Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship

Ernesto A. Hernandez-Lopez
Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship

Ernesto Hernández-López
GLOBAL MIGRATIONS AND IMAGINED CITIZENSHIP: EXAMPLES FROM SLAVERY, CHINESE EXCLUSION, AND WHEN QUESTIONING BIRTHRIGHT CITIZENSHIP

Ernesto Hernández-López†

I. INTRODUCTION ................................................. 255
II. Global Migration and Re-Imagining National Identity .................. 259
III. 200 YEARS, 150 YEARS, AND U.S. CITIZENSHIP: ENDING THE TRANSATLANTIC SLAVE TRADE AND THEN IMAGINING IN DRED SCOTT .......... 263
IV. 110 YEARS, CHINESE MIGRATION, AND WONG KIM ARK: IMAGINING CITIZENSHIP IN NEW GLOBAL CONTEXTS FOR THE UNITED STATES AND CHINA ...... 266
V. CURRENT GLOBAL MEXICO–U.S. MIGRATION AND TWO IMAGINATIONS OF CITIZENSHIP ........................................... 274
   A. On the Migrant-Sending End, Mexico’s Citizenship Re-Imagination Embraces Dual-Citizenship ........ 279
   B. On the Labor Demand End, U.S. Forces Urge Re-Imagining Citizenship Based on “Consent” to Negate Birthright Citizenship ................................. 282
VI. CONCLUSION .................................................. 287

I. INTRODUCTION

In the spirit of remembering the 200-year legacy of England’s abolition of the transatlantic slave trade in 1807 and the 150-year legacy of the U.S. Supreme Court’s decision in Scott v. Sandford in 1857, this Essay comments on the relationship between international migration and citizenship. Specifically, it uses the theme of the Texas Wesleyan University School of Law and the University of Gloucestershire’s Fourth Annual Summer Legal Conference, “Law and Justice in the Age of Globalization: Marking the 200th Anniversary of Britain’s Ab-

† Associate Professor of Law, Chapman University School of Law, Orange, California. The Author thanks John Tehranian for comments on earlier drafts; Dean John Eastman, Kevin Johnson, Erika George, and Rose Cuisin Villazor for their scholarly suggestions; Dean Eastman for the law school’s financial support; comments from co-panelists from the “Citizenship, Barriers, & Borders” panel at the Fourth Annual Gloucester Summer Legal Conference and from participants at the Harvard Law School European Research Center workshop; Chapman University COTES workshop, Third World and International Law (TWAIL) III at the Albany Law School, and the 2007 Law and Society Conference at the Humboldt University, Germany; and Research Assistant Vanessa Nguyen for her vital support.

olition of the Slave Trade (1807), to analyze the historical and global migration of persons and how responding to this domestic law reimagines national identity in the form of citizenship. This Essay's objective is to provide international and cultural contexts to legal determinations of who is (or is not) a citizen. Citizenship is studied as one example, but not the only example, of national identity. This is done by looking at nineteenth-century instances from the U.S. slavery and Chinese migration experiences and current examples of birthright citizenship in the United States and dual-nationality in Mexico. A quick view of the slavery and Chinese Exclusion histories shows these legal citizenship determinations occurred 150 and 110 years ago (Dred Scott and United States v. Wong Kim Ark, respectively), in response to prior global migration. Similarly, current citizenship issues in U.S. and Mexican law developed from changes in U.S. migration policy.


3. For this Essay, “legal citizenship determinations” refers to when the judiciary decides who is or is not a citizen. This Essay’s goal is to comment on migration and national identity in citizenship. It presents migration as a global or transnational process. This commentary is mostly inspired by the concurrent anniversaries in the year 2007 of the Dred Scott case and Great Britain’s abolition of the slave trade, which were two hundred and one hundred and fifty years ago, respectively. This Essay’s primary objective is to raise scholarly inquiry on issues of migration and citizenship. Specifically, citizenship determination may be heavily influenced by culture, which often happens after the global process of migration. With this objective, this Essay is more focused on posing scholarly questions and finding commonalities in historical events, as opposed to making fully researched doctrinal claims on citizenship and migration.

4. Following Linda Bosniak’s detailed and sophisticated analysis in The Citizen and the Alien, this Essay refers to citizenship as a “community’s boundary,” which designates a community’s belonging, exclusivity and closure. See LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 2 (2006). See also Linda Bosniak, Varieties of Citizenship, 75 FORDHAM L. REV. 2449, 2450–51 (2007) (referring to citizenship’s “border-conscious,” presumption of “national outsiders,” and characteristics of “passports and nationality”). This domain exists along with citizenship’s “internal” focus on the “nature and quality of relations” among community members. BOSNIAK, supra at 1–2. The former refers to citizenship’s outer domain and the latter to its inward domain. See id. The inward domain examines citizenship’s rights and benefits (i.e. “what is citizenship”) while the outward examination identifies citizenship’s boundaries (i.e. “who is a citizen” and “where” citizenship is determined). See id. at 12–16. This Essay does not focus on the inward analysis. Instead, it uses interpretive tools from cultural analysis, i.e., Benedict Anderson and Eric Wolf, to track the social constructions of citizenship embedded in legal interpretation responding to global migrations such as slavery to the United States, Chinese migration to the United States, and recent migration inbound to the United States and outbound from Mexico. For an excellent description of how citizenship implies both inequality and exclusion in both current and historical context, see generally Ediberto Román, The Citizenship Dialectic, 20 GEO. IMMIGR. L.J. 557 (2006) [presenting citizenship determinations as applied historically to inhabitants of U.S. territory/colonies, African-Americans, and Native-Americans, and as currently applied to persons of color in the “War on Terror”).

twenty years ago, i.e., the Immigration Reform and Control Act of 1986 (IRCA). This Essay is written in the year 2007, which inspires scholarly reflection of events in 1807, 1857, and 1898.

These cases illustrate how domestic law is forced by global processes to determine who is or is not a citizen. The decisions made in Dred Scott came after more than two centuries of slave trade to the United States. Similarly, in the last two decades of the nineteenth century, the U.S. Supreme Court decisions regarding the Chinese Exclusion measures took place after Chinese immigration to the U.S. began to increase in 1868. Likewise, Mexico's incorporation of dual-nationality for its citizens in 1997 and political and public calls to revisit birthright citizenship in the U.S. both come after steady increases in Mexico-U.S. migration. For the last twenty years, economic markets in the U.S. and in Mexico (bilateral demand and supply factors) and U.S. border policy have fed this increased presence of foreign nationals in the U.S. These trends lead to unauthorized migrants in the U.S. Children born to these migrants in U.S. territory are entitled to "birthright citizenship." Established U.S. legal interpretation entails that these children are U.S. citizens when born in U.S. territory, even if their parents are not "legally" in the U.S. This interpretation is continually contested as the "illegal" migrant presence grows consequent to economic practices and border policies.6

First, this Essay argues that these four examples of migration (slave trade, Chinese migration, Mexico emigration and U.S. immigration) show how domestic law (re)determines citizenship standards after sustained exposure to the global movement of persons, e.g., the transatlantic slave trade (which ended in the early nineteenth century), Chinese migration to the U.S. (beginning in the later part of the same century), and Mexico-U.S. migration (increasing steadily since the 1980s). Even though they are distinct, these three migrations are part of global processes. By global, I mean these developments are not unilaterally caused or felt. This is the case with slavery representing openly racist mindsets and brutal notions of property; treaty-induced Chinese migration developing from U.S. imperial ventures in Asia and in the western parts of the American continent; and the market-driven U.S. migrant-pull and Mexico migrant-push.

---

Second, this Essay contends that these legal determinations, each in distinct historical periods, reflect cultural processes of “imagined communities,” borrowing the concept from Benedict Anderson. The process by which U.S. or Mexican law defines who is a citizen comes after cultural notions determine who is (or is not) part of the political community. The legal decision of who is (or is not) a citizen is illustrative of this mix of cultural imagination and legal determination. With these averments, this Essay provides a small global, historical, and cultural contribution to recent legal scholarship on migration and citizenship.

An overarching goal of the following paragraphs is to contextualize legal issues from the nineteenth century and from current debates. This conceptual environment, wherein law must determine the normative standards of domestic citizenship, is both cultural and global. In other words, legal decisions on citizenship are not made without the influence of forces outside national territory. Similarly, these decisions do not occur without changes in communal or shared values, i.e., culture. Instead, the Essay shows two things. First, legal determinations of citizenship (both current and historic) take place amongst a political and legal interplay between domestic and foreign influences. Second, this conceptual interplay rests on a cultural context deciding who is or is not within a political community. The first point is evident in legal citizenship determinations. The second point illuminates an “imagined community” implicit in the legal reasoning. Accordingly,


9. For a working definition of “culture,” this Essay uses William Roseberry’s focus on culture and politics, economics, and history. Roseberry’s lens looks at cultural meaning and inequalities. See William Roseberry, Anthropologies and Histories: Essays in Culture, History, and Political Economy 13–14 (1989). Roseberry examines culture as developing from “social and political actors” having their actions formed “in part by preexisting understandings of the world, of other people, of the self,” which is influenced by “social and political inequalities” and “historical formation.” See id. Accordingly, history and political economics affect “actors’ differential understandings of the world, other people, and themselves . . . .” Id.
the Essay is not primarily focused on the substantive law that develops from slavery, Chinese migration, or current immigration to the U.S. Instead, the Essay points to a larger arena (both in terms of time period and geographic scope examined) from which legal citizenship determinations arise. These determinations include the historic examples of Dred Scott and Wong Kim Ark and more recent experiences with birthright citizenship in the U.S. and dual-nationality in Mexico.

To expand on this, Section I summarizes cultural studies' approaches to national identity and global analysis. This includes two, but by no means exclusive, influences. First is Anderson's Imagined Communities: Reflections on the Origin and Spread of Nationalism, arguing that nations are "imagined communities." Second is Eric Wolf's Europe and the People Without History, presenting how world history is characterized by transnational connections between communities and how this history often overlooks perspectives from migrants.

These theoretical approaches motivate this Essay to ask the following about legal citizenship determinations: (a) what is the global movement in persons that leads to the citizenship question?; and (b) what is the imagined community articulated by the legal determination of citizenship? From these questions, a legal inquiry into national identity and citizenship gains historical, global, and cultural perspectives. The next three sections briefly describe the examples of slavery, Dred Scott, and citizenship; Chinese migration to the U.S., Chinese Exclusion measures, and citizenship; and citizenship as seen from a migration experience of U.S.-pull and Mexico-push. For each of the cases their respective sections, Sections II through IV, present these legal citizenship determinations and then identify relevant global migration and imagined community contexts.

II. Global Migration and Re-Imagining National Identity

The global movement of persons results in domestic legal systems eventually re-imagining who is entitled to citizenship. Large-scale inbound or outbound migration, whether in today's "globalized world" or in previous periods such as the "age of migration," results in new determinations of legal issues regarding citizenship. To explore these claims, this Essay incorporates theoretical approaches from cultural studies and world-systems theory, painting a context that is global and

10. Anderson, supra note 7, at 6.
cultural. These theoretical suggestions elaborate on the macro causes of the four cases examined. These theoretical inquiries pinpoint a unit of analysis focused on the transnational connections in a global world (i.e., migration). They also elucidate the subject of cultural re-imagination of national identity (migration and citizenship).

To begin, anthropologist Eric Wolf in *Europe and People Without History* offers an approach that examines transnational connections in a global world, without solely focusing on nation-states. His approach adds a transnational focus, or a focus less centered on states, to world-systems theory. This theory traditionally characterizes world history as part of a core-periphery dynamic, with Europe starting as the core and expanding its influence worldwide. As this influence expands, the periphery is dependent on the core’s demand for resources and the core’s supply of manufactured goods and capital. As such, the center feeds off the periphery. He explains how the expansion of European economic power from the sixteenth century onward should be studied with less emphasis on state action and the core as sole agents of change. Instead, he urges increased analytical reference to the interconnections between societies and on the perspectives of communities before their exposure to the core’s influence. In this light, his history examines what moves transnationally irrespective of national borders. This initially includes the mercantile search for silver, slave routes, fur, sugar, and other products. These transnational connections continue in the late nineteenth and early twentieth century with the search for labor, which spurs mass global migration.

13. “World-systems” refers to the social science approach that international interactions are mostly defined by a disunion in power between the core-center and the periphery, with the core-center benefiting from the periphery’s labor and contribution. See *Immanuel Wallerstein, World-Systems Analysis: An Introduction* 11–17 (3rd prtg. 2005). This approach highlights the transnational nature or interconnectedness of politics, economies, history, and culture between nation-states. See id. Often this approach identifies world-economies or world-empires operating beyond the reach of one state or a region of the world. See id. at 17, 57. The approach examines how in different regions of the world, there is often a core-center and periphery relationship between nation-states. See id. at 11–17; see generally *Immanuel Wallerstein, The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (1974) (describing a world-system as a social system).

14. See generally *Douglas S. Massey et al., Worlds in Motion: Understanding International Migration at the End of the Millennium* 34–42 (Clarendon Press 2005) (1998) [hereinafter *Massey et al., Worlds in Motion*] (emphasizing global and macro economic causes for international migration’s initiation); *Alejandro Portes & John Walton, Labor, Class, and the International System* 4–6 (Charles Tilly & Edward Shorter eds., 1981) (discussing the “World-systems” theory, which provides global explanations for many migration issues and pinpoints how macro and economic changes in production and consumption (in the core-center) disrupt local labor markets (in the periphery)).

15. See *Wolf, supra* note 11, at 4.

16. See *id.* at 22–23.

17. See *id.* at 3–4, 22–23.

18. See *id.*
ing analysis traditionally disregarded, Wolf refers to the perspectives of societies before and after the world-system’s capitalist expansion.\textsuperscript{19} He also focuses on the actual interconnections, in the form of economic transactions or labor movements, between communities.\textsuperscript{20} This last point includes the large-scale historic migration of labor in the form of the transatlantic slave trade and migrants from Asia and from Europe to North America, South America, South Africa, and Oceania.\textsuperscript{21}

Wolf’s focus on studying world history by focusing less on state action is often presented with the “global pool hall” analogy.\textsuperscript{22} He explains that global interactions are often presented with “nations, societies, or culture” as being “internally homogeneous and externally distinctive,” as if they were billiard balls; “nations, societies, or culture,” then “spin off each other” like “hard and round billiard balls.”\textsuperscript{23} Instead, he argues there are important connections and movement between nations, societies, and culture.\textsuperscript{24} Taking cue from Wolf’s search for interconnections and histories denied, this Essay charts national identity as it changed after slavery, Chinese migration, and inbound and outbound migration between Mexico and the U.S. These three large-scale movements in persons resemble Wolf’s examination of interconnectedness between nation-states and communities.

Building from this macro and global analysis, this Essay tracks how citizenship is legally determined based on social constructions. The four cases studied suggest how domestic law constructs the idea of “who is a citizen and belongs” and “who is not a citizen and therefore is not a member.” As such, migration leads to important questions of national identity.\textsuperscript{25} Offering cultural nuances to macro examinations, Anderson describes the nation as “an imagined political community” that is “imagined as both inherently limited and sovereign.”\textsuperscript{26} It is

\textsuperscript{19} See id.
\textsuperscript{20} See id.
\textsuperscript{21} Id. (explaining that the spread of global capitalism impacts the world supply of resources and creates working classes that migrate between continents).
\textsuperscript{22} See id. at 6–7.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} The issue of migration and national identity received great scholarly, political, and public attention in response to Samuel P. Huntington’s 2004 work \textit{Who Are We? The Challenges To America’s National Identity}, which argued that migration from Mexico threatens the United States’s Anglo-Saxon culture, leading to ethnic strife as evident in Balkan Europe during the 1990s. See, e.g., Kevin R. Johnson & Bill Ong Hing, \textit{National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants}, 103 Mich. L. Rev. 1347, 1349–51 (2005) (reviewing Huntington and agreeing national identity is central to a discussion of immigration, but illustrating how migrants do assimilate despite claims of Anglo-Saxon culture’s static currency and how policies should promote assimilation instead of suggesting to stop migration).
\textsuperscript{26} Anderson, \textit{ supra} note 7, at 6. This Essay uses Anderson’s concept of “imagined communities” for three reasons. First, the concept focuses on the nation as
imagined because the members of this community can never know all of its members. This imagination creates the idea of a nation in situations where all members can not know each other. As such, the criteria for membership of a nation is conceived or imagined. The community is built from this "imagination." Its "limitation" stems from how the community cannot be infinite or without borders; instead, the community requires a finite demarcation. Since "imagination" constructs the idea of the community its borders are elastic or not permanent. Developing from nation-states versus divine orders, universal religious vision, or dynastic monarchies, this identity is an outgrowth from sovereignty. As states rid themselves of imperial, dynastic, or religious control, their sovereignty provided this freedom. At a more individual level, the imagination of the community rests on personal attachments along with state sovereignty. The imagination is of a "community" because the nation is conceived as a "deep and horizontal comradeship." There is a sense of fraternity in the community, despite inequality or exploitation.

an idea that is created, invented, and changed over time. Id. at 4. This facilitates this Essay's examination of the law of citizenship and its response to migrations in three periods of history. Second, Anderson's focus is quite cultural, instead of viewing the state or politics as solely responsible for nationalism. Id. at 4, 7, 12. This helps identify the cultural values that many legal citizenship determinations rely on. Third, because his concepts are so popular and readily accessible across disciplines and outside the United States, id. at 207, it best suits this Essay's objectives of introducing new questions along a broad scope. By no means does this Essay incorporate Anderson's more elaborate discussions on the origin and spread of nationalism, but instead it merely uses his basic definition of the nation. See id. at 4. Anderson's thesis is explanation about the origins of the nation are not without serious criticism from perspectives emphasizing historical, post-colonial, and discriminatory (racial, caste, gender, or class) perspectives. See, e.g., PARtha CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE 19-22, 50-51 (Univ. of Minn. Press 1993) (1986) (emphasizing three stages (departure, maneuver, and arrival) of Indian and possible post-colonial nationalism and questioning Anderson's thesis on print-capital origins of nationalism); Akhil Gupta, Imagining Nations, in A COMPANION TO THE ANTHROPOLOGY OF POLITICS 267, 268-80 (David Nugent & Joan Vincent eds., 2007) (presenting many of the contentions from scholars of nationalism both before and after Anderson's ideas and then comparing Anderson's modular and process approach to Partha Chatterjee's perspectives on the events that characterize Indian nationalism); CLAUDIO LOMNITZ, NATIONALISM AS A PRACTICAL SYSTEM: Benedict Anderson's Theory of Nationalism from the Vantage Point of Spanish America, in DEEP MEXICO, SILENT MEXICO: AN ANTHROPOLOGY OF NATIONALISM 3, 3 (2001) (questioning the Creole origins of the concept of a nation as coming from Spanish-American colonies and emphasizing the nation as "a community that is conceived of as deep comradeship among full citizens, each of whom is a potential broker between the national state and weak, embryonic or partial citizens who he or she can converse as dependents. . .").

27. Anderson states that the "cultural roots of nationalism" explains why millions of persons are willing to die for the nation. Anderson, supra note 7, at 1, 7. As an expert of Asian politics and culture, id. at acknowledgment, his inquiry is sparked by how and why Vietnam and Cambodia in 1978 went to war even though both states were Marxist at the time, id. at xi.

28. Id. at 7.
Taking these theoretical elaborations, this Essay uses the concept of imagined communities to illuminate how legal issues of citizenship develop from the global movement of persons.29 As explained below, legal determinations on citizenship must imagine its community’s members in the global context of the transatlantic slave trade, Chinese migration resultant to U.S. commerce with China, and recent demand-supply economics spurring Mexico-U.S. migration. With these theoretical suggestions, this Essay identifies how legal determinations of citizenship are influenced by the history of global migration and the cultural process of imagining communities.

III. 200 YEARS, 150 YEARS, AND U.S. CITIZENSHIP: ENDING THE TRANSatlANTIC SLAVE TRADE AND THEN IMAGINING IN DRED SCOTT

This Essay is written as a reflection on two important events in history: England’s abolition of the slave trade in 1807 (which was 200 years ago) and the U.S. Supreme Court’s Dred Scott decision in 1857 (which was 150 years ago).30 These events illustrate how the global migration in persons eventually results in domestic determinations of who is entitled to citizenship or not. Examining these two events together shows how there is first a movement in persons across national borders (i.e., Africa to the U.S.), and then later in history (i.e., Dred Scott) national identity is imagined to include (or not) descendants from this migration. The Essay identifies first a transnational movement in people and then later the domestic question of citizenship.

The slave trade encompassed the violent, brutal, and genocidal movement of people from Africa to the Western Hemisphere by European forces. This displacement began in the sixteenth century as a way to provide labor for imperial industries throughout the hemisphere, including the U.S., the Caribbean, Central America, and South America.31 As Spain, France, Portugal, and England developed

---

29. For a more thorough analysis of the relationship between citizenship and culture, see generally Leti Volpp, The Culture of Citizenship, 8 THEORETICAL INQUIRIES IN L. 571, 571 (2007) (demonstrating how the law often imagines the citizen as “modern and motivated by reason” and the “cultural other is assumed to be traditional and motivated by culture” using the example of illegality of headscarves in contemporary French schools).

30. With slavery, these events are fifty years apart, occurring in 1807 and 1857. Examples explored below show this difference in time can decrease with analogous processes later in the nineteenth century Chinese migration (thirty years between 1868 and 1898) and Mexico-U.S. migration (twenty-plus years between 1986 and the present).

31. See Wolf, supra note 11, at 195–231; see generally David Eltis, Free and Coerced Migrations from the Old World to the New, in Coerced and Free Migration: Global Perspectives 33, 39 (David Eltis ed., 2002) (providing a history of the transatlantic slave trade); Herbert S. Klein, African Slavery in Latin America and the Caribbean (1986) (covering the origins of the American slave system, the life of slaves in slave societies, and the transition from slavery to freedom).
enormous colonial enterprises producing silver, sugar, tobacco, coffee, and other products, Africans supplied vital labor for these ventures. Without slave labor these empires would have failed economically. While the U.S. ceased being a colony in the late eighteenth century, it continued using slavery as a labor system until the Civil War’s end in 1865. England abolished the trade or transport of slaves from Africa to the Americas in 1807. The next year the U.S. ended the importation, but would continue with slavery as a labor system until 1865.

Remembering these events, from 200 and 150 years ago, illustrates how slavery was slowly dismantled and how this process was global. It shows a belated sense of the political liberalism’s optimism, as the ideals of the Enlightenment and republican citizenship were not old in 1807 and 1857, but they were also not new. An important caveat to the concept of liberal citizenship was race, since the ideals of political participation and republican government implicitly and explicitly excluded persons of African descent. After 300 years of the slave trade and over six million persons moved from Africa to the Americas (with millions dying in the journey across the Atlantic), the dismantling of the slave trade began in 1807.

These developments were undoubtedly global and transnational. People were enslaved in the African continent and used for labor in the Americas. For centuries, England and other European empires used their military and commercial power to move millions of people. The European force, derived and sustained from the world-system’s core, kept millions of people enslaved as needed for the imperial economies. Enslavement and labor in the periphery provided economic gains and capital for Europe to industrialize. Similarly, politics in the form of abolition and liberalism in the European core slowly dismantled the transatlantic slave trade. In sum, slavery as a labor system was a challenge for political liberalism and a process developed transnationally, with causes and effects on both sides of the Atlantic.

Fifty years after England abolished the slave trade in Dred Scott domestic U.S. law made a significant determination on citizenship regarding persons of African descent. These persons were effectively only two generations removed from 1807. In this case, the basic inquiry was: whether a person of African descent was free, i.e., not a slave, could be a U.S. citizen? The Court answered no. The decision determined who was a member of the U.S. political community.

32. For instance, the Naturalization Act of 1790 limited citizenship through naturalization to "all free white person[s]." An Act To Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790). Another example is the Naturalization Act of 1870, which included persons of "African descent" but effectively denied this to Chinese. See An Act to Amend the Naturalization Laws and to Punish Crimes Against the Same, and for Other Purposes, ch. 254, 16 Stat. 254, 256 (1870).
33. See Scott, 60 U.S. 393 at 404, 406.
In order to accomplish this, the law had to imagine what were citizenship’s inclusive and exclusive boundaries. The relevance of this decision to this Essay is: it came after a long-term global movement of persons and it required the law to imagine the boundaries of national identity.

The decision in *Dred Scott* held that persons of African descent, whether they were slaves or freed persons, could never be U.S. citizens. Chief Justice Roger Taney wrote the majority opinion. Justices Benjamin Curtis and John McLean authored two dissenting opinions. Chief Justice Taney hoped that the decision would settle the larger issues regarding the legal constitutionality of slavery and remedy political and ideological divisions. Instead, the decision did quite the contrary and inflamed tensions that erupted into the Civil War four years later in 1861, with the notion of legal slavery fueling Southern state secession.

The decision imagined the U.S. political community by negatively demarcating those individuals who could not be citizens. Explicitly, for the Court these limits did not include blacks as possible citizens. The Chief Justice wrote that African-Americans were regarded as “an inferior order,” “unfit to associate with the white race,” and “so far inferior, that they had no rights which white man was bound to respect.” He added, “the negro might justly and lawfully be reduced to slavery for his benefit.” It denied the plaintiff Dred Scott the rights of citizenship even though previously his slave owner had freed him and he was not a slave during the proceedings. The Constitution, which had been in effect for over sixty years, had not determined whether persons of African descent could be citizens.

To reach its decision, the Court had to envision who could be a member of the citizenship community and what were the inherent limits of this community. The opinion accomplished this imagination and demarcation with two cultural steps. First, it claimed blacks were inferior and were not entitled to rights of citizenship enjoyed by a white and civilized world. This step imagines who is and is not part of a community. This imagination was required since the Constitution did not textually state, “slaves or descendents of slaves, or persons of Af-

34. See id. at 404–406.
35. Id. at 399.
36. Id. at 529, 564.
38. See id.
40. Id.
41. See Eisgruber, supra note 37, at 153–54 (explaining the process of freeing Dred Scott occurred when the slave owner traveled to a “free state” with the slave).
42. See *Scott*, 60 U.S. at 404–05.
frican descent may be citizens." Taney explained that the Constitution did not confer citizenship to African-Americans. He wrote they were "not included, and were not intended to be included, under the word 'citizens' in the Constitution" and "therefore [they can] claim none of the rights and privileges" of citizenship. He added they were "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." The opinion claimed that African-Americans did not qualify for the definitions of "people of the United States," political communities, or "citizens" as included in the Constitution. Instead, for the Dred Scott Court, the Constitution regards persons of African descent as a "separate class of persons" and not as a "portion of the people or citizens of the Government then formed." As its second cultural step, the Court implicitly held persons of African descent were property when it found Congress had violated states' rights when it outlawed slavery in the western territories. In the latter point, the Court found slave owners were entitled to due process protections for their slave property. This means that persons of African descent were property, for which a slave owner enjoyed due process protection. It explained because the Constitution "recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property" then it could not deny protection for this property.

IV. 110 YEARS, CHINESE MIGRATION, AND WONG KIM ARK: IMAGINING CITIZENSHIP IN NEW GLOBAL CONTEXTS FOR THE U.S. AND CHINA

Like the centuries-long transatlantic slave trade, Chinese migration to the U.S. developed as part of a larger global process. This migration eventually led to a legal re-definition of citizenship in the U.S. with Wong Kim Ark. This decision confirmed birthright citizenship in

43. The Constitution does not provide a definition of "citizen" or "citizenship." In 1790, Congress passed the first law providing for naturalization of aliens and extending citizenship to children born abroad to U.S. citizen fathers. See An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790).
44. Scott, 60 U.S. at 404.
45. Id. at 404–05.
46. See id. at 410–11.
47. Id. at 411 (referring to constitutional provisions permitting for the importation of slaves and protecting the property of slave owners).
48. See Devon W. Carbado, Racial Naturalization, in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 41, 51 (Mary L. Dudziak & Leti Volpp eds., 2006) (describing the decision as "inclusive exclusion" since persons of African descent are excluded from citizenship but also included as American property).
49. See Scott, 60 U.S. at 449–52.
50. Id. at 451.
U.S. law, which set the criteria for future citizens beyond descendents of Chinese migrants. Historically, Chinese migration to the U.S. developed from new global contexts for the U.S. and China, as both countries became more active in foreign affairs and increasingly subject to foreign influence. European and American diplomatic pressure and domestic push-factors spurred Chinese emigration after the Opium Wars ended in 1842. Public and political forces in the U.S. have resisted this migration since its increase after 1868. With the Chinese Exclusion Act of 1882, Chinese migrants were barred from entry and discriminated against in a variety of ways that affected their daily life. This included barring Chinese migrants from citizenship through naturalization, which meant that they could not become U.S. citizens after relocating to the U.S.

In this environment of labor need and political exclusion, domestic law eventually imagined the contours of citizenship with a dispute regarding children born to migrants in the U.S. In Wong Kim Ark, the Supreme Court held that an individual born to Chinese parents in U.S. territory was a U.S. citizen. In jurisprudential terms, this confirmed principles of *jus soli* and birthright citizenship in U.S. law. In cultural terms, the decision’s reasoning imagined the contours of the citizenship community to include persons born in U.S. territory (as opposed to excluding them from citizenship). Alternatively, the court could have reasoned that because of naturalization prohibitions on the contours of citizenship at birth, children born to Chinese migrants are excluded. With Wong Kim Ark, the community of who is born with citizenship explicitly includes persons born on U.S. soil, as opposed to limiting this membership to family relations, i.e., *jus sanguinis*. As described below, the global migration context from which this developed and the cultural imagining evident in Wong Kim Ark’s reasoning illus-

51. See generally *Cultures of United States Imperialism* (Amy Kaplan & Donald E. Pease eds., 1993) (showing sophisticated and varied analyses of how late nineteenth century and early twentieth century U.S. territorial expansion (continental and overseas) along with the required foreign relations implied imperial projects).

52. As this Essay is an attempt to place citizenship and migration issues in a cultural and global context, it does not examine the issue of naturalization and citizenship. Importantly though, as judicial interpretation and political determinations imagined those contours of citizenship, and U.S. law barred naturalization for non-whites, many persons acquiring U.S. citizenship through a process of naturalization were required to “prove” their whiteness.” See Ian F. HANSET LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 37–47 (1996); John Tehranian, Note, Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America, 109 YALE L.J. 817, 820–21 (2000).


trates this Essay's focus on global movement and citizenship's cultural nuances.

Chinese emigration developed from domestic push factors, overseas demand, and international pressure. With treaties concluding the Opium War (1839-1842), China eliminated many restrictions to Chinese emigration and foreign trade. These agreements were part of an increased European and eventually North American presence in Asia. This had commercial and geopolitical objectives, motivating treaties with China. Along with diplomacy leading to concessions like Hong Kong to Great Britain, the "opening up of China" included ending bans on emigration and supplying labor outside China. Similarly, domestic Chinese events such as political consolidation after the Taiping rebellion and a series of bad rice harvests fueled this emigration.

In the second half of the nineteenth century, sizeable populations of Chinese relocated around the world providing labor as global capitalism developed increasingly commercial enterprises, mostly in the production of primary goods for international consumption. Seen from an American perspective, this migrant labor represents a country with mostly an Atlantic presence, proceeding to enfranchise the western regions. Chinese labor was central to the transcontinental railroad project and to providing a workforce west of the Rocky Mountains. Between 1852 and 1875 approximately 200,000 Chinese persons relocated to California. Similar labor movements resulted in Chinese migrants numbering over 150,000 in Singapore, 90,000 in Peru, 42,000 in Australia, 19,000 in the British West Indies, nearly 5,000 to Cuba, and similar migration to Mumbai, India, Dutch Guiana, Tahiti, and Hawai'i. For these locations, Chinese labored in gold mining, agriculture, spice growing, and cotton. As global trade increased, seeking commodities for urban centers and for industrial workforces, Chinese labor was also global in reach.

In the U.S., Chinese migrants provided a source of labor in the West after gold was discovered in California in 1848. Chinese labor filled needs in railroad construction, laundries, and domestic services. While Chinese began migrating in the 1840s, the majority entered the U.S. after the Burlingame Treaty between the U.S. and China in 1868. This treaty provided the U.S. with commercial access to China and it lifted the ban on emigration for Chinese nationals. The treaty was a foreign policy gain for the U.S. as the country sought foreign commerce after the Civil War. Likewise, as domestic attention could now focus on incorporating the western regions, the treaty identified a

55. Wolf, supra note 11, at 374–79.
56. Id.
57. Id.
58. Id.
source of labor. This migration was significant with over 300,000 Chinese relocating to the U.S. by 1882, with about one-third remaining on the West Coast.\textsuperscript{60}

Chinese migration, despite being the result of domestic labor need and global movements, unfortunately faced nativist sentiment, racist discrimination, and reversal to the 1868 treaty’s invitations. These public and civil sentiments fed a series of measures from 1870 onward as part of the Chinese Exclusion process. Public sentiment was resentful of many immigrants from the period, who came from Southern and Eastern European countries and Asia, but it also specifically targeted Chinese. By the end of the nineteenth century, one-third of the U.S. population was either foreign-born or had at least one foreign parent.\textsuperscript{61} By 1882, Congress passed the Chinese Exclusion Act which suspended Chinese migration for ten years.\textsuperscript{62} In the Act, Congress codified provisions barring Chinese from becoming U.S. citizens through naturalization.\textsuperscript{63} Congress regarded Chinese as not eligible for citizenship because they were not “free white persons.”\textsuperscript{64} The 1882 rule barred any state or federal court from naturalizing a Chinese person, adding to previous federal prohibitions.\textsuperscript{65}

In the 1870 pronouncement, Congress extended the right of naturalization to African-Americans but explicitly prohibited this for Chinese because of their “undesirable qualities.”\textsuperscript{66} Rationales for barring citizenship for Chinese relied on cultural arguments that they were a different race and had a history, biology, and culture unique and so distinct that they could not assimilate.\textsuperscript{67} It was claimed that these differences threatened U.S. republican governance.\textsuperscript{68} Further, federal measures in 1888 and 1892 barred re-entry for any Chinese who had left the U.S. and required registration of all Chinese persons in the U.S.\textsuperscript{69} The Chinese community at grass-roots and strategic litigation levels publicly opposed the Chinese Exclusion process.

\textsuperscript{60} Id.


\textsuperscript{62} An Act to Execute Certain Treaty Stipulations Relating to Chinese, ch. 126, § 1, 22 Stat. 58, 59 (1882). The Chinese Exclusion Act also excluded entry for those not present in the United States by November 17, 1880, or who had arrived within ninety days of the Act’s implementation. Id. § 3.

\textsuperscript{63} Salyer, supra note 61, at 57.

\textsuperscript{64} ch. 126, § 14, 22 Stat. 58, 61.

\textsuperscript{65} Salyer, supra note 61, at 57–58.

\textsuperscript{66} Hinc, supra note 59, at 36; see Salyer, supra note 61, at 57 (referring to Nevada Senator William Stewart’s comments on Chinese as not able to understand the republican form of government).

\textsuperscript{67} Salyer, supra note 61, at 57.

\textsuperscript{68} Id. (referring to Senator John F. Miller’s comments on Chinese as “servile drudges” with limited intellect, accustomed to imperial government, and thus unable to comprehend or partake in the U.S. republican government).

\textsuperscript{69} Hinc, supra note 59, at 39.
These resistance and litigation efforts resulted in significant court decisions and lawmaking in the areas of immigration, alienage, and citizenship law. These struggles included Chinese-Americans articulating their U.S. citizenship while re-entering the U.S. This avoided border exclusions and rights limitations for Chinese migrants. States and Congress passed measures excluding Chinese migrants from entry and increasing the likelihood for their deportation. Executive authority, in the form of border control, increasingly enforced these rules. The traditional judicial perspective was that most constitutional rights and judicial review did not apply to immigration law because of the political branches' "plenary authority." With these forces directly limiting rights for migrants, for many Chinese, articulating their U.S. citizenship provided a method to avoid these harsh measures.

From this context of domestic law limiting rights for Chinese migrants and local resistance from the Chinese community, the Supreme Court affirmed the principle of birthright citizenship in Wong Kim Ark.70 Importantly, the decision conceived the contours of U.S. citizenship by birth to include children born in U.S. territory to parents who are foreign nationals.71 Thus, the rationale for community membership (here who can be a citizen) relied on the child's place of birth instead of their parent's nationality or race. The decision's immediate effect was to provide de jure incorporation for the U.S.-born children of Chinese immigrants. The long-term effect, though, was that these inclusive standards applied to later migrant communities. In Wong Kim Ark the judicial imagination regarding citizenship migrated away from race-based exclusions aimed at migrants, away from concerns for parental lineage in *jus sanguinis*, and towards an expanded focus on a child's place of birth.

Wong Kim Ark was born in San Francisco, California, in 1873.72 Both of his parents were Chinese nationals.73 He lived his whole life in the U.S.74 He made two trips to China in 1890 and 1894.75 Returning from the second journey a year later, he was denied admission in San Francisco because he was not a U.S. citizen.76 The port official reasoned his birth in the U.S. did not provide citizenship.77 The Government's denial of admission at the port had been planned by the Department of Justice, responding to public calls since the 1880s to deny citizenship on *jus soli* grounds to children born to Chinese migrants.78 With the aid and litigation support of the Chinese Consoli-
dated Benevolent Association, Wong Kim Ark brought suit before the U.S. district court in San Francisco. It ruled that he was a U.S. citizen and was illegally detained. After an appeal, the Supreme Court made its ruling in 1898, avoiding an election year for this socially and politically divisive issue.

The court ruled in favor of Wong Kim Ark, affirming his U.S. citizenship and the concept of birthright citizenship with six justices in the majority and two dissenting. Justice Horace Gray’s majority opinion found that: the law of birthright citizenship was well-established with centuries of precedent in U.S. and English common law, denying birthright citizenship would pose enormous problems for children of many migrant groups beyond the Chinese, and denying citizenship in these cases posed problems to national sovereignty with sectors of the population having divergent allegiances. Focusing less on common law precedent and sovereignty, the dissenting opinion reasoned Chinese could not exercise the allegiance needed for U.S. citizenship. It stated their children were “strangers in the land” and the notion of their citizenship was an “accident of birth.”

An important citizenship development since Dred Scott (forty years prior) was the 1868 implementation of the Fourteenth Amendment stating “all persons . . . born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” A clear reading of this provision illustrates “all persons” born in U.S. territory would be citizens. Similarly, at the time of Wong Kim Ark, jus soli principles were firmly established in the common law with precedents such as the English Calvin’s Case from 1608 and In re Look Tin Sing in 1884.

79. Id. at 67.
80. Id. at 69.
82. See id. at 694–705.
83. See id. at 731.
84. Id. (Fuller, J., dissenting) (citing Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893)).
85. U.S. CONST. amend. XIV, § 1. In 1866, Congress passed the Civil Rights Act, stating, “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.” See An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, ch. 31, § 1, 14 Stat. 27 (1866).
86. See Wong Kim Ark, 169 U.S. at 676 (“[U]pon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship . . . ”).
87. Calvin’s Case, 7 Co. Rep. 1, 4b–6a, 18a, 18b.
89. See Wong Kim Ark, 169 U.S. at 655–56, 697 (citing Calvin’s Case, 7 Co. Rep. 1, 4b–6a, 18a, 18b (setting anglo-tradition apart from jus sanguinis notions and reasoning jus soli fostered allegiance to the King) and In re Look Tin Sing, 21 F. 905, 908–99 (C.C.D. Cal. 1884) (holding children born to Chinese parents in the United States were citizens because of the Fourteenth Amendment)); Salyer, supra note 61, at 61–62.)
What led to a legal dispute about birthright citizenship after the Fourteenth Amendment and Look Tin Sing was domestic resistance and xenophobia to Chinese immigration. This migration was global in that many Chinese left China for domestic reasons there (labor push) and for domestic reasons in the U.S. (labor demand). Likewise, it was global as the U.S. negotiated these treaties to open commercial markets, and the U.S. was increasing its presence in the Pacific and in the western U.S.

As a legal articulation of this resistance, Chinese Exclusion was an institutional and long-term process with federal laws enacted in 1882, 1884, 1888, 1892, and 1893. These laws were by no means race neutral and instead specifically targeted Chinese or Asian migrants. Their rationale in Congress and in many judicial opinions relied on painting Chinese persons as foreign, impossible to assimilate, a different race, and obnoxious. These cultural arguments provided justifications for political determinations by Congress when passing measures and by courts when reviewing these measures.

This Essay argues that legal determinations of who is (or is not) a U.S. citizen incorporates these cultural notions. Legal interpretations incorporate these ideas by imagining, or conceiving, who is (or is not) a member of the citizenship community. Arguments made by litigants, judicial opinions, and the public explicitly relate cultural imaginations of a community’s limits with legal determinations of citizenship. This reasoning occurs by interpreting positive law (such as naturalization provisions and the Fourteenth Amendment) and common law precedent. This incorporation of the cultural and community limitations into a legal argument was evident in Dred Scott’s reasoning that African-Americans were not citizens, and they were property.

There is a similar process of cultural argumentation entering legal determinations in Wong Kim Ark, when reasons for excluding the Chinese become germane to the law of citizenship. These exclusionary reasons represented long-term public and political efforts made since the 1870s. Responding to this, courts determined if the law clarifying citizenship is as broad as it appears (evident in the Fourteenth Amendment or in the common law) or if it had implicit distinctions, i.e., children born to foreign parents in the U.S. are not citizens.

90. See Salyer, supra note 61, at 56–59.
93. See supra Section II.
Arguing against birthright citizenship in *Wong Kim Ark*, the Government referred to *The Slaughter-House Cases* of 1873 and *Elk v. Wilkins* from the next year. These cases explained that the Fourteenth Amendment’s “subject to the jurisdiction of” clause excluded children born to diplomats and Indians born in tribal jurisdictions from citizenship, respectively. In both cases, the rationale was that the children were not fully subject to U.S. jurisdiction. In *Wong Kim Ark*, these arguments were used in painting children of foreign nationals born in national territory as not subject to U.S. jurisdiction and thus not entitled to citizenship by birth. The rationale was extended to equate voluntary allegiance as required for citizenship. They worried that foreign national parents would not foment the allegiance required for republican governance.

Similarly, the Government argued that citizenship entailed something beyond the simple pronouncements in the Fourteenth Amendment. It was argued that citizenship could not be based solely on a shared birth location, i.e., inside domestic territory. Instead the Government argued a shared characteristic was needed and Chinese migrants lacked this. The Government further argued that this quality was passed from migrants to their children even if they were born in U.S. territory. Prior legal justifications for this existed in the ban on Chinese naturalization in 1870. In making these arguments, citizenship was presented as implying a sense of community, something that did not exist by mere territorial birth. This was supplemented with the reasoning from *Elk v. Wilkins* that Indians were not completely subject to U.S. jurisdiction, as Indian tribes exercised some sovereignty. The Government further argued that Chinese migrants, because of their distinct culture and allegiance to a foreign

---

96. These cases are referred to heavily in the dissenting opinions. *See*, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649, 721–24, 727 (1898) (Fuller, C.J., Harlan, J., dissenting) (referring to the *Slaughter-House Cases*). The Government also argued the Fourteenth Amendment had been forced upon the South and was thus unconstitutional. *See* Salver, *supra* note 61, at 71 (referring to Brief for the United States in *Wong Kim Ark*).
97. The majority refutes this claim by referring to the plain meaning of the Fourteenth Amendment’s phrase, “all persons.” *See* *Wong Kim Ark*, 169 U.S. at 675–76.
100. *Id.* at 70–71.
101. *Id.*
102. *Id.* at 71–72.
103. *Id.* at 68.
104. *See id.* at 68–71.
105. *Id.* at 71–72.
state, were similarly not subject to the U.S. jurisdiction.\textsuperscript{106} In all these arguments, the Government averred how cultural notions marked the contours of citizenship. As such, the limits were imagined to include or exclude members in a community.

Wong Kim Ark similarly made cultural arguments that the Fourteenth Amendment included a goal of racial equality for citizenship.\textsuperscript{107} Ark argued this goal was evident in the Amendment's term of "all persons" and in its clear intent to overturn \textit{Dred Scott}.\textsuperscript{108} He further argued that \textit{jus sanguinis} principles, emphasizing family lineage, lacked common law precedent in U.S. legal history.\textsuperscript{109} Ark claimed that if citizenship were denied to children born to migrants, a racialized caste would develop, given large immigration to the U.S.\textsuperscript{110} Likewise by denying citizenship to these persons, a U.S. population with mixed allegiances could hamper the federal government's power.\textsuperscript{111} It was argued that diverse allegiances by non-citizen children of migrants would lead to a foreign state involved in U.S. affairs.\textsuperscript{112} If the children were under the protection of another state, that state could intervene in matters regarding their treatment. This was specifically undesired as the U.S. increased its international presence and developed federal primacy over issues such as migration and foreign relations. Confirming that children born in U.S. territory were citizens provided the federal government control of its territory and border.

V. CURRENT GLOBAL MEXICO–U.S. MIGRATION AND TWO IMAGINATIONS OF CITIZENSHIP

Migrating on a path reflective of prior histories, specifically slave trade and Chinese migration, this Essay examines the current migra-

\begin{itemize}
  \item \textsuperscript{106} See \textit{id.} at 68–72.
  \item \textsuperscript{107} See \textit{United States v. Wong Kim Ark}, 169 U.S. 649, 692–93 (1898) (highlighting contemporary jurisprudence finding the Fourteenth Amendment language of "all persons born in . . . the United States" had the intention "to bring all races, without distinction of color, within the rule" previously limited to the white race (referring to \textit{Benny v. O'Brien}, 32 A. 696 (N.J. 1895)); see also \textit{Salyer, supra note 61}, at 73 (quoting Briefs for the Appellees submitted by J. Hubley Ashton and Maxwell Evans).
  \item \textsuperscript{108} Salyer, supra note 61, at 71–72.
  \item \textsuperscript{109} See \textit{Wong Kim Ark}, 169 U.S. at 658–66, 693. \textit{Jus sanguinis} principles do provide U.S. citizenship for children born to American citizens who reside outside the United States. See Immigration and Nationality Act (INA) §301, 8 U.S.C. §3401(c)–(e), (g), (h) (2007) (illustrating how citizenship standards vary if one or both parents are U.S. citizens and if these parents have resided in the United States).
  \item \textsuperscript{110} See \textit{Wong Kim Ark}, 169 U.S. at 694 (referring to problems for children of "English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States").
  \item \textsuperscript{111} See \textit{id.} at 668 ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."); \textit{id.} at 683–88, 690 (correlating the importance of an independent U.S. government with the importance to determine citizenship).
  \item \textsuperscript{112} See \textit{id.} at 685–86, 690.
\end{itemize}
tion and national identity discourse for citizenship in Mexican and U.S. law. U.S.–Mexico \textsuperscript{113} migration develops from global and transnational forces. Responding to this domestic law for both Mexico and the U.S. re-imagines citizenship. To explain this, this section first describes the transnational and global aspects of current migration that spurs citizenship debates in the U.S. and Mexico. Next, two sub-sections respectively relate the concept of imagined communities with legal citizenship changes in Mexico and political suggestions to revisit \textit{jus soli} citizenship in the U.S.

This Essay’s transnational view of migration contradicts a perspective that one country is solely the cause of or unilaterally has the power to control migration. Immigration (the process of crossing a national border and relocating) clearly reflects international causes, influences, and effects. With Mexico–U.S. migration, the pattern since the mid-1980s is characterized by factors such as increased U.S. migrant labor dependence (pull factor) and increased Mexican dependence on emigrant labor (push factor), and economic restructuring in the U.S. and Mexico illustrating bilateral integration and globalization. These factors continue historic migration and transnational trends between the two neighbors.\textsuperscript{114} In particular since immigration reforms in 1986, with the Immigration Reform and Control Act (IRCA), and in 1996, with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),\textsuperscript{115} immigration to the United States has increased. This results in migrants remaining in the U.S., as opposed to returning home, given tougher border control and limited legal immigration options. For both the U.S. (as a receiving-state) and

\textsuperscript{113} This Essay refers to the migration process between the United States and Mexico with two identifications, “Mexico-U.S. migration” and “U.S.-Mexico migration.” I use two terms, by reversing the order of the countries, in order to emphasize that the causes and effects of migration are on both sides of the international border. This avoids a characterization of migration being solely caused by the United States’s demand for labor or border policy; or the Mexican labor supply, demographics, or wage differentials.

\textsuperscript{114} Transnational influences in migration between the United States and Mexico and in Mexican nationality are historic, characterizing much of the migration in the early twentieth century. \textit{See David Fitzgerald, Negotiating Extra-Territorial Citizenship: Mexican Migration and the Transnational Politics of Community} 17–42 (2000).

\textsuperscript{115} IIRIRA eliminated many migrant rights and initiated the current focus of migration control through border security. \textit{See Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy} 440–42, 446–51, 529–33, 609–16 (5th ed. 2003). The comprehensive bill contained provisions which created three and ten-year bars to re-entry for aliens who were “unlawfully present,” \textit{id.} at 440; “expedited removals,” \textit{id.} at 530; and changes to eligibility for suspension of deportation, \textit{see id.} at 609–10. \textit{See also Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms}, 113 Harv. L. Rev. 1996 (2000) (discussing increasing removable classification for alien-criminals, mandatory detention for immigrants convicted of certain crimes, and statutory limitations to judicial review over immigration law claims under the IIRIRA).
Mexico (as a sending-state) consistent and long-term migration experiences result in domestic law re-imagining citizenship.

Briefly stated, after these increases in migration, Mexican law changed in 1997 to permit dual-nationality for Mexican citizens. This change to dual-nationality is a product of re-imagining Mexican identity. Similarly, in the U.S., limited popular sectors question *jus soli* legal principles as they relate to children born to immigrants. Recent domestic reactions to immigration have questioned the concept of who can be a U.S. citizen. This results in legislative efforts to alter current *jus soli* practices. Specifically, U.S. questions regard migrants lacking government authority to be in the U.S. In popular discourse they are referred to as "undocumented aliens." The national identity question is: whether children born to unauthorized migrants in U.S. territory are U.S. citizens or not? The established interpretation is that *Wong Kim Ark* affirms any child born to foreign national parents in U.S. territory is a citizen. With case law and practice since 1898, birthright citizenship is the legal norm. This judicial interpretation is not limited to "authorized" or "legal" migrants. This Essay argues that current popular efforts to limit *jus soli* to children born to unauthorized migrants, legal permanent residents, or other changes to the *jus soli* regime are examples of culturally re-imagining citizenship. Like legal responses in *Dred Scott* to the slave trade and in *Wong Kim Ark* to Chinese migration, these calls to re-visit birthright citizenship illustrate re-imagining U.S. citizenship in response to migration. Here, the global force is migration patterns since the 1980s.

This section first proceeds by describing the global and transnational process of immigration to the U.S. and specifically how migration from Mexico is so significant to this process. This makes the birthright citizenship not necessarily intrinsically tied to Mexican im-

---


118. Charles Gordon et al., *Immigration Law and Procedure* § 92.03[2][a] (rev. ed. 2007); see also id. § 92.05[2][d] (describing the current exceptions to this *jus soli* rule, which are based on common law precedent, of children born to diplomats, on foreign public vessels, and to alien enemies in U.S. territory in hostile occupation).
migrants, but the issue does overwhelmingly influence the citizenship of their children. While all immigrants to the U.S. are not from Mexico, the country is the site of origin for a majority of immigrants. Significant migrant populations do come from other countries and often exercise more numeric and qualitative influence in certain U.S. regions. But the effect of any change to birthright citizenship would weigh heavily on migrant families of Mexican descent. Next, this section describes how legal changes responding to this migration illustrate a re-imagination of citizenship. These changes include a Mexican dual-nationality legal regime and recent popular questions about birthright citizenship in the U.S.

The U.S. currently receives 1.2 million immigrants per year.119 The total immigrant population in the United States is estimated to be 33.5 million.120 It is estimated that the total unauthorized migrant population residing in national territory is 11.5 to 12 million, with 56% or 6.2 million being from Mexico.121 The current migrant population in the U.S. does not have one sole cause and is not sustained by a single factor. Migrants come to the U.S. because of transnational socio-economic networks that feed and sustain the flow, socio-economic disruptions at the point of origin, and labor demand in the U.S. Given the high percentage of Mexican migrants in the U.S. immigrant demographics and this Essay’s focus on migration as a transnational global force, this Essay highlights how Mexico plays into national identity debates for the domestic law from both the receiving and sending contexts.

Like with prior examples, Mexico–U.S. migration initiates with world-system factors. Specifically, as economic markets for resources, production, and sales extend from the center to the periphery, labor markets in the periphery are disrupted. This pushes labor in the periphery to seek new opportunities abroad. This migration is a natural outgrowth of inevitable disruptions and dislocations in capitalist development.122 With our example, the U.S. economy represents the

122. See Massey et al., Worlds in Motion, supra note 14, at 34–37 (summarizing world-system theory migration perspectives).
core and Mexico is the periphery. Migration is a historic process that happens at a global scale and is the product of economic development, versus being the sole result of wage-differential or local poverty. As presented by Eric R. Wolf, Douglas S. Massey, and J. Edward Taylor, global history shows large-scale and far-reaching migration was extremely common until World War I. 123 The forces that initiated global migration then are not too different from the current causes of migration. As the core/center industrialized and developed urban centers, workers from all over the world moved seeking demand in labor. This happened at the same time that capital, raw materials, and manufactured goods crossed borders, often within the core-periphery trajectory.

U.S.–Mexico migration rests on two national histories and two economies deeply engrained in mutual influence. This context explains why so much of the cause, continuance, and effect of migration is not solely domestic. For instance, the U.S. invaded Mexico more than three times since its independence in the early nineteenth century. The U.S.'s current “West” is comprised of over one-third of Mexico's previous territory. While Mexico is the U.S.'s second largest trading partner, the U.S. is Mexico's largest supplier of capital and market for its exports.

Applying a world-systems approach to the Mexico–U.S. migration, dislocations and disruptions in local economies come to light. Massey, et al. summarized how evidence from changes in industrialization and agriculture, both inter-connected to overseas markets, produce labor disruptions in Mexican communities. 124 This global-meets-local phenomenon is compounded by demographic and agrarian limits. Social science research of specific migrant-sending communities shows how people seek employment opportunities abroad after options at home are nonexistent, prices in basic goods at home increase, or access to capital at home is unavailable. Economic development shifts efficiencies relying on comparative advantages, which results in employment opportunities being eliminated. Mexico–U.S. migration is not the result of poverty in Mexico but instead is a product of economic development and consequential dislocations. 125


124. See Massey et al., Worlds in Motion, supra note 14, at 92–93.

A. On the Migrant-Sending End, Mexico’s Citizenship Re-Imagination Embraces Dual-Citizenship

For Mexico, economic liberalization since 1988 and NAFTA in 1994 represent the economic changes linking local communities to a global economy. This spurs migration. Enrique Dussel has examined how economic liberalization in Mexico influences potential migratory patterns. He showed how liberalization in Mexico by 1994, which was responding to the devaluation crisis of 1982, resulted in controlled inflation, decreased fiscal deficits, and enormous inflows of foreign capital. The macro economic changes, though, did not alleviate wage and employment pressures in Mexico. Dussel showed how workers’ real wages have decreased since liberalization and how the number of Mexicans lacking formal employment has grown. Similarly, U.S. immigrant-labor demand remains structurally embedded and provides an offset for disruptions in Mexico. The relevant relationship for this Essay is that international economics (NAFTA, international trade, and liberalization) results in employment pressures and falling real wages. These two factors reify how transnational factors spur Mexico-U.S. migration.

In 1997, Mexico reformed its nationality law to permit Mexican nationals to become dual nationals. In Mexico “nationality” and “citizenship” are governed by Articles XXX, XXXVII, and XXVIII of the Constitution and the LEY DE NACIONALIDAD (Nationality Law) enacted in 1993. There is a legal distinction in Mexico between nationality and citizenship. Mexican nationality, or “[ser] mexicano” (“[to be] a Mexican”), is provided for before citizenship, or “cit-
A Mexican national may only attain citizenship at the age of 18 years, which provides the right to vote. Before this age, an individual is a national but not a citizen. With that said, a Mexican citizen is not barred by Mexican law from naturalizing as a U.S. citizen. As such, dual-citizenship is permitted under Mexican law. But more accurately, the actual legal reforms affect Mexican nationality.

Dual-nationality reforms were enacted by Mexico so its nationals abroad could retain their Mexican nationality if they acquired another nationality, such as U.S. citizenship. A primary motivation for these changes was to encourage Mexican nationals to influence U.S. immigration lawmaking as U.S. citizens. Previously, Mexico was legally hostile, and denied Mexican nationality to any Mexican national who naturalized in another country. These laws had a very nationalist goal and reflected Mexican attitudes of official disdain for Mexican-Americans that regarded Mexican immigrants in the U.S. as “Chaqueteros” (traitors).

With reforms to Mexican law, these Mexican nationals would not fear losing their Mexican nationality. By changing its domestic legal regime regarding who can or cannot claim Mexican nationality, Mexico sought to increase the capacity Mexicans had to influence U.S. immigration policy.

The changes were initially announced in March 1997 with amendments to Articles XXX, XXXII, and XXXVII of the Constitution, es-

---

133. Id.
134. Id.
136. Several sources provide analysis on Mexican reforms to nationality law and their influence. See generally David Fitzgerald, “For 118 Million Mexicans”: Emigrants and Citizens in Mexican Politics, in DILEMMAS OF POLITICAL CHANGE IN MEXICO 523, 531–33 (Kevin J. Middlebrook ed., 2004) (stating that these reforms were done by Mexico “with little fear” of sovereignty concerns and with active promotion of dual nationality); Martín, supra note 116, at 873–94 (2000) (explaining that the reform’s motivation was for Mexicans in the United States to not lose legal rights as Mexicans and to inspire their naturalization as U.S. citizens to combat anti-immigrant measures); Alfredo Corchado, Zedillo Seeking Closer Ties with Mexican-Americans, DALLAS MORNING NEWS, Apr. 8, 1995, at A11; Mark Fineman, Mexican Citizens May Gain Right to Dual Nationality, L.A. TIMES, May 21, 1995, at 1; Mexico Passes Law on Dual-Citizenship, N.Y. TIMES, Dec. 12, 1996, at A8 (reporting that a primary motive for Mexico’s dual-nationality law was to create a political U.S. lobby and counter-act anti-immigrant forces). Most recently there have been discussions of proposing a Congressional district in Mexico’s legislature for migrants in the United States. See Patrick J. McDonnell, Fox Vows Better Ties with Mexican Immigrants in the U.S., L.A. TIMES, Nov. 11, 2000, at B1.
137. See Jorge G. Castañeda, U.S. Policy Shift Wakes Up the Neighbors, L.A. TIMES, Aug. 28, 1995, at B5 (explaining that Mexico’s nationality law heavily discouraged Mexicans to naturalize abroad, discussing Mexico’s ambivalence to Mexican-Americans and migrants in the United States, and noting how these positions have changed in reaction to United States’s restrictionist efforts).
138. See Vargas, supra note 131, at 823–24.
tablishing that no Mexican by birth would forfeit his or her nationality because he or she had double or multiple nationalities. The introduction of the non-forfeiture right opened the door for Mexicans to have two nationalities without fear of losing their Mexican nationality, effectively creating a “dual-nationality” regime. Enacting legislation was later implemented in March 1998 with reforms to the Nationality Law, Ley de Nacionalidad. Most recently amended in March 1997, Article XXX states methods to attain Mexican nationality, or to be a “Mexicano,” is by birth or by naturalization. In addition to persons born in Mexican territory, the amendment clarifies the category of “Mexicans by birth” to include children born outside national territory to Mexican national parents who were born in national territory or to naturalized Mexican nationals. Article XXXVII provides the heart of the dual-nationality project by stating no Mexican by birth may lose his or her Mexican nationality. This is expanded upon in the Nationality Law, which guarantees that Mexicans will not lose their Mexican nationality after acquiring another nationality.

The dual-nationality regime implies a re-imagining of who is a Mexican national. Current imagination deviates from prior nationalistic perspectives. Previous legal reasoning set a clear line between attaining a foreign nationality and remaining a Mexican national. With a large percentage of Mexican nationals residing abroad, spurred by the global forces of migration, Mexican law eventually adapted to include them as nationals. Nationality was redefined culturally to include


141. González Martín reports that prior reforms to Article XXX (in 1934, 1969, and 1974) created a naturalization process, provided for Mexican nationality to children born to Mexican mothers abroad, and provided for non-Mexican men married to Mexican women to acquire Mexican nationality by naturalization. Martín, supra note 116, at 876.

142. The Mexican nationality legal regime recognizes two manners of attaining Mexican nationality: by descent or birth to Mexican national parents (jus sanguinis) and by birth in Mexican territory (jus soli). See Constitución Política de los Estados Unidos Mexicanos, supra note 137, at art. XXX. Amendments to Article XXXII specifically prohibited foreigners from holding public office, such as federal deputy, federal senator, president, or state governor. See id. art. XXXII.

143. Id. art. XXXVII.

144. Two specific categories of dual nationals are identified: 1) Mexicans by birth who acquired another nationality before March 20, 1998, which previous to this law resulted in the loss of Mexican nationality, and 2) Mexicans by birth who have the right to another nationality after March 20, 1998. Ley de Nacionalidad, supra note 140. The process for certifying dual nationality is readily explained at the Mexican consulate webpages. See, e.g., The Mexican Consulate of Austin, http://www.sre.gob.mx/aus/ (click on left sidebar link “Documentación Consular”) (last visited Apr. 4, 2008).
those abroad and with other nationalities. Both the Mexican state and
civil society benefited economically from this migration. Remit-
tances—earnings for migrant labor abroad—provided families a
source of capital. Migrant-nationals working abroad provided an off-
set for public pressure to increase employment opportunities and/or
wages. With this political and economic context and a society increas-
ingly exposed to globalization forces, Mexican nationality is culturally
re-conceived to embrace migrants abroad. The immediate impetus for
this was discriminatory treatment nationals received abroad in the
U.S., especially after California’s Proposition 187 and then IIRIRA.

B. On the Labor Demand End, U.S. Forces Urge Re-Imagining
Citizenship Based on “Consent” to Negate
Birthright Citizenship

From a destination for migration, U.S. public and political forces
reacting to migration since the 1980s have called for a legal re-imagi-
nation of citizenship. This is specifically evident in debates about
birthright citizenship. For some sectors of society, these questions
arise despite established legal determinations from over a century ago
made about birth in domestic territory and citizenship from the Four-
teenth Amendment and Wong Kim Ark. In particular, these forces
question whether children born to unauthorized migrants are citizens.
Unauthorized migration is a product of global force, with causes, ef-
fects, and influences in sending-countries and in the U.S. This migra-
tion resembles the transnational movements in people from the
transatlantic slave trade and from late-nineteenth century Chinese mi-
gration to the U.S. Responding to these migrations, U.S. law
imagined citizenship with positive and common law determinations,
such as constitutional amendments, court decisions, and naturalization
acts. These citizenship determinations rested on cultural reasoning,
articulating how commonly held beliefs set the law’s inclusive and ex-
clusive boundaries.

The process replicates itself presently with public concern about
birthright citizenship since the 1980s. The current effort to re-imagine
birthright citizenship focuses on the concepts of consent and citizen-
ship. The simple argument is: attaining U.S. citizenship requires con-
sent from the polity, as opposed to individuals having citizenship
ascribed (i.e., provided) to them merely by birth on U.S. soil. Here,
because their parents lack de jure authorization to reside in the U.S.,
children of unauthorized migrants lack official consent to be citizens.
This argument removes citizenship as required by birth in U.S. terri-
tory, norms explicit in the Fourteenth Amendment and Wong Kim
Ark, and instead raises the significance of the state’s consent. 145

145. Several articles have addressed the idea that U.S. citizenship is not based on a
strictly consensual founding. See generally Christopher L. Eisgruber, Birthright Citi-
This sub-section proceeds by describing how the recent issue of consent for citizenship illustrates a cultural concern for who is or is not a member of the imagined community of U.S. citizens. This re-imagining resembles efforts from 150 and 110 years ago, suggesting a consistent and historic discourse in the law between migration and imagining citizen members. Next, this sub-section briefly summarizes the recent calls to re-imagine birthright citizenship and the responses affirming birthright citizenship’s settled nature in U.S. law. Accordingly, this Essay argues birthright citizenship is settled in U.S. law; but the social, political, and cultural efforts to re-visit the issue are expected, reflective of past trends, and deeply cultural. Migration forces domestic society and its law to question the community parameters in terms of race, ethnicity, and consent implicit or irrelevant to authorized migration.

The issue of consent is particularly tangible since unauthorized migrants are viewed by some as lacking the consent to reside in the U.S. Judicial opinions commenting on birthright citizenship characterize such a citizen as “accidental,” in *Wong Kim Ark* from 110 years ago, and “presumed,” in *Hamdi v. Rumsfeld* from four years ago. Those advocating for an overturn of *jus soli* principles in U.S. law relate the “accident” or “presumption,” which in reality is birth in U.S. territory, with a lack of consent.

This concern has received much attention since 1985, when Peter H. Schuck and Rogers M. Smith published the book *Citizenship Without Consent: Illegal Aliens in the American Polity*. Schuck and Smith explained that *jus soli* principles could not be compatible with republican principles basing citizenship on consent. *Jus soli* principles relied on prior reasoning that a subject born in feudal territory would be its subject. Given the U.S. Constitution’s consensual nature, birthright citizenship is painted as “a bastard concept in American ideology.” Schuck and Smith’s goal in 1985 was to provide a more

---

148. *Id.* at 554.
150. *See id.* at 20–23.
151. *See id.* at 15–17.
152. *Id.* at 2.
legitimate theory of consensual citizenship and to address problems of "illegal aliens."[^153] Along with reinterpreting the Fourteenth Amendment to nullify the Constitutional authority of birthright citizenship for children born to "illegal" or temporary visitors, they proposed enforcing immigration laws and employer sanctions, but increasing admission opportunities.[^154] They argued the Amendment’s clause of "subject to the jurisdiction [of the U.S.]" required complete jurisdiction to the U.S. and this meant citizenship required consent from the state.[^155] Their perspective gained popular, political, and legislative attention in the 1990s, but never resulted in any reversal of the *jus soli* and *Wong Kim Ark* interpretations. By 1995, though, ten years after the failed effort to decrease migration in 1986’s IRCA, the position lost some immediate strength.[^156]

In 2004, birthright citizenship gained renewed attention with the Supreme Court case *Hamdi v. Rumsfeld*. This case involved a U.S. citizen, Yaser Hamdi, who was born in domestic territory, Louisiana, to Saudi Arabian parents who were temporarily present in the U.S. in non-immigrant status. Not residing in the U.S. since his birth and relocating to Afghanistan as an adult, Mr. Hamdi surrendered to U.S. armed forces, who determined he was an enemy combatant. He was transferred to the U.S. Naval Base in Guantánamo Bay, Cuba. After his family filed a writ of habeas corpus for his release, the Supreme Court ruled that as a citizen he had the right to challenge the basis for his classification as an enemy combatant and consequent detention.[^157] Justice Scalia’s dissenting opinion briefly, but clearly, refers to Hamdi as a “presumed citizen.”[^158] This undoubtedly followed the suggestions by amicus curiae arguing that the Fourteenth Amendment does not provide citizenship for persons born in U.S. territory who lack allegiance to the U.S.[^159]

[^153]: See id. at 5–7, 37–41.
[^154]: Id. at 5, 116–22.
[^155]: Id. at 74–89.

[^158]: Id. at 554 (Scalia, J., dissenting).
[^159]: Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence in Support of Respondents at 6, 16, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 871165 (arguing the text of the Fourteenth Amendment requires both birth in domestic territory and jurisdictional allegiance for a Constitutional right to Citizenship, *Wong Kim Ark* should be narrowly read to conform with “the original understanding of the Citizenship Clause,” and current interpreta-
The *Hamdi* events brought the citizenship issue into light as the U.S. reacted to the September 11, 2001, attacks with an international and domestic “War on Terror.” As a citizen, Mr. Hamdi enjoyed more substantive and procedural rights than the hundreds of other detainees in Guantánamo. The issue of facing a “foreign threat” and the “need for government authority” to combat this were added to the imagination of U.S. citizenship. This citizenship issue is painted as urgent given the insecurity post-September 11 and the possible circumstance that a citizen could more easily breach civil security than a foreign national would be able to.

Interestingly, the argument of consent as lacking for birthright citizenship gained a textual argument after the *Hamdi* dispute. Legal scholar John C. Eastman added to the Schuck and Rogers perspective by arguing that the established interpretation of *jus soli* was not “in accord with the original understanding of the Citizenship clause.”160 The “original understanding” is claimed to require allegiance to the U.S., which temporary visitors and unauthorized migrants lack. Two things suggest this understanding. First is legislative history of the clause, implying a limitation to the amendment’s textual statement of broadly including “all persons born in the U.S.”161 Second is jurisprudence on the “subject to the jurisdiction” provision concerning Native Americans, before *Wong Kim Ark*, which is more relevant since unauthorized migrants like Native Americans may have allegiances to another country.162

Since the mid-1980s when the birthright citizenship issue re-entered public discourse, scholarly response and dialogue has been extensive, detailed, and varied. Much of this exchange builds on the idea that *Wong Kim Ark* and common law *jus soli* principles make birthright citizenship, in line with the Fourteenth Amendment, the established interpretation in constitutional law. Advocates such as Eastman, Schuck, and Rogers, explain these interpretations should be revisited.163 Central arguments against the consent-focused and original-

---


161. See id. at 62–64 (referring to comments by Senator Lyman Trumbull, James Doolittle, and Jacob Howard).

162. See id. at 62–69 (arguing that instead of the current interpretation based on *Wong Kim Ark* that citizenship should be denied for children of non-immigrants and authorized immigrants based upon the *Slaughter-House Cases* and *Elk*).

163. See id. at 60–61 (stating the “generally-accepted interpretation” should be “re-interpreted . . . with the original understanding”); SCHUCK & SMITH, supra note 149.
sist-perspectives are that the Fourteenth Amendment broadly confers citizenship to children born in the U.S.; this is supported by legislative history and the intent to overrule Dred Scott; the common law incorporates jus soli principles with limited exceptions that do not include unauthorized migrants; and foreign nationals who are illegally present are surely “subject to the jurisdiction of the U.S.” Similarly, scholars point to the discriminatory nature, in terms of race, ethnicity, and nationality, of overturning any jus soli principles.

The public and political calls to re-visit birthright citizenship, either by reviving judicial interpretations from before Wong Kim Ark or by a Constitutional amendment, imply a process of re-imagining U.S. citizenship. On its face, such a legal maneuver upsets a history of over 110 years of birthright citizenship in the U.S. Similarly, it adds a consent-focus to legal applications of Fourteenth Amendment that were rejected by Wong Kim Ark’s holding, but argued by the Government. At that point in history, public and political pressure complained about Chinese migrants in veins extremely similar to current restrictionist, xenophobic, or anti-immigrant stances.

The consent theory directly addresses how the state and the polity envision who may belong to the community of citizens. This process is intimately cultural as it clearly articulates what is the communal set of beliefs. Retracting jus soli justifications imagines these barriers to correlate (literally imagine) the immigration status of a child’s parents with consent for citizenship (or not) of the child. Put in legal terms, the immigration practice concerns of a foreign national’s potential in-

---

164. Foreign nationals and their children, despite being unauthorized to reside in the United States or being the children of the former country, are subject to the jurisdiction of the United States. See Immigration and Nationality Act (INA) §212(a), 8 U.S.C. §1182 (2007) (setting forth grounds for inadmissibility from the United States); §237(a), 8 U.S.C. §1227 (setting forth grounds for deportability from the United States). This involves not only removal from the United States, but often includes being detained or subject to executive authority. See Morawetz, supra note 115, at 1947–48. Likewise, an alien is subject to criminal punishment for immigration law violations. Id. at 1943–46. For specific exceptions in common law to jus soli, see Gordon et al., supra note 118, § 92.03[2][d]. See generally Joint Hearing, supra note 156, at 105–09 (Statement by Prof. Gerald Neuman); Gerald L. Neuman, Back to Dred Scott?, 24 San Diego L. Rev. 485, 488–96 (1987) (reviewing Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity (1985)).

admissibility, unlawful presence, deportability, or deviation from a
condition of entry (for instance a change of employer’s ownership or
errors in professional licensing documentation), imply his or her chil-
dren’s lack of consent to be citizens. There is a quite a literal imagin-
ing or conjuring up of immigration law status with political theory
about citizenship. This perspective literally envisions a parent’s im-
migration status, which belongs to the opaque bureaucratic and Kafkian
complexity of the Immigration and National Act or its corresponding
regulations, as determining their child’s potential for citizenship.
These claims are made even though the jus soli reasoning explicit in
the Fourteenth Amendment’s clear wording of “all persons born” and
Wong Kim Ark explain otherwise.

There is another communal imagination element evident in the re-
lation between immigrants and their children and a society and its
youth. As the issue places a wedge between immigrants and their chil-
dren becoming citizens, rejecting birthright citizenship literally con-
ceives of limits for new and future generations. These limits (one
cannot be a citizen because of parental immigration status) are
steeped in concerns for inequality under the law. Twenty-five years
ago, when deciding children of unauthorized migrants were entitled to
public education in Plyler v. Doe,166 the Supreme Court rejected such
notions of inequality for children who had no responsibility for their
immigration status.167

VI. CONCLUSION

This Essay is written at the end of 2007 and near the beginning of
2008. These two years mark 200 years since the end of England’s
transatlantic slave trade, 150 years since the Dred Scott decision, and
110 years since Wong Kim Ark. Viewed quickly, the three events sug-
gest how the movement in persons (slave trade and Chinese migra-
tion) is transnational, and eventually responding to them, domestic
law determines who may (or not) become a citizen. This Essay uses
analytical tools from Anderson’s imagined communities to identify
how national identity, in the form of citizenship, is conceived within
these historic examples. It then uses similar analysis to examine the
migration and citizenship law discourse evident in contemporary U.S.
and Mexican law.

In all the instances explored, there is a clear suggestion that global
and transnational forces initiate migration. For the slave trade, this
was European and North American power transporting persons from
Africa to the Western Hemisphere. For Chinese migration, it was the

167. Id. at 212 n.10 ("[N]o plausible distinction with respect to Fourteenth Amend-
ment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United
States was lawful, and resident aliens whose entry was unlawful.").
imperial projects of the U.S. in Asia and in the western part of the American continent. Examining the migration dynamic between the U.S. and Mexico, this force is the bilateral supply of and push for labor. As we currently experience migration, it is sustained by transnational socio-economic networks.

After this migration occurs there is an eventual legal determination of who can or cannot be a citizen. This Essay suggests this legal question often rests on cultural notions. In the Dred Scott decision rejecting that blacks may be citizens, the cultural reasoning involved retrograde views of who was civilized or not and who literally was property belonging to another person. In the Chinese Exclusion process, the cultural arguments explicit in the law stated Chinese persons could not assimilate, could not participate in republican governance, and were “obnoxious.” Wong Kim Ark refutes these notions in the law by holding that children of migrants born on U.S. soil are entitled to birthright citizenship. The Supreme Court was motivated by the negative prospects of having immigrants’ children with mixed allegiances and/or unable to participate in the republican process.

With more recent immigration, Mexican law on the sending end has re-imagined its parameters to permit dual-citizenship. This is a cultural process envisioning the nation as not limited by territorial bounds. On the other side of the migration dynamic, the U.S. is the recipient of labor that seeks its high demand. The law has not changed to reject birthright citizenship. But political and public calls for this are constant and developed. This Essay argues these efforts are reactions to a global and transnational process. Similarly, by adding consent-based theories to citizenship, refuting a broad and inclusive legal history of jus soli, and refuting an equal future for children, they re-imagine citizenship.

In sum, painting in broad strokes over a canvas that is long and wide in history, this Essay poses new questions about migration and citizenship. This is done by highlighting the transnational elements of migration and by tracking the cultural process embedded in the law determining who is (or is not) a citizen.