Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over Bush v. Gore?

John C. Eastman
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*Bush v. Gore*?

JOHN C. EASTMAN*

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**I. INTRODUCTION**

The premise of the “hot topics” panel*1 at which this series of Articles was first presented was that the Rehnquist Court had, in 2004, retreated from its bolder conservatism, asserting itself on the side of individual liberty against a federal government that had grown increasingly cavalier toward civil liberties during three years of a war on terror and two decades of a renewed war on crime. Proof of the premise was said to be found in a pair of Sixth Amendment cases, *Crawford v. Washington*2 and *Blakely v. Washington*,3 and also in the trilogy of terrorism cases, *Rumsfeld v. Padilla*,4 *Hamdi v. Rumsfeld*,5 and *Rasul v. Bush*.6 Professor Erwin Chemerinsky argued that these cases collectively

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* Henry Salvatori Professor of Law & Community Service, Chapman University School of Law, and Director, The Claremont Institute Center for Constitutional Jurisprudence. © 2006, John C. Eastman. Professor Eastman filed an amicus curiae brief in the Supreme Court on behalf of The Claremont Institute Center for Constitutional Jurisprudence in *Hamdi v. Rumsfeld*, a case discussed in this Article.

represented a repudiation of the Rehnquist Court’s conservative activism phase and a return to the more moderate, deferential jurisprudence of the early years of the Rehnquist Court. Professor David Cole went even further, contending that the Court’s new outlook in defense of liberty was designed to rehabilitate the Court after its “lawless” decision in Bush v. Gore.

With all due respect to Professor Joseph Kennedy, who organized and moderated a terrific panel, the premise of the panel was flawed, based on a stereotypical yet false view of the Rehnquist Court. The legacy of the Rehnquist Court—and by that I mean the five-Justice voting block most frequently voting together in the landmark cases that define the legacy: Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas—was never about preferring “law and order” outcomes over civil liberties outcomes or about siding with the government at the expense of individual criminal defendants. Rather, the Court’s legacy—and it was only modestly and rather inconsistently successful—was the revival of an originalist constitutionalism that took seriously the limits on governmental power actually detailed in the text of the Constitution itself, while also preserving the textual commitment to separation of powers and federalism. With this legacy in mind, I argue below in Part II of this Article that the Sixth Amendment cases—or more precisely, the position in those cases of Justices Scalia and Thomas, the Court’s two most devoted originalists—are perfectly consistent with the Rehnquist Court’s broader devotion to principles of constitutionalism. In Part III, I take up the trilogy of terrorism cases and argue that, contrary to popular understanding, those cases actually reflect a proper deference to the Executive Branch in the exercise of its war-making powers. Finally, I take up in Part IV what I consider to be one of the most interesting aspects of this group of cases: Justice Scalia’s apparent invitation in the Hamdi case to revisit the current understanding of birthright citizenship, which has long ignored a crucial component of the Constitution’s text.

II. SIXTH AMENDMENT CASES

The Rehnquist Court has frequently been characterized as a “law and order” Court, accused of rolling back the clock on the constitutional protections afforded to criminal defendants by the Warren Court in favor of greater deference to government. Seen in this light, the decisions in Crawford and Blakely,

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which sided with criminal defendants rather than prosecutors, can be viewed as a repudiation of the Rehnquist Court’s legacy. But I believe this view of the Rehnquist Court’s legacy is far too simplistic. The principled objection to the activism of the Warren Court was not that it favored criminal defendants over prosecutors, but that it did so without textual support in the Constitution, thereby substituting its judgment for that of the people. Seen in this more nuanced, but I believe more accurate, light, Crawford and Blakely simply cannot be considered uncharacteristic decisions by those who understood the true, constitutionalist legacy of the Rehnquist Court. Both cases represent a fairly faithful adherence to the Constitution’s text. It should therefore come as no surprise that the Court’s two staunchest devotees to the constitutional revival enterprise—Justice Scalia with his devotion to constitutional textualism and Justice Thomas with his nearly parallel devotion to constitutional principle—were in the majority, following the path commanded by the actual text of the Constitution rather than ruling in favor of some supposed “law and order”/anti-criminal-defendant predisposition. If there is a surprise in the line-up of this case on the “embarrassment” theory propounded by Professor David Cole, it is that Justices Scalia and Thomas were joined not by Chief Justice Rehnquist and Justices O’Connor and Kennedy, but by Justices Stevens, Souter, and Ginsburg, who are not known for their devotion to the originalism enterprise.10 If these cases were outcome-driven by Justices embarrassed by the decision in Bush v. Gore or the supposed overreaches of the Bush Administration’s war on terror, one would have expected to see Justices O’Connor and Kennedy in the majority rather than in dissent. Justices Scalia and Thomas, who were in the majority, have a reputation of priding themselves for not being swayed by such extrajudicial concerns. Thus, something else must have been driving their decision—perhaps even the text of the Constitution itself.

This textualist aspect of the case is most evident when one considers the different methodologies utilized in the Blakely case by Justice Scalia, on the one hand, and Justices O’Connor, Kennedy, and Breyer in separate dissents, on the other. Justice Scalia, as expected, began with the text of the Constitution: “In all

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10. It might be argued that the Chief Justice was in dissent because he had a greater predisposition to pro-prosecutorial outcomes than the other members of his coalition. I think it more likely that he, like Justices O’Connor and Kennedy, were simply less willing to challenge existing precedent than Justices Scalia and Thomas were, or that they accepted the counter-originalist argument that extraneous facts were customarily taken into account at sentencing, even facts not proved to a jury. In either case, the fact that they were in dissent strongly disproves the organizing principle of the Hot Topics Panel, that the Rehnquist Court moved left out of some supposed embarrassment over Bush v. Gore.
criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ”11 He then provided a careful analysis of what that text required, namely, that it was unconstitutional to sentence a criminal defendant based on facts never proved to a jury, drawing the necessary conclusion as certainly as if he were developing a Euclidean proof.

This methodology, which one would think is the essence of judging in a system governed by a written Constitution, is in stark contrast to the methodology employed by the dissenting Justices. Justice O’Connor (joined by Chief Justice Rehnquist and Justices Kennedy and Breyer) devoted less than a single paragraph to any discussion of constitutional or statutory text, favoring instead “a balanced case-by-case approach that takes into consideration the values underlying the Bill of Rights”12 (as distinguished, apparently, from the actual language of the Bill of Rights). Justice Kennedy (joined by Justice Breyer) announced his belief that “the fundamental principle under our constitutional system” was for the courts to “converse” with the political branches of government “on matters of vital common interest,”13 not to insure that the political branches remain within the limits of their power as specified in the Constitution. Justice Breyer waxed eloquently for page after page addressing whether the Court’s opinion was going to be helpful or harmful to criminal defendants, as though that were somehow an appropriate ground for judicial decisionmaking. Like Justice O’Connor, he devoted but a single paragraph to a legal (as opposed to a policy) argument, and even his brief legal analysis ultimately gave way to what he considered to be “the Constitution’s greater fairness goals,”14 defined, apparently, as he sees fit. He was troubled by Justice Scalia’s analysis not because he thought Justice Scalia got it wrong, but because adhering to the Constitution’s text would result in a “virtually unchangeable constitutional decision.”15 This is a truly profound repudiation of constitutionalism and of the role of constitutional interpretation that the Constitution actually assigns to the courts. Indeed, the very point of a written constitution is that it binds government officials, including judicial officials, until appropriately amended.

The Blakely decision raises another important issue as well. The decision created a bit of an uproar over the cataclysmic shift16 in sentencing practices that the decision would cause, but this too should come as no surprise. Years of small, imperceptible shifts away from the Constitution’s text had actually generated a “constitutional” rule that was unrecognizable when set against the

11. U.S. Const. amend. VI.
13. Id. at 326 (Kennedy, J., dissenting) (emphasis added).
14. Id. at 345 (Breyer, J., dissenting).
15. Id. at 345–46.
text of the Constitution itself. For originalists like Scalia and Thomas, the challenge is how to handle such precedents that have strayed so far from the constitutional mark. One answer, in my view doomed to long-term failure, is to hold the line where it is (knowing that the next constitutionally unmoored court will simply move it further after a brief hiatus). Another is to reverse the process, moving imperceptibly back toward the Constitution’s text while recognizing that any minor shift back is going to be no more grounded in the Constitution than the “constitutional” rule it will initially replace. A third, and in my view the preferable, course is to follow the Constitution’s text as written. Prudence, particularly as encompassed by the reliance and other interests reflected in the doctrine of stare decisis, may well caution against such a move in some cases, but a review of the actual consequences of the Blakely decision suggests this third course was preferable in this instance.

The defendant in Blakely pleaded guilty to a charge of second-degree kidnapping involving domestic violence and use of a firearm, a crime that carried a statutory maximum sentence of fifty-three months in prison. Yet Blakely was sentenced to a term of ninety months in prison, based on the judge’s determination that Blakely had acted with deliberate cruelty, which permitted a sentence enhancement under the state’s statutory scheme despite the fact that deliberate cruelty had neither been admitted in the plea bargain nor found by any jury. Justice Scalia, writing for the Court, held that the facts giving rise to the sentence enhancement had to be admitted in the plea or proved beyond a reasonable doubt to a jury in order to comply with the commands of the Sixth Amendment’s right to a jury trial. As with the Court’s earlier decision in Apprendi v. New Jersey, the response to Blakely had a certain “sky-is-falling” aspect. According to many commentators, determinate sentencing schemes were now all unconstitutional. Many contended that the Court tried to overturn too much in the way of sentencing precedent all at once, with predictably chaotic consequences and a return to the radically differential (and arguably racially discriminatory) practices that had marked the era of subjective sentencing before sentencing guidelines schemes were developed.

Under Blakely’s actual holding, however, determinate sentencing is clearly still permissible. Any particular sentence simply must be based on findings of fact made by a jury rather than by a judge. That seems a small price to pay for reviving such a fundamental right as the right to trial by jury that is actually codified in the Constitution, particularly when measured against abuses that

19. See id. at 301.
permitted a prosecutor to prove to a jury a relatively minor crime and then obtain a much more onerous sentence based on crimes never proved to a jury, but only described to a judge.22

A similar story played out with the Crawford decision, which addressed the Sixth Amendment’s Confrontation Clause. Justice Scalia, again writing for the majority, began with the Constitution’s textual requirement that a criminal defendant has a right to “be confronted with the witnesses against him.”23 He then reviewed the text’s historical meaning, drawing the conclusion that was compelled by the logic of the text in historical context—that out-of-court testimonial statements by witnesses may not be introduced at trial unless the witness is unavailable and the defendant had a prior opportunity to cross examine the witness.24 He was willing to admit “only those exceptions [to this confrontation requirement] established at the time of the founding.”25 Because “the common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine,”26 the out-of-court statements at issue in the case were not permitted (and the Supreme Court’s 1980 decision in Ohio v. Roberts27 to the contrary was overruled).

The conclusion may not be in accord with the supposed conservative outcome, but Justice Scalia followed the text of the Constitution where it led him, as has been his custom. “Categorical constitutional guarantees” were not going to be replaced by “open-ended balancing tests” on his watch.28 “[S]imply reweighing the ‘reliability factors’” from the Roberts test was not sufficient to restore the Constitution’s “intended constraint on judicial discretion,”29 wrote Justice Scalia. And in a bow to the right-to-jury-trial decision in Blakely, Justice Scalia noted that “[t]he Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.”30 In other words, Roberts, like pre-Blakely and pre-Apprendi sentencing guidelines practices, permitted critical determinations in the criminal prosecution to be made by judges rather than juries, both in violation of the Sixth Amendment.

There were no dissenters in the case, but Chief Justice Rehnquist, joined by Justice O’Connor, wrote a separate opinion concurring only in the judgment, disagreeing with Justice Scalia’s overruling of Roberts, his methodological

22. Stories of abuse are particularly widespread in the drug prosecution arena, where convictions for possession of small amounts of a controlled substance were followed up with much longer sentences based on quantities of drugs found only by a judge, on a preponderance of the evidence standard, rather than by a jury under a “beyond a reasonable doubt” standard. See, e.g., Thomas W. Hutchinson et al., Federal Sentencing and Practice, § 2D1.1 author’s note, at 12(b) n.322 (2005) (citing such cases).
24. See id. at 43–50.
25. Id. at 54.
26. Id.
27. 448 U.S. 56 (1980).
29. Id. at 67.
30. Id. at 62.
adherence to an originalist interpretation of the Constitution’s text rather than the more evolutionary notion reflected in Roberts, and his preference for categorical rules rather than discretionary balancing tests. Just as Justice O’Connor in Blakely looked to what she believed to be the “values” underlying the Bill of Rights rather than the Bill of Rights itself, Chief Justice Rehnquist in Crawford looked to the “mission” underlying the Confrontation Clause rather than the textual requirements of the Clause itself as understood by those who ratified it: “There were always exceptions to the general rule of exclusion,” wrote the Chief Justice, “and it is not clear to me that the Framers categorically wanted to eliminate further ones.” In other words, Chief Justice Rehnquist joined the ranks of those who believe in a living, evolving Constitution, while the Court’s “living constitutionalists”—Justices Stevens, Souter, Ginsburg, and Breyer—seem to have signed on to the originalism enterprise advanced by Justices Scalia and Thomas, in cases such as Crawford where they liked the conclusion that methodology compelled. These are some strange bedfellows, to be sure, but one thing is clear: the line-up does not support the conclusion that these cases reflect a Rehnquist Court concerned about the supposed illegitimacy of Bush v. Gore, or one troubled by the Bush Administration’s wars on terror and crime. If anything, these cases simply solidify the reputations of Justices Scalia and Thomas as interpreters of the law as they see it, wherever it leads.

III. The Terrorism Trilogy

The trilogy of terrorism cases decided by the Court in 2004 also fails to support the claim that the Rehnquist Court was backing away from its constitutionalism legacy, either out of fear of the Bush Administration’s war-on-terror initiatives or due to some perceived need to rehabilitate itself after Bush v. Gore. Indeed, the cases actually demonstrate just the opposite.

The Hamdi case is perhaps most instructive. Of the many challenges to the Bush Administration’s policy of detaining enemy combatants pursuant to its war powers rather than its prosecutorial powers (and therefore outside the criminal process review of Article III courts), all but one were rejected by the Court, and the only challenge that was permitted was sufficiently weakened so as not to amount to much of a challenge at all. This, of course, is decidedly at odds with the standard view that Hamdi amounted to a repudiation of the Bush Administration’s policies.

Challenge number one in Hamdi was the contention that Congress had not given authority to the President to detain enemy combatants. Justice O’Connor, writing for a plurality consisting of Chief Justice Rehnquist and Justices Kennedy and Breyer, held that the Authorization for Use of Military Force resolution, adopted by Congress shortly after the terrorist attacks of September 11, 2001,

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31. See id. at 69, 71–72 (Rehnquist, C.J., concurring in the judgment).
32. See id. at 73–74.
33. Id. at 73.
was more than sufficient authority for the President to detain enemy combatants.\footnote{See Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion).} “The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incidents of war,’” noted Justice O’Connor.\footnote{Id. (quoting Ex parte Quirin, 317 U.S. 1, 28 (1942)).} Justice Thomas went even further than the plurality to hold that even without the use of force authorization, Article II itself provides the President with the necessary authority to detain enemy combatants without interference from Article III courts.\footnote{See id. at 582–83 (Thomas, J., dissenting).}

A second challenge was that the President’s authority did not include the detention of American citizens whom the President had designated as enemy combatants.\footnote{I take up below whether the classification of Hamdi as a U.S. citizen is even correct. See infra Part IV.} Here, too, the Court upheld the President’s authority. Justice O’Connor specifically stated that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant,” noting that one of the detainees in \textit{Ex parte Quirin} was a naturalized U.S. citizen.\footnote{Hamdi, 542 U.S. at 519 (plurality opinion) (citing Quirin, 317 U.S. at 20).}

A third challenge brought by Hamdi was the contention that \textit{Ex parte Quirin} only authorized detentions for the purpose of trial by military commission, not detentions alone. Here again, Justice O’Connor’s plurality opinion, combined with Justice Thomas’s broader view of Executive power, rejected that contention: “While [the detainee] was tried for violations of the law of war, nothing in \textit{Ex parte Quirin} suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.”\footnote{Id.; see also id. at 590 (Thomas, J., dissenting).}

A fourth challenge, grounded in the Supreme Court’s Civil War-era decision in \textit{Ex parte Milligan},\footnote{71 U.S. (4 Wall.) 2 (1866).} posited that the Executive could not detain citizens as combatants as long as the civilian courts, in which criminal prosecutions could be brought, were in operation. This proposition, too, was squarely rejected by Justice O’Connor: “The Court’s repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.”\footnote{Hamdi, 542 U.S. at 522 (plurality opinion).}

A fifth challenge was that the determination of Hamdi’s enemy combatant status violated the requirements of Due Process absent a slew of procedural protections akin to those afforded to citizens in ordinary criminal matters. Again, this contention was squarely rejected by Justice O’Connor (although she did impose some measure of procedural protection greater than the highly deferential version proposed by the government): “[T]he ‘additional or substi-
tute procedural safeguards´ suggested by the District Court are unwarranted in light of their limited ´probable value´ and the burdens they may impose on the military in such cases.´ 42 Instead, “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” 43

Yet even the imposition of these last requirements hardly amounts to a repudiation of the Bush Administration’s policies. Indeed, Justice O’Connor went out of her way to ratify the processes that had been employed with respect to “citizens” such as Hamdi (and therefore, necessarily, for noncitizens such as those in the Rasul case). “Enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict,” she wrote. 44 Hearsay evidence would be permissible, for example, as would “a [rebuttable] presumption in favor of the Government’s evidence.” 45 And even this minimal level of process is not required for initial battlefield captures, “only when the determination is made to continue” detentions once the combatant has been removed from the field of battle. 46

Finally, Justice O’Connor strongly suggested in her plurality opinion that judicial review of military detention determinations was not required. “There remains the possibility,” she wrote, “that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal”—tribunals for which military regulations already provided in most instances. 47 Only in the absence of such a tribunal must a court that receives a petition for a writ of habeas corpus ensure that the minimal requirements of due process articulated in the opinion are met. If that was all the process a “citizen” like Hamdi was to get, the noncitizen detainees seeking habeas relief in Rasul v. Bush are certainly entitled to nothing more. The Court’s holding in Rasul that non-citizen detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, were entitled to test their combatant designation and detention by seeking a writ of habeas corpus from an Article III court, 48 therefore, has to be read against this caveat from Hamdi—such habeas relief is available only if “an appropriately authorized and properly constituted military tribunal” is not available. As the habeas petitions of Rasul and other Guantanamo Bay detainees work their way back up through the courts after the Supreme Court’s remand, it will become clear in the final analysis that the Bush Administration had already provided, via appropriately constituted military tribunals, all the process that was required in order to keep enemy combatants detained and removed from the field of battle.

42. Id. at 533 (quoting Mathews v. Eldridge, 424 U.S. 319 (1976)).
43. Id.
44. Id.
45. Id. at 533–34.
46. Id. at 534.
47. Id. at 538.
IV. JUSTICE SCALIA’S CHALLENGE TO BIRTHRIGHT CITIZENSHIP

One final development from the *Hamdi* case is worthy of note, particularly in light of the renewed commitment to the Constitution’s text that I believe is the truly significant legacy of the Rehnquist Court. Justice Scalia, joined by Justice Stevens in dissent, refused to accede to Hamdi’s claim of citizenship, referring to him instead as a “presumed American citizen.”


Justice Scalia’s significant, albeit brief and somewhat oblique, challenge to the received wisdom of the meaning of the Fourteenth Amendment’s Citizenship Clause warrants our attention. As I argued in a brief filed on behalf of the Claremont Institute Center for Constitutional Jurisprudence in the case,

50. This portion of the Article is drawn from a paper initially presented at Chapman University School of Law in March 2003 at the Claremont Institute’s Symposium on American Citizenship in the Age of Multicultural Immigration, from the brief filed on behalf of the Claremont Institute’s Center for Constitutional Jurisprudence in the *Hamdi* case and from testimony subsequently provided to Congress at a hearing on “Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty” conducted by the House Judiciary Subcommittee on Immigration, Border Control, and Claims on September 29, 2005. The superb research assistance of Chapman law student Karen Lugo (Class of 2005) is gratefully acknowledged.

the received wisdom regarding the Citizenship Clause is incorrect as a matter of text, historical practice, and political theory. Originally, as discussed in subsection A below, mere birth on U.S. soil alone was insufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., not owing allegiance to another sovereign), was the constitutional mandate, a floor for citizenship below which Congress cannot go in the exercise of its Article I power over naturalization. While Congress remains free to offer citizenship to persons who have no constitutional entitlement to citizenship, it has not done so. Mere birth to foreign nationals who happen to be visiting the United States at the time, as in the case of Hamdi the Taliban, should not result in citizenship. Because court rulings to the contrary have rested on a flawed understanding of the Citizenship Clause, those rulings should be revisited or at least narrowly interpreted. Moreover, the statutory grant of citizenship conferred by Congress, which precisely tracks the language of the Fourteenth Amendment, should itself be reinterpreted in accord with the original understanding of the Citizenship Clause. In the wake of 9/11, now would be a good time to do so.

A. THE CITIZENSHIP CLAUSE OF THE FOURTEENTH AMENDMENT

To counteract the Supreme Court’s decision in *Dred Scott v. Sanford* denying citizenship not just to Dred Scott, a slave, but to all African-Americans, whether slave or free, Congress proposed and the states ratified the Citizenship Clause of the Fourteenth Amendment, which specifies: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

51. 60 U.S. (19 How.) 393 (1857).
citizens of the United States and of the State wherein they reside.”

It is today routinely believed that, under the Clause, mere birth on U.S. soil is sufficient to confer U.S. citizenship. Legal commentator Michael Dorf, for example, noted recently: “Yaser Esam Hamdi was born in Louisiana. Under Section One of the Fourteenth Amendment, he is therefore a citizen of the United States, even though he spent most of his life outside this country.” What Dorf’s formulation omits, of course, is the other component of the Citizenship Clause. One must also be “subject to the jurisdiction” of the United States in order to be entitled to citizenship as a constitutional right.

To the modern ear, Dorf’s formulation nevertheless sounds perfectly sensible. Any person entering the territory of the United States—even for a short visit or illegally—is considered to have subjected himself to the jurisdiction of the United States, which is to say, subjected himself to the laws of the United States. Indeed, former Attorney General William Barr has contended that even one who has never entered the territory of the United States subjects himself to its jurisdiction and laws by taking actions that have an effect in the United States. Surely one who is actually born in the United States is therefore “subject to the jurisdiction” of the United States and entitled to full citizenship as a result.

However strong this interpretation is as a matter of contemporary common parlance, it simply does not comport with either the text or the history surrounding adoption of the Citizenship Clause, nor with the political theory underlying the Clause. Textually, such an interpretation would render the “subject to the jurisdiction” clause almost entirely redundant because anyone who is “born” in the United States is necessarily subject to the laws of the United States at the time of his birth. It is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be interpreted to create redundancy unless any other interpretation would lead to absurd results.

Historically, the language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment (like the rest of Section One of the Fourteenth Amendment) was derived so as to provide a more certain constitutional foundation for the 1866 Act, strongly suggests that Congress did
not intend to provide for such a broad and absolute birthright citizenship. The 1866 Act provides: “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”56 As this formulation makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child’s parents, remained a citizen or subject of the parents’ home country, was not entitled to claim the birthright citizenship provided in the 1866 Act.

Of course, the jurisdiction clause of the Fourteenth Amendment is somewhat different from the jurisdiction clause of the 1866 Act. The positively phrased “subject to the jurisdiction” of the United States might easily have been intended to describe a broader grant of citizenship than the negatively phrased language from the 1866 Act—one more in line with the contemporary understanding accepted unquestioningly by Dorf that birth on U.S. soil is sufficient for citizenship. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading. For example, when pressed about whether Indians living on reservations would be covered by the clause since they were “most clearly subject to our jurisdiction, both civil and military,”57 Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that “subject to the jurisdiction” of the United States meant subject to its “complete” jurisdiction, “[n]ot owing allegiance to anybody else.”58 Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean “a full and complete jurisdiction . . . the same jurisdiction in extent and quality as applies to every citizen of the United States now” (i.e., under the 1866 Act).59 That meant that the children of Indians who still “belong[ed] to a tribe” and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the Clause.60 Because of this interpretative gloss provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin to explicitly exclude “Indians not taxed,” as the 1866 Act had done, was rejected as redundant.61

The interpretative gloss offered by Senators Trumbull and Howard was also accepted by the Supreme Court—by both the majority and the dissenting Justices—in the Slaughter-House Cases.62 The majority correctly noted that the

56. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphasis added).
59. Id. at 2895.
60. Id. at 2895.
61. Id. at 2897.
62. 83 U.S. (16 Wall.) 36 (1872).
“main purpose” of the Clause “was to establish the citizenship of the negro,” and that “[t]he phrase, ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.”\(^63\) Justice Steven Field, joined by Chief Justice Chase and Justices Swayne and Bradley in dissent from the principal holding of the case, likewise acknowledged that the Clause was designed to remove any doubts about the constitutionality of the 1866 Civil Rights Act, which provided that all persons born in the United States were citizens both of the United States and the state in which they resided, provided they were not at the time subjects of any foreign power.\(^64\)

Although the statement by the majority in *Slaughter-House* was dicta, the position regarding the “subject to the jurisdiction” language was subsequently adopted by the Supreme Court in the 1884 case addressing a claim of Indian citizenship, *Elk v. Wilkins*.\(^65\) The Supreme Court in that case rejected the claim of citizenship by an Indian who had been born on a reservation within the boundaries of the United States and later moved to nonreservation U.S. territory, renouncing his former tribal allegiance. The Court held that the claimant was not “subject to the jurisdiction” of the United States at birth, which required that he be “not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.”\(^66\) John Elk did not meet the jurisdictional test because, as a member of an Indian tribe at his birth, he “owed immediate allegiance to” his tribe and not to the United States.\(^67\) Although “Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; . . . they were alien nations, distinct political communities,” according to the Court.\(^68\) Drawing explicitly on the language of the 1866 Civil Rights Act, the Court continued:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more “born in the United States and subject to the jurisdiction thereof,” within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.\(^69\)

Indeed, if anything, as members of tribes that were dependent on the United

\(^{63}\) *Id.* at 73.

\(^{64}\) See *id.* at 93–94 (Field, J., dissenting).

\(^{65}\) 112 U.S. 94 (1884).

\(^{66}\) *Id.* at 102.

\(^{67}\) *Id.* at 99.

\(^{68}\) *Id.*

\(^{69}\) *Id.* at 102.
States (and hence themselves subject to its jurisdiction), Indians had a stronger claim to citizenship under the Fourteenth Amendment merely by virtue of their birth within the territorial jurisdiction of the United States than did children of foreign nationals. But the Court in Elk rejected that claim and in the process necessarily rejected the claim that the phrase “subject to the jurisdiction” of the United States meant merely territorial jurisdiction as opposed to complete, political jurisdiction.

Such was the interpretation of the Citizenship Clause initially given by the Supreme Court. As Thomas Cooley noted in his highly regarded treatise, The General Principles of Constitutional Law in America, “subject to the jurisdiction” of the United States “meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government.” 70

B. THE SUPREME COURT’S 1898 MISREADING OF THE CITIZENSHIP CLAUSE

The clear (and as I contend, correct) holding of Elk v. Wilkins, and the equally correct dicta from Slaughter-House, was rejected by the Supreme Court in 1898—thirty years after the adoption of the Fourteenth Amendment—in the case of United States v. Wong Kim Ark. 71 In Wong Kim Ark, the Supreme Court held that “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 domicile and residence in the United States,” was, merely by virtue of his birth in the United States, a citizen of the United States as a result of the Citizenship Clause of the Fourteenth Amendment. 72 Justice Horace Gray, writing for the Court, correctly noted that the language to the contrary in the Slaughter-House Cases was merely dicta and not binding precedent. 73 He found the Slaughter-House dicta unpersuasive due to a subsequent decision in which the author of the majority opinion in Slaughter-House had concurred, holding that foreign consuls (unlike ambassadors) were “subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside.” 74 Justice Gray appears not to have appreciated the distinction between partial, territorial jurisdiction, which subjects all who are present within the territory of a sovereign to the jurisdiction of its laws, and complete, political jurisdiction, which requires allegiance to the sovereign as well.

More troubling than his rejection of the persuasive dicta from Slaughter-House was the fact that Justice Gray also repudiated the actual holding in Elk v. Wilkins, which he himself had authored. After quoting extensively from the

70. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270 (Boston, Little, Brown, & Co. 1880).
71. 169 U.S. 649 (1898).
72. Id. at 653, 702.
73. Id. at 678.
74. Id. at 679 (citing, e.g., In re Baiz, 135 U.S. 403, 424 (1890); JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW *44).
opinion, including the portion reprinted above noting that the children of Indians owing allegiance to an Indian tribe were no more “subject to the jurisdiction” of the United States within the meaning of the Fourteenth Amendment than were the children of ambassadors and other public ministers of foreign nations born in the United States, Justice Gray simply held, without any analysis, that *Elk* “concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.”

By limiting the “subject to the jurisdiction” clause to the children of diplomats, who neither owed allegiance to the United States nor were (at least at the ambassadorial level) subject to its laws merely by virtue of their residence in the United States, Justice Gray simply failed to appreciate what he seemed to have understood in *Elk*: namely, that there is a difference between territorial jurisdiction and the more complete, allegiance-obliging jurisdiction that the Fourteenth Amendment codified.

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

Quite apart from the fact that Justice Fuller’s dissent was logically compelled by the text and history of the Citizenship Clause, Justice Gray’s broad interpretation led him to make some astoundingly incorrect assertions. He claimed, for example, that “a stranger born, for so long 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.” And he had to recognize dual citizenship as a necessary implication of his position, despite the fact that, ever since the Naturalization Act of 1795, “applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity

75. *Id.* at 681–82.
76. This resulted from the long-established international law fiction of extraterritoriality by which the sovereignty of a diplomat is said to follow him wherever he goes.
77. United States v. Wong Kim Ark, 169 U.S. 649, 711 (1898) (Fuller, J., dissenting).
78. *Id.* at 705–07.
79. *Id.* at 693–94 (majority opinion) (emphasis added).
80. *Id.* at 691.
to every foreign prince or state, and particularly to the prince or state of which
they were before the citizens or subjects.”81 That requirement still exists, though
it no longer seems to be taken seriously.

Finally, Justice Gray’s position is simply at odds with the notion of consent
that underlies the sovereign’s power over naturalization. What it meant, funda-
mentally, was that foreign nationals could secure American citizenship for their
children unilaterally, merely by giving birth on American soil, whether or not
their arrival on America’s shores was legal or illegal, temporary or permanent.

Justice Gray held that the children of two classes of foreigners were not
entitled to the birthright citizenship he thought was guaranteed by the Four-
teenth Amendment. First, as noted above, were the children of ambassadors and
other foreign diplomats who, as the result of the fiction of extraterritoriality,
were not even considered subject to the territorial jurisdiction of the United
States.82 Second were the children of invading armies born on U.S. soil while it
was occupied by the foreign army.83 But apart from that, all children of foreign
nationals born on U.S. soil were, in his formulation, citizens of the United
States. Children born of parents who had been offered permanent residence but
were not yet citizens and had not yet renounced their allegiance to their prior
sovereign would become citizens by birth on U.S. soil.84 This was true even if,
as was the case in Wong Kim Ark, the parents were, by treaty, unable ever to
become citizens.

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

This is not to say that Congress could not, pursuant to its naturalization
power, choose to grant citizenship to the children of foreign nationals. But thus
far it has not done so. Instead, the language of the current naturalization statute

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81. Id. at 711 (Fuller, J., dissenting) (citing Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414 (1795)).
82. See id. at 688.
83. See id.
84. See id. at 705.
simply tracks the minimum constitutional guarantee—anyone born in the United States, and subject to its jurisdiction, is a citizen. With the absurdity of Hamdi’s claim of citizenship so recently and vividly before us, it is time for the courts, Congress, and the Executive to revisit Justice Gray’s erroneous interpretation of that language, restoring to the constitutional mandate what its drafters actually intended: that only a complete jurisdiction—of the kind that brings with it a total and exclusive allegiance—is sufficient to qualify for the mandatory grant of citizenship to which the people of the United States actually consented to when they ratified the Citizenship Clause of the Fourteenth Amendment.

V. CONCLUSION

So where does this leave us? First, neither the Sixth Amendment cases nor the terrorism trilogy of cases support the contention that the Rehnquist Court was tilting to the left, either out of embarrassment over Bush v. Gore or because of concern about over-reaching by the Bush Administration in the war on terror. Rather, these cases demonstrate a continuing commitment, by at least some members of the Court, to the binding nature of the Constitution’s text. That may well be the most lasting legacy of the Rehnquist Court; it certainly is the most important.