District Court Maryland

Neuer Schriftsatz im Streit um die US-Staatsangehörigkeit stellt eine weitere Lesart der Wong Kim Ark-Entscheidung des US-*Supreme Court* in den Raum

I.

In dem Gerichtsverfahren vor dem *District Court* Maryland im Streit um das US-Staatsangehörigkeitsrecht hat das Gericht dem *Immigration Reform Law Institute* (IRLI) gestattet, einen sog. *Brief as Amicus Curiae* einzureichen. *„Amicus Curiae“* ist lateinisch und bedeutet wörtlich „Freund des Gerichts“; einen *Brief as Amicus Curiae* einzureichen, ist eine in den USA übliche und auch ausdrückliche geregelte Form, sich an Gerichtsverfahren anders denn als KlägerIn/AntragstellerIn bzw. BeklagteR/AntragsgegnerIn zu beteiligen. Auch die *Plaintiffs* des Verfahrens, die sich gegen Trumps *Executive Order* zum US-Staatsangehörigkeitsrecht wenden, hatten keine Einwendungen gegen die Zulassung des *Brief* erhoben.

Politisch ist das *Institute* allerdings umstritten. Die englisch-sprachige Wikipedia bescheinigt dem Institut mit der *Federation for American Immigration Reform* verbunden zu sein und über diese wiederum heißt es in dem fraglich Wikipedia-Artikel:

> „The **Federation for American Immigration Reform** (**FAIR**) is a nonprofit, anti-immigration organization in the United States. The group publishes position papers, organizes events, and runs campaigns in order to advocate for changes in U.S. immigration policy. The Southern Poverty Law Center classifies FAIR as a hate group with ties to white supremacist groups.“
> (https://en.wikipedia.org/w/index.php?title=Federation_for_American_Immigration_Reform&oldid=1272286458; Hyperlinks teilweise und Fußnoten in Gänze getilgt)

II.

Wie bereits in meinen bisherigen Artikeln (**1**, **2**, **3**, **4**) zum US-Staatsangehörigkeits-Streit erwähnt, ist die Wong Kim Ark-Entscheidung des US-*Supreme Court* aus dem Jahre 1898 die Entscheidung des Gerichtshof zum Staatsangehörigkeitsrecht, die als grundlegend angesehen wird.

1. Die *Plaintiffs* (Casa, Inc. und *Asylum Seeker Advocacy Project* sowie schwangere Mitglieder beider Organisationen) argumentieren in Bezug auf die Wong Kim Ark-Entscheidung unter anderem:

> „In Wong Kim Ark, the Supreme Court held that the Citizenship Clause’s qualification that the child must be ‚subject to the jurisdiction‘ of the United States was intended merely ‚to exclude, by the fewest and fittest words,‘ the existing common law exceptions to birthright citizenship for ‚children born of alien enemies in hostile occupation‘ and ‚children of diplomatic representatives of a foreign state.‘ Id. at 682. In keeping with

those common law exceptions, the Court further excluded from the reach of birthright citizenship children born aboard foreign ships in U.S. waters and children born to Indian tribes, given that those classes of people, under the law of that time, fell within the power of a separate sovereign. But the Court emphasized that the Amendment's qualifying language ‚was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption.' Id. at 676."
(https://storage.courtlistener.com/recap/gov.uscourts.mdd.574698/gov.uscourts.mdd.574698.2.1_1.pdf, S. 9 bzw. 11)

2. a) Die Trump-Regierung antwortete darauf am Freitag:

„No doubt some statements in Wong Kim Ark could be read to support Plaintiffs' position. Wong Kim Ark never purported to overrule any part of Elk [= eine vorhergehende *Supreme Court*-Entscheidung], however, and the Supreme Court has previously (and repeatedly) recognized Wong Kim Ark's limited scope. In one case, the Court stated that:

> [t]he ruling in [Wong Kim Ark] was to this effect: ‚A child born in the United States, of parents . . . who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, becomes at the time of his birth a citizen.'

Chin Bak Kan v. United States, 186 U.S. 193, 200 (1902) (emphasis added; citation omitted). In another, the Court cited Wong Kim Ark for the proposition that a person is a U.S. citizen by birth if ‚he was born to [foreign subjects] when they were permanently domiciled in the United States.' Kwock Jan Fat v. White, 253 U.S. 454, 457 (1920) (citation omitted)."
(https://storage.courtlistener.com/recap/gov.uscourts.mdd.574698/gov.uscourts.mdd.574698.40.0.pdf, S. 23 f. der gedruckten bzw. S. 25 f. der digitalen Seitenzählung)

b) Schon zuvor argumentierte die Trump-Regierung – in Antwort auf einen Schriftsatz der Bundesstaaten Washington, Oregon, Arizona und Illinois – in dem Washingtoner Parallel-Verfahren, in dem der IRLI-*Brief* jetzt auch zugelassen wurde:

„Plaintiffs rely[1] on the Supreme Court's decision in United States v. Wong Kim Ark, 169 U.S. 649 (1898), but they overread that case. Wong Kim Ark involved a person who was born in the United States to alien parents who, at the time of the child's birth, ‚enjoy[ed] a permanent domicile and residence' in the United States. Id. at 652. The Court explained that the ‚question presented' concerned the citizenship of ‚a child born in the United States' to alien parents who ‚have a permanent domicile and residence in the United States.' Id. at 653. Answering that question, the Court held that ‚a child born in the United States' to alien parents who ‚have a permanent domicile and residence in

1 Im Antrag der Bundesstaaten hieß es: „This understanding of the Citizenship Clause is cemented by controlling U.S. Supreme Court precedent which, more than 125 years ago, confirmed that the Fourteenth Amendment guarantees citizenship to the children of immigrants born in the United States. United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898). As the Supreme Court explained: ‚*Every citizen or subject of another country*, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." Id. at 693 (emphasis added). […]. Consequently, the Court held that a child born in San Francisco to Chinese citizens was an American citizen by birthright. Id. at 704. In reaching this conclusion, the Court reasoned that the Fourteenth Amendment ‚affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here *born of resident aliens*.' Id. at 693 (emphasis added)." (https://storage.courtlistener.com/recap/gov.uscourts.wawd.343943/gov.uscourts.wawd.343943.10.0_1.pdf, S. 12 [der gedruckten Seitenzählung bzw. 18 [der digitalen Seitenzählung]; Hyperlink hinzugefügt)

> the United States‘ ‚becomes at the time of his birth a citizen of the United States.‘ Id. at 705. Despite some broadly worded dicta[2], the Court’s opinion thus leaves no serious doubt that its actual holding concerned only children of permanent residents. The EO is fully consistent with that holding. See, e.g., Citizenship EO § 2(c) (‚Nothing in this order shall be construed to affect the entitlement of other individuals, *including children of lawful permanent residents*, to obtain documentation of their United States citizenship.‘ (emphasis added)).“
> (http://blogs.taz.de/theorie-praxis/files/2025/01/gov.uscourts.wawd_.343943.36.0_1.pdf, S. 13 f.; Hyperlinks hinzugefügt)

3. Das IRLI vertritt nun in seinem *Brief as Amicus Curiae* eine noch restriktivere Lesart der Wong Kim Ark-Entscheidung:

> „At issue in Wong Kim Ark was whether a son born to Chinese subjects while they were lawfully residing in the United States was a citizen at birth by virtue of the Citizenship Clause. The Court found that he was, explaining:
>
> > The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in Calvin’s Case, 7 Rep. 6a, ‚strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;‘ and his child, as said by Mr. Binney in his essay before quoted, ‚if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle.‘ It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides – seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on Thrasher’s Case in 1851, and since repeated by this court, ‚independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations.‘ Ex. Doc. H.R. No. 10, 1st sess. 32d Congress, p. 4; 6 Webster’s Works, 526; United States v. Carlisle, 16 Wall. 147, 155; Calvin’s Case, 7 Rep. 6a; Ellesmere on Postnati, 63; 1 Hale P.C. 62; 4 Bl. Com. 74, 92.
>
> United States v. Wong Kim Ark, 169 U.S. 649, 693-94 (1898) (emphasis added). The Court then added an important proviso, in which it conformed its reasoning to an earlier case:
>
> > Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are ‚subject to the jurisdiction thereof,‘ in the same sense as all other aliens [lawfully] residing in the United States.

2 Lat. *obiter dicta* (Plural; obiter dictum [Singular]) = nebenbei Gesagtes; Äußerungen eines Gerichts in einer Entscheidung, die über die Beantwortung der Frage, die es zu entscheiden hat, hinausgeht. Vgl. https://www.law.cornell.edu/wex/obiter_dicta und https://jurawelt.com/rechtslexikon/o/obiter-dictum-vs-ratio-decidendi-bedeutung/.

Id. at 694 (emphasis added) (citing, inter alia, Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893)). See, e.g., The Concise Oxford Dictionary of Current English 825 (7th ed. 1919) (defining ‚so long as' as ‚with the proviso, on the condition, that').

The phrase ‚subject to the jurisdiction thereof,' then, as used in the Citizenship Clause, refers not merely to being subject to the laws of the United States. Rather, it connotes being subject to the nation's political jurisdiction, and ‚owing it direct and immediate allegiance.' Wong Kim Ark, 169 U.S. at 680 (citing Elk v. Wilkins 112 U.S. 94, 101-102 (1884)). As the Court earlier had held, in a passage cited in the above holding of Wong Kim Ark:

> Chinese laborers, [] like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person of property, and to their civil and criminal responsibility.

Fong Yue Ting, 149 U.S. at 724 (emphasis added).

‚Reside' is defined in the 1890 edition of Webster's Dictionary as ‚to dwell permanently or for a considerable time; to have a settled abode for a time; to abide continuously; to have one's domicile or home.' Webster's International Dictionary of the English Language (Noah Porter ed., G. & C. Merriam Co. (1890). Black's Law Dictionary (1891) defines ‚permission' as ‚[a] license to do a thing; leave to do something which otherwise a person would not have the right to do.' Thus, as used in Wong Kim Ark, the phrase ‚permitted to reside' applied to Chinese nationals, and also aliens of nationalities other than Chinese, who resided here without being prohibited from doing so.

Not to regard the Court as holding permission to reside in the country to be a prerequisite for being subject to the jurisdiction of the United States for Citizenship Clause purposes would be to truncate the reasoning the Court gave for its judgment, ignore the precedents it cited, and make nonsense of its opinion. For example, the Court would then have left open the possibility (which it explicitly foreclosed, and had earlier foreclosed, Fong Yue Ting, 149 U.S. at 724) that those residing in the country while being prohibited from doing so were within the allegiance and protection of the United States, and thus subject to its jurisdiction. Indeed, an illegal alien, subject to apprehension, detention, and removal at all times, is hardly within the ‚protection' of the United States, as the phrase ‚allegiance and protection' has always been understood. See, e.g., Minor v. Happersett, 88 U.S. 162, 165-66 (1874) (‚The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.') (emphasis added).

The Court's proviso requiring lawfully permitted residence is clearly part of its holding, not dicta, under the principle that the Supreme Court may set forth a standard as part of its holding in a case even when the Court finds that the standard has been met in that case. See, e.g., Jackson v. Virginia, 443 U.S. 307 (1979) (holding that a federal court hearing habeas corpus must consider whether there was legally sufficient evidence to support a conviction, not just whether there was some evidence, and finding that the prosecution had met the former, higher standard).

Likewise, Wong Kim Ark did not leave open the question of whether persons born in this country to persons who did not lawfully reside in the country were birthright citizens, merely because Wong Kim Ark's parents lawfully resided here. Rather, the standard it announced and applied, which implies that those born in this country to illegal aliens, tourists, and others who do not lawfully reside here are not birthright citizens, was and is part of the Court's holding, even though the Court found that Wong Kim Ark met that standard. (Wong Kim Ark's parents lawfully resided in the United States from 1873 until their return to China in 1890. 169 U.S. at 652-53.) Any view of "holding" that is more restrictive, at least if applied to the Supreme Court, would rob the Court of its

> ability to set forth general principles of law to guide lower courts in any case where the general principle it discerned happened to be met.
> It is true that the Court in Wong Kim Ark stated (in dicta) that ‚jurisdiction' had a unitary meaning in the Fourteenth Amendment. 169 U.S. at 687. It is also true that ‚jurisdiction' for purposes of the Equal Protection Clause was later held to be merely geographical. Plyler v. Doe, 457 U.S. 202, 215 (1982). But it cannot be concluded that the Plyler holding alters Wong Kim Ark's holding that an alien, to be subject to the jurisdiction of the United States under the Citizenship Clause, must be permitted to reside in the country. A fortiori, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (‚If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.').
> It follows, then, that the EO has innumerable valid applications, including to children born to illegal aliens, tourists, and others who do not lawfully reside in the United States. Therefore, Plaintiffs' facial challenge must fail. United States v. Salerno, 481 U.S. 739, 745 (1987) (‚A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'); see also AFSCME Council 79 v. Scott, 717 F.3d 851, 857-858 (11th Cir. 2013) (applying the rule of Salerno to a facial challenge to an executive order)."
> (https://storage.courtlistener.com/recap/gov.uscourts.mdd.574698/gov.uscourts.mdd.574698.43.1.pdf, S. 3 unten bzw. 6 unten bis S. 7 unten bzw. 10 unten)

III.

Wir haben jetzt also drei Lesarten der Wong Kim Ark-Entscheidung:

- Die *Plaintiffs* sind der Ansicht der *Supreme Court* habe in seiner Wong Kim Ark-Entscheidung *nur* vier Ausnahmen vom Grundsatz der Staatsangehörigkeit durch Geburt auf US-Boden anerkannt – (1.) „children born of alien enemies in hostile occupation"; (2.) „children of diplomatic representatives of a foreign state"; (3.) children born aboard foreign ships in U.S. waters" and (4.) „children born to Indian tribes" – und folglich seien Kinder von AusländerInnen ohne rechtmäßigem Aufenthalt in den USA nicht ausgeschlossen.
- Die Trump-Regierung sagt, ja so höre sich die Entscheidung schon an; aber der *Supreme Court* hatte damals nur über einen Ausländer (Wong Kim Ark), dessen Eltern sich zum Zeitpunkt dessen Geburt rechtmäßig aufhielten, zu entscheiden – und alles andere sei dem *Supreme Court* nur so rausgerutscht, während er vorher das Kriterium des rechtmäßigen Aufenthalts anerkannt habe: „right on the heels of the Citizenship Clause, the Supreme Court described its scope as such: ‚The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, *and citizens or subjects of foreign States* born within the United States.' The Slaughterhouse Cases, 83 U.S. 36, 73 (1873) (emphasis added)."[3]
- Und nun kommt das IRLI und sagte: ‚Nee, nee – auch in der Wong Kim Ark-Entscheidung steht, daß es auf den rechtmäßigen Aufenthalt der Eltern ankommt.'

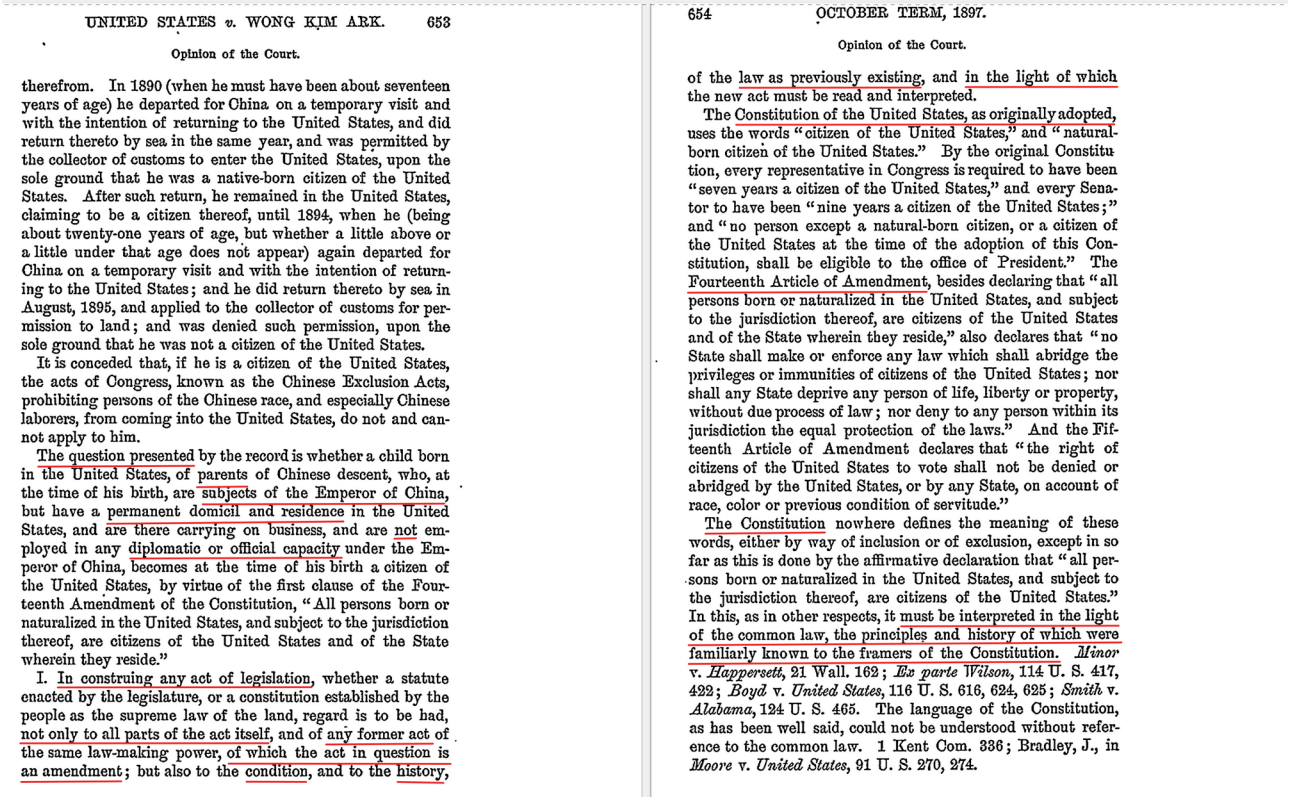
3 https://storage.courtlistener.com/recap/gov.uscourts.mdd.574698/gov.uscourts.mdd.574698.40.0.pdf, S. 17 unten bzw. 19 unten / S. 18 oben bzw. 20 oben.

IV.

Sehen wir uns daher nun an, was in der Wong Kim Ark-Entscheidung wirklich steht – ich hatte sie bereits in meinem ersten Artikel zum US-Staatsangehörigkeits-Streit verlinkt: https://tile.loc.gov/storage-services/service/ll/usrep/usrep169/usrep169649/usrep169649.pdf.

Das sind insgesamt 84 Seiten – ab S. 705 der gedruckten bzw. S. 57 der digitalen Seitenzählung ein abweichendes Votum der Richter Fuller und Harlan.

Auf S. 653 bzw. 5 expliziert das Gericht die Frage, die es meint, beantworten zu müssen und dann beschreibt es die Methode, mit der es meint die Antwort finden zu müssen.



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therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "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."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history,

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of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every Senator to have been "nine years a citizen of the United States;" and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." The Fourteenth Article of Amendment, besides declaring 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," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274.

Auf S. 655 bzw. 7 wird das britische *common law* wie folgt beschrieben:

> „The fundamental principle of the common law with regard to English nationality was birth ‚within the allegiance, faith' or ‚power,' of also called ‚ligealty,' ‚obedience,' the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual – as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem* – and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King."

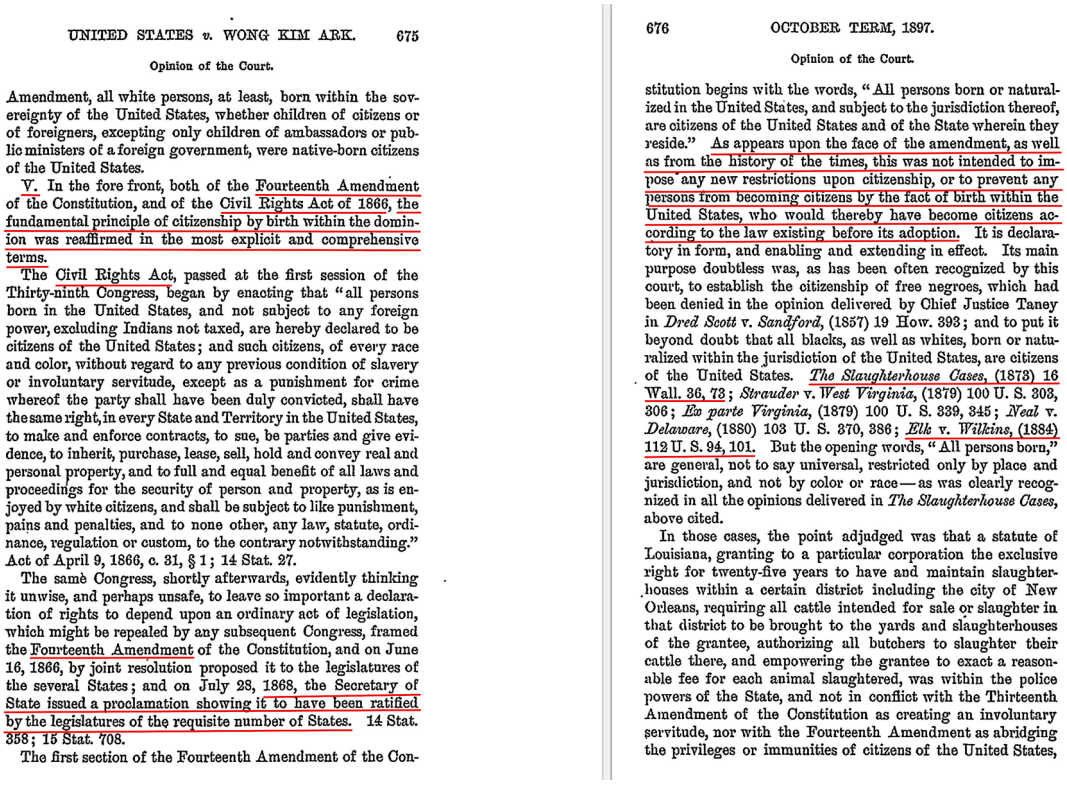
Auf S. 658 bzw. 10 heißt es dann im Übergang von Abschnitt II. zu III.:

> „It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction, of the English Sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.
> III. The same rule was in force in all the English Colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.“

Auf der folgenden Seite wird sodann folgende Auffassung zum Begriff *„allegiance“*, der nicht (ausdrücklich) im 14. Verfassungszusatz steht, aber in der Argumentation der Trump-Regierung eine große Rolle spielt, referiert:

> „Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto*.“

Ab S. 675 bzw. S. 27 geht es dann direkt um den 14. Verfassungszusatz:



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Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.

V. In the fore front, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The Civil Rights Act, passed at the first session of the Thirty-ninth Congress, began by enacting that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." Act of April 9, 1866, c. 31, § 1; 14 Stat. 27.

The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution, and on June 16, 1866, by joint resolution proposed it to the legislatures of the several States; and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the legislatures of the requisite number of States. 14 Stat. 358; 15 Stat. 708.

The first section of the Fourteenth Amendment of the Con-

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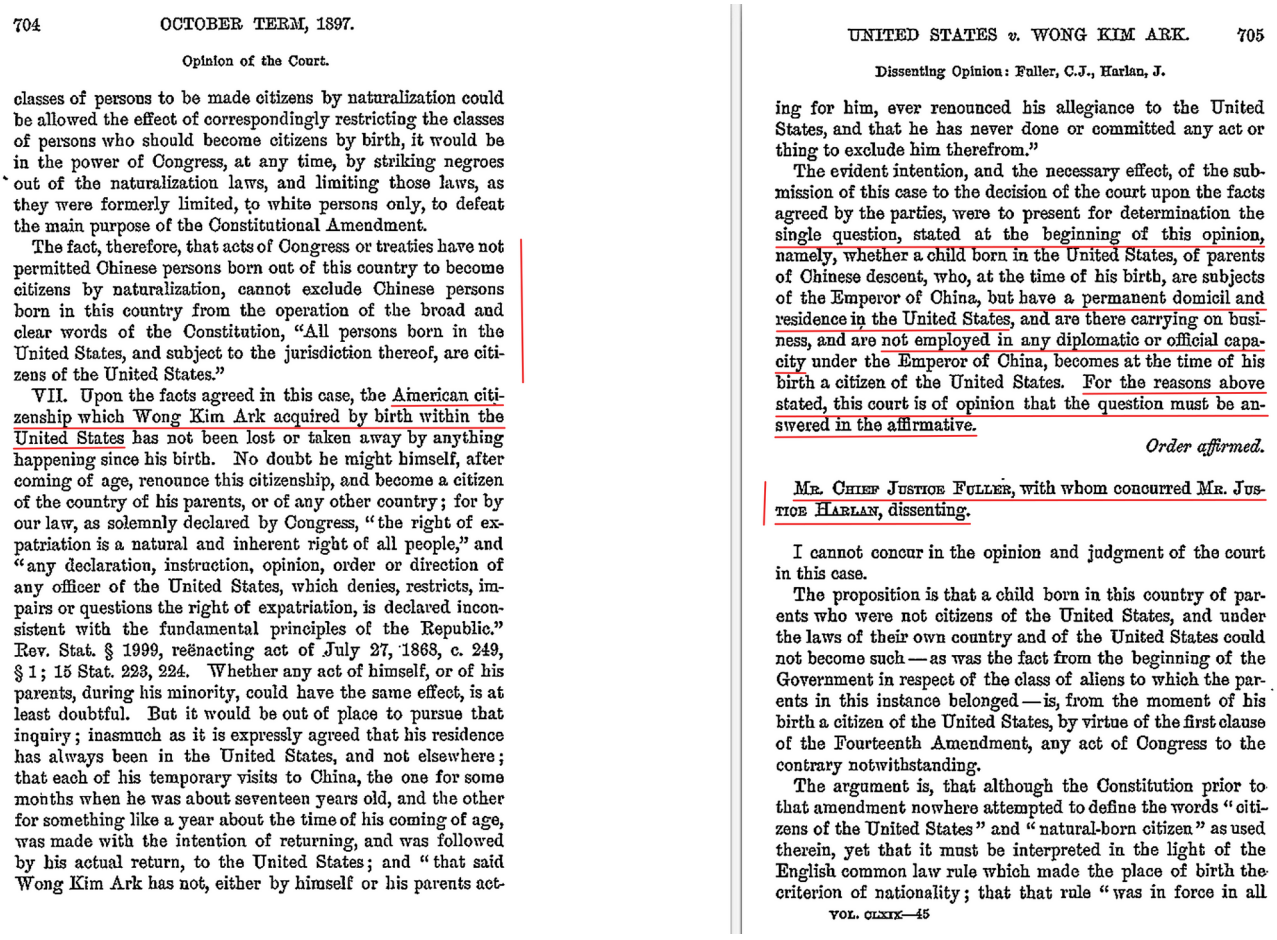
stitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott* v. *Sandford*, (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. *The Slaughterhouse Cases*, (1873) 16 Wall. 36, 73; *Strauder* v. *West Virginia*, (1879) 100 U. S. 303, 306; *Ex parte Virginia*, (1879) 100 U. S. 339, 345; *Neal* v. *Delaware*, (1880) 103 U. S. 370, 386; *Elk* v. *Wilkins*, (1884) 112 U. S. 94, 101. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race — as was clearly recognized in all the opinions delivered in *The Slaughterhouse Cases*, above cited.

In those cases, the point adjudged was that a statute of Louisiana, granting to a particular corporation the exclusive right for twenty-five years to have and maintain slaughterhouses within a certain district including the city of New Orleans, requiring all cattle intended for sale or slaughter in that district to be brought to the yards and slaughterhouses of the grantee, authorizing all butchers to slaughter their cattle there, and empowering the grantee to exact a reasonable fee for each animal slaughtered, was within the police powers of the State, and not in conflict with the Thirteenth Amendment of the Constitution as creating an involuntary servitude, nor with the Fourteenth Amendment as abridging the privileges or immunities of citizens of the United States,

Der auf S. 675 bzw. S. 27 beginnende Abschnitt V. und der folgende Abschnitt VI. gehen bis S. 704 bzw. 56 und Abschnitt VII. hat dann nur noch zwei Absätze:



704 OCTOBER TERM, 1897.

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classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the Constitutional Amendment.

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Rev. Stat. § 1999, reënacting act of July 27, 1868, c. 249, § 1; 15 Stat. 223, 224. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about seventeen years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents act-

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Dissenting Opinion: Fuller, C.J., Harlan, J.

ing for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, dissenting.

I cannot concur in the opinion and judgment of the court in this case.

The proposition is that a child born in this country of parents who were not citizens of the United States, and under the laws of their own country and of the United States could not become such — as was the fact from the beginning of the Government in respect of the class of aliens to which the parents in this instance belonged — is, from the moment of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment, any act of Congress to the contrary notwithstanding.

The argument is, that although the Constitution prior to that amendment nowhere attempted to define the words "citizens of the United States" and "natural-born citizen" as used therein, yet that it must be interpreted in the light of the English common law rule which made the place of birth the criterion of nationality; that that rule "was in force in all

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Die vorstehenden Zitate und Unterstreichungen beanspruchen selbstverständlich nicht, eine Referat oder gar eine Analyse der Entscheidung zu sein oder gar für eine der drei eingangs referierten Lesarten Partei zu ergreifen, sondern soll nur einen groben Überblick der Entscheidung geben und dessen Lektüre erleichtern. (Ich selbst habe sie auch nicht vollständig gelesen.) Eine Analyse der Mehrheitsentscheidung würde auch das abweichende Votum von Fuller und Harlan einzubeziehen haben, da aufschlußreich sein kann, *wovon* sie sich abgrenzen.

V.

Wie auch immer die Wong Kim Ark-Entscheidung zu verstehen sein mag, jedenfalls hat der US-*Supreme Court* später entschieden:

> „Use of the phrase ‚within its jurisdiction'[4] thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to

4 Dieser Formulierung stammt allerdings *nicht* aus der Staatsangehörigkeits-Klausel (Absatz 1 Satz 1 des 14. Verfassungszusatzes; dort heißt es vielmehr: „subject to the jurisdiction thereof"), sondern aus dem dortigen Satz 2, wo es heißt: „No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person **within its jurisdiction** the equal protection of the laws." (https://www.govinfo.gov/content/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf, S. 16 [gedruckte Seitenzählung] bzw. 22 [digitale Seitenzählung]; Hv. hinzugefügt)

> anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. **That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws.** And until he leaves the **jurisdiction** – either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States – he is entitled to the equal protection of the laws that a State may choose to establish."
> (Plyler v. Doe, 457 U.S. 202, 215[5] [1982]; Hv. hinzugefügt)

> „Respondents, a married couple, are natives and citizens of Mexico. Respondent husband illegally entered the United States in 1972. Apprehended, he returned to Mexico in early 1974 under threat of deportation. Two months later, he and respondent wife paid a professional smuggler $ 450 to transport them into this country, entering the United States without inspection through the smuggler's efforts. Respondent husband was again apprehended by INS agents in 1978. At his request, he was granted permission to return voluntarily to Mexico in lieu of deportation. He was also granted two subsequent extensions of time to depart, but he ultimately declined to leave as promised. INS then instituted deportation proceedings against both respondents. By that time, respondent wife had given birth to a **child, who, born in the United States, was a citizen of this country.**"
> (INS v. Rios-Pineda, 471 U.S. 444, 446[6] [1985]; Hv. hinzugefügt)

Das Kind erlangte also die US-Staatsangehörigkeit, *obwohl* seine Eltern illegal eingereist waren.

Sodann noch eine Entscheidung aus dem Jahr 2004:

> „This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. […]. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia; where he remained until a recent transfer to a brig in Charleston, South Carolina."
> (Hamdi et al v. Rumsfeld, Secretary of Defense, et al., 542 U.S. 507, [7] [2004])

Laut John Eastman (siehe zu diesem meinen Artikel vom 30.01.2025, S. 7 f., FN 10) war Hamdis Mutter, als Nadia Hussen Fattah in Taif (Saudi Arabien) geboren worden und Hamdis Vater „a native of Mecca, Saudi Arabia, and still a Saudi citizen, […] residing at the time [von Hamdis Geburt] in Baton Rouge [= die Hauptstadt von Louisiana] on a temporary visa to work as a chemical engineer on a project for Exxon."[8]

Beide Elternteile waren also anscheinend nicht US-StaatsbürgerInnen und nur vorübergehend rechtmäßig (*„temporary visa"*) in den USA und gingen mit ihrem Sohn alsbald nach

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5 https://tile.loc.gov/storage-services/service/ll/usrep/usrep457/usrep457202/usrep457202.pdf, S. 14 der Datei.
6 https://tile.loc.gov/storage-services/service/ll/usrep/usrep471/usrep471444/usrep471444.pdf, S. 3 der Datei.
7 https://tile.loc.gov/storage-services/service/ll/usrep/usrep542/usrep542507/usrep542507.pdf, S. 4 der Datei.
8 https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2741&context=lawreview, S. 955 f. bzw. 2 f.

der Geburt (*„as a child“*) zurück nach Saudi-Arabien zurück. Dennoch war jedenfalls für die *Supreme Court*-Mehrheit von 2004 klar, daß Hamdi US-Staatsbürger war.

VI.

Wie dem auch sei – der *Supreme Court* ist nicht gehindert, seine Rechtsprechung zu ändern, woran als solches nichts zu bestanden ist – auch wenn es *keine Garantie* gibt, daß neuere Rechtsprechung auch zutreffendere Rechtsprechung ist.