

Notes

Courts Have Gone off the Map: The Geographic Scope of the Citizenship Clause*

Introduction

The Citizenship Clause of the Fourteenth Amendment has certainly generated controversy over the past several years. Scholars have now debated for decades whether the Citizenship Clause grants birthright citizenship to children of illegal immigrants¹ as well as what certain dicta in the Supreme Court's *Wong Kim Ark*² case means. But this Note is not about that controversy. In all of the debates surrounding birthright citizenship, it appears that a small, yet critical, piece of the Citizenship Clause has been overlooked. The Clause reads: "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."³ Few courts, however, have paused to consider what the phrase "in the United States" means because it seems so obvious. At first glance, everyone knows what that phrase must mean. We all looked up at the map of America from our desks in elementary school, the teacher pointed to the states, we memorized them, we took our exams, and that was the end of it.

Recently, however, some courts have had to consider the geographical scope of the phrase "in the United States."⁴ They have ruled that an American

* The author would like to thank Professor Lawrence Sager for his encouragement regarding this Note. The author would also like to thank his grandfather, Professor Wallace Mendelson, for inspiring him to study constitutional law. Finally, the author would like to thank the *Texas Law Review* for its excellent editing.

1. See generally PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (arguing that the Constitution should not be interpreted as mandating birthright citizenship for the children of illegal immigrants).

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

3. U.S. CONST. amend. XIV, § 1.

4. E.g., *Thomas v. Lynch*, 796 F.3d 535, 538 (5th Cir. 2015) (considering whether petitioner born on a U.S. military base in what is now Germany was born "in the United States" for purposes of the Fourteenth Amendment), *cert. denied*, 136 S. Ct. 2506 (2016); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (considering whether American Samoa is "in the United States" for purposes of the Citizenship Clause), *cert. denied*, 136 S. Ct. 2461 (2016); *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010) (holding that persons born in the Philippines during its status as a U.S. territory were not born "in the United States" under the Fourteenth Amendment and citing *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1994)); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (following *Rabang* and denying birthright citizenship to persons born in the Philippines during the territorial period); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998) (holding that persons born in the Philippines during its time as a U.S. territory are not U.S. citizens, relying on *Rabang*); *Rabang v. INS*, 35 F.3d 1449, 1454 (9th Cir. 1994) (concluding that "persons born in the Philippines during

military base in Germany,⁵ American Samoa,⁶ and the Philippines at the time it was a U.S. territory⁷ are not “in the United States” for the purposes of the Fourteenth Amendment. Despite the fact that where the United States ends and another sovereign begins is a serious constitutional issue and has obvious implications for the American immigration system, the Supreme Court this past term denied certiorari on this question.⁸

This Note will argue that, from an originalist, historical perspective, all of the recent federal appellate cases interpreting the phrase “in the United States” for purposes of the Fourteenth Amendment have been incorrectly decided, and that if one wishes to stay true to the framers’ intent, the correct interpretation of that phrase is “in the *dominion* of the United States.” In other words, the framers of the Fourteenth Amendment would have considered anywhere that the United States exercises sovereignty to be “in the United States,” not just the fifty states and the District of Columbia. This would include U.S. territories, military bases, embassies, and other similarly situated locations.

Part I of this Note will examine the English common law idea of citizenship and show how that definition of citizenship crossed the Atlantic. Part II will discuss early interpretations of the Fourteenth Amendment and argue that it codified the citizenship ideas of the common law, specifically the geographical scope of birthright citizenship. It will further assert that early Supreme Court decisions recognized this in dicta. Finally, Part III will analyze recent federal appellate decisions that have interpreted the phrase “in the United States” and argue that those cases have been incorrectly decided from an originalist, historical perspective.

I. The English Common Law of Birth Within the Dominion

The English common law concept of citizenship originated in *Calvin’s Case*.⁹ *Calvin’s Case* was the earliest and most important decision ruling on the idea of citizenship.¹⁰ It held that all persons born within the “dominion” of the King, that is, anywhere in which the King was sovereign, were his

the territorial period were not ‘born . . . in the United States,’ within the meaning of the Citizenship Clause of the Fourteenth Amendment, and are thus not entitled to citizenship by birth”).

5. *Thomas*, 796 F.3d at 538.

6. *Tuaua*, 788 F.3d at 302.

7. *Nolos*, 611 F.3d at 284; *Lacap*, 138 F.3d at 519; *Valmonte*, 136 F.3d at 920; *Rabang*, 35 F.3d at 1454.

8. *Tuaua v. United States*, 136 S. Ct. 2461 (2016).

9. *Calvin’s Case* (1608) 77 Eng. Rep. 377, 7 Co. Rep. 1a.

10. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMAN. 73, 74 (1997).

subjects.¹¹ This idea of birth anywhere in which government was sovereign eventually found its way into the Fourteenth Amendment.¹²

The origins of the legal disputes in *Calvin's Case* began after the death of Queen Elizabeth I, when the Queen died without issue.¹³ James VI of Scotland thereby became King as James I of England, uniting England and Scotland.¹⁴ This led to the issue in *Calvin's Case* of “whether persons born in Scotland, following the descent of the English crown to the Scottish King James VI in 1603, would be considered ‘subjects’ in England.”¹⁵

Robert Calvin was born in Scotland after the English throne had passed to James I.¹⁶ Two estates in England had been conveyed to Calvin, but the defendants attempted to take the land away from him, arguing that Calvin was an alien and “born ‘within [James’s] kingdom of Scotland, and out of the allegiance of the said lord the King of his kingdom of England.’”¹⁷

If Calvin were declared an alien, then, under English law, he could not possess a freehold in England.¹⁸ “The defendant’s plea thus made the status of persons born in Scotland after the accession of James I to the throne of England the paramount legal issue.”¹⁹

The Court ruled that those born in Scotland after James I became King of England were not aliens, but rather, natural-born subjects, and thus could inherit English land.²⁰ In holding this, the court, as reported by Sir Edward Coke, articulated this key rule:

Every one born *within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of*—therefore, according to our common law, owes allegiance to—the King and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.²¹

“Coke’s report of *Calvin’s Case* was the first comprehensive statement in England of the law of naturalization.”²² The key language of the rule is that one born “within the dominions of the King” whether “in his colonies or dependencies” was a subject of the King. Critically, the rule makes no distinction between one born in England itself or one born in the English “colonies or dependencies.” In other words, anyone born in a place where

11. *Id.* at 83.

12. *Id.* at 74, 83.

13. *Id.* at 80.

14. *Id.*

15. *Id.* at 73.

16. *Id.* at 81.

17. *Id.* at 81–82 (alteration in original).

18. *Id.* at 82.

19. *Id.*

20. *Id.*

21. *Id.* at 83 (emphasis added).

22. *Id.*

the King was sovereign, with certain exceptions for those with diplomatic immunity (ambassadors), enemy combatants, and others, were English subjects.²³ This rule, making no distinctions between England proper, or “colonies or dependencies,” “was one of the most important English common-law decisions adopted by courts in the early history of the United States. Rules of citizenship derived from *Calvin’s Case* became the basis of the American common-law rule of birthright citizenship”²⁴

Coke was not the only great English legal mind to avoid a distinction between England proper versus “colonies or dependencies” with regards to birthright citizenship. Sir William Blackstone also took Coke’s position. Blackstone divided the population into aliens and natural-born subjects.²⁵ According to Blackstone, “[n]atural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance, of the king; and aliens, such as are born out of it.”²⁶ Like Coke, Blackstone’s distinction between an alien and a subject turns on birth within the *dominion* of the King, not on a distinction between birth in England proper versus a colony or dependency of England. This is because of the concept of allegiance embedded in the common law’s idea of citizenship. As Blackstone explained, “[a]llegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.”²⁷ That is, the reason a person born anywhere within the King’s dominion was a subject, and not an alien, was because the King was responsible for protecting that person from foreign governments. Hence, there was no reason for a distinction to exist, for most cases, between someone born in England proper versus elsewhere where the King was sovereign because he was responsible for protecting both.

The idea of allegiance being determinative of subject versus alien is further exemplified by the few exceptions to birthright citizenship within the dominion. Even if born in England, the children of those with diplomatic immunity—the children of ambassadors—or the offspring of enemy combatants were not considered the King’s subjects.²⁸ This was because they were “not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.”²⁹ In other words, because the King was not responsible for protecting these people, for the obvious reasons that diplomats represented a foreign power and enemy combatants were the King’s enemies, they owed no allegiance to the King

23. *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898).

24. Price, *supra* note 10, at 74.

25. 1 WILLIAM BLACKSTONE, COMMENTARIES *366.

26. *Id.*

27. *Id.*

28. *Wong Kim Ark*, 169 U.S. at 655.

29. *Id.*

and thus were not his subjects. Therefore, according to Blackstone, the key distinction between subject and alien at common law turned on allegiance and the King's responsibility for protecting that individual.

In short, the English common law, as conveyed by Coke and Blackstone, made no distinction between England itself and colonies or dependencies for citizenship purposes. Under the common law, "[e]very one born within the dominions of the King of England, whether here or in his colonies or dependencies," were English subjects, with certain exceptions for diplomats, enemies, and possibly others.³⁰

This common law idea of citizenship vesting at birth within the dominion of the King crossed the Atlantic and formed the basis for the American idea of citizenship. When the original Constitution was ratified, nothing "explicitly indicated whether the United States adopted the common law rule that all persons born within the dominion of the sovereign were citizens."³¹ However, the United States "followed Coke's theory of birthright citizenship, and came to recognize all children born within the dominion of the United States as citizens, owing allegiance to and receiving protection from the national sovereign."³²

John Marshall expounded on the phrase "United States" by saying, "[i]t is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania . . ."³³ Thus, albeit not in the context of a case about citizenship, John Marshall thought that the phrase "United States" referred to everywhere that the United States was sovereign,³⁴ echoing Coke and Blackstone.

Joseph Story, in an opinion joined by Marshall, further demonstrated that the common law idea of birth within the dominion crossed the Atlantic. Story wrote that "[t]wo things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligeance of the sovereign."³⁵ He further explained that "the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to the sovereign."³⁶ Story then proceeded to list

30. Price, *supra* note 10, at 83.

31. Johnathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 683 (1995).

32. *Id.* at 684.

33. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820).

34. *Id.*

35. *Inglis v. Trs. of the Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., concurring).

36. *Id.*

the typical common law exceptions to this rule, including the children of ambassadors and enemies.³⁷

These early Supreme Court cases demonstrate that Marshall and Story both recognized that the common law idea of birth anywhere in which the government was sovereign had become a part of American law after the ratification of the Constitution. Story essentially copied the rule in *Calvin's Case* and echoed Blackstone. Story could have noted that birth within one of the states was different from birth within the “dominion” of the United States for citizenship purposes, but he did not. Instead, he implicitly took Marshall’s view that “[t]he district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania”³⁸—analogous to “a place where the sovereign is at the time in full possession and exercise of his power.”³⁹ Early Supreme Court cases decided shortly after the ratification of the Constitution therefore demonstrate that the English common law citizenship requirement of birth within any place in which the government was sovereign, not just birth within a state or the District of Columbia, was one of the original American requirements for citizenship.

II. The Fourteenth Amendment Codified Birth Within the Dominion

The Citizenship Clause of the Fourteenth Amendment simply codified the English common law ideas of citizenship that the Supreme Court had already recognized, including birthright citizenship within the dominion of the United States. Thus, the correct interpretation of the Citizenship Clause’s phrase “in the United States” is actually “in the dominion of the United States.” This is apparent in both the legislative debates surrounding the passage of the Amendment and in Supreme Court decisions shortly thereafter.

Early legislative debates regarding the meaning of the Citizenship Clause imply that it merely codified the common law idea of birth within the dominion of the United States. The Citizenship Clause of the Fourteenth Amendment was meant to constitutionalize the citizenship language of the 1866 Civil Rights Act and to abrogate *Dred Scott*.⁴⁰ The drafters of the 1866 Civil Rights Act “insisted that it merely declared the existing law prior to *Dred Scott* and codified the common law principles that had theretofore defined birthright citizenship.”⁴¹ Specifically, “Congressman Wilson, chairman of the House Judiciary Committee, stated that under the bill, as before, ‘[e]very person born within the United States, its territories or

37. *Id.* at 155–56.

38. *Loughborough*, 18 U.S. (5 Wheat.) at 319.

39. *Inglis*, 28 U.S. (3 Pet.) at 155.

40. *Dred Scott v. Sanford*, 60 U.S. 393 (1856); Drimmer, *supra* note 31, at 695–96.

41. Drimmer, *supra* note 31, at 695.

districts, whether the parents are citizens or aliens, is a natural-born citizen of the Constitution.”⁴² Further, during the debates on the Fourteenth Amendment itself, Senator Johnson said that citizenship refers to birth within the territory of the United States.⁴³ Critically, both Wilson and Johnson did not limit the geographic scope of “the United States” to the several states and the District of Columbia. Rather, they explicitly referenced the common law of Coke and Blackstone, asserting that the borders of the Citizenship Clause extended into “territories” of the United States—that is, any place in which America was sovereign.

Overall, however, there was little debate surrounding what the phrase “in the United States” meant. The debates on the Citizenship Clause were mostly focused on whether it granted birthright citizenship to Native Americans, Gypsies, Chinese people, and others.⁴⁴ In other words, legislators were greatly concerned about whether the Citizenship Clause would give the children of foreigners birthright citizenship.⁴⁵ But these debates were largely centered around the Citizenship Clause’s second part, “subject to the jurisdiction thereof,” not the first part, “in the United States.”⁴⁶ This emphasis on debating the phrase “subject to the jurisdiction thereof,” and not “in the United States,” implies that most legislators agreed with Wilson and Johnson that the latter phrase, as used in both the 1866 Civil Rights Act and the Citizenship Clause, was simply an extension of the common law idea of birth within the dominion.

The Supreme Court’s *Wong Kim Ark* case most clearly demonstrates that, at the time of the adoption of the Fourteenth Amendment, the phrase “in the United States” meant “in the dominion of the United States.” In that case, the Court clearly articulated the common law. It first correctly declared that “[t]he interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”⁴⁷ Then, the Court explained that “[t]he fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called ‘ligealty,’ ‘obedience,’ ‘faith’ or ‘power,’ of the King. The principle embraced all persons born within the King’s allegiance, and subject to his

42. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson)).

43. *Id.* at 696 n.211 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson)).

44. James Ho, *Defining ‘American’: Birthright Citizenship and the Original Understanding of the 14th Amendment*, FEDERALIST (Aug. 25, 2015), <http://thefederalist.com/2015/08/25/defining-american-birthright-citizenship-and-the-original-understanding-of-the-14th-amendment/> [https://perma.cc/M8V4-HX57].

45. *Id.*

46. *Id.*; U.S. CONST. amend. XIV, § 1.

47. *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888)).

protection.”⁴⁸ Next, the Court listed the familiar exceptions to common law birthright citizenship—children of ambassadors and children of foreign enemies⁴⁹—before explicitly referring to *Calvin’s Case*.⁵⁰ Finally, the Court held that, “[t]here is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment . . . there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.”⁵¹

Hence, at the time of *Wong Kim Ark* in 1898, it was abundantly clear to the Supreme Court that the phrase “in the United States” meant “in the dominion of the United States.” The Court cited *Calvin’s Case*, described the common law concept of allegiance, and concluded that the appropriate rule was birth “within the dominion” of the United States.⁵²

In short, we have now seen approximately three hundred years of history. The common law idea of birth within the dominion of the King first appeared in the early 1600s at the time of *Calvin’s Case*, was expounded upon by Blackstone thereafter, and was recognized shortly after the ratification of the original Constitution by John Marshall and Joseph Story. Finally, *Wong Kim Ark* and the legislative history of the Fourteenth Amendment strongly indicate that the rule became constitutionalized in the Citizenship Clause without much debate.

Yet, no modern federal appellate decisions have chosen to follow this history. Since the 1990s, six appellate cases, over one sharp dissent, have ruled that birth in various places within the dominion of the United States, but not one of the several states, was not birth “in the United States” for purposes of the Fourteenth Amendment.⁵³ Based on the history discussed above, I will argue that these cases, at least from an originalist perspective, were incorrectly decided.

III. Modern Appellate Decisions Treating the Geographic Scope of “in the United States” Have Been Incorrectly Decided

48. *Id.*

49. *Id.*

50. *Id.* at 656.

51. *Id.* at 667.

52. *See id.* at 658 (explaining that common law allegiance depends upon the person simply being born within the jurisdiction and allegiance of the sovereign).

53. *Thomas v. Lynch*, 796 F.3d 535, 538 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016); *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (*per curiam*); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1454 (9th Cir. 1994).

The first modern case treating this issue was *Rabang*, a Ninth Circuit decision.⁵⁴ In that case, the dispositive issue was whether persons born in the Philippines at the time it was a U.S. territory were born “in the United States” for Citizenship Clause purposes.⁵⁵ Over a sharp dissent by Judge Pregerson, the court ruled that the Philippines during the territorial period was not “in the United States.”⁵⁶ In reaching this holding, the court dismissed *Wong Kim Ark* as dicta.⁵⁷ The Ninth Circuit was correct that the language covering the geographical scope of the Citizenship Clause in *Wong Kim Ark* was dicta, because *Wong Kim Ark* “held that a person born in San Francisco, California, of Chinese parents, could not be excluded from the United States under the Chinese Exclusion Acts after a temporary visit to China.”⁵⁸ However, dicta simply means that the language is not binding; it does not mean that the language is not legally and historically correct. The larger problem with *Rabang*, however, is that it dismissed one case as dicta, while choosing other nonbinding language that it preferred.

After ignoring *Wong Kim Ark*, the *Rabang* court incorrectly ruled that in a case called *Downes v. Bidwell*,⁵⁹ “the Supreme Court decided that the territorial scope of the phrase ‘the United States’ as used in the Constitution is limited to the states of the Union.”⁶⁰ This statement is simply inaccurate. As the court acknowledged in the very same paragraph, *Downes* was a case interpreting the Revenue Clauses of the Constitution, not the Citizenship Clause.⁶¹ Thus, the Supreme Court had not already decided the “territorial scope” of “the United States” in the Constitution, as the Court had only decided that phrase’s meaning in the context of the Revenue Clauses.

But, more importantly, because *Downes* was a case about the Revenue Clauses, it was just as nonbinding on the Ninth Circuit as the dicta in *Wong Kim Ark*. So, the Ninth Circuit simply ignored nonbinding language from one Supreme Court case, the case that had cited three hundred years of history, while latching onto nonbinding language from another case that interpreted a different clause of the Constitution. Such results occur when courts refuse to be faithful to history. When courts rebuke originalism, they may select their desired outcome and then write an opinion to achieve that result. History and originalism should matter more than that. As Judge Pregerson argued in dissent, the court’s “narrow approach overlooks principles of common law, readily accepted by the framers of the

54. *Rabang*, 35 F.3d at 1454.

55. *Id.* at 1451.

56. *Id.* at 1454.

57. *Id.*

58. *Id.* at 1453.

59. 182 U.S. 244 (1901).

60. *Rabang*, 35 F.3d at 1452.

61. See *id.* (explaining that *Downes* was a ruling over what constituted being in the United States in regards to the Revenue Clauses in Article I, Section 8 of the Constitution).

Constitution and the authors of the Fourteenth Amendment, which demonstrate that the Citizenship Clause applies to all persons who owe allegiance to, and are born within the territory or dominion of, the United States.”⁶² Yet, his dissent fell on deaf ears and the framers’ intent was ignored.

Rabang, unfortunately, was not the only case to ignore the history and intent of both the common law and the authors of the Citizenship Clause. In a similar case from the Second Circuit, the court also decided whether the Philippines during the territorial period was “in the United States” for purposes of the Fourteenth Amendment.⁶³ When the petitioner argued that *Wong Kim Ark*’s reasoning regarding *Calvin’s Case* and the common law should be followed, the court announced “[w]e decline petitioner’s invitation to construe *Wong Kim Ark* . . . so expansively,” and that the case was not “reliable authority for the citizenship principle petitioner would have us adopt,” namely that “in the United States” means “in the dominion of the United States.”⁶⁴

The court’s statement was filled with irony. The court refused to give an expansive reading to *Wong Kim Ark*, yet it gave a vastly expansive reading to *Downes*, a case about the Revenue Clauses, claiming that it provided “authoritative guidance on the territorial scope of the term ‘the United States’ in the Fourteenth Amendment.”⁶⁵ Yet, a plurality of the Supreme Court had cautioned that “it is our judgment that neither the cases [including *Downes*] nor their reasoning should be given any further expansion.”⁶⁶ Thus, the *Valmonte* court declined to read *Wong Kim Ark* expansively but proceeded to give an expansive reading to *Downes*, which a plurality of the Supreme Court had admonished them not to do. This, unfortunately, is the result when courts refuse to follow three hundred years of history and interpret the Constitution from an originalist perspective; they are left to choose the dicta they prefer and decide the case accordingly.

With the exception of one short per curiam opinion, which simply followed *Rabang* and *Valmonte*,⁶⁷ the issue of the geographic scope of the Citizenship Clause disappeared from the federal appellate courts until 2010. In that year, the Fifth Circuit sided with *Rabang* and *Valmonte* and became the most recent court to rule that the Philippines during the territorial period was not “in the United States.”⁶⁸ Just as in *Rabang* and *Valmonte*, the petitioner argued “that the Fourteenth Amendment codified the principles of

62. *Id.* at 1455 (Pregerson, J., dissenting).

63. *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998).

64. *Id.* at 919–20.

65. *Id.* at 918.

66. *Rabang*, 35 F.3d at 1464 (Pregerson, J., dissenting) (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)).

67. *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam).

68. *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010).

the English common law that birth within a sovereign's territory confers citizenship," and just as in the previous cases, the court rejected that reasoning.⁶⁹ The relevant part of the opinion largely relied on *Rabang*, *Valmonte*, and *Downes*,⁷⁰ the last of which formed the flawed reasoning of the first two, as discussed above. Thus, nonbinding language in *Downes* had been followed by *Rabang* and *Valmonte*, which, in turn, had been followed by *Nolos*. Multiple flawed cases were now citing each other to provide the main points of their reasoning.

By this point, all of the appellate decisions were relying on *Downes*, yet none of the majority opinions mentioned a serious problem with it: *Downes* is a 100-year-old case decided, at least in part, on racial grounds. *Nolos* simply adopted the reasoning of *Downes* and the other appellate decisions, but did not consider "that the *Insular Cases*⁷¹ are a product of their time, a time when even the Supreme Court based its decisions, in part, on fears of other races."⁷² Indeed, *Downes* was tainted with outdated ideas about foreigners. One passage reads:

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race⁷³

Such a statement, of course, is premised on 1901-era logic that white Americans are a superior race to those that live on various Pacific islands.⁷⁴ Additionally, those words were written by Justice Brown in 1901, a mere five years after he had written *Plessy*.⁷⁵ Simply put, *Downes*, one of the *Insular Cases*, was influenced by inappropriate racial ideas and written by the same Justice who began the era of "separate but equal." Perhaps this is why, over fifty years after *Downes* (and also after *Brown*⁷⁶ overruled *Plessy*), a plurality of the Supreme Court cautioned:

[I]t is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary

69. *Id.*

70. *Id.* at 282–84.

71. The name for a group of cases including *Downes*. See *id.* at 282 (explaining that "the *Insular Cases* were a series of Supreme Court decisions that dealt with . . . duties on shipments from Puerto Rico to the United States mainland").

72. *Rabang v. INS*, 35 F.3d 1449, 1463 (9th Cir. 1994) (Pregerson, J., dissenting).

73. *Downes v. Bidwell*, 182 U.S. 244, 282 (1901).

74. See *id.* at 279 (using discriminatory language to reason that "if [the inhabitants of the annexed territories] do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such," and ultimately concluding that the consequences of annexation would be "extremely serious").

75. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

76. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.⁷⁷

In other words, the Court warned that *Downes* should not be expanded because it was tainted with racism.

Yet, *Nolos*, like *Valmonte* and *Rabang* before it, still relied on *Downes*, even though the Supreme Court implied that it contained dangerous racial ideas.⁷⁸ *Nolos* could have avoided this problem simply by adopting an originalist interpretation of the Citizenship Clause and following *Wong Kim Ark*. Unfortunately, that did not happen, resulting in a third major appellate decision following tainted Supreme Court dicta.

Five years later, in 2015, the issue of “in the United States” arose again, but for the first time in a different context. In that year, the D.C. Circuit was asked in *Tuaua*⁷⁹ to determine whether American Samoa was “in the United States.”⁸⁰ The decision was significantly flawed for two reasons. First, the part of the opinion attempting to interpret the Citizenship Clause from an originalist perspective misrepresented the founders, and second, it openly decided the case in part on public policy grounds, which is the job of legislatures, not judges.

Tuaua began with an accurate reflection of the common law. It explained that “[t]hose born ‘within the King’s domain’ and ‘within the obedience or ligeance of the King’ were subjects of the King, or ‘citizens’ in modern parlance. The domain of the King was defined broadly. It extended beyond the British Isles to include, for example, persons born in the American colonies.”⁸¹ The court also acknowledged that “[a]fter independence the former colonies continued to look to the English common law rule.”⁸²

But then the court’s originalist interpretation of the Citizenship Clause went off the rails. The court held that “we are skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States’s sphere of

77. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

78. *See id.* (refusing to further expand the *Insular Cases*).

79. *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

80. *Id.* at 302–03.

81. *Id.* at 304 (internal citations omitted).

82. *Id.*

sovereignty—even where, as is the case with American Samoa, ultimate governance remains statutorily vested with the United States Government.”⁸³

This skepticism was misplaced. What mattered to the common law, and by extension the framers, was not the fact that some territories are self-governing, but rather, who was responsible for protecting the people at issue.⁸⁴ The rule in *Calvin’s Case* thus made no distinction between self-governing versus non-self-governing territories, but clearly stated that “[e]very one born within the dominions of the King of England, whether here or in his colonies or dependencies,” was an English subject (provided no exceptions applied) because the King had to protect them, regardless of their level of self-governance.⁸⁵

Blackstone also made no self-governance distinction for the same reason, explaining that being a subject, or today, a citizen, rested on the idea of allegiance, and that “[a]llegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.”⁸⁶ History, therefore, shows that the common law and the framers of the Citizenship Clause were not concerned with levels of self-governance in granting birthright citizenship, but rather with who was ultimately responsible for protection. Since American Samoa is a U.S. territory, over which the United States exercises sovereignty,⁸⁷ it is responsible for the protection of the island. Originalism, therefore, dictates that those born on American Samoa are born “in the United States” for purposes of the Fourteenth Amendment.

The D.C. Circuit’s departure from a historically accurate originalist interpretation of the Citizenship Clause led it further astray. In a later part of the *Tuaua* opinion, the court openly decided the case, in part, on public policy grounds. The court reasoned that “[d]espite American Samoa’s lengthy relationship with the United States, the American Samoan people have not formed a collective consensus in favor of United States citizenship.”⁸⁸ For this reason, the court held that it would be wrong “to impose citizenship by judicial fiat—where doing so requires us to override the democratic prerogatives of the American Samoan people themselves.”⁸⁹

There are two flaws with this judicial reasoning. First, “[i]t is emphatically the province and duty of the judicial department to say what the law is,”⁹⁰ not what it should be. Openly disregarding history and deciding a

83. *Id.* at 306.

84. *See supra* notes 25–27 and accompanying text.

85. Price, *supra* note 10, at 83.

86. 1 BLACKSTONE, *supra* note 25, at *366.

87. *Tuaua*, 788 F.3d at 306.

88. *Id.* at 309.

89. *Id.* at 302.

90. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).

case on policy grounds based on what a segment of the population may or may not want is usurping the province of the legislature.

Second—as the court correctly indicated—it is not even clear whether the American Samoan people want American citizenship.⁹¹ Some Samoans do not want American citizenship,⁹² but others certainly do, as they feel that being labeled a “national,” as opposed to a “citizen” is demeaning.⁹³ This is especially true for some Samoans who have served in the U.S. Armed Forces but do not receive birthright citizenship.⁹⁴ For these reasons, split public opinion regarding birthright citizenship in American Samoa is a reason to make birthright citizenship the default and allow those who do not want it to renounce it,⁹⁵ not the other way around.

The D.C. Circuit thus not only openly decided a case in part on public policy grounds, something a court should not do, but arguably made a bad public policy decision. If, however, the court had not ignored history and interpreted the Citizenship Clause in light of *Calvin’s Case* and Blackstone, then it never would have had to enter the public policy arena and perhaps would have even granted birthright citizenship to some who have served our country in the armed forces but are not presently citizens. Surely, such a result could not be bad.

The final and most recent case interpreting the geographic scope of the Citizenship Clause occurred shortly after *Tuaua*. This time, the Fifth Circuit was asked whether an American military base in Germany was “in the United States.”⁹⁶ Like all of the previous cases, the court held that it was not.⁹⁷ The court largely followed *Nolos*, *Valmonte*, *Rabang*, and *Downes*,⁹⁸ and, as usual, declined to apply *Wong Kim Ark*.⁹⁹ This case, however, would have been the *best* situation to apply the common law. Unlike all of the previous cases that concerned territories like the Philippines and American Samoa, *Thomas* was about a military base, which is perhaps most closely tied to the reasons behind the common law rule of birthright citizenship within the “dominion.”¹⁰⁰

91. *Tuaua*, 788 F.3d at 309.

92. *See id.* at 309–10 (discussing the reluctance some American Samoans feel toward American citizenship because of how citizenship could interfere with their traditions and way of life).

93. *See* Last Week Tonight, *U.S. Territories: Last Week Tonight With John Oliver* (HBO), YOUTUBE (Mar. 8, 2015), <https://www.youtube.com/watch?v=CesHr99ezWE> [<https://perma.cc/8AZQ-9D5Y>] (showing that one American Samoan believed his status as a national “demeans me as a person”).

94. *Id.*

95. *See* 8 U.S.C. § 1481(a) (2012) (explaining the procedures for renouncing U.S. citizenship).

96. *Thomas v. Lynch*, 796 F.3d 535, 538 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016).

97. *Id.*

98. *Id.* at 539–40.

99. *Id.* at 541–42.

100. *Id.* at 536.

As Blackstone explained, the common law idea of citizenship by birth within the dominion of the King was based on allegiance.¹⁰¹ “Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.”¹⁰² In other words, the two chief concerns behind the common law were allegiance to the sovereign and the sovereign’s responsibility for protecting its citizens. These principles apply to Mr. Thomas, the petitioner, more closely than in any other case.

Thomas was born on a military base in Germany because his father was in the Army (and a U.S. citizen) serving there.¹⁰³ Surely, the son of a member of the Army born on a military base fits the criterion of “allegiance” more so than anyone else. Regarding protection, if the United States has no obligation to protect the child of a member of the armed forces born on the sovereign territory of a military base, born there only because his father answered the call to serve, then to whom does the United States have any obligation to protect? The reasons behind the common law of birth within the dominion of the sovereign apply to Mr. Thomas’s situation more so than any other plaintiff. Yet, once again, the court held that the common law, as articulated in *Wong Kim Ark*, did not apply.¹⁰⁴ To avoid unjust results such as these, courts should consider history and originalism more closely.

Conclusion

In summary, the English common law concept of birth anywhere within the dominion, or sovereignty, of the King was first articulated in *Calvin’s Case*, was later endorsed by Blackstone, and found its way to America, at least according to John Marshall and Joseph Story. It was implicitly ratified in the text of the Citizenship Clause of the Fourteenth Amendment, as recognized by legislative history and the Supreme Court in *Wong Kim Ark*. Today, however, appellate decisions have chosen to disregard three hundred years of this history when interpreting the geographic scope of the Citizenship Clause, when such history dictates that the correct construction of “in the United States” is “in the dominion of the United States.” These cases have led to arguably unjust results, resulting in the denial of birthright citizenship to, among others, the son of a man on active military duty stationed on a base in Germany.

The Supreme Court, instead of denying cert on this question,¹⁰⁵ should take a case and definitively hold that the dicta regarding the common law in *Wong Kim Ark* is the correct interpretation of the geographic scope of the

101. 1 BLACKSTONE, *supra* note 25, at *366.

102. *Id.*

103. *Thomas*, 796 F.3d at 536–37.

104. *Id.* at 541–42.

105. *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

Citizenship Clause. In light of all of the history, such a ruling would perhaps best encapsulate Marshall's admonition that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"¹⁰⁶ not what it should be.

—*Benjamin Wallace Mendelson*

106. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).