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Litigating Citizenship

Cassandra Burke Robertson[*]
Irina D. Manta[**]

By what standard of proof—and by what procedures—can the U.S. government challenge citizenship status? That question has taken on greater urgency in recent years. News reports discuss cases of individuals whose passports were suddenly denied, even after the government had previously recognized their citizenship for years or even decades. The government has also stepped up efforts to reevaluate the naturalization files of other citizens and has asked for funding to litigate more than a thousand denaturalization cases. Likewise, citizens have gotten swept up in immigration enforcement actions, and thousands of citizens have been erroneously detained or removed from the United States. Most scholarly treatment of citizenship rights has focused on the substantive protection of those rights. But the procedures by which citizenship cases are litigated are just as important—and sometimes more important—to ensure that citizenship rights are safe.

This Article analyzes the due process implications of citizenship litigation in the United States. It examines different stages at which the citizenship question is judicially resolved, including denaturalization, removal and exclusion, and restrictions on the exercise of citizenship rights such as voting, working, and traveling. The Article concludes that the structure of U.S. democracy relies on the stability of citizenship and requires heightened procedural protections when the government challenges an individual's citizenship. In the words of Justice

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Frankfurter, "The history of liberty has largely been the history of observance of procedural safeguards."[1] *Those procedural safeguards are needed to ensure that the judicial branch can remain the stalwart protector of a key pillar of our constitutional democracy.*

INTRODUCTION

Citizenship has played a central role in the American imagination from the time of the founding to the current era. To the Founders, citizenship was closely linked to notions of consent and political legitimacy. The Declaration of Independence proclaimed that governments "deriv[e] their just powers from the consent of the governed."[2]

1. McNabb v. United States, 318 U.S. 332, 347 (1943).
2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

This civic notion became enshrined in the law of the new nation: citizens themselves would hold sovereignty, and citizenship would give individuals the right and the responsibility to participate in electing government representatives, as well as the ability to run for and to hold such offices themselves. Under the Founders' view, radical for its time, power would flow from the citizens to the state—the opposite of the English monarchy of the day, where power was lodged firmly in the sovereign and shared with the people only by the grace of that sovereign.[3] In the American experiment, the state could legitimately exercise only the power given to it by the citizens, and it had no other source or authority over its citizens beyond what those citizens had voluntarily consented to give it.[4]

Citizenship is so closely linked to democracy that the Supreme Court once stated that it was preferable to have many immigrants "improperly admitted" to the country than to have even one citizen "permanently excluded from his country."[5] And the Court recognized that citizenship and political power could be tightly entwined, warning that the Constitution must protect citizenship status because "[t]he very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."[6]

These statements have turned out to be more aspirational than descriptive. Recent news reports discuss cases of individuals whose passports were suddenly denied, even after the government had previously recognized their citizenship for years or even decades.[7] Likewise, citizens have gotten swept up in immigration enforcement actions, and thousands of citizens have been erroneously detained or removed from the United States.[8] The government has also stepped up efforts to reevaluate the naturalization files of other citizens and has asked for funding to litigate more than a thousand denaturalization cases.[9]

3. Liav Orgad, *Creating New Americans: The Essence of Americanism Under the Citizenship Test*, 47 HOUS. L. REV. 1227, 1295 (2011) ("Unlike Europe's ethnic and cultural nationalism, American nationalism is basically civic; the United States is an idea-based nation.").

4. Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus,* The Limits of Enumeration, 124 YALE L.J. FORUM 180, 201 (2014) ("Post-revolutionary America embraced the ideal of democratic government in which the only legitimate powers of government were those delegated by the consent of the governed, but gave this idea a distinctly American spin." (citation omitted)).

5. Kwok Jan Fat v. White, 253 U.S. 454, 464 (1920).

6. Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

7. *See infra* Section II.A.

8. *See infra* Section II.B.

9. *See infra* Section II.C.

Citizenship determination is not a new problem in American law.[10] Nor is it a problem of legal definition. The Constitution, through the Citizenship Clause and Naturalization Clause, offers a legal framework for defining the legal qualifications for citizenship, and federal statutes fill in the gaps. Individuals born in the United States, individuals naturalized pursuant to U.S. law, and children born of U.S. citizens all have a legal right to citizenship.[11] The problem is a factual one: How do we determine when a particular individual meets—or fails to meet—the legal requirements that determine citizenship under our laws?

This is an area where the rights of citizens and the rights of noncitizen immigrants are closely linked. In spite of political rhetoric that attempts to drive a wedge between citizen and immigrant, vindictive immigration crackdowns inherently sweep up citizens in their midst.[12] As Professor Rachel Rosenbloom has argued, "procedural safeguards within an adjudicatory system cannot be premised on a line that the system is itself engaged in drawing."[13] That is, procedural safeguards cannot be offered only to citizens because those safeguards are needed to protect the citizenship determination itself. Procedural safeguards must apply at an earlier stage, ensuring that individuals engaged in the legal system—whether they are known to be citizens or not—have a full and fair opportunity to have their claims heard.

This Article analyzes the procedural aspects of citizenship determination. It asserts that these procedures are often as politically significant as the substantive law underlying citizenship rights and that heightened levels of due process are constitutionally required in cases where citizenship is at issue. Part I illustrates the substantive and procedural issues historically at play in citizenship litigation. Part II analyzes three contexts where disputes often arise in the contemporary era: in failure to recognize potentially valid claims of citizenship, in removal and exclusion proceedings, and in denaturalization cases. Part III analyzes the due process implications of these proceedings, considering the constitutional underpinnings of the citizenship decision. Finally, Part IV argues that the United States'

10. *See infra* Part I.

11. U.S. CONST. amend. XIV, § 1; 8 U.S.C. §§ 1431, 1433 (2012).

12. Cassandra Burke Robertson & Irina D. Manta, *A Long-Running Immigration Problem: The Government Sometimes Detains and Deports US Citizens*, CONVERSATION (July 8, 2019, 7:09 AM), https://theconversation.com/a-long-running-immigration-problem-the-government-sometimes-detains-and-deports-us-citizens-119702 [https://perma.cc/W23V-MP2W].

13. Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2021–22 (2013).

system of constitutional democracy requires the courts to take special care when addressing citizenship claims.

I. SUBSTANCE AND PROCEDURE IN CITIZENSHIP DISPUTES

U.S. citizenship carries significant rights and privileges. Perhaps most importantly, it confers membership in a political polity in which the citizens themselves hold sovereignty and determine the scope of governmental legitimacy.[14] On a practical level, citizenship confers the right to enter and remain in the United States, the right to hold employment in the country, and the right to obtain a passport for international travel. These philosophical and practical benefits combine to create both a strong sense of identity and a difficult legal terrain. On one side, citizenship gives rise to an American identity,[15] a sense of belonging to a nation, and, in the words of activist Emma Goldman, "the possession of a certain guarantee of security, the assurance of having some spot you can call your own and that no one can alienate from you."[16]

On the legal side, however, Emma Goldman's own case shows both the complexity of protecting citizenship and the political vulnerability of citizenship status. Goldman's characterization of the citizenship identity reflected her ideal, but not her reality: the U.S. government stripped her of citizenship in 1909 and deported her ten years later.[17] Goldman was targeted for her anarchist political views, which were radical for their time and perceived as dangerous to the United States. When the U.S. government could not identify a legal ground on which to deport her (she had immigrated legally and gained

14. *See* Abner S. Greene, *What Is Constitutional Obligation?*, 93 B.U. L. REV. 1239, 1249–50 (2013):

> That we usually do not trust any branch of government, level of government, or official, to have unchecked power properly reflects the core notion of citizen sovereignty. We delegate our sovereignty but it must be retained; seeing power as located outside ourselves is a danger; keeping such repositories of power fractured, unsettled in this way, helps advance citizen sovereignty;

see also Perez v. Brownell, 356 U.S. 44, 62–63 (1958) (Warren, J., dissenting) (arguing that Congress does not have the power to strip citizenship because its power derives from the consent of citizens).

15. *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 202 (1996) ("[N]ational identities are not givens, but rather, socially constructed products of learning, knowledge, cultural practices, and ideology."); Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 285 (2012) (noting that political legitimacy is maximized when legal procedures comport with national identity).

16. Emma Goldman, *A Woman Without a Country*, *in* FREE VISTAS (Joseph Ishill ed., 1933), *reprinted in* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC app. 1 at 188, 188 (2013).

17. WEIL, *supra* note 16, at 60.

citizenship through marriage), it found a roundabout way to do so. Scouring her estranged husband's immigration file revealed that he had improperly obtained naturalization at age sixteen, before he reached the age of legal majority. He could therefore be denaturalized, and, under the law of the time, Goldman would be deemed to have lost her citizenship automatically.[18] The Department of Justice did not inform Goldman that she had lost citizenship when the government denaturalized her husband—instead, officials "hoped she would leave the country unaware, that, in [the Department's] view, she [had] lost her citizenship," thus making it easier for the government simply to bar her return.[19] This plan did not work, and Goldman published a version of her famous statement, "A Woman Without a Country," in response to her loss of citizenship in 1909.[20]

It took an act of Congress—specifically, the 1918 Anarchist Exclusion Act—to create a legal basis for her expulsion from the country.[21] The Act increased sanctions, extending the time period during which an individual would be subject to deportation, and "for the first time appropriated funds for the enforcement."[22] In addition to targeting Goldman, the enforcement effort focused on "immigrant anarchists and communists in a sweep of postwar vengeance against radicalism and labor militancy," arresting "10,000 alleged anarchists" and deporting 500 of them.[23]

Under the substantive law in effect in 1919, there was no clear error in Goldman's case. Even at the time, however, there were those who questioned whether such a result comported with U.S. constitutional protections for speech, for political expression, and for gender equity. Louis F. Post, the Assistant Secretary of Labor who had revoked her citizenship, acknowledged doubt as to the underlying legality of that decision.[24] Post had acceded to responsibility within the Department of Labor after Secretary William Wilson had to step aside for illness.[25] He was known as someone who "invariably took the side of the poor and downtrodden," and he "ordered the release of aliens held

18. *Id.*

19. *Id.* at 61.

20. *Id.* at 187.

21. *Id.* at 62.

22. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 74 (2003).

23. *Id.*

24. *See* LOUIS F. POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY 16 (1923) ("Whether or not I liked the law did not enter in[to] [the decision]. I was not a maker of laws but an administrator of a law already constitutionally made. . . . And this law was mandatory.").

25. Paul D. Carrington, *Fearing Fear Itself: The Encounter of A. Mitchell Palmer with Louis F. Post*, 5 GREEN BAG 2D 375, 383 (2002).

on illegally obtained evidence, or against whom the only evidence was their membership in an organization that had been folded into the Communist Party without their consent."[26]

Even if Post doubted the legality of the Goldman deportation decision, however, he ultimately expressed faith in the procedure leading to the decision and laid blame on her failure to legally challenge the ruling, asserting in his memoirs that "[i]f I erred, my decision was jurisdictional and would have been reviewed by the courts in *habeas corpus* proceedings. But Miss Goldman did not take her case to the courts."[27]

It was not true, however, that Goldman failed to take her case to the courts. She appeared in front of Judge Julius M. Mayer in 1919 to contest her deportation, seeking that very writ of habeas corpus.[28] The judge ruled that as an alien, she had no constitutional claim to avoid deportation. Although her attorney asked for a two-week stay to appeal the ruling, she was given only three days.[29] Her stay application in the Supreme Court was denied by Justice Brandeis in December 1919, only eleven days before the ship deporting Goldman and 248 others would set sail for Russia.[30]

It does not appear that there is much that Goldman or her attorney could have done to challenge the ruling. Intervention in her husband's case would likely have been denied; in the years following, other courts would hold that "the validity of derivative rights of a wife or minor child" were not subject to independent protection in cases of alleged nationalization fraud and would not create standing.[31]

In the century since Goldman's denationalization and deportation, the substantive law has changed significantly. The

26. *Id.* at 383–84.

27. POST, *supra* note 24, at 12–18.

28. *Emma Goldman and Berkman are Ordered Banished*, EVENING WORLD (Dec. 8, 1919), https://thegrandarchive.wordpress.com/emma-goldman-and-berkman-are-ordere-banished/ [https://perma.cc/DU7Q-VDV4].

29. *Id.*

30. WEIL, *supra* note 16, at 63. It is telling that Justice Brandeis was the one to deny her motion. Justice Brandeis was the member of the Court most likely to rule in Goldman's favor. He had earlier been one of two Justices to dissent to a decision denying the return of bail money posted by Goldman, Berkman v. United States, 250 U.S. 114, 118 (1919), and he would later champion free-speech positions similar to those that Goldman had advocated. DANIEL KANSTROOM, DEPORTATION NATION 151 (2010).

31. United States *ex rel.* Harrington v. Schlotfeldt, 136 F.2d 935, 939–40 (7th Cir. 1943) (refusing to appoint a guardian ad litem for a child in the father's denaturalization case, as the child's citizenship rights "must rise or fall solely on the basis of the rights of the . . . parent from whom they stem, and there are no rights to be protected independently by guardian ad litem"); United States v. Milana, 148 F. Supp. 152, 153 (E.D. Mich. 1957) (stating that a child's "derivative citizenship would not have given him standing to be heard in a proceeding to revoke his father's citizenship").

grounds on which citizenship can be lost have greatly narrowed.[32] And women are no longer deemed to derive citizenship from their husbands, so a man's loss of citizenship is no longer imputed to his wife.[33] Once these substantive protections were enacted, they greatly reduced litigation over citizenship. As a result, citizenship rights have been largely taken for granted over the last few decades, and citizenship became "an area of U.S. constitutional law that has historically been of utmost importance but has largely faded from the collective consciousness."[34]

But citizenship litigation is making a comeback.[35] And even if the substantive basis of the Goldman case has eroded with time, the procedural due process issues remain timeless. Goldman claimed that she lacked the opportunity to defend her citizenship. She asserted that the action against her husband left her no "opportunity to defend or show the falsity of the government's position" and that the government had targeted her for her unpopular opinions.[36]

The procedural tension of Goldman's case applies with equal force today. Citizenship questions still arise when individuals are perceived to be disloyal to the United States or when individuals are believed to be fraudulently attempting to obtain the benefits of a citizenship they do not deserve and to which they are not legally entitled.[37] Some scholars, in fact, have posited that it is the very strength of the citizenship identity and citizenship ideal that make it legally vulnerable.[38] Professor D. Carolina Núñez reviewed some of the most recent citizenship literature, concluding that "perhaps the most dangerous potential result of the gap between a lofty imagined citizenship and the legal structures of citizenship"[39] is a tendency to put citizenship on so high a pedestal that we "risk . . . us[ing] the almost other-worldly vision of citizenship to exclude people from citizenship

32. *See* Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 407 (2019) (discussing the Supreme Court's 1967 limitation of grounds for denaturalization to fraud and illegal procurement).

33. The spousal application was partially repealed by Congress in 1922 with the passage of the Cable Act and was fully repealed in 1931. Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 356–57.

34. Jonathan Shaub, *Hoda Muthana and Shamima Begum: Citizenship and Expatriation in the U.S. and U.K.*, LAWFARE (Feb. 25, 2019, 9:00 AM), https://www.lawfareblog.com/hoda-muthana-and-shamima-begum-citizenship-and-expatriation-us-and-uk [https://perma.cc/9PNS-DV65].

35. *Id.*; *see also* Robertson & Manta, *supra* note 32, at 471 (discussing the resurgence of civil denaturalization after a fifty-year dormancy).

36. WEIL, *supra* note 16, at 62–63.

37. *See infra* Part II.

38. D. Carolina Núñez, *Citizenship Gaps*, 54 TULSA L. REV. 301, 313 (2019).

39. *Id.*

based on biases."[40] This "citizenship gap" leaves room to question citizenship based on suspicions of disloyalty or on racial or ethnic bias.[41]

If it is true that this tension is inherent in the American ideal of citizenship, then the procedural due process protections of our justice system become even more critical to avoid wielding citizenship as a "tool of exclusion" to keep out those deemed politically undesirable.[42] This is especially true when the politicized nature of the citizenship determination makes it less likely that the political branches will be able to provide such protections. After all, citizenship is so closely tied to voting rights that naturalization policies have been politically charged since the early days of the country. When that political tension is combined with the gap between imagined citizenship and the legal structures, the political divide grows even larger.[43] And finally, common cognitive biases can dampen the public's sense of injustice in the face of politically targeted citizenship policies. When a decision is made to exclude an individual from the polity, onlookers may succumb to hindsight bias. They may be more likely to conclude that the result must have been warranted—that the procedures governing the litigation process would surely have protected against an unjust result.[44] This hindsight bias can combine with what is known as "fundamental attribution error"—that is, a tendency to assign greater weight to individual merit, undervaluing context and circumstance.[45]

The substantive importance of citizenship in American life therefore leads to the counterintuitive result that citizenship is also legally and politically vulnerable. This tension certainly existed in Emma Goldman's case, and the changes to substantive law in the ensuing century have not eliminated that tension. Even today, politicians propose legal changes based on citizenship as a tool of exclusion—for example, suggesting that some individuals are citizens

40. *Id.*

41. *Id.*

42. *Id.* at 313–14.

43. Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 746 (2018) (explaining that the country's "growing polarization means that there is less and less common ground on issues of public concern").

44. *See* Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89, 99 (1995) (finding that, under controlled conditions, jurors in hindsight may harshly judge a good-faith effort to determine reasonable precautions in foresight).

45. Victor D. Quintanilla, *(Mis)judging Intent: The Fundamental Attribution Error in Federal Securities Law*, 7 N.Y.U. J.L. & BUS. 195, 200 (2010) ("Social-psychological research, moreover, has shown that decision-makers systematically misattribute blame and intent: overestimating the role of dispositions (i.e., personality, traits, attitudes, character) and underestimating the role of social influences.").

in name only, questioning the merit of naturalization decisions,[46] and proposing new bases for citizenship loss.[47] The government's decision to legally challenge an individual's citizenship carries both legal and normative weight. Such an action may raise questions about an individual's loyalty to the country as well as his or her depth of social connection to a particular view of American culture—questions often expressed using language with racial or ethnic overtones.[48] When such challenges arise, the due process protections offered by the judicial branch are key to ensuring that individuals' rights are not infringed. The procedures by which these disputes are resolved can matter as much as—and sometimes even more than—the substantive law governing the claim.[49]

II. CONTEMPORARY CITIZENSHIP DISPUTES

Although the law has changed significantly since Emma Goldman's day, citizenship challenges in the United States have never gone away. Legal challenges tend to arise in three different arenas. First, the government may simply not recognize an individual's claim of citizenship and thus may refuse to issue her a passport, allow her to vote, or permit her to return to the country. In this case, the individual may raise the issue of citizenship offensively, seeking a declaratory judgment of citizenship and a recognition of associated rights. Second, the government may attempt to remove or exclude an individual from

46. Robertson & Manta, *supra* note 32, at 469–70 (quoting Russian President Putin's characterization that some individuals "[m]aybe . . . are not even Russians . . . but Ukrainians, Tatars or Jews, but with Russian citizenship, which should also be checked," as well as President Trump's tweet falsely claiming that President Obama had "granted citizenship, during the terrible Iran Deal negotiation, to 2500 Iranians – including to government officials").

47. For example, President Trump suggested that flag burning should result in the loss of citizenship. Charlie Savage, *Trump Calls for Revoking Flag Burners' Citizenship. Court Rulings Forbid It.*, N.Y. TIMES (Nov. 29, 2016), https://www.nytimes.com/2016/11/29/us/politics/trump-flag-burners-citizenship-first-amendment.html [https://perma.cc/9TUT-J9JS]. The Administration has also proposed citizenship loss as a sanction for providing terrorist support. Josh Gerstein, *Trump Officials Pushing to Strip Convicted Terrorists of Citizenship*, POLITICO (June 8, 2019, 6:17 AM), https://www.politico.com/story/2019/06/08/trump-convicted-terrorists-citizenship-1357278 [https://perma.cc/5ZXR-M5UC]. Both actions, however, would conflict with the Supreme Court's constitutional rulings protecting against the involuntary removal of citizenship status.

48. *See infra* Section II.A.1 (discussing the cases of Hoda Muthana and Mark Esqueda).

49. The importance of procedure, of course, has long been recognized. The U.S. Court of Appeals for the Sixth Circuit noted that "procedural rules may often be more important than the substance" of legal rules, pointing to the "immortal words" of former U.S. Representative John Dingell, who famously claimed, "I'll let you write the substance . . . and you let me write the procedure. I'll screw you every time." Clemons v. Norton Healthcare Inc. Ret. Plan, 890 F.3d 254, 269 (6th Cir. 2018) (quoting *Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell)).

the United States under the belief that he or she lacks citizenship. Most often, such action occurs subsequent to a criminal arrest or a period of detention. In such cases, the individual may attempt to raise the issue of citizenship defensively, as a means of avoiding deportation. Finally, the government may seek denaturalization, attempting to revoke citizenship either because the government mistakenly granted it to a person who failed to meet the statutory requirements or because the individual committed fraud in the naturalization process. This Part analyzes the contemporary disputes that arise under each of these categories and examines the procedures by which such disputes can be litigated.

A. Failure to Recognize Citizenship Claims

Most people born in the United States are able to take their citizenship for granted. When they apply for a passport or register to vote, their birth certificates are accepted as proof of citizenship.[50] When problems arise, however,[51] or when a birth certificate is not accepted as sufficiently credible proof, it can be difficult for an individual to prove citizenship.

1. Questioning Citizenship

It was a passport application that first raised questions in the case of Mark Esqueda.[52] He did not expect to have trouble obtaining a passport; he was born in Texas, was raised in Minnesota, and served in the U.S. military. His service included fighting in combat zones, earning an honorable discharge, and even obtaining a high-level security clearance only available to U.S. citizens, for which he had to pass a

50. *Proof of U.S. Citizenship and Identification When Applying for a Job*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/us-citizenship/proof-us-citizenship-and-identification-when-applying-a-job (last updated July 10, 2018) [https://perma.cc/YQ9F-UTZW].

51. Particular problems involving citizenship can be unusual and hard to predict. Thus, for example, even a Customs and Border Protection officer became embroiled in a citizenship problem when his employer uncovered a Mexican birth certificate with his name on it. Not only did the officer not have any idea that he might have been born in Mexico, but it also caused citizenship problems for his oldest child, who was born outside the United States. Molly Hennessy-Fiske, *U.S. Customs Officer Loses Job and Citizenship Case over His Mexican Birth Certificate*, L.A. TIMES (Nov. 26, 2019, 5:31 PM), https://www.latimes.com/world-nation/story/2019-11-26/u-s-customs-officer-loses-job-citizenship-due-to-birth-certificate-challenge [https://perma.cc/QXH4-ZUGQ].

52. Brandon Stahl, *Minnesota Man and Marine Vet Born in U.S. Files Legal Challenge to Passport Denial*, STARTRIBUNE (May 9, 2019, 10:42 PM), http://www.startribune.com/minnesota-man-born-in-u-s-files-legal-challenge-to-passport-denial/509719882/ [https://perma.cc/L5GQ-UZ9R].

background check.[53] Nevertheless, his application for a U.S. passport was rejected—twice.[54] Although Esqueda possessed an authentic Texas-issued birth certificate, the U.S. government denied its accuracy.[55] Esqueda's birth in the border region of Texas was assisted by a midwife that the government had deemed "not reliable."[56]

Some midwives in the border region had been prosecuted for accepting bribes to record the United States as the place of birth for babies born on the Mexican side of the border.[57] That history made the birth certificates of all births witnessed by border-region midwives suspect, even if the vast majority of records were correct. Nonetheless, families in the border region are familiar with the need to prove citizenship, and some had the foresight to obtain additional documents.[58] In Esqueda's case, this included a law-enforcement witness to his birth.[59] After his first passport application was denied based on questions about his birth certificate, Esqueda supplied more evidence: a signed document from the police officer who witnessed his birth, his military records, and sworn affidavits from family and friends acquainted with his mother in Texas during the time she was pregnant with him.[60] When none of that was deemed sufficient to prove his citizenship, Esqueda brought suit in federal court with the assistance of the ACLU, seeking to compel the government to recognize his citizenship and issue him a passport.[61]

Although questions about the validity of birth records most commonly affect those born near the Texas-Mexico border (and

53. *Id.*; *Esqueda v. Pompeo*, ACLU MINN., https://www.aclu-mn.org/en/cases/esqueda-v-pompeo (last visited Apr. 4, 2019) [https://perma.cc/CT3F-UBSJ] ("The southern Minnesota man served our country as a U.S. Marine in Iraq and Afghanistan, and again in the Army National Guard. In the military, he earned the second-highest level of clearance called 'secret,' which is only given to U.S. citizens.").

54. Stahl, *supra* note 52 (noting that Esqueda was denied a passport twice and lost an appeal even after he supplied the government with sworn affidavits from his family and friends attesting to his citizenship).

55. *Id.*

56. *Id.*

57. *Id.*; *see also* Kevin Sieff, *Harsh Reality: Faulty Midwife Practices Has the Federal Government Questioning Border Residents' Citizenships*, BROWNSVILLE HERALD (July 20, 2008, 12:00 AM), https://www.brownsvilleherald.com/news/local/harsh-reality-faulty-midwife-practices-has-the-federal-government-questioning/article_be27396e-39cc-5cc0-9117-be5efade9af9.html [https://perma.cc/H557-W3LV].

58. *See* Stahl, *supra* note 52 (explaining that "police officers often served as witnesses [to birth] to prevent such citizenship issues from occurring").

59. *Id.*

60. *Esqueda v. Pompeo*, *supra* note 53.

61. *Id.*

especially those of Latino heritage),[62] others have had difficulty establishing proof of citizenship as well. Gwyneth Barbara, a white woman born in Kansas, was similarly denied a passport.[63] She was born in a Kansas farmhouse in the 1970s, and her father registered her birth at the local courthouse within days.[64] Nonetheless, "because her birth certificate was not issued at [an] institution or hospital, it was not considered proof enough of her citizenship."[65] She was asked to submit additional documents verifying her citizenship, but explained that she was unable to do so: "Border crossing card or green card for your parents issued prior to your birth? My parents were born in the United States . . . . Early religious records? We don't have any. Family Bible? They won't accept a birth certificate but they will accept a family Bible?"[66] Unlike Esqueda, however, Barbara was able to resolve the matter without litigation. She sought help from her U.S. senator, and after he launched an inquiry Barbara received her passport in the mail only "[a] few days later," and "with no explanation."[67]

Another recent citizenship case is almost the polar opposite of Esqueda's. In Esqueda's case, the government questioned where he was born—but never questioned the strength of his loyalty or his service to this country.[68] In the case of Hoda Muthana, however, there was no question about where she was born—it was undisputed that she was born in New Jersey—but there was a question about the status of her parents, which may have come under scrutiny due to her disloyalty to the United States.[69] As a college student in her late teens, Muthana became infatuated with ISIS.[70] She dropped out of college and moved to

62. Stahl, *supra* note 52 (noting that "the Trump administration is pursuing a crackdown aimed at Hispanics with fraudulent birth certificates along the border"); *see Esqueda v. Pompeo*, *supra* note 53.

63. Emily Sinovic, *Kansas Woman Told Birth Certificate Wasn't Enough to Prove Citizenship for Passport*, KCTV5 NEWS (Sept. 10, 2018), https://www.kctv5.com/news/kansas-woman-told-birth-certificate-wasn-t-enough-to-prove/article_144c19aa-b50f-11e8-94f5-6b921312a97a.html [https://perma.cc/J95W-9RAN].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* Stahl, *supra* note 52.

69. *See* Steve Vladeck, *Unpacking (Some of) the Legal Issues Surrounding Hoda Muthana*, JUST SECURITY (Feb. 20, 2019), https://www.justsecurity.org/62659/unpacking-some-of-issues-surrounding-hoda-muthana/ [https://perma.cc/2YDN-UMJQ]; *see also* Irina Manta, *Denaturalizing Natural-Born Citizens*, VOLOKH CONSPIRACY (Feb. 26, 2019), https://reason.com/2019/02/26/denaturalizing-natural-born-citizens/ [https://perma.cc/3U2R-Q8RU] (providing further commentary).

70. Rukmini Callimachi & Catherine Porter, *2 American Wives of ISIS Militants Want to Return Home*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/us/islamic-state-american-women.html [https://perma.cc/8M88-9SGL]; Enjoli Francis & James Longman, *Former ISIS Bride Who Left US for Syria Says She "Interpreted Everything Very Wrong,"* ABC NEWS (Feb

Syria to join the group.[71] She was married twice to ISIS fighters, both of whom were later killed, and she gave birth to a son.[72] Later, Muthana decided that she wanted to return to the United States—even if it meant facing criminal charges for having given aid and comfort to the country's enemies.[73]

While Muthana was out of the country, however, the government canceled her passport.[74] It alleged that she had never actually been a citizen of the United States, and that the government's previous issuance of a passport had been in error.[75] Because Muthana had been born in the United States, her status depended on whether she had been "subject to the jurisdiction thereof."[76] Her father was a diplomat, and the children of diplomats do not obtain birthright citizenship when born in the United States.[77] The Constitution's Citizenship Clause asserts birthright citizenship only over individuals "born or naturalized in the United States, and subject to the jurisdiction thereof," and the recognition of diplomatic immunity means that diplomats' families are not "subject to the jurisdiction" of the United States.[78] The government had previously questioned Muthana's status but had granted her a passport after receiving documentation that her father had left his post prior to her birth.[79] Later, however, the government would change its position, arguing that even though her father had left his post before her birth, that change in position had not been reported to the government—and that in the period of time between leaving his position and communicating that change to the government, the family would have been entitled to diplomatic immunity.[80]

There is no question, of course, that Muthana's actions represented the ultimate disloyalty to her claimed country of citizenship. But it also appears that the government is retaliating against her for those actions in problematic ways. The Trump Administration's unilateral decision to declare her citizenship invalid

19, 2019, 5:48 PM), https://abcnews.go.com/International/isis-bride-left-us-syria-interpreted-wrong/story?id=61175508 [https://perma.cc/BRH8-6TTD].

71. Callimachi & Porter, *supra* note 70.

72. *Id.*

73. *See id.*

74. Memorandum in Response to the Court's March 1, 2019 Order at 5, Muthana v. Pompeo, No. 1:19-cv-00445-RBW, (D.D.C. Mar. 4, 2019).

75. *Id.* at 1, 5.

76. *See id.* at 9 (quoting U.S. CONST. amend. XIV, § 1).

77. *Id.*

78. *Id.* (quoting U.S. CONST. amend. XIV, § 1) (emphasis omitted).

79. *See* Vladeck, *supra* note 69.

80. Memorandum in Response to the Court's March 1, 2019 Order, *supra* note 74, at 5, 12.

is neither a lesser sanction nor a viable alternative to criminal prosecution. Indeed, manipulating the levers of bureaucracy to limit citizenship rights actually subverts the protections of the criminal process.[81] Criminal proceedings could ultimately result in a high sanction, but those proceedings would be governed by democratically enacted laws and would include the right to be judged by a jury composed of citizens, as well as the right to effective assistance of counsel.[82] The Supreme Court's decision in *Afroyim v. Rusk* held that the government cannot take citizenship away from unwilling individuals other than in cases of naturalization fraud or illegal procurement.[83] Of course, the government alleged that it was not taking Muthana's citizenship away—it was merely reconsidering its opinion about whether she had ever established citizenship in the first place.[84] Ultimately, however, that action had the same effect: Muthana became unable to exercise previously acknowledged citizenship rights. In late 2019, the federal district court in Muthana's case made "a surprise ruling from the bench," holding that Muthana was not a citizen and therefore dismissing the claim her father had attempted to bring on her behalf.[85] Muthana was not permitted to return to the United States.[86] Her family is appealing this determination at the time of this writing.[87]

2. Suing for Recognition

When the government fails to recognize a citizenship claim, the claimant may challenge this determination. The Supreme Court recognized a right to sue for recognition of citizenship in 1939, in a case brought by Mary Elizabeth Elg.[88] Elg was born in the United States in

81. *See* Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. 157, 158 (2014) (arguing that "low sanctions have a pernicious effect on the democratic process and on legislative rule making"); Cassandra Burke Robertson, *Low Sanctions, High Costs: The Risk to Democratic Liberty*, 66 FLA. L. REV. FORUM 31, 32 (2014) (noting "the risk that a system of informal low sanctions, brought about through selective non-enforcement, will undermine the will for political change").

82. U.S. CONST. amend. VI.

83. 387 U.S. 253, 267 (1967). For a more extensive discussion of *Afroyim*, see *infra* Section III.B.

84. Memorandum in Response to the Court's March 1, 2019 Order, *supra* note 74, at 1.

85. Charlie Savage, *American-Born Woman Who Joined ISIS Is Not a Citizen, Judge Rules*, N.Y. TIMES (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/us/hoda-muthana-isis-citizenship.html [https://perma.cc/QP3R-5N7R]; *see* Muthana v. Pompeo, No. 19-445 (RBW), 2019 U.S. Dist. LEXIS 218098 (D.D.C. Dec. 9, 2019).

86. Savage, *supra* note 85.

87. *Muthana*, 2019 U.S. Dist. LEXIS 218098, *appeal docketed*, No. 19-5362 (D.C. Cir. Dec. 30, 2019).

88. Perkins v. Elg, 307 U.S. 325, 349 (1939).

1907 to Swedish parents.[89] Her parents brought her back to Sweden while she was still a child, but she was determined to return to the United States when she reached adulthood.[90] She obtained a U.S. passport and was admitted to the United States as a citizen less than a year after reaching majority.[91] Six years after her return to the United States, however, the U.S. government informed her "that she was an alien illegally in the United States and [she] was threatened with deportation."[92] In response, she brought suit in federal court seeking a declaratory judgment of citizenship and an injunction against deportation.[93] At trial, the government relied on a treaty that the United States had signed with Sweden recognizing voluntary relinquishment of citizenship:

> Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.[94]

The Supreme Court acknowledged the treaty but pointed out that it did not specifically address the treatment of minor children.[95] As a result, the Court concluded that Elg had the right to make an election of citizenship when she reached adulthood and stated that she "has not lost her citizenship in the United States and is entitled to all the rights and privileges of that citizenship."[96]

The current law allows individuals to challenge citizenship determinations in much the same way that the Court provided in *Perkins v. Elg*. When an individual claiming citizenship is present within the United States, section 503 of the Nationality Act of 1940 permits the filing of a declaratory judgment action seeking citizenship recognition.[97] The action is ripe when a dispute over citizenship has arisen—for example, if the individual has not been allowed to obtain a passport or has not been allowed to vote. The statute provides that "[i]f any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency . . . such person may

89. *Id.* at 327.

90. *Id.*

91. *Id.*

92. *Id.* at 328.

93. *Id.*

94. *Id.* at 335 n.12, 336–37 (quoting Convention and Protocol between the United States of America and Sweden and Norway art. 1, May 26, 1869, 17 Stat. 809).

95. *See id.* at 337.

96. *Id.* at 349.

97. 8 U.S.C. § 1503(a) (2012); 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 104.12(2)(a) (2019).

institute an action . . . for a judgment declaring him to be a national of the United States."[98] The defendant in the declaratory judgment action is the "head of the department or agency which rejected the citizenship claim," often "the Attorney General, the Secretary of Homeland Security, or the Secretary of State."[99] This section applies only to declaratory judgment actions, however; it does not apply to removal cases, which are instead governed by 8 U.S.C. § 1252.[100] The plaintiff in the declaratory judgment action bears the burden of proof and must prove citizenship by a preponderance of the evidence.[101]

B. Removal and Exclusion

By law, only noncitizens are eligible for removal (deportation) and exclusion.[102] Nonetheless, there have been numerous documented cases of citizens being deported from the country, often—but not always—at the end of a criminal proceeding or term of confinement.[103] The breadth of administrative discretion over removal actions has meant that, at times, deportation "may also function as a punishment for political activity even if the law does not formally categorize it that way."[104]

98. 8 U.S.C. § 1503(a).

99. GORDON ET AL., *supra* note 97, § 104.12(2)(c).

100. 8 U.S.C. § 1252 (2012).

101. *See* Lim v. Mitchell, 431 F.2d 197, 199 (9th Cir. 1970) ("As plaintiff below, Lim had the burden of proving by a fair preponderance of the evidence that he is an American citizen."); GORDON ET AL., *supra* note 97, § 104.12(2)(d) ("The plaintiff has the burden of establishing a claim to U.S. citizenship by a preponderance of evidence. The burden of proof on the plaintiff thus is the same as it would be in other civil litigation." (citation omitted)).

102. CHARLES GORDON & ELLEN GITTEL GORDON, IMMIGRATION AND NATIONALITY LAW 2-9 (1982) ("Congress has never barred the entry of United States citizens, and doubtless never will. Indeed, any legislative attempt to bar the entry of a citizen unquestionably would be an unconstitutional abridgement of his right of free access to the country of his nationality."); *see* Siegfried Wiessner, *Blessed Be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 479 (1986):

> [A] United States citizen's right to enter is made dependent, in principle, on the possession of a valid passport. According to two landmark decisions of the U.S. Supreme Court, the issuance of a passport is protected by the fifth amendment right to travel and may not even be denied to Communists.

(citation omitted).

103. *See, e.g.*, Lyttle v. United States, 867 F. Supp. 2d 1256, 1269 (M.D. Ga. 2012) (indicating that ICE agents initiated removal proceedings against the Plaintiff following a charge for misdemeanor assault).

104. Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1261 (2016).

1. Removal of Citizens

In one case, Mark Daniel Lyttle, a U.S. citizen (of Puerto Rican descent) born in North Carolina was being treated at a psychiatric facility.[105] Two Immigration and Customs Enforcement ("ICE") agents took him into custody after he was charged with misdemeanor assault for "inappropriately touching a female orderly."[106] In spite of Lyttle's acknowledged cognitive and psychiatric disabilities—and in spite of the fact that the agents' own search of U.S. databases "revealed records showing Lyttle was a U.S. citizen with a valid Social Security number"—Lyttle was processed for deportation and pressured to sign a document waiving his right to a removal hearing.[107] After he did so, he was "sent off on foot into Mexico with only three dollars in his pocket."[108] He spoke no Spanish and had no identity documentation or proof of citizenship.[109] He spent 125 days "sleeping in the streets, staying in shelters, and being imprisoned and abused in Mexico, Honduras, and Nicaragua" before a U.S. Embassy employee helped him contact his family and arrange for his return to the United States.[110]

Occasionally the wrongful deportation of a U.S. citizen may be aided by the deportee. In one case, a fourteen-year-old runaway, born in the United States, was arrested for shoplifting at a Houston shopping mall.[111] She lied to law enforcement, her lawyer, and the court about her name and nationality, and she was subsequently deported to Colombia, where she remained for seven months.[112] According to her family, she was not fluent in Spanish and had no ties to Colombia.[113] Nonetheless, after her deportation she was given "shelter, psychological assistance and a job at a call center" in that country.[114] Her family discovered where she was after her mother "spent a lot of time on the Internet trying to track down" her daughter and ultimately located a Facebook account showing that the girl was in Colombia.[115]

105. *Lyttle*, 867 F. Supp. 2d at 1269.

106. *Id.*

107. *Id.* at 1270.

108. *Id.* at 1266.

109. *Id.*

110. *Id.*

111. Turner v. United States, No. 4:13-cv-932, 2013 WL 5877358, at *1–2 (S.D. Tex. Oct. 31, 2013).

112. *Id.*

113. *Texas Teen Mistakenly Deported Reunites with Mom*, CBS NEWS (Jan. 7, 2012, 10:13 AM), https://www.cbsnews.com/news/texas-teen-mistakenly-deported-reunites-with-mom/ [https://perma.cc/CBN9-PXNB].

114. *Id.*

115. *Id.*

These stories might be exceptionally troubling, but the mistaken detention and deportation of U.S. citizens is not unusual. Government records show that between 2007 and 2015, over 1,500 U.S. citizens spent time in immigration detention before their citizenship was recognized.[116] A political scientist who studied the records of U.S. citizens caught up in immigration detention and deportation proceedings found that in 2010 alone, "well over 4,000 U.S. citizens were detained or deported as aliens," and in the seven years between 2003 and 2010, more than 20,000 were.[117] Given the substantive protection for citizens, each case of citizen removal suggests that there must have been a procedural weakness or failing. In cases such as that of the deported teenager, the U.S. citizen may have been complicit in the proceeding. But even that case is troubling: teenagers, after all, are not known for their good judgment. In the cases described above, it is possible that the individuals might have avoided removal if they were better able (or willing) to advocate for themselves or if counsel had been appointed to represent them.[118] But citizenship rights do not belong just to those without mental disabilities or just to those with adult judgment. If citizenship protections are not robust enough to protect minors and individuals with diminished capacity from wrongful detention or removal, then these protections cannot support the equality of citizenship inherent in our constitutional structure.[119]

2. Recognizing Citizenship in Removal Proceedings

When an individual subject to removal proceedings makes a claim of citizenship, the government bears the burden of proof to establish that the individual is a noncitizen.[120] A majority of the U.S. courts of appeals agree that the individual can raise a claim of citizenship at any time in the proceedings—the claim is not forfeited by

116. Eyder Peralta, *You Say You're an American, but What if You Had to Prove It or Be Deported?*, NPR (Dec. 22, 2016, 12:29 PM), https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported [https://perma.cc/HH9C-UP9L].

117. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011).

118. *See infra* Section IV.C (discussing the appointment of counsel).

119. Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 232 (1972) (describing "the premise of equality of citizenship as a constitutive principle in American politics for its own sake, as a means to no 'realistic' end other than a renewed sense of the principled legitimacy of the whole political enterprise").

120. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. It is true that the burden of proving alienage rests upon the government." (citation omitted)).

failure to raise it earlier in the proceedings nor by failure to exhaust administrative remedies prior to judicial review.[121]

The government's burden of persuasion in such proceedings is heightened: it must establish noncitizenship by "clear, unequivocal, and convincing evidence."[122] This is unquestionably a higher standard than an individual seeking a declaratory judgment of citizenship would have to meet.[123] Within that standard, however, courts have applied a complex burden-shifting scheme. Although the government bears the initial burden to prove noncitizenship, a mere showing that the individual was born outside the United States is sufficient to create a rebuttable presumption of noncitizenship that then shifts the burden to the person claiming citizenship.[124] Once the burden has shifted, the individual must then either dispute the evidence of birth abroad or show how citizenship was obtained—perhaps through derivative status or naturalization.[125]

Obtaining judicial review typically requires the case to go through proceedings in several different layers of the judicial hierarchy.[126] Removal cases begin in the administrative system. After an immigration judge orders removal, the individual may file a petition for review with the "court of appeals for the judicial circuit in which the

121. *See* Gonzalez-Alarcon v. Macias, 884 F.3d 1266, 1268 (10th Cir. 2018) ("[A] court must first consider whether a petitioner is in fact an alien before requiring exhaustion. If a petitioner is a citizen, the provision does not apply."); Poole v. Mukasey, 522 F.3d 259, 261, 264 (2d Cir. 2008) (noting that the exhaustion requirement does not apply until a claim of citizenship is resolved); Omolo v. Gonzales, 452 F.3d 404, 407 (5th Cir. 2006) (noting that a court must first determine whether the petitioner is an alien, since "[o]nly an 'alien' may be required to exhaust his administrative remedies"); Rivera v. Ashcroft, 394 F.3d 1129, 1140 (9th Cir. 2005) (explaining that the statutory administrative exhaustion requirement does not apply before judicial determination of a nonfrivolous claim to U.S. citizenship), *superseded by statute*, REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005), *as recognized in* Iasu v. Smith, 511 F.3d 881 (9th Cir. 2007); Moussa v. INS, 302 F.3d 823, 825 (8th Cir. 2002) (stating that "the exhaustion provisions of § 1252(d)(1) do not apply to 'any person' challenging a final order of removal, only to an 'alien,'—precisely what [petitioner] claims not to be"); *see also* Ortega-Morales v. Lynch, 168 F. Supp. 3d 1228, 1238 (D. Ariz. 2016) ("Plaintiffs' failure to appeal to the Administrative Appeals Unit of USCIS does not run afoul of any statutory exhaustion requirement."). The Fourth Circuit has stated otherwise but did not discuss contrary authority from different circuits. Johnson v. Whitehead 647 F.3d 120, 125 (4th Cir. 2011); *see also* Caroline Holliday, *U.S. Citizens Detained and Deported? A Test of the Great Writ's Reach in Protecting Due Process Rights in Removal Proceedings*, 60 B.C. L. REV. E-SUPPLEMENT II.-217, II.-220 to -228 (2019) (summarizing the approach of circuit courts addressing the exhaustion requirement in the context of removal proceedings).

122. Woodby v. INS, 385 U.S. 276, 286 (1966); Chau v. INS, 247 F.3d 1026, 1029 n.5 (9th Cir. 2001). Whether this standard should be interpreted the same as "clear and convincing" or whether the addition of the word "unequivocal" further heightens the burden of proof is a disputed question that has created an unresolved circuit split. *See infra* Section III.A.

123. *See supra* Section II.A.

124. *Chau,* 247 F.3d at 1029 n.5.

125. *See id.* (explaining how "evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent or deportee to prove citizenship").

126. 8 U.S.C. § 1252(b)(5)(C) (2012).

immigration judge completed the proceedings."[127] If the individual subject to a deportation order claims to be a citizen, then the court of appeals must determine if there is a "genuine issue of material fact" as to that citizenship.[128] If there is no genuine issue, then the court of appeals "shall decide the nationality claim."[129] If, however, there is a genuine issue of material fact, then the court must transfer the case to the district court where the individual resides. The transferee court will hold "a new hearing on the nationality claim and [make] a decision on that claim as if an action had been brought in the district court" just as if the individual had filed a declaratory judgment action seeking recognition of citizenship status.[130] The judicial proceeding considers the question of citizenship de novo, without deference to the administrative process.[131]

Thus, if the case presents a factual question as to citizenship, it will likely start in the administrative system, jump to the court of appeals, be sent down to the district court for a factual finding, and only then potentially go through the ordinary appellate process. These procedures are supposed to protect against the unlawful deportation of U.S. citizens. In practice, however, there can be failures at each step.[132] Professor Jacqueline Stevens has found, for example, that officers who conduct arrests may face little scrutiny from above.[133] She explains that "ICE prosecutors are expected to file and attempt to effect all deportation orders" and that "unlike police, the vast majority of ICE agents will never testify in an immigration hearing and thus never face a respondent who might dispute their statements in front of an adjudicator."[134] Such insulation from accountability can create room for bad actors who disregard the law.[135] The summary nature of the proceedings and the administrative pressure to process cases also make error more likely.[136]

127. 8 U.S.C. § 1252(b)(2).

128. 8 U.S.C. § 1252(b)(5)(A).

129. *Id.*

130. 8 U.S.C. § 1252(b)(5)(B).

131. Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1700 (2000) ("[W]hen a nonfrivolous claim of U.S. citizenship is raised in an administrative deportation proceeding, due process requires de novo judicial review of the merits.").

132. *See* Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1271 (2019) ("Agency procedures are so defective that ICE has even mistakenly detained or deported thousands of American citizens.").

133. Stevens, *supra* note 117, at 655.

134. *Id.*

135. *Id.*

136. *See* Rosenbloom, *supra* note 13, at 1969 ("In practice, though, it is fairly easy to misclassify a U.S. citizen as a noncitizen. Such misclassifications often stem from the relaxed

Furthermore, the petitioner is not entitled to appointed counsel to help navigate these proceedings and may be held in immigration detention while the proceedings drag out. Given the hardships caused by long-term detention and the difficulty of prevailing without the assistance of legal counsel, it is not uncommon for individuals even with strong claims of citizenship to give up and consent to removal.[137] The lengthy time that some individuals spend in detention can make them lose motivation to keep fighting; citizens may accept deportation as a way to escape from confinement.[138]

Finally, if citizenship does not get resolved prior to removal, it becomes much more difficult for the individual to challenge the citizenship decision. Once U.S. citizens are deported, "it is extremely difficult to receive . . . fair hearings about their claims."[139] The risk of error is especially high because noncitizens outside the United States are not typically subject to the protection of the U.S. Constitution.[140] This means that "if an immigration judge errantly finds a citizen is an 'alien' and he is removed from this country, he is not only stripped of his fundamental right to citizenship, but he is also stripped of all the other rights afforded by the Constitution."[141]

In sum, the amount of discretion given to Customs and Border Patrol officers and administrative procedures that emphasize speed over accuracy create real difficulty for U.S. citizens caught up in immigration detention and removal proceedings. In spite of legal standards that require attention to citizenship and prohibit the detention or removal of citizens, there is still a significant level of administrative error. More worryingly, the combination of high discretion and limited oversight leaves room for intentional wrongdoing as well as mere error, thus allowing the possibility of racial discrimination or political retaliation in detention and removal proceedings.

procedural safeguards embodied in the immigration enforcement system, including lack of counsel, the prospect of prolonged detention, and summary proceedings.").

137. Stevens, *supra* note 117, at 612.

138. *Id.* at 627.

139. *Id.* at 678.

140. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 521 (2003) ("Congress regularly makes rules that would be unacceptable if applied to citizens."). If citizenship has not been adjudicated in a U.S. proceeding, a person living abroad may seek a certificate of identity that would allow the individual to travel to the United States to seek an administrative determination of citizenship. 8 U.S.C. § 1503(b) (2012); GORDON ET AL., *supra* note 97, § 104.12(1)(d) ("The need for a certificate of identity arises when the title to citizenship is not sufficiently clear to warrant issuance of a passport, but when a prima facie showing has been made in support of the claim.").

141. Hillary Gaston Walsh, *Unequivocally Different: The Third Civil Standard of Proof*, 66 U. KAN. L. REV. 565, 591 (2018).

C. Expatriation and Denaturalization

Expatriation (revocation of citizenship status) and denaturalization (revocation of citizenship specifically from one who was previously naturalized) have gone through highs and lows in U.S. history. Early on, denaturalization was rarely imposed, as the United States maintained largely open borders and offered a smooth path to citizenship.[142] The political tide turned in 1907, when Congress passed the first denaturalization statute. Potential bases for denaturalization included the traditional grounds of fraud and illegal procurement[143] as well as a lack of continued residence in the United States.[144] Bases for expatriation grew to include leaving the country to evade military service,[145] voting in the elections of another country,[146] and various similar acts.[147] In the sixty years between 1907 and 1967, more than twenty-two thousand Americans were involuntarily stripped of citizenship.[148]

1. The Rise, Fall, and Rise of Denaturalization

In the first half of the twentieth century, the Supreme Court issued a series of opinions limiting the application of denaturalization and establishing due process protections for such proceedings.[149] But it was not until 1967 that the Supreme Court issued its most influential opinion on expatriation, ruling that citizenship could be revoked in only two situations.[150] In *Afroyim v. Rusk*, the Court held that citizenship could be rescinded only if the individual affirmatively intended to

142. Ngai, *supra* note 22, at 73 (explaining that "the nation's borders were soft and, for the most part, unguarded").

143. In general, illegal procurement means that the person was not eligible for citizenship. There can be a subjective element to that determination, however—especially when the ground for purported ineligibility is a lack of "good moral character" or a failure to be "attached to the principles of the U.S. Constitution." *Fact Sheet on Denaturalization*, NAT'L IMMIGR. F. (Oct. 2, 2018), https://immigrationforum.org/article/fact-sheet-on-denaturalization/ [https://perma.cc/3ZLX-E682].

144. The Act presumed that "[n]aturalized U.S. citizens who resided for two years in their native state or five years in any other foreign state" intended to relinquish their American citizenship, though the naturalized citizens could rebut that presumption "on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States." Jonathan David Shaub, *Expatriation Restored*, 55 HARV. J. ON LEGIS. 363, 389–90 (2018) (quoting Expatriation Act of 1907, ch. 2534 § 2, 34 Stat. 1228, 1228).

145. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 147 (1963).

146. Afroyim v. Rusk, 387 U.S. 253, 254 (1967).

147. WEIL, *supra* note 16, at 178.

148. Robertson & Manta, *supra* note 32, at 422.

149. *Id.* at 430–40.

150. *See Afroyim*, 387 U.S. at 266.

renounce citizenship or if the individual had improperly gained citizenship through fraud or illegal procurement.[151]

After 1967, the number of denaturalization cases shrank to a fraction of what it had been. Between 1967 and 2013, fewer than 150 people were involuntarily stripped of citizenship (that is, less than one percent of the previous half century's number), all for alleged fraud or illegality.[152] The majority of these individuals were former Nazis and war criminals.[153]

Denaturalization cases began picking up again under the Obama Administration. Increased digitalization and "big data" analysis of computerized information allowed the government to more easily review immigration files for signs of fraud or ineligibility.[154] The government instituted a program called "Operation Janus" to digitize and review fingerprint cards, and that program identified just over eight hundred cases (out of approximately 150,000 files reviewed) where it appeared that some naturalized citizens had immigration records under two separate identities.[155] Although the Obama Administration brought more denaturalization cases than other administrations in the modern era, it could have initiated still more;[156] instead, it exercised prosecutorial discretion to focus on cases with a connection to terrorism or other threats to national security. Even in such cases, however, the Supreme Court continued its tradition of pushing back against executive branch efforts to question citizenship. For example, in 2017, the Supreme Court unanimously held that only an illegal act that played a role in an individual's acquisition of U.S. citizenship could lead to criminal denaturalization.[157]

The Trump Administration continued the Obama Administration's review of citizenship records but ended the policy of prosecutorial discretion.[158] As part of the Administration's overall "zero tolerance" policy, the government steeply increased the number of cases

151. *See id.*

152. Robertson & Manta, *supra* note 32, at 422.

153. WEIL, *supra* note 16, at 178–79; *see also List of Denaturalized Former Citizens of the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_denaturalized_former_citizens_of_the_United_States (last visited Apr. 4, 2020) [https://perma.cc/HS63-H2MX] (summarizing and categorizing individual denaturalization cases).

154. Robertson & Manta, *supra* note 32, at 409.

155. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., POTENTIALLY INELIGIBLE INDIVIDUALS HAVE BEEN GRANTED U.S. CITIZENSHIP BECAUSE OF INCOMPLETE FINGERPRINT RECORDS 2–3 (2016), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2016/OIG-16-130-Sep16.pdf [https://perma.cc/M6QU-3HKG]; *see* Robertson & Manta, *supra* note 32, at 410–11.

156. Robertson & Manta, *supra* note 32, at 409–10.

157. Maslenjak v. United States, 137 S. Ct. 1918, 1929 (2017).

158. Amanda Frost, *Alienating Citizens*, 114 NW. U. L. REV. ONLINE 48, 62 (2019).

filed.[159] In the first eighteen months of the Trump Administration, the government filed over one hundred denaturalization cases—nearly as many as had been resolved in the previous half century.[160] And those cases are only the beginning.[161] Most recently, the Department of Justice has created a new section to focus on prosecuting denaturalization claims, and "denaturalization case referrals to the department have increased 600 percent."[162]

2. The Due Process of Denaturalization

The combination of these two trends—an increase in the identification of possible naturalization fraud and a restriction on the exercise of prosecutorial discretion—raises the risk that innocent naturalized citizens will find their status in jeopardy. It is therefore important that the judicial branch protect against overenforcement. Unfortunately, as we have argued elsewhere, the current litigation procedures in denaturalization cases fail to protect citizens' rights.[163]

Denaturalization can be prosecuted either criminally or civilly. The process typically begins with the U.S. Citizenship and Immigration Services ("USCIS") referring a potential denaturalization case to the Department of Justice.[164] U.S. Attorneys' offices then evaluate the case and file either civil revocation of naturalization actions or criminal charges in federal district court.[165] When citizens are denaturalized, they return to their last immigration status prior to naturalization—most commonly, lawful permanent resident status. There is no guarantee that an individual will keep this status, however, because the same facts that gave rise to the denaturalization proceeding can also be used to revoke immigration rights, ultimately rendering the individual deportable.

On the criminal side, a conviction for naturalization fraud will automatically result in loss of citizenship as well as up to ten years in

159. Robertson & Manta, *supra* note 32, at 412.

160. *Fact Sheet on Denaturalization*, *supra* note 143.

161. *Id.* ("Since January 2017, [U.S. Citizenship and Immigration Services ("USCIS")] has identified approximately 2,500 cases to be examined for possible denaturalization . . . ."); Press Release, Dep't of Justice, Justice Department Secures First Denaturalization as a Result of Operation Janus (Jan. 9, 2018), https://www.justice.gov/opa/pr/justice-department-secures-first-denaturalization-result-operation-janus [https://perma.cc/J84K-YQWF] ("USCIS . . . has stated its intention to refer approximately an additional 1,600 [cases] for prosecution.").

162. Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. TIMES, (Feb. 27, 2020), https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html [https://perma.cc/RV7Z-2SHF].

163. Robertson & Manta, *supra* note 32, at 414.

164. *See Fact Sheet on Denaturalization*, *supra* note 143.

165. *Id.*

prison.[166] Criminal prosecution also carries with it a high level of required due process—a ten-year statute of limitations, the right to counsel, and the highest possible burden of proof.[167] Given these serious consequences of a criminal proceeding, civil actions may appear at first glance to be a less severe option.

In recent years, however, civil denaturalization has been used as a means of pursuing cases that the government would not have been able to win in a criminal proceeding.[168] In recognition of the difficulties inherent in criminal actions, an article in the *U.S. Attorneys' Bulletin* recently recommended that prosecutors pursue civil, rather than criminal, denaturalization cases to take advantage of the "benefits" of a lower burden of proof, the lack of a jury trial right, and a lack of access to assigned counsel.[169]

Civil denaturalization cases are indeed easier for the government to win—but as we explained in a recent article, ordinary civil litigation procedures do not do a good job of protecting defendants' due process interests.[170] Each of the following procedural mechanisms in civil denaturalization makes the cases slightly more difficult to defend against, and together they risk significant injustices.

First, there is no statute of limitations in civil denaturalization cases.[171] As a result, cases may involve events and evidence that are decades old, and evidence may rely on hazy memories and long-forgotten or long-lost documents. Second, and relatedly, it may be hard to locate individual defendants and ensure that they are served with process.[172] Unlike in criminal cases, civil cases do not necessarily require in-person service on the defendant. Third, there is no right to counsel in a civil action.[173] A defendant may not be able to afford an attorney to defend against citizenship loss and may not be capable of effectively engaging in self-representation.

Our review of the litigation files for Baljinder Singh—the very first individual denaturalized through Operation Janus—suggests that

166. *Id.*; *see* Press Release, U.S. Immigration & Customs Enf't, Middlesex County, New Jersey, Man Admits Attempting to Obtain US Citizenship by Fraud (Apr. 9, 2019), https://www.ice.gov/news/releases/middlesex-county-new-jersey-man-admits-attempting-obtain-us-citizenship-fraud [https://perma.cc/XZ78-EQYR] ("The attempted naturalization fraud charge carries a maximum potential sentence of 10 years in prison.").

167. Robertson & Manta, *supra* note 32, at 458–59.

168. *Id.* at 405.

169. Anthony D. Bianco et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, 65 U.S. ATT'YS' BULL. 5, 6 (2017) (writing that they "encourage[ ] Federal prosecutors to consider referring cases for civil denaturalization when a case is declined for prosecution").

170. Robertson & Manta, *supra* note 32.

171. *Id.*

172. *Id.*

173. *Id.*

these issues combined to result in significant procedural infirmities. Singh's case illustrates how even when litigation procedures are properly adhered to, they may be insufficient to guarantee due process in civil denaturalization cases. Singh first came to the United States in 1991.[174] His claim for asylum remained pending for six years, by which time he was able to get a job, fall in love, and get married to a citizen.[175] He was able to qualify first for lawful permanent resident status and later for citizenship through his marriage.[176] In 2017, however, Operation Janus discovered that Singh had two separate immigration files tied to his fingerprints—one under the name "Baljinder Singh" and one under the name "Davinder Singh."[177] "Davinder" failed to show up for an initial asylum hearing and was ordered deported as a result—less than a month before "Baljinder" had successfully navigated his asylum claim for five years, until it was finally dismissed after he married a U.S. citizen.[178] It is unclear why the two files had matching fingerprints—perhaps this truly arose from fraud, but it is also possible that the card was placed in the wrong file or that a translator mistakenly recorded the wrong name.[179]

Ordinarily, this kind of factual question could be determined through the course of civil litigation. But the justice system relies on the presentation of evidence, and that did not happen in the 2017 proceeding. First, process was served on a New Jersey address where Baljinder Singh once lived. There is some indication, however, that he no longer lived at that address—citizens, after all, are not required to keep their address records up to date with the government.[180] The Federal Rules of Civil Procedure allow service to be made by leaving the summons and complaint with a person of "suitable age and discretion" who resides at the defendant's usual place of abode.[181] We know that the summons was left with another individual at Singh's old address—but we do not know if Singh still lived there or if the person accepting service knew him or was able to get the information to him.[182]

174. Complaint at 2, United States v. Singh, No. 17-7214 (SRC), 2018 WL 305325 (D.N.J. Jan. 5, 2018) [hereinafter Complaint, *Singh*].

175. *See id.* at 4–6.

176. *Id.* at 6.

177. *Singh*, 2018 WL 305325, at *2.

178. Complaint, *Singh*, *supra* note 174, at 2.

179. Robertson & Manta, *supra* note 32, at 417–18.

180. The authors searched public directory records on Lexis. These records, if correct, suggest that Singh had moved out of state several years before service was made.

181. FED. R. CIV. P. 4(e)(2)(B) (allowing service of process on a "person of suitable age and discretion" who shares a residence with the defendant).

182. *See* Process Receipt and Return, United States v. Singh, No. 17-7214 (SRC) (D.N.J. Oct. 16, 2017) (on file with author) (showing that service was made upon an individual named Pritam Singh). The shared last name of "Singh," however, does not necessarily suggest a familial relation.

We do know, however, that Singh neither made any appearance in the denaturalization proceeding nor did any attorney record an appearance on his behalf. As a result, the proceeding was uncontested. The court accepted the government's allegations as true—including the allegation of intentional fraud—and granted a summary judgment of denaturalization. There is no indication that the government made any further attempts to locate Singh, and it is not clear even today that he knows he has lost his citizenship.

Most civil litigation seeks affirmative relief—monetary damages, specific performance, or an injunction. In all cases, the defendant (or at least the defendant's property) must be found to obtain relief. A denaturalization case, by contrast, is "only" a status adjustment. And when that status is adjusted without the defendant's participation and a proper adversarial proceeding, it is difficult to have faith in the result. The Supreme Court, after all, has said that the cornerstone of due process is notice and an opportunity to be heard.[183] It is not clear that Singh had either. Did he know about the denaturalization case? If he did, could he afford to hire a lawyer—or navigate the litigation process on his own? We have no way to know, and thus no way to know whether the government's allegations against him were true.

III. THE UNCERTAIN CONSTITUTIONAL BASIS OF PROCEDURAL PROTECTIONS

The cases described above show that proving citizenship is not always easy. These difficulties are not isolated examples of injustice; instead, they are part of a broader legal framework that does not currently do a good job of safeguarding citizenship rights. Understanding the structural deficiencies helps to identify procedural improvements that the judiciary could adopt.

Many of these procedural improvements focus on factfinding. Professor Jennifer Lee Koh has discussed what she terms the "factual

Baptized Sikh males take the name Singh, most commonly as their last name. Robertson & Manta, *supra* note 32, at 416 n.79; *see also Common Sikh Names Banned Under Canada's Immigration Policy*, CBC (July 23, 2007, 5:16 PM), https://www.cbc.ca/news/canada/calgary/common-sikh-names-banned-under-canada-s-immigration-policy-1.689259 [https://perma.cc/3K7E-HAP8] (discussing the use of Singh as a last name in Sikh tradition). In addition, the city of Carteret, where Baljinder Singh was last known to live, has the largest Sikh community in the state of New Jersey. Kevin Coyne, *Turbans Make Targets, Some Sikhs Find*, N.Y. TIMES (June 15, 2008), https://www.nytimes.com/2008/06/15/nyregion/nyregionspecial2/15colnj.html [https://perma.cc/325D-TWJ2] (stating that in 2008, New Jersey had a population of twenty-five thousand Sikhs and Carteret was "home to the largest concentration of Sikhs in the state").

183. Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

complexity" of citizenship claims, noting that citizenship can be unclear for a variety of reasons.[184] First, "[m]ost citizens do not carry their birth certificates or passports, and cannot produce them during immigration enforcement actions that take place within the United States, such as during workplace raids or criminal arrests."[185] Second, "[s]ome people, including citizens, do not own either type of document."[186] Third, "[m]ental illness and poverty may compound the inability to prove, on the spot, one's citizenship."[187] And finally, "some individuals may be citizens without knowing it, due to the rules governing acquired and derivative citizenship"—rules that have changed just within the last few years.[188]

With denaturalization, there is no question about the individual's underlying citizenship. There are, however, still complex factual issues to resolve. Under current law, denaturalization is available only in cases of fraud or illegal procurement. But because there is no statute of limitations in civil denaturalization cases, the relevant underlying facts may go back decades, requiring a court to examine an individual's life in a foreign country many years ago, his or her method of entry into this country, and similar facts. After so long, it is not uncommon for memories to fade and records—if they ever existed in the first place—to be lost or destroyed. All of these difficulties come together to create obstacles to the accurate administrative and judicial resolution of citizenship questions.

Of course, any judicial evaluation of the costs and benefits of adjusting litigation procedure requires understanding what the changes would be measured against. With regard to citizenship litigation, however, the baseline is murky and uncertain. The confusion is understandable because much of the Supreme Court precedent surrounding citizenship was developed in the early part of the twentieth century.[189] Litigation procedure was less developed and less standardized than it is today.[190] As a result, when the Supreme Court set out various procedural safeguards for citizenship, it often did not use the same keywords and phrases that later became standardized in procedural rulings, making it sometimes difficult to see how the

184. Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1824–25 (2013).

185. *Id.* (footnote omitted).

186. *Id.*

187. *Id.*

188. *Id.*; *see also* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687 (2017) (striking down gender-based differences in derivative citizenship).

189. WEIL, *supra* note 16, at 111–76 (discussing the development of the precedent through 1967); *see* Robertson & Manta, *supra* note 32, at 426–28 (discussing the development through 1952).

190. *See infra* Sections III.A, III.B.

citizenship cases should map onto modern procedural frameworks. And perhaps more importantly, it was not clear whether the Court was developing common-law protections subject to later change by Congress or whether it was interpreting the constitutional requirements for safeguarding citizenship rights in litigation.

A. Ambiguity and Confusion

The Supreme Court has long recognized the importance of citizenship determination and has required heightened due process protections in many cases dealing with citizenship. But the Court often failed to make clear whether these protections were constitutionally required or whether they were merely matters of common law and therefore potentially subject to change with legislative action.

The Supreme Court's own later decisions involving denaturalization or expatriation acknowledged a lack of clarity in the basis and scope of its earlier procedural rulings. Early denaturalization cases discussed the need for "clear, unequivocal, and convincing" evidence to support the retraction of citizenship.[191] When the Court later came back to that language, however, the Justices could not agree on what it meant in practice. First, just how far did the articulated standard heighten the ordinary civil burden of proof—was it equivalent to the later-developed "clear and convincing" standard, or did the inclusion of the word "unequivocal" bring the standard closer to—or even beyond—the criminal standard of "beyond a reasonable doubt"?[192] Second, was that heightened burden constitutionally required, or was it merely a default rule to be applied in the absence of controlling legislation?[193]

In the mid-century denaturalization case of *Klaprott v. United States*, Justice Black wrote in a plurality opinion joined by Justice Douglas that he believed the government's burden for removal of citizenship was "substantially identical with that required in criminal cases—proof beyond a reasonable doubt."[194] Justices Rutledge and Murphy agreed that the standard of proof should be interpreted similarly to that required in criminal cases. They concluded that denaturalization "required a burden of proof . . . which in effect

191. *See* Schneiderman v. United States, 320 U.S. 118, 125 (1943) ("To set aside such a grant the evidence must be 'clear, unequivocal, and convincing'—'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.' " (quoting United States v. Maxwell Land-Grant Co., 121 U.S. 325, 381 (1887)).

192. Klapprott v. United States, 335 U.S. 601, 612 (1949) (plurality opinion).

193. Mondaca-Vega v. Lynch, 808 F.3d 413, 420 (9th Cir. 2015).

194. *Klapprott*, 335 U.S. at 612.

approximates the burden demanded for conviction in criminal cases,"[195] concluding that loss of citizenship possessed a "substantial kinship of the proceedings with criminal causes," in the sense that "ordinary civil procedures, such as apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences."[196]

Thus, although at least four judges agreed that loss of citizenship should be supported by a standard of proof equivalent to that of a criminal proceeding, the Court never adopted that position in a majority opinion.[197] The circuit courts have split on the question, with the U.S. Court of Appeals for the Ninth Circuit adopting the position that the Supreme Court intended for citizenship cases to be judged by the intermediate "clear and convincing" standard, and the Sixth Circuit concluding that the Court's use of the word "unequivocal" heightened the intermediate standard to require something more than just "clear and convincing."[198]

The debate over how heightened the standard should be, however, was soon joined by an even more pressing question: Is a heightened standard of any sort actually required by the Constitution? This ambiguity dates back to nearly a century ago, when the court in *Elg* had to decide whether a treaty could overcome birthright citizenship, and it continues today. The Supreme Court in *Elg* never specified its basis for allowing an individual to reassert citizenship rights as an adult after being taken out of the country as a child: Was it merely reading the relevant treaty as providing such a right, or was it deciding that the *Constitution* required such a right?

A later decision from the D.C. Circuit, *Nikoi v. Attorney General of the United States*, concluded that the Supreme Court's basis for the ruling in *Elg* must have been constitutional.[199] The decision in *Nikoi* distinguished the right to reassert citizenship from situations where individuals seek to restore lawful permanent resident status.[200] Although diplomats' children born in the United States are not entitled to birthright citizenship, they are entitled to lawful permanent resident

195. *Id.* at 617–18 (Rutledge, J., concurring).

196. *Id.*

197. Robertson & Manta, *supra* note 32, at 435–36.

198. *Mondaca-Vega*, 808 F.3d at 420; Ward v. Holder, 733 F.3d 601, 605 (6th Cir. 2013) ("The 'clear, unequivocal, and convincing' standard is a more demanding degree of proof than the 'clear and convincing' standard."); s*ee also* Walsh, *supra* note 141, at 567 (noting that "the U.S. Supreme Court declined to resolve this circuit split . . . [and] the remaining ten circuit courts must now grapple with this issue individually").

199. 939 F.2d 1065, 1070 (D.C. Cir. 1991).

200. *Id.*

status as long as they reside in the United States.[201] Nevertheless, the D.C. Circuit held that diplomats' children born in the United States who leave as children have no option of reclaiming that status upon adulthood.[202] The decision distinguished *Elg,* noting that the earlier ruling "concerns the constitutional entitlement of citizenship, which carries with it constitutional protections."[203] Lawful permanent resident status, by contrast, contains no such constitutional dimension.

In 1980, the Court grappled with the potential constitutional basis for older citizenship rulings in *Vance v. Terrazas*, a case of supposed voluntary expatriation.[204] This case offered an additional complexity not present in earlier cases: Congress had adopted legislation applying a lower burden of proof for voluntary expatriation. Specifically, the statute provided that "[a]ny person who commits or performs . . . any act of expatriation . . . shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily."[205] If the Court's earlier-articulated heightened standard was merely a common-law development, then it would naturally give way to the legislative standard. If, on the other hand, heightened review was constitutionally mandated, then the presumption of voluntary relinquishment must yield, requiring the government to prove intentional relinquishment by clear and convincing evidence.[206]

The Supreme Court's dicta seemed to suggest that its earlier requirement for "clear, convincing and unequivocal evidence" in citizenship cases was only a common-law holding.[207] Ultimately, however, the standard of proof ended up not being dispositive to the Court's opinion. The Supreme Court held that there was insufficient evidence of a voluntary intent to expatriate even under a lower "preponderance" standard.[208] Nonetheless, two Justices issued separate writings stating they believed the heightened standard was constitutionally required. Justice Stevens situated the citizenship right

201. *Id.*

202. *Id.*

203. *Id.*

204. *See* Vance v. Terrazas, 444 U.S. 252 (1980) (discussing whether an intent to surrender U.S. citizenship is required to establish loss of citizenship); Robertson & Manta, *supra* note 32, at 437–38 (discussing the decision in *Terrazas*, 444 U.S. 252).

205. 8 U.S.C. § 1481(b) (2012).

206. *See Terrazas*, 444 U.S. at 267 ("[B]y requiring that the expatriating act be proved voluntary by clear and convincing evidence, the Court of Appeals effectively foreclosed use of the § 1481(c) presumption of voluntariness . . . .").

207. *Id.* at 258 (quoting Terrazas v. Vance, 577 F.2d 7, 11 (7th Cir. 1978)).

208. *Id.* at 263.

within a framework of both substantive and procedural due process, writing that "[i]n my judgment a person's interest in retaining his American citizenship is surely an aspect of 'liberty' of which he cannot be deprived without due process of law," and concluding that such liberty must be safeguarded through a heightened burden of proof in citizenship cases, which in his view would require meeting at least the intermediate standard of "clear and convincing" evidence.[209] Justice Marshall, writing separately, agreed that a heightened burden of proof was required under the Constitution.[210]

In addition to leaving open questions about the appropriate burden of proof, earlier decisions from the Supreme Court also did not resolve the appropriate standard of review on appeal. Early denaturalization cases emphasized a need for a searching review on appeal that would work in conjunction with the heightened standard of proof.[211] In *Baumgartner v. United States*, the Court noted that the benefit of the "clear, unequivocal, and convincing" standard "would be lost" if questions of fact underlying the citizenship decision could not also be subject to review on appeal.[212] The Court distinguished between a "subsidiary fact," for which highly deferential review is desirable, and a finding of "ultimate 'facts,'" which "more clearly implies the application of standards of law" and is therefore less entitled to judicial deference.[213] The Court emphasized the need for a searching appellate review in citizenship cases, which "cannot escape broadly social judgments—judgment lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship."[214]

The Supreme Court's failure to reconcile these ambiguous statements about the burden of proof and standard of review on appeal have created difficulties for courts dealing with citizenship cases. A recent case from the Ninth Circuit illustrates these difficulties, as the en banc court fractured over both the required burden of proof and the appropriate standard for appellate review.[215] The case involved a petitioner in his seventies whose place of birth was disputed. The petitioner had grown up on the Mexican side of the border but spent his entire adult life moving back and forth between Texas and Mexico.[216]

209. *Id.* at 274 (Stevens, J., concurring in part and dissenting in part). Justice Stevens would not give added weight to the Court's prior use of the word "unequivocal" in the heightened standard.

210. *Id.* at 271 (Marshall, J., concurring in part and dissenting in part).

211. Baumgartner v. United States, 322 U.S. 665, 671 (1944).

212. *Id.* (internal quotation marks omitted).

213. *Id.*

214. *Id.*

215. *See* Mondaca-Vega v. Lynch, 808 F.3d 413, 420 (9th Cir. 2015).

216. *Id.* at 426–28.

For decades, he had variously presented two different birth certificates: one showing he was born in California and the other showing he was born in Mexico.[217] Using his U.S. birth certificate, he had obtained a Social Security card and a U.S. passport, which had been renewed without difficulty.[218] He used his Mexican birth certificate as early as 1951, however, when he was picked up for various minor crimes; he believed, apparently correctly, that presenting himself as a non-U.S. citizen would result in deportation rather than criminal prosecution and potential continued detention.[219] It was not until decades later, when he was convicted of an assault charge, that the government connected the two sets of records. As a result, the government sought to deport the petitioner following his conviction. The district court issued a finding of fact that the petitioner was not a U.S. citizen, paving the way for him to be deported.[220]

On appeal, in the case of *Mondaca-Vega v. Lynch*, the Ninth Circuit struggled with the question of the petitioner's citizenship. There was some evidence on both sides: on the one hand, the petitioner had persuaded the government of his citizenship well enough to obtain both a Social Security card and a passport.[221] There was no indication that the U.S. birth certificate used by the petitioner was forged.[222] And the petitioner possessed significant ties to the United States, including three children who were born within the country and several other children for whom the government had recognized derivative citizenship through the petitioner.[223] On the other hand, his Mexican birth certificate also appeared regular.[224] Thus, both certificates were longstanding, having been used for decades without question. It was clear that the petitioner had a history of claiming whichever country of citizenship would best suit his interests at the time.

With the evidence so close to equipoise, the standard of proof could make a real difference in the outcome. A majority of the Ninth Circuit's en banc panel held that the appropriate burden of proof was the intermediate "clear and convincing" standard, asserting that the Supreme Court had used the phrases "clear and convincing" and "clear, convincing, and unequivocal" interchangeably, and concluding from

217. *Id.* at 417–18.

218. *Id.* at 418–19.

219. *See id.*

220. *Id.* at 416–17.

221. *Id.* at 418.

222. *Id.* at 417 ("Two *authentic* birth certificates are in the record . . . [including one] of Renoldo Mondaca Carlon, born on July 17, 1931 in Imperial, California." (emphasis added)).

223. *Id.* at 418.

224. *Id.* at 417 (noting the authenticity of the Mexican birth certificate).

this practice that the word "unequivocal" did not add additional meaning to the intermediate standard.[225] The Ninth Circuit therefore concluded that the district court had properly applied an intermediate standard of proof.[226]

Once the Ninth Circuit had accepted the intermediate burden of proof, it had to decide how the underlying evidence supporting that burden should be reviewed on appeal. The petitioner argued that the court should independently evaluate whether the evidence was strong enough to meet the government's heightened burden of proof. After all, earlier denaturalization opinions from the Supreme Court had emphasized the need for a more searching review than that ordinarily provided by appellate courts.[227] The Ninth Circuit, however, held that the Supreme Court had abrogated its earlier distinction between "subsidiary" and "ultimate" facts and thus now required that all review of judicial factfinding apply a "clear error" standard.[228] As long as there was a "plausible" basis for the district court's conclusion, the finding of fact—that is, that the petitioner was born in Mexico rather than the United States—would stand, and the petitioner could be removed. Given the balance of the overall evidence, the court concluded that there was indeed a plausible basis for the district court's findings.

Thus, these procedural rulings combined to support the removal and continued exclusion of an individual whose actual citizenship was far from clear. Even the majority conceded that there were "some errors" in the district court's factfinding and that the state of the evidence was ambiguous. But ultimately the court concluded that when "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[229]

Unsurprisingly, the en banc panel's opinion spawned several separate writings. Judge Smith, in a concurrence joined by three judges, stated that he would have held that the Supreme Court's use of the word "unequivocal" in citizenship cases should heighten the required burden of proof beyond the already heightened "clear and convincing" standard.[230] The opinion pointed to conflicting precedent from the Sixth Circuit, as well as the Supreme Court's opinion in *Addington v. United States*, which stated in a civil-commitment case that "[t]he term 'unequivocal,' taken by itself, means proof that admits of no doubt, a

225. *Id.* at 420.

226. *Id.* at 425–26.

227. *See supra* note 211 and accompanying text.

228. *Mondaca-Vega*, 808 F.3d at 426.

229. *Id.* (quoting Anderson v. City of Bessemer City, 470 U.S. 562, 574 (1985)).

230. *Id.* at 430 (Smith, J., concurring in part and dissenting in part).

burden approximating, if not exceeding, that used in criminal cases."[231] As a result, Judge Smith would have remanded the case for reconsideration in light of this heightened standard.

Judge Murguia also wrote a separate opinion joined in full by one judge and joined as to the standard of review by four judges.[232] Judge Murguia's opinion contested the majority's application of the clear-error standard, noting that the Supreme Court had never explicitly overruled *Baumgartner*'s requirement for a more searching de novo appellate review of the factual basis underlying a citizenship determination, but had instead reiterated it in both the 1960s and the 1980s.[233] Judge Murguia agreed that some questions were straightforward enough to make clear-error review appropriate, such as factual questions about how many times the petitioner had been deported, whether he successfully applied for a Social Security number, and whether he had ever been convicted of a crime as a U.S. citizen.

But the broader questions of whether the petitioner's citizenship evidence had been "procured or obtained by fraud" was not a simple question of fact—rather, it was "a finding that 'clearly impl[ies] the application of standards of law' " and should therefore be subject to de novo appellate review.[234] Judge Murguia concluded that the standard of review would make a difference to the ultimate outcome.[235] The district court, for example, stated that it was unlikely that a U.S. citizen would allow himself to be deported as deportation would be against his financial interest.[236] Judge Murguia, however, noted that "there is no evidence in the record to support the district court's findings regarding employment opportunities for a farm worker in the 1950s, much less

231. *Id.* at 430 n.8 (quoting Addington v. Texas, 441 U.S. 418, 432 (1979)) (emphasis omitted).

232. *Id.* at 436 (Murguia, J., concurring in part and dissenting in part).

233. *See id.* at 441 ("Until the Supreme Court holds otherwise, *Baumgartner* and its progeny remain good law."); *see also* Fedorenko v. United States, 449 U.S. 490, 506 (1981) ("[I]n reviewing denaturalization cases, we have carefully examined the record ourselves."); Costello v. United States, 365 U.S. 265, 269–70 (1961) ("The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here."); Knauer v. United States, 328 U.S. 654, 657–58 (1946):

> We reexamine the facts to determine whether the United States has carried its burden of proving by "clear, unequivocal, and convincing" evidence, which does not leave "the issue in doubt," that the citizen who is sought to be restored to the status of an alien obtained his naturalization certificate illegally;

Baumgartner v. United States, 322 U.S. 665, 676 (1944) ("But we must be equally watchful that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired.").

234. *Mondaca-Vega*, 808 F.3d at 437 (Murguia, J., concurring in part and dissenting in part) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982)) (alteration in the original).

235. *Id.*

236. *Id.* at 442.

Petitioner's own personal financial motives."[237] Thus, Judge Murguia believed there was insufficient evidence to conclude that the petitioner had fraudulently obtained U.S. citizenship.[238] If the evidence was in equipoise such that the Mexican birth certificate and the U.S. birth certificate could equally likely have been false, then the appellate court should have concluded that the burden of proof would disallow removal.

B. Prioritizing the Constitutional Basis of Citizenship Procedure

The *Mondaca-Vega* case raises a fundamental question: Why should the judiciary go out of its way to protect the citizenship of a petitioner who cared so little for it that he was willing to claim whichever country benefitted his interests more at any particular moment? That question goes to the heart of heightened procedural protections in citizenship cases. After all, if it is only the individual interest that matters, then the due process protections of ordinary civil litigation should surely be good enough. Courts adjudicate matters such as child custody, workers' compensation benefits, and other civil matters that strike at the core of individuals' lives and concerns every day. What is different about citizenship?

This Article asserts that citizenship interests are different—because they stem from the political order enshrined in the U.S. Constitution.[239] The Supreme Court suggested as much in *Baumgartner*, writing that "considerations of policy, derived from the traditions of our people . . . require solid proof that citizenship was falsely and fraudulently procured" before it can be taken away by the government.[240] The Court warned against applying "the illusory definiteness of any formula" in citizenship cases, noting that "a too easy finding that citizenship was disloyally acquired" could lead to a "fear of exercising . . . American freedom."[241]

This chilling effect is necessarily social, political, and structural, rather than individual. The Court's concern is not whether a particular petitioner like the one in *Mondaca-Vega* is exercising any particular

237. *Id.*

238. *Id.* ("Without these clearly erroneous findings, but considering all the other facts as found by the district court, I would conclude that the Government has not proven by clear, unequivocal, and convincing evidence that Petitioner is Salvador Mondaca–Vega, citizen of Mexico.").

239. *See* Aram A. Gavoor & Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 23 WM. & MARY BILL RTS. J. 637, 672 (2015) (suggesting that Congress codify the "clear, unequivocal, and convincing" standard, and suggesting that if Congress attempted to codify a less protective standard, such a law "could present confusion in the lower courts and would likely be held unconstitutional under existing precedent").

240. Baumgartner v. United States, 322 U.S. 665, 676 (1944).

241. *Id.*

rights of free speech, political association, or religion; its concern is the potential chilling effect on other people if litigation procedure leaves citizenship protections vulnerable. The Supreme Court has long acknowledged the risk of political manipulation of citizenship rights. In *Afroyim v. Rusk*, the case that held there could be no involuntary expatriation for anything short of fraud or illegal procurement of citizenship, the Court discussed the relationship between democracy and citizenship at greater length than it had before or has since.[242] "The very nature of our free government," wrote Justice Black in the majority opinion, "makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."[243]

When Justice Black wrote the *Afroyim* majority opinion in 1967, he was not speaking hypothetically. The country had already seen the political risks of limiting citizenship rights, especially in connection with racial discrimination. The Naturalization Act of 1790 limited citizenship to "free white person[s],"[244] and more than one hundred years later in 1923, the Supreme Court concluded that naturalized citizens from India had "illegally procured" their citizenship because they should not be considered "white" under the law.[245] Not only did Indian-born men lose their U.S. citizenship, but in many cases so did their American-born wives, who were deemed to take their husbands' citizenship.[246]

Starting in the 1930s, the United States engaged in a "massive campaign" targeting Mexicans for deportation, ultimately deporting "over one million Mexican immigrants, U.S. citizens of Mexican ancestry, and undoubtedly other Hispanic U.S. citizens."[247] And of course, during World War II the United States engaged in the mass

242. 387 U.S. 253, 268 (1967); *see also* Robertson & Manta, *supra* note 32, at 461 (discussing the impact of *Afroyim*).

243. *Afroyim*, 387 U.S. at 268.

244. An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790) (repealed 1795); Emmanuel Mauleón, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. 1326, 1336 (2018) ("[E]xplicit racial exclusion in naturalization and immigration was not completely removed until the Immigration and Nationality Act of 1965.").

245. *See* United States v. Bhagat Singh Thind, 261 U.S. 204, 213–15 (1923); Robertson & Manta, *supra* note 32, at 425 (discussing the decision).

246. *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 433–34 (2005) (noting that the Cable Act of 1922 reaffirmed that American women would lose their citizenship by marrying men who were ineligible for citizenship).

247. Ediberto Román & Ernesto Sagás, *Birthright Citizenship Under Attack: How Dominican Nationality Laws May Be the Future of U.S. Exclusion*, 66 AM. U. L. REV. 1383, 1415 (2017).

internment of U.S. citizens of Japanese ancestry.[248] The Court was therefore writing against a backdrop where recent events had shown that citizenship rights could be fragile, especially in the face of racial animus. In upholding the rights of citizenship, the Court emphasized that the language, purpose, and prior construction of the Fourteenth Amendment show that it protects an individual "against a congressional forcible destruction of his citizenship, whatever his creed, color, or race."[249]

And while racial animus may have motivated earlier encroachments on citizenship, the Court was quick to note that animus-motivated citizenship restrictions also contained a political component. The Court concluded that "it seems undeniable from the language [the Framers of the Fourteenth Amendment] used that they wanted to put citizenship beyond the power of any governmental unit to destroy."[250] The Framers were concerned that the citizenship "so recently conferred" on African Americans was so fragile that a later Congress might "just as easily take[ ] [it] away from them."[251] By 1967, however, it was clear that African Americans might not be the only ones so targeted—political animus, as well as racial animus, could provide grounds for stripping citizenship rights.[252] In turn, if individuals feared that political participation could result in losing citizenship rights, their political activity and speech would be chilled.[253]

Citizenship rights, in the *Afroyim* Court's view, go to the heart of the political polity. In holding that Congress cannot involuntarily expatriate individuals, the Supreme Court relied on the idea that "[c]itizenship in this Nation is a part of a cooperative affair."[254] Citizenship is not merely a right granted by the government; under the United States' constitutional structure, "[i]ts citizenry is the country and the country is its citizenry."[255]

Later Supreme Court cases failed to return to the strong language of the *Afroyim* Court. *Afroyim* itself was a 5-4 decision viewed

248. Korematsu v. United States, 323 U.S. 214, 215–16 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

249. Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

250. *Id.* at 263.

251. *Id.* at 262.

252. Thus, for example, many of the mid-century cases dealt with individuals accused of sympathizing either with Nazis or with Communists. *See* Robertson & Manta, *supra* note 32, at 426–27 (describing how "the United States . . . looked inward to fight against a perceived threat of communist sympathy" during the early 1900s).

253. *See* Kagan, *supra* note 104, at 1261 (noting that "[t]he threat of deportation may act as a deterrent that silences other immigrants"). Such a chilling effect would also occur when individuals risk losing citizenship status and face potential subsequent deportation.

254. *Afroyim*, 387 U.S. at 268.

255. *Id.*

as vulnerable to being overturned after a change in Court membership.[256] A switch in position from Justice Harlan saved *Afroyim* from being overruled.[257] Nonetheless, the Court did not return to the broad constitutional rhetoric of *Afroyim* in later cases, preferring instead to focus on narrower and more technical points, often grounded in statutory interpretation.[258]

The Court's more recent approach in citizenship cases at least implicitly follows the constitutional avoidance canon. Under this doctrine, the Supreme Court will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case,"[259] and "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[260] In citizenship cases of recent decades, the Court has reliably found such alternate grounds.[261] Nevertheless, the constitutional avoidance canon creates significant difficulties in cases involving citizenship rights. Even when there may be other grounds to reach the same result—and even when that result still protects the individual against the loss of citizenship rights—citizenship questions inherently invoke constitutional norms.

Professor Hiroshi Motomura wrote about the avoidance canon in immigration law, describing it as "the 'underenforcement' of constitutional norms for prudential reasons."[262] In his view, those prudential reasons are rooted in a respect for, and deference to, the political branches of government—especially in cases where Congress has adopted legislation on point.[263] Avoiding the constitutional

256. *See* Robertson & Manta, *supra* note 32, at 445 ("[E]ven though the decision got a majority opinion, it was still seen as vulnerable by those dissatisfied with the ruling. It was, after all, a 5-4 decision reversing a different 5-4 decision less than a decade old.").

257. *Id.* at 446.

258. *See id.* ("[T]hose cases would continue to apply a narrow and formalist approach; none would return to *Afroyim*'s broad statements of 'liberty and equal justice.'" (quoting *Afroyim*, 387 U.S. at 267)).

259. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting Burton v. United States, 196 U.S. 283, 295 (1905)).

260. *Id.*

261. *See, e.g.*, Maslenjak v. United States, 137 S. Ct. 1918 (2017) (narrowly interpreting statutory requirements); Kungys v. United States, 485 U.S. 759, 779 (1988) ("[W]e address only the issue considered (and resolved in the affirmative) by the Third Circuit: whether § 1101(f)(6) contains a materiality requirement for false testimony. We hold that it does not.").

262. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 563 (1990).

263. *See id.*:

> Institutional constraints, especially the judiciary's sensitivity to its limited factfinding capability and attenuated electoral responsibility, make courts reluctant to issue a constitutional command to the political branches of government. Even if such a command clearly would reflect an established constitutional norm, courts can

questions through "phantom norm decisionmaking" that finds an alternate ground to protect the individual short of recognizing a constitutional right, he points out, may counterintuitively allow the Court to assure greater protection for immigrants, finding reasons to rule in their favor without having to strike down legislation.[264] And in some cases, the so-called phantom norms may coalesce into a later formal recognition of constitutional rights.[265]

But unless or until that happens, long-term constitutional avoidance of questions involving fundamental rights can create the illusion of constitutionality.[266] That is, because the actions of the executive or legislative branch are not explicitly declared unconstitutional, they may appear to be exercising legitimate power on the whole, even if particular litigants are able to prevail in individual cases. If the Court were to expressly grapple with the constitutional questions underlying those actions, however, it might conclude that those actions are inconsistent with constitutional protections.

Another problematic effect of such avoidance is that even if the Supreme Court can find ways to avoid the constitutional questions, lower courts cannot. And without guidance from the Supreme Court, they will have to read the tea leaves to guess whether a Supreme Court result was required by the Constitution. Thus, for example, the D.C. Circuit had to determine the basis for the Supreme Court's earlier decision in *Elg* to allow children who move away from the United States to later reassert citizenship as adults.[267] If it was merely based on the intent of the treaty, then perhaps the same approach would apply as well to children who later want to reassert a right to lawful permanent resident status.[268] On the other hand, if the result was constitutionally

> sometimes vindicate that norm less intrusively, and thus perhaps more justifiably, through the indirect route of statutory interpretation.

(footnote omitted).

264. *Id.* at 567 ("The centrality of phantom norm decisionmaking in immigration law gradually emerged through several Supreme Court decisions from roughly the same period as *Mezei*, *Knauff*, and *Harisiades*. Their unifying characteristic is their propensity to use phantom norm constitutional reasoning to reach subconstitutional outcomes favorable to aliens.").

265. *See id.* at 612 ("One defense of phantom norm decisions is that they have been a useful testing ground for new constitutional ideas without the need to challenge prevailing doctrine . . . this process may be a healthy, perhaps preferred, and perhaps even inevitable form of constitutional change.").

266. *See id.* (explaining that the use of "phantom norm decisionmaking" in immigration law created a gulf between those who adhered to the plenary power doctrine and those who believe that the Constitution allows for a greater role in judicial oversight).

267. *See* Nikoi v. Attorney Gen. of U.S., 939 F.2d 1065, 1070 (D.C. Cir. 1991) (concluding that *Elg* only concerns the "constitutional entitlement of citizenship" and does not suggest that a right to permanent residence carries the same constitutional status).

268. *See id.* (discussing and rejecting the argument that "as in the case of citizenship, an intent to abandon permanent resident status may not be attributed to a minor").

required in *Elg* only as a matter of citizenship rights, then the case could be limited to apply only to citizenship and not to immigration status.[269]

In evaluating the constitutional basis of the *Elg* case, the D.C. Circuit suggested that broader political and social rights were at issue in citizenship cases. It acknowledged that citizenship carries with it certain constitutional protections that residence in the United States does not.[270] As a result, the D.C. Circuit was able to conclude that the Court's earlier decision was best understood as a constitutional ruling.[271]

Recognizing the constitutional basis of citizenship rights is the first step to ensuring protection of those rights, and the Supreme Court should not shy away from it. The language used to talk about such rights can be powerful: "In modern constitutional discourse, calling citizenship a 'right' gives it weight; it shifts the burden to the government to come forward with compelling reasons for its actions that abridge or deny citizenship."[272] Of course, not every litigant will be focused on questions of citizenship. To the individual, lawful permission to live and work in the United States may be of more immediately practical import than more ethereal rights of citizenship.

Nonetheless, the principles of democracy underlying the U.S. Constitution are tied to the political and social rights inherent in citizenship and the political community. John Hart Ely reasoned that the Constitution's role is to protect the rights of those who are left out or left behind in the political process.[273] He argued that judicial review should examine "questions of participation," rather than "the substantive merits of . . . political choice."[274] The history of citizenship, immigration, and political participation in the United States makes it clear that the courts are needed to protect democratic rights.[275]

If heightened procedural safeguards are not constitutionally required, then the political branches may limit the right to challenge

269. *See id.* (explaining that the Court remained "unpersuaded" by arguments likening permanent resident status to citizenship).

270. *Id.*

271. *See id.*

272. T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1484 (1986).

273. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

274. *Id.* at 181.

275. *See* Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 586 (2019) ("The legal effects of the second wall prompt Constitutional and statutory violations, procedural deprivations, and tangible suffering in the form of denied benefits, intense *anxiety*, and feelings of exclusion.").

citizenship determinations—either in all cases or, more perniciously, in the case of disfavored citizens. The *Afroyim* Court was correct to recognize that it is inconsistent with our system of constitutional democracy to allow the deprivation of citizenship for political reasons.[276] Returning to a constitutional analysis of due process in citizenship litigation is the best way to ensure that this cannot happen.

IV. HEIGHTENING THE PROCEDURAL SAFEGUARDS OF CITIZENSHIP

Of course, focusing on the constitutional protections of citizenship is only a beginning. Courts must also decide what those protections are and how far they extend. Although the parameters of constitutional citizenship protection are currently vague and unformed, the process by which those parameters should be established is much clearer under the Court's directives for procedural due process.[277]

Courts evaluating constitutional due process must conduct what is in essence a cost-benefit analysis.[278] The Supreme Court has held that the judge must weigh the risk that the plaintiff will be erroneously deprived of liberty against the cost of providing additional procedures to safeguard against such error.[279]

The Supreme Court set out the factors to consider in *Mathews v. Eldridge*, a case dealing with an individual's right to Social Security benefits.[280] In that case, the Supreme Court held that the reviewing court must first consider the plaintiff's "private interest that will be affected by the official action."[281] Second, the court must examine "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[282] Finally, the court must weigh "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[283] Taken together, the court must evaluate which interest weighs more: the individual's interest in

276. *See* Afroyim v. Rusk, 387 U.S. 253, 267–68 (1967) ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so . . . .").

277. *See* Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1331 (2016) (explaining the Supreme Court's approach to procedural due process).

278. *Id.*

279. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the various factors courts consider when identifying "the specific dictates of due process").

280. *See id.*

281. *Id.*

282. *Id.*

283. *Id.*

receiving the requested process, or the government's burden and cost in administering that process.

Because the *Mathews* Court focused on an individual's right to monetary benefits, it did not need to consider whether the public might have an interest on both sides of the case. But in cases that raise issues of public benefit, the public's interest must weigh in the equation as well. This means that the public's interest will be represented on both sides of the balancing test—with the public benefit joining the individual benefit on one side, weighed against the administrative cost and burden on the other side.[284]

When it comes to citizenship, the balancing test should also consider more than the financial and administrative cost—it should consider the broader harm to the public interest when citizenship is underprotected. Litigation, after all, never results in perfect accuracy.[285] The Supreme Court has preferred overprotection to underprotection, writing, "It is better that many . . . immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."[286]

A. The Burden and Standard of Proof

The Supreme Court's choice of phrasing—that it is better to improperly admit many immigrants than to permanently exclude a single citizen—is a common refrain, heard most often in the criminal context.[287] William Blackstone himself wrote in the nineteenth century that it was "better that ten guilty persons escape, than that one innocent suffer."[288] Justice Harlan echoed the sentiment, writing that "it is far worse to convict an innocent man than to let a guilty man go free."[289] What all of these formulations have in common is a recognition of the substantive value of liberty and a willingness to draw a line that allows for the underenforcement of regulatory law to ensure that such liberty is not wrongfully curtailed. In the criminal context, liberty is

284. *See* Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 506 (1998) ("As far as the second [*Mathews*] factor is concerned, society's paramount interest must be in a just determination of a person's fundamental rights and privileges.").

285. *See In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) ("[T]he trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions.").

286. Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920).

287. *See* Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 198–206 (1997) (collecting cases and exploring the different courts' formulations for how to weigh the wrongful acquittal of the guilty against the wrongful conviction of the innocent).

288. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1770).

289. *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring); *see also id.* at 361 (majority opinion) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

viewed as freedom from imprisonment. In the immigration context, liberty means protecting the civil and political rights of citizens—even at the risk of underenforcing substantive immigration law.

This parallel between criminal law and citizenship litigation extends into assigning the burden and setting the standard of proof. Making the government bear the burden of proof and assigning a heightened standard are ways to ensure that an individual is not wrongfully deprived of liberty.[290] In the criminal context, of course, the government bears the burden of proof and must prove guilt by the highest standard possible—beyond a reasonable doubt.[291] Although the origin of the rule is murky, by 1970 the Supreme Court agreed that it had "long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required," and explicitly held that due process mandated this heightened burden.[292] In so ruling, the Court focused on the interest of the accused, referring to the liberty interest as one of "transcending value."[293] It also pointed to the value to society, stating that "the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law."[294] In conducting the due process analysis, the Court did not expressly discuss the costs of such a holding—that is, that criminal proceedings are expensive, and that requiring such a high burden of proof necessarily means that some guilty individuals will go free, potentially causing additional societal harm. The implicit conclusion of the Court's holding, however, was that the combination of individual liberty and societal trust in the criminal justice system outweighed the risk that some guilty people would go free.

Even though the Supreme Court has not clarified that a heightened burden of proof is constitutionally required in citizenship cases, similar reasoning should apply. Under a due process analysis, both the individual liberty interest and the societal interest in citizenship are extremely high. From a liberty point of view, citizenship ensures that the individual has the right to live, work, and raise a family in the United States. Citizenship also gives individuals a voice in the political life of the country, ensuring that their values and concerns can help to shape the future of the nation. This ability blends into the societal interest in citizenship. A constitutional system that

290. *See* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1718 (1987) ("Requiring proof beyond a reasonable doubt guards against condemning people for crimes they did not commit.").

291. *In re Winship*, 397 U.S. at 364.

292. *Id.* at 362.

293. *Id.* at 364.

294. *Id.*

lodges sovereignty in its citizens possesses serious reason to ensure that citizenship rights do not rest on a precarious base.

Furthermore, the costs of a heightened burden of proof are lower in citizenship cases than they are in criminal cases. Allowing a guilty person to go free creates risks both to immediate public safety and to the perceived reliability of the criminal justice system. Improperly admitting an immigrant or erring in concluding that a baby was born on the U.S. side of the border rather than the Mexican side creates no public safety risk.

Lower courts struggle with the constitutional parameters of several procedural due process issues in citizenship cases, including the questions of whether the Supreme Court's earlier use of the word "unequivocal" raised the standard of proof above "clear and convincing,"[295] whether Congress possesses the right to adopt a diminished burden of proof, and when the burden of proof should switch from the government to the individual.[296] But if the Supreme Court were to directly analyze the constitutional basis of the burden and standard of proof in citizenship cases, it would very likely follow the same reasoning it applied in *In re Winship*, which held that proof beyond a reasonable doubt was constitutionally required in criminal cases.[297] If so, the Court could clarify that procedural due process necessitates a heightened burden of proof in citizenship cases—perhaps even, as some Supreme Court Justices wrote earlier, a burden that "approximates the burden demanded for conviction in criminal cases."[298]

B. Jury Trials or Equitable Defenses?

The Supreme Court has inconsistently analyzed the underlying nature of the citizenship claim. It has held that jury trials are not available in denaturalization proceedings because such actions are essentially equitable in nature, rather than legal—and the Seventh Amendment does not apply to actions in equity. In 1913, a defendant appealed his denaturalization by arguing that the trial court erred in refusing to grant him a jury trial on the facts underlying the

295. *See supra* Section III.A (discussing the ambiguity plaguing the Court's discussions of the standard of review for citizenship cases).

296. *See supra* Section III.A (noting the complexities generated by the Court's citizenship jurisprudence).

297. *See* 397 U.S. at 394 (holding that due process mandates the "beyond a reasonable doubt" standard).

298. Klapprott v. United States, 335 U.S. 601, 617–18 (1949) (Rutledge, J., concurring).

government's suit against him.[299] The Supreme Court held that he was not entitled to a jury trial on his claim to set aside a denaturalization decree, as "[t]he right asserted and the remedy sought were essentially equitable, not legal," and "[i]n this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention."[300] The same rule would presumably apply to declaratory judgments seeking recognition of citizenship.[301]

But the Court's analogy of the citizenship case to land or patent rights conflicts with later precedent giving heightened protection to citizenship rights and distinguishing citizenship claims from other types of civil litigation.[302] And the country's Founders certainly viewed jury trials as essential to protecting fundamental rights: after all, one of the grievances listed in the Declaration of Independence included the king's "depriving us in many cases, of the benefits of Trial by Jury."[303] Given the Founders' emphasis on the jury as one of the fundamental protections of democracy, it would not be unreasonable for the Supreme Court to conclude that the Seventh Amendment's jury-trial right should extend to cases involving citizenship.[304] Nevertheless, later defendants' attempts to overturn the Court's decision denying the right to a jury trial have not yet succeeded, and lower courts have continued to deny jury trials in citizenship cases.[305]

Even though the Supreme Court relied on the equitable nature of citizenship cases to deny jury-trial rights, it also held that individuals facing denaturalization cannot raise equitable defenses to the underlying charge (and so, for example, cannot invoke the equitable

299. *See* Luria v. United States, 231 U.S. 9, 27 (1913).

300. *Id.* at 27–28.

301. *See* FED. R. CIV. P. 57 (introducing the "rules [that] govern the procedure for obtaining a declaratory judgment"); Note, *Right to Jury Trial in Declaratory Judgment Actions: A Narrowing Interpretation*, 59 YALE L.J. 168, 168 (1949) ("Courts have long insisted that parties be given the same constitutional right to jury trial in declaratory actions as they have in non-declaratory proceedings.").

302. *See Klapprott*, 335 U.S. at 617 (1949) (Rutledge, J., concurring) (explaining that "ordinary civil procedures, such as apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences").

303. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

304. *See* Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 780 (2005) ("The Founders recognized the importance of the division of power between the judiciary and the jury. Generally discussing the jury, Thomas Jefferson expressed a strong belief in the power of the people in the form of the jury as a check on the judiciary."); *see also* Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 891 (2010) ("[S]cholars have long noted that the Framers viewed juries as a key component of democratic government in a new nation.").

305. *See, e.g.*, United States v. Schellong, 717 F.2d 329, 336 (7th Cir. 1983) ("We remain bound by the Supreme Court's holding in *Luria v. United States* that there is no right to a jury trial in a denaturalization proceeding." (citation omitted)).

defense of laches when the government waits for years or decades to challenge citizenship).[306] The Court stated that it was inappropriate for courts to "moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings."[307] Likewise, lower courts have held that the government will not be equitably estopped from challenging an individual's citizenship even after having previously granted the individual documents identifying the individual as a citizen.[308]

The Court did not specify whether its approach would apply to citizenship litigation more broadly or just to denaturalization proceedings, but both categories are similar in many respects. Both deal with the status of the individual: citizenship litigation more broadly asks whether the person is a citizen (by birth, by derivative attainment, or by naturalization), and denaturalization proceedings examine whether an individual fraudulently or illegally obtained citizenship status. The proceedings in both types of cases are intended to settle the status of the individual, not to punish.[309] Furthermore, Congress is constitutionally empowered to set citizenship requirements in naturalization proceedings and has likewise legislated requirements for derivative citizenship.

The Court's stated deference to Congress cannot logically support a complete avoidance of equitable remedies, however. Even though Congress is active in this arena, courts may still engage in judicial review of the constitutionality of its legislation. Just three years ago in *Sessions v. Morales-Santana*, the Supreme Court struck down a provision that made it easier for unwed citizen mothers to pass down citizenship to their children born abroad than it was for unwed citizen fathers.[310] The Court held that such a provision violated the Equal Protection Clause.[311] Thus, deference to Congress is not absolute but

306. *See* Fedorenko v. United States, 449 U.S. 490, 517 (1981) ("We agree with the Court of Appeals that district courts lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts.").

307. *Id.*

308. *See, e.g.*, Lapides v. Watkins, 165 F.2d 1017, 1019 (2d Cir. 1948) ("The issuance of the certificate or any statements made by the consul in connection therewith could not create an estoppel against the Government."); Uyeno v. Acheson, 96 F. Supp. 510 (W.D. Wash. 1951) ("The issuance of [a Certificate of Identity] does not work an estoppel against the Government.").

309. *See* Trop v. Dulles, 356 U.S. 86, 101–02 (1958) (plurality opinion) (concluding that using denationalization as punishment would violate the Eighth Amendment).

310. *See* 137 S. Ct. 1678, 1687 (2017) (explaining that under the statute "only one year of continuous physical presence is required before unwed mothers may pass citizenship to their children born abroad," whereas an unwed father was required to maintain five years of physical presence).

311. *See id.* at 1701.

must be subject to constitutional requirements. And equitable defenses, which date back to the development of cases in equity, are well established as part of the due process enshrined in equitable proceedings—they are part of the right to be heard.[312]

The Court is likely correct that citizenship litigation tends toward the equitable rather than the legal, and that distinction may be sufficient to deny the right to a jury trial.[313] Monetary damages are not generally at issue, and in fact would be wholly insufficient to protect against the mistaken loss of citizenship rights. Although there may be some amount of money that an individual would accept in lieu of voting rights or as compensation for a lost passport, the greater part of the injury is not to the individual—it is to the democratic system, which is built on citizen participation. Even when a citizen makes the choice not to participate in an election, the ultimate result still possesses legitimacy because the outcome is the sum of the choices exercised by the citizens, including their choice about whether to participate or not. When citizens are denied the opportunity to exercise those rights, however, the end result loses legitimacy.

But if citizenship litigation is equitable at heart, then individuals should be able to raise equitable defenses to citizenship challenges. Equitable defenses were developed, after all, to ensure due process in a system that relied heavily on judicial discretion. Equitable defenses therefore substitute in some ways for the protections that would otherwise be given through the right to a jury trial. Without being able to rely on society's participation through a jury trial, individuals must be able to use equitable defenses to protect societal interests.

Raising a defense of estoppel, for example, protects society's interest in the finality of citizenship determinations in situations where the government has long recognized an individual's citizenship status. Once that person has engaged with the community and with the polity over time as a citizen, government action to strip that status creates a sense of insecurity that could dampen willingness to participate in the political life of the country. The equitable defense of laches plays a similar role in protecting the finality interest, and it also counters the risk acknowledged in *Afroyim* that political expediency may cause the

312. *See* Lindsey v. Normet, 405 U.S. 56, 66 (1972) (stating that the opportunity to be heard includes "an opportunity to present every available defense"); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that the "opportunity to be heard" is a fundamental requirement of due process).

313. *But see* Berman, *supra* note 304, at 888 (arguing for an expanded understanding of jury-trial rights).

government to scapegoat certain citizens.[314] Without such a remedy, there is a risk that a new administration might come into power and target individuals or members of minority groups for extra scrutiny, even years or decades after an earlier administration had approved their citizenship. A defense of laches incentivizes the government to raise legitimate issues quickly and guards against the politicization of citizenship scrutiny.

C. The Importance of Counsel

Appointing counsel for individuals subject to deportation or denaturalization orders would also go a long way toward protecting against unjust denial of citizenship rights. Is loss of citizenship—whether explicit or de facto—meaningfully different than the risk of incarceration noted in *Gideon v. Wainwright*?[315] The *Gideon* Court, after all, based its decision in procedural due process and concluded that the rights protected by the provision of counsel outweighed the financial costs.[316] The Supreme Court noted the revealed preference for legal counsel, concluding, "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."[317] Again, if the judiciary truly explores the constitutional dimensions of citizenship, it may well find that the liberty interests inherent in citizenship are of equal weight to the liberty interests at issue when incarceration is threatened.

Courts and scholars have explored the possible extension of *Gideon* to other civil contexts. One scholar suggested that there may be a due process right to counsel for unaccompanied migrant children.[318] Judges have also acknowledged the importance of counsel for accurate decisionmaking: "As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel. Courts have neither the time nor the capacity to be

314. *See* Afroyim v. Rusk, 387 U.S. 253, 268 ("The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.").

315. *See* 372 U.S. 335, 344 (1963) (stating that it is an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

316. *Id.*

317. *Id.*

318. *See* Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 60–65 (2011).

both litigants and impartial judges on any issue of genuine complexity."[319]

The Supreme Court has so far declined to extend a right to counsel outside of cases where incarceration is threatened—that is, where there is a "potential loss of physical liberty."[320] States, however, have experimented with civil *Gideon* rights in cases implicating fundamental rights, particularly those involving the parent-child relationship and the threatened termination of parental rights.[321] Family law cases may be well suited for a state version of civil *Gideon*, as the state courts are paramount in such scenarios. But questions of U.S. citizenship are inherently federal. It is true that civil *Gideon* is not likely to be a panacea in citizenship litigation.[322] Certainly, it is no panacea in the criminal sphere—high caseloads and limited funding impair access to criminal justice even when attorneys are provided.[323]

But other methods of rights enforcement are similarly flawed. It is difficult, for example, for a wrongfully removed citizen to later recover civil damages. Federal courts have held that such an action may lie when there was no probable cause for arresting and detaining a U.S. citizen.[324] In some cases, the evidence may be strong enough to support a subsequent civil case. In *Lyttle v. United States*, for example, the court left pending several civil causes of action, including *Bivens* claims[325] against various federal officials as well as "the Federal Tort Claims Act claims against the United States for false imprisonment, negligence,

319. Sweet, *supra* note 284, at 505.

320. Suzanne A. Kim, *Transitional Equality*, 53 U. RICH. L. REV. 1149, 1195 (2019); *see also* Turner v. Rogers, 564 U.S. 431, 435 (2011) (declining to extend a right to counsel in child-support contempt cases); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33 (1981) (declining to extend a right to counsel in parental termination cases).

321. See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 245, 245–46 (2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39169.pdf [https://perma.cc/A8QG-93HL] (discussing state right-to-counsel statutes and court rules governing family law issues).

322. *See* Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1227–29, 1231–34 (2010) (advancing numerous criticisms of civil *Gideon*, including the prediction that appointed counsel in civil cases would be of limited utility given the prior poor funding efforts for civil justice).

323. *See id.* at 1251–55 (discussing underfunding and crippling caseloads, which inevitably harm the quality of indigent defense).

324. *See* Gray v. Weselmann, 274 F. Supp. 3d 81, 86 (D. Conn. 2017) ("In order for plaintiff to prevail on either of the first two claims—false arrest/imprisonment and malicious prosecution—he must prove a lack of probable cause to detain and prosecute him for unlawful reentry."), *aff'd*, 737 F. App'x 30 (2d Cir. 2018).

325. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (establishing an implied right of action under the Constitution to sue for damages following an unlawful search and seizure).

and intentional infliction of emotional distress."[326] But when the evidence of citizenship is mixed, as it is in most cases, recovery is far less certain. One federal court, for example, held that the evidence of citizenship "[a]t best . . . gave reason to further investigate plaintiff's residence at the time that his father naturalized in 1990."[327] One possibility is to put a higher affirmative duty on law enforcement officials to determine citizenship before deportation, which would, in turn, make it more likely that wrongfully deported individuals could successfully maintain an action under the Federal Tort Claims Act. Reconsidering what level of inquiry is reasonable under the circumstances can inform the probable cause determination—if greater inquiry is required, then probable cause to detain an individual may evaporate when evidence of citizenship can be easily obtained.[328] But this would require a multi-step process: first heightening what we expect from law enforcement officers and then hoping that the financial costs of civil litigation could better regulate government conduct, an uncertain prospect at best.[329]

Appointing counsel, while still an imperfect protection, is nevertheless the most direct way to avoid some of the greatest miscarriages of justice.[330] Judge Pregerson on the Ninth Circuit recently wrote that he would find a due process right to counsel in expedited removal proceedings, pointing out that "[t]he risk of erroneous removal is . . . substantial for individuals who are incompetent due to mental illness or disability."[331] This risk extends both to citizens and noncitizens; certainly, mental illness played a large role in the deportation of citizen Mark Lyttle described above,[332] and there are other documented cases of citizens with mental illness being

326. Lyttle v. United States, 867 F. Supp. 2d 1256, 1302 (M.D. Ga. 2012).

327. *Gray*, 274 F. Supp. 3d at 87.

328. *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1029 (2003) ("Recasting probable cause within a reasonableness framework can open the way for more creative thinking about accommodating law enforcement priorities on the one hand and preserving civil liberties on the other.").

329. *See* Edward T. Schroeder, Note, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 TEX. L. REV. 897, 897 (2005) ("The debate over regulation through litigation is part of a larger dispute over the proper role of tort law and the civil justice system in American society.").

330. *See* Renata Robertson, Note, *The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens*, 15 SCHOLAR 567, 571 (2013) (arguing in favor of a civil *Gideon* in deportation cases).

331. United States v. Peralta-Sanchez, 847 F.3d 1124, 1145 (9th Cir. 2017) (Pregerson, J., dissenting), *opinion withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), *and on reh'g,* 705 F. App'x 542 (9th Cir. 2017).

332. *See supra* Section II.B.1 (describing Lyttle's detention and removal after being charged with a misdemeanor during his treatment at a psychiatric facility).

removed from the country in immigration proceedings.[333] Most American citizens cannot afford counsel, and the most vulnerable citizens are the least likely to be able to do so.[334] The Supreme Court previously stated that it was willing to accept a high cost to ensure that not "one natural born citizen of the United States should be permanently excluded from his country."[335] Without a right to appointed counsel in cases where citizenship is claimed, it will almost certainly be impossible to meet the Court's goal of protecting citizens against the threat of wrongful removal.

CONCLUSION

In American life, much depends on citizenship status. Citizenship gives rise to the right to vote, to obtain a passport, to accept employment, and even to enter and remain in the United States. Given the centrality of citizenship, it is somewhat surprising that little attention has been paid to the question of how contested questions of citizenship are resolved. Disputed questions of citizenship arise frequently in civil, criminal, and administrative proceedings. The procedures by which these matters are resolved carry great weight, affecting Americans' ability to exercise fundamental rights as well as the resiliency of the democratic principles on which the United States was founded.

But citizenship litigation has not been able to sufficiently protect individual rights. Scholars have noted that citizenship has been used as a weapon to deny rights to those who are politically disfavored, whether for their own actions or for their unpopular position in society. In a number of cases, citizens have even been deported from their own country and left to fend for themselves in a foreign country with which they have no connection. In other cases, the government has pursued denaturalization based on decades-old records.

333. *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 213–14 (2017) ("In 2001, Deolinda Smith-Willmore, who suffered from partial blindness and schizophrenia, was subjected to an administrative removal order and deported to the Dominican Republic despite being a U.S. citizen.").

334. *See* Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 45 (2014) ("Conventional legal services are simply beyond the means of most Americans."); Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 195 (2014) (noting the "large population of individuals who need, but cannot afford, legal services"); Soulmaz Taghavi, Montes-Lopez v. Holder*: Applying* Eldridge *to Ensure a Per Se Right to Counsel for Indigent Immigrants in Removal Proceedings*, 39 T. MARSHALL L. REV. 245, 252 (2014) ("[I]mmigrants, an extremely vulnerable population, often 'either cannot afford counsel or are shuffled through the system before they have a chance to find a lawyer.' " (footnote omitted)).

335. Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920).

Protecting citizenship in these cases means rethinking litigation procedures. Litigation over citizenship status is different from most civil litigation. The former often requires factual determinations about events that happened many decades ago—meaning that the question of who bears the burden of proof becomes much more important. Individuals may have a strong reliance interest, especially in cases where the government recognized them as citizens for years or decades before challenging the validity of their citizenship. The liberty interests that arise in a citizenship proceeding may be just as important to the individual as those that arise in a criminal case. Issues of citizenship, moreover, affect the national interest in a way that ordinary civil cases or criminal prosecutions do not. It is only by protecting citizenship interests that constitutional democracy, which rests on the idea of political equality, can function. It is therefore incumbent on the judicial system to ensure that litigation procedures in citizenship cases offer protection commensurate with the interests at stake in those suits.