

PARADOXICAL CITIZENSHIP

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INTRODUCTION

In 1895, George Collins was on a crusade against birthright citizenship.¹ Collins was a young, brash California attorney who successfully harangued the federal government into challenging birthright citizenship before the Supreme Court of the United States. The following year he submitted a brief on the issue cosigned by the Solicitor General.² In that legal brief, as well as in interviews with a sympathetic press, Collins raised what many considered to be one of the government's strongest arguments: "For the most cogent reasons ... we have refused citizenship to Chinese subjects," Collins told the *San Francisco Examiner*, referring to federal laws that barred naturalization of Chinese immigrants, "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 ... because of the mere accident of birth!"³

Under the racist logic of the era, Collins had a point. The Naturalization Act of 1870 permitted naturalization only of Whites and "aliens of African nativity and ... persons of African descent," barring all other non-Whites, including Asians, from acquiring citizenship.⁴ To avoid any possible confusion on the subject, the 1882 Chinese Exclusion Act expressly prohibited naturalization of Chinese immigrants.⁵ Yet the children of Chinese immigrants born in the United States claimed citizenship under the Fourteenth Amendment to the U.S. Constitution—a status entitling them to vote and hold elected office, as well as enter and remain in the United States.⁶

1. Lucy E. Salyer, Wong Kim Ark: *The Contest Over Birthright Citizenship*, in IMMIGRATION STORIES 51, 65 (David A. Martin & Peter H. Schuck eds., 2005).

2. *See id.* at 66, 69; Brief for Appellant at 39, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 904).

3. *No Ballots for Mongols*, S.F. EXAM'R, May 2, 1896, at 16.

4. Act of July 14, 1870, 16 Stat. 254, 256.

5. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 61, *repealed by* Chinese Exclusion Repeal (Magnuson) Act of 1943, ch. 344, 57 Stat. 600.

6. *See, e.g., In re Look Tin Sing*, 21 F. 905, 905, 908-09 (1884) (holding that the Chinese Exclusion Act of 1882 does not affect the birthright citizenship of an American-born child of Chinese immigrants).

Collins told anyone who would listen that birthright citizenship for the Chinese was illogical and intolerable in a nation that had already decided to exclude them from naturalization.⁷ One way to resolve that conflict, Collins and the Solicitor General argued before the Supreme Court, would be to end universal birthright citizenship for the children of immigrants.⁸

* * *

In their article, *The “Free White Person” Clause of the Naturalization Act of 1790 as Super-Statute*, Gabriel J. Chin and Paul Finkelman make a powerful case that the Naturalization Act of 1790 is a “super-statute” that has shaped not only U.S. immigration law and policy, but also America’s conception of itself as a “White nation.”⁹ From its founding moment, the United States chose to limit citizenship based on race.¹⁰ Even in 1870, at the height of Reconstruction, Congress rejected a proposed amendment by Senator Charles Sumner to make naturalization available to all.¹¹ Race remained a barrier to naturalization until 1952.¹² Drawing on this history, Chin and Finkelman demonstrate that the Free White Person Clause of the Naturalization Act of 1790 has had an enduring impact on U.S. law, policy, and national identity.¹³

But there is an important wrinkle to this otherwise depressing story: the addition of birthright citizenship to the Constitution in 1868. Just a few years before rejecting Senator Sumner’s proposal, Congress codified universal birthright citizenship in the Civil Rights

7. See *No Ballots for Mongols*, *supra* note 3, at 16.

8. See Salyer, *supra* note 1, at 69-74.

9. Gabriel J. Chin & Paul Finkelman, *The “Free White Person” Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. 1047, 1050-51, 1102-03 (2024).

10. See *id.* at 1073-74; The Naturalization Act of 1790, 1 Stat. 1047, 1051-52, 1061-62 repealed by Act of Jan. 29, 1795, 1 Stat. 414.

11. CONG. GLOBE, 41st Cong., 2d. Sess. 5121-23 (1870).

12. Immigration and Nationality Act of 1952, 66 Stat. 163, 239 (“The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race.”). As Chin and Finkelman explain, these prohibitions had a significant and lasting effect on the demographics of the United States. As late as the 1960 census, the United States was 99.1 percent “White” and “Negro”; all other races made up less than 1 percent of the population combined (though at the time the census did not include Hispanic as a category). Chin & Finkelman, *supra* note 9, at 1057-58.

13. Chin & Finkelman, *supra* note 9, at 1112-13.

Act of 1866.¹⁴ That same principle was then enshrined in the Fourteenth Amendment in 1868.¹⁵ These new laws established the rule of automatic citizenship for all born on U.S. soil, regardless of their parents' race, ethnicity, or immigration status.¹⁶ As George Collins recognized, universal birthright citizenship was in significant tension with the racially exclusive Naturalization Act.¹⁷

This Comment explores the conflict between the Naturalization Act's racial restrictions on citizenship (and its proponents' vision of the United States as a White nation) and the Fourteenth Amendment's Citizenship Clause (and its proponents' vision of the United States as a multiracial nation). In important and interesting ways, the Citizenship Clause complicates the story Chin and Finkelman are telling. America has always been a bundle of contradictions, with a paradoxical view of itself as a White European nation on the one hand and a nation of immigrants that eschews bloodline and caste on the other. Those contradictions are on vivid display in the interplay between America's worst impulses, as exhibited by the White supremacist naturalization law, and its better angels, displayed in the multiracial promise of birthright citizenship.

The Citizenship Clause also complicates Chin and Finkelman's claim that the Reconstruction Congress "did not fully accept race-neutral, non-discriminatory legal equality in principle."¹⁸ Chin and Finkelman base this conclusion in part on the Naturalization Act of 1870, in which Congress narrowly rejected Senator Sumner's proposal to make U.S. citizenship available to all races, granting it instead only to Whites and persons of "African descent."¹⁹ Chin and Finkelman further argue that the Reconstruction Congress extended citizenship to Blacks to counter the political power of White Southerners rather than to promote racial equality.²⁰ The

14. Civil Rights Act of 1866, 14 Stat. 27, 27 ("[A]ll persons born in the United States ... are hereby declared to be citizens of the United States.").

15. Compare CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (remarks of Sen. Howard), with U.S. CONST. amend. XIV, § 1.

16. U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1866, 14 Stat. 27, 27.

17. See George D. Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831, 835 (1884) (discussing the tensions between Congress's exclusive tendencies and the Fourteenth Amendment).

18. Chin & Finkelman, *supra* note 9, at 1103.

19. *Id.* at 1102.

20. *Id.* at 1105.

authors are correct that congressional Republicans had pragmatic political reasons for granting citizenship to newly freed slaves, but this does not tell the whole story—a story that includes the constitutional guarantee of universal birthright citizenship.

Part I of this Comment describes how the Citizenship Clause bestowed universal citizenship that extended beyond the newly freed slaves to the children of non-White immigrants. Birthright citizenship provides a counterpoint to the racial bars in the Naturalization Act, demonstrating that—if only fleetingly—the Reconstruction Congress embraced equality for all, including for children of non-White immigrants. Part II describes how the contradiction between the racially exclusive Naturalization Act and the universal Citizenship Clause played out in politics, law, and immigration policy in the following years. For decades, the government tried to reconcile the conflict between these two laws by denying birthright citizenship to non-Whites.²¹ Not until 1952 did the pendulum swing the other way, resolving this legal anomaly by eliminating all racial bars to naturalization.²²

I. THE BIRTH OF BIRTHRIGHT CITIZENSHIP

By the end of 1865, the Civil War was over and the Thirteenth Amendment had abolished slavery.²³ The citizenship status of nearly 4.5 million Black inhabitants of the United States was far from clear, however.²⁴ In its infamous 1857 decision *Dred Scott v. Sandford*, the Supreme Court declared that no Black person, slave or free, could ever be a citizen of the United States.²⁵ That decision remained the law of the land even after slavery had ended.²⁶

21. *No Ballots for Mongols*, *supra* note 3, at 16.

22. Immigration and Nationality Act of 1952, 66 Stat. 163, 239.

23. U.S. CONST. amend. XIII, § 1.

24. See U.S. CENSUS BUREAU, 1870 CENSUS: VOLUME I. THE STATISTICS OF THE POPULATION OF THE UNITED STATES 5 (1872) (showing a total Black population of 4,441,830 in 1860 and a total Black population of 4,880,009 in 1870).

25. 60 U.S. (19 How.) 393, 404 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

26. Compare *id.* at 404-05 (declaring in 1857 that Black people, “whether emancipated or not,” could “claim none of the rights and privileges” of American citizens), with U.S. CONST. amend. XIII, § 1 (abolishing slavery in 1865), and U.S. CONST. amend. XIV, § 1 (establishing universal birthright citizenship three years later, in 1868).

In the absence of Black citizenship and accompanying rights, slavery in the South was reinstated “in all but name” through the Black Codes restricting every aspect of freedmen’s lives.²⁷ Congress responded by creating the Joint Committee on Reconstruction, consisting of fifteen congressional leaders from the House and Senate.²⁸ Those men were the impetus behind the Civil Rights Act of 1866, as well as the Fourteenth Amendment to the Constitution, both of which sought to bring an end to citizenship based on race.²⁹

Unquestionably, Reconstruction focused on securing the rights of the formerly enslaved, at least in part to counter the political power of the White leaders of the Confederacy. But some members of the Reconstruction Congress had a broader and more idealistic goal: to end caste in America by providing civil and political rights to all, regardless of race or lineage, through universal birthright citizenship.

A. *The Civil Rights Act of 1866*

The Civil Rights Act of 1866 granted all U.S. citizens the same set of civil rights “enjoyed by white citizens,” including the right to contract, to buy and sell property, and to sue and be sued.³⁰ But the first draft of that law failed to make clear who qualified for citizenship.³¹ Then, on Tuesday, January 29, 1866, Illinois Senator Lyman Trumbull rose to his feet to propose adding the following provision to the bill’s text: “That all persons of African descent born in the United States are hereby declared to be citizens of the United States.”³²

Trumbull’s proposal would have granted citizenship to the 4.4 million Black inhabitants of the United States and their progeny.³³ Left out, however, were all Asians, Arabs, and other non-Whites not

27. GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 84 (2006).

28. *Id.* at 90.

29. *Id.* at 164-65 (describing how members of the Joint Committee pushed for the Civil Rights Act of 1866, which was the precursor to the Fourteenth Amendment).

30. Civil Rights Act of 1866, 14 Stat. 27, 27.

31. EPPS, *supra* note 27, at 174-75.

32. CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866).

33. *See id.* at 474; U.S. CENSUS BUREAU, *STATISTICAL RECORD OF THE PROGRESS OF THE UNITED STATES* 29 (1920) (reporting 4.4 million Black inhabitants of the United States as of 1860).

of “African descent”—in particular, the small but growing number of children of Chinese immigrants in California.³⁴ Had it become law, the Supreme Court almost certainly would have interpreted that language to exclude these groups from birthright citizenship.

A few senators quickly objected to Trumbull’s amendment. Parroting Chief Justice Taney’s *Dred Scott* opinion, West Virginia Senator Peter G. Van Winkle argued that “persons of African descent ... were not counted among ‘we the people’ who established the national Constitution” and so were “not citizens by birth.”³⁵ Van Winkle also denied that Congress could make new citizens through legislation.³⁶ Congressional authority to grant citizenship was “one of the gravest subjects that ever could be submitted to the people of the United States,” he declared, because “it involves not only the negro race, but other inferior races that are now settling on our Pacific coast”—here, Van Winkle was surely referring to Chinese immigrants—“and perhaps involves a future immigration to this country of which we have no conception.”³⁷

Trumbull’s initial proposed amendment did not apply to the children of Chinese immigrants. But Van Winkle explained that his objection was prompted, in part, by a bill recently introduced in the House that would “strike out the word ‘white’ from the naturalization laws, so that we may expect to have an influx here of all sorts of people from all countries,” which Van Winkle viewed as “detrimental to the best interests of our country.”³⁸ He doubted that the “people” (by which he meant *White* people) were “willing that these piebald races from every quarter shall come in and be citizens with them in this country, and enjoy the privileges which they are now enjoying as such citizens.”³⁹

34. See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull).

35. Compare *id.* at 497 (remarks of Sen. Van Winkle), with *Dred Scott v. Sandford*, 60 U.S. 393, 403-04 (1857) (enslaved party), superseded by U.S. CONST. amend. XIV.

36. CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866).

37. *Id.*

38. *Id.*

39. *Id.* at 498. Van Winkle anticipated a constitutional amendment addressing citizenship, and he wanted to see that amendment sent to “conventions of the people, or, at least, that it should be so timed that it would go before the Legislatures to be elected in the coming summer or fall, so that the voice of the people may be expressed upon it.” *Id.* (remarks of Sen. Van Winkle).

Senator Trumbull took Van Winkle's criticism to heart, though not in the way Van Winkle intended. Instead of granting citizenship only to those of "African descent," as originally proposed, Trumbull decided "to withdraw [the amendment] and to offer another ... changing the phraseology."⁴⁰ The new version provided that "all persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color."⁴¹ This broadly worded version would grant citizenship to *all* children born in the United States, whatever the race of their parents; the only exceptions were for the children of diplomats and those born into Indian tribes, who were born "subject" to a "foreign Power" due to their parents' status.⁴²

That proposal prompted Senator Edgar Cowan to ask, "will not [this language] have the effect of naturalizing the children of Chinese and Gypsies born in this country?"⁴³

"Undoubtedly," came Trumbull's one-word reply.⁴⁴

Cowan was incensed. The Chinese immigrant population "is now becoming very heavy upon the Pacific coast," he complained.⁴⁵ He feared that "if they are to be made citizens and to enjoy political power in California, then ... the day may not be very far distant when California, instead of belonging to the Indo-European race, may belong to the Mongolian."⁴⁶

Congress ignored his objection, and both houses voted in favor of the bill by healthy margins.⁴⁷ But President Andrew Johnson quickly vetoed the bill, echoing Van Winkle and Cowan's concerns. He condemned the law for granting birthright citizenship to "the Chinese of the Pacific States, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks."⁴⁸ Johnson was especially aggrieved that these groups would be born citizens even as "large numbers of intelligent, worthy, and patriotic

40. *Id.* (remarks of Sen. Trumbull).

41. *Id.*

42. *See id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.* at 606-07, 1367.

48. Andrew Johnson, U.S. President, Veto Message on Civil Rights Legislation (Mar. 27, 1866), in 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 3603 (1897).

foreigners” had to wait for years to naturalize (by foreigners, Johnson meant *White* foreigners).⁴⁹

Trumbull and his Republican colleagues were undeterred, eventually passing the Civil Rights Act on April 9, 1866, over the President’s veto.⁵⁰ In an address to the Illinois legislature the following year, Senator Trumbull explained that his original, race-restricted citizenship proposal was “not acceptable to the Senate.”⁵¹ He celebrated the final version granting universal birthright citizenship for ensuring “equal rights of every human being in the land, no matter from what quarter of the globe he or his ancestors may have come, or what color may have been stamped on his face by a European or an African sun.”⁵²

B. The Fourteenth Amendment’s Citizenship Clause

A few months later, Michigan Senator Jacob Howard proposed adding similar language to the first sentence of the Fourteenth Amendment.⁵³ Like the Civil Rights Act, the Citizenship Clause of the Fourteenth Amendment constitutionalized universal birthright citizenship for *all*, not just the former slaves.⁵⁴

Once again, Senator Cowan objected, warning that the “people of California” would be “overrun by a flood of immigration of the Mongol race,” with the result that they would “be immigrated out of house and home by Chinese.”⁵⁵ For Cowan, the rights and membership granted by citizenship status should be limited to his “own people, the people of [his] own blood and lineage, people of the same religion, people of the same beliefs and traditions,” and not “a

49. *Id.* at 3604-05.

50. In final form, the citizenship provision of the Civil Rights Act of 1866 provides: “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” Civil Rights Act of 1866, Ch. 31, 14 Stat. 27.

51. *Senator Trumbull’s Address to the Illinois Legislature—The Civil Rights Bill*, N.Y. TIMES, Jan. 21, 1867, at 1.

52. *Id.* Some in Congress disagreed with Trumbull, stating that they were willing to grant citizenship and civil rights to the former slaves but not other non-Whites. But their position did not prevail. CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866).

53. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

54. *Id.*

55. *Id.* at 2890-91 (remarks of Sen. Cowan).

society of other men entirely different in all those respects from [him]self.”⁵⁶

California Senator John Conness rose to defend birthright citizenship. Conness seemed an unlikely proponent of the proposed amendment. He represented a state whose White population had become deeply hostile to the Chinese immigrants they had welcomed as workers only a few decades before.⁵⁷ But Senator Conness was himself a naturalized citizen from Ireland.⁵⁸ The youngest of fourteen children, he had immigrated to the United States as a teenager, making his way out West during the gold rush and profiting through sales of mining equipment to the “forty-niners.”⁵⁹ Perhaps it was his own experience as a new American that led him to embrace the idea of automatic citizenship for the children of all immigrants.⁶⁰

Conness read the Citizenship Clause as broadly as Cowan feared, declaring that once it became law, “the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States.”⁶¹ To dispel any doubt, Conness further specified that the Citizenship Clause applies “to the children begotten of Chinese parents in California”—a declaration that the Supreme Court would later cite to support the broadest reading of the Citizenship Clause against the government’s challenge.⁶²

Thanks in part to Conness’s vocal support, the race-neutral language granting universal birthright citizenship became the first sentence of the Fourteenth Amendment. That sentence, known as the Citizenship Clause, provides: “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.”⁶³

56. *Id.* at 2891 (remarks of Sen. Cowan).

57. See Robert Denning, *A Fragile Machine: California Senator John Conness*, 85 J. CAL. HIST. SOC’Y 26, 30, 44 (2008).

58. See *id.* at 28.

59. See *id.* at 28-29.

60. See *id.* at 45.

61. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (remarks of Sen. Conness).

62. *United States v. Wong Kim Ark*, 169 U.S. 649, 698-99 (1898) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866)).

63. U.S. CONST. amend. XIV § 1.

* * *

As this brief synopsis illustrates, the 39th Congress initially toyed with a birthright citizenship provision that would maintain a race-based citizenship standard, granting citizenship at birth only to Blacks and Whites, but then chose instead to adopt universal birthright citizenship.⁶⁴ By expressly rejecting race-based citizenship, the Reconstruction Congress went beyond protecting newly freed slaves, envisioning an egalitarian, multiracial nation built on immigration from all over the world.⁶⁵ In the years to come, much of the Fourteenth Amendment would be gutted by hostile states, an indifferent federal government, and a complicit Supreme Court.⁶⁶ Remarkably, however, birthright citizenship survived, creating a paradoxical rule of citizenship: multiracial birthright citizenship for the children of all immigrants paired with a racially restrictive naturalization law.⁶⁷

II. THE PARADOX OF UNIVERSAL BIRTHRIGHT CITIZENSHIP AND RACIALLY EXCLUSIVE NATURALIZATION

The Citizenship Clause existed uneasily in a society that was far from embracing a multiracial version of America. As Chin and Finkelman explain, Congress chose to retain a race-based conception of citizenship in the Naturalization Act of 1870,⁶⁸ rejecting by just one vote Senator Charles Sumner's proposed amendment to the Naturalization Act of 1790 to "strik[e] out the word 'white' wherever it occurs, so that in naturalization, there shall be no distinction of race or color."⁶⁹ Instead, Congress agreed to amend the law to allow only "aliens of African nativity and ... persons of African descent" to

64. See *supra* notes 54-64 and accompanying text.

65. See *infra* note 68 and accompanying text.

66. See *infra* notes 82-94 and accompanying text.

67. Although birthright citizenship prevailed for all born within the continental United States and the incorporated territories, the Supreme Court deprived the residents of the unincorporated territories of citizenship and other constitutional rights in a series of decisions known as the *Insular Cases*. See Rose Cuison-Villazor, *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HARV. L. REV. F. 1680 (2017).

68. Chin & Finkelman, *supra* note 9, at 1056.

69. See CONG. GLOBE, 41st Cong. 2d Sess. 5121, 5123 (1869); see also Chin & Finkelman, *supra* note 9, at 1102.

become citizens alongside White immigrants.⁷⁰ For the next eighty-two years, the nation lived with the anomaly of a universal birthright citizenship provision coupled with a racially exclusive naturalization statute. The tension between these two versions of American citizenship played out in the political debates over the Fourteenth Amendment, legal battles in court, and the formulation of U.S. immigration policy.

A. *Political Battles*

The conflicting visions of American citizenship and, by extension, American identity were evident throughout the debates over birthright citizenship. As explained in Part I, Senator Lyman Trumbull first suggested a racially restrictive version of birthright citizenship before proposing universal birthright citizenship.⁷¹ Several other senators objected to the very idea of opening up citizenship to non-White immigrants. And although Senator Conness spoke eloquently in defense of birthright citizenship, he hastened to add that it would have little effect on the racial composition of California, claiming that few persons of Chinese descent would obtain birthright citizenship:⁷² “[T]hey do not bring their females to our country but in very limited numbers,” he told his fellow senators, “and rarely ever in connection with families; so that their progeny in California is very small indeed.”⁷³ This is a jarring aside in a speech otherwise devoted to supporting the principle of citizenship and rights for all, including the Chinese.⁷⁴

The political forces aligned against the Fourteenth Amendment came close to derailing it. Ten of the seceding states were required to ratify it as a prerequisite to reentering the Union, leading some to question whether ratification under such coercive conditions was

70. Chin & Finkleman, *supra* note 9, at 1102.

71. *See supra* notes 32-40 and accompanying text.

72. CONG. GLOBE, 39th Cong., 1st Sess. at 2891.

73. *Id.*

74. Conness may have hoped this statement would reassure his fearful constituents and protect his own political future. If so, his strategy failed. His support of Chinese immigrants may have cost him the next election, and he returned to the East Coast shortly thereafter. *See Denning, supra* note 57, at 26, 30.

valid.⁷⁵ California was the state most immediately affected by birthright citizenship for the children of non-White immigrants, and it refused to ratify the Amendment, not doing so until 1959.⁷⁶ Oregon, Ohio, and New Jersey originally voted in favor of the Fourteenth Amendment, but then later tried to rescind their votes.⁷⁷

So chaotic was this ratification process that Secretary of State William Seward refused to proclaim it successfully concluded, as he had done for the Thirteenth Amendment.⁷⁸ By the skin of its teeth, birthright citizenship officially made it into the Constitution on July 28, 1868.⁷⁹ But the battle for universal citizenship was far from over.

B. Legal Battles

As a matter of law, the conflict between the Citizenship Clause and the Naturalization Act came to a head in the 1898 Supreme Court case *United States v. Wong Kim Ark*.⁸⁰ Wong was born in San Francisco in 1870 and lived in the United States for most of his life.⁸¹ When he tried to return to San Francisco by steamboat after a visit to his family in China in August 1895, the U.S. government barred him from disembarking. The government argued that the children of noncitizen parents were not born “subject to the jurisdic-

75. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 376-77, 377 n.5, 406-09 (2001).

76. Kevin Waite, *Op-Ed: Early California Lawmakers also Preached #Resistance—But Against Immigration*, L.A. TIMES (Aug. 3, 2018, 4:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-waite-california-14-amendment-20180803-story.html> [<https://perma.cc/UGP4-EMJN>]; *Letter from the Capital*, S.F. EXAM’R, Mar. 20, 1868, at 2 (concluding that California refused to ratify the Fourteenth Amendment because “a large majority of the people of California decid[ed] against negro and Chinese citizenship”).

77. EPPS, *supra* note 27, at 252-53; Harrison, *supra* note 75, at 409 n.188.

78. Harrison, *supra* note 75, at 409, 409 n.188.

79. William H. Seward, Proclamation No. 13, 15 Stat. 708 app. (quoting in full Congress’s concurrent resolution directing him to promulgate the amendment).

80. Lucy E. Salyer has written a fascinating and deeply researched account of the *Wong Kim Ark* litigation. See generally Lucy Salyer, *Wong Kim Ark*, in IMMIGRATION STORIES 51 (David A. Martin & Peter H. Schuck, eds., 2005).

81. See Amanda Frost, “*By Accident of Birth*”: *The Battle over Birthright Citizenship After United States v. Wong Kim Ark*, 32 YALE J.L. & HUMANS. 38, 43-47 (2021). Wong’s birth date is listed as 1873 in some sources, but in archival records Wong repeatedly reported his birthdate and age as consistent with birth in 1870. *Id.* at 40 n.6.

tion” of the United States and thus were excluded from birthright citizenship.⁸²

The government’s legal argument was based in part on the tension between birthright citizenship and the Naturalization Act. In his brief, Solicitor General Holmes Conrad argued that “Chinese persons ... are prohibited from naturalization ... [and Congress] has thus declared them unfit for citizenship within the United States.”⁸³ George Collins, the private attorney who had pressured the government to bring the case, also submitted a brief, cosigned by the Solicitor General,⁸⁴ which spelled out the argument even more clearly:

[T]here would be a most decided conflict if the definition of citizenship by birth was construed to include the children of aliens. It is only by avoiding that conflict that we can logically escape the exceedingly anomalous and flagrantly inconsistent position of denying citizenship to a particular class of aliens [in the Naturalization Act] and yet conferring the highest form of citizenship on their children, who stand in the same relation to the principle of exclusion as do their parents. The fact that such a result is possible ought of itself to be sufficient to condemn the doctrine invoked in support of the claim of Wong Kim Ark.⁸⁵

The Court struggled with the issue, taking over a year before finally issuing a 6-2 decision in Wong’s favor on March 28, 1898.⁸⁶

The Fourteenth Amendment’s Citizenship Clause spoke in race-neutral terms, which meant that the citizenship of *all* children of noncitizens born in the United States hung in the balance. “[T]he opening words, ‘All persons born,’ are general, not to say universal,

82. *Id.* at 66-68.

83. Brief for the United States at 45, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 904).

84. George Collins is often referred to as “amicus curiae,” but his exact status is unclear. Collins signed the brief over the title “Of Counsel for Appellant,” and Solicitor General Holmes Conrad signed his name as well. *See id.* at 51. Whatever Collins’ role in the litigation, the Solicitor General endorsed the arguments in Collins’ brief.

85. Brief for Appellant at 38, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 904).

86. Salyer, *supra* note 1, at 74.

restricted only by place and jurisdiction, and not by color or race,” the Court explained.⁸⁷ Accordingly, to

hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, 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.⁸⁸

In other words, the Supreme Court was not prepared to deny citizenship to the children of White immigrants alongside those of Chinese immigrants. For that reason, the Court concluded that the Citizenship Clause’s exception for those not “born subject to the jurisdiction of the United States” was intended to bar only the children of diplomats and those born within Indian tribes from birthright citizenship⁸⁹—the two exceptions discussed in the legislative history. Everyone else qualified for citizenship by virtue of birth on U.S. soil, regardless of their parents’ race, ethnicity, or immigration status.

The two dissenters, Chief Justice Melville Fuller and Justice John Marshall Harlan, were convinced by the argument that universal birthright citizenship was incompatible with the racially exclusive Naturalization Act. Chinese nationals “have never been allowed by our laws to acquire our nationality” they explained, and so it followed that the Fourteenth Amendment was also “not designed to accord citizenship to persons so situated.”⁹⁰ Instead, all methods of acquiring citizenship should remain in the hands of Congress and the executive, who, the dissenters believed, “have the power, notwithstanding the Fourteenth Amendment, to prescribe that all

87. *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898).

88. *Id.* at 694.

89. U.S. CONST. amend. XIV § 1.

90. *Id.* at 726 (Fuller, C.J., dissenting). In his celebrated dissent in *Plessy v. Ferguson*, Justice Harlan criticized the law excluding Blacks from riding in White-only railway cars in part because it gave a “Chinaman” more rights than “citizens of the black race.” 163 U.S. 537, 561 (1896). Harlan further observed that the “Chinese race” is “so different from our own that we do not permit those belonging to it to become citizens of the United States.” *Id.*; see also Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

persons of a particular race, or their children, cannot become citizens.”⁹¹

The six Justices in the majority acknowledged the conflict between universal birthright citizenship and racially restricted naturalization, but concluded that the Citizenship Clause tied Congress’s hands. The “Fourteenth Amendment ... has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship,” these justices declared.⁹² As a result, *Wong Kim Ark* guaranteed that America’s paradoxical approach to citizenship would live on.

C. *Immigration Battles*

After the Supreme Court’s decision in *Wong Kim Ark*, the government’s only means of maintaining America’s identity as a White nation was to prevent non-White immigrants from immigrating and having children on U.S. soil. Almost immediately, Congress began to exclude certain races from entering the United States, and in particular women of those races.⁹³ These racially exclusionary immigration laws were a natural extension of the racially exclusionary Naturalization Act and its vision of the United States as a White nation, as vividly described by Chin and Finkelman.⁹⁴

The Page Law of 1875 barred the immigration of any person from “China, Japan, or any Oriental country” unless the consul-general first determined that the immigrant was not entering the United States for a “lewd or immoral purpose” or “for the purposes of

91. *Id.* at 732; see also KEVIN KENNY, THE PROBLEM OF IMMIGRATION IN A SLAVEHOLDING REPUBLIC: POLICING MOBILITY IN THE NINETEENTH-CENTURY UNITED STATES 224 (2023). The dissenters may have been alluding to George Collins’s suggestion that the Court strip citizenship from the children of *all* non-citizen immigrants, after which Congress could by legislation create a streamlined naturalization pathway for the children of White immigrants while continuing to bar citizenship for the children of Chinese immigrants.

92. 169 U.S. at 703. The majority also observed that Blacks could not naturalize before 1870—two years after the Fourteenth Amendment’s ratification—and yet that anomaly did not bar Blacks from birthright citizenship. *Id.*

93. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005).

94. See Chin & Finkelman, *supra* note 9, at 1102-05.

prostitution.”⁹⁵ One legal scholar explained that the law “almost completely shut down Chinese female immigration,” while another observed that by “excluding Chinese women as prostitutes, the law prevented the birth of Chinese American children and stunted the growth of Chinese American communities.”⁹⁶

The Page Law was just the beginning. The Chinese Exclusion Act of 1882 permitted only Chinese merchants and students to immigrate to the United States—two statuses which few Chinese women could claim for themselves.⁹⁷ Their only path to the United States was as wives of men in these categories.⁹⁸ Although Chinese laborers who had been living in the United States prior to the law’s passage could leave and reenter with a certificate proving their prior residence, they were barred from bringing in their wives.⁹⁹

Under a federal law enacted in 1907 and in effect until 1931, the few women of Asian descent who could claim U.S. citizenship based on birth in the United States automatically lost their citizenship if they married a noncitizen.¹⁰⁰ Native-born women of Chinese ancestry were more likely to marry noncitizens than White women because antimiscegenation laws barred them from marrying outside their race.¹⁰¹ Once they married noncitizen men, these women were at risk of deportation and could also be barred from reentering when traveling abroad.¹⁰² Finally, immigration laws enacted in the 1920s

95. Abrams, *supra* note 93, at 695, 697.

96. Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 410-11 (2005); Abrams, *supra* note 93, at 641; see KENNY, *supra* note 91, at 9-10.

97. Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, 97, in *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943* (Sucheng Chan, ed., 1991); Volpp, *supra* note 96, at 410-11.

98. Chan, *supra* note 97, at 97.

99. *Id.* at 110.

100. Volpp, *supra* note 96, at 407-09. As Volpp explains, the Expatriation Act of 1907 stripped citizenship from all U.S. citizen women who married noncitizen men. The Cable Act of 1922 amended the law to allow women who married noncitizens eligible to naturalize to keep their citizenship, but continued to strip citizenship from women who married “alien[s] ineligible to citizenship”—a group that included Asian and Arab men. *Id.* at 431 n.132. Not until 1931 were women permitted to retain their citizenship even if they married a noncitizen racially ineligible to naturalize. *Id.* at 444-46.

101. Abrams, *supra* note 93, at 663 n.125; Volpp, *supra* note 96, at 435.

102. Volpp, *supra* note 96, at 425.

almost completely shut down immigration from Africa and Asia (including, but not limited to, women).¹⁰³

These discriminatory immigration laws interacted with existing laws and policies—ranging from antimiscegenation laws, to racially exclusive housing policies, to segregated schools—to discourage immigration by non-White women. Together, these laws and policies helped to keep the number of non-White immigrants in the United States low, in particular restricting the number of non-White women.¹⁰⁴ In 1860, there were 33,149 Chinese men and 1,784 Chinese women in the United States.¹⁰⁵ Sixty years later, in 1920, the ratios were still markedly disproportionate, with Chinese men outnumbering Chinese women at a rate of seven to one.¹⁰⁶ The dearth of Chinese women kept the number of birthright citizens low as well. In 1920, after eighty years of immigration from China, there were only 18,532 native-born children of Chinese descent in the United States in a population of 106 million.¹⁰⁷

* * *

In 1866, Senator Conness claimed that very few children of Chinese immigrants would ever be born on U.S. soil.¹⁰⁸ In the decades that followed, the government put in place immigration laws and policies seeking to ensure that result.

Yet these laws could not prevent immigrants from using birthright citizenship as an end-run around racist immigration and naturalization policies. The Chinese established a place in a conflicted

103. Chan, *supra* note 97, at 123.

104. *See id.* at 137, 139.

105. U.S. BUREAU OF THE CENSUS, *Chinese and Japanese in the United States*, in BULLETIN 127, 8 (1910).

106. U.S. BUREAU OF THE CENSUS, *Chapter II, Sex Distribution*, in POPULATION: GENERAL REPORT AND ANALYTICAL TABLES, 110 (1920) (reporting a population of 53,891 Chinese men and 7,748 Chinese women).

107. U.S. BUREAU OF THE CENSUS, *Chapter I: Color or Race, Nativity, and Parentage*, in POPULATION: GENERAL REPORT AND ANALYTICAL TABLES 30 (1920). The numbers were also lopsided for Japanese men, who outnumbered Japanese women by a ratio of two to one, as well as for “other” non-White men (defined as including Filipinos, Hindus, Koreans, Maoris, Hawaiians, Malays, Samoans, and Siamese), who outnumbered women ten to one. U.S. BUREAU OF THE CENSUS, *supra* note 106, at 110. However, the Indian male/female populations were close to even. *Id.*

108. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1865).

nation for their U.S.-born children, those children's foreign-born offspring (under laws granting citizenship by descent for children born abroad), and even for "paper sons" who falsely claimed to be sons of citizens.¹⁰⁹ One scholar reports that between 1904 and 1940, approximately 100,000 persons of Chinese ethnicity entered or returned to the United States claiming citizenship based either on birth in the United States, or on having a U.S. citizen parent.¹¹⁰ Birthright citizenship had opened a door that could not be closed.¹¹¹

At the same time, the Citizenship Clause provided an alternative conception of America as a country that eschewed ethnonationalism in favor of equal citizenship for all born on U.S. soil. That conception eventually won the day. In 1952 the United States eliminated all racial barriers to naturalization, finally putting an end to the paradoxical approach to citizenship in U.S. law.¹¹² Today, birthright citizenship is one of the most widely known constitutional provisions; in a recent study by the Pew Research Center, almost 90 percent of respondents reported familiarity with the rule that all born in the United States are U.S. citizens.¹¹³ And despite repeated calls by politicians to eliminate it, a majority of Americans continue to support automatic citizenship for all born on U.S. soil.¹¹⁴

CONCLUSION

As Chin and Finkelman explain, for over 150 years the Naturalization Act of 1790 shaped U.S. politics, law, and immigration

109. MADELINE HSU, *DREAMING OF GOLD, DREAMING OF HOME: TRANSNATIONALISM AND MIGRATION BETWEEN THE UNITED STATES AND SOUTH CHINA, 1882-1943* 78, 81 (2000); Erika Lee, *Birthright Citizenship, Immigration, and the U.S. Constitution: The Story of United States v. Wong Kim Ark* in *RACE LAW STORIES* 89, 102 (Rachel F. Moran & Devon W. Carbado eds., 2008).

110. HSU, *supra* note 109, at 79-80; Lee, *supra* note 109.

111. *Id.*

112. Chin & Finkelman, *supra* note 9, at 1110.

113. Sara Kehaulani Goo, *What Americans Want To Do About Illegal Immigration*, PEW RSCH. CTR. (Aug. 24, 2015), <https://www.pewresearch.org/short-reads/2015/08/24/what-americans-want-to-do-about-illegal-immigration> [<https://perma.cc/2X3L-HABW>]. In comparison, only 26 percent of Americans can name all three branches of the federal government. See *Americans' Knowledge of the Branches of Government is Declining*, ANNENBERG PUB. POLY CTR. (Sept. 13, 2016), <https://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining> [<https://perma.cc/2H85-68SF>].

114. Goo, *supra* note 113.

policy, as well as America's vision of itself as a White nation.¹¹⁵ The authors make a powerful case that the law's longevity and influence elevates it to "super-statute" status.¹¹⁶ Starting in 1868, however, the Naturalization Act was in direct competition with the Fourteenth Amendment's Citizenship Clause for control over the nation's future. Arguably, the conflict between the two has been a more important influence on the development of the United States than either law taken on its own.

115. Chin & Finkelman, *supra* note 9, at 1061-62.

116. *Id.* at 1051-58.