

John McCain's Citizenship: A Tentative Defense

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Sen. John McCain was born a U.S. citizen and is eligible to be president. The most serious challenge to his status, recently posed by Prof. Gabriel Chin, contends that the statute granting citizenship to Americans born abroad did not include the Panama Canal Zone, where McCain was born in 1936. When Congress amended the law in 1937, he concludes, it was too late for McCain to be “natural born.”

Even assuming, however, that McCain's citizenship depended on this statute—and ignoring his claim to citizenship at common law—Chin's argument may be based on a misreading. When the statutory language was originally adopted in 1795, it was apparently read to address all children born outside of the United States proper, which would include those born in the Canal Zone. Patterns of historical usage, early interpretations of the citizenship statutes, contemporaneous expressions of the statutes' purpose, and the actual application of the statutes to cases analogous to McCain's all confirm this understanding. More recently, the acquisition of America's outlying possessions lent plausibility to new interpretations of the law. But because the key language was never altered between 1795 and 1936, its original meaning was preserved intact, making John McCain a U.S. citizen at birth.

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INTRODUCTION

Only a “natural born Citizen” is eligible to be president.¹ Sen. John S. McCain III, the child of two U.S. citizens, was born in the Panama Canal Zone in 1936 while his father was stationed there by the Navy. Although few people could imagine denying citizenship to such children, a recent essay by Prof. Gabriel J. Chin presents a serious challenge to McCain’s status.²

His argument is as follows. At the time of McCain’s birth, the relevant statute granted citizenship to certain children “born out of the limits and jurisdiction of the United States.”³ The Canal Zone in 1936 was “out of the limits” of the United States—that is, outside its borders—

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1. U.S. CONST. art. II, § 1, cl. 5.
 2. Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship* (Ariz. Legal Studies Discussion Paper No. 08-14, July 2008), <http://ssrn.com/id=1157621>. For reactions to Chin’s essay, see, e.g., Adam Liptak, *A Hint of New Life to a McCain Birth Issue*, N.Y. TIMES, July 11, 2008, <http://www.nytimes.com/2008/07/11/us/politics/11mccain.html>.
 3. REV. STAT. § 1993 (1st ed. 1875), *amended by* An Act To Amend the Law Relative to Citizenship and Naturalization, and for Other Purposes (1934 Act), ch. 344, § 1, 48 Stat. 797, 797 (1934).

and was therefore outside the Constitution's grant of citizenship to "all persons born . . . in the United States, and subject to the jurisdiction thereof."⁴ But the Canal Zone, Chin claims, was still within the "jurisdiction" of the United States, which had exclusive control of the territory. Thus McCain was not "born out of the limits *and* jurisdiction of the United States," falling instead into a "gap in the law."⁵ When Congress changed the law in 1937,⁶ Chin concludes, it was already too late for McCain to be a "natural born Citizen."⁷

Regardless of one's political views, Chin's insightful analysis—and his conclusion that children like McCain could not grow up to be president—deserve serious consideration. The following thoughts in response are necessarily tentative, given the short period of time since his essay was made public. Even starting from assumptions friendly to Chin's conclusion, however, the historical record seems to support McCain's claim to citizenship at birth. The statutory language central to the argument, "the limits and jurisdiction of the United States," was first added in 1795.⁸ At the time, this language apparently referred to a unitary concept—the United States proper, the area within its borders—rather than the conjunction of two independent concepts of "limits" and "jurisdiction." Like "metes and bounds" or "cease and desist," the phrase

4. U.S. CONST. amend. XIV, § 1.

5. Chin, *supra* note 2, at 4.

6. See An Act Relating to the Citizenship of Certain Classes of Persons Born in the Canal Zone or the Republic of Panama (1937 Act), ch. 563, § 1, 50 Stat. 558, 558 (1937) (codified at 8 U.S.C. § 1403(a)).

7. Chin, *supra* note 2, at 5.

8. An Act To Establish an Uniform Rule of Naturalization; and To Repeal the Act Heretofore Passed on that Subject (1795 Act), stat. 2, ch. 20, § 3, 1 Stat. 414, 415 (1795). Chin seems to suggest that it dates only from 1855. See Chin, *supra* note 2, at 18, 26.

was a mere repetition—a “doublet,” one of the many “form[s] of redundancy in which lawyers delight.”⁹

In other words, to be born “out of the limits and jurisdiction of the United States” was historically understood as synonymous—and not just coextensive—with being born outside the United States proper, as children born in the Canal Zone certainly were. This understanding is supported by the historical usage of the phrase, as well as the continuous construction of the 1795 statute by Congress, the courts, and others over the first century after its enactment. It is also consistent with the recognized purposes of the statute, and avoids the absurdities that might result from a more restrictive reading. This traditional understanding was formed long before America gained possessions such as the Canal Zone; but even when independent factors of “limits” and “jurisdiction” might otherwise have conflicted, early courts and commentators uniformly adhered to a unitary interpretation of the phrase “limits and jurisdiction.” Only more recently did some begin to question the traditional interpretation, and by no means was their new position unchallenged. Because Congress never altered or displaced the crucial statutory language between 1795 and 1936, the provision’s original meaning was preserved up to the date of McCain’s birth. Thus, the balance of the evidence favors a view that John McCain—and other children like him—were citizens of the United States from birth.

I. INITIAL ASSUMPTIONS

Before delving into the history, I offer a few deck-clearing assumptions.

1. *The meaning of “natural born.”* I assume that “a natural born Citizen” is someone who was a citizen of the United States at the moment

9. *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638, 646 (7th Cir. 2007) (Posner, J.) (citing BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 11.2(f) (2d ed. 2006)).

of his or her birth, under then-current law.¹⁰ This definition includes citizens born outside the United States, as the First Congress recognized in 1790.¹¹ If McCain was not born a citizen under the law as it stood in 1936, later statutes purportedly granting him citizenship—such as the one enacted in 1937—could never have made him “natural born,” even if the statutes took account of facts about his birth. (Thus, Congress couldn’t make Arnold Schwarzenegger eligible by granting citizenship to “all people born in Thal, Austria on July 30, 1947.”¹²) Whether or not McCain is a “natural born Citizen” depends only on the law at the moment of his birth.

2. *The status of the Canal Zone.* I assume that in 1936, the Canal Zone was not “in the United States” for the purposes of the Fourteenth Amendment. Although the U.S. had complete control over the Canal Zone, under the *Insular Cases*¹³ such “unincorporated” territories were not part of the United States proper, and I assume that children born there did not automatically become U.S. citizens.¹⁴ Likewise, I assume that residents of the Canal Zone were “subject to the jurisdiction” of the

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10. See generally Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881 (1988) (arguing for this interpretation of “natural born Citizen”); Chin, *supra* note 2, at 3 n.3 (collecting sources).
 11. An Act To Establish an Uniform Rule of Naturalization (1790 Act), stat. 2, ch. 4, 1 Stat. 103, 104 (1790) (providing that certain foreign-born children of citizens “shall be considered as natural born citizens” themselves).
 12. Uri Strauss, *Don’t Amend for Uri*, A Linguist Goes to Law School, July 14, 2008, <http://linglaw.blogspot.com/2008/07/dont-amend-for-uri.html>; compare Lawrence Solum, *Chin on McCain & The “Natural Born Citizen” Clause & A Comment*, Legal Theory Blog, July 14, 2008, <http://lsolum.typepad.com/legaltheory/2008/07/gabriel-j-chin.html> (considering such a possibility), with Pryor, *supra* note 10, at 885 (“Congress has the power to define which classes of people will be citizens upon birth, but it may not declare any person a ‘citizen at birth’ retroactively.”).
 13. Such as *Downes v. Bidwell*, 182 U.S. 244 (1901), and its fellows.
 14. See Chin, *supra* note 2, at 14, 15 & n.63 (citing, *inter alia*, *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1994)). But see Laurence H. Tribe & Theodore B. Olson, Opinion (March 19, 2008), *in id.* app. A, at 1-2.

United States, and thus potentially fall within the “gap” that Chin identifies.¹⁵

3. *McCain's claim at common law.* I assume that McCain's citizenship at birth depends entirely on the meaning of statutes enacted by Congress. This is no trivial assumption, for McCain also has a strong claim to birthright citizenship at common law. In England, the children of subjects serving in the military were considered to be subjects at birth, even if they were born outside the realm due to their fathers' military service. Early American decisions and commentators held that the English common law of citizenship had carried over into the newly independent states, and apparently no statute has ever abrogated these rules. Thus, McCain may be a “natural born Citizen” on the authority of the common law alone.

The English common law largely followed the principle of *jus soli*, under which a child born within the “allegiance” of the sovereign—within its territory and under its protection and rule—was considered to be a subject by birth.¹⁶ (By contrast, under *jus sanguinis* the nationality of the child generally follows that of the parents.) In America the common law's general rule was codified in the Fourteenth Amendment, which makes citizens of “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof.”¹⁷ Some persons born “in” a country might not be “subject to [its] jurisdiction,” however. The children of foreign ambassadors or of soldiers in occupying armies, for example, were considered as neither ruled nor protected by the local

15. See Chin, *supra* note 2, at 4, 19-20.

16. See generally *United States v. Wong Kim Ark*, 169 U.S. 649, 655-66 (1898) (collecting sources); *Inglis v. Trs. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (opinion of Story, J., concurring in part and dissenting in part) (“[A]llegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign.”); *Calvin's Case*, (1608) 77 Eng. Rep. 377, 399 (K.B.); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *373 (stating that at common law, one born “out of the king's dominions” is an alien, with “only a very few exceptions”).

17. U.S. CONST. amend. XIV, § 1.

sovereign. These children took the status of their fathers, who “carried their nationality with them” onto foreign soil.¹⁸

Outside these particular exceptions, the status of foreign-born children was unclear at common law. When Parliament considered the question in 1343, it determined that members of the royal family born abroad, who would otherwise be ineligible to inherit lands in England, should be considered as English subjects. “[A]s regards other children,” it was agreed “that they should also inherit *wherever they are born in the service of the king*.”¹⁹ Agreement was less forthcoming as to the children of ordinary subjects, but eight years later, Parliament enacted a statute generally granting inheritance rights to English children “born without the Ligeance of the King.”²⁰ Scholars have since disputed whether this statute, and the several that followed it,²¹ were merely declaratory of the common law or instead augmented it.²²

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18. *Wong Kim Ark*, 169 U.S. at 657 (quoting ALEXANDER COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS 7 (London, William Ridgeway 1869)); *see also Inglis*, 28 U.S. at 155-56 (opinion of Story, J., concurring in part and dissenting in part); 1 BLACKSTONE, *supra* note 16, at *373 (noting that “as the [ambassador] father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent,” so the son is held to be of his father’s nationality).
 19. Rot. Parl. 17 Edw. 3 (April 1343), ii-139, col. a, No. 19, <http://www.sd-editions.com/AnaServer?PROME+183642+text.anv+showall=1> (registration required) [hereinafter Parliament Rolls 1343] (emphasis added); *see also* Anon., (1563) 73 Eng. Rep. 496, 496 n.29 (K.B.) (noting that in this petition it was “resolved by all the Lords and Grandees, that children of subjects born beyond the sea in the service of the king shall be inheritable”).
 20. A Statute for Those Who Are Born in Parts Beyond the Sea, 25 Edw. 3, stat. 1 (1351), 1 STATUTES OF THE REALM 310, 310. On the delay, *see* Parliament Rolls 1343, *supra* note 19; Rot. Parl. 25 Edw. 3 (Feb. 1351), ii-231, col. a, No. 41, <http://www.sd-editions.com/AnaServer?PROME+196065+text.anv+showall=1> (registration required) (noting that the 1343 petition “was not at such time completely agreed,” and thus that the remaining questions were held over until a future Parliament).
 21. *See* An Act for Naturalizing Foreign Protestants, 7 Anne, c.5, § 3 (1708), in 9 STATUTES OF THE REALM 63, 63 (“[T]he children of all natural born Subjects born out of the Ligeance of Her Majesty . . . shall be deemed adjudged and taken to be natural born Subjects of this Kingdom to all Intents Constructions and Purposes whatsoever.”); *see*

But regardless of the rule governing ordinary children, it seems to have been well established that the common law independently protected the children of subjects who served in the King's army. In 1670, the Court of Common Pleas held under the common law alone—and without regard to the statute of 1351—that “if the King of England enter with his Army hostily the territories of another prince, and any be born within the places possessed by the Kings Army, and consequently within his protection, such person is a subject born to the King of England, if from parents subjects, and not hostile.”²³ This doctrine would not necessarily be limited to times of war; the Supreme Court held in 1812 that troops stationed abroad, like foreign ambassadors, carried with them the jurisdiction of their home country even in times of peace,²⁴

also An Act To Explain a Clause in an Act 7 Anne (for Naturalizing Foreign Protestants) Which Relates to the Children of the Natural-Born Subjects of the Crown of England or of Great Britain, 4 Geo. 2, c. 21, § 1 (1730), reprinted in FRANCIS PIGGOTT, NATIONALITY: INCLUDING NATURALIZATION AND ENGLISH LAW ON THE HIGH SEAS AND BEYOND THE REALM pt. 1, at 49, 49-50 (“All children born out of the ligeance of the Crown of England or of Great Britain, or which shall hereafter be born out of such ligeance, whose fathers were or shall be natural born subjects of the Crown of England or of Great Britain, at the time of the birth of such children respectively, . . . are hereby declared to be natural born subjects of the Crown of Great Britain to all intents, constructions, and purposes whatsoever.”). A subsequent statute extended this natural-born status to certain paternal grandchildren of British subjects. See British Nationality Act 1772, 13 Geo. 3, c. 21, reprinted in PIGGOTT, *supra*, at 50.

22. See generally *Wong Kim Ark*, 169 U.S. at 669-70 (collecting sources). Some evidence for the former reading is provided by a statute enacted in 1368. In order to assure that “Infants born . . . within the Lands and Seignories that pertain to our Lord the King beyond the Sea,” would be “as able and inheritable of their heritage in England, as other Infants born within the Realm of England,” Parliament insisted “[t]hat the *Common Law*, and the Statute upon the same Point another Time made, be holden [and kept].” Naturalization Act 1368, 42 Edw. 3, c. 10, in 1 STATUTES OF THE REALM 389, 389 (emphasis added).
23. *Craw v. Ramsay*, (1670) 124 Eng. Rep. 1072, 1075 (C.P.).
24. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 139-40 (1812) (“A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions. . . . The grant of a free passage therefore implies a waiver of all jurisdiction

and Vattel's celebrated treatise reasoned generally that "the children born out of the country in the armies of the state, or in the house of its minister at a foreign court, are reputed born in the country; for a citizen absent from his family on the service of the state, and who lives under its dependence and jurisdiction, cannot be considered as being gone out of its territory."²⁵ Such views persisted into the twentieth century in both Britain and the United States.²⁶

After the Revolution, these rules of English common law survived into the independent American states and then into the constitutional period. Chin argues that today "there is no residual common-law or natural-law citizenship,"²⁷ and that citizenship can "only be obtained by statute" if it is not guaranteed by the Constitution.²⁸ Instead, he considers whether the "natural born Citizen" clause might have fixed the common law of citizenship in amber, leaving Congress no power to redefine it by statute.²⁹ A more modest view, however, might be that the "natural born"

over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.")

25. M. DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* § 217, at 169 (N.Y., Berry & Rogers 1787) (Early Am. Imprints, 1st ser., No. 45,185).
26. See, e.g., Francis Piggott, *A Note on the Construction of the Definition of "British Subject" in Sect. 1 of the Nationality Act, 1914*, 4 *TRANSACTIONS OF THE GROTIUS SOC'Y* 35, 36-37 (1918) (describing "diplomatic representatives and men in military service" as "well-known examples" of "those circumstances in which a subject is still under the King's protection although he is beyond the realm," such that "by the common law children born abroad of such subjects are British subjects"); Note, *Citizenship by Birth*, 41 *HARV. L. REV.* 643, 645 (1928) (stating that at common law, "a child born in the King's army abroad" would be a citizen). *But see* *De Geer v. Stone*, (1875) 22 Ch. D. 243 (Eng.) (holding, without consideration of contrary authorities such as *Craw v. Ramsay*, that the ambassadors' exception "does not apply to a child born abroad to a soldier in the British service abroad").
27. Chin, *supra* note 2, at 16.
28. *Id.* at 4 n.8.
29. See *id.* at 44-46.

clause takes the law of citizenship—including the general *common* law of citizenship—as it finds it. This common law would continue in force until overridden by Congress, in the exercise of its naturalization power.³⁰

The persistence of the common law of citizenship was widely recognized in early America. In his *Commentaries on American Law*, James Kent noted that foreign-born citizens left outside the terms of any statute would “be obliged to resort for aid to the dormant and doubtful principles of the English common law.”³¹ In an influential 1854 article that inspired legislative reform of the citizenship statutes, Horace Binney equally assumed that the common law of citizenship continued to apply after independence, as it had been “the law of all the States at the time of the Revolution, and at the adoption of the Constitution.”³² Binney believed that under this law, foreign-born children were aliens by birth—with certain “exceptions,”³³ among them the children of military servicemen.³⁴ In 1860, in an extended discussion of the issue, a New York court found the common law still applicable to those whose status had not been positively fixed by Congress,³⁵ and two years later, the

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30. See U.S. CONST. art. I, § 8, cl. 4. On America’s continued reliance on general law long after its supposed demise in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), see generally Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006). (Note also that John McCain was born before *Erie* was decided. If the general common law indeed vanished with *Erie*, then, it might first have vested citizenship in McCain.)
31. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 45 (N.Y., O. Halsted 1827).
32. Horace Binney, *Alienigenae of the United States*, 2 AM. L. REG. 193, 203 (1854); see also *id.* at 194. On Binney’s role in inspiring the 1855 reform, see CONG. GLOBE, 33d Cong. 1st sess. 170 (1854) (statement of Rep. Cutting) (“I have had sent to me a pamphlet written by one of the most eminent lawyers in the United States, whose fame is known from the northern extreme to the southern boundaries of our country—I refer to Horace Binney; and gentlemen who are acquainted with his standing and position before this country will perceive that I have not overrated him.”).
33. Binney, *supra* note 32, at 203.
34. *Id.* at 201 (citing *Ramsay*).
35. *Ludlam v. Ludlam*, 31 Barb. 486 (N.Y. Sup. Ct. 1860).

Attorney General turned to “the well settled principle of the common law of England” to resolve a knotty problem of citizenship law.³⁶

This resort to the common law should hardly surprise us; after all, before the Civil Rights Act and the Fourteenth Amendment, it was the *common law*—and not any enactment of Congress—that made citizens of plain old native-born Americans.³⁷ So long as these common-law rules were not directly abolished, there is no reason why they should not have continued to operate after 1866. The courts, it is true, have occasionally portrayed the statutory routes to citizenship as exclusive,³⁸ but I am not aware of any that have confronted the common law question directly. Rather, some have spoken quite favorably of the common law’s continuing role, even after the Civil War.³⁹

36. 10 Op. Att’y Gen. 328, 328 (1862).

37. See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898) (describing the Fourteenth Amendment’s grant of citizenship as “declaratory of *existing* rights and affirmative of *existing* law” (emphasis added)); *Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844) (“The only standard which then existed [at the Founding], *of a natural born citizen*, was the rule of the common law, and no different standard has been adopted since.”); 10 Op. Att’y Gen. 329, 330 (1862) (noting that the children of aliens, “born within the United States, are citizens *without aid of statutory law*” (emphasis added)).

38. See, e.g., *Zartarian v. Billings*, 204 U.S. 170, 175 (1907) (“The right of aliens to acquire citizenship is purely statutory . . .”); *Wong Kim Ark*, 169 U.S. at 702-03 (stating that persons not born in the United States can only become citizens by naturalization, which must be done “either by treaty . . . or by authority of congress”); *Boyd v. Nebraska*, 143 U.S. 135, 160 (1892) (describing Congress’s naturalization power as “exclusive,” at least vis-a-vis the states). In *Montana v. Feeney*, the Court found the respondent to have been outside the language of the relevant citizenship statutes, but it did not consider the possible application of common law rules. See 274 U.S. 308, 309-12 (1961).

39. See, e.g., *Weedin v. Chin Bow*, 274 U.S. 657, 663 (1927) (considering Binney’s view that persons unaddressed by any statute would be treated under the common law); *Mackenzie v. Hare*, 239 U.S. 299, 309 (1915) (noting that on the subject of expatriation, “[t]he condition which Kent suggested [the abrogation of the common law] has occurred; there is a legislative declaration.”); cf. Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 States’ Rights, the Law of Nations, and*

If the common law citizenship of the children of servicemen indeed persisted past the Founding, Congress does not seem ever to have overridden it. Some federal statutes have contained the sort of language that would abrogate any pre-existing common law, but not in circumstances relevant here;⁴⁰ most such language relates only to the exclusive process of admitting noncitizens *after* they are born.⁴¹

Thus, if McCain would have been a citizen under the common law of England and the independent states, and if that common law has not

Mutual Consent, 15 GEO. IMMIGR. L.J. 519, 526-48 (2001) (tracing the influence of common law citizenship rules in the United States).

40. For example, provisions forbidding the descent of citizenship to “persons whose fathers never been resident in the United States,” *see* 1790 Act, 1 Stat. at 104, or those who continued to reside outside the United States until they were eighteen years old, *see* An Act in Reference to the Expatriation of Citizens and Their Protection Abroad (1907 Act), ch. 2534, § 6, 34 Stat. 1228, 1229 (1907).
41. In 1795, Congress provided with respect to already-living foreigners that “any alien, being a free white person, may be admitted to become a citizen . . . on the following conditions, and not otherwise”; but this language did not refer to the separate section of the same statute discussing foreign-born citizens (who in any case were never “aliens,” having been citizens from the moment of their birth). *Compare* 1795 Act § 1, 1 Stat. at 414, *with id.* § 3, 1 Stat. at 415.

Subsequent statutes followed this pattern. *Compare* An Act To Establish an Uniform Rule of Naturalization, and To Repeal the Acts Heretofore Passed on that Subject (1802 Act), ch. 28, § 1, 2 Stat. 153, 153 (1802), *with id.* § 4, 2 Stat. at 155; *see also* REV. STAT. § 2165 (1st ed. 1875). The current statute cited by Chin is similarly limited. It 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.” Immigration and Nationality Act of 1952, ch. 477, § 310, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1421(d)); *see* Chin, *supra* note 2, at 16 n.72. But this language came from an enactment containing separate provisions on “nationality through [post-birth] naturalization,” *id.* tit. III, ch. 2, 66 Stat. at 239, and “nationality at birth,” *id.* tit. III, ch. 1, 66 Stat. at 235. The restrictive language applied only to the former. In particular, the statute used the phrase “naturalize[] as a citizen” to refer to a certain type of official *procedure*, rather than the natural process of being born a citizen. *Compare id.* § 310(d), 66 Stat. at 239, *and id.* § 310(a) (“Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred on the following specialized courts . . .”), *with id.* § 301, 66 Stat. at 235 (regarding “nationals and citizens of the United States at birth”).

since been abrogated, his claim to birthright citizenship regardless of the statutes may be quite strong. But because Chin's essay focuses on the statutory law of citizenship, from this point on I will only consider the statutory grounds.

II. THE TEXT OF THE STATUTES

Chin's argument is founded on the claim that McCain was not "born out of the limits and jurisdiction of the United States."⁴² On his reading, the statute's reference to the "jurisdiction" of the United States means those "subject to the jurisdiction" of the United States under the Fourteenth Amendment—i.e., those born owing allegiance to the United States and obliged to obey United States law.⁴³ These concepts of "limits" and "jurisdiction" overlap to a significant extent, but not completely. By assumption, the Canal Zone was under the jurisdiction of the United States but outside its limits; and certain special groups, such as tribal Native Americans (prior to their statutory grant of citizenship in 1924)⁴⁴ or foreign ambassadors and their families, are part of separate political communities and do not owe allegiance to the United States even if they reside within its limits.⁴⁵

Thus, on Chin's account, there are four possible classes of persons:

- (i) those born within America's limits and under U.S. jurisdiction (most people born in Dubuque);
- (ii) those born without the limits and not under the jurisdiction (most people born in Moscow);
- (iii) those born within the limits but not under the jurisdiction (children of ambassadors, members of Indian tribes before 1924); and

42. 1795 Act § 3, 1 Stat. at 415; *see* Chin, *supra* note 2, at 19-20.

43. *See, e.g., id.* at 22-23.

44. An Act To Authorize the Secretary of the Interior To Issue Certificates of Citizenship to Indians, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

45. *See, e.g., Elk v. Wilkins*, 112 U.S. 94, 102-03 (1884).

- (iv) those born without the limits but still under the jurisdiction (children born in the Canal Zone, or aboard American-flagged ships).⁴⁶

Chin's argument is that the foreign-born citizenship statutes, which concern those "born out of the limits and jurisdiction of the United States," include only persons in Class II above. Before the United States acquired its outlying possessions, there would have been few places in the world where children regularly fell outside Class I or Class II.⁴⁷ But those born in the Canal Zone, he argues, fall in Class IV, and are therefore excluded from the statutes. To interpret the statute otherwise, he claims, would be to read the words "and jurisdiction" right out of the text.⁴⁸

But before we worry about reading "and jurisdiction" out of the statute, we should first ask whether the words were ever intended to be read *into* the statute. The origins of the "limits and jurisdiction" language suggest strongly that the phrase was not meant to be read as the conjunction of two independent concepts, but rather as a single whole. Early interpretations of the statute consistently identify the "limits and jurisdiction" of the United States with its "limits"—i.e., its borders. Nor were these interpretations simple misreadings of the text, or even rough approximations based on the two concepts' broad overlap at the time. As a phrase, "limits and jurisdiction" was frequently used in this fashion in contexts unrelated to citizenship. In fact, the word "jurisdiction" was often used to carry a geographical meaning, rather than one more directly

46. See Chin, *supra* note 2, at 23 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)).

47. See *id.* at 26.

48. See *id.* at 25. Chin does not discuss the implications of his argument for those in Class III (Indian tribes, the families of ambassadors, etc.), perhaps because this class was less relevant with regard to the children of *citizens*. Under the law as it stood in 1855, for example, children born to citizen fathers would likely have been thought subject to the jurisdiction of the United States, even if their mothers were Native Americans. See, e.g., *Ex parte Reynolds*, 20 F. Cas. 582, 585 (C.C.W.D. Ark. 1879) (No. 11,719). Given the contemporary status of women, the case of a citizen father married to an ambassador mother would probably not have occurred to anyone at the time.

related to legal authority. In light of early usage, being “out of the limits and jurisdiction” of the United States may have had nothing to do with being “subject to the jurisdiction thereof,” and may in fact have meant no more than being out of the United States proper.

A. Origins and Early Readings

Early interpreters of America’s citizenship statutes understood them as addressing all children born outside the United States. Congress enacted its first statute concerning foreign-born citizens in 1790, declaring that “the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens.”⁴⁹ (A separate proviso held that “the right of citizenship shall not descend to persons whose fathers have never been resident in the United States,”⁵⁰ so as to avoid self-perpetuating colonies of citizens abroad.) Under the 1790 Act, McCain would surely have been a citizen at birth, for he was born “out of the limits of the United States” and his father had previously resided here.

In 1795, in revising the rules concerning naturalization, Congress dropped the archaic phrase “beyond sea” from this provision—a phrase that had, in other contexts, given rise to conflicts over its meaning.⁵¹ Congress also rephrased the text to refer to children “born out of the limits and jurisdiction of the United States.”⁵² This language was retained in another repeal and re-enactment in 1802, which addressed those born after independence but before Congress had first enacted statutes on the

49. 1790 Act, 1 Stat. at 104. According to the debates in Congress, the clause was intended to “provid[e] for the children of American citizens born out of the United States.” 1 ANNALS OF CONG. 1125 (1790) (statement of Rep. Hartley).

50. *Id.*

51. See *infra* notes 106-113 and accompanying text.

52. 1795 Act § 3, 1 Stat. at 415. On the meanings of “beyond sea,” see *infra* note 113 and accompanying text.

subject (“the children of persons who now are, or have been citizens of the United States”).⁵³ Unfortunately, this backward-looking language failed to include the foreign-born children of those who were not yet citizens in 1802.⁵⁴ The statute was eventually reformed in 1855 to include “persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States,”⁵⁵ and it was this version that was codified as section 1993 of the Revised Statutes.⁵⁶ Finally, when section 1993 was amended in 1934, the relevant language was left unaltered;⁵⁷ the House report described the passage as “[e]xisting law in which no change is proposed.”⁵⁸

Whether McCain is a “natural born Citizen” thus depends on the meaning of the 1795 Act’s language, preserved unchanged from its enactment through his birth. Was the difference in wording between the 1790 and 1795 Acts intended to carry a difference in meaning? Or did the 1795 Act merely paraphrase the earlier text it replaced?⁵⁹ While other

53. 1802 Act § 4, 2 Stat. at 155.

54. See 2 KENT, *supra* note 31, at 45; Binney, *supra* note 32.

55. An Act To Secure the Right of Citizenship to Children of Citizens of the United States Born out of the Limits Thereof (1855 Act), ch. 71, § 1, 10 Stat. 604, 604 (1855).

56. REV. STAT. § 1993 (1st ed. 1875).

57. See 1934 Act § 1, 48 Stat. at 797.

58. *Provide Equality in Matters of Citizenship Between American Men and American Women and To Clarify Status of their Children*, H.R. Rep. 131, 73d Cong., 1st sess., at 2 (1933) (U.S. Cong. Serial Set). Chin seems to argue that in passing the 1934 Act, Congress deliberately left the Canal Zone “gap” in place, as its committees had received testimony about the issue. See Chin, *supra* note 2, at 9, 28-33. But the absence of any congressional response may show nothing more than that the legislators in office in 1934 were not convinced there was a problem. And in any case, the pre-existing language was by no means assigned a different meaning by Congress’s *failure* to amend it.

59. *Compare Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.) (“When two parts of a provision . . . use different language to address the same or similar subject matter, a difference in meaning is assumed.”), *with United States v. Monia*, 317 U.S. 424, 443 (Frankfurter, J., dissenting) (“[T]he process of construing a statute cannot end with noting literary differences. The task is one of finding meaning; and a difference in words is not necessarily a difference in the meaning they carry.”).

aspects of the 1795 Act were controversial, there appears to have been no debate at all over this specific change.⁶⁰ The only potential mention in the recorded debates, however, supports a view that the provisions of the 1795 Act carried precisely the same meaning as those they replaced. When James Madison reported a draft version of the 1795 Act concerning new rules for naturalization, he also included “whatever was necessary from the Old Law, so that the latter should be entirely superseded”—including, presumably, the old provision on foreign-born citizens.⁶¹

Early interpreters who discussed the 1790 and 1795 provisions together uniformly identified no difference in their content. Horace Binney wrote in 1854 that “the third section of the [1795] Act re-enacted the clauses of the Act of 26th March, 1790, above referred to, in *the same or precisely equivalent terms*.”⁶² A New York court in 1860 likewise stated that “[b]y *both* these statutes it was enacted that all children of citizens, born *out of the limits* of the United States, should be considered citizens.”⁶³ Later commentators agreed,⁶⁴ and the view that the

60. See 4 ANNALS OF CONG. 809-12, 814-16, 968, 978, 1004-09, 1021-23, 1026-58, 1060-62, 1064-66, 1133 (1794-1795). Of particular controversy was a proposal that naturalizing aliens renounce any titles of nobility they held abroad.

61. *Id.* at 1060 (Jan. 5, 1795).

62. Binney, *supra* note 32, at 204 (emphasis added).

63. *Ludlam v. Ludlam*, 31 Barb. 486 (N.Y. Sup. Ct. 1860) (emphasis added); see also *infra* note 117.

64. See, e.g., John A. Hayward, *Who Are Citizens*, 2 AM. L.J. (Columbus) 315, 315 n.8 (1885) (describing the “out of the limits” provision of the 1790 Act as having been “[r]e-enacted” in the 1795 Act); see also *Minor v. Happersett*, 88 U.S. 162, 168 (1874) (“Congress, as early as 1790, provided . . . that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens. *These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since.*” (emphasis added)). The Court in *Minor* noted that the subsequent reforms in 1855 extended the time period in which such citizens could be born, but it did not imply that the geographic coverage of the statute had changed. See 88 U.S. at 168; see also *infra* note 105.

1790 and 1795 acts were synonymous persisted into the twentieth century.⁶⁵

In fact, the earliest constructions of the 1795 Act appear to have read it as applying to all children born outside the United States proper.⁶⁶ In 1796, Congress authorized certificates for American sailors to prove their citizenship, in the hopes of discouraging the British Navy from impressing them into its service.⁶⁷ Nineteen months later, a bill was proposed in the House to guide officials in disbursing the certificates, specifying the evidence of citizenship that would be required. The bill also listed the ways in which a person could gain American citizenship at the time, including among the categories of citizens those “[c]hildren of citizens of the United States, or any one of them, born *at any place out of the limits of the United States.*”⁶⁸

Throughout early America, speakers used similar phrases (such as “out of the limits” or “out of the United States”) in referring to the provision for foreign-born citizens. In 1838, a committee report in the House of Representatives summarized the 1802 Act as providing that “[a]ll persons born *out of the United States*, the children of citizens . . . , shall be considered citizens.”⁶⁹ Judicial decisions followed suit: in 1835, an opinion of the high court of Massachusetts described the 1802 Act as providing that “citizens of the United States, though born *out of the limits*

65. See Citizenship of the United States, Expatriation, and Protection Abroad, H.R. Doc. 326, 59th Cong., 2d sess., app. at 77 (1906) (U.S. Cong. Serial Set) [hereinafter Citizenship Report 1906] (stating of the 1790 Act’s foreign-born citizenship clause that “[t]he provisions of this statute were reenacted in the statute of 1795”).

66. Subject, of course, to the explicit provisos mentioned in the text.

67. An Act for the Relief and Protection of American Seamen, ch. 36, § 4, 1 Stat. 477, 477 (1796).

68. A Bill in Addition to the Act, Intituled “An Act for the Relief and Protection of American Seamen” § 1 (H.R. Jan. 8, 1798) (Early Am. Imprints 1st ser. No. 48,676) (emphasis added); *cf.* 3 H.R. J. 126 (Jan. 8, 1798).

69. H.R. Rep. 283, 25th Cong., 2d Sess. (1838) (U.S. Cong. Serial Set) (emphasis added).

of the United States, should be considered as citizens.”⁷⁰ In 1841, New York’s chancellor declared that the 1790 and 1795 statutes “clearly intended to embrace but two classes of cases,” the second of which concerned “children born *out of the United States*, whose parents were citizens of the United States at the time of such birth.”⁷¹ Likewise, in 1849, the Supreme Judicial Court of Maine noted that the 1802 Act had traditionally “been considered as determining, that persons were entitled to be regarded as citizens, who were born and had ever continued to reside *without the limits of the United States*, being the children of citizens.”⁷²

When Congress next revised the foreign-born citizenship statutes, it too identified “limits and jurisdiction” with “limits.” As mentioned above, the 1802 Act had only applied to the children of those who were already American citizens, potentially leaving those born or naturalized after 1802

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70. *Charles v. Monson & Brimfield Mfg. Co.*, 34 Mass. (17 Pick.) 70, 76 (1835); *see also id.* at 70 (reporter’s headnote) (“[T]he child of a father who was a citizen of the United States . . . was not an alien although born without the limits of the United States.”). One litigant had phrased the statute as applying to “a child born out of the jurisdiction of the United States,” *id.* at 74; on this topic see *infra* Subsections II.B.2-3.
71. *Peck v. Young*, 26 Wend. 613 (N.Y. 1841) (opinion of the Chancellor) (emphasis added). The first class concerned the minor children of naturalized aliens. *See id.* The chancellor also described the 1802 Act as intended “to embrace not only the children of parents who were then citizens, who might be born *out of the United States*, but also all children, born *out of the United States*, whose parents were citizens at the time of the birth of such children, although such parents were then dead.” *Id.* (emphasis added). Counsel in the New York case had understood the law similarly, arguing that “[t]he great object of this provision . . . was to define the political condition of the persons referred to, and to determine what persons, though born *out of the United States*, shall be deemed citizens thereof.” *Id.* (argument of counsel) (emphasis added). Three years later, another litigant’s counsel made the same point, stating that “[b]y our acts of Congress of 1795 and 1802 on the subject of naturalization, there are similar provisions [to those of the British statutes] declaring that children of citizens born *out of the United States* are to be considered citizens.” *Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844) (argument of counsel). These portrayals were not contested by the other side.
72. *Inhabitants of Calais v. Inhabitants of Marshfield*, 30 Me. 511, 1849 WL 1983, at *5 (1849) (emphasis added).

unable to pass on their citizenship. The first significant effort to repair the law, introduced by Sen. Garrett Wall in 1841, phrased the relevant category of persons as those “persons heretofore or hereafter born *out of the limits* of the United States, whose fathers were, at the time of their birth, citizens of the United States of America.”⁷³ In 1848, Sen. Daniel Webster introduced another fix,⁷⁴ which employed the same statutory text as the 1795 Act but which he described on the floor as applying to “all persons now or hereafter born *out of the limits* of the United States.”⁷⁵ Finally, in December of 1853, one member of the House asked that a committee investigate “what legislation is necessary to secure the right of citizenship to children born *out of the United States*, whose parents, at the time of such births, are citizens of the United States.”⁷⁶ The resulting bill, which eventually became the 1855 Act, was designed (according to its title) “to secure the rights of citizenship to the children of citizens born *out of the limits* of the United States”⁷⁷—even as its text followed the 1795 Act’s language of “limits and jurisdiction.”⁷⁸ The title of the final version of the Act likewise mentioned only the “limits” of the United States,⁷⁹ and the discussions of the bill in Congress regularly referred to it in that fashion.⁸⁰

73. S. 260, 26th Cong., 2d Sess. (Feb. 17, 1841), <http://memory.loc.gov/ll/lslb/026/1200/12250000.tif> (emphasis added); *see also* CONG. GLOBE, 26th Cong., 2d Sess. 181, 212, 216 (1841).

74. S. 280, 30th Cong., 1st Sess. (June 15, 1848), <http://memory.loc.gov/ll/lslb/030/0700/07100000.tif>.

75. CONG. GLOBE, 30th Cong., 1st Sess. 827 (1848) (emphasis added). He also described the existing statute as referring to those “born abroad.” *Id.* at 834.

76. CONG. GLOBE, 33d Cong., 1st sess. 70 (1854) (statement of Rep. Chandler).

77. *Id.* at 169.

78. 1855 Act § 1, 10 Stat. 604; *cf.* CONG. GLOBE, 33d Cong., 1st sess. 169 (1854) (statement of Rep. Cutting) (describing the bill as applying to “all persons born out of the limits or jurisdiction of the United States”).

79. *See id.*, 10 Stat. 604 (entitled “An Act To Secure the Right of Citizenship to Children of Citizens of the United States Born out of the Limits Thereof”).

80. *See, e.g.*, CONG. GLOBE, 33d Cong., 1st sess. 221, 248, 303 (1854). In arguing in favor of the bill, moreover, Rep. Francis Cutting identified it as part of a continuous tradition

This identification of “limits and jurisdiction” with “limits” continued into the following decades. In 1885, for example, a federal court in California described the 1855 Act—then codified as section 1993 of the Revised Statutes—as “securing citizenship to children of citizens of the United States born without their limits.”⁸¹ Congress again joined in this interpretation in 1907, when it revised the citizenship law to require foreign-born children to elect American citizenship by the time of their majority. The 1907 statute required an oath of allegiance from “all children born *outside the limits* of the United States who are citizens thereof *in accordance with the provisions of section nineteen hundred and ninety-three* of the Revised Statutes”—language that appears to reflect Congress’s contemporary understanding of section 1993’s scope.⁸² Another section of the same statute allowed minor children “born without the United States of alien parents” to become citizens upon their parents’ naturalization.⁸³ On a restrictive reading of “limits and jurisdiction,” this section would have specifically given aliens’ children born in outlying possessions a route to citizenship denied to the children of existing citizens (as their parents couldn’t be naturalized again).

In all of these examples, interpreters of the statutes employed phrases such as “out of the limits” or “out of the United States” alone, even when

with the 1790 Act (which had employed “limits” rather than “limits and jurisdiction”). He described the 1790 Act as having been “entirely sufficient to have met every exigency that existed,” because it concerned the children of future citizens as well as present ones. Moreover, he gave no indication that the 1795 alterations had in any way changed the law’s scope, for he stated that “[t]his act of 1790 continued in force as respects this branch of it until the 14th of April, 1802,” when, “in legislating what seemed to be the minor consideration in *reenacting* that small portion of the original act of 1790,” the limitations on children of future citizens were mistakenly added. *Id.* at 170 (statement of Rep. Cutting) (emphasis added). Cutting also described Sen. Wall’s 1841 bill, which had used the language of “out of the limits,” as “substantially the same in legislation as the one I have the honor to propose.” *Id.*

81. *In re Look Tin Sing*, 21 F. 905, 910 n.4 (C.C.D. Cal. 1885).

82. 1907 Act § 6, 34 Stat. at 1229 (emphasis added).

83. *Id.* § 5.

they directly referred to what Chin reads as the dual requirements of “limits” and “jurisdiction.” Nor, in any of these examples, could I locate any specific objection to this use of language. Indeed, as far as I have been able to discover, not a single court, commentator, or congressman attached any significance to the 1795 Act’s introduction of the phrase “limits and jurisdiction” for the first century after its enactment.

B. “Limits and Jurisdiction” in Early America

1. “Limits and Jurisdiction”

Why did Americans in the nineteenth century speak of the foreign-born citizenship statutes as if “limits” and “limits and jurisdiction” meant the same thing? One possibility is that this was just error, or alternatively a misleading form of shorthand that confused two similar, but not identical, legal standards. In the nineteenth century, as Chin notes, there were relatively few places outside the limits of the United States but in which children could be born “subject to the jurisdiction thereof” under the Fourteenth Amendment.⁸⁴

A better explanation, however, may be that the phrase “limits and jurisdiction” in the context of the 1795 statute was not substantively different from “limits” as a matter of *meaning*—that the phrase was in fact a particular type of redundancy known as a “doublet.” As Bryan Garner notes, “[t]he doublet and triplet phrasing common in Middle English still survives in legal writing,” although lawyers who encounter it may occasionally “strain for distinctions so that no word is rendered surplusage.”⁸⁵ Thus, a “duty of good faith and fair dealing” may be no

84. See Chin, *supra* note 2, at 26.

85. GARNER, *supra* note 9, § 11.2(f), at 192. On more substantive forms of legal redundancy, see Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998).

different than a simple duty of good faith,⁸⁶ nor do “natural” or “ordinary” add anything to the meaning of “wear and tear.”⁸⁷ Such phrases are common in the law; consider the “metes and bounds” of property or an order to “cease and desist.” Or, in the text of the Constitution itself, consider the “Aid and Comfort” given to enemies,⁸⁸ the “Revision and Control” of state customs duties,⁸⁹ the “needful Rules and Regulations” respecting federal property,⁹⁰ or the Article V amendments that shall be valid to “all Intents and Purposes.”⁹¹ In each case, the “and” of the pairing is merely one component of a larger phrase, rather than a logical operator conjoining two distinct concepts. (The repetition, one might say, is merely “belts and suspenders.”)

The use of “limits and jurisdiction” in the 1795 Act, then, may well have been one more example of the “lawyer’s well-known penchant for redundancy.”⁹² For instance, in 1789, Pennsylvania enacted a statute to banish certain convicts “to some place or places *without the bounds, limits and jurisdiction of the United States.*”⁹³ In Garner’s terminology, this is an obvious triplet: no one could maintain that the three words “bounds,” “limits,” and “jurisdiction” each denoted a distinct area, and that convicts were to be sent beyond the union of all three. Instead, the three words were simply component parts of a single colorful phrase.

86. *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638, 646 (7th Cir. 2007) (Posner, J.).

87. *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 936 (W.D. Pa. 1973).

88. U.S. CONST. art. III, § 3, cl. 1.

89. *Id.* art. I, § 10, cl. 2.

90. *Id.* art. IV, § 3, cl. 2.

91. *Id.* art. V.

92. *Marshall v. Lonberger*, 459 U.S. 422, 445 (1983).

93. An Act To Prevent the Importation of Convicts into This Commonwealth, ch. 463, § 4 (Pa. 1789), in 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 692, 693 (Alexander James Dallas ed., Phila., Hall & Sellers 1793) (Early Am. Imprints, 1st ser. No. 34,331) (emphasis added).

In early America, the same could often be said of the doublet “limits and jurisdiction” alone. In delivering instructions to a grand jury in 1793, Chief Justice John Jay used the phrase “within the limits and jurisdiction of the United States” to indicate the geographical area in which violations of U.S. neutrality would be punishable if committed by aliens “while in this country,” in light of the United States’s “perfect[] and absolute[] sovereign[ty] within its own dominions.” Here, “within the limits and jurisdiction” was used in a geographic sense, not a personal one relevant to the status of ambassadors or Native American tribes.⁹⁴ In this spirit, an opponent of the Missouri Compromise argued in 1820 that the Constitution “was formed with a view to the then existing States, and to the territory within our limits and jurisdiction, as established by our treaty with Great Britain”; thus, he claimed, “[t]he power conferred on Congress to admit new States, cannot be construed to extend beyond those limits.”⁹⁵

Other uses of the phrase were equally incompatible with ascribing separate meaning to “limits” and to “jurisdiction.” Missouri statutes of the mid-1820s used the phrases “beyond the limits of the United States” and “beyond seas or without the limits and jurisdiction of the United States” interchangeably in describing who could benefit from the tolling of statutes of limitations.⁹⁶ And in 1838, the House of Representatives debated a resolution concerning war subsidies paid by Great Britain to “Indian tribes within the territorial limits and jurisdiction of the United States”; these tribes had not become “subject to the jurisdiction” of the United States, in the future words of the Fourteenth Amendment, but were still within the nation’s “territorial limits and jurisdiction”—i.e., its

94. *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).

95. 36 ANNALS OF CONG. 1476 (1820) (statement of Rep. Fuller).

96. JOHN ADAMS, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE ACTION OF EJECTMENT AND THE RESULTING ACTION FOR MESNE PROFITS 46 n.1 (John L. Tillinghast ed., Albany, W. & A. Gould & Co. 1830).

borders.⁹⁷ Yet other uses of the phrase are merely consistent with its interpretation as a doublet, including comparisons between the high seas and the “limits and jurisdiction of the United States,”⁹⁸ as well as discussions of the “limits and jurisdiction” of states or smaller units of

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97. H.R. Res. No. 7, 25th Cong., 3d sess. (1838) (U.S. Cong. Serial Set); *cf.* Letter from William P. Preble et al., Comm’rs of Maine, to Daniel Webster, Sec’y of State (June 29, 1842), *in* S. Doc. 1, 27th Cong., 3d sess., at 72, 80 (1842) (U.S. Cong. Serial Set) (discussing French settlers who, wandering in a wilderness, “believed and understood themselves to be within the limits and jurisdiction of the United States”). In 1836, President Andrew Jackson announced American neutrality as to the secession of Texas from Mexico, describing the obligation of U.S. citizens to avoid “any act . . . which would tend to foster a spirit of resistance to [Mexico’s] government and laws, whatever may be their character or form, when administered within her own limits and jurisdiction.” In the context of the announcement, which differentiated between Mexico’s internal conflict and her alleged encouragement of attacks on U.S. soil, Jackson would have had no reason to insert a specific reservation concerning foreign ambassadors or the like. Letter from President Andrew Jackson to Newton Cannon, Governor of Tenn. (Aug. 5, 1836), *in* S. Doc. 1, 24th Cong., 2d sess., at 60, 60 (1836) (U.S. Cong. Serial Set); *see also* *Kennett v. Chambers*, 55 U.S. 38, 47 (1852) (quoting this message).
98. *See, e.g.*, *United States v. Peters*, 3 U.S. (3 Dall.) 121, 123 (1795) (describing a litigation document referring to ships captured “on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of the [Republic of France]”); ALEXANDER HAMILTON, *Camillus XV* (1795), *in* 7 *THE WORKS OF ALEXANDER HAMILTON* 295, 295 (John C. Hamilton ed., N.Y., John F. Trow 1851) (describing the payment of “compensation to British citizens for captures of their property within the limits and jurisdiction of the United States, or elsewhere, by vessels originally armed in our ports”); *see also* An Act To Relinquish the Claims of the United States to Certain Goods, Wares, and Merchandise, Captured by Private Armed Vessels, stat. 1, ch. 10, § 1, 3 Stat. 4, 4-5 (1813) (concerning captures “on the high and open seas, and without the territorial limits and jurisdiction of the United States”); Message from the President of the United States, in Compliance with a Resolution of the Senate, with Copies of Correspondence in Relation to the Seizure of Slaves on Board the Brigs “Encomium” and “Enterprise,” S. Doc. 174, 24th Cong., 2d sess., at 43 (1837) (U.S. Cong. Serial Set) (“This vessel sailed in January, 1831, from the port of Alexandria, in the District of Columbia, bound to New Orleans, in the State of Louisiana, (both ports being within the limits and jurisdiction of the United States) . . .”).

government,⁹⁹ which had no foreign ambassadors or outlying unincorporated possessions.

2. “Jurisdiction” Alone

None of this is to say that “limits and jurisdiction” was *always* a redundancy, or that the two individual terms never carried separate and

99. *See, e.g.*, An Act To Ratify and Confirm an Agreement Made Between the Commissioners Appointed by the Governor of the State of New-York, and the Commissioners Appointed by the Governor of the State of New-Jersey, Respecting the Territorial Limits and Jurisdiction Between the Said States arts. I-III (N.J. Feb. 26, 1834), *in* 2 ACTS OF THE FIFTY-SEVENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 118, 119 (Trenton, Joseph Justice 1834); An Act for the Settlement of the Territorial Limits and Jurisdiction Between the States of New Jersey and New York (N.J. Feb. 6, 1833), *in* 1 ACTS OF THE FIFTY-SEVENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 54 (Trenton, Office of the Nat’l Union 1833); A Law To Prevent the Setting of Fences or Other Obstructions in the River Within the Limits and Jurisdiction of the City of New-York (N.Y., N.Y., Apr. 29, 1799), *in* LAWS AND ORDINANCES, ORDAINED AND ESTABLISHED BY THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, IN COMMON COUNCIL CONVENED 46 (N.Y., John Burman 2d ed. 1799) (Early Am. Imprints, 1st ser. No. 35,939); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 15 (1800) (argument of counsel) (noting that the plaintiff, after fleeing to Jamaica, “hath never since returned within the limits and jurisdiction of the said United States, *or either of them*” (emphasis added)); *Champion v. Mumford*, 1 Kirby 170, 1786 WL 130 (Conn. Super. Ct. 1786) (discussing a contention that a promissory note had been delivered “without the limits and jurisdiction of the city of Norwich”); *Nash v. Tupper*, 1 Cai. R. 402 (N.Y. Sup. Ct. 1803) (referring to a cause of action arising “within the limits and jurisdiction of the state of Connecticut”); *Shoolbred v. Corp. of the City of Charleston*, 2 S.C.L. (2 Bay) 63, 1796 WL 548, at *2 (Const. App. 1796) (noting the “obligation of the city to . . . keep in repair the streets within its own jurisdiction,” as well as the state requirement “that every separate and distinct portion or division of the state should make and keep its roads and bridges in repair, within its own limits and jurisdiction”); 32 ANNALS OF CONG. 1331 (1818) (statement of Rep. Charles Mercer) (seeking to refute a contention, with respect to the federal government’s acquisition of the Mississippi Territory from Georgia, “that Georgia had no title to it; that it never was within the settled limits and jurisdiction of that State”).

distinct meanings in early America just as they do today.¹⁰⁰ But “[j]urisdiction,” it has been observed, “is a word of many, too many, meanings.”¹⁰¹ At the time, at least one of those meanings seems to have been entirely consistent with the contemporary interpretation of the 1795 Act.

When used in the context of territory or geography, rather than the scope of authority of a court or other legal institution, “jurisdiction” was occasionally employed interchangeably with “borders” or “limits.” For example, the Constitution provides that “no new State shall be formed or erected within the Jurisdiction of any other State”;¹⁰² yet this would hardly allow Congress to form new states within the purchased enclaves of forts and arsenals, in which it otherwise had power “[t]o exercise exclusive Legislation in all Cases whatsoever” and from which state jurisdiction was excluded.¹⁰³ An early version of the very bill that became the 1790 Act used “jurisdiction” to mean “borders” in this sense. That bill referred to lands “within the United States” held by aliens, which under certain circumstances would forfeit to “the State *wherein such lands shall be*, or [to] the United States, if such lands shall *not be within the jurisdiction of any individual State*”; to be within the jurisdiction of a state and to be *in* that state here meant the same thing.¹⁰⁴ Eight years later—and not long after the 1795 Act’s enactment—a statute employed “territory” and “jurisdictional limits” as synonymous terms, first forbidding French vessels from entering or remaining “within the territory of the United States,”

100. *See, e.g.*, *Sleight v. Kane*, 1 Johns. Cas. 76 (N.Y. Sup. Ct. 1799) (noting that a defendant was “out of the jurisdiction of the state,” as part of the British army, even though he was within its limits).

101. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1997) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

102. U.S. CONST. art. IV, § 3, cl. 1.

103. *Id.* art. I, § 8, cl. 17; *see Pac. Coast Dairy, Inc., v. Dep’t of Agric.*, 318 U.S. 285 (1943).

104. A Bill To Establish an Uniform Rule of Naturalization, and To Enable Aliens To Hold Lands Under Certain Restrictions § 3 (N.Y., Francis Childs & John Swaine 1790) (Early Am. Imprints, 1st ser., No. 46,021) (emphasis added).

and then specifying the accompanying penalty should such a vessel “be found within the jurisdictional limits of the United States.”¹⁰⁵

The occasional equivalence of these terms is also shown in discussions of the older phrase “beyond sea” and its variants, commonly found in statutes of limitations¹⁰⁶ and also employed in the 1790 Act.¹⁰⁷ A Maryland court in 1802 noted that “‘beyond the seas,’ and ‘*out of the realm,*’ are synon[y]mous, and mean precisely the same thing”; the reporter’s headnote summarized this finding by stating that “beyond seas” was “synonymous with, *out of the jurisdiction of the state.*”¹⁰⁸ In 1818 the Supreme Court was “unanimously of opinion, that [in the context of tolling statutes of limitations] . . . , the words ‘beyond seas’ must be held to be equivalent to ‘without the limits of the state’”¹⁰⁹—but in 1840 the Court had equal confidence that “it has always been held, that [the words ‘beyond the seas’] . . . ought to be construed as equivalent to the words, ‘without the jurisdiction of the state.’”¹¹⁰ And in 1853, a litigant before New Hampshire’s supreme court described it as “well settled that the old

105. An Act To Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 53, § 3, 1 Stat. 565, 565-66 (1798). *Compare id.* (portraying the “jurisdictional limits of the United States” as synonymous with its “territory”), *with Ex parte Dupont*, 5 S.C. Eq. (Harp. Eq.) 5, 1824 WL 999, at *6 (opinion below of Desaussure, Ch., adopted and affirmed on appeal) (describing the 1795 Act as concerning “children of citizens of the United States, born out of the limits of the jurisdiction of the United States” (emphasis added)), *rev’d on other grounds*, *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830), *and* *Minor v. Happersett*, 88 U.S. 162, 168 (1874) (describing the 1855 Act in similar terms).

106. *See, e.g.*, An Acte for Lymytation of Actions, and for Avoyding of Suits in Lawe, 1623, 21 James, c. 16, § 7, *in* 4 STATUTES OF THE REALM pt. 1, at 1222, 1223 (“beyond the Seas”).

107. 1 Stat. at 104.

108. *Pancoast’s Lessee v. Addison*, 1 H. & J. 350, 1802 WL 708, at *1, 3 (Md. Gen. Ct. 1802).

109. *Murray’s Lessee v. Baker*, 16 U.S. (3 Wheat.) 541, 545 (1818); *cf.* *Faw v. Roberdeau’s Ex’r*, 7 U.S. (3 Cranch) 174, 177 (1805) (statement of Marshall, C.J.) (“Beyond sea, and out of the state, are analogous expressions, and are to have the same construction.”).

110. *Bank of Alexandria v. Dyer*, 39 U.S. (14 Pet.) 141, 145 (1840).

phrase ‘beyond seas,’ and the phrase ‘out of the State,’ mean the same thing,” and moreover “that both mean the same as beyond the limits or jurisdiction of the State.”¹¹¹ In this context, a redundant phrase in the 1795 Act should hardly be surprising, given the obvious redundancy in its predecessor statute: every place identified as “beyond sea” in the 1790 Act was necessarily also “out of the limits of the United States.”¹¹² The removal of “beyond sea” in 1795 may have been intended to remove this particular redundancy, or to avoid the danger of an overly literal reading,¹¹³ rather than to change the meaning of the underlying provision.

111. *Gilman v. Cutts*, 7 Fost. 348, 1853 WL 2479, at *2 (N.H. 1853) (argument of counsel).

112. 1 Stat. at 104; *cf. Faw*, 7 U.S. at 177.

113. The meaning of the English legalism “beyond sea” was disputed in the early United States. Occasionally it was taken quite literally. In 1810, the House debated a bill under which volunteer militia members were liable to serve anywhere “not beyond sea without the jurisdiction of the United States.” A number of members called for striking out the words “beyond sea,” arguing that the provision as written would enable the government to send militiamen into Canada or Mexico, while the phrase “not without the jurisdiction” alone would confine the troops within the United States’ own territorial boundaries. Those who opposed the change did not argue that “beyond sea” was a mere figure of speech, but rather that the ability to invade Canada preemptively might be useful. *See* 21 ANNALS OF CONG. 1497-1520 (1810). (One representative, in an effort to provide fair warning to militia members that who “had heretofore been received to serve within the United States only,” asked that they be informed of their “liability to be taken on service without the *limits and jurisdiction* of the United States.” *Id.* at 1529 (emphasis added).)

The literal reading, however, competed with a more figurative interpretation. *Compare* An Act To Establish the Post-Office and Post-Roads Within the United States, ch. 23, § 26, 1 Stat. 354, 365 (1794) (allowing the Postmaster General “to make provision, where it may be necessary, for the receipt of all letters and packets intended to be conveyed by any ship or vessel, beyond sea, or from any port of the United States to another port therein”), *Gustin v. Brattle*, 1 Kirby 299, 1787 WL 124, at *2 (Conn. Super. Ct. 1787) (per curiam) (“As to the first point—Halifax is not over sea, but on the main land; and not at so great a distance as any place over sea. Barely its being out of this state, or jurisdiction, does not bring it within the words or reason of the proviso. Beyond seas, in the English Statute of Limitations . . . has been adjudged not to extend to Scotland, though without the jurisdiction of the courts of England. And in [*King v.*

3. “*Within*” and “*Under*”

The territorial uses of “jurisdiction” catalogued above could be contrasted with the phrases “under the jurisdiction of the United States”¹¹⁴ or “subject to the jurisdiction thereof,”¹¹⁵ which appear more likely to have indicated legal authority and protection (such as that relevant to ambassadors or Native American tribes) rather than geographical scope. Sometimes these senses were mixed: thus the Thirteenth Amendment’s reference to “the United States, or *any place* subject to their jurisdiction.”¹¹⁶ But elsewhere these senses would be directly contrasted, with the geographic uses of “jurisdiction” frequently introduced by a spatial term such as “within” rather than “under” or “subject to.” The 1795 Act itself used “jurisdiction” in both senses: it allowed aliens already residing “*within the limits and under the jurisdiction* of the United States” to be naturalized, but only if they had resided “two years, at least, *within and under* the jurisdiction of the same,” and “one

Walker, (1715) 96 Eng. Rep. 159 (K.B.)), it was held, that the words should be literally adhered to; for that the statute being a very beneficial one, the savings out of it should not be enlarged by construction.”), and *Ward v. Hallam*, 2 U.S. (2 Dall.) 217, 218, 1 Yeates 329 (Pa. 1794) (argument of counsel) (contending successfully that other states were not “beyond seas” under Pennsylvania law), *with Ferris v. Williams*, 8 F. Cas. 1164, 1164 (C.C.D.C. 1804) (No. 4749) (noting that a counsel had made a special reply to the statute of limitations, “stating that the plaintiffs were beyond the seas (that is, in the state of Delaware)”), *Harper v. Hampton*, 1 H & J. 453, 1803 WL 422, at *2 (Md. Gen. Ct. 1803) (argument of counsel) (stating that the cause had accrued when “both the plaintiff and defendant did reside and were beyond the seas, and absent out of the state of *Maryland*, to wit, at *Philadelphia* in the state of *Pennsylvania*”), and sources cited *supra* notes 108-112.

114. 1790 Act § 1, 1 Stat. at 103; 1795 Act §§ 2-3, 1 Stat. at 414-15; 1802 Act § 1, 2 Stat. at 153.

115. U.S. CONST. amend. XIV, § 1.

116. *Id.* amend. XIII, § 1.

year, at least, *within* [the same] state or territory.”¹¹⁷ To reside “under” the jurisdiction of the United States was one thing; to reside “within” the jurisdiction of the United States was another, and could be synonymous with residence within its limits.

Such usage was consistent with contemporary practice. In a protest of British practices of impressment in 1801, the American ambassador differentiated between jurisdiction *per se* and presence “within” a jurisdiction; he “admitt[ed] that each [nation], within its territorial limits and jurisdiction, may detain its own seamen found in the service of the other,” but he argued that “it by no means follows that this can be done upon the open seas, where the jurisdiction of all nations is equal.”¹¹⁸ Similarly, in the Non-Intercourse Act of 1809, Congress forbade interaction with certain vessels that had “entered any harbor or waters within the jurisdiction of the United States or [of] the territories thereof”;

117. 1795 Act § 2, 1 Stat. at 415 (emphasis added). A Pennsylvania judge in 1798 paraphrased this requirement further by stating that a naturalizing alien must have resided “two years at least, within the jurisdiction of the same”; it was in this geographic sense that we can understand his paraphrase of the foreign-born citizen clause as applying to “children of citizens of the United States born out of the jurisdiction of the United States.” ALEXANDER ADDISON, *Qualifications of Electors* (March 1798), in CHARGES TO GRAND JURIES OF THE COUNTIES OF THE FIFTH CIRCUIT IN THE STATE OF PENNSYLVANIA 243, 256 (Wash., D.C., John Colerick 1800) (Early Am. Imprints, 1st ser., No. 36,764); *cf.* *Ludlam v. Ludlam*, 31 Barb. 486 (N.Y. Sup.Ct. 1860) (stating that “both” the 1790 and 1795 Acts concerned those “born out of the limits of the United States,” and offhandedly referring to the 1802 Act—the language of which is identical—as involving those “born out of the jurisdiction of the United States”). Compare H.R. 1399 § 5, 41st Cong., 2d sess., <http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=041/llhb041.db&recNum=4845> (1870), with CONG. GLOBE, 41st Cong., 2d sess. 4268 (1870) (statement of Rep. Davis) (describing a bill using the traditional language of “limits and jurisdiction” as “making provision for the children of citizens born out of the jurisdiction of the United States”).

118. Letter from Rufus King, Ambassador to Great Britain, to Lord Hawkesbury (March 10, 1801), app. C, in 12 ANNALS OF CONGRESS app. at 967, 969-70; *cf.* 18 U.S.C. § 7(1) (including the high seas within the “special maritime and territorial jurisdiction of the United States”).

pilots who assisted in navigating such a vessel would be punished unless their aid were “for the purpose of carrying her beyond the limits and jurisdiction of the United States.”¹¹⁹ Here “within the jurisdiction” was most likely meant as a synonym for “within the borders”; reading “limits and jurisdiction” as distinct requirements here would be nonsensical, as no ships were to be piloted into foreign embassies or as-yet-unacquired American possessions.¹²⁰ Earlier uses of “within the jurisdiction” were also consistent with this interpretation.¹²¹

119. An Act To Interdict the Commercial Intercourse Between the United States and Great Britain and France, and Their Dependencies; and for Other Purposes (Non-Intercourse Act), stat. 2, ch. 24, § 2, 2 Stat. 528, 528 (1809). The insertion of “of” is justified by the application of the provision to “any citizen . . . of the United States or the territories thereof,” which clearly references the newly acquired territories (in Louisiana and elsewhere) rather than the land area of the United States generally. *Id.*

120. The Act applied similar requirements in different sections to foreign public vessels “within the jurisdiction of the United States, or of the territories thereof,” *id.* § 1, 2 Stat. at 528, and to foreign private vessels “within the limits of the United States or of the territories thereof,” *id.* § 3, 2 Stat. at 529, thus identifying “limits” with “jurisdiction” in its geographic sense.

121. For example, in 1794, Congress had prescribed penalties for “any person [who] shall within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for any military expedition . . . to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace.” The use of “from thence” here carries the implication that “jurisdiction” is here used as a spatial concept, and that the persons concerned had not yet entered foreign territory. An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, stat. 1, ch. 50, § 5, 1 Stat. 381, 384 (1794). Moreover, the use of “territory or jurisdiction” here seems to have been a doublet, and not only because it would have been odd to prohibit private expeditions on foot from U.S. Navy vessels. Another section of the same statute punished “any person [who] shall [enlist in a foreign military] *within* the territory or jurisdiction of the United States, or . . . go beyond the *limits or jurisdiction* of the United States with intent to be [so] enlisted,” a provision which was described in debate as “punish[ing] a man . . . for going *out of the limits* of the United States to enlist in foreign service.” An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, stat. 1, ch. 50, § 2, 1 Stat. 381, 383 (1794); 4 ANNALS OF CONG. 746 (1794) (statement of Rep. John Nicholas) (emphasis added).

This evidence of usage counsels against reading into the citizenship statutes a strict separation between “jurisdiction” and “limits.” To Chancellor Kent, for example, Indian tribes could be “within the territorial jurisdiction of the government of the United States” or of the several states if they were within “their respective territories,”¹²² even though Indian tribes are the paradigm case of not being “subject to [U.S.] jurisdiction” under the Fourteenth Amendment. (Members of Congress in 1828 likewise spoke of Indians being “within the territorial jurisdiction” of particular states in the sense of being “within [their] limits.”¹²³)

The meaning of “jurisdiction” as used in the Fourteenth Amendment was not the only one available to Congress in 1795; indeed, the Fourteenth Amendment itself lay many years in the future. Given the flexibility of contemporary usage, we should hesitate before treating “jurisdiction” as if it only had one meaning. To be born “out of the jurisdiction and limits of the United States,” as required by the 1795 Act, may have meant no more than to be born outside its limits.

III. TEXT AND PURPOSE

If the word “jurisdiction” could be employed in a geographic sense largely synonymous with “limits,” then the phrase “limits and jurisdiction” may not have been meaningfully different from “limits” *simpliciter*. As described above, this reading would be compatible with

122. 3 KENT, *supra* note 31, at 311-12 (“[T]he colonial and state authorities throughout the Union, always negotiated with the Indians within their respective territories as dependent tribes, governed, nevertheless, by their own chiefs and usages, and competent to act in a national character The Indian tribes within the territorial jurisdiction of the government of the United States, are treated in the same manner But while the ultimate right of our American governments to all the lands within their jurisdictional limits . . . is not to be shaken; it is equally true, that the Indian possession is not to be taken from them . . . without their free consent . . .”).

123. 4 REG. DEB. pt. 1, at 925-26 (1828).

the consistent interpretation of the citizenship statutes throughout the eighteenth and nineteenth centuries and into the early years of the twentieth.

This reading would also be compatible with the contemporary understanding of the statutes' purpose. Interpreting "limits and jurisdiction" as two distinct requirements creates an absurd legal rule, one that allows children to inherit their parents' citizenship in the most distant regions but not where our government already exercises substantial control. Of course such absurdities, as Chin effectively demonstrates, are hardly unheard of in the citizenship laws.¹²⁴ But as between two potential interpretations of a phrase, each of which is capable of being supported by the text, the interpretation in better accord with the statutory structure and purpose—all else being equal—seems more likely to have been the original meaning relied on by those who drafted it.

There is no evidence that anyone in 1795 desired to limit the descent of citizenship along the lines of the restrictive reading, so that only those outside *both* the "limits" and the "jurisdiction" of the United States would be citizens at birth. As noted above, the only potential mention of the provision in the legislative debates suggests that it was meant to replicate, rather than to diverge from, the meaning of its predecessor in the 1790 Act.¹²⁵ And if "limits and jurisdiction" was not meant to be read as a doublet, what was it there for? Chin notes that in early America, "there were few places outside the territory but within the jurisdiction"¹²⁶—but this only means that the effect of a restriction would be small, and hardly provides a positive reason for inserting it. He further claims that these places would not have been "considered fit for women and children," suggesting that "Congress certainly would have thought that, say, births in foreign ports on all-male U.S. Navy ships[] would be sufficiently

124. See Chin, *supra* note 2, at 33-34.

125. See *supra* text accompanying note 61.

126. Chin, *supra* note 2, at 26.

irregular and unusual” as to be excluded from the citizenship statutes.¹²⁷ But the historical record contains no evidence of such concerns. And here a page of history is worth a volume of speculation: in 1861, when the courts indeed encountered a child of citizens born aboard a U.S.-flagged ship in a foreign port, the child was held uncontroversially to be a citizen at birth.¹²⁸

The bizarre consequences of a restrictive reading would not only be limited to children in outlying possessions. Ambassadors and military servicemembers stationed abroad are traditionally considered to be under the jurisdiction of their home country;¹²⁹ this is why the Fourteenth Amendment applies the same rule to the children of foreign ambassadors stationed here.¹³⁰ But a restrictive reading, which denies citizenship to foreign-born children if they were born subject to the jurisdiction of the United States, implies that the children of U.S. ambassadors and U.S. troops abroad have *always* been excluded from citizenship, regardless of where their parents were stationed. Chin specifically identifies land that is “temporarily occupied by American troops by permission of a foreign sovereign” as under U.S. jurisdiction; thus McCain’s birth in the Canal Zone is ultimately irrelevant, since *any* child born on a military base abroad would be excluded by the restrictive reading.¹³¹ Yet such children were presumably among those for whose benefit the citizenship statutes would have been passed in the first place. For Congress to have added

127. *Id.*

128. *See* United States v. Gordon, 25 F. Cas. 1364, 1368 (C.C.S.D.N.Y. 1861) (No. 15,231); *see also infra* text accompanying notes 155-160.

129. *See, e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138-41 (1812).

130. *See* *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). Surely our ambassadors’ children, who enjoy diplomatic immunity while abroad, “are entitled to the protection of and owe allegiance to the United States.” *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898).

131. Chin, *supra* note 2, at 26. This rule would also have consequences for civilians; Americans settled in France would normally pass on citizenship to their children, but not if they resided within the lines of U.S. troops during World War I.

limiting words to the statute that could have had no contemporary effect except to deny citizenship to these children would be remarkable—as would the complete absence of any contemporary recognition of this purpose.

By contrast, there was a great deal of contemporary recognition of another purpose of the foreign-born citizen provisions, namely to make the citizenship of certain children no longer dependent on the place of their birth. As compared to the “gap in the law” alleged by the restrictive reading,¹³² the British statutes that preceded the 1790 Act had been understood as gapless, addressing all children born anywhere in the world (but for named exceptions). For example, the statute of 1351 addressed any child born “out of the ligeance” of the king; anyone not an English subject by *jus soli* might perhaps become one by *jus sanguinis*.¹³³ This gapless quality of British law was recognized in early America,¹³⁴ and one of the earliest American statutes to address foreign-born citizens—drafted, as it happens, by Thomas Jefferson—included as citizens of Virginia “all white persons born within the territory of this commonwealth . . . and *all infants wheresoever born*, whose father, if living, or otherwise, whose mother was, a citizen at the time of their birth.”¹³⁵ The first federal statute

132. *See id.* at 4.

133. A Statute for Those Who Are Born in Parts Beyond the Sea, 1351, 25 Edw. 3, stat. 1, in 1 STATUTES OF THE REALM 310.

134. *See, e.g.*, 2 JAMES WILSON, *Lectures on Law: Of the Common Law*, THE WORKS OF THE HONOURABLE JAMES WILSON 3, 49 (Bird Wilson ed., Phila., Lorenzo Press 1804) (“By the statute 25. Edw. III, says my lord Bacon, . . . *all children, born in any part of the world*, if they be of English parents, continuing, at that time, as liege subjects to the king, and having done no act to forfeit the benefit of their allegiance, are, ipso facto, naturalized.” (emphasis added)).

135. A Bill Declaring Who Shall Be Deemed Citizens of this Commonwealth (1779), in THOMAS JEFFERSON, THE POLITICAL WRITINGS OF THOMAS JEFFERSON 46 (Merrill D. Peterson ed., 1993) (emphasis added); *see also* An Act Declaring Who Shall Be Deemed Citizens of This Commonwealth, ch. 55 (Va. 1779), in 10 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 129, 129 (1822).

on foreign-born citizens continued in this gapless tradition. At the time, free children born within the United States—in particular those of U.S. citizens (and therefore not of tribal Indians or foreign ambassadors)—would have been citizens at common law. When the 1790 Act addressed all children born “beyond sea, or out of the limits of the United States,”¹³⁶ it assured that any child of citizens—again, with particular named exceptions—would have an equal opportunity for citizenship.

The 1795 Act, it is true, introduced the phrase “limits and jurisdiction,” which could be read as more restrictive. But the 1802 Act employed the phrase in a manner that strongly suggests a gapless reading of the statute as a whole. The fourth section of that statute provided a general declaration of *jus sanguinis*, according to which “the children of persons who now are, or have been citizens of the United States, *shall, though* born out of the limits and jurisdiction of the United States, be considered as citizens of the United States.”¹³⁷ In other words, the provision referred to the children of citizens born anywhere in the world, declaring them to be citizens themselves—*even if*, not having been born within the United States proper, they would not otherwise have had the benefit of *jus soli*. This usage is strong support for a complementary or gapless reading of the 1802 Act, as potentially applying to all children of current citizens that the *jus soli* would not include.¹³⁸

Early interpretations of the foreign-born citizenship statutes described their purpose in this gapless fashion—as ensuring that children of U.S. citizens would enjoy their parents’ status “whether born within the *United States* or not.”¹³⁹ A New York trial court in 1839 stated that such children “would be entitled to inherit in whatever country they might be

136. 1790 Act, 1 Stat. at 104.

137. 1802 Act § 4, 2 Stat. at 155.

138. On the limitation to current citizens, *see supra* note 54 and accompanying text.

139. *Inhabitants of Manchester v. Inhabitants of Boston*, 16 Mass. 230, 235 (1819) (construing 1802 Act § 4, 2 Stat. at 155).

found”;¹⁴⁰ the decision was affirmed on appeal, with the Court for the Correction of Errors noting that Congress had deliberately followed the gapless British model.¹⁴¹ In 1869, an opinion of the Attorney General inferred immediately from the status of the parent to that of the child; given “that their fathers were, at the time of their birth, citizens of the United States,” he concluded that “the children, under and by virtue of [the 1855 Act,] are deemed and considered . . . to be citizens of the United States.”¹⁴² The Secretary of State in 1884 identified “but three methods known to me for obtaining the rights of an American citizen,” including children “born in the United States, and subject to the jurisdiction thereof”; children “born of American parents whose fathers have resided within the United States”—without regard to their place of birth; and persons “embraced by the naturalization law.”¹⁴³ And a report

140. *Young v. Peck*, 21 Wend. 389 (N.Y. Sup. Ct. 1839) (Nelson, C.J.).

141. *Peck v. Young*, 26 Wend. 613 (N.Y. 1841) (opinion of Sen. Scott) (“It was enacted . . . [in Britain] that all children born out of the king’s allegiance, whose *fathers* . . . were natural-born subjects, should be deemed to be natural-born subjects themselves, to all intents and purposes. . . . These [English] statutes show what were the rights of Englishmen, which the colonists resolved that they and their *descendants* were entitled to exercise.”); *id.* (“The object of the act of Congress, by declaring the children of citizens born abroad to be citizens of the United States, it appears to me, was to perpetuate the same policy some European governments, and particularly the British government, had adopted, with respect to the children of her natural-born subjects, viz.: that the condition of the child should follow that of the parent.”).

142. 13 Op. Att’y Gen. 89, 90 (1869). (Note the use of doublets in his statement as well.) Another provision of the citizenship statutes, concerning the children of newly naturalized aliens, was read in a similarly gapless fashion. See 10 Op. Att’y Gen. 329, 330 (1862) (“The section, of course, refers to children [of aliens] born out of the United States, since the children of such persons, born within the United States, are citizens without aid of statutory law.”).

143. Letter from Frederick T. Frelinghuysen, Sec’y of State, to Mr. Willis (Feb. 21, 1884), in 2 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, TAKEN FROM DOCUMENTS ISSUED BY PRESIDENTS AND SECRETARIES OF STATE § 184, at 407 (Francis Wharton ed., Wash., Gov’t Printing Office 2d ed. 1887)); see also PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS DECEMBER 3, 1907, pt. 2, at 1016 (1910).

on citizenship prepared in the State Department in 1906 noted that “[i]n the case of such children it is our national policy to claim them as American citizens, without regard to the place of their birth, as the offspring of American citizens.”¹⁴⁴ All of these sources suggest a gapless reading of the foreign-born citizen statutes, one that would forward the statutes’ purpose rather than inhibit it.

These purpose-based arguments might be unavailing if the statutes’ meaning were otherwise clear, and if Congress had balanced this purpose with others (or had foolishly chosen language that imperfectly realized its members’ goals).¹⁴⁵ But as I have argued above, “limits and jurisdiction” could have been read as a doublet just as easily—and perhaps far more easily—than as a conjunction of independent requirements. Historically, the phrase often *was* so read. And if more than one meaning was consistent with contemporary usage, the one that seems most compatible with the statute’s recognized purpose should usually be favored.¹⁴⁶ In the absence of any apparent—much less coherent—motive for Congress to limit citizenship through a restrictive reading, these considerations strongly favor a gapless reading of the text.

IV. APPLICATION TO ACTUAL CASES

The evidence discussed thus far is still not conclusive. Perhaps “jurisdiction” in the 1795 Act wasn’t understood as the equivalent of

144. Citizenship Report 1906, *supra* note 65, at 17.

145. *Cf. Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) (“[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”).

146. The word “bank” can mean either a financial institution or the edge of a river, but even if the latter meaning were more common, it would not do to read it as “river bank” in a statute on financial matters and then to blame *Congress* for the confusion that results.

“limits”; perhaps the use of “limits” for “limits and jurisdiction” was misleading shorthand; and perhaps the gapless purpose of the provision was imperfectly realized in a poorly drafted text. But if all of this were true, then the flaws in the shorthand would have been readily apparent to contemporaries whenever the different readings of “limits and jurisdiction” would have produced different results. In the historical cases I have been able to identify, however, children born in those circumstances were uniformly held to be citizens—and no one seems to have read “limits and jurisdiction” as meaning anything other than “limits.”

1. *Native Americans.* Prior to their becoming citizens, Native Americans had a separate political existence. Under the Fourteenth Amendment, they were considered to be within the United States but not subject to the jurisdiction thereof.¹⁴⁷ When U.S. citizens and Native Americans bore children together, the status of these children (who were clearly born within the limits of the United States) was usually determined by external rules about tribal membership and not by the foreign-born citizenship statutes.¹⁴⁸ Yet courts and litigants did find the statutes relevant when the “jurisdiction” in question was portrayed in geographic terms, as if Indian lands constituted a foreign state. In 1818, a plaintiff in South Carolina took the position that the territory claimed by the Cherokees was necessarily outside the limits of the United States, and that “a person born within the limits of a territory occupied and claimed by a nation of American Indians, is an alien.”¹⁴⁹ The Court of Constitutional Appeals disregarded this argument, however, finding that the case “has been specifically provided for by an Act of Congress.”

147. *See* *Elk v. Wilkins*, 112 U.S. 94, 102-03 (1884).

148. *Compare* *Ex parte Reynolds*, 20 F. Cas. 582, 585 (C.C.W.D. Ark. 1879) (No. 11,719) (holding that Indian status descends through the father), *with* *United States v. Sanders*, 27 F. Cas. 950, 951 (C.C.D. Ark. 1847) (No. 16,220) (holding that such status descends through the mother).

149. *Davis v. Hall*, 10 S.C.L. (1 Nott & McC.) 292, 1818 WL 882, at *1 (Const. App. 1818).

Looking to the language of the 1802 Act, the court “entertain[ed] no doubt but that the child . . . is capable of taking . . . the land in question” as a citizen.¹⁵⁰ The unanimous court found it irrelevant whether “the place of birth were without the jurisdiction or limits of the United States,”¹⁵¹ for the child’s father was a citizen, and had at least once resided in the United States. Given these facts, citizenship would necessarily descend to “his child born in the Cherokee nation of Indians, whether that place be within the jurisdiction or limits of the United States or not.”¹⁵² The gapless reading of the statute meant that citizenship would descend from the father wherever a child was born; as the reporter’s headnote put it, “[w]here a *Father* has been a citizen of the United States, his *Son* is entitled to the privileges of citizenship, although born *without* the limits of the United States.”¹⁵³

2. *Birth aboard ships.* The public vessels of a foreign sovereign were generally recognized to carry with them the same form of extraterritorial jurisdiction that accompanied ambassadors.¹⁵⁴ Private American-flagged ships, however, were also considered subject to a form of U.S. jurisdiction even after they had sailed beyond its limits. In 1861, a federal court in New York concluded that acts taking place on “an American vessel, owned by American citizens,” although allegedly within the internal waters of a foreign nation, were within the admiralty and maritime jurisdiction of the court.¹⁵⁵ This view was supported by a decision of the Supreme Court thirty years later, which held that a foreign crew member of an American-

150. *Id.*

151. *Id.*

152. *Id.* (emphasis added).

153. *Id.* (reporter’s headnote).

154. *See* *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812).

155. *United States v. Gordon*, 25 F. Cas. 1364, 1368 (C.C.S.D.N.Y. 1861) (No. 15,231); *see also id.* at 1364 (noting that the criminal statute in the case at bar applied to the crew of American-flagged vessels anywhere in the world).

flagged private vessel was still subject to the jurisdiction of U.S. consular courts even for offenses in a foreign harbor.¹⁵⁶

Although it found the U.S. ship to be within U.S. jurisdiction, the 1861 court had no difficulty approving a jury instruction to the effect that a child of citizens, born on board the vessel in the waters of a foreign country, was a citizen at birth. Associate Justice Samuel Nelson, sitting on circuit, had instructed the jury that “even if the defendant was born during one of those voyages which the father made as a sea captain, . . . he would still be regarded in law as an American citizen, although thus born abroad, provided his parents were American citizens.”¹⁵⁷ The defendant excepted to this instruction “on the ground that it did not lay down the correct rule of law applicable to children of American parents, born in foreign countries.”¹⁵⁸ In ruling on the exception, however, the court was “clearly of opinion, that there was no error in this part of the charge,” for “[w]ithout here discussing the general principles of law applicable to that subject,” it was enough that “the charge on this point, taken in connection with the facts in evidence to which it was to be applied, clearly referred to a possible birth of the defendant on board of his father’s American vessel, while the latter was in a foreign country, in the course of the voyage.”¹⁵⁹ While those on such a vessel would, in the court’s view, still have been subject to U.S. jurisdiction, the birth occurred out of the limits of the United States, and the foreign-born citizenship statutes still applied. Even if the court had been wrong about the nature of U.S. jurisdiction over private vessels, it still saw no conflict between that jurisdiction and the provisions of the citizenship statutes.¹⁶⁰

156. See *In re Ross*, 140 U.S. 453, 472-75 (1891).

157. *Gordon*, 25 F. Cas. at 1368.

158. *Id.*

159. *Id.*

160. A subsequent district court decision, *In re Lam Mow*, 19 F.2d 951 (N.D. Cal. 1927), held that a child of citizens born on an American-registered ship on the high seas was not born “in the United States” for the purpose of the Fourteenth Amendment, but without considering the relevance of the foreign-born citizenship statutes—perhaps

3. *Extraterritorial jurisdiction by treaty.* In the nineteenth and early twentieth centuries, the United States obtained special extraterritorial jurisdiction over its citizens residing in various foreign nations, usually outside the West. In these countries, it was believed, the “national sovereignty of law is transferred bodily into a foreign soil and made applicable to citizens or subjects of its own nationality dwelling there.”¹⁶¹ In China, for example, the United States had established by treaty that “[a]ll questions in regards to rights whether of property or person, arising between citizens of the United States in China shall be subject to the jurisdiction and regulated by the authorities of their own Government.”¹⁶² If any group of citizens could be outside the limits of the United States but still subject to its jurisdiction, it would be these. Yet the American consul in China was specifically charged with recording “[t]he *birth* and death of every American citizen *within the limits of his jurisdiction*,”¹⁶³ a requirement explicitly presuming that the foreign-born

because only the constitutional argument had been raised. (The same flaw is found in a law review comment supporting the more recent case over *Gordon*. See Recent Important Decisions, *International Law—Citizenship—Jurisdiction over National Ships*, 26 MICH. L. REV. 219 (1927).) In Britain, the rule appears to have been that an English ship was English soil for this purpose. See *Marshall v. Murgatroyd*, (1870) 6 L.R.Q.B. 31 (holding, in the face of an argument that a child “having been born on the high seas was born out of England,” that “[i]t is part of the common law and of the law of nations, that a ship on the high seas is a part of the territory of that state to which she belongs; and therefore an English ship is deemed to be part of England”).

161. Citizenship Report 1906, *supra* note 65, at 197 (quoting Letter from Frederick T. Freylinghuysen, Sec’y of State, to Sen. William Windom, Chairman, Comm. on Foreign Relations (Apr. 29, 1882), S. Misc. Doc. No. 89, 47th Cong.).
162. Treaty of Peace, Amity, and Commerce art. 27, U.S.-China, June 18, 1858, 12 Stat. 1023, 1029; see also Treaty of Peace, Amity, and Commerce art. 29, U.S.-China, July 3, 1844, 8 Stat. 592, 598 (“The merchants, seamen, and other citizens of the United States shall be under the superintendence of the appropriate officers of their government.”). On the origins of American extraterritoriality in China, see generally Teemu Ruskola, *Canton Is Not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 859 (2005).
163. Consular Court Regulations for China, General ¶ 54 (1864), in Citizenship Report 1906, *supra* note 65, at 238, 242 (emphasis added).

children of citizens subject to U.S. jurisdiction could still obtain citizenship by birth.

The same assumptions were made in a series of State Department opinions concerning the requirement that fathers of foreign-born citizens have previously “resided in the United States.”¹⁶⁴ In 1887, the Acting Secretary of State had argued that this father-residence limitation “does not apply to the descendants of citizens of the United States” in extraterritorial communities such as that in Turkey; instead, “[s]uch descendants are to be regarded, through their inherited extraterritorial rights recognized by Turkey herself, as born and continuing in the jurisdiction of the United States.”¹⁶⁵ The relaxation of the father-residence rule may have been a stretch—the extraterritorial communities in Turkey were never “in” the United States in the sense of being within the nation’s borders—but it is critical to note what was *not* considered controversial, namely that citizens in such extraterritorial communities were able to pass on their citizenship at all. Even though U.S. citizens in Turkey were “continuing in the jurisdiction of the United States,” there was no barrier seen to the birthright citizenship of their children—at least so long as the fathers had truly resided in the United States. Thus, in 1902, the Secretary of State noted of a man born in Turkey that “[i]f the father was a citizen of the United States when the son was born, the son was himself born a citizen of the United States,” even while noting in the

164. REV. STAT. § 1993 (1st ed. 1875).

165. Letter from J.D. Porter, Acting Sec’y of State, to [William E.] Emmet (Consular Instruction No. 22, Aug. 9, 1887), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, FOR THE YEAR 1887, TRANSMITTED TO CONGRESS, WITH A MESSAGE OF THE PRESIDENT, JUNE 26, 1888, at 1125, 1125 (Wash., D.C., Gov’t Printing Office 1888); see also Citizenship Report 1906, *supra* note 65, at 212; CATHERYN SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES app. D-1, at 293 (1971); *cf. id.* at 211, app. D-1 at 293-94 (noting that the same rule was applied to Samoa).

same breath that that the son was “born in a country in which the United States exercises extra territorial jurisdiction.”¹⁶⁶

The scattered evidence from these three circumstances does not itself prove that “the limits and jurisdiction of the United States” was understood to mean the United States proper. But it does undermine any argument that the citizenship statutes had a plain meaning rendering children like McCain aliens at birth. After all, if the statutes had that meaning, it was lost on the courts and officials charged with enforcing them during the first century of their existence.

V. MODERN READINGS

In the second century after the 1795 Act, a new reading of “limits and jurisdiction” began to take hold. The more restrictive reading that Chin identifies was widespread enough by 1937—at least among government officials—to motivate Congress to “fix” the law with a new statute specific to the Canal Zone.¹⁶⁷ But the fact that this new reading began to spread in the early twentieth century is hardly surprising. Even if mistaken, it was the *kind* of mistake that no one could have made before the United States had acquired vast “unincorporated” possessions, which were subject to U.S. control even as their inhabitants were famously excluded from the “limits” of the United States (and the benefits appurtenant to American soil).¹⁶⁸ The temptation to interpret the phrase as incorporating two separate requirements of “limits” and “jurisdiction”

166. Letter from John Hay, Sec’y of State, to [Robert S.] McCormick, Ambassador to Austria-Hungary (Jan. 18, 1902), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS DECEMBER 2, 1902, at 66, 66 (1903). The Department, in its discretion, refused to issue the son a passport, on the ground that since birth he had failed to uphold the duties of citizenship by never returning to the United States. *Id.* at 67.

167. See, e.g., sources cited in Chin, *supra* note 2, at 20-21, 29-31.

168. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 277 (1901).

would have been at its height when the words, read alone, pulled in very different directions. Indeed, as far as I am aware, the earliest published argument against the citizenship of children born in outlying possessions dates from precisely this period, when one scholar in 1911 described their status as “in doubt” (and remarked that a legislative fix could not render them “natural-born”).¹⁶⁹

In part, the new reading derived from the Supreme Court's 1898 treatment of “jurisdiction” as having a single and independent meaning. In *United States v. Wong Kim Ark*, the Court sought to construe the Fourteenth Amendment's language (“in the United States and subject to the jurisdiction thereof”) by comparing it to the wording of the citizenship statutes, as “the equivalent of the words ‘within the limits and under the jurisdiction of the United States’ and the converse of the words ‘out of the limits and jurisdiction of the United States’ as habitually used in the naturalization acts.”¹⁷⁰ Although the foreign-born citizen statutes played no direct role in the case at bar, the Court interpreted “jurisdiction” in the phrase “limits and jurisdiction” as indicating a separate and distinct concept from “limits.”¹⁷¹

169. Dudley O. McGovney, *American Citizenship, Part II: Unincorporated Peoples and Peoples Incorporated with Less than Full Privileges*, 11 COLUM. L. REV. 326, 342, 343 n.32 (1911); see also Dudley O. McGovney, *Our Non-Citizen Nationals, Who Are They?*, 22 CAL. L. REV. 593, 616-17 (1934). In Britain, similar arguments were raised in Piggott, *supra* note 26, at 37-38 (raising doubts about the construction of British statutes with respect to children in “protectorates” and other territories).

170. 169 U.S. 649, 687 (1898).

171. In part, this was suggested by the context; in *Wong Kim Ark*, the Court found a child born of Chinese immigrants in the United States to be “subject to the jurisdiction thereof.” As evidence to show that American-born children of immigrants were subject to American jurisdiction, it looked to the 1795 Act, which it described as “treating aliens residing in this country as ‘under the jurisdiction of the United States,’ and American parents residing abroad as ‘out of the jurisdiction of the United States.’” *Id.* at 687. This may have been true in the geographic sense of “jurisdiction”; but the Court applied this inference to jurisdiction in a broader sense as well.

While Chin reads this dictum as supporting a restrictive view of the statute,¹⁷² in fact it may do quite the opposite: the word “converse” was apparently used by the Court to mean “negation,” a common enough usage at the time.¹⁷³ And the negation of the Fourteenth Amendment’s test for birthright citizenship, which required *both* presence in the United States and subjection to the jurisdiction thereof, is the failure of at least one of the conditions—i.e., *either* being born outside the United States *or* not being subject to its jurisdiction. While the latter would not have been as relevant to the children of U.S. citizens,¹⁷⁴ the former is quite broad, and would have included all persons born outside the United States proper.

That is precisely how the Department of State understood the Court’s holding thirty years later, when the Office of the Solicitor issued an opinion on children born in the Canal Zone.¹⁷⁵ While it had briefly considered a restrictive interpretation in 1914,¹⁷⁶ the Department

172. See Chin, *supra* note 2, at 22-23.

173. See, e.g., 2 JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES (Editorial Staff of the National Reporter System eds., 1904) at 1945 (“Failure of issue is definite or indefinite. . . . An indefinite failure of issue is the very converse or opposite of [direct failure]. It signifies a certain failure of issue whenever it may happen, without fixing any time, or a certain or definite period within which it may happen.”); 6 *id.* at 5314 (“‘Permanently,’ as used in the definition of residence, that there must be a settled, fixed abode, . . . is used as the converse of ‘transient,’ and expresses the idea of an abode which may be temporary, but is not transient.”); 7 *id.* at 5954 (1905) (“Reasonable care and prudence implies the converse of negligence.”).

174. See *supra* note 26.

175. DEP’T OF STATE, OFFICE OF THE SOLICITOR, *Citizenship of a Person Born in the Panama Canal Zone of a Father Who Is a Citizen of the United States* (Aug. 10, 1929), in SOLICITOR’S OPINIONS 1929 pt. 2, at 1075 (1929) (Opinions of the Legal Adviser, microfilm on file with the Eric F. Hutong International Law Library, Georgetown University). This opinion agreed with an earlier decision concerning children born in the Philippines, but apparently no written record of that decision survives. See *id.* at 1075.

176. In that year the Department reversed its previous policy of allowing fathers who had resided in extraterritorial American communities, but never in the United States, to

explicitly rejected such a reading in its formal opinion in 1929, holding that citizenship could descend to children born anywhere in the world. Although the statutes had never mentioned American outlying possessions by name, the Solicitor of the Department found it “entirely clear” that Congress’s intent had been to address any child not included under the Fourteenth Amendment—“to confer citizenship of the United States at birth, *jure sanguinis*, upon the children of persons having such citizenship, when such children did not acquire it *jure soli*, under the

pass on their citizenship to their children. In an opinion concerning the citizenship of Ben Zion Lilienthal, the Office of the Solicitor rejected the claim that his father’s birth and residence in an extraterritorial community qualified as “residence in the United States” as being “a too attenuated stretch of the words of the statute, no matter what may be the extraterritorial rights of the United States in these Turkish communities.” Dep’t of State, Office of the Solicitor, Memorandum in the Matter of the Citizenship of Ben Zion Lilienthal (June 22, 1914), *in* SECKLER-HUDSON, *supra* note 165, app. D, at 290, 291. The opinion argued that such a contention “answers itself; for if it be conceded that, on account of the extraterritorial rights of the United States in these Zionist communities, they are ‘within the jurisdiction of the United States,’ then Mr. Lilienthal can not claim citizenship under section 1993, because, under such contention, he was not born out of the limits *and jurisdiction* of the United States, and he would have to look [elsewhere] for his right of citizenship.” *Id.*

Yet this argument was just a makeweight, for the opinion nowhere suggested that Lilienthal’s *father*—born under the same jurisdiction—was for this reason not a citizen, or that children born in extraterritorial communities whose fathers had in fact resided in the United States could not be citizens. *See id.* at 292 (describing the Solicitor’s objection as being that “[i]f Lilienthal is to be held a citizen of the United States, then Lilienthal’s children and descendants to the latest generation, in the same situation, will be citizens of the United States, a result which, I ap[p]rehend, the United States will not be disposed to insist upon”). Indeed, the subsequent official position of the Department of State on this issue was that persons whose fathers “had never resided in the United States” were excluded from the statute, *not* that children could be excluded on the sole basis that these “American communities” were subject “to the extraterritorial jurisdiction of the United States.” Citizenship of Persons Whose American Fathers Have Never Resided in the United States, Letter from W.J. Bryan, Sec’y of State, to the Diplomatic and Consular Officers of the United States in China and Turkey (File No. 130/508a, July 27, 1914), *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: WITH THE ADDRESS OF THE PRESIDENT TO CONGRESS DECEMBER 8, 1914, at 15, 15-16 (1922).

14th Article of the Amendments of the Constitution.”¹⁷⁷ The opinion admitted that its interpretation could, “at first sight,” seem “contrary to the express terms of section 1993,” because those born in the outlying possessions were not born “out of the . . . jurisdiction of the United States.”¹⁷⁸ “However,” it added,

it is not proper to consider the word ‘jurisdiction’ as disconnected with the word ‘limits.’ In other words, a reasonable construction of section 1993 makes it necessary to regard the expression ‘out of the limits and jurisdiction of the United States’ as conveying a *single idea*, and as the antithesis of the expression, in Article 14 of the Amendments to the Constitution, ‘in the United States and subject to the jurisdiction thereof.’ As the latter is applicable only to persons born in the continental United States and the incorporated territories, the former must be regarded as applicable to persons born elsewhere, including those born in the unincorporated territories.¹⁷⁹

In other words, the Solicitor held, the section “relates only to children born outside of *the United States proper* to fathers who are citizens of the United States proper.”¹⁸⁰ A second opinion issued the next year only confirmed this position, reading “out of the limits and jurisdiction of the United States” to be “the antithesis of the expression” used in the Fourteenth Amendment, and “*likewise* the antithesis of the expression ‘*the*

177. *Id.* at 1076.

178. *Id.* at 1077 (alteration in original).

179. *Id.* (emphasis added)

180. *Id.* at 1078 (emphasis added). Perhaps the Solicitor could be accused of placing a thumb on the scale, given that he called the contrary rule a “manifest absurdity,” *id.* at 1075, and noted that “[s]o far as I can see, it is impossible to hold that a child born in . . . the Canal Zone . . . is himself a citizen of the United States unless we can hold that he acquires citizenship . . . under section 1993.” *Id.* at 1079. But at the same time, he noted that “[w]e have no authority in the Department to make a law,” only “to attempt to apply the existing laws in accordance with their apparent intent.” *Id.* Additionally, he recognized the “difficulty” faced by second-generation residents of the Canal Zone, who would not be citizens if their parents had never resided in the United States proper, but stated that this hardship would be unavoidable “[u]nless the law is amended.” *Id.*

United States' at the end of Section 1993.”¹⁸¹ That opinion declared that such a gapless reading “can hardly be questioned,” and found it “difficult to see how Section 1993 could possibly be read in any other way.”¹⁸² The modern readings that inspired the 1937 “fix,” then, were hardly unanimous—as the Department demonstrated again when its representative described the “fix” as unnecessary in his testimony before Congress.¹⁸³

CONCLUSION

Even setting aside his claims to citizenship at common law, McCain has a powerful basis on which to claim birthright citizenship by statute. The language governing the foreign-born citizens in 1936 had been preserved unaltered since its introduction in 1795. Early interpreters had construed it as re-enacting the standard of 1790, addressing all children born out of the United States proper, and they had recognized the phrase

181. DEP'T OF STATE, OFFICE OF THE SOLICITOR, *Does Residence in the Philippine Islands Satisfy the Requirement of Section 1993 of Revised Statutes of the United States Concerning Residence in the United States?* (Sept. 4, 1930), in SOLICITOR'S OPINIONS 1930 pt. 2, at 935, 936 (1930) (on file with the Ralph J. Bunche Library, U.S. Dep't of State) (emphasis added).

182. *Id.*; see also *id.* at 937 (“It must be admitted that the construction which has been placed by this office upon Section 1993 of the Revised Statutes, with regard to persons born in unincorporated territories of the United States, seems in a sense somewhat strained so far as the language of the statute is concerned, but it does not seem at all strained when the meaning and the effect of the statute are considered.”).

183. *Hearing on S. 2416 Relating to the Citizenship of Certain Classes of Persons born in the Canal Zone or the Republic of Panama, before the H. Comm. on Immigration and Naturalization*, 75th Cong., at 9-10 (July 21, 1937) (CIS No. 75 HIm-T.146) (statement of Richard W. Flournoy, Asst. to the Legal Advisor, Dep't of State) (“[T]he meaning of [the existing statute] is a child born out of the United States proper, and that is complementary to the provision in the Fourteenth Amendment concerning children born within the United States and subject to the jurisdiction of the United States. It is to take care of children of American parents who are not citizens through the fact of birth in the United States.”).

“limits and jurisdiction” as quite capable of a unitary meaning. Both the recognized purpose of the statute and its historical application to actual cases, moreover, support a view that all children of citizens, no matter where they were born, were potentially eligible for citizenship.

To read the foreign-born citizen statutes as excluding children like McCain, on the ground that the United States had *greater* influence over their place of birth, would not only produce bizarre results; it would also be something of an anachronism. If the lawyerly redundancy of the 1795 Act were thought to exclude such children, no one seems to have remarked on the fact within the first hundred years of its enactment—although appropriate situations had clearly arisen by then. Even into the twentieth century, the State Department interpreted these provisions consistently with their original understanding.

None of this evidence—as noted above—conclusively establishes McCain’s citizenship or the meaning of the relevant statutes. The limited historical record only allows for provisional judgments; no congressman in 1795 thought to mention all of the absurd consequences that the Act would *not* produce. But the evidence presented above should be enough to set aside the lawyer’s usual fear of treating any word of a statute as surplusage. While Chin notes that ambiguous grants of citizenship are construed against the grantee,¹⁸⁴ a modern reader can only decide how ambiguous the grant might be after first trying to construe it under the linguistic standards of the time. The Third Congress in 1795 could always have employed different language more acceptable to modern ears, but it had no obligation to predict changing patterns of usage, or to speak in any other way than would allow it to be understood by its own contemporaries.

184. See Chin, *supra* note 2, at 25.

In the end, we can only judge choose among the alternatives that are available to us.¹⁸⁵ It is entirely possible that the early constructions of the statutes were mistaken, or resulted from the broad overlap between “limits” and “jurisdiction” (separately construed). It is also possible that Congress’s restrictive purpose went unrecognized, that courts and officials erred in their application of the law, and that the State Department’s modern position was flawed or result-oriented. But we must weigh the evidence as we find it; and in my opinion, the balance of that evidence supports the view that John McCain is a “natural born Citizen.”

185. *Cf.* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 890 (1992) (noting the widespread assumption that “a legal interpretation is correct if it is better than its available alternatives”).