

II. Equal Citizenship and Alienage

The first sentence of the Fourteenth Amendment provides that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” The original Constitution did not specify citizenship criteria, thus facilitating the Court’s conclusions in *Dred Scott v. Sanford* (1857) that blacks were not regarded by the Framers to be citizens of the United States. The citizenship clause of the Fourteenth Amendment is thus understood to have been intended to overrule *Dred Scott*. But how broad was the extension of *jus soli* citizenship meant to be? In *United States v. Wong Kim Ark* (1898), the Supreme Court held that the clause covered children born in the United States to Chinese parents, despite the fact that Chinese were not at the time eligible for naturalization. The Court found that the “subject to the jurisdiction thereof” limitation on the *jus soli* rule was intended to apply to a narrow set of cases, namely children born to members of invading armies, diplomats, or Native Americans.

Among the threshold questions panelists might explore are: Is this early interpretation faithful to the Framers’ understanding of the citizenship clause, and does it matter if fidelity is lacking? What does the Framers’ adoption of a nearly universal *jus soli* rule suggest about post-Civil War conceptions of membership in the polity? Do those conceptions provide us with guidance in understanding today’s controversies surrounding the *jus soli* rule, namely whether children of unauthorized immigrants are covered? Given that the *jus soli* rule’s overriding original purpose—to overrule *Dred Scott*—is no longer a source of concern, might there be reasons to abandon or modify birthright citizenship?

Relatedly, the structure of Section 1 of the Fourteenth Amendment raises questions regarding the rights of aliens and the nature of membership. The second sentence of the Fourteenth Amendment was adopted before the citizenship clause, and two of its provisions—the equal protection clause and the due process clause—reference persons rather than citizens. What does the juxtaposition of these clauses with the privileges and immunities clause suggest about the Amendment’s application to aliens, or about the scope of each of its provisions? What conception of membership does the citizenship clause, coupled with the equal protection, due process, and privileges and immunities clauses, reflect?