DIVESTING CITIZENSHIP: ON ASIAN AMERICAN HISTORY AND THE LOSS OF CITIZENSHIP THROUGH MARRIAGE

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This Article narrates a sorely neglected legal history, that of the intersection between race, gender, and American citizenship through the first third of the twentieth century. It is a little known fact that marriage once functioned to exile U.S. citizen women from their country; moreover, how racial barriers to citizenship shaped expatriation and dependent citizenship presents an even more complex history. Using an intersectional analysis to consider the impact of gender on racial bars to citizenship, as well as the impact of race on gendered bars to citizenship, the Article thus begins with a clarification of the historical record.

But beyond narrating and clarifying history, exploring the contours of gender- and race-based exclusion offers a potent lesson about citizenship more generally. In particular, the history of dependent citizenship and marital expatriation shows how notions of incapacity were foundational to racial and gendered disenfranchisement from formal citizenship. Such notions of incapacity, reflected

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in laws of coverture and race-based exclusion, were deeply connected to moral and republican ideals—which were assumed unattainable by Asian women and men. Therefore, our understanding of citizenship broadens if we focus not only on the status—race and gender—used to deny citizenship, but also on the rationales about appropriate conduct that precluded certain individuals from access to the American polity.

In addition to literal access and exclusion, the Article examines how identity shapes citizenship more broadly. Whether one discusses citizenship in the form of rights, as political activity, or symbolically, it is apparent that continued ambivalence about admission to citizenship remains. Although race-based and gender-based bars to formal citizenship no longer exist, prosecution of the "War on Terror" suggests that identity still shapes notions of who is capable and incapable of fulfilling our moral and political ideals.

In an age of citizenship, there are two sorts of non-citizen: those who have never been admitted, and those who are exiled.[1]

INTRODUCTION

Marriage is often conceptualized as a ritual that both reflects and enacts citizenship. Indeed, it is precisely this positive relationship between marriage and citizenship that explains why marriage continues to be

1. Sarah Benton, *Gender, Sexuality and Citizenship*, in CITIZENSHIP 151, 154 (Geoff Andrews ed., 1991).

heterosexually policed.[2] But marriage has not always been a citizenship enacting institution. Marriage also has functioned to divest citizenship.

Consider the story of Ng Fung Sing. Born in Port Ludlow, Washington in October 1898 to Chinese parents, Sing was a U.S. citizen thanks to the U.S. Supreme Court's decision in *United States v. Wong Kim Ark*,[3] issued the same year, which held under the Fourteenth Amendment of the U.S. Constitution that Chinese born in the United States were entitled to birthright citizenship.[4] At the age of five, Sing was taken by her parents to China, where, at the age of twenty-two, she married a Chinese citizen. After her husband passed away two years later, she decided to return to the United States. When she arrived in Seattle in April 1925, she assumed she could, in the words of the Washington district court, "resume her 'American citizenship.'"[5]

But Sing was denied admission to the United States and found "ineligible for citizenship"—because of her marriage. Congress, in 1907, had mandated "[t]hat any American woman who marries a foreigner shall take the nationality of her husband."[6] While the Cable Act of 1922 allowed some women who had lost their U.S. citizenship through marriage to rejoin the American body politic through naturalization, only women who themselves were "eligible to citizenship" were allowed to do so.[7] Although the court recognized that Sing "politically . . . was born a member of the citizenry of the United States," it noted that Sing was "Chinese," or, as the court clarified, of "yellow race."[8] As such, Sing was barred from naturalization, since the racial restrictions that remained in place until the middle of the twentieth

2. *See* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1082 (2002) ("The mixed-sex requirement for civil marriage marks lesbigay persons as less than full members of the political community. This is why so many critics of current marriage laws have objected that the mixed-sex requirement relegates lesbigay persons to an inferior class of citizenship."); *see also* William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1742–49 (2001).

3. 169 U.S. 649 (1898).

4. The Court found that the Fourteenth Amendment was plain in its application as to "[a]ll persons"—aside from "children of members of the Indian tribes, standing in a peculiar relation to the National Government." *Id.* at 682; *see also In re* Yung Sing Hee, 36 F. 437 (C.C.D. Or. 1888) (recognizing the U.S. citizenship of a woman born in San Francisco in 1866 to Chinese parents); *Ex parte* Chin King, 35 F. 354 (C.C.D. Or. 1888) (recognizing the U.S. citizenship of Chin King, a woman born in San Francisco, California in 1868, and Chan San Hee, her sister, born in Portland, Oregon in 1878, both to Chinese parents); *In re* Look Tin Sing, 21 F. 905 (C.C.D. Cal. 1884) (holding that Chinese born in the United States of Chinese parents domiciled therein are citizens under the Fourteenth Amendment).

5. *Ex parte* Ng Fung Sing, 6 F.2d 670, 670 (D.D.C. 1925).

6. Expatriation Act, ch. 2534, § 3, 34 Stat. 1228, 1228–29 (1907).

7. *See* Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, § 4, 42 Stat. 1021, 1022 (1922).

8. *Ng Fung Sing*, 6 F.2d at 670.

century prohibited Asians from naturalizing as U.S. citizens. Moreover, Sing was not permitted to enter the country; as a person of Chinese ancestry, she was also subject to Chinese immigration exclusion laws. If Sing had been white, she could have naturalized following widowhood; however, as Chinese, she was precluded from doing so. Presumably, Sing returned to China. The rest of her life is lost to history.

This Article explains how it was possible for Ng Fung Sing to be barred from entering the country of her birth because of her marriage. It is not a generally known fact that American women lost their citizenship for nothing more than marriage. And marital expatriation did not affect only Chinese American women like Ng Fung Sing: Thousands of white American women who married noncitizen men also lost their citizenship.

The history of marital expatriation is largely absent from legal scholarship and, when present, often is rendered inaccurately. Many sources state that marital expatriation ended with the 1922 Cable Act.[9] This is incorrect, however, and reflects the scholarship's focus on the impact of the Act on white women. While the question of when marital expatriation ended may seem like a technical debate, the dating of historical events can have significant consequences. Recently proposed federal legislation to restore citizenship to women divested of citizenship through marriage, for example, relied upon the assumption that marital expatriation ended in 1922, leaving Asian women, and women married to Asian men, bereft of its benefits.[10]

In the last decade, legal scholars have written important work examining the impact of race on citizenship;[11] others have analyzed the impact of gender on citizenship.[12] But no legal scholarship has put these two histories together to examine how race and gender interacted with one another to expatriate Americans from citizenship.[13]

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9. *See infra* notes 133–137.

10. *See* discussion of the Restoration of Women's Citizenship Act, *infra* notes 197–200.

11. For the foundational work in this area, see IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

12. *See* Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93 (2000); Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 89 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001); Karen Knop & Christine Chinkin, *Remembering Chrystal Macmillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523 (2001).

13. Outside of legal scholarship, historians Nancy Cott and Candice Bredbenner have written excellent work on the relationship of marriage and women's citizenship. *See* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); Nancy Cott, *Marriage and Women's Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440 (1998). My interest in this project was encouraged by Cott's article,

This Article shows how our understanding of historical fact can change when using a methodology that insists upon the simultaneous consideration of race and gender.[14] Simultaneously considering race and gender in our analysis can illuminate new aspects of history. Thus, we would understand marital expatriation to end not in 1922, but in 1931, when the policy ended for all women.[15] We would also question the way in which racial histories prioritize men's experiences. In particular, Chinese exclusion is assumed to have begun in 1882, which legal scholarship often describes as the first federal, race-based immigration exclusion from our shores.[16] But we might ask why we do not date Chinese exclusion to 1875 with the passage of the Page Law, which sought to exclude prostitutes from China and Japan.[17]

Correcting the historical record is not the sole goal of this Article. Rather, the Article uses history to consider the meaning of citizenship and to analyze why U.S. citizenship has followed particular contours of inclusion and exclusion. Part I thus begins by describing the historical acquisition and denial of formal citizenship, and its shaping by gender and race.[18] This is a

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which brilliantly analyzes the ideological underpinnings of the relationship between marriage and citizenship, and Bredbenner's book, which masterfully researches the campaigns that led to shifts in the law. While both accurately describe the main contours of the amendments that ensued over the years, it is not always apparent from their writing how the law ultimately changed and what consequences ensued; moreover, their work has not traveled sufficiently to the law reviews to impact the common misperception of the Cable Act that I criticize in this piece. See also MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965 (2005), which is an extremely valuable analysis of material covered in this Article but which was published too late to be discussed here.

14. Encapsulated in the title of the foundational text in black women's studies, *All the Women Are White, All the Blacks Are Men, but Some of Us Are Brave*, is the tendency still to center white women in the analysis of gender, and to center men of color in the analysis of race. ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (Gloria T. Hull et al. eds., 1986). For examples of an intersectional methodology, see Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Celina Romany, *Ain't I a Feminist?*, 4 YALE J.L. & FEMINISM 23 (1991); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994).

15. *See* discussion *infra* notes 138–189.

16. *See, e.g.*, 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, 97 (1996) (stating that "[t]he 1882 Chinese Exclusion Act was the first national race-based immigration exclusion in American history and thus was a watershed event in U.S. immigration policy").

17. *See* discussion *infra* notes 280–290.

18. By formal citizenship, this Article refers to the status of a citizen, granted in the United States through birth or naturalization as opposed to the status of an alien.

complex story that requires first parsing the impact of race, and then of gender, before analyzing how these factors interacted together to shape dependent citizenship and marital expatriation. Part I demonstrates how the failure to employ an intersectional analysis has led to the erroneous claim that the Cable Act of 1922 completely eradicated the practice of marital expatriation, and rectifies this error by explaining its effects on women such as Ng Fung Sing.

Part II moves beyond the consideration of citizenship as a formal legal status. A more complete illustration of the history of citizenship requires examining how subjects disenfranchised because of their race or gender were prohibited from enjoying other forms of citizenship, defined as "citizenship as rights," "citizenship as political activiry," and "citizenship as identity."[19] At the same time, Part II seeks to show how our understanding of the history of citizenship is enriched through centering our inquiry on the Chinese woman. The paradigmatic citizen has been constructed in dominant memory both as the head of the domestic household and through whiteness. Histories that focus on the citizenship of white women, or the citizenship of Asian American men, tell only a partial story. Concentrating our study specifically on Chinese women in U.S. history leads us to reconceptualize our understanding of that history.

The Cable Act, for example, is often represented as a victory for women. But it had negative effects both on the citizenship of Asian American women and on women who were married to Asian men. It also redounded to the detriment of Chinese women seeking admission to the United States. As discussed below, the effort to eradicate women's dependent citizenship paradoxically caused Chinese wives to have a more difficult time gaining admission into the United States. Thus, this history provides a caution against focusing on gender unmediated by race. And we must also be attentive to the parallel problem of focusing on race unmediated by gender. When we concentrate on Chinese women in U.S. history, we are forced to question a foundational date in U.S. immigration: Chinese exclusion, the first race-based immigration exclusion from the United States, is usually understood to begin in 1882 with the ten-year suspension of immigration of Chinese laborers.[20] But the 1882 law was preceded by another piece of federal legislation, the 1875 Page Law,

19. This disentangling of citizenship discourses follows the work of Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 456–88 (2000).

20. *See* Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600, discussed *infra* notes 33 and 280.

which through its targeting of prostitutes from "China, Japan, or any Oriental country," almost completely shut down Chinese female immigration.[21]

Finally, the experiences of Chinese immigrants highlight the relationship between citizenship and ideas of freedom and morality. Against slavery, the citizen was conceptualized through the idea of freedom. Citizenship also was understood as a moral, as well as a legal, category. Perceived as enslaved and morally corrupt, Chinese were believed to jeopardize both ideals.

At the same time, the association of Chinese women with prostitution demonstrates how conduct formed a basis for exclusion from citizenship, in addition to status. We conventionally separate identiry into realms of status and conduct, and have presumed that status (for example, one's race) as opposed to conduct (in the form of how one behaves) has constituted the primary barrier to citizenship. But what we remember as status-based exclusions in fact were premised on assumptions about appropriate conduct. Thus, history shows the impossibility of separating the realm of status from that of conduct, and it illuminates the bases on which citizenship stripping is enacted today—in the context of the "War on Terror."

In the Conclusion, I evaluate the contemporary legacy of marital expatriation. The history makes apparent both the importance and the historically precarious nature of formal legal citizenship, against claims that citizenship no longer has much meaning. Additionally, the history suggests that, although race and gender no longer serve as absolute bars to formal citizenship, identity continues to restrict the ability to enjoy citizenship. While one's status—as a woman, as Asian—may no longer preclude attaining formal legal citizenship, citizenship is still restricted on the basis of conduct. We continue to see the force of identity in shaping the experience of citizenship.

I. HISTORICAL CITIZENSHIP

A. Race and Citizenship

Racial exclusion has constitutively shaped the acquisition of the legal status of citizen in the United States, whether granted through birth or through naturalization.[22] Although the United States Constitution initially

21. Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477, 477; *see also* discussion of Page Law *infra* note 282.

22. Historical disenfranchisement of Asians from citizenship occurred at the same time as racial restrictions from admission into the United States. For an overview of these laws, see ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY (Hyung-Chan Kim ed., 1996). *See also* ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943 (2003); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

included no definition of citizenship, it did provide Congress with the authority to adopt a "uniform Rule of Naturalization."[23] The first federal citizenship statute, passed by Congress in 1790, limited naturalization to "free white" aliens.[24] Following the Civil War, Congress discussed the wisdom of completely striking racial restrictions to naturalization, but concerns about granting the privileges of citizenship to Chinese immigrants precluded such a shift.[25] Chinese immigrants were thought to lack the capacity to engage in republican forms of government, and thus, allowing them to naturalize would threaten the survival of American democracy.[26] In the words of one senator, the Chinese were "pagans in religion" and "monarchists in theory and practice."[27] Because the Chinese were considered unable to vote independently of the Chinese government, an "edict from China" would "sway the political destiny of the Pacific coast."[28] Citizenship was participatory and

23. U.S. CONST. art. I, § 8, cl. 4.

24. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103. Nancy Cott suggests that to be "naturalized" is to be embraced by the state in a legal fiction of rebirth; only immigrants able to mimic the citizen who "naturally" belonged to the national community could be naturalized. Cott, *supra* note 13, at 1445. For a critique of the reproductive and heterosexist presumptions contained within the concept of naturalization, see Siobhan B. Somerville, *Notes Toward a Queer History of Naturalization*, 57 AM. Q. 659 (2005).

25. *See* Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 5 CITIZENSHIP STUD. 57, 58 (2001).

26. In discussing whether to lift racial bars to naturalization, one senator warned:

> [W]hether this door [of citizenship] shall now be thrown open to the Asiatic population . . . [for the Pacific Coast, this would mean] an end to republican government there, because it is very well ascertained that those people have no appreciation of that form of government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding it or of carrying it out.

CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan).

As Rogers Smith has described, the survival of "republican institutions" was for some the primary threat posed by Chinese immigration, as republics required "a homogenous population," not what one representative called an "ethnological animal show." ROGERS M. SMITH, CIVIC IDEALS: CONFLICTED VISIONS OF CITIZENSHIP IN U.S. HISTORY 362 (1997).

See also LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 11 (1995). Salyer describes how historians and political theorists in the nineteenth century increasingly tied the capacity for representative, democratic government exclusively to Anglo-Saxons, who were considered uniquely capable of democratic rule. This argument was picked up by anti-immigrationists, who contended that people of different races should not be allowed to enter the United States because they never would be able to understand the American governmental system. Salyer quotes one senator who testified in favor of the Chinese Exclusion Act as stating, "When [the signers of the Declaration of Independence] declared that all men were created equal, and were endowed with the inalienable right of life, liberty, and the pursuit of happiness, they undoubtedly meant all men like themselves, and in like manner joined in the bonds of civil society." 13 CONG. REC. 1546 (1882) (statement of Sen. La Fayette Grover), *quoted in* SALYER, *supra*, at 17.

27. CONG. GLOBE, 41st Cong., 2nd Sess. 5150 (1870) (statement of Sen. Stewart).

28. *Id.*

required a particular capacity,[29] which most legislators did not believe could be cultivated in the Chinese. As a result, the 1790 citizenship statute was amended only to additionally permit naturalization of "aliens of African nativity and . . . persons of African descent."[30]

In 1878, a Chinese national named Ah Yup brought the first case seeking to naturalize under the statute.[31] The court held that the statute did not permit the naturalization of a member of the "Mongolian race."[32] The 1882 Chinese Exclusion Act subsequently contained a provision explicitly barring any state or federal court from allowing Chinese to naturalize as U.S. citizens.[33] While Chinese were thus statutorily barred from naturalization, the ability of other nonwhites to naturalize could be litigated in the courts.[34] Courts, in determining who was allowed to be "white" for the purposes of the statute, variously followed rationales of "scientific evidence," "common sense,"[35] and the litigant's performance of characteristics associated with whiteness.[36] In 1923,

29. *See* Cott, *supra* note 13, at 1448; *see also* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999) (describing how the capacity for citizenship was cultivated).

30. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256. This bar was lifted to assist blacks in the United States from Africa and the West Indies who previously had been unable to naturalize. That they were few in number, and were not a "mighty tide" who would pour into the United States, was key to this amendment. *See* CONG. GLOBE, 41st Cong., 2nd Sess. 5157 (1870).

31. *In re* Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878).

32. *Id.*

33. This bar appeared in section 14 and stated: "That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed." Chinese Exclusion Act, ch. 126, § 14, 22 Stat. 58, 61 (1882), *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.

34. *See generally* HANEY LÓPEZ, *supra* note 11, at 37–44. Most of the litigation involved individuals from regions we now demarcate as the Middle East and Asia. But in 1897, a federal district court in Texas ruled that Ricardo Rodriguez, a "pure blooded Mexican," was eligible to naturalize. The court admitted it probably would not classify Rodriguez as white, but it relied on the citizenship status conferred on Mexicans through the Treaty of Guadalupe Hidalgo as indicating the "spirit and intent" of U.S. policy. *In re* Rodriguez, 81 F. 337, 349 (W.D. Tex. 1897). For a discussion, see Steven H. Wilson, Brown *over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145, 152 (2003). On the historical construction of Chicano racial identity, see generally Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9 (2005).

35. *See* HANEY LÓPEZ, *supra* note 11, at 79–102.

36. *See* John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 827–33 (2000). Tehranian draws a sharp distinction between Ian Haney López's analysis and his own. However, he argues for the need to import performance theory into our understanding of how courts responded to litigants such as Armenians, *id.* at 833–36, and my reading of López indicates that considerations of how litigants "performed whiteness" appear in López's analysis of race understood as a matter of "common sense."

For a discussion of how litigants performed whiteness in trials of racial determination outside of the naturalization context, see Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109 (1998).

the Supreme Court ruled twice on the matter within the space of four months: first denying the naturalization of Takao Ozawa, a graduate of Berkeley High School born in Japan, under the rationale that he was not "Caucasian";[37] and then denying the naturalization of Bhagat Singh Thind, a native of India, who, according to the Court, was "Caucasian" but failed to be "white."[38]

Of course, the only Asians who could attempt to naturalize were those who were first admitted under the immigration laws. Over time, Congress enacted a series of acts that eventually barred almost all Asians from entering the United States. Asians were excluded from immigration in legislation first directed against Chinese persons, and then, beginning in 1917, against the "barred Asiatic zone." This zone stretched all the way from Afghanistan to the Pacific with the exception of Japan—which the State Department did not wish to offend—and the Philippines, which was a U.S. colony. In 1924, Asian exclusion was made complete with the statutory exclusion of the Japanese, who were excluded along with all other aliens "ineligible to citizenship." Asians thus were fused into one unassimilable race, viewed as utterly foreign to American national identity.[39]

The inability to naturalize also served as a prerequisite to laws that prevented "aliens ineligible to citizenship" from owning land.[40] These laws

37. Ozawa v. United States, 260 U.S. 178 (1922).

38. United States v. Thind, 261 U.S. 204 (1923).

39. For a discussion of the Immigration Act of 1924, see NGAI, *supra* note 22, at 21–55. Filipinos were converted from nationals to aliens with the Tydings-McDuffy Act of 1934, which granted the colony independence. The Immigration Act of 1924, section 13(c) stated as follows:

> No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162. Sections (b), (d), and (e) of section 4 referred to individuals returning from temporary visits abroad, clergymen and professors, and students admitted to accredited institutions of higher learning approved by the Secretary of Labor, respectively. *Id.* § 4, 43 Stat. at 155.

The immigrant defined in section 3 covered six kinds of persons: government officials, their families, servants, and other employees; temporary visitors for business or pleasure; persons in transit to other countries; lawfully admitted persons traveling from one part of the United States to another through foreign contiguous territory; seamen; and merchants entering "solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." *Id.* § 3, 43 Stat. at 154.

40. *See* Keith Aoki, *No Right to Own? The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*," 40 B.C. L. REV. 37, 38 (1998) (citing WASH. CONST. art. II, § 33). The U.S. Supreme Court upheld the Alien Land Laws that applied to aliens ineligible to citizenship in a string of cases in the 1920s. *See, e.g.*, Cockrill v. California, 268 U.S. 258 (1925); Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923). In *Oyama v. California*, 332 U.S. 633 (1948), the U.S. Supreme Court invalidated a portion of California's Alien Land Law that created a presumption against the validity of certain transfers of agricultural land for which the price of the

were explicitly passed for the purpose of disenfranchising Asian immigrants from the right to own, rent, or devise agricultural property.[41] The inability to immigrate, naturalize, and own many forms of property created, in contrast to the citizen, the "alien ineligible to citizenship": one unable to engage in the basic functions of citizenship or to enjoy its associated rights.

Racial restrictions on naturalization were selectively lifted in the twentieth century.[42] In the 1943 Magnuson Act, Congress, animated by foreign policy concerns during World War II, allowed Chinese to become naturalized citizens.[43] This was followed in 1946 by an amendment allowing Filipinos and Indians to naturalize.[44] In 1950, the racial bar was lifted for those from Guam, followed two years later by the removal of the racial criteria for naturalization altogether.[45]

Racial exclusion was not only codified in the laws governing naturalization. The United States deviated from the common law rules inherited from England regarding birthright citizenship[46] based on territory, since not all persons born in the United States were deemed citizens. Chief Justice Taney's opinion in *Dred Scott v. Sanford*[47] achieved this result in holding that free blacks born in the United States were not citizens. Taney reasoned that

> [t]he words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the

transfer was paid by an ineligible alien, but failed to address the validity of the entire law. The California Supreme Court subsequently struck down the California Alien Land Law in *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952).

41. Aoki, *supra* note 40, at 38–40.

42. As Lucy Salyer shows us, military service began to provide a means for otherwise ineligible noncitizens to naturalize after World War I. *See* Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935*, 91 J. AM. HIST. 847 (2004).

43. *See* Neil Gotanda, *Towards Repeal of Asian Exclusion: The Magnuson Act of 1943, the Act of July 2, 1946, the Presidential Proclamation of July 4, 1946, the Act of August 9, 1946, and the Act of August 1, 1950, in* ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY, *supra* note 22, at 309. Neil Gotanda, building on the work of Derrick Bell and Mary Dudziak, describes the impetus for the passage of these acts. The acts resulted from an interest convergence with U.S. foreign policy that sought to establish American social and political identity in opposition to Nazi ideas of Aryan racial supremacy and Japanese calls for Pan-Asian unity against white imperialists. This foreign policy interest required the legislating of formal racial equality. For more discussion of civil rights advances resulting from interest convergence, see generally MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); Derrick A. Bell, Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

44. Gotanda, *supra* note 43, at 310.

45. *Id.*

46. Two doctrines govern citizenship by birth: *jus soli*—citizenship by soil, which confers citizenship to a person based on the place of birth; and *jus sanguinis*—citizenship by blood or descent, which confers citizenship based on the citizenship of a person's parents at the time of birth.

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

> political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty.[48]

In equating "citizens," the "people of the United States," and the "political body," Chief Justice Taney chose to define the sovereign body of the people at the founding moment of the republic as consisting of only one class of citizens, excluding blacks.[49]

The first sentence of the Fourteenth Amendment was written to reject Taney's judgment in *Dred Scott*. It provides that "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."[50] We might see the Civil War and the Reconstruction Amendments that reconstituted the nation as a second founding moment of the republic.[51] At this second founding moment, blacks may have been considered by some to be included in the sovereign body of the people, albeit in a degraded status.[52] But as shown by the 1870 naturalization statute, the Chinese still were not. This fact was echoed in Justice Harlan's dissent in *Plessy v. Ferguson*,[53] in which he contrasted "citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union," with "the Chinese race," which he referred to as "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."[54]

Racial exclusion of the Chinese was lifted, in a limited sense, by the Supreme Court's 1898 decision in *Wong Kim Ark*, which held that Chinese

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48. *Id.* at 404.

49. A number of commentators have noted the similarity in analysis between *Dred Scott* and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in which Chief Justice Rehnquist suggested that the Fourth Amendment does not apply to noncitizens, especially undocumented persons, as its protections apply only "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265. See, for example, 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, 246 (2002); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 681 (2003).

50. U.S. CONST. amend. XIV.

51. *See* Brook Thomas, *China Men*, United States v. Wong Kim Ark, *and the Question of Citizenship*, 50 AM. Q. 689, 705 (1998).

52. For a discussion of this status as an inclusionary form of exclusion, see Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005).

53. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

54. *Id.* at 561. For a discussion of Justice Harlan's jurisprudence in cases involving Chinese, see Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

born in the United States were entitled to birthright citizenship. The *Wong Kim Ark* decision followed three district court decisions that had addressed this question. Look Tin Sing (a Chinese American man born in Mendocino, California in 1870), two Chinese American sisters named Chin King and Chan San Hee (born in San Francisco in 1868 and in Portland, Oregon in 1878, respectively), and a Chinese American woman named Yung Sing Hee (born in San Francisco in 1866), all were denied the right to land in the United States on their return from overseas because they possessed no certificate that would allow entry.[55] All four successfully argued that they did not need a certificate because they were native-born citizens of the United States.[56] Anti-Chinese exclusionists attempted to reverse these decisions by challenging the citizenship of Wong Kim Ark, a San Francisco native who was returning from a trip to China in 1895. The government's position in the case was that Wong was unfit for citizenship: His citizenship was an "accident of birth," and his "education and political affiliations remained entirely alien to the United States."[57] But the Court found that the Fourteenth Amendment was plain in its application as to "[all] persons"—aside from "children of members of the Indian tribes, standing in a peculiar relation to the National Government."[58]

It is doubtful that *Wong Kim Ark* represented an embrace of Chinese as national citizens. The consequences of holding otherwise would have been severe, as the Court observed, because a contrary result would cast doubt on the citizenship of "thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as

55. The 1882 Chinese Exclusion Act authorized the issuance of certificates to departing Chinese laborers evidencing their right to return. If one had a return certificate, one was supposed to be granted reentry. But in 1888, even laborers who had received certificates were precluded from entry under the Scott Act. In the famous decision *Chae Chan Ping*, 130 U.S. 581 (1889), known as *The Chinese Exclusion Case*, a man who had obtained a certificate before he left the United States in 1887 for a visit to China was excluded from entry when he arrived one week after the passage of the 1888 Act. Under certain stringent conditions, returning laborers later were allowed entry. *See infra* note 295.

56. *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); *In re* Look Tin Sing, 21 F. 905 (C.C.D. Cal. 1884). Sucheng Chan states that the case involving the Chin and Chan sisters is the first reported case involving American-born women of Chinese ancestry. *See* Sucheng Chan, *The Exclusion of Chinese Women, 1870–1943*, *in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943, at 94, 118–19 (Sucheng Chan ed., 1991).

57. LEE, *supra* note 22, at 105 (internal quotation marks omitted).

58. United States v. Wong Kim Ark, 169 U.S. 649 (1898). Native Americans continued to be barred from birthright citizenship until federal legislation was passed in 1924. Whether U.S. citizenship was desirable or regressive—as illegitimating the sovereignry of Indian nations—is a subject of controversy. For a discussion of the historical debates over granting citizenship to Native Americans, see SMITH, *supra* note 26, at 390–96.

citizens of the United States."[59] Following the decision, immigrant inspectors required Chinese claiming citizenship, on return from overseas, to prove their "Americanness" through their familiarity with American geography and history, their adoption of American customs and dress, their English language skills, and the attestation of white witnesses to verify their claims.[60]

B. Gender and Citizenship

Contemporaneous to the changes in race-based exclusion, the relationship between the formal legal status of citizenship and gender was shifting. At the advent of the republic, the nationality of white women was not directly affected by marriage or coverture.[61] A white woman who immigrated to the United States could naturalize to become a citizen,[62] and marriage to a noncitizen did not deprive a female U.S. citizen of her citizenship. In *Shanks v. Dupont*,[63] the Supreme Court confirmed that "marriage with an alien . . . produces no dissolution of the native allegiance of the wife."[64] Thus, Ann Shanks, a U.S. citizen who married a British subject, only became a British subject through her residence in Britain and her

59. *Wong Kim Ark*, 169 U.S. at 694. This type of argument, in which the Court warns that laws enacted about Chinese individuals would have a detrimental impact not so much for Chinese but for whites, features in other jurisprudence of that era. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893) (Brewer, J., dissenting). As Justice Brewer writes:

> It is true this statute is directed only against the obnoxious Chinese, but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guarantees of these amendments can be thus ignored in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to?

Id. at 743.

60. LEE, *supra* note 22, at 106–08. In 1895, the Department of Treasury mandated that Chinese claiming citizenship have two white witnesses verify their claims of nativity. This was amended in 1902 to allow the admission of citizens based solely on Chinese testimony, but the presence of white witnesses continued to be viewed as favorably dispositive. *Id.* at 106.

61. Cott, *supra* note 13, at 1455. "Coverture defined married women as economic and political dependents, protected by the law and by their husbands and, in exchange, deprived of independent legal identities." Ariela R. Dubler, *"Exceptions to the General Rule": Unmarried Women and the "Constitution of the Family,"* 4 THEORETICAL INQUIRIES L. 797, 802 (2003). Under coverture, married women were unable to make contracts, own property, bring lawsuits, or be sued. *Id.* at 802–03.

62. Thus, marriage to a U.S. citizen husband did not automatically grant the foreign-born wife U.S. citizenship. This is shown in the case of *Mick v. Mick*, in which New York's Supreme Court of Judicature held that marriage did not affect native allegiance. The court held that a woman born in Ireland but married to an American was an alien. While as a white woman she could naturalize as a U.S. citizen, her marriage did not make her a citizen. Mick v. Mick, 10 Wend. 379 (N.Y. 1833).

63. 28 U.S. (3 Pet.) 242 (1830).

64. *Id.* at 246.

acceptance by the British crown, not through her marriage.[65] That she followed her husband to England had consequences for her citizenship, but the marriage alone did not.[66] In the words of Justice Story, "The incapacities of femes covert . . . apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character."[67] This assumption that marriage did not divest a woman of her political allegiance was premised in the British common law principle of indelible nationality and the assumption that a national government had to act to result in a change of allegiance.[68]

C. The 1855 Act

The relationship between marriage and nationality abruptly changed in 1855, when Congress passed a statute (the 1855 Act) granting U.S. citizenship to any woman who had married or would marry a U.S. citizen

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65. *Id.* The Court held:

> [M]arriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens.

Id.

66. Lower courts had faced two different marriage scenarios. In one, after a U.S. citizen woman married a noncitizen man, she stayed in the United States. Consistently, these women were not divested of their citizenship. *See, e.g.*, *In re* Lynch, 31 F.2d 762 (S.D. Cal. 1929) (holding that a marriage in 1889 to an alien did not divest the woman of citizenship when the wife never abandoned domicile in the United States). In the second scenario, a U.S. citizen woman left the United States after marrying a noncitizen man. Some courts held, as did the Court in *Shanks*, that marriage plus removal led to expatriation in such circumstances. *See, e.g.*, Ruckgaber v. Moore, 104 F. 947 (N.Y. 1900) (finding that a woman born in Washington, married to a British subject, and residing in British Columbia was considered a British subject).

Moreover, as a California court stated in *Petition of Sproule*:

> [W]hen the woman follows her husband to a foreign country, in which the nationality of her husband would be imposed upon her, she has severed the last tie which bound her to American nationality, the *tie of residence* in the country of her nativity. There is then no reason left for allowing her to maintain a double allegiance. In following her husband, she must have said, as did Ruth of old: "For wither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God."

Petition of Sproule, 19 F. Supp. 995, 998 (S.D. Cal. 1937) (quoting *Ruth* 1:16). But there were also contrary decisions. *See, e.g.*, Petition of Zogbaum, 32 F.2d 911 (D.S.D. 1929) (finding that a woman with birthright citizenship who married a Norwegian in Norway and subsequently returned to the U.S. to reside after his death was not expatriated).

67. *Shanks*, 28 U.S. at 248.

68. That Ann Shanks voluntarily moved with her husband in 1782 to England was considered to fix her allegiance to the British crown under the Paris Peace Treaty of 1783. *Id.* at 246–47.

husband—but not vice versa.[69] The statute read: "Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."[70] The same statute affirmed U.S. citizenship of children born abroad to U.S. citizen fathers, but not mothers.[71] This enactment followed the logic of dependent citizenship: that the citizenship of a wife and a child followed the male head of the household.[72]

Why was this new law created? The initial impetus appears to have been concern about children born abroad to American fathers.[73] But the logic that

69. In practice, this meant that in cases where a naturalized U.S. citizen sent for his foreign-born wife to join him, she might enter the United States for the first time listed as a U.S. citizen. In other cases, the immigrant woman might become a U.S. citizen through the act of marriage. *See* Marian L. Smith, *"Any Woman Who Is Now or May Hereafter Be Married . . .": Women and Naturalization, c. 1802–1940*, 30 PROLOGUE 146 (1998), *available at* http://www.archives.gov/publications/prologue/1998/summer/women-and-naturalization-1.html.

70. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604.

71. *Id.* The 1855 Act gave U.S. citizen fathers the right to transmit citizenship to foreign-born children, so long as they were married to the mother of such children. While this is not explicit on the face of the law, unmarried men could not pass their citizenship to their foreign-born children unless the children were legitimated; this protected men from claims on property, support, and status by foreign-born illegitimate children. Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669, 1683–85 (2000). In contrast, under the 1855 Act, married U.S. citizen mothers were deprived of the statutory right to transmit citizenship to foreign-born children. Unmarried U.S. citizen mothers could transmit their citizenship status to foreign-born children, however, because they were considered to stand in the place of the father and to have a common law duty to support those children, which fathers did not. *Id.* at 1683.

These gender differentials have had modern consequences. They first led to the Act of May 24, 1934, which provided U.S. citizenship for any foreign-born child of either a U.S. citizen mother or father, unless the citizen parent had never resided in the United States prior to the birth of the child. Act of May 24, 1934, ch. 344, 48 Stat. 797. The 1934 Act, however, was silent as to the question of transmission of citizenship when the children were born out of wedlock. The Nationality Act of 1940 made explicit how the transmission of citizenship to nonmarital children would take place: Nonmarital children of citizen fathers could inherit American citizenship if the father legitimated the child prior to majority, while no such procedure was required of mothers. Nationality Act of 1940, §§ 201, 205, 54 Stat. 1137, 1138–40. 8 U.S.C. § 1409 (2000), effective since June 27, 1952, still requires certain acts of the father to signify paternity and financial support, while requiring nothing of the mother. This provision has now withstood two challenges to the Supreme Court, in *Miller v. Albright*, 523 U.S. 420 (1998), and *Nguyen v. INS*, 533 U.S. 53 (2001). For discussion of questions raised by *Miller* and *Nguyen*, see Augustine-Adams, *supra* note 12, at 111–14; Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 105–07 (2003); Nina Pillard, *Plenary Power Underground in* Nguyen v. INS: *A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 852–53 (2002); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222, 245–50 (2003).

72. Cott, *supra* note 13, at 1456 n.45.

73. *Id.* The Act of Apr. 14, 1802, § 4, 2 Stat. 153, 155 attempted to grant such children U.S. citizenship, but the wording was ambiguous and could be read either to require that both parents were U.S. citizens or that citizenship could be garnered by the child of a U.S. citizen mother and foreign father if the latter had at one point resided in the country. *See* Miller v. Albright, 523 U.S. 420, 460

permitted further amendment governing the citizenship of foreign-born wives relied on the idea that all members of a family should have the same nationality, as led by the husband,[74] and on the notions of coverture and civic republicanism implicit in that idea.[75] Coverture made a married woman into a dependent, transferring to her husband her property and income.[76] Civic republicanism suggests that one's citizenship depends on one's political participation, and that one's political participation in part depended on ownership of property.[77] One congressional sponsor of the 1855 Act, Francis Cutting of New York, asserted that "by the act of marriage itself the political character of the wife shall at once conform to the political character of the husband."[78] Thus, marriage to a U.S. citizen husband was an act of political consent to the U.S. nation state. The wife could only

(1998) (Ginsburg, J., dissenting). In the process of amending the law, Congress added the clause granting U.S. citizenship to foreign-born wives of American men. *See* Cott, *supra* note 13, at 1456.

74. Until World War I, the nationality laws of virtually all countries made a married woman's nationality dependent on her husband's nationality. *See* Knop, *supra* note 12, at 96. Thus, we find Virginia Woolf writing in *Three Guineas*: "[A]s a woman, I have no country. As a woman I want no country. As a woman my country is the whole world." VIRGINIA WOOLF, THREE GUINEAS 125 (2d ed. 1986).

Dependent nationality was not inevitable, however. Dual nationality presented another option, but it was greatly disfavored by states at this time. Dual nationals represented a source of international tension because one state might attempt to protect an individual against the interests of another state claiming that individual; it also presented the concern of presumptively divided loyalties. For a discussion of the historical approach to dual nationality in the United States, see Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997).

75. Cott, *supra* note 13, at 1456.

76. LINDA KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 11–29 (1998). In the words of one author: "Marriage, which begins as a voluntary association between two 'citizens'—two agents capable of valid contractual undertakings—turns into a permanent house-arrest for one of them." Ursula Vogel, *Is Citizenship Gender-Specific?*, *in* THE FRONTIERS OF CITIZENSHIP 58, 73 (Ursula Vogel & Michael Moran eds., 1991) (describing coverture).

77. At root was the idea that through the tilling of one's own soil, a man developed the characteristics essential to participation in a civic republic: the cultivation of inner strength and the freedom from coercion and control by others. *See* Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976). All but one of the American colonies featured property qualifications for suffrage in the mid-eighteenth century; the propertyless were disenfranchised because they were considered to have "no wills of their own." Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 340 (1989). North Carolina appears to have been the last state to abolish property qualifications for suffrage, dropping its freehold requirement for voting for the election of senators in 1857. *See* Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth Century America*, 107 YALE L.J. 473, 478 n.33 (1997).

78. CONG. GLOBE, 33d Cong., 1st Sess. 170 (1854) (statement of Francis Cutting), *quoted in* Cott, *supra* note 13, at 1456.

relate to the state through her husband; as Cutting suggested, women possessed no political rights to be infringed.[79]

For many years after 1855, noncitizen women who married U.S. citizens acquired U.S. citizenship.[80] This included wives, naturalized through marriage, who never had set foot on U.S. soil.[81] However, these rules did not apply to women subject to the racial bars to naturalization.[82] The 1855 law carefully included the proviso that only women who could become citizens through marriage could "lawfully be naturalized under existing laws."[83] This meant that until 1870—the year that the racial bar on naturalization was lifted for those "of African descent or nativity"—the only wives welcomed into the American polity were free white wives.[84] The 1898 case of *Broadis v. Broadis*[85] recognized the U.S. citizenship of Ellen Maria Broadis, who was "of African descent," through her marriage to her husband, James Broadis, described by the court as "a Negro, having been at one time a slave" and a U.S. citizen.[86] While the court noted that it was unclear whether Ellen Broadis was born in Maine or Canada, it held that she was a citizen of the United

79. Assimilating foreign-born wives into the nation trumped concerns about presumptive disloyalty on the part of the immigrant spouse. We can ponder here how easily a political identity between a woman and her state merged with her identity with her husband. Karen Knop writes that it "seems true . . . that our feelings for a state may be created by our feelings for particular members of that state" and suggests this may have been behind the fiction of obedience and consent to the husband's state. Knop, *supra* note 12, at 112 (footnote omitted).

80. In *Kelly v. Owen*, the law of 1855 was held to grant U.S. citizenship to Ellen Owen, who arrived in the United States at the age of fourteen and who married a man from Ireland; he only became a naturalized U.S. citizen after the marriage. Justice Field wrote: "[W]henever a woman, who under previous act might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she became by that fact a citizen also." Kelly v. Owen, 74 U.S. 496, 498 (1868); *see also* Halsey v. Beer, 5 N.Y.S. 334 (Sup. Ct. 1889).

81. *Halsey*, 5 N.Y.S. at 334. Margaret Beer, who was English, married John Beer, a U.S. citizen through naturalization. Although they resided in England afrer their marriage, Margaret was held to be a U.S. citizen under the 1855 Act and thus entitled to take land in New York left by a nephew who died intestate. *Id.* at 334–36.

82. The *Halsey* court understood the requirements of becoming a citizen to refer to "the inherent and natural capacity of the woman to be naturalized by reason of race, without reference to residence or any other qualification required by the natutalization laws." *Id.* at 336. Race trumps residency in its importance here.

83. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604.

84. *See* Kane v. McCarthy, 63 N.C. 299 (1869). Martha Kane, a "free white woman" and a native of Ireland, was held to be a citizen of the United States through her marriage to U.S. citizen Thomas Kane, although she always had resided in Ireland. *See also* Leonard v. Grant, 5 F. 11 (D. Or. 1880) (holding that a native of Switzerland, who had married a U.S. birth citizen in 1875 and resided with him in Oregon, was assumed to be a "ftee white person" and a citizen of the United States after her marriage).

85. 86 F. 951 (N.D. Cal. 1898).

86. *Id.*

States by virtue of the fact that she was married to one; as the court wrote, "the political status of her husband was impressed upon her."[87]

In 1888, Congress enacted legislation providing that American Indian women marrying U.S. citizens would thereafter acquire citizenship through marriage.[88] However, Asian women were still precluded from citizenship.[89] The Supreme Court so held in 1912, in *Low Wah Suey v. Backus*.[90] Li Sim, married to a "Chinaman of American birth" with whom she had a child, could not naturalize, as she was a "Chinese person not born in this country."[91] As a consequence of her lack of citizenship, she remained an alien and subject to deportation after she was found in a brothel.[92] The Supreme Court

87. *Id.* at 955. The case is significant as it seems to be the first court decision interpreting whether dependent citizenship extended to women of African descent.

88. Act of Aug. 9, 1888, ch. 818, § 2, 25 Stat. 392, 392. Titled "An Act in Relation to Marriage between White Men and Indian Women," the statute provides that every Indian woman who marries a citizen of the United States gained U.S. citizenship through the marriage. *Id.* The Act also provides that nothing in the Act would impair or in any way affect the right of such married women to any tribal property. *Id.* Section 1 of the Act precludes white men not othetwise a member of any tribe from acquiring any right to any tribal property, privilege, or interest through marriage to an Indian woman. *Id.* § 1, 25 Stat. at 392.

Bethany Ruth Berger asserts that while the law was ostensibly designed primarily to protect Indian women from unscrupulous white men who would marry them for the purpose of acquiring Indian land, the statute also was intended to "make citizens of the United States instead of making Indians of our citizens"—in other words, it was intended to encourage intermarried Indian women to lose their tribal bonds and to discourage white men from assimilating into Indian tribes. Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 30 (1997) (citing 19 CONG. REC. 6885, 6886 (1888)). For an example of the application of the statute, see *McKnight v. United States*, 130 F. 659 (9th Cir. 1904) (holding that a Blackfoot Indian woman had become a U.S. citizen through her marriage to her white husband). On the question of white male citizenship in Indian nations, see 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).

89. This conclusion was aligned with a number of cases where Asian men had sought naturalization and were refused as racially ineligible. *See, e.g.*, United States v. Thind, 261 U.S. 204 (1923) (holding that Asian Indians are not white); Ozawa v. United States, 260 U.S. 178 (1922) (holding that Japanese are not white); *In re* Mallari, 239 F. 416 (D. Mass. 1916) (holding that Filipinos are not white); *Ex parte* Shahid, 205 F. 812 (E.D.S.C. 1913) (holding that Syrians are not white); *In re* Young, 198 F. 715 (W.D. Wash. 1912) (holding that persons half-German and half-Japanese are not white); *In re* Ah Yup, 1 F. Cas. 223 (D. Cal. 1878) (holding that Chinese are not white); *In re* Po, 28 N.Y.S. 838 (City Ct. 1894) (holding that Burmese are not white); *In re* Kanaka Nian, 21 P. 993 (Utah 1889) (holding that Hawaiians are not white).

90. 225 U.S. 460 (1912).

91. *Id.* at 473; *see also* Chung Fook v. White, 264 U.S. 443 (1924) (describing Lee Shee, the alien Chinese wife of a native-born citizen, as ineligible for naturalization).

92. Li Sim's deportation was pursuant to the Immigration Act of 1907, as amended by the Act of March 26, 1910, which provided:

> Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of

rationalized the decision to deport her, writing that if Li Sim had engaged in "proper conduct," she would not have found herself in this situation, which was "of her own making."[93]

What about U.S. citizen women who married foreign husbands? While the 1855 Act did not address the question, a number of courts answered it inconsistently.[94] In *Comitis v. Parkerson*,[95] the 1855 Act was held not to divest Annie Comitis of her citizenship through marriage to an Italian citizen.[96] Conversely, in *Pequignot v. Detroit*,[97] Mrs. Pequignot was divested of her citizenship after marrying a French citizen.[98] In issuing its decision, the *Pequignot* court noted that "legislation upon the subject of naturalization is constantly

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> prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported . . . .

Act of Mar. 26, 1910, ch. 128, § 3, 36 Stat. 263, 265. For the application of this statute to the case, see *Low Wah Suey*, 225 U.S. at 466–67.

93. *Low Wah Suey*, 225 U.S. at 476. In the words of the Court:

> This situation was one of her own making, and, conceding her right to come into the United States and dwell with her husband because of his American citizenship, it is obvious that such right could only have been retained by proper conduct on her part and was only lost upon her violation of the statute, she, being an alien, thereby forfeiting her right to longer remain in this country. If it be admitted that the present is a hard application of the rule of the statute, with the effect of such law this court has nothing to do.

Id.

94. Authorities other than the courts also held conflicting opinions. Attorneys general had been inclined to believe that U.S. citizen women did not lose their citizenship through marriage to an alien, while secretaries of state appeared to reach the opposite conclusion. *See* LUELLA GETTYS, THE LAW OF CITIZENSHIP IN THE UNITED STATES 117–18 (1934). Thus, when an American woman married to a Mexican citizen in Mexico complained to the Department of State about her husband's desertion and neglect, the Department replied that she had become a citizen of the Mexican Republic. *Id.* at 118. See also *In re* Fitzroy, 4 F.2d 541 (D. Mass. 1925), in which the U.S. Attorney contended that under the ruling of the Department of State, wives of aliens became aliens, whether or not they were married prior to or subsequent to the passage of the 1907 Act. *Id.* at 542.

95. 56 F. 556 (E.D. La. 1893).

96. *Id.* at 561. Annie Comitis, born in Louisiana, married an Italian citizen who lived with her in Louisiana until his death. *Id.* at 557–58. The court held that just because an alien woman became a citizen by marriage to a citizen, a citizen woman did not necessarily become an alien by marriage to an alien. *Id.* at 562–63. This would frustrate the public policy of the United States, the court suggested, which sought to legislate population of the continent by "uniformly encourag[ing] and foster[ing] the immigration and naturalization of foreigners in every proper way." *Id.* at 561. Of course, at the time of this tuling, Chinese already were not encouraged to immigrate or naturalize.

97. 16 F. 211 (E.D. Mich. 1883).

98. *Id.* The plaintiff, who had been born in France and had emigrated to the United States, married a U.S. citizen, James Partridge, in 1863, and through the 1855 Act became a U.S. citizen. *Id.* at 213. After thirteen to fourteen years of marriage, they divorced. She subsequently married Augustine Pequignot, a French citizen who lived with her in Michigan. *Id.* Although their residence in the United States was held to be a rebuttable presumption of citizenship, *id.* at 215, the Court used the logic of dependent citizenship to expatriate Mrs. Pequignot, especially because she was originally a native citizen of France. *Id.* at 217.

advancing toward the idea that the husband, as head of the family, is to be considered its political representative, at least for purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power."[99]

D. The 1907 Expatriation Act

The logic of dependent citizenship was extended by Congress in the Expatriation Act of 1907 to United States citizen wives. Because the wife took the nationality of her husband, female U.S. citizens—of any race—who married noncitizen men were stripped of their citizenship.[100] This led, for some women, to statelessness. Women became stateless when they married men from countries that did not automatically grant them citizenship because of their marriage, or when they married men who themselves were without a country, such as men who had lost their citizenship when they unsuccessfully applied for naturalization in the United States.[101] Thus the Expatriation Act created a striking gender disparity. When male U.S. citizens married foreign-born wives, their wives were welcomed into the national body, unless these women were racially barred from doing so. Meanwhile, female U.S. citizens who married foreign-born husbands were politically expelled from the nation.[102]

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99. *Id.* at 216.

100. The Expatriation Act provided, in part, as follows:

> SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.
>
> SEC. 4. That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

Expatriation Act, ch. 2534, §§ 3–4, 34 Stat. 1228, 1228–29 (1907).

101. For an example of this, see the case of Mary Das, whose Indian husband, a subject of Great Britain, had lost his citizenship when he applied for U.S. citizenship, discussed *infra* notes 145–149. *See also* CATHERYN SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES: A STUDY IN NATIONALITY AND CONFLICT OF LAWS (1934).

102. *See, e.g.*, *In re* Martorana, 159 F. 1010 (E.D. Pa 1908) (holding that Lorella Marrorana, born in the United States, who married Italian Santi Martorana, could not serve as a witness in support of his petition for naturalization because she herself had become an alien through marriage under the 1907 law).

Courts addressing the status of women married to foreign-born men before the 1907 Expatriation Act struggled to determine whether the Expatriation Act merely restated or declared the common law rule, or whether it changed this rule. Some followed the principle of *Shanks* and determined that women with marriages predating 1907 had not lost their citizenship, especially when they had continued to reside in the United States. Others followed the principle of *Pequignot* and held that they

The Expatriation Act was the first general statute to provide for loss of U.S. nationality. It covered not only marital expatriation, but also took away citizenship for those who naturalized or took an oath of allegiance to a foreign state. Some commentators have argued that the motive for the marital expatriation section of the Act was the concern about dual nationality, which previously had led to conflicting national claims on the allegiance of U.S. citizens who returned to their former nations, or who voluntarily entered the military or civil service of a third state.[103] Others have suggested that the Act was legislated to bring U.S. law in line with the law in other countries.[104] But impetus for the provisions as to marital expatriation also seemed strongly punitive and specifically designed to punish U.S. citizen women who married wealthy foreigners in order to "chase titles."[105] In fact, the Expatriation Act was sometimes referred to as the "Gigolo Act,"[106] and one member of Congress charged that women who "married foreign dukes and counts . . . when there are enough Americans for them to select from" had only themselves to blame for their loss of citizenship.[107] However, the impact of the Expatriation Act extended well beyond women of this social class.

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had lost their citizenship by "intermarrying with an alien." *See, e.g.*, *In re* Wohlgemuth, 35 F.2d 1007 (W.D. Mich 1929) (finding that the petitioner married a German citizen in 1901 but continued residence in the United States; nonetheless, the marriage divested her of citizenship).

103. *See* Donald K. Duvall, *Expatriation Under United States Law, Perez to* Afroyim: *The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408, 414 (1970).

104. *See Developments in the Law: Immigration and Nationality*, 66 HARV. L. REV. 643, 732 (1953) (noting that the "generally accepted principle of family unity . . . resulted in the wife's acquisition of the husband's nationality in most countries").

Or, perhaps, the impetus was to align citizenship law with the doctrine of coverture. See *In re Watson's Repatriation*, 42 F. Supp. 163, 165 (E.D. Ill. 1941), in which the court pointed out that in 1907 the common law doctrine of coverture and all its limitations were recognized quite generally, that a "married woman's legal status had not escaped its burdens and limitations under Anglo-Saxon law," and that the relationship between expatriation and coverture was made plain in the Act by the fact that citizenship should not be restored until termination of the coverture.

105. For evidence of congressional concern as to U.S. citizen women "marrying titles," see *Readmission of Augusta Louise de Haven-Alten to the Status and Privileges of a Citizen of the United States: Hearings on S.J. Res. 134 Before the Comm. on Immigration and Naturalization*, 66th Cong. 46–57 (1920) (providing a list of over 200 "American women who have married titles"). On the popular and literary reception of transatlantic marriages between American women and London society, see MAUREEN E. MONTGOMERY, GILDED PROSTITUTION: STATUS, MONEY, AND TRANSATLANTIC MARRIAGES, 1870–1914 (1989).

106. *See* SMITH, *supra* note 26, at 457.

107. In testimony following the enactment of the Cable Act in 1922, this punitive aspect is readily apparent. In a colloquy with Emma Wold of the National Woman's Party, Congressman Dickstein asked, "They brought it about themselves, did they not? . . . The women who married these foreign dukes and counts, these duchesses and countesses and that sort of stuff, when there are enough Americans for them to select from." *Immigration and Citizenship of American-Born Women Married to Aliens: Hearings on H.R. 4057, H.R. 6238, and H.R. 9825 Before the House Comm. on Immigration and Naturalization*, 69th Cong. 18 (1926) (statement of Emma Wold, Legislative Secretary, National

The consequences of lack of citizenship bear explication.[108] For women seeking admission to the United States, the lack of citizenship subjected them to grounds of exclusion—popular grounds of exclusion targeting noncitizen women included the carrying of contagious diseases, prostitution, and being considered likely to become a public charge. Women already within the United States were often threatened with deportation on similar grounds.[109] Women who lost citizenship also lost the ability to confer derivative citizenship to any children born outside of the United States.[110] In locations where women had voting privileges, they lost that right, too.[111] Additionally, alien status prohibited the ownership of property in many states.[112] Thus was created a bizarre, circular disenfranchisement: No citizenship

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Woman's Party). Congressman Dickstein mistakenly believed that U.S. citizen women were still expatriated for marrying white European men after 1922. The Chairman clarified that the subject at hand was what happened after the enactment of the Cable Act in 1922, *id.*, which no longer expatriated U.S. citizen women for marrying white Europeans, and Emma Wold stated that "most of our dukes and earls are members of nationalities which are eligible to citizenship." *Id.* at 19.

108. The question of citizenship, it must be clarified, is a different inquiry from the question of admission into the United States. The two inquiries can be confused, as the fact of citizenship means that one was not (and is not) subject to grounds of exclusion or deportation that preclude admission or compel expulsion once admitted.

109. For cases that raise the relationship of citizenship through marriage to grounds of exclusion and deportation, see, for example, Chung Fook v. White, 264 U.S. 443, 444 (1924) (contagious disease); *In re* Nicola, 184 F. 322 (2d Cir. 1911) (same); *In re* Rustigian, 165 F. 980 (C.C.D. R.I. 1908) (same); Sprung v. Morton, 182 F. 330 (E.D. Va. 1909) (prostitution).

110. *See* Katheryn M. Fong, *Asian Women Lose Citizenship*, S.F. JOURNAL, Dec. 29, 1976, at 12 (describing two cases in which women who lost their citizenship were unable to confer derivative citizenship to their children born outside the United States).

111. On the right to vote, see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874), in which the Court found no constitutional correlation between the privileges and immunities of citizenship and suffrage, and upholding the ability of states to "commit that important trust to men alone." The state of New Jersey, alone among the original colonies, had given women the right to vote in 1776, as "all inhabitants . . . worth fifty pounds" were so guaranteed, but in 1807 the state's legislature restricted suffrage to white male citizens who paid taxes. A few states, however, allowed women to vote in school or municipal elections. *See id.* at 172; Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265, 303–06; *see also* Dorsey v. Brigham, 177 Ill. 250, 265–67 (1898) (holding that women who were foreign born and who cast ballots at an Illinois board of education election were considered citizens when married to U.S. citizens; ballots cast by foreign-born women married to noncitizens or unmarried were rejected). For the list of states that granted women suffrage, see *infra* note 118.

112. While they have not been studied in relationship to one another, various states legislated restrictions on property that pertained generally to aliens, while others legislated restrictions on property that pertained specifically to aliens ineligible to citizenship. On the former, see Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152 (1999) (documenting historical and contemporary restrictions on the owning of real property by noncitizens). On the latter, see Aoki, *supra* note 40, at 38; Gabriel J. Chin, *Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497 (2001). In comparing the laws disenfranchising aliens generically and those laws disenfranchising aliens ineligible to citizenship, the intent behind the

(in the formal legal sense) meant no property,[113] which meant no citizenship (in the civic republican sense).[114] Those without property were not visible before the law.[115] While beginning in the 1840s, "married women's property acts" allowing married women to control their own property were passed in virtually every state,[116] the ideology of coverture and the importance of property ownership as signifying citizenship lingered well past that date.[117]

The constitutionality of marital expatriation was finally challenged before the Supreme Court by Ethel Mackenzie, a wealthy San Francisco suffragist, born in California, who had married the Scottish opera singer Gordon

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two sets of laws seems to have been quite different. The former attempted to create an incentive for citizenship and were premised on the notion that property owners should have an allegiance to the United States. The requirement of citizenship was not absolute, and many of the provisions of the laws did not apply to individuals who declared their intent to become citizens. The latter were motivated by racial animus and the desire to exclude, because the aliens these laws applied to could not become citizens. Furthermore, the two sets of laws also can be differentiated in effect. The land laws directed against aliens ineligible for citizenship were harsher, containing charges for criminal conspiracy and prohibiting short-term leaseholds, as well as prohibiting the ownership of freehold estates. In contrast, the land laws directed against aliens in general contained no criminal penalties, usually did not affect leaseholds, and instead ranged from only allowing aliens to acquire defeasible titles to prohibiting aliens from inheriting fee simple and sometimes to prohibiting aliens from purchasing land in fee simple. I am indebted to Jessica Salsbury for researching this comparison.

113. While in theory U.S. citizen women who lost their citizenship through marriage to aliens could become ineligible to hold property, some scholars suggest that this was not enforced in practice. *See* Price, *supra* note 112, at 182–90. But see *United States v. Pandit*, 15 F.2d 285 (9th Cir. 1926), in which the defendant alleged that canceling his naturalization certificate would cause him to lose his law license and cause his wife, a white woman born in the state of Michigan, to lose both her citizenship and her right to 320 acres of land that she owned in Imperial Valley, California. *Id.*

114. From the advent of the Enlightenment, the ownership of property was foundational to notions of citizenship and liberal ideals. Both Locke and Rousseau use the identification of property rights as marking the shift from a state of nature to society, as they theorize the importance of democracy against feudalism, theocracy, and monarchy. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JEAN-JACQUES ROUSSEAU, A DISCOURSE ON THE ORIGIN OF INEQUALITY (Maurice Cranston trans., Penguin Books 1985) (1755).

115. As Amy Dru Stanley writes, "Ownership lay at the heart of all rights." AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 8 (1998) (discussing Blackstone and Locke).

116. "The first wave [of statutes] simply protected women's premarital property from their husbands' creditors . . . . Later statutes first gave women the ability to manage and dispose of their property, and gave them control over their own earnings." Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV. 1613, 1628 (2001) (reviewing HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2000)).

117. On the lingering impact of coverture, see Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1655 (2003) (asserting that "[l]ong after the passage of married women's property acts . . . and the passage of married women's earnings statutes later in the nineteenth century, married women's legal and political identities continued to be defined and limited by their marital status").

Mackenzie in 1909. When Mackenzie attempted to vote in 1913,[118] her registration was refused by the board of election commissioners of San Francisco on the ground that she had become a subject of Great Britain through marriage. Despite her argument that her citizenship, an incident to her birth, was a right, privilege, and immunity that could not be taken away from her other than as punishment for a crime, or through voluntary expatriation, the Court held in *Mackenzie v. Hare*[119] that the language of the Expatriation Act was plain.[120] Furthermore, the Court explained in upholding the Act:

> The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy.[121]

Justice McKenna then found implicit power in the nature of sovereignty to permit Congress to expatriate women who married foreigners, necessitated by the fact that the marriage of an American woman with a foreigner might bring the government into "embarrassments" and even "controversies."[122] In effect, U.S. citizen women were punished through the loss of their own citizenship for marrying foreign-born men.

What was the effect of divorce or widowhood? Foreign-born wives naturalized as U.S. citizens through marriage could keep their citizenship in widowhood or after divorce.[123] U.S. citizen women who lost their citizenship through marriage could resume that citizenship on divorce

118. Fourteen states and territories—including California—gave women the vote before the U.S. Constitution was amended in 1920. In 1890, the Territory of Wyoming, which had allowed women to vote since 1869, was admitted as a state. The Utah Territorial Legislature granted women suffrage in 1872, although to attack voter support for polygamy, the U.S. Congress disenfranchised women voters in Utah in 1887. Subsequently in 1896, after the Mormon Church had issued a manifesto barring plural marriage, Utah was admitted as a state with women's suffrage. The Territory of Washington granted women voting rights in 1883 and was admitted as a state in 1910. Other early states and territories granting women suffrage were Colorado (1893), Idaho (1896), California (1911), Oregon, Kansas, and Arizona (1912), the Territory of Alaska (1913), Montana and Nevada (1914), and South Dakota and Oklahoma (1918).

119. 239 U.S. 299 (1915).

120. *Id.* at 305–12.

121. *Id.* at 311.

122. *Id.* at 312.

123. Expatriation Act, ch. 2534, § 4, 34 Stat. 1228, 1229 (1907).

or widowhood,[124] subject to some limitations. First, if they resided outside of the United States at the termination of the marriage, the women had to register as U.S. citizens within one year with a U.S. consul, or return to the U.S. to reside.[125] The idea of resumption of citizenship on divorce or widowhood may have been fueled by the idea of encouraging mothers to stay within the U.S. polity.[126] Second, while not made explicit in the text of the Act, U.S. citizen women could only resume their citizenship if they were racially eligible to naturalize. Clear here was the idea of encouraging only certain mothers to stay, namely not Asian (and formerly Asian American) women who were ineligible to naturalize.[127] Thus, we find Ng Fung Sing, barred from the country of her birth.[128]

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124. In *In re Fitzroy*, Mary Bates Fitzroy, an American-born wife who had lost her U.S. citizenship through marriage and who subsequently sought admission for citizenship, had her petition dismissed on the ground that she was, in fact, not an alien. *In re* Fitzroy, 4 F.2d 541 (D. Mass. 1925). "[S]he [was] married [to] . . . an unnaturalized Englishmen residing in Boston" from 1905 until their divorce in 1924. *Id.* While the United States Attorney contended that Fitzroy was an alien, the Court held that the loss of citizenship through marriage to an alien lasted only during coverture. On "termination of the marriage and her continuation or resumption of domicile [in the United States], her original citizenship revive[d]." *Id.* at 542.

125. Expatriation Act § 3, 34. Stat. at 1228–29.

126. *See* Cott, *supra* note 13, at 1463.

127. Asian American women were not the only women whose racial status shaped their citizenship. American Indian women who had married aliens ineligible to citizenship also possessed an uncertain citizenship. *Wong Kim Ark* had explicitly excepted American Indians from the guarantee of birthright citizenship, although many Indians had been granted citizenship through treaties and other statutes. *See* Elk v. Wilkins, 112 U.S. 94, 100, 103–05 (1884) (describing treaties and statutes by which tribes and members of tribes were naturalized). And Indians were considered racially ineligible to naturalize. *See In re* Cruz, 23 F. Supp. 774 (E.D.N.Y. 1938); *In re* Burton, 1 Alaska 111 (D. Alaska 1900); *In re* Camille, 6 F. 256 (C.C.D. Or. 1880).

In one case, Agnes Phair, a "full blooded American Indian" born on the Lummi Indian Reservation in Washington state in 1896, had married a "full blooded Canadian born Indian" in British Columbia in 1914. Letter from Geo. W. Tyler, Immigration and Naturalization Service (INS) Assistant District Director, Seattle District, to the Commissioner of Immigration and Naturalization, Washington, D.C. (Oct. 28, 1936) (National Archives and Records Administration, 29/73, File 3229/17). She contacted the INS to ask whether through the marriage she had lost her citizenship, as her husband was considered an "alien ineligible to citizenship." *Id.* Josephine Roumanis, who was "one-half Shoshone Indian," and who was born in the United States in 1902, married a Greek citizen in 1917. On his naturalization application, Roumanis's husband asserted that he believed his wife had lost her citizenship through that marriage. Letter from M.F. Lence, INS District Director, Salt Lake City, Utah, to the Commissioner of Immigration and Naturalization, Washington, D.C. and accompanying enclosures (Aug. 18, 1936) (National Archives and Records Administration, 29/71, File 19 x 963). In both instances, the Central Office of the INS resolved the cases by asserting that the question of marital expatriation was moot, as the women had become citizens of the United States under the Act of June 2, 1924, which conferred citizenship on all noncitizen Indians born within the territorial limits of the United States. *See id.*; Letter from Geo. W. Tyler, *supra.*

128. *See Ex parte* Ng Fung Sing, discussed *supra* note 5.

After the passage of the Nineteenth Amendment in 1920, granting women the right to vote, the *Mackenzie* case led to significant suffragist activity on the question of expatriation.[129] Newly enfranchised women voters focused great energy on the question of independent citizenship for married women.[130] Both Republican and Democratic parties incorporated the concept of independent citizenship into their 1920 party platforms.[131] This led Congress to pass the Cable Act of 1922, which partially repealed the Expatriation Act.[132]

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129. *See* BREDBENNER, *supra* note 13, at 70. There was an earlier, failed attempt at legislation, the Rankin bill, which had been introduced in 1917. The Rankin bill was met with significant hostility by the House Committee on Immigration and Naturalization, members of which suggested that American women who married foreigners were disloyal and seeking European titles. *Id.* at 70–73. The congressmen appeared more sympathetic to immigrant women who had married American men, assuming they had become "patriot[s] at heart." *Id.* at 72 (citations omitted). Mary Wood of the General Federation of Women's Clubs, who testified for the bill, attempted to clarify that "[s]he did not come to plead for the Claudias, the Consuellos, and the Imogenes, but for the wronged plain Janes and plain Marys who had married loyal immigrant laborers." *Id.* at 72–73 (citations omitted).

130. *See* GETTYS, *supra* note 94, at 140–41 (describing the relationship between the Cable Act and the Nineteenth Amendment). Gettys also points out the prominence of the case of Mrs. de Haven-Alten in urging the passage of the Act. *Id.* at 134–40. Augusta de Haven-Alten, the daughter of an American admiral who lost her citizenship through marriage to a German, later sued for divorce. The divorce was suspended during World War I because of German law prohibiting divorce proceedings in times of war against an army officer. During the war, she showed her sympathies by doing extensive relief work for the Allies. *Id.* Nonetheless, she was technically an enemy alien, and her property was seized by the Alien Property Custodian. *Id.*

131. *See* 62 CONG. REC. 8691, 9045 (1922).

132. The Cable Act of 1922, titled "An Act Relative to the Naturalization and Citizenship of Married Women," also known as the "Married Women's Independent Citizenship Act," provided, in part, as follows:

> That the right of any woman to become a natutalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.
>
> SEC. 2. That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws . . . .
>
> SEC. 3. That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: *Provided*, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States.
>
> . . . .
>
> SEC. 5. That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status.

Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, 42 Stat. 1021, 1021–22 (1922).

E. The 1922 Cable Act

Most law review scholarship reports that the Cable Act completely eradicated marital expatriation.[133] This is incorrect. The Cable Act only ended the expatriation of white or black women married to white or black men; for them, the Cable Act was a victory. However, the Act was not a victory for Asian American women—or for any women married to "aliens ineligible to citizenship."[134] In fact, for these women, the Cable Act was a defeat.

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133. *See, e.g.*, KRISTI ANDERSEN, AFTER SUFFRAGE: WOMEN IN PARTISAN AND ELECTORAL POLITICS BEFORE THE NEW DEAL 27 (1996) (stating that "[t]he Cable Act of 1922 . . . allowed women to remain citizens if they married foreigners"); Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 671 (1998) (stating that the Cable Act "guarantee[d] a woman's right to retain her United States citizenship upon marriage to a non-United States citizen"); Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 278 n.22 (2003) (asserting that U.S. citizen women "who married non-United States citizens between 1907 and 1922" lost their citizenship); Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 100 (2001) (claiming that "[c]overture was so much a part of United States law that from 1907 through 1922, when a United States citizen woman married a man from another country, she lost her United States citizenship"); Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 604 & n.29 (1999) (reviewing SMITH, *supra* note 26, and writing that the Cable Act repealed the expatriation of married women); Collins, *supra* note 71, at 1694 (stating that "[t]he Cable Act repealed the Expatriation Act of 1907: An American woman no longer lost her citizenship upon marriage to an alien"); Simone Tan, Note, *Dual Nationality in France and the United States*, 15 HASTINGS INT'L & COMP. L. REV. 447, 449 n.8 (1992) (stating that "[i]n 1922 the Cable Act of Sept. 22 allowed marriage of an American woman to an alien without loss of nationality"). *But see* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1018 (2002) (stating correctly that "the Cable Act abolished dependent citizenship for only some women" while "retain[ing] the old common law domicile rules for women who married men of disfavored races or nationalities").

One of the two leading casebooks on immigration and citizenship also incorrectly suggests that marital expatriation ended in 1922. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 34 n.9 (2003) (stating that "[f]rom 1907 to 1922, U.S. citizen women who married non-citizen men lost their citizenship for so long as the marriage lasted"); *see also id.* at 115 n.40 (writing that "[t]he Cable Act of Sept. 22, 1922, 422 Stat. 1021, ended automatic deprivation of citizenship upon marriage to a foreign husband and allowed women expatriated under prior law to regain U.S. citizenship through naturalization"). The casebook authors plan to rectify this in the next edition.

134. In fact, in *The Exclusion of Chinese Women*, Sucheng Chan calls the Cable Act a "severe obstacle" to marriages between Chinese American women and Chinese men but does not even mention the 1907 Act as similarly posing difficulties, and she dates marital expatriation of Chinese American women to 1922. Chan, *supra* note 56, at 128. Yet as shown by the case of *Ng Fung Sing*, discussed *supra* note 5, who married her husband in 1920, marital expatriation of Chinese American women was provided for legislatively in 1907, not 1922.

This opposite misperception, that marital expatriation began in 1922, is not uncommon. Presumably, because 1922 is the date that marital expatriation on the basis of race first appears explicitly in the text of the statute, scholars who focus on race identify the practice as beginning that year. For another example, see RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 267 (2003). Kennedy writes that the federal government,

What exactly did the Cable Act do? It provided a means to restore citizenship to wives who had been expatriated, and it eliminated future marital expatriation for women—so long as their husbands and they themselves—were eligible to become citizens.[135] In other words, the Cable Act allowed white or black women expatriated for marrying white or black noncitizen men to be renaturalized.[136] The Cable Act also guaranteed that any such future marriages would not lead to expatriation, unless such women chose formally to renounce their citizenship.[137] These two changes were the only positive effects of the Act. Its negative effects were, meanwhile, manifold.

Despite claims that the Cable Act eliminated marital expatriation, the legislation continued to take U.S. citizenship away from women who married a particular subset of noncitizen men. This subset was comprised of men ineligible to naturalize[138]—primarily Asian men.[139] In fact, the Act went beyond the Expatriation

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while never enacting antimiscegenation legislation, "did pass a law that imposed an egregious burden upon female citizens of the United States who wisbed to wed aliens ineligible for naturalization: pursuant to the Cable Act of 1922, any American woman who wed such an alien was herself immediately stripped of her citizenship." *Id.*

135. Cable Act §§ 2, 7, 42 Stat. at 1022.

136. *Id.* § 4, 42 Stat. at 1022; *see, e.g.*, *In re* Krausmann, 28 F.2d 1004 (E.D. Mich. 1928) (holding that a wife who had lost U.S. citizenship through marriage "was entitled to be admitted as citizen in naturalization proceedings").

137. I have found several examples of black women expatriated for marrying foreign-born men. The Laguna Niguel office of the National Archives and Records Administration has applications of women who lost or believed they lost their citizenship through marriage between 1907 and 1922, and who sought to become repatriated through an oath of allegiance, as provided for in 1936. All identify their color as "black." See Application to Take Oath of Allegiance to the United States under the Act of June 25, 1936, in the files of Willie Otis Cole, born in Brandon, Mississippi, who married Alexander Cole, a subject of Great Britain who was born in the British West Indies, in 1908 (National Archives and Records Administration, Pacific Region, 246/R/1498; 23-M-2067); Elizabeth Lima, born in Washington, Louisiana, who married John Lima, a citizen of Portugal, in 1909 (National Archives and Records Administration, Pacific Region, 246/R/1163; 23-M-1570); Jane Estelle Jones, born in Baton Rouge, Louisiana, who married Arthur Frederick Jones, who had been born in the United States but had naturalized as a subject of Great Britain, in 1914 (National Archives and Records Administration, Pacific Region, 246/R/1304; 23-M-1770); Corabell Duncan, born in Riverside, California, who married James Alfred Duncan, a subject of Great Britain who was born in the Bahamas, in 1918 (National Archives and Records Administration, Pacific Region, 246/R/1224; 23-M-1666); and Bertia Morillo, born in Lyndon, Mississippi, who married Pedro Morillo, a citizen of Mexico, in 1918 (National Archives and Records Administration, Pacific Region, 246/R/1236; 23-M-1659).

138. Refusal to take up arms in the nation's defense was also a basis of ineligibility to citizenship. *See* United States v. Schwimmer, 279 U.S. 644, 650 (1929).

139. *See, e.g.*, Letter from Deputy Commissioner of Naturalization to Mr. Philip L. Rice, Commander, the American Legion, Dept. of Hawaii (Aug. 28, 1923) (National Archives and Records Administration, Record Group 85, Box 399, Entry 26, File 20/3) (stating that a Hawaiian woman had lost American citizenship by virtue of her marriage to a Filipino man prior to enactment of the Cable Act; that the Cable Act indicated she could only regain citizenship if her husband was eligible to naturalize as an American citizen; and that the "Bureau entertain[ed]

Act in explicitly mandating such a loss of citizenship, stating that "any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States."[140] This was the case so long as the marriage was intact.[141] Furthermore, even after the marriage terminated, women who resided outside of the United States during the marriage were presumed to have renounced their citizenship.[142] This meant that Asian American women who left the United States for a specified period could not regain their citizenship should their marriage end, as they were racially barred from naturalization.[143]

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considerable doubt" that the woman could be admitted to citizenship because she was neither white nor of African nativity or descent).

140. Cable Act § 3, 42 Stat. at 1022. Why Congress chose in the Cable Act to make newly explicit, race-based disenfranchisements is not readily apparent. Nancy Cott suggests that these limitations in the law recorded "the contemporary public hostility toward immigrants, especially those seen as racially unassimilable," and points to the contemporaneous enactment of race-based exclusion laws. Cott, *supra* note 13, at 1465–66. Congressional testimony indicates that citizenship disenfranchisement on the basis of race gave members of Congress little pause. The fact that this disenfranchisement was gender specific, however, was more controversial. One representative, Stephans of Ohio, did object on the basis that tbe same doctrine imposing the loss of citizenship for marriage to an ineligible alien should also apply to men, saying that "what is sauce for the goose is sauce for the gander." *See* Paul Rundquist, A Uniform Rule: The Congress and the Courts in American Naturalization 1865–1952, at 231–32 (1975) (unpublished Ph.D. dissertation, University of Chicago) (on file with author). Another, Kincheloe of Kentucky, asserted, "I have no respect for an American man who marries a foreign woman ineligible under our laws to citizenship." *Id.*

141. The Secretary of the Consulate General of Japan requested clarification concerning the eligibility of a former U.S. citizen to reacquire her former status as an American citizen after marrying a Japanese man. The response from the Commissioner of Naturalization made clear that she could not be naturalized during the continuance of the marital status. Letter from the Commissioner of Naturalization to the Secretary of the Consulate General of Japan (May 25, 1929) (National Archives and Records Administration Record Group 85, Box 399, Entry 26, File 2012).

142. The length of foreign residency specified was a continuous two years in the husband's country or a continuous five years anywhere outside the United States. *See* Cable Act § 3, 42 Stat. at 1022; *see also* Memorandum from Theodore G. Rigley, Solicitor, to the Acting Secretary (Oct. 8, 1927) (National Archives and Records Administration, Record Group 85, Box 353, Entry 9, File 548-6) (inquiring about the extension of a temporary stay in the United States of women admitted as visitors who had lost their American citizenship by reason of marriage to an alien). Rigley states:

> Women who marry aliens ineligible to citizenship are still expatriated by such marriage, and if such women are themselves of a race ineligible to citizenship there is now no way in which they can regain citizenship at the termination of the marriage or gain permanent admission to the United States if they abandoned their residence in this country following the marriage. Undoubtedly, most women of the above classes have strong family ties and other interests in this country which compel their return, either permanently or temporarily, to the United States.

Id. at 2.

143. *See Amendment to the Women's Citizenship Act of 1922, and for Other Purposes: Hearing on H.R. 14684, H.R. 14685, and H.R. 16303 Before the House Comm. on Immigration and*

Arguably, the U.S. citizen women who were most likely to marry Asian men were Asian American women, due to both the extralegal pressures against intermarriage and the legal prohibitions against it.[144] But there were indeed marriages between white women and Asian men, such as that between Mary Das, a Mayflower descendent, and Taraknath Das, probably the most prominent Indian independence activist in the United States.[145] He naturalized successfully as a U.S. citizen in 1914, but his citizenship was revoked retroactively after the 1923 Supreme Court decision in *United States v. Thind*,[146] which ruled that Indians were not white for purposes of citizenship.[147] Thus, suddenly, both Taraknath and Mary Das found themselves no longer U.S. citizens.[148] The case was described in congressional testimony as follows:

Naturalization, 71st Cong. 19 (1931) (3d session) (statement of Rep. Houston) [hereinafter *Citizenship Act Hearing*]. Representative Houston stated:

> The department is not in favor of naturalizing people with less than 50 per cent Caucasian or African blood, so we are absolutely without recourse. . . . [A]n American woman, who was an American by birth, and who has lost her citizenship by marriage, to an ineligible alien, if she leaves the country, she can not return to it if she be other than a Caucasian or an African.

Id.

144. Fifteen states had antimiscegenation laws prohibiting whites from marrying "Hindus," "Asiatic Indians," "Mongolians," "Chinese," "Japanese," "Koreans," "Malayans," or "Malays." *See* Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 799 nn.18–19. Of course, for many Asian men, gender differentiation in immigration patterns meant that they never married; for others, it meant that they married non-Asian women of color. On the marriages of South Asian men to Mexican women, see *id.* at 817 n.86.

While many have lamented the all male, so-called bachelor societies in Asian immigrant communities, thought to be damaged by their lack of access to women, it is important to recognize the presence of same-sex sociality and sexuality of various forms. *See* NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN 77–79 (2001) (documenting practices of same-sex sociality among early Asian immigrants to United States and Canada, for example, in the form of cohabitation and bed sharing).

145. For a biography of Taraknath Das, see TAPAN K. MUKHERJEE, TARAKNATH DAS: LIFE AND LETTERS OF A REVOLUTIONARY IN EXILE (1997).

146. 261 U.S. 204 (1923).

147. *See* JOAN M. JENSEN, PASSAGE FROM INDIA: ASIAN INDIAN IMMIGRANTS IN NORTH AMERICA 256–58 (1988); *see also* J.W. Garner, *Denationalization of American Citizens*, 21 AM. J. INT'L L. 106, 107 (1927) (explaining that due to the holding in the *Thind* case, not only were "Hindus" barred from future naturalization, but their original nationality did not revert, rendering them stateless persons; "their American-born wives, under the Cable Act and the retroactive application of the Supreme Court decision, [were] likewise . . . denationalized and reduced to the plight of statelessness").

148. In an article in *The Nation*, Mary Das wrote: "I am an American-born woman. My ancestors came from England to America in the year 1700. By the existing double standard of the American Government, I am not only rendered alien, but a stateless alien." Mary K. Das, *A Woman Without a Country*, 123 THE NATION 105 (1926). She charged: "Some Representatives and Senators, members of the Immigration Committees of the two houses of Congress, hold that the ideal of Americanism should keep any American woman from

> One of these [Indian nationalists] has married an American wife . . . a member of an old American family from the South, of Revolutionary ancestry, a woman of wealth and prominence . . . . She married this particularly brilliant man because she is interested in the same line of work that he is . . . .
>
> . . . I found a letter . . . that the terrible blow had fallen, that this particular individual was likely to lose her American citizenship, that the Cable Act, which had passed unknown to this woman, had rendered her absolutely stateless. Because, under the system of Great Britain in her colonies she takes away citizenship from any one who applies for citizenship in another country; automatically they lose their British citizenship.
>
> . . . .
>
> . . . She has no desire to divorce him to regain her citizenship, but she has the greatest desire to remain an American citizen. It has never been a question of title, or anything of that sort; she is one of the noblest of American citizens.
>
> . . . .
>
> . . . She happens to live in a place where having lost her citizenship, it does not affect the holding of property. But there are other things that are very seriously menaced, particularly the humiliation and the thought of not being wanted as an American citizen.[149]

The cascade of events that could ensue for such couples was described in *United States* v. *Pandit*,[150] a case where the U.S. government unsuccessfully sought to cancel Sakharam Pandit's naturalization after the *Thind*

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marrying any foreigner, particularly an Asiatic." *Id.* Das explicitly made an interest convergence argument, suggesting that there were economic consequences to the law:

> The American patriots who think that such provincialism is Americanism would do well to remember what Theodore Roosevelt said on an allied topic:
>
> > Our nation fronts on the Pacific, just as it fronts on the Atlantic. We hope to play a constantly growing part in the great ocean of the Orient. We wish, as we ought to wish, for a great commercial development in our dealings with Asia, and it is out of the question that we should permanently have such development unless we freely and gladly extend to other nations the same measure of justice and good treatment as we expect to receive in return.

Id. at 105–06.

149. This testimony was before the House Committee on Immigration and Naturalization on March 23, 1926, by Miss Elizabeth Kite, an independent scholar at the Library of Congress, from Philadelphia, who professed a "deep interest in the problem of empire" and described herself as a person with "a number of very brilliant friends who are among the Indian nationalists." *Immigration and Citizenship of American-Born Women Married to Aliens: Hearing on H.R. 4057, H.R. 6238, and H.R. 9825 Before the House Comm. on Immigration and Naturalization*, 69th Cong. 22–28 (1926) (statement of Elizabeth Kite, Scholar, Library of Congress).

150. 15 F.2d 285 (9th Cir. 1926).

decision. Like Das, Pandit naturalized as a U.S. citizen in 1914, and became a member of the California bar in 1917. He was married to a white woman from Michigan, and both husband and wife owned property—she, land in the Imperial Valley, and he, their home in Los Angeles. Although the Ninth Circuit refused to cancel the naturalization on the basis of res judicata, Pandit argued that his denaturalization would mean that his wife would lose her citizenship, both parties would lose the right to their property, and he would be deprived of his license to practice law.[151]

Emily L. Chinn was another white woman who faced expatriation due to her marriage to an "ineligible alien." She read about the Cable Act in the Saturday Evening Post and wrote the Immigration Bureau to ask whether the citizenship of "an American born woman of [a] naturalized father of the white race[,] this woman having been married twenty years to a Chinese" was affected in any way by the new law.[152] She asked, "Can you give me any information whether this woman[,] mother of 4 children[,] can regain her citizenship, without renouncing her husband?"[153] The response of Rore Carl White, Second Assistant Secretary, advised Mrs. Chinn that she had lost her citizenship on her marriage and that she was also ineligible to proceed with naturalization to regain that citizenship, so long as she remained married.[154]

The Cable Act also precluded women who had been divested of their citizenship from regaining it if they were considered racially ineligible to naturalize, because only women racially "eligible to citizenship" could be naturalized.[155] A case involving a woman who was half Chinese and half Spanish provided the Immigration Service with some confusion. An

151. *Id.* at 287. The government attempted to appeal to the Supreme Court, which refused to hear the case. United States v. Pandit, 273 U.S. 579 (1927). Pandit's case appears to have been an exception in that most South Asians either lost their citizenship or were barred from naturalization after *Thind*. *See* Karen McBeth Chopra, *A Forgotten Minority: An American Perspective: Historical and Current Discrimination Against Asians From the Indian Subcontinent*, 1995 DETROIT C.L. MICH. ST. U. L. REV. 1269, 1288.

152. Letter from Emily L. Chinn, Baltimore, Maryland, to "Dear Sirs" (received Aug. 13, 1924) (National Archives and Records Administration, Record Group 85, Box 399, Entry 26, File 20/3).

153. *Id.*

154. Letter from Rore Carl White, Second Assistant Secretary, Bureau of Immigration to Mrs. George S. Chinn (Aug. 27, 1924) (National Archives and Records Administration, Record Group 85, Box 399, Entry 26, File 20/3).

155. For two cases involving Chinese American women who married graduate students from China, see JUDY YUNG, UNBOUND FEET: A SOCIAL HISTORY OF CHINESE WOMEN IN SAN FRANCISCO 168–69 (1995). *See also* Connie Young Yu, *The World of Our Grandmothers*, *in* INVENTING AMERICA: READINGS IN IDENTITY AND CULTURE 30 (Gabriella Ibrieta & Miles Orvell eds., 1996) (describing the case of Lily Sung, who lost her birthright citizenship through marrying a Chinese citizen; after "she and her four daughters tried to re-enter the United States after a stay in China, they were denied permission[, and t]he immigration inspector accused her of 'smuggling little girls to sell'").

examiner in Portland named V.W. Tomlinson reported that the woman, with a father who was "a full blooded Chinaman, born in China," and a mother "of pure Spanish blood," had been born in the United States but had married "an alien Mexican" in 1917, thereby surrendering her citizenship and becoming a citizen of Mexico.[156] V.H Tomlinson wrote the Chief Examiner in Seattle, seeking guidance, and stating that he did not see why the woman's "half-caste origin" would bar her from naturalization. The Seattle examiner differed, and writing that the woman was "half Chinese and therefore not a free white person," referred the matter to Washington, D.C.[157] The Deputy Commissioner of Naturalization responded, explicating that the woman was precluded from naturalization by reason of her race, but admitting that the statutes had not contemplated a case of this character.[158] Thus, he expressed interest in what result litigation on the matter might yield.[159]

But these were not the only negative effects of the Cable Act. The 1855 Act had allowed alien women married to U.S. citizen men to derivatively acquire U.S. citizenship. The Cable Act provided that any woman who married a U.S. citizen after the date of enactment would not become a citizen by reason of the marriage or the naturalization of her husband, but it made a special compensatory provision whereby the fact of marriage gave her the right to be naturalized upon her own petition, "if eligible to citizenship."[160] This

156. Communication from V.H. Tomlinson, Office of Examiner, Portland, Oregon, to Chief Examiner, Seattle (Sept. 13, 1923) (National Archives and Records Administration, Record Group 85, Box 399, Entry 26, File 20/3).

157. *Id.* (typed on the bottom of the same document).

158. Letter from Deputy Commissioner of Naturalization to Examiner in Charge, Portland, Oregon (Oct. 11, 1923) (National Archives and Records Administration, Record Group 85, Box 399, Entry 26, File 20/3). Another woman who raised difficult questions was a woman born in Vermont of a Chinese father and an English mother. She had married a "Hindu-Chinese" in 1925 in China, and had returned to the United States without him a few short months later. She sought to know whether she automatically would regain her citizenship in the event of divorce. Letter from Reah M. Whitehead, Justice of the Peace, Seattle, King County, Washington, to Hon. J. Speed Smith, Naturalization Service (May 4, 1926) (National Archives and Records Administration, Record Group 85, Entry 26, Box 392, File 16/19). John Speed Smith typed a note at the bottom requesting advice, writing that Reah Whitehead "is quite often asking me questions akin to above and in this case I declined to commit myself . . . as I frankly admit I do not know what advice to give." The response from Thomas B. Shoemaker, the Acting Commissioner of Naturalization, was that because "she is a Chinese," her petition to regain American citizenship "would probably be denied" given the prohibition on naturalization contained in the 1882 Chinese Exclusion Act. Letter from Thomas B. Shoemaker, to District Director, Seattle (June 7, 1926) (National Archives and Records Administration, Pacific Region, Record Group 85, Entry 26, Box 392, File 16/19).

159. Letter from Deputy Commissioner of Naturalization to Examiner in Charge, Portland, Oregon, *supra* note 158.

160. Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, § 2, 42 Stat. 1021, 1022 (1922).

created a new class of aliens: the "alien wives of American citizens" who were not immune from deportation and exclusion under the immigration laws.[161]

This change as to "alien wives" also impacted two other groups: Asian women who married U.S. citizen men and alien women who married Asian men. Since Asian women were in any case racially barred from citizenship, the import of this provision was how it shaped actual admission into the country.[162] Previously, the doctrine of dependent citizenship had been interpreted by the State Department and the Labor Department as occasionally allowing Chinese women to come to the United States but not allowing naturalization.[163] But in the 1925 decision *Chang Chan v. Nagle*,[164] the

161. The decision to halt automatic naturalization of foreign-born women through marriage meant that these women were vulnerable to exclusion. *See, e.g.*, Markin v. Curran, 9 F.2d 900, 901 (2d Cir. 1925) (excluding wife of U.S. citizen who was "diseased" and "physically defective"); Gomez v. Nagle, 6 F.2d 520 (9th Cir. 1925) (deporting the Portuguese alien wife of a U.S. citizen for "constitutional psychopathic inferiority"). This aligned European wives of American citizens with Chinese wives of American citizens, as no longer automatic citizens through marriage but as alien wives subject to being barred or removed from the country. *See* Low Wah Suey v. Backus, 225 U.S. 460 (1912).

In addition, the Cable Act shift had consequences for women with limited education who therefore faced difficulty naturalizing. Thus, a handwritten letter written to President Roosevelt from an "American Citizen," forwarded to the INS in 1939, states, in part:

> It is not only my wish, but the wishes of many in our United States, that a law that came into effect in the year 1922 *could be changed*. . . .
>
> . . . .
>
> Dear President Roosevelt why not give these people a break, so long as they came to this country before this awfull depression started and were married, they realy *do deserve* a little consideration, for many have *reared familys* in *these United States*. *Why not change that law*, it is hard for them to school for citizenship, they have not much education, leaving school at 12 + 13 years of age and at the age most of them are now 40 + 50 ect, + with there worrys ect, they must be vety tired of living. . . .
>
> . . . .
>
> You are for the working class, but before your time expires try + help these hard working wifes or husbands by making them American Citizens through mariage by changeing that law of 1922.

Letter from an American Citizen to President Roosevelt (received by INS, Jan. 21, 1939) (National Archives and Records Administration, Record Group 85, Box 399, Entry 26, File 20/2) (spelling and emphasis in original).

162. The Cable Act's effects were heightened by contemporary immigration laws. The first quota act, passed just prior to the Cable Act, required alien wives of U.S. citizens to enter the country as immigrants, subject to per-country quotas. If the quotas were exceeded, they were excluded. In 1924, the law was amended to classify alien wives as nonquota immigrants—so long as their husbands were residing in the United States and they themselves were not "ineligible to citizenship." Chang Chan v. Nagle, 268 U.S. 346, 351 (1925) (quoting the Secretary of Labor construing the Immigration Act of 1924, ch. 190, § 13, 43 Stat. 153, 161 (1925) (citations omitted in original)).

163. Technically, Chinese women never had access to U.S. citizenship through marriage, either pre- or post-Cable Act. But the Labor and State Departments prior to the passage of the Cable Act had permitted Chinese wives of U.S. citizens into the country on occasion despite the Chinese exclusion laws; the Cable Act was used subsequently as a basis to deny entry. *See* BREDBENNER, *supra* note 13, at 124.

164. 268 U.S. 346 (1925).

Supreme Court interpreted the Cable Act as barring Chinese women seeking to enter the United States on the basis of marriage to an American citizen.[165] In that case, the Court refused admission to four young Chinese women who had arrived by ship in San Francisco and were "alleged to be . . . lawful wives" of four petitioners "claiming to be native-born citizens of the United States."[166] Even if the husbands were in fact U.S. citizens and the wives legitimate wives, the Court said that the women would still be excluded. Notwithstanding marriage to citizens of the United States, the women were "alien Chinese ineligible to citizenship" and the 1924 Immigration Act barred the entry of aliens ineligible to citizenship.[167]

The elimination of derivative naturalization created a different set of problems for alien women who married Asian men. Section 5 of the Cable Act provided that "no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status."[168] Thus, a woman like Mary Ann Montoya, an immigrant from Austria who had married a Filipino man, was precluded from naturalization so long as she remained married. Montoya immigrated to the United States in 1914 and

165. *Id.* at 350–53; *see also* discussion in BREDBENNER, *supra* note 13, at 125–28.

166. *Chang Chan*, 268 U.S. at 350.

167. *Id.* at 351. The Court applied the Cable Act together with the Immigration Act of 1924 (also called the National Origins Act and the Johnson-Reed Act), which barred aliens ineligible to citizenship from admission to the United States unless they were in the United States strictly for the pursuit of commercial interests as "treaty merchants," entering "solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." Immigration Act of 1924, ch. 190, § 3, 43 Stat. 153, 155 (1925). The House Committee on Immigration and Naturalization held three hearings on the issue of the bar on admission of the "wives of American citizens of Oriental race," in 1926, 1928, and 1930, featuring testimony from the Chinese American community as to the impact of the law. Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924*, 27 LAW & SOC. INQUIRY 271, 300 (2002). Between 1924 and 1930, no Chinese wives of citizens were admitted as legal residents. *Id.* In 1930, the law was amended to allow Chinese wives of American citizens who had been married before 1924 to enter. *See* SHEHONG CHEN, BEING CHINESE, BECOMING CHINESE AMERICAN 156 (2002).

The 1924 Act was not interpreted by the Supreme Court to bar the admission of the Chinese wives of resident "Chinese merchants who were lawfully domiciled within the United States." *See* Cheung Sum Shee v. Nagle, 268 U.S. 336, 344 (1925); Rachel Silber, Note, *Eugenics, Family & Immigration Law in the 1920s*, 11 GEO. IMMIGR. L.J. 859, 893–95 (1997). These women were allowed to enter through the extension of the rights accorded to their husbands.

168. Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, § 5, 42 Stat. 1021, 1022 (1922). Under the previous legal regime, such a woman would not automatically have gained U.S. citizenship through marriage because she was not marrying a U.S. citizen, but she also would not have been precluded from naturalizing if she herself was not racially barred from naturalization.

married her husband in 1926.[169] Even though there was "a law in Oregon forbidding marriage between whites and orientals, a marriage license was issued to [them] at the Court House."[170] Montoya wrote the Director of Naturalization in June 1930, asking if she could take out her "first naturalization papers."[171] He forwarded her inquiry to the Commission of Naturalization, indicating that he assumed that section 5 would bar her application, but requesting more guidance because while "Filipinos were . . . ineligible to citizenship," there was an "exception in the law."[172] The Commissioner responded that the only exception was for Filipinos who declared their intent to become citizens, enlisted in the Navy or Marine Corps, and after not less than three years of service were discharged honorably or with recommendation for reenlistment.[173] Unless Mr. Montoya made himself eligible to naturalize in this manner, Mary Ann Montoya would be ineligible to become a citizen as well.[174]

Lastly, the Cable Act repealed section 4 of the Expatriation Act, which had allowed foreign women who acquired U.S. citizenship by marriage to retain their citizenship after the termination of the marital relationship.[175] Now foreign-born women lost their U.S. citizenship after divorce or the death of their husbands.

The impact of the Cable Act on Asian and Asian American women was severe. Victor Houston, Congressional Delegate from the Territory of Hawaii, provided substantial testimony about the impact of the Cable Act on the residents of his state. He clarified the urgent need for amendment, given

169. Letter from Mary Ann Montoya to Director of Naturalization, Portland, Oregon (June 18, 1930) (National Archives and Records Administration, Pacific Region, Record Group 85, Box 399, Entry 26, File 20/2).

170. *Id.*

171. *Id.*

172. Letter from V.M. Tomlinson, District Director of Naturalization, Portland, Oregon, to Commissioner of Naturalization (June 19, 1930) (National Archives and Records Administration, Record Group 85, Box 399, Entry 26, File 20/2).

173. Letter from Commissioner of Naturalization to Mary A. Montoya (July 19, 1930) (National Archives and Records Administration, Record Group 85, Box 399, Entry 26, File 20/2). This letter also contained a message for V.M. Tomlinson, stating that he would be "justified in receiving the application from Mrs. Montoya . . . notwithstanding her present ineligibility to naturalization," given the possibility of her husband's "enlistment in the Service of the Government." *Id.* For the history of Filipinos gaining citizenship through military service, see Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 ASIAN L.J. 33, 50–53 (1995).

174. Letter from Commissioner of Naturalization to Mary A. Montoya, *supra* note 173.

175. Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, § 6, 42 Stat. 1021, 1022 (1922) (repealing section 4 of the Expatriation Act).

that about 80,000 women belonging to the affected racial groups would be unable to renaturalize after expatriation. Houston provided three examples:

> I have in mind a very estimable part-Hawaiian girl, who married a half-Hindu. Her husband is a resident of Hawaii, because he came there as a minor, whose father was a minister of religion. His father is a pure Caucasian, a Britisher who happens to be a Buddhist Bishop. He married a Hindu woman and his son is with him in Honolulu. This young man married a part-Hawaiian girl. She has lost her citizenship through that marriage, though she has never been out of the country; and she may never, unless the law be changed, recapture her citizenship, no matter what her marriage status may be.[176]

He also shared the letter of "R.W.Y., a woman born in Massachusetts of a family that has for more than 300 years been identified with the life and work and Government of New England."[177] Through marriage to a Korean man, she lost her citizenship. Houston stated:

> I know the family, and a very estimable one it is. The husband is of Korean race—as white of skin as the average so-called Caucasian, a perfect gentleman, whiter of heart than most people. He is a graduate of medicine of Johns Hopkins, a blood specialist, and in Hawaii is looked upon as one of the most capable doctors we have.[178]

Lastly, Houston presented the situation of a Yale Law School graduate:

> I have in mind a young Chinese girl of American citizenship by birth, and of the second generation in her family, a graduate of Yale University Law School. She married a young Chinese by whom she has children. Because he was born in San Francisco before the fire, her husband is not able to prove his citizenship. The immigration authorities hold he is an alien and that she has lost her citizenship by such marriage, and can not recapture it.[179]

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176. *Citizenship Act Hearing*, *supra* note 143, 71st Cong. at 19 (statement of Rep. Houston).

177. *Id.* at 20.

178. *Id.* at 21. This kind of testimony, suggesting that the aggrieved party is "white of skin," "whiter of heart than most people," and a "capable doctor" raises both the idea of race as a physical marker and race as performance. *See* Gross, *supra* note 36, at 138–41, 151–57.

179. *Citizenship Act Hearing*, *supra* note 143, 71st Cong. at 32. Of course, I was fascinated to learn more about this Yale Law School graduate, and wondered if she existed (a Chinese American female graduate of Yale Law School in the late 1920s?) or whether her description was the product of a misstatement in the congressional record. Happily, Yale Law School has been engaged in collecting oral histories of its early women graduates; the testimony referred to Sau Ung Loo Chan, Yale Law School '28, who had been born in Hawaii of Chinese parents. E-mail from Mary Clark, Yale Law School Archival Project, to Leti Volpp (Apr. 2, 2001) (on file with author); *see also* CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAI'I 176 (Mari Matsuda ed., 1992) [hereinafter CALLED FROM WITHIN]. While at Yale, Sau Ung Loo Chan met a Chinese American man, then a student at Hamilton College, who had been born in San

F. Repeal of the Cable Act

The testimony presented by Delegate Houston and additional lobbying by women's groups, including the National Woman's Party,[180] and Asian American organizations,[181] led Congress to amend the Cable Act in a piecemeal fashion in 1930, 1931, 1932, and 1936. The 1930 Act only addressed the situation of women who had lost citizenship because of marriage to an "alien eligible to citizenship" and who themselves were "eligible to citizenship." It simplified the process through which these women could be naturalized, and eliminated the presumption that a marriage terminated citizenship if the woman resided continuously outside of the United States for two years in her husband's country or five years in any other country. However, the 1930 Act did not restore citizenship to such women retrospectively.[182] The impetus for

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Francisco. Following their marriage, the couple lived in Hong Kong for ten years, which is where their only child was born. They later decided to return to the United States, at which point Chan was required to prove her husband's U.S. citizenship. She was apparently so successful at doing so, marshaling witnesses and documentary evidence, that the INS offered her a permanent position. Chan accepted the position but resigned after she fell seriously ill and had to return to Hawaii to recuperate. According to *Called From Within*, Chan was able to prove her husband's citizenship through locating his birth certificate in Sacramento, as well as through several witnesses who confirmed that they had known him as a baby and as an adult in San Francisco. *Id.* at 178.

Chan was the first Asian American woman to practice law in Hawaii. In her interview for *Called From Within*, she told the following anecdote. After her first year at Yale, she traveled to Europe. Returning back through Canada, despite her U.S. passport, she was refused entry because of her Chinese ancestry and threatened with detention. "After having finished one year at Yale, I knew just enough law to scream 'habeas corpus' at the immigration officials . . . and they finally let me in," she said. *Id.*

180. For a detailed description of the organizing by women's groups, see BREDBENNER, *supra* note 13. For a discussion of international efforts on the issue, see Knop & Chinkin, *supra* note 12. As Knop documents, "[w]omen and others who support the principle of independent nationality . . . were active at the 1930 Hague Codification Conference, . . . [although] the resulting Convention on Certain Questions relating to the Conflict of Nationality Laws [only] addressed women's nationality . . . insofar as it was necessary to reduce statelessness and dual nationality." Knop, *supra* note 12, at 100 (citations omitted).

181. These organizations included the Chinese American Citizens Alliance of San Francisco and the Japanese American Citizens League. *See Wives of American Citizens of Oriental Race: Hearing on H.R. 2404, H.R. 5654, and H.R. 10524 Before the Comm. on Immigration and Naturalization*, 71st Cong. 545–57 (1930) (statement of Kenneth Y. Fung, Executive Secretary, Chinese American Citizens Alliance); BILL HOSOKAWA, JACL IN QUEST OF JUSTICE 42–45, 49–50 (1982).

182. There were two separate chapters of the July 3, 1930 Act amending the 1922 Act, one clarifying the method of how women might regain their citizenship, and the second clarifying whether wives were excludable from the United States. In terms of the former, the Act of July 3, 1930 amended the 1922 Act by repealing the section that had provided that two years of continuous residency in the husband's country or five years of continuous residency in another foreign nation led to a rebuttable presumption of loss of citizenship. However, it clarified that "such repeal shall not restore citizenship lost under such section 3 before such repeal." Act of July 3,

legislation that would make naturalization a simpler process for these women was laid out in the words of U.S. Commissioner of Naturalization Raymond Crist:

> Some women feel that a certain stigma attaches to the need of "naturalization" in the same manner as any lowly immigrant. Women of perhaps Mayflower ancestry, whose forbears fought through the Revolution, and whose family names bear honored and conspicuous places in our history, who are thoroughly American at heart, and who perhaps have never left these shores, but whose act in choosing alien husbands has caused forfeiture of American citizenship, bemoan the stipulation that such as they must sue for naturalization by the ordinary means.[183]

The 1931 Act constituted the first congressional action to rescind a racial barrier to citizenship since 1870.[184] Important to the bill's passage was testimony by James Brown Scott, the president of the American Society of International

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1930, ch. 835, 46 Stat. 854, 854. Section 4 was amended to clarify the process through which women who had lost citizenship through marriage could naturalize. *Id.* § 4, 46 Stat. at 854.

In terms of the second chapter, chapter 826 of the Act of July 3, 1930 amended the 1922 Act by adding a new section 8 at its conclusion. Act of July 3, 1930, ch. 826, 46 Stat. 849. The new section 8 provided

> [t]hat any woman eligible by race to citizenship who has married a citizen of the United States before the passage of this amendment, whose husband shall have been a native-born citizen and a member of the military or naval forces of the United States during the World War, and separated therefrom under honorable conditions; if otherwise admissible, shall not be excluded from admission into the United States under section 3 of the Immigration Act of 1917, unless she be excluded under the provisions of that section relating to [a contagious disease except tuberculosis; polygamy,] [p]rostitutes; procurers, or other like immoral persons; . . . [p]ersons convicted of crime; . . . [p]ersons previously deported; [or] . . . [c]ontract laborers.

Id. § 8, 46 Stat. at 849.

183. COMMISSION OF NATURALIZATION ANNUAL REPORT 13 (1923), *quoted in* Smith, *supra* note 69, at 152.

184. *See* Rundquist, *supra* note 140, at 249. The Act was not passed without vocal opposition. *Id.* Representative Robert Green of Florida warned of the consequences if U.S. citizen women were allowed to retain their citizenship after marriage to ineligible aliens:

> An American woman may marry a Hindu and may reside in India and possibly there are a half dozen children born to the union, and twenty-five years after the marriage she may elect to come back to the United States and bring her children, and possibly her Hindu husband; or suppose she is a Chinese woman residing in the United States, she may go to China and marry a Chinaman, as of course she should, and later on bring back her Chinese husband and their offspring. Suppose there is an organization of Hindus in India that are revolutionists and have no country of their own—and there are just such persons, I understand . . . they may marry American women and come here. . . . Gentlemen, I fear this bill may mean trouble. I want our American women to have full privileges, but I think it is rather dangerous to permit what may turn out to be a marriage lottery whereby foreign races of different creeds and colors may marry American women and come here and reside in the United States by virtue of this law.

Id. at 248.

Law and a professor at George Washington University Law School.[185] Scott reported that, to his knowledge, the United States was the only nation in the world that refused to repatriate its former citizens who had lost citizenship through marriage.[186] This, he warned, created diplomatic difficulties.[187]

The 1931 Act finally addressed the situation of women who had married Asian men, such as Mary Das, proclaiming that women who had lost their citizenship through marriage to "an alien ineligible to citizenship," or by residence abroad after marriage to "an alien," could regain it through naturalization.[188] Further, the 1931 Act repealed the provision that had prohibited naturalization for women like Mary Ann Montoya, noncitizens married to aliens ineligible to citizenship. Finally, the new law clarified that any woman who was a citizen of the United States at birth but who had subsequently lost her citizenship through marriage would not be denied naturalization on account of her race, even if she otherwise would be

185. *Id.* at 242.

186. *Id.*

187. *Id.* Scott testified:

> If we are to have friendly relations with the great people to our West, we should not have on our statute books a law affecting them which is a challenge to their equality in international relations. If marriage with such a person causes the American party to the marriage to lose citizenship, when marriage to a Caucasian does not involve loss of our citizenship; and if the person loses his or her citizenship so as not to be eligible to reacquire it, it must be looked upon by the nationals of that foreign country as not merely a mark of discrimination, but as a statutory assertion of the inequality of that people in one of the most universal relations of human kind.

Id.

188. The Act of March 3, 1931 amended section 3 of the 1922 Act as follows:

> (a) A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after this section, as amended, takes effect, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens.
>
> (b) Any woman who before this section, as amended, takes effect, has lost her United States citizenship by residence abroad after marriage to an alien or by marriage to an alien ineligible to citizenship may, if she has not acquired any other nationality by affirmative act, be naturalized in the manner prescribed in section 4 of this Act, as amended. Any woman who was a citizen of the United States at birth shall not be denied naturalization under section 4 on account of her race.
>
> (c) No woman shall be entitled to naturalization under section 4 of this Act, as amended, if her United States citizenship originated solely by reason of her marriage to a citizen of the United States or by reason of the acquisition of United States citizenship by her husband.

Act of Mar. 3, 1931, ch. 442, § 4(a), 46 Stat. 1511, 1511–12 (1931). The Act also repealed section 5 of the 1922 Act, *id.* § 4(b), 46 Stat. at 1512, which had stated that "no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status." Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, § 5, 42 Stat. 1021, 1022 (1922).

racially barred from becoming a citizen.[189] Thus, Asian American women like Ng Fung Sing, if they applied for naturalization, were able to regain the citizenship they had lost through marriage. In 1932, an amendment provided that women who had been born in Hawaii prior to 1900 would be considered to have birthright citizenship, regardless of race.[190]

Congress failed to consider, in these early 1930s amendments, the situation of women whose marriages had been terminated and who had already been denaturalized. In 1936, Congress enacted legislation to clarify the proper treatment of women whose marriage had terminated through death or divorce.[191] The Act of June 25, 1936 provided that women who had lost U.S. citizenship by marriage between 1907 and 1922, and whose marriage had terminated through

189. Act of Mar. 3, 1931, § 4(a), 46 Stat. at 1511 (creating section 3(b)).

190. This amendment, passed on July 2, 1932, made "a woman born in Hawaii prior to June 14, 1900 . . . a citizen of the United States at birth," acknowledging birthright citizenship for women in Hawaii regardless of race, and according to the testimony of Representative Houston, had a significant numerical impact. *Citizenship Act Hearing*, *supra* note 143, 71st Cong. at 19.

191. The Act of June 25, 1936, dubbed "An Act to Repatriate Native-Born Women Who Have heretofore Lost their Citizenship by Marriage to an Alien, and for other Purposes," stated:

> That hereafter a woman, being a native-born citizen, who has or is believed to have lost her United States Citizenship solely by reason of her marriage prior to September 22, 1922, to an alien, and whose marital status with such alien has or shall have terminated, shall be deemed to be a citizen of the United States to the same extent as though her marriage to said alien had taken place on or after September 22, 1922: *Provided, however*, That no such woman shall have or claim any rights as a citizen of the United States until she shall have duly taken the oath of allegiance as prescribed . . . .

Act of June 25, 1936, ch. 801, 49 Stat. 1917, 1917. The National Archives and Records Administration has records of women who applied to take this oath of allegiance, and the documents reveal a fascinating array of women seeking to restore their citizenship. They include: a forty-one year-old housewife named Lee Toy Quan, born in San Francisco in 1900, whose color was identified as "yellow," and who had lost her citizenship through her 1922 marriage to Shung Ben Quan, a citizen of China, who died in 1940 (National Archives and Records Administration, Pacific Region, 246/R/986; 23-M-950); a fifty-seven year-old housewife named Dolores Cornelia Ayala, identified as "white," born in Wilmington, California in 1883, who lost her citizenship through her 1909 marriage to Ynocente Thomas Ayala, a citizen of Mexico, from whom she was divorced (National Archives and Records Administration, Pacific Region, 246/R/994; 23-M-715); Edith May Byers, a sixty-six year-old housekeeper, identified as "white," born in Pleasant Ridge, Ohio in 1882, who lost citizenship through her 1921 marriage to Shickrelleh Elias Hydar, a citizen of Syria, who died in 1932 (National Archives and Records Administration, Pacific Region, 246/2753R; 2753); Jessie Mabel Jiobu, a fifty-four year-old hotel manager, identified as "white," born in Mannington, West Virginia in 1893, who lost her citizenship through her 1911 marriage to Joe Masao Jiobu, a citizen of Japan (National Archives and Records Administration, Pacific Region, 246/2751R; 2751); Willie Otis Cole, a fifty-six year-old cook, identified as "black," born in Brandon, Mississippi in 1885, who lost her citizenship through her 1908 marriage to Alexander Cole, born in the British West Indies and a subject of Great Britain, from whom she was divorced (National Archives and Records Administration, Pacific Region, 246/R/1493; 23-M-2067).

death or divorce, could file an application with their local naturalization court and resume citizenship through taking an oath of allegiance.[192]

Racial restrictions as to eligibility for naturalization continued until 1943 (Chinese),[193] 1946 (Indians and Filipinos/as),[194] 1950 (Guamians), and 1952, when the barriers to naturalization were universally lifted.[195] Thus, Asian women, like Asian men, were unable to naturalize as American citizens until the middle of the twentieth century.[196]

G. The Restoration of Women's Citizenship Act

The legacy of the Cable Act recently surfaced in the proposed Restoration of Women's Citizenship Act, which sought to restore citizenship to women who lost it through marriage between 1907 and 1922.[197] The

192. In 1940, Congress recognized the need to plug the gap for women who had lost citizenship due to marriage to an alien followed by residence abroad, and clarified that such women could regain their citizenship so long as they took an oath of allegiance. Previous to this time, "women who had married aliens and whose marriage relationship had not been terminated prior to 1922, found it necessary to be naturalized in order to regain citizenship." *See In re* Watson's Repatriation, 42 F. Supp. 163, 165 (E.D. Ill. 1941). In that case, the requirement of an oath of allegiance was interpreted as not necessary to citizenship but as optional, if desired, for providing tangible evidence of the existence of rights of citizenship. *Id.* at 166.

The Act of July 2, 1940 also amended the June 25, 1936 Act by inserting after "terminated," "or who has resided continuously in the United States since the date of such marriage." Act of July 12, 1940, ch. 509, 54 Stat. 715.

193. For an important discussion of the repeal of the Asian exclusion laws that simultaneously repealed the racial restrictions on naturalization, see Gotanda, *supra* note 43.

194. *See, e.g.*, Letter from Melva Chowdhury, to "Mrs. Roosevelt," First Lady (received Jan. 28, 1941) (National Archives and Records Administration, Record Group 85, File 29/151). Mrs. Chowdhury wrote to Eleanor Roosevelt (who, with her education and "knowledge of so many things," she thought might be able to help), saying that she was an American citizen "married to a Hindu for the past 10 years," was "raising a large family," and that her husband had been having difficulty in employment and had been "unable to obtain his last [citizenship] papers on account of the Oriental Exclusion Act. Why," she asked, "if Hindus are considered English subjects . . . [were] they denied American Citizenship rights?" Lemuel Schofield wrote back to say that the Supreme Court had held that "a Hindu does not fall within any of the classes of aliens eligible for naturalization[, and i]t is regretted therefore that [they could not] be of any service in the matter. Letter from Lemuel B. Schofield, Special Assistant to the Attorney General, to Melva Chowdhury (Feb. 8, 1941) (National Archives and Records Administration, Record Group 85, File 29/151).

195. *See, e.g.*, Letter from Itha Fellet to Department of Immigration, Washington, D.C. (Feb. 5, 1942) (National Archives and Records Administration, Record Group 85, File 29-174) (inquiring as to whether her Syrian husband was considered white, and stating, "I am also vitally interested in knowing that I am married to a White man").

196. Women like Ng Fung Sing, who had lost citizenship through marriage, could naturalize to regain their birthright citizenship after 1931. *See supra* text accompanying notes 2–9.

197. Restoration of Women's Citizenship Act, H.R. 875, 107th Cong. (1st Sess. 2001), *available at* http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.875.IH:. The proposed bill seeks to limit the benefits to women who died before December 24, 1952, though it is unclear why. Eshoo's staff

bill's primary sponsor was Congresswoman Anna Eshoo, who apparently learned of the history of denaturalization through a letter from a constituent in May of 1998. The letter stated that the constituent's mother, born in Syracuse, New York, had lost her citizenship in June 1922 when she married an Italian immigrant. The "background information" to the bill provides a timeline of women's citizenship and a list of "historical cases" of women who thus lost their citizenship.[198]

Both the text of the proposed legislation and the presentation of historical information repeat the common error that marital expatriation ended in 1922. Women who married men racially ineligible to naturalize, or women who themselves were so ineligible, are thus denied from gaining the (however minimal) benefits of this legislation.[199] Effectively, citizenship is being "restored" only for women who married foreign-born men before

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may have relied on erroneous information from the internet indicating that only since December 24, 1952 have women who lost citizenship by marriage been able to resume citizenship by taking an oath.

198. The background material states:

> After receiving Leonora Gorfinkel's letter, Congresswoman Eshoo introduced H.R. 875, the Women's Citizenship Restoration Act, legislation to restore citizenship posthumously to every native-born American woman who lost her citizenship through marriage to an alien before 1922. Though largely symbolic, this bill would correct an injustice that affected thousands of women.

It goes on to present:

> HISTORICAL CASES OF WOMEN WHO LOST THEIR CITIZENSHIP THROUGH MARRIAGE TO A FOREIGNER
>
> CONGRESSWOMAN RUTH BRYAN OWEN (D-FL)—The first woman from the South elected to the U.S. House of Representatives
>
> Ruth Bryan Owen, daughter of frequent Democratic Presidential-candidate William Jennings Bryan lost her citizenship in 1910 when she married a British army officer.
>
> The 1922 act did not automatically restore her citizenship but only gave her the right to be renaturalized. The requirements were so burdensome that she was not renaturalized until 1925.
>
> In 1928, Ruth Bryan Owen's election to Congress was challenged by her opponent on the grounds that she had not met the constitutional requirement of seven years of citizenship.
>
> HARRIOT STANTON BLATCH (Suffragist, Daughter of Elizabeth Cady Stanton)
>
> A feisty suffragist, Harriot Stanton Blatch, daughter of Elizabeth Cady Stanton, lost her citizenship when she married an Englishman in the 1890s.
>
> NELLIE GRANT (daughter of U.S. President Ulysses S. Grant)
>
> In 1874, President Ulysses S. Grant's daughter Nellie married Algernon Sartoris, an Englishman. Their wedding in the White House attracted international attention. Nellie went to live with her husband in England. She lost her citizenship.

E-mail from Janice Kaguyutan, Staff Attorney, National Organization of Women Legal Defense and Education Fund, to Leti Volpp (Apr. 26, 2001) (providing information formerly posted on Representative Eshoo's website, http://www-eshoo.house.gov/legislative.aspx) (on file with author).

199. I pointed this out to Ms. Kaguyutan, who had asked me to look at the bill. She contacted Eshoo's staff and was told that they did not realize that restricting the benefit to women who were divested of their citizenship before 1922 would leave out many women and that they needed to conduct more research on the matter.

1922. Moreover, the choice of examples—Congresswoman Ruth Bryan Owen, "feisty suffragist Harriot Stanton Blatch," and Nellie Grant, "daughter of U.S. President Ulysses S. Grant"—suggests that this history primarily disenfranchised elite white women who married British men, and implicitly suggests that their disenfranchisement is somehow more of a violation than the disenfranchisement of other women. Perhaps most frustratingly, the bill was carefully crafted to provide only symbolic value. The recipient of its benefits must be deceased, and the draft legislation explicitly does not confer citizenship or other benefits that can be conveyed to descendants.[200]

II. DISCOURSES OF CITIZENSHIP AND THE ASIAN AMERICAN WOMAN

This history has so far focused on the divestment of formal citizenship. A more complete depiction of the history of citizenship requires us to consider how subjects were also disenfranchised from other forms of citizenship. In the discussion below, I examine the way in which both race and gender have affected the enjoyment of these different forms of citizenship. I also show that we cannot capture the historical experience of Asian American women through an analysis that separates race from gender.

In recent scholarship, Linda Bosniak helpfully unpacks the ways in which notions of citizenship implicate four distinct discourses: namely "formal citizenship," "citizenship as rights," "citizenship as political activity," and "citizenship as identity/solidarity."[201] Formal citizenship, the focus of the

200. However, at least one internet website's immigration bulletin has suggested that the bill may be useful in this regard. *See* The Immigration Law Portal, Legislative Updates, http://www.visalaw.com/01mar2/2mar201.html (last visited Oct. 8, 2005). The update states:

> The Restoration of Women's Citizenship Act . . . would restore U.S. citizenship to women who lost it solely because they married a foreign national prior to September 22, 1922, and died before December 24, 1952, when the Immigration and Nationality Act was changed to eliminate this provision. Such a bill could help children and grandchildren of these women gain legal status in the US.

Id.

201. *See* Bosniak, *supra* note 19, at 456–88. For an alternative division of meanings of citizenship, see JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991). Shklar divides citizenship into (1) standing; (2) citizenship as nationality; (3) citizenship as active participation or "good citizenship"; and (4) ideal republican citizenship. *Id.* at 3.

By citizenship as standing, Shklar means "a sense of one's place in a hierarchal society," which relates to the idea of status. *Id.* at 2. "Citizenship as nationality is the legal recognition, both domestic and international, that a person is a member, native-born or naturalized, of a state." *Id.* at 4. Good citizenship as political participation "concentrates on political practices" and refers to persons "consistently engaged in public affairs," not just "on primary and election day." *Id.* at 5. Lastly, ideal republic citizenship refers to a vision of the ideal citizen, the virtuous citizen, who appears in the classics of political theory. *Id.* at 10–12.

Article until this point, refers to possessing the legal status of a citizen in the United States, as granted by the Constitution or by statute. Citizenship as rights signifies the rights necessary to achieve full and equal membership in society. As described by T.H. Marshall, the enjoyment of the rights of citizenship tracks a developmental path from civil, to political, and finally to social rights in Western capitalist societies.[202] In the context of the United States, citizenship as rights is premised on a liberal notion of rights, and the failure to be fully enfranchised through the enjoyment of rights guaranteed under the Constitution has been described as exclusion or as "second-class citizenship."[203] Citizenship as political activity posits political engagement in the community as the basis for citizenship, as exemplified both by the republican theories that played a key role in the founding of American democracy, as well as by a recent renaissance of civic republicanism.[204] Lastly, citizenship as identity refers to people's collective experience of themselves, as expressed through affective ties of kinship and solidarity.[205]

A. The Citizenship of Republican Mothers

White women clearly enjoyed citizenship as identity, in that they were considered foundational members of the national community. However, this citizenship identity was a very gendered one. For example, in the 1874 decision of *Minor v. Happersett*,[206] the Supreme Court simultaneously recognized that white women were part of "the people" at the founding of the nation[207] but held that women's citizenship did not encompass the right to vote. Women thus were denied citizenship as rights and citizenship as political activity. Through marital expatriation, women were denied formal citizenship as well.[208]

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202. T.H. MARSHALL, CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT (1964).

203. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 44–45 (1989); *see also* Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970).

204. *See* Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977–1978); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

205. *See* Bosniak, *supra* note 19, at 460–64.

206. 88 U.S. (21 Wall.) 162 (1874).

207. *Id.* at 166–67 (asserting that women were part of "the people" at the founding of the nation).

208. Arguably, women still suffer from the failure of the guarantee of citizenship as rights and as political activity. In terms of rights, I am thinking here of what has been called an epidemic of violence against women. *See* Catherine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135 (2000); *see also* MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 136 (1999) (describing "an area of female misery in which the United States may lead the world: sexual violence"). As to political activity, see *id.* at 135 (stating that "[a]mong the

As scholars such as Nancy Cott, Linda Kerber, and Carole Pateman have argued, access to citizenship has been gendered throughout U.S. history, and women's citizenship has been shaped specifically by their private roles and functions. Republican ideology and U.S. democratic discourse, descending from the Enlightenment and the French Revolution, were pervaded by binary assumptions about women and men.[209]

Historically, women's citizenship in the United States was mediated by husbands and sons who engaged in the public sphere, while women were occupied with the tasks of domesticity. Early in the republic, the ideology of "Republican motherhood" developed, offering a solution to the dilemma presented by classical republicanism, which posed the idea of equality, but excluded women from certain of its duties, such as bearing arms. Republican mothers were to inculcate their sons with civic virtues, but were only to have an indirect connection to public life. Their presumptive disinterestedness in public life lent women a moral authority: They could not control property, so they were independent of the selfish motivations of the market. Their only role in society was to exert a pure influence on male family members.[210] As historian Linda Kerber argues, this had certain effects. Freeing women from civic obligations that men had to fulfill—treating them as "ladies"—served to legitimate their disenfranchisement from rights such as voting.[211]

Women, ultimately, were confined to the nonpolitical sphere of the family, subject to their husband's governance. The antithesis of the independent political actor, the bodies, goods, and wills of *femme couverts* were

areas studied by the Human Development Report's . . . Gender Empowerment Measure, the one in which U.S. women perform worst is that of political representation"). Other nations that exceed the U.S. figure of holding 10.4 percent of seats in the U.S. Congress include the Netherlands, Norway, Finland, Sweden, Denmark, Germany, Canada, Spain, Australia, Belgium, Austria, New Zealand, Switzerland, Ireland, Italy, Barbados, Bahamas, Luxembourg, Costa Rica, Trinidad and Tobago, Hungary, Mexico, Malaysia, Poland, Bulgaria, Belize, South Africa, Guyana, El Salvador, Namibia, Zimbabwe, Cameroon, Lesotho, Bangladesh, Burundi, and Mozambique. *Id.* Nussbaum writes: "It is striking that with very high economic and educational attainments, U.S. women have still not achieved a proportional measure of political influence." *Id.*

For the argument that violence against women inhibits women's political citizenship in the United States, since it imposes arbitrary constraints and limits self-determination and full political participation, see Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783, 794–96 (2000).

209. *See, e.g.*, COTT, *supra* note 13, KERBER, *supra* note 76; CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Cott, *supra* note 13.

210. *See* ANDERSEN, *supra* note 133, at 22–23; LINDA KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 11–12 (1980) (describing Republican Motherhood).

211. *See generally* KERBER, *supra* note 76, at 8–15.

regarded as their husband's property.[212] This translated into the exclusion of women from citizenship as rights, as well as citizenship as political activity, most obviously through denial of the franchise[213]—but more elaborately through a bar on property ownership, education, profession, politics, and all of the institutions that qualified men for the public sphere.[214]

Despite the fact that white women were able to acquire U.S. citizenship from the earliest naturalization statute, the subsequent 1855 and 1907 Expatriation Acts aligned women's citizenship with their husbands, showing how marriage mediated women's relationship to the nation. While political activity in the form of suffrage was not thought of as a necessary right of women's citizenship, women's lack of political autonomy was used in a circular argument to deny them independent citizenship.[215] That women were only "Republican mothers" and not capable of political engagement was used to justify subsuming their formal citizenship into that of their husbands. Recall Congressman Cutting asserting in debates concerning the 1855 Act that "by the act of marriage itself the political character of the wife shall at once conform to the political character of the husband."[216] Since women had no independent political identity, there was no need for their citizenship to maintain its own integrity to the nation.

What of the relationship between gender and citizenship as a matter of identity? It has been argued that there is an inverse relationship between the prominence of female figures in the allegorizations of nation and the degree of access granted women to the political apparatus of the state—that it is precisely women's exclusion from political life that renders their images fit to represent the high cause of the nation for which men are willing to kill and

212. *See* Carroll Smith-Rosenberg, *Political Camp or the Ambiguous Engendering of the American Republic*, *in* GENDERED NATIONS: NATIONALISMS AND GENDER ORDER IN THE LONG NINETEENTH CENTURY 271, 275 (Ida Blom et al. eds., 2000) [hereinafter GENDERED NATIONS].

213. For the idea that women could be formal citizens but not citizens in terms of suffrage, see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

214. Of course, coverture also led to a critique of the institution of marriage. There is a continuing critique which both attacks marriage as privileged in society over other relationships and for its failures as an institution. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 145–66 (1995); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1–9 (2000); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1535–41 (1993).

215. *See* discussion of Congressman Cutting's remarks, and of *Mackenzie v. Hare*, *supra* Parts I.B and I.C.

216. CONG. GLOBE, 33rd Cong., 1st Sess. 170 (1854) (statement of Rep. Cutting).

be killed.[217] Thus, the fact that the figure of the woman frequently stands in for the nation should not be confused with the idea that women possess full citizenship: While women are called upon to emblemize the nation, they have been sidelined in the process of nation building. Nonetheless, white women enjoyed citizenship as a matter of identity because they belonged to the national community, as expressed on the terrain of culture.[218] Symbolically standing in for the nation both required and reproduced whiteness.

B. The Citizenship of Alien Citizens

Race has tremendously shaped the ability of Asian Americans to access different forms of citizenship. While birthright citizenship was guaranteed to Asian Americans after 1898, the racial bar on naturalization was not completely lifted until 1952. The long delay in allowing Asians to naturalize as U.S. citizens was predicated upon the perception of Asian Americans as perpetual foreigners, disinterested in mainstream American democratic processes and incapable of participation in republican citizenship.[219] The lack of formal citizenship status meant that many Asian Americans could not vote,[220] serve on juries,[221] or otherwise engage in the responsibilities of citizenship. Thus, the lack of formal citizenship status severely constrained the ability of Asian Americans to engage in citizenship as political activity.[222] The

217. Ruth Roach Pierson, *Nations: Gendered, Racialized, Crossed With Empire*, *in* GENDERED NATIONS, *supra* note 212, at 41, 44. We can see a separation here of citizenship in the nation from citizenship in the state. To be a citizen of the nation means that one possesses citizenship as identity, and is part of the kinship that forms the national body. Political theory often presupposes that rules about citizenship in the state are independent from rules about kinship, which are thought "natural" and not "political." But political theorist Jacqueline Stevens reminds us—as does the history in this piece—that political societies determine kinship rules that then are used to reproduce political societies. *See generally* JACQUELINE STEVENS, REPRODUCING THE STATE (1999).

218. Obviously, this is mediated by factors such as religion and sexuality.

219. *See* FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002); Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985); Volpp, *supra* note 25.

220. On the history of alien suffrage, see Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993). At various points in our history, twenty-two states and territories allowed white noncitizens to vote. *Id.* at 1393.

221. *See* State v. Ah Chew, 16 Nev. 50 (1881) (upholding a state statute denying "Mongolians" the right to serve as jurors).

222. The election of Dalip Singh Saund to Congress in 1956, as the first Asian American and only South Asian to serve in Congress until the 2004 election of Bobby Jindal, raises interesting questions about citizenship and identity. Saund, who came to the United States in 1920 as a student, was unable to naturalize as a U.S. citizen. *See* Inder Singh, *Pioneer Asian Indian*

fact that Asians could not naturalize not only reflected the racialization of Asian Americans as foreign, it helped to fix it as such in the American imagination.

Those Asian Americans who were able to enjoy the formal status of citizenship were still, in the words of historian Mae Ngai, "alien citizens":[223] persons with the formal status of citizenship as an immigration matter, but without citizenship as a matter of identity.[224] Perpetually suspected of maintaining dual loyalties, "alien citizens" were considered aliens and not citizens, especially in times of war. This was evident in the incarceration of 80,000 U.S. citizens whose citizenship status was nullified both rhetorically and in fact during World War II. American citizens of Japanese ancestry were labeled "non-aliens," as opposed to "citizens" in orders from the U.S. military that directed "persons of Japanese ancestry, both aliens and non-aliens" to report to assembly centers for evacuation.[225] The case of Japanese American internment most dramatically illustrates the fact that formal citizenship was no guarantee of citizenship as a matter of rights.

While African Americans stood as the paradigmatic "second-class citizens,"[226] Asian Americans also lacked full citizenship in the form of rights.

Immigration to the Pacific Coast: Dalip S. Saund, The First Asian in U.S. Congress (Aug. 18, 2000), *available at* http://people.lib.ucdavis.edu/tss/punjab/dalip.html. Saund married a white woman named Marian Kosa in 1928. She lost her citizenship through the marriage, but following the 1931 amendments to the Cable Act, was able to regain her citizenship. *Id.* The couple held property in her name, as he was unable to do so given the alien land laws in California. *Id.* Pivotal in lobbying for the Luce-Cellar Act of 1946, which lifted the racial bar on naturalization for Indians, Saund naturalized in 1949. *Id.* Because we could think of political representatives as the ultimate citizens, who are asked to engage in citizenship activities on behalf of a broader citizenry, what is fascinating about Saund is that he was elected as this paradigmatic representative when he by no means was representative of the electorate.

223. NGAI, *supra* note 22, at 2.

224. The idea of the *alien citizen* "suggest[s] that citizenship can be delivered in different degrees of permanence or strength." Cott, *supra* note 13, at 1441.

225. NGAI, *supra* note 22, at 175; *see also* Hirabayashi v. United States, 320 U.S. 81 (1943); Civilian Exclusion Order No. 57, 7 Fed. Reg. 3725 (May 10, 1942); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

226. For a discussion of the second-class citizenship of black Americans as both a historical and a contemporary problem, see generally JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1993); Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209 (1994); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); William M. Carter, *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 813 (1999). For a discussion of the position of black Americans in the citizenship scheme of the United States, whereby blacks are "naturalized" into a subordinated status, and for an analysis of the utility of the term "second-class citizenship," see Carbado, *supra* note 52.

The Supreme Court upheld the segregation of Asian American students in public schools in 1927,[227] and the practice of operating "separate but equal schools" for Asians in California continued at least through the mid-1940s.[228] Racism "permeated many areas of public life,"[229] so that Asian Americans were banned from public recreational facilities and forced to sit in the back of movie theaters.[230]

That Asian Americans formally could be citizens but not enjoy citizenship as a matter of rights, political activity, or identity exemplifies the contradiction posed by the purported universality of liberalism and citizenship.[231] As heir to European ideals, the United States adopted problematic Enlightenment notions about temporal and spatial citizenship and civilization, so that the "savage," the slave, the woman, and the non-property-holding person were excluded from consideration as a subject of rights and democratic participation.[232] The slippage between a universal "we the people" and a particularized enjoyment of citizenship is evident in the historical racialized citizenship of Asian Americans.

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227. Gong Lum v. Rice, 275 U.S. 78 (1927). For a discussion of the case, see Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in* Mississippi Masala, *Barriers to Coalition Building*, 5 ASIAN L.J. 7, 13–18 (1998).

228. *See* Theodore Hsien Wang, *Swallowing Bitterness: The Impact of the California Civil Rights Initiative on Asian Pacific Americans*, 1995 ANN. SURV. AM. L. 463, 471.

229. SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETATIVE HISTORY 113 (1991) (citing DAISUKE KITAGAWA, ISSEI AND NISEI: THE INTERNMENT YEARS (1967)); *see also* CHARLES KIKUCHI, THE KIKUCHI DIARY: CHRONICLE FROM AN AMERICAN CONCENTRATION CAMP (John Modell ed., 1973); JEANNE WAKATSUKI HOUSTON & JAMES D. HOUSTON, FAREWELL TO MANZANAR (1973); YOSHIKO UCHIDA, DESERT EXILE: THE UPROOTING OF A JAPANESE AMERICAN FAMILY (1982).

230. CHAN, *supra* note 229, at 113.

231. As Anne Phillips writes:

> [F]eminists have queried most of the basic concepts of political thinking, arguing that theorists have always built on assumptions about women and men, though they have not always admitted (even to themselves) what these were. One of the most common tricks of this trade is to smuggle real live men into the seemingly abstract and innocent universals that nourish political thought.

Anne Phillips, *Citizenship and Feminist Theory*, *in* CITIZENSHIP, *supra* note 1, at 76, 77.

In contrast, Rogers Smith would argue that one could parse out two separate traditions in American histoty: the first, a tradition of inequality in the name of nation building; the second, a tradition of egalitarian, liberal, and republican principles. *See generally* SMITH, *supra* note 26. I am not so sanguine that these two traditions are separable.

232. *See generally* DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING (1993); UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999).

C. Gender, Race, and Citizenship

The racial bars that white women only experienced through their interracial marriages were uniformly applied to Asian American women and men. Yet although race might appear to trump gender in shaping Asian American women's experiences, understanding the position of Asian American women through the lens of race alone is insufficient. We can see this through analyzing the interaction between gender, citizenship, and the racial bars to immigration.

Asian American women and men maintained different relationships to the nation-state because of their gender. Men and women were treated differently by the immigration laws, which, like marriage and citizenship laws, also followed the logic of coverture.[233] Male citizens and resident aliens were given the right to control their alien wives' immigration status. A wife's immigration status depended on her husband's, but the converse did not hold.[234] Citizen or resident alien women did not have the same rights as their male counterparts to petition for their alien spouses. Men could not gain immigration status through accompanying their citizen wives.[235] This relationship of coverture limited the ability of alien women to control their own futures and rendered them dependent.

We can trace how these restrictions shaped the immigration admission of Chinese women in the exclusion era. Historian Erika Lee documents that most Chinese women were admitted as the dependents (wives and daughters) of men either allowed entty as U.S. citizens, or of men who were allowed entry as exempt from Chinese exclusion, in particular as merchants.[236] Far

233. *See, e.g.*, Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991).

234. For example, in 1917, family immigration followed this rule:

> [A]ny admissible alien, or any alien heretofore or hereafter legally admitted, or any citizen of the United States, may bring in or send for his father or grandfather over fifty-five years of age, his wife, his mother, his grandmother, or his unmarried or widowed daughter, if otherwise admissible, whether such relative can read or not; and such relative shall be permitted to enter.

Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 877 (repealed 1952).

235. These laws were the precursor of what is today the gender-neutral "accompanying, or following to join" section of the Immigration and Nationality Act, which allows a "spouse or child" to be admitted with an immigrant granted a visa in the family, employment, or diversity preference categories. Immigration and Nationality Act of 1952, ch. 477, § 203(d), 66 Stat. 163, 179 (codified as amended as 8 U.S.C. § 1153(d) (2000)).

236. Between 1910 and 1924, 9565 Chinese women were admitted to the United States under the following categories: merchant wife (2756); merchant daughter (522); wife of U.S. citizen (2848); new or returning merchant (29); returning laborer (185); U.S. citizen (1580); student (469); and teacher (29). LEE, *supra* note 22, at 98.

fewer Chinese women entered as independent immigrants. When they did so enter, as students or teachers, for example, they were not able to bring husbands as dependents.[237] Thus, we can see that the racial experience of Asian American women and men diverged because of gender.

But we must remember that race also altered the experience of Asian American women relative to their white counterparts. Recall that the Cable Act sought to end the doctrine of dependent citizenship in the name of classifying women as independent individuals. The Act simultaneously ended marital expatriation as well as dependent citizenship for alien wives of U.S. citizens. In a context of racial exclusion, however, the status of Chinese women as dependent on their husbands had been crucial to these women gaining admission to the United States. In 1900, in the case *United States v. Gue Lim*,[238] the Supreme Court held that the admissibility of a wife or child followed that of the husband or father.[239] Thus, if a husband could prove that he was a merchant, his wife would be able to enter the United States through the dependent status of being his wife. Moreover, marriage to a U.S. citizen could grant a Chinese woman, although racially ineligible to naturalize, the right to remain in the United States.[240]

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237. *Id.* at 97.

238. 176 U.S. 459 (1900).

239. *Id.* For a discussion of the case, see SALYER, *supra* note 26, at 43. *See also* Chan, *supra* note 56, at 116–17. The Supreme Court decision followed divided opinions in the lower courts. As an Acting Secretary of Labor had explained in a letter to the Secretary of State in 1914:

> Even women of full Chinese blood who are married to American citizens are regarded as admissible to the United States . . . if admissible under the provisions of the general immigration act, upon the theory that the husband . . . has a right to have his wife with him in the country of his citizenship, whatever her race may be.

BREDBENNER, *supra* note 13, at 124.

240. *See* Tsoi Sim v. United States, 116 F. 920 (9th Cir. 1902). Tsoi Sim was arrested for being a female laborer without a certificate in violation of the Geary Act, ch. 60, 27 Stat. 25 (1892), which required Chinese living in the United States to carry a certificate of residence or be subject to deportation or imprisonment and a year of hard labor. Her marriage changed her status "from that of a Chinese laborer to that of a wife of a native-born American. . . . By virtue of her marriage, her husband's domicile became her domicile, and thereafter she was entitled to live with her husband . . . ." *Id.* at 925. But it should be noted that marriage often failed to guarantee the right to remain when women were facing deportation on the ground of prostitution. *See* Low Wah Suey v. Backus, 225 U.S. 460, 473 (1912); Looe Shee v. North, 170 F. 566 (9th Cir. 1909) (deporting Looe Shee, who had been admitted to the United States as the wife of a U.S. citizen, after she was found in a San Francisco brothel).

Prostitution became a ground of deportation, in addition to a ground of exclusion, in 1907. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 899–900. The 1907 Act prohibited the entry or importation of women or girls coming into the United States for the purpose of prostitution or other immoral purposes, and made it a felony to "keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States . . . ." *Id.* at 899. Any woman found in a house of prostitution within three years of entry could be deported. *Id.* at 900. These provisions were extended in 1910 and 1917 to expand the basis on which one could

The idea of independent citizenship signaled to the courts that the immigration status of wives could be considered as separate from their husbands.[241] This rendered Asian women more vulnerable to exclusion and deportation.[242] Thus, the very goal that suffragists had been fighting for—independence from husbands in the realm of citizenship—jeopardized the ability of Asian women to enter or remain in the United States because they relied on a dependent relationship to husbands for recognition from the nation-state.[243] Race unevenly molded coverture.

D. Citizenship, Morality, and Prostitution

The history of Asian American women's citizenship reminds us of the inability of single-axis categories to capture their experiences. It also leads us to consider citizenship as a moral category, in addition to a legal category—one that delimits how persons should conduct themselves as members of the national community.[244] Ideas of morality have always colored the national perception of rights to citizenship. For example, in 1917, Congress specified that women who married U.S. citizens suspiciously soon after their arrest for prostitution were precluded from naturalization, since U.S. citizenship would immunize them from prostitution as a ground of deportation.[245] Asian women

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be removed (for example, merely being employed by a place of amusement habitually frequented by prostitutes) and the length after entry one could be removed. *See* White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–78 (repealed 1952).

241. *See* Chang Chan v. Nagle, 268 U.S. 346, 347–48 (1925) (explicitly referring to the fact that the Cable Act had ended dependent citizenship in refusing admission into the United States to four Chinese women who were wives of U.S. citizens).

242. *See* Stevens, *supra* note 167.

243. *See* BREDBENNER, *supra* note 13, at 128 (pointing this out as "no small irony"). Todd Stevens also makes the argument that for Chinese Americans, marriage and coverture were in fact "a bulwark against separation and an immigration regime . . . bent on preventing the creation of Chinese American families." Stevens, *supra* note 167, at 276–77 n.8.

244. *See* Sonya O. Rose, *Sex, Citizenship and the Nation in World War II Britain*, *in* CULTURE OF EMPIRE: COLONIZERS IN BRITAIN AND THE EMPIRE IN THE NINETEENTH AND TWENTIETH CENTURIES 246, 263 (Catherine Hall ed., 2000).

245. The law stated:

> [T]he marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this Act shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation . . . .

Immigration Act of 1917, § 19, 39 Stat. at 889.

The law was enacted following the claim of the Dillingham report that women sought marriage to evade deportation for prostitution:

> In certain cases where there seemed some doubt regarding admission, the immigration authorities have permitted women who may technically at least be subject to deportation under the law to remain in this country if they marry American citizens. In some

were precluded categorically from naturalization because of the racial bar, whether proven to be prostitutes or not. The Chinese especially were considered morally incapable of citizenship as a general matter, in part because of concerns about the virtue of Chinese women.[246]

While the moral American citizen was assumed to have a normatively heterosexual family, the Chinese in America were thought to be antithetical to such. The Chinese male immigrant was seen as sexually deviant for his lack of access to Chinese women, so that Chinese men formed a "bachelor society."[247] Meanwhile, the Chinese female immigrant was envisioned as sexually deviant as a presumptive prostitute.[248] Both of these depictions hinged on actual demographic patterns in early Chinese immigrant populations in the

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> instances the woman has been allowed to stay if she married the person to whom she was booked, even though the man was a foreigner. There is every reason to believe that this device is followed by professional prostitutes who have no intention whatever of giving up their practices or of making a home for the man whom they marry.

U.S. IMMIGRATION COMM'N, IMPORTING WOMEN FOR IMMORAL PURPOSES: A PARTIAL REPORT FROM THE IMMIGRATION COMMISSION ON THE IMPORTATION AND HARBORING OF WOMEN FOR IMMORAL PURPOSES, S. DOC. NO. 61-196, at 18–19 (2d Sess. 1909). For a discussion of the marriages of prostitutes to citizens for purposes of evading deportation, see COTT, *supra* note 13, at 147–50.

246. See, for example, the statement of Representative Higby in a debate over the 1866 Civil Rights Act:

> Judging from the daily exhibition in our streets, and the well established repute among their females, virtue is an exception to the general rule. They buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. You cannot make citizens of them.

CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866), *quoted in* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 659 (2005).

247. DAVID ENG, RACIAL CASTRATION: MANAGING MASCULINITY IN ASIAN AMERICA (2001); SHAH, *supra* note 144.

248. *See* GEORGE ANTHONY PEFFER, IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION (1999). The racial characterization of the Chinese immigrant as inassimilable and strange relied on notions of normal sexual relations, which were only conceptualized as occurring within the heterosexual marital relationship. Feminist theorist Laura Kang importantly suggests that we resist the reformation of the sexually ambivalent population of nineteenth-century prostitutes and bachelor societies "within a teleological narrative that celebrates the gradual formation and survival of the Asian American 'family' in spite of the very efforts to prevent this by the state's enactment of various laws barring Asian immigration and citizenship." LAURA HYUN-YI KANG, COMPOSITIONAL SUBJECTS: ENFIGURING ASIAN/AMERICAN WOMEN 154–55 (2002). This narrative is signaled when external coercion is emphasized in explaining how women became prostitutes and when marriage and generational reproduction are seen as the only goal. She asks whether we can "imagine other forms of sexual existence . . . can contest the terms of sexual citizenship for 'becoming American' [through] marriage and motherhood," and can write different histories. *Id.* at 158. She notes the limitations of the archive in writing these histories. *Id.* at 163. The historian Nayan Shah's *Contagious Divides*, which describes what he calls "queer domestic arrangements," from female-headed household networks to workers' bunkhouses and opium dens, stands as an example of this kind of "different history." SHAH, *supra* note 144, at 13–14.

United States.[249] The Chinese immigrant was generally kept from reproducing a heterosexual family, due in part to restrictions on immigration. This fact produced the perception of Chinese men as aberrant and alien, given the notion of the family as the foundation of civil society.[250] Moreover, a large percentage of Chinese women who immigrated to the United States in the early period in fact worked as prostitutes.[251]

That Chinese women both rhetorically and materially were associated with prostitution[252] is apparent in what may be the first federal legislation enacted to restrict the movement of Chinese to the United States.[253] Titled

249. There is a dispute as to why the gender ratio was so skewed, with some scholars citing the impact of immigration law, some transnational migration patterns, and others a patriarchal culture. *See, e.g.*, PEFFER, *supra* note 248, at 4–11; Chan, *supra* note 56, at 94–97.

250. The exception to this denial would be the legal decisions that legitimized dependent citizenship under the logic of coverture and allowed Chinese men to bring their wives with them. *See* Stevens, *supra* note 167, at 273–74.

251. *See* PEFFER, *supra* note 248, at 11 (estimating conservatively that 50 percent of Chinese women in San Francisco in 1870 worked as prostitutes).

252. This association can be traced to the perceptions of Protestant missionaries working in China in the early nineteenth century, which traveled to the United States through the writing of journalists; note that this predated the immigration of Chinese women to the United States. For example, "Horace Greeley asserted in 1854 that the 'Chinese are uncivilized, unclean, and filthy beyond all conception without any of the higher domestic or social relations; lustful and sensual in their dispositions; every female is a prostitute of the basest order.'" STUART C. MILLER, THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785–1882, at 169, *quoted in* PEFFER, *supra* note 248, at 101.

253. The other contender would be the Act to Prohibit the "Coolie Trade" Law, ch. 27, 12 Stat. 340 (1862). I am indebted to Gerry Neuman for this suggestion. The first section prohibited U.S. citizens and residents from acting as

> master, factor, owner, or otherwise, [to] build, equip, load, or otherwise prepare, any ship or vessel . . . for the purpose of procuring from China . . . or from any other port or place the inhabitants or subjects of China, known as "coolies," to be transported to any foreign country, port, or place whatever, to be disposed of, or sold, or transferred, for any term of years or for any time whatever, as servants or apprentices, or to be held to service or labor.

Id. § 1, 12 Stat. at 340. But another section left the door open to Chinese migration, proclaiming that "any free and voluntary emigration of any Chinese subject" should proceed unabated so long as a U.S. consul attested to the voluntary status of the migrant through a written certificate. *Id.* § 4, 12 Stat. at 341; *see also* Act of Feb. 26, 1885, ch. 164, 23 Stat. 332 (prohibiting contract labor and imposing penalties on persons encouraging immigrants to migrate to perform contract labor).

Scholars generally have conceptualized the "Coolie Trade" Act as an antislavery law rather than an immigration law, given the fact that voluntary migration was still permitted, while involuntary migration was not. For the argument that the law should be seen as both an immigration law and an antislavery law, and that the "Coolie Trade" Act should he seen as the first federal law restricting the immigration of Chinese, see Moon-Ho Jung, *Outlawing "Coolies": Race, Nation, and Empire in the Age of Emancipation*, 57 AM. Q. 677 (2005). But for the argument that the "Coolie Trade" Act should not be seen as the first federal immigration restriction, since legislative history would indicate that it was aimed not at prohibiting importation of Chinese slaves to the United States but at banning American involvement in the slave trade between China and Cuba, see Abrams, *supra* note 246, at 668–69 & n.165.

"An Act Supplementary to the Acts in Relation to Immigration," and known as the Page Law, this 1875 legislation required that before any person from China, Japan, or "any Oriental country" was admitted to the United States, the consul-general had to determine whether such an immigrant had entered into a contract for "lewd and immoral purposes."[254] The Act also barred the admission of any woman imported "for the purposes of prostitution."[255] Thus, the racial characteristics ascribed to Chinese and Chinese American women from the advent of Chinese immigration to the United States posited the Chinese woman as a figure antithetical to the "Republican mother"—as one engaged not in moral cultivation, but in moral corruption. This depiction, coupled with a general disbelief in the honesty of the Chinese,[256] fed concerns that many marriages between Chinese and Chinese Americans were fraudulent, concocted for the purpose of importing prostitutes.[257]

254. The Page Law provided, in part:

> That in determining whether the immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary, as provided by section two thousand one hundred and sixty two of the Revised Code, title "Immigration," it shall be the duty of the consul-general or consul of the United States residing at the port from which it is proposed to convey such subjects, in any vessels enrolled or licensed in the United States, or any port within the same, before delivering to the masters of any such vessels the permit or certificate provided for in such section, to ascertain whether such immigrant has entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes; and if there be such contract or agreement, the said consul-general or consul shall not deliver the required permit or certificate.
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> . . . .
>
> Sec. 3. That the importation into the United States of women for the purposes of prostitution is hereby forbidden . . . .
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> . . . .
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> Sec. 5. That it shall be unlawful for aliens of the following classes to immigrate into the United States, namely, persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses . . . and women "imported for the purposes of prostitution."

Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477, 477.

255. *Id.*

256. See, for example, the popular 1870 poem by Bret Harte known as "The Heathen Chinee," which reads, "That for ways that are dark/and for tricks that are vain/The heathen Chinee is peculiar." RONALD TAKAKI, IRON CAGES: RACE AND CULTURE IN 19TH CENTURY AMERICA 224 (1990) (excerpting Bret Harte, *Plain Language From Truthful James*, 5 OVERLAND MONTHLY 287, 287–88 (1870)); *see also* SMITH, *supra* note 26, at 363 (noting that the Geary Act requirement of a white witness to swear to the veracity of Chinese immigrants reflected "the widespread conviction that the Chinese were natural liars").

257. *See, e.g.*, Low Wah Suey v. Backus, 225 U.S. 460 (1912). On the common perception that all Chinese women were likely to be "enslaved prostitutes," see EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 36 (2002).

Prostitutes challenge the idea of heterosexist domesticity; as women without men,[258] or single women, they are considered inappropriate and undesirable subjects by the U.S. nation-state.[259] The history of Chinese women prostitutes has been occluded in our thinking about citizenship because the subject of the nation is the citizen, who was constructed both as the male head of the household and through whiteness.[260]

The citizen was also conceptualized through the idea of freedom, against which was positioned the Chinese male worker (the Chinese "coolie"), and the Chinese woman prostitute. Post emancipation of blacks, Chinese contract laborers were thought to represent a threat to freedom in the United States in two separate ways. First, Chinese contract laborers endangered what was called the "American Standard of Living" through their willingness to accept lower wages than those paid to "free" white workers, and thus

258. Nayan Shah notes that the 1885 San Francisco "[B]oard of [S]upervisors' investigation of Chinatown counted only 57 women who were 'living [in] families' with merchant husbands and legitimate children" and "567 'professional prostitutes'—some of whom raised children . . . as their 'associates and perhaps protégées.' The majority of women, over 760 living with 576 children, were 'herded together with apparent indiscriminate parental relations, and no family classification.'" SHAH, *supra* note 144, at 83. He writes that this evidence was seized upon by city officials to prove that typical Chinatown domesticity contradicted the nuclear family ideal; surveyors could not understand how the "cohabitation of several women and children without a man at the helm" could constitute a home or family. *Id.* at 84; *see also* Peggy Pascoe, *Gender Systems in Conflict: The Marriages of Mission-Educated Chinese American Women, 1874–1939*, *in* UNEQUAL SISTERS: A MULTICULTURAL READER IN U.S. WOMEN'S HISTORY 139 (Vicki L. Ruiz & Ellen Carol Dubois eds., 1994). Pascoe tells the fascinating tale of Chinese women "rescued" by single women devoted to professional careers as Presbyterian missionaries who pressured the Chinese women into marriage, ignoring the legal and economic powerlessness that Victorian era wives endured. Some Chinese women resisted the "attempt to mold all women to fit the Victorian belief that women were 'naturally' morally pure and pious"—such as women "who [ran] away from the Mission Home . . . [to escape] the moral supervision of missionaries." *Id.* at 150.

Pascoe also argues that these reformers saw "[t]he use of Chinese women as prostitutes, a visible threat to female purity, . . . [to be] a greater peril than unlimited immigration," and therefore opposed Chinese exclusion laws. PEGGY PASCOE, RELATIONS OF RESCUE: THE SEARCH FOR FEMALE MORAL AUTHORITY IN THE AMERICAN WEST, 1874–1939, at 16 (1990).

259. "'Good' women cannot be admitted to political society for they, like nature itself, are outside political time. And 'bad' women cannot be admitted because man must keep his treacherous sexuality outside politics and public life." Benton, *supra* note 1, at 159. *See generally* Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (1999) (discussing the relationship hetween prostitution, ideas of worthiness, respectability, and degeneracy). *See also* Dubler, *supra* note 117, at 1654–60 (arguing that single women are regulated in the "shadow of marriage").

260. For a discussion of how official narratives of "We the People" are haunted by their occlusions in the form of uncanny disruptions, see PRISCILLA WALD, CONSTITUTING AMERICANS: CULTURAL ANXIETY AND NARRATIVE FORM (1995).

potentially threatened the reintroduction of slavery.[261] Second, Chinese men endangered American ideals of democracy through their inability to engage in free thought, given their purported devotion to foreign despots.[262]

The Chinese woman prostitute was also believed to jeopardize ideals of freedom: Prostitution was assumed to be nonconsensual, in contrast to marriage, which was presumed to be based on free choice.[263] That a majority of Chinese women in the United States were believed to be enslaved prostitutes imperiled notions of morality and freedom;[264] Chinese women were thought to spread "moral death."[265] The contract laborer and the prostitute were ultimately united as unfree in the eyes of the Page Law, which sought to regulate both the coolie trade and prostitution, and which targeted subjects of "China, Japan, or any Oriental country" whose immigration was not "free and voluntary."[266]

The 1904 case of *United States v. Ah Sou*[267] dramatically illustrates how Chinese prostitution was equated with slavery. Ah Sou had been "sold as a slave by her foster mother, in China" and "brought into the United States for immoral purposes."[268] "By beatings and abuse, her master compelled her to earn money for him as a prostitute, until she escaped, and took refuge in the Chinese Women's Home of the Presbyterian Church . . . ."[269] She was then

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261. TAKAKI, *supra* note 256, at 217. The *San Francisco Chronicle* reported in 1879: "When the coolie arrives here he is as rigidly under the control of the contractor who brought him as ever an African slave was under his master in South Carolina or Louisiana." SALYER, *supra* note 26, at 10.

262. *See* Volpp, *supra* note 25; *see also* TAKAKI, *supra* note 256, at 216. The *New York Times* editorialized:

> [I]f there were to be a flood-tide of Chinese population—a population befouled with all the social vices, with no knowledge or appreciation of free institutions or constitutional liberty, with heathenish souls and heathenish propensities, whose character, and habits, and modes of thought are firmly fixed to the consolidating influences of ages upon ages—we should be prepared to bid farewell to republicanism . . . .

Id. (citation omitted).

263. *See* COTT, *supra* note 13, at 136; *see also* Abrams, *supra* note 246, at 658.

264. *See* Chan, *supra* note 56, at 138.

265. *Cornelius Cole: The Senator Interviewed by a Chronicle Reporter*, S.F. CHRON., Oct. 23, 1870, at 1, *quoted in* Abrams, *supra* note 246, at 663 & n.126. On Chinese women as dangerous moral and medical threats, see PEFFER, *supra* note 248, at 101–03.

266. Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477. Sections 2 and 4 specifically referred to subjects of China, Japan, or any Oriental country who had been transported without their voluntary consent (section 2), and whose labor had been contracted in the form of the "coolie" (section 4). *Id.* §§ 2, 4, 18 Stat. at 477. These sections made void contracts for service with persons from these countries that were not free or voluntary, made the transport of those subjects a criminal offense, and rendered a violation of the "Coolie Trade" Act a felony. *Id.*

267. 132 F. 878 (D. Wash. 1904), *rev'd* 138 F. 775 (9th Cir. 1905).

268. *Id.* at 878.

269. *Id.* at 879. For a discussion of the efforts of these rescue missions, see Pascoe, *supra* note 258.

married to "a Chinese inhabitant of this country, who [was] registered as a Chinese laborer."[270] The marriage was not consummated, and it appeared to be questionable whether the parties saw it as bonafide.

Ah Sou was facing deportation because she had engaged in immoral activity,[271] and Judge Hanford professed that he found the case unique and perplexing.[272] Compliance with the laws excluding Chinese immigrants and women imported for immoral purposes would be "a barbarous proceeding, for it [would] be equivalent to remanding the appellant to perpetual slavery and degradation."[273] Moreover, "as an outcome of a bloody civil war," the people of the United States had through passage of the Thirteenth Amendment voiced opposition to slavery and involuntary servitude in the United States. The "effort which the appellant has made to escape from thraldom and to rise from her condition of degradation" entitled her to "humane consideration."[274] As a result, Judge Hanford ordered her discharged from custody, so that "she may have such protection as may be afforded by the friendly agencies which have intervened in her behalf, and the laws of this country."[275] Thus, Ah Sou was temporarily saved from slavery through Christian rescue missions and American law.

Unfortunately for Ah Sou, the government appealed the case to the Ninth Circuit, which failed to see the relevance of the Thirteenth Amendment in the decision.[276] If Ah Sou had been married to a U.S. citizen or a merchant, her husband would have been "privileged to have his wife in the United States," but she was only married to a laborer.[277] Noting that the case "enlist[ed] the sympathy of the court," and "regret[ting] that the law [was] so written" that the court could not "yield to the humane considerations which actuated the court below," the Ninth Circuit ordered Ah Sou "remanded to the country whence she came."[278]

Both Chinese women and men, as discussed above, were considered to possess characteristics contradictory to ideals of freedom necessary to citizenship. The male citizen was to possess the capacity for independent,

270. *Ah Sou*, 132 F. at 879.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 879–80.
275. *Id.* at 880.
276. United States v. Ah Sou, 138 F. 775 (9th Cir. 1905), *appeal dismissed*, 200 U.S. 611 (1905).
277. *Id.* at 777. The court referred to the case of Gue Lim. Note the wording that clearly identifies her presence in the United States as derivative of her husband, it being his privilege to keep her here.
278. *Id.* at 778.

rational thought, and to engage in free labor, while the female citizen was to engage in free marriage. This was in stark contrast to the Chinese male, enslaved by feudal culture and labor contractors, and the Chinese female, enslaved by prostitution. And, in the words of President Grant, Chinese women were doubly unfree: "[T]he great proportion of the Chinese immigrants who come to our shores do not come voluntarily . . . but come under contracts with headmen who own them almost absolutely. In worse form does this apply to Chinese women."[279]

This specific history of Chinese women is eclipsed in our present day recollection of Chinese exclusion. It is a well known "fact" that race-based federal immigration exclusion from the United States began in 1882 with the law known as the "Chinese Exclusion Act," which provided a ten-year suspension of immigration of Chinese laborers.[280] But the 1875 Page Law was an antecedent to the Chinese Exclusion Act.[281] In particular, it is believed that the Page Law almost completely shut down Chinese female immigration.[282]

If this is the case, why is the Page Law not understood as the advent of race-based federal immigration exclusion?[283] The story of race-based exclusion

279. LUIBHÉID, *supra* note 257, at 36.

280. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600. *See, e.g.*, *Separate Lives, Broken Dreams: Chinese Exclusion Era Case Files of the National Archives and Records Administration, Immigration Documents*, http://www.naatanet.org/separatelivesbrokendreams/indie.html (stating that "[i]n 1882, with a stroke of President Cbester Arthur's pen, the Chinese Exclusion Act became the first race-based immigration law in U.S. history") (last visited Nov. 1, 2005).

281. *See* Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477.

282. *See* PEFFER, *supra* note 248. Sucheng Chan asserts that there is corroborating evidence to bolster Peffer's contention. Chan, *supra* note 56, at 105–09 (describing statistics kept by the customs officer, police officer estimates of prostitution population, and census data). Chinese women who were the wives of laborers also were subsequently excluded from the United States. Thus, the only Chinese women who could enter were those who could prove that they either were the wives of Chinese merchants, *see, e.g.*, Cheung Sum Shee v. Nagle, 268 U.S. 336 (1925), the wives of U.S. citizens, *see, e.g.*, *Ex parte* Chiu Shee, 1 F.2d 798 (D. Mass. 1924), or the daughters of U.S. citizens, *see, e.g.*, Lew Shee v. Nagle, 7 F.2d 367 (9th Cir. 1925).

283. In legal scholarship, Kerry Abrams importantly and recently has drawn our attention to the Page Law as the first restrictive federal immigration statute. *See generally* Abrams, *supra* note 246. Abrams does not name the Page Law as the advent of Chinese exclusion as I suggest here, perhaps because her focus is another significant project: to rectify the lack of scholarship on how the preservation of traditional American conceptions of marriage and family lie at the root of our federal immigration system. *Id.* at 643.

Outside of legal scholarship, George Peffer calls the Page Law "America's first attempt to restrict Chinese immigration on a national basis," and refers to the effects of the law as "de facto exclusion." PEFFER, *supra* note 248, at 29; *see also* KANG, *supra* note 248, at 122 (noting that "the 1875 Page Law attests to a racially biased—but on the basis of gender, class and sexuality as well—system of restriction established several years prior"); Chan, *supra* note 56, at 95 (writing that while laborers were not "the target of the first exclusion act, the effort to bar another group of Chinese—prostitutes—preceded the prohibition against

has focused, not on the prostitute, but on the presumptively innocent Chinese male laborer who was grievously wronged by immigration exclusion.[284] Arguably, this is the legacy of cultural nationalist attempts to shore up the "normal" to appeal to the state and dominant communities.[285] I point this out to suggest that if we were to refuse to isolate race, gender, class, and sexuality, considering them jointly instead, we might date the initiatory moment of Chinese exclusion to 1875.[286] When we focus on the

laborers. Given the widely held view that all Chinese women were prostitutes, laws against the latter affected other groups of Chinese women who sought admission into the country as well").

284. We should consider whether there are other submerged stories of prostitutes in immigration law. For example, there is the famous case of Nishimura Ekiu, whose exclusion without judicial review constitutes one of the building blocks of the plenary power doctrine. In the memorable words of the Court describing persons facing exclusion: "As to such persons the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." Ekiu v. United States, 142 U.S. 651, 660 (1892). The facts in the case indicate that after arriving from Japan via steamship, Ekiu was excluded on grounds of being likely to become a public charge. *Id.* at 656. She had $22 in her possession, told the inspector that her husband had been living in the United States for one year, and that he would call for her at a prearranged hotel. *Id.* at 652. She was not believed by the inspector, and the historian Yuji Ichioka claims that Ekiu was in fact a prostitute. He writes that she was bought by a notorious procurer of Japanese prostitutes in San Francisco named Hasegawa Genji, who paid for her to contest her detention through the Supreme Court decision. Yuji Ichioka, *Ameyuki-san: Japanese Prostitutes in Nineteenth-Century America*, 4 AMERASIA 1, 5–6, & n.24 (1977). Ichioka states that Ekiu had arrived aboard the *Belgic*, along with three other women on May 7, 1891. Hasegawa's efforts to obtain their release were publicized by the San Francisco press. *Id.* at 19 n.24; *see also* SALYER, *supra* note 26, at 264 n.153 (noting that the immigration inspector suspected from Ekiu's "general appearance" and language that she was a prostitute).

285. See Pascoe, *supra* note 258, at 139–40, suggesting that scholars of Chinese America writing in the 1960s and 1970s tried to desensationalize the Chinese American past by shifting attention away from organized vice and prostitution, depicting Chinese immigrants instead as model Americans. *See also* SHAH, *supra* note 144, at 242–45 (describing attempts of second generation Chinese American reformers to construct public housing in Chinatown only for "normal" nuclear families that served literally to displace and exclude the bachelor community of single, unmarried men).

286. The point that foregrounding Chinese women, and not men, might reconceptualize our periodization of history is indicated through the differing start dates of exclusion given in the book title and chapter title in Sucheng Chan's foundational book on Chinese exclusion. The title of the book, which she edited, is *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*, while the chapter on Chinese women, which she authored, is titled *The Exclusion of Chinese Women, 1870–1943*. Chan, *supra* note 56, at 94. Chan presumably dates the advent of exclusion of Chinese women to 1870, as that is the year in which the California Legislature passed "An Act to Prevent the Kidnapping and Importation of Mongolian, Chinese and Japanese Females, for Criminal or Demoralizing Purposes," making it illegal to "bring, or land from any ship, boat or vessel, into this State" any Asian women, unless proof could be presented that they had come voluntarily and were "of correct habits and character." 1870 Cal. Stat. 230; *see also* Chan, *supra* note 56, at 98. Chan refers in the chapter to Chinese women's exclusion and deportation from 1870 to 1943. *Id.* at 137. Nonetheless, in her preface to the volume, she suggests dividing Chinese immigration to the continental United States into four periods: years of free immigration from 1849 to 1882; an age of exclusion from 1882 to 1943; a period of limited entry from 1843 to 1965; and an era of renewed immigration from 1965 to the present. *Id.* at viii.

experience of racialized women in identifying the defining moments of racial experience, we can unearth histories with different legacies.[287]

One possible objection to dating the advent of Chinese exclusion to 1875 is that we should recognize a difference between the restriction of persons based on conduct or suspected conduct (prostitution) and based on status (being Chinese); dating Chinese exclusion to 1882 reflects that the latter legislation sought to exclude persons based upon racial status.[288] However, the Page Law also sought to exclude persons based on their racial status: Its preamble specifies that its purpose is to determine whether the "immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary."[289] Moreover, the 1882 Act contained a conduct-based restriction. While this is often forgotten, the 1882 Act specifically barred only Chinese laborers for a period of ten years, and not Chinese merchants, teachers, students, or tourists.[290] In other words, the conduct barred was the particular occupation. The fact that the 1882 Act only targeted Chinese laborers has been eclipsed in our remembrance of the Act as the "first" federal exclusion law based on "race."

The common misapprehension that the Chinese Exclusion Act did not target Chinese laborers in particular, but targeted the Chinese in general, is made apparent through the frequently made claim that the 1882 Act barred "all Chinese" from entry.[291] One way to understand this

287. For example, as Pamela Bridgewater has suggested, if we shift the focus of slavery to enslaved women from men, we might begin to understand lack of reproductive control as one of the defining characteristics of slavery. Pamela Bridgewater, Reproducing the Thirteenth Amendment (unpublished manuscript, on file with author). As another example of how a shift in focus can change one's understanding of a particular phenomenon, Adrienne Davis has suggested that shifting the focus of miscegenation regulation from black men and white women to white men and black women changes the understanding of what this regulation sought to accomplish. While regulation of the black man/white woman is correctly understood as prohibitory and repressive to both sides of the dyad, regulation of the white man/black woman must be understood as operating within the context of laws and norms of slavery that intervened to provide systematic access to black women's sexuality, trumping formal antimiscegenation statutes. Adrienne Davis, *Loving* and the Law (unpublished manuscript, on file with author).

288. This comment was made when I presented this work to the Asian Pacific American Historians Collective.

289. Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477.

290. Merchants, teachers, students, and tourists were required to present a certificate from the Chinese government verifying their status in order to enter, but they were not barred from entry. Chinese Exclusion Act, ch. 126, § 6, 22 Stat. 58, 60 (1882), *repealed* by Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.

291. *See, e.g.*, Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 245 (1999) (stating that "the Chinese Exclusion Act was enacted to exclude all people of Chinese national origin"); Juan C. Montes, *Haitian Interdiction on the High Seas: A U.S. Policy of Bias and Inconsistency*, 5 ST. THOMAS L. REV. 557, 571 (1993) (stating that "[i]n 1882, the United States Legislature enacted the Chinese

misapprehension is that an exclusion law based specifically on race so offends that it clouds collective memory of what actually transpired. Another is the supposition that the study of Chinese American history has privileged a history of working-class laborers, relegating the history of merchants to relative obscurity.[292]

The notion that "all Chinese" were barred from immigration would make one believe that no Chinese were allowed entry into the United States after 1882 until the repeal of the Exclusion Act in 1943. This is not the case. From 1882–1943, an estimated 300,955 Chinese were admitted to the United States, either for the first time, as returning residents, or as native-born citizens (or as their dependents).[293] The Exclusion Law of 1882 specified that "Chinese persons other than laborers" were exempt from the exclusion.[294] Later enactments specified the exempted classes to be limited to teachers, students, merchants, and travelers for pleasure or curiosity.[295] Moreover, the treaty of 1894 allowed Chinese laborers who had left the United States to

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Exclusion Act barring the entrance of all Chinese immigrants because they allegedly threatened American jobs and could not be assimilated into the American mainstream"); Paul S. Rosenzweig, *Functional Equivalents of the Border, Sovereignty, and the Fourth Amendment*, 52 U. CHI. L. REV. 1119, 1128 (1985) (stating that "the *Chinese Exclusion Case* . . . upheld a law prohibiting all Chinese from entering the country"); Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the* Wayne Lo *Case*, 7 ASIAN L.J. 1, 7 (2001) (stating that "[b]y 1882, Congress passed the Chinese Exclusion Act of 1882, prohibiting all Chinese persons, 'lunatics,' and 'idiots' from entering the United States for ten years").

292. For analysis that would support this argument, see the work of anthropologist Sylvia Yanagisako, who analyzed undergraduate introductory Asian American history classes taught at several universities in the late 1980s. Sylvia Yanagisako, *Transforming Orientalism: Gender, Nationality, and Class in Asian American Studies*, *in* NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS 275 (Sylvia Yanagisako & Carol Delaney eds., 1995). She noted that a working-class past was privileged in these classes, molding a uniform ethnic and social class consciousness out of more divergent realities. Yanagisako theorizes that this privileging served to bridge two particular gaps in the construction of a unifying and politically mobilizing identity. One gap was between earlier and more recent immigrants, a gap that instructors and students could elide by "celebrating the laboring pasts of their ancestors," constructing a seemingly stable Asian American working-class identity over time that spanned past communities and economically disenfranchised new immigrants. The second gap was between Asian Americans and other people of color in the United States. The founders of Asian American studies desired to stand in solidarity with other people of color; however, Asian Americans, broadly speaking in socioeconomic terms, are more like white Americans than African Americans, Chicanos, and American Indians. Again, the focus on a working class past enabled this gap to disappear. *Id.*

293. LEE, *supra* note 22, at 12.

294. Chinese Exclusion Act § 6, 22 Stat. at 60.

295. The Scott Act of 1888 prohibited immigration, for twenty years, of all Chinese subjects except officials, teachers, students, merchants, or travelers for curiosity or pleasure; persons who fit under those categories were required to produce certificates from Chinese authorities, countersigned by American representatives. Chinese laborers who had a family or parents in the United States, or property to the value of $1000, or debts of that amount pending settlement, were allowed to return to the United States under the Treaty of 1894. *See* SALYER, *supra* note 26, at 57.

return if they had a "lawful wife, child or parent" living in the United States or property or debts owed them of at least $1000 in value. Thus, native-born citizens, and first time or returning residents who fell into one of these exempt categories, could still enter the United States. Because all other Chinese persons were barred, an elaborate system of identification was required whereby Chinese were mandated to prove their identities as particular persons (for example, as sons of native-born citizens) or as engaged in particular occupations (for example, as merchants).

E. Citizenship, Status, and Conduct

The system of race-based exclusion that exempted some Chinese but not others meant that the Chinese immigrant had to prove his or her identity through new and stringent requirements. The experiences of Chinese immigrants attempting to enter as members of an exempted class therefore illuminate how identity has been separated into realms of status and conduct.

Chinese merchants were expected to "look like merchants,"[296] meaning that their dress and appearance were supposed to demonstrate the wealth of a merchant. Merchants were physically inspected to uncover evidence of having performed manual labor, which would identify them as laborers and keep them from entry.[297] Merchants' wives were more likely to be admitted if they possessed "fine clothing, a respectable manner, and, especially bound feet,"[298] which were considered a mark of status.[299] Thus, one's conduct and appearance were thought proof of one's status as a merchant, a laborer, a merchant's wife, or a prostitute.[300]

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296. LEE, *supra* note 22, at 89.

297. *Id.* at 90. For example, one applicant was denied entry in part because he "had calloused hands and the general appearance of a laborer." *Id.*

298. *Id.* at 94. Lee tells the story of a merchant's wife named Gee See, who submitted an application for admission complete with an X-ray of her bound feet. *Id.* at 135.

299. Judy Yung writes:

> Only women such as my great-grandmother who had bound feet and a modest demeanor were considered upper-class women with "moral integrity." As one immigration official wrote in his report, "There has never come to this port, I believe, a bound footed woman who was found to be an immoral character, this condition of affairs being due, it is stated, to the fact that such women, and especially those in the interior, are necessarily confined to their homes and seldom frequent the city districts."

YUNG, *supra* note 155, at 24.

300. LEE, *supra* note 22, at 94. For further analysis of the fusing of status and conduct in these cases, see the work of Kitty Calavita, analyzing the attempt of administrators to determine for the purposes of exclusion who was a Chinese laborer, and the work of Eithne Luibhéid, analyzing the attempt of administrators to determine for the purposes of exclusion who was a Chinese prostitute. In both instances, inspectors used physical indicators which were presumed to mark identity as laborer or prostitute, and to reflect a person's "intrinsic nature." Laborers and prostitutes were

Conventional narratives of the history of citizenship suggest that until the end of marital expatriation and the lifting of the racial bar on naturalization, exclusions from citizenship were predicated on identity, so that one's status—as female, as Asian, as an Asian female—precluded one from membership. Today, citizenship is inclusive of all and no longer features such identity-based exclusions; instead, we have neutral, nonidentity based restrictions based on conduct.[301] However, this vision of a progression from restrictions based on status to those based on conduct ignores two facts. First, the historical status-based exclusions were, in fact, premised on certain assumptions about conduct or behavior. For example, the assumption that Chinese immigrants were incapable of comprehending republican values was used to justify retaining race-based restrictions to naturalization in 1870.[302] Thus, what we remember as status-based exclusions were in fact premised on assumptions about conduct. Second, the conduct- or behavior-based restrictions on citizenship that exist today, while usually conceptualized as neutrally based restrictions, are both constitutive of and the product of very specific identities that we understand as a matter of status.[303]

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considered somehow inherently distinct from nonlaborers and nonprostitutes. In both cases, while there was the conflation of Chinese women with prostitutes and Chinese men with laborers, the conflation was never absolute (or the administrators would not have engaged in the attempt). *See generally* LUIBHÉID, *supra* note 257, at 31–54; Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 LAW & SOC. INQUIRY 1 (2000).

In one case, a woman named Chin Shee faced deportation for "practicing prostitution"; an immigration inspector had reported that she looked like a prostitute:

> Alien, when arrested on the street, was loudly dressed, bedecked with jewelry, and face painted; it is common knowledge in Chinatown that she is a prostitute, though of course the Chinese, by reason of their peculiar laws among themselves, cannot make affidavit to that effect, because of fear of assassination by a Tong man.

Chin Shee v. White, 273 F. 801, 805 (9th Cir. 1921). Chin Shee objected that this hearsay evidence was admitted as part of the record in her deportation proceedings. The Ninth Circuit admitted that it was clear the statement was "entirely gratuitous," but pointed out that immigration proceedings were not bound by strict rules of evidence, and ruled that it was "inconceivable that the judgment of the Secretary of Labor was controlled in any degree by the interjection of this bit of irrelevant matter." *Id.*

301. An example of a restriction on the acquisition of formal citizenship is the requirement that those naturalizing as U.S. citizens must demonstrate "good moral character." *See* 8 U.S.C. § 1427 (2000).

302. *See* CONG. GLOBE, 41st Cong., 2d Sess. 5121 (1870).

303. As an example that illustrates this argument, and also reminds us of the nineteenth-century associations of the Chinese woman with prostitution, we could consider the following anecdote. A historian traveled to the People's Republic of China to adopt a baby girl. He appeared for the consular interview in China to secure the baby's visa for admission, baby in tow. The consular official asked two questions about the baby: First, is she a member of the Communist Party? And second, has she ever been a prostitute? E-mail from Kevin S. Wong to Leti Volpp (Feb. 22, 2004) (on file with author).

The decision of this consular official to ask those two particular questions—when he could have asked about myriad other grounds of exclusion—evinces the same association

Consider the idea of the "terrorist," for example, which moves us also to think about questions of citizenship and expatriation today. The "terrorist" is a conduct-based distinction that purports to separate out one who engages in terrorism from the citizen. At the same time, this distinction today is foundationally about a particularized national origin status, in the context of governmental policies for detaining, deporting, interrogating, and excluding those who are nationals of countries with significant Al Qaeda presence or activity.[304] But the governmental policies are not purely based on national origin: if so, these policies would target nationals of countries such as Germany, a country with significant Al Qaeda presence and activity.[305] Rather, these policies target countries with predominantly Muslim populations, so that the targeted status fuses national origin and religion. Moreover, when we think about police practices that call for the arrest and detention of individuals based on their appearance, we understand that the targeted status fuses national origin, religion, and race.[306] Putative terrorists targeted by the public in the context of hate violence are also identified by a fusion of national origin, religion, and race, so that an "Arab, Middle Eastern or Muslim" appearance is believed to reflect or predict terrorist conduct.[307] It seems at this point impossible to separate the idea of who is likely to engage in terrorist behavior from assumptions about that person's race, religion, and national origin.

Understanding that identity, racial and otherwise, is a matter of conduct as well as status, and that the two are in fact mutually constitutive of one another, can contribute to a reframing of the history of citizenship.[308]

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of status and conduct that contributed to Chinese exclusion in the nineteenth century. It would appear that Chinese females face a rebuttable presumption that they are prostitutes.

304. For a discussion of these policies, see Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577–82 (2002).

305. James Dunnigan, *An Al Qaeda Grows in Germany* (June 8, 2004), http://www.strategypage.com/dls/articles/200468.asp (last visited Oct. 8, 2005).

306. *See, e.g.*, Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Margaret Chon & Donna E. Arzt, *Walking While Muslim*, LAW & CONTEMP. PROBS., Spring 2005, at 215 Moustafa Bayoumi, Racing Religion (unpublished manuscript, on file with author).

307. *See* Muneer I. Ahmad, *A Rage Shared by Law: September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. (2004); Volpp, *supra* note 304, at 1580–83.

308. I draw guidance here from legal scholarship on the slippage between status and conduct in the U.S. military's "Don't Ask Don't Tell" policy, which is premised on the ejection of service personnel who assert same-sex identities but not same-sex conduct. *See generally* JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999); Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511 (2003). On the performative aspects of identity, see the foundational work of Judith Butler, BODIES THAT MATTER (1993) and GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990). For examples of the

Identity—as both status and conduct—has excluded certain persons from citizenship, and continues to do so in the contemporary moment on the terrain of morality, terrorist threat, and culture.[309]

F. Citizenship Stripping Today

More specifically, how does identity exclude certain persons from citizenship today? The stripping of citizenship has been sharply raised in recent months because of the "War on Terror." For example, expatriation has been invoked in the case of American citizens with birthright citizenship—John Walker Lindh, Jose Padilla, and Yaser Hamdi—who either have been alleged to have engaged in terrorist activity against the United States, or have been convicted of such activity.[310] While it is unlikely that revocation of citizenship would ensue in these cases if the question was litigated,[311] the

importation of the idea of performance as identity into the legal literature, see generally Carbado & Gulati, *supra* note 14; Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

309. I develop the argument about how cultural difference is used to exclude persons from citizenship in Leti Volpp, Engendering Culture (unpublished manuscript, on file with the author), in which I assert that culture functions as a shadow side to citizenship. There is an imputing of problematic cultural difference to immigrants (and other racial minorities) that is troubling, precisely since to be the abstract liberal citizen, one is to rupture attachments to culture. There is an interesting circularity at work here: To be a citizen, one is to rid oneself of certain forms of cultural excess; yet while immigrants are assumed to be especially subject to excesses of culture, this assumption reflects the belief that somehow only certain bodies are motivated by culture. Nonetheless, many pages have been written on the question of how liberal states are to accommodate or address the cultural claims of immigrants. At the same time, the solution posited by many writers to the dilemma produced by conflicts over culture is to turn to certain forms of deliberative democracy and civic participation. Ironically, this solution rests on certain ideas about citizenship—that once again bifurcate "culture" from a purportedly cultureless "citizenship."

310. *See, e.g.*, Maurice Timothy Reidy, *American Taliban's Fate Remains Foggy*, HARTFORD COURANT, Dec. 18, 2001, at A1. The article begins: "Should he be tried as a traitor? Stripped of his citizenship? Or maybe just strung up?" *Id.*; *see also* Joanne Mariner, *Patriot Act II's Attack on Citizenship: Denationalization as Punishment*, COUNTERPUNCH, Mar. 8, 2003, http://www.counterpunch.org/mariner03082003.html.

311. Revocation of citizenship would be unlikely because of the legal standard required to denationalize a U.S. citizen. *See* discussion *supra* notes 308–315. An act such as bearing arms against the United States, said the Supreme Court in *Vance v. Terrazas*, "may be highly persuasive evidence in the particular case of a purpose to abandon citizenship," but cannot be "treat[ed] . . . as conclusive evidence of the indispensable voluntary assent of the citizen." Vance v. Terrazas, 444 U.S. 252, 261 (1980). Furthermore, the citizen must have both voluntarily committed the expatriating act, and intended to relinquish his citizenship in the process, and the government must prove its case by a preponderance of the evidence. *Id.* at 267. See also Immigration and Nationaliry Act of 1952, ch. 477, § 349(a), 66 Stat. 163, 268, regarding the "[l]oss of nationality" (entering or serving in the armed forces of a foreign state if such are engaged in hostilities against the United States, commitring any act of treason, or bearing arms against the United States are all

2004 settlement agreement with federal prosecutors required Yaser Hamdi to renounce his U.S. citizenship as a condition of his release.[312] Second, there are an increasing number of cases where prosecutors have sought to denaturalize U.S. citizens who gained citizenship through naturalization, and who are accused of material or other support for terrorist organizations.[313] Finally, an early draft of the Domestic Security Enhancement Act,[314] known as "Patriot Act II," contained a section called "Expatriation of Terrorists," which provided for the presumptive denationalization of American citizens charged with "joining or serving in, or providing material support to" an organization that the executive branch has designated a terrorist organization.[315] Section 501 of the Act would expose native-born Americans,

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considered acts that create the loss of nationality—so long as those acts are "voluntarily performed" with "the intention of relinquishing United States nationality").

For the argument that John Walker Lindh would be unlikely to face denationalization, see J.M. Spectar, *To Ban or Not to Ban an American Taliban: Revocation of Citizenship and Statelessness in a Statecentric System*, 39 CAL. W. L. REV. 263 (2003).

312. *See* Yaser Esam Hamdi v. Donald Rumsfeld: Settlement Agreement (Sept. 17, 2004), *at* http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt2.html (last visited Oct. 8, 2005).

313. See the cases of Abdurahman Alamoudi, Rasmi Khader Almallah, and Attiqullah Sayed Ahmadi. *See* Muslim American Society, News & Views, U.S. Muslim Official Pleads Not Guilty, Bail Denied (Oct. 29, 2003), http://www.masnet.org/news.asp?id=623 (regarding Alamoudi); Todd Bensman, *Government Moves to Strip Citizenship of Former Holy Land Foundation Board Member* (Oct. 20, 2004), *available at* http://www.garmo.com/archives/00000394.shtml (regarding Almallah); and Kelly Thornton, *Attack on America*, SAN DIEGO UNION-TRIB., Sept. 11, 2004, *available at* 2004 WL 59004020 (regarding Ahmadi).

Only U.S. citizens who have garnered citizenship through naturalization, and not birth, can be "denaturalized"; naturalization is to be revoked when the naturalization is "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." Immigration and Nationality Act § 340(a), 66 Stat. at 260.

314. This was a leaked draft, disclosed by the Center for Public Integrity. *See* David Cole, *Patriot Act's Big Brother*, THE NATION, Mar. 17, 2003, at 6, *available at* http://www.thenation.com/doc.mhtml%3Fi=20030317&s=cole.

315. *See* Domestic Security Enhancement Act of 2003, Section-by-Section Analysis (draft as of Jan. 9, 2003), *available at* http://www.pbs.org/now/politics/patriot2-hi.pdf. The analysis states:

> Section 501: Expatriation of Terrorists.
>
> Under 8 U.S.C. § 1481, an American can lose his citizenship by voluntarily, and with the intent to relinquish nationality, taking any of a number of actions, including: (1) obtaining Nationality in a foreign state; (2) taking an oath of allegiance to a foreign state; and, most importantly, (3) serving in the armed services of a foreign state that are engaged in hostilities against the United States. The current expatriation statute does not, however, provide for the relinquishing of citizenship in cases where an American serves in a hostile foreign terrorist organization. It thus fails to take account of the myriad ways in which, in the modern world, war can be waged against the United States.
>
> This provision would amend 8 U.S.C. § 1481 to make clear that, just as an American can relinquish his citizenship by serving in a hostile foreign army, so can he relinquish his citizenship by serving in a hostile terrorist organization. Specifically, an American could be expatriated if, with the intent to relinquish nationality, he becomes a member

as well as naturalized Americans, to the stripping of citizenship for acts that could include financial donations to the lawful projects (such as orphanages or hospitals) of groups that the Attorney General designates as terrorist organizations—which potentially could include even domestic organizations.[316]

While it is unlikely that Americans with birthright citizenship will be stripped involuntarily of their formal legal citizenship, what of citizenship's other dimensions? The cases of James Yee, a Muslim chaplain at Guantanamo, and Brandon Mayfield, a Muslim lawyer in Oregon, might give us pause. Both Yee and Mayfield are U.S. citizens who were imprisoned and falsely accused of terrorist activities: Mayfield was linked to the Madrid train bombing after authorities misread fingerprints found at the scene;[317] Yee was accused originally of espionage, and when those accusations were dismissed, was charged with adultery and keeping pornography on his government-owned computer.[318] Mayfield experienced a secret search of his home and was imprisoned for two weeks. Yee spent seventy-six days in solitary confinement.[319] Both greatly suffered a restriction of the rights they should have enjoyed through citizenship, after severe treatment on unsubstantiated

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of, or provides material support to, a group that the United States has designated as a "terrorist organization," if that group is engaged in hostilities against the United States.

This provision also would make explicit that the intent to relinquish nationality need not be manifested in words, but can be inferred from conduct. The Supreme Court already has recognized that intent can be inferred from conduct. . . . Specifically, this proposal would make service in a hostile army or terrorist group prima facie evidence of an intent to renounce citizenship.

Id. at 30–31.

316. *See* Memorandum from Timothy H. Edgar, Legislative Counsel, to Interested Persons re the Section-by-Section Analysis of Justice Department draft "Domestic Security Enhancement Act of 2003," also known as "PATRIOT Act II" (Feb. 14, 2003), *at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206 (last visited Oct. 8, 2005).

While the Patriot Act II has struck fear in many Americans, we can predict that, given the Supreme Court jurisprudence, section 501 would not pass constitutional muster, nor would it be likely to appear in any actual legislation. The hypothesis of some civil liberties attorneys is that this provision was placed within the draft Act as something extreme, never actually intended to be implemented, but which could be bargained away, so the end result (specifically targeting noncitizens) would appear a compromise. For the history of how national security concerns have perennially resulted in targeting of noncitizens first, often as a precursor of similar targeting of citizens, see generally DAVID COLE, ENEMY ALIENS (2003).

317. *See* Eric Lichtblau, *U.S. Opens 2 Inquiries Into Arrest of Muslim Lawyer in Oregon*, N.Y. TIMES, Sept. 14, 2004, at A18; David Sarasohn, *The Patriot Act on Trial*, THE NATION, Sept. 26, 2005, at 28, *available at* http://www.thenation.com/doc/20050926/sarasohn.

318. *See Capt. Yee to Receive Honorable Discharge* (Sept. 16, 2004), http://www.komotv.com/stories/33072.htm (last visited Oct. 8, 2005); *see also* Captain James Yee, http://www.captainyee.org (a website about James Yee seeking an apology ftom the Army) (last visited Oct. 8, 2005).

319. *See id*; *see also supra* notes 317–318.

charges.[320] Thus, while the majority of U.S. citizens may not fear expatriation in the formal legal sense, individuals suspected of terrorist activity have lost their ability to enjoy citizenship as a matter of rights, and, arguably, all Americans are being subjected to a slow erosion of the rights that come with citizenship.[321] And of course, certain U.S. citizens, despite their theoretical entitlement to formal rights, cannot enjoy these rights because they lack citizenship as a matter of identity. Those U.S. citizens who appear "Middle Eastern, Arab, or Muslim" are not considered to be constitutive of the American body politic; rather, the consolidation of American identity is taking place against them.[322] The denial of the citizenship rights of this community is apparently desired by many Americans: A nationwide poll conducted by Cornell University revealed that nearly half of all Americans believe that the U.S. government should restrict the civil liberties of Muslim Americans.[323]

The different reactions to the citizenship status of John Walker Lindh, Jose Padilla, and Yaser Hamdi helps illustrate how to this day race, status, and conduct conspire to restrict citizenship as a matter of identity. Hamdi, despite the Fourteenth Amendment, was never considered a "real citizen," as indicated by two facts. First, the judiciaty chose to characterize his status as a "presumed American citizen" in the dissenting opinion of Justices Scalia and Stevens in *Hamdi v. Rumsfeld*.[324] Padilla, in contrast, is a "United States citizen"

320. In the words of Andrew Sullivan, writing about James Yee:

> [W]ho is going to be discharged for this horrible miscarriage of justice? Who in the military will be held responsible? This incident is particularly noxious when we need to reassute patriotic Muslim-Americans that they are not going to come under clouds of suspicion for their faith or their identity—especially Muslims who are actually serving this country in uniform. This story is a travesty of justice and fairness. And no one really seems to give a damn.

See Archive of the Daily Dish, http://www.andrewsullivan.com/index.php?dish_inc=archives/2004_04_11_dish_archive.html (last visited Oct. 8, 2005). We also could consider the case of Ahmad Al Halabi, an Air Force translator and naturalized U.S. citizen who spent ten months in jail and at one point faced the death penalty as what *60 Minutes* labeled as the victim of a "botched terrorism investigation." *The Case of the Spy Ring: A 60 Minutes Special Report* (CBS television broadcast Nov. 28, 2004).

321. For an example of this argument, see generally NAT HENTOFF, THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE (2003).

322. *See* Volpp, *supra* note 304, at 1594.

323. *See* Associated Press, *Poll Shows U.S. Views on Muslim-Americans, Nearly Half of Those Surveyed Say Some Rights Should be Restricted* (Dec. 17, 2004), http://www.msnbc.msn.com/id/6729916 (last visited Oct. 8, 2005).

324. 542 U.S. 507, 614 (2004) (Scalia, J., dissenting). The plurality opinion, authored by Justice O'Connor, refers to Hamdi as a "United States citizen." *Id.* at 586.

in Justice Rehnquist's unanimous opinion in *Rumsfeld v. Padilla*.[325] Second, there has been very little critical response to the release agreement requiring Hamdi to revoke his citizenship, arguably because that citizenship was not considered full citizenship in the first place.[326] Hamdi was born in the United States when his parents were here on temporary visas. He moved to Saudi Arabia, where he also held citizenship, at the age of three. His birthright citizenship, as the product of the "accidental" presence of nonimmigrant parents—may be considered less deserving of legal recognition for this reason,[327] or for the reason that he left the United States as a child, or because he spoke little English before he was incarcerated on Guantanamo.[328] But we must also consider the fact that his birthright citizenship may be considered a lesser form of citizenship because he fits the racial profile of the "terrorist" in a way that Padilla and Lindh do not.[329]

Lindh, called the "American Taliban," is one of a national "us" in a way that Padilla and Hamdi are not; as a white American, his citizenship and national identity completely overlap.[330] Padilla, born in New York of Puerto Rican descent, is referred to as the "dirty bomber" and as a "gang banger." He is American but a subordinated American, not close enough to the center of

325. 542 U.S. 426, 524 (2004). For an analysis of the rhetoric of these opinions, as well as of that in the lower court decisions about Hamdi and Padilla, see Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of Pseudo-Citizens*, 38 U.C. DAVIS L. REV. 79 (2004).

326. For a rare exception, see David Dow, Letter to the Editor, *Yaser Hamdi, U.S. Citizen*, N.Y. TIMES, Oct. 15, 2004, at A24.

327. In fact, his case is being used in an effort to reopen the debate about whether we should continue to grant birthright citizenship to children of undocumented parents. *See, e.g.*, Howard Sutherland, *Citizen Hamdi: The Case Against Birthright Citizenship*, AM. CONSERVATIVE (Sept. 27, 2004), *available at* http://www.amconmag.com/2004_09_27/article.html; Stephany Gabbard & Frosty Woolridge, *Anchor Babies: Born in the USA: An Abuse of the Fourteenth Amendment* (July 6, 2004), *at* http://www.frostywooldridge.com/articles/art_2004jul06.html (last visited Oct. 8, 2005). This debate was initially spurred by the 1985 publication of *Citizenship Without Consent*. *See* ROGERS SMITH & PETER SCHUCK, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985). For two responses, see David Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278 (1985); and Gerald Neuman, *Back to* Dred Scott?, 24 SAN DIEGO L. REV. 485 (1987).

328. Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantanamo*, N.Y. TIMES, Oct. 16, 2004, at A4.

329. *See* Volpp, *supra* note 304, at 1580–83, for the argument that the person who appears "Muslim, Arab or Middle Eastern" is now racialized as a putative terrorist.

330. Although, perhaps, that Lindh was labeled the "Marin Taliban" indicates an attempt to geographically expatriate him as not from the "heartland," but as coming from the "fringe" of the United States. However, the acts of Lindh arguably engender a greater feeling of betrayal than do the acts of Hamdi and Padilla, as evinced by the fact that he is the only one of the three to be the subject of a petition online seeking to strip him of his citizenship. *See* Strip John Walker Lindh of his Citizenship, http://www.petitiononline.com/sjwlohc/petition.html (along with comments by petition signers suggesting that he be executed, shot, hanged, and castrated) (last visited Oct. 8, 2005).

national membership to share in the moniker of "American Taliban."[331] And Hamdi is certainly not the "American Taliban"; he has been "shipped back" to Saudi Arabia. That Hamdi lacked citizenship as a matter of identity appears to have shaped the government's response to his formal legal citizenship.[332] Through examining the experiences of Hamdi, Lindh, Padilla, Mayfield, and Yee, just as with Ng Fung Sing, we see how identity continues to restrict the presumptively universal enjoyment of citizenship.

CONCLUSION

Today, expatriation requires a clear indication of voluntary renunciation of citizenship.[333] While the line of cases establishing this fact cites favorably to *Mackenzie v. Hare*,[334] the Supreme Court has emphasized that loss of citizenship requires a clearly expressed intent to relinquish it.[335] Chief Justice

331. And Padilla raises the complicated question of the U.S. relationship with Puerto Rico, whose members are statutory but not constitutional citizens of the United States. *See* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001). As Natsu Saito suggested, "[W]here could Padilla be expatriated to . . . Puerto Rico?" Natsu Saito, Speech at the Japanese American National Museum Symposium: Judgments Judged, Wrongs Remembered: Examining the Japanese American Civil Liberties Cases of World War II (Nov. 5, 2004).

332. I recognize as well that the response may have been shaped by the fact that Hamdi is the one of the three with dual citizenship—*jus soli* in the United States, and *jus sanguinis* in Saudi Arabia. Jose Padilla has, oddly, been called a "dual citizen" on occasion in the press, but it would appear that the presumption is that Puerto Rican citizenship constitutes a separate national citizenship from U.S. citizenship. *See, e.g.*, Michael McGough, *Intellectual Capital: "War on Terror" in the Dock* (Dec. 22, 2003), http://www.post-gazette.com/pg/03356/253629.stm (last visited Oct. 8, 2005).

333. If one has U.S. citizenship through naturalization and not birth, one also can lose citizenship through denaturalization (also called revocation of naturalization), if one's naturalization was illegally procured or procured by concealment of a material fact or by willful misrepresentation. *See* 8 U.S.C. § 1451 (2000).

334. *See, e.g.*, Perez v. Brownell, 356 U.S. 44, 51–52 (1958), *overruled in part by* Afroyim v. Rusk, 387 U.S. 253 (1967) (relying favorably on *Mackenzie* in upholding a provision of the Nationality Act that expatriated a U.S. citizen for voting in a foreign election). In the majority opinion, *Mackenzie* is presented as involving a voluntary transaction in the form of marriage, which is considered to signify renunciation. *Cf. id.* at 69–72, 71 n.23 (Warren, C.J., dissenting) (writing that *Mackenzie* should not be understood to sanction a power to divest citizenship, since the text of the Expatriation Act actually provided that American women could resume their U.S. citizenship on termination of the marriage; therefore this should have been understood not as a complete divestment, but a holding of citizenship in "abeyance" and subject to revival).

335. *See* Vance v. Terrazas, 444 U.S. 252 (1980) (holding that the record must support a finding that the expatriating act was accompanied by an intent to terminate U.S. citizenship for a citizen who applied to naturalize as a Mexican citizen); *Afroyim*, 387 U.S. at 268 (finding that in a case involving a U.S. citizen who voted in an Israeli election, every citizen has "a constitutional right to remain a citizen . . . unless he

Earl Warren, first in dissent in *Perez v. Brownwell*,[336] and then in the majority opinion in *Trop v. Dulles*,[337] reasoned that expatriation without renunciation constitutes cruel and unusual punishment in violation of the Eighth Amendment, because it results in statelessness. In his words:

> Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be.[338]

As Chief Justice Warren also stated in *Trop*, "In short, the expatriate has lost the right to have rights."[339] While not made explicit in these two opinions, this language resonates with the writing of Hannah Arendt, who described the horrific vulnerability caused by mass statelessness following World War I, and who argued that citizenship is a necessary grounding for the "right to have rights."[340] In essence, Arendt was asserting that formal citizenship was the precursor to enjoying the full rights of citizenship.

While recognizing that formal legal citizenship may not guarantee that one can exercise or enjoy citizenship's other dimensions,[341] we cannot dismiss its importance. Although some might criticize an excessive reliance on citizenship in the nation-state as the precondition for the exercise of rights, since

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voluntarily relinquishes that citizenship"). Since *Afroyim*, thousands of U.S. citizens have voted in foreign elections and served in foreign armies without consequences for their U.S. citizenship.

336. 356 U.S. 44 (1958).

337. 356 U.S. 86 (1958) (holding that the plaintiff did not lose nationality because he was convicted of desertion by a military court-martial).

338. *Perez*, 356 U.S. at 64 (Warren, C.J., dissenting).

339. *Trop*, 356 U.S. at 102.

340. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 267–302 (2d ed. 1958). She writes:

> The Rights of Man, supposedly inalienable, proved to be unenforceable . . . whenever people appeared who were no longer citizens of any sovereign state.
>
> . . . .
>
> . . . Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity.

Id. at 293, 297. Alex Aleinikoff first noticed the resonance between Arendt's language and reasoning and Chief Justice Warren's opinions. T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1479 n.42 (1986). Arendt herself was stateless for eighteen years after fleeing Germany, until she received American citizenship in 1951. *See* Kelsey Wood, *Hannah Arendt, 1905–1975*, *at* http://www.litencyc.com/php/speople.php?rec=true&UID=143 (last visited Oct. 8, 2005).

341. *See* discussion of second class citizenship, *supra* note 226.

the rights of noncitizens are in fact protected in various ways,[342] or because of the growing importance of transnational legal regimes,[343] the history of marital expatriation should make apparent both the importance and the historically precarious nature of formal legal citizenship.

Recent theorizing about "diasporic subjects," while productive in many regards, is less productive when two points are stretched to extremes: first, the idea that communities have complete agency in determining their location and their national affiliation; and second, the idea that the borders of the nation can be traversed with the greatest of ease and are so reduced as to become almost meaningless.[344] We should remember that the idea of transnationality is not solely one where individuals might function as agents in maintaining diasporic ties, but can be one where a state or its people brand some citizens with foreign membership, removing them into internment camps,[345] ejecting them from membership through violence, or expatriating them through racial and gendered logics of dependent citizenship.

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342. *See* Aleinikoff, *supra* note 340, at 1485–88, reminding us that aliens also have rights in the nation-state. For a discussion of extending certain promises of citizenship to noncitizens within the United States, see Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 NW. UNIV. L. REV. 963 (2000).

343. *See* Spiro, *supra* note 133, at 601 (suggesting that "subnational jurisdictions, the new diasporas, transnational civil society, and other identity groupings" should begin to supplant the nation as the primary locus of rights and solidarities).

344. See, for example, Arjun Appadurai, writing at perhaps a more optimistic moment, suggesting that the increase in plural transnational attachments could he understood as ultimately affirming the uniqueness of "America" as an ever growing, ever accommodating nation of immigrants from all over tbe world. Thus, he argues, the diasporic or transnational subject constructs the United States as "one node in a postnational network of diasporas." Arjun Appadurai, *Patriotism and Its Futures*, 5 PUB. CULTURE 140 (1993).

One form of plural transnational attachment is dual citizenship. Estimates of the number of dual citizens in the United States range from half a million to over five million. While in theory naturalized U.S. citizens are to renounce allegiance to any foreign nation, this is not enforced in practice. Moreover, U.S. citizens who acquire multiple citizenships at birth have no legal requirement to express primary allegiance to the United States. On dual citizenship and the idea that it reflects "the transformed nature of citizenship in a postnational world, a world in which national affiliations no longer clearly trump other associational attachments and in which the nation-state can no longer afford to extract an exclusive relationship from its membership," see Spiro, *supra* note 74, at 1416.

But for an important caution, arguing that the rise of multiple nationality should not be understood to "represent a 'shattering' of citizenship[, or] the harbinger of a 'borderless world,'" see Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT'L L. 979, 1003 (2002).

345. Kandice Chuh critically takes on Appadurai's problematic blurring of transnational and postnational through remembering the forced removal and internment of Japanese Americans by the U.S. government during World War II. Kandice Chuh, *Transnationalism and Its Pasts*, 9 PUB. CULTURE 93 (1996). I am indebted to Laura Kang for calling my attention to this juxtaposed reading of Appadurai and Chuh. *See* Laura H.Y. Kang, *Conjuring "Comfort Women": Mediated Affiliations and Disciplined Subjects in Korean/American Transnationality*, 6 J. ASIAN AM. STUDIES 25 (2003).

At the same time, the liberal universalizing discourse of citizenship as a gradually expanding membership for all does not guarantee equal citizenship in fact. As I have argued above, identity has always, and I fear, will always, return to restrict the ability to enjoy citizenship. This is connected both to the origins of the idea of citizenship, and to its very construction. Citizenship, as perhaps most obvious when considered in relation to a nation-state, depends on ideas of exclusion.[346] The idea of citizenship in a nation relies on the existence of borders that are patrolled and is predicated on the differential treatment of those with membership (the citizenry) compared to those without.[347]

In recent years there have been various attempts to resuscitate citizenship for progressive purposes through constructs such as social citizenship and cultural citizenship, which emphasize the potentiality of membership.[348] These attempts rely on the assumption that the concept of citizenship can be a useful construct through which to make claims upon a political body, even when the citizenship one is seeking (for example, cultural belonging) does not correlate with traditional legal conceptions of citizenship. Others argue

346. *See* Ayelet Shachar, *Whose Republic? Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMGR. L.J. 233, 233 (1999) ("Citizenship means drawing borders: between peoples, between states, between insiders and outsiders.").

347. For an important discussion of the consequences for aliens of "the increasing revival of interest in citizenship as a basis for rights in constitutional thought," see Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285 (2002). Bosniak asserts that "while 'alien citizenship' is not an entirely incoherent notion" (as citizenship is about both status and rights, and aliens can exercise many rights of citizenship) the citizenship that noncitizens can enjoy remains limited, due "to an ethic of national solidarity and to a practice of bounded national membership," illustrated most pointedly by the condition of undocumented immigrants. *Id.* at 1285, 1322.

348. *See, e.g.*, JOEL E. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION 9–10 (2004); LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS 15–17 (William V. Flores & Rina Benmayor eds., 1997); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1875–76 (2001); Nancy Fraser & Linda Gordon, *Contract Versus Charity: Why Is There No Social Citizenship in the United States?*, *in* THE CITIZENSHIP DEBATES 113 (Gershon Shafir ed., 1998); Stuart Hall & David Held, *Citizens and Citizenship*, *in* NEW TIMES: THE CHANGING FACE OF POLITICS IN THE 1990S 173, 187–88 (Stuart Hall & Martin Jacques eds., 1990); Sunaina Maira, *Youth Culture, Citizenship and Globalization: South Asian Muslim Youth in the United States after September 11th*, 24 COMP. STUD. S. ASIA, AFR. & MIDDLE EAST 219, 221–22 (2004); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 799 (2003); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893, 1894–95 (2001); Toby Miller, *Introducing . . . Cultural Citizenship*, 69 SOCIAL TEXT 1, 2 (2001).

For a specific critique of the notion that permanent residents in the United States could be considered to enjoy "social citizenship," see Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMM. L.J. 35 (1997).

that correlating the unruly, the subversive, and the immoral with the citizen ruptures assumptions about who can belong. Thus, for example, positioning the gay or lesbian person at the core of who we would consider the citizen, is thought by some not only to grant citizenship to gays and lesbians,[349] but foundationally to shake up the exclusionary tendencies of citizenship. My concern is that attempting to resuscitate a progressive notion of citizenship relies on the liberal assumption that there can be an ever expanding circle of membership. And this is not possible: Looking to history, we see that notions of universal equality and democratic inclusion have masked particular exclusions, while proceeding in the name of abstract citizenship.[350]

It is not only differential treatment of those outside and those inside the literal borders of a nation state that should give us pause. Even those who come within the borders will receive different gradations of protection, since membership is also normatively controlled. Any group that calls upon a state for rights or benefits will have its membership policed, so that one's access to goods or protection from the state will be based on characteristics such as status or conduct. This means that the simultaneous enjoyment of all forms of citizenship by everyone within a nation[351] (or any other formation that identifies a population that seeks something from the state) is an impossibility. Whether involving national or normative borders, citizenship, while promising membership, always also promises exclusion.[352]

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349. *See, e.g.*, Susan J. Becker, *Tumbling Towers as Turning Points: Will 9/11 Usher in a New Civil Rights Era for Gay Men and Lesbians in the United States?*, 9 WM. & MARY J. WOMEN & L. 207 (2003). Becker writes:

> We know of victims in the World Trade Center—contributing, hardworking citizens, who were gay. So was one of the heroes of flight 93. They died because they were Americans. And their memory should tell us that all Americans should be able to live their lives as full citizens of a free society.

Id. at 241 (quoting Sen. Edward Kennedy).

350. While liberalism claimed to promise universal liberty and equality, these were in fact only guaranteed to some. *See* Stuart Hall, *Conclusion: The Multi-cultural Question*, *in* UN/SETTLED MULTICULTURALISMS: DIASPORAS, ENTANGLEMENTS, TRANSRUPTIONS 209, 234 (Barnor Hesse ed., 2000) (observing that "European imperialist expansion . . . [was] presented in terms of a universalizing civilizing function," so that "western particularism was rewritten as a global universalism").

351. Of course, this raises questions about the idea of "global citizenship." For a discussion, *see* Bosniak, *supra* note 19, at 488–507 (examining the conception of what alternatively has been coined "global citizenship," "transnational citizenship," and "postnational citizenship"); *see also* FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM (Joshua Cohen ed., 1996); Martha Nussbaum, *Patriotism or Cosmopolitanism?*, BOSTON REV., Oct.–Nov. 1994, at 3.

352. For a discussion of how boundaries of inclusion and exclusion not only operate in tandem, but may be effectively the same process, see Kitty Calavita & Liliana Suárez-Navaz, *Spanish Immigration Law and the Construction of Difference: Citizens and "Illegals" on Europe's Southern Border*, *in* GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW, AND IDENTITY 99, 106 (Richard Warren Perry & Bill Maurer eds., 2003).

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This Article narrates a sorely neglected legal history, that of how race and gender intersected to divest and deny citizenship through the first third of the twentieth century. That marriage could function to exile a U.S. citizen woman from her country is a little known fact. But how expatriation and dependent citizenship were shaped by racial barriers to citizenship is an even more complicated history. Using an intersectional analysis—which insists on the simultaneous consideration of the impact of gender on racial bars to citizenship and the impact of race on gendered bars to citizenship—allows us to rectify mistakes in the remembering of this history. Thus, one goal of this Article is to clarify the historical record.

But beyond narrating and clarifying this history, we must consider what lessons we might learn. One conclusion one might draw is celebratory. It is shocking that race and gender served to divest U.S. citizens from formal citizenship, and to bar noncitizens from gaining it, but this is a thing of the past. Such disenfranchisements based on status are now, thankfully, no longer with us. But I would argue that the narrating of this history, unfortunately, suggests a more complicated conclusion.

The history of dependent citizenship and marital expatriation shows how notions of incapacity, reflected in laws of coverture and race-based exclusion, formed the groundwork for racial and gendered disenfranchisement from formal citizenship. These ideas about incapacity were deeply connected to conceptions of morality. Thus, our understanding of the history of citizenship shifts if we focus not on the status—race and gender—used to deny citizenship, but on the rationale underlying why women and Asian immigrants, in particular, were thought incapable of exercising citizenship. Our understanding shifts as well if we move beyond considering citizenship as a matter of formal status. When we evaluate whether one enjoys citizenship in the form of rights, whether one can fully engage in citizenship as political activity, and whether one is considered symbolically as the paradigmatic citizen, it becomes rapidly apparent that one's identity continues to shape access to citizenship in its fullest meaning.

Although there are no longer race-based and gender-based bars to formal citizenship,[353] ideas of morality and appropriate conduct continue to

353. Arguably, 8 U.S.C. § 1409 (2000), discussed *supra* note 71, still constitutes a gender-based bar from citizenship, albeit an attenuated one, as the logic of the differential treatment turns upon the gender of one's parent. But we might also see the section as reflecting rules of kinship,

patrol access to all forms of citizenship. The ambivalence about admission to citizenship along lines of race and gender returns to haunt; those who were never admitted and those exiled may fall outside our memory, but linger as ghostly traces to remind us of the force of identity in shaping citizenship.

and as an interesting analogy to the membership rules of American Indian tribal communities that have been subject to much commentary, in particular about *Santa Clara Pueblo v. Martinez*, 437 U.S. 49 (1978). I am indebted to Jessica Cattelino for this point. For a recent discussion of the *Martinez* case, see Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KANSAS J.L. & PUB. POL'Y 103 (2004).

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