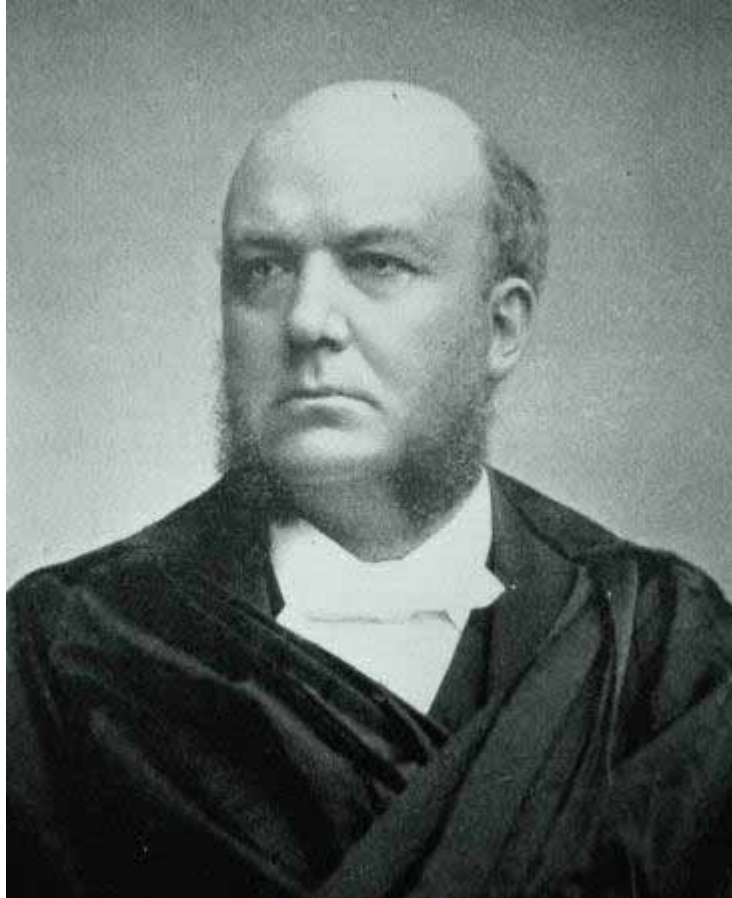


# Wong Kim Ark and Gray's Anomaly

Wong Kim Ark and Gray's Anomaly | by [Joseph DeMaio](#), ©2025



U.S. Supreme Court Associate Justice Horace Gray ([public domain](#))

(Apr. 23, 2025) — **Introduction**

Following President Trump's issuance of [Executive Order 14160](#) challenging the generally-accepted current "birthright citizenship" narrative under the Fourteenth Amendment, several individuals and a number of States, unsurprisingly, filed suit challenging the constitutionality of the order. Thereafter, various district and Circuit Courts of Appeal either entered (or on appeal, affirmed) preliminary injunctions and/or temporary restraining orders barring the operation of the order. The Trump Administration, in turn, responded by seeking, as to each of the separate injunctions, emergency partial stays pausing the injunctions.

Those three stay applications are presently pending at the Supreme Court under Docket Nos. [24A884](#); [24A885](#) and [24A886](#). Significantly, on Thursday, Apr. 17, 2025, the Court consolidated the three applications and set them for oral argument on May 15, 2025 at 10 a.m., allocating a total of one hour for the arguments.

And on Tuesday, April 22, 2025, the Court also ordered that any additional *amicus curiae* briefs would have to be filed on or before April 29, 2025. Because of the significance of the issues presented, look for an *amicus* tsunami in the next six days.

## Discussion and Analysis

The Trump partial stay applications in each of the cases; the various parties' responses; the Trump reply briefs and the several *amicus curiae* briefs thus far filed all acknowledge that one Supreme Court decision in particular may (or may not) play an important role in the proper analysis of the birthright citizenship issue. That 6-2 decision (Justice McKenna not participating) is [United States v. Wong Kim Ark](#), 169 U.S. 649 (1898) ("WKA").

The oral argument next month should be very interesting, not only because of the substantive issues being addressed – including the “subject to the jurisdiction” sub-issue embedded in the Fourteenth Amendment – but potentially also with regard to the closely-related issue of that which constitutes a “citizen at birth” or a “citizen by birth” for purposes of the “natural born Citizen” (“nbC”) restriction in Art. 2, § 1, Cl. 5, the Constitution’s “[Eligibility Clause](#).”

Fair warning: much of what follows will seem to be “old news” to *P&E* readers, as the “anomaly” flaw issue was addressed several years ago [here](#). But in light of the upcoming oral arguments, a brief refresher course on what the *WKA* opinion states..., doesn't state..., and also *mis*-states..., may prove useful.

The birthright citizenship and nbC issues are closely related, if not actually intertwined. Thus, depending on whether by May 15, 2025, any of the Justices may have discovered the spine to tackle not just the 14<sup>th</sup> Amendment issues, but the related nbC issues, some useful clarification on both issues may result. In fact, the nbC issue has been *indirectly* injected into the cases by way of certain *amicus curiae* briefs submitted after the Court's order setting the cases for oral argument. So *maybe* some long-overdue confirmation or clarification of the nbC definition by SCOTUS – might be forthcoming. The oral arguments may give a “hint” of what the ultimate decision by the Court might be on both issues.

Clearly, the opportunity to address the nbC question will be there. But whether any Justice will dare to broach it – as it was understood and intended by the Founders in 1787 as opposed to today's “experts” – is an entirely different question. Stated otherwise, the nbC “can” could be easily kicked down the road once again, with the Court continuing to “[evade](#)” a decision on it. So..., stay tuned.



Wong Kim Ark in 1904 ([public domain](#))

In the *WKA* split decision, the majority opinion – authored by Associate Justice Horace Gray – held that a person born in San Francisco to Chinese citizen parents legally-domiciled, permanently residing and doing business in that city was, himself, a U.S. citizen, the allegiance of his parents to the Emperor of China notwithstanding.

Importantly, and contrary to the claims of many “experts” today, the case decided nothing..., as in *zero*... with regard to anything other than Wong Kim Ark’s status as a “citizen” under the 14<sup>th</sup> Amendment, including any issue as to whether he – or people similarly-situated to him – were in addition nbC’s under the Constitution.

In reaching his “birthright citizenship” conclusion, Justice Gray relied for his ultimate opinion upon, among other historical sources, the enactment by the First Congress of [1 Stat. 103](#), the “Naturalization Act of 1790.” That Act provided, among other things, that “the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens....”

However, arguably realizing only five years later that the “children born beyond sea” being “considered” to be natural born citizens provision which had previously been set out in 1 Stat. 103, a “naturalization” law, could be mistakenly interpreted as creating a prohibited statutory attempt to amend or contravene the “natural born Citizen” restrictions of the Constitution itself, in 1795 Congress, likely in order to correct its 1790

oversight, repealed 1 Stat. 103 in its entirety and enacted in its place [1 Stat. 414](#), the “Naturalization Act of 1795.” (See Christina Lohman, “*Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*,” 36 Gonzaga L. Rev. 349 (2000/01) at [372-73 Lohman1.pdf](#))

Jan. 29, 1795. CHAP. XX.—*An Act to establish an uniform rule of Naturalization; and to repeal the act heretofore passed on that subject.*(a)

Act of March 26, 1790, ch. 3. Repealed by Act of April 14, 1802, ch. 28. How an alien may become a citizen.

To express his desire of becoming a citizen, and to renounce his former allegiance.

To have certain residence.

To be sworn or affirmed to support the constitution.

To renounce former allegiance.

Court to be satisfied of certain things.

To renounce title, &c.

FOR carrying into complete effect, the power given by the constitution, to establish an uniform rule of naturalization throughout the United States:

SECTION I. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:—

First. He shall have declared on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territories northwest or south of the river Ohio, or a circuit or district court of the United States, three years, at least, before his admission, that it was bona fide, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject.

Secondly. He shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he has resided within the United States, five years at least, and within the state or territory, where such court is at the time held, one year at least; that he will support the constitution of the United States; and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty, whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

Thirdly. The court admitting such alien, shall be satisfied that he has resided within the limits and under the jurisdiction of the United States five years; and it shall further appear to their satisfaction, that during that time, he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.

Fourthly. In case the alien applying to be admitted to citizenship shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility, in the court to which his application shall be made;

<https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/1/STATUTE-1-Pg414a.pdf>

The 1795 Act deleted the “natural born” modifier of “citizens” in the prior law, and substituted the unmodified term “citizens,” thus declaring children born beyond sea to U.S. citizen parents themselves “citizens,” but no longer to be “considered” as “natural born citizens.” Thus, the 1795 naturalization law could no longer be portrayed as constituting an “end-around run” on the Eligibility Clause as was the case with 1 Stat. 103.

Problematically and erroneously, however, Justice Gray claimed in his majority opinion (169 U.S. at 672-73) that in 1795, the provisions of 1 Stat. 103, including the “children considered as natural born citizens” verbiage was, along with other unrelated language, “... *re-enacted in the same words*...” (Emphasis added) In fact, 1 Stat. 103 was instead repealed *in toto*, with 1 Stat. 414 replacing it. Stated otherwise, the “considered as natural born citizens” verbiage was *not* reenacted “in the same words” in 1 Stat. 414, but was instead altogether repealed, never again to be found in a federal immigration or naturalization statute.

And whether the deletion and repeal of the verbiage was motivated by concern over the potential for interpretations that it amounted to a prohibited statutory attempt to amend the Constitution, the fact remains that the language was deleted and repealed, rather than “re-enacted in the same words,” as claimed by Justice Gray. This is what your servant labels as “Gray’s Anomaly.” As noted, this “anomaly” was addressed several years ago by your humble servant here at *The P&E*, but, as far as is known, it has not been identified or corrected in any research paper or law review article. And it certainly has not been addressed or corrected by SCOTUS itself. Do not poke the sleeping dog..., move along..., nothing to see here....

Plainly, a cursory or casual reading of Justice Gray’s claim, without examining its underlying veracity, could easily lead one to believe that Congress intended to preserve, rather than to jettison, the “natural born” modifier when enacting 1 Stat. 414, which conclusion, it is posited, would be wrong. While it is clear that Congress repealed 1 Stat. 103, unless one actually *reads* 1 Stat. 414 and confirms the opposite of what Justice Gray stated, the anomaly will go undetected. Justice Gray or one of his law clerks, seemingly, did not read 1 Stat. 414, or at minimum, did not read it closely enough.

The foregoing aside, Justice Gray’s misstatement regarding the repeal of the “natural born” modifier may (or may not) have application to the analysis of either the concept of “birthright citizenship” or the “subject to the jurisdiction” condition of the 14th Amendment. Nonetheless, Justice Gray saw fit to reference both 1 Stat. 103 and 1 Stat. 414 in his analysis of the sole question presented in *WKA*, *i.e.*, whether Wong Kim Ark was (or was not) a U.S. “citizen” under the Fourteenth Amendment. The question of whether he was *also* a natural born Citizen for presidential eligibility purposes was *never* before the Court, despite the contrary contentions of many “experts,” including some of the *amici curiae* in the cases now at issue.

As far as can be discerned, none of the parties in the present Supreme Court matters have identified the anomaly. That said, apart from the fact that the parties, even if otherwise aware of the error, might have concluded that as to the central “birthright citizenship” question, the error is immaterial or “harmless error,” the fact remains that he seemingly felt it necessary to include discussion of the two acts together as part of his 14<sup>th</sup> Amendment reasoning as to Wong Kim Ark, particularly with regard to congressional intent under the words of the Amendment.

The question of congressional intent is, of course, central to the resolution of the birthright citizenship issue as well as to the “nbC” issue, the latter matter, as noted, presently not *directly* before the Court. On the other hand, if overlooked and uncorrected, the anomaly might well be seen as playing a misinforming role in related matters, including congressional actions, scholarly research and even amicus curiae briefs filed in the Supreme Court.

For example, in 2008, the Senate unanimously approved [Senate Resolution 511](#) purporting to confirm the nbC bona fides of then-Senator John McCain. In the fourth “[w]hereas” clause in the resolution, it is stated: “Whereas such [nbC] limitations [on the

children of U.S. military personnel born abroad] would be inconsistent with the purpose and intent of the ‘natural born Citizen’ clause of the Constitution of the United States, *as evidenced by the First Congress’s own statute defining the term ‘natural born [c]itizen’*” (Emphasis added)...



<https://www.congress.gov/bill/110th-congress/senate-resolution/511/text>

There are two problems thus presented. First, this “whereas” statement in 2008 plainly is referencing 1 Stat. 103, but *without* acknowledging that its “natural born citizens” provision was repealed in 1795, 213 years *prior* to 2008. It is bad form to rely on a repealed statute as authority for one’s position, including as to U.S. Senators in their “resolutions” addressing “weighty” matters. Second, 1 Stat. 103 did not “define” the nbC term, but only categorized certain people born “beyond sea” as being “considered” to be members of that class. These issues were addressed several years ago by your servant [here](#).

Significantly, but parenthetically – since it relates more to the nbC issue than the pending birthright citizenship issue – in President Trump’s Applications for Partial Stay Memoranda in each case now before the Court – at pp. 7-8 thereof – the applications cite § 212 of Book 1, Ch. 19 (“§ 212”) of the seminal treatise *The Law of Nations* [1758, Paris] by Swiss jurist, attorney and scholar Emer de Vattel, an authority recognized and relied upon by the Framers. There, a “natural born citizen” is defined as a person ***born in a country to parents who are already then citizens of that country.***

Your servant will not bore *P&E* readers with multiple citations to the *numerous* past articles here at the *P&E* addressing the § 212 definition issue and positing that ***his*** definition was the one selected by the Founders for insertion into the Constitution, but only notes that the Solicitor General’s citation to de Vattel – and in particular § 212 – is cause for optimism that at least the current Solicitor General of the United States is not only aware of that authority, but has cited him in support of his position in briefs to the Court.

But again, I digress. In addition to the problems flowing from Justice Gray’s anomaly, the *WKA* 14<sup>th</sup> Amendment ruling has been explained by contemporary constitutional

scholars as purportedly corroborating the view that if one is merely a “citizen at birth” or a “citizen by birth,” regardless of place of birth or both parents’ U.S. citizenship, that person would qualify as an nbC eligible to the presidency. As *P&E* readers will recall, your servant disagrees..., and can back up that disagreement with “receipts” discussed in the aforesaid numerous nbC *P&E* posts.

Specifically, two highly respected and well-credentialed former U.S. Solicitors General – Paul Clement and Neal Katyal – have discussed the nbC issue in their 2015 Harvard Law Review Forum Journal [article](#) “*On the Meaning of Natural Born Citizen*.” That article addresses the 2008 nbC bona fides of former Senator John McCain and, as to his potential candidacy in 2016, current Senator Ted Cruz, but fails to even reference de Vattel or try to distinguish § 212.

With due respect, but at the risk of challenging various widely-held assumptions in that article, the anomaly in the *WKA* majority opinion may negatively impact the Harvard article’s conclusion that a Fourteenth Amendment “citizen at birth” or “citizen by birth” satisfies the nbC eligibility restriction, at least as it was intended and understood by the Framers.

In fact, the review article states (128 Harv.L.Rev.F. at 162) that “[t]he proviso in the Naturalization Act of **1790** underscores that while the concept of ‘natural born Citizen’ [*sic*] has *remained constant*, and plainly includes someone who is a citizen from birth by descent without the need to undergo naturalization proceedings, the details of which individuals born abroad to a citizen parent qualify as citizens from birth have changed.” (Emphasis added)

While it is true that the “details” regarding the status of persons born abroad “to a citizen parent” have changed since 1790, with deference and respect, it is far less than clear that the “concept of ‘natural born [c]itizen has remained constant...,” at least as intended by the Congress when it first enacted 1 Stat. 103, including the “natural born” modifier of “citizens,” then a mere five years later repealed it rather than re-enacting it “in the same words” as asserted by Justice Gray.

To the extent that Messrs. Clement and Katyal may have relied upon Justice Gray’s erroneous anomaly in his *WKA* majority opinion, rather than upon the actual words of 1 Stat. 414 following the repeal of 1 Stat. 103, their law review article may not be altogether correct. Your servant has critiqued their article [here](#), [here](#) and [here](#).

This Court has essentially recognized that the Fourteenth Amendment Birthright Citizenship Clause recognizes that individuals born within the physical territories of the United States, (who are not the children of foreign diplomats working in the United States on behalf of a foreign government and who are not the children of hostile foreign occupiers of the physical United States) are natural born American Citizens. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). Additionally, Congress appears to have essentially codified the language of the Fourteenth Amendment into congressional statute, which was enacted after the Court issued its opinion in *Wong*.

The following shall be nationals and citizens of the United States at birth:

9

### Source

Indeed, although not citing the Clement/Katyal law review article, the “Biazzo” *amicus curiae* [brief](#), submitted to the Supreme Court (but not yet accepted for filing by the Court), asserts that, under the decision in *WKA*, the Court has purportedly “essentially recognized” that under the 14<sup>th</sup> Amendment, “individuals born within the physical boundaries of the United States ... [with recognized limited exceptions] **are natural born American Citizens.**” (Emphasis added) See *Biazzo amicus curiae* brief at 9. As faithful *P&E* readers might suspect, your humble servant disagrees. Hopefully, so will a majority of the Supreme Court Justices.

Although the Biazzo brief uses the words “essentially recognized” as opposed to the stronger words “decided” or “held” – which convey the concept of “binding precedent,” – to the extent that the claimed “recognition” in *WKA* is premised upon Justice Gray’s mistaken belief that the nbC modifier of “citizens” in 1 Stat. 103 – whether in the “same words” or in “concept” or “rationale” – somehow survived its undisputed deletion and repeal in 1795 by 1 Stat. 414, the contrary conclusion in the Biazzo brief is itself plainly “mistaken.”

And to repeat: whether SCOTUS, a Justice’s law clerk or anyone else – outside of readers of *The P&E*, of course– will “pick up” on the anomaly before May 15, 2025 is anyone’s guess. Moreover, even *if* the anomaly and its impact on these cases, other cases, other congressional resolutions, law review articles and/or *amicus curiae* briefs is identified, the well-known adage may moot everything: “Don’t poke the sleeping dog ..., move along..., nothing to see here....”

## Conclusion



Credit: Fred Schilling, Collection of the Supreme Court of the United States

While there may be some cause for optimism that clarification on both the 14<sup>th</sup> Amendment birthright citizenship and Art. 2, § 1, Cl. 5 natural born Citizen eligibility issues will follow next month's oral arguments, as that great and wise everyday philosopher – Yogi Berra – noted: it ain't over 'til it's over. Sooo..., again..., stay tuned.

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