGBl] I at 1618, § 4(1) (Ger.); Irish Nationality and Citizenship Act 2004 (Act No. 38/2004) (Ir.); Citizenship Amendment Act 2005 (N.Z.); British Nationality Act, 1981, c. 61, § 1(1) (U.K.).

²⁰¹ The extent to which birthright citizenship encourages illegal immigration is hotly disputed. Though the estimated number of children born to illegal aliens is large, see Jeffery S. Passel & D'Vera Cohn, Pew Research Ctr., Unauthorized Immigrant Population: National and State Trends, 2010, at 12 (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf> (estimating that eight percent of U.S. births were attributable to illegal immigrants in 2008 to 2009), there is little evidence to show that the lure of birthright citizenship is a significant motivator for illegal immigration. See Aleinikoff & Klusmeyer, *supra* note 181, at 11. Contra Schuck & Smith, *supra* note 37, at 94–95.

²⁰² See *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006).

²⁰³ See M.W. Jacobs, *A Treatise on the Law of Domicil* § 123, at 185 (Boston, Little, Brown & Co. 1887) (noting how courts often require stronger and more conclusive evidence to establish a change of national domicile).

Assuming, as some commentators claim, that many aliens illegally enter the country for the purpose of securing citizenship for their soon-to-be-born children,²⁰⁴ a parental domicile requirement reduces the incentive for this behavior by making birthright citizenship more difficult to acquire.

A domicile-based rule of *jus soli* citizenship is by no means a perfect rule. In our mobile society, such a rule is still susceptible to over- and underinclusiveness. It is, for example, conceivable that some people born to domiciled parents will move away at a young age, never to establish residency or ties with their country of birth. At the same time, it is equally possible that someone born to nondomiciled parents will go on to reside in and develop ties to their birth country. These shortcomings are endemic to any system of birthright citizenship. Nevertheless, as compared to an automatic *jus soli* rule, a domicile-based system significantly reduces these concerns. As long as *jus soli* is embedded in our Constitution, a parental domicile requirement offers a rough-and-ready means of limiting much of the overinclusiveness that accompanies automatic birthright citizenship.

V. POLICY IMPLICATIONS OF THE PARENTAL DOMICILE REQUIREMENT

Requiring parental domicile as a prerequisite to birthright citizenship represents a significant change from the way we currently enforce the Citizenship Clause. This change, in turn, raises a myriad of policy-related questions and concerns. Two questions stand out in particular. First, how would this rule apply to the U.S.-born children of illegal immigrants? And second, how would this rule likely be administered? This Part addresses those questions in turn.

A. Effect on U.S.-Born Children of Illegal Immigrants

Under a domicile-based system of birthright citizenship, policy makers would likely attempt to use this requirement to deny citizenship to the U.S.-born children of illegal immigrants. It is not at all clear, however, that this rule would categorically exclude such persons. Framed more precisely, the question is this: whether illegal immigrants are capable of establishing domicile in the United States sufficient to satisfy the Citi-

²⁰⁴ See, e.g., Schuck & Smith, *supra* note 37, at 94–95; Robert F. Holland, Ending Birthright Citizenship Is Essential to Any Sound Reform of American Immigration Policy, 33 *Admin. & Reg. L. News*, no. 1, 2007, at 9, 10.

zenship Clause. This Section answers that question in the affirmative, arguing that illegal status does not, under traditional criteria, bar an individual from establishing domicile in the United States. Accordingly, this Section concludes that the parental domicile requirement would not categorically deny citizenship to the U.S.-born children of illegal immigrants.

1. Domicile Does Not Require Legal Immigration Status

At bottom, the question of whether an illegal alien can establish domicile in the United States is purely a matter of definition. As traditionally defined, domicile is a question of fact, requiring only residence with the intent to remain indefinitely.²⁰⁵ Under this definition, legal presence in the country is not required.²⁰⁶ This conclusion is confirmed by the Supreme Court's decision in *Plyer v. Doe*.²⁰⁷ *Plyer* involved an equal protection challenge to a Texas statute that withheld from local school districts any state funds for the education of illegal immigrants.²⁰⁸ In defending this statute, Texas officials argued, among other things, that the statute's alienage classification was "simply a test of residence."²⁰⁹ Rejecting this argument, the Supreme Court observed that "illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State."²¹⁰ Put differently, the "traditional criteria" of residence and intent to remain do not require legal presence. In support of this proposition, the Court cited Clemet Bouvé's 1912 treatise, *Exclusion and Expulsion of Aliens in the United States*.²¹¹ According to Bouvé, "An alien, who, whether entering in violation of the Immigration acts, or . . . in the manner provided by law, takes up his residence here with intent to remain has done all that is necessary for the acquisition of a domicile."²¹²

Plyer's understanding of domicile is well established in American law. First, state courts overwhelmingly accept this position, regularly

²⁰⁵ See supra text accompanying notes 14–15.

²⁰⁶ See M.P. Pilkington, *Illegal Residence and the Acquisition of a Domicile of Choice*, 33 *Int'l & Comp. L.Q.* 885, 887–89 (1984); supra text accompanying notes 14–15.

²⁰⁷ 457 U.S. 202, 227 n.22 (1982).

²⁰⁸ *Id.* at 206–09.

²⁰⁹ *Id.* at 227 n.22.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Bouvé, supra note 73, at 340.

holding that common-law domicile does not require legal status.²¹³ Second, this understanding finds support in the fact that Congress has previously used the phrase “lawful . . . domicile” as a basis for allocating rights in the immigration context.²¹⁴ Confronted with this term, courts have interpreted the word “lawful” as adding an additional requirement to the common law definition of domicile; namely, that an individual’s “intent to remain [is] legal under the immigration laws.”²¹⁵ As these courts implicitly recognize, the ordinary definition of domicile does not inherently require legal status.

2. Potential Counterarguments

There are at least two potential counterarguments to the proposition that illegal aliens can establish domicile in the United States. First, one could argue that illegal immigrants cannot establish U.S. domicile because their intent to remain is conditional on avoiding deportation. This argument attempts to invoke the well-established rule that “[a]n intention to establish a domicil[e] in the locality is not sufficient if conditional upon a future event.”²¹⁶ This argument, however, misconstrues the rule. The rule of conditional intent looks to the individual’s actual, subjective intent or desire.²¹⁷ For example, if an individual moves from Oklahoma to Virginia intending to make Virginia his home only if he can find employment there, that person’s intent to remain would be conditional.²¹⁸ That is, if the condition were not satisfied, that individual would *not* have the intent to remain in Virginia. This same reasoning does not apply with regard to deportation. Even if an alien were faced with the immediate threat of deportation, he or she could still harbor an actual, subjective intent to remain in the United States.²¹⁹ That intent

²¹³ See *Garcia v. Angulo*, 644 A.2d 498, 506–10 (Md. 1994) (Chasanow & Bell, J.J., concurring) (collecting cases); *Caballero v. Martinez*, 897 A.2d 1026, 1032–33 (N.J. 2006) (collecting cases); *Das v. Das*, 603 A.2d 139, 142 (N.J. Super. Ct. Ch. Div. 1992) (collecting cases).

²¹⁴ 8 U.S.C. § 1182(c) (1994) (repealed 1996) (emphasis added) (using the term “lawful unrelinquished domicile”).

²¹⁵ *Lok v. INS*, 681 F.2d 107, 109 (2d Cir. 1982). Some circuits—deferring to the Board of Immigration Appeals’s interpretation of § 1182(c)—interpreted the term “lawful domicile” to require lawful permanent resident (“LPR”) status. See *Castellon-Contreras v. INS*, 45 F.3d 149, 152 (7th Cir. 1995) (discussing the circuit split).

²¹⁶ 1 Wharton, *supra* note 16, at 124.

²¹⁷ See 1 Restatement (Second) of Conflict of Laws § 18 cmt. b (1971).

²¹⁸ See *id.*

²¹⁹ See *Caballero v. Martinez*, 897 A.2d 1026, 1033 (N.J. 2006).

might be futile, but it is an intent nonetheless. We can confirm this conclusion by looking to the way in which domicile law treats fugitives from justice. As with the risk of deportation for illegal immigrants, a fugitive is subject to the constant risk of capture and extradition. Nevertheless, notwithstanding this risk, “[a] fugitive from justice can establish a legal ‘domicile’ where he is hiding.”²²⁰ Thus, just because the government can deprive a person of his residence, whether through extradition or deportation, does not mean that that person is incapable of forming the requisite intent to establish domicile.

The second argument for not allowing illegal immigrants to establish domicile in the United States is premised on the idea that anyone whose presence in the United States is illegal cannot, as a matter of law, form the requisite intent to remain here indefinitely. In other words, illegal immigrants lack legal capacity to establish domicile in the United States. This argument draws support from the Supreme Court’s decision in *Elkins v. Moreno*.²²¹ *Elkins* involved a challenge to a University of Maryland policy of denying in-state status to nonimmigrant alien students.²²² The students in *Elkins* were each dependent on a parent who held a G-4 visa.²²³ The university defended its policy, arguing that the holder of a nonimmigrant visa, including the G-4 visa, could not form the requisite intent to establish a Maryland domicile.²²⁴ In approaching this issue, the Court noted that it was unclear whether the university’s argument was based on an understanding of Maryland common law or “whether it is based on an argument that federal law creates a ‘legal disability,’ . . . which States are bound to recognize under the Supremacy Clause.”²²⁵ Faced with this uncertainty, the Court did two things: (1) It decided the federal statutory question of whether a G-4 visa creates a “legal disability,” and (2) it certified the state law question to the Court of Appeals of Maryland.²²⁶ On the federal question, the Court held that

²²⁰ *Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 91 (1st Cir. 2013) (quoting *United States v. Otherson*, 480 F. Supp. 1369, 1371 n.4 (S.D. Cal. 1979) (citing *Young v. Pollak*, 5 So. 279 (Ala. 1888))); accord 25 Am. Jur. 2d Domicil § 30 (2014).

²²¹ 435 U.S. 647, 663–66 (1978).

²²² *Id.* at 652–55.

²²³ *Id.* at 652. A G-4 visa is “a nonimmigrant visa granted to officers, or employees of international organizations, and the members of their immediate families.” *Id.* (internal ellipses and quotation marks omitted).

²²⁴ *Id.* at 653–55.

²²⁵ *Id.* at 663.

²²⁶ *Id.* at 662–63.

the terms of a G-4 visa would not prevent its holder from establishing a U.S. domicile.²²⁷ In reaching this conclusion, the Court emphasized that the G-4 visa, unlike other nonimmigrant visas, did not require its holder to “maintain a permanent residence abroad or to pledge to leave the United States at a date certain.”²²⁸ Given the absence of such restrictions, the Court inferred that Congress “was *willing to allow* nonrestricted nonimmigrant aliens to adopt the United States as their domicile.”²²⁹ This reasoning—particularly the Court’s use of the phrase “willing to allow”—implies that Congress has the authority to render alien entrants legally incapable of establishing a U.S. domicile. Given that federal law prohibits undocumented immigration, one could strongly argue that, under *Elkins*, illegal aliens lack legal capacity to establish domicile in the United States sufficient to satisfy the Citizenship Clause.

Though this argument has some appeal, it too is ultimately without merit for at least three reasons. First, this argument is deeply inconsistent with the Court’s subsequent decision in *Plyer*.²³⁰ The Court in *Plyer* did far more than simply observe that legal status was not a “traditional criteri[on]” for establishing domicile.²³¹ Decided four years after *Elkins*, *Plyer* held that a state could not, consistent with the Equal Protection Clause, withhold education benefits from undocumented children.²³² The Court’s holding was based heavily on the fact that the Texas statute at issue was “directed against children, and impose[d] its discriminatory burden on the basis of a legal characteristic over which children c[ould] have little control,” namely, “their presence within the United States.”²³³ Such children, the Court observed, “can affect neither their parents’ [illegal] conduct nor their own [undocumented] status.”²³⁴ “[D]irecting the onus of a parent’s misconduct against his children,” the Court declared, “does not comport with fundamental conceptions of justice.”²³⁵ This reasoning applies with even stronger force to the U.S.-born children of illegal immigrant parents. Such children have absolutely no control over where they are born or who their parents are. Given that the

²²⁷ Id. at 666.

²²⁸ Id. at 664.

²²⁹ Id. at 666 (emphasis added).

²³⁰ See *Plyer*, 457 U.S. at 227 n.22.

²³¹ Id.

²³² Id. at 220–25, 230.

²³³ Id. at 220.

²³⁴ Id. (internal quotation marks omitted).

²³⁵ Id.

Equal Protection Clause prohibits states from penalizing children based on the illegal acts of their parents, it is hard to see why the Citizenship Clause would affirmatively require such an (to use the Court's words) "illogical and unjust" rule.²³⁶

Second, the history of U.S. immigration law suggests that the Citizenship Clause was never meant to take into account illegal status. At the time of the Fourteenth Amendment's ratification, the concept of illegal immigration, at least in the way we know it today, did not exist.²³⁷ The first piece of federal legislation to restrict entry into the United States was not enacted until 1875.²³⁸ The deportation of certain excludable aliens was not authorized until 1891,²³⁹ and the criminalization of unauthorized entry did not occur until 1929.²⁴⁰ Given this history, it seems unlikely that the concept of domicile under the Citizenship Clause would turn on whether a person is a documented or undocumented immigrant. The Court in *Plyer* explicitly endorsed this conclusion, noting, after its discussion of *Wong Kim Ark*, that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' [referring to the way this term is used throughout the Amendment] can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."²⁴¹

Third, and most importantly, this argument fails because it gives Congress the power to limit the scope of the Citizenship Clause. As proposed by the Thirty-Ninth Congress, the Citizenship Clause was meant "to put th[e] question of citizenship . . . under the civil rights bill beyond the legislative power."²⁴² The Supreme Court has consistently held to this principle, denying Congress any authority to cut down on the Citizenship Clause's grant of birthright citizenship. In *Wong Kim Ark*, for example, the Court rejected the government's argument that Congress, acting pursuant to its naturalization power, could deny birthright citizen-

²³⁶ *Id.* (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

²³⁷ See Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 58–60 (2004).

²³⁸ *Id.* at 58–59; see Act of Mar. 3, 1875 (Page Act), ch. 141, 18 Stat. 477.

²³⁹ Ngai, *supra* note 237, at 59; see Act of Mar. 3, 1891 (Immigration Act of 1891), ch. 551, §§ 1, 10–11, 26 Stat. 1084, 1084, 1086.

²⁴⁰ Ngai, *supra* note 237, at 60; see Act of Mar. 4, 1929 (National Origins Act of 1929), ch. 690, §§ 1–2, 45 Stat. 1551, 1551.

²⁴¹ *Plyer*, 457 U.S. at 211 n.10.

²⁴² Cong. Globe, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Jacob M. Howard).

ship to the U.S.-born children of Chinese immigrants.²⁴³ Though the Court recognized Congress's "inherent and inalienable" "right to exclude or to expel all aliens,"²⁴⁴ it flatly rejected the idea that this, or any other, power could be used to "restrict the effect of birth," or otherwise "abridge the rights conferred by the Constitution."²⁴⁵ The Court reaffirmed this principle in *Afroyim v. Rusk*, noting that "Congress c[an]not do anything to abridge or affect . . . citizenship conferred by the Fourteenth Amendment."²⁴⁶ Thus, even if Congress can restrict an alien entrant's legal capacity to establish U.S. domicile for state law purposes (as was the issue in *Elkins*),²⁴⁷ it cannot do so for purposes of the Citizenship Clause. To allow otherwise would effectively give Congress authority to deny birthright citizenship to any person born of alien parents. Such a result not only conflicts with the Court's opinion in *Wong Kim Ark*, it goes against the very purpose of having a constitutional rule of birthright citizenship in the first place, namely, to put the issue "beyond the legislative power."²⁴⁸

As this Section has shown, the parental domicile requirement would not categorically deny birthright citizenship to the U.S.-born children of illegal immigrants. Though this may, depending on one's politics, detract from the rule's overall political utility, there are still several important policy functions that this rule would perform, as shown in Part IV.

B. Administering a Parental Domicile Requirement

Requiring parental domicile as a prerequisite to birthright citizenship poses an administrative challenge, namely: How could the State Department or the United States Citizenship and Immigration Services fairly and efficiently administer such a rule? Domicile is, after all, a fact-bound inquiry, generally requiring a totality of the circumstances approach. It is thus not a particularly expeditious rule for adjudicating rights on a large scale, especially in the context of informal agency adjudication. The answer to this question is twofold. First, one must not forget that this requirement only applies to children born of alien par-

²⁴³ *Wong Kim Ark*, 169 U.S. at 703.

²⁴⁴ *Id.* at 699.

²⁴⁵ *Id.* at 703.

²⁴⁶ 387 U.S. 253, 266 (1967).

²⁴⁷ 435 U.S. 647, 668 (1978).

²⁴⁸ Cong. Globe, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Jacob M. Howard).

ents. It would not apply to a person born in the United States of one or more U.S. citizens. There is nothing in either *Wong Kim Ark* or any of the other authorities reviewed in this Note that would suggest that this requirement was meant to apply to the children born of citizen parents. This limitation significantly restricts the potential applicability of this rule, thereby making it far more manageable to administer.

Second, and more to the point, there are several things that Congress could (and likely would) do to make this rule more easily administrable. Two options stand out in particular. First, Congress could further limit the applicability of this requirement by exempting the children of certain categories of aliens from actually having to show parental domicile. This approach would make sense particularly for children born to lawful permanent residents (“LPRs”). LPRs are aliens lawfully admitted for permanent residence in the United States.²⁴⁹ Generally speaking, the requirements for maintaining LPR status are such that they virtually preclude alien residents from having anything other than a U.S. domicile.²⁵⁰ Thus, given that LPR status provides an almost perfect proxy for U.S. domicile, it makes sense to waive the requirement in this context. Secondly, Congress could establish a system of presumptions, making it easier for the children of certain categories of aliens to actually prove parental domicile. Congress could, for example, say that children born to aliens holding a certain type of visa are presumptively entitled to citizenship unless the government proves otherwise by some standard of proof. These presumptions could be made to depend on a whole range of factors, including, for example, the length of time that a parent or child has resided in the United States. The only thing that Congress could not do is make it more difficult for a person to establish his or her eligibility for birthright citizenship than the Constitution would otherwise require.²⁵¹ The Citizenship Clause establishes a floor below which Congress cannot go. Thus, when legislating in this area, Congress can only make it easier for a person to establish his or her claim to birthright citizenship.

This discussion of Congress’s power to legislate in the area of birthright citizenship illustrates a crucial point: Just because the Citizenship Clause conditions birthright citizenship on parental domicile does not

²⁴⁹ 8 U.S.C. § 1101(a)(20) (2012).

²⁵⁰ See, e.g., *Khodagholian v. Ashcroft*, 335 F.3d 1003, 1006–07 (9th Cir. 2003) (discussing the inquiry for determining whether an alien has abandoned his or her LPR status).

²⁵¹ See *supra* text accompanying notes 242–46.

mean that we are stuck with that requirement. Congress can always award citizenship on a more liberal basis than the Constitution would otherwise require.²⁵² Therefore, if Congress should ever become dissatisfied with this requirement, it can always craft a more lenient version of this rule or even dispense with the requirement entirely. Viewed from this perspective, the parental domicile requirement simply gives Congress more leeway to legislate in the area of birthright citizenship.

As this Section has shown, the parental domicile requirement should not create any significant administrative concerns. Congress has a variety of options available for implementing this requirement and diffusing any administrative problems that may arise. While this Section has offered some preliminary suggestions as to how Congress might go about doing so, further analysis will, of course, be necessary to fully develop this administrative system.

CONCLUSION

As earlier mentioned, the United States is one of only two developed countries in the world that confers automatic birthright citizenship. Though it is recognized on all sides that this rule is overinclusive and subject to abuse, modern debate on the issue of birthright citizenship has reached an impasse—an impasse caused by the politics of illegal immigration combined with the widely held assumption that the Constitution requires this result. This Note offers an interpretation of the Citizenship Clause capable of breaking through that impasse. The parental domicile requirement charts what is in many respects a middle course in the modern debate over birthright citizenship, allowing for a more restrictive, less arbitrary form of *jus soli* citizenship without touching the hot-button issue of illegal immigration. More importantly, this interpretation has a strong basis in the clause's original meaning, and, as this Note has shown, was the interpretation that the Supreme Court endorsed in *United States v. Wong Kim Ark*. As most of the developed world has recognized, it makes little sense to bestow citizenship on persons born to alien parents whose stay within the country is purely temporary; fortunately for us, the Citizenship Clause does not require that result.

²⁵² E.g., 8 U.S.C. § 1401(c)–(e), (g) (2012) (awarding *jus sanguinis* citizenship).