No. 03-6696

In The

Supreme Court of the United States

YASER ESAM HAMDI, *et al.*,

Petitioners,

v.

DONALD RUMSFELD, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Respondents

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QUESTIONS PRESENTED

1. Whether the Citizenship Clause of the Fourteenth Amendment *requires* (as opposed to merely *permits*) treating as citizens individuals born to foreign nationals who were temporarily visiting the United States at the time of the individual's birth?
2. Whether the clear intent of the framers who adopted and the people who ratified the "subject to the jurisdiction thereof" phrase of the Fourteenth Amendment to the United States Constitution should prevail in, or at least guide, the interpretation the Citizenship Clause?

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent author-

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

ity in our national life," including the principle, at issue in this case, that the ability of a people to decide upon whom to confer the benefits of citizenship is among the core attributes of sovereignty. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. In March 2003, the Institute sponsored a major conference entitled "American Citizenship in the Age of Multicultural Immigration," which will soon yield a book of the same title, and its affiliated scholars have published a number of other books, articles and monographs of particular relevance here, including Thomas G. West, *Immigration and the Moral Conditions of Citizenship*, in THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS AND JUSTICE IN THE ORIGINS OF AMERICA (1997); Edward J. Erler, *From Subjects to Citizens: The Social Compact Origins of American Citizenship*, in RONALD J. PESTRITTO AND THOMAS G. WEST, THE AMERICAN FOUNDING AND THE SOCIAL COMPACT 163-97 (2003); and THOMAS KRANNAWITTER, AN INTRODUCTION TO CITIZENSHIP FOR NEW AMERICANS (2002).

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Elk Grove Unified School District v. Newdow*, No. 02-1624; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

STATEMENT OF THE CASE

At 4:05 p.m. on the afternoon of September 26, 1980—day 327 of the Iranian hostage crisis—Nadiah Hussen Hamdi, born Nadia Hussen Fattah in Taif, Saudi Arabia, gave birth to a son, Yaser Esam Hamdi, at the Women's

Hospital in Baton Rouge, Louisiana. Mention is made of the Iranian hostage crisis because Yaser Esam Hamdi's parents might just as easily have been citizens of Iran, then in a hostile stand-off with the United States, as of Saudi Arabia. The boy's father, Esam Fouad Hamdi, a native of Mecca, Saudi Arabia and still a Saudi citizen, was residing at the time in Baton Rouge on a temporary visa to work as a chemical engineer on a project for Exxon.[2] While the boy was still a toddler, the Hamdi family returned to its native Saudi Arabia, and for the next twenty years Yaser Esam Hamdi would not set foot again on American soil.[3]

Yaser Esam Hamdi's path after coming of age would instead take him to the hills of Afghanistan, to take up with the Taliban (and perhaps the al Qaeda terrorist organization it harbored) in its war against the forces of the Northern Alliance and, ultimately, against the armed forces of the United States as well.[4] In late 2001, during a battle near Konduz, Afghanistan between Northern Alliance forces and the Taliban unit in which Hamdi was serving and while armed with a Kalishnikov AK-47 military assault rifle, Hamdi surrendered to the Northern Alliance forces and was taken by them to a

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[2] Certificate of Live Birth, Birth No. 117-1980-058-00393, on file in the Vital Records Registry of the State of Louisiana and available on-line at http://news.findlaw.com/cnn/docs/terrorism/hamdi92680birthc.pdf (last visited March 20, 2003); Frances Stead Sellers, *A Citizen on Paper Has No Weight*, Wash. Post B1 (Jan. 19, 2003).

[3] Sellers, *supra* n. 2, at B1.

[4] The armed forces of the United States had been ordered to Afghanistan by President Bush, acting pursuant to his powers as Commander in Chief, U.S. Const. Art. II, and an explicit Congressional Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), against the "nations, organizations, or persons [the President] determines planned, authorized, committed or aided the terrorist attacks [against the United States on September 11, 2001] or harbored such organizations or persons."

military prison in Mazar-e-Sharif, Afghanistan. Brief of the United States at 3, 6, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). From there Hamdi was transferred to Sheberghan, Afghanistan, where he was questioned by a U.S. interrogation team, determined to be an enemy combatant, and eventually transferred to U.S. control, first in Kandahar, Afghanistan and then at the U.S. Naval Base in Guantanamo Bay, Cuba. *Id.*, at 6-7.

Unlike his fellow enemy combatants being detained in Guantanamo Bay, Hamdi had a get-out-of-Cuba-free card. When U.S. officials learned that Hamdi had been born in Louisiana, they transferred him to the Naval Brig in Norfolk, Virginia, *id.*, from where, under the auspices of his father acting as his next-friend, has waged this legal battle seeking access to attorneys and a writ of habeas corpus compelling his release. This, because under the generally-accepted though erroneous interpretation of the Fourteenth Amendment's Citizenship Clause, Hamdi claimed that his birth to Saudi parents who were at the time temporarily visiting one of the United States made him a U.S. citizen, entitled to the full panoply of rights that the U.S. Constitution guarantees to U.S. citizens.

SUMMARY OF ARGUMENT

The current understanding of the Citizenship Clause is incorrect, as a matter of text, historical practice, and political theory. As an original matter, mere birth on U.S. soil was insufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., *not* owing allegiance to another sovereign) was the constitutional mandate, a floor for citizenship below which Congress cannot go in the exercise of its Article I power over naturalization.

Although this correct understanding of the text of the Citizenship Clause was adopted by this Court, first in *dicta* and then as holding, it was later repudiated in the case of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), in which this Court adopted instead an erroneous interpretation that is simply incompatible with the foundational principle of "consent of the governed."

While Congress remains free to offer citizenship to persons who have no constitutional entitlement to citizenship, it has not gone beyond the constitutional command in the context of birth citizenship. Mere birth to foreign nationals who happen to be visiting the United States at the time, as was the case of Hamdi, is not sufficient for constitutionally-compelled citizenship. Because this Court's rulings to the contrary rested on a flawed understanding of the Citizenship Clause, those rulings should be revisited. Moreover, the statutory grant of citizenship conferred by Congress, which precisely tracks the language of the Fourteenth Amendment, should itself be re-interpreted in accord with the original understanding of the Citizenship Clause. In the wake of the devastating events of September 11, 2001, now would be a good time to do so.

ARGUMENT

I. The Text of the Citizenship Clause Requires *Both* Birth In United States Territory *and* Jurisdictional Allegiance to the United States In Order For One To Have a Constitutional Right to Citizenship.

It is today routinely believed that under the Citizenship Clause of the Fourteenth Amendment, mere birth on U.S. soil is sufficient to obtain U.S. citizenship. As Professor Michael Dorf noted in August 2002, for example: "Yaser Esam Hamdi was born in Louisiana. Under Section One of the Fourteenth Amendment, he is *therefore* a citizen of the United States, even though he spent most of his life outside

this country." Michael C. Dorf, *Who Decides Whether Yaser Hamdi, Or Any Other Citizen, Is An Enemy Combatant?* FindLaw (Aug. 21, 2002) (emphasis added).[5]

However strong this commonly-believed interpretation might appear, it simply does not comport with the text of the Citizenship Clause (particularly as informed by the debate surrounding its adoption).

The Citizenship Clause of the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. Amend. XIV, § 1. As manifest by the conjunctive "and," the clause mandates citizenship to those who meet *both* of the constitutional prerequisites: 1) birth (or naturalization) in the United States; *and* 2) being subject to the jurisdiction of the United States.

As noted above, Hamdi was indisputably born in the United States, so the issue in this case is whether he was *also* at the time subject to the jurisdiction of the United States. The widely-held, though erroneous, view today is that he clearly was. Any person entering the territory of the United States—even for a short visit; even illegally—is considered to have *subjected* himself to the jurisdiction of the United States, which is to say, subjected himself to the laws of the United States. Surely one who is actually born in the United States is therefore "subject to the jurisdiction" of the Unites States and entitled to full citizenship as a result, or so the common reasoning goes.

Textually, such an interpretation is manifestly erroneous, for it renders the entire "subject to the jurisdiction" clause redundant. Anyone who is "born" in the United States is, under this interpretation, necessarily "subject to the jurisdic-

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[5] Available at http://writ.corporate.findlaw.com/dorf/20020821.html.

tion" of the United States. Yet it is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be interpreted to create redundancy unless any other interpretation would lead to absurd results. *See, e.g., Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 562 (1995) ("this Court will avoid a reading which renders some words altogether redundant"); *see also* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case. W. Res. L. Rev. 179 (1989).

The "subject to the jurisdiction" provision must therefore require something in addition to mere birth on U.S. soil. The language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment was derived, provides the key to its meaning. The 1866 Act provides: "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." 14 Stat. 27, ch. 31 (April 9, 1866). As this formulation makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child's parents remained a citizen or subject of the parents' home country, was not entitled to claim the birthright citizenship provided by the 1866 Act.

The jurisdiction clause of the Fourteenth Amendment is somewhat different from the jurisdiction clause of the 1866 Act, of course. The positively-phrased "subject to the jurisdiction" of the United States might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act, one more in line with the modern understanding accepted unquestioningly by Professor Dorf and others that birth on U.S. soil is alone sufficient for citizenship. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading.

When pressed about whether Indians living on reservations would be covered by the clause since they were "most clearly subject to our jurisdiction, both civil and military," for example, Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that "subject to the jurisdiction" of the United States meant subject to its "complete" jurisdiction; "[n]ot owing allegiance to anybody else." Congressional Globe, 39th Cong., 1st Sess., 2893 (May 30, 1866). And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now" (*i.e.*, under the 1866 Act). *Id.*, at 2890. That meant that the children of Indians who still "belong[ed] to a tribal relation" and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin explicitly to exclude "Indians not taxed," as the 1866 Act had done, was rejected as redundant. *Id.*, at 2892-97; *see also* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 72-89 (1985).

The interpretative gloss offered by Senators Trumbull and Howard was also accepted by this Court—by both the majority and the dissenting justices—in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). The majority in that case correctly noted that the "main purpose" of the Clause "was to establish the citizenship of the negro," and that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, *and citizens or subjects of foreign States born within the United States*." *Id.*, at 73 (emphasis added). Justice Steven Field, joined by Chief Justice Chase and Justices Swayne and Brad-

ley in dissent from the principal holding of the case, likewise acknowledged that the Clause was designed to remove any doubts about the constitutionality of the 1866 Civil Rights Act, which provided that all persons born in the United States were as a result citizens both of the United States and the state in which they resided, provided they were not at the time subjects of any foreign power. *Id.*, at 92-93 (Field, J., dissenting).

Although the statement by the majority in *Slaughter-House* was *dicta*, the position regarding the "subject to the jurisdiction" language advanced there was subsequently adopted as holding by this Court in *Elk v. Wilkins*, 112 U.S. 94 (1884). John Elk was born on an Indian reservation and subsequently moved to non-reservation U.S. territory, renounced his former tribal allegiance, and claimed U.S. citizenship by virtue of the Citizenship Clause. This Court held that the claimant was not "subject to the jurisdiction" of the United States at birth, which required that he be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." *Id.*, at 102. Elk did not meet the jurisdictional test because, as a member of an Indian tribe at his birth, he "owed immediate allegiance to" his tribe and not to the United States. Although "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states," "they were alien nations, distinct political communities," according to the Court. *Id.*, at 99.

Drawing explicitly on the language of the 1866 Civil Rights Act, the Court continued:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power), although in a geographical sense born in the United States, are no more "born in the United

> States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.

Id., at 102. Indeed, if anything, American Indians, as members of tribes that were themselves dependant upon the United States (and hence themselves subject to its jurisdiction), had a stronger claim to citizenship under the Fourteenth Amendment merely by virtue of their birth within the territorial jurisdiction of the United States than did children of foreign nationals. But the Court in *Elk* rejected even that claim, and in the process necessarily rejected the claim that the phrase, "subject to the jurisdiction" of the United States, meant merely territorial jurisdiction as opposed to complete, political jurisdiction.

Such was the interpretation of the Citizenship Clause initially given by this Court, and it was the correct interpretation. As Thomas Cooley noted in his treatise, "subject to the jurisdiction" of the United States "meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government." THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN AMERICA 243 (2001) (1880),

II. The Overly-Broad Reading of this Court's Decision in *Won Kim Ark* Needs to be Narrowed to Conform to the Original Understanding of the Citizenship Clause.

Despite the clear holding of *Elk* and the persuasive *dicta* from *Slaughter-House* that mere birth on U.S. soil is not sufficient to meet the constitutional prerequisites for birthright

citizenship, this Court held otherwise in *United States v. Won Kim Ark*, 169 U.S. 649 (1898), with expansive language even more broad than the holding of the case itself. It is that erroneous interpretation of the Citizenship Clause, adopted thirty years after the adoption of the Fourteenth Amendment, that has colored basic questions of citizenship ever since.

In *Won Kim Ark*, Justice Horace Gray, writing for the Court, held that "a child born in the United States, of parents of Chinese descent, who at the time of his birth were subjects of the emperor of China, but have a permanent domicile and residence in the United States," was, merely by virtue of his birth in the United States, a citizen of the United States as a result of the Citizenship Clause of the Fourteenth Amendment. 169 U.S., at 653. Justice Gray correctly noted that the language to the contrary in *The Slaughter-House Cases* was merely *dicta* and therefore not binding precedent. *Id.*, at 678. He found the *Slaughter-House dicta* unpersuasive because of a subsequent decision, in which the author of the majority opinion in *Slaughter-House* had concurred, holding that foreign consuls (unlike ambassadors) were "subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside." *Id.*, at 679 (citing, *e.g.*, *In re Baiz*, 135 U.S. 403, 424 (1890)).

Justice Gray appears not to have appreciated the distinction between partial, territorial jurisdiction, which subjects all who are present within the territory of a sovereign to the jurisdiction of that sovereign's laws, and complete political jurisdiction, which requires allegiance to the sovereign as well.

More troubling than his rejection of the persuasive *dicta* from *Slaughter-House*, though, was the fact that Justice Gray also repudiated the actual holding in *Elk*, which he himself had authored. After quoting extensively from the opinion in *Elk*, including the portion, reprinted above, noting that the children of Indians owing allegiance to an Indian tribe were

no more "subject to the jurisdiction" of the United States within the meaning of the Fourteenth Amendment than were the children of ambassadors and other public ministers of foreign nations born in the United States, Justice Gray simply held, without any analysis, that *Elk* "concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country." *Id.*, at 681-82.

By limiting the "subject to the jurisdiction" clause to the children of diplomats, who neither owed allegiance to the United States nor were (at least at the ambassadorial level) subject to its laws merely by virtue of their residence in the United States as the result of long-established international law fiction of extra-territorality by which the sovereignty of a diplomat is said to follow him wherever he goes, Justice Gray simply failed to appreciate what he seemed to have understood in *Elk*, namely, that there is a difference between territorial jurisdiction, on the one hand, and the more complete, allegiance-obliging jurisdiction that the Fourteenth Amendment codified, on the other.

Justice Gray's failure even to address, much less appreciate, the distinction was taken to task by Justice Fuller, joined by Justice Harlan, in dissent. Drawing on an impressive array of legal scholars, from Vattel to Blackstone, Justice Fuller correctly noted that there was a distinction between the two sorts of allegiance—"the one, natural and perpetual; the other, local and temporary." *Id.*, at 710. The Citizenship Clause of the Fourteenth Amendment referred only to the former, he contended. He noted that the absolute birthright citizenship urged by Justice Gray was really a lingering vestige of a feudalism that the Americans had rejected, implicitly at the time of the Revolution, and explicitly with the 1866 Civil Rights Act and the Fourteenth Amendment. *Id.*, at

707; *see also* Edward J. Erler, *Immigration and Citizenship: Illegal Immigrants, Social Justice and the Welfare State*, in GERALD FROST, ED., LOYALTY MISPLACED: MISDIRECTED VIRTUE AND SOCIAL DISINTEGRATION 71, 81 (1997).

Quite apart from the fact that Justice Fuller's dissent was logically compelled by the text and history of the Citizenship Clause, Justice Gray's broad interpretation led him to make some astoundingly incorrect assertions. He claimed, for example, that "a stranger born, for so long as he continues within the dominions of a foreign government, owes obedience to the laws of that government, *and may be punished for treason*." *Id.*, at 693. And he necessarily had to recognize dual citizenship as a necessary implication of his position, *id.*, at 691, despite the fact that ever since the Naturalization Act of 1795, "applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects." *Id.*, at 711 (Fuller, J., dissenting) (citing Act of Jan. 29, 1795, 1 Stat. 414, c. 20).

Finally, Justice Gray's position is incompatible with the notion of consent that underlay the sovereign's power over naturalization. What it meant, fundamentally, was that foreign nationals could secure American citizenship for their children merely by giving birth on American soil, whether or not their arrival on America's shores was legal or illegal, temporary or permanent.

Justice Gray stated that the children of only two classes of foreigner nationals were not entitled to the birthright citizenship he thought guaranteed by the Fourteenth Amendment. First, as noted above, were the children of ambassadors and other foreign diplomats who, as the result of the fiction of extra-territorality, were not even considered subject to the territorial jurisdiction of the United States. Second

were the children of members of invading armies who were born on U.S. soil while it was occupied by the foreign army. But apart from these two narrow exceptions, all children of foreign nationals who managed to be born on U.S. soil were, in Justice Gray's formulation, citizens of the United States. Children born of parents who had been offered permanent residence but were not yet citizens and who as a result had not yet renounced their allegiance to their prior sovereign would become citizens by birth on U.S. soil. This was true even if, as was the case in *Wong Kim Ark* itself, the parents were, by treaty, unable ever to become citizens.

Children of parents residing only temporarily in the United States on a student or work visa, such as Hamdi's parents, would also become U.S. citizens. Children of parents who had overstayed their temporary visas would likewise become U.S. citizens, even though born of parents who were now in the United States illegally. And, perhaps most troubling from the "consent" rationale, even children of parents who never were in the United States legally would become citizens as the direct result of the illegal action by their parents. This would be true even if the parents were nationals of a regime at war with the United States and even if the parents were here to commit acts of sabotage against the United States, at least as long as the sabotage did not actually involve occupying a portion of the territory of the United States. The notion that the framers of the Fourteenth Amendment, when seeking to guarantee the right of citizenship to former slaves, also sought to guarantee citizenship to the children of enemies of the United States who were in its territory illegally, is simply too absurd to be a credible interpretation of the Citizenship Clause.

Although hard to sustain under the broad language used by Justice Gray, the actual holding of *Wong Kim Ark* is actually much more narrow, and the case need not be read so expansively as to produce such absurd results. Because of the

Chinese Exclusion Acts, *e.g.*, 22 Stat. 58 (1882), Wong Kim Ark's parents were ineligible for citizenship *even if* they had renounced their Chinese citizenship and subjected themselves to the exclusive jurisdiction of the United States. As such, Wong Kim Ark arguably would have been entitled to citizenship because, like his parents, he would in fact have been "subject to the jurisdiction" of the United States in the complete, allegiance-obliging sense intended by the phrase. *Cf. In re Look Tin Sing*, 21 F. 905, 907 (C.C. Cal. 1884) (Field, Circuit Justice) (concluding that the American-born son of Chinese immigrants, who had taken up permanent residence in the United States pursuant to a treaty with China that recognized the right of man to change his home and allegiance as "inherent and inalienable," because he, like his parents, was at the time of his birth subject to the "exclusive" jurisdiction of the United States).

Hamdi's parents, on the other hand, did not suffer from the legal disability that made Wong Kim Ark's parents ineligible for citizenship. No law barred them from applying for citizenship, and they did not manifest any intent to become permanent residents of the United States. They were, instead, merely temporary visitors to the United States, subject to the territorial jurisdiction and laws of the United States for the extent of their stay but not owing to the United States any other, much less exclusive, allegiance.

This is not to say that Congress could not, pursuant to its naturalization power, choose to grant citizenship to the children of foreign nationals. *See* U.S. Const. Art. I, § 8, cl. 4 ("The Congress shall have power … To establish a uniform Rule of Naturalization"). But thus far it has not done so. Instead, the language of the current naturalization statute simply tracks the minimum constitutional guarantee—anyone "born in the United States, *and subject to the jurisdiction thereof*," is a citizen. 8 U.S.C. § 1401(a). Indeed, Congress has by its own actions with respect to Native Americans—

both before and after this Court's decision in *Wong Kim Ark*—rejected the claim that the Citizenship Clause itself confers citizenship merely by accident of birth. *See* Act of July 15, 1870, 16 Stat. 361, ch. 296, § 10 (cited in *Elk*, 112 U.S., at 104) (extending the jurisdiction of the United States to any member of the Winnebago Tribe who desired to become a citizen); Act of March 3, 1873, 17 Stat. 632, ch. 332, § 3 (cited in *Elk*, 112 U.S., at 104) (same offer of citizenship to members of the Miami tribe of Kansas); Indian Citizenship Act of 1924, 43 Stat. 253, 8 U.S.C. § 1401(b) (granting citizenship to Indians born within the territorial limits of the United States). None of these citizenship acts would have been necessary—indeed, all would have been redundant—under the expansive view of the Citizenship Clause propounded by Justice Gray.

With the absurdity of Hamdi's claim of citizenship so vividly presented, it is time for this Court to revisit Justice Gray's erroneous interpretation of the Citizenship Clause, restoring the constitutional mandate to what its drafters and ratifiers actually intended—that only a complete jurisdiction, of the kind that brings with it a total and exclusive allegiance, is sufficient to qualify for the grant of citizenship to which the people of the United States actually consented when they ratified the Fourteenth Amendment.

III. The Overly-Broad Reading That Has Been Given to *Wong Kim Ark* Is Incompatible with the Theory of Government by Consent Adopted by the Founders and Reaffirmed by the Framers of the Fourteenth Amendment.

Once one considers the full import of Justice Gray's language in *Wong Kim Ark*, it becomes clear that his proposition is simply incompatible not only with the text of the Citizenship Clause but with the political theory of the American founding as well.

At its core, as articulated by Thomas Jefferson in the Declaration of Independence, that political theory posits the following: Governments are instituted among particular peoples, comprised of naturally-equal human beings, to secure for themselves certain unalienable rights. Such governments, in order to be legitimate, must be grounded in the consent of the governed—a necessary corollary to the self-evident proposition of equality. Decl. of Ind. ¶ 2. This consent must be present, either explicitly or tacitly, not just in the formation of the government but in the ongoing decision whether to embrace others within the social compact of the particular people. As formulated in the Massachusetts Bill of Rights of 1780:

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights …. The body-politic is formed by a voluntary association of individuals; it is a social compact by which *the whole people covenants with each citizen and each citizen with the whole people* that all shall be governed by certain laws for the common good.

Mass. Const. of 1780, Preamble (emphasis added). Thus, as Professor Edward Erler has noted:

> [T]he social contract requires *reciprocal consent*. Not only must the individual consent to be governed, but he must also be accepted by the community as a whole. If all persons born within the geographical limits of the United States are to be counted citizens—even those whose parents are in the United States illegally—then this would be tantamount to the conferral of citizenship without the consent of 'the whole people.

Erler, *Immigration and Citizenship*, at 77; *see also* THOMAS G. WEST, VINDICATING THE FOUNDERS, at 166-67. In other words, birthright citizenship—the claim advanced by Hamdi that he is entitled to citizenship status merely by accident of birth—is contrary to the principle of consent that is one of the bedrock principles of the American regime.

Such a claim of birthright citizenship traces its roots not to the republicanism of the American founding, grounded as it was in the consent of the governed, but to the feudalism of medieval England, grounded in the notion that a subject owed perpetual allegiance and fealty to his sovereign. *See id.*, at 81. A necessary corollary of the feudal notion of citizenship was the ban on expatriation, embraced by England and described by Blackstone as follows:

> Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection …. Natural allegiance is therefore a debt of gratitude; which cannot be forteited, canceled, or altered, by any change of time, place, or circumstance…. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was instrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrence act of that prince to whom it was first due.

William Blackstone, 1 Commentaries on the Laws of England 357-58 (1979) (1765).

Thus, when Congress passed as a companion to the Fourteenth Amendment the Expatriation Act of 1868, which provided simply that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment

of the rights of life, liberty, and the pursuit of happiness," it necessarily rejected the feudal birth-right citizenship doctrine of medieval England, advanced here by Hamdi, as fundamentally incompatible with the principles of the Declaration of Independence. As Representative Woodward of Pennsylvania noted on the floor of the House of Representatives: "It is high time that feudalism were driven from our shores and eliminated from our law, and now is the time to declare it." Cong. Globe, 40th Cong., 2nd Sess., at 868 (1868); *see also id*., at 967 (Rep. Baily) (describing birth-right citizenship as "the slavish feudal doctrine of perpetual allegiance"); *Wong Kim Ark*, 169 U.S., at 707 (Fuller, J., dissenting) (describing the rule adopted by the majority as "the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due was that of liege men to their liege lord").

Such remnants of feudalism were rejected by our nation's founders, when they declared to a candid world that they no longer owed allegiance to the king of their birth. They were rejected again by the Congress in 1866, and by the nation when it ratified the Fourteenth Amendment. Hamdi's case presents this Court with the opportunity to reject them once and for all, and to repudiate the erroneous decision of *Wong Kim Ark* that revived that forgotten doctrine to the detriment of the American republican ideal of government by consent.

CONCLUSION

The decision of the Fourth Circuit should be affirmed, and this Court should correct the erroneous and overly-broad interpretation of the Citizenship Clause provided in *Wong Kim Ark*.

Respectfully submitted,

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