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Originalism, Illegal Immigration, and the Citizenship Clause

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ABSTRACT

The Citizenship Clause of the Fourteenth Amendment confers birthright citizenship in cases of lawfully domiciled aliens, but not in cases of illegal immigration or legal visitation by aliens. The best reading of the original understanding in the 1860s is that the Clause impliedly requires parental domicile in the United States, domicile in turn requires some degree of allegiance, but parents who have not been received into the U.S. cannot pay any allegiance, so these requirements can only be reconciled by domicile de jure — that is, the domicile must be legal. This dichotomy between de jure and de facto domicile was well-known in the 1860s. In cases of illegal immigration, citizenship for U.S.-born children should be sought via naturalization, and the same in cases of legal visits by temporary foreign visitors. Intertwined with birthright citizenship is the Clause's guarantee of state citizenship, and scholars who say that Washington D.C. is out of compliance are correct, because the federal government has failed to ensure state citizenship there.

KEYWORDS

citizenship, immigration, 14th amendment, birthright, domicile

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I. Introduction

There is presently a controversy about whether U.S.-born children of unlicensed immigrants[1] are entitled to birthright United States citizenship under the Fourteenth Amendment to the Constitution, which was ratified shortly after the Civil War, in 1868.[2] In tandem with that is a similar controversy: whether temporary foreign visitors can claim constitutional birthright citizenship for their children born during the visit.

Both controversies are addressed in an executive order issued in January 2025 by President Donald Trump.[3] The relevant portion of the Fourteenth Amendment is its first clause, which is the Citizenship Clause:[4]

> 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.

This article will focus mainly on two specific aspects of this legal controversy: first, whether the Citizenship Clause has an implied domicile requirement (yes), and second, whether that domicile requirement can be satisfied by unlicensed immigrants (no) or by temporary foreign visitors (no). Domicile generally means a permanent residence accompanied with intent to remain there, which is a mostly factual matter, but under certain circumstances that residence must be limited to lawful residence only. Keeping the scope of this article primarily focused upon this pair of aspects will allow them to be more fully addressed.[5]

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1 I use the term "unlicensed immigrants" instead of "illegal aliens" because the latter has been criticized for suggesting that the people themselves are illegal. In 2015, the Associated Press made this recommendation: "Except in direct quotations, do not use the terms *illegal alien*, *an illegal*, *illegals*, or *undocumented*." Nicole Meir, *"Illegal Immigrant" No More*, Associated Press, August 3, 2015 (original emphasis). The term "undocumented" is indeed euphemistic. The idea of a "license" to enter the U.S. is very old. *See* note 51 *infra* and accompanying text.

2 U.S. Const. amend. XIV.

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

4 U.S. Const. amend. XIV, §1, cl. 1. The Citizenship Clause was written as an amendment to Section 1 of the joint resolution that had already passed in the House. It was proposed by Sen. Jacob Howard, except for the words "or naturalized" which were added later. *See* Cong. Globe, 39th Cong. 1st Sess. 2890 (1866) (remarks of Sen. Howard).

5 For example, this article will not take any position about whether the existence of an alien "invasion" affects the operation of the Citizenship Clause. *See generally* Zachary Wolf, *Why the US has birthright citizenship and how Trump could challenge it*, CNN, December 10, 2024 (quoting Judge James Ho as saying, "No one to my knowledge has ever argued that the children of invading aliens are entitled to birthright citizenship."); *see generally* Robert Natelson & Andrew Hyman. *The Constitution, Invasion, Immigration, and the War Powers of States,* 13 Br. J. Am. Leg. Studies 1 (2024). Nor will this article address the theory that the Citizenship Clause requires 100% exclusive allegiance to the U.S., which would be contrary to the holding in United States v. Wong Kim Ark, 169 U.S. 649 (1898); Professor Ramsey rebuts that theory, and I would not bet on Professor Ramsey being wrong. *See* Michael Ramsey, *Originalism and Birthright Citizenship*, 109 Georgetown Law Journal 405, 451-54 (2020). Another issue that will not be discussed here is the legal fiction that any immigrant can be considered not

The emphasis here is on the original meaning of the Constitution, and anything after 1868 is much less persuasive, because the original meaning is clear. Therefore, this article will not say much about the holding in the leading case on this subject, *United States v. Wong Kim Ark* (1898),[6] except to mention that the parents in that case unequivocally immigrated legally; the majority opinion in that case used the word "domicile" 24 times, and there was no doubt the parents were domiciled in the U.S. when the child was born in California, even though they had a limited local allegiance to the United States rather than exclusive allegiance.[7] The Citizenship Clause does not require exclusive allegiance, or at least this author is not aware of evidence on that score sufficient to overcome the stare decisis effect of *Wong Kim Ark*.

To be clear, the law before and during the 1860s was that domicile (often spelled "domicil" in older sources) required some degree of allegiance, either full or merely local. Additionally, non-domiciled parents such as foreign tourists traveling lawfully in the U.S. could owe local allegiance, even though it was "but momentary and uncertain," as Sir Edward Coke put it; the tourist's U.S.-born children would receive birthright citizenship, unless domicile was required too, and the status of the parents mattered in determining domicile.[8] In contrast, people who entered the U.S. without implied or express consent of the sovereign could not pay any allegiance unless subsequently received into the U.S.[9]

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to be technically "in" the U.S.; a law review article in 2012 said the "born…in" issue is "as contentious as the definition of 'jurisdiction.'" Allison Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. Rev. L. & Soc. Change 57, 68 (2012).

6 United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) ("Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States").

7 John Eastman, *The Significance of "Domicile" in Wong Kim Ark*, 22 Chap. L. Rev. 301 (2019).

8 Calvin's Case (1608), 77 Eng. Rep. 377, 384; 7 Co. Rep. 1, 6b (K.B.). Here is some context for that quote of Sir Edward Coke:

> Concerning the local obedience it is observable, that as there is a local protection on the King's part, so there is a . . . local ligeance of the subject's part. . . . [L]ocal obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is . . . a natural born subject. . . . [I]t is . . . neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born . . . .

Id. (original emphasis). The word "ligeance" meant allegiance, and Coke wrote that "ligeance" was sometimes used synonymously with "obedience" or "obeisance." *Id*. at 4b. It appears from that last blockquoted sentence that Coke was not enthusiastic about a pure system of *jus soli*, which is Latin for "right of the soil." Coke also wrote that the status of the parents mattered, for determining the status of the newborn child. *Id*. at 18b ("the parents be under the actual obedience of the King").

9 *See* Timothy Cunningham, 1 A New and Complete Law Dictionary (3d ed. 1783) (definition of "estate") ("Every person … cannot pay any allegiance to any other Society, unless he be afterwards received into it"). *See also* note 47 *infra* and accompanying text (Matthew Bacon on allegiance). The inability of a person to pay allegiance after immigrating unlawfully was already well-established by English law before the United States gained independence. *See, e.g.*, Natelson & Hyman, *supra* note 5, at 29 n.182

Part II of this article will prove that the Citizenship Clause includes an implied requirement of domicile, which is acknowledged even by scholars who have argued that unlicensed immigrants satisfy that domicile requirement.[10] This requirement of domicile excludes foreign visitors from claiming a constitutional right to U.S. citizenship for their U.S.-born child. Part III will describe features of domicile law as of the 1860s that are pertinent to the Citizenship Clause's application to illegal immigration, and will show that unlicensed immigrants do not qualify as being domiciled under the Clause. Part IV argues that the Clause, and its domicile requirement, do not apply to any U.S. territories, regardless of whether a territory has been deemed "incorporated," but do apply in the District of Columbia. Part V discusses a piece of *Wong Kim Ark* apart from its holding, specifically its use of French law and history to interpret the Citizenship Clause. Part VI draws conclusions from Parts II through V. Illegal immigration was not a significant issue in the 1860s, but the original meaning of the Citizenship Clause is clear as applied to that subject, just as the meaning of the First Amendment is clear as applied to communication via telegraph, telephone, radio, television, and the internet.

II. The Citizenship Clause Includes an Implied Domicile Requirement

The text of the Citizenship Clause is paramount. Two separate pieces of that clause independently imply a domicile requirement: the clause's use of the word "jurisdiction" does so, and then the state citizenship subclause does so again.

As to the jurisdiction requirement, it was well-known before and during the Civil War era that full and complete jurisdiction often required domicile.[11] In 1830,

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and accompanying text.

[10] Justin Lollman, Note, *The Significance of Parental Domicile Under the Citizenship Clause*, 101 Va. L. Rev. 455 (2015). Lollman takes a middle ground, by arguing that the U.S.-born child of temporary foreign visitors *is not* covered by the Citizenship Clause, whereas the U.S.-born child of unlicensed immigrants *is* covered by the Citizenship Clause. He is correct about the former because temporary visitors have no U.S. domicile. *Cf.* Kurt Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, Notre Dame L. Rev. (forthcoming 2025) (manuscript at 92), https://papers.darn.com/sol3/papers.cfm?abstract_id=5140319. Lash concludes that, "Any child born in the United States to a family that legally entered the United States to take up a permanent domicile here is presumptively a citizen of the United States." *Id*.

[11] *See* John Trayner, Latin Phrases and Maxims 295-96 (1861) ("Domicile is the basis on which civil jurisdiction is most frequently founded; it subjects the person to the jurisdiction of the judge in whose territory he resides…."). *See also* 11 Encyclopædia Britannica 625 (6th ed. 1823) ("where a stranger, not a native of Scotland, has only a moveable estate in this kingdom, he is deemed to be so little subject to the jurisdiction of its courts, that action cannot be brought against him till his effects be first attached…."). The person who proposed the Citizenship Clause was Senator Jacob Howard, and he said this: "I concur entirely with the honorable Senator from Illinois [Trumbull], in holding that the word 'jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States." Cong. Globe, 39th Cong., 1st Sess. 2895 (1866).

Joseph Story wrote the following about that requirement:[12]

> The question of domicil is of very great importance, for it often regulates political and civil rights, and founds or destroys jurisdiction over the person or property. Thus, for instance, there is what is called a *political domicil*, which is that place where a party must exercise his political rights, duties and privileges, as his right to vote, his duty to pay taxes, etc. Then there is what is called a *civil domicil*, or that place where he has fixed his habitual home or residence, which decides upon his civil rights, and power to acquire, alienate, and dispose of property, to contract marriage, etc. Then, again, there is, or may be, a *forensic domicil* (*forum domicilii*), or place where he is to sue or be sued, and to be subjected to the exercise of the jurisdiction of judicial courts. It may, and it often does happen, that the political, civil and forensic domicil is the same….

James Kent made a similar point, writing that the "place of domicil of the defendant, commonly called the *forum domicilii*," is a "place[] of jurisdiction."[13] Thus, if a person's principal domicile is not in the United States, then the United States cannot have full and complete jurisdiction over that person.

It is true that some unlicensed immigrants have been charged and convicted of various crimes unrelated to their immigration status, and some scholars might infer adequate jurisdiction from that fact. However, that alone is not indicative of a full and complete jurisdiction.

The executive branch has had authority on tribal reservations to prosecute major crimes ever since 1885, and even before then the United States had latent power to make that happen. Yet, no one disputes that the U.S. lacked full and complete jurisdiction over those areas at least up until 1885, within the meaning of the Fourteenth Amendment.[14] The lack of full and complete federal jurisdiction

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[12] *Domicil, in* 4 Encyclopedia Americana 613-16 (Francis Lieber ed., 1st ed. 1830) *reprinted in* John Hogan, *Joseph Story's Essay on Domicil*, 35 B.U.L. Rev. 215, 219 (1955) (original emphasis). That encyclopedia was successful, sold thousands of copies, and Story requested that the editor delay attribution of his essay on domicile until after initial publication. Lewis Harley, Francis Lieber: His Life and Political Philosophy 57 (1899). Professor Ramsey has stressed the importance of distinguishing "full and complete" jurisdiction (which the framers intended) from exclusive jurisdiction (which they did not). *See* Ramsey, *supra* note 5, at 450 n.216. Thus, the word "jurisdiction" in the Citizenship Clause must be broad enough to encompass the function described here by Story.

[13] James Kent, 2 Commentaries on American Law 462-63. (3rd ed. 1836) (original emphasis). *See also* Joseph Story, *Conflict of Laws*, 11 Am. Jurist & L. Mag. 365, 405-06 (1834). Like Kent, Story described *forum domicilii* as simply the domicile of a defendant. *Id*.

[14] The Major Crimes Act of 1885 gives jurisdiction to the federal government over crimes on tribal lands including murder, rape, arson, and burglary, while the tribes have retained concurrent jurisdiction. *See* 18 U.S.C. § 1153. Congress also has power to abrogate sovereign immunity of tribal reservations. *See generally* Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 593 U.S. 382 (2023). *See also* Ramsey *supra* note 5, at 443. Referring to passage of the Major Crimes Act in 1885, Professor Wildenthal says, "It seems difficult to dispute that, at least from that time on, Indians have been 'subject to the jurisdiction' of the United States." Bryan Wildenthal,

on reservations was the main reason for the exclusion of tribal members from constitutional birthright citizenship.[15] Likewise, the amenability of unlicensed immigrants to prosecution for crimes is insufficient to imply the sort of jurisdiction that is mentioned in the Citizenship Clause, because a U.S. domicile is necessary too, for the reasons described by Story and Kent.

Now consider the other way in which the Clause's text implies a domicile requirement. The last seven words of the Clause say, "and of the state wherein they reside." The last word "reside" refers to domicile, as is evident from the word "state" being singular; a person can have only one principal domicile at a time, but potentially can own a plural number of abodes. This singularity was no accident of spelling; when the Senate's printer incorrectly used the plural form, Senator Jacob Howard of Michigan insisted upon a correction: "The word 'state' in the eleventh line is printed 'states.' It should be in the singular instead of the plural…."[16]

Howard had introduced the Fourteenth Amendment in the Senate, and subsequently drafted the Citizenship Clause (as an amendment to the proposed constitutional amendment).[17] He presumably knew whereof he spoke.

The Clause is a package deal of federal and state citizenship, and none of the framers asserted that a state-born person (or anyone else) could be constitutionally entitled only to U.S. citizenship without state citizenship at the time of birth. Thus, the domicile requirement of the last seven words applies to the whole Clause as of the time of birth. Horace Maynard was a Congressman from Tennessee, an abolitionist and union supporter who put the matter this way while the Fourteenth Amendment was pending: "Under our system of government state citizenship is inseparable from national citizenship."[18] That is what the text itself says.

The Clause's domicile requirement, which is doubly evident from the text, was also verified by Senator Lyman Trumbull of Illinois, who chaired the Senate

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Native American Sovereignty on Trial 29 (2003). In any event, the Citizenship Clause could only apply to tribal reservations located within states rather than federal territories, because the Clause specifically refers to "the state" wherein they reside.

[15] In 1924, the remaining exclusions of the tribes from citizenship were abolished. *See* Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. §1401(b). As to the power under which the 1924 statute was enacted*, see generally* Boyd v. Nebraska, 143 U.S. 135, 162 (1892) (affirming the constitutionality of "collective naturalization"); Contzen v. United States, 179 U.S. 191, 193 (1900) (same); Charles Martin and William George, American Government and Citizenship 382 (1927).

[16] Cong. Globe, 39th Cong. 1st Sess. 2892 (1866) (remarks of Sen. Howard). Sen. Reverdy Johnson suggested leaving it alone, but Sen. Howard insisted. *Id.* American lawyers in that era defined residence as domicile, and recognized that any further residence of a person would not be his primary domicile. John Bouvier, 2 A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law 468 (1856).

[17] *See* note 4 *supra*.

[18] Cong. Globe, 40th Cong., 2nd Sess. 159 (1867) (remarks of Rep. Maynard). Regarding the defeated southern rebels, Maynard said there were only two choices: "either readmit them to a participation in the State and General Government or not, at our discretion." *Id*. *See generally* Donald Weckstein, *Citizenship for Purposes of Diversity Jurisdiction*, 26 Sw. L. J. 360, 369-71 (1972) (discussing whether a person who leaves his state is stateless until he establishes domicile in a new one).

Judiciary Committee from 1861 to 1873. One of the purposes of the Citizenship Clause was to entrench or legitimize aspects of a similar clause that had already been enacted by the Civil Rights Act of 1866 (hereinafter "CRA"),[19] and that clause in the CRA was written by Trumbull: "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[20] Trumbull explained to President Andrew Johnson: "The Bill declares 'all persons' born of parents … domiciled in the United States, except untaxed Indians, to be citizens of the United States."[21] So, the 39th Congress explicitly had in mind parental domicile as a requirement for birthright U.S. citizenship.

Senator Trumbull was not the first member of Congress to explicitly link birthright citizenship with a domicile requirement. Congressman John Bingham of Ohio authored the Privileges or Immunities Clause of the Fourteenth Amendment, before the Citizenship Clause was written. Like the Citizenship Clause authored by Sen. Howard. the Privileges or Immunities Clause written by Bingham addresses U.S. citizenship: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Bingham had already gone on record as early as 1857 about the meaning of U.S. citizenship: "All free persons born and *domiciled* within the jurisdiction of the United States, are citizens of the United States from birth…."[22]

Given the explicit confirmation of the domicile requirement for birthright U.S. citizenship (by Trumbull and Bingham), plus the double implication of domicile in the text itself (in the words "jurisdiction" and the phrase "state wherein they reside"), there can be little doubt that such a domicile requirement exists in the Citizenship Clause.

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19 Civil Rights Act of 1866, §1, Pub. L. No. 39-31, 14 Stat. 27. Another relevant federal statute of that era was the Expatriation Act of 1868 which protected people from action by their nation of origin, after being naturalized by the United States. *See generally* Expatriation Act of 1868, Pub. L. No. 40-249, 15 Stat. 223. The right to voluntarily expatriate from the U.S. is codified at 8 U.S.C. § 1481(a)(5). A person who expatriates from a foreign country may become stateless, which potentially complicates deportation from the U.S., and can also disincentivize expatriation. Though a migrant may expatriate from his country of origin, and thereby decrease or eliminate allegiance to it, the country of origin might not look kindly upon the rupture.

20 *See* Cong. Globe, 39th Cong., 1st Sess. 498 (1866) (statement of Sen. Trumbull).

21 Letter from Sen. Lyman Trumbull to President Andrew Johnson (undated), *in* Andrew Johnson Papers, Reel 45, Manuscript Div., Library of Congress, Washington D.C., www.tifis.org/Trumbull.pdf (last visited January 12, 2025). This letter from Trumbull to Johnson was probably written in February or March of 1866, before Johnson unsuccessfully vetoed the Civil Rights Bill. *See* Mark Shawhan, *The Significance of Domicile in Lyman Trumbull's Conception of Citizenship*, 119 Yale Law J. 1351, 1352 n.7 (2010). Trumbull was well aware that the domicile requirement of the Fourteenth Amendment marked a departure from old English law. *See* Lollman, *supra* note 10, at 472-73. Of course, the handwritten letter from Trumbull to Johnson is more indicative of original intent than original public meaning.

22 Cong. Globe, 35th Cong., 2nd Sess. 983 (1859) (statement of Rep. Bingham) (emphasis added). This statement by Bingham was well-publicized. *See, e.g.*, *Washington D.C., Admission of Oregon, Speech of Hon. John A. Bingham*, The National Era, March 3, 1859.

The domicile requirement should be no surprise, because the courts had already pointed that way.[23] In the *Dred Scott* case (an aspect of which the Citizenship Clause overturned), Justice John McLean's dissent discussed the word "citizen" in federal law:[24]

> It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the federal courts, and so may any individual who has a permanent *domicil* in the state under whose laws his rights are protected, and to which he owes allegiance.

This statement by Justice McLean was well-grounded in precedent.[25]

To analyze birthright citizenship according to the Citizenship Clause, without analyzing the issue of domicile, is inadvisable, because it was the dominant doctrine of citizenship in the United States when the Fourteenth Amendment was drafted and ratified. Senator Howard, the lead author of the Citizenship Clause, explained that the Clause would perpetuate rather than overturn the dominant doctrine:[26]

> 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.

For the reasons described, the word "jurisdiction" certainly implies the domicile requirement. But even if that interpretation were uncertain, the state citizenship subclause implies the same thing, thus constraining the word "jurisdiction" by implication. That was the original understanding expressed by members of Congress at the time.

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[23] *Cf*. Lynch v. Clarke, 1 Sand. Ch. 583, 648, 665–68 (N.Y. Ch. 1844)("all persons born within the ligeance of the crown of England, were natural born subjects, without reference to the status or condition of their parents…."). The Lynch case involved a U.S.-born child of a temporary foreign visitor; as Professor Ramsey says, "despite the holding in Lynch, it seems fair to say that the issue of temporary visitors remained somewhat unsettled in the mid-nineteenth century." Ramsey*, supra* note 5, at 416 n.43. Moreover, Ramsey says that New York case law in the 1860s was in "considerable tension with Lynch." Ramsey*, supra* note 5, at 415 n.39. Agreed on both counts.

[24] Dred Scott v. Sandford, 60 U.S. 393, 531 (1857) (McLean, J., dissenting) (emphasis added). By an "elector" he meant a voter. By "the act" he meant "the act of Congress authorizing him to sue in the Circuit Court." *Id.*

[25] *See* Case v. Clarke, 5 Fed. Cas. 254 (C.C.R.I. 1828) (Justice Story on circuit) "To constitute a person a citizen of a state, so as to sue in the courts of the United States, he must have a domicil in such state …. [A] mere temporary change of place, without any intention of permanent residence, constitutes no change of domicil"); Brown v. Keene, 33 U.S. 112, 115 (1834) ("A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicile….").

[26] Cong. Globe, 39th Cong. 1st Sess. 2890 (1866) (remarks of Sen. Howard).

III. Applying Pre-1869 Domicile Law to Current Illegal Immigration

The domicile requirement established in Section II clearly excludes foreigners who are briefly visiting the U.S. in a lawful manner. The issue becomes more complicated for unlicensed immigrants, but the result is the same. Generally speaking, in the mid-1860s, it had long been the law that an infant's domicile was the domicile of the infant's parents; so, under that rule, if the parents have no U.S. domicile despite presence in the United States, then the infant's domicile is not in the U.S. either.[27] Looking through a modern lens, that rule makes some sense in terms of family cohesion, in terms of sending unmixed messages to would-be immigrants, and in terms of prioritizing aspiring legal immigrants over unlicensed immigrants, although the rule also could be unfair to a child who grows up in the U.S. lacking citizenship through no fault of his own. For better or worse, this rule of domicile was part of the background law in the 1860s when the Fourteenth Amendment was written. But naturalization has been available as well, since 1789, to virtually whatever extent Congress wishes.

To understand why unlicensed immigrants cannot achieve U.S. domicile, consider the principles of domicile prevalent in the 1860s. Robert Phillimore wrote a treatise on international law published in 1861, and he defined domicile in the following excerpt:[28]

> Perhaps…the American Judges have been the most successful in their attempts, and from a combination of their dicta upon different occasions, we may arrive at a tolerably accurate definition in designating it "*residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.*" Domicil answers very much to the common meaning of our word "home;" and, where a person possessed two residences, the phrase, "he made the latter his home," would point out that to be his Domicil.

The word "presumptive" in the definition italicized above is important, because it is sometimes difficult to prove that an intent to maintain a residence is genuine or firm. The longer a person stays at a residence, the stronger is the presumption that they intended to remain there permanently. As to the duration of time needed

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27 *See, e.g.*, Guier v. O'Daniel, 1 Binn. 349 (Pa. 1806) ("A minor during pupillage cannot acquire a domicil of his own. His domicil, therefore, follows that of his father…."); School Directors v. James, 2 Watts & Serg. 568, 570 (Pa. 1841) ("The domicil of an infant is the domicil of the father, during the father's lifetime, or of the mother during her widowhood, but not after her subsequent marriage: the domicil of her widowhood continuing in that event to be the domicil of her child"). *See also* note 8 *supra* (Lord Coke saying parental status matters for becoming a subject at birth); note 21 *supra* and accompanying text (Sen. Trumbull saying parental status matters); note 38 *infra* (further discussing School Directors v. James); note 48 *infra* (New York's top court saying parental status matters).

28 Robert Phillimore, 4 Commentaries Upon International Law 43 (1861) (emphasis added, citations omitted). As to Phillimore's reputation, see note 75 *infra* and accompanying text.

to establish domicile, many Roman jurists in ancient times held that ten years of residence was needed before domicile could be established, but if sufficient intent could be proved then even a few days of residence sometimes could suffice.[29]

If a person has entered the United States unlawfully, then it would be difficult to presume that domicile has been established earlier than several years after entry.[30] By analogy, even legal immigrants are required to wait five years before becoming eligible for naturalization.[31] In any event, as we shall see, any U.S. domicile is inconsistent with illegal immigration, so a time delay is unnecessary, unless and until those migrants are received into the United States.

It is true that crossing a U.S. border unlawfully can be a dangerous, difficult, and costly endeavor that indicates serious determination. But, a significant part of the danger and difficulty is the substantial risk of apprehension and deportation. Whether an unlicensed immigrant really has the skills to continually thwart law enforcement, while remaining at a fixed residence, will typically not become clear to that unlicensed immigrant for several years.

It is useful to keep in mind that the Citizenship Clause impliedly refers not merely to domicile but to *principal* domicile. As Phillimore explained, "a man can have but one principal domicil, yet a man may have two or more domicils… for different purposes."[32] The Citizenship Clause refers to principal domicile, as it limits the number of residences to only one.[33] Phillimore explains that people often fall into the trap of confusing the principal domicile with other specific types of domicile:[34]

> It might, perhaps, have been more correct to have limited the use of the term Domicil to that which was the *principal domicil*, and to have designated simply as *residences* the other kinds of domicil; but a contrary practice has prevailed, and the neglect…to distinguish between the different subjects to which the Law of Domicil is applicable, has been the chief source of the errors which have occasionally prevailed on this subject.

Some general principles of domicile may be useful in this discussion. One such principle, endorsed by jurists of Great Britain and America, was "that the former Domicil is not abandoned until a new one has been intentionally and actually (*animo et facto*) acquired."[35] A related principle is that, "The original Domicil, and

29 *Id*. at 185, 191, 192. It appears that acquisition of domicil after ten years was not retroactive. *See id*. at 90 ("after the lapse of that time, a domicil would be acquired"); *id*. at 185 ("lapse of time was held to have effected a tacit abandonment of a former domicil").

30 As to the validity of federal immigration statutes, *see generally* Robert Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution's Define and Punish Clause*, 11 Br. J. Am. Leg. Studies (2022).

31 Cong. Rsch. Serv., R43366, U.S. Naturalization Policy 1 (April 2024).

32 *Id*. at 46.

33 *See* note 16 *supra* and accompanying text (the last occurrence of the word "state" in the Clause is singular instead of plural).

34 Phillimore, *supra* note 28, at 48 (original emphasis). *Cf*. Weckstein, *supra* note 18 (citing cases about whether this principle of national domicile applies to domicile within U.S. states).

35 Phillimore, *supra* note 28, at 53.

the native character easily revert," so a vagabond who supposedly has no domicile will likely be assigned the domicile at the time of birth, and children of unknown parents will likely be assigned the domicile where they are located.[36] If a child was born to parents who were temporarily travelling, or otherwise temporarily absent from their domicile, then the parental domicile would become the domicile of the child as well, instead of the child's domicile being his place of birth.[37] All jurists agreed that a minor cannot change his domicile of his own accord, but "such change may be effected by the parents or guardians of the minor…[though] they differ as to the exception from and limitations of it."[38] Any student, minor or not, who stayed at a place for school did not acquire domicile there.[39]

For present purposes, the following question posed by Phillimore is of importance, as to whether governments can withhold permission to establish domicile:[40]

> Where the Government of a country prescribes a certain form, whereby a stranger shall be admitted to establish his Domicil therein, and to enjoy all the civil rights of a native subject, can a stranger, without the permission of Government, acquire a domicil in such country?

If so, then the stranger can obtain a domicile *de facto* according to Phillimore, but otherwise it must be domicile *de jure*, and he said that this remained a "vexed and difficult question."[41] If the question is answered affirmatively, then an unlicensed immigrant can likely establish domicile in the U.S. (after several years[42]), and thus have a child who becomes a U.S. citizen at birth via the Citizenship Clause.

The question posed by Phillimore (blockquoted above) is somewhat ironic, because Phillimore had already written that many errors arise by failing to distinguish primary domicile from some other type of domicile.[43] Yet here we have two types of domicile (*de facto* and *de jure*), with Phillimore hesitating to say which one is principal. The best answer is that it depends. In the context of

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36 *Id*. at 54-56. If all that is known about the parents is their nationality, then arguably the domicile assigned to the children should conform to that nationality, for example when unaccompanied minors are encountered near an international border.

37 *Id*. at 57.

38 *Id*. at 73. Of course, Phillimore was not suggesting that any parent can change the child's domicile to any place whatsoever in the universe. In School Directors v. James, *supra* note 27, Chief Justice John Gibson wrote that a parent "may change the domicil of the child by changing the domicil of the family…. No infant, who has a parent…can in the nature of things, have a separate domicil….The parents' domicil, therefore, is consequently and unavoidably the domicil of the child." *Id.* Phillimore explicitly relied upon that case. Phillimore, *supra* note 28, at 74. The general antebellum rule was that the domicile of the child follows the domicile of the father. *See* Barber v. Barber, 62 U.S. 582 (1858).

39 Phillimore, *supra* note 28, at 90. Aliens overstaying student visas is a familiar phenomenon, not unlike illegal immigration, and it is doubtful that a person can still be considered "received" into the United States after such visa expiration.

40 *Id*. at 204.

41 *Id*. at 207. A concept similar to domicile *de jure* is "domicile by operation of law." *See* 1 Bouvier, *supra* note 16, at 443-44.

42 *See* note 29 *supra* and accompanying text.

43 *See* note 34 *supra* and accompanying text.

illegal immigration, it would be anomalous to answer the question affirmatively for reasons we will get to shortly, in which case it is most appropriate that the domicile *de jure* be the primary domicile, within the meaning of the Citizenship Clause. However, in cases of legal immigration, or cases not involving any immigration, then the domicile *de facto* can be the primary domicile in some or all situations, including the situation with *Wong Kim Ark*.

To better understand why domicile *de jure* would be the only suitable type of domicile under the Citizenship Clause when unlicensed immigrants are involved, it is necessary to consider the concept of allegiance. It was well-known in the 1860s that domicile is joined with allegiance; having domicile implied at least a local allegiance to the United States.[44] Vine Kingsley was a prominent New York lawyer who wrote about this principle in 1865:[45]

> Allegiance arises from domiciliation. Foreigners owe temporary allegiance to the country where they reside. If they assume citizenship, then the allegiance is perpetual and not dependent on domicile. Allegiance is not a matter of choice, it arises from domicile, and because the government is bound to protect those within its allegiance.

During the Civil War, the British government acknowledged that its subjects who were domiciled in the United States had various duties of allegiance to the United States.[46] But unlicensed immigrants did not have legal capacity, in either

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[44] William Blackstone, 1 Commentaries on the Law of England 369 (1852) ("Allegiance, both express and implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary").

[45] Vine Wright Kingsley, Reconstruction in America 24 (1865). *See also* Don Doyle, The Age of Reconstruction 336 n.72 (2024) ("Kingsley, a prominent New York lawyer…."). *See also* Abington v. North Bridgewater, 40 Mass. (23 Pick.) 170, 176 (1839) ("The fact of domicil is often one of the highest importance to a person… it fixes his allegiance….") *quoted in Domicil*, 12 Am. L. Reg. 257 (1864). Of course, the U.S. government can protect people who have no allegiance to the U.S. and no U.S. domicile, without any duty of allegiance arising; examples abound, because the U.S. is often a helpful and humanitarian nation.

[46] The British Ambassador to the U.S. acknowledged that Englishmen lawfully present in the U.S. necessarily had local allegiance to the U.S. (one might call this a statement against interest):

> I have no desire that British subjects be exempted from 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 internal peace and order and for the protection of property. But no further military service can be required of them….

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 286-87 (1862) (the last ten words of that blockquote suggest the jurisdiction of the U.S. was not full and complete during wartime as to at least some foreign visitors). During the Civil War, aliens in the U.S. who had declared an intention to be naturalized ("declarant aliens") but had not yet voted within the U.S. were drafted unless they abandoned their naturalization plans as well as their residence in the U.S.

wartime or peacetime, to pay any allegiance at all to the United States, as explained in a treatise by Matthew Bacon published in Philadelphia in 1860:[47]

> [E]very person is presumed to have a natural and necessary allegiance to that society that first protected and preserved him; and therefore he cannot pay any allegiance to any other society, unless he be afterwards received into it.

The U.S.-born child of unlicensed immigrants has the same domicile as his parents, regardless of the child's allegiance.[48] If domicile under the Citizenship Clause were not domicile *de jure*, then the parents could establish U.S. domicile, and thus be in the impossible situation of owing allegiance to the United States (as Vine Kingsley explained) while not being able to pay it due to never having been received into the United States (as Matthew Bacon explained). These considerations necessarily exclude unlicensed immigrants from the ancient tie that binds the sovereign to every citizen and every licensed immigrant. Even before the Citizenship Clause was adopted, the absence of that ancient tie would have prevented unlicensed immigrants from automatically becoming a citizen or subject.[49]

For these reasons, the Citizenship Clause must refer to domicile *de jure* as applied to unlicensed immigrants, instead of domicile *de facto*. The federal government therefore has legitimate power to lawfully deny permission or recognition for unlicensed immigrants to establish domicile in the United States, and such domicile is prerequisite to birthright citizenship under the Citizenship Clause.[50]

See Gerald Neuman, Strangers to the Constitution 69 (2010). A rule during that era was that, "the right of jurisdiction and authority over a merely *commorant foreigner*, though he be *subditus temporaries*, does not extend to compelling him to render civil or military services…." Robert Phillimore, 1 Commentaries Upon International Law 270 (1854) (original emphasis). *Cf.* Robert Mensel, *Jurisdiction in Nineteenth Century International Law and its Meaning in the Citizenship Clause of the Fourteenth Amendment*, 32 St. Louis U. Pub. Law Rev. 329, 351 (2013) ("an Englishman domiciled within the U.S. owed the U.S. neither allegiance nor military service…."). I am grateful to Professor Mensel for confirming that "the allegiance I referred to was full allegiance" rather than local allegiance. E-mail from Robert Mensel to author (January 10, 2025, 11:39 EST) (on file with author).

[47] Matthew Bacon, Henry Gwyllim, Charles Dodd, Byrd Wilson, and John Bouvier, 3 A New Abridgment of the Law 421 (Philadelphia, Johnson & Co. 1860). Bacon initially wrote this treatise, which became a standard encyclopedia of the common law in England and America, and his coauthors kept the treatise up to date after he died. According to that same 1860 American edition, aliens could be "received" in different degrees; e.g. an alien could be received "totally" by naturalization, or be received partially by other procedures. *See* 1 *id*. at 199. The aliens who have most clearly never been "received" into any society are those who have always been deportable; meanwhile, English law regarding other aliens has changed considerably since the 1860s, including more ability to buy real estate.

[48] *See, e.g.,* Ludlam v. Ludlam, 26 N.Y. 356 (N.Y. 1863) ("The domicil of the minor child is always that of the father during his life…."). *See also* note 27 *supra*.

[49] *See* Natelson & Hyman, *supra* note 5 at 27-35.

[50] The U.S. Supreme Court once stated in a footnote that, "illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a state."

The last blockquote (of Matthew Bacon) raises the question of what it means to be *received* into the United States. Many things can amount to being *received* into the U.S. to one degree or another, including naturalization which marks a total reception, or merely using a valid passport which marks a partial reception. There is no legal reason why an alien, who wants to benefit from the Clause, must be *received* formally instead of informally into the United States, nor any reason why that permission to enter must be explicit. Chief Justice John Marshall long ago wrote that an "implied license" will suffice, but of course a valid prohibition upon entry defeats any implication of a license.[51]

Unlawful entry and unlawful presence are analogous to a non-permissive use of property, which can be legitimized by continuous, open, and notorious occupation for a term of years, at least in the context of adverse possession. Therefore, it is possible that an unlicensed immigrant could eventually be *received* by implication, years after immigrating, if his residence and status have been continuous, open, and notorious, so much so that law enforcement agencies have ample opportunity to respond. In short, the Citizenship Clause is only available for children of aliens who are *received* into the United States, not aliens who persistently evade, defy, or strain the resources of law enforcement agencies.[52]

IV. Status of U.S. Territories and the District of Columbia Under the Clause

State and federal citizenship are a package deal at birth, as already described in Section II. This principle has significant ramifications for U.S. territories and also the District of Columbia, which will therefore be addressed now.

How U.S. territories and the District of Columbia are affected by the Citizenship Clause is not a simple matter. A court in 2021 declined to grant U.S. citizenship for residents of American Samoa, partly because of the last seven words of the Clause which are ostensibly about state citizenship.[53] That part of the court's

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Plyler v. Doe, 457 U.S. 202, 227 n.22 (1982). In support of that *dictum*, the Court cited a treatise published in 1912. *See* Clement Bouvé, A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States 340 (1912):

> An alien, who, whether entering in violation of the immigration acts, or, after being duly passed by the immigration authorities in the manner provided by law, takes up his residence here with intent to remain has done all that is necessary for the acquisition of a domicile.

Id. Bouvé also said, again without citation, about unlicensed immigrants: "Their temporary allegiance to the United States was complete and gave rise to reciprocal protection…." *Id*. at 426. Insofar as these unsubstantiated opinions of Bouvé were accepted doctrine in 1912, law in the 1860s was different. *See* note 47 *supra* and accompanying text.

51 The Schooner Exchange v. McFadden, 11 U.S. 116, 144 (1812).

52 These include the Transportation Security Administration (TSA), the United States Border Patrol (USBP), Immigration and Customs Enforcement (ICE), and agencies of the border states.

53 Fitisemanu v. United States, 1 F.4th 862, 875 n.16 (10th Cir. 2021) (*quoting* U.S. Const.

opinion has been criticized because of its presumed effect upon residents of the District of Columbia.[54] But, putting aside the District for a moment, there is little doubt that the Citizenship Clause is inapplicable in the territories, and citizenship there is instead a matter for Congress and its naturalization power.

There was an effort in 1867 to explicitly include the territories in the Citizenship Clause, and that effort failed, which suggests that the territories are not covered by the Clause.[55] Thus, in all likelihood, the territories were not covered by the Citizenship Clause, including both "incorporated" and "unincorporated" territories.[56] Similarly, the Thirteenth Amendment (which banned slavery) distinguished the United States from other areas subject to its jurisdiction, which is consistent with the territories being among those other areas.[57] The immense territories existing in the 1860s were all destined for statehood, so the only things needed for them to acquire birthright citizenship were patience or naturalization.

The District of Columbia is another story. Old maps from the nineteenth century never distinguished the District from the United States (though they sometimes did distinguish the territories from the United States).[58] Nor was there any failed effort in the 1860s to add language into the Fourteenth Amendment about the District, as happened with the territories. So, under the Citizenship Clause, Washington D.C. is very much part of the "United States" and people who are born there to lawfully-domiciled parents are entitled not just to U.S. citizenship, but also to state citizenship. This is a consequence of state and federal citizenship being a package deal at birth.

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amend. XIV, §1, cl. 1), *cert. denied*, 143 S. Ct. 362 (2022) ("Another textual consideration suggesting the Citizenship Clause's exclusive application to state-born residents is its effect of rendering persons born in the United States 'citizens of the United States and of the *State wherein they reside*'") (original emphasis).

[54] Cassandra Burke & Irina Manta, *Integral Citizenship*, 100 Tex. L. Rev. 1325, 1354 (2022).

[55] Cong. Globe, 40th Cong. 2nd Sess. 117 (1867). The effort was led by Congressman James Ashley, who had been a lead author of the Thirteenth Amendment.

[56] According to the dubious territorial incorporation doctrine, there is a constitutional distinction between "incorporated" territories, which are likely headed for statehood, and "unincorporated" territories. That doctrine was first suggested in a concurring opinion by Justice Edward White in 1901, joined by two others. *See* Downes v. Bidwell, 182 U.S. 244, 311-21 (1901).

[57] U.S. Const. amend. XIII (banning slavery "within the United States, or any place subject to their jurisdiction"). Incidentally, after that amendment, there was apparently no attempt to deport the small subset of former slaves who had been unlawfully smuggled into the United States; they were impliedly received into the country, and were free to establish or continue domicile in the U.S.

[58] From 1850 to 1868, various maps used the term "United States" to include the District but not the territories. *See* Andrew Hyman, *More Cool Maps as Evidence of What the "United States" Meant in 1868*, The Originalism Blog (June 27, 2021, 6:44 AM), https://originalismblog.typepad.com/the-originalism-blog/2021/06/more-cool-maps-as-evidence-of-what-the-united-states-meant-in-1868andrew-hyman.html [web.archive.org/web/20210627163515/https://originalismblog.typepad.com/the-originalism-blog/2021/06/more-cool-maps-as-evidence-of-what-the-united-states-meant-in-1868andrew-hyman.html].

How to bring state citizenship to the people of the District is a political question,[59] and such questions are often handled less than perfectly.[60] Retrocession and statehood are two possible solutions. In the mean time, officials should continue to recognize that the Citizenship Clause does confer birthright U.S. citizenship on domiciled residents born in the District, because that would have been the result if Congress had been doing its job ensuring compliance with the Clause; it is better to give people some of what they are entitled to, than none at all.

The congressional inertia since 1868 may be attributable to a phenomenon once described by Justice Robert Jackson: "even the North never fully conformed its racial practices to its professions."[61] The Citizenship Clause does profess a right of state citizenship in the nation's capital, not just U.S. citizenship, and license plates in the District of Columbia aptly declare "taxation without representation."

Enclave status for the District would be another solution, as opposed to statehood or retrocession. By enclave status, I mean a place "for the erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings" (as the Constitution puts it), in contrast to a district "not exceeding ten miles square."[62] Such enclave status could allow residents to have citizenship in Maryland.[63] According to the Congressional Research Service, enclave status was permitted when Maryland donated land for the national capital: [64]

> The Maryland statute ceding the land made the cession "pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States," suggesting that Maryland transferred the land for the limited purpose of creating the District of Columbia under the District and Federal Enclaves Clause (found in section 8 of Article I).

Under its section five enforcement power, Congress could unilaterally change D.C. into a federal enclave, which would bring state citizenship to its residents,

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[59] *See* Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 Georgetown Law J. 1269, 1273,1289 (2022) ("Although D.C. statehood is a constitutional imperative, it is not a judicially enforceable one….The Constitution requires that all American citizens living in the United States be able to claim state citizenship where they reside.").

[60] *See generally* Joseph Jaroscak, Cong. Rsch. Serv., IFII443, District of Columbia Voting Representation in Congress: Overview of Proposals, (2024).

[61] Robert Jackson, *Memorandum by Mr. Justice Jackson*, *in* I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases 137 (Mark V. Tushnet ed. 2008).

[62] *See* U.S. Const. art. I, § 8, cl. 17 (re. the District and enclaves).

[63] *See* Evans v. Cornman, 398 U.S. 419 (1970). The District was established at its present location as part of the Compromise of 1790, which included southern payment of northern war debts. Maryland and Virginia received some compensation as part of the Compromise of 1790, for contributing the land; Virginia got a tax break, and Maryland got a promise that all public buildings would be located on the Maryland side with concomitant commercial benefits. *See* Jessie Romero, *A Capital Compromise*, Econ Focus 24, 26 (2019). The Virginia part was retroceded in 1847.

[64] Kenneth Thomas, Cong. Rsch. Serv., 7-5700, Hearing on H.R. 51, the Washington D.C. Admission Act 3 (2019).

while maintaining federal control of the District.[65] All of this without violating the Twenty-Third Amendment, assuming a tiny zone remains as a remnant of the current District.[66] Other solutions are available but they would require action by Maryland, or a constitutional amendment.[67]

In all likelihood, the nation's capital would already be a federal enclave today, if there were not an alternative (statehood) that would achieve political goals unrelated to the Fourteenth Amendment, such as shifting the balance of power in the U.S. Senate. The District could be turned into a federal enclave, and then statehood — or reacquisition of land by Maryland — could still be considered after that. By turning the District into a federal enclave, its lifelong residents would no longer be "stateless" in the sense of lacking citizenship in any of the U.S. states, and that statelessness is an ongoing violation of the Citizenship Clause, as Professors Bulman-Pozen and Johnson have argued.[68]

V. PURPORTED INFLUENCE OF FRANCE UPON THE CITIZENSHIP CLAUSE

The Court in *Wong Kim Ark* (1898) discussed eighteenth-century French law, among other things. Consider this problematic excerpt from *Wong Kim Ark* about French law:[69]

> [A]t the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicil"…. The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and was affirmed in successive constitutions, from the one adopted by the Constituent Assembly in 1791 to that of the French Republic in 1799. The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, *jus soli,* the rule of descent or blood, *jus sanguinis,* as the leading principle….

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65 U.S. CONST. amend. XIV, §5. It is beyond this article's scope to consider how much power the president might have to initiate or participate in such a change.

66 *See* U.S. CONST. amend. XXIII. The District could be converted into a federal enclave that is part of Maryland, except for a tiny zone (e.g. a triangle with the seats of the three branches at the vertices except for any domicile within the triangle). Of course, the White House is not a domicile because, for example, no president can stay beyond his tenure in office. The most legitimate way to handle the three electors appointed on behalf of that tiny zone would be to require that they abstain.

67 *See* U.S. Const art. IV, §3 (re. forming new states). *See generally* Derek Muller, *Twenty-Third Amendment: Problems Confronting District of Columbia Statehood*, HARV. J. L. & PUB. POL'Y PER CURIAM 1 (2021).

68 *See* Bulman-Pozen, *supra* note 59. *See generally* Weckstein, *supra* note 18 (discussing whether a person who leaves his U.S. state becomes stateless until he settles in a new one); text accompanying note 53 *supra* (Phillimore on similar subject).

69 United States v. Wong Kim Ark, 169 U.S. 649, 666-667 (1898) (citations omitted).

Generally speaking, it is best for American courts to stick with Anglo-American law, and if American legislators enact legislation in reliance upon foreign law, then courts would still be wise to exercise caution. The reception statutes enacted by the newly-independent states specifically received English common law as domestic U.S. law, rather than receiving the law of France or other countries. Also, putting too much weight on foreign law outside the Anglo-American legal tradition risks misunderstanding those foreign laws, as happened here, according to historian Peter Sahlins:[70]

> [W]hen modern historians of French nationality argue…that *jus soli* was originally a feudal practice that persisted as the dominant mode of attributing French citizenship until the Civil Code (1803), their language caricatures practices of both the medieval and modern period.

Moreover, a close look at the French constitutions referred to in the Court's *Wong Kim Ark* opinion reveals that, "the Constitution of [1791] — and those of 1793, 1795, and 1799 — only provided the possibility of citizenship to established male property holders who fulfilled the statutory requirements."[71] Those French constitutions are therefore far removed from citizenship law in the United States, and it would be best not to seek guidance from them.

As to Robert Pothier, who was mentioned and quoted by the Court in *Wong Kim Ark*, he was an eighteenth-century French jurist of great renown. The Court in *Wong Kim Ark* offered this quote from Pothier: "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicil."[72] But that general rule does follow from the Citizenship Clause in the vast majority of cases, especially if Professor Ramsey is correct that birthright citizenship is available to U.S.-born children of foreign parents who are lawfully domiciled in the United States.[73] Pothier did not discuss any of the exceptions to that general rule, and it is therefore unclear what exceptions he would have approved.

If Pothier's statement is taken as prohibiting all exceptions (which it should not be) then we would need to make constitutional birthright citizenship available for several categories of people for whom it is currently unavailable, including children of ambassadors, and invaders.

Although the use of old Franch law by the Court in *Wong Kim Ark* was inaccurate, this is no criticism of the holding in that case. The Court supported its holding by proper recourse to Anglo-American law, including the Citizenship Clause.

The distinction between *de facto* domicile and *de jure* domicile that has been discussed in this article, and that was well-known in the 1860s, appeared in French legal cases, before its appearance in the leading English-language international law

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70 Peter Sahlins, Unnaturally French: Foreign Citizens in the Old Regime and After 58 (2018).

71 *Id*. at 274.

72 Robert Pothier, 9 Oeuvres de Pothier, Traité Des Personnes et des Choses 17-20 (M. Bugnet ed. 1846).

73 *See* Ramsey, *supra* note 5. The present article in no way suggests that Professor Ramsey is incorrect on this point.

treatise by Phillimore.[74] For purposes of understanding what Americans intended the Citizenship Clause to mean in the 1860s, it is more important what Phillimore wrote than what exactly happened in the French proceedings he described, because Phillimore's reputation was such that his integrity and accuracy were taken for granted.[75] The Framers and ratifiers of the Citizenship Clause must have known that resolving any international law issues raised by the Clause would be influenced by the pre-1868 writings of Phillimore.

VI. Conclusion

The Citizenship Clause of the Fourteenth Amendment has an implicit requirement of domicile within a U.S. state or the nation's capital. Because domicile has permanence by definition, temporary foreign visitors cannot claim citizenship for U.S.-born children.

A presumption as old as the Roman Empire is that domicile does not begin until a person has lived in a place for a period of years, not unlike current naturalization statutes. Such a presumption would be difficult for an unlicensed immigrant to overcome, because residency in the U.S. is susceptible to being terminated at any time by immigration officials.

Even after several years, and even if a genuine intent to remain at the U.S. domicile can be proven despite its difficulty and illegality, there remains one insuperable obstacle to claiming U.S. domicile under the Citizenship Clause: the domicile required by the Citizenship Clause is necessarily *de jure* domicile rather than *de facto* domicile for unlicensed immigrants. Otherwise, they would be in the impossible spot of owing allegiance but being unable to pay it. That still leaves open the possibility that they could be received into the U.S., either via naturalization, or a process similar to adverse possession.

No people born in U.S. territories were intended to have constitutional birthright citizenship, but the situation is different for U.S.-born people whose homes are in the nation's capital. They are constitutionally entitled to both U.S. and state birthright citizenship, but again that excludes people whose parents are not lawfully present in the U.S. at the time of birth.

It is sometimes said that the United States follows a tradition of *jus soli* rather than *jus sanguinis* (i.e. birthright based upon soil rather than parentage), and that is almost correct. But even France in the eighteenth century did not perfectly follow that rule, nor did the Fourteenth Amendment in the next century. Lord Coke went so far as to deprecate *jus soli*, by comparing it to climate as a non-factor for determining whether a newborn becomes a subject.[76] In addition to soil, the

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74 *See* Phillimore, *supra* note 28, at 204-226.

75 In 1868, the U.S. Supreme Court referred to the "recent learned and most valuable commentaries of Mr. Phillimore (now Sir Robert Phillimore, Judge of the High Court of Admiralty of England), on international law…." The Georgia, 74 U.S. 32, 41 (1868). *See also The International Cases Summed Up,* New York Times, Nov. 24, 1861 at 4 (he is "the highest English theoretic authority"); Boston Evening Transcript, April 22, 1987 at 2 (he "takes precedence of all the English bar on matters of international law").

76 *See* note 8 *supra* (quoting *Calvin's Case*). To the extent that Coke in *Calvin's Case* endorsed the rule of *jus soli*, he did so only "by implication." Polly Price, *Natural Law*

Citizenship Clause takes into account parental allegiance and domicile, in cases where entry into the United States has been unlawful.

People who cross the U.S. border unlawfully cannot obtain U.S. citizenship for their U.S.-born children via the Citizenship Clause, but could still to do so via individual or collective naturalization. The latter type of naturalization already applies to residents of Puerto Rico, and residents of tribal reservations. As mentioned at the outset of Section III, there are upsides as well as downsides to citizenship for children of unlicensed immigrants. Illegal immigration was rare in the 1860s, but statesmen of that era had considerable foresight; perhaps that foresight helps to explain why the law leaves this matter to Congress instead of establishing a rigid constitutional rule. But even if they lacked such foresight, the words they wrote have meaning, and we should apply their original meaning as best we can to unanticipated circumstances, at least prospectively.

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and Birthright Citizenship in Calvin's Case (1608), 9 YALE J. LAW & HUMANITIES 73, 116 (1997). The rule of *jus soli* was never fixed in stone, and "changed in response to changing political exigencies." *Id.* at 78. Around the time Calvin's Case was decided, France and Italy were using a hybrid system *of jus soli* and *jus sanguinis* for children born on their soil. *Id.* at 124-125. On foreign soil outside Europe, newborns automatically got the same European citizenship as their parents had. *See, e.g., id.* at 133. England abandoned the *jus soli* rule in 1981. *Id*. at 77 n.15. The present article suggests no abandonment of *jus soli*, but only restraint in its application consistent with the text of the Citizenship Clause.