Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation

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In accord with the traditional restriction of citizenship of nonwhites, for decades some conservative lawmakers and scholars have urged Congress to deny citizenship to U.S.-born children of unauthorized migrants. For its part, the Trump Administration promised to pursue birthright citizenship "reform." The most prominent and compelling argument that Congress can deny citizenship by statute notwithstanding the citizenship clause of the Fourteenth Amendment comes from Citizenship Without Consent*, a book authored by Yale Law Professor Peter Schuck and then-Yale Political Science Professor Rogers Smith. They argue that there was no federal exclusion or deportation in 1868 and thus the Fourteenth Amendment simply did not contemplate the citizenship of children of the then non-existent category of "illegal aliens." Hundreds of law review articles, op-eds, white nationalist listservs, congressional hearings, and bills have embraced this argument, often citing* Citizenship Without Consent.

This Article is the first to examine the law regulating, suppressing, and banning the African slave trade to demonstrate, contrary to Citizenship Without Consent*, that throughout the period leading up the Civil War and the adoption of the Fourteenth Amendment, the United States had both*

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immigration laws and unauthorized migrants in the modern sense. First, the slave trade laws used immigration regulation techniques, including interdiction, detention, and deportation. Second, they were designed to exclude undesirable migrants and shape the nation's population. Persons trafficked illegally could be and were deported, but, as Congress well knew, some were successfully smuggled into the country and remained here. Because the children of unauthorized migrants born in the United States were unquestionably made citizens by the Fourteenth Amendment, any modern statute denying citizenship to the children of undocumented migrants would be unconstitutional. In addition, scholars must consider the slave trade laws as part of the origins of federal immigration regulation.

Finally, we note that from the 1790s to the 1860s there were anti-immigration social movements and political parties (most notably the Know-Nothing Party of the 1850s) that pushed for limitations on the immigration and naturalization of Catholics, Chinese, and others. Everyone in Congress was well of aware of this anti-immigration agitation, and thus Congress was on notice that at some point there might be statutory limits on immigration, and this would lead to unauthorized immigrants living in the United States and having American-born children. Nevertheless, in the face of this history, in 1866 Congress put into the Fourteenth Amendment the iron-clad language that, with the exception of the children of diplomats, "All persons" born in the United States were "citizens of the United States and of the State wherein they reside."

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INTRODUCTION

From the Founding of the United States until 1952, federal authorities often denied or questioned the citizenship of non-white immigrants and their children. Before the passage of the Civil Rights Act of 1866 and the ratification of the Fourteenth Amendment in 1868, the "rule of law" in the United States was that no one of African descent could be a U.S. citizen.[1] Even after the adoption of the Fourteenth Amendment there were persistent questions about the citizenship status of Asian

[1] *Cf.* Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005) (discussing racial discrimination in U.S. law). *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th Anniversary ed. 2006) (discussing racial restrictions on eligibility for naturalization); Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 WASHBURN L.J. 311 (2012) (discussing restrictions). The Naturalization Act of 1790, ch. 3, 1 Stat. 103, allowed only "free white persons" to become naturalized citizens. Birthright citizenship was the general rule in the U.S., and thus free blacks born in the U.S. were presumptively citizens of the nation at the founding. However, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court through Chief Justice Roger B. Taney held that African Americans could never be citizens of the United States, even though they had voted in at least six states when the Constitution was ratified in 1788. Justice Curtis's dissent took a very different view of the history. *See id.* at 572-76. After 1775 free blacks (whether born in Africa or the colonies) served in all northern (and some southern) militias, and many thousands served in the Revolutionary army. At the time of the adoption of the U.S. Constitution free blacks voted on the same basis as whites in New Hampshire, Massachusetts, New York, New Jersey, Pennsylvania, and North Carolina, and there is evidence that a least some free blacks voted in Connecticut and Maryland. In 1860 they could vote in Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island, on an equal basis as whites, in New York if they owned sufficient property, and in elections involving school taxes in Michigan. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 425 (1986). The Fourteenth Amendment overturned Taney's claims that blacks could not be citizens of the United States. *See* U.S. CONST. amend. XIV, § 1 ("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."). The Naturalization Act of 1870, ch. 254, 16 Stat. 254, extended eligibility for naturalization to "aliens of African nativity and to persons of African descent."

immigrants and their American-born children,[2] Puerto Ricans,[3] Mexicans,[4] and Native Americans.[5] Similarly, some now question the

[2] The Naturalization Act of 1790 limited naturalization to "free white persons." The Naturalization Act of 1870 extended the right of naturalization to "aliens of African nativity and to persons of African descent," but not to other races. As the Supreme Court explained, "[g]enerally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not." Terrace v. Thompson, 263 U.S. 197, 220 (1923). *See generally* Dudley O. McGovney, *Race Discrimination in Naturalization*, 8 IOWA L. REV. 129 (1923) (examining race discrimination in naturalization statutes and cases). In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), a 6–2 Supreme Court majority held, contrary to the arguments of the Department of Justice, that persons of Chinese ancestry born in the United States were citizens under the Fourteenth Amendment. *Id.* at 704. These racial limitations continued to exist until 1952.

[3] *See* Gonzales v. Williams, 192 U.S. 1, 13 (1904) (rejecting effort of the United States to exclude a native of Puerto Rico arriving at the port of New York as an "alien"). This of course is an example of a challenge that the Courts rejected. *See generally* Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017) (analyzing the racial exclusion of American nationals from citizenship and the rights of nationals in relation to citizens).

[4] In *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897), U.S. District Judge Thomas Sheldon Maxey sought the opinions of several prominent members of the bar on the question of whether Mexican immigrants were eligible to be naturalized. Despite the divided opinions of his consultants, Judge Maxey ultimately granted them citizenship. *Id.* at 355.

[5] *See* Elk v. Wilkins, 112 U.S. 94, 109 (1884) (holding that an Indian born in the U.S. in tribal relations was not a birthright citizen). *See generally* Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185 (2016) (examining how *Elk v. Wilkins* and *United States v. Wong Kim Ark* affect concepts of citizenship and freedom). However, under this ruling, as well as under early state law, Indians not in a tribal relation could be birthright citizens. Determinations of citizenship for Native American were often problematic and idiosyncratic. For example, New York State denied the right of Ely S. Parker, a member of the Seneca nation, to take the bar and become a lawyer. However, he was allowed to be an officer in the New York militia, *id.* at 1206, even though federal law only allowed "white male citizen[s]" to serve in the militia. Act of May 2, 1792, ch. 33, 1 Stat. 271. He then served in the U.S. Army during the Civil War, ultimately being promoted to Brigadier General and received citizenship based on his war service. He later served as the U.S. Commissioner of Indian Affairs. Charles S. Curtis, a member of the Kaw nation, represented Kansas in the House of Representatives (1893–1907) and the Senate (1907–13; 1915–27), before serving as Vice President of the United States (1928–33). His service as vice president required that he be a "natural born citizen." *See* U.S. CONST. amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."). The Indian Citizenship Act of 1924, commonly called the Snyder Act, ch. 233, Pub. L. No. 175, 43 Stat. 253 (1924) extended citizenship to all Native Americans born in the United States. However, at least five other Native Americans, in addition to Charles Curtis, who were born on tribal lands and/or grew up on tribal lands served in the U.S. House of Representatives before passage of the Snyder Act. However, under the Dawes Allotment Act of 1887, ch. 119, 24 Stat. 388, and numerous treaties, by 1924 about two-thirds of all Indians were

entitlement to U.S. citizenship of children of undocumented noncitizens[6] and other immigrants[7] born in the United States.[8] The text of the Constitution seems to plainly grant them citizenship: Section 1 of the Fourteenth Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof,

citizens before the passage of the Snyder Act. Berger, *supra* note 5, at 1195-96, 1201, 1205, 1209-10, 1241.

[6] Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 13 (2009); *see* Charles Wood, *Losing Control of America's Future — The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 506-08 (1999); Adam C. Abrahms, Note, *Closing the Immigration Loophole: The 14th Amendment's Jurisdiction Requirement*, 12 GEO. IMMIGR. L.J. 469, 469-70 (1998); John C. Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUND. (Mar. 30, 2006), https://www.heritage.org/the-constitution/report/feudalism-consent-rethinking-birthright-citizenship [https://perma.cc/8STQ-Y5EP]; *see also* Jonathan 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, 712 (1995) ("Although these outcries duplicate earlier justifications used to exclude groups from the polity, perhaps the most dangerous recurring argument against recognizing the American-born children of illegal immigrants as members of the national community is that they will degrade its racial and cultural character."); Mary Romero, *"Go After the Women": Mothers Against Illegal Aliens' Campaign Against Mexican Immigrant Women and Their Children*, 83 IND. L.J. 1355, 1371, 1378-79 (2008) ("The Mission of Mothers Against Illegal Aliens-(MAIA) is to bring awareness to and educate the LEGAL American families whose children are the silent victims of this Invasion of Illegal Aliens."); William M. Stevens, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment's Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337, 350 (2008).

[7] During the 2020 presidential campaign, one scholar questioned the citizenship of Vice President Harris, whose parents are immigrants, notwithstanding her birth in California. John C. Eastman, Opinion, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 12, 2020, 8:30 AM EDT), https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483 [https://perma.cc/BJB4-HW5L].

[8] Race-based doubts about citizenship have not disappeared. The best-known example is the conspiracy theory that President Obama was a Muslim born in Kenya. *See* Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 980 n.51, 1004 (2010) (discussing "the Birther Movement, whose reliance on the significance of race is not even thinly veiled"); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2521 (2007) ("The alien citizen is an American citizen by virtue of her birth in the United States but whose citizenship is suspect, if not denied, on account of the racialized identity of her immigrant ancestry."). Oddly, in 2016 there were almost no suggestions that Ted Cruz was not a citizen, even though he was born in Canada to a father who was a citizen of Cuba and did not renounce his Canadian citizenship (based on birth there) until after he was elected to the U.S. Senate. *But see* Robert Clinton, *Ted Cruz Isn't a 'Natural Born' Citizen*, U.S. NEWS & WORLD REP. (Jan. 27, 2016), https://www.usnews.com/opinion/articles/2016-01-27/ted-cruz-is-not-a-natural-born-citizen-according-to-the-constitution [https://perma.cc/ZG5Z-K6LB].

are citizens of the United States, and of the state wherein they reside."[9] The debates over the passage of the Amendment in the House and the Senate illustrate that Congress assumed the language meant what it said. For example, in the face of vicious anti-Chinese sentiment, Congress stood firm on birth-right citizenship. Senator Edgar Cowan, a conservative Republican who opposed African American citizenship, directly asked if the Fourteenth Amendment would "have the effect of naturalizing the children of Chinese and Gypsies born in this country."[10] Senator Lyman Trumbull, who had drafted the Thirteenth Amendment two years earlier, answered tartly: "Undoubtedly," and no Senator contradicted him.[11] Senator Trumbull's view was consistent with the English tradition of birthright citizenship recognized in *Calvin's Case* in 1608[12] and followed in early American decisions.[13] Yet, today the debate rages.

The most serious argument that there is less to the Fourteenth Amendment than meets the eye comes from the scholarship of political scientist Rogers Smith and law professor Peter Schuck. In their 1985 book *Citizenship Without Consent: Illegal Aliens in the American Polity*, they argue that as a republic rejecting the idea of monarchy, membership in the polity — citizenship — must be by agreement of the people.[14] Under our government, the consent of the people comes through Congress. Of course, the Fourteenth Amendment is an act of the people through both Congress and the States, but they argue that

[9] U.S. CONST. amend. XIV, § 1. The Court has stated that unauthorized migrants in the United States are "subject to the jurisdiction thereof" within the meaning of the Fourteenth Amendment. Plyler v. Doe, 457 U.S. 202, 211 & n.10 (1982).

[10] Berger, *supra* note 5, at 1197 (quoting CONG. GLOBE, 39th Cong., 1st Sess. at 498 (1866)). For more discussion on Cowan, see Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1024-25 & n.27 (2014) [hereinafter *Original Intent and the Fourteenth Amendment*].

[11] Berger, *supra* note 5, at 1197 (quoting CONG. GLOBE, 39th Cong., 1st Sess. at 498 (1866)).

[12] Calvin's Case (1608) 77 Eng. Rep. 377, 382; 7 Co. Rep. 1 a, 4 b.

[13] *See, e.g.*, Lynch v. Clarke, 7 N.Y. Ch. Ann. 443 (1844) ("With these various and conclusive illustrations of the uniform, wise and beneficial policy of the United States, for nearly two centuries past; a policy which embraced every legitimate means for increasing the number, not merely of its inhabitants, but of its *citizens*; it is impossible to hold that there has been any relaxation from the common law rule of citizenship by means of birth within our territory."). *See generally* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 28 (1978) (discussing natural allegiance).

[14] PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 116 (1985).

this is insufficient evidence of consent. They assert that in 1868, when the Fourteenth Amendment was ratified, "[i]mmigration to the United States was entirely unregulated," and thus there were no "illegal aliens" for Congress to consider.[15] They further argue that because Congress and the states simply did not even consider the possibility that there might someday be people in the United States whose presence was prohibited by law, the Fourteenth Amendment does not automatically make the American-born children of undocumented migrants part of the political community.[16] Now that we have federal laws restricting immigration and providing for exclusion and deportation, they believe Congress faces an entirely new situation unforeseen by the framers of the Fourteenth Amendment. Accordingly, they argue, Congress has the power, by enacting a statute, to deny citizenship to the children born here of those present without authorization of U.S. law.[17]

Immediately after the publication of *Citizenship Without Consent*, and regularly since,[18] some conservative politicians and commentators have been captivated by the argument that children of undocumented migrants can be denied citizenship.[19] Most recently, President Donald J. Trump stated: "We're looking at that very seriously, birthright citizenship, where you have a baby on our land, you walk over the border, have a baby - congratulations, the baby is now a U.S. citizen. . . .

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[15] *Id.* at 92.

[16] *Id.* at 102.

[17] *Id.* at 119-20.

[18] *See* End Birth Citizenship to Illegal Aliens Act of 2006, H.R. 6294, 109th Cong. (2006); *Birthright Citizenship: Is It the Right Policy for America?: Hearing Before the Subcomm. on Immigration & Border Sec. of the H. Comm. on the Judiciary*, 114th Cong. (2015); *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Sec., & Claims of the H. Comm. on the Judiciary*, 109th Cong. (2005); *Citizenship Reform Act of 1997; and Voter Eligibility Verification Act*: *Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 105th Cong. (1997).

[19] On several occasions, *Citizenship Without Consent* is mentioned in congressional documents, or one of its authors testified before Congress. *See, e.g.*, *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Joint Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 94 (1995) (testimony of Prof. Schuck); *Members' Forum on Immigration: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 14 (1995) (citing to Professors Schuck and Smith's book); *Economic and Demographic Consequences of Immigration: Hearings Before the Subcomm. on Econ. Res., Competitiveness, & Security Economics, Joint Econ. Comm.*, 99th Cong. 199, 496, 508 (1986) (mentioning Professors Schuck and Smith's book); ALEXANDRA M. WYATT, CONG. RES. SERV., BIRTHRIGHT CITIZENSHIP AND CHILDREN BORN IN THE UNITED STATES TO ALIEN PARENTS: AN OVERVIEW OF THE LEGAL DEBATE 14 n.105 (2015) (citing to Professors Schuck and Smith's book).

It's frankly ridiculous."[20] While Professors Smith and Schuck "strongly favor even more legal immigration than the U.S. now accepts, and a generous amnesty for those now here illegally,"[21] a range of immigration restrictionists and white nationalists have enthusiastically embraced their argument that the Fourteenth Amendment does not provide birthright citizenship for children born in the U.S. if their parents are undocumented migrants.[22]

There have been many critiques of the work of Smith and Schuck. As Neil Gotanda wrote:[23] "Reviewers have critically examined Schuck and Smith's proposal as a question of ethical theory,[24] of political theory,[25]

[20] Kathleen Hunter & Terrence Dopp, *Trump Says He'll End Birthright Citizenship with Executive Order*, BLOOMBERG (Oct. 30, 2018), https://www.bloomberg.com/news/articles/2018-10-30/trump-to-sign-order-ending-birthright-citizenship-axios [https://perma.cc/676X-VY8L]; *Trump Says He Is Seriously Looking at Ending Birthright Citizenship*, REUTERS (Aug. 21, 2019), https://www.reuters.com/article/us-usa-immigration-trump-idUSKCN1VB21B [https://perma.cc/RYQ6-T3X7]; *see also* Ediberto Roman & Ernesto Sagas, *Birthright Citizenship Under Attack: How Dominican Nationality Laws May Be the Future of U.S. Exclusion*, 66 AM. U. L. REV. 1383, 1385 (2017) ("Trump promised that, if elected, his administration would 'end birthright citizenship.'").

[21] Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenship*, NAT'L AFF. (2018), https://www.nationalaffairs.com/publications/detail/the-question-of-birthright-citizenship [https://perma.cc/M5K6-CNNK] [hereinafter *The Question of Birthright Citizenship*].

[22] *See* Oforji v. Ashcroft, 354 F.3d 609, 621 (7th Cir. 2003) (Posner, J., concurring); Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?*, 7 STAN. L. & POL'Y REV. 127, 127-28 (1996) (relying on Schuck and Smith to reach the same conclusion); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 476 n.327 (2005) (citing Howard Sutherland, *Citizen Hamdi: The Case Against Birthright Citizenship*, AM. CONSERVATIVE (Sept. 27, 2004), https://www.theamericanconservative.com/articles/citizen-hamdi/ [https://perma.cc/CLF7-2FMY]); Stephany Gabbard & Frosty Woolridge, *Anchor Babies: Born in the USA: An Abuse of the Fourteenth Amendment*, FROSTY WOOLDRIDGE.COM (July 6, 2004), http://www.frostywooldridge.com/articles/art_2004jul06.html [https://perma.cc/UWY4-LCUT].

[23] Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People": A Review Essay on* Citizenship Without Consent, 76 OR. L. REV. 233, 237 (1997).

[24] *Id.* (citing David S. Schwartz, *The Amorality of Consent*, 74 CALIF. L. REV. 2143 (1986) (book review)).

[25] *Id.* (citing David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278 (1985)).

of constitutional law,[26] and of social policy.[27]" Professor Gotanda added his own critique,[28] and there have been others since.[29]

A telling objection came from Professor Gerald Neuman who pointed out that, whatever else it did, the citizenship clause unquestionably granted citizenship to the formerly enslaved African Americans born in the United States.[30] As we note later in the Article, the parents of some of those children had been trafficked here in violation of federal laws regulating or prohibiting the slave trade, and were in fact living in the United States in violation of federal law.[31] Accordingly, whatever else

[26] *Id.* (citing Gerald L. Neuman, *Back to* Dred Scott*?*, 24 SAN DIEGO L. REV. 485 (1987) (book review)).

[27] *Id.* (citing Janet Wong, 21 HARV. C.R.-C.L. L. REV. 746 (1986) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985)); Arthur C. Helton, Book Review, 19 N.Y.U. J. INT'L L. & POL. 221 (1986) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985))).

[28] *See* Gotanda, *supra* note 23, at 255 ("Schuck and Smith, by ignoring any racial aspect to their proposal, deny very real implications. They discuss only 'illegal' immigrants and refuse to acknowledge that for Americans there is a racial link to foreignness, and Other Non-Whites are inescapably affected by their proposal.").

[29] *See, e.g.*, Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 68 (1997) (asserting that the "argument offered by Schuck and Smith misperceives the legitimating force of consent"); Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331, 343 (2010) ("[I]t has two shortcomings: (1) it produces seemingly valid conclusions from the wrong sources and (2) it shortchanges and misunderstands the actual legislative record of the Clause."); James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367, 369 (2006) ("Congress approved the Citizenship Clause to overrule *Dred Scott* and elevate *jus soli* to the status of constitutional law."); Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499, 501-02 (2008) (arguing that Schuck and Smith misunderstand the meaning of "subject to the jurisdiction" and the comparison of foreign-born immigrants to native born Indians for purposes of citizenship theory).

[30] Gerald L. Neuman, *Back to* Dred Scott*?*, 24 SAN DIEGO L. REV. 485, 498-99 (1987) (book review); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898) ("No one doubts that the amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been . . . .").

[31] On the illegal smuggling of slaves into the United States — slaves whose American-born children would have become citizens under the Fourteenth Amendment, see David Head, *Slave Smuggling by Foreign Privateers: The Illegal Slave Trade and the Geopolitics of the Early Republic*, 33 J. EARLY REPUB. 433, 434-62 (2013). For discussions of the legal suppression of the slave trade, see Paul Finkelman, *Regulating the African Slave Trade*, 54 CIV. WAR HIST. 377, 377 (2008) [hereinafter *Regulating the African Slave Trade*]; Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 432 (2009) [hereinafter *The American Suppression*].

"subject to the jurisdiction thereof" might mean, it necessarily included the children of unauthorized migrants.[32]

In response to President Trump's restrictive immigration policies and interest in revisiting birthright citizenship, Professors Schuck and Smith have once again placed their argument before the public and policymakers, and they contend that three decades of scholarly criticism have not undermined their argument. In a *Washington Post* op-ed they argue:

> The 14th Amendment's citizenship clause did not even address, much less resolve, the question of citizenship for the U.S.-born children of undocumented immigrants . . . [because] the federal government was not then restricting immigration. (The U.S. slave trade was banned by this time, but that was not immigration in any sense we think of it today.)[33]

In a longer article in *National Affairs*, they contend:

> In thinking about what the Citizenship Clause's "subject to the jurisdiction" proviso was intended to mean, recall the obvious fact that the category of immigrant parents here in violation of U.S. law simply did not exist at the time. Federal regulation of immigration (other than a ban on the international slave trade, foreshadowed in the original Constitution) did not begin until 1875. Some states had enacted public-health requirements for immigrants, but Congress did not enact significant bans, especially limited quotas, until well into the 20th century.[34]

However, in these works neither Professor Neuman nor Professors Smith and Schuck closely examined the slave trade laws to explore how

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[32] Professor Neuman also suggested that Schuck and Smith repeated the error of *Dred Scott* by innovating a personal legal theory unsupported by the law:

> Nothing is clearer than that the framers of the fourteenth amendment did not view themselves as adopting revolutionary new principles of citizenship by consent. Taney had done that in the *Dred Scott* decision, denying blacks citizenship on the ground that whites did not consider them appropriate partners in the political community. The framers sought to overturn Taney's innovation, and to reaffirm on a racially neutral basis the same principles that had always governed American citizenship for persons of European descent.

Neuman, *supra* note 30, at 496.

[33] Peter H. Schuck & Rogers M. Smith, Opinion, *Trump Is Half-Right. Congress Can End Birthright Citizenship*, WASH. POST (Oct. 31, 2018, 11:49 AM PDT), https://www.washingtonpost.com/outlook/2018/10/31/trump-is-half-right-congress-can-end-birthright-citizenship/ [https://perma.cc/849K-KCRJ].

[34] Schuck & Smith, *The Question of Birthright Citizenship*, *supra* note 21, at 50-51.

they operated, and their similarities and differences from "immigration" laws. Nor have they considered early acts which actually prohibited the immigration of free people of African ancestry.[35] This Article examines the slave trade laws and those banning black immigrants to challenge the contention that "the category of immigrant parents here in violation of U.S. law simply did not exist at the time" and that the slave trade "was not immigration in any sense we think of it today."[36]

Of course, U.S. laws banning the African slave trade differed in many respects from the much more comprehensive Immigration and Nationality Act currently in effect. Forced and trafficked migrants such as those victimized by the slave trade undoubtedly are in a different position than those who immigrate voluntarily.[37] Yet, there are also similarities between the slave trade laws and modern immigration law. For example, because the coverage of current immigration law extends to involuntary migrants and to trafficked persons,[38] it now applies to enslaved persons.[39] Because the institution of slavery affected the composition of the people of the United States, Professor Rhonda Magee has argued that the slave trade should be understood as part of immigration,[40] even if the trafficked Africans were "unwilling immigrants." This Article understands immigration policy as designed to "shape[] the destiny of the Nation"[41] by using legal tools to determine

[35] *See* Act of Feb. 28, 1803, ch. 10, 2 Stat. 205.

[36] Schuck & Smith, *The Question of Birthright Citizenship*, *supra* note 21, at 50-51.

[37] *See, e.g.*, John U. Ogbu & Herbert D. Simons, *Voluntary and Involuntary Minorities: A Cultural-Ecological Theory of School Performance with Some Implications for Education*, 29 ANTHRO. & EDUC. Q. 155, 169 (1998) (discussing differences between voluntary and involuntary migrants).

[38] Carole Angel, *Immigration Relief for Human Trafficking Victims: Focusing the Lens on the Human Rights of Victims*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 23, 23 (2007).

[39] While not nearly as extensive as the African trade, there are examples of people held as slaves in the United States who were trafficked here in violation of U.S. law or legally brought here and then held against their will. *See* KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES 5-9 (2007); Kevin Bales, *Slavery in its Contemporary Manifestations*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 281, 299-300 (Jean Allain ed., 2012).

[40] Rhonda V. Magee, *Slavery As Immigration?*, 44 U.S.F. L. REV. 273, 275 (2009) ("I call upon race law scholars and critical race theorists to look more carefully at the importation components of the larger system of slavery — including the infamous middle passage — as a particularly horrific form of what contemporary historians in law and social science are now calling forced migration immigration.").

[41] Arizona v. United States, 567 U.S. 387, 415 (2012).

"(1) who may enter the country and (2) who may stay here after entering."[42]

As Part I explains, the legal feature of modern immigration law that seems salient to Professors Smith and Schuck is exclusion and deportation — the decision of Congress that some people are allowed to enter and remain in the United States because of their perceived good qualities or lack of bad qualities, while others are kept out or required to depart. On this basis, the laws regulating and then banning the African slave trade and the entry of free blacks were tools of selective immigration policy just like modern immigration legislation.

Like other immigration laws, the slave trade laws determined who would be allowed to come to the United States, and what would happen to them if they arrived in the country in violation of law.[43] The laws used now ubiquitous methods of immigration control, including interdiction, incarceration, and deportation. Under the Slave Trade Act of 1819, Congress authorized that illegally trafficked slaves be sent, at government expense, to Africa,[44] after 1822 to a settlement created in Liberia, operated by a private organization with extensive governmental connections, the American Colonization Society ("ACS").[45] This deportation occurred even if the victims of the illegal trade might have preferred to stay in the United States, and even though few or none of the trafficked victims were from Liberia.[46]

Congress purposefully designed these laws to shape the demographics of the U.S. population.[47] In this way, they were akin to laws recognized as immigration regulation such as the Chinese Exclusion Act of 1882[48] or the Immigration Act of 1924,[49] with its

[42] Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018).

[43] *See* Finkelman, *Regulating the African Slave Trade*, *supra* note 31, at 378 (discussing statutes); Finkelman, *The American Suppression*, *supra* note 31, at 432; statutes cited *supra* notes 28, 35.

[44] Act of Mar. 3, 1819, ch. 101, 3 Stat. 532.

[45] P.J. STAUDENRAUS, THE AFRICAN COLONIZATION MOVEMENT 1816–1865, at 63-65 (1961). Illustrative of the government connections, the national president of the Society was Supreme Court Justice Bushrod Washington, the nephew of the first president of the United States. The leading figure of the Virginia state society was Chief Justice John Marshall. PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 49-51 (2018); *see also infra* text accompanying notes 166-68.

[46] Act of Mar. 3, 1819, § 2. Indeed, some enslaved persons of African ancestry were not from Africa at all, but from somewhere else, such as Latin America or the Caribbean.

[47] The laws also had a humanitarian goal of ending the African slave trade, but much of the support for the laws was based on opposition to more people from Africa coming into the United States.

[48] Act of May 6, 1882, ch. 126, 22 Stat. 58.

[49] Immigration Act of 1924, ch. 1910, Pub. L. No. 68-139, 43 Stat. 153.

highly restrictive National Origins Quota System, and for that matter the Immigration and Nationality Act in force today.

Part II offers an additional reason to show why the drafters of the Fourteenth Amendment cannot be imagined to have been ignorant of, or unaware of, the possibility of undocumented migration. Immigration restriction of free people from Europe and China had been, for decades, a political issue in the states and Congress. For its part, the federal judiciary had long made clear that the government could regulate immigration, and had the power to ban or deport undesirable noncitizens.

Because the slave trade laws (including the 1803 law which prohibited bringing free people of color into states prohibiting their entry) regulated immigration,[50] Professor Neuman's argument about the slave trade is conclusive. Congress had indeed identified a category of people who were not allowed to be here, and who could be deported under federal law if found in the United States. Nevertheless, through the Fourteenth Amendment, Congress made the children of illegally imported slaves and free blacks U.S. citizens if born in the United States. Accordingly, any statutory or regulatory attempt to deny citizenship to the children of unauthorized migrants would be unconstitutional because of the decision of the enactors of the Fourteenth Amendment to grant citizenship to the children of foreign born people who were illegally in the United States in 1868.

I. REGULATION OF MIGRATION OF ENSLAVED AND FREE PERSONS OF AFRICAN ANCESTRY

Two generations of laws regulated the African slave trade. They illustrate how the suppression of this trade became a form of modern immigration law. The Constitution forbade a federal ban on importation of enslaved persons to the United States until at least 1808,[51] so the first

[50] Notably, the regulation of the slave trade before 1807 and the total ban on the trade starting in 1808, was based on the provision of the Constitution that specifically dealt with persons coming into the United States, including immigrants: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. CONST. art. I, § 9. The early history of the debates over congressional regulation of immigration under the commerce power is elegantly analyzed in Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996).

[51] U.S. CONST. art. I, § 9, cl. 1. Significantly, despite claims by many scholars, the clause did not "require" a ban on the trade after 1808.

set of laws, passed between 1794 and 1803, regulated the trade by prohibiting American investors, sailors, or ships from participating in the trade to or between foreign countries, but not to the United States itself. An act of 1803 also made it a federal offense, under some circumstances, to bring people of color into the United States.[52] This law is a "smoking gun," demonstrating that before 1868 Congress has indeed regulated immigration and prohibited some classes of free people from being brought to the United States. Starting in 1807, the second set of laws absolutely prohibited the importation of slaves to the United States and continued the ban on U.S. residents and citizens participating in the African slave trade to other countries. These laws did not overrule or repeal the 1803 law prohibiting free blacks from coming into the United States under some circumstances. Both sets of laws carried out a federal policy of limiting migration of people of African ancestry into the United States.

The earliest laws regulating the African slave trade[53] were designed to prevent American participation in the African and Atlantic slave trade using such techniques as asset forfeiture[54] and criminal penalties.[55] However, these laws differed from modern immigration laws in that they did not direct the disposition of the enslaved persons involved.[56]

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[52] Act of Feb. 28, 1803, ch. 10, 2 Stat. 205. We discuss this act *infra* at note 73. A number of southern states passed similar laws, prohibiting free black people from entering their jurisdictions.

[53] Act of Mar. 22, 1794, ch. 11, 1 Stat. 347; Act of May 10, 1800, ch. 51, 2 Stat. 70; Act of Feb. 28, 1803. For a full discussion of these laws, see Finkelman, *The American Suppression*, *supra* note 31, at 432. *See also* W.E.B. DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638-1870, at 57-59 (1904).

[54] Penalties under the 1794 law included fines ranging from $2,000 for outfitting a ship to $200 for an individual working on such a ship. The act provided that the actual ships involved in the trade could be confiscated with half of all fines going to any informants. These provisions were later incorporated in the laws absolutely banning the trade. For an example of prolonged litigation over the fate of a slave ship, see United States v. Preston, 28 U.S. (3 Pet.) 57, 67 (1830) (deciding entitlement to proceeds from sale of enslaved persons on the *Josefa Segunda*); The Josefa Segunda, 23 U.S. (10 Wheat.) 312, 332 (1825) (deciding competing claimants' claims); The Josefa Segunda, 18 U.S. (5 Wheat.) 338, 359 (1820) (upholding condemnation). *See generally* PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 86-96 (2018) (discussing litigation over slave ships).

[55] Act of May 10, 1800, ch. 51, 2 Stat. 70, an Act in addition to the act entitled "An act to prohibit the carrying on the slave trade from the United States to any foreign place or country," provided for up to two years in prison for anyone working on a slave ship.

[56] However, regulating means of transportation in this way is immigration law in the sense that statutes often regulate vessels and instrumentalities of commerce in order to regulate the flow of people. *See, e.g.*, Air Espana v. Brien, 165 F.3d 148, 150 (2d Cir. 1999) (discussing 8 U.S.C. § 1323(a)(1) and imposing fines on "any person, including

The first statute regulating the slave trade, passed in 1794, prohibited U.S. citizens and residents from fitting out or otherwise preparing vessels for the slave trade, investing in the trade, or commanding slave trading vessels.[57] Because the Constitution protected the right of states to import slaves until at least 1808,[58] the law did not actually prohibit the importation of slaves into the United States, instead focusing on the foreign slave trade. However, at the time *every* state either prohibited the slave trade outright or taxed imported slaves so heavily that no one could profitably import them into the United States.[59] Thus, the 1794 law prohibited U.S. citizens or residents from building or outfitting ships for the slave trade, operating them, or taking enslaved persons "to any foreign country" or "from any foreign kingdom, place, or country . . . to any foreign country, port, or place whatever."[60] The 1794 Act did not dictate the disposition of enslaved persons who were illegally trafficked but rescued or captured.[61]

An 1800 amendment clarified some issues, but not with respect to immigration. It provided that the offending vessel and its contents "other than slaves" were forfeited if seized by a commissioned vessel, and that the former owners "shall be precluded from all right or claim to the slaves found on board such vessel."[62] The law also prohibited American citizens and residents from serving on slave ships sailing under any flag or registry.[63] But the statute did not address who obtained the property interest in the Africans themselves or whether the enslaved persons became free.

any transportation company, or the owner, master, commanding officer, agent, charterer, or consignee of any vessel or aircraft" bringing people without required visas to the United States). An effective means of excluding undesirable migrants, in addition to or instead of banning them directly, might be to fine or penalize common carriers who bring them to the United States.

57 Act of Mar. 22, 1794, ch. 11, 1 Stat. 347.

58 U.S. CONST. art. I, § 9; *id.* art. V. This clause did not require that the trade end in 1808, but only prohibited a ban on the trade before 1808.

59 *See* Finkelman, *The American Suppression*, *supra* note 31, at 451-52. The state prohibitions would end in 1803 when South Carolina and Georgia reopened the African slave trade.

60 Act of Mar. 22, 1794, ch. 11, 1 Stat. 347, 349.

61 At the time the law was passed, all of the states actually prohibited the importation of slaves, so Congress may have, naively believed that Americans involved in the trade would only be bringing slaves from Africa to other places, like the British Caribbean. In addition, this was before the creation of the settlements in Liberia by Americans and Sierra Leone by the British, and thus Congress did think there was a place in Africa to deport illegally imported slaves.

62 Act of May 10, 1800, ch. 51, § 4, 2 Stat. 70, 71.

63 *Id.* § 2.

In what became a common feature of the slave trade laws, the 1800 statute regulated African migration without reference to slave status. It provided that "nothing in this act contained shall be construed to authorize the bringing into either of the United States, any person or persons, the importation of whom is, by the existing laws of such state, prohibited."[64] At the time every U.S. state prohibited the importation of slaves. Thus, under this law, if a U.S. naval ship intercepted a slave ship owned by Americans or built or "fitted out" (to use the language of the statute) in the United States and sailing under a foreign flag, the naval vessel could bring the ship to the United States, but not, presumably any slaves on it. What would happen to the illegally transported Africans is, again, unclear.

An important 1803 statute indirectly regulated the slave trade.[65] It provided that no ship or person "shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman of the United States" into any port "which port or place shall be situated in any state which by law has prohibited or shall prohibit the admission or importation of such negro, mulatto, or other person of colour."[66] On its face, the law covered

[64] *Id.* § 6. These acts are discussed at length in Finkelman, *The American Suppression of the African Slave Trade*, *supra* note 31, at 458-61.

[65] Act of Feb. 28, 1803, ch. 10, § 1, 2 Stat. 205.

[66] *Id.*; *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1869 (1993) ("In 1803, the Southern states succeeded in obtaining the enactment of a federal statute prohibiting the importation of foreign blacks into states whose laws forbade their entry."). There seems to have been little litigation over this statute. The Supreme Court found it inapplicable in a case where there was no local prohibition. *See* The Brigantine Amiable Lucy v. United States, 10 U.S. (6 Cranch) 330, 332 (1810). However, Felix Frankfurter and James M. Landis wrote that the statute had been "inferentially" sustained by a decision holding "that the power of congress over vessels, which might bring in persons of any description, whatever, was complete before the year 1808, except that it could not be so exercised, as to prohibit the importation or migration of any persons, whom any state, in existence at the formation of the constitution, might think proper to admit." Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 YALE L.J. 685, 725 n.159 (1925) (discussing The Wilson v. United States, 30 F. Cas. 239, 243 (C.C.D. Va. 1820)). In *Elkison v. Deliesseline*, Justice Johnson, while riding circuit, asserted that South Carolina could not arrest a free black British sailor when his ship docked in Charleston, because this action violated the powers of Congress under the Commerce Clause, the power of Congress to regulate foreign policy, the treaty power, and the Supremacy Clause. Elkison v. Deliesseline, 8 F. Cas. 493, 494 (C.C.D.S.C. 1823). His opinion noted that the U.S. might use the Treaty power to restrict free black sailors from entering the nation. However, for technical procedural reasons — which were arguably political motivated to avoid a confrontation with local authorities — Justice Johnson ultimately claimed he had no jurisdiction to grant relief to the hapless British sailor who was incarcerated in a South Carolina jail.

both free and enslaved persons, and by including other "person[s] of color" would have applied to people from Asia, Pacific Islanders, and native peoples from North and South Americas not born in the United States.[67] U.S. Customs and Revenue officers were "enjoined vigilantly to carry into effect the said laws of said states, conformably to the provisions of this act."[68]

This law in part assisted state slave trade prohibitions. When the law was passed, all states prohibited the slave trade,[69] and thus under this law the federal government could help enforce state bans. However, the law also applied to free blacks. The law was written in response to the Haitian revolution and the influx of free people of color fleeing the newly independent former French colony.[70] In January 1803, North Carolinians had petitioned Congress to prevent the immigration of free black Haitians.[71] While the Constitution prohibited federal interference (until 1808) with importation or migration of persons that states desired,[72] nothing, apparently, denied Congress the power to help enforce state exclusions. Thus, the 1803 act was passed to "prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited."[73] Those "certain persons" were free blacks. By the eve of the Civil War, most slave states, as well as the free states of Indiana, Illinois, and Oregon, flatly refused to allow the

[67] The first known Chinese to come to the United States arrived in 1785 and some Filipinos were living in Louisiana, which the United States was in the process of acquiring from France. THE COLUMBIA DOCUMENTARY HISTORY OF THE ASIAN AMERICAN EXPERIENCE 9-10 (Franklin Odo ed., 2002); *Chinese Immigration to the United States 1884-1944*, https://bancroft.berkeley.edu/collections/chinese-immigration-to-the-united-states-1884-1944/timeline.html (last visited Feb. 23, 2021) [https://perma.cc/KJ73-ADFR].

[68] Act of Feb. 28, 1803, ch. 10, § 3. For a discussion of travel restrictions and the fight against them, see ELIZABETH STORDEUR PRYOR, COLORED TRAVELERS: MOBILITY AND THE FIGHT FOR CITIZENSHIP BEFORE THE CIVIL WAR 6 (2016).

[69] That would change later in the year when South Carolina reopened the trade to that state. Act of Dec. 17, 1803, No. 1814, 1803 S.C. Acts 48 ("An Act to alter and amend the several acts respecting the importation or bringing into this state, from beyond seas, or elsewhere, negroes and other persons of colour, and or other purposes therein mentioned."). This law set the stage for the importation of about 40,000 slaves into Charleston before Congress finally closed the trade in 1807. *See* Jed Handelsman Shugerman, *The Louisiana Purchase and South Carolina's Reopening of the Slave Trade in 1803*, 22 J. EARLY REP. 263, 280 (2002).

[70] *See* DU BOIS, *supra* note 53, at 84.

[71] *Id.* (citing ANNALS OF CONGRESS, 7th Cong. 2d Sess. 385-86); *see also* Nicholas Wood, *A "Class of Citizens": The Earliest Black Petitioners to Congress and Their Quaker Allies*, 74 WM. & MARY Q. 3rd Ser. 109, 139-41 (2017).

[72] *See* U.S. CONST. art. I, § 9, cl. 1.

[73] Act of Feb. 28, 1803, ch. 10, 2 Stat. 205.

immigration of free blacks, either from overseas or from within the United States.[74] Accordingly, Congress in effect banned some immigration as early as 1803. While some scholars and historians contend there was no U.S. immigration policy until after the Civil War, that is true only for white immigrants. Starting in 1803 federal authority would regulate the migration of persons of African descent and "persons of colour."[75]

In 1807, Congress moved beyond assisting the states, and discouraging the international slave trade, imposing an outright prohibition on the importation of "any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such negro, mulatto, or person of colour, as a slave, or to be held to service or labour" as of January 1, 1808.[76] However, it did so through an odd statute that, though inexpensive to enforce, still functionally permitted continued importation of enslaved persons.[77] While the Act provided that illegal importers would lose their right "to any negro, mulatto, or person of colour," it also provided that the illegally imported Africans would be "subject to any regulations . . . which the legislatures of the several states or territories at any time hereafter may make, for disposing of any such negro, mulatto, or person of colour."[78] Accordingly, slave states could benefit from the slave trade by choosing to keep the illegally imported Africans as slaves. Furthermore, the states could sell the illegally imported African slaves for the benefit of the state, which also had the added advantage of increasing the slave population in the slave states while simultaneously contributing to the state coffers. The statute provided that federal custody would be transferred "to such person or persons as shall be appointed by the respective states, to receive the same" or, "if no such person or persons shall be appointed" the Africans

[74] *See* Neuman, *supra* note 66, at 1866-67 (noting that slave and free states "erected barriers to the entry of blacks"); Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 421-22, 432 n.99 (1986). Indiana was the only northern state that effectively enforced the ban. Between 1850 and 1860 there was almost no growth in the free black population of that state. *Id.* at 442.

[75] Act of Feb. 28, 1803, ch. 10, 2 Stat. 205; *see* John Vlahoplus, *Apportionment, Allegiance, and Birthright Citizenship*, 10 BR. J. AM. LEGAL STUD. 107, 111 (2021) (discussing 1803 law).

[76] Act of Mar. 2, 1807, ch. 22, 2 Stat. 426. The act is commonly called a ban on the African slave trade — and it surely did that, but it also prohibited the importation of slaves from any place, including slave jurisdictions in the Caribbean and Latin America.

[77] This result was not accidental. For a discussion of the policy debate, see DU BOIS, *supra* note 53, at 96-101.

[78] Act of Mar. 2, 1807, ch. 22, § 4.

would be transferred "to the overseers of the poor," and notice given "to the governor or chief magistrate of the state . . . that he may give directions respecting such negroes, mulattoes, or persons of colour."[79] An 1818 revision clarified that states could pass good title to illegally imported enslaved persons seized and sold under state laws.[80] Ironically, then, a law ostensibly designed to suppress the slave trade, in fact facilitated the sale of illegally imported slaves, allowing them to remain in the United States.

The structure of slave trade suppression as of 1818 as immigration law in the modern sense is debatable. Trafficked persons who ended up in the slave states were turned over to the state governments, and not allowed to leave the United States. In this way, they were in the same position as U.S.-born enslaved persons. The reason both groups were oppressed was the existence and protection of the institution of slavery, not by any legal structure that looks like immigration policy — if it were not for slavery, the trafficked persons could stay or go as they chose. In any event, under this regime, it is plausible to argue that the slave trade laws — to this point — were not deportation laws because the illegally enslaved and imported persons were not merely permitted, but, under the laws of the southern states, affirmatively required to remain in the United States, in bondage. However, the 1803 law still prohibited the importation or migration of free blacks and other "people of colour" into the United States. Anyone interdicted under that law would not be enslaved. People who evaded that law and remained in the United States would in fact have been the equivalent of undocumented aliens today.

Policy regarding importation into free states was equally muddled. No one involved in the illegal trade would have intentionally trafficked Africans to free states, for fear that the enslaved persons would be freed and the traffickers would more likely be prosecuted. However, the 1807 law made it a crime for a ship to "hover" off of the coast of the United States with intent to land a cargo of illegally imported Africans.[81] A ship hovering near the United States, or one interdicted anywhere on the Atlantic, might have been taken to a free state port[82] and any Africans

[79] *Id.* § 7.

[80] *See* Act of Apr. 20, 1818, ch. 91, § 7, 3 Stat. 452.

[81] Act of Mar. 2, 1807, § 7.

[82] All northern states had either abolished slavery or were in the process of ending it through gradual emancipation laws. *See* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 45 (1981); ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 222 (1967). All of these states, including those where some people were still enslaved, prohibited the importation of slaves. Had slave ships landed in the northern states the Africans would have been freed, but under existing federal law could not have become naturalized citizens. This would

on these ships presumably would have been set free according to northern state law.[83] Neither the 1807 law nor the 1818 law indicated what would happen to them under such circumstances.[84] However, if they remained in the United States because a northern state released them from custody, they would have been living in the country contrary to federal law.

In 1819, Congress dramatically changed course, implementing a new uniform national policy with respect to illegally imported enslaved persons, using what are recognizable as modern immigration control methods.[85] First, in an early example of the now-familiar immigration control method of interdiction,[86] the President was authorized to capture slave ships on the high seas by ordering "any of the armed vessels of the United States, to be employed to cruise on any of the coasts of the United States, or territories thereof, or of the coast of Africa, or elsewhere."[87] Seized ships and their contents were subject to forfeiture; to encourage energetic enforcement, the law provided that the proceeds from the sale of such ships "shall be divided equally

include slave ships captured on the high seas that were towed to a northern port. This was in fact what happened to the French ship, *La Jeune Eugenie*, which the Navy brought to Boston. United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822). This is discussed further in FINKELMAN, SUPREME INJUSTICE, *supra* note 54, at 124-30. There were no slaves on board this ship when it was interdicted.

83 Thus, in 1800, the *U.S.S. Ganges* seized the slave ships *Phoebe* and *Prudent*, and brought 134 trafficked persons to Philadelphia, where they were freed. Their descendants, many with the family name Ganges, live in the area to this day. V. Chapman-Smith, *Philadelphia and the Slave Trade: The Ganges Africans*, 5 PA. LEGACIES 20 (2005); *see also* Norman B. Wilkinson, *Papers of the Pennsylvania Society for Promoting the Abolition of Slavery*, 68 PA. MAG. HIST. & BIOGRAPHY 286, 287 (1944); THE GANGES FAMILY HISTORY PROJECT, https://thegangesfamilies.com (last visited Dec. 16, 2020) [https://perma.cc/4RNP-DD2A].

84 After the founding of the American Colonization Society and its acquisition of Liberia, they might have been sent there. But before that, Congress did not believe there was a place in Africa where they could be deported. Most Africans caught in the Atlantic trade at this time were not from any coastal African nation or kingdom, but had been captured in the interior of Africa and marched to the coast where they were then sold mostly to European traders and sometimes to the few American traders operating in violation of United States law.

85 *See* Act of Mar. 3, 1819, ch. 101, 3 Stat. 532.

86 *See* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 187 (1993) (recognizing "the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States"). *See generally* Lory Diana Rosenberg, *The Courts and Interception: The United States' Interdiction Experience and Its Impact on Refugees and Asylum Seekers*, 17 GEO. IMMIGR. L.J. 199 (2003) (discussing the effects of federal interdiction policies).

87 Act of Mar. 3, 1819, § 1. For two decades, the Navy maintained a fleet off the coast of Africa. *See* DONALD L. CANNEY, AFRICA SQUADRON: THE U.S. NAVY AND THE SLAVE TRADE 1842–1861, at 56-57 (2006).

between the United States and the officers and men" of the ship interdicting the slaver.[88]

The law also changed the disposition of enslaved persons: the president was now

> authorized to make such regulations and arrangements as he may deem expedient for the safe keeping, support, and removal beyond the limits of the United States, of all such negroes, mulattoes, or persons of colour . . . [a]nd to appoint a proper person or persons, residing upon the coast of Africa, as agent or agents for receiving the negroes, mulattoes, or persons of colour.[89]

Although histories of deportation do not always categorize it as such,[90] this law is an early example of implementation of the immigration control technique of deportation.[91]

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[88] Act of Mar. 3, 1819, § 1.

[89] *Id.* § 2; *see also* Authority of the President Concerning Imported Slaves, 4 Op. Att'y Gen. 566, 570 (1847).

[90] For example, Daniel Kanstroom's definitive work discusses Indian removal, race-based state regulation of immigration, fugitive slave laws, and colonization plans as antecedents to modern deportation, but does not seem to mention the slave trade deportation provisions. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 63-90 (2007). Similarly, Mae Ngai's brief discussion of the history of deportation does not mention the slave trade laws. *See* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 72-73 (2003).

[91] Federal deportation was probably invented in 1798. *See* Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 63 (2002) ("America's history of deportation began with war and controversy. An undeclared war with France led Congress to pass the Alien Act of 1798, which for the first time authorized the federal government to deport aliens."). However, under various colonial laws criminals were often deported. The most famous example of such deportations was the attempt by officials in Massachusetts Bay to send Roger Williams back to England, where he might have been executed for his hostility to the rule of King Charles I. Luckily for Williams, and the history of religious freedom in what became the United States, he escaped to Narraganset Bay where he founded the colony of Rhode Island. Massachusetts Bay authorities were more successful in banishing Anne Hutchinson for her heresies. *See* EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 153 (Oscar Handlin ed., 1958). The Dutch authorities in New Netherland expelled Quakers and a Lutheran pastor. *See* Paul Finkelman, *"A Land That Needs People for Its Increase": How the Jews Won the Right to Remain in New Netherland*, *in* NEW ESSAYS IN AMERICAN JEWISH HISTORY 19, 33 (Pamela S. Nadell, Jonathan D. Sarna & Lance J. Sussman eds., 2010). In addition, most colonies often transported slaves condemned to death rather than executing them. This practice continued after the Revolution in many slave states as well. *See* Henry N. Sherwood, *Early Negro Deportation Projects*, 2 MISS. VALLEY HIST. REV. 484, 484 (1916). Many antebellum slave states transported slaves convicted of crimes to be sold elsewhere, rather than incarcerating or executing them.

The 1819 law also provided for deportation of illegally trafficked Africans who were already in the United States. Again, to incentivize enforcement, the law rewarded informants.[92] If "any citizen, or other person" reported to the U.S. attorney that Africans had been illegally imported, "it shall be the duty of the said attorney forthwith to commence a prosecution."[93] Upon finding a violation, "the court shall direct the marshal of the said district to take the said negroes, mulattoes, or persons of colour, into his custody, for safe keeping, subject to the orders of the President of the United States."[94] While the statute provided that the fate of these individuals was "subject to the orders" of the President, it was clear that the President was to deport them.[95] Attorney General William Wirt opined that the central power granted the President by the Act was "to send such negroes, &c., out of the limits of the United States to Africa or elsewhere."[96] The Attorney General further asserted that the deportation power in the 1819 Act applied retroactively to persons trafficked into the country before the Act, including those who could have been turned over to state authorities under earlier law, but had not yet been sold or disposed of by the state.[97] Illegally imported Africans were subject to deportation without limitation of time. As U.S. District Judge William Giles Jones explained in 1860:

See JEFF FORRET, WILLIAMS' GANG: A NOTORIOUS SLAVE TRADER AND HIS CARGO OF BLACK CONVICTS 56 (2020).

[92] Upon a finding a violation, the informer was entitled to "a bounty of fifty dollars, for each and every negro, mulatto, or persons of colour, who shall have been delivered into the custody of the marshal." Act of Mar. 3, 1819, § 4.

[93] *Id.*

[94] *Id.*

[95] *See* United States v. Preston, 28 U.S. (3 Pet.) 57, 66 (1830) (noting that "a new arrangement is made as to the disposal of persons of colour seized and brought in under any of the acts prohibiting the traffic in slaves. By the latter act, they are deliverable to the orders of the president; not of the states"); *see also id.* at 61 (noting argument of the United States that "[b]y the act of 1819 all such persons so found in the United States, were directed to be transported to Africa. That act authorises the president so to remove all negroes brought into the United States contrary to the act of 1807, and repeals all prior acts repugnant to its provisions"); Bank of St. Mary's v. State, 12 Ga. 475, 492 (1853) ("[B]y the provisions of which persons of color brought in under the provisions of any of the Acts prohibiting traffic in slaves, were to be delivered to the President of the United States, to be sent to Africa.").

[96] Suppression of the Slave Trade, 1 Op. Att'y Gen. 314, 316 (1819).

[97] *See* The Slave-Trade, 1 Op. Att'y Gen. 334, 334 (1820) (opining that the Act applied "to all negroes theretofore brought in against the provisions of any of the acts of Congress on the subject, who had not been disposed of previously by the State laws; and, consequently, that if these negroes are in this predicament, and are now in any State or Territory of the United States, proceedings may still be had against them").

> The law also properly provides for his removal out of the country as one of the means necessary and proper to carry out the execution of the power to prohibit importation. . . . [Even after] he has passed out of the possession or control of the importer or his agents or employees, and has been mingled with the mass of the population in a state . . . the general government may remove him out of the country.[98]

Was this deportation in the modern sense? One argument that it is not, might be that returning kidnapped Africans to Africa should be understood as a kindness[99] not a punishment. It could be contended that the 1819 Act should be understood as offering repatriation — a free trip home — rather than inflicting deportation, which the modern Court has recognized "may result in the loss 'of all that makes life worth living.'"[100] What is critical, however, is the deprivation of freedom, the absence of choice, and the fact that these deportations did not take these Africans back to their homes. The law required that the Africans be held in custody while awaiting deportation; while "guests" of the federal government, the Africans could be required to work (that is, be treated as slaves doing uncompensated labor), and U.S. Marshals in fact often rented them out.[101]

In addition, the ships on which Africans would return,[102] and the Liberian settlement (and after 1847 the Republic of Liberia) where they

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[98] United States v. Gould, 25 F. Cas. 1375, 1378-79 (S.D. Ala. 1860). Judge Jones would go on to become a judge of Confederate District Court for the District of Alabama.

[99] There seems little question that suppression of the slave trade itself was motivated in part by humanitarian concerns. *See* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 13 (2014); Paul Finkelman, *The First Federal Human Rights Legislation: Suppressing the African Slave Trade*, 3 CRIT 20, 33 (2010).

[100] Knauer v. United States, 328 U.S. 654, 659 (1946) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

[101] *See* Concerning the Importation of Slaves, 1 Op. Att'y Gen. 728 (1821). In the case of *The Antelope*, Africans were hired out, sold, and perhaps even stolen from the custody of U.S. Marshals. Many of these Africans, who were illegally brought into the United States, ended up as slaves in Georgia, and are a clear example of illegal aliens entering and staying in the United States. On this case, see generally JONATHAN M. BRYANT, DARK PLACES OF THE EARTH: THE VOYAGE OF THE SLAVE SHIP *ANTELOPE* (2015) (discussing the Supreme Court case of *The Antelope* and its implications on future jurisprudence). Bryant provides details of these Africans becoming slaves in Georgia in flagrant violation of American law. *See also* FINKELMAN, SUPREME INJUSTICE, *supra* note 54, at 90-102, 129, 220-22.

[102] *See* Ted Maris-Wolf, *"Of Blood and Treasure": Recaptive Africans and the Politics of Slave Trade Suppression*, 4 J. CIV. WAR ERA 53, 53 (2014) (noting fatalities of nearly one-

would be delivered,[103] had mortality rates so dreadful that reasonable people might have chosen to take their chances in the United States,[104] no matter how difficult it might it have been for them to adjust to a new culture, with a new language, and different climate. Some Africans unlawfully trafficked into the United States might have developed personal connections that would have led them to elect to stay. Professors Schuck and Smith have asserted that at this time U.S. borders were open to all immigrants, and there is much truth to that at the federal level for white people from Europe or of European ancestry.[105] But this was not true with respect to blacks at the federal level and there were also state regulations limiting the migration or immigration of free blacks.[106] As was the case with the 1803 law, under the 1819 law Africans were not free to enter and remain in the United States. Under the 1819 law (and the 1803 law) the borders were clearly not open to Africans, and if brought to the U.S. on slave ships or on merchant ships — they had to go. Finally, it is important to understand that the destination for these deportations was Liberia, even though virtually no illegally trafficked Africans came from Liberia.[107] This would also have been true for people trafficked to the United States from Brazil, Cuba, or some other slave jurisdiction in the Western Hemisphere. Thus, enslaved persons were removed from the U.S., but emphatically not repatriated to their homelands. There was clearly no "act of kindness" begin offered to Africans brought to the United States. The unwelcome nature of deportation is illustrated by the most famous case under the

third on "the *Castillian*, a 'floating hell' of dropsy, dysentery, and scurvy" which returned people to Africa).

103 *See* Antonio McDaniel, *Extreme Mortality in Nineteenth-Century Africa: The Case of Liberian Immigrants*, 29 DEMOGRAPHY 581, 583 (1992); Tom W. Shick, *A Quantitative Analysis of Liberian Colonization from 1820 to 1843 with Special Reference to Mortality*, 12 J. AFR. HIST. 45, 45-46 (1971).

104 *See* Maris-Wolf, *supra* note 102, at 53. *See generally* HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440–1870, at 13-14 (1997) (detailing how lethal the slave trade itself could be).

105 *See, e.g.*, *In re* Kaine, 55 U.S. (14 How.) 103, 114 (1852) ("This country is open to all men who wish to come to it. No question, or demand of a passport meets them at the border. He who flees from crimes committed in other countries, like all others, is admitted; nor can the common thief be reclaimed by any foreign power. To this effect we have no treaty.").

106 *See infra* notes 170–81 and accompanying text.

107 Most Africans brought to the U.S. by this time had been marched overland from places in central Africa. They were taken to the coast of Africa south of Liberia and then sold to slave trades. *See generally* THOMAS, *supra* note 104, at 686 (discussing the various slave harbors used during the slave trade).

1819 law, *United States v. The Amistad*,[108] which involved a Spanish ship that was transporting illegally imported Africans from one part of Cuba (where they had been landed and sold), to another part of Cuba.[109] The Africans revolted, killed the ship's crew, and tried to force the two remaining Spaniards on board (their purchasers) to sail to Africa. The Spaniards sailed east during the day (under compulsion from the Africans) but at night went north and west, hoping to reach the U.S. South. Instead, they reached Long Island Sound, where the *U.S.S. Washington*, a revenue cutter[110] interdicted the *Amistad*, boarded it, and took it to New Haven, Connecticut. Many parties claimed the ship or its cargo, including local fishermen who first boarded the ship, the crew of the *U.S.S. Washington*, under the command of Lt. Thomas R. Gedney, who claimed salvage rights, the two Cubans who had bought the Amistads (as they came to be called at the time) in Cuba, and the Spanish government. In addition, lawyers representing the Africans themselves, argued that the Amistads were not "cargo" but free people who were entitled to their liberty.[111] The United States entered the case, initially wanting to try the Amistads for murder because they killed the *Amistad*'s captain and crew, and later demanding the restoration of the ship and its cargo to Spain,[112] or, in the alternative "demanding that the negroes be delivered up to the president to be transported to Africa."[113] U.S. District Judge Andrew Judson threw out the murder charges and

[108] 40 U.S. (15 Pet.) 518 (1841).

[109] For a comprehensive history of the story of the Amistad, see generally HOWARD JONES, MUTINY ON THE *AMISTAD*: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY (1987). The factual discussion of this case in the paragraphs that follow is supported by this book.

[110] Congress established the Revenue Cutter Service, predecessor of U.S. Coast Guard, in 1790. It operated under the authority of the Department of the Treasury, although in cooperation with the U.S. Navy. *See* Act of Aug. 4, 1790, ch. 35, §§ 62-64, 1 Stat. 145, 175 ("An Act to provide more effectually for the collection of the duties impose by law on goods, wares and merchandise imported into the United States and on the tonnage of ships or vessels."); *see also* Act of Mar. 2, 1799, ch. 22, §§ 97-102, 1 Stat. 627, 699-700 ("An Act to regulate the collection of duties on imports and tonnage.").

[111] The full caption of the case in the U.S. Supreme Court illustrates its complexity and the many parties involved: The United States v. The Libellants and Claimants of the Schooner Amistad, Her Tackle, Apparel, and Furniture, Together with her Cargo, and the Africans Mentioned and Described in the Several Libels and Claims, 40 U.S. (15 Pet.) 518 (1841). This was an appeal from the District Court case, captioned Gedney et. al. v. L'Amistad, which reflected the name of the commander of the *U.S.S. Washington*. Gedney v. L'Amistad, 10 F. Cas. 141, 141-42 (D. Conn. 1840).

[112] *See* Case of the Amistad-Surrender Under Treaty with Spain, 3 Op. Att'y Gen. 484, 491-92 (1839).

[113] Gedney v. L'Amistad, 10 F. Cas. 141, 141-42 (D. Conn. 1840).

ultimately agreed that the 1819 act "renders it essential that all such Africans as these should be transported, under the direction of the president of the United States, to Africa,"[114] and so ordered.[115]

On appeal by the United States, the Supreme Court took a different view. The United States argued that under a treaty with Spain, the nation was obligated to return the "property" of the Spanish residents of Cuba to that Spanish colony.[116] The Amistads did not want deportation, but, rather, they wanted to return to their homeland in Africa (not Liberia) as free people. The U.S. Supreme Court noted that at trial through counsel they "filed an answer, denying that they were slaves . . . or that the Court could, under the Constitution or laws of the United States, or under any treaty, exercise any jurisdiction over their persons, by reason of the premises; and praying that they might be dismissed."[117] At the Supreme Court, the Amistads continued to insist that they were "now entitled to maintain their freedom."[118] This position was in part strategic, because the Van Buren administration argued that they were legally the property of Spanish citizens and should be returned to their Cuban "owners."[119]

Justice Joseph Story for the Court upheld the District Court's finding that under Spanish law the Amistads were never legally held as slaves in Cuba, and thus they could not be returned to the Cubans claimants. However, Story also found the deportation provision of the 1819 Act inapplicable because *The Amistad* did not enter U.S. jurisdiction as a slave trader, but instead arrived as a liberated vessel: "When the Amistad arrived she was in possession of the negroes, asserting their freedom; and in no sense could they possibly intend to import themselves here as slaves, or for sale as slaves."[120] Accordingly, the

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[114] *Id.* at 148.

[115] *Id.* at 151 ("I shall put in form a decree of this court, that these Africans . . . be delivered to the president of the United States to be transported to Africa, there to be delivered to the agent, appointed to receive and conduct them home.").

[116] United States v. The Libellants and Claimants of the Schooner Amistad, Her Tackle, Apparel, and Furniture, Together with her Cargo and the Africans Mentioned and Described in the Several Libels and Claims, 40 U.S. (15 Pet.) 518, 588-89 (1841). We have departed from the traditional *Bluebook* form for a case caption here to give readers a sense of the complexity of the case and the parties involved.

[117] *Id.* at 589.

[118] *Id.* at 592.

[119] *See id.* at 538-49 (providing the argument of Attorney General Henry Dilworth Giplin).

[120] *Id.* at 596-97; *see also* Expenses on Account of the Amistad Negroes, 3 Op. Att'y Gen. 510, 510 (1840) (stating the funds appropriated for suppression of slave trade could not be used for the support of people from *The Amistad*).

Court revised the judgment below. Speaking for the Court Justice Joseph Story wrote:

> [S]o far as it directs the negroes to be delivered to the President, to be transported to Africa, in pursuance of the act of the 3d of March, 1819; and, as to this, it ought to be reversed: and that the said negroes be declared to be free, and be dismissed from the custody of the Court, and go without day.[121]

While upholding the freedom of the Amistads, this left them in limbo. Under U.S. law they could not become naturalized citizens and they wanted to return to their homeland in Africa. But Story's decision meant that the Amistads could depart only after their abolitionist supporters were able to raise funds for their return. However, unlike Africans deported to Liberia under the 1819 law, the Amistads actually went home.[122]

Reflecting continuing concern with immigration policy, subsequent treaties and legislation further refined the disposition of rescued people. Under the Webster-Ashburton Treaty of 1842[123] between the United States and Great Britain obligated each party to maintain a fleet to suppress the slave trade and to cooperate in that effort, but the treaty contained few details of how this process would work.[124] That treaty was supplanted by a comprehensive agreement in 1862,[125] which established British-American "Mixed Courts of Justice" to dispose of

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[121] *The Amistad*, 40 U.S. (15 Pet.) at 597. First, in rejecting the claim that Spain or Spanish owners were entitled to restoration of their slave property, the Court rejected the argument, necessary under the treaty, that they were "Pirates or robbers:" "these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board of the Amistad; there is no pretence to say, that they are pirates or robbers." *Id.* at 593. Nevertheless, Spain, with the sympathy of some U.S. politicians, pressed a claim for compensation for some years. *Schooner Amistad*, H.R. Rep. No. 29-753 (June 24, 1846).

[122] *See* FINKELMAN, SUPREME INJUSTICE, *supra* note 54, at 139; JONES, MUTINY ON THE *AMISTAD*, *supra* note 109, at 134.

[123] *See* HOWARD JONES, TO THE WEBSTER–ASHBURTON TREATY: A STUDY IN ANGLO-AMERICAN RELATIONS, 1783–1843, at XI (1977).

[124] *See* A Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America; for the Final Suppression of the African Slave Trade; and for the Giving Up of Criminals, Fugitive from Justice, in Certain Cases (Webster-Ashburton Treaty), Gr. Brit.-U.S., art. 8-9, Aug. 9, 1842, 8 Stat. 572, 576.

[125] *See* Treaty Between the United States and Great Britain for the Suppression of the Slave Trade, art. I-XII, Apr. 7, 1862, 12 Stat. 1225.

seized vessels at Sierra Leone, the Cape of Good Hope, and New York.[126] A key provision granted freedom to those found by the Mixed Courts of Justice to have been illegally trafficked.[127]

In 1860, Congress strengthened its interdiction policy, authorizing the President to enter into a contract with an agency "to receive from the United States through their duly constituted agent or agents, upon the coast of Africa, all negroes, mulattoes, or persons of color, delivered from on board vessels seized in the prosecution of the slave trade, by commanders of the United States armed vessels."[128] In addition, the President was authorized to order naval commanders "to proceed directly to the coast of Africa, and there deliver . . . all negroes, mulattoes, and persons of color."[129] An 1862 statute gave the President the same powers with respect to governments having possessions in the West Indies.[130]

The policy culminated in 1870, when an amended Anglo-American treaty provided that liberated individuals were to be brought "to the nearest British authority"[131] rather than New York or any other U.S. port. No longer would the United States take responsibility for the enslaved persons wherever they might be seized on the high seas; no longer would there be any risk that Africans or their descendants living in New World slave jurisdictions might somehow wind up in the United States. This new policy reflected the fact that slavery had been abolished in the United States by the Emancipation Proclamation, the United States Army, and the Thirteenth Amendment, and thus the United States was less actively interested in the African slave trade. By this time slavery in the Western Hemisphere only existed in Cuba, Puerto Rico, and Brazil.[132]

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[126] *Id.* at 1227, art. IV. Congress passed a statute allowing the president, with advice and consent of the Senate, to appoint three judges and three arbitrators to staff the courts. Act of July 11, 1862, ch. 140, § 1, 12 Stat. 531.

[127] Treaty Between the United States and Great Britain for the Suppression of the Slave Trade, *supra* note 125, art. X ("The negroes who are found on board of a vessel condemned by the mixed courts of justice, in conformity with the stipulations of this treaty, shall be placed at the disposal of the Government whose cruiser has made the capture; they shall be immediately set at liberty, and shall remain free, the Government to whom they have been delivered guarantying their liberty.").

[128] Act of June 16, 1860, ch. 136, § 1, 12 Stat. 40.

[129] *Id.* § 2.

[130] *See* Act of July 17, 1862, ch. 197, § 1, 12 Stat. 592.

[131] Suppression of African Slave Trade, Gr. Brit.-U.S., art. III, Apr. 7, 1862, 16 Stat. 777, 780.

[132] On the final abolition of slavery in Puerto Rico, Brazil and Cuba, see SEYMOUR DRESCHER, ABOLITION: A HISTORY OF SLAVERY AND ANTISLAVERY 333-71 (2009); *see also*

Efforts to suppress the slave trade and remove enslaved persons from the United States were prominent political and social issues in the years before the enactment of the Fourteenth Amendment; members of the 39th Congress would certainly have known of the related proposed legislation and the highly publicized captures and prosecutions.[133] As a matter of history, a political movement in the 1850s proposed reopening the slave trade,[134] and there were widely publicized captures and deportations from the United States in the 1850s and into the 1860s.[135] Like every other reader of newspapers and magazines, members of Congress would certainly have known of the *Wanderer*, a slave ship which landed off of the Georgia coast in 1858 with more than 400 Africans, who were then smuggled into the United States.[136]

Paul Finkelman & Seymour Drescher, *The Eternal Problem of Slavery in International Law: Killing the Vampire of Human Culture*, 2017 MICH. ST. L. REV. 755-92.

[133] *But cf.* Rick Hills, *Birthright Citizenship: A Case Study in the Near-Inevitability of Constitutional Ambiguity*, PRAWFSBLAWG (Nov. 2, 2018), https://prawfsblawg.blogs.com/prawfsblawg/2018/11/birthright-citizenship-a-case-study-in-the-near-inevitability-of-constitutional-ambiguity.html [perma.cc/KD7V-QTFY] (comment at 9:03:56 p.m.) ("My sense is that prosecutions of the slavers themselves were rare and often unsuccessful, despite the incentives of prize money. The federal government had few resources — no ICE! — to investigate and deport smuggled slaves. So it seems doubtful to me that anyone in the 39th Congress had any awareness of unlawfully present persons or any legal theory about unlawfully present slaves' relationship to the 'jurisdiction' of the United States.").

[134] *See* DU BOIS, *supra* note 53, at 168-78; RONALD T. TAKAKI, A PRO-SLAVERY CRUSADE: THE AGITATION TO REOPEN THE AFRICAN SLAVE TRADE 160-65 (1971); Jim Jordan, *Charles Augustus Lafayette Lamar and the Movement to Reopen the African Slave Trade*, 93 GA. HIST. Q. 247, 247-48 (2009).

[135] *See* SYLVIANE A. DIOUF, DREAMS OF AFRICA IN ALABAMA: THE SLAVE SHIP *CLOTILDA* AND THE STORY OF THE LAST AFRICANS BROUGHT TO AMERICA 11 (2007) ("The newspapers were replete with stories of Africans introduced . . . illegally . . . ."); Maris-Wolf, *supra* note 102, at 601.

[136] *See* TOM HENDERSON WELLS, THE SLAVE SHIP *WANDERER* 30-31 (1967); Ashley Williams, *50 Years After the Slave Trade Ban, Hundreds of Captive Africans Were Smuggled into Jekyll Island on a Ship Called the* Wanderer, JACKSONVILLE MAG. (Feb. 1, 2019), https://www.jacksonvillemag.com/2019/02/01/the-wanderer-jekyll-island/SlaveVoyages [https://perma.cc/EA3C-8P82]. *See generally* ERIK CALONIUS, THE *WANDERER*: THE LAST AMERICAN SLAVE SHIP AND THE CONSPIRACY THAT SET ITS SAILS (2006) (describing the background and story of the Wanderer). For prosecutions in this case, see United States v. Corrie, 25 F. Cas. 658, 658 (C.C.D.S.C. 1860). The full report of all the proceedings in the *Wanderer* case were well known through a published book: CIRCUIT COURT OF THE UNITED STATES. IN ADMIRALTY. THE UNITED STATES OF AMERICA, BY INFORMATION, VERSUS THE SCHOONER WANDERER, AND CARGO (Boston: Prentiss & Deland, 1860), *reprinted in* SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM, 1700-1872, Series V, Vol. 2, THE AFRICAN SLAVE TRADE AND AMERICAN COURTS: THE PAMPHLET LITERATURE 203 (Paul Finkelman ed., 2007). To access a database of Trans-Atlantic and Intra-American slave trade voyages, see generally *Trans-Atlantic Slave Trade Database*, SLAVEVOYAGES,

Similarly, they would have known of the case of the *Echo*, whose crew was the subject of an unsuccessful federal prosecution in 1858.[137] After the capture of the slave ships *William* and *Wildfire*; the liberated Africans were held at Key West by the U.S. Marshal; officials pleaded with Congress and the President for an appropriation of funds for their removal in 1860.[138] The *Clotilda* landed about 110 bondspeople in Mobile, Alabama in 1860 to national publicity; in vain, the U.S. Attorney and the Attorney General sought to recapture them.[139]

There were also prominent prosecutions of slave traders. Senators and representatives would have likely been aware of Justice James Wayne's Charge to the Grand Jury in Savannah, in 1859, concerning the smuggling of slaves into the United States.[140] Although a slaveholder from Georgia, Justice Wayne remained loyal to the Union during the Civil War. In 1865, he was part of the unanimous Court upholding various convictions of slavers.[141] In February 1862, the United States executed Nathaniel Gordon for slave trading. This action by the Lincoln administration was the first capital sentence under an 1823 statute

https://www.slavevoyages.org/ (last visited Jan. 6, 2021) [https://perma.cc/YZB4-4GLZ].

137 The crew of *The Echo* was unsuccessfully prosecuted for piracy in Charleston. *See In re* Bates, 2 F. Cas. 1015 (D.S.C. 1858). This case was memorialized in a book-length pamphlet covering all the proceedings and a second pamphlet containing the opinion of the district judge. REPORT OF THE TRIALS IN THE ECHO CASES, IN FEDERAL COURT, CHARLESTON, S.C., APRIL 1859; TOGETHER WITH ARGUMENTS OF COUNSEL AND CHARGE OF THE COURT (J. Woodruff reporter, Columbia, S.C. Steam Power Press of R.W. Gibbes, 1859), *reprinted in* SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM, 1700-1872, Series V, Vol. 2, THE AFRICAN SLAVE TRADE AND AMERICAN COURTS: THE PAMPHLET LITERATURE 55 (Paul Finkelman ed., 2007); THE UNITED STATES VS. WILLIAM C. CORRIE. PRESENTMENT FOR PIRACY. OPINION OF THE HON. A.G. MAGRATH (1860), *reprinted in id.*, at 171. The Africans on *The Echo* were ultimately sent to Liberia, not where they were from, and many died along the way from lack of food and other harsh conditions.

138 *See* Willis D. Boyd, *The American Colonization Society and the Slave Recaptives of 1860-1861: An Early Example of United States-African Relations*, 47 J. NEGRO HIST. 108, 111-12 (1962).

139 *See* DIOUF, *supra* note 135, at 77-80.

140 *See In re* Charge to Grand Jury, 30 F. Cas. 1026, 1026 (C.C.D. Ga. 1859) (Wayne, Cir. J.). This charge was printed as a pamphlet, and thus nationally available. CHARGE OF MR. JUSTICE WAYNE OF THE SUPREME COURT OF THE UNITED STATES GIVEN ON THE FOURTEENTH DAY OF NOVEMBER, 1859, TO THE GRAND JURY OF THE SIXTH CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA (Savannah: E. Purse, 1859), *reprinted in* SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM, 1700-1872, Series V, Vol. 2, THE AFRICAN SLAVE TRADE AND AMERICAN COURTS: THE PAMPHLET LITERATURE 1 (Paul Finkelman ed., 2007).

141 *See* The Slavers, 69 U.S. (2 Wall.) 350, 365 (1864).

deeming slave trading "piracy," punishable by death.[142] The Supreme Court reviewed the case, but even the notoriously pro-slavery Chief Justice Roger B. Taney acquiesced in Gordon's execution.[143] Everyone in Congress in 1866, when the Fourteenth Amendment was written, would have been fully aware of this execution and of the problem of slave smuggling.

Illustrative of the knowledge of the illegal trade, President Abraham Lincoln discussed suppression of the slave trade in each of his four annual addresses to Congress.[144] Other formal federal attention to the illegal importation of Africans into the United States in the years immediately preceding the writing and adoption of the Fourteenth Amendment included an Attorney General opinion in 1859,[145] legislation in 1860,[146] a treaty and two statutes in 1862,[147] a treaty in 1863,[148] and a statute in 1864 prohibiting the coastwise slave trade.[149]

In addition, Congress appropriated funds for slave-trade suppression on the high seas in 1859,[150] 1860,[151] February[152] and March[153] 1861,

[142] *See* Act of Jan. 30, 1823, ch. 7, 23 Stat. 721. This law was a permanent reenactment of similar, but temporary, statutes passed in 1819 and 1820. *See* Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513; Act of May 15, 1820, ch. 113, § 4, 3 Stat. 600, 600-01.

[143] *See Ex parte* Gordon, 66 U.S. (1 Black) 503, 506 (1862) (Taney, C.J.) (rejecting Gordon's appeal because the Supreme Court had no jurisdiction to review a capital sentence for slave trade law violation).

[144] President Abraham Lincoln, *First Annual Message* (Dec. 3, 1861), *in* JAMES D. RICHARDSON, 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 53; President Abraham Lincoln, *Second Annual Message* (Dec. 1, 1862), *id.* at 127; President Abraham Lincoln, *Third Annual Message* (Dec. 8, 1863), *id.* at 179; President Abraham Lincoln, *Fourth Annual Message* (Dec. 6, 1864), *id.* at 244, 245. Today these would be called State of the Union Addresses.

[145] *See* Compensation of Marshals Under Acts Prohibiting the Slave Trade, 9 Op. Att'y Gen. 302 (1859).

[146] Act of June 16, 1860, ch. 136, 12 Stat. 40, 40-41.

[147] Act of July 17, 1862, ch. 197, sec. 1, 12 Stat. 592, 592-93; Act of July 11, 1862, ch. 140, § 1, 12 Stat. 531, 531 (implementing portions of British treaty); Act of Mar. 25, 1862, ch. 50, § 5, 12 Stat. 374, 375 (establishing forfeiture procedures applicable to the slave trade laws); Treaty Between the United States and Great Britain for the Suppression of the Slave Trade, *supra* note 125, art. I.

[148] Additional Article to the Treaty for the Suppression of the African Slave-Trade, Gr. Brit.-U.S., Feb. 17, 1863, 13 Stat. 645.

[149] Act of July 2, 1864, ch. 210, § 9, 13 Stat. 344, 353.

[150] Act of Mar. 3, 1859, ch. 75, § 1, 11 Stat. 402, 404 ($75,000).

[151] Act of May 26, 1860, ch. 60, 12 Stat. 19, 21 ($40,000).

[152] Act of Feb. 19, 1861, ch. 42, 12 Stat. 131, 132 ($900,000).

[153] Act of Mar. 2, 1861, ch. 84, 12 Stat. 214, 218-19 ($900,000).

1862,[154] 1863,[155] 1864,[156] January[157] and December[158] 1865, 1866,[159] 1867,[160] and 1868.[161] Congress further appropriated funds specifically for domestic law enforcement actions to suppress the slave trade in 1862,[162] 1863,[163] 1864,[164] and 1866.[165] Given all of these acts passed by Congress, and the prominent cases such as that involving the *Wanderer* and the execution of Nathaniel Gordon, it is not plausible that slave trade enforcement — and the presence in the nation of Africans who

[154] Act of July 16, 1862, ch. 182, § 4, 12 Stat. 582, 583 (allocating $15,000 to carry out British treaty).

[155] Act of Feb. 4, 1863, ch. 19, 12 Stat. 638, 639 (allocating $17,000 to carry out British treaty).

[156] Act of June 20, 1864, ch. 136, § 1, 13 Stat. 138, 139 (allocating $17,000 to carry out British treaty).

[157] Act of Jan. 24, 1865, ch. 18, 13 Stat. 422, 424 (allocating $17,000 to carry out British treaty).

[158] Act of Dec. 21, 1865, 14 Stat. 347 (transferring $500,000 of the unexpended balance of slave trade suppression funds to provide for "immediate subsistence and clothing of destitute Indians").

[159] Act of July 25, 1866, ch. 233, § 1, 14 Stat. 224, 226 (allocating $17,000 to carry out British treaty).

[160] Act of Feb. 28, 1867, ch. 99, 14 Stat. 412, 414-15 (allocating $17,000 to carry out British treaty).

[161] Act of Mar. 30, 1868, ch. 38, 15 Stat. 56, 58 (allocating $12,500 to carry out British treaty).

[162] Act of Mar. 14, 1862, ch. 41, § 3, 12 Stat. 355, 368-69 ("[T]he President of the United States is hereby authorized to expend during the fiscal year ending the thirtieth of June, eighteen hundred and sixty-three, so much of the appropriation of second of March, eighteen hundred and sixty-one, as he may deem expedient and proper, not exceeding in the whole ten thousand dollars, for compensation to the United States marshals, district attorneys, and other persons employed in enforcing the laws for the suppression of the slave trade, for any services they may render, and for which no allowance is otherwise provided for by law.").

[163] Act of Mar. 3, 1863, 12 Stat. 829 ($10,000).

[164] Act of July 2, 1864, ch. 210, § 6, 13 Stat. 344, 352 ($10,000).

[165] Act of Apr. 7, 1866, ch. 28, § 5, 14 Stat. 14, 23 ($10,000). Of course, it has long been the law that Congress, like everyone else, is presumed to know the law; this would seem to apply with particular force to law coming from their own actions. *See* Welch v. Cook, 97 U.S. 541, 543 (1878) ("We are to presume that Congress knew that, as the law stood on the 20th of June, 1874, the property in the District was liable to taxation, with certain exceptions, and that it knew of what such exceptions consisted."); Wetmore v. United States, 35 U.S. (10 Pet.) 647, 656 (1836) ("Congress knew what these were, and cannot be supposed to have intended to re-enact the law of 1816, with the construction of it here contended for; in opposition to the practice of the treasury department under it."); Karthaus v. Frick, 14 F. Cas. 136, 136 (Taney, Circuit Justice, C.C.D. Md. 1840) ("Inasmuch as it was the established custom, at the time this law was passed, always to import the fine salt in bags, congress must be presumed to have been fully apprised of it, and to have legislated with a full knowledge of the usual course of trade.").

were not legally allowed to be in the country — could have gone unnoticed or unconsidered by Congress when the Fourteenth Amendment was being drafted and enacted into law.[166]

An additional factor makes clear that the deportation provisions of the 1819 Act were about the composition of the population of the United States, as well as about humanitarian opposition to the African trade. First, "[t]he 1819 Slave Trade Law was the culmination of ACS lobbying, which had begun with their petition in January 1817."[167] The American Colonization Society was a private organization which received support from the federal and state governments. Members, at various times, included several presidents and future presidents, including James Madison, James Monroe, Andrew Jackson, John Tyler, Millard Fillmore, and Abraham Lincoln. Supreme Court Justice Bushrod Washington was the president of the national organization and Chief Justice John Marshall led the Society in Virginia. Other jurist-members included Chief Justice Roger B. Taney, Justice James Moore Wayne, Justice Peter V. Daniel, Judge William Cranch, the Chief Judge of the U.S. District Court in Washington, D.C., and U.S. District Judge for the District of Connecticut Andrew T. Judson, who presided over the *Amistad* trial. Other prominent members included Charles Carroll of Carrollton (a signer of the Declaration of Independence), Harvard President Edward Everett (also Vice Presidential candidate of the Constitutional Union Party in 1860), Senator Theodore Frelinghuysen (also Whig Vice Presidential candidate in 1844), Daniel Webster, Stephen A. Douglas, Henry Clay, and Francis Scott Key.[168] Professor

166 More evidence could be cited, including debates in Congress over the slave trade, continuing efforts by southerners to compensate the Spanish "owners" of the Amistads, and debates over the disposition of the *Creole*, a ship in the interstate slave trade that ended up in the British Caribbean when the slaves revolted. But passage of appropriations and other laws are of particular significance.

167 Nicholas P. Wood, *The Missouri Crisis and the "Changed Object" of the American Colonization Society*, *in* NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN RECOLONIZATION 146, 150 (Beverley C. Tomek & Matthew J. Hetrick eds., 2017).

168 David F. Ericson, *The American Colonization Society's Not-so-Private Colonization Project*, *in* NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN RECOLONIZATION, *supra* note 167, at 111, 112, 116, 119; KANSTROOM, *supra* note 90, at 85; *American Colonization Society*, AM. ABOLITIONISTS & ANTISLAVERY ACTIVISTS, http://www.americanabolitionists.com/american-colonization-society.html#Individuals (last visited Jan. 7, 2021) [https://perma.cc/MC6K-F85S] (naming Charles Carroll and other prominent members of the ACS). *See generally* STAUDENRAUS, *supra* note 45, at 107 (noting that the most prestigious chapter was the Richmond and Manchester Auxiliary; Chief Justice John Marshall was President; Vice-Presidents of this branch also included three men who served as President of the United States: James Madison, James Monroe, and John Tyler).

Nicholas Wood reports that one step in the passage of the 1819 slave trade law was ACS vice president Henry Clay submitting a petition requesting action to the Speaker of the House of Representatives, Henry Clay.[169]

The settlement the ACS proposed to build was primarily for free African Americans and recently manumitted slaves.[170] Accordingly, their proposed disposition of liberated slaves was designed in part to shape the population of the U.S. as well as to return illegally imported Africans to their home continent and recently manumitted slaves to the continent of their African ancestors. The House Committee report responding to the memorial of the ACS referred to the slave trade as "the crime of Europe, the scourge of Africa, and the affliction and disgrace of America."[171] The word "affliction" was not a slip. Justice Wayne, another ACS vice president, later said that government support for the mission of the society was appropriate, because "there is a great constitutional conservative obligation upon the National Government to remove a national evil, when it presses upon the general welfare of the United States."[172] Chief Justice John Marshall begged the Virginia legislature to support sending blacks to Africa, because of the "urgent expedience of getting rid in some way, of the free coloured population of the Union." Marshall declared that free blacks in Virginia were worthless, ignorant, and lazy and that in Richmond half the free blacks were "criminals."[173] He argued that the entire nation "could be strengthened" by the "removal of our colored population." He believed

169 *See* Wood, *supra* note 167, at 151.

170 The purposes of the American Colonization Society were mixed. Some members saw colonization as a way to encourage an end to slavery, on the understanding that southerners (and many northerners) would never accept a large free black population. Abraham Lincoln, for example, saw colonization outside the U.S. as a peaceful way to end slavery. On the other hand, many southerners, such as Chief Justice John Marshall, joined the Society because they saw it as a way to rid the South of free blacks.

171 H.R. REP. NO. 348, at 54 (1818).

172 THIRTY-SEVENTH ANNUAL REPORT OF THE AMERICAN COLONIZATION SOCIETY WITH THE PROCEEDINGS OF THE BOARD OF DIRECTORS AND OF THE SOCIETY AND THE ADDRESSES DELIVERED AT THE ANNUAL MEETING, JANUARY 17, 1854, at 40 (1854). Shortly thereafter, he would join Chief Justice Taney's opinion in *Dred Scott*. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 399, 454 (1857) (Wayne, J., concurring) ("Concurring as I do entirely in the opinion of the court, as it has been written and read by the Chief Justice — without any qualification of its reasoning or its conclusions — I shall neither read nor file an opinion of my own in this case . . . ."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

173 *See* Memorial from John Marshall, to the Honourable General Assembly of Virginia (Dec. 13, 1831), *in* 12 PAPERS OF MARSHALL 127, 127-28 (Charles Hobson ed., 2006).

the "danger" from free blacks "can scarcely be estimated."[174] The framers of the 1819 law believed it was best for the free African Americans to have their own colony and for illegally imported Africans to be returned to their home continent. These members of Congress also believed that removing free blacks and Africans (other than those held as slaves) was best for the white people of the United States.

In sum, examination of federal statutes shows that for more than half a century before the Fourteenth Amendment, Congress regulated immigration to shape the racial demographics of the country. People prohibited from entering based on those laws were sometimes deported, such as those freed from the slave ships *Echo* and *Wildfire*.[175] Others, however, remained (often illegally) in the United States and had children. For example, "many descendants of the *Wanderer's* captives still live on St. Simons Island, Brunswick, and Darien, Georgia."[176] Federal efforts to find and deport the *Clotilda* survivors failed, and after Emancipation, they founded a community in Alabama called Africa Town where some of their descendants reside to this day, while others live in other parts of the United States.[177] Calculations vary as to how many arrived between 1808 and 1866.[178] Although some died or left the United States, 1,984 persons of color born in Africa were counted in the 1870 Census (out of 4.8 million overall);[179] this is probably an undercount, either because some wanted to "conceal their origin" as "illegal immigrants" or because "the Republican administration of Ulysses S. Grant sought to minimize the illegal slave trade by undercounting the Africans."[180] The SlaveVoyages project, funded by

[174] Letter from John Marshall, to Ralph R. Gurley, Sec'y of the ACS (Dec. 14, 1831), *in* 12 PAPERS OF MARSHALL, *supra* note 173, at 131.

[175] *See* Boyd, *supra* note 138, at 111, 114-16 (discussing capture of the *William* and *Wildfire*, and the deportation of the freedpersons to Liberia).

[176] Williams, *supra* note 136 (emphasis added).

[177] *See* DIOUF, *supra* note 135, at 238; *see also The Story of the Clotilda 110*: *Never Let the World Forget*, CLOTILDA DESCENDANTS ASS'N, https://theclotildastory.com/ (last visited Jan. 7, 2021) [https://perma.cc/K26P-FGAA].

[178] *See* DIOUF, *supra* note 135, at 241-43 (describing various historical estimates).

[179] *Id.* at 242 & n.8. Diouf notes that while the official census number was 1,984, others examining the records calculated the returns differently. *Id.* Only approximately 500 free immigrants from Africa were recorded between 1820 and 1870, so a supermajority were freedpersons. *See* U.S. CENSUS BUREAU, INTERNAL MIGRATION 109 (1975), https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p1-chC.pdf [https://perma.cc/5DSS-K5SP].

[180] DIOUF, *supra* note 135, at 242.

UNESCO, estimates that between 1808 and 1875, 13,151 enslaved persons embarked to the United States, and 10,941 disembarked.[181]

This history demonstrates that there were clearly "illegal aliens," both free migrants banned under the 1803 law and illegally imported slaves, in the United States before and during the consideration of the Fourteenth Amendment. In 1898, the Supreme Court held: "No one doubts that the amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been."[182] This underscores that three decades after the ratification of the Amendment, American leaders understood that after the Civil War ended there were people in the United States who had been born in Africa, even though the African slave trade had been illegal for almost two generations. On this basis, when Congress wrote the Fourteenth Amendment and the states ratified it, the framers and ratifiers knew that they were making the children of unauthorized migrant citizens of the nation.

II. FEDERAL IMMIGRATION REGULATION AT THE TIME OF THE FOURTEENTH AMENDMENT

In addition to illegally imported slaves, Congress knew that there could be other people in the United States in violation of the law. Exclusion and deportation proposals having nothing to do with slavery received political consideration in the decades before enactment of the Fourteenth Amendment, and many court decisions made it clear that the government had the power to regulate immigration beyond the slave trade.

During the nineteenth century immigration regulation was often a significant political issue, and all members of Congress in 1866 would have known this. In the 1830s and 1840s there were important anti-immigration parties, and their members served in Congress, in state legislatures, and as governors. Starting in the 1840s various nativist political parties pushed for bans on certain classes of immigrants, especially Roman Catholics. In 1844 James Harper, the candidate of the American Republican Party (later renamed the Native American Party) was elected mayor of New York on an anti-Catholic, anti-immigration ticket. In Philadelphia, Lewis Charles Levin won a seat in Congress on

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[181] *Trans-Atlantic Slave Trade – Estimates*, SLAVEVOYAGES, https://www.slavevoyages.org/assessment/estimates (last visited Jan. 7, 2021) [https://perma.cc/83ZR-VSUJ] (linking to an interactive tool allowing users to adjust time frame and see numbers of slaves "embarking" and "disembarking").

[182] United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).

a similar platform, as a candidate of the American Party. Starting in 1852 a broad spectrum of people in California, including Governor John Bigler, pushed for limitations or bans on Chinese immigrants, while also calling for special taxes to be imposed on Chinese immigrants already in the state.[183] In 1854, the American Party, better known as the Know-Nothing Party, won control of a number of state legislatures and gubernatorial seats on an anti-Catholic, anti-immigrant platform.[184] In 1856, former president Millard Fillmore won 21.5% of the popular vote for president on the American Party (Know-Nothing) ticket. His platform strongly discouraged immigration, especially for Catholics.[185] Most northern Know-Nothings eventually abandoned their anti-immigrant views and joined the Republican Party after 1854.[186] Thus, when Republicans wrote and passed the Fourteenth Amendment, they were fully aware of the possibility that there might someday be a ban on legal immigration for select groups, just as Congress had restricted immigration from Africa in 1803. These proposals were not simply fantasy or nonsense which were beyond the constitutional power of Congress to enact. Court decisions recognized congressional authority to regulate immigration.[187] In 1800, Justice William Cushing asserted that "[t]he right to confiscate and banish, in the case of an offending

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[183] *See* CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA 10-12 (1994).

[184] *See* TYLER ANBINDER, NATIVISM & SLAVERY: THE NORTHERN KNOW NOTHINGS & THE POLITICS OF THE 1850S, at 273 (1992).

[185] PAUL FINKELMAN, MILLARD FILLMORE, THE AMERICAN PRESIDENTS 133 (Arthur M. Schlesinger, Jr., & Sean Wilentz eds., 2011); *see also Nativist Political Parties and Organizations*, YOUNG AM. REPUBLIC, http://projects.leadr.msu.edu/youngamerica/exhibits/show/irishimmigration/nativistparties (last visited Feb. 24, 2021) [https://perma.cc/U3EK-5ABF]. *See generally* DAVID H. BENNETT, THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY (2011) (discussing Millard Fillmore's 1856 presidential campaign).

[186] *See* ANBINDER, *supra* note 184, at xiii.

[187] *See, e.g.*, Smith v. Turner, 48 U.S. (7 How.) 283, 408-09 (1849) ("On the subject of foreign commerce, including the transportation of passengers, Congress have adopted such regulations as they deemed proper, taking into view our relations with other countries. And this covers the whole ground. The act of New York which imposes a tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in Congress; and the act is therefore void."); Mayor, Aldermen & Commonalty of City of N.Y. v. Miln, 36 U.S. (11 Pet.) 102, 132 (1837) ("Vattel, book 2d, chap. 7th, sec. 94. 'The sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state.' Ibid. chap. 8, sec. 100. 'Since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases, to the permission to enter.'").

citizen, must belong to every government."[188] The Alien Friends Act[189] established registration rules for immigrants, with penalties for those who did not register. The Alien Enemies Act,[190] provided for the deportation of citizens of enemy nations, without any proof of illegal conduct on the part of the noncitizen. While the act does not prohibit immigration of alien enemies, the implication is, especially when connected to the registration requirements of the Alien Friends Act, that such immigration would have been unlawful and led to immediate deportation. Thus, in 1817 when Justice Bushrod Washington analyzed the Alien Enemies Act of 1798, he gave unquestioned support for federal authority to deport noncitizens.[191] Under both laws, and Justice Washington's opinion, there could have been immigrants living the United States who had evaded deportation and were illegally still in the United States. Any children they had would be children of "illegal aliens" born in the United States. Shortly before the Civil War, the Supreme Court again reminded the nation that banishment was a permissible aspect of national sovereignty and could lead to the illegal return of banished people.[192] At the time the states were considering the Fourteenth Amendment, the Supreme Court also discussed

[188] Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 20 (1800) (opinion of Cushing, J.).

[189] The Alien Friends Act, ch. 54, § 1, 1 Stat. 566, 566-67 (1798).

[190] The Alien Enemies Act, ch. 66, § 1, 1 Stat. 577, 577 (1798).

[191] Justice Washington explained:

> [T]he power of the president under the first section of the law, to establish by his proclamation or other public acts, rules and regulations for apprehending, restraining, securing, and removing alien enemies, under the circumstances stated in that section, appears to me to be as unlimited as the legislature could make it. He alone is authorised to direct the conduct to be observed on the part of the United States towards such alien enemies, and to prescribe the manner and degree of restraint to which they should be subject; to declare in what cases, and on what terms, their residence should be permitted, and to provide for the removal of those whom he should not permit to remain in the United States, and who should refuse or neglect to depart; and, to avoid all doubt as to the extent of his power, he is authorised in general and unqualified terms, to establish any regulations which he should think necessary in the premises, and for the public safety.

Lockington v. Smith, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817).

[192] *See Ex parte* Wells, 59 U.S. (18 How.) 307, 320 (1855) (McLean, J., dissenting) ("There can be no doubt, where one punishment is substituted, under the laws of England, for another — as banishment for death — if the convict shall return, he may be arrested on the original offence; and if he shall be found by a jury to be the identical person originally convicted, the penalty of death incurred by him may be inflicted.").

banishment.[193] Any banishment would of course require some sort of interior enforcement. While there was debate over whether the power to exclude and expel rested with the states or with the general government, there was little question that it resided somewhere in U.S. law.[194] Accordingly, it was clear that some noncitizens might be in the United States and its territories without permission. Certainly, that would have been the status of enemy aliens who remained in the United States after they were ordered to leave under the Alien Enemies Act of 1798.[195]

In the 1830s, New York passed immigration restrictions which the Supreme Court upheld in *Mayor of New York* v. *Miln*,[196] ignoring the obvious Commerce Clause issues by creating a notion of state "police powers" which allowed for immigration regulations. In 1849, the Supreme Court recommended that Congress regulate the burden of foreign immigration.[197]

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[193] *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 321 (1867) ("'Some punishments,' says Blackstone, 'consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like.'"); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 896 (2d Cir. 1996) ("Early in American history, the punishment of banishment was imposed upon British loyalists, and was even celebrated as a matter of sound policy in dictum by a Justice of the Supreme Court." (citing *Cooper*, 4 U.S. at 20 ("The right to confiscate and banish, in the case of an offending citizen, must belong to every government."))).

[194] For example, one judge explained:

> The first precedent to which I shall refer is, the old alien law passed in 1798 [1 Stat. 570], during the federal administration of the elder Adams. That law authorized the persident [sic], under certain circumstances, to remove aliens out of the country. It was strongly denounced by Mr. Jefferson, Mr. Madison, and all the statesmen of the state rights school of that day, as unconstitutional—a palpable usurpation of power by the general government—and a dangerous encroachment on the rights of the states. Why was it considered unconstitutional? Obviously, because it was an original inherent sovereign right of each state to determine who might or who might not live within its limits, and that power had not been surrendered to the general government.

United States v. Gould, 25 F. Cas. 1375, 1378 (S.D. Ala. 1860).

[195] *See* Alien Enemies Act, 1798, § 1.

[196] Mayor, Aldermen & Commonalty of City of N.Y. v. Miln, 36 U.S. (11 Pet.) 102, 143 (1837) (upholding immigration restrictions in New York).

[197] Smith v. Turner, 48 U.S. (7 How.) 283, 408 (1849) (McLean, J.) ("It is not doubted that a large portion, perhaps nine tenths, of the foreign passengers landed at the port of New York pass through the State to other places of residence. At such places,

During this period Congress received many petitions requesting immigration bans. One presented by Henry Clay (who also supported colonization free blacks in Africa), warned that "[a] flood of foreign Catholics, guided by crafty and zealous priests, are ominously pouring into our country."[198] In 1844, James Harper won the New York City mayoralty as the candidate of the anti-immigrant American Republican Party. Six members of the party won seats in Congress. The party renamed itself the Native American Party and was also known as the American Party. It fizzled out in a few years, but at least one member, Lewis Charles Levin of Philadelphia, held his seat until 1851.[199] In the mid-1850s the anti-immigrant Order of the Star Spangled Banner, better known as the Know-Nothing Party, and officially on the ballot as "The American Party," dominated several state legislatures and won seven governorships. The Speaker of the House of Representatives after the 1856 election was a Know-Nothing, and that year, Millard Fillmore, the Know-Nothing presidential candidate, running on a viciously anti-Catholic and anti-immigrant platform won 21% of the popular vote and eight electoral votes.[200]

As we noted above, a significant portion of the Republican Party, which had only come into existence in the mid-1850s, had come out of various anti-immigration parties.[201] By the end of the Civil War most Republicans had abandoned their nativism, and most party leaders, like

therefore, pauperism must be increased much more by the influx of foreigners than in the city of New York. If, by reason of commerce, a burden is thrown upon our commercial cities, Congress should make suitable provisions for their relief. And I have no doubt this will be done."). An 1852 extradition case seemed to hint at the possibility of federal regulation. *See In re* Kaine, 55 U.S. (14 How.) 103, 114 (1852) ("But it is certainly due to our own citizens that they should be protected against murderers, and those who attempt to murder; and against pirates, house-burners, robbers, and forgers. That these should be extruded, on the demands of a foreign government where the crime was committed, and there punished, is due to humanity. Such wicked and dangerous men ought not to remain here. The case before us furnishes a striking instance of our dangerous condition in this respect.").

198 BENNETT, *supra* note 185, at 51.

199 *Id.* at 58-60; *Levin, Lewis Charles (1808 – 1860)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000262 (last visited Jan. 7, 2021) [https://perma.cc/ACQ6-NPPX].

200 FINKELMAN, *supra* note 185, at 24; Richard Pallardy, *United States Presidential Election of 1858*, BRITANNICA, https://www.britannica.com/event/United-States-presidential-election-of-1856 (last visited Feb. 19, 2021) [https://perma.cc/YK4X-Y43P].

201 *See* ANBINDER, *supra* note 184, at 246; WILLIAM E. GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1856, at 190 (1978).

Lincoln, Seward, Chase, and Grant, had always opposed it.[202] The importance of immigrants to the Union cause in the Civil War undermined nativist sentiment in the Republican Party. About a quarter of all U.S. soldiers were immigrants and nearly 20% more had at least one foreign born parent.[203] Prominent immigrant generals, like Franz Sigal, Carl Schurz, and Friedrich C. Salomon, and the service of various German, Irish, and other immigrant regiments, made it impossible for Republicans to oppose immigration, at least from Europe. But in 1866, when Congress debated and passed the Fourteenth Amendment, everyone in the House and the Senate understood the potential for a nativist resurgence, and the Republican leadership understood that some Party members were still hostile to immigration.

The potential for such a resurgence was clear during some of the debates over the Amendment. When Congress debated the Fourteenth Amendment, there was already a strong movement in California, Nevada, and Oregon to deny citizenship to the American-born children of Chinese immigrants.[204] During the debates over the Fourteenth Amendment, California Congressman William Higby argued the Chinese were "a pagan race" and said, "You cannot make good citizens of them; they do not learn the language of the country."[205]

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[202] Abraham Lincoln was particularly hostile to nativism. *See* Angela Alexander, *All Men Are Created Equal: Abraham Lincoln, Immigration, and Ethnicity*, 3 ALB. GOV'T L. REV. 803, 814 (2010). In 1855, when the Know-Nothings were reaching their zenith, he wrote:

> I am not a Know-Nothing. That is certain. How could I be? How can any one who abhors the oppression of negroes, be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that "*all men are created equal*." We now practically read it "all men are created equal, *except negroes*[.]" When the Know-Nothings get control, it will read "all men are created equal, except negroes, and *foreigners, and Catholics*." When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty — to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocracy [sic].

Letter from Abraham Lincoln to Joshua F. Speed (Aug. 24, 1855), *reprinted in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (Roy P. Basler et al. eds., 1953).

[203] Don H. Doyle, *The Civil War Was Won by Immigrant Soldiers*, TIME (June 29, 2015, 3:42 PM EDT), https://time.com/3940428/civil-war-immigrant-soldiers/ [https://perma.cc/K5VV-W85U].

[204] *See* John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 62, 91 (1996).

[205] Finkelman, *Original Intent and the Fourteenth Amendment*, *supra* note 10, at 1025 n.31.

In sum, even apart from the slave trade laws, given the persistent recurrence of immigration restriction demands since the 1830s, the passage of state restriction laws like the one at issue in *Miln*, and the success of some nativist politicians, the possibility of immigration restriction and deportation was plain. It is simply not plausible that the enactors of the Fourteenth Amendment overlooked the possibility that they were writing an amendment that might well affect deportable noncitizens and their children born in the United States.

III. WERE ILLEGALLY IMPORTED PERSONS NATURALIZED SUB SILENTIO?

After reading an earlier draft of this Article, Professor Smith proposed that unlawfully imported Africans were implicitly naturalized by the Fourteenth Amendment.[206] This could explain why there were no deportations of members of this group. Even if the unauthorized migrants were implicitly naturalized sub silentio, then when the Fourteenth Amendment granted citizenship to all persons born here, the framers of the Amendment were still granting citizenship to people whose parents were deportable when those children were born. Yet, under the theory set out in *Citizenship Without Consent*, if the parents were naturalized sub silentio, it could be argued that the Fourteenth Amendment granted citizenship only to the children of people who, at the time of the enactment of the Fourteenth Amendment, had been made part of the political community, whatever their status before.

There are many problems with this contention. First, assuming that Congress and the states took this momentous step without mentioning it, the theory set out in *Citizenship Without Consent* that undocumented

[206] Professor Smith suggested:

> But what about those former slaves themselves who were brought illegally and never deported? By your logic, they should not have been citizens. They were not born here, and there are no records I've been able to find of them ever seeking or gaining naturalization. Nor, however, were there continuing efforts to deport them as unauthorized aliens, of the sort you describe before the 14th. They appear to have been treated as citizens — and so their children were also citizens.
>
> Why? I haven't found anything explicitly addressing the question (nor has [Gerald Neuman], to my knowledge; and you don't address the question, so I'm guessing you haven't either). I think there was a tacit assumption after the 14th Amendment that they should be seen as effectively naturalized by having been made American slaves. If so, they were not unauthorized aliens and are not the precedent for today that you see them as being.

Email from Rogers Smith to Paul Finkelman, Gabriel J. Chin & Peter Schuck (Oct. 20, 2019) (on file with author).

migrants were unknown to Congress is refuted. Clearly, if Congress knew about the unauthorized migrants, and regularized their status sub silentio in the Fourteenth Amendment, then Congress did contemplate unauthorized migrants when it enacted the Fourteenth Amendment. Thus, Congress was putting no limits on such grants of citizenship in the future under the Amendment they adopted.

There is a second problem. The literature does report naturalizations of trafficked persons, such as some of the survivors of the *Clotilda*.[207] The lack of naturalizations may be a product of their numbers — perhaps as few as 2,000 in 1870,[208] and the national dispersion of naturalization records, which are scattered in every state and federal courthouse for the period before 1906.[209] This theory also conflicts the actual language of the Amendment. Congress might easily have granted citizenship to all "former slaves." But Congress did not say this. Congress clearly excluded from Fourteenth Amendment citizenship those few slaves who were not born in the United States, but clearly included their American-born children. It is difficult to interpret the clear language — "born" in the United States — to mean "born in the United States or elsewhere."

In addition, Professor Smith's argument is fatally inconsistent with congressional drafting and the Supreme Court's interpretation of the naturalization laws. Since 1795, federal law has provided that a foreign-born noncitizen may become a citizen by complying with the naturalization laws "and not otherwise."[210] For its part, the Supreme Court has interpreted the Fourteenth Amendment as providing for citizenship only by birth in the United States. The only other way to become a citizen is by satisfaction of the terms of a group or individual naturalization statute.[211] Even when the Supreme Court has held

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[207] DIOUF, *supra* note 135, at 165.

[208] *Id.* at 242 & n.8.

[209] *See* Act of June 29, 1906, ch. 3592, 34 Stat. 596, 596.

[210] Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (providing "[t]hat any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise"); Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 (same). It was carried forward in the Revised Statutes of 1874. REV. STAT. § 2165 ("An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise."). Current law provides that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise." 8 U.S.C. § 1421(d) (2018).

[211] As the Supreme Court explained, "[t]he Fourteenth Amendment . . . contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law." United States v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898). Perhaps the clearest indication of the principle that Congress has plenary power over

naturalization laws unconstitutionally discriminatory, its remedy has been to deny citizenship to those under the favorable parts of the laws rather than to grant citizenship to those whom Congress has denied citizenship.[212] The bottom line is that citizenship other than that granted by birth in the United States or compliance with a law passed by Congress is to many people a morally compelling idea. Thus, for example, people have argued that certain foreign-born children of U.S. citizens, or people born in a territory under U.S. jurisdiction but deemed "unincorporated" should be considered citizens at birth. A flexible, equitable source of citizenship, independent of the Constitution or statute, or, alternatively, liberal interpretation of naturalization statutes, would be humane. But Congress and the Supreme Court have uniformly rejected the idea of citizenship other than through birth in the United States proper, or as granted by an act of Congress.[213]

the area are the holdings that children of U.S. citizens born overseas have no right to citizenship except as provided by statute. *See, e.g.*, Rogers v. Bellei, 401 U.S. 815, 827 (1971) ("The central fact, in our weighing of the plaintiff's to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen."); Montana v. Kennedy, 366 U.S. 308, 312 (1961) (finding a statutory basis "provided the sole source of inherited citizenship status for foreign-born children of American parents"); *see also, e.g.*, Fedorenko v. United States, 449 U.S. 490, 506 (1981) ("[T]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship 'illegally procured,' and naturalization that is unlawfully procured can be set aside."); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 167 (1874) ("Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization.").

212 *See* Sessions v. Morales-Santana, 137 U.S. 150, 174 (2017).

213 Courts have demonstrated judicial reluctance to grant citizenship by anything other than clear positive law. *See, e.g.*, Toyota v. United States, 268 U.S. 402, 409 (1925) (demonstrating courts' reluctance). In the wake of World War I, Congress provided that noncitizens who served honorably in the armed forces were entitled to become naturalized citizens. Act of July 19, 1919, 41 Stat. 222 (indicating that "[a]ny person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service," would be entitled to become a citizen).

Hidemitsu Toyota, an immigrant from Japan, served in both the Coast Guard and the Navy during the War, and after being honorably discharged, he applied for citizenship. The Court refused to allow his naturalization, asserting that the 1919 law did not override earlier laws prohibiting the naturalization of immigrants from Japan and other

A much simpler set of explanations resolves the absence of deportations after the Civil War. There is also an obvious political reason for the absence of deportations. The Civil War had been fought over slavery. Slavery was the motivation for secession[214] and by the end of the War complete abolition was the goal of the Republican Party, and even some northern Democrats. More than 200,000 people of African ancestry served in the U.S. Army and Navy, and helped defeat the Rebellion.[215] Tens of thousands of others worked as civilian employees for the military.[216] It was simply inconceivable, after this history, that the victorious supporters of the Union would have sought to expel Africans who were illegally in the United States, especially since some of them and their children had probably contributed to the defeat of the Confederacy and the preservation of the Union. But if the actions of Congress to reconsider the general status of African Americans under law made deporting even a handful of them politically impossible, tolerating their presence in the United States gave them no vested legal right to remain.[217]

Because of these political realities, Congress appropriated no funds for deportation.[218] After passing the Fourteenth Amendment and

East Asian countries. To his credit, Chief Justice William Howard Taft, a former Secretary of War, dissented.

214 Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449, 449 (2012).

215 Americans forget that another "Official" name for what we call the Civil War is "The War of the Rebellion." *See* LIBRARY OF CONGRESS, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, https://www.loc.gov/item/03003452/ (last visited Jan. 7, 2021) [https://perma.cc/CE6Z-3LLR].

216 *See* DUDLEY DAVID CORNISH, THE SABLE ARM: BLACK TROOPS IN THE UNION ARMY, 1861–1865, at 251 (1956).

217 *See infra* note 218 and accompanying text.

218 Of course, this does not mean that the presence of undocumented migrants has been regularized. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."). Congress currently appropriates enough funds to deport only a small fraction of the undocumented noncitizens in the United States. Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285, 1291 (2015) ("[T]he government has resources to deport approximately 400,000 individuals annually — less than four percent of the deportable population."). But under current doctrine, any not deported in any given year remain fully deportable. If there were a doctrine that non-enforcement or under-enforcement creates constitutionally vested rights, that would have dramatic implications for current immigration policy. However, it is not relevant to this problem. As the 39th Congress was finalizing the Fourteenth Amendment, it funded domestic slave trade enforcement.

sending it on to the states, Congress appropriated no funds, as it had in 1862, 1863, 1864, and 1866, to support domestic judicial enforcement of the slave trade laws.[219] To be sure, Congress continued to legislate and appropriate to suppress the slave trade on the high seas and off the coast of Africa.[220] But in the United States, the general project of colonization of Africans was winding down. In 1865, the American Colonization Society received its last federal funding, an appropriation for past services in Liberia[221] in the grand sum of $6,962.50.[222] In 1867, the House rejected a proposed $50,000 appropriation for the ACS by a vote of seventy-seven to twenty-three.[223] The ACS memorialized Congress in 1868 and 1869 for additional funds, with emphatic lack of

Act of Apr. 7, 1866, ch. 28, § 5, 14 Stat. 14, 23. Accordingly, even if non-enforcement were legally determinative, there is no room historically to argue that Congress was initiating a policy of toleration.

[219] *See supra* notes 161–64 and accompanying text.

[220] *See* Act of Aug. 4, 1886, ch. 903, 24 Stat. 298, 303 (noting comptroller payment of bounties for slave trade suppression); An Act for the Relief of Jacob H. Ela, ch. 52, 17 Stat. 647, 647 (1872) (authorizing payment of costs of transporting Naval officers from the African Squadron out of the fund for the suppression of the slave trade); Act of Mar. 3, 1869, ch. 125, 15 Stat. 319, 321 (appropriating $12,500 to carry out the British treaty); Act of Mar. 30, 1868, ch. 38, 15 Stat. 56, 58 (appropriating $12,500 to carry out British treaty); Additional Convention to the Convention Between the United States and Great Britain of the Seventh of April, 1862, Respecting the African Slave Trade, Gr. Brit.-U.S., June 3, 1870, 16 Stat. 777, 777 (revising the British treaty).

[221] *See* Joint Resolution to Facilitate the Adjustment of Certain Accounts of the American Colonization Society for the Support of Recaptured Africans in Liberia, S.J. Res. 19, 38th Cong., 13 Stat. 569, 569 (1865).

[222] FORTY-NINTH ANNUAL REPORT OF THE AMERICAN COLONIZATION SOCIETY 24 (1866), https://archive.org/details/ASPC0001927100 [https://perma.cc/K26K-XVSB].

[223] CONG. GLOBE, 39th Cong., 2d Sess. 1739-40 (1867).

success.[224] Colonization, at least mandated or facilitated by the federal government, was a spent force.[225]

In 1870, people of African birth or ancestry became eligible for naturalization,[226] at least in retrospect raising a serious question of whether those who wished to stay continued to be deportable, practically or legally. Congress repealed the deportation provision in 1874 with the enactment of the Revised Statutes of the United States, the first codification of U.S. law, which carried forward the prohibition on the slave trade basically as it had existed before, employing fines,[227] forfeiture,[228] criminal penalties,[229] interdiction,[230] and requiring custody and deportation of those found on the high seas.[231] But there was no equivalent in the Revised Statutes to Section 4 of the 1819

[224] CONG. GLOBE, 40th Cong., 3d Sess. 77 (1868) (granting Senate Finance Committee request to be discharged from further consideration of memorial); CONG. GLOBE, 40th Cong., 3d Sess. 1574-75 (1869) (granting House Post Office and Post Roads Committee request to be discharged from further consideration of memorial); *see also* 8 CONG. REC. 1216-17 (1879) (memorial requesting funds to explore the western coast of Africa). Another hint of the declining place and importance of the American Colonization Society comes from its listings in the Congressional Directory. In 1868, its address was listed in the "City Directory" of important public buildings, and its officers identified between Andrew Johnson and the other officers of the Smithsonian Institution, and the officers of the U.S. Agricultural Society. *See* BEN PERLEY POORE, CONG. DIRECTORY, 40TH CONG., 2d SESS. 90, 96 (2d ed. 1868). Although the "City Directory" feature persisted for decades, 1871 seems to be the last edition in which they merited inclusion. *See* BEN PERLEY POORE, CONG. DIRECTORY, 42D CONG., 1ST SESS. 107 (1871).

[225] STAUDENRAUS, *supra* note 45, at 248 (noting the Society's 1867 funding request "there was no room in reconstruction plans for African colonization or emigration").

[226] Naturalization Act of 1870, 16 Stat. 254, 254 (extending the right of naturalization to "aliens of African nativity and to persons of African descent," but not to other races).

[227] REV. STAT. § 5552 (1874).

[228] REV. STAT. § 5553 (1874).

[229] REV. STAT. §§ 5375-5382 (1874) (listing crimes); REV. STAT. § 5560 (1874) (requiring commanders to take suspects into custody).

[230] REV. STAT. § 5557 (1874) (noting that the president may direct armed vessels to seize suspected law violators); REV. STAT. §§ 5567, 5569 (1874) (noting that the armed vessels may deliver enslaved persons directly to the place agreed by treaty).

[231] *See* REV. STAT. § 5561 (1874) ("The President is authorized to make such regulations and arrangements as he may deem expedient for the safe-keeping, support, and removal beyond the limits of the United States, of all such negroes, mullatoes, or persons of color, as may be delivered and brought within their jurisdiction; and to appoint a proper person residing upon the coast of Africa as agent for receiving negroes, mullatoes, or persons of color delivered from on board vessels seized in the prosecution of the slave trade, by commanders of United States armed vessels."); REV. STAT. § 5566 (1874) (authorizing the President to contract with an agent on the coast of Africa).

statute, providing for deportation of those found in the United States.[232] Federal immigration policy had changed, such persons were thereafter allowed to remain in the United States, just like every other noncitizen who came to the United States in that period.

Regarding naturalizations, some are reported in the literature; among eight *Clotilda* survivors, for example.[233] In addition, Congress authorized naturalization of persons of African nativity and descent only in 1870; before that, it was clear enough that naturalization of blacks was unauthorized.[234] A well-established doctrine explains the lack of naturalization of these Americans thereafter.[235]

In the years immediately preceding the adoption of the Fifteenth Amendment in 1870, African Americans, who had always voted in some northern states,[236] voted in most of the former Confederate states under the protection of the U.S. Army as part of military reconstruction; the 1867 voter registers do not provides ages or dates of birth for registered voters, but they suggest the possibility of the registration of a number of Clotilda survivors.[237] Today, in 2020, federal law makes voting by a

[232] Section 4 was therefore repealed. Discussing another law not carried forward, the Supreme Court explained: "This clause was omitted, however, in the compilation of the Revised Statutes, and therefore expired after the passage of the Revision, June 22, 1874 — section 5996 enacting that all acts prior to December 1, 1873, any portion of which was embraced in any section of the revision, should be repealed." Campbell v. City of Haverhill, 155 U.S. 610, 614 (1895).

[233] DIOUF, *supra* note 135, at 165. These naturalizations also illustrate that Africans who had been brought to the United States illegally before 1868 did not think that the Amendment had made them citizens *sub silentio*, and neither did the courts which naturalized these African-born residents of the United States.

[234] *See* Naturalization Act of 1870, 16 Stat. 254, 254 (1870) (extending the right of naturalization to "aliens of African nativity and to persons of African descent," but not to other races, such as South Asians, East Asians, and Pacific Islanders).

[235] Another explanation for the absence of naturalizations is that African Americans in the South used the judicial system in disproportionately low numbers compared to whites, so it is not surprising that they did not regularly avail themselves of the judicial process in this context. *See* MELISSA MILEWSKI, LITIGATING ACROSS THE COLOR LINE: CIVIL CASES BETWEEN BLACK AND WHITE SOUTHERNERS FROM THE END OF SLAVERY TO CIVIL RIGHTS 207 (2018).

[236] While Chief Justice Taney asserted that no black could be a United States citizen, he conceded they could vote in those states which enfranchised them. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 422 (1857); *see also* ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 266 (1997).

[237] Charles Lewis and Cudjo Lewis are listed as "colored" voters in the 1867 registry, apparently naturalized in 1868, and appear as black and having been born in Africa in the 1870 or 1880 Census as black people having been born in Africa. *Alabama 1867 Voter Registration Records Database*, ALA. DEPT. ARCHIVES & HIST., https://archives.alabama.gov/VoterReg/index.cfm (last visited Jan. 7, 2021)

noncitizen a ground for deportation.[238] In the 19th Century, however, under a broadly accepted doctrine, casting a ballot was presumptive evidence of citizenship. As the North Dakota Supreme Court explained:

> The alienage being shown, it is presumed to continue until evidence to the contrary is shown. *Hauenstein v. Lynham*, 100 U.S. 483, 25 L. Ed. 628. But, when it is shown that the party has cast a vote in this country, then this presumption disappears, and the opposite presumption prevails, because the law will not presume that a party has committed an unlawful act.[239]

The Supreme Court and Congress both acknowledged this doctrine. In an opinion holding that a foreign-born person elected governor of Nebraska who had never been naturalized was, nevertheless, a U.S. citizen, based on the presumed naturalization of his father, the Court explained:

> It is true that naturalization under the acts of congress known as the 'Naturalization Laws' can only be completed before a court, and that the usual proof of naturalization is a copy of the record of the court. But it is equally true that, where no record of naturalization can be produced, evidence that a person, having the requisite qualifications to become a citizen, did in fact and for a long time vote and hold office, and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen.[240]

The longevity and vitality of this doctrine is demonstrated by its ratification by Congress in 1910.[241] Congress did not treat unauthorized voting as a deportable offense. On the contrary, Congress made civic participation (such as voting) evidence of good faith and a basis to waive naturalization requirements, other than, of course, racial restrictions.[242]

[https://perma.cc/4PVD-ZY8D]. Tony Thomas and Archie Thomas naturalized and people with those names appear in the voter register.

[238] *See* Fitzpatrick v. Sessions, 847 F.3d 913, 914 (7th Cir. 2017) (applying 18 U.S.C. § 611 (2018), criminalizing noncitizen voting in federal elections, and 8 U.S.C. § 1227(a)(6) (2018), making unauthorized voting grounds for deportation).

[239] Kadlec v. Pavik, 83 N.W. 5, 5 (N.D. 1900) (citing Gumm v. Hubbard, 11 S.W. 61 (Mo. 1889)); GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 342-43 (4th ed. 1897); *see also* People v. Pease, 27 N.Y. 45, 63-64 (1863).

[240] Boyd v. Nebraska, 143 U.S. 135, 180-81 (1892).

[241] *See* Act of June 25, 1910, ch. 401, § 3, 36 Stat. 830, 831.

[242] The Second Circuit explained how the law worked for the benefit of unauthorized noncitizen voters:

Indeed, many states in the late nineteenth century specifically enfranchised noncitizens who had declared their intention to naturalize.[243]

In sum, Africans in America who did not vote, seek office, or need a passport would have had no particular reason to naturalize because until 1874, for financial reasons, and after 1874, by positive law, they suffered no danger of deportation, even if not citizens. Those who participated in the establishment and operation of Reconstruction and later governments by voting or holding office would be presumed to have been naturalized, whether or not they actually went through the

> Because he has acted in good faith as a citizen, he was relieved of the obligation of making any declaration of intention by the provision added to paragraph 2, § 4, c. 3592, Laws of 1906, by section 3, c. 401, Laws of 1910 (36 Stat. 830), which provides as follows:
>
> > 'Provided further, that any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May 1st, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, * * * and said court may issue such certificate without requiring proof of former declaration, * * * but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens.'

United States v. Meyer, 241 F. 305, 308 (2d Cir. 1917); *see also, e.g.*, *In re* Fleury, 223 F. 803, 804 (E.D.N.Y. 1915) (recognizing acts of good faith by intended citizens for purposes of naturalization); *In re* Center, 218 F. 975, 976 (S.D. Ga. 1914) (granting naturalization; "It is clear from the evidence that Center has acted under the impression that he was a citizen of the United States, and so acted because of misinformation"); *cf.* United States v. Kol Lee, 132 F. 136, 137 (S.D. Ga. 1904) (Chinese Exclusion case; "Now, taking that in connection with his own testimony that he had papers which admitted him to this country, and that they were lost or destroyed, with his application in Savannah to obtain a duplicate of his certificate, and with the fact that he had been here for 19 years without interference, so far as the record discloses, by government officials, it all raises a strong presumption of the legality of his residence in the United States.").

[243] Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 307-08 (1992); *see* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1395 (1993).

formal process. For these reasons, the absence of additional records of naturalizations is unsurprising.

CONCLUSION

The Fourteenth Amendment facially grants citizenship to all persons born or naturalized in the United States. The argument that it does not include the children of undocumented noncitizens rests on the claim that there were no "illegal aliens" in the United States in 1868, and moreover, that there had never been "illegal aliens" in the United States. These claims are simply wrong. Congress prohibited a group of people from coming to the United States, and provided that if they were here, they should be removed. Many of these people were in fact not removed but remained in the United States. Yet, there is no doubt that their children were granted United States citizenship under the Fourteenth Amendment. For the same reason, the children of undocumented noncitizens born in the United States are also citizens under the Constitution.