

The Amherst Series in Law, Jurisprudence, and Social Thought

Each work included in The Amherst Series in Law, Jurisprudence, and Social Thought explores a theme crucial to an understanding of law as it confronts the changing social and intellectual currents of the late twentieth century.

The Fate of Law, edited by Austin Sarat and Thomas R. Kearns

Law's Violence, edited by Austin Sarat and Thomas R. Kearns

Law in Everyday Life, edited by Austin Sarat and Thomas R. Kearns

The Rhetoric of Law, edited by Austin Sarat and Thomas R. Kearns

Identities, Politics, and Rights, edited by Austin Sarat and Thomas R. Kearns

Legal Rights: Historical and Philosophical Perspectives, edited by Austin Sarat and Thomas R. Kearns

Justice and Injustice in Law and Legal Theory, edited by Austin Sarat and Thomas R. Kearns

Law in the Domains of Culture, edited by Austin Sarat and Thomas R. Kearns

Cultural Pluralism, Identity Politics, and the Law, edited by Austin Sarat and Thomas R. Kearns

Justice and Injustice in Law and Legal Theory

Edited by
Austin Sarat and Thomas R. Kearns

Cott
1998

Ann Arbor

THE UNIVERSITY OF MICHIGAN PRESS

Justice for All? Marriage and Deprivation of Citizenship in the United States

Nancy F. Cott

In 1924 Mary K., an American-born woman descended from seventeenth-century English colonists, married a man who was, she and he both believed, also an American citizen. He was Taraknath Das, a native of India, a Hindu who had received a certificate of naturalization from a U.S. court in 1914 after eight years of American residence. Shortly after the marriage, however, Mr. Das's naturalization was declared to be illegal and void, and Mary K. Das was also stripped of her citizenship. When she applied for a passport she was refused, on the ground that she had lost her citizenship by her marriage to a man who was an alien ineligible for citizenship.¹

Just about the same time, another woman arrived in Seattle, Washington—the state where she had been born—expecting to take up her privileges as an American citizen after having spent most of her life in China, where she had married a Chinese man and then been widowed. She was the daughter of Chinese parents; her name was Ng Fung Sing. At Seattle, she was refused admission to the country of her birth. A fed-

1. Mary K. Das, "A Woman Without a Country," *Nation* 123, no. 3187 (4 August 1926): 105-6; Emma Wold, "A Woman Bereft of Country," *Equal Rights*, 15 August 1925. Both Mary and Taraknath Das were consequently stateless: while American authorities claimed that Hindus who were deprived of their American citizenship reverted to their former status as British subjects, British law stipulated that any subject who had voluntarily been naturalized in another country lost British nationality. Candice Dawn Bredbenner, "Toward Independent Citizenship: Married Women's Nationality Rights in the United States, 1855-1937" (Ph.D. diss., University of Virginia, 1990), 289-91, first alerted me to this case.

eral court confirmed the immigration officials' judgment that she was a Chinese subject, ineligible for American citizenship and inadmissible to the country.²

These incidents—and they are not isolated incidents—occurred because of a conjunction of federal laws declaring married women's status and laws restricting naturalization privileges. I want to look at these series of laws and their meanings here, with several aims in mind. First of all, I am interested in marriage as a public institution, particularly in its relation to the nation-state. What we call marriage, and may commonly think of as an arrangement of private life, is a legal status—one that local, state, and federal governments in the United States have established and that does not itself exist without the state. Marriage has been a means of social ordering, an instrument that keeps in place the social order sanctioned by public authority. In the United States the marriage institution has been a powerful instrument of gender ordering and of racial ordering (so-called antimiscegenation laws, which I will not deal with here, being the most blatant evidence of the latter). At the level of the nation-state, marriage, along with naturalization and immigration policies, is the institution that guards the qualities and characteristics of the "body politic" by controlling sexual reproduction that is deemed legitimate. Marital status and citizenship have been linked together in the United States historically in complex ways, not always the same ways for men and for women, for the alien and the citizen, or for different racial and ethnic groups.

Second, on the assumption that the government of the United States is meant to "establish justice," as the preamble to the Constitution declares, I am interested in how far the laws linking marriage and citizenship can be said to constitute or be compatible with justice. I take as a point of departure Susan Moller Okin's important and effective critical insistence that the history of theorizing about justice—from ancient to contemporary—has by and large assumed that family relations are outside or prior to the realm of social relations where the criteria of justice matter. This assumption not only divides the world into realms of public (where considerations of justice apply) and private (where justice appears irrelevant) but also means, in effect, that the individual to

2. Ex parte Fung Sing, 6 F.2d 670 (1925); Waldo Emerson Waltz, *The Nationality of Married Women: A Study of Domestic Policies and International Legislation*, Illinois Studies in the Social Sciences, vol. 22, no. 1 (Urbana: University of Illinois Press, 1937), 46, first alerted me to this case.

whom justice pertains—who is to be subject of and to justice—is not every or any individual, but the one who is a male head of household. To my mind, Okin has argued successfully that this assumption (implicit or explicit) will rob a theory of "justice for all" of its validity. To purport to offer a plan for justice while ignoring male domination and privilege in the family is futile, she contends, because it allows the nature of the next generation to take place inside an unjust institution.³

In stressing the mutually constitutive relation of marriage and the state, I hope to illuminate, in line with Okin's critique, the partiality or falsity of any claim that marriage as an organization of "private" life is exempt from criteria of justice. As I hope my narrative of the impact of marriage on citizenship will make clear, the state is actively involved in creating social and civic relations for both men and women through legal marriages (therefore actively involved in forming and sustaining gender itself). State policies have been central in mandating relations of domination and dependence in the marriage institution in the past and reproducing these for the future through the socialization of future citizens. If a central purpose of governing is to "establish justice," such formative state policies cannot be exempt from criteria of justice. I don't mean to suggest, however, that criteria of justice, especially as enacted into law, are absolute or fixed. There has been tremendous change in public judgment, and also in judicial opinion of what is just, over time. Even though changes in the law move not consistently but only fitfully toward enhanced conceptions or enactments of justice (as the history I will relate suggests), nonetheless I think that we have to recognize the social construction of both justice and law and even to applaud that mutability.

Following Robert Gordon, I would argue for the "fundamentally constitutive character of legal relations in social life." In Gordon's simile, "the specific legal practices of a culture are simply dialects of a parent social speech and . . . studying the speech helps you understand the dialect and vice versa."⁴ Yet since justice and law are not congruent and

3. Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989). See also Okin's earlier work, *Women in Western Political Thought* (Princeton: Princeton University Press, 1979).

4. "Even a legal system clotted with arcane technicalities is unlikely to depart drastically from the common stock of understanding in the surrounding culture in the methods it uses to categorize social realities, the arguments about facts and values that it recognizes as relevant and persuasive, and the justifications it gives for its exercises of power." Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 57 (1984): 104, 90.

coterminous, and both are socially constructed, the sometime gap, or lag, between them begs for address. Can and do laws only (belatedly) adopt notions of justice that are already vented in social life and general public debate? Or can and do laws create and implement—indeed, invent—new notions of justice? With the alternative posed this starkly, most of us would probably answer, “some of both.” I do not mean to dertermine but simply to raise the issue here, because it seems especially germane to considerations about marriage as an institution linked to citizenship. As long ago as 1847, in the flush of American pretensions to lead the world in democracy, the renowned jurist Justice Joseph Story wrote, “In respect to the powers and rights of married women, the law is by no means abreast of the spirit of the age. Here are seen the old fossil foot-prints of Feudalism. The law relating to women tends to make every family a barony or a monarchy, or a despotism, of which the husband is the baron, king or a despot, and the wife the dependent, serf or slave. . . . Public opinion is a check to legal rules on this subject.”⁵ Story’s view here seems curiously appropriate to the narrative I am going to relate, although the public opinion that formed a “check” was not contemporaneous but subsequent to the legal rules.

The spine of my narrative is provided by congressional actions taken in 1855, 1907, and 1922, which significantly revised the relation between women’s marital status and their nationality.⁶ Congress also enacted additional modifications in the early 1930s, essentially restoring the relation between marriage and citizenship for women to what it had been before 1855 (ironically enough). An examination of these policy changes and their consequences illuminates the reliance of men’s and women’s civic statuses on their family positions and, when immigration restriction is brought into the discussion (as it should be), also reveals intersections between civic gender prescriptions and the ethnic and racial formation of the national community.

5. J. Story, *Treatise on the Law of Contracts Not under Seal*, 2d ed. (Boston, 1847), quoted in Carol Weisbrod and Pamela Sheingorn, “Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women,” *Connecticut Law Review* 10 (summer 1978): 835.

6. Bredbenner, “Toward Independent Citizenship,” is a thorough investigation of the history of married women’s nationality rights in Congress and the courts, more concerned with the interaction between that history and immigration law than is Waltz, *Nationality of Married Women*, the preexisting definitive history. I was first interested in this topic by Virginia Sapiro’s very compelling article, “Women, Citizenship and Nationality: Immigration and Naturalization Policies in the United States,” *Politics and Society* 13, no. 1 (1984): 1–26.

For three-quarters of a century after the American Revolution, women’s nationality rights appeared to be about the same as men’s. Adhering to the British common-law tradition that nationality was indelible, American law did not assume that a woman’s citizenship changed if she married a man of a different citizenship (although the settled presumption of the law was that a woman’s domicile, or legal residence, followed that of her husband). A U.S. Supreme Court decision of 1830, *Shanks v. Dupont*, enshrined this doctrine. In it, Justice Story wrote that “marriage with an alien . . . produces no dissolution of the native allegiance of the wife. It may change her *civil* rights, but it does not effect [*sic*] her political rights or privileges.”⁷

In 1855, however, the U.S. Congress passed a statute declaring that foreign-born women who married American men became American citizens by marriage.⁸ Two aspects of this provision are notable. One is its gender specificity. It gave a particular privilege to American male citizens, to endow their wives with American citizenship. It did not give a parallel privilege to American female citizens—quite the opposite. No American woman got to endow her foreign husband with her nationality. The statute underlined male headship of the marital couple (and therefore of the family and household) as a political norm as well as a social norm. That was even more emphatically so because the same statute affirmed that children born abroad to American fathers—not American mothers—were American citizens. (A bill had earlier been proposed to affirm citizenship for children born abroad to American mothers or fathers, but that bill did not succeed.)⁹

In its privileging of the male individual as *the* American citizen, this 1855 act brought forward the always-implicit connection between an individual’s marital status and his or her civil status. As feminist political theorists from Susan Okin to Carole Pateman have pointed out, the Western contractual political tradition gave great (if implicit) importance to a man’s headship of a family—his responsibility for dependent wife and children—as a qualification for him to be a participating mem-

7. *Shanks v. Dupont*, 3 Pet. 242 (1830), at 246; Waltz, *Nationality of Married Women*, 18–23. See James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978), on the differences between British and American notions of citizenship in the early republic.

8. *Congressional Globe*, 33d Cong., 1st sess., 13 January 1854, 169–71; *Congressional Globe*, 33d Cong., 2d sess., 20–21 December 1854, 8 February 1855, 91–92, 116, 632, 651.

9. Frank George Franklin, *The Legislative History of Naturalization in the United States from the Revolution to 1861* (Chicago: University of Chicago Press, 1906), 271–74.

ber of the polity.¹⁰ In the minds of the founders of the American republic, marriage, property holding, and heading a family were together linked to political participation. Discussing political rights in 1776, for instance, Thomas Jefferson wrote to a friend that he favored "extending the right of suffrage (or in other words the rights of a citizen) to all who had a permanent intention of living in the country. Take what circumstances you please as evidence of this, either the having resided a certain time, or having a family, or having property, any or all of them."¹¹ In republican theory, the citizen's independence (independence of means and of judgment) was key; and men's independence was strongly associated with being married—with the succession to (inherited) property or livelihood that came along with marrying and establishing one's own household. The fullness of a man's civil and political status appeared in his becoming an independent head of a unit that included dependents, in his heading a household unit that deserved representation in the polity.

The act of 1855 relied on these principles. It gave the male citizen greater privileges, and did so by limiting his wife's choice, by making his wife's and children's nationality derivative of and dependent on his. It made sure, a congressional sponsor said, that "by the act of marriage itself the political character of the wife shall at once conform to the political character of the husband." Foreign-born wives of American citizens were deprived of the exercise of independent political consent—or more exactly, I should say, the act prescribed that consent to *marriage* was the basic and definitive act of political consent available to them. The congressional sponsor of the bill saw no infringement or impairment of rights in it. Implicitly equating political rights with the vote, he presumed that "women possess no political rights." The bill was in his view simply "a relief to the husband, it aids him in the instilling of proper

10. Okin, *Women in Western Political Theory*; Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

11. Thomas Jefferson to Edmund Pendleton, August 26, 1776, quoted in Joan Guntdersen, "Independence, Citizenship, and the American Revolution," *Signs* 13, no. 1 (autumn 1987): 64. The connections between male headship of a family, property owning, and citizenship in public policy can be seen quite explicitly in the Jacksonian-era federal treaties with Indian tribes: U.S. government treaties with Cherokees in 1817 and 1819, for instance, gave land grants to (male) heads of families who wished to become U.S. citizens; the treaty of 1830 likewise stipulated that "each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months . . ." Quoted in Kettner, *Development of Citizen-*

principles in his children and cannot interfere with any possible right of a political character"—because women had none.¹² Controverting the traditional understanding that Justice Story had articulated in *Shanks v. Dupont*, the bill amplified the common-law doctrine of coverture—the doctrine that a woman, upon marriage, ceded her legal individuality as well as her property to her husband. Such amplification was remarkable in an era when state legislation seemed to be beginning to unseat coverage, with the passage of acts enabling married women to keep title to their property and increasing statutory grounds for divorce.¹³

The second aspect of the 1855 provision that I want to highlight is its racial specificity. Not every woman married to an American citizen was to become an American national—only those "who might lawfully be naturalized under existing laws." This phrase was inserted by Senate amendment to the original House proposition.¹⁴ It was a racial qualification. To be "lawfully naturalized" is to embrace (and to be allowed by the state to embrace) a legal fiction of rebirth into a new nativity, to mimic the citizen who belongs to the national community by birth.¹⁵ When Congress had determined American naturalization policy in 1790 (as the new Constitution gave it power to do), it had stipulated that only "free white persons" could be naturalized. Perhaps more remarkable,

12. *Congressional Globe*, 33d Cong., 1st sess. 13 January 1854, 169–71. Francis B. Cutting of New York sponsored the bill. U.S. congressmen were aware that Britain had already made a similar double move: Parliament in 1844 had passed legislation declaring that foreign-born women marrying British citizens gained British nationality and also confirming British citizenship in the children of British fathers—and mothers—abroad. Cutting had "not gone to that extent" (that is, to include mothers as authors of citizens). On consent, see Carole Pateman, "Women and Consent," *Political Theory* 8, no. 2 (May 1980): 149–68.

13. Although the principle involved was ominous, in practice, the women who gained American citizenship by the 1855 act were mostly glad of it—"not one in a thousand objects," declared a U.S. agent when confronted with one who did, vociferously; quoted in Bredbenner, "Toward Independent Citizenship," 18–20, discussing the case of Elise Lebert protesting her inadvertent loss of French citizenship. On married women's property acts and on divorce in the antebellum era see, for instance, Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York* (Ithaca, N.Y.: Cornell University Press, 1982); Richard H. Chused, "Married Women's Property Law, 1800–1850," *Georgetown Law Journal* 71, no. 5 (June 1983): 1359–1425; Norma Basch, "Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815–1870," *Law and History Review* 8, no. 1 (spring 1990), 1–24; Glenda Riley, *Divorce: An American Tradition* (New York: Oxford, 1991).

14. The Senate Committee on the Judiciary at first wanted to eliminate the section granting citizenship to wives, but on second thought amended it. *Congressional Globe*, 33d Congress, 2d session, 20–21 December 1854, 8 February 1855, 91–92, 116, 632.

15. On naturalization as a legal fiction, see Kettner, *Development of Citizenship*, 41–43.

this racial exclusiveness became a fundamental tenet of American naturalization policy without any debate. As reported in the *Annals of Congress*, the debate on the 1790 law gave no attention to this limiting phrase. Two of the three senators on the committee delegated to draft the law were from slaveholding states, Virginia and South Carolina, which in their state constitutions had limited naturalization to free white persons. The committee's draft contained the limiting phrase and no one in the Senate contested it—although debate about the proper length of residency for citizenship raged.¹⁶

The requirements for naturalization named those strangers most clearly welcomed and signaled who would belong most "naturally" to the imagined national community.¹⁷ The wives who were welcomed into the American polity in 1855, then, were free white wives. In 1870, after the Civil War and the Thirteenth and Fourteenth Amendments, Congress extended naturalization privileges to Africans and their descendants, mainly in response to the strenuous efforts of Sen. Charles Sumner. Sumner put a proposal before Congress to remove *all* racial restrictions from naturalization policy, but that proposal failed, because of western senators' animus against the Chinese immigrants who were becoming more numerous in the western states at this time.¹⁸

After 1870, because whites and persons of African descent could be "lawfully naturalized," the law of 1855 regarding wives' nationality applied to women of both of those groups. A federal circuit court decision in 1898 confirmed that a black woman born in Canada became an American citizen through her marriage to an African-American man. Although native Americans could not be naturalized (they could become American citizens by treaty arrangement), another decision in that decade even interpreted the reach of the 1855 act to mean that a native American woman who had married a white American, left her tribe, and

16. *Annals of Congress*, 1st Cong., 2d sess. (1790), 1057, 1109-25.

17. See Benedict Anderson, *Imagined Communities*, rev. ed. (London and New York: Verso, 1991), 5-7, on the concept of the nation as an imagined (limited and sovereign) political community.

18. *Congressional Globe*, 41st Cong., 2d sess., 2 July 1870, 4 July 1870, 5114-25, 5148-77; George M. Fredrickson, *White Supremacy: A Comparative Study in American and South African History* (New York: Oxford University Press, 1981) 145; Edward P. Hutchinson, *Legislative History of American Immigration Policy 1798-1965* (Philadelphia: University of Pennsylvania Press, 1981), 57-61; James Harrison Cohen, "A Legal History of the Rights of Immigrant Aliens in the United States under the Fourteenth Amendment to the Constitution, 1870 to the Present" (Ph.D. diss., New York University, 1991), 27.

"adopted the habits of civilized life" thereby became an American citizen.¹⁹

No Asian woman could acquire U.S. citizenship by operation of the 1855 statute. The Chinese population in America hardly worried about a surplus of marriageable women, however—quite the opposite. Among Chinese residents in the United States, who numbered more than 100,000 by 1880, the sex ratio was drastically skewed toward men. It was possibly the most skewed of any immigrant group at any time in the nation's history.²⁰ Chinese male laborers had first immigrated to follow the gold rush in California in the late 1840s and then were recruited as cheap labor to build the transcontinental railroad (which was completed in 1869). Their presence fueled the prejudices and anxieties manifested in the 1870 naturalization debate. Anti-Chinese feeling soon ballooned into enactments to exclude, first, Chinese prostitutes, and then all Chinese laborers from the United States. The Chinese exclusion acts of 1882, 1892, 1902, and 1904 not only closed Chinese immigration down to a trickle of specific categories of merchants, ministers, and students, but also reaffirmed that Chinese could not become citizens via naturalization.²¹

19. *Broadis v. Broadis*, 86 Fed. 951 (1898); *Hatch v. Ferguson*, 57 Fed. 959 (1893). The latter decision (about the native American woman) was based on the 1855 statute, even though a subsequent federal law had more direct impact, namely, an act of 1888 declaring that every woman member of any Indian tribe in the United States (except the five so-called "civilized tribes") who thereafter married a citizen of the United States would become a citizen herself, by marriage. See Frederick Van Dyne, *Citizenship of the United States* (Rochester, N.Y.: Lawyers' Cooperative Publishing, 1904), 121. Passage of this law had more to do with Congress's wish to keep white men from claiming exemption from U.S. jurisdiction by marriage to Indian women than it did with desire to make citizens of Indian women.

20. Bill Ong Hing, *Making and Remaking Asian America through Immigration Policy, 1850-1990* (Stanford: Stanford University Press, 1993), 48; Megumi Dick Osumi, "Asians and California's Anti-Miscegenation Laws," in *Asian and Pacific American Experiences: Women's Perspectives*, ed. Nobuya Tsuchida (Minneapolis: Asian/Pacific American Learning Resource Center and University of Minnesota, 1982), 8.

21. There is an excellent concise summary of the nineteenth-century welcome and then enmity for the Chinese and the passage of Chinese exclusion laws in Hing, *Making and Remaking*, 20-26. On Chinese exclusion, see also Hutchinson, *Legislative History*, 67-84, 104, 130, 431-33; and Sidney Kansas, *U.S. Immigration Exclusion and Deportation and Citizenship of the United States of America*, 2d ed. (Albany and New York: Matthew Bender, 1940), 4-6. The very first restrictive immigration law, in 1875, prohibiting the entry of prostitutes and contract laborers, was aimed at Chinese in both categories. See Hing, *Making and Unmaking*, 23; and Sucheng Chan, "The Exclusion of Chinese Women, 1870-1943," in *Entry Denied: Exclusion and the Chinese Community in America, 1882-1943*, ed. Sucheng Chan (Philadelphia: Temple University Press, 1991), 105-9.

Wyoming, which made marriages between Chinese and whites criminal and void.²⁵

In 1907, Congress ended indeterminacy on the question of American women who married foreigners by passing legislation that expressly followed through the logic of coverture in the 1855 statute. The new law, part of congressional streamlining of immigration and naturalization provisions, declared "that any American woman who marries a foreigner shall take the nationality of her husband." Where in 1855 Congress had invited U.S. men to absorb and replace the national identity of the women of other groups, the 1907 statute forcefully warned American women that they would become aliens in their own country if they married outsiders. This congressional prescription for wives' allegiance passed at the very height of immigration: about a million immigrants per year entered the United States in 1905, 1906, and 1907. It meant not only that American women were discouraged from marrying immigrants by the threatened loss of their own nationality, but also that any immigrant wife could not make her own decision to become naturalized; only if her husband (assuming that he was also foreign-born) sought naturalization could she become an American citizen. And the act had a clear racial cast: the American woman who married an Asian would remain an alien for the duration of her marriage, since her husband could not be naturalized.

By punishing American women who would introduce foreign racial or ethnic elements into the body politic, the 1907 act served a purpose similar to that of state antimiscegenation laws, which criminalized or nullified marriages between whites and persons of color. The 1907 act did not criminalize marriage to an immigrant, even to an Asian, but made the female partner in such a marriage give up her attachment to her country. Losing one's American citizenship meant more than a change of passport or a symbolic punishment. Aliens were not only placed outside the American political community, but also were hampered by material restrictions on occupational choice in many states and, most broadly, on the freedom to own, inherit, and devise property.²⁶

25. For a summary of laws prohibiting whites from marrying persons seen as belonging to other races, see David H. Fowler, *Northern Attitudes towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest, 1780-1930* (New York and London: Garland, 1987), appendix.

26. On common-law prohibition of aliens owning, devising, and inheriting property, see Kettner, *Development of Citizenship*. The clear trend during the late nineteenth century

The aim to keep Chinese immigrants out of the American body politic was further realized, subtly, by the act of 1855: not so much by its failure to include Chinese women who might marry American men as by its threat to American women who might marry Chinese men and permit them to father Chinese-American citizens. The act of 1855 (and its generous confirmations in state and federal courts), clearly indicating that a woman was one with her husband if he had American nationality, said absolutely nothing about the converse—the American woman who married a foreigner. Did she lose her U.S. citizenship by marrying "out"? Cases on this question were being decided, in less than consistent fashion, during the decades when the Chinese Exclusion Acts were formulated and strengthened.²² In one leading case of the 1880s in federal court, the judge noted with satisfaction that "legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative, at least for the purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power." He found it appropriate "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 where an alien woman marries an American citizen."²³ In another leading federal case of the 1890s, the judge felt exactly the opposite, concluding that the act of 1855 "was not intended as a general enactment upon the consequences of marriage between people of different nationalities."²⁴ The inconsistent decisions in these cases meant that the strong possibility of loss of citizenship loomed over any American woman who would marry a Chinese man. Thus discouraging interracial marriage, federal marriage policy backed up the spirit of laws passed between 1861 and 1913 in Arizona, California, Idaho, Montana, Nebraska, Nevada, Utah, and

22. On the indeterminacy on the question whether an American woman who married a foreigner lost her citizenship in the years 1855-1907, see Luella Gettys, *The Law of Citizenship in the United States* (Chicago: University of Chicago Press, 1934), 113-19; Van Dyne, *Citizenship*, 127-41; Ernest J. Hover, "Citizenship of Women in the United States," *American Journal of International Law* 26 (1932): 703-40; Waltz, *Nationality of Married Women*, 31-33; Sapero, "Women, Citizenship," 7-8; Bredbenner, "Toward Independent Citizenship and Nationality," 55-70. See digest of cases confirming the 1855 statute in *Century Edition of The American Digest: A Complete Digest of All Reported American Cases from the Earliest Times to 1896*, vol. 10, 13-15.

23. *Pequignot v. Detroit*, 116 Fed. 211 (1883), at 216, 214.

24. *Comitis v. Parkerson et al.*, 56 Fed. 556 (1893), at 562.

Congress passed this legislation with very little discussion, because of congressmen's assumptions about a woman's essential nonentity once married. Proponents said that the provision was merely "declaratory," that it codified the existing state of the law, that a woman's nationality followed that of her husband. Although such comments overlooked the actual conflicts and controversy in the case law, no congressman was sufficiently well informed or bold enough to say so.²⁷ The 1907 act showed how far congressmen took the primacy of male citizenship and headship of the family for granted and assumed in corollary that wives' primary political allegiance was to their husbands, not to their country. The contrast between national treatment of male citizens who married foreigners (their wives accepted into the fold—provided they were racially acceptable), and female citizens who married foreigners (themselves and their children ejected from the national community) could not have been more stark.

Yet the 1907 legislation coincided with a rising political trend entirely opposite in meaning—that is, the new percolating vigor and string of successes in the woman suffrage movement. By 1915, when the constitutionality of the 1907 act came before the U.S. Supreme Court, women were enfranchised in a dozen states. Ethel Mackenzie, an American woman who had married an Englishman, was prevented from registering to vote in California (where women were enfranchised in 1911) on the grounds that she was not a citizen. She fought this determination in court, contending that Congress could not take away the birthright nationality of a citizen, as the 1907 legislation purported to do. The U.S. Supreme Court was regrettably unsympathetic to her point of view. By-

was to eliminate restrictions of this sort, but many still remained in the early twentieth century; see Richard R. Powell, *Powell on Real Property*, rev. ed. by Patrick Rohan, vol. 1 (New York: Matthew Bender, 1993), 100–109. It is true, too, that during the nineteenth century a number of (underpopulated) midwestern and western states enfranchised aliens who had declared their intent to become citizens although this latitude was widely challenged by the end of the century. See J. B. Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage," *University of Pennsylvania Law Review* 141, no. 4 (April 1993), 1391–1470.

27. *Congressional Record*, 59th Cong., 2d sess., 21 January 1907, 41:1463–67; 27 February 1907, 41:4116; 28 February 1907, 41:4263–64. The act did provide that upon the husband's death his widow could resume her citizenship, and that if she did, her minor children born abroad would become citizens upon taking up residence in the United States. Note that in an earlier discussion of a (failed) bill to allow the American widow or divorced wife of a foreigner to regain her citizenship, senators also assumed that any married woman's nationality was the same as her husband's. *Congressional Record* 58th Cong., 3d sess., 14 January 1905, 39:829–31.

passing the precedent of *Shanks v. Dupont*, and embracing the "ancient principle" of "the identity of husband and wife," the court noted the important fact that the Expatriation Act of 1868 enabled Americans to divest themselves of national allegiance voluntarily. The court further contended that since the 1907 law had warned Ethel Mackenzie of the consequences, her marriage to a foreigner must be judged "as voluntary and distinctive as expatriation."²⁸

Punitive as the Supreme Court decision against Ethel Mackenzie seemed, it followed congressional directives to the letter. The Mackenzie case in 1915 caused a good deal more public commentary—and public outrage—than the passage of the act in 1907 had. Shortly afterward, World War I aroused further public awareness of the 1907 provisions, for a number of American-born women who happened to be married to German immigrants were declared enemy aliens and therefore had their property seized.²⁹ In the woman suffrage movement, where several leading figures, such as Harriot Stanton Blatch, Inez Milholland, and Crystal Eastman, were married to foreigners, the notion that marriage should decide a woman's political capacities was anathema. Suffragists equally rejected the premise that marriage to a foreigner should constitute expatriation and the provision that marriage to an American should constitute citizenship. The demand for equal suffrage required women, married or not, to be regarded as political individuals. Suffragists were horrified that marriage, in its interaction with nationality, could enfranchise some women and disenfranchise others.

It is not surprising, then, that one of the first and most unanimous moves of organized women after the passage of the Nineteenth Amendment was to challenge the provisions of 1855 and of 1907—to eliminate consequences of marriage for women's citizenship.³⁰ The initial result

28. Mackenzie v. Hare, 239 U.S. 299 (1915), 311, 312. Supreme Court Justice McKenna was either ignorant or crafty in declaring that "the identity of husband and wife is an ancient principle of our jurisprudence. . . . It was neither accidental nor arbitrary. . . . It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy" for this claim ignored the precedent of *Shanks v. Dupont*, in which Justice Story said that the political rights of fernes covertes, meaning "their acquiring or losing a national character," "do not stand upon the mere doctrines of municipal law . . . but stand upon the more general principles of the law of nations" (248).

29. Waltz, *Nationality of Married Women*, 12–13; Bredbenner, "Toward Independent Citizenship," 67–68, 117–18.

30. J. Stanley Lemons, *The Woman Citizen: Social Feminism in the 1920s* (Urbana: University of Illinois Press, 1973), 63–68, 235–37, includes a brief and helpful overview of the women's movement to achieve "independent citizenship" and the Cable Act's provisions.

of their efforts was the Cable Act of 1922 (named after its congressional sponsor, John Cable). Although some women lawyers had been agitating on the issue since the early 1910s, the enfranchisement of women made all the difference to the passage of the Cable Act. A Massachusetts congressman conceded during congressional debate that once women got the ballot, the existing relation between women's marriage and citizenship became "as archaic as the doctrine of ordeal by fire."³¹

The Cable Act asserted the principle of "independent citizenship" for married women, but it accomplished that only partially. First, it overruled the act of 1855, removing the foreign-born woman's privilege of gaining U.S. citizenship simply by marrying an American man. Instead, such wives were given a streamlined naturalization opportunity: they would have to wait only a year, rather than the standard five years, before going through naturalization procedures, and they could bypass the stage of declaring intent. Second, the Cable Act overruled the Act of 1907 by allowing an American woman who married a foreigner to retain citizenship. Rather than going the simple route of making her marriage irrelevant to or truly independent of her citizenship, however, the Cable Act awarded the American woman married to a foreigner the status of a naturalized citizen, who, if she lived for two years in her husband's country or five years in any foreign nation, was presumed (as any naturalized citizen in that situation was presumed) to have given up her American nationality. In superseding the provisions of 1907, the Cable Act also enabled an immigrant woman married to a noncitizen to apply for naturalization on her own.

Thus undoing the earlier laws, the Cable Act still retained male privilege in citizenship in connection with marriage. Sharp distinctions persisted between the prerogatives of American male citizens who married "out" and American female citizens who did so. Congress did not consider the possibility that foreign-born spouses of American women should have their paths to naturalization cleared. Not only did the American woman not gain any special privileges for her husband, but her own hold on her citizenship was not absolute; rather, it was depen-

31. See debate on the Cable Act in *Congressional Record*, 67th Cong., 2d sess., 1922, 62, pt. 9:9039-67; quotation from Rogers on 20 June 1922, 9047. On 1910s efforts, see Bredbenner, "Toward Independent Citizenship," 96-97; and Senate Committee on Immigration, *American Citizenship Rights of Women: Hearing before a Subcommittee of the Committee on Immigration*, 72d Cong., 2d sess., 2 March 1933.

dent on her residence, which was crucially tied to her husband's domicile. On the other hand, the prejudice that an American man should be able to control and decide his wife's nationality—that, whomever he married, his should be a fully *American* household—held strong sway among congressmen. Once the Nineteenth Amendment passed, this prejudice was countered by many congressmen's fears that the dispensation of 1855 would catapult foreign-born women married to American men into unseemly power as voters. The tug-of-war between these two prejudices resulted in the compromise that foreign-born wives of American citizens would have to be resident one year and would have to pass through naturalization procedures to become citizens.³²

If the Cable Act was about the principle of independent citizenship, why these complications? Why did it not simply emancipate citizenship from marriage considerations completely?³³ The limitations in the law showed how deeply it was embedded in the gender order and the racial order, displaying not only congressmen's (and presumably their constituents') attachments to male citizens' prerogatives, but also the intensifying public hostility toward immigrants, especially those seen as racially unassimilable. Besides the Chinese exclusion laws I have mentioned, immigration was further regulated by Congress in 1891, 1903, 1907, and 1910; in 1917 the Chinese exclusion acts were extended to virtually all of Asia; restrictions leaped forward in the Quota Act of 1921 (first limiting immigrants by country of origin) and culminated in the law of 1924 (the basic provisions of which lasted until 1952).

This movement toward restriction, at its height in the early 1920s when the Cable Act was also passed, was fueled by fear on the part of white Americans of English and northern European stock that the

32. The special contribution of Sapiro's article, "Women, Citizenship and Nationality," was to point out that congressmen's anti-immigrant animus was essential to passing the Cable Act. On political efforts before and around the passage of the Cable Act, see Bredbenner, "Toward Independent Citizenship," 127-35. Much earlier, Sophonisba P. Breckinridge, *Marriage and the Civic Rights of Women* (Chicago: University of Chicago Press, 1911), 33-34; and Waltz, *Nationality of Women*, 47 recognized that the Cable Act retained elements of "family unity"—that is, remnants of patriarchal control of citizenship. Another sex discrimination in the act was its providing explicit means for an American woman to renounce her citizenship upon marriage to a foreigner, should she wish to; before any court with jurisdiction over naturalization; the act contained no assumption that a male should or might want to do so; Waltz, *Nationality of Married Women*, 44.

33. Earlier-trying, more egalitarian versions of an independent citizenship bill did not make progress in Congress: see Bredbenner, "Toward Independent Citizenship," 119-27.

"true" American type was being overrun and outpeopled, that American standards of life and work were being undercut by swarthy and non-Protestant hordes from the Mediterranean, Russia, and parts of the world even less known or trusted. The 1921 and 1924 immigration restriction acts drastically lowered the ceiling on all immigration and established maximum quotas for groups by national origin, mimicking the ethnic makeup of the United States *before* the great waves of immigration of 1880 to 1920. The 1924 act barred foreigners who could not be naturalized from even entering the country. Now Asians overall, not only Chinese laborers, were inadmissible, as well as ineligible to citizenship.³⁴

It was this last provision, in conjunction with marriage policy, that caught Ng Fung Sing. She had been born an American citizen, but her marriage to a Chinese man made her, in the eyes of American law, Chinese. That was so even though she married in 1924, after the passage of the Cable Act. She was not able to retain her citizenship because the exclusionary sentiments so prominent in the period built into the Cable Act a racial prejudice: American women who married foreigners "ineligible for citizenship" (those who did not meet the racial requirements for naturalization) missed the grant of "independent citizenship" and were treated as under the act of 1907.³⁵ And if the woman herself did not meet the requirement for naturalization, her marriage made her an alien for life. When Fung Sing arrived in Seattle in 1925, immigration authorities regarded her (because of her marriage to a Chinese and her residence in China) as a Chinese subject, despite her American birth, and therefore ineligible for naturalization and inadmissible into the country. She was a widow, which would ordinarily have meant that her husband's nationality no longer affected her own citizenship—but the Immigration Act of 1924 also had a provision saying that "an immigrant born in the U.S. who has lost his U.S. citizenship shall be considered as having been born in the country of which he is a citizen or subject." This

34. On the making of the 1924 law, see Hutchinson, *Legislative History*, 484–85. The history of immigration restriction to 1924 has been detailed by many historians; see besides Hutchinson, *Legislative History* Kansas, *U.S. Immigration Exclusion*; and John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925* (New York: Atheneum, 1963).

35. All treatments of the Cable Act note this discrimination, including Lemons, *Woman Citizen*, 67; Cyril D. Hill, "Citizenship of Married Women," *American Journal of International Law* 18 (1929): 727; Waltz, *Nationality of Married Women*, 43–44.

provision operated especially harshly against those of Chinese or other Asian descent and seemed exactly designed to keep a woman such as Ng Fung Sing from her American birthright once she had left the country and married a Chinese man.³⁶

The racial prejudice in the Cable Act had a direct and particular impact on the Chinese and Japanese populations in the United States. In Asian-American communities, there were American-born adults who had citizenship because they were born on American soil.³⁷ Yet if an American-born woman of Asian descent married a first-generation Asian immigrant (which was very likely because of the skewed sex ratio), the Cable Act stipulated that she lost her American citizenship.³⁸ Nor could she regain it, being herself racially ineligible for naturalization.

It was also because of the clause excepting marriage to "aliens ineligible for citizenship" in the Cable Act that Mary K. Das became a woman without a country. Her husband had been naturalized during a period when a number of Hindus, Sikhs, and Parsees managed to do so, on the reasoning that natives of India were ethnologically classified as Aryan or Caucasian and therefore fit the requirement of "free white persons." But in 1923 the U.S. Supreme Court, putting the definition of the Caucasian race aside, decided that Indians were not "white" in the common understanding of that term as used in 1790 and 1870. The decision followed one from the year before, declaring Japanese people likewise ineligible. As the U.S. Supreme Court interpreted the 1790 naturalization statute, its "intention was to confer the privilege of citizenship upon

36. *Ex parte Fung Sing*; Waltz, *Nationality of Married Women*, 46.

37. The *ius soli*, or "right of the soil," as an American tradition stemmed from British practice that birth in the Crown's dominion made one a British subject. The principle was not formally enunciated in the United States until the Fourteenth Amendment to the Constitution (1868), however. In *U.S. v. Wong Kim Ark*, 165 U.S. 649 (1898), a divided Supreme Court affirmed that the child born of Chinese parents on American soil was an American citizen.

38. Chan, "Exclusion," 128–29; Osumi, "Asians," 15–16. Osumi claims that the "aim [of this clause of the Cable Act] was to discourage Nissei [second-generation Japanese immigrant] women and women of other races from marrying Issei [immigrant-generation] men." He points out that in 1920, 42 percent or more of the Japanese men over age fifteen were unmarried. According to Hing, *Making and Unmaking*, 55, the sex ratio among the Japanese population in the United States at that time was almost 2 to 1 (down from 7 to 1 in 1910 because the Gentleman's Agreement of 1907 allowed wives and children of Japanese men already in the country to enter); the sex ratio among the Chinese population was nearly 7 to 1, down from 14 to 1 in 1910 (presumably by natural increase).

that class of persons whom the fathers knew as white" and to deny it to others.³⁹ Retroactive application of the Supreme Court decision deprived Taraknath Das of his citizenship—which for ten years he had believed valid—and the Cable Act deprived his wife of hers. When she and members of the National Woman's Party, whom she enlisted in her cause, lobbied Congress for amendments to the Cable Act on this issue, she reported bitterly that "some Representatives and Senators, members of the Immigration Committees of the two houses of Congress, hold that the ideal of Americanism should keep any American woman from marrying any foreigner, particularly an Asiatic."⁴⁰

During the House debate on the Cable bill, a couple of congressmen had noted the sex discrimination involved in thus punishing an American woman, while an American man who married an Asian woman kept his citizenship. The best response that John Raker of California, a strong proponent, could muster, was to say, "The man has always had his right of citizenship. The men have dominated the thing from the beginning." When a Kentucky congressman offered an amendment extending the loss of citizenship to men who married aliens ineligible for citizenship by naturalization, it was handily rejected.⁴¹ To serve the goal of that was clearly intended in the making of the immigration laws of 1921 and 1924, congressmen had no trouble reading American woman out of the polity for straying, but they balked at restricting the freedom of American men to choose wives. It was just at this time, in 1923, that

39. *U.S. v. Bhagat Singh Thind*, 361 U.S. 204 (1923), at 208, quoting Takao Ozawa v. U.S., 260 U.S. 178 (1922).

40. Mary Das married in 1924, after the decision in *U.S. v. Thind*. She consulted lawyers as to whether she might lose her citizenship by the marriage and was assured by "experts, one a former adviser to the State Department," that a U.S. Supreme Court decision would never have retroactive effect. Das, "Woman Without," 105-6; Wold, "Woman Bereft"; Cohen, "Legal History," 42-52; Bredbenner, "Toward Independent Citizenship," 289-91. The justification for the effect of *Thind* on Indians naturalized years earlier was that the naturalization had been illegal and void. Cf. "Moves to Revoke Hindu's Citizenship," *New York Times*, 22 September 1925, p. 10.

The question of permanence in citizenship or loss of citizenship came up in several different and contradictory ways in connection with the consequences of marriage. Many courts agreed that the U.S. citizenship that a foreign-born woman gained by marrying an American man was permanent: if he died or they were divorced, she remained a citizen. But an American woman who became an alien via marriage could regain her American nationality after divorce or her husband's death (unless she was "ineligible for citizenship" by naturalization). This happened automatically under the statute of 1907 and via a year's wait and naturalization procedure under the Cable Act.

41. *Congressional Record*, 67th Cong., 2d sess., 20 June 1922, 62, pt. 9:9057, 9063-64.

a U.S. Supreme Court opinion first articulated the right of the individual "to marry, establish a home and bring up children" as a Fourteenth Amendment liberty.⁴² The principle that American male citizens ought to be able to create, sustain, and keep together the families they chose was an extremely important one in national thinking and in immigration policy—so important that it vied with and sometimes triumphed over the racialized nationalism of the period. Indeed, the creation of a class of "nonquota" immigrants amid the restrictive act of 1924 was to satisfy this principle. In the Quota Act of 1921, there had been no such class. During the few years that the Quota Act was in force, an American man who married outside of the country could bring his wife home only if she fit under the quota of her country of origin. This affront to the male citizen's right to unite his family caused so much furor and disbelief that a "nonquota" category of admissibles—namely, the wives and children of American male citizens—was established in 1924. Women citizens did not get the right to bring their foreign husbands home to the United States outside of the quota at that time, however. That took another four years of lobbying and an amendment in 1928.⁴³

Nor did Asian-American men receive the usual prerogatives of male citizens and husbands. The immigration act of 1924 made special provisions for the entry into the United States of citizens' wives, but it also prohibited admission of persons ineligible to citizenship. What happened when someone was both? The U.S. Supreme Court in 1925 declared, in a case concerning Chinese women married to American-born citizens of Chinese ancestry, that the racial limits on admissibility governed. The men in this case, though American citizens, could not have their wives join them. Chinese-American men lobbied the congressional immigration committees for years before an amendment to

42. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

43. Nor were American women who had lost their citizenship by marriage between 1907 and 1922 allowed to enter outside the quota: they had to reenter the country as quota immigrants in order to move toward regaining their citizenship through naturalization! Waltz, *Nationality of Married Women*, 47; Bredbenner, "Toward Independent Citizenship," 151-55, 203-06, 221-22, 235-40. Note that the first Quota Act (1921) did give male citizens' family members first preference under the quota; these family members had preference above the husbands of American citizens and above American women who had lost their citizenship through marriage and wanted to return to become naturalized. I am indebted to Bredbenner's work for stressing the conflict between the principles of "family unity" and of immigration restriction in the 1920s.

dom."⁴⁷ Yet to conclude that the policy changes on citizenship and immigration were dictated strictly by enlarging conceptions of justice to the individual would be naive and would ignore the relation of these changes to assessments of domestic order and to congressmen's assumptions about the role that the United States was destined to play in international politics as the leader of the "free" world.⁴⁸ Conceptions of justice in national policy are never separate from conceptions of national interest. If either shifts, so may the other. The reformation of citizenship and immigration policy that took place in the mid-twentieth century can be appreciated without it suggesting that the earlier chapter is so removed from the present day that it can be forgotten—not while shades of racial and gender hierarchy still tinge the policy landscape.

the Cable Act answered them: in 1930, Chinese wives of American citizens who had been married before 1924 were given a special dispensation to enter the country.⁴⁴

Unlike some narratives of policy change, this one has a upbeat ending. As a result of pressure brought by constituents, Congress amended the Cable Act in 1930, 1931, and 1934 until women's citizenship was fully separate from marriage consequences, including the differential consequences of marrying an "alien ineligible for citizenship." The National Woman's Party, the originator of the Equal Rights Amendment and a group sometimes criticized by historians for its elitism, led this effort.⁴⁵ While its position was gender-based—focusing on the unfairness of an American woman losing her citizenship for marrying an ineligible alien, when an American man did not—the result achieved was anti-racist. It wasn't until 1947, following wartime alliance between the United States and China and postwar occupation of Japan, that all racial barriers excluding citizens' spouses from entering the country were lifted. Five years later, the McCarran-Walter Act eliminated racial barriers to citizenship, substituting new political restrictions instead.⁴⁶

Accomplished because of insistent pressure from interested parties who stressed the injustice of the existing laws, the congressional moves in the 1930s to equalize married women's citizenship with married men's and the formal elimination, in the postwar years, of racial categories of citizenship, took fuller cognizance of individual rights without limits by sex or race than had the earlier policies. The values informing conceptions of justice can and do change, so that, as Justice Thurgood Marshall proposed in an opinion of 1985 (on a different issue), "what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and free-

44. Chang Chan et al. v. Nagle, 268 U.S. 346 (1925); Breckinridge, *Marriage and Civil Rights*, 31–32; Chan, "Exclusion," 125–26; Bredbenner, "Toward Independent Citizenship," 247–52, 256–57. The 1930 law was quite limited in its coverage, not extending to all Chinese wives of American citizens, only those married before 1924. Bredbenner notes that the wives at issue in *Chang Chan* were still in the United States, on bond, when the relevant law passed in 1930.

45. On the 1930s amendments, see Waltz, *Nationality of Married Women*, 51–58; Breckinridge, *Marriage and Civil Rights*, 39–40; Hover, "Citizenship of Women," 718–19; Blumstein and Crozier, "The Changing Basis of Women's Nationality," *Boston University Law Review* 10 (1934): 129–53; Bredbenner, "Toward Independent Citizenship," 339–40, 473–79; Chan, "Legal History," 42–52.

46. Cohen, "Legal History," 42–52; and see Robert A. Divine, *American Immigration Policy, 1924–1952* (New Haven: Yale University Press, 1957), 146–76.

47. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), at 466, quoted in Andrew Koppelman, "The Miscegenation Analogy: Sodomy Laws as Sex Discrimination," *Yale Law Journal* 98 (November 1988): 165.

48. See Divine, *American Immigration Policy*, 146–76.