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Article

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The Trump administration's birthright citizenship order: blatantly unconstitutional – or not ?

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Abstract

The second Trump administration has sought through the use of executive orders to fashion significant changes to federal government policies in many areas. While many of those Orders raise no significant constitutional issues, some appear to overstep long-recognised constitutional boundaries. Perhaps the most contentious of the Orders is the Trump administration's attempt to alter understandings of the so-called 'birthright citizenship' clause of the Fourteenth Amendment. The Order has widely been regarded as what one federal judge termed 'blatantly unconstitutional'. This paper suggests that characterisation is overly simplistic, and that a close reading of the (very little) Supreme Court authority on the point would suggest that the current Supreme Court could credibly construe the citizenship clause in a fashion which gives the Trump administration much of the policy outcome which it is seeking, albeit not through the interpretive methodology that one would expect the Court's conservative majority would instinctively wish to use.

Keywords

United States, constitution, birthright citizenship, Fourteenth Amendment, originalism

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Introduction [A heading]

Future historians may struggle when looking back at the second Trump Presidency of the United States to agree on which of his administration's many and varied assaults on constitutional law orthodoxies should be regarded as the most egregious in doctrinal terms. This article considers the merits of what at first glance is an obvious contender for that dubious honour; a presidential Order issued from the White House on 20 January 20025.

There is nothing per se problematic constitutionally about Presidents issuing 'Orders' to federal employees. That is presumptively an element of "the executive power" vested in the President by Article II Section 1 of the Constitution. The live question is whether the powers which an Order purports to discharge are found to be found either in the Constitution directly or in legislation enacted by Congress within the limits of its lawmaking authority. The best starting point for that evaluation in respect of the Birthright Citizenship Order is part of the text of the Order itself:

PROTECTING THE MEANING AND VALUE OF AMERICAN CITIZENSHIP

The White House
January 20, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. The privilege of United States citizenship is a priceless and profound gift. The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." That provision rightly repudiated the Supreme Court of the United States's shameful decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which misinterpreted the Constitution as permanently excluding people of African descent from eligibility for United States citizenship solely based on their race.

But the Fourteenth Amendment has never been interpreted to extend citizenship universally to everyone born within the United States. The Fourteenth Amendment has always excluded from birthright citizenship persons who were born in the United States but not "subject to the jurisdiction thereof." Consistent with this understanding, the Congress has further specified through legislation that "a person born in the United States, and subject to the jurisdiction thereof" is a national and citizen of the United States at birth, 8 U.S.C. 1401, generally mirroring the Fourteenth Amendment's text.

Among the categories of individuals born in the United States and not subject to the jurisdiction thereof, the privilege of United States citizenship does not automatically extend to persons born in the United States: (1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth….

The Order's presumption in Sec. 1 that citizenship is a 'privilege' and/or a 'gift' as opposed to a right might have prompted even Antonin Scalia to raise a doctrinal eyebrow, but the central concern is of course whether the Order is consistent with the provisions of section 1

of the Fourteenth Amendment to the Constitution, an amendment adopted in 1868 in the aftermath of the Civil War:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A flurry of first instance litigation on the legality of the Order prompted a blunt response from one Federal District judge to the effect that it was "blatantly unconstitutional",[2] and by early April 2024 several federal district courts had issued interim injunctive orders preventing its implementation. If, however, we are to are to take the meaning of the Constitution's text as something settled by the ratio of United States Supreme Court decisions, that 'blatantly unconstitutional' characterisation of the Order is at best simplistic, and quite plausibly just plain wrong. There is very little Supreme Court authority on the point; such authority as there is cast in terms which would accommodate much of the policy concern (ostensibly) underlying Trump's Order; and that authority might – in accordance with quite orthodox techniques of construction – be regarded as of minimal relevance in the contemporary context.

The text of the Constitution in its pre-Civil War amendments form treats the question of citizenship by birth rather obliquely. There is no simple assertion for example that any person born in any specified place (be it continental North America per se, or any former British colony on the continent, or any of the areas comprised within the original 13 States) should be regarded as a citizen. Article II section 5 imposes citizenship constraints on the office of President; its occupant had to be a 'natural born Citizen or a Citizen of the United States, at the time of the Adoption of this Constitution', but sheds no light on who was eligible to be an 'at the time of Adoption' citizen. Article I section 3 imposes a 'nine years a Citizen of the United States' eligibility requirement for membership of the Senate; a member of the House had to be per Article 1 Section 2 a citizen for at least seven years.[3] The route to citizenship through

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[2] *State of Washington et al v Donald Trump et al* Case No. C-25-0127-JCC, https://www.wawd.uscourts.gov/sites/wawd/files/TRO%2025cv127.pdf. The judge concerned being John Coughenor, appointed to the federal bench by Ronald Reagan in the 1980s; see Birthright citizenship: Judge blocks Trump's 'blatantly unconstitutional' executive order | CNN Politics. Similar interim orders were promptly issued by federal courts in Maryland (*CASA, Inc v Trump* No. 25-cv-00201, 2025 WL 408636; https://clearinghouse.net/doc/155439/; Judge blocks Trump's bid to restrict birthright citizenship - BBC News; New Hampshire (*New Hampshire Indonesian Community Support v Trump*; No. 25-cv00038, 2025 WL 457609, D, NH; *https://clearinghouse.net/doc/155306/* Federal Court Blocks Trump Birthright Citizenship Executive Order | American Civil Liberties; Union); and Massachussets (*Doe v Trump, State of New Jersey et al v Trump et al* No. 25-cv-10135, 25-cv-10139, 2025 WL 485070, D. Mass; https://clearinghouse.net/doc/155644/ Massachusetts federal judge blocks Trump order to end birthright citizenship | Courthouse News Service).

[3] There was no concept of national citizenship under the Articles of Confederation, which functioned as the first 'Constitution' of the United States from 1781 to 1787. The term 'citizen' appears only once in the text of that instrument, and that in reference to State citizenship (in Article IV).

naturalisation was however clearly identified. Article I section 8.4 granted that power without any express restrictions or qualifications to Congress.

Much mass media commentary in respect of the birthright Order – and the initial judgments of the lower federal courts on its constitutionality - has referred to an 1898 United States Supreme Court judgment, *Wong Kim Ark v United States.*[4] In *Ark,* the Supreme Court accepted that a child born in San Francisco to Chinese national parents was entitled to birthright citizenship. It has therefore been suggested that this decision makes it clear that the Order is not consistent with the Fourteenth Amendment, such that the current Supreme Court bench would have to overrule *Wong Kim Ark* if the Order is to have any, still less full, legal effect. This paper suggests that a careful reading of *Wong Kim Ark* indicates that the judgment falls some way (and perhaps some considerable way) short of providing an effective rebuttal to the Order in respect of many (and perhaps even all) of the children who prima facie fall within the Order's scope.

That cautionary note is rooted in a methodological principle, and a very (small c) conservative methodological principle, set out by Chief Justice John Marshall as a long ago as 1821, in the seminal case of *Cohens v Virginia*:

> It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.[5]

That proposition can be expressed in more prosaic terms. If the question answered by a court in *Case A* is materially different from the question being addressed by the court in *Case B*, then the reasoning which underpinned the court's answer in *Case A* is at best of persuasive rather than determinative authority in respect of the answer to be produced in *Case B*.

The *Wong Kim Ark* judgment(s) [A heading]

Mr Ark's status was that of the American born child (in 1873) of parents who were Chinese nationals, themselves born in China. When Mr Ark was born, his parents had been – legally under the immigration law regimes then in force[6] – domiciled for many years in the United States, where they ran a successful import and export business until 1890, when they returned to China. Mr Ark remained domiciled in San Franciso. The parents had never sought to become naturalised United States citizens. For them to have done so would likely at that time have

[4] 169 US 649 (1898). See for example How a young Chinatown cook helped establish birthright citizenship in the US | US news | The Guardian: Wong Kim Ark's legacy rekindled amid birthright citizenship threat - Axios San Francisco: This Man Won Birthright Citizenship for All - The New York Times.

[5] 19 US 264, 399-400 (1821).

[6] 'Not illegally' might be a better descriptor, as there was no significant body of federal law on the point in the mid-late nineteenth century when Mr and Mrs Ark arrived in the United States.

amounted to a serious crime under Chinese law;[7] and naturalisation was also then expressly forbidden by a treaty between China and the USA which made various provisions for each country's nationals to enter and remain in the other country's territory.[8]

Mr Ark had unproblematically travelled to China and returned to the United States when he was 18. When he repeated that trip a few years later he was denied entry when he arrived back in San Francisco. The basis for the denial was that Mr Ark was a Chinese national, and that such persons were not entitled to enter the United States unless they fell within the particular categories of exempted persons in what were 'popularly' known as the Chinese Exclusion Acts, legislation which Congress had first enacted in 1882, and which prohibited any further immigration of Chinese nationals into the United States unless the individuals concerned had been certificated by the Chinese government as eligible to do so in accordance with the treaty arrangements.[9] The Act in effect privatised its enforcement, by making it a crime for a master of a ship to allow any 'Chinese' passenger who did not have the relevant certificate of entry required by the Act to disembark into the United States. Mr Ark was detained by the master of his ship when it docked in San Francisco, because he did not have such a certificate, whereupon he brought habeas corpus proceedings before a federal district court in California n January 1896.[10]

The first instance judgment in Wong Kim Ark and the 'authorities' on which it relied [B heading]

The issue before the court at first instance was cast in narrow terms:

> The question to be determined is whether a person born within the United States, whose father and mother were both persons of Chinese descent, and subjects of the emperor of China, but at the time of the birth were both domiciled residents of the United States, is a citizen, within the meaning of that part of the fourteenth amendment which provides that;
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.[11]

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[7] The relevant Chinese laws – to the best of then contemporary American knowledge - are reproduced at the end of the judgment; 169 US 649, 732. The sanction would presumably have been regarded as cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution in an American context:

> All persons renouncing their country or allegiance, or devising the means thereof, shall be beheaded, and in the punishment of this offence no distinction shall be made between principals and accessories. The property of all such criminals shall be confiscated, and their wives and children distributed as slaves to the great officers of State….

[8] The Treaty is generally known as the Angell Treaty. It was signed in November 1880. The text is at STATUTE-22-Pg826.pdf.

[9] The text of the Act and an explanation of its origins and effect is readily found at Chinese Exclusion Act (1882) | National Archives..

[10] *In re Wong Kim Ark* 71 F. 382 (ND Cal. 1896).

[11] Ibid, 383.

The trial proceeded before Morrow J on the basis of agreed facts, the two most important being that Mr Ark had indeed been born in the USA and that his parents had always been Chinese nationals. The court was offered two distinct approaches to finding the meaning of the 'subject to the jurisdiction thereof'. The first, for Mr Ark, was that the term should be construed as giving effect to the common law principles informing English (and subsequently British) law. The second, for the federal government, was that the proviso gave effect to international law understandings.

Simply put, the common law position was that place of birth bestowed citizenship, subject to a (very small) set of exceptions, themselves long recognised at English common law, which exceptions were comprehended within the 'and subject to the jurisdiction thereof' caveat. Those exceptions were limited to children born in the United States to parents who were citizens or subjects of another country and who were present in the United States while in the service of that other country; children of nationals of another State which was forcibly occupying United States territory; and children born on ships which although in United States territorial waters sailed under another nation's flag. The exclusions derive from a negative or exclusionary reading of 'jurisdiction': the positive flip side of the term equates 'jurisdiction' with being subject to the laws (civil and criminal) of the United States. On this analysis there was no need for (either of) the child's parents to be United States citizens, nor for (either of) them to be domiciled or employed in the United States nor to have been there for a minimum period of time, nor even for them to have entered the United States lawfully.

In equally simple terms, the international law understanding maintained that 'and subject to the jurisdiction thereof' was intended to embrace the principle – accepted by many European nations – that that a child's citizenship descended from his/her father,[12] with the result if the child's father was not a United States citizen at the time of her birth, then the mere fact of her birth being within the United States did not bestow citizenship upon her.[13] On this view, 'jurisdiction' did not mean merely that a person was subject to the laws of the United States, but that her political allegiance was also to the United States, which could not be the case if she had automatically been endowed by the laws of her father's nation with her father's citizenship.

Morrow J expressed a clear preference as a matter of policy for the federal government's position:

> The doctrine of the law of nations, that the child follows the nationality of the parents, and that citizenship does not depend upon mere accidental place of birth, is undoubtedly more logical, reasonable,

[12] Patriarchal descent outweighed matrilinear descent. The mother's citizenship became relevant in this view only if the father was dead or the child was illegitimate.

[13] The judgment suggests that the latter view was a recent arrival on the constitutional law landscape, planted and nurtured there by a San Francisco based lawyer called George D. Collins in several articles in the *American Law Review*: "Mr. Collins' position upon this question has been known for some time, and his views have been expressed in able and interesting articles in the American Law Review. 18 Am.Law Rev. 831; 29 Am.Law Rev. 385"; (71 F.382, 384). Collins' engagement with the question was evidently so intense that he sought and was allowed to appear as an amicus at the hearing. If a somewhat sensationally presented internet source is to be believed, Mr Collins' ingenuity as a legal scholar was at least matched by his ingenuity as a spouse and parent; see George D. Collins, the Brilliant Attorney who Committed Bigamy and Perjury, 1905 - HistoricalCrimeDetective.com

> and satisfactory, but this consideration will not justify this court in declaring it to be the law against controlling judicial authority.[14]

However, his decision in *Ark* was in a methodological sense – at least prima facie - a very (small c) conservative one. It did not engage with any grand theoretical ideas as to the proper interpretive theory to be applied to the Amendment, nor did it embark upon any detailed journey into the history of the Amendment's text and passage. In essence, Morrow J simply asked himself if there was any judicial authority as to the meaning of the first section of the Amendment, and if so whether that authority was binding upon him.

Authority in support of the common law position [C heading]

The court was taken by Mr Ark's counsel to several lower federal court judgments, dealing with factual scenarios on all fours with Mr Ark's claim, which counsel claimed offered clear support for the proposition that the Fourteenth Amendment had constitutionalised the common law position. The two which seemed most significant to Morrow J were *In re Look Tin Sing*[15]*,* an 1884 decision of a four judge Circuit Court bench, and *Gee Fook Sing v United States,*[16] an 1892 decision by the Court of Appeals, Ninth Circuit.

The decision in *Look Tin Sing* was written by Justice Field, who had been sitting on the United States Supreme Court since 1863;[17] (this being an era when Supreme Court justices still went out on circuit). The case's background facts are certainly on all fours with those in *Ark*. The judgment itself might charitably be described as rather skimpy.

Justice Field asserted at the outset of his judgment – albeit not in terms – that the common law perspective was correct. Place of birth per se presumptively created citizenship, subject only to narrow exceptions embraced in the 'jurisdiction' caveat. Those exceptions were the children of foreign nationals[18] present in the United States in the service of their government, children born in United States territorial waters but on foreign flagged vessels and – this a new point – persons who had renounced their United States citizenship to become nationals of another country.

Justice Field did not engage in any detailed analysis of the passage of the Fourteenth Amendment to sustain this conclusion, but simply stated that the Amendment had two purposes:

> The clause as to citizenship was inserted in the amendment not merely as *an authoritative declaration of the generally recognized law of the country*, so far as the white race is concerned, but also to overrule the doctrine of the Dred Scott Case, affirming that persons of the African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States, nor capable of becoming such.[19]

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[14] 71. F. 382, 392.

[15] 21 F. 905 (D. Cal 1884).

[16] 49 F. 146 (9th Cir. 1892).

[17] Field, a Californian, was a Lincoln appointee. He was then Chief Justice of the California Supreme Court, having previously run a political career as a Democrat, albeit one who was a staunch supporter of the Union in the civil war.

[18] Justice Field was presumably referring only to fathers here, but he does not take the point expressly.

[19] 21 F. (905), 909.

That *Dred* Scott was the primary target of the Amendment cannot credibly be contested. But it was the second presumed purpose, highlighted above in italic text, which was determinative of the issue raised in this case.

The 'generally recognised law' on the point was apparently that:

> [I]t has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship.

Justice Field invoked two authorities – which could at best have persuasive force – to support this assertion.

Lynch v Clarke[20] was an 1844 first instance decision in the New York Court of Chancery, in which the issue of citizenship would be determinative of a dispute over the inheritance of property. Justice Field is certainly correct in asserting that the *Lynch* court "elaborately considered"[21] the citizenship question, but his adoption of a State trial court's conclusion without giving the matter independent analysis betokens a distinct lack of jurisdictional rigour. The same criticism might be levelled at Justice Field's second source of (to him highly) persuasive authority. This was taken from a passage in Chancellor Kent's *Commentaries* which identified various other narrow exceptions (Field noted children born to members of an occupying foreign army occupying American territory and indigenous American Indians) to a presumptive common law inspired norm.[22]

Morrow J was not disposed to interrogate the adequacy of Justice Field's reasoning, concluding simply – and defensibly - that the ratio of *Look Tin Sing* was clear and binding upon him. His treatment of his second authority was more problematic.

Given the institutional hierarchy of the federal court system, a Circuit Court of Appeals judgment would be binding on a District Court hearing a matter on undistinguishable facts. Morrow J was persuaded in *Ark* that *Gee Fook Sing* was such a case. However, that conclusion is patently not correct.

Like Mr Ark, Gee Fook Sing had brought habeas corpus proceedings to establish that his detention by a ship's master on arrival in San Franciso per the 1882 Act was unlawful. The court, in a very brief judgment, rejected the claim on the simple basis that Mr Sing could not offer the court any credible evidence that he had actually been born in the United States. The

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[20] 1 Sand. Ch. 583, 1844 N.Y. Misc. LEXIS 87, 3 N.Y. Leg. Obs. 236. The judgment is most easily found at Lynch v. Clarke - Case Law.

[21] 71 F. 905, 909. The *Lynch* judge was Lewis Sandford. His analysis in *Lynch* rested on a detailed study of English common law, pre-and post-revolutionary judgments in colonial and State and federal courts, and both American and English academic treatises. Sandford proceeded on the basis that there could be no doubt as to the position in English law. The question to be answered was to what extent American law had adopted the English position. The answer that Sandford J arrived at was in essence 'fully'.

[22] Ibid, fn 3. Kent initially wrote his *Commentaries* in the 1790s, after a long term pre- and post-revolutionary career on the New York bench and while a professor at Columbia. The multi-volume work was widely regarded by lawyers and widely invoked in court as an authoritative exposition of may aspect of United States law; see generally John Langbein, 'Chancellor Kent and the History of Legal Literature' (1993) 93 Columbia Law Review 547.

only aspect of the judgment which can properly be taken as its ratio is the Court's conclusion that any person claiming to have acquired citizenship by virtue of the Fourteenth Amendment was entitled to a "hearing and judicial determination" of that assertion. The judgment does not contain any analysis of the substantive question being considered in *Ark*. It does not quote from, discuss or even cite Justice Field's opinion in *Look Tin Sing*. It does not engage in any fashion with the common law or international law analyses of the citizenship issue. It offers no view whatsoever on the crucial issue of what 'subject to the jurisdiction thereof might mean'.

Morrow J – with an 'impressive' leap of his judicial imagination – nonetheless treated that case as authoritative:

> The authority of In re Look Tin Sing is not referred to by the court, nor, in fact, are any authorities cited, or a discussion of the question indulged in; but it is safe to assume that Mr. Justice Field's decision was considered and followed.[23]

Why it was 'safe' to do so is not explained.

Authority in support of the international law position [C heading]

Counsel for the federal government in *Ark* was unable to furnish the court with a single district or appeals court judgment which had accepted the international law position on facts identical or even similar to those arising in Mr Ark's case. Morrow J did accept that passages could be found in two United States Supreme Court judgments which ostensibly offered some support for the federal government's position. The first of those was the *Slaughterhouse Cases*[24] in 1872; the second was *Elk v Wilkins*[25] from 1884.

The single sentence from *Slaughterhouse* relied on by counsel for the federal government in *Ark* came from Justice Miller's opinion: "The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, *and citizens or subjects of foreign states born within the United States*."[26] The passage taken from *Elk* for this purpose was a distinctly more ambiguous part of Justice Gray's judgment for the Court on the meaning of the Fourteenth Amendment:

> This section contemplates two sources of citizenship, and two sources only, birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely subject to their political jurisdiction, and owing them direct and immediate allegiance*.[27]

The argument developed for the federal government from this passage was in essence that Mr Ark had acquired Chinese citizenship by descent, and so – while subject to the laws of the United States – did not owe 'allegiance' to it. The argument really amounts to no more than

[23] 71 F. 382, 388.
[24] 83 US 36 (1872).
[25] 112 US 94 (1884).
[26] 83 US 36, 73-74; emphasis added.
[27] 112 US 94, 101-102; emphasis added.

an assertion that 'jurisdiction' connotes an acceptance of the international law perception of citizenship. However, that passage then ends in a comment which seemed most unhelpful to the federal government's case:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.'

Morrow J was evidently impressed by the skill with which government counsel pressed these arguments. But he was not persuaded that either judgment had any binding force in the instant case. Neither was dealing with factual situations comparable to those arising in *Ark*. The *Slaughterhouse Cases* concerned the constitutional defensibility of the award of a butchery monopoly in New Orleans by Louisiana state authorities: *Elk* dealt with the question of voting rights of indigenous Americans:

> Arriving at the conclusion, as I do, after careful investigation and much consideration, that the supreme court has as yet announced no doctrine at variance with that contained in the Look Tin Sing decision and the other cases alluded to, I am constrained to follow the authority and law enunciated in this circuit.[28]

Wong Kim Ark **in the United States Supreme Court** [A heading]

As noted above, the question which Morrow J had decided had been cast quite narrowly. The question put to the Supreme Court on appeal was framed in still more restrictive terms. Five restrictions are visible in the Court's formulation:

> The question presented by the record is whether a child born in the United States, of parents of [1] Chinese descent, who, at the time of his birth, are [2] subjects of the Emperor of China, but [3] have a permanent domicil and residence in the United States, and [4] are there carrying on business, and [5] are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States by virtue of the first clause of the Fourteenth Amendment of the Constitution.[29]-

By a 6-2 majority, the Court held that the answer to that question was 'Yes'. As suggested below, the reasoning which the majority deployed to resolve the case in Mr Ark's favour can credibly be seen as applicable to 'persons' whose parents' circumstances at the time of their birth did not meet all the criteria satisfied by Mr Ark's mother and father. But that is not strictly speaking what the Court decided. Both the majority and the dissenters decided the case on the basis of an originalist methodology. They reached different conclusions because they formed different views on what the empirical content of that original meaning actually was: for the majority it was found in English common law; for the dissenters it lay in international law. 'Originalism' is used here to embrace two sub-types of originalist interpretation. The first

[28] 71 F. 382, 392. Morrow J's opinion is a nice illustration of the (unacknowledged by Morrow J himself) of Marshall's caveat in *Cohens v Virginia*; fn. 5 above.
[29] 169 US 649, 653; my numbers added.

is essentially textual in nature, and is concerned with identifying the prevailing meaning that particular words would have borne at the time the Fourteen Amendment was passed. The second focuses on the particular policy objectives espoused by the politicians who promoted and discussed the adopted text.[30]

The majority judgments [B heading]

The majority opinion was written by Justice Gray.[31] Gray appeared to accept at the outset of his opinion that the meaning of the Fourteenth Amendment was to found in common law principles, whereupon he engaged in the type of 'elaborate consideration' that Justice Field had attributed to the New York State court in *Lynch*.

The structure and narrative of Gray's judgment is erratic, but his methodology is tolerably clear. He began by offering a view as to the substance of English law prior to the revolution, and continued by considering what authority there was to clarify the extent to which those English law principles had been adopted in the United States. His search for authority alighted variously on federal and State judicial decisions, on academic commentaries, on federal government policy and on the legislative history of citizenship laws generally and of the Fourteenth Amendment in particular.

After reviewing English authorities (variously judicial, legislative and academic)[32] supporting the proposition that birth presumptively conferred citizenship subject to some very narrowly

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[30] For an elaboration of the point in both a general sense and in relation specifically to the birth citizenship question see Michael Ramsey, 'Originalism and Birthright Citizenship' (2020) 109 Georgetown Law Journal 405, especially 408-410.

[31] Gray was appointed to the Court in 1881 from a seat on the Massachusetts Supreme Court. He was a Bostonian, a graduate of Harvard, who had built a substantial reputation as a legal historian, especially on racial matters.

[32] These included *Calvin's Case* 7 Coke Rep, 1a (1608); 77 ER 377 *Udny v Udny* (1869) L.R. 1 H.L Sc. 441. (On the significance of *Calvin's Case* in the United States citizenship context see especially Polly Price, 'Natural Law and Birthright Citizenship in Calvins' Case' (1997) 9 Yale Journal of Law and the Humanities 73. Among recent treatments of the 'British' content of the case the most informative is perhaps Keechang Kim, "Calvins's Case (1608) and the Law of Aliens' (1996) 17 Journal of Legal History 155). The legislative history was traced as far back as 1343 and 1350, when Parliament enacted statutes to confirm that children born overseas whose parents were English subjects were themselves English nationals. The inference drawn from that Act and other naturalisation statutes relating to overseas birth was that no statutory intervention was required in respect of children born in England (or its overseas dominions) as their English nationality derived from the common law. Among the academic commentators referred to, Professor A.V. Dicey was taken as a leading authority, the Court quoting verbatim two passages from his Conflict of Laws:

> '*Natural-born British subject' means a British subject who has become a British subject at the moment of his birth.' 'Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject.* This rule contains the leading principle of English law on the subject of British nationality."
>
> The exceptions afterwards mentioned by Mr. Dicey are only these two:

defined exceptions and irrespective of whether a child of a foreign national would also derive citizenship of that other State through descent, Gray turned to a series of federal and State court judgments which had accepted that principle as conclusive in the post-revolutionary American context.

Among the United States Supreme Court judgments which he invoked to support that contention were three decisions of the Marshall Court, spanning a 30 year period, *Murray v The Charming Betsy*[33] from 1804 and *Inglis v Trustees of Sailor's Snug Harbour*[34] and *Shanks v Dupont*[35] from 1833. None of these authorities were concerned directly with the question of birthright citizenship, so the passages within them to which Justice Gray referred could at best be seen as obiter comment in relation to underlying or contextual assumptions. The one Supreme Court authority where the question of citizenship by birth was squarely addressed – albeit only in relation to people who were the descendants of slaves - was *Dred Scott v Sandford.*[36] Justice Gray's treatment of *Dred Scott* was certainly a little selective:

> In *Dred Scott v. Sandford,* (1857) 19 How. 393, Mr. Justice Curtis said: "The first section of the second article of the Constitution uses the language, 'a natural-born citizen.' It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth." 19 How. 60 U. S. 576. And, to this extent, no different opinion was expressed or intimated by any of the other judges.[37]

Curtis was among the dissenters in *Dred Scott,* being one of the judges who accepted as a matter of historical accuracy that some descendants of slaves had been regarded – in the northern colonies/States – as citizens in the revolutionary era. The 'majority' in *Dred Scott* manifestly did hold a 'different opinion' on that specific question; albeit that one might credibly attribute agreement on their part to Curtis' sentiment in respect of white people.

The clearest federal judicial statement to the effect that the United States Constitution implicitly adopted the English common law rule was taken from the opinion of a Supreme Court judge – Noah Swayne[38] - sitting on circuit, in litigation addressing inter alia the question of whether a former slave was a citizen of the United States and her State of residence under the terms of the Civil Rights Act 1866:

> "1. Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien."
> "2. Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the Crown by the Sovereign of a foreign State is (though born within the British dominions) an alien."….
> The acquisition," says Mr. Dicey, (p. 741) "of nationality by descent is foreign to the principles of the common law, and is based wholly upon statutory enactments;" 169 US 649,657-8, 670; (original emphasis).

[33] 6 US 64 (1804).
[34] 28 US 99 (1830).
[35] 28 US (3 Pet) 342 (1830).
[36] 169 US 649, 662.
[37] Ibid, 662.
[38] Swayne was a Lincoln appointee to the Court.

> In *United States v. Rhodes* (1866), Mr. Justice Swayne… said: "All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. . . . We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution." 1 Abbott (U.S.) 28, 40, 41.[39]

Justice Gray also identified a clutch of State Court decisions which supported this principle, *Lynch v Clark* being prominent among them.[40] Justice Gray's reading – or selection if one prefers – of academic commentaries on the point led him to the same conclusion. He also invoked the assumptions of various federal government administrations during the nineteenth century which had implemented the common law principle. Among the more powerfully persuasive 'authorities' which Justice Gray invoked to sustain this conclusion was perhaps the text of various pieces of naturalisation legislation passed by Congress from the late eighteenth to mid-nineteenth century eras, all of which statutes had applied the phrase 'under the jurisdiction of the United States' to embrace foreign nationals resident in the United States for the requisite qualification period:

> From the first organization of the National Government under the Constitution, the naturalization acts of the United States, in providing for the admission of aliens to citizenship by judicial proceedings, uniformly required every applicant to have resided for a certain time "within the limits and under the jurisdiction of the United States," and thus applied the words "under the jurisdiction of the United States" to aliens residing here before they had taken an oath to support the Constitution of the United States, or had renounced allegiance to a foreign government……. And, from 1795, the provisions of those acts which granted citizenship to foreign-born children of American parents described such children as "born out of the limits and jurisdiction of the United States."….Thus, Congress, when dealing with the question of citizenship in that aspect, treated aliens residing in this country as " under the jurisdiction of the United States," and American parents residing abroad as "out of the jurisdiction of the United States.

These elements of Justice Gray's opinion are methodologically an illustration of the textualist variant of originalism adverted to above. But he also touched briefly on the policy intentions expressed by the framers of the Fourteenth Amendment during Congressional debates regarding the text which should be sent to the States for ratification, albeit that this 'evidence' bore more directly on whether ethnic Chinese children were per se excluded rather than on the meaning of 'jurisdiction':[41]

> The Fourteenth Amendment of the Constitution, as originally framed by the House of Representatives, lacked the opening sentence. When it came before the Senate in May, 1866, Mr. Howard, of Michigan, moved to amend by prefixing the sentence in its present form….
> Mr. Cowan objected upon the ground that the Mongolian race ought to be excluded, and said:

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[39] 169 US 649, 662-663.

[40] Ibid, 663-664. Massachusetts featured prominently in this list of authorities.

[41] Ibid, 697-700. Gray did not make any reference to contemporaneous press coverage of the Amendment's passage as a source of understanding then prevalent 'public' understandings of the meaning of its text or its policy objectives. That source is considered in Matthew Ing, 'Birthright Citizenship, Illegal Aliens and the Original Meaning of the Citizenship Clause' (2012) 45 Akron Law Review 719, 743-747; and points in Ings' view to a clear endorsement of the common law position.

> "Is the child of the Chinese immigrant in California a citizen? . . . I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow citizens regard them……
> Mr. Conness, of California, replied:
> "The proposition before us relates simply, in that respect, to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the Nation. I am in favor of doing so…..". Congressional Globe, 39th Congress, 1st sess. pt. 4, pp. 2890-2892.

What Justice Gray could not find in the ratification debates was any indication that the supporters of the proposed text in either House of Congress suggested that the Amendment would not apply to children born in the United States of Chinese parents.

In respect of the federal government's invocation of the above quoted passages in *Elk* and the *Slaughterhouse Cases* as authorities supporting the exclusion of children of all foreign nationals from birth citizenship, Gray took the same view as Morrow J at trial. Since Gray had also authored the Court's opinion in *Elk,* he might credibly be taken as understanding quite well how relevant that judgment was to Mr Ark's situation. The answer was: 'Not at all relevant':

> The decision in *Elk v. Wilkins* concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent not in the diplomatic service of a foreign country.[42]

As to Justice Miller's comment in *Slaughterhouse*:

> This was wholly aside from the question in judgment and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities, and that it was not formulated with the same care and exactness as if the case before the court had called for an exact definition of the phrase.[43]

The crucial next step in Justice Gray's opinion was his conclusion that the Fourteenth Amendment was 'declaratory' of this common law presumption[44], that it in essence gave an explicit textual basis to a constitutional norm that had previously existed only as a matter of inference because of the original Constitution's failure to address it in clear terms. Gray then concluded with an assertion which bundled together this 'declaratory' principle with a selection of the various types of authority which he had drawn upon in earlier parts of his judgment:

> The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law), the two classes of cases -- children born of alien enemies in hostile occupation and children of diplomatic representatives of a foreign State -- both of which, as has already been shown, by the law of England and by our own law

[42] 169 US 649, 662-663, 682.

[43] Ibid, 678. Gray quoted here Marshall's *Cohens* caveat (at fn. 5 above) to reinforce his dismissal of *Elk* and *Slaughterhouse* as helpful authorities. He did not explicitly acknowledge that the same caveat might be invoked in respect of many of the authorities on which his judgment was relying.

[44] This endorsing Justice Field's analysis in *Look Tin Sing*.

> from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country….[45]

That reasoning goes significantly beyond the ratio of the judgment, and creates very obvious difficulties for any arguments defending the constitutionality of the Order. And for that purpose, the dissenting opinions in *Ark* are of little assistance.

The dissenting judgments [C heading]

Contemporary observers might be a little surprised to find the first John Harlan as one of the two dissenters in *Wong Kim Ark. Wong Kim Ark* was handed down on 28 March 1898, just two years after *Plessy v Ferguson.*[46] Harlan had stood alone in dissent in *Plessy* against the validity of the 'separate but equal' doctrine which was by then taking hold across a swathe of southern States, much as he had stood alone a decade earlier in *The Civil Rights Cases*[47] against the Court's restrictive construction of the Thirteenth and Fourteenth Amendments as a source of Congressional authority to regulate racial discriminatory behaviour by private sector businesses. In *Wong Kim Ark*, he joined a dissent penned by Chief Justice Fuller.[48] The judgment is for several reasons distinctly feeble stuff.

The dissent seemed to be driven primarily by a concern that the position adopted by the majority would mean both that children born abroad to United States citizens were not citizens themselves and that Congress would lack authority to legislate to grant such status automatically. This concern was rooted in the presence of the word 'in' in the Amendment's text - ("All persons born or naturalized *in* the United States….) – which Fuller considered had the effect of removing Congress' power to pass naturalisation legislation which could give citizenship to children of United States citizens living abroad unless the child actually returned to the United States to be naturalised there. The premise seems quite ill-founded. The 'in' with respect of naturalisation is much more obviously understood as ensuring that a United States citizens also acquired State citizenship if she resided in a State. There is no suggestion in the majority judgment that the Fourteenth Amendment restricted Congress' naturalisation power in the way that Fuller claimed. Gray's opinion indeed states the contrary positon in express terms: "The Fourteenth Amendment…leaves the power where it was before, in Congress, to regulate naturalisation…".[49]

The second weakness in Fuller's judgment lies in the basis for his rejection of the majority's contention that the post-revolutionary United States did not adopt the English common law position that place of birth created citizenship. His argument on this point went through three stages. Firstly, English common law did not permit citizens to terminate their nationality. Secondly, American law did permit American citizens to terminate their nationality. Thirdly, therefore the United States could not have adopted the common law principle that place of

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[45] 169 US 649, 682.

[46] 163 US 537 (1896).

[47] 109 US 3 (1883).

[48] Harlan's biographer does suggest that Harlan's robust support for black Americans co-existed with a personal antipathy towards persons of Chinese ethnicity; Tinsley Yarborough, Judicial Enigma: the First Justice Harlan, (1995) 192-194. Fuller, appointed as Chief Justice in 1888, had been in the majority in *Plessy*.

[49] 169 US 649, 703.

birth bestows citizenship. While steps one and two are quite correct, step three is a complete non-sequitur.

The weakness of Fuller position here is underlined by the very skimpy basis of the 'authorities' he invoked to sustain it. What he very notably did not do was engage with the many judgments that Gray had referred to and explain either why those authorities were wrong or why they were outweighed by judgments which contradicted them. The only Supreme Court judgments to which Fuller referred were the aforementioned passage in *Elk* and *Slaughterhouse*, the relevance of which to Mr Ark's position Gray had convincingly debunked. Fuller went so far as assert that *Elk* actually resolved the question before the Court in *Ark*;[50] an assertion which is plain silly on its face and – given that the author of the *Elk* judgment was Gray - tantamount to saying that Gray's dismissal of *Elk's* relevance was the result either of idiocy or mendacity.

Having rejected the relevance of common law principle, Fuller necessarily fastened on the international law concept of citizenship by descent as the rule that had been adopted in the United States. He was unable to offer a single judicial authority to sustain that proposition, invoking instead what he seemed to acknowledge himself was an unhelpful statement in Story's Conflict of Laws,[51] an aside from Justice Miller's Lectures on Constitutional Law,[52] and a single instance of the federal government supporting it.[53]

On ratios, precedents and interpretive methodology

The most legitimate way for Trump to achieve his objectives on birthright citizenship[54] would manifestly be to propose an express amendment to the text of the Fourteenth Amendment, adding words to the effect of those suggested below:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, save that a person born in the United States after the coming into force of this Amendment shall be a citizen of the United States only if one or both

[50] 169 US 649, 724.

[51] "Persons who are born in a country are generally deemed to be citizens 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."
>
> Undoubtedly all persons born in a country are presumptively citizens thereof, but the presumption is not irrebuttable; ibid, 718.

[52] Which in essence re-stated his 'irrelevant' comment in *Slaughterhouse*; ibid, 719.

[53] Ibid.

[54] One cannot exclude the possibility that insofar as the Trump administration has a fully thought through strategy on this question, it has no wish to 'succeed' in this way, but would prefer to keep losing legal arguments in the lower courts so that it has 'radical left lunatic activist judges' against whom to rail in order to bolster support among its electoral base.

> of the person's parents, neither parent being himself or herself a citizen of the United States, had been lawfully present in the United States for a period of no less than 5 year prior to the person's birth.[55]

Given the febrile state of party politics in the United Stets at present there is no realistic prospect of sufficient political support emerging for such a proposal even to initiate the amendment process, still less to complete it.[56] The only route to that outcome is through a Supreme Court judgment. How then might that objective be achieved? The 'best' answer to that question is perhaps a surprising one.

If treated in (very) strict precedential terms, *Wong Kim Ark* does not negate (many of) the assertions made in Trump's Order. *Wong Kim Ark* does not ***hold*** that birthright citizenship extends to the children of persons unlawfully present in the United States, since such persons could not be domiciled in the United States nor be engaged in lawful employment or self-employment. Nor does the ratio of *Wong Kim Ark* reach to the children of some foreign nationals lawfully but only temporarily present in the United States. The ratio of the judgment clearly does embrace lawful immigrants whose permission to be present in the United States permits them to establish a domicile and to be employed or self-employed and who have done so.[57] What the Court **held** goes no further than that.

The door is therefore open to the current Supreme Court to adopt an originalist methodology and deliver a judgment which upholds the Trump Order to a substantial extent. But that door is only open in the most narrowly formalist of senses. While the question which the majority answered was very particularised, the reasoning which underlay that answer was both significantly broader in its application and – and here one must further qualify the qualification that John Marshall offered in *Cohens* – very broad in scope, very detailed in nature and very precisely targeted at factual scenarios less particularised than the one which was actually the subject of the Court's judgment. Relatedly, the reasoning offered in the dissent was comparatively very flimsy. The weight of evidence as to the original meaning of 'and subject to the jurisdiction thereof' and the policy objectives which underlay it is stacked heavily in favour of an expansive reading of *Wong Kim Ark's* implications.

It is not likely that the question(s) which will be posed to the Supreme Court in respect of the Order will be as elaborately particularised as the one answered in *Wong Kim Ark*. The plethora of lower court litigation already initiated in response to the Order will bring many differently situated litigants into play. Many of their parents will have entered the United States illegally; many will have parents not domiciled in the United States; many will have parents who have been there for very short periods; many of those parents will not be lawfully engaged in any form of employment or business activities; many parents may have several or all of those characteristics. The ratio of *Wong Kim Ark* does not apply to any of those scenarios.

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[55] Astute readers will discern that such a Trumpian reading of the Fourteenth excludes the children of same sex couples.

[56] Per Article V of the Constitution, initiation requires the support of two thirds of the States or two thirds of members of Congress. Approval requires ratification in three quarters of the States.

[57] I assume here that it could not credibly be argued that *Wong Kim Ark's* ratio only applies to persons of Chinese ethnicity; but pressed to extremes such a conclusion is defensible on the basis that *Wong Kim Ark* was at its core concerned with the question of whether the Chinese Exclusion Acts could be enforced against Mr Ark. On the issue of what might be considered a 'domicile' for these purposes see the discussion in Justin Lollman, 'The Significance of Parental Domicile Under the Citizenship Clause' (2015) 101 Virginia Law Review 455.

It is of course quite plausible that (some members of) a presumptive pro-Order majority on the current Court (Alito, Gorsuch, Thomas and Kavannagh JJ core members, and Roberts CJ and Coney Barret J as probables) would be little troubled by sacrificing their juridic integrity (such as they have) as exponents of originalism to achieve the desired outcome. Alexander Hamilton's oft-quoted observation in the *Federalist 78* as to the atypical alliance of extraordinary levels of intellectual ability and moral propriety demanded of a Supreme Court Justice might seem to have little bite in present circumstances.[58]

The nice irony which Trump's Order throws up to the Court is that a (to Trump) satisfactory outcome can more credibly be reached by abandoning rather than embracing originalism. It was likely unappreciated by whoever drafted and approved the text of the Order that it actually contains an implicit disapproval of originalism as an interpretive device. That disapproval is rooted in the Order's castigation in Sec. 1 of (presumably just the majority opinions in) *Dred Scott* as "shameful". (We might leave aside the obvious error in the Order's characterisation of the ratio of the majority opinions in *Dred Scott*, which at least in form were directed to *persons of African descent who had themselves been or were the descendants of slaves,* rather than to all persons of African descent per se). Chief Justice Taney's judgment in *Dred Scott* is quite defensibly seen as the primary source of original intent jurisprudence:

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.[59]

From this interpretive perspective, the Constitution – 70 years after its adoption:

> is not only the same in words, but the same in meaning; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court…..[60]

That assertion as to the propriety of judicial restraint was inextricably linked to the next stage in Taney's analysis. The Constitution provided a mechanism in Article V for changes to be made to its text. If the American 'people' in the form of the extraordinary lawmaker expressly created in Article V wished to alter that text, they were at perpetual liberty to do so.[61]

Viewed from that methodological perspective, the assertion that slaves and their descendants would not have been regarded by (many of) the Constitutions' framers as

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[58] "….[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge"; Clinton Rossiter (ed) The Federalist Papers (1961) 471.

[59] 60 US 393, 405 (1856).

[60] Ibid, 426.

[61] Taney himself observed in *Dred Scott* – though with what degree of sincerity is unclear – that if it were permissible for the Court to view the Constitution from the perspective of prevailing political beliefs in the 1850s as to the issues of slavery and citizenship rather than those of the 1780s, its meaning in relation to the possibility that former slaves and their descendants could become United States citizens might have been very different; ibid, 407.

capable of becoming United States citizens is not at all outlandish, still less is it 'shameful'. Many of the attendees who attended the various conventions leading up to ratification of the constitution's text owned and bred and bought and sold slaves; and many other attendees who eschewed those practices themselves were content to allow others to continue them rather than risk a collapse in the constitution building process.[62]

That the judgment was reversed by the Thirteenth Amendment rather than a subsequent judicial decision can also sensibly be taken to confirm that the majority's opinion had not – as the Trump order puts it – 'misinterpreted' the Constitution, but simply confirmed that the original Constitution gave politically entrenched status to slavery as a legal institution. From an originalist perspective, the majority judgment in *Dred Scott* was neither 'shameful' nor 'wrong'; and the only acceptable way to reverse it would be through express amendment of the Constitution's text.

There is a body of revisionist literature arguing that *Wong Kim Ark* was wrongly decided – even in terms of its ratio – on the basis of an originalist interpretation.[63] That literature would for the reasons suggested above be profoundly unconvincing to an audience which approached the question in good faith. The not much less unpersuasive perspective – now often pulled together under the rubric of a so-called 'consensual citizenship' thesis[64] – is that originalism properly takes us as far as the *Wong Kim Ark* ratio but not a citizen further.

That second objective at least might be more credibly achieved in doctrinal terms by abandoning literalism altogether. Roger Taney's prescription as to the legitimate boundaries of judicial lawmaking stands in obvious contrast to the methodology espoused by Chief Justice John Marshall some 40 years earlier in *M'Culloch v Maryland*:

> This provision is made in a Constitution intended to endure for ages to come, *and consequently to be adapted to the various crises of human affairs*. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur…..[The Constitution's] nature requires that only its great outlines should be marked, its important objects designated and the *minor ingredients which compose those objects be deduced* from the nature of the objects themselves.[65]

Marshall's 'crises in human affairs' analysis speaks with extraordinary clarity to the birthright citizenship question. The contextual circumstances within which the Fourteenth Amendment's treatment of this question falls to be determined in the 2020s have altered

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[62] See especially Earl Maltz, 'Slavery, Federalism and the Structure of the Constitution' (1992) 36 American Journal of Legal History 466: William Freehling, 'The Founding Fathers and Slavery' (1972) 77 American Historical Review 81.

[63] For example, John Eastman, 'Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11' (2007) 12 Texas Review of Law and Policy 167: Patrick Charles, 'Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection and the Law' (2012) 51 Washburn Law Journal 211.

[64] The 'originalist' source of this argument is generally taken to be Peter Schuck and Rogers Smith, Citizenship Without Consent: Illegal Aliens in the American Polity (1985), although their argument may be best characterised as being concerned more with what the meaning of the Fourteenth Amendment should be as a matter of policy and morality rather than what it actually is as a matter of law.

[65] 17 US (4 Wheat) 316, 407 (1819); emphasis added.

substantially – beyond recognition may not be an overstatement – from those which prevailed in the 1860s when the amendment was adopted.

Large scale illegal immigration simply did not exist in the mid-nineteenth century United States; (for the prosaic reason that there was no significant body of federal law regulating the issue in any way at all): nor did the phenomenon of mass tourism by foreign citizens. More broadly, there was no substantial let alone systematic body of federal immigration law delineating the conditions under which non-citizens might lawfully enter the United States and what they might lawfully do in respect of such matters as employment, self-employment or establishing a domicile while they remained there. In the modern era, all of those matters are prominent features of the United States' immigration landscape. The birth citizenship aspect of the Fourteenth Amendment in the 2020s is directed towards a set of social and political circumstances which did not exist in the 1860s and cannot as matter of empirical fact be presumed to have informed either the then accepted meaning of its text or the policy objectives of the politicians who framed it and voted for its adoption.[66]

The 'nice' irony identified above becomes delicious if one suggests that it may be that the 'best' authority for those Justices inclined towards upholding (much of) the Order to adopt would be *Brown v Board of Education.*[67] In *Brown*, Earl Warren's Court rejected any use of originalism with respect to the Fourteenth to discern its effect on racial segregation in the public school system on the basis that the original meaning was undiscoverable primarily because in 1868 there was virtually no mandatory public schooling anywhere in the country. The meaning of the Fourteenth Amendment's equal protection clause on the point therefore had to be found in its contemporaneous political, social and cultural context:

> In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[68]

If one were to replace 'public education' in that extract with 'birthright citizenship' then one has opened the door (and widely so) to lending the notion of 'subject to the jurisdiction thereof' a meaning which excludes many more children than the original common law rooted understanding of the term.

The matter is unlikely to reach the Supreme Court before the spring or summer of 2026. Informed observers would probably predict that the Court will divide six to three in support of judgment which takes at least some and probably many steps towards the desired destination that the Trump government has identified. What at present remains more uncertain is the route that the six will take to get there.

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[66] The point is neatly expressed by Christina Rodriguez, who suggests that the contemporary question is: "the debate over whether the children of unauthorised immigrants fall within the purview of the clause – a question that would have made little sense at the time of the Amendment's framing given that the category of "illegal immigrant" is largely a modern invention": "The citizenship clause, original meaning and the egalitarian unity of the Fourteenth Amendment" (2009) 11 University of Pennsylvania Journal of Constitutional Law 1363, 1367.

[67] 347 US 483 (1954).

[68] Ibid, 492-493.

Addendum

In the interim period between this article being written and its publication, the federal court of Appeals for the Ninth Circuit has approved and applied the more broadly construed impact of *Wong Kim Ark* that has been discussed here; *State of Washington; State of Arizona; State of Illinois and others v Donald J. Trump and others.*[69] The matter is likely to come before the Supreme Court in the summer of 2026.

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