

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

6-22-2021

“By Accident of Birth”: The Battle over Birthright Citizenship after United States v. Wong Kim Ark

Amanda Frost

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Immigration Law Commons](#)

**“By Accident of Birth”:
The Battle over Birthright Citizenship
After *United States v. Wong Kim Ark***

Amanda Frost*

*In theory, birthright citizenship has been well established in U.S. law since 1898, when the Supreme Court held in *United States v. Wong Kim Ark* that all born on U.S. soil are U.S. citizens. The experience of immigrants and their families over the last 120 years tells a different story, however. This article draws on government records documenting the Wong family’s struggle for legal recognition to illuminate the convoluted history of birthright citizenship.*

Newly discovered archival materials reveal that Wong Kim Ark and his family experienced firsthand, and at times shaped, the fluctuating relationship between immigration, citizenship, and access to civil and political rights. The U.S. government reacted to its loss in Wong’s case at first by refusing to accept the rule of birthright citizenship, and then by creating onerous proof-of-citizenship requirements that obstructed recognition of birthright citizenship for certain ethnic groups. But the Wong family’s story is not only about the use and abuse of government power. Government records reveal that the Wongs, like others in their position, learned how to use the immigration bureaucracy to their own advantage, enabling them to establish a foothold in the United States despite the government’s efforts to bar them from doing so.

INTRODUCTION..... 39

I. AN IMMIGRANT FAMILY’S BACKSTORY 43

* Ann Loeb Bronfman Distinguished Professor of Law and Government, American University. I am grateful for the American Council of Learned Societies, which awarded me a fellowship to support the research and writing of this article. I benefitted from helpful feedback on drafts of this article at the 2018 Immigration Law Scholars and Teachers Workshop and from conversations and correspondence with Bethany Berger, Gabriel “Jack” Chin, Garret Epps, Alexandra Lahav, Rachel Rosenbloom, and Lucy Salyer. This article is a modified and expanded version of Chapter 3 in my book *YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS* (2021). I also published an essay entitled “Birthright Citizens and Paper Sons” in *The American Scholar* on January 18, 2021 that draws from some of this material.

II. THE ORIGINS OF BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES .	48
III. UNITED STATES V. WONG KIM ARK: THE SUPREME COURT BATTLE OVER BIRTHRIGHT CITIZENSHIP	51
A. <i>A Test Case</i>	51
B. <i>Before the U.S. Supreme Court</i>	54
C. <i>The Supreme Court’s Decision</i>	60
IV. THE GOVERNMENT’S REFUSAL TO ACCEPT DEFEAT	62
V. BIRTHRIGHT CITIZENS AND PAPER SONS	70
CONCLUSION.....	75

INTRODUCTION

When Wee Lee went into labor with her first child in 1870, she faced the ordeal almost entirely alone. She would be giving birth at her home on the second floor of 751 Sacramento Street, above the grocery store her husband owned with his partners in the heart of San Francisco’s Chinatown.¹ San Francisco hospitals would not admit a person of Chinese ethnicity, white doctors were unwilling to visit a Chinese home, and there were not many Chinese midwives or even Chinese women nearby to assist her.² In 1870, there were fewer than 5,000 Chinese women in the United States, a mere blip in a country of nearly thirty-nine million people. Wee Lee’s child would be an even greater rarity—of the 63,254 ethnic Chinese listed in the 1870 U.S. census, only 518 were native born.³

1. “Interview with Wong Kim Ark on August 31, 1895,” in Wong Kim Ark File 12017/42223, Immigration and Naturalization Service, Record Group 85, Archival Research Catalog Identifier 296477, National Archives and Records Administration at San Francisco—San Bruno.

Descriptions of Wong Kim Ark’s travel to and from China and details of his life in China and the United States come from the following two case files held by the National Archives: Wong Kim Ark File 12017/42223, Immigration and Naturalization Service, Record Group 85, Archival Research Catalog Identifier 296477, National Archives and Records Administration at San Francisco—San Bruno; and Wong Kim Ark Case File No. 11198, Admiralty Case Files, 1851-1966, United States District Courts, Northern District of California, San Francisco, Record Group 21, Archival Research Catalog (ARC) Identifier 296013, National Archives and Records Administration at San Francisco—San Bruno. Hereinafter these files collectively will be cited as “Wong Kim Ark File, National Archives.”

2. Joan B. Trauner, *The Chinese as Medical Scapegoats in San Francisco, 1870-1905*, 57 CAL. HIST. 57, 82-83 (1978).

3. 1 U.S. DEP’T OF THE INTERIOR, *Table I: Population of the United States*, NINTH CENSUS 3 (1872), <https://www2.census.gov/library/publications/decennial/1870/population/1870a-04.pdf?#>; *Id.*, *Table XXII: Tables of Sex, and Selected Ages*, at 609, <https://www2.census.gov/library/publications/decennial/1870/population/1870a-55.pdf>. See also Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in CHINESE IMMIGRANTS AND AMERICAN LAW 2 (Charles McClain ed., 1994); 1 U.S. DEP’T OF THE INTERIOR, *Table I: Population of the United States*, NINTH CENSUS 8 (1872), <https://www2.census.gov/library/publications/decennial/1870/population/1870a-04.pdf?#>; *Id.*, *Table VI: Population of the United States*, at 328, <https://www2.census.gov/library/publications/decennial/1870/population/1870a-32.pdf?#>.

When she arrived from China many years earlier, Wee Lee and her husband, Wong Si Ping, had settled in San Francisco's Chinatown—one of the most densely populated areas of the city in a land the Chinese nicknamed “Gold Mountain.”⁴ Wong Si Ping joined the hustle and bustle every morning, but Wee Lee would have been a perpetual observer, passing her days watching a slice of this scene from her second-story window on Sacramento Street. Respectable Chinese women did not parade along the streets or mingle with strangers in public spaces. In any case, she couldn't walk far. As a woman of the merchant class, it is likely the bones of her feet had been crushed and then bound tightly with strips of cloth, so that she was forced to balance her weight on appendages just a few inches in length. Her “lily feet” would have helped Wee Lee prove to immigration inspectors that she was not a slave girl or a prostitute—disfavored groups that would eventually be barred from entering the country. Once she had settled in the United States, however, they only isolated her further.⁵

But Wee Lee would not be alone for much longer. In the fall of 1870, she safely delivered a baby boy, and she named him Wong Kim Ark.⁶ Decades later, her son's birth would be at the center of the Supreme Court case establishing the Fourteenth Amendment's guarantee of birthright citizenship, raising legal issues that continue to be debated today.⁷

Almost 150 years later, in the middle of a slow news week, President Donald Trump announced that his administration was “seriously” looking at the possibility of ending birthright citizenship for the children of undocumented immigrants. “[Y]ou walk over the border, have a baby—congratulations, the baby is now a U.S. Citizen . . . It's frankly ridiculous,” Trump told reporters gathered outside the White House on August 21, 2019. His comments echoed those made in October 2018, when he declared he had the power to end the “crazy, lunatic” policy of birthright citizenship unilaterally through an executive order. He reiterated the same arguments in August 2020, when he questioned the citizenship of Vice President Kamala Harris, who was born in the United States to noncitizen parents

4. WENDY ROUSE JORAE, *THE CHILDREN OF CHINATOWN: GROWING UP CHINESE AMERICAN IN SAN FRANCISCO, 1850-1920*, at 10 (2009).

5. See JUDY YUNG, *UNBOUND FEET: A SOCIAL HISTORY OF CHINESE WOMEN IN SAN FRANCISCO 24-25* (1995); HUPING LING, *SURVIVING ON THE GOLD MOUNTAIN: A HISTORY OF CHINESE AMERICAN WOMEN AND THEIR LIVES* 19 (1998); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 670, 674-75 (2005).

6. Immigration records give inconsistent dates for Wong Kim Ark's birth. Some records describe him as being born on October 1, 1870, others as having been born on an unspecified date in 1873. The confusion may be due in part to the differences between the Chinese and Western calendar. I chose to use October 1, 1870, as his birthdate because it was listed as a precise birthdate in some documents, and because it is consistent with the age Wong gave for himself in numerous immigration interviews over many years.

7. This article uses the term “birthright citizenship” to refer to citizenship based on birthplace, also known by the Latin term “*jus soli*.”

while they were legally present on student visas.⁸

The legal basis for these claims was identical to those made in 1897 by Solicitor General Holmes Conrad, who argued before the U.S. Supreme Court in *United States v. Wong Kim Ark* that the Fourteenth Amendment’s birthright citizenship guarantee did not apply to children born to noncitizens living in the United States.⁹ That Amendment declares: “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.” Conrad argued that the children of Chinese immigrants were not “subject to the jurisdiction” of the United States because they owed their allegiance to the emperor of China. Although Conrad’s focus was the Chinese, by logical extension his argument would deny citizenship to the children of all non-naturalized immigrants, a group numbering millions of people. On behalf of the U.S. government, Conrad asserted that these children could not, and should not, be Americans through “accident of birth.”¹⁰

The government lost. In a 6-2 decision, the Supreme Court declared that all persons born in the United States—whatever their race, ethnicity, or the immigration status of their parents—are U.S. citizens, period. The decision seemingly put an end to the debate. Today, few constitutional principles are more widely known than birthright citizenship. A recent study by the Pew Research Center found that eighty-seven percent of Americans are familiar with the rule¹¹—striking in comparison to the mere twenty-six percent who can name all three branches of the federal government.¹² Indeed, President Trump’s comments were newsworthy because they questioned the principle, long thought ingrained in both U.S. law and culture, that all born on U.S. soil automatically receive the rights and privileges of full citizenship.

8. *Trump Says He Is Seriously Looking at Ending Birthright Citizenship*, REUTERS (Aug. 21, 2019, 12:43 P.M.), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-he-is-seriously-looking-at-ending-birthright-citizenship-idUSKCN1VB21B>; Paul LeBlanc, *Trump Again Says He’s Looking ‘Seriously’ at Birthright Citizenship Despite 14th Amendment*, CNN POLITICS (Aug. 22, 2019, 9:14 A.M.), <https://edition.cnn.com/2019/08/21/politics/trump-birthright-citizenship-14th-amendment/index.html>; Stephen Collinson, *Trump Slams ‘Crazy, Lunatic’ Constitutional Amendment in Midterm Endgame*, CNN POLITICS, (Nov. 2, 2018, 2:58 P.M.), <https://edition.cnn.com/2018/11/02/politics/donald-trump-immigration-midterms-missouri/index.html>; Esther Yu-Hsi Li, *How Many Candidates Have ‘Taken Advantage’ of Birthright Citizenship, But Oppose It?*, THINKPROGRESS (Aug. 19, 2015, 5:44 P.M.), <https://archive.thinkprogress.org/how-many-candidates-have-taken-advantage-of-birthright-citizenship-but-oppose-it-d63046b4c2cc/>; Katie Rogers, *Trump Encourages Racist Conspiracy Theory About Kamala Harris*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/08/13/us/politics/trump-kamala-harris.html>.

9. Brief for Petitioner [Conrad] at 49-51, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

10. *Id.* at 20.

11. Sara Kehaulani Goo, *What Americans want to do about illegal immigration*, PEW RESEARCH (Aug. 24, 2015), <http://www.pewresearch.org/fact-tank/2015/08/24/what-americans-want-to-do-about-illegal-immigration/>.

12. *Americans’ Knowledge of the Branches of Government is Declining*, ANNENBERG PUB. POL’Y CTR. (Sep. 13, 2016), <https://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining/>.

This Article argues, however, that Trump's comments brought into the open the unacknowledged truth: birthright citizenship has never been fully accepted as a matter of law or policy. Birthright citizenship has occasionally been the subject of academic debate, most notably around the 1985 publication of Peter H. Schuck and Rogers M. Smith's book, *Citizenship Without Consent: Illegal Aliens in the American Polity*, which argued against birthright citizenship for the children of undocumented immigrants.¹³ More significantly, long before Trump took office, federal officials covertly undermined and at times openly contested birthright citizenship.

The decision in *Wong Kim Ark* was important, to be sure, but its primary effect was to shift the fight over birthright citizenship from the lofty Greco-Roman chambers of the federal courts to the drab administrative offices of immigration inspectors at ports of entry, where executive branch officials have nearly unfettered power to decide who is and is not an American. Likewise, birthright citizenship led both state and federal officials to erect new hurdles to *proving* citizenship—a prerequisite to exercising many civil and political rights, and in particular the right to vote. Finally, the Supreme Court's decision in *Wong Kim Ark* was the partial impetus for an increasingly restrictive immigration policy through the early twentieth century. All of these battles gathered speed in the wake of *Wong Kim Ark*'s victory. All continue, in modified form, to this day.

* * *

The life of Wong Kim Ark exemplifies the shifting grounds on which birthright citizenship has been contested over the last 150 years. Newly discovered archival materials reveal that Wong and his family experienced firsthand, and at times shaped, the fluctuating relationship between immigration, citizenship, and access to civil and political rights. Drawing from government archives, legal opinions, family interviews, and immigration records, this Article uses the Wong family's struggle for a legal foothold in the United States to illustrate how birthright citizenship became superficially accepted in law but not in practice.

Part I describes the Wong family's arrival in the United States and the events that led the U.S. Supreme Court to pronounce on the scope of birthright citizenship in Wong's case. Part II provides a brief sketch of the citizenship laws and practices predating that case, and Part III describes the legal arguments raised and ostensibly resolved in *United States v. Wong Kim Ark*. Part IV brings to light new archival materials concerning Wong,

13. PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985). See also Peter H. Schuck & Rogers M. Smith, *Trump Is Half-Right. Congress Can End Birthright Citizenship*, WASH. POST (Oct. 31, 2018), <https://www.washingtonpost.com/outlook/2018/10/31/trump-is-half-right-congress-can-end-birthright-citizenship/>.

his family, and the ethnic Chinese living in the United States. These records illustrate how the government refused to recognize birthright citizenship even after the Supreme Court ruled in Wong’s favor. Finally, Part V mines government records stretching into the second half of the twentieth century to describe how the Wong family pushed back, establishing themselves in the United States despite immigration inspectors’ best efforts to thwart them. The Article concludes by drawing connections between the long history of denying birthright citizenship and debates over citizenship and immigration today.

Drawing on one family’s experience to describe the trajectory of birthright citizenship serves multiple purposes. First, the Wong family’s struggle illustrates how pronouncements in the U.S. law reports can fail to tell the whole story, obscuring the complicated ways in which the law on the books plays out in the lives of those declared the winners in its pages.¹⁴ Second, the Wongs demonstrate how those affected by government policies obstructing access to their legal rights can play an active role in protecting their own interests. As the archives reveal, the Wong family at times manipulated the government’s bureaucratic hurdles to obtain the results that were promised by the nation’s highest courts, but then withheld from them by the government officials charged with putting the law into practice.¹⁵

I. AN IMMIGRANT FAMILY’S BACKSTORY

Wong Kim Ark’s parents, Wee Lee and Wong Si Ping, lived legally in the United States for many years before their son’s 1870 birth.¹⁶ At the time, there was no such thing as an *illegal* immigrant because there were almost no laws barring entry into the country.¹⁷ They likely never considered

14. Professors Erika Lee and Lucy Salyer have both written detailed and compelling histories of Wong Kim Ark’s case in order to “remember the life history of Wong Kim Ark himself,” as well as the Supreme Court decision he is known for today. See Erika Lee, *The Story of Wong Kim Ark*, in *RACE LAW STORIES* (Rachel E. Moran & Devon W. Carbado eds., 2008); Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, in *IMMIGRATION STORIES*, (David A. Martin & Peter H. Schuck eds., 2005). This Article benefits enormously from their scholarship, and seeks to build on it through additional archival material describing Wong and his family’s experiences after he won his Supreme Court case.

15. Many scholars have explored the ways in which the Supreme Court’s legal pronouncements fall short of their stated goals, or fail to capture the experiences of the individuals involved. See, e.g., Shirin Sinnar, *The Lost Story of Iqbal*, 105 *GEO. L. J.* 379 (2017) (describing how the facts of plaintiff Iqbal’s detention were mischaracterized by the Supreme Court’s opinion in *Ashcroft v. Iqbal*); *Introduction: The Story of Law and American Racial Consciousness—Building a Canon One Case At a Time*, in *RACE LAW STORIES*, eds. (Rachel F. Moran & Devon W. Carbado eds., 2008) (noting the value of providing historical context to judicial decisions); MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) (explaining how criminal law has been used as a proxy to discriminate on the basis of race, undermining the Supreme Court’s equal protection jurisprudence).

16. Wong Kim Ark File, National Archives.

17. But see GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* 19-43 (1996) (explaining that although few federal laws barred noncitizens from entering the United States in the early and mid-nineteenth century, some state laws created barriers to entry).

America to be their permanent home, however, and for good reason. “The Chinese must go,” was the slogan of one prominent labor leader—a message the family received daily in big ways and small.¹⁸

The Wong family certainly knew that the Chinese were discouraged from living outside of Chinatown, that their children were excluded from most of San Francisco’s public schools, and that all Chinese immigrants were barred by federal law from becoming U.S. citizens.¹⁹ Wong Si Ping would likely have learned from his customers of the special taxes on Chinese fishermen, laundrymen, and miners intended to limit immigration and encourage the Chinese to leave, and he may have heard about the law requiring all prisoners held in the San Francisco County jail to have their hair cut within an inch of their scalp—a law obviously targeted at Chinese men, most of whom wore their hair in a long braid, or queue, as Chinese law required. He was directly affected by the San Francisco ordinance making it a misdemeanor to carry baskets on a pole across one’s shoulders, as Chinese merchants did to transport their goods across town.²⁰

Discriminatory laws were not the family’s only concern. On October 24, 1871, when Wong Kim Ark was still in diapers, a mob of 500 whites swarmed the City of Los Angeles’ tiny Chinatown—really nothing more than an alley strung with red banners and lanterns, housing fewer than 200 Chinese men, women, and children. Over the next few hours, the mob murdered 18 Chinese men with “fiendish pleasure.” They kicked, stabbed, shot, and hung their victims, resorting to clothesline when they ran out of rope. “Bring me more Chinamen, boys!” shouted a self-appointed hangman from a balcony, who “danc[ed] a quick step” while he awaited delivery of the next victim. Stores up and down the alley were looted and destroyed, and the pockets of men dangling by their broken necks were emptied. One victim hung naked from the waist down, his pants stolen and one of his fingers cut off to get at his diamond ring.²¹

The pogrom was widely reported in the national press.²² And yet Wee Lee and Wong Si Ping remained in San Francisco with their new baby. Perhaps they assumed that the violence that beset the handful of Chinese immigrants in the backwaters of Southern California would not repeat itself

18. BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* (2018).

19. YUNG, *UNBOUND FEET*, *supra* note 6, at 21-22 (1995); *Tape v. Hurley*, 66 Cal. 473 (1885) (challenging exclusion of Chinese-American children from San Francisco public schools); *Naturalization Act of 1870*, 16 Stat. 254 (1870).

20. YUNG, *supra* note 6, at 21-22; YONG CHEN, *CHINESE SAN FRANCISCO, 1850-1943: A TRANS-PACIFIC COMMUNITY* 64 (2000).

21. Scott Zesch, *Chinese Los Angeles in 1870-1871: The Makings of a Massacre*, 90 SOUTHERN CAL. Q. 113, 141, 142 (2008); *The Los Angeles Massacre*, N.Y. TIMES, Nov. 10, 1871, at A8. A total of 178 Chinese lived in Los Angeles in 1870, but many were servants who lived with their employers.

22. *War of Races*, N.Y. TIMES, Oct. 26, 1871, at A8; *The Los Angeles Massacre*, S.F. EXAMINER, Oct. 26, 1871, at A3; *The California Massacre*, CHICAGO TRIB., Nov. 8, 1871, at A4; *The Los Angeles Massacre*, N.Y. TIMES, Nov. 10, 1871, at A8.

on the modern, cosmopolitan streets of San Francisco.

If so, they were wrong. On the evening of July 24, 1877, a mob of hundreds of men, many newly out of work as a result of the deepening economic depression, marched toward the Chinese quarter, "rend[ing] the air with . . . demoniacal yells."²³ They ripped up the slats of the wooden sidewalks to use as weapons and battering rams, breaking into Chinese laundries and other Chinese-owned businesses along the way to steal money, then tipping over the coal lamps to set them on fire as they left. In the words of the *New York Times*, they had "resolved to exterminate every Mongolian and wipe out the hated race."²⁴ Fearing for their lives, newspapers reported that "not a Chinaman was to be seen on the streets" and "every door and shutter" in the Chinese quarter was "closed fast." Even so, when the night was over, four Chinese men lay dead, one shot and then burned to death after the mob torched his home.²⁵

Shortly after, the Wong family packed their bags and left the United States, giving up their home and store at 751 Sacramento Street. As the steamship pulled out of San Francisco harbor, it was the last time that Wee Lee would ever set sight on the United States. But her son would soon be back.²⁶

* * *

As the *S.S. Coptic* approached the port of San Francisco in August 1895, Wong Kim Ark, now twenty-four years old, must have breathed a sigh of relief. The journey between China and San Francisco took about a month, and for those crammed into steerage it was an ordeal. Wong likely joined his fellow passengers on the bow as the boat approached land, breathing the fresh air and watching the hills above San Francisco Bay materialize from the wreath of morning fog. He was finally home.²⁷

This was the third time Wong Kim Ark had enjoyed the view of San Francisco harbor from the deck of a steamship. After leaving for China as a child with his parents, Wong returned to the United States several years later

23. Katie Dowd, *140 Years ago, San Francisco was set ablaze during City's deadliest race riots*, S.F. GATE (Jul. 23, 2017), <https://www.sfgate.com/bayarea/article/1877-san-francisco-anti-chinese-race-riots-11302710.php>.

24. *The Force of "Sympathy"*, N.Y. TIMES, July 25, 1877, at A4; *Outbreak in San Francisco, Rioters Attack the Chinese*, EVENING STAR (Washington, DC), July 24, 1877.

25. *Mob Violence in San Francisco Directed Against the Chinese*, PHILADELPHIA INQUIRER, July 25, 1877; Katie Dowd, *140 Years Ago, San Francisco Was Set Ablaze During the City's Deadliest Race Riots*, S.F. GATE (July 23, 2017), <https://www.sfgate.com/bayarea/article/1877-san-francisco-anti-chinese-race-riots-11302710.php>; *The Force of "Sympathy"*, N.Y. TIMES, July 25, 1877, at A4; *Outbreak in San Francisco, Rioters Attack the Chinese*, EVENING STAR (Washington, D.C.), July 24, 1877.

26. Wong Kim Ark Files, National Archives.

27. JORAE, *supra* note 5, at 12; Lee Chew, *The Life Story of a Chinaman*, 55 INDEPENDENT 417 (Feb. 19, 1903), reprinted in *THE LIFE STORIES OF UNDISTINGUISHED AMERICANS AS TOLD BY THEMSELVES* 179-81 (Hamilton Holt ed., 1990).

with an uncle. His formal education over, he began work first as a dishwasher and then as a cook, living in a mining camp in the Sierras. In 1889, at age nineteen, Wong went back to China again, this time to find a wife.²⁸

Wong's parents would never have left it up to him to find a spouse, and in any case he had few women to choose from in California. In recent years, it had only become harder for Chinese women to immigrate to the United States. California's antipathy to the Chinese had swept the country, inspiring Congress to pass the Page Act in 1875, and then the Chinese Exclusion Act of 1882, which together barred most Chinese women, and all but select groups of Chinese men, from immigrating to the United States.²⁹ By 1890, there were fewer than four Chinese women in the United States for every 100 Chinese men. Marriage to a white woman was simply unthinkable, both culturally and legally under California's anti-miscegenation law, so men of Chinese ethnicity living in the United States often returned to China to marry and start a family.³⁰

Even had he been able to find a prospective bride on his own in the United States, Wong did not appear to be the type of young man to rebel against filial obligations. In an 1894 photo, he is the model a dutiful Chinese son. Despite having lived in the United States for twenty years, his hair is braided in the traditional Chinese queue and he is wearing a high-necked mandarin tunic rather than a western shirt and jacket. He looks younger than his years, though at five foot seven he was likely taller than both his parents.³¹

Wong not only found a wife on his 1889 sojourn to China, he also conceived his first child. His bride Yee Shee was seventeen, with bound feet like her mother-in-law. Together with his parents, Wong and his new wife took up residence in a five-room house with brick walls and a dirt floor in Ong Sing village in Guangdong province, awaiting the arrival of the family's first grandchild.³²

28. Wong Kim Ark File, National Archives.

29. YUNG, *supra* note 6, at 32-33 (describing the effect of the Page Law of 1875 and the Chinese Exclusion Act of 1882 on the number of male and female immigrants from China who came to the United States). The Page Law of 1875 barred persons from "China, Japan, or any Oriental country" from coming to the United States for "lewd and immoral purposes" or for "purposes of prostitution," as well as certain criminals and contract laborers. Act of March 3, 1875 (Page Law), ch. 141, 18 Stat. 477. Professor Leti Volpp describes the Page Law as the "advent of Chinese exclusion." Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405, 466 & n.283 (2005).

30. The 1890 census records the presence of 103,607 Chinese men and only 3,868 Chinese women in the United States as a whole. The ratio was slightly less extreme in California, which recorded 69,382 Chinese men and 3,090 Chinese women. 1 U.S. CENSUS BUREAU, REPORT ON POPULATION OF THE UNITED STATES 488, Table 21, ftp://ftp2.census.gov/library/publications/decennial/1890/volume-1/1890a_v1-14.pdf. See also MADELINE YUAN-YIN HSU, DREAMING OF GOLD, DREAMING OF HOME: TRANSNATIONALISM AND MIGRATION BETWEEN THE UNITED STATES AND SOUTH CHINA, 1882-1943 90-123 (2000).

31. Wong Kim Ark Files, National Archives; Max Roser, Cameron Appel and Hannah Ritchie, *Human Height*, OUR WORLD IN DATA (May 2021), <https://ourworldindata.org/human-height>.

32. Wong Kim Ark File, National Archives.

But the economic opportunities on Gold Mountain called, and Wong would not stay in China long enough to meet his son. Just a few months shy of his twentieth birthday, Wong returned by himself to the United States, where he rented a room and went back to work as a cook. Like many immigrants before and after, he endured months and years separated from his family in order to support them, sending whatever money he could save back to his parents, wife and child in Ong Sing village. Wong would not return to China again until December 1894, when he would meet for the first time his eldest child, a boy named Wong Yook Fun, and conceive a second child with the wife he had not seen for four years.³³

When Wong left for China in 1894, did he worry about his ability to return to the country in which he had been born and lived for most of his life? The Chinese Exclusion Act barred Chinese laborers from entering the United States, though Chinese merchants, teachers, students, and diplomats could still do so if they could prove their status to immigration officials' satisfaction. The law was grounded in racist views of the Chinese as an “unassimilable” race who, absent legal restrictions, would immigrate in “enormous numbers” and become a “corrupting and dangerous” influence on the rest of society.³⁴

Economic fears, stoked by racism and xenophobia, also played a role. Defending his vote in favor of the Chinese Exclusion Act, Republican Senator James G. Blaine echoed the complaints of many when he analogized Chinese laborers to slaves who would flood the labor market and undermine wages. Just as a “free white laborer never could compete with the slave labor of the South,” the Senator explained, so too would the “cheap servile labor” of “the Chinaman . . . pull[] down the more manly toil [of white workers] to its level” unless Congress put a stop to it.³⁵ So it was no surprise that the Chinese Exclusion Act passed by overwhelming majorities in the House and Senate and was signed into law by President Chester A. Arthur on May 6, 1882.

The law was the first significant barrier to immigration, and the first explicitly to target a group based on its race and class—though the 1875 Page Law did so implicitly. The Chinese Exclusion Act was also responsible for creating the immigration bureaucracy and its attendant paperwork, which took root and are still with us today—the forms, photos, stamps, seals, and signatures, as well as the officials needed to process all this paperwork and to detain and deport those who could not satisfy the law's requirements.³⁶

33. Wong Kim Ark Files, National Archives.

34. *Open Letter of Senator Blaine to Mr. Garrison*, BUFFALO MORNING EXPRESS & ILLUSTRATED BUFFALO EXPRESS, Feb. 24, 1879, at A2;

35. *Id.* See also Volpp, *Divesting Citizenship*, *supra* note 29, at 462-463 (describing contemporaneous views of Chinese immigrants).

36. ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA*,

But none of these changes to the law should have concerned Wong Kim Ark. The first sentence of the Fourteenth Amendment to the U.S. Constitution, ratified two years before he was born, provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.” As Wong knew, by virtue of his birth on U.S. soil, he was an American.³⁷

II. THE ORIGINS OF BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES

In most of the world today, automatic citizenship through birth on a country’s soil—known by its Latin term *jus soli* (“right of the soil”) is the exception, not the rule. Citizenship throughout the world is more typically conveyed through inheritance of the citizenship of one or both parents, known as *jus sanguinis* (“right of the blood”), or as a result of birth in the country followed by many of years of residence.³⁸ In contrast, under the Fourteenth Amendment, U.S. citizenship follows automatically from birth in the United States. The U.S. version of *jus soli* is without exception. A child born on U.S. soil is a citizen regardless of her parents’ immigration or citizenship status or the length of time she spends in the United States.³⁹

The United States inherited birthright citizenship from England at its founding, though England has now abandoned the rule in its purest form.⁴⁰ Under eighteenth century English law, almost everyone born on territory controlled by the British Crown “ow[ed] a lasting obedience to his natural superior the king” and had no power to cut the ties that bound. “Once an Englishman, always an Englishman,” had been the maxim cited by British courts. But America’s Founding Fathers concluded that this was *subjectship*, not *citizenship*. The Declaration of Independence and the

1882-1943, at 6-7 (2003); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and Passing: Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 4 (2000). As Professor Leti Volpp has explained, the Page Law of 1875 barred most Chinese women from immigrating to the United States. The Chinese Exclusion Act was the first to mention race explicitly, and it further restricted the immigration of Chinese women, as well as creating new barriers to immigration by Chinese men. Volpp, *Divesting Citizenship*, *supra* note 29, at 466 & n.283.

37. Wong knew that he was a U.S. citizen entitled to return to the United States. He was also aware that immigration officials might nonetheless attempt to deny him entry under the Chinese Exclusion Act. Before he left San Francisco, Wong provided immigration officials with documents proving he was born in the United States to ensure that he could re-enter upon his return. See Wong Kim Ark File, National Archives; Lee, *supra* note 14, at 95-96.

38. Omer Solodoch & Udi Sommer, *Explaining the Birthright Citizenship Lottery: Longitudinal and Cross-National Evidence for Key Determinants*, 14 REG. & GOVERNANCE 63 (2020), <https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12197>

39. Eric Foner, *Birthright Citizenship is the Good Kind of American Exceptionalism*, THE NATION, Aug. 27, 2015.

40. *Inglis v. Trustee of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830) (holding that England’s practice of birthright citizenship applied in the colonies); *Murray v. The Charming Betsy* 6 U.S. (2 Cranch) 64 (1804) (assuming that all persons born in the United States were citizens of the United States). In 2021, those born on British soil to noncitizen parents can register for citizenship only if they have lived in the United Kingdom for a significant period during childhood. See <https://www.gov.uk/apply-citizenship-born-uk/uk-until-10>.

American Revolution that followed refuted the English conception of perpetual and immutable citizenship without choice or consent. The Declaration announced that the “people” were entitled to “dissolve the political bands which have connected them with another,” because “governments . . . deriv[e] their just powers from the consent of the governed.” After the new nation ratified the U.S. Constitution in the name of “We the People of the United States,” it was clear that these “People” were empowered to choose their government. Left unresolved, however, was the question of which of the United States’ millions of residents were included within that term.⁴¹

Remarkably, the U.S. Constitution failed to define the rights and privileges of U.S. citizenship, or even who could claim that status. The Framers did not explain whether American citizenship was acquired by being born on U.S. soil, or by being the child of a U.S. citizen parent, or whether both were prerequisites. Nor was it clear whether the federal government or the states controlled access to citizenship.

Nonetheless, the Constitution does hint at what citizenship meant to the founding generation. We know that they conceived of citizenship as a significant marker of allegiance and civic engagement, for the Constitution provides that eligibility to serve as a member of the U.S. House of Representatives requires a minimum of seven years of U.S. citizenship, and to serve in the Senate a minimum of nine. The Framers shared the belief that citizenship could be automatically acquired at birth, as evident from the constitutional requirement that the President of the United States be a “natural born citizen.”⁴² And the Constitution grants Congress the exclusive power to create a “uniform rule of naturalization” governing acquisition of U.S. citizenship of those born outside the fold.⁴³

The Framers also made clear their opposition to gradations or hierarchies among citizens, as had been the case in ancient Rome and medieval England. The Constitution prohibits both the government of the United States and those of the individual states from granting a “title of nobility” that would suggest that one person or group had a status above their fellow citizens.⁴⁴ To guarantee that each state treated the others’ citizens as equals, Article IV of the Constitution provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States”⁴⁵ But the Constitution’s Privileges and Immunities Clause begged the question of who qualified as a citizen entitled to equal treatment—a tinderbox issue in a nation divided over racialized slavery.

41. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP*, at 7-8, 187 (1978); I-MIEN TSIANG, *THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907*, at 11 (1942).

42. U.S. CONST., art. II, § 1.

43. *Id.* art. I, § 8, cl. 4.

44. U.S. CONST. art. I, § 9, cl. 8.

45. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 251 (2005).

As legal historian Martha Jones has explained, the privileges and immunities clause posed a threat to the slave states in the antebellum era. If free blacks were considered citizens *anywhere*, the Privileges and Immunities Clause suggested they had to be treated as citizens *everywhere*, entitled to all the political and civil rights that even many Northern states limited to white property holders alone. If Vermont bestowed citizenship on its free black residents who then traveled to the South, did the Privileges and Immunities Clause require Virginia to treat those transplanted Vermonters as they would their own white citizens? That question repeatedly came before both the courts and Congress in the first half of the nineteenth century, producing clashing oratory but no clear results.⁴⁶ The issue finally came to a head in the Supreme Court's 1857 decision in *Dred Scott v. Sanford*, which declared that *no* African American, slave or free, was a citizen of the United States—a decision that helped to propel the nation into the Civil War.⁴⁷

In the aftermath of that war, the Constitution was amended not only to prohibit slavery and mandate equal protection of the law, but also to overrule *Dred Scott*'s rejection of birthright citizenship.⁴⁸ After the ratification of the Fourteenth Amendment in 1868, birthright citizenship was officially the law of the land, enshrining a race-neutral and lineage-free conception of what it means to be an American.

The Citizenship Clause of the Fourteenth Amendment was intended to do far more than overturn a single Supreme Court decision, however. In the words of legal historian Garrett Epps, that provision is the “key to the egalitarian, democratic Constitution that emerged from the slaughter of the Civil War.”⁴⁹ Birthright citizenship was the great equalizer, ensuring that

46. Martha S. Jones, *Birthright Citizenship and Reconstruction's Unfinished Revolution*, JOURNAL OF THE CIVIL WAR ERA, <https://www.journalofthecivilwarera.org/forum-the-future-of-reconstruction-studies/birthright-citizenship-reconstructions-unfinished-revolution/#page>; KETTNER, *supra* note 41, at 312-23; AMAR, *supra* note 45, at 253-54; ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 126 (1999); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 9-12 (2018).

47. 60 U.S. (19 How.) 393 (1857).

48. Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 429 (2013) (“How can we understand the 14th Amendment without understanding *Dred Scott v. Sandford*, which the Amendment overturned?”); Cristina M. Rodriguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 UNIV. OF PENN. J. OF CONST. L. 1363, 1364 (2009) (stating that the “specific purpose” of the Fourteenth Amendment’s citizenship clause was to “overrule *Dred Scott v. Sandford*.”).

49. Garrett Epps, *The Citizenship Clause Means What It Says*, THE ATLANTIC, Oct. 30, 2018, <https://www.theatlantic.com/ideas/archive/2018/10/birthright-citizenship-constitution/574381/>; Cristina M. Rodriguez, *14th Amendment is Key to the American Experiment*, CNN (Aug. 17, 2010, 3:09 P.M.) (“The [birthright citizenship] clause [] operates as a constitutional reset button. Each generation in the United States stands on its own, with equal citizenship status, regardless of parentage.”), <http://edition.cnn.com/2010/OPINION/08/17/rodriguez.14th.amendment/index.html>; GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 184-185 (1996) (“Withdrawal of birthright citizenship would aggravate caste division. . . .”). But see ROGERS M. SMITH, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 UNIV. OF PENN. J. OF CONST. L. 1329, 1330-31 (2009) (denying that the Citizenship Clause “embod[ies] an anti-caste,

the United States is “one nation, with one class of citizens, and that citizenship extends to everyone born” on U.S. soil.⁵⁰ No group who made their home in the United States could be perpetually excluded because of their race, ethnicity, religion, immigration status, social class, or former condition of servitude.⁵¹

Whatever his status before the Fourteenth Amendment, after its ratification Wong Kim Ark—like all other native-born children of immigrants—was a U.S. citizen. To reenter his country, Wong needed only to prove the location of his birth.

III. UNITED STATES V. WONG KIM ARK: THE SUPREME COURT BATTLE OVER BIRTHRIGHT CITIZENSHIP

A. *A Test Case*

Despite the language of Section 1 of the Fourteenth Amendment, by the 1890s, the U.S. government was unwilling to concede that all born on U.S. soil were citizens. The government opposed birthright citizenship for the children of Chinese immigrants not only because so many white Americans thought them unfit to be fellow citizens, but also because it created a “loophole” in the Chinese Exclusion Act of 1882. The Act’s stated goal was to “protect . . . white people of the Pacific States . . . against a degrading and destructive association with the inferior race now threatening to overrun them.”⁵² But now lawmakers feared it wasn’t working. As U.S. Attorney John T. Carey bemoaned in 1888, the “remarkable increase in the per cent of those claiming to be citizens is portentous of the desperate resorts that will be made to defeat the objects of the Exclusion Bill.”⁵³

Remarkably, the question of who qualified for birthright citizenship remained unsettled almost thirty years after that provision had been added to the Constitution. A few lower courts had held that the Fourteenth Amendment’s birthright citizenship guarantee applied to children born to noncitizen parents, including those born to Chinese immigrants who were banned from naturalizing under federal law.⁵⁴ But in previous opinions the Supreme Court had expressed “doubts” on the matter—fertile ground on

anti-subordination principle”).

50. Rodríguez, *supra* note 49, at 1365-67.

51. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION*, xxix (2019).

52. Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 34 (1998) (quoting 13 CONG. REC. 1637-38 (1882) (statement of Sen. George)).

53. Salyer, *supra* note 14, at 63 (citing letter from John T. Carey to Attorney General, Oct. 27, 1888, File 980-84, Letters Received, Year File, Central File, Records of the Department of Justice, RG 60, National Archives and Records Administration).

54. *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884).

which to plant a ruling for the government.⁵⁵ As the *S.S. Coptic* sailed into San Francisco Bay in August 1895, the government had been on the hunt for a test case to bring that question of “vast importance” before the nation’s highest court.⁵⁶ It chose Wong Kim Ark.

* * *

Today, the nation has dozens of immigrant detention facilities that house 40,000 would-be immigrants for the months it can take to resolve their cases.⁵⁷ But in 1895 the United States excluded only a small percentage of those who reached its shores, and so California had no place to put Wong while he awaited word of his fate.⁵⁸ When Wong was denied entry into the United States, he was forced to remain under guard on the ship he had arrived on, the *S.S. Coptic*. When that boat was ready to depart, he was transferred to the *S.S. Gaelic*, and then finally to the *S.S. Peking*. The food and water he had received during his month-long journey had been poor and minimal, and it could only have gotten worse as the captains of these ships were forced to host an unwanted third-class passenger for weeks on end.⁵⁹

At least Wong was not fighting alone. A consortium of Chinese interest groups known in the mainstream press as the “Chinese Six Companies” quickly hired a lawyer to represent Wong. They were as eager to defend the first case to test birthright citizenship as the government was to bring it. Within a few days, the lawyer had filed a habeas corpus petition on Wong’s behalf. The petition was slapdash, at least by today’s standards. Essential dates and names were added in cursive squeezed between the typewritten boilerplate. But it was good enough to get Wong a court date.⁶⁰

Enlisting the courts to protect a persecuted minority’s rights is a strategy most closely associated with the African American civil rights movement and the National Association for the Advancement of Colored People. But

55. *Minor v. Happersett*, 88 U.S. 162, 168 (1875).

56. *A Question of Citizenship*, S.F. CALL, Feb. 8, 1896; Salyer, *supra* note 14, at 63 (describing how the U.S. government sought a test case to challenge birthright citizenship for the children of Chinese immigrants).

57. Andy Kiersz, Leanna Garfield & Shayanne Gal, *Migrant Detention Centers in the United States Are Under Fire for Their Horrifying Conditions—and There’s at Least One in Every State*, BUSINESS INSIDER (July 5, 2019, 12:11 P.M.) <https://www.businessinsider.com/ice-immigrant-families-dhs-detention-centers-2018-6>.

58. ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 10 (2012) (explaining that steamships were main location for immigrant detention for decades after the enactment of the first laws restricting immigration).

59. Petition for Writ of Habeas Corpus at 2, Wong Kim Ark Files, National Archives; Lee, *supra* note 14, at 96-97.

60. Wong’s lawyer could have argued that because Wong had been previously admitted to the United States in 1890, the government had already conceded his citizenship. Whatever the merits of that argument, his lawyer chose not to make it because he preferred that the “broad principle of citizenship [be] settled for all time.” *All Asiatics Affected*, S.F. CALL, November 13, 1895. It is unclear whether Wong’s lawyer obtained his informed consent before making that choice. Wong Kim Ark Files, National Archives.

the Chinese were among first groups targeted for discrimination who mounted a systemic legal response on their own behalf.⁶¹

In the latter half of the nineteenth century, Chinese immigrants in the United States organized to support the community against an increasingly hostile white world. A newly-arrived Chinese immigrant would be met by a member of a family association—groups loosely based on lineage—who could help with immigration problems at a port of entry. Organizations based on region of origin in China, known as *huiguan*, provided further support in finding employment, housing, and medical care.

The “Chinese Six Companies,” also known as the Chinese Consolidated Benevolent Association, consisted of representatives from these regional organizations. At first, the Chinese Six Companies primarily served to assist the Chinese community through charitable activities, networking, and mutual aid. As anti-Chinese animus grew, however, the Six Companies took on an outward-facing role, advocating on behalf of the rights and interests of those of Chinese descent living in the United States or seeking to enter.⁶²

The Six Companies kept a handful of white, establishment lawyers on retainer, paying them well to bring cases on their behalf, and they did so at a relentless pace.⁶³ In the decade that followed the enactment of the Chinese Exclusion Act of 1882, recent arrivals from China filed over 7,000 cases challenging exclusion, deportation, and discriminatory laws and practices—an extraordinary number, especially considering that there were only about 110,000 people of Chinese descent living in the United States at the time.⁶⁴ Seven percent of the Chinese population went to court.

Although the Chinese won with some frequency in front of the lower courts, their track record in the U.S. Supreme Court was abysmal.⁶⁵ The nine justices often ruled unanimously against Chinese plaintiffs in cases challenging exclusion and deportation, referring to Congress’s intent to protect against an “oriental invasion” that posed a “menace to our

61. See Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1222-23 (2016). The National Association for the Advancement of Colored People was founded in 1909. NAACP History: W.E.B. Dubois, <https://www.naacp.org/naacp-history-w-e-b-dubois/>.

62. Lucy E. Salyer, *Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891-1905*, THE JOURNAL OF AMERICAN HISTORY, Vol. 76, no. 1 (June, 1989), at 100; YUCHENG QIN, THE DIPLOMACY OF NATIONALISM: THE SIX COMPANIES AND CHINA’S POLICY TOWARD EXCLUSION, 45-46 (2009). See generally Him Mark Lai, *Historical Development of the Chinese Consolidated Benevolent Association/Huiguan System in CHINESE AMERICA: HISTORY AND PERSPECTIVES* (1987).

63. YUCHENG QIN, THE DIPLOMACY OF NATIONALISM: THE SIX COMPANIES AND CHINA’S POLICY TOWARD EXCLUSION, 106-108, 120 (2009); Salyer, *Captives of the Law*, *supra* note 62, at 100. Salyer explained that a small group of between 6-8 attorneys handled almost all of the Chinese immigrants’ cases, and were paid well—approximately \$75-\$100 per case. She concludes the “Chinese litigants’ ability to obtain representation was a key to their success in the federal courts.” *Id.* California barred noncitizens from practicing law, and so there were very few lawyers of Chinese descent in the state.

64. Salyer, *Captives of Law*, *supra* note 62, at 92.

65. *Id.* (stating that the Chinese won judicial reversals of immigration officials’ decisions to deny them entry in over 85% of the 7,080 cases filed in federal court between 1882 and 1890).

civilization.”⁶⁶ If Wong Kim Ark’s case reached the Supreme Court, no one could be sure what that tribunal would decide.

All recognized that the stakes in Wong’s case were momentous.⁶⁷ At issue was the future of birthright citizenship not just for those of Chinese ancestry, but for every child of an immigrant who had yet to naturalize by the date of the child’s birth. As Wong’s lawyer put it in an interview with the *San Francisco Call*, “Think of all the people in this country who have been born of parents who owe allegiance to either Great Britain, Germany, Italy or some other European Power. Are all these people to be declared not citizens?”⁶⁸ Wong’s best chance, the lawyer knew, was to tie his claim to citizenship to that of hundreds of thousands of children of *white* immigrants, ensuring that they would stand or fall together.

But the government and its supporters countered that to grant the Chinese birthright citizenship would be disastrous. If the children of Chinese immigrants were considered U.S. citizens, then they “may go and come whenever and wherever they please” and would also have the right to hold public office and to “exercise the elective franchise.”⁶⁹ In an editorial, the *San Francisco Call* declared it would be “the height of absurdity” to give such rights to an “unassimilable race” who “wear a foreign dress, speak a foreign tongue” and whose native-born children remain as “distinctively alien as the rawest recruit from the coolie hordes of Canton.”⁷⁰ With the battle lines clearly drawn, it was now for the U.S. Supreme Court to decide.

B. Before the U.S. Supreme Court

On the afternoon of Friday, March 5, 1897, U.S. Solicitor General Holmes Conrad rose to his feet as the justices filed into the Old Senate Chamber in the U.S. Capitol, ready to begin the oral argument in *United States v. Wong Kim Ark*. Nine upholstered chairs were arranged behind a raised bench, separated from counsel and audience by a decorative iron railing. Chief Justice Melville Fuller sat in the middle, his colleagues arranged evenly on either side, all dressed in robes of black silk. (Fuller, who was under five and a half feet tall, had arranged for his chair to be raised, putting him on the same plane as his taller colleagues but forcing him to rest his feet on a hassock.)⁷¹

The Chief Justice had played an important role the day before, when he had sworn in William McKinley to serve as the twenty-fifth President of the

66. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

67. *A Question of Citizenship*, S.F. CALL, Feb. 8, 1896 (referring to *United States v. Wong Kim Ark* as raising “a question of vast importance”).

68. *All Asiatics Affected*, S.F. CALL, November 13, 1895.

69. *Chinese as Citizens*, S.F. CALL, Jan. 4, 1896, 5.

70. *Chinese and the Law*, S.F. CALL, Nov. 14, 1895.

71. JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 4, 9 (1978).

United States on the steps of the U.S. Capitol. The post-election timing of the oral argument in Wong Kim Ark’s case was no accident. Neither the government nor Wong’s team of lawyers wanted the case to become entangled in election politics, especially because the Supreme Court’s decision could jeopardize the eligibility to vote of the native-born children of all noncitizens—amounting to hundreds of thousands or more—who had always thought themselves U.S. citizens.⁷²

Solicitor General Conrad, a tall man with prematurely graying hair and an “erect military bearing,” invariably made a good impression on the Justices. Conrad was a Democrat from a prominent, slave-owning Virginian family, and he had also served as a high-ranking Confederate cavalry officer during the Civil War. Although Conrad would not have appreciated the comparison, he shared with Wong Kim Ark the experience of having his citizenship questioned. Like all those who fought for secession, Conrad lost his citizenship rights during the Civil War and for at least a time was unable to vote or to hold public office.⁷³ But those rights were restored, at the very latest, by President Andrew Johnson’s blanket Christmas pardon of 1868.⁷⁴ Conrad became an active member of the Democratic Party, eventually winning a seat in the Virginia legislature before being appointed Solicitor General by President Grover Cleveland, a Democrat, in 1895. As he stood up to argue for the United States, Conrad was well aware that his days as Solicitor General were numbered now that a Republican had taken over the Presidency.⁷⁵

Sitting just a few feet away were Supreme Court veterans Maxwell Evarts and John Hubley Ashton, who had been hired by the Chinese Six Companies to handle the argument for Wong.⁷⁶ Evarts worked in the law department of the Southern Pacific Railroad, which had a vested interest in maintaining a source of Chinese labor.⁷⁷ Ashton had served as an Assistant Attorney General under President Lincoln, and he fondly described Lincoln as “the great soul that wrote the Emancipation Proclamation.”⁷⁸ The two

72. Salyer, *supra* note 14, at 69; *The Question of Citizenship*, S.F. CALL, Feb. 8, 1896; *The Wong Kim Ark Case*, S.F. CALL, Mar. 29, 1896 (explaining that the government’s lawyers planned to “ask the court to defer its decision until after the election”)

73. See AMANDA FROST, YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS 31-48 (2021) (describing how Confederate leaders lost their citizenship rights when they sought to secede from the United States). See also KETTNER, *supra* note 41, at 334-337, 340 n.17; General Robert E. Lee’s Parole and Citizenship, PROLOGUE MAGAZINE 37, no. 1 (2005); JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953) 112.

74. Declaration of December 25, 1868 granting full pardon and amnesty to all persons engaged in the late rebellion, <https://www.loc.gov/resource/rbpc.23602600/>.

75. Holmes Conrad Collection, Stewart Bell Jr. Archives Room, Handley Regional Library, Winchester-Frederick County Historical Society, <https://www.handleyregional.org/services/departmen ts/archives/manuscripts/c/893-THL>.

76. *Important Case Argued*, WASH. TIMES, Mar. 6, 1897.

77. BULLETIN OF YALE UNIVERSITY, *Obituary of Maxwell Evarts*, OBITUARY RECORD OF YALE GRADUATES 629 (1914), http://mssa.library.yale.edu/obituary_record/1859_1924/1913-14.pdf.

78. J. Hubley Ashton, *Lincolnia: A Glimpse of Lincoln in 1864*, 69 J. OF THE ILL. STATE HIST.

men were convinced, both morally and legally, that all persons born in the United States were entitled to citizenship, whatever their race.

Speaking first, Solicitor General Conrad made the best legal argument available to him in light of the language of the Fourteenth Amendment. Seizing upon that Amendment's qualification that birthright citizenship applied only to those "subject to the jurisdiction" of the United States on the date of their birth, Conrad argued that the term "jurisdiction" referred to *political* as well as territorial jurisdiction. Because Wong's parents were citizens of China at the time of his birth, Conrad claimed they were "subject to the jurisdiction of the Emperor of China" and not the United States. As their child, Wong was therefore also "the subject[] of a foreign power" because the "domicile of the parent is the domicile of the child. Their people are his people."⁷⁹

But Conrad did not limit himself to this textual argument. Halfway through his brief, he dropped a bombshell worthy of a former officer in the Confederate Army. The Fourteenth Amendment is of "doubtful validity" so "far as the ten Southern States were concerned," he declared on behalf of the United States. The Southern States' admission back into the Union after the Civil War was conditioned on their ratification of that Amendment—a process Conrad described as "coerc[ive]" and amounting to "a blot on our constitutional history."⁸⁰

In other words, the Solicitor General of the United States was defending a federal governmental policy against constitutional challenge on the ground that a provision of the Constitution was, well, unconstitutional. Conrad did not stop there. He took aim at the entire Reconstruction era, which he described as "that unhappy period of rabid rage and malevolent zeal when corrupt ignorance and debauched patriotism held high carnival in the halls of Congress."⁸¹ Apparently, Solicitor General Conrad viewed Wong's case as an opportunity not only to challenge the citizenship of a handful of children of Chinese immigrants, but also to shape the legacy of Reconstruction and the three constitutional amendments that era produced.

By the 1890s, the federal government had abandoned its grand project to reconstruct the nation into an egalitarian society in which political power was shared among the races. After the federal government withdrew federal troops from the South in the late 1870s, rampant violence disenfranchised black voters and ushered in the Jim Crow era, putting an end to a brief period when blacks exercised some degree of political power. As Conrad's argument in Wong's case made clear, Reconstruction's opponents sought

SOC'Y 67, 69 (Feb. 1876).

79. Brief for the Petitioner (Conrad), at 49-51, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

80. *Id.* at 46-48 & n.1 (quoting 2 GEORGE TICKNOR CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES*, 376 *et seq.* (1896)).

81. *Id.* at 16-17.

to deny citizenship rights not only to blacks, but to all who were viewed as outsiders for reasons of race, nationality, or immigration status. Wong’s case was an opportunity to further erode Reconstruction’s anti-caste, anti-subordination principles by holding that some born in the United States would by law never be granted the full civil and political rights of membership. The Confederacy may have lost the Civil War, but Conrad was determined it would win the peace.

Conrad was strangely silent, however, on the practical consequences of the government’s position. The race-neutral language of the Fourteenth Amendment made it impossible for the government to distinguish native-born children of Chinese descent from the children of Caucasian immigrants. If Wong was not a U.S. citizen at birth because his parents were noncitizens, then the same was true for every person born on U.S. soil to foreign parents, whatever that person’s race. His position could unravel the status of millions, including those whose families had been in the United States for many generations. After all, if the child of an alien is himself an alien, then that person’s children are also aliens, and the children of that person’s children are aliens—and so on.

Conrad left this awkward policy question to George D. Collins, a private San Francisco attorney whose published articles on the issue had played a key role in getting the case before the Supreme Court.⁸² Collins submitted an *amicus curiae* brief addressing the policy arguments against birthright citizenship, though he spent as much time litigating his case in the press as he did briefing it in court.⁸³ The *San Francisco Examiner* quoted Collins extensively. “For the most cogent reasons we have refused citizenship to Chinese subjects,” Collins declared in the pages of that publication, referring to the bar against Chinese naturalization, “and yet as to their offspring who are just as obnoxious, and to whom the same reasons apply with equal force, we are told that we must accept them as fellow citizens and that, too, because of the mere accident of birth!”⁸⁴

In the racist logic of his era, Collins had a point. The Chinese Exclusion Act of 1882 expressly barred the Chinese from naturalizing—a prohibition that remained in place until 1943. The consensus in Congress was that unlike the “Aryan or European race,” the Chinese lacked “sufficient brain capacity . . . to furnish motive power for self-government,” and had “no comprehension of any form of government but despotism.”⁸⁵ One

82. George D. Collins, Note, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831, 834 (1884); *Attorney Collins’ Part*, S.F. CALL, Nov. 14, 1895.

83. *Attorney Collins’ Part*, S.F. CALL, Nov. 14, 1895. Collins remained a colorful figure long after Wong Kim Ark’s case was resolved. In 1905, he was tried for bigamy and perjury in a case that dominated the headlines of the San Francisco papers for weeks. *George D. Collins v. Thomas F. O’Neil*, 3 AM. J. INT’L L. 747 (July 1909).

84. *No Ballots for Mongols*, S.F. EXAMINER, May 2, 1896, 16.

85. LEE, *supra* note 36, at 100.

congressman declared that they were “a class of people wholly unworthy to be entrusted with the right of American citizenship.”⁸⁶ If Congress had the constitutional authority to prevent the Chinese from acquiring U.S. citizenship—and in the 1890s, all assumed it did—then Collins argued that surely the Constitution did not bestow citizenship on their equally “obnoxious” children simply because they were born on U.S. soil.

Collins began his brief to the Supreme Court with a sermon. The “honor and dignity in American citizenship” was “sacred,” he proclaimed, and must be protected from the “foul and corrupting taint of a debasing alienage.” He asked, are “Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth?” He answered his own question: “If so, then . . . American citizenship is not worth having.”⁸⁷

Unlike Solicitor General Conrad, Collins did not shy away from the consequences of his argument. He acknowledged that the government’s interpretation of the Fourteenth Amendment would strip citizenship from hundreds of thousands of children of immigrants—children who had come of age and now voted in federal and state elections, held political office, served in the military, traveled abroad under the protection of the U.S. flag, and who had always considered themselves to be Americans.⁸⁸ Collins airily dismissed the disruption such a ruling might cause, declaring that “it is the cardinal duty of the judicial department to administer the law regardless of its consequences, leaving to the legislature the correction of evil results.”⁸⁹ But he also suggested a neat solution: all the *white* individuals affected could acquire citizenship through naturalization, leaving as perpetual aliens only the children of Chinese, Japanese, Indians, Arabs, and other racial groups “unworthy” of citizenship.⁹⁰

When it was their turn to speak, Evarts and Ashton made short work of the government’s “extraordinary proposition” to eliminate birthright citizenship for the children of aliens.⁹¹ The government’s position would replace citizenship based on birth on U.S. soil with citizenship based on parentage. Such a reading of the Constitution would strip citizenship from all born to noncitizens. Included would be the very group the Reconstruction Congress most clearly sought to protect—the former slaves

86. LEE, *supra* note 36, at 100 (quoting Rep. Horace Page).

87. Brief for Petitioner (Collins), at 34, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

88. *Id.* at 32-33, 37.

89. *Id.* at 33.

90. *Id.* at 33-34 (explaining that those who lose their citizenship could naturalize, and then noting that the naturalization laws “wisely discriminat[e] in the selection of such aliens as are to be deemed eligible to citizenship”); *The Question of Citizenship*, S.F. CALL, Feb. 8, 1896.

91. Brief for Respondent, at 14, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

and their children, who were all declared in the Supreme Court’s 1857 *Dred Scott* decision to be noncitizens.⁹² And it would defeat the Amendment’s overarching purpose to rid the country of “Caste” and “Oligarchy of the skin”—the scourges over which the Civil War had in large part been fought.⁹³

Wong’s lawyers then walked the justices through the legislative history of the Fourteenth Amendment. The limiting phrase “subject to the jurisdiction [of the United States]” was meant to exclude from citizenship only the “children born in the United States of foreign diplomatic agents” and “Indians born within the limits of the United States, and who maintain their tribal relationship” because neither of these groups was subject to the jurisdiction of U.S. civil and criminal laws.⁹⁴

But the children of immigrants, whatever their race, were included in the birthright citizenship guarantee. Congressional debates preceding the Amendment’s ratification had addressed the very question at issue in Wong’s case. When Pennsylvania Senator Edgar Cowan asked, “Is the child of the Chinese immigrant in California a citizen?” the answer was a clear yes. “We are entirely ready to accept the provision proposed in this constitutional amendment,” declared California Senator John Conness, “that the children begotten of Chinese parents in California . . . shall be citizens.”⁹⁵

For Wong Kim Ark and his attorneys, as for Solicitor General Conrad and the U.S. government, the Civil War itself was on trial. Evarts and Ashton decried the Solicitor General’s suggestion that the Fourteenth Amendment “is not a valid part of the Constitution of the United States,” and accused the government of having “disdain” for the Amendment’s framers. In the aftermath of the Civil War, the country established birthright citizenship “without distinction of color or race, and irrespective of the nationality, or color, or race, or previous political condition of their parents,” they explained.⁹⁶ Yet under the government’s reading of the Constitution, “the war has not terminated,” and antebellum views excluding certain races from citizenship still held sway. If the government’s position prevailed, Evarts and Ashton argued, it would eliminate the constitutional changes for “which the country had paid so dearly in costly treasure and still more costly blood.”⁹⁷

92. *Id.* at 14-18. *See also* Gabriel J. Chin and Paul Finkelman, Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation, 54 U.C. Davis L. Rev. 2215 (2021) (arguing that slaves brought to the United States in violation of federal laws restricting the slave trade were nonetheless intended to be included in the Fourteenth Amendment’s citizenship clause).

93. Cong. Globe, 40th Cong., 3d Sess. 903 (1869) (statement of Sen. Sumner).

94. Brief for Respondent, at 22-23, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (quoting Sen. Howard).

95. *Id.* at 23-24.

96. *Id.* at 6-8.

97. *Id.* at 8.

C. The Supreme Court's Decision

Wong Kim Ark's case was not easy. Justice Field was the only member of the Court on record in support of birthright citizenship, and he would retire before the case was decided. The Court had questioned birthright citizenship in dicta in some of its previous decisions, giving the government hope that the Court was sympathetic to its argument.⁹⁸ The *San Francisco Call* declared that "there is a strong possibility" the government would win.⁹⁹ And no one needed to tell Evarts and Ashton that they could lose. The two had done so before in cases in which the justices had expressed deep-seated animus against the Chinese.¹⁰⁰

The Court did not issue its opinion for a little over a year—an unusually lengthy delay that may have been due to contentious behind-the-scenes lobbying by the justices. The case had become such a thorn in the justices' sides that when the Court finally released its decision, Justice David Brewer privately circulated among his brethren a poem in mock celebration:

At last the end of Wong!
We've studied, written long,
And may be wholly wrong;
Yet join the happy song,
Goodby, goodby to Wong.¹⁰¹

Out on \$250 bail, Wong continued to work as a chef and live in a rented room in San Francisco, surely wondering every day whether the Court would declare that he was an alien without permission to remain in the United States.

Then on Monday, March 28, 1898, the news arrived. In a rare Supreme Court victory for a "Chinaman," Wong had won by a 6-2 vote. Not only was he now safely an American citizen entitled to remain in the United States for the rest of his life, Wong Kim Ark had won that right for every child born on U.S. soil, regardless of race, color, or ancestry.

* * *

The majority opinion was authored by Justice Horace Gray, and it makes for a tedious read. He devoted dozens of pages to reviewing the history of birthright citizenship in the United States, England, and continental Europe over the previous millennium, despite its marginal relevance to the question at hand. Turning to the modern era, Gray admitted that the origins of birthright citizenship in the United States were muddled by slavery and

98. See *Minor v. Happerset* (1874), 88 U.S. (21 Wall.) 162 (1875).

99. *The Question of Citizenship*, S.F. CHRONICLE, Feb. 8, 1896.

100. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); see also Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898: States' Rights, the Law of Nations, and Mutual Consent*, 15 GA. IMMIGR. L. REV. 519 (2001) (arguing that Wong Kim Ark's victory was not inevitable).

101. Salyer, *supra* note 14, at 77.

racism. Nonetheless, Gray concluded that even before the Fourteenth Amendment was enacted “all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners . . . were native-born citizens”—with the usual exceptions for children of ambassadors and public ministers of foreign governments.¹⁰² The Fourteenth Amendment “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.”¹⁰³

But Wong was not black; he was the child of immigrants of the “yellow race.” And so the question for the Court was whether the Fourteenth Amendment extended to *all* children of noncitizens, whatever their race or their immigration status.

Gray explained that a majority of the Court found that it did. The Amendment referred to “All persons born . . .” words that are “general, not to say universal, restricted only by place and jurisdiction, and not by color or race.”¹⁰⁴ The Court agreed with Wong’s lawyers that the qualifying language “and subject to the jurisdiction thereof” was intended merely to exclude members of Indian tribes, children born to enemy aliens in a hostile occupation, and children of diplomatic representatives—longstanding exceptions to the common law rule of birthright citizenship.¹⁰⁵ In all three of these exceptions, the parents and their children were *not* within the full jurisdiction of the United States, in that they were not subject to the full range of civil and legal sanctions that could be imposed on all other residents. This put them in marked contrast to the children of noncitizens, such as Wong. Whatever the immigration status of Wong’s parents, they were subject to all the same criminal and civil laws as any resident.¹⁰⁶ Gray and his brethren reached the “irresistibl[e] . . . conclusion” that the “fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory.”¹⁰⁷ (Wisely, the Court ignored the government’s argument that the Fourteenth Amendment was invalid because southern states had been “coerced” into ratifying it.)

The Court may also have been persuaded by the pragmatic case for granting Wong Kim Ark birthright citizenship. As the Court recognized, to

102. *United States v. Wong Kim Ark*, 169 U.S. 649, 674-75 (1898).

103. *Id.* at 676.

104. *Id.* at 676.

105. *Id.* at 682.

106. In recent years, some have argued that neither the Fourteenth Amendment nor *Wong Kim Ark* support granting birthright citizenship to the children of unauthorized immigrants. Wong’s parents were legally residing in the United States when Wong was born, these commentators argue, and thus the decision does not apply to children of those in the United States illegally. *See supra* notes 8, 13. But the rationale for the Court’s decision is that *everyone* in the United States is required to obey criminal and civil laws, and thus is “subject to the jurisdiction” of the United States, with the exception of members of Indian tribes, children born to enemy aliens, and children of diplomats. That reasoning would include the children of persons not legally present in the United States at the time of the decision.

107. *Wong Kim Ark*, 169 U.S. at 693.

hold otherwise “would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.”¹⁰⁸ However tempting it might be to deny birthright citizenship to the Chinese, the government’s argument applied to the children of European immigrants as well, and the Court was unwilling to put an end to their claims of birthright citizenship.

Chief Justice Fuller penned a lengthy dissent. The mere “accident of birth” in the United States did not automatically subject the child to the jurisdiction of the United States, Fuller argued, and he repeated Collins’ arguments that it made no sense to grant birthright citizenship to a group that was barred from naturalizing.¹⁰⁹ But of the eight justices who voted on the case, Fuller could convince only Justice John Marshall Harlan to join him. In the words of Fuller’s biographer, *Wong Kim Ark* “was perhaps his worst defeat on the Court.”¹¹⁰

Harlan’s dissent is startling, complicating his legacy as an advocate for racial equality. His stance in favor of civil rights for blacks had led Frederick Douglass to declare him “a moral hero.”¹¹¹ In 1896, just a year before Wong’s case reached the Court, Harlan had written an angry dissent in *Plessy v. Ferguson*—the case establishing “separate but equal” accommodations for whites and blacks, cementing Jim Crow racial segregation into U.S. law until the Supreme Court’s 1954 decision in *Brown v. Board of Education* finally declared it must end. The Court’s lone dissenter in that case, Harlan had passionately argued that “our constitution is color-blind.”¹¹² He condemned his colleagues in highly personal terms, declaring “the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case”—a pronouncement that eventually earned him the title of “racial prophet.”¹¹³ But it seems that Harlan also had his racial blind spots. For Harlan, the Constitution’s principle of racial equality stopped just short of the Chinese.

IV. THE GOVERNMENT’S REFUSAL TO ACCEPT DEFEAT

The U.S. government had lost the battle to eliminate birthright citizenship. Native-born children of Chinese immigrants were now free to come and go from the United States, to vote, hold office, and exercise all

108. *Id.* at 694.

109. *Id.* at 731.

110. WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910, at 235 (1967).

111. James W. Gordon, *Was the First Justice Harlan Anti-Chinese?*, 36 WESTERN NEW ENGLAND L. REV. 287, 288 (2014); see also Goodwin Liu, *The First Justice Harlan*, 96 CAL. L. REV. 1383 (2008); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

112. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

113. Gordon, *supra* note 111, at 289.

the other rights of citizenship.

That was not all. Under federal statute, children born to U.S. citizen fathers anywhere in the world were also automatically U.S. citizens at birth, entitled to all those same rights.¹¹⁴ Like Wong, many native-born men of Chinese ancestry had little choice but to return to China to find a spouse.¹¹⁵ These Chinese wives frequently remained behind in China, visited at most every few years by their absent spouses. In the words of one Chinese saying, these men returned to dust off the “webs on top of the bedposts” and conceive another child before going back to their jobs on Gold Mountain.¹¹⁶ Eventually, these children grew up and sought to come to the United States for the same economic reasons that compelled their fathers to do so. The Supreme Court’s decision in *United States v. Wong Kim Ark* meant that they were citizens at birth too.

But federal immigration officials did not give up so easily. At times, government officials simply ignored the Supreme Court’s decision in *Wong Kim Ark*’s favor, making up new exceptions to birthright citizenship nowhere in the text of the Fourteenth Amendment or the Court’s decisions. In 1904, Victor H. Metcalfe, Secretary of the Department of Commerce and Labor, refused to allow the admission of native-born citizen Yee Ching Ton. Yee had spent most of his twenty-six-years in China, but upon his arrival in San Francisco he produced witnesses attesting that he had been born in San Francisco. Without a shred of legal support, Metcalfe declared that a person who “waits until he is 26 years of age . . . before he attempts to claim his birthright is not within the reasoning upon which the Supreme Court reached its decision in the Wong Kim Ark case.”¹¹⁷ Metcalfe explained that he had no choice, for if Yee was allowed to claim birthright citizenship, then “by the exercise of a little ingenuity, any Chinese person in [his] twenties . . . [could] establish his standing as an American citizen.”¹¹⁸

The government further undermined birthright citizenship by making the standard of proof of that status so high as to be nearly impossible to meet. Following Wong Kim Ark’s victory, immigration officials adopted the

114. An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Acts Heretofore Passed on That Subject (Naturalization Law of 1802), ch. 28, 7 Stat. 153 (1802) (“[T]he children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States.”); Mae M. Ngai, *Legacies of Exclusion: Illegal Chinese Immigration During the Cold War Years*, 18 J. AM. ETHNIC HIST. 3, 28 n.5 (1998).

115. Denesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC’Y REV. 587, 596 tbl.2 (2007).

116. ; Sucheng Chan, *Against All Odds: Chinese Female Migration and Family Formation on American Soil During the Early Twentieth Century*, in CHINESE AMERICAN TRANSNATIONALISM: THE FLOW OF PEOPLE, RESOURCES, AND IDEAS BETWEEN CHINA AND AMERICA DURING THE EXCLUSION ERA 41-42 (Sucheng Chan ed., 2006) (finding that only 21.5 percent of U.S.-born married men of Chinese ancestry had resident wives, and only 12.7 percent of Chinese-born married men had resident wives).

117. *Decision Makes Precedent*, S.F. CHRONICLE, July 19, 1904, at A5.

118. *Id.*

presumption that all persons of Chinese ancestry seeking to enter the country were excludable noncitizens, placing the onus on the “alleged citizen” to demonstrate otherwise.¹¹⁹ The Secretary of Treasury, who oversaw immigration enforcement at the end of the nineteenth century, endorsed the view expressed by Treasury officials that the “Chinese are an undesirable addition to our society,” and so “every presumption, every technicality and every intendment should be held against their admission, and their testimony should have little or no weight when standing alone.”¹²⁰

Proving citizenship under such a system became a lengthy ordeal, particularly for those Chinese Americans, like Wong Kim Ark, who had not adopted western dress or customs, and thus who appeared “un-American” to the immigration officials charged with determining their citizenship.

Hearings on the question routinely took place after weeks of detention and over several days.¹²¹ Officials concluded that no witness of Chinese ancestry could be trusted, and so anyone claiming birthright citizenship was required to produce at least two white witnesses attesting to that fact.¹²² For many Chinese Americans born at home in the ethnic enclave of Chinatown, this was simply impossible. Wong Kim Ark’s birth—attended by no one other than his mother and (possibly) his father—was not unusual. As one immigration official critical of the policy asked, “Who else [but the Chinese relatives of the applicant] would be likely to have the knowledge required as a witness in a case of native birth?”¹²³

Immigration officials separated the claimed citizen from their witnesses and then questioned each on the minute details of their lives. A returning citizen would be asked to recall the number of steps or rooms in the house in which he had been born, even if he had not lived in it for years, and his answer would be compared to that of the witness claiming to be able to verify his birth in the United States. Likewise, children born in China to U.S. citizen fathers were asked detailed questions about their home village in China, and their answers would then be compared to their fathers’ in an effort to disprove the claimed relationship.¹²⁴ Interrogations lasted for hours

119. LEE, *supra* note 36, at 66. This position was eventually upheld by the Supreme Court. See *Li Sing v. United States*, 180 U.S. 486, 493-94 (upholding requirement that Chinese provide two witnesses to establish lawful presence in the United States); *Ah How v. United States*, 193 U.S. 65, 76 (1904) (holding that Chinese residents of the United States were properly required to bear the burden of proving their right to be in the country); *United States v. Ju Toy*, 198 U.S. 253 (1905) (holding that Congress could bar courts from reviewing immigration officials’ determinations of citizenship).

120. LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 67 (1995).

121. *The Chinese Horde. Methods Adopted for Keeping Track of the Coolies*, THE DAILY EXAMINER (San Francisco) Jun. 30, 1888. For “each individual Chinaman,” officials recorded “where each Mongolian is from,” “his name,” “age, occupation, complexion, color of eyes, height and physical marks,” and his history of travel into and out of the United States.

122. SALYER, *supra* note 120, at 65; U.S. DEP’T OF TREASURY, ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION 76-77 (1902).

123. LEE, *supra* note 14, at 103.

124. LEE, *supra* note 36, at 185, 196-97, 209-12; SALYER, *supra* note 120, at 59-60, 150.

or days, and consisted of hundreds of questions. The ordeal would terrify any newcomer who had not been carefully prepared for the experience.

The interrogations were coupled with invasive physical examinations requiring applicants strip naked to be measured, poked, and prodded in an effort to determine their age and relationship to claimed relatives. As one examiner’s notes attest, the ordeal required scrutiny of the applicant’s “hair, (caputal, axillary, facial, and pubic), condition of skin, eruption and development of teeth, development of sexual organs, facial expression, and general attitude.”¹²⁵

Even those Chinese Americans who had never left the United States, or who had been safely admitted, were at risk of harassment, arrest, detention, and removal. In 1910, the Native Sons of California, an advocacy group for birthright citizens of Chinese descent, complained to the Secretary of Commerce and Labor that Chinese Americans were “liable to arrest at any time and place by zealous immigration officials upon the charge of being unlawfully in the country.”¹²⁶ As sociologist Mary Roberts Coolidge observed in 1909, “[a]ll Chinese are treated as suspects, if not as criminals” by the immigration officers charged with determining their citizenship.¹²⁷ One detained immigrant scrawled on the walls of the detention facility at Angel Island:

America has power, but not justice
In prison, we were victimized as if we were guilty
Given no opportunity to explain, it was really brutal
I bow my head in reflection but there is nothing I can do¹²⁸

* * *

Wong Kim Ark was well aware of the limits of his judicial victory. After winning his Supreme Court case, Wong did not return to Ong Sing village to see his wife and children for another seven years, perhaps because the months of detention were too painful to risk reliving. But with family as a draw, he did finally go back in 1905, and then again in 1913.

Each time Wong returned, he had to produce the documents attesting to his citizenship. He was even required to prove that he was himself—a hard task in a world before fingerprinting and DNA testing, and in which immigration official insisted that all Chinese looked alike. In an attempt to forestall such queries, Wong obtained a sworn affidavit from a Caucasian attorney who claimed to be “familiar with Chinese physiognomy,” attesting

125. LEE, *supra* note 36, at 211.

126. Lee, *supra* note 14, at 105.

127. MARY ROBERTS COOLIDGE, CHINESE IMMIGRATION 324 (1909).

128. Vanessa Hua, *Art Gives Voice to Immigrant Detainees*, S.F. CHRONICLE (March 8, 2018), <https://www.sfchronicle.com/entertainment/article/Art-gives-voice-to-immigrant-detainees-12736827.php>.

that a recent photo provided by Wong and the photo appended to Wong's habeas petition on file in the district court "are photographs of the same person, to wit: Wong Kim Ark."¹²⁹

Like many other Chinese Americans, Wong was forced to prove his citizenship even when he was not trying to enter the United States. In October 1901, while living in El Paso, Texas, he was arrested on the ground that he was a "Chinese person" who did "unlawfully, fraudulently, and knowingly enter and . . . remain in the United States of America in violation of the 'Chinese Exclusion Acts.'" He was taken into custody, and freed only after he posted the \$300 bail. Wong must have despaired to find himself once again behind bars on account of his Chinese ancestry, despite being the named plaintiff in the Supreme Court case establishing that all persons born in the United States are U.S. citizens. It was not until February 18, 1902, that United States Commissioner Walter D. Howe declared, once again, that Wong was a citizen entitled to remain in his own country.¹³⁰

But it was far worse for Wong's children. On October 28, 1910, Wong Kim Ark's eldest son, Wong Yook Fun, arrived in San Francisco Bay on the *S.S. Korea*. Yook Fun had been conceived during Wong's first year of marriage in 1890 and was now about twenty years old. It took at least a week to travel from Ong Sing Village to Hong Kong by a combination of horse drawn wagon and boat, and then another month in steerage on a steamship before he arrived in San Francisco. But his journey was not over.¹³¹

Like almost all new arrivals of Chinese ancestry, Yook Fun was taken by a U.S. government ferry from the *S.S. Korea* to the new immigration detention facility on Angel Island in the center of San Francisco Bay. Angel Island opened its doors only a few months before, and the press had quickly dubbed it the "Ellis Island of the West." But the two immigration facilities were nothing alike. Ellis Island was a processing center primarily for European immigrants, most of whom were allowed to enter and, if they chose, eventually become U.S. citizens. Angel Island primarily served as a detention center for Asian immigrants, many of whom would be turned away under U.S. immigration law, and all of whom were barred from naturalizing. Ellis Island welcomed future Americans; Angel Island

129. See "Affidavit of Frank v. Bell, October 25, 1901," in "Return Certificate Application Case Files of Chinese Departing (12017), 1912-1943," Immigration and Naturalization Service, Record Group 85, Archival Research Catalog Identifier 296477, Wong Kim Ark File 12017/42223, National Archives and Records Administration at San Francisco—San Bruno.

130. *United States v. Wong Kim Ark*, El Paso case 802(7), WTX097A1, Equity Case Files Relating to Deportation of Chinese 1892-1915, National Archives and Records Administration, El Paso.

131. Unless otherwise noted, this paragraph and all following information regarding Wong Yook Fun's attempt to enter the United States are based on the Wong Yook Fun File, Record Group 85, Archival Research Catalog Identifier 10434, National Archives and Records Administration—San Bruno, CA.

excluded unwanted aliens.¹³²

Like all the detainees at Angel Island, Yook Fun was not permitted visitors and his written communication was closely monitored. On December 4, 1910, after more than a month imprisoned on Angel Island, he wrote a letter to his father that was translated and included in the record by immigration officials on the lookout for fraud:

Dear Father,

Now I am in the detention shed. I am well. Please do not worry and buy me some clothes, ½ doz. socks and a cap, also some money.

Your son,

Yook Fun.

(One wonders what the U.S. immigration officials reviewing the case thought of Yook Fun’s plea for money and socks—requests that would seem to epitomize a father-son relationship.)

Immigration officials questioned Wong for two days in an attempt to determine whether Yook Fun was really his son, and therefore a citizen entitled to enter the country. He was asked about his parents, his younger brother, his sons, and his own travel back and forth between China and the United States. And he was interrogated in mind-numbing detail about the placement of houses and their occupants in Ong Sing village—answers he often stumbled over, likely because he had last visited five years before.

Q. “Which way does your village face?”

A. “The village faces straight east.”

Q. “How many houses are there in the first row?”

A. “When I left there were three. I now understand there are four.”

* * *

Q. Who lives in the second house first row?

A. Wong Oung.

Q. Who occupies that house?

A. He and his wife and several children.

Q. What are their names?

A. I don’t remember.”

132. ERIKA LEE & JUDY YUNG, *ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA* 8 (2010).

* * *

Q. Where is the school house in your village?

A. It is located at the north end of the village. There are vacant lots between the school and the front of the village.

Q. What is the teacher's name?

A. I don't know. They change every year.

And on. And on.

Finally, on December 27, 1910, Acting Commission Luther Steward issued his verdict. He did not question Wong Kim Ark's citizenship, or deny that Wong had been in China at the time Yook Fun was conceived. Nonetheless, he found the evidence "shows conclusively that the applicant's claims are fraudulent" because "material" differences between Wong Kim Ark's and Yook Fun's testimony proved that they were not actually father and son.

Most of the discrepancies flagged by immigration officials are minor. Wong and his son disagreed over the amount of money Wong sent to his wife in China, whether Yook Fun worked after graduating from school, and the placement of some of the houses in the village—all errors that seem more likely the product of father and son's long separation than fraud. But one difference in their testimony does give pause. Wong testified that his mother, who was living in Yook Fun's home village, died in 1901 or 1902, when Yook Fun would have been eleven or twelve, but Yook Fun testified that his paternal grandmother died before he was born. The inconsistency may have been due to an interpreter's error, or confusion in translating dates from the Chinese to the Gregorian calendar. But it was enough to convince immigration officials that Wong Yook Fun was a fraud, a so-called "paper son." He was deported to China on January 9, 1911, never to return.¹³³

For many years after, Wong's three other sons made no effort to enter the United States. Perhaps their spirit had been broken by Yook Fun's detention and deportation, by the hostility of the immigration inspectors, and by Wong's own reluctance to put himself and his children through that process again.

But then, thirteen years later, in 1924, Wong's third son, Wong Yook Sue, sailed across the Pacific Ocean in the hope of joining his father in the United States. At first, he had no better luck than his older brother. As before, both Wong Kim Ark and his son were interrogated at length on Angel Island. As before, a three-member commission of immigration officials unanimously denied Yook Sue's admission to the United States.¹³⁴

133. Findings and Decree by Acting Commissioner Luther C. Steward, December 27, 1910, Wong Yook Fun Case.

134. Wong Yook Sue File, Record Group 85, Archival Research Catalog Identifier 23517, National

But Yook Sue fought back, choosing to appeal rather than to be deported on the next steamship to China. He got lucky. The decision was reversed and Yook Sue entered the United States as an American citizen.¹³⁵ Heartened by this success, Wong's second son, Yook Thue, came a year later and was admitted to the United States in March 1925. Once again, Wong testified on behalf of his child, and Yook Sue also testified in support of his brother's application.

Yook Thue, who was 31-years old, had not laid eyes on his father for over a decade. But the family ties ran deep despite Wong's long absences from the home. When immigration officials asked Yook Thue how he would make a living in the United States, he responded, “I will do whatever my father wants me to do.”¹³⁶

One year later, on an unusually warm day in July of 1926, Wong Kim Ark's last and youngest son, Wong Yook Jim, arrived at the port of San Francisco on the *S.S. President Lincoln*. He was only eleven years old and had spent over a month traveling from Ong Sing village to San Francisco, coming to live with the father he had never met. Like his brothers, he was immediately taken into detention on Angel Island, where he was forbidden from having contact with his father and brothers—the only people he knew in the United States. He spoke no English, and was questioned through a translator. Yook Jim was tiny, standing only four feet, two inches tall, about half a foot smaller than the average eleven-year-old Chinese boy today. Like his brothers, he would never reach his father's height of 5' 7"—evidence of the limited nutrition and difficult lives endured by villagers in southeastern China, conditions that had driven all to follow their father to the United States.¹³⁷

According to a letter read into the immigration record, Yook Jim made the long journey from Ong Sing village to Hong Kong with Yook Fun, his eldest brother who had been refused admission to the United States sixteen years before.¹³⁸ Yook Fun saw himself as the protector to his little brother in their father's absence, and perhaps did not fully trust his father to care for the son he had never met. “Please look after him upon his arrival,” he begged his father in a letter, adding that his little brother “needs to be looked

Archives and Records Administration—San Bruno, CA.

135. *Id.*

136. Wong Yook Thue File, Record Group 85, Archival Research Catalog Identifier 29438, National Archives and Records Administration—San Bruno, CA.

137. Wong Yook Jim File, Record Group 85, Archival Research Catalog Identifier 30980, National Archives and Records Administration—San Bruno, CA [hereinafter “Wong Yook Jim File, National Archives”]. Yook Jim reported that he was born on January 5, 1915, which would have made him eleven years old when he arrived in the United States, though at other times he gave his age as thirteen years old. Wong Kim Ark returned to the United States from China in the fall of 1914, and responded “no” when asked in 1926 if he had “ever seen” his son before their meeting on Angel Island, which further supports the conclusion that Yook Jim was born in 1915.

138. *Id.*

after . . . on account of his tender age.”¹³⁹

Wong Kim Ark pulled all the legal levers required to ensure the boy was admitted. He hired a lawyer, and both Wong and Yook Sue submitted affidavits on Yook Jim’s behalf attesting that he was a “citizen of the United States” because he was the “Son of a Native.”¹⁴⁰ The photo of Wong appended to his affidavit shows a man verging on elderly, though he was only in his mid-fifties. By then, his hair was clipped short in the western style, and he had abandoned the Chinese tunic in favor of a jacket over a collared shirt. In contrast, his son’s photo shows a tiny boy in western dress, his shirt buttoned up to the neck but his collar askew. Side-by-side on the affidavit, the photos of the man and boy appear closer to grandfather and grandson than to relations one generation removed.¹⁴¹

On a Friday afternoon in late July, after Yook Jim had spent three weeks in detention, a three-member Board of Special Inquiry convened at Angel Island to determine whether he was really the “son of a native” who could claim U.S. citizenship. The Board questioned the boy and heard testimony from Wong and Yook Sue before issuing their decision. By a unanimous vote, Yook Jim was deemed to be Wong Kim Ark’s son, and thus a US citizen entitled to enter the country.¹⁴²

Wong must have felt enormous relief as he greeted his son for the first time on Angel Island. He took him home to live with him at 878 Sacramento Street in San Francisco’s Chinatown, just four blocks from where Wong had been born more than a half-century before.

V. BIRTHRIGHT CITIZENS AND PAPER SONS

Only three of Wong Kim Ark’s four sons were eventually allowed to enter the country after lengthy detention and hearings lasting multiple days. Their experience was typical. Racist immigration inspectors assumed all the “cunning” Chinese were liars and cheats, and put the burden on U.S. citizens of Chinese descent to prove their status. Undoubtedly, many Americans were forever barred from entering their country, as was the case with Wong Kim Ark’s eldest son.

But the targets of this government exclusion campaign did not passively accept the government’s decision to *de facto* deny them birthright citizenship and to bar their children from derivative citizenship. Nor did Chinese immigrants always abide by the immigration laws barring their entry. As historian Erika Lee has explained, some Chinese immigrants and Chinese Americans learned how to use the government’s system against it,

139. *Id.*

140. *Id.*

141. Affidavit of Wong Kim Ark, Oct. 2, 1925, Wong Yook Jim File, National Archives.

142. Wong Yook Jim File, National Archives.

manipulating the bureaucracy to lay the foundation for their legal entry.¹⁴³ Ironically, the government’s relentless documentation of the Chinese enabled some to fraudulently claim citizenship, even as these same hurdles barred true citizens from entering the United States.

Between 1894 and 1940, 97,143 Chinese claiming to be native-born citizens were admitted into the United States.¹⁴⁴ According to Lee, however, a “large majority of these cases were likely fraudulent.”¹⁴⁵ A government program in the 1950s that encouraged confessions of fraud in return for immigration status found that about twenty-five percent of Chinese in the United States in 1950 had entered based on false claims of citizenship by themselves or another family member—and that number was likely significantly lower than the actual percentage of fraudulent claims.¹⁴⁶

False claims of citizenship were a common method of entering the United States after the Chinese Exclusion Act barred most other avenues of immigration.¹⁴⁷ Creating fake paperwork to support a claim of citizenship was easier than attempting to fool immigration officials into believing that a Chinese laborer was really a merchant or teacher.¹⁴⁸ It was also big business. Because the children of birthright citizens were themselves automatically citizens, a birthright citizen returning from China could report to immigration inspectors that he had fathered another child, then sell the slot of “paper son” to another family, providing an affidavit and testimony to support the claim.¹⁴⁹ For cultural and economic reasons, those seeking to purchase such slots were almost always male, leading the Chinese Americans who traveled between the countries to report births of far more sons than daughters.

The numbers are striking. A 1925 study of 256 Chinese American men arriving in San Francisco found that they claimed a total of 719 children born in China, a whopping 670 males and only 49 females—in the words of immigration officials, an “absurd” proportion. In his 1925 Report, the Commissioner General of Immigration observed that the “foundation has been laid in the records for the coming of thousands of foreign-born alleged children of citizens of the Chinese race.”¹⁵⁰ The “situation is not peculiar to San Francisco,” he added, “as the Chinese entering the United States at the other ports of entry for Chinese are, as a rule, claiming about all the children they could possibly have in China and most of them deny having any

143. Lee, *supra* note 14, at 102.

144. *Id.*

145. *Id.*

146. Ngai, *supra* note 114, 3, 35 (1998); SALYER, *supra* note 120, at 44.

147. ESTELLE T. LAU, PAPER FAMILIES: IDENTITY, IMMIGRATION ADMINISTRATION, AND CHINESE EXCLUSION 36-38 (2006).

148. LEE, *supra* note 36, at 202.

149. LAU, *supra* note 147, at 36; SALYER, *supra* note 120, at 44.

150. U.S. DEP’T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 22-23 (1925).

girls.”¹⁵¹

An improbable number also claimed citizenship based on birth in the United States. After the 1906 San Francisco earthquake and fire destroyed all of San Francisco’s birth records, claims of birthright citizenship soared now that there was no way to disprove birth on U.S. soil.¹⁵² Immigration officials joked that each Chinese woman in the United States before the 1906 earthquake must have given birth to 800 sons to account for the thousands now claiming to be native born citizens.¹⁵³

Services to assist false claims of citizenship became a cottage industry, supported by corrupt immigration officials willing to look the other way in return for payment. Would-be immigrants could purchase “coaching books,” which included hundreds of questions applicants should prepare for in advance of their interviews.¹⁵⁴ Coaches found inventive ways to communicate with clients detained on Angel Island to alert them to dates, names, and other facts they would need to know to verify their status as the son of a citizen. Immigration officials confiscated notes hidden inside the shells of peanuts, which had been pried apart and then carefully glued back together before being sent as part of a care package. In one case, important dates and names had been cooked inside pork buns. In another, a note had been wrapped around an orange whose rind had been removed and then pasted back together.¹⁵⁵ Witnesses were easy to find for the right price. In 1899, one Treasury Department official sent to San Francisco’s Chinatown to investigate confirmed that “San Francisco is full of old men, that will, for \$5 identify ANY Chinaman as his son . . .”¹⁵⁶ Likewise, elderly Chinese women would “come forward and testify that they were present . . . at the birth” of any person claiming birthright citizenship.¹⁵⁷

The system penalized the real citizens even as it aided those seeking to defraud it. Actual citizens, unprepared to run the gauntlet, could easily stumble over detailed questions about the location of houses in their home village or the exact names and birthdates of neighbors and children, even as well-coached imposters sailed through.¹⁵⁸ U.S. immigration officials treated all claims of citizenship by those of Chinese ancestry as fraudulent and made it difficult for even legitimate citizens to prove their status. The result was a system in which fraudulent claimants competed with legitimate ones, all in a battle with immigration officials seeking to keep the Chinese out of

151. *Id.* at 23.

152. Ngai, *supra* note 114, at 4-5.

153. *Id.* at 6.

154. LEE, *supra* note 36, at 197; JORAE, *supra* note 5, at 13.

155. LEE, *supra* note 36, at 215.

156. Salyer, *supra* note 120, at 59.

157. LEE, *supra* note 36, at 198.

158. SALYER, *supra* note 120, at 61-62.

the United States.¹⁵⁹

* * *

On Tuesday, October 18, 1960, Wong Hang Juen, also known as Ernest J. Wong, submitted an application to become a permanent resident of the United States. He lived at 579 Pacific Street, on the edge of San Francisco’s Chinatown. A photo accompanying his application shows a middle-aged man with thick, black-rimmed glasses. Wong Hang Juen worked as a cook at the boutique Drake hotel at the corner of Powell and Sutter Streets on Union Square, and his employer submitted a letter attesting that he was “of good character and an A1 employee.” A check of his fingerprint records found he had no criminal record, and Bank of America confirmed that he had \$3,021.30 in his savings account. He stated under oath that he was not now, and had never been, a member of the Communist Party.¹⁶⁰

Still, Wong Hang Juen’s application for permission to remain in the United States was risky. As he stated in his affidavit, “I last entered the United States claiming to be WONG YOOK SUE, the citizen son of WONG KIM ARK. I now admit that I am a citizen of China and that I have never been a citizen of the United States . . . I am not related to my immigration father, WONG KIM ARK, in any way.”¹⁶¹

Hang Juen had come forward to confess the fraud as part of the Immigration and Naturalization Service’s Chinese Confession Program, which operated from 1957 until about 1965. The Program arose from Cold War fears that Communist China would use its “paper sons” in the United States to infiltrate the U.S. government and undermine democracy. The U.S. government encouraged the Chinese living in the United States to come clean about their fraudulent claims of citizenship, typically in return for permission to remain in the United States as green card holders under their real name, and eventually qualify for naturalization. The program enabled immigrants to wipe the slate clean, giving their families a fresh start in the United States without the convoluted layers of fake documents and lies to weigh them down. The process also enabled them to sponsor their real family members living in China to immigrate to the United States. For the U.S. government, it was a chance to root out Communist influences. Men like Hang Juen were routinely approved for permanent residence despite the fraud, but left-leaning labor leaders were often deported.¹⁶²

The Chinese Confession Program required those seeking to remain in the United States to reveal the names of family members and friends who had

159. LEE, *supra* note 36, at 215.

160. Alien Case File for Wong Hang Juen (aka Wong Yook Sue), on file with the author.

161. *Id.*

162. TUNG POK CHIN WITH WINIFRED C. CHIN, PAPER SON: ONE MAN’S STORY, at xvii (2000) (describing the distrust, fear, and coercion surrounding confession).

also come to the United States on false pretenses.¹⁶³ Hang Juen had been flagged by another confessor in an unrelated case, and he surely felt he had no choice but to admit that his father had paid for him to pretend to be Wong Kim Ark's son. In his one-page, typed confession, he took pains to note "I believe that WONG KIM ARK was actually born in the United States as he claimed," and also that "the third son, YOOK JIM, is a true son of WONG KIM ARK."

By the time Hang Juen confessed that he was Wong Kim Ark's paper son, Wong Kim Ark had passed away. We cannot know what Wong would have said in his own defense. But others have explained that the Chinese saw no reason to obey racist laws and policies that barred the Chinese—and *only* the Chinese—from entering the United States and naturalizing. One Chinese immigrant explained "[i]f we told the truth, it didn't work. And so we had to take the crooked path."¹⁶⁴

Wong Kim Ark, in particular, had little reason to respect U.S. immigration laws. At every turn, the U.S. government denied his citizenship—both before and even after his Supreme Court victory. He spent four months imprisoned on a steamship by a government that conceded he was native-born but wanted to deny him citizenship anyway. Even after the case bearing his name established birthright citizenship for all, he was arrested again in Texas and held on the ground that he *looked* un-American—a "mistake" the government rarely made with its white citizens. Wong's eldest son, Yook Fun, was barred from entering the United States after weeks of travel and months of detention on Angel Island. The evidence strongly suggests that Yook Fun was Wong's actual son—he remained intimately involved in the family's day-to-day life more than a decade after he was denied entry into the United States, helping Wong's youngest son (and his brother), Yook Jim, immigrate to the United States.¹⁶⁵ Wong may have decided that in a system in which legitimate claims of citizenship are routinely attacked or ignored, he had nothing to lose by claiming a paper son as his own.

From the perspective of a century later, the morality of paper sons and their citizen fathers is complicated. Are they criminals, or are they the victims of a racist and inhumane system? Did they help or harm the United States? Does the United States regret the presence of a group of immigrants who mined the gold and built the transcontinental railroad at extraordinary speed and under harsh conditions? Or of those, like Wong and his children, who took jobs that white American men refused to do, laundering the

163. HIM MARK LAI, *BECOMING CHINESE AMERICAN: A HISTORY OF COMMUNITIES AND INSTITUTIONS* 32 (2004).

164. LEE, *supra* note 36, at 169; see also *Hearings Before the President's Commission on Immigration and Naturalization*, 82d Cong. 271 (1952) (statement of Edward Hong).

165. Wong Yook Jim File, Record Group 85, Archival Research Catalog Identifier 30980, National Archives and Records Administration—San Bruno, CA.

clothes and cooking the meals to be enjoyed by the “real” citizens? In the words of Stanford history professors Gordon H. Chang and Shelley Fisher Fishkin, Chinese immigrants, both legal and illegal, in big ways and small, “helped build America.”¹⁶⁶ One hundred years from now, when future historians scour the archives for records of the immigrants arriving today, they will surely say the same.

CONCLUSION

Wong Kim Ark’s citizenship struggles illustrate birthright citizenship’s shifting battlegrounds. Periodically throughout U.S. history, the government has refused to accept the principle of *jus soli*. In 1897, Solicitor General Holmes Conrad argued before the Supreme Court that because the Fourteenth Amendment granted birthright citizenship only to those “subject to the jurisdiction” of the United States, the children of non-naturalized immigrants were not citizens. The government lost. But as the Wong family’s experience shows, even after the Supreme Court ruled that all born on U.S. soil were citizens, the government created new exceptions to that rule, as well as new proof of citizenship requirements, that it used to bar U.S. citizens of Chinese ethnicity from entering the United States.

The Wongs’ struggle for citizenship was shared by many in a pattern that continues to this day. On multiple occasions, President Trump declared he had the power to eliminate birthright citizenship for the children of undocumented immigrants—repeating the legal arguments rejected by the Supreme Court in Wong’s case, but nonetheless raised and argued by other legal scholars and policymakers over the last few decades.¹⁶⁷ Likewise, for some, citizenship remains hard to prove to government officials’ satisfaction. For example, the government has taken a skeptical view of claims of birthright citizenship by those who live near the southern border of the United States and who are born outside of hospital settings, refusing to accept their birth certificates as evidence of their citizenship.¹⁶⁸ Federal

166. Gordon H. Chang & Shelley Fisher Fishkin, *The Chinese Helped Build America*, FORBES (May 12, 2014).

167. Michael Anton, *Citizenship Shouldn’t Be a Birthright*, WASH. POST (July 18, 2018, 3:47 P.M.), https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146b0b_story.html; *Trump Says He Is Seriously Looking at Ending Birthright Citizenship*, REUTERS (Aug. 21, 2019, 12:43 P.M.) <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-he-is-seriously-looking-at-ending-birthright-citizenship-idUSKCN1VB21B>; Paul LeBlanc, *Trump Again Says He’s Looking ‘Seriously’ at Birthright Citizenship Despite 14th Amendment*, CNN POLITICS (Aug. 22, 2019, 9:14 A.M.), <https://edition.cnn.com/2019/08/21/politics/trump-birthright-citizenship-14th-amendment/index.html>; Stephen Collinson, *Trump Slams ‘Crazy, Lunatic’ Constitutional Amendment in Midterm Endgame*, CNN POLITICS, (Nov. 2, 2018, 2:58 P.M.), <https://edition.cnn.com/2018/11/02/politics/donald-trump-immigration-midterms-missouri/index.html>; Esther Yu-Hsi Li, *How Many Candidates Have ‘Taken Advantage’ of Birthright Citizenship. But Oppose It?*, THINKPROGRESS (Aug. 19, 2015, 5:44 P.M.), <https://archive.thinkprogress.org/how-many-candidates-have-taken-advantage-of-birthright-citizenship-but-oppose-it-d63046b4c2cc/>.

168. Rachel E. Rosenbloom, *From the Outside Looking in: U.S. Passports in the Borderlands*, in

immigration officials have mistakenly detained citizens on a surprisingly frequent basis, just as happened to Wong Kim Ark in 1901.¹⁶⁹ Proof of citizenship is also a hurdle to exercising the right to vote. In 2018, a federal judge found that a Kansas state law requiring proof of citizenship to register to vote led to the disenfranchisement of tens of thousands of citizens who lacked the requisite paperwork.¹⁷⁰

Even the citizenship of prominent elected officials has been questioned by those who deny their eligibility to serve. The “birther” movement’s baseless, bizarre claim that President Barack Obama was not a “natural born” citizen qualified to be president of the United States was remarkably effective.¹⁷¹ *The New York Times* reported that in January 2016, near the end of Obama’s eight years as president, 52 percent of those polled questioned whether he had been born in the United States.¹⁷² For all affected by such claims, as for the Wong family, birthright citizenship exists in theory but not always in fact.

CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT CITIZENSHIP AND STATELESSNESS 135 (Benjamin N. Lawrance and Jacqueline Stevens eds., 2017); Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border; Throwing Their Citizenship into Question*, WASH. POST (Sep. 13, 2018, 6:18 P.M.), https://www.washingtonpost.com/world/the-americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html.

169. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606 (2011) (estimating about 3,000 citizens each year are mistakenly detained by immigration officials). See also *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the Comm. on the Judiciary, House of Representatives*, 110th Cong. (Feb. 13, 2008) (Testimony of Kara Hartzler, Attorney, Florence Immigrant and Refugee Rights Project); email from Kara Hartzler to author, August 12, 2020.

170. *Fish v. Kobach*, 309 F. Supp.3d 1048, 1067 (D. Kan. 2018) (striking down a Kansas state law requiring proof of citizenship to vote after finding the law barred 31,000 U.S. citizens from registering to vote).

171. Kyle Dropp and Brendan Nyhan, *It Lives. Birtherism Is Diminished but Far from Dead.*, N.Y. TIMES (Sep. 23, 2016), <https://www.nytimes.com/2016/09/24/upshot/it-lives-birtherism-is-diminished-but-far-from-dead.html>.

172. Similarly, in the summer of 2020, President Trump, among others, claimed that Vice President Kamala Harris was not a U.S. citizen because her parents were not citizens or green card holders when she was born. Amanda Frost, *You Are Not American*, AM. PROSPECT, Aug. 19, 2020.