Br. J. Am. Leg. Studies 10(1) (2020), DOI: 10.2478/bjals-2020-0023 sciendo

Apportionment, Allegiance, and Birthright Citizenship

John Vlahoplus*

ABSTRACT

Trump v. New York appears to present the Supreme Court with a simple question of statutory construction: do federal statutes allow the President to exclude unlawfully resident aliens from the apportionment of seats in the House of Representatives? The President claims that they do. A three-judge District Court ruled that they do not.

However, many arguments for the President go further and assert that the Constitution supports or even compels the exclusion. Some are historical, like the argument that no federal law restricted immigration before 1875, or that apportionment historically included aliens only because they were on a path to citizenship. Others assert that unlawfully present aliens should not be counted because they are outside the allegiance, jurisdiction, and polity of the United States. Some even utilize discredited theories that reject birthright citizenship for U.S.-born children of aliens. This Article rebuts those arguments and shows constitutional history supporting inclusion in the decennial apportionment. It demonstrates that the arguments ignore early federal, state, and colonial restrictions on immigration and naturalization and are inconsistent with fundamental constitutional principles governing apportionment, liability for treason, and birthright citizenship.

Because these arguments reach far beyond the apportionment issue and threaten to surreptitiously alter longstanding constitutional law, the Court should disregard them and decide the case on statutory rather than constitutional grounds. If instead the Court addresses these arguments, it should reject them and reaffirm longstanding principles governing apportionment, liability for treason, and birthright citizenship.

KEYWORDS

Constitutional Law, Immigration, Treason, Census, Apportionment, Citizenship

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* B.A., Washington & Lee University; J.D., Harvard Law School; D.Phil., Oxford University; Member, New York State Bar.

Introduction

Trump v. New York[1] appears to present a simple question of statutory construction: do federal statutes allow the President to exclude unlawfully resident aliens from the apportionment of seats in the House of Representatives? The President claims that they do.[2] A three-judge District Court ruled that they do not.[3]

However, many arguments for the President go further and assert that the Constitution supports or even compels the exclusion.[4] These arguments ignore early federal, state, and colonial immigration and naturalization laws, are inconsistent with fundamental constitutional principles, and threaten longstanding precedents governing birthright citizenship and liability for treason. Some claim that a fundamental principle of consent defines the polity,[5] which has been asserted and discredited in attempts to restrict or eliminate birthright citizenship for U.S.-born children of aliens.[6] The President even cites Vattel, the patron saint of birthers,[7] in an argument related to citizenship.[8] These arguments reach far beyond the

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1 No. 20-366 (Oct. 16, 2020).

2 *See, e.g.*, Memorandum of Law in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Partial Summary Judgment or Preliminary Injunction at 32, New York v. Trump, No. 20 Civ. 5770 (JMF) (S.D.N.Y. 2020) [hereinafter "President's Memorandum"] (2 U.S.C. § 2a(a) leaves the President significant policy discretion), https://www.brennancenter.org/sites/default/files/2020-08/MTD_2020-08-19.pdf.

3 New York v. Trump, 20-CV-5770 (RCW) (PWH) (JMF) (S.D.N.Y. Sept. 10, 2020) at 85 (excluding them would violate "Congress's delegation of its constitutional responsibility to count the whole number of persons in each State and to apportion members of the House of Representatives among the States according to their respective numbers under 2 U.S.C. § 2a and 13 U.S.C. § 141."), https://www.brennancenter.org/sites/default/files/2020-09/OpinionandOrder_2020-09-10_0.pdf.

4 *See* President's Memorandum, *supra* note 2, at 27, 29 (Fourteenth Amendment incorporates a narrow standard of "inhabitants" for inclusion in the enumeration that is not in the text of the apportionment clause); Brief Amicus Curiae of Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of Appellants at 5, Trump v. New York, No. 20-366 (Oct. 2, 2020) (Constitution compels "that the House be apportioned based on a count of 'the People.'").

5 *See* Brief of *Amici Curiae* U.S. Reps. Morris Jackson "Mo" Brooks, Jr., Bradley Byrne, and Robert Aderholt in Support of Appellants at 29, Trump v. New York, No. 20-366 (Oct. 2020), https://www.supremecourt.gov/DocketPDF/20/20-366/159267/20201030144754270_20-366%20TSAC%20Rep%20Brooks%20et%20al.pdf.

6 *See, e.g.*, John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. Rich. L. Rev. 955, 955, 966 (2008) (asserting that *United States v. Wong Kim Ark* was wrongly decided and that not even U.S.-born children of lawfully permanent resident aliens are natural born citizens). Eastman's claims have been broadly discredited. *See, e.g.*, Alex Nowrasteh, *John Eastman on Birthright Citizenship, Kamala Harris, the Mexican Repatriation, and Citizenship for the Children of Braceros*, Cato Institute (Aug. 14, 2020), https://www.cato.org/blog/john-eastman-birthright-citizenship-kamala-harris-mexican-repatriation-citizenship-children. It is unsurprising that Eastman is counsel for Brooks, Byrne, and Aderholt in their amicus brief before the Court. *See supra* note 5.

7 *See infra* note 57 and accompanying text.

8 *See infra* note 50 and accompanying text.

apportionment issue and threaten to surreptitiously alter longstanding constitutional law. Consequently, the Supreme Court should disregard them and decide the case on statutory rather than constitutional grounds. If the Court chooses to address the constitutional arguments, however, it should reject them and reliance on Vattel for anything involving or related to U.S. citizenship.

This Article details and rebuts the constitutional arguments of the President and amici. It utilizes only materials and events up to the 1868 ratification of the Fourteenth Amendment because that amendment applies to apportionment and because some Justices may apply an original public meaning approach to interpreting the relevant text.

I. Historical Arguments

A. Naturalization

The President claims that apportionment historically included aliens only "because the law provided them with a direct pathway to citizenship—mainly, an oath of loyalty and five years of residence in the United States," citing the naturalization Act of Apr. 14, 1802 and statements of members of Congress in 1866.[9] However, that statute and other early federal naturalization acts only authorized naturalization of white immigrants.[10] The President provides no evidence that apportionment historically excluded non-white resident aliens, even though they had no greater pathway to citizenship than unlawfully resident aliens do today.

B. Immigration Restrictions

The President also dismisses "historical evidence about the treatment of aliens" for apportionment purposes, arguing that it "does not and cannot resolve the distinct question whether *illegal* aliens must be included—for the simple reason that there were no federal laws restricting immigration (and hence no illegal aliens) until 1875."[11] In fact there were federal, state and colonial laws restricting immigration long before the Constitution and the Fourteenth Amendment prescribed apportionment. Some were racially restrictive. Others attacked immigrants as nativists do today, from fear that immigrants might retain their own language, become too successful and replace natives, or alternatively become public charges. Any assertion that the Constitution and Fourteenth Amendment were ratified without any awareness of illegal immigration is untenable.

1. Federal Provisions

The Constitution forbade Congress to prohibit "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit" prior

9 President's Memorandum, *supra* note 2, at 37.

10 *See, e.g.*, An Act to establish an uniform Rule of Naturalization, § 1, March 26, 1790, ch. 3, 2 Stat. 103 (repealed 1795).

11 President's Memorandum, *supra* note 2, at 36.

to 1808.[12] Congress exercised its power at the earliest opportunity, prohibiting the entry of Black indentured servants beginning January 1, 1808.[13] Treasury Secretary Cobb explained in 1858 that the statute's language "leaves no doubt" that Congress "intended to provide in the most unequivocal manner against the increase of that class of population by immigration from Africa."[14] Cobb's views were widely published.[15]

Congress had previously sidestepped the 1808 limitation by federalizing state laws prohibiting the entry of free Blacks. Many states prohibited their entry, and in 1803 some—apparently those that allowed slavery—pushed Congress to incorporate their statutes in federal law.[16]

A congressional bill proposed in February of 1803 would have forbidden anyone to bring, or cause to be brought, any Black person into any state whose law prohibited their entry.[17] Many in Congress supported the bill to protect the country from outlaws, exiles, and "brigands from the West India Islands."[18] West Indian Brigands were largely freed slaves allied with France who fought the British for independence.[19]

Others members of Congress opposed the bill as unconstitutionally overbroad in "destroying and abridging the rights of free negroes and persons of color, who were citizens of one State," by preventing their entry into "certain [other] States."[20] The final act included an exception protecting them and confirming President Jefferson's and Congress's understanding that free Blacks could be citizens. It excepted from its prohibition any Black person who was "a native, a citizen, or registered seaman of the United States."[21]

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12 U.S. Const. art. I, § 9, cl. 1.

13 *See* An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight, § 1 (March 2, 1807), https://hdl.handle.net/2027/nyp.33433090743166?urlappend=%3Bseq=102.

14 *See* 2 Annual Report of the American Historical Association for The Year 1911 at 436 (1913) (letter to the Charleston collector of the customs, May 22, 1858) [hereinafter "American Historical Association"], https://hdl.handle.net/2027/mdp.39015062260826?urlappend=%3Bseq=444.

15 *See, e.g.*, *African Emigration: Letter from Secretary Cobb*, Daily Pennsylvanian 1, col. 3 (June 9, 1858).

16 *See* American Historical Association, *supra* note 14, at 436–37; Gales and Seaton, Annals of the Congress of the United States: Seventh Congress—Second Session 472 (1851) (the bill's penalties were described as "rigorous," but "only such as the imminent danger of the Southern States called for."), https://hdl.handle.net/2027/uc1.$c227010?urlappend=%3Bseq=244.

17 *See* Gales and Seaton, *supra* note 16, at 467.

18 *See id.* at 471–72.

19 *See, e.g.*, James L. Sweeney, *Caribs, Maroons, Jacobins, Brigands, and Sugar Barons: The Last Stand of the Black Caribs on St. Vincent*, 10 African Diaspora Archaeology Newsletter 1, 26 (March 2007), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1228&context=adan.

20 *See* Gales and Seaton, *supra* note 16, at 472.

21 *See* An Act to prevent the importation of certain persons into certain States, where, by the laws thereof, their admission is prohibited, § 1 (February 28, 1803), https://hdl.handle.net/2027/nyp.33433090743125?urlappend=%3Bseq=537.

Because of these restrictions and the prohibition on slave trading, Treasury Secretary Cobb advised the Charleston collector of the customs in 1858 to refuse a vessel permission to depart for Africa for the purpose of boarding Blacks there and bringing them to the United States.[22] The statutes were critical for the nationwide policy of racial exclusion[23] that they advanced. Not even the later *Dred Scott* decision could deny natural born citizenship to U.S.-born children of indentured or free Black immigrants.[24]

Congress also considered other restrictions on immigration, including a proposal in 1856 to prevent immigration by foreign criminals and paupers.[25] Although some argue that Congress has no power to prohibit voluntary immigration,[26] it has long been clear that Congress has that power. Any claim that the Fourteenth Amendment was ratified with no awareness of illegal immigration is untenable.

2. State and Colonial Provisions

Not all early American immigration restrictions targeted race. A 1782 Virginia statute forbade British subjects to enter the state, declared those who did to be prisoners of war, and required them to be jailed and either exchanged or sent to a British post.[27] A 1783 Virginia statute forbade entry to any American who had

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22 *See* American Historical Association, *supra* note 14, at 434–35, 435 n.2, and 438–39.

23 *See, e.g.*, *id*. at 438 ("I may be permitted to refer, in this connection, to the various repeated and earnest efforts which have been made in every section of the Union, to provide for the removal from our midst of this most unfortunate class. However variant the motives which have induced these efforts with different persons in different sections of the country, they all exhibit an earnest desire to diminish rather than increase the free negro population.") (statement of Treasury Secretary Cobb).

24 *See* Scott v. Sandford, 60 U.S. 393, 403 (1857) (Taney, C.J.) ("[T]he plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. . . [T]he court must be understood as speaking in this opinion of that class only . . . ."). *See also* Op. Att'y Gen. Bates 26 (1863) (explaining that limited holding).

25 *See, e.g.*, H.R. 124, 34th Cong, 1st Sess. (1856), https://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=034/llhb034.db&recNum=419. A congressional report cited efforts as early as 1838 to exclude such immigrants. *See* Foreign Criminals and Paupers: Report to Accompany Bill H. R. 124, August 16, 1856, at 19, https://hdl.handle.net/2027/uiuo.ark:/13960/t4kk98c53?urlappend=%3Bseq=21.

26 *See, e.g.*, Ilya Somin, *Why the Migration or Importation Clause of the Constitution Does Not Imply Any General Federal Power to Restrict Immigration*, Wash. Post (April 19, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/19/why-the-migration-or-importation-clause-of-the-constitution-does-not-imply-any-general-federal-power-to-limit-immigration/. Somin cites, among others, James Madison. However, Madison acknowledged that "the term migration allow[ed] those who were scrupulous of acknowledging expressly a property in human beings, to view *imported* persons as a species of emigrants, whilst others might apply the term to foreign malefactors sent or coming into the country. It is possible tho' not recollected, that some might have had an eye to the case of freed blacks, as well as malefactors." 3 The Records of the Federal Convention of 1787 at 436–37 (Max Farrand, ed. 1937), https://hdl.handle.net/2027/uiug.30112038035702?urlappend=%3Bseq=444.

27 *See* An act to prohibit intercourse with, and the admission of British subjects into this state, §§ III and V, ch. XVII (ch. CXII in the original), in 11 William Waller Hening, The Statutes at Large; Being a Collection of All the Laws of Virginia, From

fought for the British or had been on or had acted under the direction or authority of the Board of Refugee Commissioners at New York.[28]

In 1786 a group of citizens met in Petersburg, Virginia because "sundry persons" had been residing in the town "above twelve months" contrary to the latter statute, "giv[ing] much uneasiness to a majority of this meeting."[29] The meeting resolved that "their residence here is illegal" and "that an application ought to be made to the Legislature at the next session praying a revision" of the statute to enforce it.[30] Americans recognized even before the adoption of the Constitution that people can reside here illegally for extended periods contrary to immigration proscriptions. Their usual residence is here, contrary to the President's denials.[31]

Colonial provisions also limited admission of Catholics, Germans, and persons considered to be "indigent or immoral and vicious," among others.[32] Some feared that the "Peace and Security" might "be endangered by such Numbers of Strangers daily poured in, who being ignorant of our Language & Laws, & settling in a Body together, make, as it were, a distinct People from his Majesties Subjects."[33] Others feared that large numbers of immigrants with their "superior Industry and Frugality may in Time, out the *British* People from the Colony."[34] Contemporary American xenophobia—with its Muslim bans, fears of Spanish-speaking immigrants, and "replacement" conspiracy theories—sadly parallels colonial history.

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the First Session of the Legislature, in the Year 1619 (1823), https://hdl.handle.net/2027/mdp.39015039504942?urlappend=%3Bseq=142.

28 *See* An act prohibiting the migration of certain persons to this commonwealth, and for other persons, § § I and II, https://hdl.handle.net/2027/mdp.39015039504942?urlappend=%3Bseq=330.

29 4 Calendar of Virginia State Papers and Other Manuscripts 171 (William P. Palmer, ed. 1884), https://hdl.handle.net/2027/wu.89069546364?urlappend=%3Bseq=185.

30 *Id.* at 171–72. The statute purported not to provide "full and ample protection" to those violating its prohibition. *See* An act prohibiting the migration of certain persons to this commonwealth, and for other persons, § IV, *id.* However, Attorney General Edmund Randolph advised that the statute did not prescribe a "specific stile of prosecution," and therefore the correct remedy was indictment in accordance with the common law. *See id.* at 179.

31 *See, e.g.*, President's Memorandum, *supra* note 2, at 40.

32 *See* Emberson Edward Proper, Colonial Immigration Laws: A Study of the Regulation of Immigration by the English Colonies in America 18, 31, 36 (1900), https://hdl.handle.net/2027/uc2.ark:/13960/t6rx9d544.

33 3 Pennsylvania, Minutes of the Provincial Council of Pennsylvania, From the Organization to the Termination of the Proprietary Government 299 (1840) (from a Council held Sept. 14, 1727), https://hdl.handle.net/2027/uva.x001608428?urlappend=%3Bseq=309.

34 2 William Douglass, A Summary, Historical and Political, of the First Planting, Progressive Improvements, and Present State of the British Settlements in North-America 326 (1751), https://hdl.handle.net/2027/osu.32435030859581?urlappend=%3Bseq=336.

II. Allegiance, Jurisdiction, and the Polity

The President and his amici argue that unlawfully resident aliens are outside the jurisdiction of the United States,[35] lack allegiance to United States,[36] and must not be allowed "to redistribute 'political power' within" the United States through apportionment because that would be "fundamentally antithetical" to principles governing "the sovereign's rights to define the polity ('the people')."[37]

These arguments are inconsistent with the legal history of apportionment.[38] They are also inconsistent with the liability of aliens for treason, which requires a violation of allegiance.[39] Finally, they threaten birthright citizenship because a lack of parental allegiance arguably could negate citizenship for children born here.[40]

C. Jurisdiction

Unlawfully resident aliens are within the jurisdiction of the United States. As Chief Justice Marshall explained in 1812,

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[41]

The claim that the United States lacks jurisdiction over unlawfully resident aliens, or that its jurisdiction over them is only partial,[42] is groundless.

D. Allegiance

Unlawfully resident aliens also owe allegiance to the United States. Under the common law, both alien friends and alien enemies who are within the realm benefit from the protection of the sovereign and therefore owe allegiance and

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35 Brief *Amicus Curiae* of Immigration Law Reform Institute in Support of Appellants, Trump v. New York, No. 20-336 at 5 (Oct. 6, 2020).

36 *See id. See also* President's Memorandum, *supra* note 2, at 26–28 (denying that unlawfully resident aliens have minimum ties such as allegiance to the states in which they reside).

37 President's Memorandum, *supra* note 2, at 35–37.

38 *See infra* note 63 and accompanying text.

39 *See, e.g.*, Act of April 30, 1790 (liability for treason "if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort").

40 *See, e.g.*, Inglis v. The Trustees of the Sailor's Snug Harbour, 28 U.S. 99, 156 (1830) (Story, J., dissenting on other grounds) ("children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens").

41 The Schooner Exchange v. McFaddon, 11 U.S. 116, 136 (1812) (Marshall, C.J.).

42 *See, e.g.*, John C. Eastman, *Some Questions for Kamala Harris About Eligibility,* Newsweek (Aug. 12, 2020), https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483.

can be liable for treason,[43] contrary to both the President's views in the current litigation and to the claim of counsel for the President's amici in his attempt to deny birthright citizenship for U.S.-born children of aliens.[44] So too an alien enemy who arrives after hostilities begin in order "to inhabit either as a merchant, dweller, or sojourner . . . because he comes not hither as an enemy, or by way of hostility, but partakes of the king's protection."[45] Unlawfully resident aliens are violating the immigration laws, of course. But even those who break the law continue to owe allegiance.[46]

Under the same principle, even prisoners of war owe allegiance and can be liable for treason:

> [A] prisoner at war is not adhering to the King's enemies, for he is here under protection from the King. If he conspires against the life of the King, it is high treason; if he is killed, it is murder; he does not therefore stand in the same situation as when in a state of actual hostility.[47]

Alien enemies who are in the country owe allegiance even though the nation may choose whether to deport them or allow them to remain. Representative Sewall noted in discussing the controversial alien bill in 1798, for example, that not "all alien enemies shall be sent out of the country; but that persons of that description who are not suspected of being inimical to the interests of this country, shall be protected."[48]

An alien's allegiance is not limited to the duration of their presence. Aliens—including alien enemies—continue to owe allegiance and be liable for treason after

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43 *See* 2 Sir Matthew Hale, The History of the Pleas of the Crown 92 (George Wilson, ed., 1778), https://hdl.handle.net/2027/njp.32101013843204?urlappend=%3Bseq=138.

44 In critiquing Justice Gray's opinion in *United States v. Wong Kim Ark*, John C. Eastman asserts that Gray made "some astoundingly incorrect assertions" including that an alien present in the realm owes obedience "*and may be punished for treason*." *See* Eastman, *supra* note 6, at 965 (quoting Gray and adding emphasis). But Gray was correct, and Eastman is wrong—as he is about birthright citizenship generally.

45 Hale, *supra* note 44, at 92–93.

46 *See, e.g.*, Thomas Jefferson, *Notes on British and American Alienage* [1783] ("Abjuratur still owes allegiance because he may be restored. 9.b. So an outlaw. ib. 14.a.), Founders Online, http://founders.archives.gov/documents/Jefferson/01-06-02-0346. Jefferson cites Calvin v. Smith, 7 Co. Rep. 1a (1608), the landmark English case governing allegiance.

47 *See* Sparenburgh v. Bannatyne, 1797, 1 Bos. & Pull. 163, 171 (Heath, J.). *See also id.* (Rooke, J.: "A prisoner at war is, to certain purposes, under the King's protection. . . ."). *See also* H. Byerley Thomson, The Laws of War Affecting Commerce and Shipping 22 (1854) (paraphrasing Heath, J., in *Sparenburgh*), https://hdl.handle.net/2027/hvd.hb9rn9?urlappend=%3Bseq=38. *Cf.* 3 Richard Burn, The Justice of the Peace and Parish Officer 60 (12th ed. 1772) (prisoner of war who offends against "the fundamental laws of all society . . . is liable to answer in the ordinary course of justice, as other persons offending in like manner are."), https://hdl.handle.net/2027/nyp.33433008577771?urlappend=%3Bseq=68.

48 Joseph Gales, The Debates and Proceedings in the Congress of the United States, with an Appendix, Fifth Congress 1971 (1851) (statement of Rep. Sewall) (June 16, 1798), https://hdl.handle.net/2027/nyp.33433081775185?urlappend=%3Bseq=390.

departing the country if they leave family or property behind and thereby continue to benefit from the sovereign's protection.[49]

The President and amici argue further that the Constitution only permits the counting of "inhabitants," which they define thickly to mean lawfully and permanently resident by reference among other sources to the continental theorist Vattel's understanding of "inhabitants" and "citizens."[50] But period American usage was broader and acknowledged both temporary and permanent inhabitants.[51] Soldiers were described as inhabitants of the locations in which they were posted.[52] Period statutes described persons who inhabit for as much as seven years or as little as forty days.[53] Many of those who came to the United States in the great wave beginning 1830–50 intended to ultimately return home,[54] and large numbers did—

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[49] *See, e.g.*, Sir Michael Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry: And of Other Crown Cases: To Which are Added Discourses Upon a Few Branches of the Crown Law 185, § 4 (1792) ("This rule was laid down by all the judges assembled at the Queen's command *Jan.* 12th 1707."), https://hdl.handle.net/2027/nyp.33433009490438?urlappend=%3Bseq=225. *See also* Sir Michael Foster, Discourse on High Treason (1762) (same, excerpted § 4 available at https://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s7.html, the original of which is unavailable to the author).

[50] *See, e.g.*, President's Memorandum, *supra* note 2, at 27–28 (limitation to "inhabitants") and 32 (quoting Vattel's "proposition that 'inhabitants, as distinguished from citizens, are strangers who are *permitted* to settle and stay in the country.'" (emphasis from the President's Memorandum); Brief for the Appellants at 37, Trump v. New York, No. 20-366 (Oct. 2020) ("This Court's understanding that such aliens are not 'dwelling,' 'resid[ing] permanently,' or otherwise 'in' the United States supports deeming them not to be 'inhabitants' of this country."), https://www.supremecourt.gov/DocketPDF/20/20-366/159324/20201030213207220_20-366tsUnitedStates.pdf; Brief of *Amici Curiae*, *supra* note 5, at 19 (lawfully and permanently resident).

[51] *See, e.g.*, A Further Supplement to the Act to Raise the Supplies for the Year Seventeen Hundred and Eighty-One, Laws of Maryland ch. XXV, § XX (1781) (taxation of French subjects "who hath or may come into this state . . . to be a temporary inhabitant only"), https://hdl.handle.net/2027/mdp.35112203945748?urlappend=%3Bseq=288; Bingham v. Cabot, 3 U.S. 382, 383 (1798) (argument of counsel that state citizenship follows from the place where one is a permanent inhabitant).

[52] *See Extracts from the Gazette, 1735*, The Pennsylvania Gazette (Aug. 28, 1735) ("They say . . . that there are but few People settled on that River, only here and there a Fort for Security of Trade; and that there are more Soldiers than other Inhabitants."), https://founders.archives.gov/documents/Franklin/01-02-02-0018.

[53] *See, e.g.*, An Act for Naturalizing such Foreign Protestants, and Others Therein Mentioned, as are Settled, or Shall Settle, in Any of His Majesty's Colonies in America, 13 Geo. II c. 7 (1740) (naturalizing those who "inhabit or reside, for the Space of seven Years or more" in the colonies); A Law to Prevent Strangers from Becoming Chargeable to the City of Albany § § 1 and 2, in City of Albany, The Charter of the City of Albany and the Laws and Ordinances, Ordained and Established by the Mayor, Aldermen and Commonalty of the Said City, in Common Council Convened 47 (1800) (subjecting to legal process those who "come into any of the wards of the said city, and shall there reside and inhabit for the space of forty days"), https://hdl.handle.net/2027/nyp.33433082046610?urlappend=%3Bseq=51.

[54] *See, e.g.*, Alex Shashkevich, *New Stanford research explores immigrants' decision to return to Europe during historical Age of Mass Migration*, Stanford News (Sept. 12, 2017), https://news.stanford.edu/2017/09/12/returning-home-age-mass-migration/.

including more than "half of all southern Italians, . . . 64 percent of Hungarians, 59 percent of Slovaks and 40 percent of Germans."[55]

The Court recently refused to accept thick definitions of words like "elector," "ballot," and "vote" in litigation over the electoral college.[56] It should refuse to accept the proffered thick definitions of "inhabitant." In particular, Vattel is the patron saint of birthers, who assert that his description of the continental rule of *jus sanguinis* defines natural born citizenship.[57] But the Constitution inherited the English law of *jus soli*,[58] and even temporary local allegiance is sufficient to make a U.S.-born child a natural born citizen under that law.[59] The Supreme Court should reject reliance on Vattel for anything involving or related to citizenship, including his cited discussion of inhabitants and citizens.

E. The Polity

The President asserts that unlawfully resident aliens should not be allowed "to redistribute 'political power' within" the United States through apportionment because that would be "fundamentally antithetical" to principles governing "the sovereign's rights to define the polity ('the people')."[60] Amici argue that the apportionment must exclude all aliens for the same reason.[61] These are just policy arguments, which a nineteenth-century author set out in strikingly similar terms to try to exclude all aliens from the count that determines apportionment:

> [T]he government, being republican, must necessarily be in the hands of the people exclusively; and any participation of unnaturalized aliens in the rights of representation and suffrage would be inconsistent with the nature of the government. It is inconceivable that the American people should have intended to authorize unnaturalized foreigners, in any way, to augment or influence the representative power of any portion of the people; and it is equally inconceivable that they should have intended, in

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55 *See* Joshua Zeitz, *The Real History of American Immigration*, Politico Magazine (Aug. 6, 2017), https://www.politico.com/magazine/story/2017/08/06/trump-history-of-american-immigration-215464.

56 *See* Chiafalo v. Washington, 591 U.S. __, slip op. at 11–12 (2020).

57 *See, e.g.*, Mario Apuzzo, *Emer de Vattel, Adolf Hitler, America's Youth, and the Natural Born Citizen Clause*, CDR Kerchner (Ret)'s Blog (Dec. 11, 2011), https://cdrkerchner.wordpress.com/2011/12/11/emer-de-vattel-adolf-hitler-americas-youth-and-the-natural-born-citizen-clause-by-atty-mario-apuzzo/.

58 *See, e.g.*, Inglis v. The Trustees of the Sailor's Snug Harbour, 28 U.S. 99, 155–56 (1830) (Story, J., dissenting on other grounds). *See also* Op. Att'y Gen. Bates 12 (1863) (citing Kent, Blackstone, *Calvin's Case*, *Shanks v. Dupont*, and other authorities), http://hdl.handle.net/2027/miun.aew6575.0001.001

59 *See, e.g.*, Calvin v. Smith, 7 Co. Rep. 1a, 6a (1608) ("local obedience being but momentary and uncertain, is yet strong enough to make a natural subject").

60 *See* President's Memorandum, *supra* note 2, at 36–37.

61 *See* Brief of *Amici Curiae*, *supra* note 5, at 29 ("the 'one-person, one-vote' principle articulated by this Court must necessarily be tied to 'the people' who form the body politic, not to some undifferentiated total population that includes those who are not part of the body politic. Citizens are 'the people' who give the government legitimacy by their consent.").

> this way, to naturalize all such, and confer on them the rights of citizens, seeing they have expressly provided another mode for the purpose. It is therefore probably true that aliens cannot be counted, either as "free persons" or "other persons," in apportioning Representatives to "the people of the several States."[62]

But the Federalist 54 sets out the rationale for counting enslaved people for purposes of apportionment. It applies as well to resident aliens, whether lawfully present or not:

> In being protected . . . in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others, the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property.[63]

The President attempts to separate the "personhood" of unlawfully resident aliens from their potential status as "inhabitants."[64] But their legal status makes no difference for apportionment. Their subjection to and advantage from the country's general laws makes each of them "a member of the society" who counts for purposes of apportionment as the Federalist 54 explains. They are indistinguishable from other residents for this purpose.

Conclusion

The constitutional arguments of the President and his amici fail. Apportionment did not historically include aliens because of any path to citizenship. Federal, state, and colonial laws restricted immigration long before 1868. Americans were aware of illegal residence even before the adoption of the Constitution.

Unlawfully resident aliens are within the jurisdiction of and owe allegiance to the United States. They need not be part of the polity to be counted. It is enough that they are members of the society. The Court should decide *Trump v. New York* on statutory grounds. But if it reaches these constitutional arguments it should reject them and any application of Vattel's continental legal theories to anything involving or related to American citizenship.

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62 Timothy Farrar, Manual of the Constitution of the United States of America 56–57 (1867), https://hdl.handle.net/2027/nyp.33433081767257?urlappend=%3Bseq=90.

63 The Federalist 54 (Alexander Hamilton or James Madison).

64 *See* President's Memorandum, *supra* note 2, at 24.