

Saint Louis University Public Law Review

Volume 32
Number 2 *General Issue (Volume XXXII, No. 2)*

Article 6

2012

Jurisdiction in Nineteenth Century International Law and Its Meaning in the Citizenship Clause of the Fourteenth Amendment

Robert E. Mensel
St. Thomas University School of Law, Miami, rmensel@stu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>

 Part of the [Law Commons](#)

Recommended Citation

Mensel, Robert E. (2012) "Jurisdiction in Nineteenth Century International Law and Its Meaning in the Citizenship Clause of the Fourteenth Amendment," *Saint Louis University Public Law Review*: Vol. 32 : No. 2 , Article 6.

Available at: <https://scholarship.law.slu.edu/plr/vol32/iss2/6>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**JURISDICTION IN NINETEENTH CENTURY INTERNATIONAL
LAW AND ITS MEANING IN THE CITIZENSHIP CLAUSE OF THE
FOURTEENTH AMENDMENT**

ROBERT E. MENSEL*

All persons born or naturalized in the United States,
and subject to the jurisdiction thereof,
are citizens of the United States. . .¹

TABLE OF CONTENTS

ABSTRACT	330
I. INTRODUCTION.....	331
II. THE PRESENT DEBATE	333
III. ALLEGIANCE AND EXPATRIATION IN THE NINETEENTH CENTURY	340
A. <i>The Law of Allegiance</i>	340
B. <i>The Law of Expatriation</i>	346
C. <i>U.S. Concerns Before and During the Civil War</i>	348
D. <i>U.S. Concerns After the Civil War</i>	353
V. THE ACT AND THE AMENDMENT.....	354
A. <i>“Not subject to any foreign Power”: The Civil Rights Act</i>	354
B. <i>“[S]ubject to the jurisdiction thereof”: The Fourteenth Amendment</i>	362
C. <i>The Civil Rights Act the Third Time Around</i>	372
D. <i>Jurisdiction in the Popular Press</i>	372
VII. POST-AMENDMENT TREATIES AND LEGISLATION.....	376
A. <i>The Bancroft Treaties</i>	376
B. <i>The Expatriation Act</i>	377
C. <i>H.R. 2199 (1874)</i>	379
VI. CONCLUSION	385

* Professor of Law, St. Thomas University School of Law, Miami Gardens, Florida. B.A. Wesleyan University, J.D. University of Pennsylvania, M.A., Ph.D. Rutgers University. ST. THOMAS UNIV., www.stu.edu/law/FacultyAdministration/FullTimeFaculty/Mensel,RobertE/tabid/2408/Default.aspx (last visited Apr. 4, 2012). The author would like to thank Andrea Villate for her excellent research assistance, and is also grateful to Dennis S. Corgill, Allison Eberle-Lindemuth, Samuel P. Jordan, Lauren Gilbert, John M. Kang, Patricia Moore, Ira Nathenson, Loren D. Prescott, Jr., Courtney Segota, and Siegfried Wiessner for their assistance.

1. U.S. CONST. amend. XIV § 1, cl. 1.

ABSTRACT

This article addresses the meaning of the citizenship clauses of the Civil Rights Act of 1866 and the Fourteenth Amendment by augmenting the historical record relevant to those clauses. It argues that the key to understanding their meaning lies in the nineteenth century concept of allegiance, the central concept in the international law of citizenship and subjecthood in the nineteenth century. International law, diplomatic history, and international conflict centered around that concept, reveal complexities not fully explored in the previous scholarly literature on the citizenship clauses. Conflicting national claims to the allegiance of subjects and citizens and to the duties they owed to sovereigns caused, in part, the War of 1812. They almost led the U.S. to war with Austria in 1853, and they contributed to tensions with other German states. They flared up again with Great Britain in conflicts over conscription by the United States of British subjects in 1862, and in the Fenian conflicts of 1866. Conflict arose over the extent to which sovereigns whose subjects emigrated to the United States retained jurisdiction over those emigrants based on allegiance to their native sovereigns. This, to which I refer as the jurisdiction arising from allegiance, differed from and to some extent clashed with territorial jurisdiction. It was recognized as a matter of international law as an extraterritorial jurisdiction grounded in the relationship between the subject and the subject's original sovereign. It was vastly more extensive and expansive than its enervated twenty-first century descendant, and so, in a seeming paradox, has remained generally invisible to the modern eye. To understand it is to gain important insights into the meanings underlying both the Act and the Amendment. The citizenship clauses of the Act and the Amendment offered opportunities to relieve this international tension, even while addressing their principal purpose of making citizens of the freedmen. The congressional debates over the Act and Amendment lapsed into incoherence because one group of legislators discussed the proposed Amendment as if the word 'jurisdiction' therein meant the jurisdiction arising from allegiance. That suggests that they intended to exclude from birthright citizenship the children of aliens, of persons who owed allegiance to some other sovereign at the time of the child's birth in the United States. Their opponents discussed the proposed Amendment as if the word 'jurisdiction' meant only territorial jurisdiction. That meant that anyone born within the United States would be a citizen by birthright, with only the most trivial exceptions, unless excluded explicitly. The greater weight of language and history favors the conclusion that the word "jurisdiction" in the Fourteenth Amendment was predominantly understood to mean the jurisdiction arising from allegiance. The weight of the evidence is not overwhelming, however, and the disposition of enormously important modern

issues on the basis of that weight, without further research, might well be ill-advised.

I. INTRODUCTION

“Born in the U.S.A., I was born in the U.S.A.” – and therefore I am a citizen, right? The title and lyric to that ambivalent anthem imply the answer that most people born here would give. Yes, I was born here and [therefore] I am a citizen. Lately that assumption has come under fire. Birthright citizenship has become caught up in the debate over illegal immigration. Some scholars contend that under the Citizenship Clause of the Fourteenth Amendment birth on U.S. soil is sufficient, without more, to confer U.S. citizenship.² Others assert that the Amendment confers citizenship by right of birth only upon those born here who do not, and whose parents do not, owe allegiance to another sovereign at the time of the birth.³ Many scholars have suggested that the resolution to this disagreement lies in the history of the citizenship clause of the Civil Rights Act of 1866 and the citizenship clause of the Fourteenth Amendment, drafted the same year. Each side in the current debate claims the unambiguous support of the historical record.⁴ This in itself ought to raise suspicion.

2. Brief for The Claremont Inst. Ctr. for Constitutional Jurisprudence as Amici Curiae Supporting Respondents at 4, *Hamdi v. Rumsfeld*, 524 U.S. 507 (2004) (No. 03-6696), 2004 WL 871165 [hereinafter Claremont Brief] (summarizing the position taken by its opponents). The principal author appears to have been Dean John Eastman, who is listed as counsel of record. For another explanation of his view of the issue, see John C. Eastman, *Born in the U.S.A.?: Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 958 (2008).

3. Claremont Brief, *supra* note 2, at 4. Sadly, the debate has taken an unpleasant tone unworthy of serious scholarly discourse. One side has described the other’s conclusion as “absurd[.]” *Id.* at 9. The other side accuses some (but not all) of its opponents of racism and nativism. Garrett Epps, *The Citizenship Clause: A Legislative History*, 60 AM. U. L. REV. 331, 333–34 (2010); see also Saby Ghoshray, *Rescuing the Citizenship Clause From Nativistic Distortion: A Reconstructionist Interpretation of the Fourteenth Amendment*, 51 WASH. L.J. 261, 262–67 (2012). On the other hand, in an excellent piece composed in an appropriately measured tone, the legal historian Patrick J. Charles has reached conclusions compatible with mine, based on evidence that overlaps mine. Patrick J. Charles, *Decoding the Fourteenth Amendment’s Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L. J. 211, 260 (2012). My concept of the “jurisdiction arising from allegiance” seems to include many of the characteristics of the relationship he characterizes as “personal subjection.” *Id.* at 240–245. His approach accommodates interpretations articulated years after the date of the last evidence I consider. My approach gives greater weight to diplomatic history and international law. I attempt to cleave almost exclusively to the historical record generated in the period before and only shortly after the third enactment of the Act and the ratification of the Amendment. I consider the Bancroft Treaties and H.R. 2199, both *infra*, to be within that historical record.

4. Epps, *supra* note 3, at 334; Eastman, *supra* note 2, at 259.

This article adds to the historical context of the debate the international law of allegiance and the conflicts that arose from it in nineteenth century American diplomatic history. The legal consequences of emigration and immigration were not limited to the consequences arising within the receiving state. During the first seven decades of the nineteenth century native states continued to claim some jurisdiction over their emigrants. Great Britain was particularly aggressive in that respect. Conflicts between the jurisdiction of the United States as the receiving state and various foreign powers as the dispatching states were common and sometimes serious in that period. For example, such conflicts contributed to causing war with Great Britain in 1812, nearly led to war with Austria in 1853, and almost led again to war with Great Britain during and shortly after the Civil War. Such conflicts have been entirely forgotten by present-minded participants in today's debate, and hold little interest for those determined combatants. But they were important to nineteenth century American lawmakers, who had only their past to consider when drafting the Act and Amendment, and who were not presciently aware of today's concerns.

Beyond expanding understanding of the historical context within which the Act and Amendment arose, this article also sheds new light on the congressional debates leading to both measures. Most importantly, it points out that, during some of the most critical exchanges of the debates over the Fourteenth Amendment, members of Congress spoke past one another, never fully engaging one another's meanings in ways that would be helpful today. One group apparently understood the word "jurisdiction" in the Amendment to mean only the territorial jurisdiction of the United States.⁵ The other group apparently thought the word "jurisdiction" meant, in context, a different kind of jurisdiction.⁶ This latter was an extraterritorial jurisdiction reaching from other countries into the United States, arising from allegiance owed to those countries by their subjects present here.⁷ Its importance in nineteenth century thought has for the most part been forgotten. It is discussed herein as "the jurisdiction arising from allegiance." A proper understanding of its role in the international law of the period, and its mention in the debates, complicates the modern debate quite considerably, in ways unlikely to please the participants.

In light of this confusion in the Congressional debates, the certainties proclaimed by the combatants in the current debate seem suddenly like mere talking points, and less like firm and defensible conclusions based on the historical record. The conclusions that may reasonably be drawn from this augmented record are based on the greater weight of the historical evidence. They cannot, however, be drawn with certainty. Additional historical material

5. *See infra* Part IV.D.

6. *Id.*

7. *Id.*

drawn from other places not yet mapped and mined, particularly archival materials and the papers of the persons involved, remains to be unearthed.

Part II herein summarizes briefly the two leading schools of thought on the interpretation of the Citizenship Clause. Part III summarizes the diplomatic history of allegiance and expatriation, concepts rooted in international law and far more salient during the nineteenth century than today. Part IV recounts and analyzes the Congressional debates on the meaning of citizenship under both the Civil Rights Act of 1866 and its doppelganger, the Fourteenth Amendment. It places them in the context of the tensions discussed in Part III. Part V discusses briefly a number of matters relevant to, but outside of the debates. It notes the rather sparse coverage of the concept of jurisdiction in the popular press, indicating that there was no discernible intent of the ratifiers evident in the historical record. It notes also the obvious meaning of the fact that the Civil Rights Act was re-enacted, in full, in 1870, two years after the ratification of the Fourteenth Amendment. It seems highly unlikely that the two could have been intended to be anything other than consonant with one another.

Part V also discusses the Bancroft Treaties, entered into with most of the Western European powers and Great Britain from 1868 to 1870. These treaties adjusted the competing claims of native countries and naturalizing countries to persons born in the one and naturalized in the other. They relieved international tensions arising from the conflicting jurisdictions of territory and of allegiance. Part V then discusses H.R. 2199, a bill proposed in 1874 at the behest of President Grant and the State Department. That bill was an attempt by Congress to resolve decisively as a matter of domestic law the problems of overlapping national jurisdictions over individual persons, in a manner consistent with the Fourteenth Amendment. The failure of the bill left the other branches, and commentators since, with the doubts that continue to vex the debate today. Part VI offers tentative and modest conclusions supported by the historical record.

II. THE PRESENT DEBATE

The leading commentators on the Citizenship Clause have attempted to simplify the debate and reduce it to, on the one side, a simple matter of vocabulary, and on the other, a straightforward matter of the political philosophy of the social compact.⁸ The first approach is illustrated principally by the work of Garrett Epps, a professor of constitutional law.⁹ He reads the word ‘jurisdiction’ in the first clause of the Fourteenth Amendment as if it

8. Compare Epps, *supra* note 3, at 333–34, with Eastman, *supra* note 2, at 955, and Claremont Brief, *supra* note 2, at 4–5.

9. See generally, Epps, *supra* note 3, at 331; GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006).

referred solely to the territorial jurisdiction of the United States. “As a matter of text,” he writes, “this result is straightforward. A child of illegal aliens, if ‘born’ in the United States, is in a commonsense way surely at the moment of birth ‘subject to the jurisdiction’ of the United States.”¹⁰

Some of Professor Epps’ arguments are well-taken. Anyone present within the territory of a sovereign is subject to its territorial jurisdiction. Surely he is correct about that, but it did not settle the question in 1866. The issue then was that certain persons present in U.S. territory might have been subject to the jurisdiction of another sovereign as well, and so not exclusively subject to the jurisdiction of the United States.¹¹

Some of his other assertions do not fit well with the historical context. For example, he suggests that “[i]f the [Citizenship] Clause is not peremptory in its meaning, then Congress could vote to withhold citizenship from native-born children based on their parents’ immigration status – which, if upheld by the courts, would quickly produce a large population of native non-citizens (possibly stateless as well) within our borders.”¹² That sort of present-mindedness distorts the historical record. The past was different, to an extent beyond the grasp of advocates whose interest in it is limited to the search for a usable past. Some native-born children would indeed be excluded from citizenship, not on the basis of the parents’ “immigration status,” a term that would have been meaningless in 1866, but on the basis of the parents’ allegiance to a foreign country.

The Fourteenth Amendment was drafted by Congress in 1866, with the concerns of the then-recent past in mind, not the concerns of our present. Statelessness was not then a concern, but the status we would now describe as “dual citizenship” was a serious concern. Within the living memory of some members of Congress, serious conflicts had arisen with other countries, particularly Great Britain, over persons claimed as citizens or subjects by both countries. The status of dual allegiance, ordinary as it seems today, seemed anomalous and inappropriate then. As a British Parliamentary report of 1868 indicated, the general view was that “[n]o one can have two countries. The general interest requires that no one should have two countries.”¹³ The general

10. Epps, *supra* note 3, at 333.

11. *See infra* Part V.

12. Epps, *supra* note 3, at 334.

13. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: PART I-GENERAL CORRESPONDENCE; and PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, H.R. Exec. Doc. No. 43-1, at 1282 (1873) [hereinafter PAPERS RELATING TO NATURALIZATION AND EXPATRIATION]. The quote is from a British report entitled Report of a Commission Appointed by the Queen of Great Britain for Inquiring Into the Laws of Naturalization and Allegiance. The report was commissioned on May 21, 1868, and returned later that year. It was reproduced in the State Department papers hereinafter cited as PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, beginning at page 1232. The British report is particularly

international interest was harmed by dual citizenship because it led to conflicts, some serious, such as those discussed herein. Both the Act and the Amendment can be read, *inter alia*, as efforts to avoid the creation of that status, and so to avoid or minimize those conflicts.

The historical context within which the Civil Rights Act of 1866 and the Fourteenth Amendment were written also included the recognition that some non-citizens present in the United States could become citizens under the Naturalization Act.¹⁴ If they did not, or even if they could not, nothing in the law at that time required that they leave the U.S.¹⁵ Comments made by Secretary of State Daniel Webster to a congressional committee highlight the fact that many antebellum immigrants simply moved to the U.S. and took no legal steps to confirm their status: “[I]t is well known that hundreds of thousands of persons are now living in this country, who have not been naturalized according to the provisions of law, nor sworn any allegiance to this Government, nor been domiciled among us by any regular course of proceedings.”¹⁶ Children born to such persons would not, at that time, have been stateless. They would have been claimed as citizens by the state of citizenship of the father, under foreign law.¹⁷

It is worth noting that Webster’s principal concern arising from the situation he described was with diplomatic relations between the U.S. and the countries from which these immigrants originated. He was also concerned to protect the immigrants from the claims of their native countries.

What degree of alarm would it not give to this vastly numerous class of men, actually living among us as inhabitants of the United States, to learn that, by removing to this country, they had not transferred their allegiance from the governments of which they were originally subjects, to this Government? And, on the other hand, what would be the condition of this country and its Government, if the sovereigns of Europe, from whose dominions they have emigrated, were supposed to have still a right to interpose to protect such

useful for its summaries of the laws of the various European powers, based upon inquiries made directly of those countries, as well as of British law.

14. Naturalization Act, ch. 186, 4 Stat. 69 (1824).

15. *Id.*

16. DANIEL WEBSTER, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING INFORMATION RESPECTING THE IMPRISONMENT, &C., OF JOHN S. THRASHER, H.R. EXEC. DOC. NO. 10, at 2 (1851). Although nominally a message from President Millard Fillmore, it was in fact prepared by the State Department and signed by Secretary of State Daniel Webster. For a summary of similar British concerns arising later that century, see ALEXANDER COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS, CONSIDERED WITH A VIEW TO FUTURE LEGISLATION (1869). Webster’s comment addressed the United States’ interest in avoidance of conflict over such citizens, but made no reference to any other country’s interest in claiming or in releasing the duties of such citizens.

17. COCKBURN, *supra* note 16, at 15–19.

inhabitants against the penalties which might be justly incurred by them, in consequence of their violation of the laws of the United States?¹⁸

Webster made no mention of any concern on the part of “this vastly numerous class of men”¹⁹ that they should be required to leave the United States. That was simply not a concern at the time. But the possibility of diplomatic complications arising from their unnaturalized presence worried Webster. Related concerns vexed the U.S. in its international relations for the next couple of decades. The Bancroft Treaties, ratified between 1868 and 1870, and negotiated earlier, solved some problems by establishing the terms on which native countries would release their claims to their natives who emigrated to a treaty partner.²⁰ The treaties illustrate the concern among the various organs of the U.S. government, and of foreign governments, to avoid the problem of dual allegiance. That concern spanned the nineteenth century, and is an unavoidable part of any thorough consideration of issues of citizenship, allegiance, and jurisdiction during that century.²¹ Professor Epps does not integrate this historical context into his analysis, but, as Webster’s report makes clear, Congress was well aware of it.

The second position in contemporary debate is illustrated principally by the work of Rogers Smith, a political philosopher. It cannot be surprising that his is ultimately a philosophical approach. He relies on what Justice Story might have called the “metaphysical niceties”²² appropriate for a philosopher, and treats history as an illustration of first principles. Professor Smith and his erstwhile collaborator, Peter Schuck, reject Epps’ position.²³ In fact, they reject the traditional rule of *jus soli*, the rule that allegiance is determined by the place of birth, in favor of a rule more consonant with their idea of the social

18. WEBSTER, *supra* note 16, at 2-3.

19. *Id.*

20. For the texts of the various Bancroft Treaties, *see e.g.*, Treaty between the United States and the King of Bavaria concerning the Citizenship of Emigrants, U.S.-Bavaria, May 26, 1868, 15 Stat. 661; Treaty between the United States and the Grand Duchy of Baden: Naturalization, U.S.-Baden, July 19, 1868, 16 Stat. 731; Treaty between the United States and the Kingdom of Württemberg: Naturalization, U.S.-Württemberg, July 27, 1868, 16 Stat. 735; Convention between the United States and Belgium: Naturalization, U.S.-Belg., Nov. 16, 1868, 18 Stat. 61; Convention between the United States and Great Britain: Naturalization, U.S.-Gr. Brit., May 18, 1870, 16 Stat. 775 [hereinafter Bancroft Treaties].

21. FRANCES WHARTON, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW 2-3 (2d ed. 1881); Maximilian Koessler, “Subject,” “Citizen,” “National,” and “Permanent Allegiance,” 56 YALE L.J. 58, 69 (1946).

22. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 14 (1834); COCKBURN, *supra* note 16, at 5.

23. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 4 (1985).

compact.²⁴ They are, in a sense, modern political anabaptists, and they claim that their rule is superior because it is fully consensual.²⁵ They claim, incorrectly, that American law rejected the rule of *jus soli* as early as 1776, in the Declaration of Independence.²⁶ In their classic liberal formulation of the relationship between sovereign and individual that constitutes citizenship, *jus soli* was oppressive because it imposed itself on all involved simply by dint of law.²⁷ Neither sovereign nor citizen exercised a choice.

Dean John C. Eastman has attempted to turn Professor Smith's political philosophy into a legal argument.²⁸ His first attack on Epps' position is that it would reduce the jurisdiction clause itself to mere surplusage.²⁹ This is obviously a forceful objection. Eastman asserts, as well, that Epps' position "simply does not comport with either the text or the history surrounding adoption of the Citizenship Clause."³⁰ Eastman is correct to that extent, but his own history would also benefit from expansion into the realms of international law and diplomatic history. In fairness, his real interest, like that of Schuck and Smith, is in what he calls "the political theory underlying the Clause."³¹ This explains the light hand with which he goes over the historical record. From the standpoint of Eastman's philosophical position, to constitute a citizen automatically, as Epps would do, would violate the correct understanding of citizenship as a matter of mutual consent between individual and sovereign.³²

The virtues or vices of Professor Smith's and Dean Eastman's philosophical position are not matters of concern here. Their historical arguments are matters of great concern, however, and careful review reveals that their history falls quite short of the mark. Dean Eastman has been disloyal to the historical record, most obviously in his equating of birthright citizenship, or *jus soli*, and perpetual allegiance.³³ His philosophy necessarily condemns

24. *Id.*

25. *Id.* at 4–5.

26. Eastman, *supra* note 2, at 957–58. This statement is inconsistent with the historical record described herein. *See infra* Part III.

27. Eastman, *supra* note 2, at 959.

28. *Id.* Eastman, together with Edwin Meese, III, served as counsel of record to The Claremont Institute Center for Constitutional Jurisprudence, *amicus curiae* in the case of *Hamdi v. Rumsfeld*. Claremont Brief, *supra* note 2, at 1.

29. Eastman, *supra* note 2, at 959.

30. *Id.*

31. *Id.*

32. *See id.* at 955.

33. Claremont Brief, *supra* note 2, at 18. Even so careful a scholar as Patrick J. Charles has fallen into the same error. He states that "the Fourteenth Amendment extinguished the doctrine of perpetual allegiance." Charles, *supra* note 3, at 237. It did not. It modified the doctrine of *jus soli* so that it was, thereafter, not peremptory at its inception. Of course, some would argue that it was never peremptory, and so the Amendment changed nothing in that respect. Even so, as the debates discussed herein indicate, the Amendment was intended to clarify the rule of *jus soli*. It

both, but that is no reason to equate them. Linked as consequences of the same cause in 1765 by William Blackstone, they differ conceptually and are entirely separable.³⁴ In a nutshell, the first is one way to acquire citizenship; the second prevents a citizen from abjuring his citizenship.³⁵ Citizenship at birth is indeed a relic of the same feudal barbarism that made allegiance perpetual, and both were under attack during the middle third of the nineteenth century, but from the standpoint of historical analysis they must be, and were in fact, treated differently.³⁶

More damaging to Professor Smith's argument is the fact that members of Congress, in the period surrounding the drafting and ratifying of the Fourteenth Amendment, did not see citizenship exclusively as a matter of consent. In January of 1868, the House Committee on Foreign Affairs issued a report proposing legislation to define the right of expatriation under American law and under international law.³⁷ The report was, in essence, a legal brief based on international law, justifying the proposed legislation to a world on the verge of abandoning perpetual allegiance.³⁸ This very important document revealed the Committee's understanding of the proper rules for creating and terminating allegiance. The principal basis of this relationship was not mutual consent. According to the Committee:

The law of allegiance and of service is as essential to a republic as it is to a monarchy. It is not a mere matter of agreement, convenience, or utility; it is a necessity. Every form of government depends upon it, and dissolution awaits all forms of society to which it is denied.³⁹

In the view of the Committee, "[s]ociety is necessary to the existence of man, and government indispensable to his civilization, prosperity, and power."⁴⁰ "This does not arise so much from any special or implied contract

had nothing directly to do with the doctrine of perpetual allegiance. That doctrine was extinguished by the Bancroft Treaties. *See infra* Part V.A.

34. *Id.* (citing WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 357–58 (1765)).

35. Claremont Brief, *supra* note 2, at 13. The citations offered in Dean Eastman's brief do not support any equation of the two. *Id.* at 10.

36. COCKBURN, *supra* note 16, at 13–14; WHARTON, *supra* note 21, at 10–11.

37. CONG. GLOBE, app. 40TH CONG., 2D SESS. 94 (Jan. 27, 1868). Dean Eastman's characterization of the legislation arising from this report as "a companion to the Fourteenth Amendment" is not precisely correct. Claremont Brief, *supra* note 2, at 18. Part of the Fourteenth Amendment and the entire Expatriation Act arose from a general reconsideration of the idea of allegiance that took place in the United States and western Europe in the period from 1866 to 1874. This trend was also reflected in the Bancroft Treaties and in other, unsuccessful legislative efforts in Congress. *See infra* Part V.

38. WHARTON, *supra* note 21, at 11–14.

39. CONG. GLOBE, app. 40TH CONG., 2D SESS. 96 (Jan. 27, 1868). *See also* WHARTON, *supra* note 21, at 10.

40. CONG. GLOBE, app. 40TH CONG., 2D SESS. 95 (Jan. 27, 1868).

made in the organization of society as from the law of necessity and of nature. It is inherent in every form of civilized society . . .".⁴¹ Society arises from the laws of nature and necessity,⁴² according to the Committee, not from the "voluntary association of individuals" that Dean Eastman posits.⁴³ The Committee held that allegiance, in the first instance, did not arise from mutual consent, but expatriation required it. "It may justly be conceded that the express or implied consent of both parties is necessary to the extinction of mutual obligations between a Government and its subject."⁴⁴ This was not a conclusion, it was the premise of the Report.

The domestic social compact was not the Committee's concern; its principal concern was international law and the avoidance of potential conflicts with other countries, especially Great Britain, over competing claims to citizens.⁴⁵ The burden of the report was to assert reasons for American rejection of the doctrine of perpetual allegiance, and perhaps to persuade or embarrass Great Britain to do the same. But it held to the traditional view that allegiance could, and indeed must necessarily, be imposed in the first instance, regardless of consent.

Some of the difficulties faced by those advocating the Epps position and the Smith/Eastman position arise because of the selectivity of the historical records they consider. Their difficulties arise also from the all-too-obvious tactic of each of the combatants to conform the past to the present policy for which they covet support.⁴⁶ Professor Epps recognizes the need to place legislative events in context, but his context is too limited to support a thorough understanding.⁴⁷ Professor Smith tells an extended fable in which the liberal philosophy he espouses eventually triumphs. Like most such fables, his leaves out an important part of the story.⁴⁸ Dean Eastman's work is even more

41. *Id.* See also WHARTON, *supra* note 21, at 11.

42. CONG. GLOBE, app. 40TH CONG., 2D SESS. 95 (Jan. 27, 1868).

43. Claremont Brief, *supra* note 2, at 17 (quoting MASS. CONST. pmbl.). Certainly, comments suggesting that the social compact is the basis of society and government can be found in the records of congressional debates, but it was not the premise of this report.

44. CONG. GLOBE, app. 40TH CONG., 2D SESS. 96 (Jan. 27, 1868).

45. *Id.* at 94.

46. See Epps, *supra* note 3, at 339 ("[i]n my view, the history of the Amendment's framing lends no support to the idea that native-born American children should be divided into citizen and non-citizen classes depending on the immigration status of their parents."); see also Claremont Brief, *supra* note 2, at 4 ("The current understanding of the Citizenship Clause is incorrect, as a matter of text, historical practice, and political theory. As an original matter, mere birth on U.S. soil was insufficient to confer citizenship as a matter of constitutional right.").

47. See Epps, *supra* note 3, at 353.

48. See ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) (especially Chapter 10). Neither international law nor diplomacy appears in the index, and neither is a matter of concern in Smith's text. *Id.*

obviously determined by the philosophy and the policy he favors.⁴⁹ As we will see, the inclusion of diplomatic history and international law in an expanded historical record complicates the matter considerably, and imposes significant inconveniences upon both sides in the contemporary debate.⁵⁰

III. ALLEGIANCE AND EXPATRIATION IN THE NINETEENTH CENTURY

A. *The Law of Allegiance*

In order to understand the debates about the Citizenship Clauses of the Civil Rights Act of 1866 and the Fourteenth Amendment, it is essential to understand the historical background of the nineteenth-century concept of allegiance. Allegiance in the period up to 1870 carried with it a jurisdiction that extended beyond the borders of the sovereign claiming it.⁵¹ It was far more expansive than its enervated twenty-first century descendant. Nineteenth-century conflicts over allegiance brought the United States to war with Great Britain and later helped split the U.S. into hostile halves.⁵² While they receive little attention from modern scholars, allegiance and the jurisdiction arising from it received considerable attention from American and European governments during the first seven decades of the nineteenth century.⁵³ Their concerns echoed in the citizenship clauses of the Civil Rights Act of 1866 and of the Fourteenth Amendment.⁵⁴

Relations between individuals and European sovereigns had been changing in ways favorable to individuals since Magna Carta. Even so, the persistent and firm grip of jurisdiction based on allegiance lasted well into the nineteenth century.⁵⁵ Allegiance was based upon two rules during the eighteenth and early nineteenth centuries. The first, the rule of *jus soli*, held that the place of birth

49. See Claremont Brief, *supra* note 2.

50. Another way in which the debate has been framed boils down to the question of whether the United States Supreme Court was correct in its characterization of the meaning of the citizenship clause in *The Slaughterhouse Cases*, 83 U.S. 36 (1873), and *Elk v. Wilkins*, 112 U.S. 94 (1884), on the one hand, or later in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). This article does not address that debate directly, but it implies that the Supreme Court's historical analysis was, in all likelihood, more accurate in *Slaughterhouse* than in *Wong Kim Ark*. Obviously, the Congressional Record is vastly more important for the instant purpose than the Court's recollection or interpretation of it.

51. See *infra* text accompanying notes 73-84.

52. In a letter to Congress submitted by Raphael Semmes, a former Confederate naval officer, requesting to be restored to citizenship and relieved of the incapacities imposed by the Fourteenth Amendment, he characterized the war as presenting "a contest of allegiance." 2 CONG. REC., 43D CONG., 1ST SESS. 3279 (April 22, 1874).

53. STORY, *supra* note 22, at 6-10.

54. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; U.S. CONST. amend. XIV.

55. See CONG. GLOBE, app. 40TH CONG., 2D SESS. 94-97 (Jan. 27, 1868).

determined allegiance and hence, citizenship.⁵⁶ This rule of the soil seems to have been based conceptually on the feudal idea that the soil belonged to the sovereign, and the person belonged to the soil.⁵⁷ The preemptory quality and scope of the *jus soli* was doubted as early as 1834, when Justice Story wrote:

Persons who are born in a country, are generally deemed to be citizens and subjects of that country. A reasonable qualification of the rule 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. It would be difficult, however, to assert, that in the present state of public law such a qualification is universally established.⁵⁸

Story's exceptions, "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,"⁵⁹ obviously extend beyond the categories of children of foreign diplomats and children born to members of occupying armies, recognized by all as exceptions to the rule of *jus soli*.⁶⁰

The second basis of allegiance, the rule of *jus sanguinis*, held that the allegiance of the parents, or one of them, determined the allegiance of the child.⁶¹ It seems to have been based conceptually on membership in a clan.⁶² It provided an alternative to *jus soli* in circumstances, as in Roman Europe, in which different tribes occupied the same territory. This often arose from conquest, but the principle did not require it.⁶³ It prevailed in Europe even after the rise of the territorial state.⁶⁴ It prevailed in the United States with respect to members of some tribes of Indians, especially those in the east, who occupied territory also occupied by persons of European descent.⁶⁵ Both the United States and Great Britain adopted *jus sanguinis* as an adjunct to the rule of *jus*

56. See COCKBURN, *supra* note 16, at 6.

57. CONG. GLOBE, app. 40TH CONG., 2D SESS. 94, 95 (Jan. 27, 1868); WHARTON, *supra* note 21, at 676–80; PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1213 ("Formerly the governments of Europe, which were mostly founded on feudal principles, regarded the sovereign as having a kind of property in his subjects, or lieges, which bound them to him for life."); see JOHN WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW 19–23 (1859).

58. STORY, *supra* note 22, at 48.

59. *Id.*

60. COCKBURN, *supra* note 16, at 7; WESTLAKE, *supra* note 57, at 19–23.

61. COCKBURN, *supra* note 16, at 13–14; WHARTON, *supra* note 21, at 7–21, 676–80; EMER DE Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 101–04 (7th ed. 1849).

62. WHARTON, *supra* note 21, at 7–21, 676–80; WESTLAKE, *supra* note 57, at 19–23.

63. *Id.*

64. *Id.*

65. See, e.g., Goodell v. Jackson, 20 Johns. 693, 733–734 (N.Y. 1823) (Kent, Ch.).

solis, each claiming the allegiance of children born abroad to its citizens or subjects.⁶⁶

Alliance made the individual a citizen and made the state a sovereign. Once so constituted, each had duties to the other.⁶⁷ The state had the duty to protect the citizen by maintaining the peace at home and by intervening if he should be treated unjustly abroad.⁶⁸ The citizen's duties included, most importantly, military service for protection of the realm.⁶⁹ These duties were mutual.⁷⁰ Citizenship also included lesser duties that states might impose not only on citizens, but also on non-citizen domiciliaries.⁷¹ These included payment of certain taxes, service in fire brigades, night watches, and in other capacities necessary to the public police.⁷²

The concepts of allegiance, jurisdiction, and sovereignty overlapped one another. Feudal rules of allegiance gave sovereigns a type of jurisdiction over persons within their territories, and over their subjects present within the territory of another sovereign.⁷³ The overlap here is obvious, and persisted with some force well into the nineteenth century. Justice Johnson distinguished the two types of jurisdiction in 1813, noting that "jurisdiction cannot be justly exercised by a state . . . over persons not owing them allegiance *or* not subjected to their jurisdiction being found within their limits."⁷⁴ The historian and international lawyer Maximilian Koessler lamented that the distinction has caused confusion: "Another source of confusion . . . is the concept that state sovereignty is personal as well as territorial."⁷⁵

States had affirmative legislative jurisdiction over their citizens outside the territory of the state, to a vastly greater extent than one might think today.⁷⁶

66. Act of Feb. 10, 1855, ch. 70, 10 Stat. 604; COCKBURN, *supra* note 16, at 12–13.

67. This was commonplace in legal literature of the period. *See, e.g.*, *McIlvaine v. Coxe's Lessee*, 8 U.S. 209, 213 (1808). It was mentioned many times on the floor of Congress in discussions about reconstruction era legislation. *See, e.g.*, CONG. GLOBE, 39TH CONG., 1ST SESS. 509 (Jan. 30, 1866) (Mr. Smith stated "[t]he citizen owes allegiance to the Government and the Government owes simple protection to the citizen.").

68. *See, e.g., id.*

69. CONG. GLOBE, app. 40TH CONG. 2D SESS. 94, 96–97 (Jan. 27, 1868) (Report of the Committee on Foreign Affairs).

70. CONG. GLOBE, 39TH CONG., 1ST SESS. 2799 (May 24, 1866), 2918–19 (May 31, 1866).

71. *See generally*, *Shanks v. Dupont*, 28 U.S. 242, 246 (1830).

72. Letter from William Stuart, Ambassador of Great Britain, to William H. Seward, Secretary of State of the United States (Sept. 6, 1862), in PAPERS RELATING TO FOREIGN AFFAIRS 286, 286–287 (1862).

73. *Mills v. Duryee*, 11 U.S. 481, 486–87 (1813) (Johnson, J., dissenting); Koessler, *supra* note 21, at 59.

74. 11 U.S. at 486 (Johnson, J., dissenting) (emphasis added).

75. Koessler, *supra* note 21, at 69. The jurisdiction he refers to as personal is the jurisdiction I refer to as arising from allegiance.

76. *Id.* at 69–70.

This jurisdiction arising from allegiance went far beyond the imposition of duties on citizen and sovereign. It originally included the authority to define everywhere the legal personhood of the citizen, and so to grant and limit the citizen's legal and civil rights everywhere.⁷⁷ For example, the law of the state of allegiance was recognized as defining the status of its citizens abroad with respect to their age of majority, their marital eligibility and status, their competency to contract, and their eligibility to inherit, even when they acted within the territory of another state.⁷⁸ By the late eighteenth century a rough system of comity had arisen, by which host sovereigns with territorial jurisdiction acknowledged such rules governing foreigners. The local sovereign with territorial jurisdiction thus accommodated distant sovereigns with the jurisdiction arising from allegiance.⁷⁹ This comity was consistent with the idea that the sovereign in some sense owned its subject, and that other sovereigns would generally respect that ownership.⁸⁰ Justice Story was referring to this comity when he wrote that "every nation has a right to bind its own subjects by its own laws in every other place."⁸¹ It is the source of modern rules of conflict of laws.

States owed protection to their citizens traveling abroad, especially when they received inappropriate or ill-treatment from other states.⁸² As a corollary, customary international law required host sovereigns to permit representatives of the home sovereign to visit and advocate for the latter's subjects incarcerated or otherwise legally disadvantaged by the host.⁸³ Finally, it recognized that, while the host sovereign could impose some duties on a foreigner domiciled in or sojourning in the host country, the host could not

77. WHARTON, *supra* note 21, at 22–23.

78. STORY, *supra* note 22, at 220.

79. *Id.* at 23–24. *See e.g.*, *Shanks v. Dupont*, 28 U.S. 242, 246. The historical trend in all of these respects was to loosen the grip of the state of citizenship and to strengthen that of the state of domicile, but that trend had by no means run its course by 1870; WHARTON, *supra* note 21, at 22–23, 149–50. The advanced state of that trend by the late twentieth century has, perhaps, misled some scholars in their reading of the earlier period, in which it had only just begun to influence the thinking of some statesmen and diplomats. *Id.*

80. *Shanks*, 28 U.S. at 246 (describing allegiance in terms of sovereign possession of the persons owing such: "It did not annihilate their allegiance . . . and make them de facto aliens. That could only be by a treaty of peace, which should cede the territory, and them with it").

81. STORY, *supra* note 22, at 22.

82. This was commonplace in legal literature of the period. *See, e.g.*, *McIlvaine v. Coxe's Lessee*, 8 U.S. 209, 213 (1808). *See, e.g.*, CONG. GLOBE, 39TH CONG., 1ST SESS. 509, *supra* note 67, and accompanying text; *see infra* text accompanying notes 130–45.

83. *See, e.g.*, H.R. DOC. NO. 32-10, at 3 (1851) (letter from Daniel Webster to the Committee on Foreign Affairs).

impose a duty of military service on an unwilling foreigner.⁸⁴ Neither presence nor domicile, without more, gave rise to allegiance.

The doctrine of perpetual allegiance caused significant friction between Britain and the United States, particularly in 1812, but later as well. By the domestic law of Great Britain, and probably by that of the United States as well, the subject or citizen had no right to unilateral expatriation.⁸⁵ Chief Justice Alexander Cockburn observed in 1869 that, under British law, a person born within its realm was a citizen by virtue of the *jus soli*, and this “natural allegiance cannot be got rid of by anything less than an Act of the legislature, of which it is believed no instance has occurred.”⁸⁶ Justice Story held U.S. law to be the same in 1830,⁸⁷ and the Court of Appeals of New York concurred as late as 1863.⁸⁸

The paradigm of conflict over the allegiance of a citizen or subject was as follows: A person born in Great Britain was a subject thereof.⁸⁹ If he were to naturalize in, for example, the United States, naturalization constituted him a citizen of the U.S. as a matter of that country’s domestic law, but it could have no effect on his status as a matter of Great Britain’s domestic law.⁹⁰ In addition, British law held that children born outside the realm, to British fathers, were British subjects, just as if they had been born within the realm.⁹¹ The upshot of this was that a British native naturalized in the United States, and perhaps his children born in the United States, owed allegiance to both countries, as a matter of each country’s domestic law. The U.S. claim on the children of British parents born here was less clear than its claim on the children of its own citizens born abroad. With respect to those children, the U.S. made precisely the same aggressive claims as Great Britain did on the progeny of its subjects.⁹² Western European countries generally made less ambitious claims upon their natives and their natives’ progeny.⁹³ These claims, while more confusing, were less troublesome.

84. Letter from William Stuart to William H. Seward, *supra* note 72, at 286–87, COCKBURN, *supra* note 16, at 113; ROBERT PHILLIMORE, COMMENTARIES ON INTERNATIONAL LAW VOLUME I, at 270 (1854); Koessler, *supra* note 21, at 71.

85. WHARTON, *supra* note 21, at 2–3

86. COCKBURN, *supra* note 16, at 64.

87. *See Shanks v. Dupont*, 28 U.S. 242, 250 (1830).

88. *See Ludlam v. Ludlam*, 26 N.Y. 356, 373 (1863).

89. COCKBURN, *supra* note 16, at 63–67.

90. *Id.* at 50–67, 105. The United States did not formally abandon the doctrine of perpetual allegiance by statute until 1868. Act of July 27, 1868, ch. 249, 15 Stat. 223.

91. COCKBURN, *supra* note 16, at 12–13. After 1855, U.S. law similarly made citizens of the children born abroad to American fathers. Act of Feb. 10, 1855, ch. 71, 10 Stat. 604.

92. COCKBURN, *supra* note 16, at 12–13. Act of Feb. 10, 1855, ch. 71, 10 Stat. 604.

93. *See infra* text accompanying notes 194–99.

States had the authority to summon home their citizens abroad in times of national emergency and to press them into military or naval service.⁹⁴ The United States recognized such claims of other countries with respect to aliens living in the U.S., and with respect to naturalized Americans who had returned to their native countries, but not with respect to naturalized American citizens abroad but remaining outside of their native countries.⁹⁵ The British recognized no limits to their claims. They invoked their more ambitious version of the rule by decree in 1807, summoning all seafaring subjects back to England to participate in the war effort against Napoleon.⁹⁶ Under this claim of authority, Great Britain impressed on the high seas sailors thought by British officers to have been born in Britain, regardless of naturalization elsewhere.⁹⁷ American ships were frequent targets of this practice, and many sailors born in Great Britain but naturalized in the United States were impressed.⁹⁸ This direct conflict between Britain's claims to the duties of its subjects and U.S. duty to protect its citizens led, in part, to the War of 1812.⁹⁹ The possibility of the recurrence of such a problem remained, as a matter of British, American, and international law, until the Bancroft Treaty of 1870 with Great Britain.¹⁰⁰

94. *McIlvaine v. Coxe's Lessee*, 8 U.S. 209, 213 (1808); H.W. HALLECK, *INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR* 692 (1861); PHILLIMORE, *supra* note 84, at 261. Halleck was an American commentator; Phillimore was British.

95. *See generally McIlvaine*, 8 U.S. at 213. HALLECK, *supra* note 94, at 692.

96. COCKBURN, *supra* note 16, at 72. Sir John Nicholl, King's Advocate, advised the British Government in 1806 as follows:

His Majesty, by his Royal prerogative, has a right to require the service of all his seafaring subjects against the enemy, and to seize them by force wherever they shall be found. This right is limited by the territorial sovereignty of other nations . . . But the high seas are extraterritorial, and merchant vessels navigating upon them are not admitted to possess a territorial jurisdiction, so as to protect British subjects from the exercise of His Majesty's prerogative over them.

Id. at 71. The British Government estimated that there were 20,000 British natives working on American merchant ships in 1812. *Id.* at 70. For a fuller discussion of the long dispute between the United States and Great Britain, *See id.* at 70–106. Cockburn tells a harrowing story of native Britons who, without naturalizing, served in the U.S. Army during the War of 1812, along with Britons naturalized in the U.S., and the different treatment they received from that received by native Americans when taken prisoner during that war. COCKBURN, *supra* note 16, at 75–77. For a brief discussion of the causes of the War of 1812, *see* ALAN BRINKLEY, *THE UNFINISHED NATION* 184 (Michael Ryan et al. eds., 6th ed. 2010).

97. CONG. GLOBE, app. 40TH CONG., 2D SESS. 94 (Jan. 27, 1868) (Report of the Committee on Foreign Affairs); BRINKLEY, *supra* note 96, at 184.

98. BRINKLEY, *supra* note 96, at 184.

99. *Id.* at 184–85.

100. Convention between the United States and Great Britain. Naturalization, May 18, 1870, 16 Stat. 775.

Later in the century, the conflict presented itself in a different form. Many of the Continental states imposed mandatory military service on the great majority of the adult male population, and enforced it by means of the criminal law.¹⁰¹ Many such men emigrated to the United States before they had discharged their duty of military service to their native country.¹⁰² Many of those became naturalized citizens here.¹⁰³ Some, who later returned to their native land, were conscripted, or were prosecuted, in effect, for draft-dodging.¹⁰⁴ They invoked the jurisdiction arising from their allegiance to the United States to claim its protection from forced service in the military of what they claimed was, after naturalization, a foreign country.¹⁰⁵ The United States vacillated in its response, seeking to avoid conflict with other sovereigns but not wishing to shirk its obligations to its naturalized citizens.¹⁰⁶

B. *The Law of Expatriation*

Expatriation is the severance of the bond of allegiance previously existing between subject or citizen and sovereign.¹⁰⁷ It terminates the citizen's duties and the sovereign's protection and jurisdiction.¹⁰⁸ Generally it is accompanied by naturalization in another country, and hence the plighting of duty to a different sovereign, which then owes protection.¹⁰⁹ During the nineteenth century, many continental European powers permitted expatriation of their citizens, with certain limitations.¹¹⁰ As late as 1868, British law had not yet permitted expatriation of its subjects under any circumstances.¹¹¹

In the United States there was considerable confusion on the subject, with the State Department, the federal courts, and the state courts all taking different positions at different times. So, for example, in 1793, Secretary of State Thomas Jefferson took the position that Americans were free to divest themselves of their citizenship.¹¹² His successor, William Randolph, wrote the following year that "no law of any of the states prohibits expatriation."¹¹³

101. STORY, *supra* note 22, at 12–13, 24; *see infra* text accompanying notes 137–43.

102. CONG. GLOBE, app. 40TH CONG., 2D SESS. 94 (Jan. 27, 1868).

103. *Id.*

104. *Id.*

105. *Id.*

106. *See infra* text accompanying notes 128–145.

107. Letter from Hamilton Fish to Ulysses Grant (Aug. 25, 1873), in PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1187.

108. *Id.*

109. *Id.* at 1203.

110. *Id.* at 1194–95 (summarizing expatriation laws of continental European countries).

111. *Id.* at 1195.

112. *Id.*

113. Letter from Hamilton Fish to Ulysses Grant (Aug. 25, 1873), in PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1195.

The courts were not so sure. The justices of the United States Supreme Court intimated different views on the subject as early as 1795.¹¹⁴ Justice Iredell seemed to believe it available to United States citizens and Chief Justice Rutledge seemed to believe the opposite.¹¹⁵ Justice Washington doubted its availability, writing in 1815 that “I must be more enlightened on this subject than I have yet been, before I can admit, that a citizen of the United States can throw off his allegiance to his country, without some law authorising him to do so.”¹¹⁶ By 1830 it seems to have been settled in the federal courts that expatriation could not be accomplished unilaterally by a citizen, but that legislation would be required. No such legislation yet existed.¹¹⁷

State courts were divided on the issue. The high court in Massachusetts held in 1813 that “by the common law no subject can expatriate himself.”¹¹⁸ The New York courts held similarly in 1844.¹¹⁹ The Virginia courts took the opposite position, holding in 1811 that “although municipal laws cannot take away or destroy [the right of expatriation], they may regulate the manner and prescribe the evidence of its exercise; and, in the absence of regulations *juris positivi*, the right must be exercised according to the principles of general law.”¹²⁰ That court might have been influenced by a Virginia statute that expressly permitted expatriation upon certain conditions.¹²¹ As late as 1863 the New York courts again held that “[t]he right of expatriation, on the part of citizens of the United States, without the consent of the Government, has never been recognized by the courts of this country, or by any of the writers upon public law.”¹²² The existence of the right remained in doubt in the United States until 1868.¹²³

114. *Talbot v. Jansen*, 3 U.S. 133 (1795).

115. *Id.* at 161–62 (opinion of Iredell, J.); *id.* at 169 (opinion of Rutledge, C.J.).

116. *United States v. Gillies*, 25 F. Cas. 1321, 1322 (C.C.D. Pa. 1815) (No. 15,206).

117. *See Shanks v. Dupont*, 28 U.S. 242, 246–48 (1830).

118. *Ainslie v. Martin*, 9 Mass. 454, 461 (Mass. 1813).

119. *Lynch v. Clark*, 7 Sand. Ch. 443, 469 (N.Y. Ch. 1844).

120. *Murray v. McCarty*, 16 Va. 393, 397 (Va. 1811).

121. The text of the statute is reprinted in *Talbot v. Jansen*, as follows:

‘Whosoever any citizen of this Commonwealth, shall, by deed in writing, under his hand and seal, executed in the presence of, and subscribed by, three witnesses, and by them, or two of them proved in the General Court, any District Court, or the court of the County or Corporation where he resides, or by open verbal declaration made in either of the said courts, to be by them entered of record, declare that he relinquishes the character of a citizen, and shall depart out of this Commonwealth, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen.’ Passed 23d Dec. 1792.

Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 136 n.* (1795).

122. *Ludlam v. Ludlam*, 26 N.Y. 356, 373 (1863). For additional authorities *see* PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1199–1202.

123. Expatriation Act of 1868, ch. 249, 15 Stat. 223.

C. *U.S. Concerns Before and During the Civil War*

The conflict between Great Britain and the United States with respect to the allegiance of persons with links to both countries lingered from the close of the War of 1812 to the 1860s without resolution, but also without violent eruption.¹²⁴ Similar conflicts between the United States and other European powers, all based on competing claims to persons born in those countries and later naturalized in the U.S., occupied American diplomats time and again during the second third of the nineteenth century.¹²⁵ The United States, with its desperately felt need for European population and its seemingly limitless territory, wanted its naturalized citizens, and in many cases their native countries wanted them, too.¹²⁶

As mid-century approached, the United States and Great Britain began to re-examine their positions. Britain stopped enforcing its doctrine of perpetual allegiance, beginning in the 1840s, without formally abandoning it.¹²⁷ The United States generally recognized the claims of perpetual allegiance made by other countries with respect to naturalized American citizens, when those citizens returned to their native countries.¹²⁸ It was as if the native country had a reversionary interest in the individual.¹²⁹ In one of many instances gleaned from U.S. diplomatic records, the State Department rejected a request for protection made in 1840 by a naturalized United States citizen, of Prussian birth, who had returned to Prussia and been forced into military service.¹³⁰ Henry Wheaton, the U.S. Minister to Prussia, advised the citizen that,

Had you remained in the United States, or visited any other foreign country, (except Prussia,) on your lawful business, you would have been protected by the American authorities, at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But, having returned to the country of your birth, *your native domicil and natural character* revert, (so long as you remain in the Prussian dominions,) and you

124. CONG. GLOBE, app. 40TH CONG., 2D SESS. at 94–95 (Jan. 27, 1868) (report of the Committee on Foreign Affairs concerning the rights of American citizens in foreign states).

125. For an incomplete list of examples see PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1293–1325.

126. See, e.g., *id.* at 1203 (describing the case of Christian Ernst, a naturalized American born in Prussia and forced into military service upon his temporary return to Prussia).

127. See COCKBURN, *supra* note 16, at 79–89, 106. The United States did not formally abandon the doctrine of perpetual allegiance by statute until 1868. Expatriation Act of 1868, ch. 249, 15 Stat. 223; COCKBURN, *supra* note 16, at 106.

128. COCKBURN, *supra* note 16, at 117–27.

129. PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1293 (letter from Henry Wheaton, Minister to Prussia, to Johann P. Knocke), and in S. EXEC. DOC. NO. 36–38, at 6–7 (1860), also quoted in COCKBURN, *supra* note 16, at 125. The same doctrine was, in modified form, codified in the Bancroft Treaties. See *infra* Part VII.

130. PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1293.

are bound in all respects to obey the laws exactly as if you had never emigrated.¹³¹

The same doctrine prevailed in the State Department into the 1850s.¹³² It began to change in 1859, when Secretary of State Lewis Cass instructed his minister to Prussia to assert more aggressively the protections due to naturalized U.S. citizens, even when they returned to their native country.¹³³ “The moment a foreigner becomes naturalized,” Cass wrote, “his allegiance to his native country is severed forever.”¹³⁴ Prussia was then experiencing serious tensions with Austria, which ultimately led to war,¹³⁵ and was not seeking additional conflict. Over the next few years it released several naturalized Americans of Prussian birth who had returned to Prussia and been conscripted.¹³⁶

Another shift in position took place in 1863, when Secretary of State William Seward reversed the Cass doctrine, noting that

[i]nstances have occurred where Europeans who have become naturalized citizens of the United States have left the country when their services were required, and returned to Europe to avoid needful military duty here, and then have invoked the protection of the United States to screen them from military duty there.¹³⁷

He instructed U.S. diplomats that they should no longer intercede with foreign countries on behalf of such persons.¹³⁸

As U.S. protection for naturalized citizens waned and waxed, the U.S. also became more aggressive in protecting residents who had begun, but had not completed, the naturalization process. In 1853, in what became known as the Koszta Affair, a Hungarian native who had begun but had not completed the naturalization process, was seized in Smyrna, a port city in Turkey, and turned over to the Austrian navy.¹³⁹ Martin Koszta was a native Hungarian, but

131. *Id.* (Italics in original). In 1852, Secretary of State Daniel Webster gave similar advice to a native of Spain naturalized in the U.S. *Id.* at 1303. But in 1860 the United States prevailed upon Spain to release a native of Spain, naturalized in the U.S., who had been conscripted in Havana. *Id.*

132. For additional illustrations, *see id.* at 1293–95.

133. *Id.* at 1295.

134. *Id.*

135. The Austro-Prussian War of 1866.

136. *See, e.g.,* PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1296.

137. *Id.*

138. *Id.*

139. *Id.* at 1298.

Austria claimed jurisdiction over him by virtue of a treaty with Hungary.¹⁴⁰ Hungary took no action on his behalf.¹⁴¹

An American naval vessel happened to be in the Turkish harbor at that time.¹⁴² On diplomatic instructions, the captain demanded return of Koszta under threat of sinking the Austrian ship in the Turkish harbor.¹⁴³ Secretary of State William Marcy took the position that Koszta, though not yet naturalized, was an American national and within the protection of the United States.¹⁴⁴ The Austrians turned Koszta over to the French, who delivered him to the Americans.¹⁴⁵

The Koszta Affair appears to have set a precedent. If, as Secretary Marcy had held, merely declarant aliens were within the protection of the United States as if they were citizens, then, by a parity of reasoning, they had a reciprocal duty to the United States. This was a plausible application of the logic of allegiance. By this logic, declarant aliens could be compelled to perform military service for the United States.

During the Civil War, desperation for manpower drove the army to resolve doubts about the eligibility of particular candidates in favor of conscripting them. Without specific statutory authority, the northern army began conscripting unwilling aliens, especially British subjects domiciled in the United States.¹⁴⁶ A few years earlier, Congress had taken umbrage at British efforts to recruit willing Americans into service during the Crimean War.¹⁴⁷ The more aggressive American effort during the Civil War brought a quick response from the British government.

The terms of the British response shed light on the evolving division of duties of citizens, as compared to the duties of domiciliaries, to territorial sovereigns.¹⁴⁸ Queen Victoria's government accepted the rule that Englishmen domiciled in the U.S. would be subject to "all the obligations ordinarily incident to domicile, such as service in the local police, where imposed by the municipal law, or in companies formed exclusively for the maintenance of

140. *Id.*

141. *Id.* at 1299.

142. PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1298.

143. *Id.*

144. *Id.* at 1299.

145. *Id.* at 1298–99.

146. *Id.* Letter from William Stuart, Ambassador of Great Britain, to William H. Seward, Secretary of State of the United States (Sept. 6, 1862), in PAPERS RELATING TO FOREIGN AFFAIRS, *supra* note 72, at 286–87.

147. CONG. GLOBE, 34TH CONG., 1ST SESS. 489–495 (Feb. 25, 1856).

148. Letter from William Stuart, Ambassador of Great Britain, to William H. Seward, Secretary of State of the United States (Sept. 6, 1862), in PAPERS RELATING TO FOREIGN AFFAIRS, *supra* note 72, at 286–87.

internal peace and order and for the protection of property.”¹⁴⁹ But domicile was not the equivalent of citizenship, and an Englishman domiciled within the U.S. owed the U.S. neither allegiance nor military service:

But no further military service can be required of them without compelling them to violate the Queen’s proclamation of neutrality by taking part in the war, and I must therefore appeal to you to afford them proper protection against any compulsory service beyond that which I have admitted above to be properly due from aliens to the locality in which they are domiciled.¹⁵⁰

The U.S. quickly acceded to this demand.

The French government responded adversely, as well, to the conscription of foreigners. At the time, Great Britain had troops in Nova Scotia and France had troops in Mexico.¹⁵¹ Each had expressed sympathy for the Confederate cause, and Britain had intimated that it might intervene in the American war.¹⁵² The dispute over conscription exacerbated existing tensions between the U.S. and Great Britain over the Trent Affair.¹⁵³ That diplomatic conflict arose when a U.S. warship stopped a British ship on the high seas and forcibly removed two passengers, both Confederate diplomats bound for England.¹⁵⁴ It nearly caused war with Great Britain.¹⁵⁵ France made no secret of its opinion that the U.S. had violated international law, but claimed it would not join in any British intervention.¹⁵⁶ Even so, tensions were high with both foreign powers, most especially on the border with Canada.¹⁵⁷

Congress did not help. It appears to have attempted to turn the doctrine of the Koszta Affair to its advantage by drafting citizens of other countries who had started, but not completed, the naturalization process.¹⁵⁸ Thus, it implicitly backed the Marcy doctrine on March 3, 1863, when it included within “the

149. *Id.*

150. *Id.* This was the general rule of international law at the time. PHILLIMORE, *supra* note 84, at 270; Koessler, *supra* note 21, at 71.

151. KENNETH BOURNE, *BRITAIN AND THE BALANCE OF POWER IN NORTH AMERICA 1815–1908*, at 211 (1967); *The History of Foreign Intervention in Mexico*, N.Y. TIMES, July 12, 1867, at 2.

152. *Id.*

153. *Id.*

154. Letters of William L. Dayton, Minister to France, to William H. Seward, Secretary of State of the United States (Dec. 6, 1861; Dec. 11, 1861), in *PAPERS RELATING TO FOREIGN AFFAIRS*, *supra* note 72, at 307–08; Letters of William H. Seward to William L. Dayton (Dec. 28, 1861; Jan. 3, 1862), in *PAPERS RELATING TO FOREIGN AFFAIRS*, *supra* note 72, at 307–08; BRINKLEY, *supra* note 93, at 353–54.

155. *Id.*

156. Letter of William L. Dayton, Minister to France, to William H. Seward, Secretary of State of the United States (Dec. 6, 1861), in *PAPERS RELATING TO FOREIGN AFFAIRS*, *supra* note 72, at 307.

157. CONG. GLOBE, 38TH CONG. 2D SESS. 33-34 (December 14, 1864).

158. Enrolling Act, ch. 75, 12 Stat. 731 (1868).

national forces,” eligible to be conscripted, “persons of foreign birth who shall have declared on oath their intention to become citizens.”¹⁵⁹ Virtually all of these would have been European subjects. In addition, the United States actively recruited Irish citizens of Great Britain, and Germans as well, to the consternation of their native countries, with the promise of automatic citizenship for those who served in the army for two years.¹⁶⁰ In doing so, it gave military training to potential future revolutionaries, as the experience of the Fenian Irish would later confirm.¹⁶¹

In the face of international objection to the conscription of foreigners, and seeking to avoid foreign intervention in the war, Lincoln was forced to act. He issued an executive order that had the effect of allowing declarant aliens sixty-five days to avoid the draft by quitting the country.¹⁶² This appears to have satisfied the British and French.

159. *Id.* Non-declarant aliens were not within the scope of the statute, and so were not subject to conscription.

160. The Militia Act of July 17, 1862, ch. 201, 12 Stat. 597 (1862).

161. COCKBURN, *supra* note 16, at 97–105. The Fenians were a group of Irish revolutionaries who aspired to free Ireland from British rule. For a general history of the movement *see* LEON O’BROIN, *REVOLUTIONARY UNDERGROUND: THE STORY OF THE IRISH REPUBLICAN BROTHERHOOD 1858–1924*, at 2–4 (1976).

162. The relevant text of Lincoln’s order, dated May 8, 1863, provided:

Whereas it is claimed by and in behalf of persons of foreign birth within the ages specified in said act who have heretofore declared on oath their intentions to become citizens under and in pursuance of the laws of the United States, and who have not exercised the right of suffrage or any other political franchise under the laws of the United States or of any of the States thereof, that they are not absolutely concluded by their aforesaid declaration of intention from renouncing their purpose to become citizens, and that, on the contrary, such persons, under treaties or the law of nations, retain a right to renounce that purpose and to forego the privileges of citizenship and residence within the United States under the obligations imposed by the aforesaid act of Congress: Now, therefore, to avoid all misapprehensions concerning the liability of persons concerned to perform the service required by such enactment, and to give it full effect, I do hereby order and proclaim that no plea of alienage will be received or allowed to exempt from the obligations imposed by the aforesaid act of Congress any person of foreign birth who shall have declared on oath his intention to become a citizen of the United States under the laws thereof, and who shall be found within the United States at any time during the continuance of the present insurrection and rebellion or after the expiration of the period of sixty-five days from the date of this proclamation, nor shall any such plea of alienage be allowed in favor of any such person who has so as aforesaid declared his intention to become a citizen of the United States and shall have exercised at any time the right of suffrage or any other political franchise within the United States under the laws thereof or under the laws of any of the several States.

Gerhard Peters & John T. Wooley, *Proclamation 101-Enrollment of Aliens for Military Duty*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=69895> (last visited Apr. 4, 2013); Maximilian Koessler, *Rights and Duties of Declarant Aliens*, 91 U. PA. L. REV. 321, 329–30 (1942).

If nothing else appears from this, it must at least be clear by now that the international ramifications of domestic rules of citizenship were a matter of great importance to the American government up to and including the years of the Civil War. The issue was fraught with potential for conflict with foreign powers. Such conflict, had it occurred at that time between the U.S. and Great Britain, or worse, between the U.S., on the one hand, and Great Britain allied with France on the other, could have been catastrophic for the United States. Congress was certainly aware of the risks of such a conflict.¹⁶³ To ignore the importance of these concerns would be to ignore an important element of the historical context from which the Civil Rights Act and the Fourteenth Amendment emerged.

D. U.S. Concerns After the Civil War

After the war the issues of allegiance and citizenship took on a new importance, principally for domestic reasons, but also for reasons having to do with foreign relations.¹⁶⁴ The most obvious, from a domestic standpoint, was the status of the freedmen. Four million of them had been redeemed from chattel slavery by the sword,¹⁶⁵ but were ineligible for national citizenship under the combined old rules of Dred Scott and the Naturalization Act of 1802.¹⁶⁶ The other compelling domestic issue was the status of citizens of the former Confederate states, including soldiers and public officials.¹⁶⁷ Would they be exiled, as Edward Everett Hale had envisioned?¹⁶⁸ Or would they be

163. CONG. GLOBE, 37TH CONG., 2D SESS. 208 (Jan. 7, 1862) (“England *needs*—I do not say she wants—war; but she must and will have it. And this Administration has acted, sir, from the beginning as if it were their purpose to oblige her in it to the utmost. Look into your diplomatic correspondence”); *id.* at 209. (“It was too much to ask of it [the Lincoln Administration] that it take another war on its hands”). See also a lengthy discussion of war with Great Britain, CONG. GLOBE, 37TH CONG., 2D SESS. 1619-1623 (Apr. 10, 1862); CONG. GLOBE, 39TH CONG., 2D SESS. 2802 (May 24, 1866) (mentioning possible war with Great Britain or France).

164. See CONG. GLOBE, app. 40TH CONG., 2D SESS. 94-100 (Jan. 27, 1868).

165. This number was repeated throughout the record of congressional debates and appears to have been unanimously accepted. See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 3035 (June 8, 1866); CONG. GLOBE, app. 39TH CONG., 2D SESS. 82 (Jan. 19, 1867); CONG. REC., 43D CONG., 1ST SESS. 3308 (Apr. 23, 1874).

166. CONG. GLOBE, 39TH CONG., 1ST SESS. 504 (Jan. 30, 1866); Dred Scott v. Sandford, 60 U.S. 393 (1857); Naturalization Act of April 14, 1802, ch. 28, 2 Stat. 153 (1802).

167. A letter to Congress submitted by Raphael Semmes, a former Confederate naval officer, requested restoration to citizenship and relief of the incapacities imposed by the Fourteenth Amendment. CONG. REC., 43TH CONG., 1ST SESS. 3279 (April 23, 1874) (characterizing the war as presenting a “contest of allegiance”).

168. See generally Edward Everett Hale, *The Man Without A Country*, ATLANTIC MONTHLY, Dec. 1863, at 665-679, reprinted in MODERN CLASSICS 448 (1863).

permitted, or even required to return to the fold, as others thought best?¹⁶⁹ What would become of the Fenian Irish,¹⁷⁰ who had earned U.S. citizenship wearing the blue, and then sought to return to Ireland to wear the green of Irish revolutionaries?¹⁷¹

The first step in the process of accommodating the freedmen and reassembling the whole United States was the Thirteenth Amendment. It finally resolved the status of chattel slavery by making it illegal and authorizing Congress to legislate the details.¹⁷² The extent of the authority it conferred upon Congress was the subject of sharp disagreement on the floor of the Senate,¹⁷³ and that, together with other considerations, led ultimately to the Fourteenth and Fifteenth Amendments.

V. THE ACT AND THE AMENDMENT

A. “Not subject to any foreign Power”: *The Civil Rights Act*

The next step important for our purposes was the Civil Rights Act of 1866.¹⁷⁴ The principal purpose of the Citizenship Clause of the Act was to recognize the citizenship of the freedmen.¹⁷⁵ The original citizenship language of the proposed bill was drafted by Senator Lyman Trumbull.¹⁷⁶ It provided “that all persons of African descent born in the United States are hereby

169. *Brigandage of Peace*, THE GALVESTON DAILY NEWS, June 13, 1875, at 1 (summarizing the terms of the first Sherman-Johnston Convention of April 18, 1865, and lamenting the assassination of Abraham Lincoln, whose successor disapproved the terms on the grounds that Sherman had exceeded his authority by including political terms in the agreement of surrender); MICHAEL LES BENEDICT, THE FRUITS OF VICTORY: ALTERNATIVES IN RESTORING THE UNION, 1865-1867, at 82 (1975) (outlining the text of the Sherman-Johnston Convention); BRINKLEY, *supra* note 96, at 184, 372–73.

170. The Fenians were a group of Irish revolutionaries who aspired to free Ireland from British rule. For a general history of the movement *see* O’BROIN, *supra* note 161.

171. COCKBURN, *supra* note 16, at 97–105.

172. U.S. CONST. amend. XIII, § 2.

173. CONG. GLOBE, 39TH CONG., 1ST SESS. 497 (Jan. 30, 1866); CONG. GLOBE, 39TH CONG., 1ST SESS. 1266, 1268 (March 8, 1866); CONG. GLOBE, 39TH CONG., 1ST SESS. 1286, 1291, 1293, 1295 (Mar. 9, 1866).

174. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

175. CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (Jan. 29, 1866) (Comments of Senator Lyman Trumbull, proposing an amendment to the bill providing “that all persons of African descent born in the United States are hereby declared to be citizens of the United States.”). Trumbull withdrew that language the next day and offered a substitute set forth below. *Id.* at 498 (Jan. 30, 1866). Republicans in Congress ultimately overcame Democratic opposition to this provision because the Thirty-Ninth Congress had a veto-proof Republican supermajority. Richard L. Aynes, *The 39th Congress (1865-1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1019, 1022–23 (2009).

176. CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (Jan. 29, 1866).

declared to be citizens of the United States.”¹⁷⁷ The legislation was proposed to be enacted under the authority of the Thirteenth Amendment and the Naturalization Clause, although some legislators expressed doubt that those provisions extended Congressional authority that far into what had been state prerogative.¹⁷⁸ Trumbull anticipated attacks on the constitutionality of the proposed citizenship of the freedmen, and, immediately after proposing it, undertook to defend it.¹⁷⁹ A number of Senators then challenged him, claiming, in part on the authority of *Dred Scott*, that Congress lacked power to make citizens of the freedmen without amending the Constitution.¹⁸⁰

Debate continued the next day, when Trumbull withdrew his original language and proposed instead the following:

Be it enacted, etc., That all persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery, etc.¹⁸¹

Trumbull did not place on the record his reasons for proposing the new language. He claimed that the new language was “to the same purport” as the old, merely “changing the phraseology.”¹⁸² Plainly, the new language was not merely a change in words carrying the same meaning. The language Trumbull withdrew from discussion applied only to persons of African descent. The new language could not have been interpreted by anyone, even Trumbull himself, as having “the same purport” as the language originally proposed. This was the first of the imprecise, incorrect, and confusing statements made by Senator Trumbull during the Civil Rights Act debates, that have vexed historians and judges since. Nowhere in the record of Congressional debates did Trumbull explain affirmatively and precisely what he intended the new language to mean.

In a letter to President Johnson, undated but written after January 30, 1866, Trumbull wrote: “The [Civil Rights] Bill declares ‘all persons’ born of parents domiciled in the United States, except untaxed Indians, to be citizens of the

177. *Id.* at 475-481.

178. CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (Jan. 30, 1866); CONG. GLOBE, 39TH CONG., 1ST SESS. 1266, 1268 (March 8, 1866); CONG. GLOBE, 39TH CONG., 1ST SESS. 1286, 1291, 1293, 1295 (Mar. 9, 1866).

179. CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (Jan. 29, 1866) (“[T]he question will arise, has Congress authority to pass such a bill? . . . In my judgment, Congress has this authority.”)

180. *Id.* at 475-81.

181. *Id.* at 498 (Jan. 30, 1866). Nothing in the Congressional Globe reveals Trumbull’s reason for doing so.

182. *Id.*

United States.”¹⁸³ The letter was unearthed by Professor Mark Shawhan, who asserts that Trumbull intended the language of the bill, “not subject to any foreign power” to mean “domiciled in the United States.”¹⁸⁴

To link citizenship with domicile was not unheard of at the time. It was consistent with Daniel Webster’s 1851 suggestion to Congress for a remedy to the potential problems in international relations posed by the failure of many immigrants to naturalize according to law.¹⁸⁵ Both Webster’s suggestion and Trumbull’s would have represented changes in the law, and would have exacerbated conflict with foreign powers. Citizenship and subjecthood, on the one hand, and domicile, on the other, were different in 1851, and remained so in 1866. Domicile did, as Professor Shawhan asserts, mean residence with an intention to remain permanently.¹⁸⁶ But it did not change the status of the parents as subjects of a foreign power, as Webster had lamented and British Ambassador Stuart had vigorously pointed out.¹⁸⁷ In fact, it was well-settled in 1851, and remained so in 1866, that a foreigner could be domiciled in the United States but remain subject to a foreign power.¹⁸⁸

It is possible that Trumbull intended to change U.S. law on this subject in defiance of international law and of the claims of foreign powers, but it is nonsensical to suggest that he would have done so with language that, taken literally under prevailing law, deferred to those foreign powers. Trumbull’s carelessly written letter, together with his careless comment concerning Gypsies and Chinese, have made a hash of the historical record and obscured the thought process that led to the statutory language.

Taking the statutory language as it would have been understood in 1866, the “foreign Power[s]” Trumbull mentioned were, most obviously, foreign countries.¹⁸⁹ In the context of the diplomatic history leading to that moment in

183. Mark Shawhan, *The Significance of Domicile in Trumbull’s Conception of Citizenship*, 119 YALE L.J. 1351, 1352–53 (2010). It is regrettable that the author did not attach the letter to his article, or otherwise make it easily available to interested readers.

184. *Id.*

185. WEBSTER, *supra* note 16.

186. Shawhan, *supra* note 183, at 1353.

187. *Id.* at 1357; Letter from William Stuart, Ambassador of Great Britain, to William H. Seward, Secretary of State of the United States (Sept. 6, 1862), in PAPERS RELATING TO FOREIGN AFFAIRS, *supra* note 72, at 286–87.

188. *See supra* text accompanying notes 63–71.

189. *American Topics: Belligerent Rights of the South*, N.Y. TIMES, May 28, 1865, at 2 (discussing “the views of Emperor Napoleon [III] or any other ‘foreign Power’”); *French Intermeddling*, N.Y. TIMES, Feb. 18, 1863, at 4 (referring to France as a “foreign Power”); *The Tribune on Peace and Foreign Mediation*, N.Y. TIMES, Feb. 5, 1863, at 4 (referring to the “Great Powers of Europe” as “foreign Powers”); *News From Washington*, N.Y. TIMES, Nov. 22, 1862, at 1 (referring to Russia as a “foreign Power”) *Foreign Mediation*, N.Y. TIMES, Jan. 8, 1862, at 4 (referring to Switzerland as a “foreign Power”). There are hundreds of examples of the use of that phrase to describe a European country.

1866, the proposed language would have changed or clarified the law to avoid some of the conflicts of allegiance that had vexed the United States before. Taken literally, Trumbull's language would accomplish two salutary ends—to make citizens of the freedmen and to reduce the incidence of conflict with foreign powers over particular persons claimed by both. Some persons born in the United States, claimed as subjects or citizens by other countries, would not be American citizens by right of birth. Their paths to citizenship would be different.

The first question asked of Trumbull after he proposed this language was not about European powers, or sojourners and immigrants from those countries. It was asked by Senator James Guthrie, of Kentucky: "I will ask the Senator if he intends by that amendment [of the proposed statutory language] to naturalize all the Indians of the United States?"¹⁹⁰ Trumbull's response indicates in context that he had not considered the Indian tribes when he crafted the new citizenship language: "I should have no objection to changing it so as to exclude the Indians [from birthright citizenship]. It is not intended to include them."¹⁹¹ He also pointed out the most salient similarity between the tribes and the "foreign Powers" of his newly proposed language. "Our dealings with the Indians are with them as foreigners, as separate nations. We deal with them by treaty . . ."¹⁹² This was consistent with the prevailing legal doctrine at the time. As Chief Justice Taney had written in *Dred Scott*:

These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government.¹⁹³

The debate over the Indians' citizenship highlighted characteristics of foreign powers and of tribes that made them all foreign within the meaning of the proposed language. The United States dealt with all of the Western European powers, with the tribes, and with Great Britain by treaty. Great Britain and some other foreign powers formally laid claim, in their domestic

190. *See supra* text accompanying notes 63-71.

191. *Id.* Senator Trumbull made a similar statement during the debate over the citizenship clause of the Fourteenth Amendment: "We make treaties with [Native American tribes], and therefore they are not subject to our jurisdiction." CONG. GLOBE, 39TH CONG., 1ST SESS. 2893 (May 30, 1866). This was consistent with Chief Justice Taney's observations in *Dred Scott*. *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857).

192. *Id.*

193. *Dred Scott*, 60 U.S. at 404.

law, to the allegiance of their subjects' children born in the United States.¹⁹⁴ There were no foreign powers that asserted any such claim to the allegiance of the freedmen or their progeny. There were no states, recognized as such for purposes of diplomacy, in the places from which persons had been abducted into American slavery.¹⁹⁵

Both the language and the rationale that excluded the children of Indians would exclude the children of Europeans, born in the United States, if the European power involved claimed the allegiance of the child.¹⁹⁶ Of course, not every European power asserted a claim upon the allegiance of all of its natives in the U.S., or upon the allegiance of all of their children. British law at the time plainly did, holding with respect to the parents that "the allegiance of a natural-born British subject is regarded by the common law as indelible."¹⁹⁷ British law further claimed as subjects the children of persons of British parentage born abroad. A series of Parliamentary enactments beginning as early as the reign of Edward III¹⁹⁸ provided that such persons "shall and may be adjudged and taken to be natural-born subjects of the Crown of Great Britain, to all intents, constructions, and purposes whatsoever."¹⁹⁹ The upshot was that, absent Parliamentary action or treaty, the descendants of a British man would be subject to the Crown to the second generation.

Relations with Great Britain over competing claims of allegiance had been particularly fraught over the previous half-century, as has been discussed herein.²⁰⁰ That history, and the impending problems with the Fenians, whom Britain claimed as subjects, could not have been far from the minds of experienced members of the Senate. Trumbull himself had come to the Senate in 1855, and so must have been familiar with concerns over diplomatic conflicts with foreign powers that posed the threat of British intervention in the war. The proposed language would reduce the field of possible conflict with Great Britain over persons who would otherwise have been British by the *jus sanguinis* and American by the *jus soli*.

The situation was more variable with other European powers. The report to Parliament indicated that French law claimed the children of French citizens born abroad as French citizens as well:

194. See *infra* text accompanying notes 198-207.

195. U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, *All Countries*, <http://history.state.gov/countries/all> (last visited Apr. 4, 2013)

196. See CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (Jan. 30, 1866).

197. Royal Commission Report, May 21, 1868, reprinted in PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1232, 1234.

198. Reigned from 1327 A.D. to 1377 A.D.

199. PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1237.

200. See *supra* text accompanying notes 89-100.

‘Tout Français né d’un Français en pays étranger est Français.’ As to children born in France, they were under the code French if their fathers were French, aliens if their fathers were aliens, but with a right in the latter case to claim French citizenship on making a declaration and fixing their domicile in France.”²⁰¹

Prussian law was the same as French law, according to the British Report. But Prussia and France released their claims to adult subjects more easily than did Great Britain, and thereby released claims to the allegiance of the children as well.²⁰² Prussia released its claim to its subjects under a variety of circumstances, including, with some limitations, residence abroad for a period exceeding ten years.²⁰³ Belgian law was similar.²⁰⁴ French law recognized naturalizations abroad of French citizens, but penalized them if it could. French law did

not annul naturalizations acquired abroad without authorization [from France]; it inflicts penalties therefor, but allows them to exist. The Frenchman has therefore a new country, to which he has been obliged to take the oath of allegiance. No one can have two countries. The general interest requires that no one should have two countries.²⁰⁵

Austria, Bavaria, and Württemberg released their claims to their natives upon naturalization abroad with permission from the native government.²⁰⁶ In sum, European claims to adult subjects varied, and those variations determined the claims to children born to those subjects. Trumbull’s proposed language would reduce the field of possible conflict with those countries as well.

This is not to suggest that Trumbull, or any other Senator, had in mind the precise terms of European law concerning expatriation when they contemplated the proposed citizenship language of the Civil Rights Act. In fact, it is clear that Trumbull did not, as his comment about the citizenship of Pennsylvania Germans indicated.²⁰⁷ But after wartime efforts to recruit foreigners into the army, wartime conflict with foreign countries over efforts to conscript their subjects, and pre-war diplomatic dust-ups grounded in conflicting claims to allegiance, it is implausible that the international context of the birthright language would have been entirely lost on the Senators.

201. PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1237–38 (quoting the Code Napoléon, art. 10. “Every Frenchman born of a Frenchman in a foreign country is French.”).

202. *Id.* at 1282, 1286.

203. *Id.* at 1286.

204. *Id.* at 1289.

205. *Id.* at 1282.

206. *Id.* at 1287.

207. CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (Jan. 30, 1866).

But Trumbull's later comments cast doubt on what would otherwise have been reasonably certain inferences as to his intentions. The next question in the floor debates, voiced by Senator Cowan, of Pennsylvania, concerned neither Indians nor Europeans, but two other populations whose presence worried some members of Congress, the Gypsies of Pennsylvania²⁰⁸ and the Chinese of California.²⁰⁹ This is the moment in the debates that has caused so much later difficulty. Asked whether the bill would make citizens of the children of those groups born within the United States, Trumbull replied simply, "Undoubtedly."²¹⁰ It is impossible to square this answer fully with the language of the Bill. It is difficult to square this answer with his other statements in the record of the debates, particularly during the debate over the Fourteenth Amendment. Obviously, the United States managed its relations with China by treaty.²¹¹ If, as Trumbull believed,²¹² Indian children would be excluded from birthright citizenship because the tribes were sovereigns with which the U.S. made treaties, then, by a parity of reasoning, the children of Chinese, as well as English born here, would be excluded from birthright

208. The source relied upon by Professor Epps is mistaken to characterize Gypsies in this period as non-existent except as "bugaboos" to nativists. Epps, *supra* note 3, at 352 n.80. Senator Edgar Cowan of Pennsylvania appears rather clearly to have been a racist, but his concerns about Gypsies did not arise out of thin air. Their presence in Pennsylvania cannot be doubted. Henry W. Shoemaker, Chairman, Pennsylvania Historical Commission, Address to the Civic Club: Gypsies and Gypsy Lore in the Pennsylvania Mountains (1924). Newspaper descriptions of them characterized them principally by their alienation from the society through which they moved. The gypsy population in Pennsylvania received occasional attention in local newspapers, which published articles disparaging them in various ways. For the present purpose, one perception of them was important. They were characterized as "averse to civilized life" in three newspapers during the month of April, 1861. *Origin of the Gypsies*, DAILY PATRIOT AND UNION (Harrisburg, Pennsylvania), Apr. 3, 1861, at 1; *Origin of the Gypsies*, HUNTINGDON GLOBE (Huntingdon, Pennsylvania), Apr. 10, 1861, at 1; *Origin of the Gypsies*, ALTOONA TRIBUNE (Altoona, Pennsylvania), Apr. 19, 1861, at 1. I have been unable to discover any incident that might explain the sudden attention. Earlier they had been characterized as "semi-vagrant persons separated from the communities around them." *Gypsies in the United States*, HUNTINGDON J. (Huntingdon, Pennsylvania), June 29, 1853, at 3. They were later characterized as a "stranger to each people and country." *The Gypsies*, CLEARFIELD REPUBLICAN (Clearfield, Pennsylvania), June 21, 1865, at 1. They kept themselves apart and avoided participating in community duties. In a sense, they constituted an *imperium in imperio*, but they did not do so under the rubric of any foreign power. There is no indication that they claimed to have been or were recognized as being citizens or subjects of any other country.

209. CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (January 30, 1866).

210. *Id.*

211. See e.g., Treaty with China, U.S.-China, July 3, 1844, 8 Stat. 592; Treaty with China, U.S.-China, June 18, 1858, 12 Stat. 1023.

212. CONG. GLOBE, 39TH CONG., 1ST SESS. 475 (Jan. 29, 1866); 498 (Jan. 30, 1866); 2894 (May 30, 1866).

citizenship. To claim the children of Chinese as citizens might also have violated the treaties then prevailing between the U.S. and China.²¹³

To make citizens of the children born here of Chinese and Gypsies would be consistent with citizenship based on territorial jurisdiction, because they were all here. It would have been inconsistent with the jurisdiction arising from allegiance. The Chinese and their children were not within U.S. jurisdiction arising from allegiance because they remained subjects of the Emperor.²¹⁴ Gypsies were not identified as citizens or subjects of any foreign country.²¹⁵ As vagabonds they were understood to eschew allegiance to any sovereign.²¹⁶

Each group was subject to exclusion from citizenship for other reasons as well. The Chinese could not be naturalized under the Naturalization Act, which included only white applicants.²¹⁷ The Gypsies could be excluded as vagabonds and paupers at common law and under the Naturalization Act.²¹⁸ To make citizens of them would have violated longstanding policies of exclusion embodied in statute and common law. Trumbull continued to believe that members of the Native American tribes would not be made citizens by the language he had proposed that day, but did not have a strong objection to the addition of specific language of exclusion.²¹⁹ After several possibilities were discussed without resolving the debate, Trumbull himself came up with an amendment to his own language:

Now, I should be very glad if our friends would not embarrass this general bill with provisions in regard to this particular class of persons. Let them be

213. Treaty with China, U.S.-China, July 3, 1844, 8 Stat. 592; Treaty with China, U.S.-China, June 18, 1858, 12 Stat. 1023; Treaty with China, U.S.-China, July 28, 1868, 16 Stat. 739, 740. The 1858 Treaty was supplemented by the 1868 Treaty, which added language prohibiting what was then commonly known as the Coolie Trade, and also by adding the following language: "But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." Differing conclusions may be drawn from this fact, in light of the certainty that it was negotiated and ratified during the same period in which the Act and Amendment were drafted and the Bancroft Treaties negotiated. It seems unlikely, however, that the intent underlying this added language was to exclude Chinese immigrants from naturalizing, but to permit the United States to claim the children of those immigrants as citizens, or to permit the Emperor of China to claim the children of Americans, born in China, as his subjects.

214. CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (Jan. 30, 1866).

215. *The Gypsies*, *supra* note 208, at 1.

216. The public perception of them was that they were a "stranger to each people and country." *Id.*

217. Naturalization Act of April 14, 1802, ch. 28, 2 Stat. 153. This was confirmed in a treaty entered into by the United States and China in 1868. Treaty with China art. VI, U.S.-China, July 28, 1868, 16 Stat. 739.

218. Naturalization Act, *supra* note 217, at 153-154; Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COL. L. REV. 1833, 1846-50 (1993); WESTLAKE, *supra* note 57, at 35-36.

219. CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (January 30, 1866).

legislated for specially. Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be subject of the United States in the sense of being citizens. They must be excepted. The Constitution of the United States excludes them from the enumeration of the population of the United States, when it says that Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the view of all gentlemen, which used these constitutional words, and said that all persons born in the United States, excluding Indians not taxed, and not subject to any foreign Power, shall be deemed citizens of the United States.²²⁰

Senator John Conness, an opponent of the earlier language, stated immediately, “That will do.”²²¹ Others continued to object.²²² But Trumbull persisted, noting that “We often pass laws to remove doubts.”²²³

Even if unnecessary, as Trumbull continued to believe it was, the language became part of the Act.²²⁴ It merely reiterated the point made during debate that the tribes were “foreign Powers,” similar in that sense to Great Britain and the Western European powers soon to become Bancroft Treaty partners. Were that not the interpretation of the statutory language, there would be no reason not to return to the original language that expressly, but solely, referred to persons of African descent. The comment about the Chinese and Gypsies remains baffling, but, in context, cannot be squared with the remainder of the record. In light of the broad historical record, it cannot be claimed that it clarifies the text. By the same token, it cannot be denied that it obscures the meaning of the text. It remains an unresolved contradiction in the record.

B. “[S]ubject to the jurisdiction thereof”: The Fourteenth Amendment

The bulk of the text of what became the Fourteenth Amendment was proposed in the House by Representative John A. Bingham.²²⁵ It did not include language specifying or implying any particular means of acquiring citizenship. The first such language was proposed by Senator Benjamin Franklin Wade, on May 23, 1866. It was linked to the privileges and immunities clause, and provided: “No state shall make or enforce any law which shall abridge the privileges or immunities of persons born in the United

220. *Id.* at 527 (Jan. 31, 1866).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. Paul Finkelman, *John Bingham and the Background to The Fourteenth Amendment*, 36 AKRON L. REV. 671 (2003).

States or naturalized by the laws thereof.”²²⁶ Wade’s language replaced the word “citizen” in Bingham’s text with the phrase “persons born in the United States or naturalized by the laws thereof.”²²⁷ In his comments introducing the new language, Wade acknowledged continuing confusion over the rules governing citizenship.

In the first section of the proposition of the committee, the word “citizen” is used. That is a term about which there has been a good deal of uncertainty in our Government. The courts have stumbled on the subject, and even here, at this session, that question has been up and it is still regarded by some as doubtful.²²⁸

This statement indicates that, in that session of Congress in which the Civil Rights Act had been passed, there was still disagreement as to the law of citizenship. The Act had not settled that matter as its proponents had hoped. To be sure, Wade himself thought the question settled, but he acknowledged that others did not. “I find that gentlemen doubt upon that subject, and I think it is very easy now to solve that doubt and put the question beyond all cavil for the present and for the future.”²²⁹ He continued:

In the first clause of the amendment which I have submitted, I strike out the word “citizen,” and require the States to give equal rights and protection of person and property to all persons born in the United States or naturalized under the laws thereof. That seems to me to put the question beyond all doubt. The Senator from Maine [Fessenden] suggests to me, in an undertone, that persons may be born in the United States and yet not be citizens of the United States. Most assuredly they would be citizens of the United States unless they went to another country and expatriated themselves, if they could do so by being adopted in that other country by some process of naturalization that I know nothing about; for I believe the countries of Europe – certainly it is so in England – have always held that a person born within the realm cannot expatriate himself and become a citizen of any other country or owe allegiance to any other country. I think, then, the first section of my amendment covers the whole ground.²³⁰

Senator William Pitt Fessenden had asked him, in language echoing Story’s qualification to the rule of *jus soli*:²³¹ “Suppose a person is born here of parents from abroad temporarily in this country.”²³² Wade referred only to children of diplomats in his response, and suggested that because the number of such persons would be small, the circumstance would come under the maxim “*de*

226. CONG. GLOBE, 39TH CONG., 1ST SESS. 2768 (May 23, 1866).

227. *Id.*

228. *Id.*

229. *Id.* at 2769.

230. *Id.*

231. STORY, *supra* note 22, at 48.

232. CONG. GLOBE, 39TH CONG., 1ST SESS. 2769 (May 23, 1866).

*minimis lex non curat.*²³³ Wade's comment indicates that he favored few limits on birthright citizenship, and saw the issue as one of territorial jurisdiction. Fessenden did not question further. Wade's proposed language was not adopted.

The language eventually adopted was added by Senator Jacob Howard.²³⁴ Howard's proposed text states: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."²³⁵ The Senator introduced this text with a brief explanation:

This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country.²³⁶

Like Wade, Howard thought he was settling the unsettled. Like Wade's, Howard's text did not meet his expectations. His speech indicates that he wished, with the terms of his amendment, to accommodate Fessenden's comment about Wade's proposed text. This is entirely more plausible than any interpretation that suggests that Howard simply ignored the discussion between Wade and Fessenden. It also appears that he wished to link the meaning of the proposed amendment with the meaning of the Civil Rights Act, which had by then been enacted by Congress, vetoed, and passed over the veto.²³⁷ The Act was to be clarified by the Amendment.

The Fourteenth Amendment, as it was when referred to the states, had additional purposes. One was to effectuate the Republican supermajority's plan to

233. *Id.*

234. *Id.* at 2890 (May 30, 1866).

235. *Id.* The final 's' in States was later stricken as a printing error. *Id.* at 2892. The words "or naturalized" were later added on motion by Senator William Pitt Fessenden and adopted by general consent. *Id.* at 3040 (June 8, 1866).

236. *Id.* at 2890 (May 30, 1866).

237. The Act was first passed by Congress on January 30, 1866. *Id.* at 498 (January 30, 1866). President Johnson vetoed it on March 27, 1866. Johnson's Veto Message reprinted *See id.* at 1679 (March 27, 1866) (explaining President Johnson's reasons for vetoing the Act). Congress then passed the Act over Johnson's veto. *Id.* at 1857, 60. (April 9, 1866). The Civil Rights Act was reenacted over the veto on April 9, 1866. *Id.* at 1860.

[P]ut this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin, who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.²³⁸

The Republicans wanted to put the rules they had adopted in the Civil Rights Act beyond the reach of repeal by a mere majority of any future Congress.²³⁹ The other reason appears to have been to address the many questions raised as to the constitutionality of the Civil Rights Act.²⁴⁰ The fact that Senator Fessenden denied that the Committee on Reconstruction harbored any doubts about the constitutionality of the Act²⁴¹ cannot mask the fact that many other legislators had raised such doubts forcefully and on the record.²⁴² The constitutional amendment would, Howard hoped, obviate all such objections.

The addition of Howard's citizenship language launched a debate that resembled the earlier debate on the citizenship language of the Civil Rights Act. So, for example, Senator James Doolittle, of Wisconsin, immediately proposed an amendment to Howard's citizenship language intended to make explicit the exclusion from citizenship of "Indians not taxed."²⁴³ This, it will be recalled, is identical to the language that Senator Trumbull had borrowed from the original Constitution and added to the Civil Rights Act.²⁴⁴ Senator Edgar Cowan then asked for a clarification, following up on Senator Howard's promise that his amendment would finally "settle[] the great question of citizenship...".²⁴⁵ Cowan asked: "Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen? If so, what rights have they? Have they any more rights than a sojourner in the United States?"²⁴⁶ His questions were never explicitly answered.

The stakes with respect to the citizenship of members of the Indian tribes were even higher with respect to the proposed Fourteenth Amendment than they had been with respect to the Civil Rights Act. The penalty provisions in the Amendment stripped states of a portion of their representation in Congress should they fail to protect the rights of all persons deemed citizens.²⁴⁷ This was intended to protect the freedmen, but it presented an issue with respect to its

238. CONG. GLOBE, 39TH CONG., 1ST SESS. 2896 (May 30, 1866). The "Senator from Wisconsin" referred to therein was Senator James Doolittle, a nominal Republican.

239. *Id.*

240. *Id.* at 475 (Jan. 29, 1866).

241. *Id.* at 2986 (June 6, 1866).

242. *Id.* at 475–81 (Jan. 29, 1866).

243. *Id.* at 2890 (May 30, 1866).

244. CONG. GLOBE, 39TH CONG., 1ST SESS. 527 (Jan. 31, 1866).

245. *Id.* at 2890 (May 30, 1866).

246. *Id.*

247. *Id.* at 2897.

effect on the Native American tribes.²⁴⁸ If Indians were made citizens and then excluded from the full rights of citizenship, particularly adult male suffrage, the excluding state would lose a portion of its representation in Congress.²⁴⁹ No state with a significant tribal presence could risk such an outcome. Trumbull saw no such risk, however, because Indians were subject to the sovereignty of their tribes, just as Englishmen were subject to the sovereignty of the Queen.²⁵⁰ To Trumbull, the tribes were foreign powers.

The debate over the Fourteenth Amendment's citizenship language resembles that over the citizenship language in the Civil Rights Act, but is murky for different reasons. Cowan wondered whether the children of Chinese and Gypsies born here would have more rights than children of mere sojourners. Would the children of Chinese and Gypsies be citizens, while children of sojourners would not? Would all three be excluded? His question seems rhetorical, in the context of his regressive views. He apparently intended to suggest that the children of Chinese and Gypsies should have only those rights held by the children of sojourners. There is nothing in his remarks to suggest that members of any or all of these groups would be citizens. The parents of Chinese and Gypsy children would not have the right to confer citizenship on their children by choosing their place of birth, nor would the sojourner, if I read Cowan in context correctly. And "sojourner," in this context, was certainly not limited to the children of foreign diplomats. His limitations seem to correspond to those earlier suggested by Justice Story, that the *jus soli*, and hence citizenship by right of birth, "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."²⁵¹

Cowan's additional comments reveal the heart of the conceptual difference that vexed the debate. He noted that "If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. You cannot murder him with impunity."²⁵² I understand the word traveler here to bear the same meaning as the word sojourner in the comment Cowan had made immediately before. Such a sojourner, whether eligible for citizenship, as was the Englishman, or not, as was the Ethiopian, would have been protected by the law and obligated to obey the law. That was so because the traveler was within the territorial jurisdiction and protection of the United States.

248. *Id.*

249. *Id.*

250. CONG. GLOBE, 39TH CONG., 1ST SESS. 2893.

251. STORY, *supra* note 22, at 48.

252. CONG. GLOBE, 39TH CONG., 1ST SESS. 2890 (May 30, 1866).

Cowan then turned his attention from protection within U.S. territory, which did not require the allegiance of the protected, to the political citizenship for which allegiance was required.²⁵³ “But,” Cowan continued, “he is not a citizen in the ordinary acceptance of the word. It is perfectly clear that the mere fact that a man is born in the country has not heretofore entitled him to the right to exercise political power.”²⁵⁴ Clearly Cowan believed that something more than birth was necessary to confer citizenship, as the law stood at that moment. Trumbull agreed. “What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else. That is what it means.”²⁵⁵ That is what more was necessary to confer citizenship in both Cowan’s and Trumbull’s view, at this stage of the ongoing debate.

Trumbull’s comment, made months after his comment about the citizenship of Chinese and Gypsy children, seems to contradict that earlier comment, at least with respect to the Chinese. They continued to owe allegiance to the Emperor as a matter of treaty between the Emperor and the United States.²⁵⁶ The Gypsies presented a different and more vexing conceptual problem, but one that had little practical consequence due to their small numbers. Because their provenance was not reliably determinable, it would seem that allegiance to another sovereign could not be attributed to them. By Trumbull’s logic, their children would be citizens. In any event, they are clearly distinguishable for these purposes from the Chinese, who were here in greater numbers, and whose native allegiance was, as a matter of treaty, unaffected by their presence in the United States.²⁵⁷

The debate turned once again to the status of the Indian tribes, without express resolution of the question concerning the Chinese and Gypsies. Trumbull’s comment: “What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else. That is what it means”,²⁵⁸ could not, by its terms, have been addressed to mere territorial jurisdiction. But other senators’ comments concerned only territorial jurisdiction. Much of the remainder of the debate devolved into an implicit contest between jurisdiction as territorial jurisdiction, on the one hand, and the jurisdiction that arises from allegiance, on the other.²⁵⁹ So, for example, Senator Doolittle’s proposal to include the language “excluding Indians not

253. *Id.*

254. *Id.*

255. *Id.* at 2893.

256. Treaty with China, U.S.-China, July 28, 1868, 16 Stat. 739, 740.

257. *Id.*

258. CONG. GLOBE, 39TH CONG., 1ST SESS. 2893 (May 30, 1866).

259. *See id.* at 2892-95.

taxed,” was necessary in his view because the Indians were within the territorial jurisdiction of the United States.²⁶⁰

I moved this amendment because it seems very clear to me that there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States. All the Indians upon reservations within the several States are most clearly subject to our jurisdiction, both civil and military.²⁶¹

The clarity he claimed could only have been present if the jurisdiction he invoked was territorial.

Senator Trumbull responded by invoking the jurisdiction arising from allegiance in opposition to Doolittle’s territorialism.

[I]t is very clear to me that there is nothing whatever in the suggestions of the Senator from Wisconsin [Senator Doolittle]. The provision is that ‘all persons born in the United States, and subject to the jurisdiction thereof, are citizens.’ That means ‘subject to the complete jurisdiction thereof.’ Now, does the Senator from Wisconsin pretend to say that the Navajoe Indians are subject to the jurisdiction of the United States? What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else. That is what it means. . . . We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them.²⁶²

The clarity Trumbull claimed could only have been present if the jurisdiction he invoked was the jurisdiction arising from allegiance. Mere domicile would not carry with it “the complete jurisdiction” of the United States nor relieve the parent of allegiance to any other country, but it would surely carry with it territorial jurisdiction. Trumbull later confirmed that the jurisdiction arising from allegiance was his concern, saying: “I have already replied to the suggestion as to the Indians being subject to our jurisdiction in the sense of owing allegiance solely to the United States”²⁶³

260. *Id.* at 2890.

261. *Id.* at 2892.

262. *Id.* at 2893.

263. *Id.* at 2894 (Trumbull’s position was consistent with the idea that the tribes presided over what was commonly called then an “imperium in imperio.” That phrase means empire within an empire, or state within a state. It is a group of people within a nation’s territory who owe allegiance to some other sovereign. It is a useful concept to modern students of this particular debate in this period. As both an idea and a political arrangement it was familiar to legislators and merchants during the middle third of the century. Great Britain, France, Russia, and the United States had all negotiated with the Chinese Emperor treaties that gave those foreign powers “exclusive jurisdiction” over their own nationals in China.); *see also* Peace, Amity, and Commerce, U.S.-China, July 3, 1844, 8 Stat. 592–605; *see also* *Jurisdiction in China*, ILLUSTRATED TIMES LONDON, Aug. 29, 1863, at 134 (stating the United States had a similar arrangement with Egypt and the Ottoman Empire until 1874); *see also* JAMES D. RICHARDSON, A

The parties to the debate agreed that the proposed amendment should not make citizens of the Indians.²⁶⁴ The incoherence of the debate arose from the fact that they could not agree on a principle by which that should be effected.²⁶⁵ Senator Doolittle and those who agreed with him spoke of territorial jurisdiction,²⁶⁶ without articulating, and perhaps without recognizing the importance of that limitation. They therefore required language explicitly excluding Indians from birthright citizenship. Senator Trumbull and those who agreed with him spoke of the jurisdiction arising from allegiance.²⁶⁷ They therefore did not require language explicitly excluding Indians from birthright citizenship. They certainly understood territorial jurisdiction in the abstract, but did not seem to realize that their opponents were invoking it, to the exclusion of the jurisdiction arising from allegiance, in the debate. The two sides were simply talking past one another, leaving behind them, at least with respect to this issue, a debate that, by its terms, from a historical perspective, is incoherent.

If one were to insist that Trumbull's view prevailed, then the literal language of the Fourteenth Amendment excluded the children of Indians, and, necessarily, the children of European subjects as well. But this requires that Trumbull's comment on the citizenship of the Chinese and Gypsies, made in a different debate but arguably relevant here as well, be ignored or dismissed. If one were to insist that Doolittle's view prevailed, then the literal language included Indians and everyone else as citizens. This would render the jurisdiction language surplusage. Neither is a sensible, consistent reading of the full text and context together, but it is more plausible, in context, that Trumbull simply changed his position, and by then opposed the addition of conceptually redundant language intended merely to resolve doubts.

Senator Trumbull had not strongly objected to, and in fact had proposed, exclusionary language in the Civil Rights Act.²⁶⁸ But by the time of the debate on the Fourteenth Amendment, it seems he had changed his mind. He said so explicitly.²⁶⁹ Speaking of that text as then proposed, without express language

COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, H.R. MISC. DOC. NO. 210, pt. 7, at 238–39 (2d Sess. 1898); *see also* 2 CONG. REC. 1778 (Feb. 25, 1874). By such agreements the jurisdiction arising from allegiance displaced territorial jurisdiction.

264. CONG. GLOBE, 39TH CONG., 1ST SESS. 2897 (May 30, 1866).

265. *Id.* at 2890–94.

266. *Id.* at 2892; *see also id.* at 2893–94 (the comments of Senator Reverdy Johnson of Maryland and Senator Thomas Hendricks of Indiana, each describing jurisdiction in terms that define territorial jurisdiction).

267. *Id.* at 2894. Senator William Pitt Fessenden of Maine, echoing Senator Trumbull stating “We could extend it [jurisdiction] over Mexico in the same way.” That means, in context, by conquest. *Id.* at 2894.

268. *Id.* at 504 (Jan. 30, 1866).

269. *Id.* at 2894 (May 30, 1866).

excluding Indians, Trumbull said: “I think...the language proposed in this constitutional amendment is better than the language in the civil rights bill.”²⁷⁰ It did not burden the text, and yet it carried the same meaning. Once again, this can have been so only if Trumbull intended by the phrase “not subject to any foreign Power” in the Act, and by the word, “jurisdiction” in the Amendment, to invoke the jurisdiction arising from allegiance.

This understanding, that the tribes possessed a sovereignty similar, in the relevant respect, to the sovereignty of European powers, was consistent with the traditional understanding of the status of the tribes, shared by Chief Justices Marshall and Taney. Taney had only recently written

These Indian Governments were regarded and treated as foreign Governments, *as much so as if an ocean had separated the red man from the white*; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But *they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens* of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.²⁷¹

There is no reason to condemn this passage with the criticisms so justifiably leveled at other portions of Taney’s opinion in *Dred Scott*.²⁷² This portion simply restated the prevailing view of the nature of the tribes’ sovereignty.

Professor Epps argues that the discussion of the Amendment language on this date in Congress was only about Indians, suggesting that it has no other use in understanding the Fourteenth Amendment.²⁷³ He insists that “[t]he language relied upon by advocates of a restrictive reading was uttered entirely within the context of citizenship of tribal Indians. The language about ‘full and complete jurisdiction’ refers to the legal immunities of these Indians, not in any way to immigrant populations within the United States.”²⁷⁴ This is exceedingly unlikely, in light of the broader historical context set forth herein,

270. CONG. GLOBE, 39TH CONG., 1ST SESS. 2894 (May 30, 1866).

271. *Dred Scott*, 60 U.S. at 404 (emphasis added).

272. *Id.*

273. Epps, *supra* note 3, at 361–62.

274. *Id.*

and in light of the broad and obvious meaning of the phrase “foreign Powers” in the Civil Rights Act. That phrase cannot possibly be read to mean the tribes only. The implicit comparison to foreign countries repeatedly invoked by Senator Trumbull indicates beyond cavil that he had foreign countries in mind, as well as the tribes. The discussion tells us every bit as much about the subjects of European powers as it tells us about the tribes.

Professor Gerald Magliocca has argued that to invoke the status of the tribes as Trumbull did was an effort to enhance the autonomy of the tribes and “maximize Native Americans’ rights.”²⁷⁵ But the context makes it clear that they were mentioned for purposes of excluding them from the protections of citizenship. They would have had more rights and more power to protect their autonomy had they been made citizens, even without their consent. The autonomy of the tribes, in Trumbull’s view, was sufficient to constitute them sovereigns with claims to jurisdiction for Fourteenth Amendment purposes, “foreign Powers” for Civil Rights Act purposes, and to exclude their children from citizenship under both measures.²⁷⁶

The greater weight of the historical record supports the conclusion that the intention shared by a majority of the drafters of the Fourteenth Amendment was to exclude from citizenship children born here of citizens or subjects of foreign powers, including the Native American tribes and other nations with which the United States entered into treaties. The language of both the Act and the Amendment most closely, although imperfectly, conforms to that meaning. In 1866, this rule would not have posed insurmountable barriers to persons born here of non-citizen parents. Things were not then as they are today. Then, such children would become citizens by the naturalization of their parents or by their own naturalization.²⁷⁷ Or they could simply wait out the two generation limit on the claims to allegiance asserted by Great Britain, and the shorter claims asserted by other Western European powers.²⁷⁸ Congress considered legislation later to manage this problem.²⁷⁹

But it must be acknowledged that the evidence is not monolithic, and these conclusions cannot be made with absolute certainty. The evidence found in the debates on the Civil Rights Act of 1866 is less clear than that in the debates on the Fourteenth Amendment. The greater confusion in the earlier debate is due almost entirely to Senator Trumbull’s comments on the Senate floor and his letter to President Johnson.²⁸⁰ Later events tend to strengthen the conclusion

275. Gerald N. Magliocca, *Indians and Invaders, The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 521 (2008).

276. CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (Jan. 30, 1866).

277. COCKBURN, *supra* note 16, at 38–40.

278. *Id.* at 69.

279. *See infra* Part V.

280. *See supra* Part IV.A.

that the prevailing intent was to exclude from birthright citizenship the children of foreigners still subject to their native sovereigns, but this later evidence, apart from its cumulative quality, presents problems of its own.

C. *The Civil Rights Act the Third Time Around*

One fact that has received little attention in the debate over the meaning of the Fourteenth Amendment is that, two years after it was ratified, Congress passed once again the old text of the Civil Rights Act of 1866.²⁸¹ The Enforcement Act of 1870²⁸² provided as follows: “*And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted[.]*”²⁸³ This is very strong evidence that Congress intended the Act and the Amendment to have the same meaning. It is inconceivable that Congress would have re-enacted the statute after the ratification of the Amendment unless it intended the two to mean the same with respect to their overlapping provisions. The problem is not to decide that the Act and the Amendment were intended to have the same meaning. That much is clear. The problem is to decide the precise meaning they were intended to share.

D. *Jurisdiction in the Popular Press*

Despite the attention given to issues of civil rights generally and the Fourteenth Amendment in particular during the late 1860s, there was little in the newspapers on the technical issue of jurisdiction within the meaning of the citizenship clause. It seems clear that no position on this issue can be attributed to the ratifiers. And, of course, it need not be doubted that, had anyone taken a survey of literate Americans about their understanding of the phrase “foreign Power,” it would certainly have been interpreted to apply to European and other foreign countries.²⁸⁴

The historian David Hardy has shown that newspaper coverage of complex political debates, both in and out of Congress, was extensive.²⁸⁵ Hardy is surely correct to conclude that literate citizens were generally well informed about political issues during the late 1860s.²⁸⁶ His survey of newspaper articles during the ratification period revealed informative coverage of the new due

281. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 144, § 18 (1870).

282. *Id.*

283. *Id.*

284. *See supra* note 189.

285. David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695, 696–97 (2009).

286. *Id.*

process, equal protection, and privileges and immunities clauses.²⁸⁷ Hardy's analysis makes no mention of the Citizenship Clause of the Amendment. The omission appears to reflect an omission in the newspaper coverage, not any shortcoming in his research. The upshot of his work and my own research is that no conclusion can be drawn as to the ratifiers' understanding of the phrase, "within the jurisdiction thereof," because it received little attention from them.²⁸⁸

The reason for this will never be completely clear. The lack of coverage may be taken as a proxy for the lack of interest in the broad, newspaper-reading public, in the mechanics of becoming a citizen and in the significance of the location of birth. This might be explained by Daniel Webster's observations, mentioned elsewhere herein.²⁸⁹ It would appear that, for most of the people Webster described, the law was simply irrelevant and citizenship was either assumed or not challenged. For many immigrants, during the first seventy-five years of the nineteenth century, the formalities of citizenship became an issue when one ran for office in those states that required citizenship as a condition of officeholding, when one voted in those states that required citizenship as a condition of voting, when one wished to travel abroad, and when one was faced with military conscription during the Civil War.²⁹⁰ It is obvious that few people at that time engaged in three of these things, and only somewhat more engaged in the fourth. This would explain the lack of popular concern with the mechanics of becoming a citizen.

The personal rights often associated with citizenship were another matter entirely, however, both before and after the war. Before the war, newspaper coverage of matters related to citizenship generally concerned the legal rights of immigrants, free blacks, and women.²⁹¹ Nativist agitation against Irish immigration received coverage, as did the responses of those sympathetic to the Irish.²⁹² The little attention given to matters relevant herein included a

287. *Id.* at 699–717.

288. *Id.* at 699–700.

289. WEBSTER, *supra* note 16, at 2; COCKBURN, *supra* note 16, at 75–77.

290. *See, e.g.*, TEX. CONST. of 1845, art. III, § 1; Enrollment Act, ch. 75, 12 Stat. 731 (1863); *Trial of the Chief of Police: Charged with Being an Alien*, N.Y. DAILY TIMES, Feb. 26, 1856; *Trial of the Chief of Police: Decision of the Police Commissioners*, N.Y. DAILY TIMES, Mar. 24, 1856.

291. *See, e.g.*, J.A. Smith, Editorial, *Know Nothings*, THE WESTERN FREEMAN (Fond du Lac, Wis.), June 27, 1855, at 1.

292. *See, e.g.*, John Mitchel, Lecture, *Position and Duties of European Refugees*, N.Y. DAILY TIMES, Jan. 2, 1854, at 2 (setting forth and refuting the Know-Nothing position). It is difficult today to imagine the contempt with which the Irish were regarded by some in antebellum America. Even the enlightened Henry David Thoreau, describing an impoverished Irish immigrant family in Walden, wrote: "But alas! the culture of an Irishman is an enterprise to be undertaken with a sort of moral bog hoe." HENRY DAVID THOREAU, WALDEN 140 (The American Library of World Literature, Inc. 1960) (1854).

piece explaining the incidence of immigrants coming to the United States, naturalizing, and then returning to their native countries.²⁹³ There they invoked their American citizenship as an exemption to local laws requiring military service.²⁹⁴ The author lamented the possibility that:

[T]here might, in process of time, exist a class of persons abroad who, although in every sense of the word foreigners, would still be deemed Americans by the law—a state of things which would be quite adverse to the policy of all Governments, and peculiarly offensive in the present state of feeling in our country.²⁹⁵

During the war, attention focused on the meaning of the word “citizen,” in part because, prior to 1862, as a matter of law, only citizens were subject to military conscription.²⁹⁶ But the possibility that foreigners might be drafted into the northern armies created confusion even in leading newspapers. On August 6, 1862, under the headline “How Foreigners Are Affected By The Draft” the New York Times reported “so much contradiction about the word ‘citizen’ and the liability of the children of foreigners to being drafted” that it reproduced in translation text from a French language newspaper which described foreign exemptions to the draft as follows:

First – The foreigner who has not thrown off his nationality, is, of full right and without any possible dispute, exempt from any and every obligation to perform military duty, no matter how protracted his residence in the United States. Second – The children of these foreigners, even if born within the United States, necessarily follow the condition of their parents, and cannot be compelled to assume the title and obligations of an American citizen, unless, upon attaining their majority, they shall, by acts of their own, have laid aside the nationality of their family.²⁹⁷

Just a few days later, on August 10th, the New York Times published a long letter, written in a tone similar to a legal brief, challenging the second exemption described above, and insisting that persons born in the United States of parents who remained foreign citizens are U.S. citizens as a matter of common law.²⁹⁸ The author, identified only as “LEX,” seemed to suggest that the confusion might have sprung from a provision in U.S. statutory law making

293. Editorial, *Rights of Americans Born Abroad*, N.Y. DAILY TIMES, Mar. 14, 1855, at 4.

294. *Id.*; PAPERS RELATING TO NATURALIZATION AND EXPATRIATION, *supra* note 13, at 1293 (letter from Henry Wheaton, Minister to Prussia, to Johann P. Knocke) (expressing a similar concern).

295. Editorial, *supra* note 291, at 4.

296. Act of July 17, 1862, ch. 201, 12 Stat. 594; Act of Mar. 3, 1863, ch. 75, 12 Stat. 731.

297. Editorial, *Concerning Drafting, Again*, N.Y. TIMES, Aug. 6, 1862, at 5 (quoting in translation the *COURIER DES ETATS UNIS*, Aug. 5, 1862). This appears to have conformed to French law at the time, but not to U.S. law.

298. LEX, Letter to the Editor, *Naturalized Citizens and the Draft*, N.Y. TIMES, Aug. 10, 1862, at 8.

U.S. citizens of children born abroad to U.S. citizen parents.²⁹⁹ Apparently, according to this commentator, the U.S. had by then taken the same position it had criticized the British for taking: that persons born in the U.S. were citizens by dint of the *jus soli*, and persons born abroad to U.S. citizen parents were U.S. citizens by dint of the *jus sanguinis*.³⁰⁰

After the war, racist newspapers accepted white immigration, but, in screeds echoing the most deplorable portions of Taney's opinion in *Dred Scott*,³⁰¹ insisted that even free blacks must be excluded from citizenship. For example, during the ratification period, *The Alleganian*, a particularly vicious publication from Maryland, railed against the proposed Amendment on the grounds that it reflected the intention of "Black Republicans" to "level all distinctions between the white man and the negro."³⁰² This would include, according to *The Alleganian*, both citizenship and the franchise for the freedmen.³⁰³ Women were to be excluded from full rights of citizenship, especially the franchise, but recognized as citizens.³⁰⁴ Republican supporters of the Amendment continued, as they had before, to support rights for blacks, woman suffrage, and prohibition, as the natural ramification of applied Protestant virtue.³⁰⁵

A few days later, the *New York Times* commented that the first clause of the Amendment "clothe[d] with the equal civil rights belonging to citizenship all the *native born inhabitants* of the United States."³⁰⁶ One might read the italicized phrase to mean all those born in and continuing to inhabit the United States, thus excluding those whose birth here was merely adventitious, and who inhabited another place. The comment was not part of an extended discussion of the question, but the idea reappeared in proposed legislation in 1874.³⁰⁷ As this brief summary, together with Professor Hardy's work, suggests, there was little in the newspapers that addressed specifically the concept of jurisdiction within the meaning of the Fourteenth Amendment. The

299. *Id.*

300. *Id.*; Act of Feb. 10, 1855, ch. 71, 10 Stat. 604.

301. *Dred Scott*, 60 U.S. at 426–27.

302. Editorial, *THE ALLEGANIAN* (Cumberland, Md.), Sept. 19, 1866, at 1-2. Similar sentiments appeared after ratification in an Ohio newspaper. Editorial, *THE OHIO DEMOCRAT* (New Philadelphia, Ohio), June 4, 1869, at 1.

303. Editorial, *THE ALLEGANIAN* (Cumberland, Md.), Sept. 19, 1866, at 1-2.

304. *Id.*

305. See, e.g., W.C. Swigart, Editorial, *Negro Citizenship*, *MAQUOKETA WKLY. SENTINEL* (Maquoketa, Iowa) June 11, 1857, at 1; David Atwood, Horace Rublee, & George Gary, "Tempora Mutantur," *DAILY STATE JOURNAL* (Madison, Wis.) June 26, 1855, at 2; J.A. Smith, *supra* note 289, at 1.

306. Editorial, *The Constitutional Amendment*, *N.Y. TIMES*, Sept. 24, 1866, at 4 (emphasis added).

307. 2 CONG. REC., 43D CONG., 1ST SESS. 2491 (Mar. 26, 1874); 2 CONG. REC., 43D CONG., 1ST SESS. 3279 (Apr. 22, 1874); 2 CONG. REC., 43RD CONG., 1ST SESS. 3512 (May 1, 1874).

intention of the ratifiers simply cannot be discerned, if any such thing even existed with respect to the jurisdiction clause of the proposed Fourteenth Amendment. That portion of the historical record lends little help to either side of the current debate.

VII. POST-AMENDMENT TREATIES AND LEGISLATION

A. *The Bancroft Treaties*

From 1868 to 1870 the United States entered into treaties with the principal European powers, each a “treaty concerning the citizenship of emigrants, between the United States of America” and the treaty partner.³⁰⁸ They were framed as treaties about emigrants because they concerned the claims of the countries of origin.³⁰⁹ The treaties marked the end of perpetual allegiance, and reduced the incidence of dual allegiance, thereby removing major sources of conflict between the U.S. and its principal sources of immigration. Each treaty included, for the most part, the same terms with respect to citizenship and allegiance.³¹⁰ Citizens of each treaty partner who became naturalized in the other according to the naturalizing country’s domestic law, and who had resided there without interruption for five years, were held to have been expatriated.³¹¹ In other words, the native country’s jurisdiction arising from allegiance was terminated by a combination of formal naturalization and five years of residence within the new sovereign. Otherwise, presumably, the jurisdiction arising from allegiance would persist. The old reversionary interest vested in the native sovereign reappeared in the form of a fast-track process for resumption of native citizenship.³¹² This required residence in the country of origin, without intent to return to the country of naturalization, for two years.³¹³

The Bancroft Treaties marked a significant transition in the international law of citizenship. Bancroft himself, even after years of diplomatic and public service, and substantial achievement as a historian, considered them to have been his greatest achievement.³¹⁴ But their legal relationship to the Fourteenth

308. Bancroft Treaties, *supra* note 20.

309. Rev. Stanley Johnson, *Agreement between the United States and Great Britain Respecting the Naturalization of Immigrants*, N.Y. TIMES, Jan. 24, 1869, at 1.

310. *Id.*

311. 2 CONG. REC., 43RD CONG., 1ST SESS. 2491 (Mar. 26, 1874); 2 CONG. REC., 43RD CONG., 1ST SESS. 3279 (Apr. 22, 1874).

312. *Id.* at 3279.

313. *Id.*

314. Letter from George Bancroft to Hamilton Fish (June 30, 1874), reprinted in M. A. DE WOLFE HOWE, *THE LIFE AND LETTERS OF GEORGE BANCROFT* 274-75 (Da Capo Press 1970) (1908).

Amendment was not clear.³¹⁵ Like the Amendment, the Treaties required legislation to establish specific procedures for compliance with their terms.³¹⁶ The Treaties required each party to release its jurisdiction arising from allegiance over those persons subject to the Treaties, but because they were not self-executing, they provided no domestic law to do so.³¹⁷

*B. The Expatriation Act*³¹⁸

The first Congressional action to accommodate Fourteenth Amendment imperatives and those of the Bancroft Treaties originated in the Committee on Foreign Relations of the House of Representatives. Beginning in 1868, the Committee investigated various issues surrounding citizenship.³¹⁹ Once again, relations with Great Britain were a principal concern, especially after the sharp post-Civil War diplomatic conflict between the two nations over the Fenian Irish.³²⁰ The inquiry led to a report, mentioned earlier, made by the Committee to the House, including proposed legislation that eventually became the Expatriation Act.³²¹ The purpose of the report was to justify the Committee's rejection of the doctrines of perpetual allegiance and of the *jus soli*, both of which it disparaged as "feudal."³²² The purpose of the proposed legislation was to deny that the doctrine of perpetual allegiance to the native country could ever apply to naturalized Americans.³²³ The report itself was, in essence, a legal brief based on international law, justifying the proposed legislation to a world on the verge of abandoning perpetual allegiance. It supported the new ideological dispensation underlying the Bancroft Treaties, but the Act went farther than did the Treaties in stripping native countries of the jurisdiction arising from allegiance.³²⁴

315. The presumptive expatriation provisions would probably not survive constitutional scrutiny today. *Afroyim v. Rusk*, 387 U.S. 253, 254–68 (1967) (voiding involuntary expatriation provisions in a federal statute).

316. See Bancroft Treaties, *supra* note 20.

317. *Id.*

318. Right of Expatriation, ch. 289, 15 Stat. 223–24 (1868).

319. CONG. GLOBE, app. 40TH CONG., 2D SESS. 94 (Jan. 27, 1868) (Committee on Foreign Affairs, U.S. House of Representatives, Report Concerning the Rights of American Citizens of Foreign States).

320. *Id.* at 98. For some additional background on the dispute with Great Britain over the Fenians, see *The Fenian War*, N.Y. TIMES, June 3, 1866, at 1; see also *The Fenian Trials*, N.Y. TIMES, Nov. 13, 1866, at 5; *The Fenian Brothers*, N.Y. TIMES, July 26, 1865, at 8; *The 'Fenians' and the London Times*, N.Y. TIMES, June 25, 1865, at 1; *From Montreal*, N.Y. TIMES, Dec. 21, 1864, at 1 [hereinafter N.Y. TIMES Articles].

321. Right of Expatriation, ch. 289, 15 Stat. 223–24 (1868).

322. CONG. GLOBE, app. 40TH CONG., 2D SESS. 95 (Jan. 27, 1868)

323. *Id.* at 99–100.

324. See WHARTON, *supra* note 21, at 2–3 (“[T]he last four years have witnessed the final and universal abandonment of this doctrine. In the United States the question was settled by the Act

Although allegiance arose from necessity, expatriation required mutual consent. According to the committee, “[i]t may justly be conceded that the express or implied consent of both parties is necessary to the extinction of mutual obligations between a Government and its subject.”³²⁵ A different necessity, one arising from the practicalities of nineteenth century emigration and immigration, required that persons be permitted to expatriate, to cast off their allegiance to their native countries and plight it to new countries by naturalization.

The Committee took this position expressly: “The reciprocal protection which is the basis of the obligation due from a subject to the State is rightfully terminated by a permitted removal, and leaves no foundation for the subsequent claim of perpetual service.”³²⁶ It invoked a sort of estoppel, directed specifically at Great Britain.³²⁷ That country had relieved itself of millions of persons it could not support by allowing them to emigrate, the majority to the United States.³²⁸ Great Britain was, therefore, effectively estopped to deny the right of expatriation to those persons.

The Expatriation Act was not intended to challenge a sovereign’s authority to prevent emigration; rather, it was intended to challenge its authority to claim any continuing jurisdiction over its natives, naturalized in another country.³²⁹ The latter, and not the former, had been the trigger of international friction in the past. It was also the principal concern of the Bancroft Treaties.³³⁰ The necessity with which the Committee was concerned arose from international, not domestic concerns.³³¹ At the moment of its enactment, the Expatriation Act was more aspirational than legislative, although it did provide guidance to the State Department by effectively adopting Secretary Cass’s understanding of the effects of naturalization, and rejecting Wheaton’s understanding.³³² By means of this Act, as a matter of American domestic law, Congress demanded of other countries that its naturalized citizens be treated abroad as if they had been born and raised in the United States.³³³

of July 27, 1868.”). Compare this to the texts of the Treaties themselves, which allowed resumption of native allegiance under circumstances described therein.

325. CONG. GLOBE, app. 40TH CONG., 2D SESS. 96 (Jan. 27, 1868).

326. *Id.*

327. *Id.* at 98.

328. *Id.* at 97–98.

329. Right of Expatriation, ch. 289, 15 Stat. 223–24 (1868).

330. *See supra* Part V.A.

331. This is not to suggest that it had no domestic implications. It was, in part, also intended to address the concerns of a newly important domestic constituency, the Irish, after the dispute with Great Britain over the Fenians. For one of the causes of that dispute, *see* N.Y. TIMES Articles, *supra* note 320; *see also* O’BROIN, *supra* note 161, at 2.

332. *See supra* text accompanying notes 129–38.

333. Right of Expatriation, ch. 289, 15 Stat. 223–24 (1868) (“[A]ll naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government,

Of course, the Act could have no effect on the domestic law of any other country, and it contradicted, to some extent, the terms of the Bancroft Treaties, then under negotiation. The Treaties recognized a limited and contingent reversionary interest in the emigrant, vested in the native country.³³⁴ The Act represented Congress's attempt to stake its position in relation to other countries from which the United States naturalized immigrants. It was an aggressive step, different in tone and meaning from the more measured steps then being taken by the State Department.³³⁵

Just at the time Congress was examining the issue of the breadth and scope of rights recognized as a matter of international law, arising from American citizenship, Parliament appointed a Royal Commission for the analogous purpose.³³⁶ All of this coincided with the negotiations over the Bancroft Treaties.³³⁷ Thus, the international landscape then included impending changes in the domestic citizenship laws of the United States and Great Britain, along with treaty negotiations on the subject of citizenship, between the U.S. and most of the countries of Western Europe, including Great Britain.³³⁸ Congress, Parliament, and the authorities in many continental countries were all engaged in the effort to resolve lingering problems of the international law of citizenship and the disputes surrounding it that had vexed them for decades.³³⁹ Clearly, changes in the international law of citizenship, allegiance, and jurisdiction were in the air in this period.

C. H.R. 2199 (1874)

In that shifting environment, President Grant recommended to Congress that it consider additional legislation “respecting expatriation and the election of nationality by individuals.”³⁴⁰ Grant raised several concerns as the bases for this recommendation. First, he noted that “[m]any citizens of the United States reside permanently abroad with their families.”³⁴¹ Under a statute enacted in 1855 the children of such citizens, born abroad, were citizens of the United

the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.”).

334. See, e.g., Treaty with the Grand Duchy of Baden on Naturalization, *supra* note 20, at 301 (providing for repatriation to native country upon certain conditions).

335. A similar conflict seems to have existed between the British Parliament and its Foreign Office. See COCKBURN, *supra* note 16, at 106–11.

336. *Id.* at 3.

337. See *id.* at 122–34.

338. See *id.* at 135–37.

339. See generally *id.* at 12–67.

340. Ulysses S. Grant, *Fifth Annual Message to the Senate and House of Representatives* (Dec. 1, 1873), in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 1789–1897, at 235, 239 (1897).

341. *Id.*

States.³⁴² This raised a problem analogous to the problem that occupies our attention here in the twenty-first century:

It thus happens that persons who have never resided within the United States have been enabled to put forward a pretension to the protection of the United States against the claim to military service of the government under whose protection they were born and have been reared. In some cases even naturalized citizens of the United States have returned to the land of their birth, with intent to remain there, and their children, the issue of a marriage contracted there after their return, and who have never been in the United States, have laid claim to our protection, when the lapse of many years had imposed upon them the duty of military service to the only government which had ever known them personally.³⁴³

Such a state of affairs was to be deplored, Grant implied, both with respect to United States citizens abroad and with respect to foreigners here.³⁴⁴ Grant went on to describe some of the contents of the Expatriation Act and the Bancroft Treaties, suggesting that some of the work of resolving longstanding problems of citizenship had been completed, but that more was needed. One shortcoming he considered remarkable was that the Expatriation Act did not indicate “what acts are deemed to work expatriation.”³⁴⁵ Grant continued: “The United States, who led the way in the overthrow of the feudal doctrine of perpetual allegiance, are among the last to indicate how their own citizens may elect another nationality.”³⁴⁶ In other words, additional legislation was necessary to establish the mechanics of expatriation for American citizens.

I invite Congress now to mark out and define when and how expatriation can be accomplished; to regulate by law the condition of American women marrying foreigners; to fix the status of children born in a foreign country of American parents residing more or less permanently abroad, and to make rules for determining such other kindred points as may seem best to Congress.³⁴⁷

Such a bill was proposed in the House in 1874. It undertook to reconcile the processes of acquiring citizenship, on the one hand, and abandoning it, on the other.³⁴⁸ In the months after Grant’s recommendation, the House debated H.R. 2199, entitled “A bill to carry into execution the provisions of the Fourteenth Amendment to the Constitution concerning citizenship, and to

342. Act of February 10, 1855, ch. 71, § 1, 10 Stat. 604 (1855) (“[P]ersons heretofore born. . .out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth Citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States . . .”).

343. Grant, *supra* note 340, at 239.

344. *Id.*

345. *Id.*

346. *Id.* at 240.

347. *Id.*

348. See 2 CONG. REC., 43D CONG., 1ST SESS. 3279 (April 22, 1874).

define certain rights of citizens of the United States in foreign countries, and certain duties of diplomatic and consular officers, and for other purposes.”³⁴⁹

Representative Fernando Wood characterized the task as follows:

It is our duty, therefore, under the fourteenth amendment to the Constitution to provide by law a final settlement of this question so as to govern the executive department in its negotiations with nations abroad. It is our duty, also, if we wish to live at peace and in comity with all the world, to endeavor to regulate by statute precisely the limitations on this question, so that every American, be he native born or adopted, whenever he goes into a foreign country, either for the purpose of pleasure, or the purpose of business, or for the purpose of acquiring a permanent domicile, shall know and be advised what the laws of his country are on the subject if he desires to maintain his allegiance to this country. I think, therefore, that the bill is in the right direction. It starts out with a desire to do that which it is incumbent upon Congress to do, and the sooner we reach a conclusion on this question the better.³⁵⁰

This captures the general sense of Congress as to the authority for and purposes of the proposed legislation. It was within the authority of Congress to define the jurisdiction of the United States, within the meaning of the Fourteenth Amendment, with respect to its citizens abroad and with respect to foreigners within the United States.³⁵¹ To that extent, Wood’s comments drew no opposition or contradiction from his colleagues.

This also sheds some light on a comment made by Thaddeus Stevens on the day Congress approved the text of the proposed Fourteenth Amendment. Stevens had hoped for a text more favorable to the interests of the freedmen and other immigrants, but endorsed the text eventually ratified.³⁵² “[L]et us no longer delay,” he said, “take what we can get now and hope for better things in further legislation; in enabling acts or other provisions.”³⁵³ Stevens seemed to have believed that in “enabling acts” the meaning of the text of the Amendment might be clarified.

The proposed bill addressed the jurisdiction of the United States in a manner more precise and comprehensive than any act or amendment up to that time. It provided first that, for its purposes, “the words ‘domicile’ and ‘reside’ are to be construed as implying a fixed residence at a particular place, with direct or presumptive proof of an intent to remain indefinitely.”³⁵⁴ It then addressed a limitation on citizenship by birth,³⁵⁵ which appears to have been a partial repudiation of the *jus soli*. It provided as follows:

349. *Id.* at 2491 (Mar. 26, 1874).

350. *Id.* at 3308 (Apr. 23, 1874).

351. *See id.* at 3279 (Apr. 22, 1874).

352. CONG. GLOBE, 39TH CONG., 1ST SESS. 3148 (June 13, 1866).

353. *Id.*

354. *See* 2 CONG. REC., 43D CONG., 1ST SESS. 3279 (Apr. 22, 1874).

355. *Id.*

[A] child born within the United States of parents who are not citizens, and who do not reside within the United States, and who are not subject to the jurisdiction of the United States, shall not be regarded as a citizen thereof, unless such child shall reside in the United States, or unless his or her father, or in case of the death of the father his or her mother, shall be naturalized during the minority of such child, or such child shall within six months after becoming of age file in the Department of State, in such form and with such proof as shall be prescribed by the Secretary of State, a written declaration of election to become such citizen, or shall become naturalized under general laws.³⁵⁶

This bill effectively renounced U.S. jurisdiction arising from allegiance created solely by the *jus soli*. It did not merely invoke concepts, as did both the Civil Rights Act and the Fourteenth Amendment, but provided examples of outcomes, and so was clearer in meaning.³⁵⁷ To the extent this bill sheds light on the intended meaning of jurisdiction in the Amendment itself, it indicates, consistently with Justice Story's observation four decades earlier,³⁵⁸ that the jurisdictional exception to birthright citizenship was not limited to diplomatic personnel. The text clearly contemplates other parents, not permanently residing in the United States, having children born here who were not, without more, to be citizens. Representative and former Attorney General Ebenezer R. Hoar, the floor manager of the bill, described the meaning of this provision as follows:

We have incorporated into this bill corresponding provisions in regard to the inhabitants of other countries who may have children born to them here and who are not citizens of the United States, by giving that same election which we claim for our citizens abroad to citizens of foreign countries who are born in this country, and who would be entitled to the privileges of citizenship in the country of which their fathers were citizens; in giving them, instead of naturalization, if born and residing here, the power to become citizens simply on their making their election and filing it here upon arriving at majority. That extends to children of foreign parents born in this country whose parents do not become naturalized here a privilege in regard to acquiring citizenship on coming of age which they do not now enjoy.³⁵⁹

The bill further defined the reach of the "jurisdiction of the United States within the intent of the said fourteenth amendment."³⁶⁰ It provided: "the

356. *Id.*

357. *Id.* (providing, for example, that "the citizens of the United States who are, or may hereafter be, domiciled in a foreign country, may, if adults, within six months of the time of first acquiring such domicile . . . register themselves as citizens at the legation of the United States . . .").

358. STORY, *supra* note 22, at 48.

359. 2 CONG. REC., 43D CONG., 1ST SESS. 3280 (Apr. 22, 1874).

360. *Id.* at 3279.

following persons shall be regarded as not subject to the jurisdiction of the United States within the intent of the said fourteenth amendment, or as not residing within the United States within such intent, namely” six categories of expatriated former citizens.³⁶¹ The categories provided a roadmap to the various methods by which a U.S. citizen might expatriate himself or herself.

The proposed statutory categories were (1) U.S. citizens who naturalized in a foreign state,³⁶² (2) U.S. citizens who entered into the civil or armed services of a foreign state,³⁶³ (3) naturalized citizens who resumed their native citizenship according to the terms of a treaty with the native country,³⁶⁴ (4) naturalized citizens who, on returning to their native country should be convicted of a crime committed before they had arrived in the United States,³⁶⁵ (5) female citizens marrying foreigners and residing abroad,³⁶⁶ and finally, (6) naturalized citizens who should become domiciled in their native land without registering with the State Department according to a later provision of the bill.³⁶⁷ These presumptive expatriation provisions were drawn in part from the recently concluded Bancroft Treaties.³⁶⁸

There was more to the bill than the effort to conform domestic law expressly to the obligations undertaken in the Treaties. Another purpose of both the citizenship and the expatriation language was to avoid creating a class of persons entitled to the protections afforded to citizens, but who were, for all practical purposes, foreigners. The floor manager stated:

But we do not desire to encourage or foster a class of persons, whether native or naturalized, who acquire or inherit by birth the right of American citizenship, and renouncing all its obligations and all its duties, actually reside within and practically become citizens of foreign countries, using their right of American citizenship solely for the purpose of embarrassment to their country.³⁶⁹

The same concerns with citizenship had been expressed in the New York Times as early as 1855. The editors lamented the possibility that

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. 2 CONG. REC., 43D CONG., 1ST SESS. 3279 (Apr. 22, 1874).

366. *Id.* These women might resume their U.S. citizenship by registration after the death of the husband. *Id.* at 3281. The language concerning residence abroad was added to the original text after the bill was printed for debate but before debate took place. *Id.*

367. *Id.*

368. Bancroft Treaties, *supra* note 20. The presumptive expatriation provisions would probably not survive constitutional scrutiny today. *See Afroyim v. Rusk*, 387 U.S. 253, 254–68 (1967) (voiding statutory involuntary expatriation provisions).

369. 2 CONG. REC., 43RD CONG., 1ST SESS. 3280 (Apr. 22, 1874).

[T]here might, in process of time, exist a class of persons abroad who, although in every sense of the word foreigners, would still be deemed Americans by the law – a state of things which would be quite adverse to the policy of all Governments, and peculiarly offensive in the present state of feeling in our country.³⁷⁰

The theme of H.R. 2199 was the continuing connection between citizen and country. It was intended to define jurisdiction in a manner that both demanded and protected that connection.³⁷¹ Persons born here of non-citizen parents could become citizens by the quick and simple act of filing papers upon reaching the age of majority, if their parents had not first naturalized, and if they, the children, had continued to live within the U.S. They did not need to go through the longer process of naturalization. Naturalized citizens who moved permanently back to their native country would be deemed expatriated unless they took the similar step of filing papers.

Opposition to the bill was principally focused not on the provisions that conferred citizenship, but on the provisions that withdrew it.³⁷² Representative Samuel S. Cox gave a frantic speech claiming that the presumptive expatriation provisions of the bill were part of a conspiracy by the newly united German states to stanch German emigration to the United States.³⁷³ He also objected to the provision that required a naturalized citizen residing in his or her native country to register with the State Department every two years.³⁷⁴ He characterized as a penalty what was in fact a presumption of expatriation upon failure to register.³⁷⁵ He suggested, in a frantic tirade on the House floor, that if Congress could so require, it could also require any of a catalogue of horrors that he deplored.³⁷⁶ Representative Hoar rejected Cox's "ecstasies" and embraced the bill as a harmless tool for "distinguishing whom [the State Department] are to protect as their citizens abroad."³⁷⁷

The next day, Representative Wood objected to the automatic expatriation provisions in a more measured fashion.³⁷⁸ The bill did not pass. Its disappearance from the Congressional debates appears to have been based upon the objections raised to the automatic expatriation provisions.³⁷⁹ The force of the conclusions that may reasonably be drawn from this bill must also

370. *Rights of Americans Born Abroad*, N.Y. DAILY TIMES, March 14, 1855, at 4.

371. *Id.*

372. See 2 CONG. REC., 43D CONG., 1ST SESS. 3282-85 (Apr. 22, 1874); see also *id.* at 3309-10 (Apr. 23, 1874).

373. See *id.* at 3283-84.

374. *Id.* at 3283.

375. *Id.* at 3282-83.

376. *Id.* at 3283-85.

377. *Id.* at 3285.

378. 2 CONG. REC., 43RD CONG., 1ST SESS. 3309-10 (Apr. 23, 1874).

379. *Id.* at 3282-85 (Apr. 22, 1874); see also *id.* at 3309-10.

reflect the fact that it was proposed eight years after the Fourteenth Amendment was sent to the states. While it reflects concerns that appeared throughout the historical record both before and after the Act and Amendment passed through Congress, its late date and rejection by that body counsel care in its use. Nevertheless, in my view it adds to the weight of the evidence favoring the conclusions offered herein.

VI. CONCLUSION

Nineteenth century citizenship and subjecthood cannot be understood without a grasp of the concept of allegiance. Allegiance was the link between subject and sovereign that created the obligations of each to the other. The idea that one person could owe allegiance to more than one sovereign in that period was conceptually anomalous and logistically unwieldy. The competing claims could not comfortably co-exist. A citizen or subject could owe allegiance to only one sovereign.

The jurisdiction over persons mentioned in the Fourteenth Amendment can only have arisen from the allegiance owed by that person to his or her sovereign, or from that person's presence in the territory of the sovereign claiming to exercise the jurisdiction. Jurisdiction in that century arose only from those sources. Yet the jurisdiction arising from allegiance, on the one hand, and territorial jurisdiction, on the other, overlapped and clashed throughout the nineteenth century, causing significant international friction, including the War of 1812 and numerous, less violent confrontations.

Territorial jurisdiction is well enough understood that it needs little explanation. It has changed little, from the standpoint of international law, since that period. The jurisdiction arising from allegiance is less well known to observers today. It was an artifact of the relationship between the subject and the subject's original sovereign. It followed the itinerant subject into the territories of foreign sovereigns. It was vastly more important and more intrusive into the authority of territorial sovereigns during the nineteenth century than is generally recognized today.

This put American law on a collision course with the laws of Great Britain and many of the Western European states in the nineteenth century, once leading to war and once nearly so. International law had not yet evolved to accommodate and defuse this conflict. Change was in the air, however, in the U.S. and in Europe. Diplomats and legislators explored ways to avoid such conflicts by resolving overlapping claims to allegiance asserted by different sovereigns. Congress and the Executive did so immediately after the Fourteenth Amendment was sent to the states, when the U.S. and several European partners negotiated and finally entered into the Bancroft Treaties. At that same time, Congress re-enacted the Civil Rights Act of 1866, word for word, in the Enforcement Act of 1870, confirming that the citizenship clauses of the two measures carried the same meaning.

With the historical trend leading toward these conflict-avoidance measures, Congress debated the Act and the Amendment, each including language intended to settle the question of citizenship, in 1866. Unfortunately, the debates do not reveal any unambiguous meaning intended to be captured in the language under consideration. In fact, the debates lapsed into incoherence because one group of legislators discussed the word 'jurisdiction' in the proposed amendment as if it meant the jurisdiction arising from allegiance. That suggests that they intended to exclude from birthright citizenship the children of aliens, of persons who owed allegiance to some other sovereign at the time of the child's birth in the United States. Their opponents discussed the proposed Amendment as if the word 'jurisdiction' meant only territorial jurisdiction. That meant, in context, that anyone born within the United States would be a citizen by birthright, with only the most trivial exceptions. They seemed to speak past one another, as discussed herein, and so failed to leave a clear record for their posterity. Aside from that confusion, the record is further obscured by remarks made, perhaps carelessly, by Senator Lyman Trumbull on the floor of the Senate and in a letter to President Johnson. Even taking those comments into account, the combined force of the statutory and constitutional language itself, together with the little sense that can be made of the debates, and the broader historical context, favor that conclusion.

Avoidance of conflict with foreign nations over the allegiance of particular persons was an important goal of American policy. It was the express purpose of legislation proposed after the ratification of the Fourteenth Amendment, and based upon it. That is a fact, and is apparent from the historical context within which these measures were embedded. The interpretation advanced as most likely herein would have reduced the possibility of international conflict of that type. The Bancroft Treaties, negotiated as the Fourteenth Amendment was being ratified, and themselves ratified afterward, were expressly intended to accomplish this purpose as well. Debates over the post-ratification legislation shed some light on the purpose of the citizenship measures adopted in 1866, but only some of the post-ratification bills actually became law, and so the weight of the evidence present in those debates must be calculated with care.

Today's debate over the extent to which citizenship by birthright was intended to be limited by the language of the Civil Rights Act and Fourteenth Amendment has descended into a contest of competing certainties, described in detail herein. Each side claims the unambiguous support of what it claims to be a clear historical record. To that extent, both positions are seriously mistaken. The historical record of the Congressional debates, and the historical context preceding those debates, are rife with contradiction and uncertainty. The conclusions that can be drawn from the relevant history must be recognized as based not on the certainty of the record, but on a process of assessing and balancing the contradictions therein. The best we can do is to weigh the competing bodies of evidence and assess their relative weight.

Even taking into account all of the sources of confusion, in my judgment, the weight of the historical record still favors the understanding that both the Act and Amendment were intended by the majority that enacted them to limit citizenship by birthright to children born here of parents who owed undivided allegiance to the United States. This conclusion may seem anomalous, unhelpful, or too extreme in the context of the current debate. So be it. The past did not exist for our convenience, or as the prologue to a present imagined as inevitable. Children born here of parents who, at the time of the birth, remained citizens or subjects of another sovereign, would not have been citizens by birthright. They would have different paths to citizenship. No one was stateless; no one was required to leave in 1866 or 1868. The weight of the evidence favors that understanding, but the evidence is not monolithic or unanimous. Caution and further research are appropriate.

