Citizenship Outside the Courts

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The notion of citizenship lies at the core of our constitutional structure, determining possession of fundamental rights ranging from the rights to vote and hold public office to the right to enter and remain in the United States at all. Indeed, the entire constitutional project of self-governance rests on the premise of a defined group of "We the people." Determining who qualifies as a citizen is thus central to our constitutional fabric. Prior literature has tacitly assumed that the federal judiciary has been the principal arbiter for deciding who qualifies for citizenship under our Constitution. This Article, however, demonstrates that political actors, rather than federal courts, have played the primary role in defining access to constitutional citizenship for members of historically marginalized groups, which raises significant normative implications.

This Article excavates records surrounding three pivotal episodes from our nation's history: the contestation of citizenship for Black Americans in the early to mid-nineteenth century; the denial of citizenship to Chinese Americans during the Exclusion Era from 1882 to 1943; and the stripping of citizenship from American women who married noncitizens prior to 1922. In each case, members of historically marginalized groups seeking to assert their constitutional citizenship found little recourse in the federal courts. Political institutions, however, independently wrestled to determine their citizenship

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status, in the absence of — or even in defiance of — federal court opinions. The historical record tells a story of judicial abdication, which allowed political actors to both narrow and expand access to constitutional citizenship.

The histories unearthed in this Article raise an urgent fundamental normative question: To what extent should *constitutional citizenship be determined by political actors? This Article argues that citizenship is unique among constitutional provisions in ways that generally cast doubt on the legitimacy of efforts — political or otherwise — to deny it to members of marginalized communities. Moreover, the histories uncovered in this Article show that political institutions are not inherently more or less likely than the federal judiciary to do so. The experiences of Black Americans, Chinese Americans, and married American women thus suggest that the road to a more inclusive citizenship requires involvement by both: federal courts must play an active role in policing the constitutional floor for citizenship, but the political branches must remain free to expand constitutional citizenship beyond that floor, which may, in turn, generate a new consensus on what that floor should be.*

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INTRODUCTION

The notion of citizenship lies at the core of our constitutional structure, determining possession of fundamental rights ranging from the rights to vote and hold public office to the right to enter and remain in the United States at all. Indeed, the entire constitutional project of self-governance rests on the premise of a defined group of "We the People." Determining who qualifies as a citizen is thus central to our constitutional fabric. Prior literature has tacitly assumed that the politically insulated federal judiciary has been the principal arbiter for deciding who qualifies for citizenship under our Constitution, resulting in a body of scholarship focused largely on federal judicial decisions.[1] This Article, however, demonstrates that political actors, rather than federal courts,[2] have played the primary role in extending, or denying, constitutional citizenship to members of historically marginalized groups.[3]

[1] *See, e.g.*, Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185 (2016) (examining the evolution of the Supreme Court's understanding of citizenship after Reconstruction); Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007) (analyzing the federal judiciary's role in reviewing naturalization applications under the Immigration Act of 1990); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020) (assessing the role of originalist principles in Supreme Court interpretations of birthright citizenship); Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757 (2020) (examining judicial adjudications of citizenship and critiquing absence of procedural due process protections).

[2] For purposes of this Article, the term "political actors" refers to members of Congress, the President, members of the Executive Branch who serve under the President, and the several States, primarily in the form of state court judges. For a description of the political nature of state court judges, see *infra* note 10.

[3] A rich body of literature in the closely related field of immigration law examines the role of political actors in shaping *non*citizen admissions into the country. *See, e.g.*, PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION

The Constitution, ratified in 1789, though asserting itself on behalf of "We the People," did not explicitly define who would be included in that definition, *i.e.*, who qualified as members of the new nation-state.[4] That document delegated power to Congress to develop a uniform rule of naturalization, thereby ensuring that the status of citizenship could be conferred by Congress to an individual after birth.[5] But, while the framers clearly contemplated the existence of "natural born Citizens" (requiring such status for the President), they said nothing about who would qualify as such.[6] It was not until the Fourteenth Amendment was adopted in 1868 that the Constitution explicitly recognized that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[7]

Both before and after Reconstruction, members of historically marginalized groups seeking to assert their constitutional citizenship found little recourse in the federal courts; rather, their citizenship

FEDERALISM (2015) (examining role of state and local governments in regulating immigration); Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71 (2021) (critiquing weakness of internal checks on administrative agency officials responsible for immigration); Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173 (2016) (describing role of street-level administrative officials in immigration law); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (describing early role of the several States in regulating immigration); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129 (2017) (critiquing role of the Attorney General in regulation of immigration).

[4] The original Constitution's directives regarding citizenship largely focus on state citizenship. Article Four, section two, provides, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article Three, section two, provides for federal court jurisdiction over cases or controversies between citizens of different states. For a provocative discussion of the potential contemporary role of States in defining citizenship, see Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 869 (2015). For recent scholarship contending that the Constitution contemplated a third form of "general citizenship," independent of local or national citizenship, see Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 614 (2023).

[5] U.S. CONST. art. I, § 8.

[6] The Constitution requires that members of the House and Senate be "citizens," U.S. CONST. art. I, §§ 2-3, but that the President of the United States be a "natural born Citizen," U.S. CONST. art. II, § 1.

[7] U.S. CONST. amend. XIV, § 1.

status was principally determined by political actors.[8] To reveal the breadth and depth of political control over access to constitutional citizenship, this Article excavates historical records surrounding the contestation of citizenship for the following three groups: Black Americans in the early to mid-nineteenth century; Chinese Americans during the Exclusion Era from 1882 to 1943; and American women who married noncitizens prior to 1922.[9] Broadening the lens beyond federal court opinions, this Article mines state court records,[10] legislative

[8] *See also* Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603 (2019) [hereinafter *Borders of Belonging*] (calling on legal scholars to draw from the work of historians to reveal how the constitutional interpretations of administrative agencies impacted marginalized populations).

[9] To be sure, these three examples are not exhaustive, and many other marginalized groups have fought to have their constitutional citizenship recognized. For scholarly treatment of the contestation of citizenship for Native Americans, see JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870, at 288-98 (1978); Maggie Blackhawk**,** *Federal Indian Law as a Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1789 (2019); 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, 56 (2002); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma,* 96 CALIF. L. REV. 801, 801-02 (2008) (discussing use of blood quantum as a proxy for political indigeneity). For scholarship examining the contestation of citizenship for residents of U.S. territories, *see* FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES 143-250 (1904) (examining conferrals of U.S. citizenship by treaty, conquest, special acts of Congress, and for residents of newly admitted States); Kristina M. Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 583 (2022). For scholarship examining access to citizenship for other marginalized groups, *see* Leticia Saucedo & Rose Cuison Villazor, *Illegitimate Citizenship Rules*, 97 WASH. U. L. REV. 1179, 1179-80 (2020) (discussing conferral of citizenship on children born out of wedlock); Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100, 100 (2013) (examining access to citizenship for members of the LGBT community).

[10] The actions by the several States to define U.S. citizenship generally occurred through state courts. Unlike state legislatures or governors, which had little occasion to define U.S. citizenship, state courts were called upon to adjudicate an individual's U.S. citizenship with some frequency. Although state courts are less politically accountable than state legislatures and governors, this Article nonetheless treats them as political actors. State court judges are far less insulated from political pressures than federal judges, who enjoy extraordinary tenure and salary protections under Article Three. More importantly, during the historical periods examined in this Article, state court judges were generally seated through popular election. *See* Larry C. Berkson, *Judicial*

debates, and the correspondence, reports, and opinions of members of the Executive Branch, to show how political institutions *independently* wrestled to determine the citizenship status of these groups, in the absence of — or even in defiance of — federal courts.[11]

Prior to Reconstruction, several States (including at least one slave state), parts of the Executive Branch, and members of Congress independently engaged in constitutional interpretation to conclude that free Black Americans were entitled to constitutional citizenship.[12] The Supreme Court subsequently rejected those interpretations in *Dred Scott v. Sandford*,[13] purporting to deny constitutional citizenship to Black Americans definitively. Yet even after *Dred Scott*, the Executive Branch continued to recognize the citizenship of free Black Americans, explicitly rejecting the Supreme Court's analysis.[14] Then, once the Civil War ended, Congress acted, first by statute and then by constitutional amendment, to guarantee constitutional citizenship to Black Americans.[15]

Similarly, political actors, particularly officials within Executive Branch agencies charged with enforcing the Chinese Exclusion laws, played the primary role in defining access to constitutional citizenship for Chinese Americans.[16] For this group, however, these actors were

Selection in the United States: A Special Report, 64 JUDICATURE 176, 176 (1980). More recent reforms to select state judges through nonpartisan commissions would not take hold until the 1930s. *See id.* at 177.

[11] At the same time, this Article readily acknowledges that the decisions of both political actors as well as federal courts were reflective of and respondent to more general historical currents, including shifts in attitudes regarding race and gender.

[12] *See infra* Part II.B.

[13] 60 U.S. (19 How.) 393, 404-05 (1857).

[14] *See infra* Part II.C (discussing opinion of Attorney General Edward Bates, 10 Op. Att'y Gen. 382 (1862)).

[15] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27; U.S. CONST. amend. XIV, § 1.

[16] This section of the Article is indebted to the work of historians ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA 1882-1943 (2003), and LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995). This is not the first piece of legal scholarship to benefit from their work. *See, e.g.*, Amanda Frost, *"By Accident of Birth": The Battle Over Birthright Citizenship After* United States v. Wong Kim Ark, 32 YALE J.L. & HUMAN. 38, 38-43 (2021) (building on work of Salyer and Lee to document how experience of Wong Kim Ark and his family reflects "the fluctuating relationship between immigration,

more restrictive than the federal courts. Prior to 1898, Executive Branch officials repeatedly rejected the citizenship claims of individuals born in the United States to Chinese parents even in the face of lower federal court opinions uniformly recognizing their citizenship under the Fourteenth Amendment.[17] The Supreme Court finally intervened in *United States v. Wong Kim Ark*,[18] affirming that ethnic Chinese individuals born in the United States were entitled to the protections of the Constitution's Citizenship Clause. Yet notwithstanding that decision, members of the Executive Branch continued to deny citizenship to these individuals, generating significant conflict with the lower federal courts.[19] Responding to that growing antagonism, the Supreme Court sided with Executive Branch officials in *United State v. Ju Toy*,[20] granting them virtually exclusive authority to determine the citizenship of Chinese Americans without judicial intervention. The administrative campaign to deny citizenship to Chinese Americans would not end until 1943, when Congress finally eliminated the bar on Chinese nationals entering the country, which relieved the necessity for Chinese Americans to prove their citizenship in order to enter or remain in the United States.[21]

Likewise, it was political actors, rather than the federal courts, who determined the citizenship status of American women who married noncitizens. Although the Supreme Court in its 1830 decision *Shanks v. Dupont* held that American women retained their citizenship after marriage,[22] several states and parts of the Executive Branch (as well as

citizenship, and access to civil and political rights"); Tani, *Borders of Belonging*, *supra* note 8, at 1624-27 (drawing on work of Salyer and Lee to analyze jurisprudential developments in procedural due process protections for ethnic Chinese individuals claiming citizenship); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005) (drawing on work of Lee to analyze citizenship of Asian American women and women married to Asian men and explore intersecting roles of race and gender in giving meaning to U.S. citizenship).

[17] *See infra* Part III.A.

[18] 169 U.S. 649, 705 (1898).

[19] *See infra* Part III.B.

[20] 198 U.S. 253, 263-64 (1905).

[21] *See* Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600 (1943) (codified at 8 U.S.C. §§ 262-297, 299).

[22] Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 248 (1830).

some lower federal courts) acted unilaterally to strip American women of their citizenship based on their marriage to a noncitizen;[23] then, in 1907, Congress enacted legislation expressly divesting such women of their citizenship.[24] When an American woman challenged that statute as a violation of her constitutional right to citizenship, the Supreme Court in *Mackenzie v. Hare*[25] rejected her claim, effectively granting the political branches free reign to divest American women of their citizenship upon marriage. Ultimately, it was Congress rather than the federal courts who acted to protect the citizenship of American women regardless of marriage, beginning with its passage of the Cable Act of 1922.[26]

Collectively, these histories tell a story of judicial abdication, which allowed political actors to expand or narrow access to citizenship for marginalized groups. In doing so, they illustrate the extent to which membership in the American community has been subject to political, rather than legal, constraints. This Article focuses on, in the language of Professor Linda Bosniak, the "who" rather than the "what" of citizenship.[27] That is, it analyzes decisions to extend or deny citizenship status to particular groups and individuals. To be sure, that question is not easily disentangled from the *substance* of citizenship, or, what rights are associated with citizenship.[28] While U.S. citizenship today is often

[23] *See infra* Part IV.A.

[24] Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228, 1228-29.

[25] 239 U.S. 299 (1915).

[26] Cable Act of 1922, ch. 411, 42 Stat. 1021.

[27] *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 11-12, 26-28 (2006).

[28] For scholarship examining different rights associated with citizenship, see JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 99 (1991) (tethering concept of citizenship to nation's history of slavery to argue that U.S. citizenship is not only about the right to vote but also the right to work); Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619, 620 (2012) (discussing relationship between citizenship and right to bear arms); Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 979 (2010).

For scholarly discussion of the desirability of U.S. citizenship, see MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA 1 (2020); Rose Cuison-Villazor, *Rejecting Citizenship*, 120 MICH. L. REV. 1033, 1034 (2022) (book review); Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 1 (1989) (contending that expansions of constitutional notions of equality and due

associated with the right to vote,[29] that is a modern understanding.[30] In earlier times, suffrage was not limited to citizens,[31] and even today, it is denied to many citizens (*e.g.*, children, felony disenfranchisement).[32] In the contestation of citizenship for Black Americans and Chinese Americans, the individual's claim of citizenship generally was not in pursuit of the right to vote (or hold public office, own property, inherit, or bear arms); rather, the stakes were far more fundamental, involving the individual's right to simply *exist* in the United States.[33] Black Americans asserted citizenship to challenge laws that prohibited or otherwise restricted their ability to enter and reside in a state or locality. Chinese Americans asserted citizenship to secure entry into their native land. In these ways, the citizenship claims they raised distill to the most

process "have reduced almost to the vanishing point the marginal value of citizenship" in the United States).

[29] *See, e.g.*, RICHARD BELLAMY, CITIZENSHIP: A VERY SHORT INTRODUCTION 18 (2008) ("[C]itizenship has gone hand in hand with political participation in some form of democracy — most especially, the right to vote."); Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEO. L.J. 1269, 1272 (2022) (exploring the role of the Reconstruction Amendments and later constitutional amendments in equating citizenship with the right to vote).

[30] The Supreme Court in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), explicitly decoupled citizenship from the elective franchise, holding that while women clearly qualified as U.S. citizens, states were free to deny them the right to vote. The Nineteenth Amendment in 1920 of course overruled that decision at least with respect to female suffrage. *See also, e.g.*, VAN DYNE, *supra* note 9, at iii ("United States citizenship does not give the right to vote. The Constitution does not guarantee a citizen this right. The right to vote is a right conferred and regulated by state laws.").

[31] *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397-1417 (1993).

[32] For an overview of contemporary felony disenfranchisement laws, see THE SENTENCING PROJECT, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER (2021) (noting that in 2020, 5.2 million Americans were prohibited from voting due to felony disenfranchisement laws).

[33] The premise that citizenship in a sovereign state confers a right to enter and remain in the territorial boundaries of that state (subject to exceptions such as banishment for crime), while universally recognized, has never been seriously contested or theorized. *See, e.g.*, Worthy v. United States, 328 F.2d 386, 394 (5th Cir. 1964) ("We think it is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil. It is not to be wondered that the occasions for declaring this principle have been few.").

elemental sense of "belonging."[34] The contestation of citizenship for married women, by contrast, typically involved additional rights associated with citizenship, such as the right to own or inherit property, vote in elections, or secure a passport or diplomatic protections. These cases were generally brought by white women, who, unlike the Black Americans and Chinese Americans who preceded them, were otherwise unencumbered in their ability to enter, remain in, and travel across the United States. Nonetheless, the marriage of these women to noncitizens placed them in an outsider status, leading to their loss of citizenship at the hands of political actors.

The histories unearthed in this Article raise an urgent fundamental normative question which has not yet been considered in the existing literature: To what extent *should* constitutional citizenship be determined by political actors?[35] Scholars associated with

[34] This Article does not mean to suggest that citizenship historically has been or today should be a necessary prerequisite to belonging in our constitutional community. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006) (analyzing historical treatment of "intending citizens," *i.e.*, those who were racially eligible to naturalize and who had submitted a declaration of intent to do so); Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794, 1797 (2022) (noting need for "vocabulary for recognizing a liminal space where people are subject to legal regulation because they are presumed not to belong"). Rather, it aims to show that the denial of citizenship for Black Americans and Chinese Americans operated to preclude not only their "belonging" in some abstract sense, but also their mere physical presence in the country.

[35] It is important to note that politicized efforts to deny citizenship to members of marginalized groups continue to this day. The Trump administration's "Operation Janus" to investigate an estimated 700,000 citizens for denaturalization proceedings is one recent high-profile example. *See* Amanda Frost, *Alienating Citizens*, 114 NW. U. L. REV. ONLINE 241, 242-53 (2019) (providing a detailed account of Operation Janus); Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402 (2019) (critiquing Operation Janus and similar denaturalization efforts under the Obama administration). Other examples include the State Department's denial of passports for individuals whose births were attended by midwives in the United States near the border with Mexico, see Villafranca v. Blinken, No. 19-CV-173, 2022 WL 1210762 (S.D. Tex. Apr. 25, 2022); Picasso v. Pompeo, No. 17-CV-00171, 2019 WL 13193245 (S.D. Tex. Sept. 11, 2019); Stipulation and Agreement of Settlement and Release, Castelano v. Clinton, No. CA M-08057 (S.D. Tex. June 24, 2009), https://www.aclu.org/legal-document/castelano-v-clinton-agreement [https://perma.cc/4FGR-MA6B]. Similarly, the State Department denied passports to children born abroad to a U.S. citizen parent if the child's parents were in a same-sex marriage and the U.S. citizen parent was not

departmentalism,[36] popular constitutionalism,[37] and administrative constitutionalism,[38] generally endorse efforts by actors outside the

biologically related to the child, *see* Bruce Hale, *"Born of" Outside the United States: Acquisition at Birth of U.S. Citizenship by Children Born Through Assisted Procreation*, 34 J. AM. ACAD. MATRIM. LAWS. 121, 129-31 (2021) (describing a change in policy following litigation in Dvash-Banks v. Pompeo, No. CV 18-523, 2019 WL 911799 (C.D. Cal. Feb. 21, 2019)). In 2013, the Texas Department of State Health Services initiated a policy of refusing to grant birth certificates to children born in the state if the mother's only identification was in the form of a *matricula consular* issued by the Mexican consulate. *See* Elisa Cariño, *Made in America: How Birth Certificate Applications Infringe on the Right to Citizenship*, 43 N.Y.U. REV. L. & SOC. CHANGE 225, 230 (2019) (analyzing Serna v. Tex. Dept. of State Health Servs., Vital Stat. Unit, No. 15-CV-446, 2015 WL 6118623 (W.D. Tex. Oct. 16, 2015)).

For additional scholarship examining the contemporary role of political actors in defining citizenship, see Jennifer M. Chacón, Susan Bibler Coutin, Stephen Lee, Sameer Ashar, Edelina Burciaga & Alma Nidia Garza, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 UC DAVIS L. REV. 1 (2018) (conducting interviews to show how immigrant communities shape collective understandings of citizenship); Emily Ryo & Reed Humphrey, *Citizenship Disparities*, 107 MINN. L. REV. 1 (2022) (conducting an empirical study of administrative adjudications of naturalization applications and finding wide disparities in outcomes across field offices).

[36] *See* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 371 (1994) (rejecting the notion of judicial supremacy in constitutional interpretation and instead endorsing "a system within which competing institutions with differing competencies and perspectives confront one another constructively and sometimes aggressively about how best to interpret constitutional principles"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (arguing that separation-of-powers principles require that the President, Congress, and the federal courts each possess independent and co-equal authority to interpret the Constitution).

[37] *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004) (centering the role of the "people themselves" in guiding the evolution of constitutional law); Robert C. Post & Reva B. Siegal, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003) (proposing model of "pol[y]centric" constitutional interpretation granting "equal interpretative [power] to Congress and to the Court").

[38] *See* Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 109, 111 (Nicholas R. Parillo ed., 2017) [hereinafter *From the History to Theory*] (offering normative defense of administrative constitutionalism "even . . . if it varies from court doctrine"); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010)

federal courts to independently engage in constitutional interpretation on the ground that such efforts promote political accountability and therefore democratic legitimacy. Citizenship, however, is unique among constitutional provisions in ways that cast doubt on the legitimacy of any efforts — political or otherwise — to deny it to individuals. First, it is more fundamental than other constitutional rights to the extent it is the one from which other rights, such as the right to vote, may derive. Second, citizenship defines the very composition of our self-governing nation-state. Third, citizenship is unusual in the specificity with which the text of the Constitution affirmatively guarantees it. This Article argues that these factors weigh in favor of inclusive definitions of citizenship that would extend that status to marginalized groups, as opposed to exclusive definitions that would deny citizenship to those groups.[39]

Importantly, the histories unearthed in this Article reveal that political institutions are not inherently more or less inclusive than the

(introducing concept of "administrative constitutionalism" to refer to "regulatory agencies' interpretation and implementation of constitutional law" and focusing on its departures from judicial doctrine); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1901-02 (2013) (concluding that administrative constitutionalism "can represent a particularly legitimate form of constitutional development"); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 523 (2015) (endorsing administrative constitutionalism as necessary to "adapt[] to changing societal contexts — changes in the economy, social structures, technology, and most importantly, public values"); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015) (providing an historical account of the federal welfare agency's innovative interpretation of equal protection to protect the rights of the poor); *see also* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 26, 18 (2010) (contending that process of "small c" constitutional change, through which nation's most deeply held normative commitments are negotiated "by political (as opposed to judicial) officers," is superior to alternative processes of formal constitutional amendment or Supreme Court adjudication). *But see* Joy Milligan, Plessy *Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924 (2020) (documenting role of federal housing agencies in undermining constitutional prohibition against segregation).

[39] To be sure, that position can be, and is, debated. *See, e.g.*, PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 5 (1985) (arguing in favor of exclusive approach that would deny constitutional citizenship to those born within the United States to parents only temporarily present in the United States or lacking documented status).

federal judiciary in terms of recognizing claims to citizenship. In the case of Black Americans, the several States, the Executive Branch, and Congress adopted positions more protective than that allowed by the Supreme Court in *Dred Scott*.[40] But for classes of Chinese Americans and married American women, political actors sought to deny Americans their citizenship, notwithstanding Supreme Court precedent.[41]

These histories thus suggest that the road to a more inclusive citizenship requires both the politically insulated federal judiciary as well as its political counterparts. The federal courts must play an active role in policing the constitutional floor for citizenship, as guaranteed by the Citizenship Clause of the Fourteenth Amendment.[42] The extraordinary tenure and salary protections provided by Article III[43] render the federal courts the institution best suited to fulfill this role, as they are better insulated from the populist impulses that might lead other institutions to deny constitutional citizenship to politically disempowered groups.

At the same time, however, the Supreme Court has repeatedly failed in serving this role. In *Dred Scott*,[44] the Court categorically denied constitutional citizenship to Black Americans. In *Ju Toy*, it disavowed any meaningful role for the federal courts to intervene when agency officials denied the citizenship of Chinese Americans.[45] And in *Mackenzie v. Hare*, it granted Congress virtually free reign to divest Americans of their citizenship.[46] For each of the three groups examined in this Article, it was political actors rather than the federal judiciary who ultimately recognized and protected their constitutional citizenship. These political efforts embodied a populist rejection of efforts to deny citizenship to these groups, even after the Supreme Court endorsed or at least acquiesced in them. These histories thus underscore the importance of ensuring that the political branches remain free to protect citizenship beyond the constitutional floor defined by the

[40] *See infra* Part II.

[41] *See infra* Parts III, IV.

[42] U.S. CONST. amend. XIV, § 1.

[43] U.S. CONST. art. III, § 1.

[44] 60 U.S. (19 How.) 393 (1857).

[45] *See* United States v. Ju Toy, 198 U.S. 253, 264 (1905).

[46] *See* Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915).

federal courts, which may in turn generate a new consensus on what that floor should be. When federal courts define the constitutional right to citizenship narrowly, the political branches must be empowered to expand that definition.

This Article proceeds as follows. Part I sets the stage by describing competing theoretical conceptions of citizenship and tracking the adoption of the *jus soli* principle in early American history. Parts II through IV unearth the historical evolution of citizenship for three classes. Part II focuses on the contestation of citizenship for Black Americans during the early to mid-nineteenth century. Part III turns its attention to the citizenship status of Chinese Americans during the Exclusion Era from 1882 to 1943. Part IV examines efforts to strip American women of their citizenship upon their marriage to a noncitizen prior to 1922. In all three contexts, the Supreme Court either denied the constitutional right to citizenship outright (for Black Americans) or refused to protect it (for Chinese Americans and married women), which allowed political institutions to step in to redefine who qualifies as a citizen. Part V then builds on these histories to explore the normative implications of having political actors outside the federal courts determine constitutional citizenship.

I. CONSTITUTIONAL CONCEPTIONS OF CITIZENSHIP

Citizenship is typically equated with full membership in a nation-state.[47] Vattel states, "The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages."[48] International law recognizes

[47] *See, e.g.*, SHKLAR, *supra* note 28, at 3-4 ("In any modern state and especially in an immigrant society, citizenship must always refer primarily to nationality. Citizenship as nationality is the legal recognition, both domestic and international, that a person is a member, native-born or naturalized, of a state."); VAN DYNE, *supra* note 9, at iii ("In the broad sense of the word, citizens are 'the people,' the members of the state or nation, including men, women, and children. In the United States they are the sovereign power."); *cf.* Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017) (describing status of U.S. nationals as distinct from U.S. citizens).

[48] EMER DE VATTEL, THE LAW OF NATIONS 101 (London, G.G. & J. Robinson, new ed. 1797).

that each sovereign state possesses the power to define such membership.[49] And many scholars, though not all,[50] endorse this view.[51]

Within the United States, the concept of citizenship is foundational to our constitutional culture. The Constitution's preamble, asserting that document on behalf of "We the people," can only be understood as referencing the members, or citizens, of the newly sovereign United States.[52] Thus while the American project of constitutional self-governance is largely premised on the notion of citizenship, the language of the original Constitution of 1789 was surprisingly sparse in defining who qualified for such status. That document contains two references to state citizenship. Article Four section two provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States,"[53] while Article Three

[49] *See* Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 458 n.35 (2000) ("Under international law, states are ordinarily regarded as having sovereign authority to determine who will be accorded citizenship or nationality." (citing Nottebohm Case (Liech. v. Guat.), Second Phase Judgment, 1955 I.C.J. 4, 20 (Apr. 6))).

[50] A growing body of scholarship associated with cosmopolitanism rejects the notion that states may exclude outsiders. *See* JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 225 (2013); Jeremy Waldron, *Immigration: A Lockean Approach* (N.Y.U. Sch. of L., Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 15-37, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652710 [https://perma.cc/7ZCZ-CY5W].

[51] *See* SARAH SONG, IMMIGRATION AND DEMOCRACY 53 (2019) ("If we take the value of collective self-determination seriously, we see that the power to shape the future of one's political community is not a brute, amoral power or a mere convention but a legitimate power of a people aspiring to govern itself."); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 52, 62 (1983) ("Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.").

[52] *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 165-66 (1874) ("There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association . . . . For convenience it has been found necessary to give a name to this membership . . . . [The word] [c]itizen is understood as conveying the idea of membership of a nation and nothing more.").

[53] U.S. CONST. art. IV, § 2.

section two grants the federal judiciary jurisdiction over "Controversies . . . between Citizens of different States."[54]

At the same time, however, the document also contemplates some form of *federal* citizenship.[55] It delegates to Congress the power to enact a uniform rule for naturalization,[56] thereby ensuring that U.S. citizenship could be granted to an individual after birth. It also references federal citizenship by requiring such status for members of Congress.[57] Indeed, it requires that such status be conferred *at birth* to those elected to the Presidency.[58] These provisions show that the framers contemplated not only some form of federal citizenship, but also some form of *birthright* federal citizenship.

Two general approaches for conferring birthright citizenship existed at the time of our nation's founding. The first principle was that of *jus soli* (right of soil), which conferred citizenship on the basis of an individual's birth within the territory of a state, regardless of one's parentage. *Jus soli* was well established in the common law of England, under which any individual born in the King's dominions owed a personal, and indeed perpetual, allegiance to the crown.[59] A second, competing, principle was *jus sanguinis* (right of blood), conferring

[54] U.S. CONST. art. III, § 2.

[55] Professor Jud Campbell contends that the Constitution contemplated a third, "general citizenship," in addition to the state and federal counterparts. *See* Campbell, *supra* note 4, at 614.

[56] U.S. CONST. art. I, § 8.

[57] U.S. CONST. art. I, § 2 ("No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . . ."); *id.* art. I, § 3 ("No Person shall be a Senator who shall not have . . . been nine Years a Citizen of the United States . . . .").

[58] U.S. CONST. art. II, § 1 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President . . . .").

[59] This principle was articulated in Sir Edward Coke's celebrated opinion in *Calvin's Case*. Calvin's Case (1608) 77 Eng. Rep. 377, 384 (KB). In analyzing the subject of "*ligeantia naturalis,*" or the natural-born subject (as opposed to, for example, the naturalized subject), he characterized it as the "true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an incident inseparable from every subject: for as soon as he is born, he oweth by birth-right ligeance and obedience to his sovereign." Peter Schuck and Rogers Smith identify *Calvin's Case* as the universal "starting point for Anglo-American legal analyses of political membership at least through the nineteenth century." SCHUCK & SMITH, *supra* note 39, at 13; *see also* KETTNER, *supra* note 9, at 7-8 (describing significance of Coke's opinion to American conceptions of citizenship).

citizenship on the basis of birth to a citizen-parent, typically without regard to the location of birth.[60] The text of the original Constitution does not identify which, if either, of these principles was to be adopted.

At the time of the Constitution's adoption, the several States retained their own provisions for determining state citizenship, and all of these definitions seemed to embrace the English common law rule.[61] Some states did so explicitly; Virginia, for example, conferred state citizenship on all white persons, and then on all free persons, born within the territory.[62] Other states seemed to take the common law rule for granted, making provisions only for naturalization, whereby a newcomer could acquire the citizenship rights enjoyed by the native born. Pennsylvania's constitution, for example, awarded to any foreigner who lived within the state for at least one year "all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years residence."[63] Given the absence of any language to the contrary, the constitutional framers presumably intended for federal citizenship to track state citizenship and therefore incorporate the *jus soli* principle.

Early Supreme Court decisions seemed to accept this premise that the United States had adopted the English common law principle.[64] In *Murray v. The Schooner Charming Betsy*, involving the citizenship of a vessel's owner, Chief Justice Marshall assumed that an individual's birth

[60] Emer de Vattel characterized this principle as requiring not only birth to citizen parents but also birth within the country: "natives, or national-born citizens, are those born in the country, of parents who are citizens. . . . [I]n order to be of the country, it is necessary that a person be born of a father who is a citizen; for if he is born there of a foreigner, it will be only the place of his birth, and not his country." VATTEL, *supra* note 48, at 101.

[61] *See* KETTNER, *supra* note 9, at 214-19 (describing citizenship rules of the several States prior to the American Revolution).

[62] *See id.* at 215 (citing Act of May 1779, ch. 55, *in* 10 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 129, 129-30 (William Waller Hening ed., Richmond, George Cochran 1822).

[63] PA. CONST. of 1776, § 42, https://avalon.law.yale.edu/18th_century/pa08.asp [https://perma.cc/M2BX-GQJV].

[64] Commentators likewise assumed the adoption of the *jus soli* principle in the United States. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 33 (New York, O. Halsted, 1st ed. 1827) ("Natives are all persons born within the jurisdiction of the United States.").

within the United States rendered him a citizen at least in the first instance, although he declined to determine whether such individual could subsequently expatriate himself.[65] Likewise in *McCreery's Lessee v. Somerville*, Justice Story characterized claimants as "natural born subjects" of the United States based on their birth in the United States, even though their father was not a citizen.[66] He further explained in *Inglis v. Trustees of Sailor's Snug Harbor*:

> The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject . . . . [A]llegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to the sovereign, as such, de facto.[67]

One of the fullest, and most frequently cited, expositions on the matter comes from the New York Chancery Court's opinion in *Lynch v. Clark*.[68] That case concerned whether a Julia Lynch could inherit lands in New York from her uncle, which in turn depended upon whether she was a U.S. citizen. Julia Lynch had been born in the United States to alien parents who were temporarily visiting; a few months later she returned to Ireland with her parents while still an infant, and remained

[65] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 120 (1804) ("Whether a person born within the United States, or becoming a citizen according to the established laws of the country; can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which is it not necessary at present to decide.").

[66] McCreery's Lessee v. Somerville, 22 U.S. (9 Wheat.) 354, 356-57 (1824) (quoting language of statute of 11 & 12 Will. 3 c. 6, which was adopted in Maryland for the purpose of determining whether land could be inherited by the children of non-citizens).

[67] Inglis v. Trs. of Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99, 155 (1830).

[68] Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. Ch. 1844).

in Ireland at the time her uncle died.[69] In concluding that Julia Lynch was in fact a U.S. citizen (and thus entitled to inherit the disputed estate), the New York court began by asserting: "It is an undisputable proposition, that by the rule of the common law of England . . . Julia Lynch was a natural born citizen of the United States" regardless of the "*status* or condition of their parents."[70] It then analyzed the adoption of this common law principle by each of the colonies before reaching its analysis of the Federal Constitution. While acknowledging the absence of language expressly adopting the common law rule, the court held:

> The entire silence of the Constitution in regard to it, furnishes a strong confirmation, not only that the existing law of the states was entirely uniform, but that there was no intention to abrogate or change it. The term citizen, was used in the Constitution as a word, the meaning of which was already established and well understood. . . .
>
> Upon principle, therefore, I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen. It is surprising that there has been no judicial decision upon this question. . . . This circumstance itself, in regard to a point which must have occurred so often in the administration of justice, furnishes a strong inference that there has never been any doubt but that the common law rule was the law of the land.[71]

It then reviewed the statutes of various states, which confirmed "that the universal understanding of the representatives of the people of the states in establishing their fundamental and statutory laws, was that every person born within their territory, was by that circumstance alone, a citizen . . . ."[72]

The Executive Branch also recognized the adoption of the common law *jus soli* principle in the United States. In a letter dated June 6, 1854,

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[69] *Id.* at 638.

[70] *Id.* at 639 (emphasis in original).

[71] *Id.* at 656, 663.

[72] *Id.* at 667.

Secretary of State Marcy wrote, "[I]t is presumed that, according to the common law, any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship."[73] In 1859, Attorney General Jeremiah Black affirmed that at least for "free white person[s]," birth in the United States, regardless of foreign parentage, conferred U.S. citizenship.[74] Attorney General Edward Bates affirmed this position in 1862 without the racial qualification asserted by his predecessor, simply concluding, "I am quite clear in the opinion that children born in the United States of alien parents, who have never been naturalized, are native[] citizens of the United States. . . ."[75] Thus the common law principle was presumed by the federal courts as well as the Executive Branch to extend citizenship to all who were born within the United States.

Of course, after the Civil War, the Citizenship Clause of the Fourteenth Amendment explicitly adopted the common law rule into our Federal Constitution, providing "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."[76] The framers of that Amendment, as well as those who legislated its predecessor the Civil Rights Act of 1866,[77] understood themselves as merely codifying preexisting law recognizing the *jus soli* principle (while also, as discussed in the following Part, extending it to people of color).[78]

It is worth noting that the United States also recognizes the *jus sanguinis* principle, conferring citizenship on individuals born abroad to

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[73] Letter from William Marcy, Sec'y of State, to John Mason, U.S. Ambassador to Fr. (June 6, 1854), *in* 3 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 276 (1906).

[74] 9 Op. Att'y Gen. 373, 374 (1859) (citing Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. Ch. 1844), and noting prior expression of similar opinion by letter dated Sept. 8, 1858).

[75] 10 Op. Att'y Gen. 328 (1862).

[76] U.S. CONST. amend. XIV, § 1.

[77] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 ("That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . .").

[78] *See* VAN DYNE, *supra* note 9, at 7-12 (recounting congressional debates and citing, inter alia, CONG. GLOBE, 39th Cong., 1st Sess. 475, 570, 572, 1115, 1117, 1151, 1262, 2890, 2891, 2896, 2893 (1865–66)).

a U.S. citizen parent.[79] In fact, such citizenship was recognized by the first Congress in 1790, which enacted a statute providing that "the children of citizens of the United States" born outside of the country "shall be considered as natural born citizens."[80] Citizenship conferred through parentage, however, remains solely a creature of statute.[81] Only citizenship conferred through birth within the territory of the United States or through naturalization are constitutionally protected.

The next three Parts each recount an episode from our nation's history to unearth the dominant roles played by the several States, Executive Branch officials, and Congress, rather than federal courts, in defining access to constitutional citizenship. First, it examines the contestation of citizenship for Black Americans, documenting how the understandings of political institutions evolved both before and after the Supreme Court's decision in *Dred Scott*. Second, it recounts the efforts of Executive Branch officials to undermine the principle of birthright citizenship announced by the Supreme Court in *Wong Kim Ark*. Third, it exposes actions by the several States, Executive Branch officials, and, ultimately, Congress to strip married American women of their citizenship upon marriage to a noncitizen. These histories then provide a foundation for the normative discussion in Part V.

II. THE CITIZENSHIP STATUS OF BLACK AMERICANS BEFORE AND AFTER *DRED SCOTT*

As described in the preceding Part, it was generally understood even prior to the Civil War that the United States adopted the English common law's *jus soli* principle, conferring citizenship on any individual born within the territory. Nevertheless, Black people were often excepted from the general rule. Enslaved Black people, legally

[79] 8 U.S.C. § 1401(c), (e), (f).

[80] Naturalization Act of 1790, ch. 3, 1 Stat. 103. This *jus sanguinis* principle was limited to one generation, prohibiting the transmission of citizenship to individuals whose "fathers have never been resident in the United States . . . ." *Id.*

[81] Of course, such statutory conferrals of citizenship, like all congressional legislation, remain bound by the Constitution. *Cf.* Terrace v. Thompson, 263 U.S. 197, 220 (1923) (describing Congress's power to racially restrict naturalization as follows: "Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit.").

considered property, were clearly denied the right of citizenship.[82] But the status of free Black people was more complicated. The logic of racial subordination that enabled slavery as an institution made it difficult for some to accept Black people, even free Black people, as brethren citizens. After all, even states that abolished slavery continued to preserve systems of racial subjugation in various forms.

In the antebellum period, Black Americans often asserted their citizenship not to secure the right to vote, hold office, or own property, but simply to be allowed to *exist* within a geographic space without interference. Many locales prohibited free Black people from entering county or city lines; others imposed a hefty tax on Black Americans who chose to reside in the jurisdiction; and still others regulated the types of occupations or activities in which Black people could participate.[83] Black people challenging these restrictions did so by asserting their citizenship. Specifically, they argued that such regulations violated the Privileges and Immunities Clause of the Constitution, denying them the rights of citizenship enjoyed by others.[84] This Part tells the story of how different government institutions outside the federal courts independently wrestled to define the constitutional citizenship status of free Black people both prior to, *and after*, the Supreme Court's 1857 decision in *Dred Scott*.

[82] *See* KETTNER, *supra* note 9, at 311 ("Although it was impossible to avoid confronting problems of slave status . . . the debates could be argued in terms that did not raise the issue of citizenship explicitly. At least in the first instance, the decisive question was not whether the Negro was a citizen, but whether he was a slave or a free man, property or person. Property had no national character. It was neither alien nor citizen.").

[83] *See infra* notes 90–121 and accompanying text.

[84] The Privileges and Immunities Clause of Article Four of the Constitution of 1789 as a formal matter refers to state, rather than federal, citizenship. Prior to the Civil War, however, these two concepts were often conflated, and a citizen of any state was considered a citizen of the United States. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. 40, § 1800 (Boston, Hilliard, Gray & Co. 1833) ("It is obvious, that, if the citizens of each state were to be deemed aliens to each other, they could not take, or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them, if one may so say, a general citizenship."). Moreover, as a conceptual matter, the Clause can be understood as conferring on all *federal* citizens all of the rights (privileges and immunities) that are conferred on the citizens of any given State.

A. Prior to Dred Scott

1. The Several States

Prior to the Supreme Court's decision in *Dred Scott*, the several States actively engaged with the question of whether Black Americans qualified as citizens within the meaning of the Constitution, often through their state courts.[85] Although several states denied citizenship to free Black Americans, others — including at least one slaveholding state — explicitly recognized that free Black Americans were constitutionally entitled to citizenship.

It is important to note that state courts, particularly during this period, were far less insulated from political pressures than federal courts. Even today, state court judges generally lack the extraordinary insulation afforded to federal court judges, *i.e.*, life tenure and salary protections.[86] And certainly during the period studied here, state courts were far more beholden to political influence. As Larry Berkson recounts, most state judges at the nation's founding were appointed by the state legislature or the Governor, but states began using popular elections to fill their benches in the early 1800s.[87] By the mid-1800s,

[85] Some states enacted statutes addressing the citizenship status of free Black Americans. Historian James Kettner notes that prior to the ratification of the U.S. Constitution, both Virginia and South Carolina enacted laws limiting citizenship to whites. KETTNER, *supra* note 9, at 215 (citing a Virginia statute enacted in 1779 in Act of May 1779, ch. 55, *in* 10 The Statutes at Large: Being a Collection of all the Laws of Virginia 129, 129-30 (William Waller Hening ed., Richmond, George Cochran 1822); Act of Mar. 26, 1784, Pub. L. No. 1328, *in* The Public Laws of the State of South-Carolina 339, 339-40 (John Fauchereaud Grimké ed., Philadelphia, R. Aitken 1790). He notes that the language of the Virginia statute was subsequently amended in 1783 and 1786 to extend citizenship to all individuals who were "free," rather than only to individuals who were "white." *Id.* The Virginia courts, however, nonetheless excluded free Black people from citizenship. *See* Booth v. Commonwealth, 57 Va. (1 Gratt.) 519, 529 (1861) (noting that free Black individuals were disqualified from serving on juries because they were not citizens).

[86] For an overview of the various procedures for selecting state court judges, see *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures (last updated Apr. 14, 2023) [https://perma.cc/6KQG-AXLD].

[87] *See* Berkson, *supra* note 10, at 176.

popularly elected state court judges had become the norm.[88] The more modern movement of seating state court judges through apolitical commissions on the basis of merit did not gather steam until the 1930s.[89] State court judges thus were largely political actors during this period.

In the first half of the nineteenth century, several state courts concluded that free Black Americans were excluded from the privileges and protections of constitutional citizenship. The Tennessee Supreme Court's 1838 decision in *State v. Claiborne* is instructive.[90] That case involved the validity of a state law that made it a felony for "any free person of color" to enter the state to reside therein and remain for twenty days.[91] The defendant, a free Black man who had been emancipated in Kentucky, contended that the state law violated the Privileges and Immunities Clause of the federal Constitution.[92] The Tennessee court rejected this claim, reasoning that free Black people "have always been a degraded race in the United States . . . constituting an inferior caste in society."[93] As such, "free negroes . . . were never in any of the States entitled to all the privileges and immunities of citizens, and consequently were not intended to be included when this word was used in the Constitution."[94]

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[88] *See id.*

[89] *Id.* at 177.

[90] State v. Claiborne, 19 Tenn. (Meigs) 331 (1838).

[91] *Id.* at 332.

[92] *Id.* at 339 (citing U.S. CONST. art. IV).

[93] *Id.*

[94] *Id.* State courts in Arkansas, Georgia, and South Carolina likewise categorically excluded Black Americans from citizenship. The Supreme Court of Arkansas in *Pendleton v. State*, 6 Ark. 509 (1846), sustaining a law "to prohibit the emigration, etc., of free negroes and free persons of color into this State," stated: "Are free negroes or free colored persons citizens within the meaning of [the Privileges and Immunities Clause of the U.S. Constitution]? We think not. In recurring to the past history of the constitution, and prior to its formation, to that of the confederation, it will be found that nothing beyond a kind of quasi citizenship has ever been recognized in the case of colored persons." *Id.* at 510-11.

The Supreme Court of Georgia in *Cooper v. City of Savannah*, 4 Ga. 68 (1848), rejecting a constitutional challenge to a city ordinance that imposed a tax of one hundred dollars on free persons of color who resided in the city on pain of imprisonment, stated, "[t]he Court below, did not err in ruling the petitioners were not citizens of this State, as contemplated by the constitution and laws thereof. Free persons of color have never

Such reasoning was not confined to slave states. In its 1837 decision in *Hobbs v. Fogg,* the Pennsylvania Supreme Court, in denying the right to vote to Black people, stated that the words "freeman" and "citizen" as used in the state and federal constitutions did not encompass people of color.[95] After reviewing the history of the state constitution, the court turned to the Federal Constitution:

> Yet it is proper to say that the [Privileges and Immunities Clause] presents an obstacle to the political freedom of the negro, which seems to be insuperable. It is to be remembered that citizenship, as well as freedom, is a constitutional qualification; and how it could be conferred so as to overbear the laws imposing countless disabilities on him in other states, is a problem of difficult solution.[96]

A Connecticut lower court judge similarly concluded in 1833 that Black people did not qualify as "citizens" within the meaning of the federal Constitution. In *Crandall v. State,* Prudence Campbell had been prosecuted under a state statute providing "[t]hat no person shall set up or establish any school . . . for the instruction and education of coloured persons, who are not inhabitants of this state; [nor teach in any such school, nor harbor or board for the purpose of attending such a school], without consent in writing first obtained" by the local authorities.[97] Rejecting Campbell's argument that the statute violated the Privileges

been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office. They have always been considered as in a state of pupilage." *Id.* at 72. It then noted that: "By a joint resolution of the Legislature of Georgia, in 1842, it was *unanimously* Resolved, that free negroes are not citizens of the U.S., 'and that Georgia will never recognize such citizenship.'" *Id.* at 72 n.1.

In *White v. Tax Collector of Kershaw Dist.*, 37 S.C.L. (3 Rich.) 136 (1846), the South Carolina Court of Appeals of Law, in the context of a challenge to the imposition of a capitation tax on "free negroes, mulattoes and mustizoes," by individuals who claimed to be white, stated: "The claim involves all the civil and political rights of citizenship. For the law recognizes only three classes of persons; freemen under the constitution, or citizens; slaves; and free negroes, mulattoes and mustizoes, who constitute the third class. A firm and wise policy has excluded this class from the rights of citizenship in this and almost every State in which they are found." *Id.* at 139.

[95] Hobbs v. Fogg, 6 Watts 553, 560 (Pa. 1837).

[96] *Id.*

[97] Crandall v. State, 10 Conn. 339, 367 (1834).

and Immunities Clause, the lower court judge instructed the jury as follows: "[I]t would be a perversion of terms, and the well known rule of construction, to say, that slaves, free blacks, or Indians, were citizens, within the meaning of that term, as used in the constitution."[98] The Supreme Court of Connecticut reversed Campbell's conviction on technical grounds, expressly declining to address the question of whether Black people constituted citizens within the meaning of the federal Constitution.[99]

Crucially, however, not all states followed such reasoning. Some states, including at least one slave state, explicitly extended citizenship to free Black people. Six years after *Crandall* was decided, the Supreme Court of Connecticut reversed course to explicitly confer citizenship on emancipated slaves in *Colchester v. Lyme*.[100] That case involved a dispute between two towns, Colchester and Lyme, over which town was responsible for the support of an indigent woman, Jenny.[101] Jenny had been enslaved by a Dr. Mather in the town of Lyme until he emancipated her in 1799.[102] She then went to work as a hired servant for a Dr. Watrous in the town of Colchester.[103] She subsequently became unable to support herself, and the town of Colchester sued the town of Lyme to pay for her support as a pauper.[104] The legal question presented to the court was whether Jenny had legally acquired a new settlement by commorancy.[105] In the course of deciding that question, the court stated,

> The master of this slave, by relinquishing all claims to service and obedience, effectually emancipates her; and thus she became *sui juris*, and entitled to all the rights and privileges of other free citizens of the state, among which the right of acquiring a new place of settlement, is the most important.[106]

[98] *Id.* at 347.

[99] *Id.* at 365-67.

[100] Town of Colchester v. Town of Lyme, 13 Conn. 274 (1839).

[101] *Id.*

[102] *Id.* at 275.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 276-77.

[106] *Id.* at 278.

Even the slave state of North Carolina extended citizenship to free Black people. The North Carolina constitution of 1776 did not limit citizenship by race, providing generally: "That every foreigner, who comes to settle in this State having first taken an oath of allegiance to the same, may purchase, or, by other means, acquire, hold, and transfer land, or other real estate; and after one year's residence, shall be deemed a free citizen."[107] In *State v. Manuel*, the Supreme Court of North Carolina affirmed the citizenship of free Black people.[108] That case involved a challenge to a state statute providing that free Black people who had been fined for a criminal offense and could not pay would be imprisoned and then hired out for servitude.[109] The defendant argued that such imprisonment violated a clause of the state constitution, which allowed debtors to claim insolvency in lieu of imprisonment.[110] The State Attorney General argued, however, that the defendant, as a Black man, could not avail himself of any constitutional protection because he was not a citizen.[111] The court rejected that argument, explaining:

> According to the laws of this State, all human beings within it who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the king of Great Britain, whatever their colour or complexion, were native born British subjects — those born out of his allegiance were aliens. . . . Upon the Revolution, no other change took place in the law of North Carolina, than was consequent upon the transition from a colony . . . to a free and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina free-men. Foreigners until made members of the State continued aliens. Slaves manumitted here become free-men — and therefore if born

[107] N.C. Const. of 1776, art. II, § 40.

[108] State v. Manuel, 20 N.C. (3 & 4 Dev. & Bat.) 144 (1838).

[109] *Id.*

[110] *Id.* at 22.

[111] *Id.*

> within North Carolina are citizens of North Carolina — and all free persons born within the State are born citizens of the State.[112]

And in the Kentucky case of *Amy v. Smith*, while a majority of a panel on the state court of appeals denied citizenship to Black people, it was not without dissent.[113] In that case, Amy filed a tort action for trespass, assault and battery, and false imprisonment against a William Smith; Smith defended on the ground that Amy belonged to him as a slave.[114] The facts suggested that Amy had been enslaved by a family in Pennsylvania, but that her former slaveowner had devised her to his wife for a period of thirty years, the period after which Pennsylvania law would declare her to be free if not registered.[115] The family then moved, with Amy, to Maryland and then to Virginia.[116] Amy argued that under the Privileges and Immunities Clause of the Federal Constitution, she was entitled to carry with her the freedom from slavery she had secured in Pennsylvania, and subsequently enjoyed in Virginia.[117] Rejecting that claim, the majority held:

> Before we can determine whether she was a citizen, or not, of either [Pennsylvania or Virginia], it is necessary to ascertain what it is that constitutes a citizen. In England, birth in the country was alone sufficient to make any one a subject. Even a villain or a slave, born within the king's allegiance, is, according to the principles of the common law, a subject . . . but subject and citizen are evidently words of different import, and it indisputably requires something more to make a citizen than it does to make a subject. It is, in fact, not the place of a man's birth, but the rights and privileges he may be entitled to enjoy, which make him a citizen . . . .

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[112] *Id.* at 24-25. The court nonetheless went on to sustain the validity of the statute, concluding that the state constitution prohibited imprisonment for civil debts, but not for criminal fines.

[113] Amy v. Smith, 11 Ky. (1 Litt.) 326 (1822).

[114] *Id.* at 327.

[115] *See id.*

[116] *Id.* at 327-28.

[117] *Id.* at 331.

> No one can, therefore, in the correct sense of the term, be a citizen of a state who is not entitled, upon the terms prescribed by the institutions of the state to all the rights and privileges conferred by those institutions upon the highest class of society . . . .
>
> Free negroes and mulattoes are, almost everywhere, considered and treated as a degraded race of people; insomuch so, that, under the constitution and laws of the United States, they cannot become citizens of the United States.[118]

However, a lengthy dissent accompanied this majority opinion. Judge Mills began by adverting to the common law: "The American colonies brought with them the common, and not the civil law; and each state, at the revolution, adopted either more or less of it, and not one of them exploded the principle, that the place of birth conferred citizenship."[119] He then pointed out that by the majority opinion's reasoning, white women, children, and many white males without property could not be counted as citizens, as they could not vote.[120] He continued,

> The mistake on this subject must arise from not attending to a sensible distinction between political and civil rights. The latter constitutes the citizen, while the former are not necessary ingredients. A state may deny all her political rights to an individual, and yet he may be a citizen. The rights of office and suffrage are political purely . . . . A citizen, then, is one who owes to government allegiance, service, and money by way of taxation, and to whom the government in turn, grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property, of marriage and the social relations, of suit and defence, and security in person, estate and reputation. These, with some others which might be enumerated, being guaranteed and secured by government, constitute a citizen. To aliens, we extend these privileges by courtesy; to others, we secure them; to male as well as female,

[118] *Id.* at 332-34.

[119] *Id.* at 337-38 (Mill, J., dissenting).

[120] *Id.* at 338-39.

> to the infant as well as the person of hoary hairs. To all such, I would extend the clause in question.[121]

Concluding that the Pennsylvania law had secured to Amy her freedom and thus citizenship, Judge Mills would have held that she carried this citizenship, and all of the freedom and rights it entailed, with her to the various states to which she moved under the Privileges and Immunities Clause of the Federal Constitution.

In these ways, state court judges staked markedly differing positions on the question of whether free Black people enjoyed U.S. citizenship. Moreover, these differences did not track whether the state allowed slavery or not. Rather, judges from across different states engaged in independent analyses of this question through the antebellum era.

2. The Executive Branch

The Executive Branch likewise wrestled with the citizenship status of Black Americans, and its position evolved through time. Unlike the state court decisions described above in which the stakes of citizenship involved the very ability to exist within particular geographic areas, the Executive Branch opinions involved arguably lower stakes, such as the right to command vessels, obtain a passport, or receive diplomatic protection.

The Justice Department, for its part, initially adopted the view that free Black people were not U.S. citizens. In 1821, the Secretary of the Treasury, prompted by a query from the collector of customs in Norfolk, Virginia, requested the opinion of Attorney General William Wirt on whether free Black people should be considered U.S. citizens for purposes of a congressional statute regulating foreign and coastal trade that limited the command of vessels to U.S. citizens.[122] Wirt responded in the negative. First, he concluded that the term "citizen of the United States" as used by Congress in the statute at issue possessed the same meaning as the same term used in the Constitution.[123] He continued, "Looking to the constitution as the standard of meaning, it seems very manifest that no person is included in the description of citizen of the

[121] *Id.* at 342.

[122] 1 Op. Att'y Gen. 506 (1821).

[123] *Id.* at 507.

United States who has not the full rights of a citizen in the State of his residence."[124] He then proceeded to identify various rights denied to persons of color in Virginia such as voting, holding public office, testifying as witnesses, or marrying a white woman, finding them "amply sufficient to show that such persons could not have been intended to be embraced by the description 'citizens of the United States,' in the sense of the constitution and acts of Congress."[125] Noting that to rule otherwise would render "free negroes and mulattoes" eligible for high offices such as President, senator, or congressional representative, "and other reasons, which might easily be multiplied, I am of the opinion that the constitution, by the description 'citizens of the United States,' intended those only who enjoyed the full and equal privileges of white citizens in the State of their residence."[126]

It is worth noting that Wirt's opinion did not categorically preclude the recognition of citizenship in a person of color; his reasoning suggests that if a state extended all of the rights and privileges associated with citizenship without regard to race, even "negroes and mulattoes" could be considered citizens. Yet the inclusion of an anti-miscegenation law as evidence of a lack of citizenship among Black people in Virginia severely limited the extent to which citizenship would be recognized. After all, even abolitionist states like Massachusetts prohibited interracial marriages at the time.[127]

Similarly, the State Department initially viewed free Black people as outside the purview of citizenship. In 1849, Secretary of State John M. Clayton responded to a newspaper article reporting his refusal to grant a passport to a "colored man." He stated, "I am sure that there is no law requiring or authorizing me to grant a passport to a colored person, and applications for such a passport as was asked in this case have always been refused by every other Secretary of State."[128]

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[124] *Id.*

[125] *Id.* at 508.

[126] *Id.* at 507.

[127] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 413 (1857) (noting maintenance of anti-miscegenation law in Massachusetts).

[128] Letter from Mr. Clayton, Sec'y of State, to Mr. D.W.C. Clark of Burlington, Vt., (Aug. 8, 1849), *in* 3 MOORE, *supra* note 73, at 880.

But subsequently, the State Department adopted a different position. In 1855, Secretary of State William L. Marcy wrote an opinion regarding a free man of color from the United States who requested the assistance of the State Department after he had been imprisoned by the Mexican authorities.[129] During the prior year, the United States minister to Mexico forbade consular officials from extending diplomatic protection to persons of African descent born in the United States on the ground that they were not United States citizens.[130] Secretary Marcy rejected that position.[131] The Supreme Court opinion in *Dred Scott* had not yet been issued at that time, but the lower courts in that case had already decided that a person of African descent could not claim U.S. citizenship. Marcy cited those decisions as precluding the consul from certifying a person of African descent as a citizen.[132] Yet he nonetheless concluded that such individuals were entitled to diplomatic protection from consular officials and further suggested that a consul might certify that they were born in the United States and were free, and that the government would regard it as its duty to protect them.[133] Thus, even while the State Department felt legally precluded from recognizing citizenship for Black people by judicial opinions, it was willing to extend the privileges of citizenship over which it exercised control, *i.e.*, diplomatic protection, to such individuals.

In these ways, officials within the Executive Branch engaged in their own legal reasoning and constitutional analysis to determine the citizenship status of free Black people in the antebellum period.

3. Congress

While Congress would not legislate a guarantee of Black citizenship until after the Civil War, it squarely confronted the question of whether free Black people were entitled to U.S. citizenship in the debates surrounding the admission of Missouri into statehood. By March of

[129] Lucien Mateo v. Mexico (Nov. 7, 1871), *in* 3 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2462 (1898).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

1820, the broad contours of the Missouri Compromise had been reached, under which Missouri would be accepted into the Union as a slave state along with Maine as a free state, and slavery would be prohibited in the Upper Louisiana Territory.[134] But then a new issue threatened to unravel this compromise. In December of that year, members of Congress objected to a provision of the newly proposed Missouri Constitution, which provided "[t]hat it shall be the duty of the General Assembly of the State, as soon as may be, to pass such laws as may be necessary (among other things) to prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever."[135] These debates show, first, how different members of Congress independently engaged in constitutional interpretation to determine the citizenship status of Black Americans, and second, that at least some members viewed it as their institutional duty to decide this constitutional question.

Opponents of the provision contended that it violated the Privileges and Immunities Clause by denying Black citizens their right to enter the state. For example, Senator Burrill of Rhode Island contended that "[i]f a person was not a slave or a foreigner — but born in the United States, and a free man — going into Missouri, he has the same rights as if born in Missouri . . . . All distinctions among citizens which arise from color, rested . . . on State laws alone — there was nothing in the Constitution of the United States which recognized distinctions."[136] Defenders of the provision, by contrast, argued that free Black people did not qualify as citizens at all, and therefore fell outside the protections of the Privileges

[134] Act of Mar. 6, 1820, ch. 22, 3 Stat. 545 (Missouri Compromise).

[135] 37 ANNALS OF CONG. 47 (1820).

[136] *Id.* at 47-48. Similarly, Senator Otis of Massachusetts pointed out that under common law, "[a]ll persons born within the realm of England were citizens. All persons born in Massachusetts, of free parents, were citizens; and all persons in that State, not aliens or slaves . . . were of consequence free citizens . . . . In Massachusetts, many persons of color existed in this relation [as citizen] to the States, and he should believe, until the contrary was shown, that the same was true in every State in the nation." *Id.* at 93-94. He also criticized the view that citizenship was limited to those who were permitted to vote, noting, as others had before him, that voting and other such privileges did not define citizenship, but were frequently reserved to only a subset of citizens, excluding for example women and children. The exclusion of such rights did not in and of itself deny citizenship. *Id.*

and Immunities Clause. Senator Smith of South Carolina contended that the history of the nation and state

> furnish a mass of evidence . . . that free negroes and mulattoes have never been considered as a part of the body politic; neither by the General Government nor the several State governments. . . . Almost all the States in the Union have excluded them from voting in elections. There is no State that admits them into the militia. Very few States admit them to give evidence. No State has passed any law constituting them citizens.[137]

While that last statement was factually inaccurate, he correctly cited the laws in many different states, including in states that had abolished slavery, that imposed similar restrictions on the emigration of free Black people.[138] He questioned why Missouri should be denied this privilege freely exercised by her sister states.[139]

Members of Congress also diverged in their views of their institutional role. Some who sought to hasten Missouri's entry into the Union insisted it was the role of the judiciary alone to determine the constitutionality of the Missouri provision.[140] Opponents of the state provision, however, insisted that the Constitution imposed on Congress a duty to independently ensure that any newly admitted state conform to a republican form of government, and that this requirement precluded them from admitting Missouri as a state that proposed to deny the privileges and immunities of Black citizens.[141] Representative Sergeant delivered a two-hour speech expounding on the proper institutional role of Congress, stating: "The trust of guarding the Constitution of the United States from violation . . . is peculiarly and

[137] *Id.* at 57-58.

[138] *Id.* at 59-60.

[139] *Id.* at 62-72.

[140] *See, e.g.*, *id.* at 56 (statement of Senator Smith of South Carolina) ("It is evident, to a demonstration, that Congress is not the tribunal to decide this Constitutional question. It must be left to the judicial department, whose province alone is to judge the rights of individuals."); *id.* at 88 (statement of Senator Holmes of Maine); *id.* at 514 (statement of Representative Lowndes).

[141] *See, e.g.*, *id.* at 46 (statement of Senator Burrill of Rhode Island); *id.* at 103-06 (statement of Senator Morril of New Hampshire).

emphatically ours."[142] He pointed out that leaving such questions to the judiciary foisted upon an individual litigant the obligation to secure the Constitution's rights:

> You shift the responsibility from yourselves and leave it to individuals to fight the battle with the States. . . With respect to the proposition to turn over to the judiciary the decision of the question involved in this constitution, . . . he could not consent, on a question which was properly presented for his own decision, to say, let the question sleep till some humble individual, some poor citizen, shall come forward and claim a decision on it. He never would pass a duty by, by leaving it to some individual to do what Congress ought to have done.[143]

Finally, he noted the dangers of leaving such divisive questions to a judiciary that might not bear it, "throw[ing] on the Judiciary the performance of an odious duty . . . [which] exposes it most to that excitement which, of all departments of the Government, it was least capable of contending against."[144]

Ultimately, Congress dodged the question, reaching a compromise by accepting Missouri's admission into statehood on the "fundamental condition" that the contested provision not be construed to violate the Privileges and Immunities Clause of the Federal Constitution.[145] Nonetheless, the debates over the Missouri Constitution illustrate the extent to which members of Congress independently engaged with constitutional meaning to define the citizenship status of free Black people.

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[142] *Id.* at 525.

[143] *Id.* at 524-25.

[144] *Id.* at 529.

[145] *See* Proclamation No. 28 (Aug. 10, 1821), https://www.presidency.ucsb.edu/documents/proclamation-28-admitting-missouri-the-union#:~:text=Now%2C%20therefore%2C%20I%2C%20James,Congress%20aforesaid%2C%20whereupon%20the%20admission [https://perma.cc/AB4N-V4N9].

B. Dred Scott

The Supreme Court was finally directly confronted with the question of free Black people's citizenship in *Dred Scott v. Sandford* in 1857.[146] The stakes for the plaintiffs in that case could not have been higher: Dred and Harriet Scott sought to establish their freedom from slavery, as well as that of their daughters Eliza and Lizzie. The stakes for the country as a whole were also high, involving the power of Congress to prohibit slavery in federal territories and the validity of the Missouri Compromise. Dred Scott had been enslaved by an army surgeon named Emerson, who took Scott from Missouri to the military post Rock Island in Illinois in 1834.[147] Two years later in 1836, he brought Scott to the military post Fort Snelling in the Upper Louisiana Territory, where he purchased Harriet as a slave and permitted her to marry Scott.[148] Two years after that, in 1838, Emerson brought the family back to Missouri and purported to sell them as slaves to the defendant, Sandford.[149] Substantively, Scott argued he obtained his freedom when Emerson brought him to Illinois, a state in which slavery was outlawed, and, further, that the family's residence in the Upper Louisiana Territory also ensured their freedom, as Congress had, as part of the Missouri Compromise, prohibited slavery in that territory.[150]

The case arrived in federal court on diversity grounds, as a suit between citizens of different states.[151] Scott claimed he was a citizen of Missouri, and that the Defendant, Sandford, was a citizen of New York.[152] Chief Justice Taney, writing for the Court, framed the jurisdictional question as follows:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become

[146] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[147] *Id.* at 397.

[148] *Id.* at 397-98.

[149] *Id.* at 458.

[150] *See id.* at 397.

[151] *Id.* at 400.

[152] *Id.*

> entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution . . . . The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States.[153]

Taney reasoned that the terms "people of the United States" and "citizens" were synonymous and described:

> the 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.[154]

Answering the jurisdictional question in the negative, Taney reasoned that Black people, at the time of the Constitution's adoption

> were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[155]

In ruling on the jurisdictional issue, Taney categorically removed all Black people from eligibility for U.S. citizenship.

C. Political Institutions' Response to Dred Scott

The *Dred Scott* opinion generated immediate backlash, particularly among northerners and abolitionists. As Professor Michael Stokes Paulsen shows, President Abraham Lincoln owed much of his political

[153] *Id.* at 403.

[154] *Id.* at 404.

[155] *Id.* at 404-05.

rise to his explicit rejection of the Supreme Court's opinion in *Dred Scott*.[156] Ultimately, the political branches would reject the Supreme Court's exclusion of Black people from the purview of U.S. citizenship.

Importantly, even prior to Reconstruction, the Executive Branch independently engaged in constitutional interpretation to reject the Supreme Court's reasoning in *Dred Scott*. At the start of the Civil War — *before* the Civil Rights Act of 1866 and subsequent adoption of the Fourteenth Amendment in 1868 — the Department of Justice revisited its earlier position on the citizenship of free Black people. In 1862, Lincoln's Attorney General Edward Bates responded to another query posed by the Secretary of Treasury, again concerning the question of whether free Black people were deemed U.S. citizens for purposes of commanding vessels.[157] Bates provided a lengthy thirty-three-page response, reversing the Justice Department's prior position. Addressing the *Dred Scott* opinion, he stated: "In this argument I raise no question upon the legal validity of the judgment in Scott v. Sandford." Nonetheless, he opined that the decision's binding force was limited to the specific facts set forth in the plea of abatement; consistent with the President's position on the matter, Bates concluded that the Court's opinion "respecting any supposed legal disability resulting from the mere fact of color" was not legally binding.[158]

Freed from the tethers of Supreme Court precedent, Bates engaged in an independent assessment of the constitutional citizenship of free Black people. He began by acknowledging the persistence of confusion in the matter, "often . . . pained by the fruitless search in our law books and the records of our courts, for a clear and satisfactory definition of the phrase *citizen of the United States*."[159] He then argued that much of the confusion stemmed from confounding citizenship with the exercise of certain political powers, such as the right to hold public office and more frequently, the right of suffrage. But he pointed out, as others had before him, that such logic would preclude citizenship in the vast majority of the populace, including women, children, and others. He emphasized

[156] Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1229 (2008).

[157] 10 Op. Att'y Gen. 382 (1862).

[158] *Id.* at 412.

[159] *Id.* at 383.

that citizenship was neither necessary nor sufficient to vote. On this basis, he criticized the opinion of his predecessor, Attorney General Wirt, as well as state court opinions denying citizenship to free Black people on account of their inability to vote or exercise other privileges enjoyed by only a subset of citizens. Stripped of this confusion, he continued,

> In my opinion, the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other. . . . The phrase, 'a citizen of the United States,' without addition or qualification, means neither more nor less than a member of the nation . . . .
>
> We have natural-born citizens (Constitution, article 2, sec. 5,) not made by law or otherwise, but born. . . . As they became citizens in the natural way, by birth, so they remain citizens during their natural lives, unless, by their own voluntary act, they expatriate themselves . . . . And in this connection the Constitution says not one word, and furnishes not one hint, in relation to the color, or to the ancestral race, of the 'natural-born citizen.' Whatever may have been said, in the opinion of judges and lawyers, and in State statutes, about negroes, mulattoes, and persons of color, the Constitution is wholly silent upon that subject. The Constitution itself does not make the citizens; it is, in fact, made by them. It only intends and recognizes such of them as are natural — home-born; and provides for the naturalization of such of them as were alien — foreign-born; making the latter, as far as nature will allow, like the former.[160]

In defiance of the Supreme Court, the Executive Branch thus recognized the citizenship of free Black people.

Of course, after the Civil War, Congress quickly followed suit, enacting legislation in the Civil Rights Act of 1866 to explicitly confer

[160] *Id*. at 388-89.

citizenship to Black Americans.[161] That statute provided, "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[162] Moreover, recognizing the importance of citizenship and unwilling to leave its conferral to the vagaries of shifting politics, Congress then proposed a constitutional amendment in the form of the Citizenship Clause of the Fourteenth Amendment, adopted in 1868, which provided: "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."[163] In doing so, the amendment imposed a constitutional floor for defining citizenship, removing from the political branches the power to deny citizenship beyond that floor. Yet it was these very political branches — Congress in proposing the amendment and the States in ratifying it[164] — that finally secured citizenship for Black Americans.

In *Dred Scott*, the Supreme Court imposed a racial criterion for citizenship, categorically denying it to Black Americans. Before and after that decision, however, political actors outside the federal courts independently engaged with constitutional meaning to recognize the citizenship of free Black Americans. And, of course, after the Civil War, political actors explicitly rejected *Dred Scott* by enacting the Civil Rights Act of 1866 and then amending the Constitution to guarantee citizenship to all those born within the United States regardless of race. In these ways, political actors recognized and then guaranteed a more expansive definition of constitutional citizenship than that of the federal courts.

III. CHINESE AMERICANS DURING THE EXCLUSION ERA

The Fourteenth Amendment finally resolved the question of citizenship for Black Americans. But after Reconstruction, the right to citizenship for a different group came into contest. Chinese migrants had begun arriving in the United States in growing numbers in the

[161] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[162] *Id.* § 1, 14 Stat. at 27.

[163] U.S. CONST. amend. XIV, § 1.

[164] *See* U.S. CONST. art. V (setting forth procedures for constitutional amendment).

middle of the nineteenth century, primarily to work in the California gold mines and help lay the transcontinental railroad.[165] When those labor needs dried up and white people found themselves in a period of economic dislocation, xenophobic pressures gathered strength and led to the passage of the Chinese Exclusion Act of 1882, imposing a moratorium on the entry of Chinese laborers for ten years.[166] That law further explicitly rendered Chinese nationals ineligible for naturalization.[167] Subsequent enactments extended the moratorium[168] (it would not be repealed until 1943[169]) and restricted the entry of Chinese people even further, excluding them unless they could prove that they fell within one of the narrow exempted classes.[170] Moreover,

[165] For excellent histories of the Chinese Exclusion Era, see generally LEE, *supra* note 16; BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018); SALYER, *supra* note 16.

[166] Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58. This first Chinese Exclusion Act was preceded by the Page Act of 1875, ch. 141, 18 Stat. 477, prohibiting the entry of contract laborers and prostitutes, which was designed to restrict the entry of Chinese. The statute explicitly targeted the "immigration of any subject of China, Japan, or any Oriental country." For this reason, Leti Volpp argues that the Chinese Exclusion Era should be regarded as beginning in 1875, not 1882. Volpp, *supra* note 16, at 409.

[167] § 14, 22 Stat. at 61. Even before passage of the 1882 statute, Congress racially limited naturalization first to "free white person[s]," Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103, and then to "aliens of African nativity and to persons of African descent," Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256. The Ninth Circuit in *In re Ah Yup* held that a Chinese national "of the Mongolian race" was statutorily ineligible for naturalization under these provisions. Circuit Judge Sawyer noted that in the legislative history surrounding the extension of naturalization to Black people in 1870, Senator Sumner of Massachusetts proposed striking the word "white" from the eligibility requirements for naturalization altogether. According to Judge Sawyer, Sumner's proposed amendment was defeated "for the sole purpose of excluding the Chinese from the right of naturalization." In light of this legislative history, as well as the common usage of the term "white person," the judge easily concluded that a Chinese individual could not naturalize. *In re* Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878).

[168] Geary Act of 1892, ch. 60, 27 Stat. 25 (extending the moratorium for an additional ten years); Act of Apr. 29, 1902, ch. 641, 32 Stat. 176 (excluding Chinese persons permanently).

[169] Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600 (1943) (codified at 8 U.S.C. §§ 262-297, 299).

[170] Act of Sept. 13, 1888, ch. 1015, § 2, 25 Stat. 476, 476 (allowing entry of "Chinese officials, teachers, students, merchants, or travelers for pleasure or curiosity" but requiring such individuals to secure a certificate in order to enter).

exclusion applied to all persons of Chinese ethnicity, regardless of nationality.[171] But these restrictions could not bar the entry of U.S. citizens, regardless of their ethnicity.[172]

During a time of widespread animosity toward individuals of Chinese descent, political actors, particularly those officials within the Executive Branch charged with enforcing immigration laws, went so far as to deny the citizenship of such individuals in order to exclude them from our borders. Congress vested enforcement of the 1882 law in the customs officials at the various ports of entry into the United States who were within the jurisdiction of the Department of the Treasury.[173] In 1891, it established a Bureau of Immigration to be housed within Treasury and headed by a Commissioner-General of Immigration.[174] In 1903, Congress transferred all immigration-related duties, including enforcement of the Chinese Exclusion laws, to the newly created Department of Commerce and Labor.[175] Congress divided that agency to create the Department of Labor as a standalone cabinet office in 1913, placing responsibilities for immigration and naturalization within that

[171] *Id.* § 3, 25 Stat. at 476 (applying exclusion provisions to "all persons of the Chinese race, whether subjects of China or other foreign power").

[172] *See* United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898) ("It is conceded that, if he is a citizen of the United States, the acts of Congress known as the Chinese Exclusion Acts . . . do not and cannot apply to him.").

[173] Chinese Exclusion Act of 1882, ch. 126, §§ 4, 6, 8, 12, 22 Stat. 58, 59-61. Historian Hidetaka Hirota emphasizes the important role played by state officials in the period between 1882 and 1891, when the authority to regulate immigration formerly exercised by the several States was transferred to the federal government. Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of Federal Immigration Policy*, 99 J. AM. HIST. 1092, 1093 (2013). Prior to this transition, many States, particularly those on the Atlantic Seaboard, had already established bureaucratic structures for the enforcement of state laws at ports of entry. From 1882 until the creation of the federal Bureau of Immigration in 1891, state officials bore much of the responsibility for enforcing the new federal immigration laws. *Id.* at 1099 (noting with reference to federal law prohibiting entry of paupers that: "The federal government, unlike the already-established state agencies, had neither the administrative capacity nor the experience in passenger control to implement the act."). Moreover, even after 1891, the Department of the Treasury recruited many of these state officials into the new federal immigration bureaucracy. *Id.* at 1106.

[174] Immigration Act of 1891, ch. 551, § 7, 26 Stat. 1084, 1085.

[175] Act of Feb. 14, 1903, ch. 552, § 4, 32 Stat. 825, 826-27.

unit.[176] It eventually transferred these duties, by then unified under an Immigration and Naturalization Service, to the Department of Justice in 1940,[177] where they remained until the creation of the Department of Homeland Security in 2003.[178]

Like the free Black people discussed in the preceding Part, the individuals in this Part sought to have their citizenship recognized not so that they could vote, hold office, or for some other lofty purpose, but rather to secure the right to simply exist within the United States. This Part tells the story of ethnic Chinese individuals who asserted claims to citizenship to gain entry into and remain in the United States,[179] and the dominant role played by Executive Branch officials in deciding these claims. It begins by recounting how administrative interpretations of the Citizenship Clause diverged from those of the lower federal courts until the Supreme Court finally established the scope of the *jus soli* principle in its 1898 decision in *United States v. Wong Kim Ark*.[180] It next examines the Executive Branch's efforts to undermine the *Wong Kim Ark* holding, and the Supreme Court's refusal to intervene, ceding virtually exclusive authority to administrative officials to adjudicate the citizenship claims of Chinese Americans in *United States v. Ju Toy*.[181] Finally, it demonstrates the ways in which Executive Branch officials defied both Congress and the federal courts in denying the statutory citizenship of children born in China to U.S. citizen parents.

[176] Act of Mar. 4, 1913, ch. 141, § 3, 37 Stat. 736, 737.

[177] Reorganization Act of 1939, ch. 36, 53 Stat. 561 (vesting President with authority to reorganize agencies); Reorganization Plan No. V of 1940, *reprinted in* ch. 231, § 3, 54 Stat. 230, 231 (1940).

[178] Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441-78, 116 Stat. 2135, 2192-212.

[179] The premise that citizenship in a sovereign state confers a right to enter and remain in the territorial boundaries of that state (subject to exceptions such as banishment for crime), while universally recognized, has never been seriously contested or theorized. *See, e.g.*, Worthy v. United States, 328 F.2d 386, 394 (5th Cir. 1964) ("We think it is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil. It is not to be wondered that the occasions for declaring this principle have been few.").

[180] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[181] United States v. Ju Toy, 198 U.S. 253 (1905).

A. Interpreting the Citizenship Clause

The Fourteenth Amendment, ratified in 1868, affirmed, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[182] The plain text of that provision, consistent with the English common law principle on which it was founded, would seem to confer citizenship on all individuals born within the territorial United States, regardless of race, parentage, or residence, for example. Yet the Supreme Court would not definitively affirm the U.S. citizenship of ethnic Chinese born in the United States until *Wong Kim Ark* in 1898.[183] In the thirty years preceding that decision, the citizenship of this group remained contested. The Supreme Court itself invited such contest, casting doubt as early as 1874 on the proposition that citizenship was conferred at birth to all individuals born in the United States. During the period between 1868 and 1898, the Executive Branch repeatedly denied the citizenship of individuals born within the United States, even while the lower federal courts affirmed it.[184]

The Supreme Court first cast doubt on the meaning of the Citizenship Clause in its 1874 decision in *Minor v. Happersett*, which affirmed that women qualified as U.S. citizens but held that states nonetheless were free to deny them the right to vote.[185] In the course of that opinion, the Court rather disingenuously contended that "[]the Constitution does not, in words, say who shall be natural-born citizens,"[186] a proposition difficult to square with the passage of the Citizenship Clause of the Fourteenth Amendment only six years earlier. Yet the Court disavowed any clarity in the language of the Amendment and insisted it must look "elsewhere."[187] It then proceeded to characterize the English common law rule as limiting birthright citizenship to those born within the territory *to citizen parents*,[188] before stating, "Some authorities go further

[182] U.S. CONST. amend. XIV, § 1.

[183] *Wong Kim Ark*, 169 U.S. 649.

[184] *See infra* notes 198-207 and accompanying text.

[185] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

[186] *Id.* at 167.

[187] *Id.* at 170.

[188] *Id.* at 167-68 ("At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country

and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first."[189] Because it was undisputed that Virginia Minor was born within the United States *and* that her parents were both U.S. citizens, the Court felt it unnecessary to resolve the "doubts" as to the citizenship of children born within the territory to noncitizen parents. Yet the Court's characterization of birthright citizenship departed from the English common law on which it purported to rely, which extended citizenship to all those born within the crown's dominion, regardless of their parents' nationality.[190] Moreover, it did not identify any source for the "doubts" entertained with respect to the children born to noncitizens. Any such doubts, if founded, would have had the surprising effect of stripping citizenship from a significant segment of the white populace of the United States at the time, who had always been considered, by themselves as well as the government, as citizens based on their birth in the United States irrespective of their parents' status. Without any substantive support, the Court cast doubt on the meaning of the Citizenship Clause of the Fourteenth Amendment.

Notwithstanding the Supreme Court's initial ambivalence on the subject, the lower federal courts during this period uniformly recognized the citizenship of ethnic Chinese persons born in the United States to noncitizen parents. In 1884, the circuit court for the District of California decided *In re Look Tin Sing*, involving an individual who had been born in Mendocino, California.[191] Look left for a trip to China in 1879, but upon his return in 1884, the government attempted to exclude him pursuant to the Chinese Exclusion laws.[192] Justice Field, riding

of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners.").

[189] *Id.*

[190] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (6th ed. 1775) ("The children of aliens, born here in England, are, generally speaking, natural born subjects, and entitled to all the privileges of such. In which the constitution of France differs from ours; for there, by their *jus albinatus,* if a child be born of foreign parents it is an alien.").

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

[192] *Id.* at 905-06.

circuit, joined by Judges Sawyer and Sabin, ordered that Look be admitted into the United States.[193] The opinion began by noting that the language of the Citizenship Clause "would seem to be sufficiently broad to cover the case of the petitioner."[194] The qualifying clause "subject to the jurisdiction thereof," it explained, excepted only the children of diplomats, those born on another country's vessel while within American waters, and those who renounced their citizenship through expatriation.[195] The Court noted that even before the Citizenship Clause was adopted, "it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship."[196] Since passage of the Amendment, the undisputed fact of Look's birth in the United States incontrovertibly established his citizenship; as such, he could not be denied admission into the country.[197]

But the frequency with which the question was brought to federal courts' attention[198] suggests that the administrative officials who screened entering migrants in the first instance continued to interpret the Citizenship Clause as excluding Chinese Americans who were born in the United States. Indeed, the historical record reveals two cases in which the Executive Branch refused to recognize the citizenship of *white* individuals born in the United States to noncitizen parents. In the case of Ludwig Hausding, Secretary of State Frederick Frelinghuysen concluded that an individual born to Saxon parents during a temporary visit to the United States was not a U.S. citizen and thus ineligible for a passport.[199] In the case of Richard Greisser, who had been born in the

[193] *Id.* at 905.

[194] *Id.* at 906.

[195] *Id.* at 906-07.

[196] *Id.* at 909.

[197] *Id.* at 906, 909, 910.

[198] *See, e.g.*, Gee v. United States, 49 F. 146 (9th Cir. 1892) (affirming person of Chinese parentage born within the United States is a U.S. citizen); *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* Wy Shing, 36 F. 553 (C.C.N.D. Cal. 1888).

[199] Letter from Frederick Frelinghuysen, Sec'y of State, to John Kasson, U.S. Minister to Ger. (Jan. 15, 1885), *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 394, 394-96 (1885).

United States to a German father and Swiss mother and had moved to Germany with his family the following year, Secretary of State Thomas Bayer likewise concluded that the individual was not a U.S. citizen and thus ineligible for a passport.[200] Neither of these cases involved ethnic Chinese persons, and the individuals at issue in both cases presumably were free to enter the United States as noncitizen immigrants and eventually naturalize after a period of residence; they were simply denied a U.S. passport.

The legal position of ethnic Chinese people differed considerably. Most Chinese persons by this time were barred from entering the United States, and even those who were permitted to enter or were already present were statutorily excluded from naturalizing. In a case that did involve an individual of Chinese descent, the Executive Branch was decidedly skeptical of the claim to citizenship. In 1897, the Treasury Secretary requested the opinion of Attorney General Joseph McKenna regarding an individual named Chu Lock who sought entry into the United States as a citizen.[201] Interestingly, the Solicitor of the Treasury had on three prior occasions issued opinions concluding that "Chinese born here are citizens."[202] Nonetheless, the Treasury Secretary requested the opinion of the Attorney General in Chu Lock's case, presumably in lieu of requesting the opinion of his own Department's Solicitor. On a prior occasion, Chu Lock had been charged with unlawfully entering the United States, but the federal district court commissioner who adjudicated that case on habeas issued a certificate releasing Chu on the ground that he was a U.S. citizen and thus entitled to enter and remain in the United States.[203] Evidently, Chu subsequently traveled overseas with documentation of the commissioner's decision assuring his citizenship; upon his return to the United States, he

[200] Letter from Thomas Bayard, Sec'y of State, to Boyd Winchester, U.S. Minister to Switzer. (Nov. 28, 1885), *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 814-15 (1885).

[201] 21 Op. Att'y Gen. 581 (1897).

[202] ROBERT J. MAWHINNEY, DIGEST OF THE OPINIONS AND BRIEFS OF THE SOLICITOR OF THE TREASURY, JANUARY 1, 1880 TO DECEMBER 31, 1910, at 50 (1911) (citing opinions dated June 15, 1895, June 20, 1895, and Feb. 20, 1897).

[203] At the time, all habeas cases brought by ethnic Chinese challenging their exclusion in federal court were referred in the first instance to a district court commissioner. *See* SALYER, *supra* note 16, at 77.

presented the commissioner's certificate to the collector of customs at Burlington, Vermont.[204] The Treasury Secretary requested the Attorney General's opinion as to whether the commissioner's certificate should be deemed sufficient evidence of citizenship to allow Chu's return to the United States.[205] Answering in the negative, the Attorney General pointed out that the Chinese Exclusion Act of 1882 expressly prohibited any state or federal court from granting Chinese people citizenship.[206] Of course, that statute only related to *naturalization*, which the Attorney General obliquely acknowledged through his citation to *In re Ah Yup*, the case affirming that Chinese people are prohibited from naturalizing.[207] But the district court commissioner's opinion did not purport to *naturalize* Chu; rather, it merely adjudicated his citizenship, presumably conferred at birth.[208] The Attorney General stated, "[I]t is not yet finally decided whether or not children born in this country of subjects of the Chinese Emperor are to be recognized as citizens of the United States," noting that a case was pending before the Supreme Court on that issue.[209] But while purporting to leave that question open, he effectively denied the right to citizenship for ethnic Chinese people by excluding them from the country even if a federal district court commissioner had affirmatively adjudicated their citizenship status. This exchange reveals how administrative officials sought to evade the opinions of the federal courts and other parts of the Executive Branch in order to deny the citizenship of ethnic Chinese individuals born within the United States.

Eventually, the Supreme Court dispelled the shadow cast by *Happersett* in its 1898 decision in *United States v. Wong Kim Ark*, affirming that all individuals born within the United States, including ethnic Chinese individuals, are entitled to birthright citizenship.[210] Wong was born in 1873 in San Francisco to parents who were lawfully domiciled in the United States but who remained Chinese nationals as they were

[204] 21 Op. Att'y Gen. at 581.

[205] *Id.*

[206] *Id.* at 582.

[207] *Id.* (citing *In re* Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878)); *see supra* note 167.

[208] *Id.* at 581.

[209] *Id.* at 582.

[210] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

racially ineligible for naturalization.[211] He left the United States on two occasions, both for temporary visits to China.[212] On his return from the second trip, in 1895, the collector of customs denied him landing pursuant to the Chinese Exclusion laws.[213] Wong claimed a right to enter on the basis of his birthright citizenship. Justice Gray, writing for the majority, began with an exposition of the common law of England, under which "every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation."[214] He then noted that this "same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established."[215] In his view, the Fourteenth Amendment and the Civil Rights Act of 1866 "reaffirmed in the most explicit and comprehensive terms" this "fundamental principle of citizenship by birth within the dominion."[216] While acknowledging that Congress excluded Chinese individuals from eligibility for naturalization, he concluded that the "fourteenth amendment . . . has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship."[217] Justice Gray concluded:

> The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile

[211] *Id.* at 652. As Amanda Frost notes, the precise year of Wong's birth remains unclear, likely due to differences between the Gregorian calendar and the Chinese lunar calendar. Frost, *supra* note 16, at 40 n.6.

[212] *Wong Kim Ark*, 169 U.S. at 653.

[213] *Id.*

[214] *Id.* at 658.

[215] *Id.*

[216] *Id.* at 675.

[217] *Id.* at 703.

> occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.[218]

In this way, the Supreme Court finally affirmed the language of the Fourteenth Amendment conferring citizenship on all individuals born within the United States.[219]

B. Undermining the Wong Kim Ark Principle

Even after *Wong Kim Ark* established that all children born within the United States (with certain limited exceptions) were endowed with citizenship, the Executive Branch continued to deny citizenship to individuals of Chinese descent. In some instances, the Executive Branch's rejection of the *jus soli* principle was direct, as when it denied

[218] *Id.* at 693. As evident from the quoted language, *Wong Kim Ark* did not go so far as to extend birthright citizenship to Native Americans. It explicitly declined to overrule its decision in *Elk v. Wilkins*, 112 U.S. 94 (1884), which denied birthright citizenship to an individual born to a Native American tribe within the territorial United States but who had severed his ties to the tribe and moved into the non-Indian community. Birthright citizenship for Native Americans occurred piecemeal, first through treaties with individual tribes providing for mass naturalizations of their members and then eventually by congressional statute. *See* Indian Citizenship Act of 1924, Pub. L. No. 68-175, ch. 233, 43 Stat. 253. Bethany Berger argues that Congress's decision to deny birthright citizenship to Native Americans was in fact "compelled by the egalitarian ideals of the Fourteenth Amendment" by protecting tribal sovereignty. Berger, *supra* note 1, at 1188.

[219] The *Wong Kim Ark* opinion was not without dissent. Justice Fuller, joined by Justice Harlan, denied that the United States had adopted the common law of England, pointing out that the common law mandated *perpetual* allegiance, while the United States clearly allowed for the naturalization of other countries' citizens. *Wong Kim Ark*, 169 U.S. at 707-10 (Fuller, J., dissenting). Moreover, he cited the opinions of the Secretary of State in the cases of Hausding and Greisser, described above, as further evidence of the United States' rejection of the English common law rule. *Id.* at 719. Finally, he emphasized the fact that Wong's parents were not, and legally could never become, U.S. citizens: "Now I take it that the children of aliens, whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such other country." *Id.* at 725.

citizenship to individuals born within the United States if they were raised elsewhere. In other instances, it resisted judicial precedent indirectly, by imposing insuperable evidentiary burdens on ethnic Chinese individuals to establish their citizenship. The federal courts intervened in many of these early cases, prompting Executive Branch officials to become increasingly vocal in their condemnation of the judiciary, which they accused of undermining their statutory mandate. Somewhat surprisingly, the Supreme Court responded to the growing antagonism between federal courts and the Executive Branch by eliminating a meaningful role for the judiciary, ceding virtually exclusive authority to adjudicate the citizenship claims of Chinese Americans seeking to enter the United States to administrative officials.[220]

1. Individuals Born Within the United States but Raised Elsewhere

In the years following the *Wong Kim Ark* decision, Executive Branch officials rejected the Supreme Court's articulation of constitutional birthright citizenship by denying citizenship to individuals born within the United States if they were raised abroad. Initially, the Treasury Department recognized the citizenship of such individuals, with the Solicitor of the Treasury issuing a decision two months after *Wong Kim Ark* to the effect that "[b]oys born here, brought up in China, [are] not expatriated."[221] Less than a year later, however, the Solicitor reversed course, concluding that "[c]hildren born here of aliens and taken abroad by parents who are not permitted to return have the same status as father until majority at least, and should be sent back."[222] The Commissioner-General of Immigration affirmed that position in a case involving the children of one Anzelmo Giovanna, who came to the United States with her husband around 1889, established domicile, and had two children here, Emma and Salvatore.[223] In December of 1898, the family returned to Italy for a temporary visit, but upon their return to the United States three months later, they were excluded as noncitizens

[220] *See* United States v. Ju Toy, 198 U.S. 253, 262 (1905).

[221] MAWHINNEY, *supra* note 202, at 49 (citing opinion dated May 24, 1898).

[222] *Id.* at 59 (citing opinion dated Feb. 23, 1899).

[223] T.D. 20747, 1 Treas. Dec. 416 (Feb. 29, 1899); *In re* Giovanna, 93 F. 659, 659 (S.D.N.Y. 1899).

likely to become a public charge.[224] On February 28, 1899, the Commissioner-General of Immigration, T.V. Powderly, citing the advice of the Solicitor of the Treasury, sustained the family's exclusion, including that of the U.S.-born children, stating that "a child born in this country of a foreign father and taken abroad by his father acquires said parent's domicile and nationality."[225]

The Giovannas appealed to the Federal District Court for the Southern District of New York, which reversed the exclusion of the children on the ground that under *Wong Kim Ark*, they were "citizens of the United States and not aliens" and thus could not be excluded.[226] Yet the Treasury Department did not withdraw or amend its original position, prompting the German embassy to draw the State Department's attention to the matter two years later.[227] The Department of State, apparently after inquiring with the Treasury Department, responded to the German embassy by noting that the federal courts had overruled the Treasury decision and reporting that the Secretary of the Treasury, by letter dated May 20, 1901, "admitted [the district court opinion] to be binding and conclusive upon [the] Department and is now following it."[228] The records suggest, however, that the Treasury Department's acceptance of the federal court's decision was limited. Likely in response to the State Department's inquiry, the Solicitor of the Treasury issued an opinion affirming that "[w]here parents abandon domicile in United States, children liable to exclusion until majority; *abandonment of domicile erroneously assumed in case of February 23, 1899*."[229] Evidently, the Treasury Department was willing to accept the district court's decision only to the extent that the Giovanna parents had, as a factual matter, not actually abandoned their domicile in the United States; for other factual scenarios, it held fast to

[224] *In re Giovanna*, 93 F. at 659-60.

[225] T.D. 20747, 1 Treas. Dec. 416.

[226] *In re* Giovanna, 93 F. at 660. The judge noted, however, that he lacked jurisdiction to review the exclusion of the children's parents, producing the "unfortunate result of separating the mother from her children of tender years." *Id.*

[227] 3 MOORE, *supra* note 73, at 280-81.

[228] PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 175 (1901).

[229] MAWHINNEY, *supra* note 202, at 59 (citing opinion dated May 18, 1901) (emphasis added).

its earlier position concluding that individuals born in the United States but brought abroad as children were, as a general matter, expatriated and ineligible to return to the United States as native-born citizens.

Executive Branch officials applied that policy to exclude individuals of Chinese descent who were born in the United States if they were raised in China. The Commissioner-General of Immigration, F.P. Sargent, acknowledged in 1904 that the lower federal courts recognized that such individuals were U.S. citizens and could not be excluded, stating,

> The inferior courts have, from time to time, rendered decisions construing the *Wong Kim Ark* ruling so broadly as to bring within its scope all Chinese or other persons who can show that they probably were born in the United States, regardless of the subsequent residence of such persons. It is to be regretted that appeals were not taken, on behalf of the Government.[230]

Yet it is unclear whether he felt bound by those decisions, as only three years later he cited:

> . . . an Executive decision to the effect that a Chinese person who claimed to have been born in this country, to have been taken to China in early infancy by his parents, and to have remained in China until after reaching his majority had in effect expatriated himself or been expatriated by his parents, and was not, therefore, entitled to be regarded as an American citizen under the terms of the decision of the Supreme Court in the *Wong Kin* [sic] *Ark* case.[231]

Sargent lauded that Executive Branch decision as creating an effective deterrent against "raw native" cases, which he described as those involving "a Chinaman who, without possessing any evidence of residence in this country, seeks to enter . . . on the claim that . . . he was born in the United States . . . and that in early infancy he was carried or

[230] ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION 146 (1904) [hereinafter 1904 ANNUAL REPORT].

[231] ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION 108 (1907) [hereinafter 1907 ANNUAL REPORT].

sent by his parents to China."[232] He warned, however, that recently enacted legislation by Congress providing for expatriation only upon certain affirmative acts would be used by ethnic Chinese persons to defeat this policy.

In these ways, the Executive Branch rejected the birthright citizenship principle announced by the Supreme Court in *Wong Kim Ark* and affirmed by the lower federal courts to deny citizenship to Chinese Americans who were born in the United States but raised abroad.

2. Evidentiary Burdens

In addition to rejecting the *jus soli* principle outright for individuals born in the United States but raised elsewhere, Executive Branch officials further undermined *Wong Kim Ark* by imposing insuperable evidentiary burdens on ethnic Chinese individuals claiming birthright citizenship. As historian Lucy Salyer documents, administrative officials at each of the ports of entry wielded enormous discretion in determining whom to admit, and whom to deny entry into the United States.[233] But they followed instructions from the highest levels of the Department, either from the Commissioner-General of Immigration or even the Secretary of Treasury (and later Secretary of Commerce and Labor and Secretary of Labor) themselves, which made clear the skepticism with which these officials should regard ethnic Chinese individuals claiming U.S. citizenship. For example, in 1899, Acting Secretary of the Treasury Spaulding, advised, "Great pains should be taken" to ensure that citizenship claims made by Chinese Americans are "well founded . . . . In no case should the applicant be admitted on the ground that he is of American birth unless you are fully satisfied that the evidence presented to you is reliable and justifies such admission."[234]

Indeed, the Treasury Department went so far as to hold that even a U.S. passport was insufficient evidence to allow entry.[235] Affirming the exclusion of one Sam Kee who had arrived at the port of entry at Burlington, Vermont, bearing a U.S. passport, Spaulding relied on the

[232] *Id.* at 106.

[233] SALYER, *supra* note 16, at 65.

[234] T.D. 20970, 1 Treas. Dec. 726 (Apr. 8, 1899).

[235] T.D. 21212, 1 Treas. Dec. 1071 (Jun. 2, 1899).

fact that Chinese individuals were ineligible for *naturalization* to conclude "that a passport issued by the Department of State is not evidence that the person to whom it was issued was a citizen of the United States."[236] Similarly, although the Department after *Wong Kim Ark* amended its policy relating to the acceptability of certificates issued by district court commissioners adjudicating citizenship as evidence for admission (the issue raised in Chu Lock's case described above),[237] the Assistant Secretary of the Treasury instructed customs officers to be wary of such certificates, stating, "As the said certificates are unprovided with photographs or other description whereby the holder might be identified, you are directed in all such cases to require that the applicant prove conclusively that the document is genuine and that he or she is in fact the person therein referred to."[238]

But perhaps the most consequential obstacle imposed by Executive Branch officials on ethnic Chinese individuals claiming birthright citizenship was their rejection of Chinese persons' testimony to establish birth within the United States. Most ethnic Chinese people born within the United States lacked formal documentation of their birth. As Professor Amanda Frost notes, in San Francisco, for example, "[H]ospitals would not admit a person of Chinese ethnicity, white doctors were unwilling to visit a Chinese home, and there were not many Chinese midwives or even Chinese women nearby" to assist a Chinese woman in labor.[239] If these native-born citizens left the United States, they faced the daunting task of persuading skeptical customs officials of the validity of their claims.

As a formal matter, the Solicitor of the Treasury declined to impose special evidentiary burdens on Chinese Americans claiming citizenship, issuing an opinion in 1898 that "the uncontradicted testimony of Chinese witnesses as to birth of laborer in the United States should not be rejected."[240] But according to historian Erika Lee, the Treasury

[236] *Id.*

[237] *See supra* note 201 and accompanying text.

[238] T.D. 22572, 3 Treas. Dec. 878 (Oct. 30, 1900).

[239] Frost, *supra* note 16, at 39 (explaining absence of formal documentation for Wong Kim Ark's birth in San Francisco).

[240] U.S. TREAS. DEP'T, DIGEST OF "CHINESE EXCLUSION" LAWS AND DECISIONS 42 (Chapman W. Maupin ed., 1899) (citing Opinion of the Solicitor of the Treasury dated

Department in 1892 began requiring the testimony of at least two white witnesses to establish an ethnic Chinese individual's birth in the United States.[241] Documents submitted to the Senate by the Department of Justice in 1896 affirm the existence of that policy, referencing a Treasury Department circular instructing customs officers to exclude individuals of Chinese descent claiming birthright citizenship "unless they make proof of their citizenship by . . . evidence other than Chinese."[242] The Executive Branch's rejection of Chinese testimony to establish citizenship even reached the President himself, who issued an Executive Order in 1903 setting forth general requirements relating to the issuance of passports which provided, "A person of the Chinese race, alleging birth in the United States, must accompany his application with supporting affidavits from at least two credible witnesses, preferably not of the Chinese race, having personal knowledge of the applicant's birth in the United States."[243] It is unclear when the Executive Branch rescinded its policy of requiring white witness testimony to establish birthright citizenship, although by 1907, the Commissioner-General of Immigration conceded, "There is no statutory rule of evidence . . . under which, in determining the claims of alleged natives, the Government can require the testimony of persons other than Chinese."[244] In these ways, Executive Branch officials imposed evidentiary burdens that effectively denied the citizenship of ethnic Chinese people born in the United States.

These events demonstrate the impact of administrative officials' policy "expertise" on their interpretations of the Constitution. On the one hand, scholars of administrative constitutionalism suggest that

May 24, 1898); *see also* MAWHINNEY, *supra* note 202, at 49 (citing opinion dated May 24, 1898 for proposition that "Chinese witnesses should not be discredited on general principle").

[241] LEE, *supra* note 16, at 106; *see also* SALYER, *supra* note 16, at 65 (noting that the Customs Collector at San Francisco John Wise required the evidence of two white witnesses to establish nativity). The Geary Act of 1892 required at least "one credible white witness" to testify as to a Chinese laborer's prior lawful entry, but Congress did not impose any such requirement on U.S. citizens. Geary Act of 1892, ch. 60, 27 Stat. 25.

[242] S. DOC. NO. 55-120, at 9 (1897).

[243] Exec. Order No. 235, at 4 (1903).

[244] 1907 ANNUAL REPORT, *supra* note 231, at 107 (urging Congress to enact legislation imposing such a requirement).

agencies' regulatory expertise may *enhance* their ability to ensure that statutory goals promote, or at least conform to, the Constitution's normative commitments.[245] On the other hand, they acknowledge the risk that such expertise, defined by a singular focus on regulatory goals, may lead officials to run roughshod over constitutional impediments to achieving those goals.[246] The suspicion with which customs officials evaluated the citizenship claims of Chinese Americans underscores the risk rather than the benefit. Customs officials at the various ports of entry, especially those in San Francisco, where the vast majority of ethnic Chinese people entered the United States, had developed expertise in investigating the citizenship claims of individuals. To be sure, some of these investigations likely revealed fabricated claims. But these false claims led agency officials to categorically deny the veracity of virtually all citizenship claims by ethnic Chinese individuals. A report by the Chinese Bureau at the Port of San Francisco exemplifies this attitude, complaining about "so-called natives" by stating, "All who have had any experience with the way many Chinese of this class testify know how unreliable their testimony is."[247] The events recounted above demonstrate that the zeal with which immigration officials pursued their statutory mission of excluding Chinese people occluded their

[245] *See* Lee, *From the History to the Theory*, *supra* note 38, at 121 (describing agencies' promulgation of equal employment rules and noting, "[w]hat they brought of value was their in-the-weeds understanding of how to administer equal protection with minimal interference to, or even salubrious congruence with, the statutory and regulatory ecosystem they oversaw"); Metzger, *supra* note 38, at 1922-23 (suggesting that agency officials' "background of expertise in the statutory schemes they implement and the areas they regulate" render them "likely to be better at integrating constitutional concerns with the least disruption to these schemes and regulatory priorities").

[246] Metzger, *supra* note 38, at 1925 (noting risk that agencies' "deep engagement and commitment to particular statutory regimes — sometimes called administrative 'tunnel vision' — will make them reluctant to give much weight to constitutional concerns that could seriously impede their regulatory efforts"); *see also id.* at 1921 ("[G]iven that individuals are often drawn to working at federal agencies because of a shared commitment to their underlying missions, agency officials might be thought particularly likely to privilege programmatic needs over constitutional concerns.").

[247] ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION 97-98 (1903) [hereinafter 1903 ANNUAL REPORT]; *see also* ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION 76 (1902) [hereinafter 1902 ANNUAL REPORT] (criticizing district court commissioners for recognizing citizenship claims on the basis of testimony by Chinese witnesses).

willingness to recognize the constitutional citizenship of ethnic Chinese persons born in the United States.

3. The Judiciary Cedes Authority to the Executive Branch

Initially, the federal courts were willing to intervene to ensure that U.S. citizens were not arbitrarily denied entry into the United States.[248] Executive Branch officials grew increasingly vocal in their denunciations of such interventions, however, characterizing the federal courts as undermining their statutory mission of excluding Chinese individuals from the United States. Somewhat surprisingly, the Supreme Court responded to these accusations by ceding virtually exclusive control over the adjudication of citizenship claims to the Executive Branch.

Prior to 1905, the lower federal courts frequently reversed the Executive Branch's decisions to exclude ethnic Chinese individuals claiming citizenship. Unlike immigration officials, the federal courts generally did not require that an ethnic Chinese individual produce white-witness testimony in order to establish birth in the United States.[249] In *In re Yung Sing Hee*, for example, the federal court reversed the exclusion of a woman whose only evidence of citizenship came from Chinese witnesses.[250] Recounting the extensive evidence offered by the woman's father, corroborated by the testimony of two Chinese merchants who knew the family well over the course of many years, and noting that "a rigid cross-examination failed to impair in the least the probability of their statements, or to cast a shadow of suspicion on their honesty," the judge concluded, "The testimony on which these facts are found [regarding the birth of the petitioner], although given by Chinese persons, is consistent, reasonable, and convincing. It is probably much

[248] *See* United States v. Jung Ah Lung, 124 U.S. 621 (1888) (affirming that individuals denied admission by customs collectors maintained a right to file habeas corpus petitions allowing federal courts to exercise review over those exclusions decisions).

[249] *See* S. DOC. 55-120, at 9-11 (1897) (describing difficulty in prosecuting exclusion cases due to administrative officials' rejection of testimony of Chinese witnesses while federal courts accepted such testimony); *see also* LEE, *supra* note 16, at 77-81 (noting that Commissioner E.H. Heacock for the federal district court for the Northern District of California accepted the testimony of Chinese witnesses to establish citizenship).

[250] *In re* Yung Sing Hee, 36 F. 437, 438 (C.C.D. Or. 1888).

more entitled to credit than that on which hundreds of Europeans are every day admitted to become citizens of the United States."[251]

To be sure, the federal courts during this period did not provide a failsafe for Chinese Americans, often exhibiting the same skepticism toward Chinese testimony as customs officials. Such skepticism was apparent in *Quock Ting v. United States,*[252] in which the Supreme Court sustained the exclusion of a sixteen-year-old Chinese boy. The boy and his father testified that the boy had been born in San Francisco but returned to China with his mother when he was ten years old. Though this testimony was uncontroverted, the Court nonetheless held it need not be credited.[253] The Court emphasized the boy's inability to speak English as evidence that he had not in fact been born and lived in the United States:

> The testimony given by himself amounted to very little; indeed, it was of no force or weight whatever. . . . A boy of any intelligence, arriving at that age, would remember, even after the lapse of six years, some words of the language of the country, some names or streets or places, or some circumstances that would satisfy one that he had been in the city before.[254]

The Court did not appear to consider the plausibility that a boy raised in the segregated Chinese enclave in San Francisco would not learn English, or the possibility that such a language barrier prevented the boy from providing the sort of substantive testimony it found wanting in questioning that appeared to occur entirely in English.[255]

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[251] *Id.*

[252] 140 U.S. 417 (1891).

[253] *Id.* at 420 ("Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony.").

[254] *Id.* at 419-20.

[255] Similarly, in *Gee v. United States*, 49 F. 146 (9th Cir. 1892), the Ninth Circuit affirmed the exclusion of Gee Joong Ding absent any evidence controverting his claim that he was born in San Francisco. The court stated, "The evidence in the case shows that . . . [Gee's] appearance and language prove[] that he is in all respects, save, possibly, in the one matter of his legal citizenship, a Chinaman, and not an American." *Id.* at 148.

Notwithstanding such skepticism, for a brief period, federal courts exercised a meaningful check on the sometimes-capricious decisions of Executive Branch officials. As Salyer recounts, "Until the late 1890s, the [federal district court] commissioner overturned the collector's decision to deny entry in more than 80 percent of the cases. The rate of reversal reached a low of 46 percent in 1899 but otherwise averaged well over 50 percent until 1905."[256]

During this period, Executive Branch officials grew increasingly hostile toward federal court interventions in this area. The Commissioner-General of Immigration in particular repeatedly decried the judiciary's recognition of the citizenship of Chinese Americans. In his 1902 Annual Report, referring to decisions by federal district court commissioners reversing the deportation of ethnic Chinese individuals on the ground that they were U.S. citizens, he stated: "No comment can emphasize the danger of such a method of conferring citizenship upon persons of a race which it is contrary to the expressed policy of this country to admit within its boundaries even as aliens."[257] In 1903 he complained of "judicial officers who, either through ignorance of the law, indifference to its enforcement, or openly-expressed dissent from its policy," discharge ethnic Chinese persons from administrative detention.[258] By adjudicating these individuals as native-born U.S. citizens, the federal courts were, in his view, effectively "doing that thing which is expressly forbidden by law and treaty, to wit, naturalizing Chinamen."[259] In 1904, he decried judicial grants of writs of habeas corpus on due process grounds as follows:

> Thus occurs another instance in which an alien . . . successfully invokes the judicial authority of the United States to prevent the execution of a mandate made in strict conformity with law by

As for the evidence Gee offered, the court concluded: "Under the circumstances stated by him, but little, if any, credence should be given to his own evidence as to the place of his birth, and he is corroborated on this vital point only by the testimony of other Chinese persons, who confessedly have seen him but a few times, and can give only hearsay evidence." *Id.*

[256] SALYER, *supra* note 16, at 81.

[257] 1902 ANNUAL REPORT, *supra* note 247, at 77.

[258] 1903 ANNUAL REPORT, *supra* note 247, at 96.

[259] *Id.*

> another branch of the Government . . . to prevent him from forcing an entrance to a country which, as the cases stands when presented to the courts, has excluded him.[260]

The Executive Branch's growing frustration with the lower federal courts' adjudication of birthright citizenship claims found a receptive audience in the Supreme Court's 1905 decision in *United States v. Ju Toy*.[261] That case again involved an individual of Chinese descent who had been denied entry into the United States notwithstanding his claim of birthright citizenship.[262] After the customs collector in San Francisco denied him landing, Ju appealed to the Secretary of Commerce and Labor, who affirmed the denial.[263] Ju then filed a habeas writ in federal court, and the district court determined that Ju Toy was in fact a U.S. citizen and ordered him released.[264] The government appealed, and the circuit court certified a series of questions to the Supreme Court. On the central question of whether the decisions of Executive Branch officials adjudicating an individual's citizenship could constitutionally be treated as final pursuant to a statute enacted by Congress,[265] the Court answered in the affirmative. As a corollary, it held that the district court erred in adjudicating the question of citizenship on habeas, concluding that the court was required to sustain the decision of the Executive Branch.[266] Thus, after 1905, the federal courts no longer provided a venue for adjudicating the citizenship claims of individuals denied entry into the United States. Agency officials exclusively determined such claims.[267]

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[260] 1904 ANNUAL REPORT, *supra* note 230, at 121.

[261] United States v. Ju Toy, 198 U.S. 253 (1905).

[262] *Id.* at 258-59.

[263] *Id.*

[264] *Id.* at 259.

[265] Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390.

[266] *Ju Toy*, 198 U.S. 253 at 263-64.

[267] The Court subsequently limited *Ju Toy*. First, in *Chin Yow v. United States*, 208 U.S. 8 (1908), it held that an individual excluded at the border may be entitled to judicial review over his citizenship claim if "petitioner arbitrarily was denied [] a hearing" by customs officials. Next, in *Ng Fung Ho v. White*, 259 U.S. 276 (1922), the Court held that an individual arrested and charged with deportation while *within* the U.S. is entitled to a judicial hearing to adjudicate his claim of U.S. citizenship, even though an individual denied admission at the border is not entitled to such judicial review.

C. Jus Sanguinis: Defying Congress and the Federal Courts

Executive Branch officials were particularly aggressive in excluding Chinese Americans claiming U.S. citizenship pursuant to the *jus sanguinis* principle. As described above, Congress first codified that principle in 1790, declaring that the children of United States citizens who are born abroad "shall be considered as natural born citizens."[268] While this ground of citizenship is conferred only through statute rather than through the Constitution, administrative officials are no less bound by it. Yet the Executive Branch explicitly defied not only Congress, which legislatively conferred citizenship to this group, but also the federal courts, imposing a policy of denying entry to Chinese Americans claiming citizenship through parentage.

At first, the Department of Treasury recognized that the *jus sanguinis* principle applied to ethnic Chinese persons. The Solicitor of the Treasury in 1898 issued an opinion to the effect that "Chinese children born in China, of parents (Chinese) born here, are citizens of the United States."[269] Shortly thereafter, however, the Department began expressing concerns about the conferral of citizenship on such individuals. The Commissioner-General for Immigration in 1903 warned "there is practically no limit to the number that might be imported on that ground."[270] In 1907, he stated: "[I]t must be remembered that the moment a person of the Chinese race is invested with American citizenship he acquires all the privileges that the term implies, among others the right to bring his wife and children to this

Interestingly, the agency remained unsatisfied. In 1917, the Commissioner-General of Immigration reported: "[o]ne of the greatest impediments to the enforcement of the exclusion laws has been the necessity of resorting to judicial process to bring about the deportation of Chinese unlawfully here. These immigration questions are fundamentally of an administrative nature, and judicial machinery does not lend itself to their solution." ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION, at xxi (1917).

[268] Naturalization Act of 1790, ch. 3, 1 Stat. 103 (establishing a uniform rule of naturalization). Congress later narrowed the *jus sanguinis* principle to restrict the ability to convey citizenship to a child born to U.S. citizen fathers but not to U.S. citizen mothers. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604.

[269] MAWHINNEY, *supra* note 202, at 50 (citing opinion dated Aug. 3, 1898).

[270] 1903 ANNUAL REPORT, *supra* note 247, at 98.

country — *and therein lies the chief danger*."[271] His Annual Report for 1909 identified the growing numbers of ethnic Chinese people being admitted as "foreign-born children of natives" as "a serious evil" and urged Congress to enact legislation "changing the rule by which . . . the claim of citizenship shall be determined."[272]

Congress did not respond, leaving in place the conferral of citizenship on the children born abroad to U.S. citizen parents. In 1915, the Department of Commerce and Labor, to which enforcement of the Chinese Exclusion laws had been transferred, took matters into its own hands, promulgating a new Rule 9(f) in its Rules Governing the Admission of Chinese, providing that only the wives and dependent children of ethnic Chinese individuals born within the United States were permitted entry.[273] Male children aged fifteen to seventeen were subject to a rebuttable presumption that they were dependent upon the native-born U.S. citizen father; those aged eighteen to twenty were required to prove affirmatively that they were dependent; and those twenty-one years of age or older were categorically precluded from entering as the child of a U.S. citizen.[274] Yet the congressional statute conferring *jus sanguinis* citizenship made no such distinctions; an individual born to a U.S. citizen father was deemed a citizen regardless of the individual's sex or age. In this way, the Department defied Congress by denying statutory citizenship rights to the adult sons of ethnic Chinese individuals born in the United States.

Moreover, the Department openly defied federal courts on the matter. In a series of cases decided between December 1915 and February 1916,

[271] 1907 ANNUAL REPORT, *supra* note 231, at 107 (emphasis added).

[272] ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION 125-26 (1909).

[273] U.S. DEP'T OF LAB., BUREAU OF IMMIGR., TREATY, LAWS, AND RULES GOVERNING ADMISSION OF CHINESE r. 9(f), at 30 (1915). Under this rule, the wives and female children of U.S. citizens were admissible, as were male children aged fourteen or younger.

[274] *Id.* r. 9(d), at 29. It is worth noting that the federal courts were not uniformly hostile to immigration officials' position that the ethnic Chinese children of U.S. citizens should be denied citizenship. *See* United States v. Hom Young, 198 F. 577, 579 (S.D.N.Y. 1912) (characterizing a claim of U.S. citizenship as "extreme" in the case of an individual born to a father who was born in the United States but "left this country when an infant four years old, went to China, the native country of his parents, lived there 17 years, married there, and then in 1900 left his wife . . . and his infant son in China," and where the son seeking entry was born in China and remained there until he turned 15).

Judge Maurice T. Dooling, appointed to the Northern District of California in 1913,[275] repeatedly intervened in cases where the Executive Branch denied admission to the adult sons of native-born citizens.[276] In the first case, *Ex parte Ng Doo Wong*,[277] customs officials in San Francisco barred the entry of an individual on the ground that "[a]pplicant is a man 27 years of age, and has a wife and three children in China. He is to all intents and purposes a Chinese citizen." Judge Dooling interpreted this reasoning as meaning that "no matter what the proof, a foreign-born son of a Chinese native will not be admitted to this country, notwithstanding his citizenship, unless he applies for admission during his minority or shortly thereafter."[278] He pointed out that such reasoning conflicted with the congressional statute extending U.S. citizenship to any individual born outside of the United States whose father was a U.S. citizen.[279] While noting the *Ju Toy* precedent precluding judicial review over the citizenship determinations of Executive Branch officials, Judge Dooling concluded that such finality does not attach "when based upon an erroneous construction of the law."[280] Consequently, Judge Dooling granted the writ of habeas corpus.[281]

Weeks later, Judge Dooling issued an opinion in *Ex parte Wong Foo*.[282] In that case, the Assistant Secretary denied admission to an ethnic

[275] As Lucy Salyer notes, Judge Dooling was a faithful adherent to norms of procedural justice who came under heavy criticism from the Bureau of Immigration. SALYER, *supra* note 16, at 191 (quoting chief law officer for the Bureau accusing Dooling of "seeking to run our business").

[276] Although *Ju Toy* generally precluded judicial review over the Executive Branch's citizenship determinations, these cases presumably fell within the exception recognized in *Chin Yow*, allowing judicial review in cases involving manifest unfairness. *See supra* note 267.

[277] *Ex parte* Ng Doo Wong, 230 F. 751 (N.D. Cal. 1915).

[278] *Id.* at 752.

[279] The statute in operation at the time provided, "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." *Id.* (citing Rev. Stat. § 1993 (1875)).

[280] *Ng Doo Wong*, 230 F. at 752.

[281] *Id.*

[282] *Ex parte* Wong Foo, 230 F. 534 (N.D. Cal. 1916).

Chinese individual claiming to be the son of a native-born U.S. citizen.[283] Expressing some doubt regarding the relationship between the individual and purported father, the Assistant Secretary went on to reason,

> inasmuch as the father's sense of allegiance is clearly to the country of his ancestors, and not to this country, which is true also of the applicant, who has lived all his life (28 years) in that country, the doubt should be resolved against naturalizing the applicant under the statute.[284]

Judge Dooling responded by noting that "[i]f the applicant is in reality the son of an American citizen, even though it [sic] be a citizen of Chinese descent, he also is such citizen, and entitled to enter this country as such."[285] He went on to express concern that the Executive Branch's inquiry into this question rested on its assessment of the father's allegiance to the United States, stating, "I should be loth to hold that the rights of a citizen of this country, even though such citizen were born in China, may be dependent upon the notion of some officer that the father of such citizen had not manifested a proper sense of allegiance."[286] Judge Dooling concluded he need not pass on that question, however, as the record did not show any attempt by the agency to actually inquire into the allegiance of the father:

> If the father's sense of allegiance is a proper matter to be weighed against the applicant, which is questioned here, but not decided, such sense of allegiance must be proved as any other fact. It was evidently the controlling factor in the adverse decision of the Assistant Secretary, and the hearing accorded to the applicant was to that extent unfair.[287]

The following month, in February of 1916, Judge Dooling decided *Ex parte Lee Dung Moo*.[288] In that case, the Acting Commissioner General of

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[283] *Id.*

[284] *Id.* at 535.

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Ex parte* Lee Dung Moo, 230 F. 746 (N.D. Cal. 1916).

Immigration denied admission to the individual, concluding that "the applicant's right to admission is at best only technical. He is . . . a Chinese in every respect save his claim to American citizenship by virtue of the alleged birth in this country of his alleged father, who, as pointed out . . . has not become Americanized to any apparent degree."[289] The Assistant Secretary of Labor affirmed, concluding:

> To admit this applicant is to recognize naturalization of a man of 25, with a family of his own, who has never lived in the United States, who does not speak English, nor understand it, and who has in no way indicated any sense of American allegiance, but whose sense of allegiance has been and is distinctly alien. It cannot be that Congress intended to confer citizenship under these circumstances, especially of races whom they have excluded from naturalization.[290]

On habeas, Judge Dooling concluded that the agency adjudicated the case with "an unfriendly eye" and "with a spirit hostile to the law" which conferred citizenship on the foreign-born children of native-born U.S. citizens.[291] He held that such a bias rendered the "hearing given him . . . anything but fair," and again granted the habeas writ, for further investigation as to the relationship between the applicant and putative father.[292]

Finally, the next day, Judge Dooling issued his opinion in *Ex parte Leong Wah Jam*.[293] In that case, Leong, "a person of the Chinese race, born in China," sought to enter the United States based on his father's U.S. citizenship.[294] The customs inspector evidently concluded that the father was in fact a U.S. citizen and that Leong was in fact his son. Nonetheless, he denied admission, a denial affirmed by the Assistant Secretary of Labor, who cited Rule 9(f) which prohibited the entry of adult Chinese Americans claiming citizenship through parentage. The Assistant Secretary further reasoned,

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[289] *Id.* at 746.

[290] *Id.*

[291] *Id.* at 747.

[292] *Id.*

[293] *Ex parte* Leong Wah Jam, 230 F. 540 (N.D. Cal. 1916).

[294] *Id.* at 540.

> If there were any evidence of a spirit of American allegiance in this case, I should resolve the slight doubt [raised by a factual discrepancy] in favor of applicant; but the evidence of Chinese allegiance is so pronounced, applicant being 24 years old and having a family of his own in China, and neither he nor his father indicating any tendency to Americanism, that I am indisposed, by resolving the doubt in applicant's favor, to give him the benefit of this short-cut route to naturalization.[295]

Judge Dooling once more intervened, concluding that the hearing was fundamentally unfair.[296]

This series of opinions is remarkable in several respects. First, it shows how Executive Branch officials based their exclusion decisions on their assessments of an individual's "Americanness," regardless of legal citizenship. Second, the federal court seemed to waver in its own legal analyses. In the first case, *Ng Doo Wong*, Judge Dooling simply cited the legal rule conferring citizenship on the petitioner and proceeded to issue the habeas writ.[297] But in the third decision, *Lee Dung Moo,* Judge Dooling reiterated that the adult sons of U.S. citizens are entitled to enter the United States as citizens, but rather than simply order Lee's admission, he remanded for further inquiry into the relationship between the applicant and the putative father.[298] In the second and fourth decisions, Judge Dooling went so far as to lend credence to a reliance on "Americanness" as a ground for exclusion. In both *Wong Foo* and *Leong Wah Jam*, he concluded that if the Executive Branch relied upon the father's perceived Americanness as the reason for exclusion, then it should have inquired into the matter.[299] It was the absence of any inquiry on this issue, rather than the mere fact of the applicant's citizenship, that formed the basis of the grant of habeas in these two cases. Third, and perhaps most telling, while none of the four opinions identified the date on which the applicants were excluded, the timing of the decisions suggests that the Executive Branch was on notice of at

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[295] *Id.* at 540-41.

[296] *Id.* at 541.

[297] *Ex parte* Ng Doo Wong, 230 F. 751, 752 (N.D. Cal. 1915).

[298] *Ex parte* Lee Dung Moo, 230 F. 746, 747 (N.D. Cal. 1916).

[299] *Ex parte* Wong Foo, 230 F. 534, 535 (N.D. Cal. 1916); *Leong Wah Jam*, 230 F. at 541.

least the first of these decisions (issued in December of 1915) yet continued to deny admission to Chinese Americans whose citizenship derived from their fathers.

Indeed, subsequent correspondence shows the Executive Branch's open disregard of Judge Dooling's rulings. As late as March 14, 1916, well after the four opinions were issued, the Secretary of Labor wrote to the Attorney General regarding two individuals, Wong Gim Toon and Wong Shing Gim. Both individuals were in their twenties and "sons of Chinamen who, by reason of their birth in the United States, are citizens of the United States," who were denied admission into the United States at the port of San Francisco.[300] The Secretary requested the Attorney General's opinion first, as to whether Rule 9(f) was legally valid, and, second, if not,

> are the above named Chinese entitled to enter the United States as citizens thereof in view of the fact that they continued to reside for some time in China after reaching their majorities without any affirmative action on their part indicating an intention to remain citizens of the United States?[301]

Attorney General T. W. Gregory responded on April 27, 1916, concluding that Rule 9(f), by effectively denying citizenship to foreign-born children of U.S. citizens, was invalid as it conflicted with the plain language of the statutory provision extending U.S. citizenship to "[a]ll children" born outside of the United States whose fathers are birth citizens.[302] In support of this conclusion, Gregory cited both the relevant statutes as well as case law. He then referenced Judge Dooling's opinions as follows:

> [T]he unreported decisions of the United States District Court for the Northern District of California in the cases of Ng Doo Wong, Wong Foo, and Lee Dung Moo, holding section 1993 [conferring citizenship on the children of U.S. citizen fathers] applicable to Chinese children, should not be overlooked even though, as contended, the decision of the citizenship question

[300] 30 Op. Att'y Gen. 529, 529 (1916).

[301] *Id.*

[302] *Id.* at 530.

> was not apparently essential to a determination of the cases. With those decisions you are, of course, entirely familiar.[303]

The Attorney General concluded that the identified individuals were indeed U.S. citizens and that, as such, they could not be denied admission into the country.[304]

These events present a nuanced perspective on administrative officials' interpretations of the Constitution. The Department of Labor, while rejecting the decisions of Judge Dooling, sought the guidance of the Department of Justice on whether the adult sons born in China to U.S. citizen fathers qualified as citizens. While the historical record is not conclusive, the Labor Secretary appeared more willing to defer to the Justice Department's expertise on citizenship than that of the federal court. *Intra*-branch dialogue evidently persuaded the Labor Department to recognize the citizenship of Chinese Americans where *inter*-branch dialogue had failed. These events underscore the crucial role of agencies in *implementing* the right to citizenship: the recognition of citizenship by federal courts carries little weight unless it is accepted by the agencies charged with enforcing federal law.

It is worth noting that Executive Branch officials' skepticism toward the citizenship claims of Chinese Americans was not entirely unwarranted. Given the strict bars to admission imposed by the Chinese Exclusion laws, one of the only avenues available to Chinese individuals seeking to enter the United States was to claim citizenship. Particularly after the destruction of vital records during the San Francisco fire and earthquake of 1906, a cottage industry in false documentation for "paper sons" emerged.[305] Chinese Americans who could prove their citizenship would sell "slots" to individuals claiming to be their children for purposes of entry.[306] Even Wong Kim Ark, whose claim to citizenship resulted in the Supreme Court decision affirming the *jus soli* principle, evidently participated in the scheme.[307] Decades later, as the Cold War

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[303] *Id.* at 532.

[304] *Id.* at 536-37.

[305] *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 203-04 (2004) (describing emergence of paper sons); *see also* LEE, *supra* note 16, at 178 (describing the loss of San Francisco birth records).

[306] LEE, *supra* note 16, at 173, 180; *see also* NGAI, *supra* note 305, at 217.

[307] Frost, *supra* note 16, at 73-74.

loomed and the government feared Chinese communist infiltration into the United States, it instituted the Chinese Confession Program to grant legal status to those who admitted their prior falsified entries and disclosed the names of others who participated in such arrangements.[308] According to historian Mae Ngai, at least a quarter of the Chinese American population in the United States in 1950 was unlawfully present, and a majority of these — numbering tens of thousands of individuals — were paper sons.[309]

The contestation of citizenship for Chinese Americans during this period exposes deep rifts between the lower federal courts and the Executive Branch officials charged with enforcing the Chinese Exclusion laws. In the face of this conflict, the Supreme Court sided with administrative officials, effectively granting them free reign to determine the citizenship status of Chinese Americans, which they exercised in defiance of federal courts and Congress. As was the case for Black Americans, the experience of Chinese Americans during this era underscores the primary role played by political actors — specifically, Executive Branch officials — rather than by the federal courts in defining constitutional citizenship. But in the case of Chinese Americans, popular pressures led political actors to adopt a *narrower* definition of citizenship than that endorsed by the Supreme Court, resulting in the *exclusion* of a historically subordinated group.

IV. MARRIED WOMEN AND EXPATRIATION

In the late nineteenth and early twentieth centuries, a time when women in the United States were systematically subjugated by law through doctrines of coverture and the denial of suffrage, various governmental institutions struggled to define the citizenship status of American women who married noncitizens, notwithstanding the absence of any constitutional provision vesting any organ of the government with the power to strip an individual of U.S. citizenship, whether on the basis of marriage or other grounds.

In early American history, the question of whether an individual could ever lose their U.S. citizenship (unless as a punishment for crime)

[308] NGAI, *supra* note 305, at 206, 218-20 (describing Chinese Confession Program).

[309] *Id.* at 203-04.

remained open. The English common law doctrine mandated *perpetual* allegiance to the crown, and an individual could not on their own, without the government's consent, divest themselves of their citizenship.[310] The United States, however, as a nation of immigrants, was largely premised on the acceptance of expatriation, as the country adopted as its citizenry those who were born subjects of other nations.

The Supreme Court expressly declined to resolve the question of whether a citizen could expatriate themselves in its 1804 decision in *The Charming Betsy Case,* stating,

> Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide.[311]

That language, however, seemed to contemplate that Congress could legislate a means of expatriation. After reviewing the history, case law, and theories regarding the matter, Chancellor James Kent concluded in his *Commentaries on American Law* that "the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered."[312]

Later, however, the Supreme Court in its 1898 decision in *Wong Kim Ark* asserted that Congress lacked the power to strip an individual of citizenship, stating:

> The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. . . . Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori no

[310] *See generally* KETTNER, *supra* note 9, at 8-9 (describing English common law doctrine).

[311] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 120 (1804).

[312] KENT, *supra* note 64, at 49.

> act or omission of Congress . . . can affect citizenship acquired as a birthright.[313]

This statement, while dicta, appeared to deny the political branches any constitutional power to strip either native-born or naturalized Americans of U.S. citizenship.

Notwithstanding the absence of any constitutional provision authorizing the revocation of American citizenship, prior to 1907 some of the federal courts, the several States, and parts of the Executive Branch acted unilaterally to deny the citizenship of American women who married noncitizens.[314] Then, in 1907, Congress enacted legislation expressly purporting to deny citizenship to such women.[315] Although its earlier dicta suggested that Congress lacked such authority,[316] the Supreme Court refused to intervene in its 1915 decision in *Mackenzie v. Hare*, effectively granting the political branches free reign to divest American women of their citizenship upon marriage.[317] Indeed, it appeared to impose no constitutional limit to the political branches' authority to strip an individual of U.S. citizenship, so long as the act constituting expatriation was voluntarily undertaken.[318]

Unlike the individuals claiming citizenship in the two previous Parts, the American women described in this Part did not claim citizenship solely to enter or remain in the country. These women were presumably white and thus generally unencumbered in their ability to enter and remain in the United States regardless of their citizenship status during this period. Rather, they sought citizenship in order to secure other rights, such as the right to hold real property, inherit land, or to obtain a passport or diplomatic protection. Indeed, in some cases the individual sought to *disclaim* U.S. citizenship. Nonetheless, the contestation of citizenship for married women provides another context in which institutions outside the federal courts played an active role in defining the right to citizenship for a historically subordinated group.

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[313] United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).

[314] *See infra* Part IV.A.

[315] Expatriation Act of 1907, ch. 2534 § 3, 34 Stat. 1228, 1228-29.

[316] *See supra* note 313 and accompanying text.

[317] Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

[318] *Id.* at 311-12.

A. Prior to 1907

Notwithstanding the absence of any constitutional provision authorizing the revocation of citizenship guaranteed under the Fourteenth Amendment, as well as the absence of any legislation purporting to exercise such authority prior to 1907, some lower federal courts, state courts, and parts of the Executive Branch unilaterally acted to divest American women of their citizenship based on their marriage to a noncitizen.

Initially, the Supreme Court affirmed the common law doctrine of perpetual allegiance in *Shanks v. Dupont*, holding that a woman's marriage to a non-citizen did not deprive her of her U.S. citizenship.[319] That case involved the right to inherit land on James Island in South Carolina, which required a determination of the citizenship of one Ann Scott, who was born in the colony of South Carolina.[320] During the War of Independence, the British took possession of James Island and then Charleston in 1780.[321] The following year, Ann married British officer Joseph Shanks and left with him for England when Charleston was evacuated in 1782.[322] She remained in England until her death in 1801.[323] Justice Story writing for the majority began his analysis by noting that Ann, prior to her departure for England, was a citizen of South Carolina.[324] Story then went on to determine whether her citizenship had been relinquished, and concluded that marriage to the noncitizen Shanks did not affect her citizenship "because marriage 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 effect her political rights or privileges."[325] Addressing the common law doctrine of coverture, under which a married woman lost all of her civil rights, Justice Story explained, "The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their

[319] Shanks v. Dupont, 28 U.S. 242, 246 (1830).

[320] *Id.* at 244.

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] *Id.* at 244-45.

[325] *Id.* at 245-46.

protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character."[326]

In 1855 Congress enacted legislation providing that a noncitizen woman's marriage to a U.S. citizen conferred her with U.S. citizenship.[327] The new statute provided, "[A]ny 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."[328] Notably, the statute excluded women who were racially ineligible for naturalization. More important for present purposes, while the statute *conferred* citizenship on noncitizen women, nothing in the language suggested that Congress intended to *revoke* the citizenship of American women.

In 1868, Congress enacted a joint resolution recognizing expatriation as a "natural and inherent right of all people."[329] That resolution finally settled the United States' rejection of the common law doctrine of perpetual allegiance. Nothing in the statute purported to establish a means through which an individual could divest themselves of U.S. citizenship, however. On the contrary, the resolution, titled "Concerning the Rights of American Citizens in foreign States," focused on protecting naturalized American citizens when they returned to their native lands. It stated,

> whereas, . . . this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of the public peace that this claim of foreign allegiance should be promptly and finally disavowed . . .[330]

[326] *Id.* at 247. Justice Story nonetheless concluded that Ann Story became a citizen of Britain pursuant to the 1783 Treaty of Paris, which provided that "All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown. All those who then adhered to the British crown, were deemed and held subjects of that crown." *Id.* at 248.

[327] Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604.

[328] *Id.*

[329] Act of July 27, 1868, ch. 249, 15 Stat. 223.

[330] *Id.*

The resolution would, for example, allow the State Department to intervene on behalf of a naturalized U.S. citizen (*i.e.*, one who had expatriated themselves from their native country) if they returned to visit their native country and the native country sought to conscript them into military service. The resolution did not appear to contemplate situations in which Americans might seek to naturalize in another country and expatriate themselves of U.S. citizenship, however. Thus, although Congress acted to *confer* citizenship upon marriage, and to recognize the right of expatriation prior to 1907, it did not purport to strip individuals of U.S. citizenship, whether through marriage or otherwise. Yet even absent statute, federal courts, state courts, and Executive Branch officials wrestled with the citizenship status of American women who married noncitizens, with many concluding that such marriage divested the woman of her citizenship.

The lower federal courts differed on whether marriage divested an American woman of citizenship prior to 1907. In *Pequignot v. Detroit*, the federal district court for the Eastern District of Michigan concluded that an American woman who married a French national became divested of her citizenship.[331] In that case, the plaintiff's citizenship was litigated for the purpose of establishing alienage jurisdiction in the federal courts. The plaintiff was born in France and emigrated to the United States as a child, though her parents never naturalized.[332] She then married a native-born American citizen.[333] Subsequently, however, she divorced and remarried a French national.[334] Judge Brown (who was later elevated to the United States Supreme Court) held that plaintiff's first marriage, by operation of the Act of 1855, conferred upon her U.S. citizenship.[335] However, he concluded that her subsequent marriage to a French national divested her of this citizenship, even though the couple remained resident in the United States.[336] Judge Brown reasoned, "[W]e . . . ought to apply the same rule of decision to a case where a female American citizen marries an alien husband, that we should to a case

[331] Pequignot v. City of Detroit, 16 F. 211, 217 (C.C.E.D. Mich. 1883).

[332] *Id.* at 213.

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.* at 217.

where an alien woman marries an American citizen."[337] In this manner, the district court unilaterally divested a woman of her U.S. citizenship on the basis of her marriage to a noncitizen, absent any constitutional provision or even statutory directive authorizing such action.

The federal district court for the Eastern District of Louisiana, however, reached the opposite conclusion in *Comitis v. Parkerson*, holding that an American woman's marriage to a noncitizen did not divest her of her citizenship.[338] As in *Pequignot*, the plaintiff's citizenship was litigated for purposes of establishing alienage jurisdiction within the federal courts. Plaintiff had been born in Louisiana but married an Italian national who had, prior to marriage, established his residence in New Orleans.[339] The couple resided in New Orleans until the husband's death, after which the wife remained in that city.[340] Judge Billings first held that expatriation could only be effectuated through an act of Congress, and noted that Congress had not legislated the expatriation of American women upon marriage to a noncitizen.[341] He further explained: "Nor does it seem to me that [the 1855 statute] which provides that an alien woman by marriage with a citizen shall become a citizen, authorizes any inference that congress meant to declare the

[337] *Id.* at 214. Similarly, in *Ruckgaber v. Moore*, 104 F. 947 (C.C.E.D.N.Y. 1900), the district court for the Eastern District of New York concluded that an American woman who had married a French citizen and subsequently moved abroad, living her last years in France, had lost her U.S. citizenship. *Ruckgaber*, 104 F. at 948-49. That case involved the validity of an inheritance tax on the estate of the woman. *Id.* at 948. Plaintiff argued that the inheritance was not subject to taxation because, *inter alia*, the testatrix was not a citizen. *Id.* The court reasoned that "By the several statutes of America, France, and Great Britain, the marriage of a citizen of such country with an alien wife confers upon the latter the citizenship of the husband; and this policy of the three great powers . . . establishes that the political status of the wife follows that of her husband, with the modification that there must be withdrawal from her native country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage." *Id.* at 948-49. It is worth noting, first, that the plaintiff in the case sought to establish that the individual was *not* a U.S. citizen, so as to avoid paying a tax. *Id.* at 948. Second, the court qualified its conclusion regarding the loss of an American woman's citizenship by requiring not only marriage to a noncitizen, but also some additional act such as removing to another country. *Id.* at 948-49.

[338] Comitis v. Parkerson, 56 F. 556, 563 (C.C.E.D. La. 1893).

[339] *Id.* at 557.

[340] *Id.* at 558.

[341] *Id.* at 558-59.

converse, *viz.* that a citizen woman by marriage with an alien should become an alien."[342] Moreover, he concluded that even if Congress had legislated expatriation in this manner, such loss of citizenship could only be effectuated by departing the United States. As the plaintiff had never left the country, she could not be deemed to have consented to expatriation.[343] He concluded his opinion by noting:

> on the questions of naturalization and expatriation the judgement of the courts must not outrun the action of congress, and [] the courts must carefully observe the lines of demarcation which congress has drawn; that any imperfections or inconsistencies in those lines must be supplied and corrected by congress, and not by the courts.[344]

In this way, the Eastern District of Louisiana was careful to preserve the U.S. citizenship of married women, explicitly departing from the conclusion of the Eastern District of Michigan on this point.[345]

The several States likewise disagreed on the effect of marriage on an American woman's citizenship. In an earlier case predating the two congressional actions in the area, *Beck v. McGillis*, the New York Supreme Court was asked to adjudicate the citizenship status of a Mrs. McGillis for the purpose of determining whether she was eligible to inherit real property in the state.[346] Mrs. McGillis was born a U.S. citizen but subsequently married a British national and evidently moved abroad.[347] The court decided that "neither her marriage nor her residence in a foreign country constitutes her an alien."[348] It then cited *Shanks v. Dupont* for the proposition that "the marriage of a feme sole with an alien husband, does not produce a dissolution of her native allegiance .... There is, therefore, no obstacle in the way of Mrs.

[342] *Id.* at 561.

[343] *Id.* at 562-63.

[344] *Id.* at 563.

[345] *Id.* at 563-64 (noting that the judge who authored *Pequignot* had since been elevated to the Supreme Court but also noting that the facts in *Pequignot* arguably differed to the extent that those facts might have been interpreted as establishing only temporary residence in the United States).

[346] Beck v. McGillis, 9 Barb. 35, 51 (N.Y. Gen. Term 1850).

[347] *Id.* at 49.

[348] *Id.*

McGillis taking as a devisee under the will."[349] The New York legislature affirmed such protections by enacting a statute in 1897 preserving the right to own real property for American women who married noncitizens.[350]

The Kentucky Court of Appeals adopted the opposite approach in *Trimbles v. Harrison,* another case adjudicating the citizenship of a woman for the purpose of determining whether she was eligible to inherit land.[351] Ann Dixon, whose birth in Boston was prior to the Revolution, was born a British subject.[352] Her father subsequently took her to England, though the year of her removal was unknown.[353] She then married a British subject in 1798 and thereafter remained in England.[354] The court held that even if Dixon had at one time been a U.S. citizen (*i.e.*, by electing to remain in the United States after the War of Independence),

> still the decisive facts remain, that being in England, and of mature age, she there married a British subject, with the prospect, and therefore with the presumed intention of remaining, during life, in that country . . . and that she has, for forty years, so remained a subject, in fact, of Great Britain. These facts, as we think, sufficiently demonstrate her intention to renounce her character as an American citizen.[355]

The court thus concluded that an American woman who moved abroad, married a noncitizen, and remained abroad, lost her citizenship.[356]

The Executive Branch also struggled to determine the citizenship of American women who married noncitizens during this period. The Departments of Justice and the Interior protected the citizenship rights

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[349] *Id.* at 49-50.

[350] *Current Topics*, 55 ALB. L.J. 371, 372-73 (1897) (reporting passage of legislation due to "increasing number of international marriages among the wealthy [which] has led to many complications over their estates").

[351] Trimbles v. Harrison, 40 Ky. (1 B. Mon.) 140, 140 (1840).

[352] *Id.* at 141.

[353] *Id.*

[354] *Id.*

[355] *Id.* at 147.

[356] *Id.*

of married American women, while the Departments of State and the Treasury concluded that marriage to a noncitizen divested American women of their citizenship.

In 1862, Attorney General Edward Bates issued an opinion affirming that U.S. citizen women retained their citizenship after marriage to a noncitizen.[357] That opinion was prompted by a query from the Secretary of State regarding whether a Mrs. Preto and her daughter should lawfully be regarded as citizens of the United States; the correspondence does not indicate the purpose of establishing citizenship, but as the question originated from the State Department's charge in Madrid, it was presumably for the purpose of either extending diplomatic protection or issuing a passport. Mrs. Preto, whose maiden name was Griffith, was born in New Jersey.[358] She eventually moved to Washington, D.C., where she married a Spanish national, Francis Preto, and subsequently gave birth there to a daughter, Theresa.[359] Francis Preto resided in the United States but never naturalized.[360] Before Theresa turned three, the family moved to Spain, where they evidently remained after Francis Preto's death in 1858.[361] Bates began his analysis by noting that at the time of Mrs. Preto's birth in New Jersey, she clearly was a United States citizen.[362] As to whether her subsequent marriage to a Spanish national had "the effect to deprive the young wife of her native citizenship, and transform her at once into an alien," he responded, "No, certainly not."[363] He reasoned, "Such marriages [between citizens and aliens] are as legal and legitimate as any other marriages, but they do not change the political status of the parties to them. . . . It is clear, then, that Miss Griffith did not lose her American citizenship by the fact of marrying Mr. [P]reto; and, to my mind, it is equally clear that her daughter, Theresa, born here in Washington, was born an American citizen."[364] Next, Bates concluded that Mrs. Preto's and her daughter's

[357] 10 Op. Att'y Gen. 321, 322 (1862).

[358] *Id.* at 321.

[359] *Id.*

[360] *Id.* at 321-22.

[361] *Id.* at 321, 323.

[362] *Id.* at 322.

[363] *Id.*

[364] *Id.* at 322-23.

change in residence did not constitute an "exercise [of] the right to cast off her native allegiance, and adopt a new sovereign."[365] As such, he concluded that both Mrs. Preto and her daughter remained Americans.[366]

Four years later, a different Attorney General, Henry Stanberry, reached a somewhat different conclusion in a case involving a Madame Berthemy.[367] That opinion was also issued in response to a query from the Department of State; although the correspondence itself does not indicate why Berthemy's citizenship was at issue, subsequent documents, as described below, reveal that Berthemy sought to establish herself as a noncitizen for the purpose of avoiding payment of federal taxes. Madame Berthemy, who was born in France to a U.S. citizen father, remained in France, where she married a French national who subsequently died.[368] She stayed in France after her husband's death, and never changed her domicile to the United States.[369] Stanberry first noted that Madame Berthemy was born a U.S. citizen pursuant to the statute conferring citizenship on children born abroad to U.S. citizen fathers.[370] He stated that in such cases, "the legal presumption in the first instance is, that the party is a citizen of the United States."[371] Stanberry continued, however, that such a presumption could be overcome upon showing that the individual "duly acquired, and is at the time invested with, the full rights of citizenship in a foreign country."[372] Stanberry then proceeded to consult *French* law, pursuant to which her marriage to a French national did grant her "good title . . . to the citizenship of France." [373] He then went on to note the French law's similarity to Congress's 1855 statute, conferring citizenship on noncitizen women upon their marriage to citizens.[374] He further pointed

[365] *Id.* at 323-24.

[366] *Id.* at 324.

[367] 12 Op. Att'y Gen. 7, 9 (1866).

[368] *Id.* at 7.

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Id.*

[373] *Id.* at 8.

[374] *Id.*

out that there was "no such domiciliary residence here as could constitute evidence of a desire and intention on her part to assume the duties and obligations of an American citizen."[375] Consequently, he concluded that Madame Berthemy was a citizen of France.[376]

While Stanberry's opinion in the case of Madame Berthemy might be interpreted to hold that an American woman who marries a noncitizen loses her citizenship (at least if she never resides in the U.S.), a later opinion by Stanberry's successor, Attorney General Ebenezer Hoar, interpreted Stanberry's opinion more narrowly. Hoar noted that the case of Madame Berthemy arose in the context of determining whether she should be considered a "citizen[] of the United States residing abroad" within the meaning of the Internal Revenue Code.[377] Hoar noted that although his predecessor concluded that Madame Berthemy was a citizen of France, he did "not expressly, but only inferentially, decide that she is not a citizen of the United States."[378] Hoar went on to explain:

> I do not propose to discuss the general question of . . . expatriation under our laws, or to express any opinion whether a woman who is by birth a citizen of the United States, and by marriage has become a citizen of France, is not after such a marriage a citizen of the United States in a qualified sense.[379]

Instead, he merely concluded that, consistent with Stanberry's opinion (on Hoar's reading), the words "citizen[] of the United States residing abroad," as used in the Internal Revenue Code, "mean[s] exclusive citizenship."[380] This construction allowed for the possibility of dual citizenship, such that individuals who could claim citizenship in another country (like Madame Berthemy or other American women who married French nationals), were not liable to pay taxes to the United States Treasury yet might nonetheless retain their U.S. citizenship.

A subsequent opinion by Attorney General Taft affirmed that a U.S. citizen woman does not lose her citizenship upon marriage to a

375 *Id.* at 9.

376 *Id.*

377 13 Op. Att'y Gen. 128 (1869).

378 *Id.* at 129.

379 *Id.*

380 *Id.*

noncitizen.[381] That opinion arose in the context of a Mary D'Ambrogia who sought to assert her U.S. citizenship for the purpose of filing a claim with the Commissioner of Claims to recover for property taken from her for use by the U.S. Army.[382] The facts of that case were similar to those at issue in the *Pequignot* decision: A noncitizen woman living in the United States married a naturalized citizen of the United States; after his death, she remarried a noncitizen, who died without ever naturalizing.[383] Attorney General Taft concluded that D'Ambrogia obtained U.S. citizenship upon her first marriage pursuant to the Act of 1855, and that her subsequent marriage to a noncitizen did not divest her of that citizenship.[384] Interpreting the 1855 statute, he concluded that "I am of [the] opinion that the citizenship bestowed [by that statute on women who marry U.S. citizens] is not lost by the woman's survival of her husband, but that it was the intention of Congress to bestow upon her a permanent status of citizenship, defeasible only as in the case of other persons."[385]

The Department of the Interior agreed, at least to the extent the American woman remained resident in the United States. In 1904, the Department of the Interior considered an administrative challenge to the homestead entry of one Mary B. McKay.[386] The contestant argued that McKay's marriage in Canada to a Canadian subject, after she had entered her homestead, disqualified her from holding the homestead. The Acting Secretary to the Commissioner of the General Land Office disagreed. He cited *Shanks v. Dupont* for the proposition that an American woman's marriage to a noncitizen does not expatriate her, but that her removal to the husband's native country did.[387] In *Shanks*, however, the woman's removal was dispositive only because it occurred shortly after the War of Independence and thus her citizenship was governed by the Treaty of Paris, which allowed an American to elect to retain allegiance to Great Britain by moving there after the war. In any

[381] 15 Op. Att'y Gen. 599 (1877).

[382] *Id.* at 600.

[383] *Id.* at 599.

[384] *Id.* at 600-01.

[385] *Id.* at 600.

[386] Kessler v. McKay, 33 Pub. Lands Dec. 230 (1904).

[387] *Id.* at 233 (citing Shanks v. Dupont, 28 U.S. (3 Pet.) 242 (1830)).

event, because McKay and her husband remained resident in the United States (indeed her husband had filed an intention to naturalize as an American citizen), the Department of the Interior concluded she retained her citizenship.[388]

Other parts of the Executive Branch were less protective of American women, however. The Department of State in particular maintained a consistent policy of denying passports and diplomatic protections to American women who had married noncitizens. In 1871, Secretary of State Fish instructed the American legation in France to decline to issue a passport to an American woman who had married a noncitizen and, after his death, applied for an American passport.[389] He opined,

> The widow to whom you refer may, as a matter of strict right, remain a citizen, but, as a citizen has no absolute right to a passport . . . I think it judicious to withhold passports in such cases unless the widow gives evidence of her intention to resume her residence in the United States.[390]

Two years later, Secretary Fish in a letter to the President stated

> Hence it would seem that the marriage of a female citizen of the United States with a foreigner, subject of a country by whose laws marriage confers citizenship upon the wife of its subject, and her removal to and residence in the country of her husband's citizenship, would devest her of her native character of an American citizen.[391]

The State Department went further in 1895, declining to issue a passport to a native-born American woman who had married a Hollander *residing in the United States*.[392] She was temporarily in Germany pursuing her education when she requested a passport.[393] Secretary Olney responded,

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[388] *Id.*

[389] Letter from Hamilton Fish, Sec'y of State, to Elihu Washburne, U.S. Minister to Fr. (Feb. 24, 1871), *in* VAN DYNE, *supra* note 9, at 133-34.

[390] *Id.*

[391] *Id.* at 134 (quoting PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES pt. 2, at 1187 (1873)).

[392] *Id.* at 137-138 (quoting Mr. Olney to Mr. Morton (Oct. 26, 1895)).

[393] *Id.*

"It has been the uniform practice of this Department to decline to grant passports to American women who are married to aliens. In my opinion, the Department would not be warranted in departing from this practice in the present case."[394]

The State Department's position provides another example of the ways in which administrative policy expertise might influence constitutional interpretation.[395] The State Department's rejection of citizenship for American women who married noncitizens was likely informed by its policy expertise in dealing with cases of dual citizenship. Given that an American woman's marriage to a French national granted her French citizenship under the laws of France, the State Department would be placed in a difficult position if the woman sought diplomatic protection as a U.S. citizen while in France. Such complications perhaps informed the Department's conclusion that such women were no longer U.S. citizens, notwithstanding the absence of any constitutional authority to divest them of their citizenship.

The Treasury Department adopted the same position as the State Department in 1900 in a case regarding a duty imposed on the importation of paintings made by a Mrs. Mattie Dube.[396] Dube claimed that the paintings were exempt from the tax because she was an American citizen only temporarily residing abroad.[397] She had been born in Arkansas and in 1888 married a Canadian national in London.[398] She maintained a studio in New York but had traveled to Paris in May 1889, which she stated was only temporary.[399] The General Appraiser concluded, however, that her paintings were not exempt from the duty because she was not an American citizen by virtue of her marriage:

> It is a settled principle of international law that a wife's political status follows that of her husband, and that her nationality and domicile for business purposes must always be deemed that of her husband. It is our opinion that Mrs. Dube, by reason of her

394 *Id.* at 138 (quoting Mr. Olney to Mr. Morton (Oct. 26, 1895)).

395 *See supra* notes 245–246 and accompanying text.

396 T.D. 22364, 3 Treas. Dec. 611, 611-12 (Jul. 16, 1900).

397 *Id.* at 611.

398 *Id.* at 612.

399 *Id.*

> marriage with an alien, must be presumed by operation of law to have lost both citizenship and domicile.[400]

Again, the Treasury Department's statutory mandate — to collect taxes — arguably influenced its constitutional interpretation that the woman at issue had lost her citizenship.

In these ways, the federal courts, the several States, and the Executive Branch diverged as they struggled to determine the citizenship of American women who married noncitizens.

B. After 1907

In 1907, Congress purported to resolve the confusion by legislating that an American woman lost her citizenship upon marriage to a noncitizen.[401] That statute, passed at the urging of the State Department,[402] for the first time specified the grounds on which an individual would be deemed expatriated. Section three provided "[t]hat any American woman who marries a foreigner shall take the nationality of her husband."[403] The legislation was not limited to expatriating married women, however. Section two provided that an American could also lose their U.S. citizenship by naturalizing or taking an oath of allegiance in a foreign state; more controversially, it added the following: "When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen."[404] The legislative history shows that Congress strenuously debated the constitutionality of the last part of section two. Representative Crumpacker of Indiana argued,

> Now, the Constitution determines the question of citizenship, and after one has become a citizen by naturalization that status has attached; and I understand the judgment of some of the

[400] *Id.*

[401] Expatriation Act of 1907, ch. 2534, § 2, 34 Stat. 1228, 1228 (1907).

[402] *See* 41 CONG. REC. 1464 (1907) (noting bill reported "at the request of the Department of State"); H.R. DOC. NO. 59-326 (1906) (report of State Department urging legislation regarding expatriation).

[403] § 3, 34 Stat. at 1228.

[404] *Id.* § 2, 34 Stat. at 1228.

> officers in the State Department is that Congress itself cannot decitizenize him; he can only expatriate himself in a formal manner by renouncing his allegiance to this country and announcing his allegiance to some foreign country or doing something irreconcilable with his status as a citizen.[405]

While recognizing and endorsing the State Department's practice of declining to issue passports or diplomatic protections to Americans who acquired a permanent residence abroad, he nonetheless objected, "[T]his section goes beyond that, because it says that one ceases to become an American citizen by simply residing abroad."[406] Moreover, by treating naturalized citizens differently from native-born citizens (*i.e.*, allowing residence abroad for the latter but not the former), Representative Crumpacker charged that the provision violated the provisions of the Constitution, which "make no difference between native and naturalized citizens."[407] Interestingly, however, Congress did not view any constitutional obstacle to the expatriation of married women in section three, with one member characterizing it as "simply declaratory of existing law."[408]

Section three made no exception for American women who remained resident in the United States (although it did provide that upon termination of the marriage the woman could resume her U.S. citizenship by returning to, or remaining resident in, the United States or by registering with a consular office).[409] Thus, it stripped American women of citizenship even if they married immigrants in the United States who intended to naturalize, for example. The Department of State remained faithful to that expansive view in a letter dated March 13, 1912, describing its interpretation and application of the statute as follows: "the Department has held . . . that any American woman loses her citizenship upon her marriage to a foreigner, whether she resides abroad or remains in this country."[410] It then went on to describe

[405] 41 CONG. REC. 1465.

[406] *Id.*

[407] *Id.*

[408] *Id.* (statement of Representative Perkins of New York).

[409] § 3, 34 Stat. at 1228.

[410] Letter from U.S. Dep't of State to Rep. William Kent (Mar. 13, 1912), *in* 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 246 (1942).

international law principles in support of this view before adding, "For many years before the passage of the Act of 1907, the practice of this Department conformed to this general international rule."[411]

Although the Supreme Court had intimated in its 1898 decision in *Wong Kim Ark* that Congress lacked authority to divest an individual of citizenship, it rejected a constitutional attack on the expatriation statute in its 1915 decision in *Mackenzie v. Hare*.[412] That case involved a woman who was born and always resided in California. In 1909, she married a British national who was a permanent resident in California.[413] When she sought to register to vote, the San Francisco board of election commissioners refused to register her on the ground that she was no longer a U.S. citizen by virtue of her marriage.[414] She argued that as her citizenship "was an incident to her birth in the United States . . . under the Constitution and laws of the United States, it became a right, privilege, and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation."[415]

Rejecting that claim, the Supreme Court concluded that "[t]he identity of husband and wife is an ancient principle of our jurisprudence."[416] Moreover, while acknowledging the absence of any constitutional provision delegating to Congress the authority to denationalize an individual, the Court noted "there may be powers implied, necessary or incidental to the expressed powers."[417] Expressing concern about the potential for international "embarrassments" and "controversies," the Court concluded, "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."[418] Nonetheless, it held that the statute "does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences."[419] As the individual had

[411] *Id.* at 247.

[412] Mackenzie v. Hare, 239 U.S. 299 (1915).

[413] *Id.* at 306.

[414] *Id.*

[415] *Id.* at 308.

[416] *Id.* at 311.

[417] *Id.*

[418] *Id.* at 311.

[419] *Id.* at 311-12.

voluntarily entered into marriage, the Court deemed her consequent loss of citizenship to be voluntary. In this way, the Supreme Court suggested that Congress could revoke the citizenship of individuals for virtually any conduct as long as that conduct was voluntarily undertaken. The right to citizenship was, thus, relegated to the mercy of Congress.

The publicity surrounding the denationalization of prominent American women pursuant to the Expatriation Act led Congress to pass the Cable Act in 1922.[420] That law provided 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."[421] At the same time, it withheld the automatic U.S. citizenship previously conferred on noncitizen women who married Americans, although it did streamline the naturalization process for such women.[422] Nonetheless, it is important to note that it was Congress, not the federal courts, that preserved the citizenship of American women upon marriage to noncitizens.

A few additional aspects of the Cable Act are worth noting. First, notwithstanding the general rule that an American woman retained her citizenship after marriage, the statute provided that "any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States."[423] Second, it provided that "no woman whose husband is not eligible for citizenship shall be naturalized during the continuance of the marital status."[424] In this way, the Cable Act presented a victory for American women who married white or Black

[420] Cable Act of 1922, ch. 411, 42 Stat. 1021.

[421] *Id.* § 3, 42 Stat. at 1022.

[422] *Id.* § 2, 42 Stat. at 1022; *see* Chang Chan v. Nagle, 268 U.S. 346, 351-52 (1925) (concluding that Chinese wives of U.S. citizens no longer entitled to citizenship under 1922 statute, and holding that such women, who were racially ineligible for naturalization, should be excluded pursuant to statute prohibiting admission of individuals ineligible to naturalize).

[423] § 3, 42 Stat. at 1022. *See generally* Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011) (discussing role of federal immigration and citizenship laws in the racial regulation of marriage).

[424] § 5, 42 Stat. at 1022.

noncitizens, but continued to divest them of their citizenship status for marrying Asian men, for example. This effort by Congress to continue the revocation of American citizenship on grounds of race and marriage met no resistance from the federal courts.

Notably, the Cable Act did not operate retroactively to restore the U.S. citizenship of women who lost it under the 1907 statute. Thus in its 1925 decision in *Ex parte Ng Fung Sing,* the federal district court for the Western District of Washington sustained the denial of entry to a native-born U.S. citizen.[425] Ng was born in the United States in 1898, but then moved to China as a child.[426] She married there in 1920, before the Cable Act was passed.[427] After her husband's death, she sought to return to the United States, but was excluded under the provision of the 1924 Immigration Act which denied admission to any alien ineligible for citizenship.[428] The district court sustained that exclusion, pointing out,

> Racially the petitioner is Chinese (yellow race); politically she was born a member of the citizenry of the United States. Citizenship is a political status, and may be defined and the privilege limited by Congress. The Congress has, no doubt, power to say what act shall expatriate a citizen and forfeit right to 'protection abroad,' and prescribe prerequisites for resumption of citizenship.[429]

The court evidently concluded that Ng lost her citizenship upon her marriage to a Chinese national in 1920, and nothing in the Cable Act restored it. Moreover, as she was racially ineligible for naturalization, she was unable to restore her citizenship. And, as an individual ineligible for citizenship, the 1924 Act barred her return to her native United States.

In 1930, Congress addressed the status of women such as Ng Fung Sing, allowing admission into the United States for "[a] woman who was a citizen of the United States and lost her citizenship by reason of her

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[425] *Ex parte* Ng Fung Sing, 6 F.2d 670 (W.D. Wash. 1925).

[426] *Id.* at 670.

[427] *Id.*

[428] *Id.*

[429] *Id.*

marriage to an alien."[430] The following year, it provided that "[a]ny woman who was a citizen of the United States at birth shall not be denied naturalization . . . on account of her race."[431] Finally, in 1936, Congress provided 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 [the Cable Act], 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 after [the Cable Act]

as long as she took an oath of allegiance.[432] Again, it was Congress, not the federal courts, that restored the right to citizenship for married American women of all races.

Like the contestations of citizenship for Black Americans and Chinese Americans, the experience of married American women during this period demonstrates the dominant role played by political institutions rather than by federal courts in defining constitutional citizenship. Contemporary views regarding the subordination of women led political actors to exclude them from citizenship upon marriage to a noncitizen. The Supreme Court's refusal to intervene allowed these actors to redefine who qualified as a U.S. citizen.

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The contestation of citizenship for Black Americans, Chinese Americans, and married women recounted in the previous Parts demonstrates the active role played by government actors outside the federal courts in defining U.S. citizenship. In each of the three periods recounted in this Article, the Supreme Court relegated federal courts to the margins in determining the right to citizenship. The Court either denied the right to citizenship outright (for Black Americans) or refused to protect it (for Chinese Americans and married women), thereby allowing political actors — including the several States, Executive

[430] Act of July 3, 1930, ch. 835, § 4(f), 46 Stat. 854, 854.

[431] Act of Mar. 3, 1931, ch. 442, § 4(a), 46 Stat. 1511, 1512.

[432] Act of June 25, 1936, ch. 801, 49 Stat. 1917.

Branch officials, and Congress — to narrow or expand who qualified as an American citizen under the Constitution.

V. ASSESSING INSTITUTIONAL ROLES IN DETERMINING CITIZENSHIP

The histories unearthed in the preceding Parts underscore an urgent fundamental normative question: To what extent *should* the right to citizenship be determined politically? Scholars in departmentalism, popular constitutionalism, and administrative constitutionalism generally endorse efforts by political actors outside the federal courts to independently engage in constitutional interpretation as a way to promote democratic accountability and thus legitimacy. This Part argues that citizenship, however, is unique among constitutional provisions in ways that cast doubt on the legitimacy of efforts — political or otherwise — to deny it to individuals. Moreover, the historical treatment of Black Americans, Chinese Americans, and American women who married noncitizens reveal that political institutions are not inherently more or less likely than the federal courts to do so. These histories thus suggest that the road to a more inclusive citizenship requires both the federal judiciary as well as its political counterparts. Federal courts must play an active role in policing the constitutional floor for citizenship, but the political branches must remain free to expand citizenship beyond the constitutional floor defined by the federal courts, which may, in turn, generate a new consensus on what the constitutional floor should be.

Scholars in departmentalism, popular constitutionalism, and, more recently, administrative constitutionalism, generally share a common normative premise: that institutions outside the federal courts *should* decide issues of constitutional import to ensure that our constitutional understandings are informed by changing public sentiments. On this view, vesting constitutional interpretive authority with political actors imbues such interpretations with a degree of democratic legitimacy. Professor Paulsen, for example, challenges the Supreme Court's claim of exclusive constitutional interpretive authority as "inconsistent with democracy — with the right of the people independently to interpret their Constitution through all the avenues of popular, republican

government subject to their direct and indirect control."[433] Professor Larry Kramer similarly criticizes the view that the Constitution is inherently counter-majoritarian and insists instead that constitutional interpretation must rest with "the people themselves."[434] Professors Bill Eskridge and John Ferejohn emphasize that the deliberations of legislatures and agencies (and, I would add, popularly elected state judges) are politically accountable in ways that the decisions of federal courts are not.[435]

Yet citizenship is unique among constitutional provisions in ways that cast doubt on the legitimacy of efforts to deny it, whether political or otherwise. *First,* citizenship is more fundamental than other constitutional rights in the sense that it is a right from which other rights may derive. In the words of Chief Justice Earl Warren, citizenship is "man's basic right for it is nothing less than the right to have rights."[436] To the extent that citizenship is the key to unlocking access to other constitutional rights, it should be especially protected. Otherwise, fundamental rights such as the right to vote or hold public office could be eliminated not by abridging those rights directly, but by denying citizenship to politically marginalized populations.

Second, citizenship is more fundamental than other constitutional provisions in that it defines the composition of our nation-state.

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[433] Paulsen, *supra* note 156, at 1298.

[434] KRAMER, *supra* note 37, at 5-7; *see* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004) (agreeing with Kramer "that constitutional law must in the end find its legitimacy in the constitutional culture of nonjudicial actors").

[435] *See* ESKRIDGE & FEREJOHN, *supra* note 38, at 15, 56; Metzger, *supra* note 38, at 1929 (endorsing administrative constitutionalism as a "potential opportunity for greater popular involvement in the construction of constitutional meaning."); Ross, *supra* note 38, at 523 (contending that the need for "constitutional adaptation to changing societal contexts" requires that the process of constitutional interpretation be responsive to shifts in public values). *But see* Lee, *From the History to the Theory*, *supra* note 38, at 117 ("History thus supports the conclusion that administrative constitutionalism can, but does not always, live up to the participatory ideal.").

[436] Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). *But see* YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 3-4 (1994) (noting global shift in recognition of rights as rooted in universal personhood rather than national citizenship); Schuck, *supra* note 28, at 2-4 (analyzing devaluation of U.S. citizenship).

Political scientist Michael Walzer posits that a political community's right to determine its own membership

> . . . is more basic than [other decisions], for it is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character,* historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.[437]

Yet even if one endorses the view that the People must be free to define its composition, the People have made that decision by adopting the Citizenship Clause of the Fourteenth Amendment guaranteeing U.S. citizenship for all individuals born or naturalized within the United States. Moreover, the adoption of that provision by constitutional amendment, rather than relying on the already enacted congressional conferral of such citizenship in the Civil Rights Act of 1866, makes clear that the People decided to shield future efforts to limit who qualifies as a U.S. citizen from ordinary majoritarian political processes. Fidelity to constitutional principles requires that we honor that choice.

Moreover, the nature of our nation-state as one that is self-governing imposes an external limiting principle on the norm of self-determination. The concept of self-governance is premised on the idea that the sovereign body responsible for deciding the rules to govern the nation-state must be comprised of all those who are governed. Decisions to exclude a subset from the sovereign body by denying them citizenship thus departs from the norm of self-governance by imposing a set of rules crafted by one body (those deemed citizens) on a population of others (those deemed not-citizens).[438] For these reasons, any efforts to exclude groups and individuals from constitutional citizenship, whether by federal courts or political actors, should be disfavored.

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[437] WALZER, *supra* note 51, at 61-62.

[438] Indeed Walzer himself endorses the view that all those within the territorial borders of a nation-state should generally be entitled to citizenship. *Id.* at 60-61.

Citizenship is unique among constitutional rights in yet a *third* respect, in the specificity with which it is affirmatively guaranteed in the constitutional text.[439] That it grants its holders, at a minimum, the right to enter and remain in the United States, has never been contested.[440] The text of the Constitution, at least since Reconstruction, imposes a hard and fast floor on denials of U.S. citizenship. Regardless of one's views on judicial supremacy,[441] any action to deny citizenship to an

[439] *Cf.* ESKRIDGE & FEREJOHN, *supra* note 38, at 3-6 (noting the dearth of affirmative rather than negative rights protected by the Constitution and insisting on importance of political processes in giving meaning to vaguely-worded affirmative guarantees such as equal protection and due process).

[440] *See supra* note 179.

[441] The Supreme Court itself may be the strongest proponent of the view that it possesses supreme and exclusive authority to interpret the Constitution. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 704 (1974) (asserting as the "province and duty of this Court 'to say what the law is'" with respect to the Constitution); Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that the Supreme Court's interpretation of the Constitution is "the supreme law of the land"). Professors Larry Alexander and Frederick Schauer defend the judicial supremacy position, resting their case on the settlement function of law, and particularly constitutional law, which is enacted "to achieve a degree of settlement and stability, and . . . to remove a series of transcendent questions from short-term majoritarian control." Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1380 (1997). They argue that these functions are best served by vesting final interpretive authority in a single organ, and, in their view, the Supreme Court is the institution best designed to fulfill that role because, among other reasons, "constitutions are designed to guard against the excesses of the majoritarian forces that influence legislatures and executives more than they influence courts." *Id.* at 1378 n.80.

For challenges to the judicial supremacy position, *see, e.g.*, KRAMER, *supra* note 37, at 233 (characterizing judicial supremacy as "an ideological tenet whose whole purpose is to persuade ordinary citizens that, whatever they may think about the Justices' constitutional rulings, it is not their place to gainsay the Court. It is a device to deflect and dampen the energy of popular constitutionalism"); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 243-44 (2002) (criticizing claims of judicial supremacy and coordinate demise of the political question doctrine, which "forces the Court to confront the institutional strengths of the political branches — and its own weaknesses"); Paulsen, *supra* note 156, at 1298 (challenging judicial supremacy as "inconsistent both with the limited nature of judicial power generally and with the bedrock conception of separation of powers," "inconsistent with democracy," and

individual born or naturalized in the United States, whether on grounds of race, ethnicity, or marital status, violates the Constitution. State officials, Congress, Executive Branch officials, and the federal courts are equally bound by this command.

In theory, the political insulation of the federal courts renders them uniquely suited to police the constitutional floor of citizenship. Life tenure and salary protections help protect federal judges from the political impulses of the day. While widespread nativism, xenophobia, sexism, or other popular sentiments might motivate political actors to deny citizenship to particular groups, the federal courts are designed to defend against them. Professor John Hart Ely's theory of representation-reinforcing judicial review suggests that courts should play a particularly active role in policing denials of the right to citizenship, first because participation in the political process generally requires, at least today, citizenship, and second because many denials of citizenship, and certainly the ones recounted in this Article, target discrete and insular minorities.[442] The denials of citizenship recounted in this Article showcase precisely the sort of exclusion of politically powerless groups that Ely argued warranted heightened judicial intervention.

In actual practice, however, this Article underscores the Supreme Court's repeated failures in serving this role. In *Dred Scott,* the Court explicitly denied constitutional citizenship to free Black Americans.[443] In *Ju Toy*, it disavowed any role for federal courts to intervene when administrative officials rejected the citizenship of Chinese Americans.[444] And in *Mackenzie v. Hare*, it granted Congress free reign to expatriate American women who married noncitizens.[445] For these groups, it was political actors rather than the federal courts who ultimately recognized and protected their constitutional citizenship. Congress proposed and

"inconsistent with the reality of willful, monstrous judicial error, most pressingly illustrated by *Dred Scott*").

[442] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74-77 (1980).

[443] *See supra* notes 146–155 and accompanying text.

[444] *See supra* note 261 and accompanying text.

[445] *See supra* note 412 and accompanying text.

the States ratified the Fourteenth Amendment overruling *Dred Scott*.[446] For Chinese Americans, Congress eventually repealed the Chinese Exclusion laws in 1943, which benefited citizens and noncitizens alike.[447] For American women, Congress passed the Cable Act in 1922 to preserve their citizenship status after marriage. These actions embodied a populist rejection of efforts to deny citizenship to these groups, even after the Supreme Court endorsed or at least acquiesced in them.

At the same time, the histories recounted in this Article also show that vesting constitutional interpretive power with political actors does not necessarily lead to a more inclusive definition of citizenship, either. A populist constitutional enterprise does not always translate into more inclusive access to citizenship.

The contestation of citizenship for Black Americans lends partial support for the view that politically responsive interpretations of the Constitution may lead to a more inclusive citizenship than that adopted by the Supreme Court. In *Dred Scott,* seven members of the politically insulated Supreme Court concluded that free Black people were not citizens within the meaning of the U.S. Constitution.[448] In stark contrast, popularly elected state court judges in both slave states and free states recognized the citizenship of Black Americans. In Congress, the 1820 debates over Missouri's admission as a state showcased that at least some members interpreted the Constitution to confer citizenship on Black Americans.[449] The Executive Branch likewise did so, going so far as to reject the Supreme Court's authority on the issue.[450] And, of course, Congress in proposing and the several States in ratifying the Fourteenth Amendment definitively resolved the matter. These decisions by political actors responsive to popular sentiment showed a greater willingness to recognize the citizenship of Black Americans than the federal courts. It is worth remembering, though, that the status of Black Americans was resolved not by political consensus but by Civil War. Indeed, resistance to the notion of Black citizenship endured even

[446] *See* U.S. CONST. amend. XIV, § 1.

[447] Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600 (1943) (codified at 8 U.S.C. §§ 262-297, 299).

[448] *See supra* notes 146–155 and accompanying text.

[449] *See supra* notes 135–139 and accompanying text.

[450] *See supra* notes 157–160 and accompanying text.

after the adoption of the Fourteenth Amendment, with southerners continuing to cast doubt on the legitimacy of even formal constitutional amendment. Ultimately, then, the contestation of citizenship for Black Americans may demonstrate the limits of political efforts to resolve divisive constitutional questions of membership.

Moreover, the contestation of citizenship for Chinese Americans shows that politically responsive institutions may well choose a narrower view of who qualifies as a U.S. citizen than that of the federal courts. During the Chinese Exclusion Era, political pressures led agency officials to reject citizenship for ethnic Chinese individuals in defiance of the Supreme Court's opinion in *Wong Kim Ark*. Particularly in the western states where most of these agency decisions occurred, public antipathy towards Chinese people ensured that the officials appointed to high-level positions within the immigration bureaucracy were often those most committed to the exclusion mission, even to the point of excluding U.S. citizens.[451]

The stripping of citizenship from American women who married noncitizens similarly shows that political actors may adopt narrower views of citizenship than federal courts. Although these women were not politically vilified like Chinese people during the Exclusion Era, their expatriation occurred at a time when women were generally viewed as subordinate. Perhaps more importantly, it occurred at a time when women were not guaranteed the right to vote; the Nineteenth Amendment granting female suffrage was not adopted until 1920.[452] Notably, Congress enacted the Cable Act only two years later, preserving the citizenship of American women regardless of marital status. The treatment of American women, then, suggests that political

[451] *See* LEE, *supra* note 16, at 50 ("San Francisco immigration officials, California politicians, and the larger anti-Chinese public developed close and reciprocal relationships. Because the position of collector of customs was filled through a political appointment, he and the Customs Service found it politically expedient to act upon the will of the people and to comply with public demands for strict enforcement. Many of the lower-level officials in the service also owed their positions to local and state politicians.").

[452] U.S. CONST. amend. XIX.

actors may be particularly unlikely to protect citizenship for politically disenfranchised groups.[453]

These events suggest that the road to a more inclusive citizenship does not demand federal courts' supremacy over political actors, or vice versa. Rather, they show that an ongoing dialogue between the two may facilitate the emergence of more inclusive constitutional understandings. They lead me to conclude that while the federal courts must police the constitutional floor of citizenship, political actors must remain free to protect constitutional citizenship beyond that floor, which may, in turn, generate a new consensus on what that constitutional floor should be. In this vein, Professor Bertrall Ross advocates for a "process of constitutional experimentation" through which "popular engagement and informed dialogue" generate new understandings of constitutional requirements, which are followed by "popular pressure on courts and agencies" to adopt those new understandings.[454] Professor Andy Hessick similarly argues, "Evolution and development of constitutional law depends in part on legislators enacting laws that conflict with Supreme Court rulings. These laws provide opportunity for the Supreme Court to reconsider its precedents and allow for the continued development of constitutional law."[455] Professors Eskridge and Ferejohn likewise emphasize the importance of deliberative dialogue between the courts and political institutions, noting that such deliberation over "larger public norms changes those norms and those commitments."[456]

Changes in constitutional doctrine relating to expatriation exemplify this type of dialogue between political institutions and the Supreme

[453] On the other hand, widespread reports of naturalization frauds immediately preceding elections suggest that at least in some circumstances, political actors may be inclined to *expand* citizenship, even beyond legal limit, in order to secure voters. *See, e.g.*, U.S. DEP'T OF LAB., HISTORICAL SKETCH OF NATURALIZATION IN THE UNITED STATES 8-10 (1926) (recounting public furor over naturalization frauds in connection with elections).

[454] Ross, *supra* note 38, at 525.

[455] F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1466 (2010).

[456] ESKRIDGE & FEREJOHN, *supra* note 38, at 15; *see id.* at 69 (arguing that administrative constitutionalism permits different government institutions to experiment and engage in a dialogic enterprise with each other, which may coalesce into a new public consensus on the meaning of the Constitution).

Court. After the Supreme Court's decision in *Mackenzie,* Congress enacted the Cable Act, and then the Nationality Act of 1940, which more strictly narrowed the circumstances under which an individual could be divested of citizenship.[457] These legislative changes arguably helped generate a new popular consensus that citizenship should not be revoked lightly, a view which the Supreme Court ultimately adopted. In its 1967 decision in *Afroyim v. Rusk,* the Court rejected its reasoning in *Mackenzie* to invalidate a congressional provision divesting an individual of citizenship for voting in a foreign election.[458] Justice Black, writing for the majority, made a broad assertion of the sanctity of citizenship:

> The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.[459]

Thus, after the Supreme Court failed to protect the citizenship status of American women, the political branches stepped in to protect it, thereby facilitating the emergence of a new constitutional consensus, a consensus which the Supreme Court eventually embraced.

At least since Reconstruction, the text of the Constitution has guaranteed the right to citizenship to all those born or naturalized in the United States. Moreover, the document does not purport to vest any institution, whether political or otherwise, with the power to strip an individual of citizenship. Throughout history, the Supreme Court has repeatedly failed to safeguard this right for various groups. When it has, as in *Dred Scott*, *Ju Toy*, and *Mackenzie*, political actors intervened,

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[457] Nationality Act of 1940, ch. 876, §§ 801, 803, 904, 54 Stat. 1137; Cable Act of 1922, ch. 411, 42 Stat. 1021-22.

[458] *See* Afroyim v. Rusk, 387 U.S. 253, 276-77, 277 n.17 (1967) (overruling Perez v. Brownell, 356 U.S. 44 (1958)).

[459] *Id.* at 268.

generating new understandings of our constitutional commitments. The events recounted in this Article thus suggest that although federal courts must play an active role in policing the constitutional floor for citizenship, the political branches must remain empowered to innovate to expand our understandings of the right to citizenship beyond the constitutional floor defined by the courts.

CONCLUSION

This Article documents the historically active role played by political institutions — including the several States, Congress, and Executive Branch officials — in determining who qualifies for, and who is excluded from, constitutional citizenship in the United States. Both before and after Reconstruction, members of marginalized groups seeking to assert their citizenship under the Constitution — including Black Americans in the early to mid-nineteenth century, Chinese Americans during the Exclusion era, and American women who married noncitizens prior to 1922 — found little recourse in the federal courts; instead, their citizenship status was determined principally by political actors. These histories underscore a fundamental normative question: To what extent *should* citizenship be determined democratically? This Article concludes that the road to a more inclusive citizenship requires an active role for both the federal judiciary as well as its political counterparts.