NORTH CAROLINA LAW REVIEW

Volume 99 | Number 6 Article 2

9-1-2021

# Inalienable Citizenship

Irina D. Manta

Cassandra Burke Robertson

# INALIENABLE CITIZENSHIP*

IRINA D. MANTA** & CASSANDRA BURKE ROBERTSON***

*Over the last decade, citizenship in the United States has become increasingly precarious. Denaturalization cases increased under President Obama and skyrocketed under President Trump. No number of years spent in the United States protects individuals against sudden accusations that they procured citizenship fraudulently or were never eligible for citizenship in the first place. Moreover, the government has challenged the citizenship status even of some individuals—largely from ethnic and religious minority communities—that the government had previously recognized as citizens for decades.*

*If the U.S. justice system is committed to the values of reliance and finality, how can it permit citizenship to be challenged without any time limit? American courts currently do not recognize a statute of limitations for civil denaturalization or apply the traditional doctrines of equitable estoppel or laches to this context. This state of affairs is partly based on judicial misunderstanding of the property-like features of citizenship and of the punitive nature of removing it. We argue that this must change. Denaturalization and citizenship denial undermine the foundation of our democratic system by tolerating second-class citizenship and promoting chilling effects against free speech and political participation. The time has come for the legislative and judicial branches to recognize that delayed citizenship challenges violate constitutional due-process protections. Security of citizenship is an essential bedrock of our constitutional order.*





** Irina D. Manta is a Professor of Law and the Founding Director of the Center for Intellectual Property Law at the Maurice A. Deane School of Law at Hofstra University; Yale Law School, J.D.; Yale College, B.A.

*** Cassandra Burke Robertson is the John Deaver Drinko-Baker Hostetler Professor of Law and Director of the Center for Professional Ethics at Case Western Reserve University School of Law. University of Texas School of Law, J.D.; University of Texas LBJ School of Public Affairs, M.P.Aff.; University of Texas M.A. (Middle Eastern Studies); University of Washington, B.A. We would like to thank Kimberly Capuder and Fiona Hogan for their research assistance as well as Taylor Belknap and the editorial staff of the *North Carolina Law Review* for their thoughtful suggestions and editorial assistance. We are grateful for institutional support to the Case Western Reserve University School of Law, NYU School of Law, St. John's University School of Law, and Maurice A. Deane School of Law at Hofstra University.

## INTRODUCTION

A Latino U.S. military member born in Texas was granted a high-level security clearance available only to U.S. citizens but was then denied a U.S. passport because officials doubted the veracity of his birth certificate.[1] A white woman born in a Kansas farmhouse in the 1970s was also denied a U.S. passport, and that decision was only rescinded when a U.S. senator intervened on her behalf.[2] A young woman born in the United States had no trouble obtaining a U.S. passport, but then found her citizenship challenged after she traveled abroad to marry an ISIS fighter.[3] A mentally ill U.S. citizen of Puerto Rican descent was apprehended by the U.S. Immigration and Customs Enforcement ("ICE") and deported to South America, where he remained for months and experienced abuse.[4] A fourteen-year-old Texan runaway was deported to

1. 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].

2. *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] [hereinafter *Birth Certificate Wasn't Enough To Prove Citizenship*].

3. 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/9NVG-79V2 (dark archive)]; *see* Muthana v. Pompeo, No. 19-445(RBW), 2019 U.S. Dist. LEXIS 218098, at *3–4 (D.D.C. Dec. 9, 2019).

4. *See* 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).

Colombia (in spite of having no ties to the country or familial connection to it) when the false name she provided to police matched that of a Colombian citizen.[5]

All of these cases share a common theme: precarity of citizenship rights. The individuals in each of these cases had long been recognized as U.S. citizens and had exercised their citizenship rights in various ways—through voting, employment, travel on a U.S. passport, and even through service in the military. They had been recognized as U.S. citizens by their communities. But in each of these cases, their citizenship was later challenged by the U.S. government, and rights that they had previously taken for granted—the right to return to or remain in the United States, the right to obtain a passport, the right to vote—were suddenly denied or placed at risk.

Citizenship is growing increasingly precarious. This is perhaps most clearly demonstrated by the government's denaturalization efforts. Denaturalization can be a remedy for criminal naturalization fraud.[6] But the government can also file a civil action seeking to strip citizenship even where there is no allegation of criminal conduct.[7] In the nearly fifty years between 1967 and 2013, fewer than 150 individuals were stripped of citizenship in total.[8] These numbers increased under the Obama administration, and skyrocketed under the Trump administration.[9] Since January 2017, the start of the Trump administration, the U.S. Citizenship and Immigration Services ("USCIS") agency "identified approximately 2,500 cases to be examined for possible denaturalization and referred at least 110 denaturalization cases to the Department of Justice (DOJ) for prosecution by the end of August 2018."[10] In a 2019 budget request, the DOJ reported that the number of cases referred for denaturalization proceedings had increased from approximately thirty a year to an estimated 324 cases for fiscal year 2019, and that the unit had reached "maximum capacity" for its ability to litigate denaturalization cases.[11] Thus, in 2019, the number of expected denaturalization cases in a single year was more

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

6. 8 U.S.C. § 1451(e); *see* Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 407 (2019) [hereinafter *(Un)Civil Denaturalization*].

7. *See* 8 U.S.C. § 1451(a).

8. *See* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC 179–80 (2013).

9. *Fact Sheet on Denaturalization*, NAT'L IMMIGR. F. (Oct. 2, 2018), https://immigrationforum.org/article/fact-sheet-on-denaturalization/ [https://perma.cc/2FAF-JZL7].

10. *Id.*

11. U.S. DEP'T OF JUST., CIV. DIV., FY 2020 BUDGET & PERFORMANCE PLANS 26 (2019), https://www.documentcloud.org/documents/6789088-2019-Budget-Documents-Civil-Division.html#document/p30/a553738 [https://perma.cc/H56D-WU9U].

than double the number of people denaturalized over the fifty years prior—a stunning increase.[12]

This is a change driven by politics, not by law.[13] Legally, the Supreme Court has never wavered from a 1967 holding that drastically limited the government's ability to take citizenship away. In *Afroyim v. Rusk*,[14] the Court stated that revocation of citizenship was inconsistent with the original guarantee of the Constitution, writing that "[i]n our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."[15] In addition, the Court said that the Fourteenth Amendment went even further: "Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy."[16]

These statements seem to preclude today's denaturalization efforts. But the Supreme Court left open a loophole, found only in a footnote: "Of course . . . naturalization unlawfully procured can be set aside."[17] For sixty years, the opening left by this footnote was used only sparingly. Its most notable use was as a mechanism to bring escaped Nazi war criminals to justice.[18] But now, a shift in the political environment has caused what was once a minor loophole to play a central role in the government's policy objectives.[19] The DOJ created a new office in February 2020 just to focus on civil denaturalization efforts, and has set a target of terminating eighty percent of denaturalization cases with a "favorable resolution"—defined as "anything other than a disposition on the merits in favor of the defendant" whose citizenship is challenged.[20]

If the United States was built on the notion that its power derives from the sovereignty of its citizens, what does it mean for the American government to remove the very root of that power by removing citizenship—either by denying that someone ever qualified for naturalization or by rescinding

12. It is, of course, important to note that the relative likelihood of denaturalization for any given person is still quite low; in 2019 alone, more than 830,000 individuals became naturalized citizens in the United States. *See Number of Service-Wide Forms Fiscal Year to- Date, by Quarter, and Form Status, Fiscal Year 2019*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY19Q4.pdf [https://perma.cc/M9ZU-GWLB].

13. *See (Un)Civil Denaturalization*, *supra* note 6, at 409–14 (discussing the trends shaping denaturalization policy).

14. 387 U.S. 253 (1967).

15. *Id.* at 257.

16. *Id.* at 263.

17. *Id.* at 267 n.23.

18. *(Un)Civil Denaturalization*, *supra* note 6, at 403–04 ("Civil actions seeking to strip individuals' citizenship have been exceedingly rare in the last fifty years. When they occurred, they were often the product of human rights groups' efforts to identify former Nazis and war criminals who had used forged and fraudulent credentials to avoid accountability.").

19. *Id.*

20. U.S. DEP'T OF JUST., CIV. DIV., *supra* note 11, at 27.

recognition of native-born status? And more broadly, how can we ensure equality in our democratic system if some of our citizens can never achieve full security in their status? A system that relegates some to second-class citizenship leaves foreign-born, ethnic minority, and politically "undesirable" individuals at constant risk of losing citizenship rights. Targeting even a small number of people in such discrete categories creates a profound chilling effect, discouraging political participation and the exercise of speech and associational rights—the very activities on which participatory democracy was founded.[21]

This Article argues that citizenship precarity is inconsistent with the fundamental principles of the U.S. Constitution. It contends that the loophole left open by the Court in *Afroyim* authorizes at most a narrow period in which citizenship decisions are subject to review or reconsideration. Once a person has been accepted and acknowledged as a citizen for years or decades, the security of citizenship is essential to the security of our democratic system. Accepting this principle does not require an affirmative change in the law; instead, it necessitates interpreting existing law in light of this fundamental principle. The law already offers mechanisms promoting finality, including statutes of limitations, the equitable doctrine of laches, and limited windows for appeal or reconsideration of judgments. These doctrines can and should be applied to citizenship determinations.

The Article proceeds as follows. Part I explores the meaning of citizenship in the history of the United States, including the initial rise and fall of political denaturalization, and analyzes how identity and law come together in citizenship. Part II scrutinizes modern-day citizenship policy, including the growing use of denaturalization and citizenship challenges, the gap between official policy and government practice, and the judiciary's growing unease with denaturalization procedures. Part III examines how courts use the doctrine of substantive due process to decide whether citizenship has been appropriately rescinded, and it argues that citizenship security is a cornerstone of a healthy democracy. Part IV examines the legal and constitutional contexts of reliance and finality in governmental determinations. Part V introduces a shifted model for when and how the government should be able to—or no longer be able to—challenge individuals' U.S. citizenship.

## I. THE MEANING OF CITIZENSHIP

What does it mean to be a U.S. citizen? In the twenty-first century, citizenship is a legal conclusion based on facts of birthplace, parentage, or naturalization.[22] But citizenship has always had additional meanings of

21. *See infra* Section III.B.

22. *See (Un)Civil Denaturalization*, *supra* note 6, at 407–08 (explaining how denaturalization fits within citizenship law); Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND.

belonging, allegiance, and identity. Professor Ming Hsu Chen describes two dimensions of citizenship: a formal dimension that "permits an individual to attain naturalized citizenship and state-conferred rights and benefits," and a substantive dimension that "consists of more informal claims to social belonging."[23] In the early days of this country, the substantive aspects of citizenship had even greater legal import than the formal facts of birth, parentage, or official naturalization proceedings.[24] Even as the country's bureaucracy grew and the formal aspects of citizenship became paramount, these additional substantive meanings of citizenship continued to play a significant role in both sociological identity and legal interpretation, leading to an increased politicization of citizenship law.[25]

This part examines the meaning of citizenship in American life. It looks first at how the idea of citizenship was conceived by the founders of the country and by the later framers of the Fourteenth Amendment. It then examines how the expectations surrounding citizenship evolved as citizenship determinations grew more formalized and citizenship was increasingly wielded as a political tool. Finally, this part considers the social psychology of citizenship, examining how legal and social forces combine to shape individuals' civic identity.

### A. *Citizenship in America's First Century*

It is something of a strange conundrum that citizenship, an idea so central to the creation of the United States and its constitutional order, remained largely undefined in the founding era. Professor Josh Blackman traced the meaning of citizenship during the years between the Declaration of Independence in 1776 (which first articulated the idea of U.S. citizenship) and the Constitution, which became effective in 1789 and outlined citizenship requirements for individuals to serve as representatives, senators, or president.[26] The creation of the United States followed the formation of a new theory of citizenship at odds with the notions that existed under English monarchy. In the seventeenth and eighteenth centuries, Lord Coke's opinion set out the English theory of citizenship under the monarchy, holding that "a person's

L. REV. 757, 766–67 (2020) [hereinafter *Litigating Citizenship*] (describing contemporary citizenship disputes).

23. MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA 5 (2020); *see also* MICHAEL KAGAN, THE BATTLE TO STAY IN AMERICA: IMMIGRATION'S HIDDEN FRONT LINE 2–3 (2020) (recounting a conversation between the author and his young adopted daughter where he explained that he viewed her citizenship certificate as "a certificate of welcome, a gesture of inclusion, [and] a form of protection" that "mean[t] that she [wa]s American, and that[] [was] final," but that his daughter grew anxious after hearing anti-immigrant political rhetoric and worried that "at a far more fundamental level, being welcomed in America might be provisional").

24. *See infra* Section I.A.

25. *See infra* Sections I.B–C.

26. Josh Blackman, *Original Citizenship*, 159 U. PA. L. REV. PENNUMBRA 95, 95 (2010).

birthright subjectship was immutable, perpetual, and could not be abandoned."[27] Under the Declaration of Independence, however, the United States threw off its subjectship—an idea utterly at odds with Lord Coke's view.[28] The founders of the United States subscribed to a new view of citizenship derived from John Locke's idea of a social contract: Government got its legitimacy from the consent of the people. Individuals could revoke their consent and give up citizenship; likewise, society could revoke its consent and set up a new government when circumstances warranted.[29]

How did people become U.S. citizens in the founding era? It was not just a matter of living in the states at the end of the Revolutionary War. Instead, individuals had a choice: they could maintain allegiance to England and leave the United States after a reasonable time, or they could elect to become citizens of the new Republic.[30] This option became important when individuals were charged for their conduct assisting England in the revolutionary years.[31] If they were citizens of the United States, their conduct amounted to treason. But if they were subjects of England, they could not be convicted of treason.[32]

Early courts, including ultimately the U.S. Supreme Court, adopted the theory of "citizenship by election," deferring to individual choice. Courts were well aware of the potentially troubling incentives created by a rule that allowed individuals to make such a choice; in the words of Pennsylvania Chief Justice Thomas McKean, "[t]his construction, it may be said, is favorable to traitors, and tends to the prejudice of the Commonwealth."[33] Individuals could claim citizenship for purely instrumental purposes, regardless of their true loyalties. Traitors could escape prosecution by claiming a false loyalty to England, even if they were only motivated by financial gain and not by any sense of political allegiance. Nonetheless, the court weighed these concerns and decided that it was "better to err on the side of mercy, than of strict justice."[34]

While the Declaration of Independence and the adoption of the U.S. Constitution both shaped the original understanding of citizenship in the United States, the third major foundation of U.S. citizenship came from the end of the Civil War and ratification of the Fourteenth Amendment, which

27. *Id.* at 103 (citing Calvin's Case (1608) 77 Eng. Rep. 377 (KB)).

28. *Id.* at 113; DAVID RAMSAY, A DISSERTATION ON THE MANNER OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN OF THE UNITED STATES 3 (1789) ("The principle of government being radically changed by the revolution, the political character of the people was also changed from subjects to citizens. The difference is immense.").

29. Blackman, *supra* note 26, at 105–07; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 149–50 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (setting out the social contract theory of citizenship).

30. Blackman, *supra* note 26, at 113–16.

31. *See id.*

32. *Id.* at 114–15.

33. Respublica v. Chapman, 1 U.S. (1 Dall.) 53, 59 (Pa. 1781).

34. *Id.* at 60.

shifted America's understanding of citizenship once again. Most importantly, of course, the Fourteenth Amendment provided that individuals formerly held in slavery would now be equal citizens under the Constitution.[35] The amendment states: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[36] With the adoption of the Fourteenth Amendment, the concept of birthright citizenship became constitutionally enshrined. The Supreme Court's decision in *United States v. Wong Kim Ark*[37] held that although Congress retained the power to adopt eligibility requirements for naturalization, individuals who did not meet those requirements would now be eligible for citizenship as long as they were born on American soil.[38]

While Congress's limitations on naturalization eligibility could not override the Fourteenth Amendment's guarantee of birthright citizenship, Congress still possessed considerable power to establish the substantive requirements for naturalization and the procedural mechanisms by which to accomplish it. Congress passed laws setting out naturalization requirements shortly after ratification of the Constitution. The first law, adopted in 1790, allowed the courts of any common-law jurisdiction in the United States to grant naturalization, meaning that over 5,000 courts could grant citizenship.[39] At this time, there was no statutory basis for denaturalization. Nonetheless, courts possessed inherent authority over their own judgments, and it was accepted that "a court which had issued a certificate of citizenship had the power to cancel it upon a showing by a proper party that the certificate had been procured through fraud."[40]

35. *See* Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977) ("The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."). This constitutional guarantee of equal citizenship, of course, was not borne out in law or practice; though progress has been made over the decades, the struggle for full recognition of equal citizenship remains ongoing. *See, e.g.*, Ayesha Bell Hardaway, *The Supreme Court and the Illegitimacy of Lawless Fourth Amendment Policing*, 100 B.U. L. REV. 1193, 1195 (2020) ("Historical documentation of local law enforcement attacks on Black communities extend back to the American Reconstruction. The American legal system—both state and federal—has largely failed to address the issue."); Christina Swarns, *"I Can't Breathe!": A Century Old Call for Justice*, 46 SETON HALL L. REV. 1021, 1028 (2016) ("'I Can't Breathe' must be understood as a poignant articulation of how generations of racialized violence—particularly by law enforcement—has impaired the American criminal justice system.").

36. U.S. CONST. amend. XIV, § 1.

37. 169 U.S. 649 (1898).

38. *Id.* at 699 ("The acts of congress, known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the Constitutional Amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions.").

39. WEIL, *supra* note 8, at 18.

40. *Privilege Against Self-Incrimination Denied in Denaturalization Proceeding*, 105 U. PA. L. REV. 424, 425 n.11 (1957) [hereinafter *Self-Incrimination Denied*].

Naturalization fraud existed perhaps as long as naturalization itself and often originated in corrupt government actors.[41] From an early time, people recognized that naturalization created both financial and political incentives for government actors and entities.[42] The financial incentives came from the court fees charged for naturalization, which turned into a significant source of revenue for many state courts.[43] The political incentives came from the ability of naturalization to create new pools of voters, a draw so strong that the Tammany Hall political machine in New York City induced 41,112 naturalizations just prior to the election of 1868—a vast increase over the 9,205 naturalizations occurring between 1856 and 1867.[44]

Denaturalization existed during this period, but it was relatively rare and not standardized.[45] There was (and still is) no federal registry of citizens. All common-law courts, whether state or federal, had the power to naturalize; they "gave no notice of the filing of applications, and were not required to make reports of any kind."[46] But denaturalization existed as part of the general power that courts had over their dockets. One judge wrote that "any court before whom such proceedings take place may, on the ground of fraud, mistake, or irregularity, vacate its own orders or decrees," but required that such action be undertaken as any other judgment would be reviewed, specifying that such review be conducted through the court's "inherent power to correct or annul its judgments or decrees by petition, bill of review, or other similar and equivalent method of procedure."[47]

However, there were limits to the courts' inherent power to undo naturalization. A citizenship challenge reached the Supreme Court in 1830.[48] The case involved a will contest—the challengers argued that the testator had obtained his citizenship by fraud.[49] If the testator were not a citizen, he would lack the power to bequeath his property. Chief Justice John Marshall applied equitable principles, focusing on the reliance interest, in concluding that naturalization should not be subject to a collateral attack.[50] He acknowledged that forbidding a collateral attack on naturalizations would create "inconvenience," but concluded that allowing such attacks would cause "still

41. WEIL, *supra* note 8, at 15 (explaining that "naturalization was a tool for political machines to increase the number of loyal voters on the eve of local, state, and federal elections").

42. *Id.* (noting that naturalization gave access to jobs reserved for U.S. citizens).

43. *Id.* at 18.

44. Arthur John Keeffe & Morton Moskin, *Pre-Statutory Denaturalization*, 35 CORNELL L.Q. 120, 126 (1949).

45. *Id.* at 121.

46. *Id.* at 122.

47. United States v. Norsch, 42 F. 417, 417 (C.C.E.D. Mo. 1890).

48. Spratt v. Spratt, 29 U.S. (4 Pet.) 393, 393 (1830); *see also* Keeffe & Moskin, *supra* note 44, at 124 (discussing the case).

49. *Spratt*, 29 U.S. at 405.

50. *Id.* at 408.

greater" inconvenience and indeed "great mischief, if, after the acquisition of property on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court, not apparent on the record of his admission."[51] The Court unanimously held the testator to be a citizen.[52] This may be the first recognition in U.S. law that the harm arising from upsetting settled expectations of citizenship was greater than the harm of continuing to recognize citizenship granted in error. In this way, the Court recognized that citizenship rights were fundamental to the constitutional order and demonstrated a willingness to protect those rights from interference by the political branches of government.

### B. *Denaturalization and the Politicization of Citizenship*

As the nineteenth century drew to a close and the twentieth century dawned, political issues surrounding citizenship and denaturalization increased. It was not unusual for denaturalization to be "used as a political weapon in order to decrease the opposition's eligible voters before election."[53] From the very beginning, denaturalization was rooted in political opportunism rather than legal principle. In one notable case from 1912, an enterprising political candidate used citizenship as a weapon in the race for the office of supervisor of Kline township in Pennsylvania.[54] One candidate sought a court declaration that his opponent's father, Calogero Macoluso, had fraudulently obtained citizenship, and that his opponent, John Macoluso (who was born in Italy but immigrated to the United States as a child), was therefore ineligible to hold office, as John held derivative citizenship based on his father's naturalization.[55] The court did not consider the Supreme Court's 1830 ruling warning against collateral attacks on naturalization;[56] it is possible that no one brought it to the court's attention. At any rate, the Pennsylvania court held that the citizenship challenge could proceed.[57] The elder Calogero was no longer alive to contest the proceeding, and his naturalization certificate had never been challenged in his lifetime.[58] The naturalization certificate had, in fact, been accepted as valid for years, and allowed Calogero's son John to be recognized as a citizen and to vote for years after reaching adulthood.[59] Nonetheless, the court concluded that Calogero's

51. *Id.*
52. *Id.*
53. *Self-Incrimination Denied*, *supra* note 40, at 425 n.11.
54. *See In re* Macoluso's Naturalization, 85 A. 149, 149 (Pa. 1912).
55. *Id.*
56. *See supra* Section I.A.
57. *In re* Macoluso's Naturalization, 85 A. at 151.
58. *See id.* at 150.
59. *Id.* at 149.

naturalization certificate was invalid and that John therefore lacked citizenship and was ineligible to hold the office of county supervisor.[60]

The citizenship challenge put John in a difficult bind. Prior to the political challenge, John's options were significantly limited—during the years in which the government recognized him as a citizen, he could not have sought naturalization; only noncitizens can be naturalized.[61] And even if the declaratory judgment procedure was open to him in early twentieth-century Pennsylvania, there would have been no ground on which to seek a declaration of citizenship when there was no one contending that his citizenship was invalid. There was no question that he had relied on his father's naturalization certificate, and that the government had relied on it as well, in allowing him to vote in a number of elections. Until the political challenge, there was no case or controversy. Thus, if John had not chosen to run for office, it is likely that his citizenship would never have been challenged at all, and he would have continued to be recognized as a U.S. citizen. This was an early case where political participation and political ambitions put citizenship status at risk.

John Macoluso's case also occurred at a time when the process for both naturalization and denaturalization was shifting from state to federal authority. By the early twentieth century, citizenship determination became more formalized. The Naturalization Act of 1906 created the first federal registry of naturalized citizens.[62] The Act introduced formal denaturalization proceedings and, for the first time, denaturalization was not limited to the courts' inherent power to undo judgments.[63] But the federalization of citizenship did not remove politics from the process. For the first time since the founding, political beliefs (like anarchism) and lifestyle (like polygamy) could exclude someone from citizenship.[64]

Interestingly, Congressional action on denaturalization was not primarily a reaction to the earlier voting-fraud cases. By the twentieth century, laws surrounding ballot secrecy had reduced the political machines' ability to strong-

60. *Id.* at 150.

61. *See* 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 301.9-3 (2021), https://fam.state.gov/FAM/08FAM/08FAM030109.html [https://perma.cc/RGR2-YN3T]; 8 U.S.C. § 1427(a), (f)(3) (describing processes for the naturalization of "aliens" and requiring their being "lawfully admitted for permanent residence" prior to naturalization).

62. Naturalization Act of 1906, Pub. L. No. 59-338, 34 Stat. 596 (repealed 1940).

63. *See* Kritika Agarwal, *Stripping Naturalized Immigrants of Their Citizenship Isn't New*, SMITHSONIAN MAG. (July 24, 2018), https://www.smithsonianmag.com/history/stripping-naturalized-immigrants-their-citizenship-isnt-new-180969733/ [https://perma.cc/8DV7-LQ44] ("The Naturalization Act of 1906 was the first law in U.S. history that provided for denaturalization."). Prior to 1906, state courts controlled the naturalization process, and naturalization decisions were court judgments subject to reversal only through the limited mechanisms of the civil justice system, primarily by appeal. Loss of citizenship was therefore rare, with only a few cases reported. *Id.*

64. *See id.*; Aram A. Gavoor & Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 23 WM. & MARY BILL RTS. J. 637, 650 (2015).

arm newly naturalized citizens into voting—there was simply no guarantee they would vote the "right" way.[65] And although people decried the naturalization fraud related to elections, sentiments were not strong enough to spur legislative action. After all, naturalization fraud was a game played by both sides, and there were other reforms targeted at reducing the power of machine politics.

Racism, on the other hand, played a bigger role in influencing citizenship legislation. An earlier bill proposing naturalization reform had stalled when members of Congress got sidetracked by debating whether individuals of Asian descent could be eligible for citizenship. Debate on the bill devolved into a discussion that "was largely composed of anthropological exchanges between the egalitarian [Senator] Sumner [who proposed extending naturalization rights regardless of race], and the western racists."[66] By the time the 1906 Act passed, there was growing concern in Congress that the number of "nordic" immigrants from northern and western Europe were now outnumbered by immigrants from eastern Europe and the Mediterranean—a fact that influenced political demand "for ending our easy naturalization policy and cracking down on those who had obtained naturalization in violation of the laws."[67]

In the decades following, denaturalization efforts increased and all three of the branches of government took actions that caused people to lose their American citizenship. Congress adopted laws taking away citizenship from American women who married foreign men,[68] from individuals who voted in foreign elections or served in the armed forces of another country, and from members of the U.S. military who deserted their posts in wartime.[69] In the executive branch, during World War II, the DOJ "targeted members of the German-American Bund for denaturalization," arguing that Bund members lacked sufficient attachment to the U.S. Constitution.[70] And although the political branches were the primary drivers of citizenship revocation, the judicial branch played a role as well; when the Supreme Court ruled in 1923 that individuals from India were racially ineligible for citizenship, dozens of

65. Keeffe & Moskin, *supra* note 44, at 133.

66. *Id.* at 129.

67. *Id.* at 133.

68. Expatriation Act of 1907, Pub. L. No. 59-193, § 3, 34 Stat. 1228, 1228–29 (repealed 1922).

69. *(Un)Civil Denaturalization*, *supra* note 6, at 440–41 (discussing Trop v. Dulles, 356 U.S. 86, 87 (1958)). It is noteworthy that some of these statutes stripped citizenship not just through denaturalization (affecting naturalized citizens) but also through the expatriation of natural-born citizens.

70. Agarwal, *supra* note 63; *see also* Esther Rosenfeld, *Fatal Lessons: United States Immigration Law During the Holocaust*, 1 U. CAL. DAVIS J. INT'L L. & POL'Y 249, 262 (1995) ("The Nazi Ministry of Propaganda directed the German-American Bund, which claimed a membership of 25,000. This organization operated twenty-four retreat camps across the United States, distributed thousands of pamphlets, sponsored a daily national radio program, and staged huge 'patriotic' rallies. Via the German-American press, the Bund tried to frustrate policies which it considered prejudicial to Germany, including all proposals for harboring German refugees.").

naturalized citizens—and, in some cases, their American-born wives—had their U.S. citizenship taken away from them.[71]

These actions added up. In the six decades between 1907 and 1967, the government revoked the citizenship of more than 22,000 Americans.[72] Moreover, facially neutral citizenship laws were, at times, applied vindictively as political punishment. In 1918, as part of the effort to fight communism, the U.S. government denaturalized and deported radical anarchist Emma Goldman by denaturalizing her ex-husband (causing Goldman, a woman, to lose citizenship because it had been derived from and was dependent on his).[73] During the 1940s, the government increased its use of denaturalization, in particular against perceived Nazi sympathizers.[74] The 1940 Nationality Act newly allowed denaturalization for working in some foreign government positions, voting in other countries' elections, or (in the case of children) spending six months or more in a country of which their parents were citizens.[75] The Immigration and Nationality Act of 1952 also enacted provisions to permit denaturalization of those who engage in "subversive activities."[76]

As America's second century advanced into its third, both the law and politics surrounding denaturalization shifted. In a series of holdings beginning in the 1940s, the Supreme Court increasingly protected the institution of citizenship, requiring heightened due-process protections when citizenship was challenged.[77] In 1967, the Court took an important step further, holding in *Afroyim v. Rusk* that individuals could no longer be deprived of their citizenship involuntarily; only people who affirmatively chose to give up citizenship could have it taken away.[78] The Court warned that "[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

71. *See* Agarwal, *supra* note 63; United States v. Bhagat Singh Thind, 261 U.S. 204, 213–15 (1923).

72. WEIL, *supra* note 8, at 179.

73. *Id.* at 63; *see also* AMANDA FROST, YOU ARE NOT AMERICAN 149 (2021) ("No matter that Kersner's citizenship had been certified by a court, that the errors in the timing of the citizenship application were apparently inadvertent, or that he had been a US citizen for the past twenty-four years. Kersner would be collateral damage in the government's quest to denaturalize and deport his former wife.").

74. *See, e.g.*, WEIL, *supra* note 8, at 93.

75. Nationality Act of 1940, Pub. L. No. 76-853, §§ 401–402, 54 Stat. 1168–69 (repealed 1952).

76. Pub. L. No. 82-414, § 340, 66 Stat. 163, 260–63 (codified as amended at 8 U.S.C. §§ 1101–1537) (stating that subversive activities include concealment of a material fact, membership in certain organizations, and foreign residence).

77. *Litigating Citizenship*, *supra* note 22, at 779–80.

78. *See* 387 U.S. 253, 266–67 (1967). In a footnote, the Court exempted cases of citizenship fraud. *Id.* at 267 n.23.

of their citizenship,"[79] although it qualified this statement in a footnote by saying that "naturalization unlawfully procured can be set aside."[80]

After *Afroyim*, denaturalization became exceedingly rare. It was not just that the law had changed—the politics had changed as well. As the Cold War went on, the United States increasingly defined itself by its due-process protections and welcome to new citizens; a "papers please" mentality was for communist and totalitarian systems, not for U.S. citizens.[81] The Supreme Court's increasingly protective holdings combined with a changing political landscape to vastly reduce the number of denaturalization cases pursued by the government.[82] In the late 1990s, there was briefly renewed interest in denaturalization when the executive branch, under President Bill Clinton, tried to create administrative procedures for denaturalization.[83] The U.S. Court of Appeals for the Ninth Circuit put an end to this effort when it ruled that while Congress had delegated naturalization powers to the Attorney General, it had not done so for denaturalization authority.[84] The entire period of 1968 to 2018 saw only four denaturalization cases reach the Supreme Court.[85] Indeed, even the period after 9/11 did not involve a spike after leaders of both political parties opposed proposals to use denaturalization in the fight against terrorism.[86] Thus, the Supreme Court's protection of citizenship rights put at least a half-century lull in the political branches' gamesmanship surrounding denaturalization.

### C. *Citizenship and Identity*

The prior two sections examined the law and politics of citizenship in the United States. This section considers the third leg of the stool: the individual and social identities tied to citizenship. Identity has played a role in citizenship law from the founding—after all, in the very first citizenship cases, the operative legal question was whether the individual self-identified as an English subject

79. *Id.* at 268.

80. *Id.* at 267 n.23.

81. *See* Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 262 (2012) [hereinafter *American Identity*] ("[D]uring both the Cold War and the civil rights struggle of the twentieth century . . . judicial rhetoric contrasted our democratic judicial procedures with the arbitrary use of power associated with communist and totalitarian regimes."); Thomas L. Knapp, *Are Your Papers in Order?*, CTR. FOR STATELESS SOC'Y (June 2, 2009), http://c4ss.org/content/605 [https://perma.cc/CK68-UHUN] ("There was a time—in living memory, even—when the roadblock, the vehicle or personal search, and the demand for 'your papers, please' were the height of Cold War cliché. If you saw them on a film screen or read them in a potboiler novel, . . . you knew the protagonists were traveling in Nazi Germany, Soviet Russia, or a troubled, war-torn Third World dictatorship.").

82. *See* WEIL, *supra* note 8, at 139, 178–80 (noting that the government mostly focused on high-profile cases after that point).

83. *See* 8 C.F.R. § 340.1 (2020).

84. *See* Gorbach v. Reno, 219 F.3d 1087, 1089, 1097 (9th Cir. 2000).

85. *See (Un)Civil Denaturalization*, *supra* note 6, at 429–30.

86. *Id.*

or an American citizen.[87] As Professor Harold Hongju Koh writes, "national identities are not givens, but rather, socially constructed products of learning, knowledge, cultural practices, and ideology."[88]

Research from social psychology helps to explain how identity informs our understanding of citizenship and how people engage in activities related to citizenship, such as civic participation.[89] Individuals have both social identities and role identities.[90] Social identities answer the questions: who is "us" and who is "them"?[91] Each person has multiple social identities, some more salient than others, in ways that are different for each individual. Thus, for example, some individuals have a stronger social identity based on statehood, racial, ethnic, or religious background,[92] or political affiliation.[93] Individuals engage in cognitive framing that reinforces uniformity and enhances group members' self-esteem.[94]

People do not need to directly interact to form a social identity; it is enough to recognize a common "ingroup" that is viewed in opposition to others who are part of the "outgroup."[95] A group identity might arise from shared

87. *See supra* notes 28–34 and accompanying text.

88. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 202 (1996).

89. *American Identity*, *supra* note 81, at 276 ("Individuals perform an 'American' or 'citizen' role identity when they participate in the United States democratic process—for example, by making decisions about which candidates to support, by debating friends and colleagues about policy choices, or by answering political polling questions."); *see also* Ian Long, Note, *"Have You Been an Un-American?": Personal Identification and Americanizing the Noncitizen Self-Concept*, 81 TEMP. L. REV. 571, 589 (2008) ("In the field of social psychology, there are two prominent theories used to describe self-concept and explain how this concept of self is either altered or reinforced by one's existence within society.").

90. *American Identity*, *supra* note 81, at 272–76.

91. PETER J. BURKE & JAN E. STETS, IDENTITY THEORY 118–19 (2009); *see* MICHAEL A. HOGG & DOMINIC ABRAMS, SOCIAL IDENTIFICATIONS: A SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS AND GROUP PROCESSES 172 (1998).

92. Holning Lau, *An Introduction to Intragroup Dissent and Its Legal Implications*, 89 CHI.-KENT L. REV. 537, 539 (2014) ("[R]acial, ethnic, and religious groups are identity groups because these groups frequently play a role in shaping people's self-concept. To be sure, not all individuals feel a strong sense of membership in racial, ethnic, and religious groups, but these groups have been socially constructed in such a way that they are often salient to people's identity."); Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1527–28 (2013) (discussing challenges that can arise when African-American lawyers share one social identity with clients (race) but not another (class)); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 283 (1995) ("As the notions of outing and passing remind us, a person's interior sense of his or her own race or sexual orientation may or may not be enacted in public. Yet, public or not, each of these identities is social, carrying a conventional name that defines someone as a particular kind of person, a member of one of society's categories of identity.").

93. *See* Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RSRV. J. INT'L L. 389, 394–95 (2009).

94. *See* Michael Hogg, *Social Identity and Misuse of Power: The Dark Side of Leadership*, 70 BROOK. L. REV. 1239, 1242 (2005) ("Since the groups and categories we belong to furnish us with a social identity that defines and evaluates who we are, we struggle to promote and protect the distinctiveness and evaluative positivity of our own group relative to other groups.").

95. BURKE & STETS, *supra* note 91, at 118–19; *see also* HOGG & ABRAMS, *supra* note 91, at 172.

characteristics that are outside the individual's control, such as ethnic background or similarities in upbringing. However, shared characteristics alone do not create identity; instead, social identities arise from individuals' self-categorization.[96] Thus, a person may identify as a Southerner, a Presbyterian, a Latino, and an American. In recent years, partisan identification (for example, as a Republican or Democrat) has also become a powerful social identity.[97]

Role identities arise from the roles that individuals play in society—for example, one person may have role identities that include attorney, parent, friend, and committed voter. Role identities affect how people see the world and influence the actions they take.[98] Although role identities operate at the individual level, they are influenced by context and by the reflected views of others. When a role identity is externally confirmed—for example, when "a person with a strong 'student' identity receives an A"—it is considered "self-verification."[99] Self-verification "confirm[s] what [people] already believe about themselves."[100]

> When people see their self-assessments reflected back at them, they experience positive emotions. On the other hand, when people receive feedback at odds with their self-identity—as when a person with a strong student identity receives a C or D—emotional distress results. The distress that results from non-self-verifying feedback is greater than the situation would seem to warrant. Thus, for example, the low grade itself may be relatively unimportant, as with a grade on a low-stakes assignment likely to have little bearing on the student's overall grade in the course—but because the low grade contradicts the student's self-

96. *See* Marilynn Brewer, *The Social Self: On Being the Same and Different at the Same Time*, *in* INTERGROUP RELATIONS 245, 247 (Michael A. Hogg & Dominic Abrams eds., 2001) ("Membership may be voluntary or imposed, but social identities are chosen. Individuals may recognize that they belong to any number of social groups without adopting those classifications as social identities."); *see also* John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, *in* SOCIAL IDENTITY AND INTERGROUP RELATIONS 15, 15 (Henri Tajfel ed., 1982) ("[A] social group can be defined as two or more individuals who share a common social identification of themselves or, which is nearly the same thing, perceive themselves to be members of the same social category."); Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 71 (2006) ("The individual chooses specific 'social categories' with which he identifies and places himself . . . .").

97. *See* Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 751 (2018) [hereinafter *Judicial Impartiality*] ("[I]ncreasing political polarization and hardening partisan attitudes lead to personal and political rifts. Hardening views mean that increasingly people are not just predisposed to think well of others who share their social identity, but are also predisposed to feel antipathy toward those who do not.").

98. *Id.* at 748.

99. *Id.*; *see* BURKE & STETS, *supra* note 91, at 58–59.

100. *Judicial Impartiality*, *supra* note 97, at 748.

> conception, it creates an emotional response similar to a much larger threat, potentially leading to anger, distress, and depression.[101]

Citizenship is a part of both social and role identity. Citizenship status promotes an "American" social identity. And individuals enact an American role identity when they engage in civic activities—voting, expressing support for one candidate over another, running for office, or debating policy choices.

The social psychology of citizenship has been closely tied to both law and politics since the country's founding. As one scholar noted, "[n]ational citizenship was the standard legal mechanism that nation-states used to bind individuals to the polity and to bridge the gap between a categorical conception of identity and an emotional attachment."[102] Modern citizenship is a legal category that feeds into individual identity: "Law is constituent of identity . . . . [It] provides the mechanisms that support institutions and the identities that they define. Public identities principally include citizenship and work identities, both institutionally buttressed by the organizations of the modern nation-state and the market."[103] In 2012, former Secretary of State Madeleine Albright highlighted the psychological link to citizenship security, urging new citizens to "do what I did, and put your citizenship document in the safest and most secure place you can find," because the document "represents not just a change in legal status but a license to a dream."[104]

Scholar Peter Callero delved further into identity and democratic participation.[105] His work challenges the assumption that democratic participation is fully explained by rational-choice theory.[106] He found that "cooperation for the common good is also motivated by role-taking, group commitments, and altruistic identities."[107] Security of citizenship encourages such group commitments by strengthening an "American" social identity. And it encourages cooperative democratic role-taking by allowing the self-verification of an American role-identity, which is enacted by voting and engaging in other forms of civic participation.[108]

---

101. *Id.* at 748–49; *see also* Cassandra Burke Robertson, *Organizational Management of Conflicting Professional Identities*, 43 CASE W. RSRV. J. INT'L L. 603, 607–08 (2011).

102. Mabel Berezin, *Identity Through a Glass Darkly: Review Essay of Peter J. Burke and Jan E. Stets,* Identity Theory, 73 SOC. PSYCH. Q. 220, 221 (2010).

103. *Id.*

104. Emily Ryo & Ian Peacock, *Denying Citizenship: Immigration Enforcement and Citizenship Rights in the United States* 2 (Univ. of S. Cal. L. Sch., Working Paper No. 307, 2019).

105. Peter L. Callero, *Identity and Social Capital: How To Advance Democracy at the Level of Interaction*, *in* NEW DIRECTIONS IN IDENTITY THEORY AND RESEARCH 75, 76 (Jan E. Stets & Richard T. Serpe eds., 2016).

106. *Id.*

107. *Id.* at 99.

108. *See id.* at 97 ("[D]eliberative democracy is reformulated in a manner that takes into account the role of emotion in communication, the significance of small groups, and the fact that identities structure social interaction, influence perception, and motivate action.").

The immigration experience is a story of shifting identities, sometimes including citizenship itself and sometimes including social or role identities connected with citizenship. As the individual adapts to life in the United States, some identities will remain, some may be lost, and some may rise or fall in salience:

> Most immigrants arrive in their destination country with a firm sense of their national and ethnic identity . . . . Religion may also be a prominent identity, sometimes closely linked to the national identity . . . . Once the immigrant is settled in the destination country, a new national identity becomes an option. Existing identities, such as ethnicity and religion, often continue to be central to the immigrant, but at the same time, the meaning and acceptability of those identities may be subject to new challenges, and new networks of support need to be established. As a consequence, the immigrant's identity structure may be redefined in light of the new conditions, traditions, and norms.[109]

In some cases, individuals may experience role strain when two identities push them in different directions. Professors Jessie Finch and Robin Stryker studied Latino/a attorneys and judges working in immigration proceedings on the Arizona border as part of Operation Streamline.[110] Operation Streamline seeks to fast-track proceedings for unauthorized border-crossers, and it has been widely criticized for violating procedural due process.[111] In these court proceedings, defendants would "plead guilty in groups of twenty or more, with mass waivers of rights followed by individual pleas that took only a few minutes," and judges would not consider individual circumstances.[112]

The lawyers and judges working in these proceedings experienced tension between values of "formal legality and substantive justice,"[113] as well as tension between their social identity (Latino/a, a social identity shared with their clients and defendants) and their role identity (lawyer or judge in a summary proceeding aimed at quickly imposing criminal sanctions).[114] In some places, citizenship played a moderating role, making a national identity more salient

109. Kay Deaux, *Immigration and Identity Theory: What Can They Gain from Each Other?*, *in* IDENTITY AND SYMBOLIC INTERACTION: DEEPENING FOUNDATIONS, BUILDING BRIDGES 273, 280 (Richard T. Serpe, Robin Stryker & Brian Powell eds., 2020).

110. Jessie K. Finch and Robin Stryker, *Competing Identity Standards and Managing Identity Verification*, *in* IDENTITY AND SYMBOLIC INTERACTION: DEEPENING FOUNDATIONS, BUILDING BRIDGES 119, 119–20 (Richard T. Serpe, Robin Stryker & Brian Powell eds., 2020).

111. Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 2002–03 (2020) ("Scholars repeatedly called attention to the fact that Streamline—often referred to as 'McJustice' or 'Operation Steamroller'—fostered 'assembly-line justice,' threatened basic due process rights, and severely constrained access to counsel.").

112. *Id.* at 2002.

113. Finch & Stryker, *supra* note 110, at 124–27.

114. *See id.* at 140–42.

than an ethnic identity.[115] For example, one judge described how others sometimes challenged his participation: "People say, 'Well how can you do that?' Like to me, as a judge, sentence these people to time. I look at them and I say, 'I'm an American. The problem is this: you think I'm Mexican.'"[116] For this particular judge, citizenship was the factor which eased the tension he felt between social identity and role identity.

A social identity based on citizenship could also moderate criticism from the opposite side of the political sphere. One defense attorney reported:

> I always got it from the conservative groups, "Why do you represent these criminals, these illegals? Why do you help these people out—just because you're all Mexicans?" And I tell them "I believe in the constitution of the United States." . . . [T]his is probably the most American thing you can do as a job and I'm very proud of it . . . .[117]

The attorneys and judges in the Finch & Stryker study managed their competing identity standards by drawing on their citizenship identity and their role in facilitating formal justice.[118] This was possible because of the participants' professional roles in the justice system. In other circumstances, however, individuals may be pushed away from a strong citizen or civic identity, rather than drawn toward it, and thus might refrain from political participation. As a result, citizenship itself could play a role in the individual's conception of self, and the meanings associated with the "citizen" identity could also influence engagement in the civic sphere.

Attacks on citizenship—and political efforts to suggest a relationship between citizenship and whiteness—can have a negative effect on individuals' American identity and on their civic participation. Journalist Masha Gessen writes that naturalization is supposed to be like adoption; "once it has taken effect, the adopted child is legally indistinguishable from a biological one."[119] Adoption gives one a new family identity, and naturalization a new citizenship identity. But the formation of such a new identity requires security, and "if one can be denaturalized, one can never really become a child of America."[120]

115. *Id.* at 142 ("Many Latino/a attorneys and judges participating in Operation Streamline also deflected threats to non-verification of their social identity by elevating the prominence and salience of their citizenship-based identity while lessening the prominence and salience of their racial/ethnic identity.").

116. *Id.* at 140.

117. *Id.* at 141.

118. *Id.*

119. Masha Gessen, *Trump, "Shitholes," and the Nature of "Us*," NEW YORKER (Jan. 12, 2018), https://www.newyorker.com/news/our-columnists/trump-shitholes-and-the-nature-of-us [https://perma.cc/6LUU-GTFV (dark archive)].

120. *Id.*

Politically scapegoating and dehumanizing immigrants may further increase the identity tension for immigrants and newly naturalized citizens.[121] A study of healthcare-seeking behavior in an immigrant community suggested that punitive immigration actions can affect citizen behavior.[122] It found that Latino U.S. citizens were less likely to make appointments with healthcare providers when the government strengthened immigration enforcement.[123] Other studies have looked at the connection between punitive immigration enforcement efforts and the political participation of citizens living in communities subject to such efforts.[124] There is some indication that punitive immigration activity may spur later political activism: "[M]obilization spurred by proximal contact is rooted in a politicized group identity and the belief that punitive immigration policies unfairly target Latinos based on group affiliation."[125] But there is also indication that the opposite result can occur, leaving the researchers to open the question for future research: "Is there a tipping point, whereby excessive exposure to punitive policy yields deep political alienation?"[126] In either case, however, it is clear that citizenship is more than just a legal status: it is also a fundamental part of individual and social identity.

## II. RECENT CHALLENGES TO CITIZENSHIP

The U.S. government can challenge an individual's citizenship in multiple ways. This can entail refusal to recognize citizenship; failure to issue a passport, permit voting, or allow entry at the border; removal from the country; or denaturalization on the basis that the person did not meet the statutory requirements or committed fraud when applying for citizenship.[127] Scholars have categorized citizenship challenges as either "formal denial," such as denaturalization or refusal to issue a passport based on an alleged lack of citizenship, or "effective denial," involving "state actions that curtail, derogate,

121. Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, NEW YORKER (June 18, 2018), https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence [https://perma.cc/4AS5-LD8H (dark archive)] ("The President calls immigrants 'animals.' The Attorney General presumes that everyone crossing the border—or at least the southern border—is a criminal.").

122. Franciso I. Pedraza, Vanessa Cruz Nichols & Alana M.W. LeBrón, *Cautious Citizenship: The Deterring Effect of Immigration Issue Salience on Health Care Use and Bureaucratic Interactions Among Latino US Citizens*, 42 J. HEALTH POL. POL'Y & L. 925, 925 (2017).

123. *Id.*

124. Hannah Walker, Marcel Roman & Matt Barreto, *The Direct and Indirect Effects of Immigration Enforcement on Latino Political Engagement*, 66 UCLA L. REV. 1818, 1818 (2019).

125. *Id.* at 1822.

126. *Id.* at 1841.

127. *Litigating Citizenship*, *supra* note 22, at 766–67; *see also* 8 U.S.C. §§ 1401, 1427 (detailing the statutory requirements for citizenship).

or interfere with the exercise of full citizenship rights by certain segments of the U.S. population."[128]

It has been difficult to research the full extent of ongoing citizenship challenges. We have previously written about the recent growth of both formal and effective citizenship challenges, examining the increase in denaturalization cases, denial of previously recognized citizenship rights, and wrongful expulsion of U.S. citizens as a result of immigration proceedings that failed to offer meaningful due-process rights.[129] There is, however, no central registry of denaturalization cases, and the government has not been entirely forthcoming with Freedom of Information Act requests.[130] In addition, some denaturalization cases have been filed under seal, keeping them out of the public view. The mistaken deportation of U.S. citizens is especially hard to track, as the very reason for the removal action is the government's failure to recognize the person as a citizen—and once deported, noncitizens do not have recognized rights to petition the government.[131] Nonetheless, enough cases have made it into to the press and into court proceedings that some trends are becoming visible. This part discusses the recent political challenges to citizenship and the response of the judicial branch.

### A. *The New Politics of Citizenship*

Donald Trump made immigration law and policy an essential part of his political platform when he ran for and ultimately won the U.S. presidency in 2016.[132] His plan was to have the government show "zero tolerance" for any

128. Ryo & Peacock, *supra* note 104, at 10 (explaining that "effective denial" of citizenship rights would apply to citizen children, who "are not the targets of immigration enforcement action themselves, but their citizenship rights are substantially curtailed due to enforcement action against their parents").

129. *Litigating Citizenship*, *supra* note 22, at 780–84.

130. Ryo & Peacock, *supra* note 104, at 18–19 (noting that some information had been made available through a Freedom of Information Act request, but that "we do not even know how many cases the USCIS has investigated for denaturalization, on what bases, and how many of those cases have been referred to the DOJ" and that USCIS has not responded to the first author's request for these records).

131. Hillary Gaston Walsh, *Unequivocally Different: The Third Civil Standard of Proof*, 66 U. KAN. L. REV. 565, 591 (2018) ("[I]f 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."); Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444, 1503 (2019) ("President Trump seeks to radically remake immigration law and immigration enforcement. In so doing, the administration has taken a series of steps that would reduce the racial diversity of immigrants to the United States.").

132. *See, e.g.*, Molly Ball, *Donald Trump and the Politics of Fear*, ATL. (Sept. 2, 2016), https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116/ [https://perma.cc/R8YY-2KL5]; Philip Klinkner, *Op-Ed: Yes, Trump's Hard-Line Immigration Stance Helped Him Win the Election—But It Could Be His Undoing*, L.A. TIMES (Apr. 17, 2017, 4:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-klinker-immigration-election-20170417-story.html [https://perma.cc/Y3EQ-T7LN (dark archive)] ("Data from the recently released American National

immigration-related infractions.[133] These actions increased the burden on immigrants in a number of ways, including increasing the wait time for naturalization and creating instability for "green card holders[,] . . . DACA recipients, TPS holders, and other immigrants holding lesser legal protections."[134]

One of the tools to enforce Trump's immigration policy was the digitization of decades-old fingerprint records to verify the consistency of immigration records, an operation known as "Operation Janus" that had roots in the Obama administration.[135] After this and other measures led to multiple denaturalizations during the Trump presidency, the DOJ announced the creation of a Denaturalization Section within its Civil Division—a further increase in the DOJ's commitment to "bring justice to terrorists, war criminals, sex offenders, and other fraudsters who illegally obtained naturalization."[136] The DOJ explained in its press release: "While the Office of Immigration Litigation already has achieved great success in the denaturalization cases it has brought, winning ninety-five percent of the time, the growing number of referrals anticipated from law enforcement agencies motivated the creation of a standalone section dedicated to this important work."[137]

Notably, the DOJ was rather selective in the types of cases it chose to mention—and *not* to mention—in that press release. For example, the DOJ did not discuss its very first denaturalization: a case in which the litigant was never personally served, the proceedings were litigated in the defendant's absence,

Election Study has finally provided an answer: Immigration was central to the election, and hostility toward immigrants animated Trump voters.").

133. Donald J. Trump, *Transcript of Donald Trump's Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html [https://perma.cc/PW3G-MVJW (dark archive)] (stating that under his presidency, "all immigration laws will be enforced . . . [and] no one will be immune or exempt from enforcement . . . . Anyone who has entered the United States illegally is subject to deportation. That is what it means to have laws and to have a country.").

134. Ming H. Chen, *Making Litigating Citizenship More Fair*, 73 VAND. L. REV. EN BANC 133, 138 (2020); *see also* COLO. STATE ADVISORY COMM. TO THE U.S. COMM'N ON CIV. RTS., CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND NATURALIZATION APPLICATIONS 9 (2019) (discussing how the processing time for citizenship applications has increased from 5.6 months in 2016 to 10.1 months in 2019); Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 98 DENV. U. L. REV. 669, 676 (2020) ("[T]he estimated range for processing time at the end of 2019 was five and a half to twelve months.").

135. *See* DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-16-130, POTENTIALLY INELIGIBLE INDIVIDUALS HAVE BEEN GRANTED U.S. CITIZENSHIP BECAUSE OF INCOMPLETE FINGERPRINT RECORDS 2 (2016), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2016/OIG-16-130-Sep16.pdf [https://perma.cc/TUE4-3Dt7].

136. Press Release, Office of Pub. Affs., Dep't of Just., The Department of Justice Creates Section Dedicated to Denaturalization Cases (Feb. 26, 2020), https://www.justice.gov/opa/pr/department-justice-creates-section-dedicated-denaturalization-cases [https://perma.cc/ZG9A-FV8Y].

137. *Id.*

and no attorney was there to represent the interests of the defendant, a man named Baljinder Singh.[138] Singh's "fraud" was based on suspicions that he (allegedly intentionally) filed a second asylum application with a different first name, even though he had no incentive to act improperly when the first application had never been adjudicated.[139] Although the DOJ suggested that it was targeting the worst of the worst for denaturalization, the reality is that Singh lived in the United States for over thirty years with no criminal record whatsoever; as Masha Gessen wrote about his case: "The case against Singh contains no allegations of other violations. It appears that Singh has lived in the United States his entire adult life, without incident. The Justice Department has stated that he is forty-three, which would mean that he came to this country as a teen-ager."[140] As we have pointed out in earlier work, there is no indication that Singh ever learned about the case against him, either before the denaturalization judgment or after it.[141]

Another case not trumpeted by the government involved a sexagenarian grandmother named Norma Borgoño, an office manager who allegedly failed to meet the good moral character required at the time she acquired citizenship.[142] She had pleaded guilty to preparing paperwork that her boss used in fraudulent transactions, an offense that she was also accused of failing to disclose.[143] Her financial gain from her boss's illegal dealings was less than $2,000,[144] she worked a second job during her probation, she paid the ordered restitution in full,[145] and she otherwise led an unremarkable life in the United States for decades—a country she might be forced to leave despite suffering from a rare kidney disease for which she may not be able to receive treatment in her native Peru.[146]

Because imposing genuine "zero tolerance" is simply impossible, the actual result of the Trump government's policies has predictably consisted of an arbitrary assortment of denaturalizations and other denials of citizenship

138. *See (Un)Civil Denaturalization*, *supra* note 6, at 414–18 (explaining the technological improvements that led to the reopening of naturalization files).

139. *Id.*

140. Gessen, *supra* note 119.

141. *See (Un)Civil Denaturalization*, *supra* note 6, at 416–17.

142. Affidavit of David Jansen at 2, ¶ 15, United States v. Borgoño, No. 1:18-cv-21835 (S.D. Fla. May 8 2018), https://www.justice.gov/opa/press-release/file/1060901/download [https://perma.cc/UQR8-VKCM].

143. *Id.* at 3, ¶ 8.

144. *See id.* at 3, ¶ 10 (stating the amount was $1996.75).

145. *See* Adiel Kaplan, *Miami Grandma Targeted as U.S. Takes Aim at Naturalized Immigrants with Prior Offenses*, MIA. HERALD (July 12, 2018, 5:45 PM), https://www.miamiherald.com/news/local/immigration/article214173489.html [https://perma.cc/32JG-RBGZ].

146. *See* Patricia Mazzei, *Congratulations, You Are Now a U.S. Citizen. Unless Someone Decides Later You're Not*, N.Y. TIMES (July 23, 2018), https://www.nytimes.com/2018/07/23/us/denaturalize-citizen-immigration.html [https://perma.cc/J8R4-6ZU6 (dark archive)].

status.[147] Even leaving aside the disconcerting cases where it turned out that the government's pursuit of citizenship loss was based on sheer error, the offenses leading to denaturalization largely appear unimpressive when viewed through the lens of what actual danger those immigrants represented to the U.S. population at large. Indeed, most of these individuals committed either minor or no other offenses during their (sometimes lengthy) lives in the United States.[148]

While the individuals who have drawn the legal attention of the Trump administration are quite diverse, a few trends stand out. First, almost all individuals pursued seem to be ethnic minorities. Second, most of the people involved appear to be of modest means. While some of that may be explained by immigration demographics, it raises concerns about targeting and the difficulty in mounting vigorous defenses due to racial biases and the costs of the legal process. As other scholars have pointed out, "many of the immigrant groups most affected by denaturalization under the Trump administration are those originating from countries that have been targets of President Trump's public attacks (e.g., Mexico, Haiti, and Nigeria)."[149]

Not all citizenship challenges in the Trump era have sought denaturalization, however. In some cases, the government targeted individuals who were born in the United States and whose citizenship the government had previously recognized for decades.[150] Mark Esqueda served in the U.S. military for eight years and lost part of his hearing while fighting in combat zones, but the State Department denied him a passport for years because it claimed that the midwife who signed his Texas birth certificate lied about which side of the border he was born on.[151] It took over six years and an intervention by the American Civil Liberties Union of Minnesota, where Esqueda now lives, to resolve the situation in his favor.[152] In one of the less common cases (seemingly involving a nonminority individual) Gwyneth Barbara, a Kansas resident, was suddenly told her birth certificate was insufficient to procure a passport because she was born at a farmhouse rather than a hospital—even though her father had recorded her birth at a courthouse within days.[153] Shortly after a U.S. senator

147. For a discussion on how the arbitrariness and unpredictability of the use of denaturalization procedures may in themselves present due-process difficulties, see *(Un)Civil Denaturalization*, *supra* note 6, at 409–14.

148. *See* Ryo & Peacock, *supra* note 104, at 13 (discussing denying naturalization to applicants with minor criminal histories).

149. *Id.* at 19 n.5 (citation omitted).

150. *See* Stahl, *supra* note 1.

151. *Id.*

152. *See id.*; Press Release, ACLU of Minn., ACLU-MN Wins Fight To Get U.S.-Born Veteran Declared Citizen (July 30, 2019), https://www.aclu-mn.org/en/press-releases/aclu-mn-wins-fight-get-us-born-veteran-declared-citizen [https://perma.cc/MRE8-3PG7].

153. *See Birth Certificate Wasn't Enough To Prove Citizenship*, *supra* note 2.

intervened on Barbara's behalf, she obtained her passport in the mail without further explanation.[154]

The Trump administration also launched a multipronged attack on those it deemed to have questionable citizenship, whether it believed that said citizenship was obtained fraudulently (by the individual themselves or sometimes through the doings of a parent) or accidentally. Some of the people whose citizenship is under attack are more sympathetic than others. Indeed, the case of a wounded veteran, such as Esqueda, is likely to evoke greater public support than that of Hoda Muthana, whose passport was revoked on the basis of her father's diplomat status at the time of her birth on U.S. soil only after she left for Syria where she became an ISIS "bride."[155]

These cases illustrate how easily the government can declare that someone was never a citizen at all. When the government deems a birth certificate to be suspicious, longstanding citizens may have a hard time proving they were born on American soil—and the more time has passed, the harder it can be to prove. All witnesses to the birth could be dead, and medical professionals' memories may have faded after dozens of years have passed. According to data, "[a]lmost all [the people being denied passports are] Hispanic, living in a heavily Democratic sliver of Texas."[156] The result for those individuals is costly and littered with downright absurd hoops: "[P]assport applicants who are able to afford the legal costs are suing the federal government over their passport denials. Typically, the applicants eventually win those cases, after government attorneys raise a series of sometimes bizarre questions about their birth [such as]: 'Do you remember when you were born?'"[157] Taken together, these policies appear to form "a broader immigration policy known as 'attrition through enforcement,'" that targets both legal and illegal immigration.[158]

### B. *What the Justice Department Says—and What It Does*

Authors Timothy Belsan and Aaron Petty argue that scholars are alarmist in their critique of current citizenship challenges.[159] Although they wrote in

154. *See id.*

155. *See Litigating Citizenship*, *supra* note 22, at 769–71.

156. Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border, Throwing Their Citizenship into Question*, WASH. POST (Sept. 13, 2018, 6:18 PM), https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html [https://perma.cc/7X76-2FDQ].

157. *Id.*

158. Amanda Frost, *Alienating Citizens*, 114 NW. U. L. REV. ONLINE 48, 73 (2019) ("Aggressive use of denaturalization accomplishes that goal by sending the message that no immigrant has a safe and secure status, and therefore none can enjoy the 'assumption of permanence' that naturalized citizens had come to expect.").

159. Timothy M. Belsan & Aaron R. Petty, *Civil Revocation of Naturalization: Myths and Misunderstandings*, 56 CAL. W. L. REV. 1, 3 (2019) ("Unfortunately, much of the discussion surrounding

their personal capacities, both worked for the DOJ.[160] Belsan and Petty argue that prosecutorial discretion will protect citizens: "[T]he Department of Justice, which litigates the cases, has to agree that the facts and law in a given case warrant filing a denaturalization lawsuit, and the U.S. Attorney must institute each proceeding individually."[161] They suggest that this discretion will be applied so the denaturalization will focus on "(1) convicted terrorists and individuals who pose national security concerns; (2) human rights violators and war criminals; (3) serious felons (including a large number who committed sexual offenses against minors); and (4) fraud cases."[162] They further limit the DOJ's interest in fraud to that which is "willful and deliberate" and a threat to the "body politic."[163] Further, they write, scholars' concerns are "unfounded in civil cases: an applicant *cannot* be denaturalized for misrepresentations unless the misrepresentation was either intentional, material, or both."[164] But is that true? Does DOJ discretion ensure that only cases posing a threat to the country will be pursued?

Thus far, the evidence points strongly toward no. Belsan and Petty identify the correct substantive legal standard, but that standard is only as strong as the procedural protections that surround its enforcement. Petty litigated the Baljinder Singh case, where the procedural history left no confidence that the substantive standard was met.[165] Certainly, the government alleged that Singh had intentionally misrepresented his identity in an earlier proceeding.[166] But the evidence that the government produced to prove that misrepresentation was exceedingly weak and more consistent with bureaucratic error on the government's part than intentional wrongdoing on Singh's.[167] When the government filed the denaturalization suit, however, a series of

denaturalization, and especially the law governing the civil denaturalization process, has been inaccurate, poorly researched, and/or shown a lack of appreciation for critical nuance. At the extreme, some have even argued that the United States should eliminate denaturalization entirely, without regard to the nature of the case or the degree of fraud.").

160. As of this writing, Belsan is the Director of the Enforcement Section in the U.S. Department of Justice's Office of Immigration Litigation. *Biographical Information*, BD. OF IMMIGR. APPEALS, DEP'T OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals-bios [https://perma.cc/T89U-782X]. Petty also worked for the DOJ in the Office of Immigration Litigation and in fact prosecuted the Baljinder Singh case described above. *Id.* In April 2020, he was appointed to an administrative judgeship with the Board of Immigration Appeals. *Id.*

161. Belsan & Petty, *supra* note 159, at 31.

162. *Id.* at 7.

163. *Id.*

164. *Id.* at 27.

165. We discuss the procedural foibles of the Singh case at length in *(Un)Civil Denaturalization*, *supra* note 6, at 414–18.

166. *Id.* at 417.

167. *Id.* at 417–18 (providing potential explanations for the error, such as describing that the translator may have made a mistake in recording the name).

procedural defaults meant that the merits were never challenged in court.[168] Singh was not personally served and there was no proof in the record that he even knew about the denaturalization proceeding. He did not show up to defend it—perhaps because he did not know about it, perhaps because he could not afford to hire an attorney to defend his citizenship even if he did know.[169] Although it is possible that Singh committed intentional fraud, it seems unlikely given that he would have had no incentive to do so.[170] Ultimately, the court credited the government's allegations as true and denaturalized Singh in a summary judgment.[171]

But isn't denaturalization necessary to root out terrorists? Belsan and Petty's first category of denaturalization targets, after all, was "convicted terrorists."[172] Press releases from the DOJ also tout a national security rationale for increasing the resources dedicated to denaturalization.[173] A closer look at one of the first fully litigated cases involving an individual with alleged terrorist ties suggests that the national security rationale may be more tenuous than it first appears.

Abderrahmane Farhane was a Brooklyn bookstore owner who, until the events giving rise to his denaturalization, had no criminal history.[174] But in the months after 9/11, the government ramped up its law enforcement activities in Muslim communities to identify individuals who might be plotting terrorist attacks or assisting those interested in doing so.[175] In late 2001, Farhane "was approached by a government informant [as part of a sting operation] . . . who sought his assistance to transfer money overseas to Mujahadeen."[176] The government's sentencing memo describes this conversation, stating that first "CS-1 [the informant] asked Farhane how CS-1 would be able to send money to fighters in Chechyna and Afghanistan. Farhane responded that he would ask

168. *Id.* at 454.

169. *Id.* at 416.

170. Frost, *supra* note 158, at 71 ("In short, it seems unlikely that Singh willfully evaded a hearing in immigration court in January 1992—a hearing at which he could have asserted asylum—only to turn around and apply for asylum a month later. Indeed, it is hard to see what he could possibly have gained by giving a false first name, purposely not showing up at a hearing so that he would be ordered deported in absentia, and then immediately seeking asylum under a slightly different first name.").

171. United States v. Singh, No. CV 17-7214 (SRC), 2018 WL 305325, at *6 (D.N.J. Jan. 5, 2018).

172. Belsan & Petty, *supra* note 159, at 7.

173. *See* Press Release, Office of Pub. Affs., *supra* note 136.

174. Memorandum of Law in Aid of Sentencing for Defendant Abderrahman Farhane at 5, United States v. Farhane, 634 F.3d 127 (2d Cir. 2011) (No. 05 CR. 673 (LAP)) [hereinafter Memorandum of Law in Aid of Sentencing].

175. *See* Ashcroft v. Iqbal, 556 U.S. 662, 667 (2009) (explaining that in the months after 9/11 "the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general").

176. Memorandum of Law in Aid of Sentencing, *supra* note 174, at 5.

some 'brothers' to provide information about how to send money and would get back to CS-1."[177] At a later point,

> Farhane told CS-1 that there were "people we trust" with whom CS-1 could send money overseas. Farhane instructed CS-1 to send less than the whole amount and explained that if CS-1 sent less than $10,000, such a transfer would avoid law enforcement scrutiny since it was "what the law allows." Farhane and CS-1 also discussed how individuals were attempting to collect money at the local mosques for the "fighters" in Afghanistan but that people were afraid of donating funds since it could "lead them to problems."[178]

Farhane did not transfer any money or take any other action.[179]

The next year, in 2002, Farhane became a naturalized citizen.[180] The government continued to monitor Farhane and others.[181] Four years after the initial conversation with the informant, the government became suspicious of another individual who had communicated with Farhane.[182] In 2005, the FBI questioned Farhane about conversations that he had had with the confidential informant and with the other individual.[183] During the course of this questioning, Farhane allegedly lied to the FBI, claiming that although he was familiar with both people, he had never met with them in person.[184] Farhane was subsequently arrested.[185] The indictment alleged that he had made false statements to a federal officer and that he had "conspired to assist another in transferring money from the United States to a place outside the United States," in violation of money-laundering statutes, and that he had lied to the FBI when they investigated the transaction.[186]

The charge for lying to a federal officer seems to have been fairly clear—Farhane had stated that he had not met with the two individuals, but the government had compelling evidence, and even transcripts, showing that he

177. Sentencing Memorandum at 3, United States v. Farhane, 634 F.3d 127 (2d Cir. 2011) (No. S3 05 Cr. 673 (LAP)).

178. *Id.*

179. *Id.* at 13 ("Farhane's conduct in attempting to assist in the transferring of funds earmarked to provide jihadists fighting in Afghanistan and Chechnya with weapons and equipment, and then lying about that conduct, falls comfortably within the heartland of the terrorism-related activities that Congress has sought to punish severely and deter.").

180. United States v. Farhane, No. 05 CR. 673-4 (LAP), 2020 WL 1527768, at *1 (S.D.N.Y. Mar. 31, 2020).

181. Memorandum of Law in Aid of Sentencing, *supra* note 174, at 12.

182. Sentencing Memorandum, *supra* note 177, at 3–5 (describing the investigation of Tarik Shah).

183. *Id.* at 4–5.

184. *Id.* at 4.

185. *Id.*

186. Defendant-Appellant Abdulrahman Farhane's Brief Filed Pursuant to *Anders v. California* at 2, United States v. Farhane, 634 F.3d 127 (2d Cir. 2011) (No. 07-5531-cr (CON)) [hereinafter Defendant-Appellant's Brief].

had.[187] The "conspiring to assist another in transferring money" in violation of money laundering statutes was likely a more difficult charge for the government to prove. The government was investigating individuals who provided material support to terrorists, and others in his community were charged with that crime.[188] But Farhane's advice to the informant to send less than $10,000 to avoid government scrutiny appeared to run afoul of money-laundering statutes—it is true that transactions over $10,000 will receive extra governmental scrutiny, but Congress has also made it a crime to structure transactions to be less than $10,000 to avoid such attention.[189] Farhane, of course, did not transfer any funds at all. But by advising the informant to structure the funds transfer in this manner, he was alleged to have "conspired to assist another" with an illegal transaction.[190]

Farhane thus faced a choice: accept a plea bargain or risk trial. The government alleged that the "conspiracy to assist another" with structuring was a terrorism-related offense that when combined with the charge for lying could carry a sentence of 360 months to life in prison, even with no other criminal history.[191] And though conspiracy to assist with structuring might be difficult to prove, the charge for lying to the FBI would likely be a slam-dunk. Under the circumstances, Farhane accepted the plea deal and served ten years in prison; he was released in 2017.[192]

In 2018, however, Farhane's denaturalization saga began. The government brought a denaturalization petition, arguing that Farhane's naturalization had been procured by fraud.[193] Post-naturalization criminal conduct, such as his lying to the FBI in 2005, could not be used to put his citizenship in jeopardy.[194] But the 2001 conduct—when Farhane had suggested that the informant structure the monetary gift in an amount less than $10,000—was allegedly

187. Memorandum of Law in Aid of Sentencing, *supra* note 174, at 8.

188. The government indicated that if Farhane had not agreed to plead guilty to the money-laundering claim, he may have been tried for conspiracy to provide material support for terrorism. *See* Memorandum of Law in Support of Pretrial Motions Filed on Behalf of Aber Rahman Farhane at 3, *Farhane*, 634 F.3d 127 (2d Cir. 2011) (No. 05 CR. 673 (LAP)).

189. *See* Peter J. Reilly, *Structuring Seems Like a Crime You Can Commit by Accident*, FORBES (June 4, 2015, 3:55 PM), https://www.forbes.com/sites/peterjreilly/2015/06/04/structuring-seems-like-a-crime-you-can-commit-by-accident/#580038854030 [https://perma.cc/9N9F-TNUV] ("Of course, it is easier to convict them of structuring than whatever their structuring was intended to obscure. . . . Given that it is something that can be done otherwise innocently, though, it may put too much power in the hands of prosecutors.").

190. Defendant-Appellant's Brief, *supra* note 186, at 2.

191. *Id.* at 2–3.

192. United States v. Farhane, No. 05 CR. 673-4 (LAP), 2020 WL 1527768, at *1 (S.D.N.Y. Mar. 31, 2020).

193. *Id.*

194. Afroyim v. Rusk, 387 U.S. 253, 292–93 (1967) (prohibiting involuntary denaturalization once citizenship has been lawfully obtained).

disqualifying criminal conduct.[195] Of course, the government knew of this conduct in 2001, before Farhane had applied for and received naturalization, yet had chosen neither to prosecute him then nor to deny his naturalization application. But in 2018, nearly two decades after the conduct at issue and after Farhane had served ten years, the government alleged that Farhane had lied when he answered "no" to the question of "whether he had ever knowingly committed a crime for which he had not been arrested" when it was asked as part of his naturalization.[196]

Like Borgoño, Farhane might have been able to argue that his actions did not amount to a crime; there was no proof that the contemplated funds would have gone to an illegal activity, and the mens rea for a structuring crime is difficult to prove—much less the mens rea to assist a conspiracy to commit structuring.[197] But the admissions contained in the plea deal precluded Farhane from litigating those issues. Farhane brought a later habeas proceeding attempting to vacate the original conviction—after he had served his time—to avoid denaturalization.[198] The Supreme Court has held, after all, that a habeas claim can undo a plea agreement when the lawyer fails to warn the defendant of potential immigration consequences.[199] But in something of a Catch-22, the court denied relief to Farhane—denaturalization was so unusual in 2005 that "Mr. Farhane's lawyer had no basis for suspecting that the guilty plea could have immigration consequences," and it therefore "was not objectively unreasonable for his lawyer to give no advice on that issue."[200]

The court's logic here leaves something to be desired—if denaturalization was such an unexpected result that a reasonable lawyer could not have been expected to advise Farhane about it before his plea, then it is equally unlikely that Farhane could have considered the citizenship consequences of pleading guilty. It is also notable how long the government waited to pursue Farhane. The relevant conduct occurred in 2001, and the government knew about it at that time—but saw no need to charge him with a crime until 2005, when it could make an easier case for his lying to the FBI. Then it waited until 2018 to pursue civil denaturalization for the 2001 conduct. If the government had wanted to, it could have brought a criminal naturalization fraud charge against Farhane when it brought the other charges. The fact that it chose not to suggests that public protection was not the immediate goal.

195. *Farhane*, 2020 WL 1527768, at *2.

196. *Id.* at *1.

197. *See* United States v. MacPherson, 424 F.3d 183, 189 (2d Cir. 2005) (noting that for the government to convict a defendant of a structuring offense, the defendant must have acted "with knowledge that the financial institutions involved were legally obligated to report currency transactions in excess of $10,000" and "inten[ded] to evade this reporting requirement").

198. *Farhane*, 2020 WL 1527768, at *1.

199. Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

200. *Farhane*, 2020 WL 1527768, at *2.

The early cases involving Borgoño, Singh, and Farhane therefore do not seem to fit within the stated priorities of the DOJ. Why aren't DOJ prosecutors using their discretion to let these cases go? In fact, by creating a performance metric where the government is judged on its ability to prevail in at least eighty percent of the cases it brings, the DOJ has created incentives to pursue the cases that are easiest to win rather than those that might pose the greatest threat.[201] Thus, in one denaturalization case litigated in 2019, the ground for denaturalization was merely that the defendant had been absent from the United States for two out of the five years preceding his 2005 naturalization.[202] Under the statute, he should not have been absent for more than six months.[203] The court therefore did not even consider whether the defendant had willfully misstated his qualifications or whether the mistake was material. The mere fact of his presence outside the United States more than fifteen years in the past was enough to take away the defendant's citizenship.[204]

U.S. attorneys have recognized the incentives favoring civil denaturalization. In a 2017 article in the *U.S. Attorneys Bulletin*, several government officials "encourage[d] Federal prosecutors to consider referring cases for civil denaturalization when a case is declined for prosecution."[205] They write that filing civil proceedings rather than criminal actions offers several "benefits": civil litigation carries a lower burden of proof, there is no statute of limitations on civil denaturalization, there is no right to a jury trial, and there is no right to appointed counsel.[206] The cases that are the easiest to win are the ones where the citizen is unable to defend themselves—either because they did not even know about the proceeding or because they could not afford to hire an attorney to litigate the case.

### C. *Judicial Discomfort with Denaturalization Proceedings*

The lack of procedural protections in denaturalization cases, combined with the cases' sometimes tenuous connection to national security or public safety, has led courts to express significant concern about some of the litigation

201. There is a parallel in immigration enforcement proceedings, where agents pursue undocumented "targets" that are suspected of committing crimes, but then make "collateral" arrests of undocumented individuals unconnected with the crimes (when the targets cannot be located) to meet apprehension goals. *See* IMMIGRATION NATION: INSTALLING FEAR (Netflix 2020).

202. United States v. Shalabi, No. 19-13709, 2020 WL 4282200, at *3 (E.D. Mich. July 27, 2020) ("Thus, at minimum, Shalabi was absent from the United States for a continuous period of roughly two years and three months during the five years immediately preceding his application for citizenship.").

203. *Id.*

204. *Id.* ("Shalabi admits that he left the United States no later than January 1, 2011 and that he did not return until at least April 6, 2003.").

205. Anthony D. Blanco, Paul Bullis & Troy Liggett, *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, U.S. ATT'YS' BULL. 5, 6 (2017).

206. *Id.* at 8.

coming before them. In one case, the government sought to revoke the citizenship of a woman who had allegedly entered the United States on a false passport during her youth.[207] Although the court ultimately ruled in favor of the government, it expressed some reluctance and suggested that the law should impose limits:

> The Court makes the following acknowledgment. Charles is a sixty-year-old woman who has lived half her life in the United States. She works as an accountant and, since she was naturalized fifteen years ago, has been a law-abiding American citizen. There is no contention to the contrary. Charles committed a low-level fraud. In a case such as this, to truly administer justice, the legal tools of statute of limitations and judicial discretion are most needed, yet absent.[208]

The court noted an issue about which we have also written elsewhere[209]—the counterintuitive circumstance that criminal denaturalization offers more protection than civil denaturalization:

> Curiously, civil denaturalization has a more responsible sibling in criminal denaturalization. Criminal denaturalization provides much more protection to the naturalized citizen. First, there is a statute of limitations of ten years. Second, the government must prove its case beyond a reasonable doubt. Third, all criminal law safeguards apply, including the right to a jury trial and the Fifth Amendment protection against self-incrimination. Under this legal regime, it may be more advantageous for the government to be less diligent, to wait until the passage of ten years, in order to commence civil denaturalization instead of the stricter criminal process. For the law to condone this opportunity for governmental abuse of power is a promotion of injustice. Civil and criminal denaturalization are substantively comparable, as both may arise from the same conduct . . . both require similar legal analysis; and the relief the government seeks is often the same—revocation of citizenship. Therefore, the same handy legal tools, especially a statute of limitations, are warranted in both actions. The Court is concerned that the law presently allows this disparity.[210]

In Norma Borgoño's case, the judge wrote that he was "sympathetic" to her claim that the government had waited too long to contest her citizenship, but nonetheless ruled that laches could not bar a claim for denaturalization.[211]

207. United States. v. Charles, 456 F. Supp. 3d 268, 274–75 (D. Mass. 2020).

208. *Id.* at 287.

209. *See (Un)Civil Denaturalization*, *supra* note 6, at 454–60.

210. *Charles*, 456 F. Supp. 3d at 287–88 (citations omitted).

211. United States v. Borgoño, No. 18-21835-CIV, 2019 WL 1755709, at *4 (S.D. Fla. Apr. 19, 2019) (denying a motion to dismiss, the court noted that "[a]lthough the Court is sympathetic to Borgoño's argument, her position is nonetheless unavailing. . . . '[T]he United States is not subject to

Another judge wrote that the government's "boundless discretion means that these second-class citizens can never feel entirely secure in their claim to American citizenship," especially as defendants in denaturalization cases "often do not have the right to a court-appointed attorney nor the money to hire one."[212] Another expressed concern about the "weighty consequence of denaturalization," and therefore appointed pro bono counsel to the denaturalization defendant.[213] Finally, even Justices on the Supreme Court have expressed doubt that denaturalization can be based on minor misrepresentations. In *Maslenjak v. United States*[214] the Court ruled that, as a matter of statutory interpretation, misrepresentations must be material to the naturalization process.[215] At oral argument, Justice Breyer suggested that a "serious constitutional question" is raised when an American citizen can "have his citizenship taken away because 40 years before, he did not deliberately put on paper what his nickname was or what . . . his speeding record was 30 years before that, which was, in fact, totally immaterial."[216] The Justices questioned the attorneys about the same question that was at issue in Farhane's denaturalization: "Have you EVER committed . . . a crime or offense for which you were NOT arrested?"[217] This question clearly troubled the Justices, as it would seem to allow the denaturalization of anyone who failed to report each and every instance in which they exceeded the speed limit without being pulled over. Thus, the Supreme Court seemed to repeat the pattern from the last century: responding with skepticism to the political branches' attempts to limit citizenship rights.

## III. THE RIGHT TO REMAIN AMERICAN

The Supreme Court in *Afroyim* held that citizenship cannot be involuntarily taken away, but left open a loophole: citizenship obtained by fraud or error can be revoked. For nearly half a century, very few cases were litigated under that loophole. Now, however, the situation is more complex: the government is intentionally pursuing large numbers of denaturalization cases.

the defense of laches in enforcing its rights.'") (quoting United States v. Mandycz, 447 F.3d 951, 964 (6th Cir. 2006))).

212. United States v. Eguilos, 383 F. Supp. 3d 1014, 1022 (E.D. Cal. 2019).

213. United States v. Multani, No. 2:19-CV-01789-BJR, 2020 WL 4581184, at *1 (W.D. Wash. Aug. 3, 2020). Although no statute requires appointed representation for indigent denaturalization defendants, we have argued elsewhere that constitutional due process likely gives rise to a right to counsel. *See (Un)Civil Denaturalization*, *supra* note 6, at 459–60.

214. 137 S. Ct. 1918 (2017).

215. *Id.* at 1929.

216. Transcript of Oral Argument at 53, *Maslenjak*, 137 S. Ct. 1918 (No. 16-309).

217. *Maslenjak*, 137 S. Ct. at 1927.

We argue elsewhere that pursuing denaturalization as a policy likely violates the substantive due-process protections of the U.S. Constitution.[218] We expand that argument here: we propose that once the government recognizes an individual's U.S. citizenship, and once that individual relies on the citizenship grant to structure his or her life and business, the government cannot take that citizenship away.

### A. *Substantive Due Process*

Courts look to the doctrine of substantive due process to determine "whether there is a sufficient substantive justification, a good enough reason for [] a deprivation [of citizenship]."[219] Substantive due process also interacts with other constitutional protections, including procedural due process and the Citizenship Clause.[220] For instance, the Supreme Court has explicitly warned against applying different standards to naturalized citizens and those born in the United States,[221] suggesting that it would risk creating "a second-class" citizenship.[222] Moreover, even though the *Afroyim* Court left open a loophole for cases of fraud and illegal procurement,[223] the main thrust of the opinion was to warn of precisely the situations we see today. The Court warned that denaturalization could be wielded as a political weapon—that a group of citizens "temporarily in office can deprive another group of citizens of their citizenship."[224]

Although courts criticizing the lack of due process in denaturalization cases have largely felt constrained to rule in favor of the government, the Supreme Court's post-1967 development of substantive due process and equal liberty in cases outside of the denaturalization context suggests that a closer examination of substantive due process is warranted in cases involving citizenship claims. Substantive due process is grounded in the Fifth and Fourteenth Amendments, which forbid depriving a person of "life, liberty, or property, without due process of law."[225] It asks whether particular restrictions on liberty are constitutionally valid—that is, whether there is "a sufficient substantive

218. *See (Un)Civil Denaturalization*, *supra* note 6, at 460–64.

219. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

220. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.").

221. *See* United States v. Kairys, 782 F.2d 1374, 1383 (7th Cir. 1986) ("*Schneider* and *Afroyim* do stand for the propositions that naturalized and native citizens must be treated equally and that before any citizen can be expatriated or denaturalized there must be a voluntary and intentional act.").

222. *See id.*

223. *See* Afroyim v. Rusk, 387 U.S. 253, 267 n.23 (1967).

224. *Id.* at 268.

225. U.S. CONST. amends. V, XIV.

justification" for that deprivation of liberty, and it protects against the arbitrary loss of fundamental rights.[226]

The Supreme Court relied on the doctrine of substantive due process to strike down same-sex marriage restrictions in *Obergefell v. Hodges*.[227] The Court outlined two requirements for substantive due-process protection: first, the liberty at issue must be a fundamental right,[228] and second, the Court must consider "central reference to specific historical practices" in determining whether a right is fundamental.[229] There is little doubt that citizenship is a fundamental right: it is the very foundation of membership in the polity, giving rise to an equal vote in political matters.[230] There is also no doubt that citizenship rights have been recognized through historical practice. Chief Justice John Marshall himself, the fourth Chief Justice of the U.S. Supreme Court, understood that people relied on their citizenship when he warned that attempting to revoke a previously recognized claim of citizenship would cause "great mischief."[231]

The government can deprive individuals of a fundamental right only if there is a compelling state interest.[232] In most of the citizenship cases litigated over the past few years, it is difficult at best to find a compelling state interest. Even in the cases allegedly tied to terrorism, the government waited over a decade to seek denaturalization.[233] The government has identified some interest in denaturalization, including protecting Congress's power to set naturalization

226. Chemerinsky, *supra* note 219, at 1501; *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1807 (2012).

227. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015) ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.").

228. *See id.* at 2602.

229. *Id.*

230. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."); *see also* Catherine Yonsoo Kim, Note, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448, 1466 (2001) ("Citizenship, once attained, constitutes a fundamental right.").

231. *See supra* text accompanying notes 48–51.

232. *See Obergefell*, 135 S. Ct. at 2616 ("The theory is that some liberties are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' and therefore cannot be deprived without compelling justification." (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

233. *See supra* Section II.B.

requirements,[234] deterring immigration fraud,[235] and defending the nation against those who mean it harm.[236]

But abridging fundamental interests is subject to strict scrutiny, and these interests are neither sufficiently strong nor sufficiently tailored to support upholding citizenship revocation.[237] After all, protecting Congress's naturalization power could be better accomplished on the front end through careful naturalization processes, rather than on the back end through revocation. And given the criminal penalties already at play for immigration fraud (including incarceration and a permanent ban from the United States), it is unlikely that denaturalization adds any significant disincentive.[238]

### B. *Democratic Citizenship*

It is necessary to recognize citizenship as a fundamental right to protect constitutional guarantees of political participation. As far as protecting the political fabric of the nation goes, we note elsewhere that "[t]he lesson of McCarthyism during the Red Scare was that the political fabric of the nation is strongest when political ideas are freely expressed; trying to suppress political disagreement is itself a threat to the American identity and political fabric."[239]

Professor Patti Lenard outlines three key reasons why revocation cannot be squared with the concept of democratic citizenship:

234. *See* Fedorenko v. United States, 449 U.S. 490, 518 (1981) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." (quoting United States v. Ginsberg, 243 U.S. 472, 474–75 (1917))).

235. *See* Rainer Bauböck & Vesco Paskalev, *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*, 30 GEO. IMMIGR. L.J. 47, 80 (2015).

236. Peter J. Spiro, *Expatriating Terrorists*, 82 FORDHAM L. REV. 2169, 2171 (2014) ("As those hostile to the United States retain their citizenship, citizenship will no longer demarcate the boundary between friends and enemies.").

237. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 864 (2006) ("Substantive due-process cases, which make up the majority of strict scrutiny applications in the fundamental rights area, survive at a rate (22%) consistent with strict scrutiny more generally.").

238. 8 U.S.C. § 1182(a)(6)(C)(i); *see also* Robert L. Reeves, *Visa Fraud and Waivers*, REEVES IMMIGR. L. GRP. https://www.rreeves.com/immigration-news/visa-fraud-waivers/ [https://perma.cc/9BX9-C32A] ("A finding of fraud under section 212(a)(6)(c) of the INA results in a lifetime bar for future immigration benefits such as a green card and the ability to petition family unless granted a waiver.").

239. *(Un)Civil Denaturalization*, *supra* note 6, at 464; *see also* Masumi Izumi, *Alienable Citizenship: Race, Loyalty and the Law in the Age of 'American Concentration Camps,' 1941–1971*, 13 ASIAN AM. L.J. 1, 20 (2006) ("[I]n the wake of the McCarthyist fervor, even staunch liberals . . . equated disloyal citizens with enemy aliens. It shows that in the postwar United States, the border between citizens and aliens ceased to exist in terms of civil liberties. Freedom became a privilege that only those whom the government considered loyal enjoyed.").

> First, revocation laws often treat citizens unequally, by subjecting only some to the threat of revocation on the basis of national origin or identity. Second, revocation laws treat citizens unequally by issuing different punishments for the same crime, again on the basis of national origin or identity. And third, the reasons offered to support the power to revoke are inadequate to justify the policy's profoundly coercive impact on some citizens.[240]

In short, a country whose government can revoke citizenship is one that—in the case of the United States, perpetually—engages in discrimination between citizens without the level of justification required to relegate a large part of the population to second-class citizenship. It especially drives a wedge between individuals born in the United States and those that were not, given that the latter are at much higher risk of losing citizenship judging from the government's track record so far. It also puts at special risk those born in the United States but near the border, mainly if they are of Hispanic ethnicity.

The chilling effects may be significant, as some groups may choose to stay out of the public eye their whole lives even if they committed no illegal actions. This could entail shying away from voicing political opinions that are controversial and/or disfavored by the particular regime in power, rejecting the idea of running for office, and generally leading lives of risk-aversion. The loss from that could be profound not only for these individuals themselves, but also for the rest of the world that will fail to benefit from their perspectives and leadership.

Giving the government the ability to revoke citizenship also brings to a head the relationship between individuals and the state, subverting the values underlying the political system of the United States. As we discuss in previous work, governments derive their powers from the consent of the governed; rather than the state creating the right of citizenship, it is citizens who have sovereignty and delegate to the government the power to function as a sovereign.[241] What does it mean for a government to be able to cancel the very root of its own legitimacy? It cannot answer that these individuals were never citizens in the first place—they clearly were, until revocation. This subjugation of a subset of the citizenry could ultimately have consequences for *all* citizens: not only could they lose their citizenship status, but even short of that, their other rights could more easily be eroded as well. It is arguably no coincidence

240. Patti Tamara Lenard, *Democracies and the Power To Revoke Citizenship*, 30 ETHICS & INT'L AFFS. 73, 78–79 (2016).

241. *See (Un)Civil Denaturalization*, *supra* note 6, at 464 (citing Perez v. Brownell, 356 U.S. 44, 64–65 (1958) (Warren, C.J., dissenting), *overruled in part by* Afroyim v. Rusk, 387 U.S. 253 (1967)).

that the Trump administration's attack on citizenship rights was accompanied by other reductions of civil liberties.[242]

## IV. RELIANCE AND FINALITY IN THE U.S. LEGAL SYSTEM

Americans have recognized the importance of citizenship security since the founding of the country. It was in 1830, after all, that Chief Justice John Marshall pointed out the "great mischief" that would occur if naturalization could be taken away after an individual had relied on citizenship in managing business and personal affairs.[243] More recently, Masha Gessen expressed a fear that a renewed emphasis on denaturalization could prevent new citizens from feeling secure in their identity.[244] The court decisions quoted in Section II.C expressed concern that finality doctrines do not apply in denaturalization cases.[245] The law on that point, however, is not so clear.

This part focuses on some of the foundational principles of the American legal system. Chief among them are the complementary values of reliance and finality, both of which give deference to the importance of creating and respecting settled expectations.

### A. *The Value of Reliance*

Reliance is a concept weaved throughout our legal doctrines. While contract law is often the first body of law that comes to mind in that context, individuals' ability to count on their property interests (including in the form of government benefits) is built around the same principle. The Supreme Court famously stated in *Goldberg v. Kelly*[246] that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[247] One would be hard-pressed not to view citizenship as an interest equal to or stronger than the types of property interests to which this test has been applied.[248] As Professor Amy Ronner explains,

242. For one organization's list of such reductions, see *Trump Administration Civil and Human Rights Rollbacks*, LEADERSHIP CONF. ON CIV. & HUM. RTS., https://civilrights.org/trump-rollbacks/ [https://perma.cc/P98K-7THH].

243. *See supra* text accompanying notes 48–51.

244. *See supra* text accompanying notes 119–20.

245. *See supra* Section II.C.

246. 397 U.S. 254 (1970).

247. *Id.* at 262–63 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

248. Blanche Bong Cook explicitly mentions the idea of a possible "property interest in citizenship." Blanche Bong Cook, *Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the "WHP") or Johnny and the WHP*, 31 YALE J.L. & FEMINISM 57, 132–33 (2019).

> [I]ndividuals residing here for a long time take root in our soil. Such a resident has likely created arteries to a slew of microcosmic communities such as employers, neighbors, friends, schools, churches, charities, clubs, and civic groups. Such ties are organic and reciprocating, so that others may have come to rely on the individual that the government seeks to expel. Because the passage of time fosters such human networks and cements them in place, it should infiltrate the deliberative process that has the potential to dismantle them.[249]

The *Goldberg* case itself involved monetary help received under the federally assisted Aid to Families with Dependent Children program and New York's general Home Relief program.[250] The Court explained:

> Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals."[251]

There is no question that for most people, a loss of U.S. citizenship would directly or indirectly entail a loss of income or other financial benefits. Indeed, at least some of the individuals for whom the reverse is true (generally because they live abroad and no longer wish to pay American taxes) voluntarily choose to renounce U.S. citizenship.[252] Asked another way: how much money would a U.S. citizen have to be paid, if there is such an amount at all for many people, to voluntarily give up their citizenship, assuming that they even have or can claim a different citizenship? Odds are that for most, the amount would have to be significant, suggesting that the property interest in this status is a large one.

249. Amy D. Ronner, *Denaturalization and Death: What It Means To Preclude the Exercise of Judicial Discretion*, 20 GEO. IMMIGR. L.J. 101, 129 (2005).

250. *Goldberg*, 397 U.S. at 256–57.

251. *Id.* at 262 n.8 (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)). Indeed, Ayelet Schachar makes a related link when stating that "[f]rom the perspective of each member of the polity, reconceptualizing his or her entitlement to citizenship as a complex type of property fits well within the definition of *new property*, a phrase famously coined by Charles Reich . . . ." AYELET SCHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 29 (2009).

252. Indeed, there has been a significant increase of such cases in early 2020. *See* Shubhangi Shah, *2020 Witnessed 1,051% Rise in Americans Giving up US Citizenship*, INT'L BUS. TIMES (May 13, 2020, 2:33 PM), https://www.ibtimes.sg/2020-witnessed-1051-rise-americans-giving-us-citizenship-44932 [https://perma.cc/ETK8-AM7D].

This is generally the case because people with U.S. citizenship have built their lives in reliance on that status.[253] They may have chosen a profession that can mostly or entirely be exercised only on U.S. soil (hello, lawyers!). These individuals have chosen romantic partners or married spouses that wish to spend their lives in the United States, and they have built or become a part of communities deeply embedded in this country. All these actions were taken and had significant investments of time and money made in them with the belief that the existence of their U.S. citizenship would be an enduring fact.

This reliance goes hand in hand with the government's decision to denaturalize very few people over a long period of time. Indeed, it is rational to have increased one's reliance in this area the further denaturalization laws inched closer toward quasi-desuetude.[254] Until recent years, just about anyone, with the possible exception of former war criminals, simply had no reason to believe that loss of citizenship was on the table. And all of these individuals—whether they were born on U.S. soil with the help of midwives or became naturalized citizens—built their lives around precisely this sense of stability.

### B. *Finality and the Law*

While there is a trade-off between the goal of accuracy and that of finality, "[i]n almost every case . . . the value of accuracy will eventually give way to a need for finality."[255] Courts have applied that principle so far as to deny DNA tests to convicted individuals.[256] Notably,

> the principal value served by double jeopardy is finality. Why has English law for almost 1000 years forbidden a second trial after conviction or acquittal for the same offense? The answer is elegant and explains why double jeopardy principles appear in the writings of ancient Greek philosophers. A defendant who has been acquitted or convicted deserves to live the rest of his life without being burdened by the threat of a new trial or new punishment for the same offense. It is the same

253. This is not to diminish the level of property interests that may attach at birth and hence before any time in which to develop reliance has passed. Some scholars have drawn a direct analogy in that respect "between the intergenerational transfer of property and birthright citizenship." Ayelet Schachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 POL. THEORY 253, 258–59 (2007).

254. One of us has previously discussed issues surrounding relatively or completely unenforced laws. *See* Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. 157, 167–74 (2014).

255. Cassandra Burke Robertson, *The Right To Appeal*, 91 N.C. L. REV. 1219, 1275 (2013) [hereinafter *The Right To Appeal*].

256. *See* Lindsey Webb, *The Immortal Accusation*, 90 WASH. L. REV. 1853, 1888 (2015) (stating that courts have "denied DNA tests to convicted persons with innocence claims based on the principles of finality").

> principle of finality that underlies the prohibition of ex post facto laws, statutes of limitations, and the civil doctrine of res judicata.[257]

According to the same norms, do naturalized citizens, who underwent a lengthy process and long waits to obtain their status and the vast majority of whom have not committed illegal offenses along the way, deserve to live under permanent threat of losing their status? Should natural-born citizens who have any quirk in their lives, like not having been born in a hospital, always live with the concern that the U.S. government could decide some day they have never been citizens and do not deserve a passport? The fact that, practically speaking, the current answer to these questions is yes should offend the sense of justice of anyone who has studied the American justice system and its government's historical commitment to democracy. Three features of the U.S. legal system deserve particular attention in this context because their full-fledged integration into immigration law is worth seriously pondering: statutes of limitations, equitable remedies (both equitable estoppel and laches), and time limits on appeals.

### 1. Statutes of Limitations

Statutes of limitations have characterized American criminal law since the founding period, based on both the interests of 1) fairness toward the individual given the increased difficulties that the passage of time introduces; and 2) efficiency, in that they motivate the government to investigate suspected activity promptly and reduce the need to question the appropriateness of specific prosecutions.[258] In the federal criminal system, the few exceptions that exist are usually reserved for offenses as serious as terrorism, crimes against children and/or sexual crimes.[259] For federal civil causes of action, the "catchall" provision 28 U.S.C. § 2462 states that:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.[260]

257. Reid Kress Weisbord & George C. Thomas, III, *Judicial Sentencing Error and the Constitution*, 96 B.U. L. REV. 1617, 1657 (2016) (footnotes omitted) (first citing GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 76–79 (1998); then citing DEMOSTHENES, 1 ORATIONS 20.147 (J.H. Vince trans., 1930)).

258. Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 115–16 (2008).

259. *See id.* at 124–28; *see also* CHARLES DOYLE, CONG. RSCH. SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 2 (2017).

260. 28 U.S.C. § 2462.

Criminal denaturalization actions are governed by a ten-year statute of limitations.[261] Civil denaturalization statutes, however, do not contain a parallel provision that would bar actions after a certain amount of time.[262] The Supreme Court has yet to take up the question of whether the catchall provision should, however, apply to civil denaturalization. Some lower courts have answered that question in the negative. In *United States v. Rebelo*,[263] the U.S. Court of Appeals for the Third Circuit stated in an unpublished decision that "a denaturalization action is not an action seeking the enforcement of a penalty or forfeiture, the subject matter of Section 2462."[264] Instead, the court argued, "denaturalization 'is regarded not as punishment but as a necessary part of regulating naturalization of aliens.'"[265] Meanwhile, a district court ruled in *United States v. Wang*[266] that there was no statute of limitations defense because none was mentioned in 8 U.S.C. § 1451, which governs the denaturalization proceeding.[267] Another district court followed similar logic.[268] The argument in *Wang* is none too convincing as the same is true for any civil actions that do not contain explicit statutes of limitations, which is precisely why the catchall provision exists.

The question of whether denaturalization is punitive is perhaps a more difficult call. Historically, the Supreme Court held that it is not, and that it merely serves to "deprive[] [the defendant] of his ill-gotten privileges"[269] and to "protect the integrity of the naturalization process."[270] During the latter half of the twentieth century, as the Court became more protective of citizenship, it maintained that denaturalization was not generally intended to be punitive—but left open the idea that intent matters, writing that "[d]enaturalization is not imposed to penalize the alien for having falsified his application for citizenship; if it were, it would be a punishment."[271]

Under the current circumstances, it is impossible to say that denaturalization is no longer intended as punishment. Both logic and the

261. *See* 18 U.S.C. § 1425 (defining unlawful naturalization); 18 U.S.C. § 3291 (imposing a ten-year statute of limitations).

262. *See (Un)Civil Denaturalization*, *supra* note 6, at 405 ("Civil litigation carries a lower burden of proof, there is no statute of limitations on civil denaturalization, there is no right to a jury trial, and there is no right to appointed counsel.").

263. 394 F. App'x 850 (3d Cir. 2010).

264. *Id.* at 853.

265. *Id.* (quoting E.B. v. Verniero, 119 F.3d 1077, 1101–02 (3d Cir. 1997)).

266. 404 F. Supp. 2d 1155 (N.D. Cal. 2005).

267. *See id.* at 1157–58.

268. *See* United States v. Dhanoa, 402 F. Supp. 3d 296, 300 (D.S.C. 2019) (citing Costello v. United States, 365 U.S. 265, 283 (1961), for the proposition that Congress could add a statute of limitations but has chosen not to).

269. Johannessen v. United States, 225 U.S. 227, 242 (1912).

270. United States v. Kairys, 782 F.2d 1374, 1382 (7th Cir. 1986).

271. Trop v. Dulles, 356 U.S. 86, 98 (1958).

explicit statements of the Trump administration counsel against adopting their understanding.[272] For one, there is no doubt that denaturalization imposes significant negative consequences on an individual that can rival incarceration and be permanent in nature.[273] In the modern era, it has been increasingly recognized that "loss of citizenship renders extraordinarily severe consequences upon the individual concerned."[274]

Furthermore, the words of the DOJ openly belie the idea that denaturalization is not punitive. When announcing the creation of a new Denaturalization Section within the DOJ in February 2020, the press release emphasized that "[t]his move underscores the Department's commitment to *bring justice* to terrorists, war criminals, sex offenders, and other fraudsters who illegally obtained naturalization."[275] Assistant Attorney General Jody Hunt was additionally quoted as saying: "The Denaturalization Section will further the Department's efforts to pursue those who unlawfully obtained citizenship status and ensure that they are *held accountable* for their fraudulent conduct."[276] When Baljinder Singh was denaturalized in 2018, USCIS Director L. Francis Cissna stated: "I hope this case, and those to follow, send a loud message that attempting to fraudulently obtain U.S. citizenship will not be tolerated."[277] This language of disincentivizing future bad conduct is part and parcel of the principles behind both criminal and civil punishment measures.[278]

Given statements of this nature, some of which were made before its ruling, the U.S. Court of Appeals for the Ninth Circuit's 2019 decision to continue treating denaturalization as nonpunitive for statute of limitations purposes is rather puzzling. In *United States v. Phattey*,[279] the Ninth Circuit refused to apply the catchall provision of § 2462, stating: "Because the purpose of denaturalization is to remedy a past fraud by taking back a benefit to which an alien is not entitled, we conclude it is not a penalty, and the statute of limitations does not apply."[280] By this logic, it is difficult to envision where § 2462 ever *would* apply because the imposition of any consequence involves the undoing of a benefit obtained via illegal action.

272. *See Trump Administration Civil and Human Rights Rollbacks*, *supra* note 242.

273. *See (Un)Civil Denaturalization*, *supra* note 6, at 435.

274. *Self-Incrimination Denied*, *supra* note 40, at 426.

275. Press Release, Office of Pub. Affs., *supra* note 136 (emphasis added).

276. *Id.* (emphasis added).

277. Press Release, Office of Pub. Affs., Dep't of Just., 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/JFM8-R652].

278. *See generally, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, *in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT (Gary S. Becker & William M. Landes eds., 1974) (discussing the calibration of punishments to discourage offenses optimally).

279. 943 F.3d 1277 (9th Cir. 2019).

280. *Id.* at 1279 (citing Johannessen v. United States, 225 U.S. 227, 242–43 (1912)).

The *Phattey* court combats that point by seeking to distinguish the purposes of sanctions from their effects, arguing that the defendant was conflating the two.[281] The court does this to justify why the Supreme Court applied § 2462 in *Kokesh v. SEC*,[282] an action involving disgorgement in the context of federal securities laws violation.[283] This distinction is difficult to square with the explicit statements of the DOJ, which suggest that punishment is very much the primary goal. Worse, though, the Ninth Circuit quotes the Supreme Court's *Kokesh* decision in an abbreviated manner that leads to incorrect conclusions: "The Supreme Court has determined that a sanction is a penalty only if it is sought for the *purpose* of punishment or deterrence."[284] That passage in *Kokesh*, however, reads at greater length: "[A] pecuniary sanction operates as a penalty only if it is sought for the purpose of punishment, and to deter others from offending in like manner—*as opposed to compensating a victim for his loss*."[285] The *Kokesh* Court then went on to give examples of the latter in the form of copyright statutory damages (where both the suit and the recovery belong to a private plaintiff) and a refund that a railroad company had to provide to a shipping company for excessive shipping rates, where "[b]ecause the liability imposed was compensatory and paid entirely to a private plaintiff, it was not a 'penalty' within the meaning of the statute of limitations."[286]

When viewed in this light, it becomes clear that the Ninth Circuit's rationale for refusing to impose the statute of limitations from § 2462 is deeply flawed. Denaturalization can in no way be described as compensation to a private victim—language from *Kokesh* that the Ninth Circuit chose to omit would have made clear that instead, denaturalization should be regarded as a penalty. Providing further support for this proposition, none of the examples in *Kokesh* of actions for which § 2462 ought not to apply bear any resemblance to denaturalization. Instead, they are all actions in which a private citizen unambiguously compensates another. Thus, the *Kokesh* Court only offered two choices: a pecuniary sanction is either used for punishment and general deterrence, or it is compensation to a private victim. Denaturalization can only be the former.

Matters may be trickier for cases involving denial that citizenship ever existed. If the State Department refuses to issue a new U.S. passport to an individual, this arguably does not constitute an "action" to which the catchall provision would apply. For those types of cases, courts likely would not be able

281. *See id.* at 1283.
282. 137 S. Ct. 1635 (2017).
283. *See Phattey*, 943 F.3d at 1281–83 (citing *Kokesh*, 137 S. Ct. at 1642).
284. *Id.* at 1283 (citing *Kokesh*, 137 S. Ct. at 1642).
285. *Kokesh*, 137 S. Ct. at 1642 (emphasis added) (internal quotation and citation omitted).
286. *See id.* at 1642–43 (internal citations omitted).

to find a statute of limitations defense, though they could potentially apply other doctrines such as equitable estoppel.

2. Equitable Estoppel and Laches

Bridging the values of reliance and finality, the doctrine of equitable estoppel has a long-standing pedigree in American law. In 1871, the Supreme Court explained: "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage."[287]

Hoda Muthana's attorneys argued that equitable estoppel should prevent the government from withdrawing her citizenship rights many years after issuing her a passport and then renewing it.[288] In opposition to the government's motion to dismiss, they stated: "The case for estoppel against the government requires proof of both the traditional elements of the doctrine as well as 'a showing of an injustice . . . and lack of undue damage to the public interest.'"[289] Further, they explained that "[a] showing of injustice requires a demonstration that the government and/or its agents 'engage[d]—by commission or omission—in misrepresentation or concealment, or, at least, behave[d] in ways that have or will cause an egregiously unfair result.'"[290] The attorneys explained that the government knew all relevant facts about Muthana's father's diplomatic status when it issued Muthana a passport in 2005, that these actions prevented Muthana's father from applying for naturalization for her as he successfully did for his older children who had not been born in the United States, and that the government engaged in bad faith when it waited to raise objections until a year after Muthana left the United States and allegedly associated with ISIS.[291]

The district court rejected Muthana's equitable estoppel argument, ruling that "[c]ourts cannot grant citizenship through their equitable powers."[292] As a result, the court also decided that it was unable to have the State Department reissue a U.S. passport to an individual who is not actually a citizen.[293] One of the cases on which the court relied for its decision is *Hizam v. Kerry*,[294] where

287. Ins. Co. v. Wilkinson, 80 U.S. 222, 233 (1871).

288. *See* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss or in the Alternative Motion for Partial Summary Judgment at 39–42, Muthana v. Pompeo, No. 1:19-cv-00445-RBW (D.D.C. May 10, 2019).

289. *Id.* at 39–40 (quoting Hertzberg v. Veneman, 273 F. Supp. 2d 67, 83 (D.D.C. 2003).

290. *Id.* at 40 (quoting Grumman Ohio Corp. v. Dole, 776 F.2d 338, 347 (D.C. Cir. 1985).

291. *See id.* at 41.

292. Muthana v. Pompeo, No. 19-445 (RBW), 2019 U.S. Dist. LEXIS 218098, at *36 (D.D.C. Dec. 9, 2019) (quoting Hizam v. Kerry, 747 F.3d 102, 110 (2d Cir. 2014)).

293. *See id.* at *36–37.

294. 747 F.3d 102 (2d Cir. 2014).

another individual of Yemeni background was refused a new passport after more than twenty years of believing he was a U.S. citizen.[295] Unlike Hoda Muthana, the plaintiff Abdo Hizam had no ties to any terrorist organizations—the State Department had simply made an error in processing while first issuing him proof of citizenship when he was nine years old and discovered it decades later when Hizam applied for passports for his children.[296] Rejecting the plaintiff's equity-based arguments, the Second Circuit stated that "[i]n the citizenship context, the reliance interest that an individual might have on an administrative decision is not enough to read retroactive effect into a statute that provides cancellation authority."[297]

The *Muthana* and *Hizam* courts' central reliance on *I.N.S. v. Pangilinan*[298] in their declarations that courts do not have the equitable power to grant citizenship is, however, misplaced. The *Pangilinan* case dealt with individuals who were never granted citizenship in the first place and who wanted the courts to declare them citizens.[299] That is an entirely different predicament from that of individuals who were told by the government for dozens of years that they *were* citizens. The plaintiffs in *Muthana* and *Hizam* are thus arguably not asking the courts to confer citizenship on them, but rather to stop the government from denying a state of affairs that it had itself created and on which the plaintiffs reasonably relied.

When roles were reversed, courts did not hesitate to apply equitable estoppel to bar citizens from benefitting from their own fraud or mistake. In one case, a plaintiff claimed that her own citizenship had been secured through her and her husband's fraud.[300] Denaturalization, in this case, would have been economically valuable: as a non-American Dutch citizen she would be automatically entitled to a share of her deceased husband's estate, a benefit she would not get if she were an American citizen.[301] The court concluded that the widow was equitably estopped from challenging her naturalization; she had "voluntarily enjoyed the fruits of her citizenship for some 23 years," the court pointed out, and she traveled with a U.S. passport, paid state and federal taxes, and used American consular services while traveling abroad.[302] The court was

295. *Id.* at 104.

296. *See id.* at 105–06.

297. *Id.* at 110.

298. 486 U.S. 875 (1988).

299. *See id.* at 875.

300. Simons v. United States, 333 F. Supp. 855, 858 (S.D.N.Y. 1971), *aff'd*, 452 F.2d 1110 (2d Cir. 1971).

301. *Id.* The *Simons* court quoted Justice Black's famous observation that "[n]ot only is United States citizenship a 'high privilege,' it is a priceless treasure." *Id.* (quoting Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting)). However, the *Simons* court distinguished the case before it, observing that "it seems that the plaintiff here seeks a treasure which she would value more, a share of her former husband's substantial estate in which she may have rights under Dutch law." *Id.*

302. *Id.* at 867.

willing to accept, for the sake of argument, that she had failed to meet the statutory requirements for naturalization, but was unwilling to allow her to take advantage of her own fraud by later attacking the validity of her citizenship.[303] This was true even though the court acknowledged that there was a public interest issue in citizenship that went beyond the duplicitous widow, but concluded that both the widow herself, and the U.S government—which had appeared to defend the case—were ill-suited to "vindicate the public interest."[304] The court therefore dismissed the case, and the widow retained her U.S. citizenship.

But although the widow was equitably estopped from asserting her own citizenship fraud, the Supreme Court suggested in *Fedorenko v. United States*[305] that courts lack equitable discretion in denaturalization cases.[306] The Court perhaps left room for equitable discretion in other types of cases involving citizenship status; it stated only 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] At the very least, the holding in *Fedorenko* could arguably be limited to cases involving official denaturalization proceedings (as in *Singh*). The limitation on equitable discretion need not apply when the government challenges the original existence of citizenship rights (as in *Muthana* or *Hizam*). So far, the Supreme Court has not squarely addressed the issue of equitable estoppel in the context of a case in the citizenship denial category. Further, the complete change in composition of Supreme Court justices between the *Fedorenko* decision in 1981 and today opens the door to revisiting the matter even for denaturalization cases.

Another equitable defense that individuals have pursued is that of laches. When a party has let too much time elapse to bring a claim, laches provide a defense if the party against whom it is asserted showed lack of diligence and if prejudice would otherwise result to the party asserting it.[308] While the doctrine of laches was historically inapplicable against the government, this has changed more recently.[309] In *Hizam*, the Second Circuit stated that "[t]he equities in this case overwhelmingly favor Hizam[, but] . . . [w]ell-settled case law bars a court

303. *See id.*

304. *See id.*

305. 449 U.S. 490 (1981).

306. *Id.* at 517.

307. *Id.*

308. *See* Costello v. United States, 365 U.S. 265, 281–82 (1961).

309. *See generally* An Nguyen, Note, *It's About Time: Reconsidering Whether Laches Should Lie Against the Government*, 2015 U. ILL. L. REV. 2111, 2111 (discussing the growing trend that questions the assumption that laches cannot be asserted against the government).

from exercising its equity powers to naturalize citizens."[310] The district court in *Wang* had reached the same result, citing to the Supreme Court's decision in *Costello v. United States*.[311]

Courts have thus generally denied a defense of laches for the same reason that they have denied one of equitable estoppel. In so doing, they have cited to the same cases, which issued blanket prohibitions on the use of any equitable defense. *Pangilinan* is distinguishable with regard to laches for the same reasons as for equitable estoppel: the case involved people who had never been told they were citizens versus, in cases of denaturalization and denial, people who had. Similarly, *Fedorenko* could at least be limited to denaturalization instances for purposes of laches analysis.

### 3. Time Limits on (Governmental and Other) Appeals

As one of us has stated previously, one of the key ways in which accuracy ultimately yields to finality is "the universal existence of appellate deadlines."[312] This runs both ways, and neither defendants nor plaintiffs or even governments can extend that period indefinitely. Citizenship determinations, however, are not treated like court judgments. Therefore, because there is no statute of limitations for civil denaturalizations, the government can either deny citizenship ever existed or officially denaturalize individuals after dozens of years.[313]

Even in most general criminal cases, the government only has thirty days to appeal a judgment—and acquittals cannot be appealed at all.[314] If the government believes that a dangerous individual will be released, its hands are eventually still tied. The legal system does not allow the government to continue dragging people through process after process after a certain amount of time has passed. Proving citizenship, however, has no such end point; issues

310. Hizam v. Kerry, 747 F.3d 102, 111 (2d Cir. 2014) (citing I.N.S. v. Pangilinan, 486 U.S. 875, 885 (1988)); *Fedorenko*, 449 U.S. at 517; United States v. Wong Kim Ark., 169 U.S. 649, 702 (1898). In addition to the discussion we provide in the main text about *Pangilinan* and *Fedorenko*, it is not at all obvious that the language in *Wong Kim Ark* presents a barrier to having equitable defenses protect citizenship. The *Hizam* court was presumably referring to the passage that states: "[c]itizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law." *Wong Kim Ark.*, 169 U.S. at 702. For one, this would not apply to the use of equitable defenses in cases like Hoda Muthana's in which the individual was born in the United States. For another, even in cases of naturalization for those born outside the country, it is not clear that an equitable defense stands outside the "forms of law."

311. United States v. Wang, 404 F. Supp. 2d 1155, 1158–59 (N.D. Cal. 2005) (citing to *Costello*, 365 U.S. at 283–84, which held that the doctrine of laches was not available to the defendant as a defense in his denaturalization proceeding).

312. *The Right To Appeal*, *supra* note 255, at 1275.

313. *See supra* Section IV.B.1.

314. FED. R. APP. P. 4(b)(1)(B); United States v. Ball, 163 U.S. 662, 670 (1896) ("If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot.").

can arise any time a person seeks to renew a passport or vote in an election. Citizens can also be swept up unexpectedly in immigration enforcement proceedings and have to assert their citizenship to defend against removal proceedings. The government can ask an individual to prove again and again and again, over any length of years, that the information presented was accurate.

## V. UNCONDITIONAL CITIZENSHIP

A spectrum of possible solutions exists to protect citizenship in a manner more consistent with our foundational principles of government and to align its treatment with the general values governing our legal system. The feasibility of each option depends on the level of commitment to these principles of the relevant reforming body—be it the courts or Congress.

The first set of possibilities involves mechanisms to limit in time the ability of the government to denaturalize an individual or deny that they have citizenship through civil mechanisms. This would help to ensure the finality of citizenship, enable the realization of reliance interests, and at least reduce the chilling effects after a number of years have passed. For denaturalization, courts could hold that the federal catchall provision imposes an outer limit on the government's ability to challenge someone's naturalization for any reason. Alternatively, Congress could pass a law imposing a statute of limitations for the challenging of both denaturalizations and citizenship denials. In the case of denaturalizations, the time would run from when naturalization took place. In the case of denials, it could run from when a U.S. birth certificate or passport was issued, depending on the circumstances.

A mechanism that would shorten the time and opportunity for the government to challenge denaturalization specifically—thus clarifying a person's status with finality more quickly and reducing chilling effects more than a multiyear statute of limitations would—is to bind the government's ability to challenge citizenship to a brief post-naturalization appeals period. After someone obtains citizenship, the government would have thirty or sixty days to challenge USCIS' determination. This would incentivize USCIS to investigate applications properly from the start rather than rest easy in the knowledge that if it misses the existence of fraud, the government can return any time to take away an individual's citizenship. Creating such an appeals period would require congressional action.

Another set of tools at courts' disposal to protect citizenship in cases of both denaturalization and denial is that of equitable defenses. One of the obstacles to judicial intervention is that the courts may first need to fully grasp the significance and property-like nature of the citizenship interest. A district court went the other way on this issue in *Hizam* when it stated that the case "does not deal with property or contractual rights or set out new criminal

punishments. Instead, it falls within the citizenship context."[315] As explained above,[316] this view is incorrect, and courts must adjust their understanding accordingly. Ideally, this would eventually result in the Supreme Court overturning *Fedorenko* and allowing equitable defenses to protect citizenship in relevant cases (with the greater passage of time certainly helping to increase an individual's chance of winning their case). Alternatively, courts should at least clarify that *Fedorenko* applies only to situations of denaturalization and not of denial. This would potentially then allow the immediate implementation of equitable defenses, like equitable estoppel or laches, to cases of citizenship denial.

The solutions discussed here so far apply to civil processes. Similar problems arise, however, with criminal denaturalization or criminal law mechanisms related to citizenship denial. As an example of the latter, an individual asserting citizenship and applying for a passport could be pursued for fraud. This could, of course, chill their exercise of the full panoply of citizenship rights, as is true with fears over criminal denaturalization even if one did nothing wrong. This could cover any action that an individual perceives as placing them in the "eye of the authorities." While criminal denaturalization at least has a statute of limitations, being criminally pursued for illegitimately applying for a passport could happen to anyone at any point.

The most clean-cut solution is to eliminate all mechanisms for civil and criminal denaturalization and for denials of previously recognized citizenship. This would provide the ultimate protection for citizenship and allow for full exercise of citizenship rights without chilling effects. It would say that once the government has naturalized an individual, or given them a U.S. birth certificate or passport, that individual has truly been accepted into the polity and can enjoy full rights for perpetuity. The downsides of doing so are minor. Most abuse and fraud can be weeded out at the front end, as they should be. It is true that a new, small number of individuals could gain perpetual rights to citizenship through the changes delineated in this Article—the vast majority of whom will lead otherwise unremarkable lives in the United States. Nevertheless, this is a worthwhile price to pay to ensure the rights of so many innocent people who currently live in fear that an abusive regime could use a completed (or even attempted) denaturalization or denial process to silence them at any time.

## CONCLUSION

U.S. citizens today are not safe from the threats of denaturalization and citizenship denial. The procedural protections that exist for much lesser rights are unavailable in the citizenship context, and our current system fails to respect

315. Hizam v. Kerry, 747 F.3d 102, 110 (2d Cir. 2014).

316. *See supra* Section IV.B.2.

the dual values of reliance and finality. The introduction of statutes of limitations, finite appeals periods, and equitable defenses could all help to improve the flaws of the civil denaturalization and denial systems. Taking matters a step further, we should consider eliminating all methods of civil and criminal denaturalization and denial. It is the only way to help remove any meaningful legal distinction between different types of citizens, and to take away from the government tools that enable invidious discrimination.