

BIRTHRIGHT CITIZENSHIP ON TRIAL: *ELK V. WILKINS* AND *UNITED STATES V. WONG KIM ARK*

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In the summer of 2015, the majority of Republican candidates for president announced their opposition to birthright citizenship. The constitutional dimensions of that right revolve around two cases decided at the end of the nineteenth century, Elk v. Wilkins (1884) and United States v. Wong Kim Ark (1898). The first held that an American Indian man born in the United States was not a citizen under the Fourteenth Amendment; the second, that a Chinese American man born in the United States was indeed a citizen under the amendment. This Article juxtaposes the history of these decisions. By showing the distinctive constitutional and political status of Native peoples, this history underscores the unconstitutionality of efforts to limit birthright citizenship and the consistency of Elk with the egalitarian ideals of the Fourteenth Amendment.

Further, by providing new facts about the litigants, lawyers, and communities in these cases, this history provides new perspectives on the meaning of citizenship and its role in judicial and administrative law. Although John Elk's non-Native lawyers presented him as seeking to assimilate and abandon his tribe, Elk was part of a Winnebago community and likely sought only freedom from the federal government's aggressive policies of land acquisition and domination. While Wong Kim Ark's lawyers were products of an organized Chinese migrant community, Wong also likely sought citizenship less as a quest for full assimilation than as an effort to maintain his transnational family in the face of exclusionary immigration policies. Wong's citizenship, however, permitted his Chinese-born son to migrate to the United States, be drafted into the army in World War II, and make a career with the Merchant Marines. The histories also show the limits of judicial action, as Congress quickly undermined the effect of each opinion, and the divergent opinions

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both contributed to expanded administrative power. Together, these histories challenge idealized concepts of citizenship, freedom, and individual action that remain with us today, and provide a richer understanding of race, constitutional doctrine, and administrative structure in the United States.

“The greatest hoax ever perpetrated upon [the Indian] was the [Indian] citizenship [act] of 1924”

—Luther Standing Bear, 1933¹

“We are American citizens in name but not in fact.”

—Chinese American young adult, ca. 1931²

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¹ LUTHER STANDING BEAR, *LAND OF THE SPOTTED EAGLE* 229 (Univ. of Neb. Press 1978) (1933).

² Erika Lee, *Wong Kim Ark: Chinese American Citizens and U.S. Exclusion Laws, 1882–1943*, in *THE HUMAN TRADITION IN CALIFORNIA* 65, 76 (Clark Davis & David Iglar eds., SR Books 2004) (2002) [hereinafter Lee, *Wong Kim Ark*] (quoting Kit King Louis, *A Study of American-Born and American-Reared Chinese in Los Angeles* 127 (Jan. 22, 1931) (unpublished M.A. thesis, University of Southern California)).

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INTRODUCTION

In the summer of 2015, birthright citizenship unexpectedly became a key subject in the Republican presidential primary race. In August, poll-leader Donald Trump, who had long been among the “birther” zealots challenging President Obama’s birthright citizenship, announced that he would seek its demise.³ Retired neurosurgeon Ben Carson, who would soon challenge Trump’s popularity as a say-anything outsider candidate, quickly agreed that birthright citizenship didn’t “make any sense” to him.⁴ Louisiana Governor Bobby Jindal, born to Indian immigrants four months after their arrival in the United States, soon tweeted his opposition.⁵ Former Senator Rick Santorum had actually published his opposition back in May, although no one noticed until Trump joined in.⁶ Senators Lindsey Graham and Rand Paul, meanwhile, noted that they had supported ending birthright citizenship for years.⁷ Senator Ted Cruz, the Canadian-born son of a Cuban immigrant and a birthright citizen through his U.S. citizen

³ Editorial, *G.O.P. Candidates Follow Trump to the Bottom on Immigration*, N.Y. TIMES (Aug. 20, 2015), <http://www.nytimes.com/2015/08/20/opinion/gop-candidates-follow-trump-to-the-bottom-on-immigration.html>.

⁴ Esther Yu-Hsi Lee, *How Many Candidates Have ‘Taken Advantage’ of Birthright Citizenship, But Oppose It?*, THINKPROGRESS (Aug. 19, 2015, 1:44 PM), <http://thinkprogress.org/immigration/2015/08/19/3692969/birthright-citizenship-pres-candidates>.

⁵ *Id.*

⁶ Rick Santorum, *An Immigration Policy for Hard-Working Americans*, BREITBART (May 6, 2015), <http://www.breitbart.com/big-government/2015/05/06/an-immigration-policy-for-hard-working-americans>.

⁷ Mark Murray, *Where the GOP 2016 Candidates Stand on Birthright Citizenship*, MSNBC (Aug. 18, 2015, 3:39 PM), <http://www.msnbc.com/msnbc/where-the-gop-2016-candidates-stand-birthright-citizenship>.

mother,⁸ backed off his earlier position that birthright citizenship was guaranteed by the Constitution, and declared he supported either statutory or constitutional repeal.⁹ New Jersey Governor Chris Christie also came out against birthright citizenship, but backtracked when he figured out it was a constitutional right.¹⁰ Eventually only a few Republican primary candidates refused to oppose automatic citizenship for those born on U.S. soil.¹¹

As Governor Christie discovered, birthright citizenship has been part of the Constitution since the Fourteenth Amendment declared that “[a]ll 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.”¹² The recurring movements to limit birthright citizenship by statute, however, center around the ambiguous phrase “subject to the jurisdiction thereof.” The meaning of that phrase, in turn, revolves around two Supreme Court cases decided at the end of the nineteenth century, *Elk v. Wilkins*¹³ and *United States v. Wong Kim Ark*,¹⁴ the first rejecting citizenship for John Elk, a Winnebago man born in Iowa to Wisconsin-born parents, the second upholding it for Wong Kim Ark, a Chinese man born in California to Chinese-born parents.

This Article is the first to juxtapose the histories of the two cases, and the first to examine the history of *Elk v. Wilkins* in any detail. This fuller picture underscores the flaws in constitutional arguments against birthright citizenship, by highlighting the distinctive constitutional status of Indian tribes.¹⁵ The drafters and supporters of the Fourteenth Amendment both recognized this status, and recognized that protecting it—and preventing automatic citizenship for tribal Indians—was compelled by the egalitarian ideals of the Fourteenth Amendment. Equally important, new facts about both men’s lives suggest that

⁸ See Paul Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen”*, 128 HARV. L. REV. FORUM 161, 163 (2015). See generally Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014) (discussing derivative citizenship).

⁹ Igor Bobic, *Ted Cruz Once Said It Was a ‘Mistake’ to Try to End Birthright Citizenship*, HUFFINGTON POST (Aug. 20, 2015, 12:31 PM), http://www.huffingtonpost.com/entry/ted-cruz-birthright-citizenship_55d5f798e4b0ab468da01952.

¹⁰ Catherine Thompson, *Chris Christie Backtracks a Bit on Birthright Citizenship*, TPM LIVEWIRE (Aug. 20, 2015, 1:50 PM), <http://talkingpointsmemo.com/livewire/chris-christie-birthright-citizenship-take>.

¹¹ Murray, *supra* note 7.

¹² U.S. CONST. amend. XIV, § 1.

¹³ *Elk v. Wilkins*, 112 U.S. 94, 95 (1884).

¹⁴ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

¹⁵ This Article uses the terms American Indian, Indian, Native American, and Native interchangeably to refer to the descendants of the people who were here before the arrival of Europeans in North America.

birthright citizenship, for them, was about preserving family and community in the face of destroying governmental oppression. Finally, this history shows the limits of judicial action and citizenship in the face of this oppression, as Congress quickly undermined the effect of each opinion, and the divergent opinions both contributed to expanded administrative power.

Elk and *Wong* arose in a period in which citizenship and fitness for it became key axes of federal subordination. This subordination took place on several levels, and American Indians and Chinese were paradigmatic examples of each. First, exclusion from citizenship came to mean geographic exclusion from the United States; Chinese were its first federal targets; and *Wong Kim Ark's* case was a restraint on this exclusion. Second, inclusion within citizenship, although it had always meant subjection to the national government,¹⁶ became a central tool of involuntary colonial domination, continuing on a political level the geographic absorption of formerly autonomous territories.¹⁷ Although policymakers had always tried to persuade Indians to accept citizenship and assimilation, John *Elk's* suit was part of a new insistence that American Indians could no longer choose to remain unassimilated noncitizens. Third, lack of citizenship and unfitness for it increasingly justified denying rights to those within the geographic community. At the same time, a particular concept of citizenship became central to American identity: that of the independent individual joining in the great American melting pot. Those who did not meet this ideal were denied both equality and governmental assistance to achieve it.¹⁸

Throughout the late nineteenth century, both Indians and Chinese were condemned as falling short of the “self-reliant manhood”¹⁹ of the

¹⁶ Alleged birthright citizenship, for example, had been a source of prosecutions for treason and piracy since the founding. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 52 (1985); see also *Inglis v. Trs. of Sailor's Snug Harbour*, 28 U.S. 99, 121 (1830) (discussing citizenship of those born in colonies); *Talbot v. Jansen*, 3 U.S. 133 (1795) (rejecting defendants' efforts to renounce their American citizenship).

¹⁷ See, e.g., Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER J. 107 (1999). See generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 10–14 (1995) (discussing differing claims of formerly autonomous groups absorbed within a territory and those who come to that territory from the outside).

¹⁸ See HEATHER COX RICHARDSON, *WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR* (2007) (discussing the emerging role of new individualistic citizenship ideal); see also LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998) (discussing exclusion of women from full citizenship); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004) (discussing “alien citizenship” of racialized groups).

¹⁹ 3 THEODORE ROOSEVELT, *THE WINNING OF THE WEST* 211 (New York, G.P. Putnam's Sons 1894) (describing inherited traits of natural leaders of America).

citizenship ideal. Their ties to culture and community were thought to root them in the past, making them unfit to be part of the “great nation of futurity.”²⁰ Both were also considered unfree, Indians in “thralldom” to their tribes,²¹ and Chinese “coolies” to Mandarin masters.²² Although policymakers claimed Indians were lazy and needed to be taught to work and Chinese were *too* hard working, both were also considered feminized by their relationship to work, Indian men by allowing women to farm,²³ and Chinese men by accepting labor—like laundry and cooking—deemed fit for women, and eating rice rather than manly meals of meat and potatoes.²⁴ Therefore, although Wong Kim Ark’s citizenship was an important source of rights, he, like the anonymous Chinese American quoted at the beginning of this Article, likely never fully felt included in the United States; while John Elk’s Winnebago Tribe found that citizenship did not bring freedom from federal authority but only increased federal coercion.

Chinese were usually described as permanently unassimilable and Indians as needing coercion into assimilation, but in both cases the result was to empower a growing federal bureaucracy. Both Indians and Chinese, therefore, were early victims of the “contradictory ideology” of activist government in the name of individualism and freedom.²⁵ In the name of freeing Indians from the shackles of tribalism, federal officials governed the minutiae of reservation life, charting how many Indians wore “citizen’s dress” and how many acres they farmed,²⁶ and removed Indian children to boarding schools, circulating photographs showing their transformation from savagery to civilization. In the name of preserving American freedom, federal officials policed the nation’s borders, interrogating Chinese entrants, cataloging their distinguishing marks, photographing them for future identification, and establishing rights to interrogate, detain, and deport them once within U.S.

²⁰ John L. O’Sullivan, *The Great Nation of Futurity*, 23 U.S. MAG. & DEMOCRATIC REV. 426 (1839).

²¹ Philip C. Garrett, *Indian Citizenship*, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900, at 57, 60 (Francis Paul Prucha ed., 1973) [hereinafter AMERICANIZING THE AMERICAN INDIANS].

²² See Moon-Ho Jung, *Outlawing “Coolies”: Race, Nation, and Empire in the Age of Emancipation*, 57 AM. Q. 677 (2005).

²³ See, e.g., CONG. GLOBE APP’X, 30th Cong., 2d Sess. 31, 32 (1848) (report of William Medill, U.S. Comm’r of Indian Affairs) (“[A]nything like labor is distasteful, and utterly repugnant [to Indian men and if] it be necessary to cultivate the earth, or to manufacture materials for dress, it has to be done by the women . . .”).

²⁴ See, e.g., AM. FED’N OF LABOR, SOME REASONS FOR CHINESE EXCLUSION: MEAT VERSUS RICE—AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM—WHICH SHALL SURVIVE?, S. DOC. NO. 57-137 (1902) [hereinafter REASONS FOR CHINESE EXCLUSION].

²⁵ See RICHARDSON, *supra* note 18, at 6.

²⁶ See, e.g., 1874 COMMISSIONER INDIAN AFF. ANN. REP. 108–31 (tables reflecting citizen dress and acres and products farmed).

borders.²⁷ For both Indians and Chinese, formal citizenship was initially believed to limit federal authority, but this limitation soon evaporated.²⁸ Today, immigration and federal Indian law remain strange backwaters in constitutional law, areas of executive and administrative supremacy that contribute to U.S. dealings with foreign peoples in other contexts.²⁹ John Elk and Wong Kim Ark's stories illuminate all of these developments and helped to catalyze some of them.

Part I of this Article provides the background for the cases, outlining the ways the Civil War and its aftermath transformed federal citizenship and how a potential emancipatory moment for Indians and Chinese instead laid the groundwork for future patterns of subordination.

Part II focuses on the participants in the two cases and their communities. This Part uses neglected aspects of the historical record to consider for the first time the origins of *Elk v. Wilkins* and its meaning for John Elk himself. The federal government had moved Elk's Winnebago Tribe five times since his birth in pursuit of policies of expansion and assimilation. When Elk brought suit, he was an illiterate laborer living in a wigwam on the banks of the Mississippi, and likely sought escape from federal domination rather than full assimilation. While *United States v. Wong Kim Ark* has received far more attention, including in excellent studies by two of the leading historians of Chinese-American migration,³⁰ these histories have not noted a crucial fact: Wong had married a woman and fathered a child in China four years before his historic journey. When customs officers stopped him at the U.S. border, he was returning from seeing his oldest child for the first time and fathering a second. Working in America was necessary to support his growing transnational family. Elk and Wong's struggles for citizenship, these facts suggest, were less bids for individualistic change of allegiance than efforts to maintain community and familial connections in the face of federal attempts to destroy them. Although these stories counter the ideal of the autonomous citizenship-seeker represented in the mythology of the pioneer and the melting pot, they

²⁷ See *infra* Section III.B.2.

²⁸ *Tiger v. W. Inv. Co.*, 221 U.S. 286, 315 (1911); *United States v. Ju Toy*, 198 U.S. 253 (1905).

²⁹ See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 12–14 (2002).

³⁰ See Erika Lee, *Birthright Citizenship, Immigration, and the U.S. Constitution: The Story of United States v. Wong Kim Ark*, in RACE LAW STORIES 89 (Rachel F. Moran & Devon W. Carbado eds., 2008); Lee, *Wong Kim Ark*, *supra* note 2, at 65; Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, in IMMIGRATION STORIES 51 (David A. Martin & Peter H. Schuck eds., 2005) [hereinafter Salyer, *Wong Kim Ark*].

reflect the reality of migrants from the Pilgrims onward who became Americans in part to preserve their original community ties.

Part II also examines the role of the lawyers in each case, illuminating the complex relationship between citizenship suits and community desires.³¹ At the time of *Elk v. Wilkins*, American Indians had diminishing ability to intervene in policy as a group, either through sovereign-to-sovereign diplomacy or by hiring their own attorneys. As a result, Elk's case was undertaken by reformers committed to assimilation and acculturation for Indians, who fit their clients' wishes to their case rather than vice versa.³² *United States v. Wong Kim Ark*, in contrast, was one aspect of a coordinated, multifaceted, and remarkably successful campaign by ethnic Chinese organized through *huiguan*, mutual aid associations with roots in the migrants' districts of origin.³³

Part III addresses the litigation, the ways Congress blunted the impact of each ruling, and their aftermath for Elk, Wong, and their communities. *Elk* inspired Congress to extend citizenship to Indians receiving individual land under the disastrous 1887 Dawes Allotment Act, and the need to prepare Indians for citizenship helped justify federal boarding schools and subjection to American law.³⁴ After *Wong*, Congress amped up immigration laws to exclude all Asians, political radicals, the disabled and poor, and others whose presence was deemed inconsistent with American citizenship, and reduced the power to challenge exclusion in federal court.³⁵ In the same year in 1924, Congress closed the circle by declaring all Indians born in the United States to be citizens, and placing quotas on all immigrants according to their national origins and excluding all nonwhites from the quotas.³⁶ For both Indians and Chinese, community ties provided new strategies to survive and challenge these measures.

Together, the histories of the two cases illuminate key aspects of contemporary law and policy. They underscore the errors of arguments that the cases support denying birthright citizenship to children of illegal immigrants,³⁷ and cast doubt on the use of Indian citizenship to

³¹ This examination complements work on the imperfect relationship between client desires and lawyer action in scholarship on twentieth century desegregation lawsuits. See TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 11–13 (2011); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

³² See *infra* Section II.A.2.

³³ See *infra* Section II.B.2.

³⁴ See *infra* Section III.A.2.

³⁵ See *infra* Section III.B.2.

³⁶ See *infra* Section III.B.2.

³⁷ See SCHUCK & SMITH, *supra* note 16, at 94–96; John C. Eastman, Commentary, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 961–62 (2008). Rogers Smith now argues that his and Schuck's constitutional assessment was valid

attack everything from tribal sovereign immunity to treaty fishing rights.³⁸ They shed light on our current immigration system, our colonial traditions, and the expansive federal power that supports them, and contribute to recent scholarship exposing the dark side of citizenship.³⁹ Finally, they present distinctly American stories, ones that counter mythologies of assimilation and individualism, revealing instead traditions of multinational communities enriching the mosaic that is the United States.

I. BACKGROUND: INDIANS, CHINESE, AND FOREIGNNESS AS SUBORDINATION

The Civil War and Reconstruction⁴⁰ transformed the meaning of citizenship in America. Previously, many of the most important aspects of citizenship today—immigration,⁴¹ voting, provision of social welfare,⁴² even naturalization⁴³—were arenas of state and local rather than federal regulation. Citizenship did carry important benefits, particularly with regard to property ownership,⁴⁴ but it was not yet a

in 1985, but that subsequent rejection of numerous efforts to limit birthright citizenship reflects a new American constitutional consensus. See Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329 (2009) [hereinafter Smith, *Birthright Citizenship*]. Smith notes that he and Schuck refuse to testify on behalf of these efforts. *Id.* at 1332.

³⁸ See *infra* notes 595–99 and accompanying text.

³⁹ See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 1–4 (2006); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 30 (1997) [hereinafter SMITH, *CIVIC IDEALS*]; Kunal M. Parker, *Citizenship and Immigration Law, 1800–1924: Resolutions of Membership and Territory*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789–1920)*, at 168, 172–73 (Michael Grossberg & Christopher Tomlins eds., 2008).

⁴⁰ There are numerous definitions of the period of Reconstruction. Eric Foner, the leading historian of the period, defines it as extending from the Emancipation Proclamation of 1863 to 1877, when the last federal troops left the South; others date its beginning to the end of the war in 1865, or its start in 1861. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at xxv (Perennial Classics 2002) (1988). More recent scholarship posits a much later end date. See RICHARDSON, *supra* note 18, at 4 (discussing the period from the 1860s to 1900); Sam Erman, *The Reconstruction Constitution in the Age of Empire* 3 (2014) (unpublished manuscript) (on file with author) (discussing the period extending into the second decade of the twentieth century). This Article does not embrace a particular chronological definition, except in using the term “early Reconstruction” to refer to the 1860s.

⁴¹ See Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 *VAND. L. REV.* 1353 (2009); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 *COLUM. L. REV.* 1833 (1993).

⁴² Parker, *supra* note 39, at 173.

⁴³ Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 *YALE J.L. & HUMAN.* 73, 140 (1997) [hereinafter Price, *Calvin's Case*].

⁴⁴ See Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 *AM. J. LEGAL HIST.* 152, 159 (1999).

significant source of either personhood or rights—voting rights were often denied to citizens and extended to noncitizens,⁴⁵ and the relationship of citizenship to geographic exclusion was only beginning to emerge.⁴⁶ Although African American citizenship was subject to debate,⁴⁷ because slaves had been forcibly separated from their nationalities of origin, foreignness itself was not central to their domination.

This all changed over the latter part of the nineteenth century. Reconstruction established citizenship as a matter of national definition and regulation.⁴⁸ Although American Indians and Chinese were tiny fractions of the U.S. population—0.6% and 0.2% respectively in 1880⁴⁹—they played an outsized role in these changes. The immediate postwar period suggested new hope for the rights of both American Indians and Chinese, but these possibilities quickly faded. Instead, each provided models for foreignness as a source of domination, the first through imperialism and the second through exclusion. At the same time, Reconstruction left behind substantive and procedural legal tools that made it possible for Elk and Wong to assert their own citizenship claims.

A. *The Fourteenth Amendment and Birthright Citizenship of Indians and Chinese*

Although noncitizenship was not central to antebellum subordination, *Dred Scott v. Sandford*,⁵⁰ holding that African Americans

⁴⁵ CONG. GLOBE, 41st Cong., 2d Sess. 5177 (1870) (noting that eleven of thirty-seven states permitted noncitizens to vote). Noncitizens continued to vote in a number of states until the 1920s. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397–417 (1993).

⁴⁶ Parker, *supra* note 39, at 172.

⁴⁷ See SMITH, CIVIC IDEALS, *supra* note 39, at 176–78 (discussing debate in context of status of new territories); see also *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 144, 24–25 (1838) (holding that “all free persons born within the State are born citizens of the State,” including slaves born in North Carolina then manumitted); *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 334 (1822) (holding that a slave born in the colonies could not become a citizen because she could not exercise the rights and privileges of a citizen, such as voting).

⁴⁸ Parker, *supra* note 39, at 169.

⁴⁹ See U.S. CENSUS OFFICE, COMPENDIUM OF THE TENTH CENSUS 4, 557 (1880) (U.S. population 50,155,783, Chinese population 105,465); NANCY SHOEMAKER, AMERICAN INDIAN POPULATION RECOVERY IN THE TWENTIETH CENTURY 4 (paperbound prt. 2000) (Indian population 306,543). These proportions only shrank over the next decades. U.S. CENSUS OFFICE, TWELFTH CENSUS OF THE UNITED STATES, TAKEN IN THE YEAR 1900, PART I: POPULATION, at cxlvii, 492 (1901) [hereinafter 1900 CENSUS] (total population 76,212,168, Indians 263,760, Chinese 119,050, or .35 and .16% of population respectively).

⁵⁰ 60 U.S. 393 (1857).

could never be U.S. citizens,⁵¹ was a red flag to antislavery forces.⁵² In 1866, Congress overrode President Johnson's veto to enact birthright citizenship as statutory law.⁵³ Soon after, Congress proposed the Fourteenth Amendment, enshrining national citizenship and *jus soli* as constitutional law.⁵⁴

American Indians and Chinese were central to a new discourse linking race to foreign culture and allegiance in these debates. Republican Senator Frelinghuysen of New Jersey, otherwise a supporter of Reconstruction, declared himself "not in favor of giving the rights of citizenship . . . to either pagans or heathen. . . . I am not in favor of taking steps backward into the slough of ignorance and of vice, even under the cry of progress."⁵⁵ More sensationally, Democratic Representative James Johnson of California warned that

[i]f the Hottentot, the cannibal from the jungles of Africa, the West India negro, the wild Indian, and the Chinaman are to become a ruling element in this country, then . . . convert your churches into dens and brothels, wherein our young may receive fatal lessons to end in rotting bones, decaying and putrid flesh, poisoned blood, leprous bodies, and leprous souls.⁵⁶

With respect to Indians, however, the recurring theme was insufficient progress toward civilization, while for Chinese it was permanent inability to assimilate from an ancient but regressive civilization. Objections to Indian citizenship focused on extending it to "Indians in all stages," such as the "wild Indian of the plains" or the "Digger Indians of California."⁵⁷ Senator Henry Corbett of Oregon did propose an amendment to prohibit naturalization of either Indians or Chinese,⁵⁸ but in general, the question was not whether Indians should become citizens—the Senate approved several treaties extending

⁵¹ *Id.* at 404–06.

⁵² See, e.g., GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* 57–60, 69 (2013) [hereinafter MAGLIOCCA, *AMERICAN FOUNDING SON*].

⁵³ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

⁵⁴ See U.S. CONST. amend. XIV, § 1, cl. 1 ("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."); Price, *Calvin's Case*, *supra* note 43, at 74.

⁵⁵ CONG. GLOBE, 40th Cong., 3d Sess. 979 (1869).

⁵⁶ CONG. GLOBE, 41st Cong., 2d Sess. 756 (1870).

⁵⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2892 (1866) (statements of Sen. Doolittle); see also *id.* at 2890, 2893, 2895 (statements of Sens. Doolittle, Fessenden, and Hendricks).

⁵⁸ CONG. GLOBE, 40th Cong., 3d Sess. 939 (1869).

citizenship to tribal nations and Indian individuals between 1862 and 1868⁵⁹—but when and how.

While most congressmen had confidence in the ultimate assimilation—or extinction—of Indians, many asserted that Chinese could never partake of American identity.⁶⁰ Senator Edgar Cowan of Pennsylvania, for example, declared that if “th[e] door [is] thrown open to the Asi[an] population[,] . . . there [will be] an end to republican government there, because . . . those people have no appreciation of that form of government; it seems to be obnoxious to their very nature.”⁶¹ Even those like Senator Oliver Morton of Indiana, a strong supporter of Negro suffrage, warned against extending suffrage to the Chinese, who “belong to another civilization, one that can never unite or assimilate with ours. They never can become American citizens in heart and feeling.”⁶² Although congressmen acknowledged the accomplishments of Chinese civilization, these only added to the existential threat the immigrants posed.⁶³

These debates, however, made clear that Indians born in tribal relations were not birthright citizens and that Chinese born in the United States were. The Civil Rights Act of 1866 explicitly excluded “Indians not taxed” along with those “subject to any foreign power” from those who were citizens because they were born in the United States.⁶⁴ After a long debate, the Senate voted not to include the “Indians not taxed” exception in the citizenship clause of the Fourteenth Amendment,⁶⁵ but this was based on the belief that although tribal Indians were “born in the United States,” they were not “subject to the jurisdiction thereof” in the sense in which the amendment used the phrase.⁶⁶ With respect to Chinese, however, there was universal

⁵⁹ See, e.g., Treaty with the Sioux, Sioux-U.S., art. 6, Apr. 29, 1868, 15 Stat. 635; Treaty with the Delawares, Delawares-U.S., art. 9, July 4, 1866, 14 Stat. 793; Treaty with the Kickapoo, Kickapoo-U.S., art. 3, June 28, 1862, 13 Stat. 623.

⁶⁰ See John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55 (1996).

⁶¹ CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866).

⁶² CONG. GLOBE, 40th Cong., 3d Sess. 1034 (1869); see also *id.* at 939, 1034–38; Torok, *supra* note 60, at 82–84.

⁶³ See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 287 (1869) (statement of Sen. Davis) (“There is no nation out of Europe that has as high a civilization as the Chinese,” but the “efficiency of this race” only added to the threat should it “come in its deluge” to American shores).

⁶⁴ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

⁶⁵ CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866); see also U.S. CONST. amend. XIV, § 1, cl. 1.

⁶⁶ See CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull); *id.* at 2895 (Sen. Howard); *id.* at 2897 (Sen. Williams). This phrase excluded not only Indians, but also those born to diplomatic representatives of other countries. *Id.* This consensus also explains the decision to retain the exclusion of Indians not taxed in the apportionment clause

agreement that with the Fourteenth Amendment, “the fundamental instrument of the nation” established the citizenship of “children begotten of Chinese parents in California.”⁶⁷ When Senator Cowan asked whether the Fourteenth Amendment would “have the effect of naturalizing the children of Chinese and Gypsies born in this country,” Senator Trumbull answered, “Undoubtedly.”⁶⁸ No one countered this consensus.⁶⁹

What explains the difference? Given the degree of anti-Chinese sentiment, acceptance of birthright citizenship for ethnic Chinese partly reflects belief that there would be few birthright citizens, as the first wave of Chinese immigrants largely came without their wives and most intended to return to China before their deaths.⁷⁰ It also, however, reflects acknowledgment that *jus soli* was a fundamental principle of Reconstruction.⁷¹

Although some have described the lack of birthright citizenship for tribal Indians as a mechanism of subjection,⁷² contemporary discussions suggest that exclusion of tribal Indians from citizenship was also faithful to the egalitarian principles of Reconstruction. There had been general agreement that tribal Indians were not U.S. citizens since the 1787 Constitution declared that “Indians not taxed” should not be counted in apportionment of congressional representatives.⁷³ This exclusion from citizenship reflected the autonomy of tribal nations. As Chancellor Kent wrote in *Goodell v. Jackson* in 1823, Indians were not citizens because they “are not our subjects . . . born in obedience to us. They belong, by

when the Fourteenth Amendment revised it to remove the reference to three-fifths of unfree persons. U.S. CONST. amend. XIV, § 2, cl. 2.

⁶⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2890–92 (1866) (statement of Sen. Conness).

⁶⁸ *Id.* at 498 (statements of Sens. Cowan and Trumbull).

⁶⁹ See Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT. L. REV. 1019, 1024–25 (2014) (explaining that California and Oregon senators were unhappy with birthright citizenship for Chinese but understood that it was the Fourteenth Amendment’s effect); Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719, 743–45, 746 & n.136, 747 & n.140 (2012) (discussing public understanding that the Citizenship Clause affirmed citizenship of all native-born individuals).

⁷⁰ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Conness) (explaining why “their progeny in California is very small indeed”).

⁷¹ However, it does help to explain California’s failure to ratify the Fourteenth or Fifteenth Amendments, and Oregon’s attempt to revoke ratification. See HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 207 (1908) (noting that California took no vote on the Fourteenth Amendment because it would have been deadlocked); Cheryl A. Brooks, Comment, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR. L. REV. 731, 741–42 (2004) (arguing revocation attempt reflected racism against blacks, Indians, and Chinese).

⁷² See, e.g., SCHUCK & SMITH, *supra* note 16, at 63–66.

⁷³ U.S. CONST. art. I, § 2, cl. 3; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 14.01(2) (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S].

birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities.”⁷⁴ Citizenship would “annihilate the political existence of the Indians as nations and tribes” and could not justly be extended without the “full knowledge and assent of the Indians themselves.”⁷⁵

Although the executive branch had generally embraced plans to “annihilate the political existence of the Indians as nations and tribes” by the 1860s,⁷⁶ for many abolitionists and radical Republicans, abuses of tribal sovereign rights were linked to abuses of African American individual rights.⁷⁷ The insistence that Indians in tribal relations should not involuntarily become citizens came exclusively from Republicans, and was championed most fervently by the stalwarts of early Reconstruction egalitarianism.

As early as 1862, Representative John Bingham, who is credited with drafting the first section of the Fourteenth Amendment, passionately argued for extending citizenship to “every human being, no matter what his complexion,”⁷⁸ but asserted that Indians were the only exception to this rule, because tribes had been “recognized at the organization of this Government as independent sovereignties.”⁷⁹ Similarly, in arguing that the citizenship clause did not include Indians born in tribal relations, Senate Republican leader Lyman Trumbull argued that it would “be a breach of good faith on our part to extend the laws of the United States over the Indian tribes with whom we have these treaty stipulations.”⁸⁰

⁷⁴ See *Goodell v. Jackson*, 20 Johns. 693, 712 (N.Y. 1823).

⁷⁵ *Id.* at 717. Similarly, Justice Taney in *Dred Scott* asserted that Indian nations “were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white,” and Indians might become citizens “like the subjects of any other foreign Government.” *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857). Nevertheless, Taney insisted, Indians were not “aliens being free white persons” able to naturalize under the 1790 act. *Id.* at 419–20 (quoting Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103). For discussions of Taney’s position regarding Indians in *Dred Scott*, see Frederick E. Hoxie, *What Was Taney Thinking? American Indian Citizenship in the Era of Dred Scott*, 82 CHI-KENT L. REV. 329 (2007), and Bethany R. Berger, “Power Over this Unfortunate Race”: Race, Politics and Indian Law in United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2004–08 (2004) [hereinafter Berger, “Power Over this Unfortunate Race”].

⁷⁶ *Goodell*, 20 Johns. at 712; see Berger, “Power Over this Unfortunate Race”, *supra* note 75, at 2016–18 (discussing executive branch policy and battles with Congress).

⁷⁷ See GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 88–93, 118–23 (2007); Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165, 1172–73 (2010); Linda K. Kerber, *The Abolitionist Perception of the Indian*, 62 J. AM. HIST. 271, 279 (1975).

⁷⁸ CONG. GLOBE, 37th Cong., 2d Sess. 1640 (1862).

⁷⁹ *Id.* at 1639. See generally MAGLIOCCA, AMERICAN FOUNDING SON, *supra* note 52 (discussing Bingham’s role in Fourteenth Amendment and Civil Rights Act).

⁸⁰ CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866).

Those arguing to add an “Indians not taxed” exception to the Citizenship Clause, in contrast, insisted that Indians were fully subject to the jurisdiction of the United States because Indians had “no sovereign power whatever,” and the United States could do with them “just what it thought proper.”⁸¹ This argument lost in an almost entirely party-line vote.⁸² Two years later, the Senate Judiciary Committee rejected the notion that the Fourteenth Amendment had made Indians citizens with whom the United States could not enter a treaty.⁸³ The committee insisted that tribes retained their “character as a nation or political community,” and that to “treat the . . . tribe[s] as subject to the municipal jurisdiction of the United States” in the sense intended by the Fourteenth Amendment, “would be unconstitutional and void.”⁸⁴ The consistent refrain of the strongest advocates of egalitarian Reconstruction was that excluding tribal Indians from birthright citizenship was necessary to recognize their remaining national autonomy and freedom from subjection.

B. *Reconstruction’s Lost Promise for American Indians*

Discussions of tribal autonomy in the citizenship debates were partly constitutional rhetoric, and indeed, respect for tribal sovereignty was already fast passing away.⁸⁵ But other aspects of the immediate postwar years also suggested a “potential recasting of the relationship between Indian people and the United States.”⁸⁶ Ultimately this potential failed, in part because of the other effects of the war and Reconstruction.

During the Civil War, local volunteers replaced soldiers in western states.⁸⁷ Motivated by desire for Indian land and vengeance for local conflicts, these volunteers committed abuses that generated a “great humanitarian outcry” against federal Indian policy.⁸⁸ In 1867, a committee appointed by Congress to investigate the treatment of Indian

⁸¹ *Id.* at 506 (statement of Sen. Johnson).

⁸² *Id.* at 2897.

⁸³ COMM. ON THE JUDICIARY, EFFECT OF FOURTEENTH AMENDMENT UPON INDIAN TRIBES, S. REP. NO. 41-268 (1870).

⁸⁴ *Id.* at 3, 9.

⁸⁵ See Hoxie, *supra* note 75.

⁸⁶ C. JOSEPH GENETIN-PILAWA, CROOKED PATHS TO ALLOTMENT: THE FIGHT OVER FEDERAL INDIAN POLICY AFTER THE CIVIL WAR 3 (2012).

⁸⁷ ROBERT M. UTLEY, THE INDIAN FRONTIER 1846–1890, at 71 (rev. ed. 2003).

⁸⁸ FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 480 (1984) [hereinafter PRUCHA, THE GREAT FATHER]; see also COHEN’S, *supra* note 73, § 1.03(7). The 1864 Sand Creek Massacre is emblematic: Colorado Volunteers annihilated hundreds of peaceful Cheyenne who had gone to Sand Creek to seek protection from soldiers attacking Indians indiscriminately. *Id.*

tribes leveled myriad charges of fraud and corruption against civilian and military forces and blamed Indian wars largely on “the aggressions of lawless white men.”⁸⁹ In 1868, a new Indian Peace Commission denounced the violation of tribal treaty and property rights, declaring that the United States had been “uniformly unjust.”⁹⁰ The commission set out to negotiate new treaties with the Indian tribes, resulting in more than a dozen treaties between 1865 and 1868.⁹¹ In 1869, President Ulysses Grant appointed his friend and former military secretary Ely Parker, a Seneca sachem, as the first Native American Commissioner of Indian Affairs.⁹²

But in other ways the war and its aftermath undermined respect for tribal territory and autonomy. In part, this was ideological. Emphasis on integration and education for former slaves contributed to a similar emphasis on Indian assimilation instead of sovereignty.⁹³ More importantly, the war transformed the territorial reality and imagination of the United States. Freed from conflict over the slave or free status of new territories and eager to exploit new land to support the war effort, Congress enacted the Homestead Act in 1862 encouraging Americans (and foreigners who had filed declarations of intent to become citizens) to settle and claim the west.⁹⁴ Wartime industrial expansion and investment by the Reconstruction Congress resulted in the completion of the transcontinental railroad in 1869,⁹⁵ the final blow to the notion that any part of the country could remain free from white settlement. Between 1850 and 1912, moreover, seventeen western territories became states, making the west with its large Native communities both a powerful national symbol and an important voting bloc.⁹⁶

Railroad interests lobbied for new lines across Indian Territory, while settlers demanded new lands.⁹⁷ To placate expansionists, the Peace Commission failed to reserve territories on which the tribal negotiators insisted and the executive failed to restrain settlers or to provide promised annuities to compensate for lost hunting grounds.⁹⁸ These

⁸⁹ JOINT SPECIAL COMM. OF THE TWO HOUSES OF CONG., *CONDITION OF THE INDIAN TRIBES*, S. REP. NO. 39-156, at 5 (1867).

⁹⁰ INDIAN PEACE COMM'N, *REPORT TO THE PRESIDENT* (1868); *see also* PRUCHA, *THE GREAT FATHER*, *supra* note 88, at 491 (quoting report).

⁹¹ *See* COHEN'S, *supra* note 73, § 1.03(8).

⁹² WILLIAM H. ARMSTRONG, *WARRIOR IN TWO CAMPS: ELY S. PARKER, UNION GENERAL AND SENECA CHIEF* 135–36 (1990).

⁹³ *See* Kerber, *supra* note 77, at 288–89.

⁹⁴ Homestead Act of 1862, ch. 75, 12 Stat. 392; FONER, *supra* note 40, at 21; RICHARDSON, *supra* note 18, at 25.

⁹⁵ FONER, *supra* note 40, at 21.

⁹⁶ *See* RICHARDSON, *supra* note 18, at 4.

⁹⁷ *See* COLIN G. CALLOWAY, *PEN & INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY* 180, 186 (2013).

⁹⁸ *Id.* at 213–14.

treaties also embraced the use of reservations as crucibles of assimilation.⁹⁹ Unsurprisingly, therefore, the peace treaties did not produce peace.¹⁰⁰ This failure, combined with resentment by the House of Representatives at its inability to vote on treaties that transferred land to railroads, led Congress to end treaty making with Indian tribes in 1871.¹⁰¹

Citizenship was part of this campaign for expansion and assimilation. Beginning in 1874, Congress repeatedly debated a bill that would allow individual Indians to become citizens if they proved they had “adopted the habits of civilized life.”¹⁰² Supporters argued that it was no longer possible to protect tribal lands from settlers and that assimilation was inevitable.¹⁰³ (Suggesting an ulterior motive, the bill’s primary advocate was Senator Ingalls of Kansas,¹⁰⁴ a state which sought to declare resident Indians citizens subject to state taxation.)¹⁰⁵ These bills stumbled on concerns that citizenship had often been disastrous for the Indians to which it had been extended,¹⁰⁶ and that permitting Indians to become citizens and yet retain rights to tribal property violated treaty obligations.¹⁰⁷

Inspired in part by *Standing Bear v. Crook* (a case litigated by John Elk’s lawyers), however, eastern reformers who had once championed abolition seized on Indian citizenship and assimilation as their new humanitarian cause.¹⁰⁸ *Elk v. Wilkins*, a defeat for this campaign, ultimately helped catalyze its later legislative triumphs.

⁹⁹ *Id.* at 182.

¹⁰⁰ *See id.* at 220.

¹⁰¹ Act of March 8, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2012)); *see* CONG. GLOBE, 40th Cong., 2d Sess. 3261–64 (1868).

¹⁰² *See* SEC’Y OF THE INTERIOR, LETTER TRANSMITTING DRAFT OF BILL TO ENABLE INDIANS TO BECOME CITIZENS OF THE UNITED STATES, H.R. EXEC. DOC. NO. 43-228 (1874).

¹⁰³ *See* 6 CONG. REC. 551 (1877) (statement of Sen. Ingalls); 6 CONG. REC. 525–26 (1877) (statement of Sen. Thurman). Ely Parker made similar arguments in 1869, declaring citizenship, assimilation, and the end of treaty making were the only just future for Indians. ANN. REP. COMMISSIONER INDIAN AFF., H. EXEC. DOC. NO. 41-1 (1869).

¹⁰⁴ 6 CONG. REC. 554 (1877) (statement of Sen. Ingalls) (noting that he had introduced the same bill every year he had been in Congress).

¹⁰⁵ *See In re Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) (rejecting attempt).

¹⁰⁶ *See* 7 CONG. REC. 1130–31 (1878) (statement of Sen. Whyte).

¹⁰⁷ 6 CONG. REC. 551–53 (1877) (statements by Sens. Hoar, Thurman, and Maxey). Although Congress did not pass the general bill, it did enact several similar measures with respect to particular tribes. Act of Mar. 3, 1873, ch. 332, 17 Stat. 631 (Miami Indians); Act of July 15, 1870, ch. 296, § 9, 16 Stat. 335, 361–62 (Winnebago Indians in Minnesota); Act of Mar. 3, 1865, ch. 127, § 4, 13 Stat. 541, 562 (Stockbridge Indians).

¹⁰⁸ *See infra* Section II.A.

C. *Reconstruction's Lost Promise for Chinese in America*

Although congressmen on both sides of the aisle expressed virulent anti-Chinese sentiment, early Reconstruction also presented potential for a more egalitarian reception of Chinese in the United States.¹⁰⁹ Most notable is the Burlingame Treaty of 1868. Moved by the economic advantages of Chinese immigration and commerce,¹¹⁰ the Chinese negotiating delegation was feted on a tour of the United States, and received a respectful, almost obsequious reception in Congress.¹¹¹

The resulting treaty “cordially recognize[d] the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects,” including as “permanent residents.”¹¹² It guaranteed Chinese in the United States “the same privileges, immunities, [and] exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.”¹¹³ These provisions seemed to repudiate discriminatory and exclusionary laws many western states had enacted.¹¹⁴ Two years later, Congress implemented these provisions in the 1870 Civil Rights Act, guaranteeing “all persons” equal rights to give evidence and equal taxation of emigrants “from any other foreign country,”¹¹⁵ thus invalidating state bans on Chinese testimony¹¹⁶ and taxes on Chinese miners.¹¹⁷

But even these early years reflect strong opposition to Chinese citizenship. The Senate inserted a provision in the Burlingame Treaty that “nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.”¹¹⁸ And in 1870, the Senate initially voted in favor of Charles Sumner’s proposal to remove the word “white” from the requirements for naturalization, but reversed in the face of anti-

¹⁰⁹ Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CAL. L. REV. 529, 540–42, 564–68 (1984) [hereinafter McClain, *Chinese Struggle*] (discussing advocacy strategy).

¹¹⁰ *Id.* at 545–46.

¹¹¹ See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 2970 (1868) (statement by H. Speaker Colfax) (“[W]e turn our faces from the fatherland of Europe to clasp hands in closer relations than ever before with those who come to us from that continent which was the birthplace of mankind.”).

¹¹² Burlingame Treaty, China-U.S., art. 5, July 28, 1868, 16 Stat. 739, 740.

¹¹³ *Id.* art. 6.

¹¹⁴ McClain, *Chinese Struggle*, *supra* note 109, at 562–63.

¹¹⁵ Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144.

¹¹⁶ *People v. Washington*, 36 Cal. 658 (1869), *overruled by* *People v. Brady*, 40 Cal. 198 (1870).

¹¹⁷ McClain, *Chinese Struggle*, *supra* note 109, at 563–66.

¹¹⁸ Burlingame Treaty, China-U.S., art. 6, July 28, 1868, 16 Stat. 739, 740.

Chinese sentiment, opening naturalization only to those of African descent.¹¹⁹

Industrialization had mixed effects for Chinese immigrants. While it stimulated demand by business interests for Chinese workers, it also gave rise to a new worker class seeking scapegoats for their powerless condition.¹²⁰ A series of national depressions between the 1870s and 1890s fueled anti-Chinese nativism.¹²¹ The growing power of the western vote, moreover, was as fatal for Chinese migrants as it was for Indians.

As with Indians, policymakers used the ideals of Reconstruction to warrant subordination of Chinese. Abhorrence of slavery served to justify what some call the first federal law restricting immigration, an 1862 statute prohibiting Americans from participating in the “coolie trade” importing conscripted Chinese laborers to foreign countries.¹²² Although the statute exempted voluntary migrants and did not reach migration into the United States alone, the idea that Chinese were slave laborers inconsistent with American ideals helped justify America’s first exclusionary laws.¹²³ In 1875, Congress enacted the Page Act, restricting and criminalizing importation of individuals from “China, Japan, or any Oriental country” who were not “free and voluntary” emigrants or were party to any contract for “lewd [or] immoral purposes,” and prohibited immigration by convicted criminals and by all women “for the purposes of prostitution.”¹²⁴ Although Chinese merchants in America had lobbied for more restrictions on prostitution and fully supported the Page Act,¹²⁵ policymakers deployed the same logic to prohibit migration of Chinese laborers in the Exclusion Act of 1882,¹²⁶ describing Chinese as a

¹¹⁹ CONG. GLOBE, 41st Cong., 2d Sess. 5177 (1870); *see also* Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

¹²⁰ *See* AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 189 (2010).

¹²¹ JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925*, at 18, 46, 73–74 (1955); *see also* FONER, *supra* note 40, at 512–22.

¹²² Coolie Trade Prohibition Act, ch. 27, 12 Stat. 340 (1862); CONG. GLOBE, 37th Cong., 2d Sess. 350–52 (1862) (discussing goals of act).

¹²³ Jung, *supra* note 22 (arguing act was origin of later prohibitions).

¹²⁴ Page Act, ch. 141, §§ 1, 3, 18 Stat. 477 (1875). While some scholars argue that the law was responsible for the exclusion of most Chinese women other than merchants’ wives, *see* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 465 & n.282 (2005), others disagree, *see* Adam McKeown, *Transnational Chinese Families and Chinese Exclusion, 1875–1943*, J. AM. ETHNIC HIST., Winter 1999, at 73, 80.

¹²⁵ YUCHENG QIN, *THE DIPLOMACY OF NATIONALISM: THE SIX COMPANIES AND CHINA’S POLICY TOWARD EXCLUSION* 52–53, 83 (2009).

¹²⁶ Exclusion Act of 1882, ch. 126, 22 Stat. 58.

“servile people” who were “held . . . in the country in a bondage” and were “incapable of free or self-government.”¹²⁷

The end of slavery, by removing disputes about migration of freed and enslaved blacks, also freed the Supreme Court to assert congressional supremacy over immigration.¹²⁸ It did so in the 1870s with decisions invalidating restrictive California,¹²⁹ New York, and Louisiana laws.¹³⁰ Although ostensibly limiting state power, the decisions resulted in translation of concerns of a handful of states into federal demands.¹³¹ While the states had been limited to indirect measures such as bonds on passengers and ships,¹³² the federal government could exclude migrants entirely. In the age of federal immigration supremacy, the limited attempts by individual states to restrict immigration within their own borders became broad prohibitions with the full enforcement power and territorial reach of the federal government behind them.

D. Conclusion

Reconstruction created a new sense of national territory and citizenship as well as a newly empowered national government. Together, these helped doom separate sovereignty for Indians and egalitarian migration for Chinese. But Reconstruction also left these groups with new legal tools to counter their subordination. Although the Supreme Court drained much of the force from the Fourteenth Amendment’s privileges and immunities of national citizenship,¹³³ litigation by Chinese established that the guarantee of equal protection to “any person” within state jurisdiction covered foreigners as well as citizens.¹³⁴ Equally important for Elk and Wong, in 1867, Congress had broadened the scope of habeas corpus jurisdiction to give the courts power to grant writs where “any person may be restrained of his or her

¹²⁷ 13 CONG. REC. 1484, 1486 (1882) (statement of Sen. Miller); see also ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 26–27 (2003) [hereinafter LEE, *AMERICA’S GATES*]; Volpp, *supra* note 124, at 462–63.

¹²⁸ Parker, *supra* note 39, at 176.

¹²⁹ *Chy Lung v. Freeman*, 92 U.S. 275, 278–81 (1875).

¹³⁰ *Henderson v. Mayor of New York*, 92 U.S. 259, 275 (1875).

¹³¹ Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092, 1096–98 (2013).

¹³² See *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283 (1849) (invalidating state laws that directly taxed immigrants upon arrival).

¹³³ See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (holding that voting was not one of the privileges and immunities of citizenship and limiting voting rights to men did not violate Fourteenth Amendment); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872) (stating the privileges and immunities of U.S. citizens included “very few express limitations”).

¹³⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

liberty in violation of the constitution, or of any treaty or law of the United States,”¹³⁵ while in 1875, Congress finally granted the lower courts original federal question jurisdiction,¹³⁶ removing what had been an important obstacle to tribal litigation.¹³⁷ Both Indians and Chinese would use these legal tools to preserve some legal recognition of tribal and immigrant rights, even as both were overwhelmed in the name of the American national destiny.

II. LITIGANTS, LAWYERS, AND COMMUNITIES

This Part examines the meanings of *Elk v. Wilkins* and *United States v. Wong Kim Ark* for the litigants’ communities, their lawyers, and Elk and Wong themselves. This examination reveals the ambiguities of citizenship for both American Indians and Chinese, the very different relationship of Elk’s and Wong’s lawyers to their clients and the American Indian and Chinese communities, and finally the unexplored facts of each man’s life that show that although both likely sought citizenship to adapt and change in the face of crushing circumstances, neither appears to have done so as the autonomous individual of the citizenship ideal.

A. *Elk v. Wilkins*

1. The Significance of Citizenship for American Indians

For policymakers in the nineteenth century, citizenship meant assimilation and the end of tribal status. Laws and treaties extended citizenship as a reward for renouncing allegiance to the tribe and adopting the “habits of civilized life.”¹³⁸ Anglo-American clothing was called “citizen’s dress,” and the Indian Office kept censuses of how many reservation Indians wore it.¹³⁹ Citizenship, many believed, ended tribal immunity from state law and taxation as well as federal obligations of support and protection. Citizenship was not primarily a

¹³⁵ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

¹³⁶ Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

¹³⁷ See Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 618–19 (2006).

¹³⁸ Treaty with the Delawares, Delawares-U.S., art. 9, July 4, 1866, 14 Stat. 793, 796; Treaty with the Kickapoo, Kickapoo-U.S., art. 3, June 28, 1862, 13 Stat. 623; Treaty with the Potawatomi, Potawatomi-U.S., art. 3, Nov. 15, 1861, 12 Stat. 1191.

¹³⁹ See, e.g., 1874 COMMISSIONER INDIAN AFF. ANN. REP. 112 (reporting 43,953 Indians wearing citizen’s dress).

boon extended to Indians.¹⁴⁰ Rather, it was the end point of federal plans to end the “Indian problem” by ending Indian tribes.¹⁴¹

How did Indians feel about these measures? Some individual Indians did seek citizenship. As tribal territories became smaller and poorer and federal efforts to acculturate Native people grew more intense, more Indians left their reservations to enter non-Indian society. While they often experienced prejudice as nonwhites in Jim Crow America, in many settings these legal and social barriers were less extreme than those experienced by African Americans. But their lack of citizenship often meant they could not participate in the civil and political rights reserved for citizens.

Perhaps the most famous Indian citizenship-seeker of the period was Ely Parker. Parker studied law, but was denied the right to sit for the New York State Bar Exam because he was not a citizen.¹⁴² He then became a successful civil engineer, and headed major public works projects.¹⁴³ He also became a leader in the (largely ceremonial) New York militia¹⁴⁴ and the Masons.¹⁴⁵ Despite this, the United States initially rebuffed his attempts to enlist in the Civil War, telling him that this was “an affair between white men,” which they could settle “without any Indian aid.”¹⁴⁶ Stung at the rejection, Parker petitioned Congress to admit him to citizenship, proclaiming himself a “freeholder, paying taxes in the states of New York, Iowa and Minnesota” who had held “positions of trust and honor in the state and federal [government]” and had “a high veneration for the laws and institutions of this, his native country.”¹⁴⁷ Congress rejected the petition, stating that it could not grant individual petitions for citizenship.¹⁴⁸ Finally, on a friend’s recommendation, Parker received a commission as an assistant adjutant general with the rank of Captain.¹⁴⁹ He was ultimately promoted to Brigadier General, and, as military secretary for Ulysses S. Grant, wrote out the terms of Confederate surrender at Appomattox.¹⁵⁰ After the war,

¹⁴⁰ See Kevin Bruyneel, *Challenging American Boundaries: Indigenous People and the “Gift” of U.S. Citizenship*, 18 *STUD. AM. POL. DEV.* 30 (2004).

¹⁴¹ See Hoxie, *supra* note 75, at 342 (arguing Indian citizenship campaigns “employed the language of Indian competence to justify the dismantling of tribal governments and the acquisition of tribal lands”).

¹⁴² ARTHUR C. PARKER, *THE LIFE OF GENERAL ELY S. PARKER: LAST GRAND SACHEM OF THE IROQUOIS AND GENERAL GRANT’S MILITARY SECRETARY* 79 (1919) [hereinafter PARKER, *LIFE OF GENERAL PARKER*].

¹⁴³ *Id.* at 90–98.

¹⁴⁴ ARMSTRONG, *supra* note 92, at 55–56.

¹⁴⁵ PARKER, *LIFE OF GENERAL PARKER*, *supra* note 142, at 96–98.

¹⁴⁶ *Id.* at 102–03 (quoting Gen. Ely Parker).

¹⁴⁷ ARMSTRONG, *supra* note 92, at 78.

¹⁴⁸ H. COMM. ON THE JUDICIARY, H.R. REP. NO. 37-84 (1862).

¹⁴⁹ ARMSTRONG, *supra* note 92, at 82.

¹⁵⁰ PARKER, *LIFE OF GENERAL PARKER*, *supra* note 142, at 131–32, 142–43.

he received citizenship for his service,¹⁵¹ married one of the belles of white Washington society, and later became the first indigenous Commissioner of Indian Affairs.

Parker's story illustrates the barriers that racism, lack of citizenship, and tribal status, posed to Indian people. But it also illustrates that for Indians with "a high veneration"¹⁵² for United States laws and institutions, doors were open that were often closed to people of color. The next generation of Indian intellectuals would even claim that Americans did not harbor racial prejudice against American Indians.¹⁵³ Although many Indians could testify to the falsehood of this generalization, it also captured something of the distinctive status of Native people in the United States. Parker delighted in recounting that when General Robert E. Lee saw him at Appomattox, he flushed indignantly thinking Parker was a black man, but when he realized Parker was Indian he shook his hand saying he was glad to see a "real American" there.¹⁵⁴ Booker T. Washington recalled how, in the 1880s, he was placed in charge of the Indians brought to the Hampton University for African Americans for a training program founded in the inferiority of Native culture,¹⁵⁵ but that when he took one of his young charges to Washington, D.C., to get a federal certificate permitting his return to his western reservation, the Indian ward was admitted to dining rooms and hotels from which his African-American guardian was excluded.¹⁵⁶

Few reservation Indians achieved Parker's status in white society. But some saw citizenship as the remedy for the problems facing ordinary Indians as well. Federal agents had assumed vast control over Indian lives by this time, managing tribal funds and lands, appointing and deposing tribal chiefs, judges, and police, and doling out food and clothing to Indians prohibited from using their former lands for sustenance.¹⁵⁷ Like John Elk's Winnebago Tribe, moreover, the United States removed many tribes from their lands not once, but again and again, as non-Indians expanded into previously remote lands.¹⁵⁸

A new group of reformers calling themselves the "Friends of the Indian" promoted citizenship and allotment of land as the alternative to

¹⁵¹ *Id.* at 141.

¹⁵² ARMSTRONG, *supra* note 92, at 78.

¹⁵³ LUCY MADDOX, *CITIZEN INDIANS: NATIVE AMERICAN INTELLECTUALS, RACE & REFORM* 65–67 (2005).

¹⁵⁴ PARKER, *LIFE OF GENERAL PARKER*, *supra* note 142, at 133 (quoting Ely Parker). Parker allegedly responded that "[w]e are all Americans." *Id.* (quoting Ely Parker).

¹⁵⁵ See Kerber, *supra* note 77, at 292.

¹⁵⁶ BOOKER T. WASHINGTON, *UP FROM SLAVERY: AN AUTOBIOGRAPHY*, ch. VI (1901).

¹⁵⁷ See Berger, "Power Over this Unfortunate Race", *supra* note 75, at 1972–73, 2009.

¹⁵⁸ *Id.*

this federal domination. Some Indians joined this campaign. Susette La Flesche was one of these. Her Omaha Tribe neighbored the Winnebago Reservation, and she was likely involved in John Elk's case. La Flesche became involved in the reform movement in 1879, when she testified on behalf of the Ponca in *Standing Bear v. Crook*.¹⁵⁹ Standing Bear's lawyers became Elk's lawyers, and she was almost certainly in touch with them, and perhaps him, about the case. On March 10, 1880, a month before Elk filed his petition, La Flesche published an essay claiming

[i]t is either extermination or citizenship for the Indian. . . . Set aside the idea that the Indian is a child and must be taken care of, . . . give him a title to his lands, throw over him the protection of the law, make him amenable to it, and the Indian *will* take care of himself."¹⁶⁰

Like Ely Parker, La Flesche was a member of the western-educated elite. Her father Joseph La Flesche came from a Ponca/French fur trading family but had been adopted by and succeeded the Chief of the Omahas; her mother was the daughter of a white army doctor and an Omaha woman.¹⁶¹ The La Flesche children attended mission schools and later eastern colleges; her sister Susanne became the first licensed Native American woman doctor; her brother Francis became the first professional Native American ethnologist.¹⁶²

Due the advocacy of the La Flesches and white ethnologist Alice Fletcher, the Omahas were early experiments in allotment and citizenship.¹⁶³ Omaha land was allotted in 1884, and the Omahas became citizens in 1887.¹⁶⁴ The results were such a disaster that by December 1887, 158 Omahas had signed a petition to Congress asking for their citizenship to be revoked and their tribal status returned.¹⁶⁵ One man pleaded, "I want you to help us keep this thing citizenship, away from us."¹⁶⁶ The petitioners claimed that Alice Fletcher had misled them; they had been forced to become citizens and wished to return to their old status.¹⁶⁷ One wrote that Fletcher had told them that they would not be citizens or pay taxes for twenty-five years, but now, only

¹⁵⁹ United States *ex rel.* *Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879); AMERICAN INDIAN NONFICTION: AN ANTHOLOGY OF WRITINGS, 1760S–1930S, at 285–86 (Bernd C. Peyer ed., 2007) [hereinafter AMERICAN INDIAN NONFICTION].

¹⁶⁰ Susette La Flesche, *The Indian Question*, CHRISTIAN UNION, Mar. 10, 1880, at 222, reprinted in AMERICAN INDIAN NONFICTION, *supra* note 159, at 284, 285.

¹⁶¹ AMERICAN INDIAN NONFICTION, *supra* note 159, at 286.

¹⁶² *Id.*

¹⁶³ JUDITH A. BOUGHTER, BETRAYING THE OMAHA NATION: 1790–1916, at 109–13 (1998).

¹⁶⁴ *Id.* at 112–13.

¹⁶⁵ WA HANE GA ET AL., PETITION OF MEMBERS OF THE OMAHA TRIBE OF INDIANS IN REGARD TO CITIZENSHIP AND TAXATION, S. MISC. DOC. 50-26 (1888).

¹⁶⁶ *Id.* at 2 (statement of Pa-hang-ga-ma-ne).

¹⁶⁷ *Id.* at 1 (statement of Hopera).

three years later, they had become citizens.¹⁶⁸ “If there is a chance at all,” he asked, “we want a little of our Indian ways for twenty-five years.”¹⁶⁹

Although statements of those like La Flesche and Parker received widest dissemination, those of the Omaha petition seem more typical. After being made citizens under an 1843 statute, most Stockbridge Indians refused to accept it; they later persuaded Congress to revoke the legislation and enter into a treaty restoring their status as a tribe.¹⁷⁰ The Wyandotte, who had entered into an 1855 treaty accepting citizenship and dissolving the tribe, found its impact so damaging that they successfully petitioned for an 1867 treaty in which they “beg[a]n anew a tribal existence.”¹⁷¹ One of the three bands of Kickapoo Indians were so resistant to an 1862 treaty trying to allot them lands and make them citizens that they refused to accept citizenship until 1885.¹⁷² Kansas Indians, who were allegedly made citizens to please the railroads, sought to have their tribal status restored.¹⁷³ In 1874, former Commissioner of Indian Affairs Francis Walker reported that of the tribes to whom citizenship had been extended, “more than half, probably at least two-thirds, are now homeless, and must be re-endowed by the government, or they will sink to a condition of hopeless poverty and misery.”¹⁷⁴

Tribal leaders were also concerned about citizenship. In 1831, when the Cherokee Nation sued Georgia in the U.S. Supreme Court, the tribal nation’s attorneys “insisted that individually they are aliens, not owing allegiance to the United States.”¹⁷⁵ In response to the citizenship bills of the 1870s, the Seminole, Creek, Choctaw, and Chickasaw Nations petitioned Congress arguing that the bill violated solemn treaties guaranteeing the tribes property and self-government.¹⁷⁶ The Friends of the Indian dismissed such protests as a desire to maintain the “tribal thralldom” upon which the chiefs’ “importance depends.”¹⁷⁷

¹⁶⁸ *Id.* at 2 (statement of Wa-ha-na-zhe).

¹⁶⁹ *Id.* at 3.

¹⁷⁰ Treaty with the Stockbridge Tribe, Stockbridge-U.S., Nov. 24, 1848, 9 Stat. 955.

¹⁷¹ See Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, Etc. pmbl. & art. 13, Feb. 23, 1867, 15 Stat. 513.

¹⁷² 143 *Renegade Kickapoos Accept U.S. Citizenship*, N.Y. TIMES (Nov. 22, 1985), <http://www.nytimes.com/1985/11/22/us/around-the-nation-143-renegade-kickapoos-accept-us-citizenship.html>.

¹⁷³ SEMINOLE & CREEK DELEGATES, REMONSTRANCE AGAINST THE PASSAGE OF SENATE BILL NO. 107, TO ENABLE INDIANS TO BECOME CITIZENS, S. MISC. DOC. NO. 45-8, at 3 (1878) [hereinafter SEMINOLE & CREEK REMONSTRANCE]. The “Indians in Kansas” are probably the Kansas Indians or Kansas Delawares, who generations later were still suing about their lack of federal recognition. See *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 77–78 (1977).

¹⁷⁴ FRANCIS A. WALKER, THE INDIAN QUESTION 141 (1874).

¹⁷⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

¹⁷⁶ SEMINOLE & CREEK REMONSTRANCE, *supra* note 173, at 1–2; CHOCTAW & CHICKASAW NATIONS OF INDIANS, MEMORIAL REMONSTRATING AGAINST THE PASSAGE OF SENATE BILL NO. 107, TO ENABLE INDIANS TO BECOME CITIZENS, S. MISC. DOC. NO. 45-8 (Dec. 10, 1877).

¹⁷⁷ Garrett, *supra* note 21, at 60.

For the Friends of the Indian, citizenship and assimilation meant equality and the good life. Their beliefs were largely correct for Indians like Ely Parker, who had chosen to leave tribal society, as well as for those whose tribal societies had already been destroyed. But for the federal government, citizenship was a means to end the Indian problem by ending Indian tribes. And for those trying to maintain tribal land, culture, and political status—to retain, as the Omaha pled, “a little of our Indian ways”—citizenship was an anathema.

2. Elk’s Lawyers

Available records tell us almost nothing about who John Elk was or how he came to file his petition for citizenship. What we do know is that he was represented by A.J. Poppleton and John L. Webster, two prominent Omaha attorneys fresh from their 1879 victory in *Standing Bear v. Crook*.¹⁷⁸ This fact may be more revealing about the case and what catalyzed it than the contents of the petition.

Tribes and Indians had limited access to legal counsel in this period. Tribes had initiated litigation on their own behalf since 1703, when Mohegan leader Owenoco appealed Connecticut land settlements to the Privy Council in London.¹⁷⁹ *Worcester v. Georgia*,¹⁸⁰ still recognized as the most important case in federal Indian law,¹⁸¹ was initiated and led by the Cherokee Nation. By the latter half of the nineteenth century, however, the federal government controlled tribal funds, and had to consent for their use to hire attorneys and supervised their selection.¹⁸² Public interest and sympathy for Indians did mean that pro bono lawyers were sometimes available.¹⁸³ But these attorneys

¹⁷⁸ United States *ex rel.* *Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879).

¹⁷⁹ See Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1067–68 (1995).

¹⁸⁰ 31 U.S. (6 Pet.) 515 (1832).

¹⁸¹ Matthew L.M. Fletcher, *Results of Second Turtle Talk Poll: Worcester v. Georgia Most Important Indian Law Precedent*, TURTLE TALK (Mar. 19, 2009), <https://turtletalk.wordpress.com/2009/03/19/results-of-second-turtle-talk-poll-worcester-v-georgia-most-important-indian-law-precedent>.

¹⁸² In *Ex parte Crow Dog*, 109 U.S. 556 (1883), for example, Crow Dog’s court-appointed attorney had to petition Congress for funds for the appeal, and submitted his briefs and arguments to the Bureau of Indian Affairs for approval. Sidney L. Harring, *Crow Dog’s Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 216–17 (1989). As late as the 1950s, the United States used its control over tribal funds to disapprove contracts with disfavored attorneys. See Bethany R. Berger, *Williams v. Lee and the Debate Over Indian Equality*, 109 MICH. L. REV. 1463, 1475 (2011).

¹⁸³ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), for example, was financed by the Indian Rights Association. Ann Laquer Estin, *Lone Wolf v. Hitchcock: The Long Shadow, in THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S*, at 215 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984).

usually came from the reformer class, and the very real claims of their clients were often distorted through the interests of those that represented them. *Standing Bear v. Crook* and *Elk v. Wilkins* were both important vehicles for these reformers.

Although John Elk was almost invisible in the legal papers and press about his case, Standing Bear was not. Standing Bear, or Ma-chu-nah-zha, was one of several chiefs of the Ponca Tribe, which had been moved in short succession first to a fraction of its former lands in Nebraska, then to the Dakota Territory, and then to the Indian Territory in present day Oklahoma.¹⁸⁴ In the Indian Territory, they found no guaranteed lands or supplies waiting for them and within a year 158 of the 581 Ponca—over one quarter of the tribe—had died.¹⁸⁵ Standing Bear himself lost his son, sister, brother, and mother-in-law.¹⁸⁶ In desperation, he and twenty-nine other Ponca fled the reservation, making a forty-day trek to Nebraska, where the Omahas, relatives of the Ponca, were willing to take them in.¹⁸⁷ When they arrived, however, federal troops under the command of General Crook arrested the refugees and took them to the city of Omaha, imprisoning them pending their return to Indian Territory.¹⁸⁸

There, *Omaha Herald* editor Thomas Tibbles interviewed the refugees and witnessed their councils with General Crook.¹⁸⁹ Moved by their eloquence,¹⁹⁰ (and likely happy to enhance his national profile)

¹⁸⁴ James A. Lake, Sr., *Standing Bear! Who?*, 60 NEB. L. REV. 451, 456–58, 468–71 (1981).

¹⁸⁵ United States *ex rel.* *Standing Bear v. Crook*, 25 F. Cas. 695, 698 (C.C.D. Neb. 1879).

¹⁸⁶ *Criminal Cruelty*, OMAHA HERALD, Apr. 1, 1879, at 4–5.

¹⁸⁷ Lake, *supra* note 184, at 471–72.

¹⁸⁸ *Id.* at 472.

¹⁸⁹ *Id.* at 472–73.

¹⁹⁰ These words from Ta-zha-but are a sample of this eloquence:

I sometimes think that the white people forget that we are human, that we love our wives and children, that we require food and clothing, that we must take care of our sick, our women and children, prepare not only for the winters as they come, but for old age when we can no longer do as when we are young. But one Father made us all. We have hands and feet, heads and hearts all alike. We also are men. Look at me. Am I not a man? I am poor. These clothes are ragged. I have no others. But I am a man.

Criminal Cruelty, *supra* note 186. In his book on the case, Tibbles apparently cobbled together Tah-zah-but's and the Merchant of Venice's words to make up his own version of Standing Bear's closing argument:

[My] hand is not the color of yours, but if I pierce it, I shall feel pain. If you pierce your hand, you also feel pain. The blood that will flow from mine will be of the same color as yours. I am a man. The same God made us both.

THOMAS HENRY TIBBLES, *BUCKSKIN AND BLANKET DAYS* 201 (Bison Book 1969) (1905) (quoting Standing Bear). In his original reporting, Tibbles wrote that Standing Bear stated,

You see me standing here. Where do you think I came from? From the water, the woods[,] or where? God made me and he put me on my land; But I was ordered to

Tibbles began a campaign on their behalf, organizing local churches and publicizing their words in newspapers across the country.¹⁹¹ He also approached his friend John Lee Webster about representing them, and at his request secured A.J. Poppleton as well.¹⁹²

Webster and Poppleton were among the state's leading lawyers and key figures in the state Republican Party. Only thirty-two in 1879, Webster had fought in the Civil War, been elected to the Nebraska Legislature, and served as president of Nebraska's 1875 constitutional convention.¹⁹³ Poppleton, a seasoned forty-nine, had been speaker of the Nebraska Legislature, mayor of Omaha, and then the lead western attorney for the Union Pacific Railway.¹⁹⁴ Although likely committed to the Ponca cause, they were also committed to building the State of Nebraska; diminishing federal authority over Indians and their territory was part of this goal.

Their habeas petition framed the case as one about the rights of Indians to leave their tribes and assimilate with white society. It alleged that Standing Bear and his followers had "a considerable time before . . . separated from the[ir] . . . tribe," and no longer maintained tribal relations.¹⁹⁵ The petition claimed they had "made great advancements in civilization," and were "actually engaged in agriculture . . . and were supporting themselves by their own labors."¹⁹⁶ In his reply, U.S. District Attorney Genio Lambertson,¹⁹⁷ insisted that the complainants "still retain their tribal relations . . . and owe allegiance to the tribal head" of the Ponca, and "have not adopted and are not pursuing the habits and vocations of civilized life."¹⁹⁸ Relying on *Dred Scott's* denial of jurisdiction over a suit by a noncitizen, Lambertson also

stand up and leave my land. . . . I want to go back to my old reservation to live there and be buried in the land of my fathers.

The Writ of Liberty, OMAHA HERALD, May 3, 1879.

¹⁹¹ Lake, *supra* note 184, at 474.

¹⁹² ZYLYFF, THE PONCA CHIEFS: AN INDIAN'S ATTEMPT TO APPEAL FROM THE TOMAHAWK TO THE COURTS 39-40 (Boston, Lockwood, Brooks & Co. 1880) [hereinafter THE PONCA CHIEFS] (Thomas Henry Tibbles writing pseudonymously as "Zylyff").

¹⁹³ 2 OMAHA: THE GATE CITY AND DOUGLAS COUNTY, NEBRASKA: A RECORD OF SETTLEMENT, ORGANIZATION, PROGRESS AND ACHIEVEMENT 986 (Arthur Cooper Wakeley ed., 1917).

¹⁹⁴ *Id.* at 5-6.

¹⁹⁵ THE PONCA CHIEFS, *supra* note 192, at 42 (quoting the habeas petition).

¹⁹⁶ *Id.* at 43 (quoting the habeas petition).

¹⁹⁷ Also a Republican, Lambertson would later serve as Assistant Secretary of the Treasury under President Rutherford Hayes, counsel for the Interstate Commerce Commission, and unsuccessful candidate for U.S. Senate. LXV REPORTS OF CASES IN THE SUPREME COURT OF NEBRASKA, JANUARY AND SEPTEMBER TERMS 1902, at xvi (1904).

¹⁹⁸ THE PONCA CHIEFS, *supra* note 192, at 51 (quoting the return brief).

argued that as noncitizens the Ponca could not invoke the habeas jurisdiction of the U.S. courts.¹⁹⁹

Lambertson's jurisdictional challenge relied on the law of an earlier time. Given the Reconstruction-era enhancements to habeas jurisdiction, the main legal question should have been easy: Was a noncitizen included in the grant of the writ of habeas corpus to "any person" in custody "in violation of the constitution, or of any treaty or law of the United States"?²⁰⁰ But Judge Elmer Scipio Dundy (who had previously rejected Crook's claim that certain lands in Nebraska were Indian territory)²⁰¹ accepted the petitioners' grand narrative of the case. The petitioners, he wrote, were "representatives of [a] wasted race," who, having "completely severed their tribal relations therewith, and had adopted the general habits of the whites" were now "asking for justice and liberty to enable them to adopt our boasted civilization, and to pursue the arts of peace, which have made us great and happy as a nation."²⁰²

Finding that an "individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence," Dundy ruled that the federal government could not force the petitioners to return to Indian country.²⁰³ But he conceded a point that doomed Ponca hopes of remaining on the Omaha Reservation, agreeing that the military *did* have the right to remove any unauthorized persons from Indian reservations.²⁰⁴ Standing Bear could not be forcibly taken south, but had no claim to remain on the Omaha Reservation in the north either.

The aftermath of *Standing Bear v. Crook* gave the lie to the assimilationist story told by his lawyers. Rather than give up tribal ways, Standing Bear, his followers, and over one hundred other Ponca, returned to their old lands on the Niobara River.²⁰⁵ In 1881, the United States agreed to confirm Ponca title to land there, but only to allot it individually rather than create a new reservation.²⁰⁶ Standing Bear refused to accept an allotment, and the federal government tired of the persistent Ponca chief. No longer an icon of an Indian who had severed his tribal ties and pursued white man's habits, officials now decried Standing Bear as a "shrewd, cunning savage . . . the only one of the

¹⁹⁹ *The Writ of Liberty*, *supra* note 190.

²⁰⁰ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (emphasis added).

²⁰¹ *United States v. Crook*, 179 F. 391 (D. Neb. 1875) (holding Crook had no authority to arrest squatters on allegedly unceded Sioux territory).

²⁰² *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 695 (C.C.D. Neb. 1879).

²⁰³ *Id.* at 699.

²⁰⁴ *Id.* at 700.

²⁰⁵ HELEN JACKSON, *A CENTURY OF DISHONOR* 369–70 (Boston, Roberts Bros. 1889).

²⁰⁶ Lake, *supra* note 184, at 485–86.

Ponca band who persists in the old savage way,”²⁰⁷ “too lazy to work, but not too proud to beg,” but for whose “pernicious conduct” his followers “would have steadily gone forward towards civilization.”²⁰⁸

Whatever the consequences for the Ponca, the *Standing Bear* victory set those involved on a broader campaign to reform Indian policy. Tibbles quickly wrote a book telling the story,²⁰⁹ and along with Standing Bear and Susette and Francis La Flesche, went on a speaking tour to publicize the plight of the Ponca and the cause of Indian reform.²¹⁰ The tour was eagerly received in Boston, where former abolitionists seized on the Indian question as their new cause.²¹¹ The Ponca story made Indian reformers of two particularly important allies: journalist Helen Hunt Jackson, who went on to write the influential 1881 book *A Century of Dishonor* on the plight of the Indian; and Massachusetts Senator Henry L. Dawes, who became chairman of the Senate Committee on Indian Affairs in 1881 and drafted the Dawes Allotment Act of 1887.²¹²

Elk v. Wilkins was likely a facet of the Indian reformers’ campaign. Money from sales of the Tibbles’ book went to a fund to secure the Ponca lands and establish the rights of Indians in the Supreme Court.²¹³ Elk’s lawyers sent their bill for court costs to Boston for payment.²¹⁴ An article on *Elk* called it “part of proceedings by the friends of the Indians to establish the status of Indians as citizens,”²¹⁵ while district attorney Lambertson dismissed the case as “an instance of ‘the overflowing love for the red man’ of philanthropists in Boston and elsewhere.”²¹⁶

In his closing speech in *Standing Bear*’s case, Webster had already announced the legal arguments he would make on behalf of John Elk: When an Indian severed tribal relations, he by that act became a citizen.²¹⁷ With the arguments prepared and the research done, all that was needed was a client.

²⁰⁷ *Id.* at 488 (quoting H.R. EXEC. DOC. 51-1, at 146 (1890) (statement of Ponca Sub-Agent James E. Helms)).

²⁰⁸ *Id.* (quoting H.R. EXEC. DOC. 51-1, at 147 (statement of missionary John E. Smith)).

²⁰⁹ THE PONCA CHIEFS, *supra* note 192.

²¹⁰ Lake, *supra* note 184, at 491–93.

²¹¹ THE INDIAN REFORM LETTERS OF HELEN HUNT JACKSON, 1879–1885, at 8 (Valerie Sherer Mathes ed., 1998).

²¹² *Id.* at 6, 8, 17.

²¹³ Helen Hunt Jackson, *The Story of the Poncas*, N.Y. EVENING POST, Dec. 17, 1879, at 1, reprinted in THE INDIAN REFORM LETTERS OF HELEN HUNT JACKSON, *supra* note 211, at 41–42.

²¹⁴ Letter from John L. Webster, to James H. McKinney, Clerk, U.S. Supreme Court (Mar. 17, 1884) (on file at Entry 21, Record Group 267, NARA, D.C.).

²¹⁵ *Appeals to the Law*, DAILY INTER OCEAN, Apr. 16, 1880, at 5.

²¹⁶ *Can “Lo” Vote? The Arguments on the Question Before the U.S. Court*, OMAHA HERALD, Jan. 15, 1881, at 8 (quoting Lambertson).

²¹⁷ *The Writ of Liberty*, *supra* note 190.

3. Citizenship for John Elk

And how did John Elk become that crucial client? The petition presents the case as one about voting rights, demanding (a perhaps exorbitant) \$6,000 to compensate for Charles Wilkins' refusal to permit Elk to vote in an Omaha city council election.²¹⁸ But Poppleton and Webster filed the petition just nine days after the registration attempt, suggesting that Elk sought to register to create a test case.²¹⁹ The records in the case tell us almost nothing about John Elk, not even the name of his tribe; other records say little more. What can be pieced together, however, suggests that John Elk's plea for citizenship had little in common with Ely Parker's quest for robust advancement in non-Indian society. Rather, it was likely an attempt to escape the whims of federal control in order to build and maintain his relationships to land, family, and community.

On the petition in his case, Elk signs his name with an X, the mark of illiteracy.²²⁰ According to 1880 census records, Elk was thirty-five years old, worked as a laborer, could neither read nor write, and lived with his wife in a wigwam on the banks of the Missouri River.²²¹ He was born in Iowa in 1845, although his parents were born in Wisconsin.²²² While the census records only indicate Elk's race and not his tribe, several newspaper accounts of the case report that he was Winnebago.²²³ No one who has written about Elk's case has noted the significance of his tribal affiliation. Together with his geographic background, it opens a window on a long story of suffering at a fickle and cruel federal Indian policy.

The Ho-Chunk, named Winnebago by neighboring tribes,²²⁴ were once a powerful people with villages scattered across Wisconsin, Iowa,

²¹⁸ Transcript of Record at 2, *Elk v. Wilkins*, 112 U.S. 94 (1884) (No. 305) [hereinafter *Elk Record*].

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ 4 U.S. CENSUS BUREAU, 10TH CENSUS 1880, NEBRASKA, DOUGLAS COUNTY 34 (Supervisor's Dist. No. 2, Enumeration Dist. No. 20) [hereinafter 1880 DOUGLAS COUNTY CENSUS].

²²² *Id.*

²²³ See, e.g., *Appeals to the Law*, *supra* note 215; *Can "Lo" Vote? The Arguments on the Question Before the U.S. Court*, *supra* note 216; *The Indian's Vote*, OMAHA HERALD, Jan. 12, 1881, at 5.

²²⁴ The Ho-Chunk's name for themselves is variously translated as the People of the Parent Speech and People with the Big Voice. Winnebago, meaning People of the Stinking Waters, is an Algonquin name derived from their location on Green Bay, whose mudflats had an odor at low tide. Nancy Oestreich Lurie, *Winnebago*, in 15 HANDBOOK OF NORTH AMERICAN INDIANS 690, 696 (Bruce G. Trigger ed., 1978) [hereinafter Lurie, *Winnebago*]. Although the Wisconsin tribe formed by the descendants of these people now call themselves the Ho-Chunk, I use the term Winnebago because it is both the official name of the Nebraska tribe from which John Elk

and Illinois, but by the early 1800s they had concentrated near Green Bay, Wisconsin. In 1832, under federal pressure, the tribe signed a treaty exchanging half their Wisconsin territory for land in the “Neutral Ground” in Iowa.²²⁵ The Neutral Ground was actually contested no-man’s land between warring Sauk and Fox tribes, and the Winnebago were beset by Sauk soldiers.²²⁶ Nevertheless, the United States immediately began pressuring the Winnebago to cede their remaining land in Wisconsin and relocate to Iowa. In 1837, while nineteen chiefs were on a diplomatic trip in Washington, federal treaty commissioners refused to allow them to leave until they signed a land cession treaty.²²⁷ They finally agreed to sign after being told that the treaty gave them eight years to leave Wisconsin. In fact, the treaty allowed them only eight months to leave; the federal negotiators had been instructed to deceive them to secure the land cessions.²²⁸

Although many Winnebago refused to comply with the treaty, the federal government rounded them up and forced them across the Mississippi River.²²⁹ John Elk was born in Iowa during this period. While some fled Iowa and returned home, by 1846, 2,600 Winnebago were settled in Iowa, a school had been established there, and farms started.²³⁰

But by that time, white settlers were petitioning to obtain the Iowa reservation for their own.²³¹ In 1846, the Winnebago were forced to exchange the Iowa reservation for one in central Minnesota.²³² Again, the United States had picked unwisely: the reservation was in the middle of warring Sioux and Chippewa bands, historic enemies of the Winnebago; it was heavily wooded and unsuitable for farming; and its timber was already drawing white trespassers.²³³ In 1855, the Winnebago were permitted to exchange their lands for safer and more fertile lands in Blue Earth, Minnesota.²³⁴

likely descended, *see* WINNEBAGO TRIBE OF NEBRASKA, <http://www.winnebagoTribe.com> (last visited Dec. 20, 2015) (tribal website), and the term used in historical documents.

²²⁵ Jason Tetzloff, *Indian Removal: The Winnebago as a Case Study, 1825–1875*, at 17–18 (May 22, 1989) (unpublished paper, University of Wisconsin), <http://minds.wisconsin.edu/handle/1793/34813>.

²²⁶ *Id.* at 17.

²²⁷ *Id.* at 21.

²²⁸ Lurie, *Winnebago*, *supra* note 224, at 696–98.

²²⁹ Tetzloff, *supra* note 225, at 26–27.

²³⁰ *Id.* at 27.

²³¹ *Id.* at 27–28.

²³² *Id.* at 28–29.

²³³ *Id.* at 29.

²³⁴ *Id.* at 31.

On the Blue Earth reservation, the Winnebago hoped that “they had finally found a permanent home.”²³⁵ They established farms, and houses began to replace wigwams.²³⁶ Even there, all was not well. The reservation agent was quick to depose any chief who did not conform to his civilization plan, and white settlers—some of whom were already trespassing on their lands—soon began petitioning to remove them.²³⁷ To ward off removal, the Winnebago signed an 1859 treaty to cede the western portion of their reservation and have the remainder allotted to them individually.²³⁸ But the Senate—perhaps bowing to settler agitation—delayed ratifying the treaty, so neither the patents for the allotments or the money from the land sale to farm them were forthcoming.²³⁹

Despite their treatment by the United States, a number of Winnebago men enlisted with the Union army when the Civil War broke out.²⁴⁰ But after violence between Dakota and Minnesota soldiers and settlers in 1862, the peaceful Winnebago were expelled from the state along with the Dakota, and forced to relocate to drought-stricken, infertile lands in South Dakota.²⁴¹ They made the forced trek in the depths of winter; of 1934 Winnebago that left Minnesota, only 1382 arrived.²⁴² Though ordered to remain on the reservation under pain of death, almost all escaped by the summer of 1864.²⁴³ Of these, 1200 settled among the Omaha in Nebraska, while the rest scattered, some rejoining the fugitive Wisconsin Winnebago.²⁴⁴

In an 1865 treaty, the United States agreed to create a reservation for the tribe in Nebraska, but by this time many had lost faith in federal promises.²⁴⁵ In the 1870s, allotment began under the treaty, but the Winnebago had soured on fickle attempts to turn them into farmers;

²³⁵ Nancy O. Lurie, *The Winnebago Indians: A Study in Cultural Change* 137 (1952) [hereinafter Lurie, *Cultural Change*] (unpublished Ph. D. dissertation, Northwestern University).

²³⁶ *Id.* at 137–38.

²³⁷ WINNEBAGO ORATORY: GREAT MOMENTS IN THE RECORDED SPEECH OF THE HOCHUNGRA, 1742–1887, at 84–85 (Mark Diedrich ed., 1991) [hereinafter WINNEBAGO ORATORY]; Tetzloff, *supra* note 225, at 31–32.

²³⁸ WINNEBAGO ORATORY, *supra* note 237, at 85.

²³⁹ Lurie, *Cultural Change*, *supra* note 235, at 142.

²⁴⁰ Lurie, *Winnebago*, *supra* note 224, at 700.

²⁴¹ Colette Routel, *Minnesota Bounties on Dakota Men During the U.S.-Dakota War*, 40 WM. MITCHELL L. REV. 1, 12 (2013).

²⁴² Lurie, *Cultural Change*, *supra* note 235, at 150.

²⁴³ *Id.* at 149–50.

²⁴⁴ *Id.* at 150.

²⁴⁵ *Id.* at 176.

many quickly sold or leased their land to whites, becoming laborers like Elk.²⁴⁶

While the treaty-abiding faction was forcibly moved again and again, some Winnebago remained illegally in Wisconsin and others returned there in flight from ill-fated reservations.²⁴⁷ It is possible that Elk rejoined this group from Iowa, Minnesota, or South Dakota. In the winter of 1874, however, federal troops rounded up the Wisconsin Winnebago and marched them to Nebraska; a number died on the way.²⁴⁸ By September, the federal agent noted that more than half of the Wisconsin Winnebago had already fled, and those that remained had “set up the cry of dissatisfaction” and “unsettled and demoralized a number of the young men of the reservation.”²⁴⁹

We cannot know how John Elk wound up in a wigwam in Omaha, almost one hundred miles downriver of the Nebraska Winnebago reservation—about twenty other Indians lived in wigwams next to Elk, most slightly younger and born in Minnesota to Wisconsin parents, suggesting they too were Winnebago survivors of multiple removals.²⁵⁰ We can be relatively sure, however, that Elk had experienced either a lifetime of forced removals or one of evading federal authority in Wisconsin only to be forcibly marched to Nebraska. Perhaps he traveled to Omaha out of disillusionment with reservation life; perhaps he was displaced by the initial allotments of the Winnebago reservation; perhaps he left simply to look for work. He may well have resented that after all he had suffered in the name of the federal campaign to assimilate Native people with white society, that society still denied him the right to vote. But he probably sought citizenship less from a desire for full assimilation than from a plea to escape the federal campaign of domination and civilization, a campaign whose costs he already knew far too well.

²⁴⁶ Lurie, *Winnebago*, *supra* note 224, at 700; 1883 COMMISSIONER OF INDIAN AFF. ANN. REP. 106 (stating that the Winnebago had a “natural indifference to farming” but “their value as laborers is known to the people living near the reserve”).

²⁴⁷ Tetzloff, *supra* note 225, at 37–38.

²⁴⁸ *Id.* at 38.

²⁴⁹ 1874 COMMISSIONER OF INDIAN AFF. ANN. REP. 211 (report of Taylor Bradley, U.S. Indian Agent, Winnebago Agency).

²⁵⁰ 1880 DOUGLAS COUNTY CENSUS, *supra* note 221.

B. United States v. Wong Kim Ark

1. The Significance of Citizenship for Ethnic Chinese in America

While citizenship had dubious desirability for American Indians in the nineteenth century, there was no such ambiguity for ethnic Chinese in America. But here too there is a divergence from the romanticism often associated with citizenship. Although some ethnic Chinese certainly did seek citizenship from a sense of belonging in the American polity, many maintained important connections with China. Attempts to reject and exclude Chinese, however, catalyzed efforts to seek citizenship to blunt the edge of discrimination and to resist exclusion. At the same time, racism and violence in their adopted homes encouraged the migrants to maintain ties with China and discouraged the sense of belonging and allegiance American rhetoric espoused.

Although many early Chinese migrants were fleeing political and economic upheaval in China,²⁵¹ most planned to return to China before their deaths or to have their bones buried there if they could not.²⁵² Even before the advent of immigration restrictions, moreover, few Chinese women migrated, both because of the expense and lack of work for women overseas and because of responsibilities for caring for parents and in-laws at home.²⁵³ Male migrants also had ties of responsibility and tradition not only to their wives, but also their parents, clans, and home villages. Indeed, *huiguan*, mutual aid societies for those from the same districts, provided the social organization for the migrant communities.²⁵⁴

Despite these ties, some migrants fully shifted allegiance to the United States,²⁵⁵ and all experienced cultural and economic transformation.²⁵⁶ Nevertheless, the early rhetoric on behalf of Chinese

²⁵¹ RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 192–93 (1993).

²⁵² JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* 341 (2007).

²⁵³ Sucheng Chan, *Race, Ethnic Culture, and Gender in the Construction of Identities Among Second-Generation Chinese Americans, 1880s to 1930s*, in *CLAIMING AMERICA: CONSTRUCTING CHINESE AMERICAN IDENTITIES DURING THE EXCLUSION ERA* 127, 127 (K. Scott Wong & Sucheng Chan eds., 1998) [hereinafter *CLAIMING AMERICA*] (discussing cultural demands limiting female migration).

²⁵⁴ HIM MARK LAI, *BECOMING CHINESE AMERICAN: A HISTORY OF COMMUNITIES AND INSTITUTIONS* 40–46 (2004); QIN, *supra* note 125, at 27–28.

²⁵⁵ See, e.g., K. Scott Wong, *Cultural Defenders and Brokers: Chinese Responses to the Anti-Chinese Movement*, in *CLAIMING AMERICA*, *supra* note 253, at 3, 20, 22–23 (discussing the naturalization and “cultural metamorphosis” of Yung Wing).

²⁵⁶ Immigrants defied early Qing dynasty prohibitions on emigration, transformed their economic lives and possibilities, and became *jinshanke*—Gold Mountain guests—when they

migrants described them not as aspiring members of American society, but sojourners, valued guests, and beneficiaries of diplomatic relationships between China and the United States.²⁵⁷

Anti-Chinese oppression, however, enhanced and catalyzed efforts to achieve citizenship. In the mid-1870s, an officer of one of the Chinese immigrant associations testified before the California Senate that Chinese immigrants wished to become citizens in part to influence anti-Chinese legislation.²⁵⁸ In 1878, four San Francisco Chinese brought a test case seeking to naturalize.²⁵⁹ The federal court quickly rejected the petition, finding—despite many previous instances of Chinese naturalizing²⁶⁰—that one could “scarcely fail to understand” that the term “white” signified only members of the Caucasian race.²⁶¹ The 1882 Exclusion Act mooted similar claims by providing explicitly that Chinese were ineligible to naturalize.²⁶² In reaction to the 1882 Act, Wong Chin Foo gathered fifty naturalized ethnic Chinese together in New York to promote political participation, noting that “the moment you appear at the ballot box you are a man and a brother and are treated to cigars, whiskeys and beers.”²⁶³ Historian Qingsong Zhang argues that Chinese in the United States first began to refer to themselves as “Chinese Americans” rather than sojourners in protest against the 1882 law.²⁶⁴

As the exclusion period progressed, citizenship became even more important for ethnic Chinese in the United States. Although much legislation expressly targeted “Chinese” or “Mongolians,” states also

returned to their former villages. HAIMING LIU, *THE TRANSNATIONAL HISTORY OF A CHINESE FAMILY: IMMIGRANT LETTERS, FAMILY BUSINESS, AND REVERSE MIGRATION* 6 (2005).

²⁵⁷ In seeking passage of the Burlingame Treaty, for example, the Six Companies emphasized the importance of China in American commerce, and sought protections for Chinese “visiting or residing” in the United States equivalent to “the citizens or subjects of the most favored nation.” Burlingame Treaty, China-U.S., art. 6, July 28, 1868, 16 Stat. 739, 740; *see also* Qingsong Zhang, *The Origins of the Chinese Americanization Movement: Wong Chin Foo and the Chinese Equal Rights League*, in *CLAIMING AMERICA*, *supra* note 253, at 41, 53 (discussing 1877 memorial by the Six Companies).

²⁵⁸ Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 *ASIAN L.J.* 33, 36 (1995).

²⁵⁹ *Id.*

²⁶⁰ *See* Zhang, *supra* note 257, at 47, 52 (describing a gathering of fifty naturalized Chinese Americans in New York in 1883 and noting that Wong Chin Foo had been naturalized by a federal court in Michigan in 1874).

²⁶¹ *In re Ah Yup*, 1 F. Cas. 223, 223 (C.C.D. Cal. 1878). For extended discussions of the shifting boundaries of whiteness in interpreting the naturalization act, *see* IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996), and Devon W. Carbado, *Yellow by Law*, 97 *CAL. L. REV.* 633 (2009).

²⁶² Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58.

²⁶³ Zhang, *supra* note 257, at 47–48 (quoting *The Chinamen Organizing*, N.Y. TIMES, July 30, 1884).

²⁶⁴ Zhang, *supra* note 257, at 48–49.

enacted less constitutionally suspect laws excluding those who were “not eligible for citizenship”²⁶⁵ or had not “in good faith . . . declared their intent[] to become citizens”²⁶⁶—categories targeting Chinese and other Asians unable to naturalize—from various rights and privileges.²⁶⁷ After 1888, citizenship was necessary for Chinese laborers legally in the United States to travel to and from the United States.²⁶⁸

Even worse, the 1892 Geary Act²⁶⁹ provided that all Chinese laborers in the United States must register for a certificate of residence, that any person of Chinese descent could be seized and hauled before a commissioner or court to prove legal residence, and that all those found not entitled to remain in the United States would be sentenced to one year hard labor and then deported.²⁷⁰ The Geary Act inspired further Americanization campaigns. The Chinese American Equal Rights League issued a statement declaring it had “no sympathy for those [who] . . . refuse to become Americanized,” and requiring each member to “adopt American custom[], to cut off his queue, and wear the regulation clothing used in the United States.”²⁷¹ In 1895, as Wong Kim Ark’s petition was pending before the Supreme Court, other native-born Chinese formed the Native Sons of the Golden State (invoking the name of the nativist group the Native Sons of the Golden West) to protect their rights, promote patriotism, and advocate political and cultural participation.²⁷²

Although exclusion encouraged citizenship and assimilation campaigns, it also encouraged ethnic Chinese to maintain ties with China. As early as the 1850s, leaders of the immigrant community argued that “[i]f the privileges of your laws are open to us” more Chinese would “acquire your habits, your language, . . . your feelings.”²⁷³ The privileges of the laws were not opened—instead, Chinese faced

²⁶⁵ Oregon Alien Land Law, ch. 350, 1949 Or. Laws 503 (1949).

²⁶⁶ WASH. CONST. art. II, § 33, *repealed by* WASH. CONST. amend. XLII.

²⁶⁷ See STATES’ LAWS ON RACE AND COLOR 51, 289, 349, 378, 387, 442, 491 (Pauli Murray ed., 1997) (reprinting text of numerous state laws).

²⁶⁸ Scott Act, ch. 1064, 25 Stat. 504 (1888); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

²⁶⁹ Geary Act, ch. 60, 27 Stat. 25 (1892).

²⁷⁰ *Id.* §§ 2–4, 6. The Supreme Court quickly upheld the law, declaring an “absolute and unqualified” power in the federal government to expel foreigners within its borders, and authorizing individuals across the country to make citizen’s arrests of those they suspected of being deportable. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893); *cf.* *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding that a judicial trial was necessary before deportees could be sentenced to hard labor).

²⁷¹ Salyer, *Wong Kim Ark*, *supra* note 30, at 64 (quoting the Chinese American Equal Rights League).

²⁷² Sue Fawn Chung, *Fighting for Their American Rights: A History of the Chinese American Citizens Alliance*, in CLAIMING AMERICA, *supra* note 253, at 95, 98.

²⁷³ Wong, *supra* note 255, at 16 (quoting Hab Wa & Long Achick, *The Chinese in California: Letter of the Chinamen to His Excellency Gov. Bigler*, LIVING AGE, July 1852, at 32).

concerted efforts to exclude them wherever they laid down roots. And while in other countries, Chinese women and children began to join male immigrants after the initial waves of migration, exclusion laws prevented this pattern from emerging in the United States.²⁷⁴ Unable to establish families and facing legal and extralegal violence and discrimination in America, Chinese immigrants continued to look to China as a place of greater acceptance. Even so, they fought hard to remain in their adopted countries, traveling to new towns when they were violently driven out of others, and employing litigation, lobbying, and collective action to remain in the country that fiercely sought to exclude them.²⁷⁵

Regardless of whether they embraced full assimilation or distinctly Chinese American identities, citizenship became a key goal of ethnic Chinese in America. Although it could not prevent extralegal violence or even much legal discrimination, it was one limited way to fight back and secure residence in the United States. With the naturalization route firmly closed, birthright citizenship was the only way to achieve this goal.

2. Wong's Lawyers

Although American Indians often had to rely on attorneys with little awareness or concern for their clients' interests, this was not the case for the Chinese. Chinese organized through what became known as the Chinese Six Companies to bring a multifaceted campaign against state, federal, and private discrimination and exclusion. In addition to lobbying successes such as the Burlingame Treaty and the 1870 Civil Rights Act, the Six Companies financed thousands of lawsuits challenging exclusion and civil rights violations.²⁷⁶ As the NAACP was not founded until 1909, and even then, W.E.B. DuBois was the only African American among its executives,²⁷⁷ the Six Companies may be

²⁷⁴ GEORGE ANTHONY PEPPER, IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION 16 (1999); Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in CHINESE IMMIGRANTS AND AMERICAN LAW 2, 2-3 (Charles McClain ed., 1994) [hereinafter CHINESE IMMIGRANTS AND AMERICAN LAW].

²⁷⁵ See PFAELZER, *supra* note 252, at 340-43.

²⁷⁶ QIN, *supra* note 125, at 51-52, 54, 89-90; LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW, at xiii (1995) [hereinafter SALYER, LAWS HARSH AS TIGERS] (over 7000 lawsuits brought in the first decade of Chinese exclusion).

²⁷⁷ NAACP: 100 Years of History, NAACP, <http://www.naacp.org/pages/naacp-history> (last visited Dec. 20, 2015).

the earliest cause lawyering organization directed by the discriminated-against group.²⁷⁸

Chinese in the United States originally organized through their *huiguan*, mutual aid societies representing migrants from the same districts in China.²⁷⁹ *Huiguan* pooled funds to provide care for the sick and injured, coffin and funeral expenses, and aid for those who could not return to China on their own.²⁸⁰ In response to oppression in the United States, the six most important *huiguan* joined forces to form an organization open to all Chinese.²⁸¹ Although best-translated as the “Chinese Native Place Association,”²⁸² because merchants were the leaders of the *huiguan*, the English name for the organization was the “Chinese Six Companies,”²⁸³ and remained so even after seventh and eighth *huiguan* joined.²⁸⁴ This name was consistent with anti-Chinese propaganda characterizing the Six Companies as virtual slave masters,²⁸⁵ “long-nailed mandarins who control the destinies of the Chinese in this country.”²⁸⁶

The Six Companies used membership dues to employ attorney Colonel Frederick Bee as their spokesman, keep Thomas Riordan, Hall McCallister, and other attorneys on retainer, and hire yet others on a less frequent basis.²⁸⁷ After China established a consulate in California in 1878, Bee and Riordan went on joint retainer with both organizations, and, for a time, litigation was coordinated between the two.²⁸⁸

In the first decade of the exclusion laws, Chinese litigants brought over 7000 challenges to their validity and implementation, and won the

²⁷⁸ Other scholars, particularly Charles McClain, have powerfully demonstrated the revolutionary nature of this litigation. See CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994); CHINESE IMMIGRANTS AND AMERICAN LAW, *supra* note 274. My discussion here differs from earlier scholarship in focusing on this litigation as a product of an overarching organization.

²⁷⁹ QIN, *supra* note 125, at 27–28.

²⁸⁰ LAI, *supra* note 254, at 46; QIN, *supra* note 125, at 27–29.

²⁸¹ QIN, *supra* note 125, at 45.

²⁸² The transliteration of the Chinese name is *Zhōnghuá* (Chinese) *Huiguan* (Native Place Association), or *Jinshan Zhongua Huiguan* (Gold Mountain Chinese Native Place Association), but the organization later incorporated with the English name as the Chinese Consolidated Benevolent Association. LAI, *supra* note 254, at 49–50.

²⁸³ QIN, *supra* note 125, at 45.

²⁸⁴ LAI, *supra* note 254, at 50–51.

²⁸⁵ See, e.g., PFAELZER, *supra* note 252, at 26 (discussing allegation that the Six Companies were importing “slaves of a degraded caste” (quoting San Francisco merchant Lai Chun-Chuen)).

²⁸⁶ *Funds for the Fight*, S.F. MORNING CALL, Sept. 11, 1892, at 8.

²⁸⁷ QIN, *supra* note 125, at 89–90, 106–09.

²⁸⁸ *Id.* at 106–07, 120.

vast majority.²⁸⁹ Thomas Riordan alone was a lawyer in 2900 habeas cases in this period.²⁹⁰ While some of this litigation surely originated outside the Six Companies, the volume and speed of litigation on behalf of impoverished laborers—many confined on steamships offshore without access to family, friends, or prospective employers—would not have been possible without coordinated and independently-financed counsel. An 1889 article (entitled *Chinese Wives*) even attributed the fact that habeas writs were not taken out immediately after thirty-two Chinese migrants were confined to their ship to the death of Consul Bee's wife the night before.²⁹¹

In civil rights cases as well, the Chinese unleashed the power of the law in revolutionary ways. The best known of these cases is *Yick Wo v. Hopkins*, argued by Hall McCallister, which successfully challenged implementation of a San Francisco law banning wooden laundries—the first Supreme Court case invalidating a facially neutral law due to its discriminatory application under the Equal Protection Clause.²⁹² Six Companies financed litigation also established many less well-known civil rights landmarks.²⁹³ *Ho Ah Kow v. Nunan*²⁹⁴ challenged San Francisco's practice of cutting off the queues of imprisoned Chinese pursuant to an ordinance regulating prisoner hair length, arguably providing broader protection for religious rights than some more recent decisions.²⁹⁵ *In re Lee Sing* invalidated the first racially discriminatory

²⁸⁹ SALYER, LAWS HARSH AS TIGERS, *supra* note 276, at xiii. For an illuminating study of the judges in these cases, see Christian G. Fritz, *A Nineteenth-Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, in CHINESE IMMIGRANTS AND AMERICAN LAW, *supra* note 274, at 55, 55.

²⁹⁰ *Attorneys*, FREDERICK BEE HIST. PROJECT, <http://frederickbee.com/habeasattorneys.html> (last visited Dec. 21, 2015).

²⁹¹ *Chinese Wives*, SACRAMENTO DAILY REC.-UNION, Aug. 20, 1889, at 1.

²⁹² 118 U.S. 356 (1886).

²⁹³ Chinese litigated outside the Six Companies as well. The most famous of these cases is *Tape v. Hurley*, 6 P. 129 (Cal. 1885), in which the Tapes hired William Gibson, the lawyer for the counsel for the Chinese missions in San Francisco, to successfully challenge the exclusion of Chinese from public schools. MAE NGAI, *THE LUCKY ONES: ONE FAMILY AND THE EXTRAORDINARY INVENTION OF CHINESE AMERICA* 51 (Princeton Univ. Press 2012). Even this case was not fully separate from the Six Companies: Otis Gibson, William's father and head of the Chinese Mission, was a frequent collaborator with the Chinese consulate and Six Companies, which participated in the Tape case from the beginning. QIN, *supra* note 125, at 83, 89, 107.

²⁹⁴ 12 F. Cas. 252 (C.C.D. Cal. 1879) (invalidating practice of cutting off long braid, or queue, worn by Chinese men).

²⁹⁵ See, e.g., *Olf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1045 n.4 (1972) (Douglas, J., dissenting) (quoting *Ho Ah Kow* in dissent from denial of certiorari of cases upholding school hair-length requirements); *Longoria v. Dretke*, 507 F.3d 898 (5th Cir. 2007) (rejecting religious challenge to prison's short hair policy).

zoning ordinance,²⁹⁶ anticipating the U.S. Supreme Court by twenty-seven years.²⁹⁷ *Gandolfo v. Hartman* found unconstitutional a covenant prohibiting selling or leasing to Chinese,²⁹⁸ anticipating *Shelley v. Kraemer* by a half century.²⁹⁹ Repeatedly, this litigation showed the transformative power of providing attorneys for individuals otherwise unable to afford them.

The lawyers in these cases took on a deeply unpopular cause, and suffered the repercussions. Frederick Bee was frequently caricatured in anti-Chinese cartoons,³⁰⁰ and his obituary noted that the sadness at his death was “notwithstanding his office.”³⁰¹ Thomas Riordan faced accusations of criminal conspiracy for his role in the boycott of the Geary Act’s registration requirements.³⁰² But in other ways, Bee and Riordan would have had little in common with modern-day public interest lawyers. Bee had run mining, telegraph, and railroad companies, and was “one of the most prominent citizens of San Francisco.”³⁰³ Riordan was a fixture at society events,³⁰⁴ and a leader of the state and local Republican Party.³⁰⁵ Although the Republican Party was associated with greater tolerance for Chinese immigration, Joseph Napthaly, the prominent attorney who initially filed Wong Kim Ark’s habeas petition, was a Democratic Party fixture.³⁰⁶

In fact, in some respects, advocacy for the Chinese was an establishment cause. Anti-Chinese sentiment was deepest in the working class, which linked Chinese labor with capitalist oppression; for owners of railroad, mining, and agricultural businesses, however, the

²⁹⁶ *In re Lee Sing*, 43 F. 359 (C.C.N.D. Cal. 1890); Charles J. McClain, *In re Lee Sing: The First Residential-Segregation Case, in CHINESE IMMIGRANTS AND AMERICAN LAW*, *supra* note 274, at 223, 230, 232–34 [hereinafter McClain, *In re Lee Sing*].

²⁹⁷ *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating zoning ordinance segregating “colored” and white residents).

²⁹⁸ 49 F. 181 (C.C.S.D. Cal. 1892).

²⁹⁹ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³⁰⁰ See *Col. B’s Hobby Horse*, S.F. ILLUSTRATED WASP, Nov. 9, 1878 (picturing Bee atop a Chinese man depicted as a horse crushing a white man beneath his hooves); *The Golden Calf Retained*, S.F. ILLUSTRATED WASP, Mar. 15, 1879 (picturing Bee and others dancing around a statue depicting a Chinese man as a calf).

³⁰¹ *Their Old Friend Gone*, S.F. CALL, May 27, 1892.

³⁰² *Geary’s Wrath*, L.A. TIMES, Mar. 30, 1893, at 2.

³⁰³ *China in America*, WASH. POST, Oct. 25, 1878, at 2.

³⁰⁴ See, e.g., *Engagement of Miss Denman and Col. Cheatham Is Announced at a Musicale Given by Fiancee*, S.F. CALL, Nov. 8, 1901, at 4; *Society Was There—Wealth and Beauty at Harvard-Yale Game*, S.F. MORNING CALL, Nov. 20, 1892, at 8.

³⁰⁵ See *Riordan Will Be League President—“De Machine” Will Be in Control of the Republican Convention*, L.A. HERALD, Apr. 27, 1900, at 5; *Thomas D. Riordan Is Dead from Heart Failure*, S.F. CALL, June 18, 1905 (noting that Riordan had chaired the San Francisco County Republican Committee for the last six years).

³⁰⁶ See, e.g., *Well Ended—The Last Session of the State Convention*, L.A. DAILY HERALD, May 18, 1888, at 3 (noting Napthaly’s nomination as an elector in Democratic slate and platform’s opposition to Chinese immigration).

Chinese were an inexpensive labor source.³⁰⁷ The *huiguan*, moreover, were led by the merchant classes and acted in their interests.³⁰⁸ These merchants and their advocates also sought to deploy racial and class prejudices in their favor, creating distinctions between the “better class” of people who appreciated the Chinese and the labor agitators and low-class European immigrants who attacked them.³⁰⁹ While the lawyers for the Chinese played a heroic role, therefore, they did not sacrifice all class or racial prejudice, or even an elite lifestyle, to do it.

What these lawyers did provide—and what American Indians sorely lacked—was legal counsel organized and directed by the community they represented. Although confined in a ship’s hold off the coast of San Francisco, through this community Wong Kim Ark could mobilize the legal system to fully represent his interests.

3. Citizenship for Wong Kim Ark

As with John Elk, earlier scholarship seems to have missed a crucial aspect of the meaning of citizenship for Wong Kim Ark. Immigration documents show that his quest for citizenship was likely not primarily one for individual autonomy or assimilation. These documents suggest that for Wong, citizenship meant the ability to maintain distinctly transnational familial, cultural, and community relationships.

Wong was born in 1873 or 1871³¹⁰ at 751 Sacramento Street in San Francisco, California,³¹¹ to Wong Si Ping and Wee Lee, who had emigrated from China and established a “permanent residence” in San Francisco “a long time prior” to his birth.³¹² Being American-born was a rare status among ethnic Chinese. Although there were 105,000 ethnic Chinese in the United States by 1880,³¹³ only about one percent of them had been born there.³¹⁴

³⁰⁷ See, e.g., REASONS FOR CHINESE EXCLUSION, *supra* note 24.

³⁰⁸ LAI, *supra* note 254, at 50.

³⁰⁹ See, e.g., *China in America*, *supra* note 303 (quoting Frederick Bee); *Funds for the Fight*, *supra* note 286 (quoting Chinese Vice-Consul King Owyang); *Wyoming Massacre, Horrid Butchery and Untold Agony of Suffering*, DAILY ALTA CAL., Sept. 28, 1885 (quoting Bee).

³¹⁰ Wong’s birth year is reported as 1873 in the habeas petition, but as 1871 in others. See Transcript of Record at 6, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 132) [hereinafter *Wong Record*] (stating that Wong was born in 1873); Testimony of Wong Kim Ark, *In re Wong Yook Fun*, No. 9079/590-C (Immigration Service Dec. 6, 1910) (stating that Wong was born in 1871).

³¹¹ *Wong Record*, *supra* note 310.

³¹² *Id.*

³¹³ LEE, *AMERICA’S GATES*, *supra* note 127, at 238.

³¹⁴ Salyer, *Wong Kim Ark*, *supra* note 30, at 58.

Their numbers were growing,³¹⁵ however, and after Congress slammed the door to naturalization in 1882, anti-Chinese forces were eager to close the remaining path to citizenship. In 1884, the San Francisco customs collector denied entry to Look Tin Sing,³¹⁶ a fourteen-year-old merchant's son who had been born in Sacramento but sent to China to be educated some years before.³¹⁷ Riding circuit in California, Justice Field ruled that both the Fourteenth Amendment and the common law of the land compelled the conclusion that Look was indeed a citizen.³¹⁸

Nevertheless, collectors of customs kept stopping American-born Chinese at the ports and the federal courts kept reversing them.³¹⁹ This refusal to follow judicial branch rulings is not surprising. Customs collector was a political appointment, and collectors found it convenient to enforce the local political will.³²⁰ In San Francisco, the customs office even claimed that the “undercurrent of hostility to this race” would give rise to violence if Chinese exclusion was not stringently enforced.³²¹ The port of San Francisco accordingly earned a reputation as the most arduous processing center for Chinese immigrants.³²² In particular, John Wise, the collector who refused to admit Wong, described himself as a “zealous opponent of Chinese immigration.”³²³ Wise unabashedly implemented his own interpretations of the law,³²⁴ including requiring Chinese claiming birthright citizenship to present evidence from two white witnesses to their birth.³²⁵

Why would Wong make repeated trips between China and the United States despite the expense and risk of exclusion? Although Wong Si Ping had been a merchant, Wong Kim Ark became a cook—likely a less lucrative position and one that classified him as a laborer,

³¹⁵ *Id.* (noting that number had grown to eleven percent by 1900).

³¹⁶ *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ See *In re Wy Shing*, 36 F. 553 (C.C.N.D. Cal. 1888); *In re Yung Sing Hee*, 36 F. 437 (C.C.D. Or. 1888); *Ex parte Chin King*, 35 F. 354 (C.C.D. Or. 1888); see also *Gee Fook Sing v. United States*, 49 F. 146 (9th Cir. 1892) (approving of rule but finding petitioner was not in fact born in the United States). The reported decisions represent a small fraction of the cases on behalf Chinese claiming birthright citizenship. *Index of Habeas Cases by Attorney*, FREDERICK BEE HIST. PROJECT, <http://www.frederickbee.com/habeastableoneatty.html> (last visited Dec. 21, 2015) (showing over 100 habeas cases on behalf of American-born Chinese between 1882 and 1892).

³²⁰ LEE, *AMERICA'S GATES*, *supra* note 127, at 50.

³²¹ *Id.* at 51 (quoting Letter from R.P. Schwerin, to John W. Linck (Feb. 9, 1898)).

³²² *Id.*

³²³ *Id.* at 52 (quoting Letter from John Wise, to Special Agents Johnson & Bean (Apr. 3, 1895)).

³²⁴ *Id.*

³²⁵ SALYER, *LAWS HARSH AS TIGERS*, *supra* note 276, at 65.

presumptively barred by the 1888 Exclusion Act.³²⁶ Each trip for him involved the cost, time, and risk of trans-Pacific passage, additional cost of taking pictures and finding white witnesses to verify his right to return, and the risk of exclusion or lengthy detention while the collector of customs looked for an excuse to keep him out. And yet when his parents returned to China in 1889, Wong went with them, returning alone several months later, and left again in 1894, returning in 1895 to be excluded and imprisoned offshore.

In Look Tin Sing's case, his lawyers had argued that his family had assimilated, "abandoning Chinese garments, and conforming to the customs of the country."³²⁷ Pictures of Wong Kim Ark from 1894, 1904, and 1910, however, show a man in a queue and traditional dress; not until 1914 (when the queue was no longer mandatory in China) do we find Wong with short hair in a suit and tie.³²⁸ It was likely not an unqualified embrace of American culture that motivated Wong's quest for citizenship.

But immigration records also show that Wong had the best of reasons to seek citizenship: maintaining a multigenerational set of familial relationships and obligations. On his initial 1889 trip to China, Wong married a woman from a nearby village.³²⁹ Although the new couple conceived a son, Wong Yook Fun, Wong had already returned to America by the time he was born.³³⁰ On his 1894 trip, Wong both met his oldest son for the first time, and conceived another, Wong Yook Thue. Wong would conceive another son, Wong Yook Sue, on a 1905 trip, and yet another, Wong Yook Jim, on a 1914 trip.³³¹

³²⁶ Act of Sept. 13, 1888, ch. 1015, §§ 5–6, 25 Stat. 476, 477 (1888).

³²⁷ Salyer, *Wong Kim Ark*, *supra* note 30, at 61 (quoting *Agreed to Disagree*, S.F. EVENING BULL., Sept. 29, 1884, at 3). The choice to send Look to China to be educated while still a boy may cast doubt on this assertion in Look Tin Sing as well.

³²⁸ Wm. Fisher et al., Affidavit Certifying Identity of Wong Kim Ark, Nov. 5, 1894 (on file with author); Affidavit of Wong Kim Ark, *In re Wong Yoke Fun*, Case 10434/137 (Jan. 31, 1910) (on file at Box 464, Loc. 3279 I, RG 85, NARA, San Bruno); Wong Kim Ark Certificate of Departure, Nov. 11, 1914 (issued at the Port of San Francisco) (on file with author).

³²⁹ Affidavit of Wong Kim Ark, *supra* note 328. The affidavit gives the dates in the old Chinese calendar; these translate into a marriage date of December 1889, and his son's birthdate of October 1890. JOHN ENDICOTT GARDNER, BUREAU OF IMMIGRATION., U.S. DEP'T OF COMMERCE & LABOR, AMERICAN-CHINESE CALENDAR FOR 65 YEARS, 1849–1914 (1904).

³³⁰ See *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898).

³³¹ Testimony of Wong Kim Ark, *In re Wong Yok Jim*, Case No. 25141/5-6, at 2 (July 26, 1926) (on file at Box 3061, Loc. 3279 H, RG 85, NARA, San Bruno). It is possible that one or more of these children were in fact "paper sons," who had won Wong's cooperation in their bid to enter America. But Wong Yook Jim still identifies as Wong's son and the other three as his brothers, see WILLIAM WONG, *YELLOW JOURNALIST: DISPATCHES FROM ASIAN AMERICA* 54 (2001) [hereinafter WONG, *YELLOW JOURNALIST*], and he arrived in the United States with the assistance of Wong Yook Fun, the oldest son, and Wong Yook Sue, who lived with Wong in the United States and testified in Wong Yook Jim's case. Testimony of Wong Kim Ark, *supra*. Haiming Liu notes, moreover, that many of these paper sons were in fact part of kinship

Wong was not alone in this transnational married life. Madeline Hsu estimates that two-fifths of Chinese men in the United States in this period had wives in China.³³² This status was in part compelled by racist American laws and in part by long-standing strategies for combining social mobility with intergenerational obligations.

Marriage was a filial responsibility, necessary to bear children to continue the family line, ensure the continued worship of one's ancestors,³³³ and provide a wife to live with and care for one's parents in their old age.³³⁴ But Wong would have had little chance of finding a suitable bride in the United States. In 1880, California specifically prohibited marriage between whites and "Mongolians," while neighboring jurisdictions Arizona, Oregon, Idaho, and Nevada had already done so.³³⁵ Among Chinese in America, however, there were at least fourteen men for every woman,³³⁶ and many of those present would have been merchants' wives, merchants' daughters with higher aspirations than marriage to a cook, or prostitutes and their children.³³⁷

Wong's family might have sought a bride in China even had one been available in the United States. Marriages were negotiated by prospective in-laws,³³⁸ and Chinese parents might reject American-born girls, who were thought to be less virtuous and less likely to continue support of the husband's family.³³⁹ And, of course, if the parents wished to eventually return to China, the bride must be there as well.

Wong Si Ping and Wee Lee would have had many reasons not to wish to grow old in San Francisco. The late 1880s had seen Chinese communities up and down the West Coast driven, beaten, and burned

networks, and so would have been part of Wong's family in any case. LIU, *supra* note 256, at 2, 91.

³³² MADELINE Y. HSU, DREAMING OF GOLD, DREAMING OF HOME: TRANSNATIONALISM AND MIGRATION BETWEEN THE UNITED STATES AND SOUTH CHINA, 1882-1943, at 99 (2000). An empirical study found that as many as half of ethnic Chinese men in San Francisco had nonresident wives. 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, at 34, 41-42 (Sucheng Chan ed., 2006).

³³³ HSU, *supra* note 332, at 100.

³³⁴ *Id.* at 103-05.

³³⁵ Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC'Y REV. 587, 596 tbl.2 (2007).

³³⁶ 1900 CENSUS, *supra* note 49, at 492 (reporting 111,062 Chinese men and 7996 Chinese women in the United States).

³³⁷ One fascinating study suggests that most resident Chinese-born wives arrived as prostitutes. Chan, *supra* note 332, at 34, 41-58.

³³⁸ HSU, *supra* note 332, at 95.

³³⁹ *Id.* at 102.

out of their homes.³⁴⁰ In the year that they left, San Francisco hosted speeches by the racist labor organizer Denis Kearney; condemned and tore down buildings in Chinatown;³⁴¹ dug up Chinese coffins in an old cemetery;³⁴² and was on the verge of passing a law directing that all Chinese move to a portion of the city otherwise reserved for slaughterhouses and hog factories.³⁴³ After two decades in the United States and with a son of marriageable age, Wong's parents likely decided to find a nice girl to help secure their retirement and progeny in a country that would accept them. Wong's status as a "Gold Mountain guest" would only have enhanced his marriageability: With the promise of a good income and children, and a not unduly interfering husband, his bride might hope for a secure and even fulfilling life.³⁴⁴

On November 15, 1894, Wong returned to his family in China.³⁴⁵ He would have arrived in time for the Dongzhi holiday, at which Chinese traditionally connect with family and make offerings to ancestors.³⁴⁶ His departure papers included affirmations by three white witnesses of his birth in San Francisco and a photo in which he looks hopeful, apprehensive, and very, very young.³⁴⁷ When he returned in August 1895, collector Wise refused to allow him to land.³⁴⁸ He was held on the steamer Coptic until it left harbor, then transferred to the steamer Gaelic, and then to the steamer Peking after the Gaelic too left.³⁴⁹ He was not ordered released on bond until January 3, 1896, after five months a prisoner.³⁵⁰

In her study of the three generations of the transnational Chang family, Haiming Liu writes, "Family and home are one word, *jia*, in the Chinese language. Family can be apart, home relocated, but *jia* remains intact, as it signifies a system of mutual obligations and a set of cultural values," enabling families

to survive long physical separation, expand economic activities beyond a national boundary, and accommodate continuities and

³⁴⁰ PFAELZER, *supra* note 252, at 195 (Truckee, Cal., in 1886); *id.* at 209–11 (Rock Springs, Wyo.); *id.* at 215 (Seattle & Newcastle, Wash., in 1885); *id.* at 219–33 (Tacoma, Wash., in 1885); *id.* at 237 (San Jose, Cal., in 1887).

³⁴¹ *The Condemned Buildings*, DAILY ALTA CAL., Aug. 27, 1889, at 4.

³⁴² *Eighty-Six Skeletons in All*, DAILY ALTA CAL., Mar. 2, 1889, at 1.

³⁴³ McClain, *In re Lee Sing*, *supra* note 296, at 229–30.

³⁴⁴ HSU, *supra* note 332, at 104.

³⁴⁵ Wm. Fisher et al., Affidavit Certifying Identity of Wong Kim Ark, *supra* note 328 (stamp affixed indicating "departed from San Francisco . . . Nov 15 1984").

³⁴⁶ See SHU JIANG LU, WHEN HUAI FLOWERS BLOOM: STORIES OF THE CULTURAL REVOLUTION 143–44 (2007) (describing author's experience of returning to make offerings to grandparents).

³⁴⁷ Wm. Fisher et al., Affidavit Certifying Identity of Wong Kim Ark, *supra* note 328.

³⁴⁸ Wong Record, *supra* note 310, at 8.

³⁴⁹ *Id.* at 2.

³⁵⁰ *Id.* at 23–24.

discontinuities in the process of social mobility. . . . When social instability in China and a hostile racial environment in the United States prevented them from being rooted on either side of the Pacific, transnational family life became a focal point of their social existence.³⁵¹

Wong, confined for months on steamships off the San Francisco coast, would have been sustained by his family and home, by the ties that made them stretch across oceans and years to exist wherever he was. He would have thought of his parents, wife, and children, all waiting and depending on him reaching the Gold Mountain again, and known that citizenship was the key to both meeting his obligations and seeing them again.

C. Conclusion

Both the differences and the similarities between the stories of *Elk v. Wilkins* and *United States v. Wong Kim Ark* contain important lessons. The differences in part reflect the different positions of American Indians and ethnic Chinese in America, the first as self-governing peoples whose land was colonized by the United States, the second as migrants to an existing nation. But for both groups, citizenship was closely linked with subordination—for American Indians, as either the means of tribal destruction or an effort to escape its effects, while for Chinese, the boundary that denied them the right to establish families and homes in the United States. For each, abandonment of past community and culture was held up as an ideal, although for American Indians the asserted possibility of achieving this ideal justified coercion and expropriation, while for Chinese the asserted impossibility of achieving it justified forcible exclusion and discrimination. Through their cases, both litigants seem to have defied both state coercion and the ideals of citizenship, Elk by trying to escape the federal domination that sought to destroy tribal culture and territory, and Wong by facilitating a distinctly transnational family with ties to both China and America.

III. LITIGATION AND AFTERMATH

Although the opinions in *Elk v. Wilkins* and *United States v. Wong Kim Ark* have important places in American law, they cannot be fully understood without their aftermath. Congress quickly blunted the

³⁵¹ LIU, *supra* note 256, at 1–2.

impact of each decision, in *Elk* by forcing citizenship, allotment, and boarding school on Indians to shape them into individualistic Americans, and in *Wong Kim Ark* by further restricting migration and the means to challenge the restrictions. Through their communities, Indians and Chinese both fought against these measures, ultimately reshaping the meaning of citizenship in America. American efforts to colonize Indians and exclude Chinese, however, created patterns for early twentieth century encounters with other foreign peoples, both migrants and colonized others.

A. *Elk v. Wilkins*

1. Litigation

On April 14, 1880, John Elk filed his petition in the U.S. Circuit Court in the District of Nebraska alleging that he was a citizen and had been denied the right to vote because of his race and color in violation of the Fourteenth and Fifteenth Amendments.³⁵² Many of the other participants were repeating their roles from *Standing Bear v. Crook*: Poppleton and Webster represented the petitioner; U.S. Attorney Lambertson represented the defendant; and Judge Dundy heard the case. There were also two new players: Lambertson was joined by attorney Edward W. Simeral, who oddly was also the notary solemnizing Elk's petition; and more significantly, Judge Dundy was joined by new Eighth Circuit Judge George Washington McCrary.³⁵³

McCrary had begun his law practice studying in the Iowa office of future Supreme Court Justice Samuel Miller, then served in the House of Representatives from 1866 to 1877, and was Secretary of War from 1877 to December 1879.³⁵⁴ As Secretary of War he oversaw the formal end of Reconstruction with the withdrawal of the last troops from the South; the suit against the military in *Standing Bear v. Crook*; as well as the shattering of fading hopes for Grant's peace policy with, in McCrary's words, "outbreaks" by the Apaches in New Mexico and the "massacre" by Utes in White River, Colorado.³⁵⁵ He was unlikely to sympathize with reformers who saw the Indian problem as one of federal wrongs against innocent Indians.

³⁵² Elk Record, *supra* note 218, at 2.

³⁵³ *Id.* at 1–3.

³⁵⁴ Edward A. Goedeken, *McCrary, George Washington*, BIOGRAPHICAL DICTIONARY IOWA, <http://uipress.lib.uiowa.edu/bdi/DetailsPage.aspx?id=261> (last visited Dec. 21, 2015).

³⁵⁵ *War Department Needs—Secretary M'Crary's Annual Report*, N.Y. TIMES, Nov. 24, 1879 (quoting George W. McCrary, Secretary of War).

Although Wilkins' attorneys did not file their response until November 8, it was less than 100 words long, a brief demurrer asserting that the petition did not state sufficient facts to justify relief and that the court lacked jurisdiction over both the defendant and subject matter.³⁵⁶ The court held a hearing in January of 1881,³⁵⁷ and in May sustained the demurrer without written opinion and certified a writ of error to the Supreme Court.³⁵⁸ The brief opinion and certification may reflect disagreement between Judges Dundy and McCrary, as in the event of disagreement between a district court and circuit judge, the opinion of the circuit judge controlled, but the case would be certified to the Supreme Court.³⁵⁹

In the Supreme Court, Elk's brief presented the case as an extension of the ideals of Reconstruction. The "spirit of human liberty and human rights" that inspired the Reconstruction amendments was "planted on motives broad enough and grand enough to reach all classes and all races and all colors."³⁶⁰ The 1866 Civil Rights Act declaring all but "Indians not taxed" to be citizens indicated that Indians who had left their tribes and lost their immunity from state taxation were in fact citizens under the statute.³⁶¹ The Fourteenth Amendment omitted a similar exception to "make a step in advance" of the 1886 law and ensure that citizenship would not be dependent on taxation.³⁶²

The brief argued both that Indians in tribal relations might be "subject to the jurisdiction of the United States"³⁶³ and that all Indians had a right to abandon those relations and assume a new allegiance to the United States.³⁶⁴ This individual decision to shift allegiance need not receive the official imprimatur of naturalization, as tribes were not true foreign powers.³⁶⁵ Again, the brief invoked the abolition of slavery. "As emancipation was the removal of the incapacity of slavery, so expatriation . . . would be the removal of the tribal incapacity, and as the Indian as well as the negro, was born in the United States, they become citizens without naturalization."³⁶⁶

The brief concluded with a plea for Indian reform. Declaring Indians as worthy of citizenship as the immigrants "we welcome to our shores," the brief insisted that "[t]he time has gone by to shut the doors

³⁵⁶ Elk Record, *supra* note 218, at 4.

³⁵⁷ *Can "Lo" Vote? The Arguments on the Question Before the U.S. Court*, *supra* note 216.

³⁵⁸ Elk Record, *supra* note 218, at 6.

³⁵⁹ Act of June 1, 1872, ch. 255, § 1, 17 Stat. 196.

³⁶⁰ Brief for Plaintiff at 9, *Elk v. Wilkins*, 112 U.S. 94 (1884).

³⁶¹ *Id.* at 12–13.

³⁶² *Id.* at 14.

³⁶³ *Id.* at 21–22.

³⁶⁴ *Id.* at 27.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

of justice against the Indian race on the plea that they are savages.”³⁶⁷ Quoting “a prominent journalist” (in fact, Thomas Tibbles) on the “absolute monarch[y]” of the Indian commissioner,³⁶⁸ invoking the “massacred men and women and children of the Cheyennes,”³⁶⁹ and calling the Indian Territory a “pest hole of death to northern tribes,” the brief asked what was the remedy to the “wrongs and oppressions, the *involuntary servitude*” the Indians had suffered?³⁷⁰ “We answer: Citizenship.”³⁷¹

Lambertson’s brief for the appellee opened with the status of Indian tribes as “separate nations, independent political communities, and only in a very limited sense subject to our jurisdiction.”³⁷² The 1871 prohibition on further treaties, it asserted, did not “destroy the tribes as political communities,” but simply removed the treaty power, while the Fourteenth Amendment did not include tribal members “because they were not born in the allegiance of the United States except in a qualified sense.”³⁷³ While a man might independently throw off his natal allegiance, he could not become a citizen of another country without that country’s consent.³⁷⁴

Without formal naturalization, moreover, “[h]ow is a registrar of vote[r]s to know whether an Indian is subject to the jurisdiction of the United States?” Would the test require an Indian to farm? To own land individually? To otherwise demonstrate the habits of civilization? To simply absent himself from his tribe? And if any of these were necessary, how long ago would he need to have done it?³⁷⁵

The petition, Lambertson wrote, was impossibly vague on these questions, stating neither Elk’s tribe nor what he had done to subject himself to the jurisdiction of the United States other than “a change in mental allegiance.”³⁷⁶ Indeed, for all the facts presented, Elk “seems to have been dropped from the clouds to raise this question.”³⁷⁷ No child of a foreign minister born in the United States would be able to demand citizenship simply by claiming she had transferred her allegiance; no more, the brief argued, should an Indian born in tribal relations.³⁷⁸

³⁶⁷ *Id.* at 28.

³⁶⁸ *Id.* at 29 (quoting *The Ponca Habeas Corpus Case*, OMAHA HERALD, May 2, 1879, at 4).

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 28–29.

³⁷¹ *Id.* at 29 (emphasis omitted).

³⁷² Brief and Argument of Defendant in Error at 3, *Elk*, 112 U.S. 94.

³⁷³ *Id.* at 5.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 10.

³⁷⁶ *Id.* at 7.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 9.

Although the brief cited the Indians who had been made landless and impoverished by citizenship to argue that automatic citizenship might result in “greater injustice,”³⁷⁹ its main policy arguments were founded in racism. Indians were “a nation of aristocratic idlers” whose “ideas of government are the simplest and rudest.”³⁸⁰ It stretched the principle of universal citizenship “to the verge of absurdity” to extend it to “subjects of an independent political community, who have made the tomahawk the arbiter of their wrongs.”³⁸¹ While citizenship might be the ultimate goal for the Indians, it could only be achieved after a government “course of industry, instruction and constraint.”³⁸² Elk himself was simply “an Indian savage or ‘noble red man’” striving for something beyond his ability to understand.³⁸³

Writing for the Supreme Court, Justice Gray did not engage the parties’ policy arguments, and ruled for Wilkins on the legal ones. The opinion declared that there were only two categories of U.S. citizens, those by birth and those by naturalization, and naturalization could not occur without federal action.³⁸⁴ Indians born “members of, and owing immediate allegiance to, one of the Indian tribes, . . . although in a geographical sense born in the United States,” were in the same position as children born in foreign countries, or those born in the United States to “ambassadors or other public ministers of foreign nations.”³⁸⁵ The Court agreed that non-tribal Indians were born citizens of the United States, such as those from the “remnants of tribes” in New York and Massachusetts which had no federal recognition,³⁸⁶ and cited approvingly an 1876 case holding an Indian born to a group that had “ceased to exist as a tribe” was a citizen entitled to vote.³⁸⁷ Indians, Gray wrote, could also naturalize under federal law.³⁸⁸ But absent federal action, an Indian born in tribal relations could not become a citizen simply by living apart from his tribe.

Justice Harlan, as was his wont, dissented. Joined by Justice Woods, he asserted that any Indian who “in good faith” severed tribal relations and “fully and completely surrendered” to the jurisdiction of the United States became by that action a citizen.³⁸⁹ If this was not true, moreover, the purpose of the Fourteenth Amendment “wholly failed . . . in respect

³⁷⁹ *Id.* at 16.

³⁸⁰ *Id.* at 17–18.

³⁸¹ *Id.*

³⁸² *Id.* at 18.

³⁸³ *Id.*

³⁸⁴ *Elk*, 112 U.S. at 101–02.

³⁸⁵ *Id.* at 102.

³⁸⁶ *Id.* at 107–08.

³⁸⁷ *Id.* at 107 (citing *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877)).

³⁸⁸ *Id.* at 103.

³⁸⁹ *Id.* at 110, 118 (Harlan, J., dissenting).

of the Indian race,” and there was “still in this country a despised and rejected class of persons with no nationality whatever” subject to “all the burdens of government” and yet not “entitled to any of the rights, privileges, or immunities of citizens of the United States.”³⁹⁰

Harlan was wrong that exclusion from birthright citizenship meant that the purposes of the Fourteenth Amendment had failed with respect to Indians. In the 1860s, the most stalwart advocates of Reconstruction’s ideals had rejected broad extensions of Indian citizenship in the name of tribal rights. Now, however, Harlan and Elk’s lawyers cloaked Indian citizenship in the ideals of Reconstruction, while Lambertson relied on racism to argue against it. In part this reflected the changing status of Indians and tribes: Increasingly controlled by agents on reservations and surrounded by white settlers, U.S. citizenship seemed the only remaining path for Indian equality. But it also reflected the ways the terms of the debate had shifted, so that even the designated advocates for the Indians were no longer willing to champion tribal autonomy.

2. Aftermath I: Coercion in the Name of Citizenship

The reformers’ defeat in *Elk v. Wilkins* catalyzed legislative action.³⁹¹ In 1885, Senator Dawes proposed a bill to reverse the result in *Elk*.³⁹² That bill did not pass, but Dawes’ 1886 proposal to allot Indian lands individually provided that any Indian born in the United States “to whom allotments shall have been made,” or “who has voluntarily taken up . . . his residence separate and apart from any tribe of Indians . . . , and has adopted the habits of civilized life” was a citizen of the United States.³⁹³ Earlier citizenship and allotment proposals had required the consent of the tribe or individual Indians affected, but the Dawes Act thrust both on Indians and tribes involuntarily.³⁹⁴ And

³⁹⁰ *Id.* at 122–23.

³⁹¹ See FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 75 (Bison Books 2001) (1984) (arguing that reformers believed the decision made gradual assimilation no longer an option); Carol Nackenoff, *Constitutionalizing Terms of Inclusion: Friends of the Indian and Citizenship for Native Americans, 1880s–1930s*, in THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 366, 380 (Ronald Kahn & Ken I. Kersch eds., 2006).

³⁹² 1885 COMMISSIONER INDIAN AFF. ANN. REP. 7–8.

³⁹³ 17 CONG. REC. 1632 (1886) (statement of the Chief Clerk).

³⁹⁴ *Id.* at 1631 (striking the provision regarding consent); FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865–1900, at 242–43, 252 (1976) [hereinafter PRUCHA, CHRISTIAN REFORMERS] (discussing proposals that two-thirds of tribe consent to allotment).

unlike allotment bills proposed since 1879,³⁹⁵ this one passed, becoming the infamous Dawes Allotment Act of 1887.³⁹⁶

The problem at this point was not citizenship itself. With tribal sovereignty ignored and Indians forced into non-Indian society, citizenship was a necessary if inadequate protection. But citizenship became the rallying cry for everything done for—or more accurately done to—Native people. Secretary of the Interior Carl Schurz wrote in 1881 that “[t]o fit the Indians for their ultimate absorption in the great body of American citizenship” three things were necessary: that Indians “be taught to work”; that their youth be educated; and that “they be individualized in the possession of property by settlement in severalty with a fee simple title.”³⁹⁷ The late nineteenth century policies now almost synonymous with the federal abuses of Indians—allotment, boarding schools, extension of state law—were all intended to ensure that the Indian “individual is separated from the mass” and “made a citizen.”³⁹⁸

Allotment in particular was central to the reformers’ “obsession” with individualizing Indians and fitting them for citizenship.³⁹⁹ The Board of Indian Commissioners asserted that allotment would break up the Indian “communistic system” providing the “incentive to labor and enterprise that the right to individual ownership of property inspires.”⁴⁰⁰ Senator Dawes declared it would teach the Indians “selfishness, which is at the bottom of civilization,”⁴⁰¹ “wipe out the disgrace of our past treatment” of the Indian, and “lift him up into citizenship and manhood.”⁴⁰² Secretary of the Interior L.Q.C. Lamar even called the 1887 Allotment Act “a general naturalization law for the American Indians.”⁴⁰³

While rhapsodizing about Indian citizenship, the reformers ignored a key aspect of that status—political self-governance. Initial allotment proposals required two-thirds of the male adult Indians in a tribe to consent to allotment; the consent requirements were stripped

³⁹⁵ PRUCHA, CHRISTIAN REFORMERS, *supra* note 394, at 241–42.

³⁹⁶ Dawes Allotment Act of 1887, ch. 119, 24 Stat. 388.

³⁹⁷ Carl Schurz, *Present Aspects of the Indian Problem*, in AMERICANIZING THE AMERICAN INDIANS, *supra* note 21, at 13, 17.

³⁹⁸ PRUCHA, CHRISTIAN REFORMERS, *supra* note 394, at 250.

³⁹⁹ *Id.* at 232.

⁴⁰⁰ *Id.* at 244 (quoting REPORT OF THE BD. OF INDIAN COMM’RS 10 (1880)).

⁴⁰¹ D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 11 (Francis Paul Prucha ed., 1973).

⁴⁰² Henry L. Dawes, *Solving the Indian Problem*, in AMERICANIZING THE AMERICAN INDIANS, *supra* note 21, at 27, 30; *see also* PRUCHA, CHRISTIAN REFORMERS, *supra* note 394, at 237–38 (Sen. Richard Coke on allotment and citizenship); *id.* at 241–42 (Commissioner of Indian Affairs E.A. Hayt on allotment and citizenship).

⁴⁰³ PRUCHA, CHRISTIAN REFORMERS, *supra* note 394, at 256.

from the final bill.⁴⁰⁴ The “Five Civilized Tribes,” the Cherokee, Choctaw, Chickasaw, Creek, and Seminole—widely described as those most suited for American citizenship—consistently opposed any allotment program.⁴⁰⁵ The chiefs of the Kiowa and Caddo Nations defied the efforts of the federal agent to travel to Washington, D.C., to protest against the Dawes Act, but Congress had already voted by the time they arrived.⁴⁰⁶ An aging Ely Parker now called “compulsory allotment of lands and enforced citizenship” “certain death to the poor Indians,” declaring Indians “as a body . . . deadly opposed to the scheme.”⁴⁰⁷

The reformers did not even agree that citizen allottees should have the right to vote. Former Supreme Court Justice William Strong declared himself in favor of citizenship for allottees but not suffrage for all Indian citizens,⁴⁰⁸ while Harvard Law professor James Thayer declared it “inexcusable to force such a body of voters suddenly upon the States where they live.”⁴⁰⁹

Thayer’s solution for making Indians into good citizens was to subject them to American law.⁴¹⁰ Other reformers agreed. For Commissioner of Indian Affairs Merrill Gates, “the rule of law” (which tribes allegedly lacked) was “essential” for making an Indian into an “intelligent, useful citizen.”⁴¹¹ The “white man’s law” was a key aspect of citizenship for Carl Schurz as well.⁴¹² The Allotment Act provided that all allotments would be subject to state probate law and that the Indians made citizens under the act would “be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.”⁴¹³ The 1906 Burke Act provided that once Indians held their allotments in fee they would also be subject to state property taxes.⁴¹⁴ Similar assimilationist arguments also contributed to the passage of the Major Crimes Act in 1885, subjecting felonies between Indians to federal jurisdiction.⁴¹⁵

⁴⁰⁴ *Id.* at 243, 252.

⁴⁰⁵ *Id.* at 256.

⁴⁰⁶ Estin, *supra* note 183, at 216.

⁴⁰⁷ Ely S. Parker, *Letter to Harriet Maxwell Converse*, in *AMERICAN INDIAN NONFICTION*, *supra* note 159, at 268.

⁴⁰⁸ Nackenoff, *supra* note 391, at 380.

⁴⁰⁹ James B. Thayer, *A People Without Law*, in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 21, at 175, 181.

⁴¹⁰ *Id.* at 182.

⁴¹¹ Merrill E. Gates, *Land and Law as Agents in Educating Indians*, in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 21, at 45, 55.

⁴¹² 1885 COMMISSIONER INDIAN AFF. ANN. REP. 8.

⁴¹³ Act of Feb. 8, 1887, ch. 119, §§ 5–6, 24 Stat. 388, 389–90.

⁴¹⁴ Burke Act, ch. 2348, § 6, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349 (2012)).

⁴¹⁵ 18 U.S.C. § 1153 (2012); Harring, *supra* note 182, at 223–33 (discussing debate on the Act).

Boarding schools were another key plank of the citizenship campaign. Richard Pratt, founder of the policy, declared that they would “lift the Indian tribes into civilization and citizenship.”⁴¹⁶ Senator Dawes said the boarding schools used Indian children as “the raw material out of which shall come by this treatment a citizen of the United States,”⁴¹⁷ while Commissioner Thomas Morgan described them as “that comprehensive system of training and instruction which will convert them into American citizens.”⁴¹⁸ The infamous practice of punishing pupils for speaking their native languages was a direct outgrowth of education for citizenship, with schools ordered to ensure children spoke “the language of the Republic of which they are to become citizens.”⁴¹⁹

Citizenship was thus at the center of federal policies of Indian assimilation and transformation. The Department of Interior’s citizenship ceremony, developed in 1916, symbolized this transformation. Federal officials were instructed to construct an artificial teepee, from which the candidates for citizenship would emerge.⁴²⁰ If the candidate was male, the official would hand him a bow and arrow and direct him to shoot, then address him in his “Indian name”: “You have shot your last arrow. That means that you are no longer to live the life of an Indian. You are from this day forward to live the life of the white man.”⁴²¹ Then, addressing the candidate in his “white name,” the official directed him to place his hands on a plow, saying, “This act means that you have chosen to live the life of the white man—and the white man lives by work.”⁴²² If the candidate was a woman, the official handed her a work bag and purse and told her, “This means that you have chosen the life of the white woman—and the white woman loves her home. . . . Upon the character and industry of the mother and home maker largely depends the future of our Nation.”⁴²³

⁴¹⁶ PRUCHA, CHRISTIAN REFORMERS, *supra* note 394, at 281 (quoting Everett Arthur Gilcreast, Richard Henry Pratt and American Indian Policy, 1877–1906: A Study of the Assimilation Movement 305–06 (1967) (unpublished Ph.D dissertation, Yale University)). The Indian Rights Association agreed that Pratt’s “goal is American citizenship,” and he “flings himself at it with all the force and combativeness of his vigorous nature.” *Id.* at 276 (quoting Elaine Goodale in INDIAN RIGHTS ASS’N, CAPTAIN PRATT AND HIS WORK FOR INDIAN EDUCATION 6 (1886)).

⁴¹⁷ 15 CONG. REC. 4070 (1884) (statement of Sen. Dawes).

⁴¹⁸ Thomas J. Morgan, *Supplemental Report on Indian Education*, in AMERICANIZING THE AMERICAN INDIANS, *supra* note 21, at 221, 222.

⁴¹⁹ J.D.C. Atkins, *The English Language in Indian Schools*, in AMERICANIZING THE AMERICAN INDIANS, *supra* note 21, at 197, 203.

⁴²⁰ JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN: 1887–1934, at 95–96 (1991).

⁴²¹ U.S. Dep’t of the Interior, Ritual on Admission of Indians to Full American Citizenship (1918) (on file with North Dakota Historical Society, Major James McLaughlin Papers).

⁴²² *Id.*

⁴²³ *Id.*

The aftermath of these policies is well known. The Supreme Court has declared the allotment policy “disastrous.”⁴²⁴ Within a few decades, the Indian land base had been reduced by two-thirds and reservations were transformed into ungovernable checkerboards of Indian and non-Indian land.⁴²⁵ Application of state intestacy laws to Indians, who rarely wrote wills, soon made land unusable, because rights to a single parcel were divided among hundreds, even thousands, of heirs,⁴²⁶ while state property tax laws only exacerbated land loss.⁴²⁷ The 1928 Meriam Report declared that the boarding school system “largely disintegrates the family” and that provisions for the care of the children there were “grossly inadequate.”⁴²⁸ More recent reports are even more critical.⁴²⁹

As more and more Indians became citizens, fewer and fewer benefits were attached to citizenship.⁴³⁰ The Supreme Court initially suggested that Indian citizenship limited federal authority,⁴³¹ but quickly ate away this precedent, reversing it in 1911.⁴³² The justification for federal power, however, shifted from reliance on tribal political status and diplomatic relationships with them to assertions of Indian inferiority and dependence.⁴³³ And although the *Elk* Court stated that citizen Indians should be able to vote, states rapidly found new ways to avoid enfranchisement: some by declaring that the federal relationship made Indians incompetent wards; others relying on Indian exemption from state taxes; and others by deciding that those living on reservations were not residents of the state.⁴³⁴ These restrictions continued until the 1950s in several states.⁴³⁵

⁴²⁴ *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

⁴²⁵ ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 108–12 (2d ed. 2010).

⁴²⁶ *Id.* at 110.

⁴²⁷ Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12 (1995).

⁴²⁸ LEWIS MERIAM ET AL., INST. GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 15, 11 (1928) (prepared at the request of Hubert Work, Secretary of the Interior).

⁴²⁹ See, e.g., SPEC. SUBCOMM. ON INDIAN EDUC., S. COMM. ON LABOR & PUB. WELFARE, *INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE*, S. REP. NO. 91-501, at XI (1969).

⁴³⁰ HOXIE, *supra* note 391, at 213–31.

⁴³¹ See *In re Heff*, 197 U.S. 488, 509 (1905), *overruled by* *United States v. Nice*, 241 U.S. 591, 601 (1916). Congress reacted to *Heff* by passing the Burke Act, which delayed citizenship for allottees until their allotments were patented in fee. Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349 (2012)).

⁴³² *Tiger v. W. Inv. Co.*, 221 U.S. 286, 315 (1911).

⁴³³ HOXIE, *supra* note 391, at 230; see, e.g., *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (justifying federal authority over Pueblos despite their citizenship because they were “a simple, uninformed, and inferior people”).

⁴³⁴ HOXIE, *supra* note 391, at 231–34.

⁴³⁵ Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 645–46 (2009) (discussing restrictions in Arizona, New Mexico, South Dakota, Idaho, Utah, and Minnesota).

The legacies of Indian incorporation also played a role in the emergence of the United States as an imperial nation. 1890, the year of the massacre at Wounded Knee, was considered the closing of the American frontier, and the United States soon turned its expansionist attention abroad. Between 1898 and 1905, the United States asserted colonial authority over Hawaii, Cuba (briefly, except for Guantanamo), Puerto Rico, Guam, the Philippines, the Panama Canal, and Samoa.⁴³⁶ *United States v. Wong Kim Ark* was decided amidst this riot of expansion, and whether it dictated citizenship for the racially suspect inhabitants of the new territories was immediately a subject of concern.⁴³⁷ The Indian assimilation program, however, had produced Supreme Court cases asserting vast power over Indian tribes independent of tribal consent, treaty obligations, or constitutional authority.⁴³⁸ Drawing on the unmoored power established in these precedents and the *Chinese Exclusion Cases*,⁴³⁹ the United States established federal authority over the insular territories not fully bound by the Constitution, territories not destined to become states, subjects without promise of citizenship, and citizens without full voting or other rights.⁴⁴⁰

On June 2, 1924, President Coolidge signed the law establishing birthright citizenship for American Indians.⁴⁴¹ Neither Indians nor Indian advocacy groups advocated for the Act.⁴⁴² A congressional report noted that two-thirds of Indians were already citizens as a result of allotment and other measures⁴⁴³ and “Indians, as a whole, are not much concerned about citizenship.”⁴⁴⁴ The leaders of the Society of American Indians, a group of western-educated Indian intellectuals,⁴⁴⁵ had begun to reject citizenship as assimilation, emphasizing instead Indian

⁴³⁶ Cleveland, *supra* note 29, at 208.

⁴³⁷ See 32 CONG. REC. 574 (1899) (statement of Sen. Allen); *American Citizenship*, LOUISVILLE COURIER J., July 10, 1898, at 20.

⁴³⁸ See, e.g., *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902) (upholding federal authority to lease tribal property without tribal consent); *United States v. Kagama*, 118 U.S. 375, 376–78 (1886) (upholding federal authority to prosecute crimes between Indians); *Ex parte Crow Dog*, 109 U.S. 556, 569 (1883) (asserting that Indians were subject to U.S. regulation as “wards, subject to a guardian”).

⁴³⁹ See Cleveland, *supra* note 29, at 10–12 (linking cases regarding Indians and immigrants to cases regarding insular territories).

⁴⁴⁰ *Id.* at 237–41; Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CAL. L. REV. 1181, 1187–88 (2014).

⁴⁴¹ Act of June 2, 1924, ch. 233, 43 Stat. 253.

⁴⁴² Gary C. Stein, *The Indian Citizenship Act of 1924*, 47 N.M. HIST. REV. 257, 258 (1972).

⁴⁴³ JOSEPH E. OTIS, COMM. OF ONE HUNDRED APPOINTED BY THE SEC’Y OF THE INTERIOR, THE INDIAN PROBLEM: RESOLUTION AND REVIEW, H.R. DOC. NO. 68-149, at 6 (1924).

⁴⁴⁴ *Id.* at 40.

⁴⁴⁵ See MADDIX, *supra* note 153, at 10–11, 107–08; Bruyneel, *supra* note 140, at 33–35.

tradition and culture.⁴⁴⁶ Other Indians were even less positive about the Citizenship Act. Benjamin Caswell, president of a coalition of Minnesota Chippewa tribes, believed citizenship would deprive them of the right to meet as a political body; Wyandotte Jane Zane Gordon wrote that Indians could not be forced to accept the dubious gift of citizenship; and the nations of the Iroquois Confederacy sent the president and Congress letters respectfully declining the citizenship extended without their consent.⁴⁴⁷

Although organizations were stepping up advocacy for protection of Indian religious, cultural, and property rights, citizenship was not their focus.⁴⁴⁸ One non-Indian reformer, Herbert Spinden, even borrowed from anti-immigrant rhetoric to declare that if given citizenship, Indians “would form a dangerous mass of alien stock in our political system.”⁴⁴⁹ The Committee of One Hundred, a federal commission of scholars, scientists, and leaders of Indian advocacy organizations, had just submitted its report on Indian policy, but rejected a resolution for immediate citizenship.⁴⁵⁰ Committee member Arthur Parker, Ely Parker’s nephew and former president of the Society of American Indians, declared that the committee rejected the resolution to “protect them from the rapacity of certain elements that prey[ed] upon” them.⁴⁵¹ The committee’s main influence on the bill appears to have been a provision to ensure that citizenship would not affect Indian tribal or other property rights.⁴⁵²

A careful history speculates that the Indian Citizenship Act did not reflect specifically Indian concerns, but was an effort of the dwindling Progressive movement in Congress to remove the authority of the notoriously inefficient Indian Bureau to grant or deny citizenship.⁴⁵³

⁴⁴⁶ Prominent SAI member Charles Eastman referred to the “savagery of civilization,” rejected mandatory citizenship, and emphasized the superiority of traditional Native education and religion over modern versions. MADDOX, *supra* note 153, at 131, 133, 137 (quoting CHARLES A. EASTMAN, FROM THE DEEP WOODS TO CIVILIZATION: CHAPTERS IN THE AUTOBIOGRAPHY OF AN INDIAN 139 (Univ. of Neb. Press 1977) (1916)). Gertrude Bonnin rejected the idea of the “whites as elevating the Indian,” and wrote condemning boarding schools and fought to preserve tribal culture and self-governance. *Id.* at 145–51 (quoting Letter from Gertrude Bonnin, to Carlos Montezuma (June 1901)); *see also* Bruyneel, *supra* note 140, at 33 (“[T]he more active” pro-citizenship voices in the SAI “advocated a form of political integration into the U.S. polity that subtly and carefully challenged the boundaries of American citizenship.”).

⁴⁴⁷ Bruyneel, *supra* note 140, at 136–38.

⁴⁴⁸ Stein, *supra* note 442, at 257–58, 261–62.

⁴⁴⁹ *Id.* at 262 (quoting Herbert J. Spinden, *What About the Indian?*, WORLD’S WORK, Feb. 1924, at 384).

⁴⁵⁰ *Id.* at 260–61.

⁴⁵¹ *Id.* at 271 n.14 (quoting Arthur C. Parker, Letter to the Editor, N.Y. TIMES, Jan. 20, 1924, at 8.).

⁴⁵² *Id.* at 261.

⁴⁵³ *Id.* at 268.

Given recent diminishment of the privileges associated with citizenship, the Citizenship Act cannot be explained as a strong blow for Indian equality. The bill's author, Representative Homer Snyder of New York, assured the House that it was "not the intention of this law to have any effect upon the suffrage qualifications in any State" or affect "tribal relation[s] or any property" rights, but simply make the Indian "an American citizen, subject to all restrictions to which any other American citizen is subject, in any State."⁴⁵⁴ The law clearly did not release Indians from federal domination. In fact, the 1924 Report of the Board of Indian Commissions declared the Act "a challenge to the Government to intensify its Indian Service activities."⁴⁵⁵

In 1933, Luther Standing Bear called the Indian Citizenship Act "[t]he greatest hoax ever perpetrated" on the Indians, declaring that the bill changed "not in the slightest measure the condition of the Indian. Not one agent was removed from office . . . and the reservation and reservation rule still exist."⁴⁵⁶ In the name of citizenship, Indians had lost their land, their children, and their legal independence, and got almost nothing in return.

3. Aftermath II: Citizen Elk?

John Elk seems to disappear from written records after 1884.⁴⁵⁷ He may have changed his westernized name,⁴⁵⁸ he may have died, or, despite obsessive tracking of Indians in this period, he may simply have been missed by census takers. Whatever the case, we cannot know the aftermath for him. What we do know is what happened to the Winnebago Tribe.

By 1890, almost all Winnebago reservation land was allotted.⁴⁵⁹ With little interest in participating in another federal experiment, most Winnebago maintained their traditional villages until whites began agitating for their allotted land.⁴⁶⁰ Responding to this pressure, Congress

⁴⁵⁴ 65 CONG. REC. 9303 (1924) (statement of Rep. Snyder).

⁴⁵⁵ Stein, *supra* note 442, at 269 (quoting 1924 BOARD OF INDIAN COMMISSIONERS TO THE SECRETARY OF THE INTERIOR ANN. REP. 2).

⁴⁵⁶ STANDING BEAR, *supra* note 1, at 229; MADDOX, *supra* note 153, at 155.

⁴⁵⁷ Records do repeatedly show a Sam Elk, who appears to have had a wife who died sometime before 1890, but both his birth year (closer to 1855 than 1845) and birth location (given as either Minnesota or Nebraska) are inconsistent with John's. The historians of the Winnebago Tribe of Nebraska had no records of this notable ancestor. Conversation with David Smith, Historian, Winnebago Tribe (May 5, 2013).

⁴⁵⁸ Such names were generally assumed to deal with non-Indians, and might be changed for convenience. *Id.*

⁴⁵⁹ See Lurie, Cultural Change, *supra* note 235, at 177.

⁴⁶⁰ *Id.*

authorized leasing of allotments, and by 1898, eighty percent of allotted Winnebago land was leased to non-Indians.⁴⁶¹ Federal agents administered the lease proceeds; their approval was necessary before Winnebago allottees could withdraw their own money.⁴⁶² Then, after Congress amended the Allotment Act to permit “competent” allottees to sell their allotments,⁴⁶³ the Winnebago fell prey to land grabbers who induced them to persuade agents to let them sell their lands for quick cash.⁴⁶⁴ By 1914, non-Indians owned almost two-thirds of the reservation.⁴⁶⁵ Dispossessed of land, their money controlled by federal agents, and second-class citizens in the white-run towns now dominating the reservation, Winnebago had high rates of alcoholism and dissatisfaction; by the 1950s, many were leaving the reservation altogether.⁴⁶⁶

A much-publicized case of the era reveals the barriers citizen Winnebago still faced. Like many reservation Indians,⁴⁶⁷ Winnebago Sergeant John Rice enlisted during World War II and received a Bronze Star and Purple Heart for his service.⁴⁶⁸ In 1945, he returned home and married Evelyn, a white woman whose father owned a farm on the Winnebago reservation.⁴⁶⁹ He re-upped to fight in Korea and was killed leading his squad in combat in 1950.⁴⁷⁰ Because he was not white (or, the courts reported, was eleven-sixteenths Winnebago and five-sixteenths white), several cemeteries refused his wife’s attempts to purchase a burial plot for him, until she was finally able to obtain one in Sioux City, Iowa.⁴⁷¹ After seeing Indians at Sergeant Rice’s burial, however, cemetery officials asked the undertaker about his race, and then refused to allow his coffin to be lowered into the ground.⁴⁷² The cemetery’s contract restricted burials to whites, and (the cemetery declared in a pamphlet about the controversy) “Canadian archaeologists

⁴⁶¹ PRUCHA, CHRISTIAN REFORMERS, *supra* note 394, at 260–62.

⁴⁶² Lurie, Cultural Change, *supra* note 235, at 178.

⁴⁶³ Burke Act of 1906, ch. 2348, 34 Stat. 182, 183.

⁴⁶⁴ *Id.* at 178–79.

⁴⁶⁵ *Id.* at 180.

⁴⁶⁶ *Id.* at 182, 185, 217.

⁴⁶⁷ Although some Indians resisted induction and the imposed citizenship it implied, noncitizen Indians had voluntarily enlisted in World War I in large numbers, and in World War II voluntary enlistees had outnumbered inductees by two to one. ALISON R. BERNSTEIN, AMERICAN INDIANS AND WORLD WAR II: TOWARD A NEW ERA IN INDIAN AFFAIRS 22–42 (1991).

⁴⁶⁸ *Soldier’s Burial*, TIME, Sept. 10, 1951, at 28; *John Raymond Rice*, ARLINGTON NAT’L CEMETERY, <http://www.arlingtoncemetery.net/jrrice.htm> (last updated May 13, 2006).

⁴⁶⁹ David Hendee, *Wife in Racial Flap at Cemetery Dies*, OMAHA WORLD-HERALD, Jan. 28, 2005, at 2B, reprinted at *John Raymond Rice*, *supra* note 468.

⁴⁷⁰ *John Raymond Rice*, *supra* note 468.

⁴⁷¹ *Rice v. Sioux City Mem’l Park Cemetery, Inc.*, 60 N.W.2d 110, 112 (Iowa 1953).

⁴⁷² *Id.* at 113.

have reported definite proof that American Indians are descended from Wild Mongolian Nomads that came to North America from Asia by way of Alaska. In other words, the American Indian is not of Caucasian descent.”⁴⁷³ The Iowa Supreme Court rejected Evelyn’s claims that the cemetery violated the Fourteenth Amendment,⁴⁷⁴ and the U.S. Supreme Court, burned from the backlash against *Brown v. Board of Education*,⁴⁷⁵ twice agreed to hear the case then twice found a way not to rule on it.⁴⁷⁶ President Truman publicly condemned the Iowa cemetery and offered Arlington Cemetery instead; Rice was buried there with military honors in 1951.⁴⁷⁷

While Rice’s case was pending, Nebraska became one of several states to obtain jurisdiction over Indians on reservations under Public Law 280.⁴⁷⁸ The law further undermined the already-declining Winnebago tribal government.⁴⁷⁹ It was not individual assimilation but tribal group action that turned the decline around. The work of Henry Roe Cloud, a Winnebago man born in the early years of allotment, may even have contributed to this policy shift. Initially a passionate advocate of assimilation and Christianization for Indians, Cloud later served as the only Indian contributor to the 1928 Meriam Report, which influentially condemned assimilation policy and redefined Indian citizenship to mean active participation in one’s own community.⁴⁸⁰ In the 1930s, Cloud was a tireless advocate for the Indian Reorganization Act, which sought to enhance tribal self-government, and as superintendent of Haskell Indian Institute, he advocated preservation of “Indian race culture.”⁴⁸¹

The 1930s encouragement of tribal self-government quickly gave way to a policy of terminating the special Indian rights in the name of granting Indians “all of the rights and prerogatives pertaining to American citizenship.”⁴⁸² In the 1970s, however, when federal policy

⁴⁷³ *Id.* (quoting the pamphlet).

⁴⁷⁴ *Id.* at 116.

⁴⁷⁵ STEPHEN L. WASBY ET AL., *DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES* 137 (1977) (arguing that the Court declined to rule on the case to avoid generating further unpopular desegregation decisions).

⁴⁷⁶ *Rice v. Sioux City Mem’l Park Cemetery, Inc.*, 349 U.S. 70 (1955) (dismissing certiorari as improvidently granted); *Rice v. Sioux City Mem’l Park Cemetery, Inc.*, 348 U.S. 880 (1954) (per curiam) (affirming without opinion because Court was evenly divided).

⁴⁷⁷ *Indian Hero Is Buried in Arlington Cemetery After Being Refused Interment in Sioux City*, N.Y. TIMES, Sept. 6, 1951, at 3.

⁴⁷⁸ 18 U.S.C. § 1162 (2012); 28 U.S.C. § 1360 (2012).

⁴⁷⁹ Milo Colton, *Self-Determination and the American Indian: A Case Study*, 4 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 1, 2–3, 24 (2001).

⁴⁸⁰ JOEL PFISTER, *THE YALE INDIAN: THE EDUCATION OF HENRY ROE CLOUD* 139 (2009).

⁴⁸¹ DAVID W. MESSER, *HENRY ROE CLOUD: A BIOGRAPHY* 109–11 (2010) (quoting Henry Roe Cloud, *Haskell and Her New Frontiers*, INDIAN LEADER, June 1932).

⁴⁸² Indians, H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953).

shifted back toward tribal self-determination, ideas like those espoused by Cloud helped lay the groundwork for Winnebago transformation. Since the 1980s, the Winnebago have won back jurisdiction over their reservation, established tribal health and welfare programs, and cut tribal unemployment by two-thirds through their economic development corporation Ho-Chunk, Inc.⁴⁸³ Like tribes across the nation, the Winnebago now have citizenship in the sense of autonomy and self-governance, but they gained it by working through their tribe, not by abandoning it.

B. United States v. Wong Kim Ark

1. Litigation

On October 2, 1895, with Wong Kim Ark still isolated on a steamship in the San Francisco harbor, prominent San Francisco attorney Joseph Naphaly filed a writ of habeas corpus on behalf of Wong's friend Hoo Lung Soeey.⁴⁸⁴ On November 11, 1895, Thomas Riordan joined Naphaly to file a more complete petition with Wong's verification.⁴⁸⁵ On January 3, 1896, district court Judge William Morrow opined that having citizenship follow that of one's parents was "undoubtedly more logical, reasonable, and satisfactory," but the law of the circuit required him to uphold birthright citizenship.⁴⁸⁶ He declared Wong a citizen and ordered him released upon payment of a \$250 bond.⁴⁸⁷

Deluged with letters from San Francisco lawyer George Collins, for whom the case against Chinese birthright citizenship was a "special hobby,"⁴⁸⁸ the U.S. Attorney General decided to use Wong's case to test the issue before the Supreme Court.⁴⁸⁹ Solicitor General Holmes Conrad filed a rambling opening brief, much of it showing, Conrad admitted, that "the opinions of the Attorneys-General, the decisions of the Federal and State courts, and, up to 1885, the rulings of the State Department all concurred in the view that birth in the United States conferred

⁴⁸³ Colton, *supra* note 479, at 33–35.

⁴⁸⁴ Wong Record, *supra* note 310, at 2–3.

⁴⁸⁵ *Id.* at 5–9.

⁴⁸⁶ *In re Wong Kim Ark*, 71 F. 382, 392 (N.D. Cal. 1896).

⁴⁸⁷ Wong Record, *supra* note 310, at 23–24.

⁴⁸⁸ Salyer, *Wong Kim Ark*, *supra* note 30, at 65 (quoting Letter from Henry S. Foote, U.S. Attorney, to Holmes Conrad (Nov. 6, 1895)).

⁴⁸⁹ *Chinese as Citizens*, S.F. CALL, Jan. 4, 1896, at 5. The issue had reached the Supreme Court once before, but the Court found the petitioner was not in fact born in the United States. *Quock Ting v. United States*, 140 U.S. 217 (1891).

citizenship.”⁴⁹⁰ To counter this broad consensus, Conrad made several disjointed assertions: (1) there was no national common law or national citizenship, only derivative state citizenship;⁴⁹¹ (2) Roman/international law followed the principle of citizenship by descent;⁴⁹² (3) the Fourteenth Amendment phrase “subject to the jurisdiction” incorporated the international law definition and Wong’s citizenship, under international law, followed that of his parents;⁴⁹³ and (4) the exclusion laws showed that the United States did not want Chinese to be citizens anyway.⁴⁹⁴

The arguments hung together so poorly as to suggest that the real target for Conrad—a proud Virginian and veteran of the Confederate army—was Reconstruction and the shift in federal power it created. The Fourteenth Amendment, the brief asserted, was of “doubtful validity” because of the coercion of ten southern states into ratification.⁴⁹⁵ Even “if ever lawfully adopted,” the brief argued, both national citizenship and the Fourteenth Amendment were products of the “corrupt ignorance and debauched patriotism” that led to a “reconstruction’ of States which had contributed largely to the construction of the United States.”⁴⁹⁶

George Collins filed a second brief for the United States in an “of counsel” capacity.⁴⁹⁷ His brief was more coherent than Conrad’s, if no less radical. He argued that although it was “generally . . . [accepted] that a person born within the United States is *ipso facto* a citizen,” this was a mere “traditionary dogma” based on “ignorance.”⁴⁹⁸ The rule of *jus soli*, Collins insisted, was “peculiarly feudal and monarchical, and therefore foreign to republican institutions.”⁴⁹⁹ “Clearly,” he wrote (in a use of the term legal writing professors would condemn) the Roman principle of citizenship by descent “must be the correct one, and it is now the prevailing law.”⁵⁰⁰ (Collins seems not to have been struck by the feudalism of the rule he advocated, which determined a child’s status according to the status of her father, if legitimate, her mother, if not, and of the state, if a “[f]oundling.”⁵⁰¹) The founders allegedly adopted the

⁴⁹⁰ Brief for the United States at 28, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 132).

⁴⁹¹ *Id.* at 8–9, 11–19.

⁴⁹² *Id.* at 9–11.

⁴⁹³ *Id.* at 39, 43, 48–51.

⁴⁹⁴ *Id.* at 42, 45.

⁴⁹⁵ *Id.* at 46; see also *Maj. Homes Conrad*, 24 CONFEDERATE VETERAN, 1916, at 30.

⁴⁹⁶ Brief for the United States at 37, 16–17, *Wong Kim Ark*, 169 U.S. 649 (No. 132).

⁴⁹⁷ Brief on Behalf of the Appellant at 1, 39, *Wong Kim Ark*, 169 U.S. 649 (No. 132).

⁴⁹⁸ *Id.* at 1–3, 33.

⁴⁹⁹ *Id.* at 6.

⁵⁰⁰ *Id.* at 7.

⁵⁰¹ *Id.* (quoting BAR ON INT’L LAW § 31).

Roman principle by establishing the nation for “[w]e the people,” including “ourselves and *our posterity*,”⁵⁰² as did the Fourteenth Amendment through the term “subject to the jurisdiction.”⁵⁰³ The brief bolstered its legal arguments with racism, declaring that the “offspring” of Chinese subjects were “just as obnoxious” as their parents, and the “honor and dignity in American citizenship” should be kept “sacred from the foul and corrupting taint of a debasing alienage.”⁵⁰⁴

Although Thomas Riordan filed a brief initial statement of the case, the main briefs were by Maxwell Evarts and J. Hubley Ashton,⁵⁰⁵ leading Supreme Court lawyers whom the Six Companies had previously secured to challenge the Geary Act in the Supreme Court.⁵⁰⁶ Their briefs expressed disbelief that the United States would cede the question of citizenship to international law, and noted that the so-called international law rule was actually not followed by many European nations.⁵⁰⁷ The rule in the United States—established by common law before 1866 and statutory and constitutional law thereafter—was that those born in the United States were its citizens, regardless of the citizenship of their parents.⁵⁰⁸ Although Conrad and Collins relied on *Elk v. Wilkins* to argue that “subject to the jurisdiction” meant full political allegiance, Evarts and Ashton argued that *Elk* reflected the distinct status of Indian tribes as independent political communities on U.S. soil; no foreign country, however, was authorized to “establish within our borders an independent political community.”⁵⁰⁹ Ashton’s brief also set forth the legislative history of the Fourteenth Amendment and the Reconstruction Congress’ agreement on birthright citizenship of children of Chinese immigrants.⁵¹⁰

In 1898, the Court ruled for Wong. Justice Horace Gray’s majority opinion catalogued the voluminous legal evidence for the rule of birthright citizenship before, during, and after Reconstruction. Birthright citizenship was an “ancient and fundamental rule.”⁵¹¹ The Fourteenth Amendment affirmed this rule “in clear words and in

⁵⁰² *Id.* at 15 (quoting U.S. CONST. pmb.).

⁵⁰³ *Id.* at 27 (quoting U.S. CONST. amend. XIV).

⁵⁰⁴ *Id.* at 34.

⁵⁰⁵ Statement of the Case for Appellee, *Wong Kim Ark*, 169 U.S. 649 (No. 132); Brief of the Appellee, *Wong Kim Ark*, 169 U.S. 649 [hereinafter Evarts Brief]; Brief for the Appellee, *Wong Kim Ark*, 169 U.S. 649 [hereinafter Ashton Brief]. “Evarts Brief” refers to the brief submitted in the 1895 term and signed by Maxwell Evarts, while “Ashton Brief” refers to the brief signed by J. Hubley Ashton and submitted in the 1896 term.

⁵⁰⁶ SALYER, LAWS HARSH AS TIGERS, *supra* note 276, at 47.

⁵⁰⁷ Evarts Brief, *supra* note 505, at 10, 13–14, 46.

⁵⁰⁸ *Id.* at 6.

⁵⁰⁹ *Id.* at 15, 27 (quoting U.S. CONST. amend. XIV).

⁵¹⁰ Ashton Brief, *supra* note 505, at 19–34.

⁵¹¹ *Wong Kim Ark*, 169 U.S. at 693.

manifest intent,” including as citizens “children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States.”⁵¹² The limited exceptions were for “children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and . . . children of members of the Indian tribes owing direct allegiance to their several tribes.”⁵¹³

The dissent followed the arguments of the solicitor general. The United States had adopted and the Fourteenth Amendment reflected the Roman law rule of citizenship based on descent. Justice Fuller wrote the dissent, and Justice Harlan joined him, revealing again the gap in his racial egalitarianism when it came to the Chinese.⁵¹⁴

The majority also noted that rejecting birthright citizenship for children of noncitizens would “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.”⁵¹⁵ The Court underestimated the numbers: fifteen million white native-born United States residents—almost a quarter of the white native-born population—had foreign-born parents.⁵¹⁶ Political parties actively courted the support of this group, and the government delayed oral arguments in *Wong Kim Ark* until after the 1896 election.⁵¹⁷ Interest convergence, therefore, surely aided Wong’s victory.

2. Aftermath I: Exclusion’s Spread

Although the interests of white immigrant groups contributed to the result in *Wong*, the tactics and arguments originating with Chinese exclusion were soon redeployed against all new migrants.⁵¹⁸ Pressure from the many voting citizens with immigrant origins and the business interests still clamoring for new workers delayed the legal influence of the nativists.⁵¹⁹ But by the 1920s, American traditions of inclusion were transformed in pursuit of the goal, in the words of one Immigration

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156 (1996) (arguing that Justice Harlan “was a faithful opponent of the constitutional rights of Chinese for much of his career on the Court”).

⁵¹⁵ *Wong Kim Ark*, 169 U.S. at 694. Justice Field made the same point in the 1884 *Look Tin Sing* arguments. See *Look Tin Sing: An Important Case Argued in the Circuit Court Yesterday*, DAILY ALTA CAL., Sept. 28, 1884.

⁵¹⁶ 1900 CENSUS, *supra* note 49, at vol. 1, cxxxiii.

⁵¹⁷ SALYER, *Wong Kim Ark*, *supra* note 30, at 51, 69–70.

⁵¹⁸ See generally HIGHAM, *supra* note 121.

⁵¹⁹ *Id.*

Commissioner, of drawing “the meshes of the sieve . . . closer and tighter” to “invite into our house virile men, strong men,” but “protect ourselves” against the rest.⁵²⁰

Between the 1890s and 1920s, Congress enacted laws excluding those found to have a “loathsome” (code for sexually-transmitted) or “dangerous contagious disease,”⁵²¹ “epileptics,” those convicted of misdemeanors “involving moral turpitude,” anarchists,⁵²² those who practiced or even believed in polygamy, those who were “mentally or physically defective,”⁵²³ and those who possessed literature from anarchist and other radical groups for distribution.⁵²⁴ Trapped between the Scylla of protection of American jobs and the Charybdis of protection of the public fisc, immigrants could be excluded both if they were deemed “likely to become a public charge” and if they already had a promise of employment in the United States.⁵²⁵ In 1929, entry without authorization itself became a criminal offense.⁵²⁶

Although these laws were inspired in part by racialized fears of white immigrants from eastern and southern Europe, particularly Jews and Italians,⁵²⁷ blatantly racial bars increased as well. In 1902, Congress made the Chinese exclusion laws permanent, and added Chinese migrants from the new island territories—Hawaii, Puerto Rico, and the Philippines—to their scope.⁵²⁸ The 1908 “Gentleman’s Agreement” excluded Japanese laborers,⁵²⁹ while a 1917 statute prohibited all immigration from an “Asiatic barred zone,” stretching from Afghanistan to the Pacific, excluding only Japan and the Philippines,⁵³⁰ then a U.S. territory.

In 1924, the classification of immigrants by their racial and ethnic desirability became complete. The 1924 Johnson Act limited immigration from any country to two percent of the number from that country present in the United States in 1890, before substantial immigration from eastern and southern Europe (i.e., Italians and Jews)

⁵²⁰ SALYER, *LAWS HARSH AS TIGERS*, *supra* note 276, at 227 (quoting Henry J. Skeffington, Commissioner for Immigration, Remarks at the 1915 Immigration Consultation at San Francisco 166–67 (Aug. 9–11, 1915)).

⁵²¹ Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084.

⁵²² Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214.

⁵²³ Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875.

⁵²⁴ Act of June 5, 1920, ch. 251, 41 Stat. 1008.

⁵²⁵ Immigration Act of 1891, ch. 551, §§ 1, 3, 26 Stat. 1084.

⁵²⁶ Act of Mar. 4, 1929, ch. 690, § 1, 45 Stat. 1551.

⁵²⁷ HIGHAM, *supra* note 121, at 160–75 (discussing racialized opposition to immigration from Europe, particularly against Jews and Italians).

⁵²⁸ Act of Apr. 29, 1902, ch. 641, 32 Stat. 176.

⁵²⁹ TAKAKI, *supra* note 251, at 320.

⁵³⁰ Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874; *see* Immigration Act of 1921, ch. 8, § 2(a)(6), 42 Stat. 5 (referring to the prohibited region as “the so-called Asiatic barred zone”).

began.⁵³¹ Descendants of slaves, American “aborigines,” and immigrants ineligible for citizenship were excluded entirely from quotas.⁵³²

Women too were targeted, to prevent Asians from forming families in the United States, protect sexual morals from degrading foreign influences, police relationships across national or racial lines, and codify the conviction that a woman’s economic and political identity was derivative of her husband’s.⁵³³ By 1917 one could be deported for engaging in prostitution at any time after entry or committing a crime of “moral turpitude” within five years after entry.⁵³⁴ Laws restricting prostitutes and immigrants likely to become public charges were used to exclude single women as well as Chinese and Japanese wives.⁵³⁵ Marriage could also lead to exclusion or inclusion. Between 1907 and 1922 any American woman marrying a foreigner lost her citizenship;⁵³⁶ even after that a woman could lose her citizenship for marrying a man racially “ineligible to citizenship.”⁵³⁷ Although the 1924 quota act freely admitted white immigrant wives seeking to join their citizen husbands,⁵³⁸ it completely barred Asian wives from joining theirs.⁵³⁹

Responding to Chinese success in using the rule of law to challenge exclusion⁵⁴⁰ and the self-preservation narrative employed in the Chinese exclusion cases,⁵⁴¹ rights associated with entry and deportation were also transformed. In rules preserved in current statutes,⁵⁴² Congress deprived courts of jurisdiction to review administrative decisions to exclude immigrants at the border.⁵⁴³ Asserting that untrammelled federal power to exclude and deport foreigners was “essential to self-preservation”⁵⁴⁴

⁵³¹ Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159.

⁵³² *Id.* § 11(d)(4).

⁵³³ See EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 3–8 (2002); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014); Volpp, *supra* note 124, at 424–26.

⁵³⁴ Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889.

⁵³⁵ See LUIBHÉID, *supra* note 533, at 9–11; see also LEE, AMERICA’S GATES, *supra* note 127, at 93–97; Tanaka Kei, *Marriage as Citizen’s Privilege: Japanese Picture Marriage and American Social Justice*, 31 NANZAN REV. AM. STUD. 131, 134–38 (2009).

⁵³⁶ Act of Sept. 22, 1922, ch. 411, § 4, 42 Stat. 1021, 1022.

⁵³⁷ *Id.* § 3.

⁵³⁸ Immigration Act of 1924, ch. 190, § 4, 43 Stat. 153, 155.

⁵³⁹ *Chang Chan v. Nagle*, 268 U.S. 346 (1925). In 1930, Congress relaxed the principle with respect to pre-1924 marriages. Act of June 13, 1930, ch. 476, 46 Stat. 581.

⁵⁴⁰ SALYER, LAWS HARSH AS TIGERS, *supra* note 276, at 26–29.

⁵⁴¹ See Cleveland, *supra* note 29, at 127–45.

⁵⁴² See 8 U.S.C. § 1225(b)(1)(A)(i) (2012) (explaining that there is no administrative or judicial review of decisions to deny entry); *cf.* *United States v. Barajas-Alvarado*, 655 F.3d 1077 (9th Cir. 2011) (noting that this principle is only limited when the exclusion serves as the basis for criminal prosecution).

⁵⁴³ Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1084; Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390 (“Enforcement of the Chinese Exclusion Act”).

⁵⁴⁴ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

the Supreme Court repeatedly upheld these laws against due process challenges.⁵⁴⁵ Again invoking national self-preservation, the Court also rejected First Amendment challenges to deportation for expressing anarchist views,⁵⁴⁶ privileges and immunities challenges to the law expatriating women who married noncitizens,⁵⁴⁷ and declared the right to exclude immigrants based on race “no longer open to discussion.”⁵⁴⁸

Noncitizenship haunted immigrants legally within United States borders as well. Although Chinese won numerous nineteenth-century cases challenging state laws discriminating against noncitizen Chinese, the Fourteenth Amendment offered only limited resistance to a new wave of state laws preventing ownership, lease, or property ownership by noncitizens who had not declared their intent to become citizens.⁵⁴⁹ These laws targeted Japanese immigrants, who, in the wake of Chinese exclusion, occupied the space Chinese had left both as an immigrant labor force and as an unassimilable other.⁵⁵⁰ Although the Supreme Court had held that a pro-labor statute requiring employers to have eighty percent citizen employees was unconstitutional,⁵⁵¹ the Court upheld the alien land laws,⁵⁵² overlooking their racially discriminatory intent and finding that ownership and occupancy of land affected “the safety and power of the state itself.”⁵⁵³

As with Indians, the value of citizenship also decreased to protect federal discretion. Lower courts initially held that those claiming U.S. citizenship had to be granted judicial review of exclusion by immigration officials at the border.⁵⁵⁴ In *United States v. Ju Toy*,⁵⁵⁵ the district court found, after a trial of the evidence, that Ju Toy (like Wong, a California-born cook) was a citizen born in the United States,

⁵⁴⁵ *United States v. Ju Toy*, 198 U.S. 253 (1905); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895).

⁵⁴⁶ *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290–92 (1904).

⁵⁴⁷ *Mackenzie v. Hare*, 239 U.S. 299 (1915).

⁵⁴⁸ *Yamataya v. Fisher*, 189 U.S. 86, 97 (1903).

⁵⁴⁹ Although restrictions on property ownership by noncitizens had a long history in the United States and some forms still continue, see Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1 (2013); Rose Cuisson Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010), these laws were both more encompassing, preventing beneficial use as well as descent, and were distinctive in targeting racially-other immigrants, see Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 38–40 (1998).

⁵⁵⁰ Aoki, *supra* note 549, at 44–45.

⁵⁵¹ *Truax v. Raich*, 239 U.S. 33 (1915).

⁵⁵² *Frick v. Webb*, 263 U.S. 326 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197, 221 (1923); *Webb v. O’Brien*, 263 U.S. 313 (1923).

⁵⁵³ *Terrace*, 263 U.S. at 221.

⁵⁵⁴ SALYER, LAWS HARSH AS TIGERS, *supra* note 276, at 108–09.

⁵⁵⁵ 198 U.S. 253, 253 (1905).

reversing the customs collector's decision.⁵⁵⁶ The Supreme Court reversed, holding that Ju Toy was not entitled to judicial review. Dissenting, Justice Brewer called the examination by the collector a "star-chamber proceeding of the most stringent sort."⁵⁵⁷ Regulations dictated that Chinese seeking to enter the United States should be kept from communicating with "any persons other than the officials under [government] control," and "[examined] separate and apart from the public, in the presence of . . . such witness or witnesses only as the examining officer shall designate."⁵⁵⁸ Although those same regulations provided that the exclusion acts did not apply to ethnic Chinese born in the United States,⁵⁵⁹ the Court in *Ju Toy* in effect treated the applicant's race and his citizenship as the same thing. The writ of habeas corpus—that gift of the Reconstruction Congress to all seeking to vindicate Reconstruction's ideals—could be denied to Chinese citizens stopped at the border.

3. Aftermath II: Citizen Wong

In 1904, Wong Kim Ark traveled to China again. In his departure photo, Wong looks confident, even happy.⁵⁶⁰ Although those claiming to be native-born citizens were still being stopped at the border, and the Supreme Court rejected Ju Toy's challenge to this exclusion that same year,⁵⁶¹ Wong (as his departure papers noted) had been certified a citizen by the federal courts.⁵⁶² He could go back to see his parents, wife, and children, and be confident of readmission.

Between 1910 and 1926, each of Wong's four sons would seek to join him in America, under the rule that marital children of resident U.S. citizens wherever born were eligible for citizenship.⁵⁶³ Two were initially rejected as fraudulent "paper sons"; one of these, already confined at Angel Island for months, decided not to pursue an appeal, but the second appealed and won.⁵⁶⁴ At least one, Wong Yook Sue, was

⁵⁵⁶ *Id.* at 259; see also SALYER, LAWS HARSH AS TIGERS, *supra* note 276, at 111.

⁵⁵⁷ *Ju Toy*, 198 U.S. at 268 (Brewer, J., dissenting).

⁵⁵⁸ *Id.* at 266–67 (quoting certified questions from the Ninth Circuit).

⁵⁵⁹ *Id.* at 274.

⁵⁶⁰ *Identification Photograph on Affidavit*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/296479?q=*:* (last visited Feb. 14, 2016).

⁵⁶¹ *Ju Toy*, 198 U.S. at 263–64.

⁵⁶² *Identification Photograph on Affidavit*, *supra* note 560.

⁵⁶³ Act of Feb. 10, 1855, ch. 71, 10 Stat. 604.

⁵⁶⁴ See Testimony of Wong Kim Ark, *supra* note 331 (testifying that Wong Yook Sue had been denied admission but was admitted on appeal); Letter from Luther C. Steward, Acting Commissioner, Immigration Service, to Supervising Inspector, Immigration Service (Jan. 10, 1911) (on file with author) (noting that Wong Yoke Fun had returned to China on Jan. 9, 1911); Letter from O.P. Stiger, to Luther C. Steward, Acting Commissioner of Immigration,

married when he made his initial journey, replicating his father's life between two nations.⁵⁶⁵

These sons did not all stay in America, and could not always live with Wong when they were there. When the youngest boy, Wong Yook Jim made the trip in 1926, the oldest, Wong Yook Fun, was already back in China helping the eleven-year-old begin his journey. The boy was confined on Angel Island for weeks,⁵⁶⁶ and would have been isolated from friends or family to prevent coaching by "wily Chinese."⁵⁶⁷ At Yook Jim's hearing, Wong testified that his third son, Wong Yook Sue, lived with him and worked as a pantry boy in a San Francisco hotel, while the second, Wong Yook Thue, was working in railway camps in Arizona.⁵⁶⁸ He also testified that he had not had work as a cook for two months, and that he had not been back to China since 1914, before Yook Jim was born.⁵⁶⁹

Although Wong's citizenship created citizenship for his sons, he probably never felt truly included in America. As one American-born Chinese explained for a 1931 study, "We are American citizens in name but not in fact."⁵⁷⁰ The 1890 and 1900 censuses did not even report the number of native-born Chinese citizens, lumping them together with other Chinese.⁵⁷¹ Wong retired to China in the 1930s, at age sixty-two, and never came back.⁵⁷²

Today, Chinese Americans have created central elements of American culture, and like American Indians helped contribute to the meaning of American citizenship itself. By 1966, Chinese were being held up as a model minority, and this success was attributed to those same factors—hard work, thrift, adherence to family and tradition—once deemed to make them unassimilable.⁵⁷³ The Chinese-American food developed by cooks like Wong is "arguably the most pervasive cuisine on the planet"; there are more Chinese restaurants in the United

Angel Island Station (on file with author) (withdrawing appeal and noting that Wong Yoke Fun had arrived on October 28, 1910).

⁵⁶⁵ List or Manifest of Alien Passengers on S.S. President Lincoln (June 18, 1924) (listing Wong Yook Sue as married to Lee Shee from China on his arrival in the United States) (on file with National Archives at San Francisco).

⁵⁶⁶ Action Sheet Arrival of Wong Yook Jim, U.S. Dept. of Labor (Aug. 3, 1926) (noting arrival on June 30, 1926 and admission on July 24, 1926) (on file with National Archives at San Francisco).

⁵⁶⁷ LEE, *AMERICA'S GATES*, *supra* note 127, at 126.

⁵⁶⁸ Testimony of Wong Kim Ark, *supra* note 331.

⁵⁶⁹ *Id.*

⁵⁷⁰ Lee, *Wong Kim Ark*, *supra* note 2, at 76.

⁵⁷¹ CENSUS DIV., DEP'T OF THE INTERIOR, ABSTRACT OF THE ELEVENTH CENSUS: 1890, at 42 (2d ed. rev. & enlarged 1896), <https://usa.ipums.org/usa/resources/voliii/pubdocs/1890/1890b2-01.pdf>; 1900 CENSUS, *supra* note 49, at 492.

⁵⁷² Lee, *Wong Kim Ark*, *supra* note 2, at 76.

⁵⁷³ *Success Story of One Minority Group in U.S.*, U.S. NEWS & WORLD REP., Dec. 26, 1966.

States than McDonald's, Burger King, and KFC restaurants combined.⁵⁷⁴ San Francisco's Chinatown remains one of the largest in the world, and is one of the city's top tourist destinations.⁵⁷⁵ 751 Sacramento Street, where Wong Kim Ark was born, is now part of the Nam Kue Chinese School, originally founded by the Fook Yum *huiguan*, and still a place parents send their children to learn Chinese languages and culture.⁵⁷⁶

Only Wong's youngest son, however, made a permanent home in the United States. Wong Yook Jim initially remained in San Francisco only six months before homesickness drove him back to China to finish high school.⁵⁷⁷ His father returned to China four years later, but after a rare few months with him, Yook Jim returned to San Francisco,⁵⁷⁸ repeating his father's 1890 journey leaving his parents in China to find work on his own. Arriving during the Depression, he traveled to Minneapolis, Chicago, and Sacramento in search of work as a waiter.⁵⁷⁹ When World War II broke out, Yook Jim's derivative citizenship subjected him to the draft; he was inducted into the army but transferred to the Marines.⁵⁸⁰ Until then, he had corresponded regularly with his father, but their letters did not get through during the war.⁵⁸¹ Shortly after the war, village elders wrote to tell him his father had died.⁵⁸²

During the Korean War, Yook Jim signed up with the Merchant Marines.⁵⁸³ He remained with them for twenty-five years, traveling across the world,⁵⁸⁴ but marrying and making his home near Sacramento.⁵⁸⁵ Wong Kim Ark had never really spoken of his legal battle, and Yook Jim had not realized its importance until he saw an article on its hundredth anniversary in his local Chinese-language newspaper.⁵⁸⁶ He suggested that his nineteen-year-old granddaughter Alice Wong investigate the case records in the National Archives in San

⁵⁷⁴ JENNIFER 8. LEE, *THE FORTUNE COOKIE CHRONICLES: ADVENTURES IN THE WORLD OF CHINESE FOOD* 9, 209 (2008).

⁵⁷⁵ PHILIP P. CHOY, *SAN FRANCISCO CHINATOWN: A GUIDE TO ITS HISTORY AND ARCHITECTURE* 9 (2012).

⁵⁷⁶ LAI, *supra* note 254, at 282; *Nam Kue Chinese School*, S.F. CHINATOWN, <http://www.sanfranciscochinatown.com/attractions/namkue.htm> (last visited Jan. 2, 2016).

⁵⁷⁷ WONG, *YELLOW JOURNALIST*, *supra* note 331, at 52, 54.

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.* at 54–55.

⁵⁸¹ *Id.* at 55.

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ Lisa Davis, *The Progeny of Citizen Wong*, S.F. WKLY. (Nov. 4, 1998), <http://www.sfweekly.com/1998-11-04/news/the-progeny-of-citizen-wong>.

⁵⁸⁶ WONG, *YELLOW JOURNALIST*, *supra* note 331, at 52.

Bruno.⁵⁸⁷ Alice was treated like a celebrity by the archivists, but angered by the story of discrimination she found in the files.⁵⁸⁸ Later, Alice and Yook Jim visited the former Angel Island detention center together; her grandfather cried remembering the weeks he spent detained there as a boy, alone, waiting to meet his father for the first time.⁵⁸⁹

C. Conclusion

In the wake of *Elk v. Wilkins*, the United States involuntarily extended citizenship to Indian allottees and took their land, children, and independence to prepare them for it, while in the wake of *United States v. Wong Kim Ark*, the United States doubled down on exclusion, extending it past Chinese to classify all immigrants based on race, national origin, and other characteristics deemed threatening to the United States. The Indian Citizenship Act and the Johnson Immigration Act were enacted within a week of each other in 1924. As with the apparent contrast between *Elk v. Wilkins* and *United States v. Wong Kim Ark*, the statutes are not as inconsistent as they appear,⁵⁹⁰ both representing the power of the government to forcibly absorb the land and sovereignty of those already here and regulate and exclude those they did not want.

CONCLUSION

Citizenship is a powerful thing. At its best, it represents a commitment to sharing governance, welfare, and belonging with all members of a community. For John Elk and Wong Kim Ark, as for many individuals, it likely represented access to the best things in life: family, community, and freedom from governmental oppression. But the stories of John Elk and Wong Kim Ark show the dark side of citizenship. Constructing the community of citizens, we see, may erase existing political, geographic, and familial communities and create governmental authority to police and define both geographic and ideological borders.

The legacies of these stories are very much with us today. Most immediately, the distinction between *Elk v. Wilkins* and *United States v. Wong Kim Ark* remains central for those insisting on constitutional

⁵⁸⁷ Davis, *supra* note 585.

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.*

⁵⁹⁰ See Joseph William Singer, *The Stranger Who Resides with You: Ironies of Asian-American and American Indian Legal History*, 40 B.C. L. REV. 171, 172–73 (1998).

authority to withhold citizenship from children of undocumented immigrants.⁵⁹¹ As others have noted,⁵⁹² the history makes clear that *Elk v. Wilkins* was based on the unique constitutionally-recognized autonomy of tribes even while on U.S. soil. This prevents its application to non-tribal peoples, who have no such status. In addition, the 1898 acceptance of birthright citizenship for Wong at a time when Chinese were wholly despised and excluded under U.S. policy inscribes the fundamental constitutional value of *jus soli* for all, a value that has only been reaffirmed in the failure of efforts to repeal it for the children of undocumented immigrants.⁵⁹³

But the effects of this history are far more broad-reaching and insidious. Nineteenth-century efforts to use private property to shape Indians into individualistic citizens have left today's reservations checkerboards of Indian and non-Indian land, much so divided it cannot profitably be used, while boarding schools contributed to the death of many tribal languages and lasting scars on Indian family life.⁵⁹⁴ In the modern era, the fact of Indian citizenship has been used to argue for state jurisdiction over Indian tribes,⁵⁹⁵ efforts to reduce tribal jurisdiction over criminals in their territory,⁵⁹⁶ denial of off-reservation fishing rights,⁵⁹⁷ and other incursions on tribal sovereignty.⁵⁹⁸ Recognizing that citizenship was not a gift to Native people, but part of a campaign of forced assimilation, contributes to the moral imperative to combine Indian citizenship with tribal self-determination.⁵⁹⁹

⁵⁹¹ See Eastman, *supra* note 37, at 961–95; Jan C. Ting, *Illegal Immigration, Arizona, and the Fourteenth Amendment: The Case for Limits and Enforcement*, 45 NEW ENG. L. REV. 449, 460 (2011).

⁵⁹² See, e.g., Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008).

⁵⁹³ Smith, *Birthright Citizenship*, *supra* note 37, at 1334.

⁵⁹⁴ See ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 425, at 108–12.

⁵⁹⁵ Indians, *supra* note 482 (congressional resolution calling policy of terminating Indian tribes and subjecting Indians to state law as giving them the “same privileges and responsibilities as are applicable to other citizens of the United States”).

⁵⁹⁶ See, e.g., *United States v. Lara*, 541 U.S. 193, 212–13 (2004) (Kennedy, J., concurring in judgment) (arguing that tribes cannot constitutionally exercise jurisdiction over nonmember Indians within their borders).

⁵⁹⁷ See, e.g., *Wash. State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 571 P.2d 1373, 1376 (Wash. 1977) (en banc) (relying in part on citizenship of Indians and non-Indians to find treaty rights unconstitutional), *vacated sub nom. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979).

⁵⁹⁸ *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 382–408 (Minn. Ct. App. 1996) (Randall, J., dissenting) (arguing that citizenship of American Indians made tribal courts, sovereign immunity, and sovereignty generally illegal).

⁵⁹⁹ See, e.g., 116 CONG. REC. 23,396 (1970) (statement of President Richard M. Nixon, calling forced termination of tribal status “no more appropriate than to terminate the citizenship rights of any other American”).

Similarly, although Congress repealed Chinese exclusion laws in 1943,⁶⁰⁰ racial bars to naturalization in 1952,⁶⁰¹ and racialized immigration quotas in 1965,⁶⁰² the period that began with Chinese exclusion left behind a system that dubs millions of U.S. residents illegal aliens and accords the government plenary power to regulate them.⁶⁰³ Immigration law, moreover, remains defiant to constitutional norms of due process, free speech, and equal protection.⁶⁰⁴ The coiner of the phrase “manifest destiny” described America as a nation “from many other nations . . . entirely based on the great principle of human equality.”⁶⁰⁵ As in Wong’s time, we continue to assert these ideals in order to justify departing from them.

Yet the stories of Elk and Wong and their communities also offer a more positive legacy. Both decisions were results of egalitarian traditions: for *Wong Kim Ark*, the commitment to inclusion of all those born on United States soil, regardless of race or despised status; for *Elk*, the legacy of a commitment to tribal sovereignty. Despite the violations of these commitments in the nineteenth century and today, indigenous people and immigrants were able to draw on these traditions to protect their own families and distinctive communities. These communities and their stories, too, are part of the American citizenship tradition.

⁶⁰⁰ Chinese Exclusion Repeal Act of 1943, Pub. L. No. 78-199, 57 Stat. 600.

⁶⁰¹ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

⁶⁰² Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

⁶⁰³ See NGAI, *supra* note 18 (tracing creation of the illegal immigrant to the 1920s legislation); SALYER, LAWS HARSH AS TIGERS, *supra* note 276 (dating vast federal power over immigration to Chinese exclusion); Judith Resnik, *Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail* (Yale Law Sch. Pub. Law Research Paper No. 520, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472101 (discussing modern immigration regime).

⁶⁰⁴ See Cleveland, *supra* note 29, at 162; see also *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 56–57 (2001) (affirming sex discriminatory laws regarding parental derivative citizenship); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (upholding lack of judicial review of deportation allegedly for unpopular views and religion).

⁶⁰⁵ O’Sullivan, *supra* note 20, at 426.