U.S. birth certificate, he had obtained a Social Security card and a U.S. passport, which had been renewed without difficulty. He used his Mexican birth certificate as early as 1951, however, when he was picked up for various minor crimes; he believed, apparently correctly, that presenting himself as a non-U.S. citizen would result in deportation rather than criminal prosecution and potential continued detention.[177] It was not until decades later, when he was convicted of an assault charge, that the government connected the two sets of records. As a result, the government sought to deport the petitioner following his conviction. The district court issued a finding of fact that the petitioner was not a U.S. citizen, paving the way for him to be deported.[178]

On appeal, the Ninth Circuit struggled with the question of the petitioner's citizenship. There was some evidence on both sides: on the one hand, the petitioner had persuaded the government of his citizenship well enough to obtain both a Social Security card and a passport.[179] There was no indication that the U.S. birth certificate used by the petitioner was forged.[180] And the petitioner possessed significant ties to the U.S., including three children who were born within the United States, and several others for whom the government had recognized derivative citizenship through the petitioner.[181] On the other hand, his Mexican birth certificate also appeared regular. Thus, both certificates were long-standing, having been used for decades without question. It was clear that the petitioner had a history of claiming whichever country of citizenship would best suit his interests at the time.

With the evidence so close to equipoise, the standard of proof could make a real difference in the outcome. A majority of the Ninth Circuit's *en banc* panel held that the appropriate burden of proof was the intermediate "clear and convincing" standard, asserting that the Supreme Court had used the phrases "clear and convincing" and "clear, convincing, and unequivocal" interchangeably, and concluding from this practice that the word "unequivocal" did not add additional meaning to the intermediate standard.[182] The circuit court therefore concluded that the district court had properly applied an intermediate standard of proof.[183]

Once the Ninth Circuit had accepted the intermediate burden of proof, it had to decide how the underlying evidence supporting that burden should be reviewed on

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] Mondaca-Vega v. Lynch, 808 F.3d 413, 420 (9th Cir. 2015) ("The Supreme Court has repeatedly used the phrases 'clear, unequivocal, and convincing' and 'clear and convincing' interchangeably.")

[183] *Id.*

appeal. The petitioner argued that the court should independently evaluate whether the evidence was strong enough to meet the government's heightened burden of proof. After all, earlier denaturalization opinions from the Supreme Court had emphasized the need for a more searching review than that ordinarily provided by appellate courts.[184] The Ninth Circuit, however, held that the Supreme Court had abrogated its earlier distinction between "subsidiary" and "ultimate" facts and thus now required that all review of judicial fact-finding apply a "clear error" standard.[185] As long as there was a "plausible" basis for the district court's conclusion, the finding of fact—that is, that the petitioner was born in Mexico rather than the United States—would stand, and the petitioner could be removed. Given the balance of the overall evidence, the court concluded that there was indeed a plausible basis for the district court's findings.

Thus, these procedural rulings combined to support the removal and continued exclusion of an individual whose actual citizenship was far from clear. Even the majority conceded that there were "some errors" in the district court's factfinding and that the state of the evidence was ambiguous. But ultimately the court concluded that when "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[186]

Unsurprisingly, the *en banc* panel's opinion spawned several separate writings. Judge Smith, in a separate writing joined by an additional three judges, stated that he would have held that the Supreme Court's use of the word "unequivocal" in citizenship cases should heighten the required burden of proof beyond the already-heightened "clear and convincing" standard.[187] The opinion pointed to conflicting precedent from the Sixth Circuit, as well the Supreme Court's opinion in *Addington v. United States*, which stated in a civil-commitment case that "'[t]he term 'unequivocal,' taken by itself, means proof that admits of no doubt, a burden approximating, if not exceeding, that used in criminal cases.'"[188] As a result, Judge Smith would have remanded the case for reconsideration in light of this heightened standard.

Judge Murguia also wrote a separate opinion joined in full by one additional judge and joined as to the standard of review by four judges.[189] Judge Murguia's opinion contested the majority's application of the "clear error" standard, noting that the Supreme Court had never explicitly overruled *Baumgartner*'s requirement for a more searching *de*

[184] *See supra* text accompanying note 171.

[185] Mondaca-Vega v. Lynch, 808 F.3d 413, 426 (9th Cir. 2015).

[186] *Id.*

[187] *Id.* at 428 (Smith, J., concurring in part and dissenting in part).

[188] *Id.* (quoting Addington v. Texas, 441 U.S. 418, 432 (1979)).

[189] *Id.* at 437 (Murguia, J., concurring in part and dissenting in part).

novo appellate review of the factual basis underlying a citizenship determination, but instead had reiterated it in both the 1960s and the 1980s.[190] Judge Murguia agreed that some questions were straightforward enough to make clear-error review appropriate, such as factual questions about how many times the petitioner had been deported, whether he successfully applied for a Social Security number, and whether he had ever been convicted of a crime as a U.S. citizen.

But the broader questions of whether the petitioner's citizenship evidence had been "procured by fraud" was not a simple question of fact—rather, it was "a finding that 'clearly impl[ies] the application of standards of law'" and should therefore be subject to *de novo* appellate review.[191] Judge Murguia concluded that the standard of review would make a difference to the ultimate outcome.[192] The district court, for example, stated that it was unlikely that a U.S. citizen would allow himself to be deported as deportation would be against his financial interest.[193] Judge Murguia, however, noted that "there is no evidence in the record to support the district court's findings regarding employment opportunities for a farm worked in the 1950s, much less Petitioner's own financial motives."[194] Thus, Judge Murguia believed there was insufficient evidence to conclude that the petitioner had fraudulently obtained U.S. citizenship.[195] If the evidence was in equipoise such that the Mexican birth certificate and the U.S. birth certificate could equally likely have been false, then the appellate court should conclude that the burden of proof would disallow removal.

2. Prioritizing the Constitutional Basis of Citizenship Procedure

The *Mondaca-Vega* case raises a fundamental question: why should the judiciary go out of its way to protect the citizenship of a petitioner who cared for it so little that he was willing to claim whichever country benefitted his interests more at any particular moment? That question goes to the heart of heightened procedural protections in citizenship cases. After all, if it is only the individual interest that matters, then the due

[190] *Id.*; *see* Baumgartner v. United States, 322 U.S. 665, 676 (1944); *see* Fedorenko v. United States, 449 U.S. 490, 506 (1981) ("[I]n reviewing denaturalization cases, we have carefully examined the record ourselves."); Costello v. United States, 365 U.S. 265, 269–70 (1961) ("The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here."); Knauer v. United States, 328 U.S. 654, 657–58 (1946) ("We reexamine the facts to determine whether the United States has carried its burden of proving by 'clear, unequivocal, and convincing' evidence, which does not leave 'the issue in doubt,' that the citizen who is sought to be restored to the status of an alien obtained his naturalization certificate illegally.").

[191] *Id.* (quoting Pullman–Standard v. Swint, 456 U.S. 273, 288 (1982) (cleaned up)).

[192] *Id.*

[193] *Id.*

[194] *Id.* at 442.

[195] *Id.*

process protections of ordinary civil litigation should surely be good enough. Courts adjudicate matters such as child custody, workers' compensation benefits, and other civil matters that strike at the core of individuals' lives and concerns every day. What is different about citizenship?

If the citizenship interests are different—and this Article asserts that they are—then that difference must stem from the political order enshrined in the United States Constitution.[196] The Supreme Court suggested as much in *Baumgartner*, writing that "considerations of policy, derived from the traditions of our people . . . require solid proof that citizenship was falsely and fraudulently procured" before it can be taken away by the government.[197] The Court warned against applying "the illusory definiteness of any formula" in citizenship cases, noting that "a too easy finding that citizenship was disloyally acquired" could lead a "fear of exercising . . . American freedom."[198]

This chilling effect is necessarily social, political, and structural, rather than individual. The Court's concern isn't whether a particular petitioner like the one in *Mondaca-Vega* was exercising any particular rights of free speech, political association, or exercise of religion; its concern is the potential chilling effect on other people if litigation procedure leaves citizenship protections vulnerable. The Supreme Court has long acknowledged the risk of political manipulation of citizenship rights. In *Afroyim v. Rusk*, the case that held there could be no involuntary expatriation for anything short of fraud or illegal procurement of citizenship, the Court discussed the relationship between democracy and citizenship at greater length than it had before or has since.[199] "The very nature of our free government," said the majority opinion authored by Justice Black, "makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."[200]

When Justice Black wrote the *Afroyim* majority opinion in 1967, he was not speaking hypothetically. The country had already seen the political risks of limiting citizenship rights, especially in connection with racial discrimination. The Naturalization

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

[197] Baumgartner v. United States, 322 U.S. 665, 676 (1944).

[198] *Id.*

[199] Afroyim v. Rusk, 387 U.S. 253 (1967); *see also* Robertson & Manta, *supra* note 26, at 461 (discussing the impact of *Afroyim*).

[200] *Afroyim*, 387 U.S. at 268.

Act of 1790 limited citizenship to "free White persons,"[201] and more than one hundred years later in 1923, the Supreme Court concluded that naturalized citizens from India had "illegally procured" their citizenship because they should not be considered "white" under the law.[202] Not only did Indian-born men lose their U.S. citizenship, but so in many cases did their American-born wives, who were deemed to take their husbands' citizenship.[203]

Starting in the 1930s, the United States engaged in a "massive operation" targeting Mexicans for deportation, ultimately deporting "over one million Mexican immigrants, U.S. citizens of Mexican ancestry, and undoubtedly other Hispanic U.S. citizens."[204] And of course, during World War II the United States engaged in the mass internment of U.S. citizens of Japanese ancestry.[205] The Court was therefore writing against a backdrop where recent events had shown that citizenship rights could be fragile, especially in the face of racial animus. In upholding the rights of citizenship, it emphasized that the language, purpose, and prior construction of the Fourteenth Amendment show that it protects individuals "against a congressional forcible destruction of his citizenship, whatever his creed, color, or race."[206]

And while racial animus may have motivated earlier encroachments on citizenship, the Court was quick to note that animus-motivated citizenship restrictions also contained a political component. It concluded that "it seems undeniable from the language [the Framers of the Fourteenth Amendment] used that they wanted to put citizenship beyond the power of any governmental unit to destroy."[207] The Framers were concerned that the citizenship "so recently conferred" on African-Americans was so fragile that a later Congress might "just as easily take [it] away from them."[208] By 1967, however, it was clear that African-Americans might not be the only ones so targeted—political animus, as well as racial animus, could provide grounds for stripping citizenship

[201] An Act to Establish a Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790) (repealed 1795); Emmanuel Mauleón, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. 1326, 1390 (2018) ("[E]xplicit racial exclusion in naturalization and immigration was not completely removed until the Immigration and Nationality Act of 1965.").

[202] United States v. Bhagat Singh Thind, 261 U.S. 204, 213-15 (1923); Robertson & Manta, *supra* note 26.

[203] Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 433-34 (2005).

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

[205] Korematsu v. United States, 323 U.S. 214, 215 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[206] Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

[207] *Id.* at 264.

[208] *Id.* at 262.

rights.[209] In turn, if individuals fear that political participation could result in losing citizenship rights, their political activity and speech will be chilled.[210]

Citizenship rights, in the *Afroyim* Court's view, go to the heart of the political polity. In holding that Congress cannot involuntarily expatriate individuals, the Supreme Court relied on the idea that "[c]itizenship in this Nation is a part of a cooperative affair."[211] Citizenship is not merely a right granted by the government; under the United States' constitutional structure, "[i]ts citizenry is the country and the country is its citizenry."[212]

Later Supreme Court cases failed to return to the strong language of the *Afroyim* Court. *Afroyim* itself was a 5-4 decision viewed as vulnerable to being overturned after a change in Court membership.[213] A switch in position from Justice Harlan saved *Afroyim* from being overruled.[214] Nonetheless, the Court did not return to the broad constitutional rhetoric of *Afroyim* in later cases, preferring instead to focus on more narrow and technical points, often grounded in statutory interpretation.[215]

The Court's more recent approach in citizenship cases at least implicitly follows the constitutional avoidance canon. Under this doctrine, the Supreme Court will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case," and "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[216] In citizenship cases, the Court has been reliably able to find such alternate grounds in recent decades. Nevertheless, the constitutional avoidance canon creates significant difficulties in cases involving citizenship rights. Even when there may be other grounds to reach the same result—and even when that result still protects the individual against the loss of citizenship rights—citizenship questions inherently invoke constitutional norms.

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[209] Thus, for example, many of the mid-century cases dealt with individuals accused of sympathizing either with Nazis or with Communists. *See* Robertson & Manta, *supra* note 26, at 426-27.

[210] *See* Kagan, *supra* note 72, at 1261 (noting that "[t]he threat of deportation may act as a deterrent that silences other immigrants"). Such a chilling effect would also occur when individuals risk losing citizenship status as well as could face potential subsequent deportation.

[211] Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

[212] *Id.*

[213] *See* Robertson & Manta, *supra* note 26, at 445 ("[E]ven though the decision got a majority opinion, it was still seen as vulnerable by those dissatisfied with the ruling. It was, after all, a 5-4 decision reversing a different 5-4 decision less than a decade old.").

[214] *Id.*

[215] *Id.*

[216] Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (cleaned up).

Professor Hiroshi Motomura wrote about the avoidance canon in immigration law, describing it as "the 'underenforcement' of constitutional norms for prudential reasons."[217] In his view, those prudential reasons are rooted in a respect for, and deference to, the political branches of government—especially in cases where Congress has adopted legislation on point.[218] Avoiding the constitutional questions through "phantom norm decisionmaking," that finds an alternate ground to protect the individual short of recognizing a constitutional right, he points out, may counterintuitively allow the Court to assure greater protection for immigrants, finding reasons to rule in their favor without having to strike down legislation.[219] And in some cases, the so-called phantom norms may coalesce into a later formal recognition of constitutional rights.[220]

But unless or until that happens, long-term constitutional avoidance of questions involving fundamental rights can create the illusion of constitutionality.[221] That is, because the actions of the executive or legislative branch are not explicitly declared unconstitutional, they may appear to be exercising legitimate power on the whole, even if particular litigants are able to prevail in individual cases. If the Court were to expressly grapple with the constitutional questions underlying those actions, however, it might conclude that those actions are inconsistent with constitutional protections.

Another problematic effect of such avoidance is that even if the Supreme Court can find ways to avoid the constitutional questions, lower courts cannot. And without guidance from the Supreme Court, they will have to read the tea leaves to guess whether a Supreme Court result was required by the Constitution. Thus, for example, the D.C. Circuit had to determine the basis for the Supreme Court's earlier decision in *Elg* to allow children who move away from the United States to later re-assert citizenship as adults.[222]

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

[218] *Id.* ("Institutional constraints, especially the judiciary's sensitivity to its limited factfinding capability and attenuated electoral responsibility, make courts reluctant to issue a constitutional command to the political branches of government. Even if such a command clearly would reflect an established constitutional norm, courts can sometimes vindicate that norm less intrusively, and thus perhaps more justifiably, through the indirect route of statutory interpretation.").

[219] *Id.* at 568 ("The centrality of phantom norm decisionmaking in immigration law gradually emerged through several Supreme Court decisions from roughly the same period as Mezei, Knauff, and Harisiades. Their unifying characteristic is their propensity to use phantom norm constitutional reasoning to reach subconstitutional outcomes favorable to aliens.").

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

[221] *Id.* (explaining that the use pf phantom norm decisionmaking in immigration law created a gulf between those who adhered to the plenary power doctrine and those who believe that the Constitution allows for a greater role in judicial oversight).

[222] Nikoi v. Attorney Gen. of U.S., 939 F.2d 1065, 1070 (D.C. Cir. 1991).

If it was merely based on the intent of the treaty, then perhaps the same approach would apply as well to children who later want to re-assert a right to lawful permanent resident status.[223] On the other hand, if the result was constitutionally required in *Elg* only as a matter of citizenship rights, then the case could be limited to apply only to citizenship and not to immigration status.

In evaluating the constitutional basis of the *Elg* case, the D.C. Circuit suggested that broader political and social rights were at issue in citizenship cases. It acknowledged that citizenship carries with it certain constitutional protections that residence in the United States does not.[224] As a result, the D.C. Circuit was able to conclude that the Court's earlier decision was best understood as a constitutional ruling.

Recognizing the constitutional basis of citizenship rights is the first step to ensuring protection of those rights, and the Supreme Court should not shy away from it. The language used to talk about such rights can be powerful; "[i]n modern constitutional discourse, calling citizenship a 'right' gives it weight; it shifts the burden to the government to come forward with compelling reasons for its actions that abridge or deny citizenship."[225] Of course, not every litigant will be focused on questions of citizenship. To the individual, lawful permission to live and work in the United States may be of more immediately practical import than then more ethereal rights of citizenship.

Nonetheless, the principles of democracy underlying the U.S. Constitution are tied to the political and social rights inherent in citizenship and the political community. John Hart Ely pointed out that the Constitution's role is to protect the rights of those who are left out or left behind in the political process.[226] He argued that judicial review should examine "questions of participation," rather than "the substantive merits of . . . political choice."[227] The history of citizenship, immigration, and political participation in the United States makes it clear that the courts are needed to protect democratic rights.[228]

If heightened procedural safeguards are not constitutionally required, then the political branches may limit the right to challenge citizenship determinations—either in all cases, or more perniciously, in the case of disfavored citizens. The *Afroyim* Court was

[223] *Id*.

[224] *Id.* at 1070.

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

[226] JOHN HART ELY, DEMOCRACY AND DISTRICT 181 (1980).

[227] *Id*.

[228] Ming Hsu Chen and Zachary New, *Silence and the Second Wall*, 27 S. CAL. INTERDISC. L.J. (forthcoming) ("The legal effects of the second wall prompt Constitutional and statutory violations, procedural deprivations, and tangible suffering in the form of denied benefits, intense anxiety, and feelings of exclusion.").

correct to recognize that it is inconsistent with our system of constitutional democracy to allow the deprivation of citizenship for political reasons.[229] Returning to a constitutional analysis of due process in citizenship litigation is the best way to ensure that this cannot happen.

B. Heightened Procedural Safeguards

Of course, focusing on the constitutional protections of citizenship is only a beginning. Courts must also decide what those protections are, and how far they extend. Although the parameters of constitutional citizenship protection are vague and unformed at the current time, the process by which those parameters should be established is much clearer under the Court's directives for procedural due process.[230]

Courts evaluating constitutional due process must conduct what is in essence a cost-benefit analysis.[231] The Supreme Court has held that the judge must weigh the risk that the plaintiff will be erroneously deprived of liberty against the cost of providing additional procedures to safeguard against such error.[232]

The Supreme Court set out the factors to consider in *Mathews v. Eldridge*, a case dealing with an individual's right to Social Security benefits.[233] In that case, the Supreme Court held that the reviewing court must first consider the plaintiff's "private interest that will be affected by the official action."[234] Second, the court must examine "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[235] Finally, the court must weigh "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[236] Taken together, the court must evaluate which interest weighs more: the individual's interest in receiving the requested process, or the government's burden and cost in administering that process.

Because *Mathews* focused on an individual's right to monetary benefits, it did not need to consider whether the public might have an interest on both sides of the case. But

[229] Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

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

[231] *Id.*

[232] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

in cases that raise issues of public benefit, the public's interest must weigh in the equation as well. This means that the public's interest will be represented on both sides of the balancing test—with the public benefit joining the individual benefit on one side, weighed against the administrative cost and burden on the other side.[237]

When it comes to citizenship, the balancing test should also consider more than the financial and administrative cost—it should also consider the broader harm to the public interest when citizenship is underprotected. Litigation, after all, never results in perfect accuracy.[238] The Supreme Court has favored overprotection above underprotection, writing: "It is better that many . . . immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."[239]

1. The Burden and Standard of Proof

The Supreme Court's choice of phrasing that it is better to improperly admit many immigrants than to permanently exclude a single citizen is a common refrain, heard most often in the criminal context.[240] William Blackstone himself wrote in the nineteenth century that it was "better that ten guilty persons escape, than that one innocent suffer."[241] Justice Harlan echoed the sentiment, writing that "it is far worse to convict an innocent man that to let a guilty man go free."[242] What all of these formulations have in common is a recognition of the substantive value of liberty and a willingness to draw a line that allows for the underenforcement of regulatory law to ensure that such liberty is not wrongfully curtailed. In the criminal context, liberty is viewed as freedom from imprisonment. In the immigration context, however, liberty means protecting the civil and political rights of citizens—even at the risk of underenforcing substantive immigration law.

This parallel between criminal law and citizenship litigation extends into assigning the burden and setting the standard of proof. Making the government bear the

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

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

[239] Kwok Jan Fat v. White, 253 U.S. 454, 464 (1920).

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

[241] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357 (1871).

[242] In re Winship, 397 U.S. at 372 (Harlan, J., concurring) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

burden of proof and assigning a heightened standard is one way to ensure that an individual is not wrongfully deprived of liberty.[243] In the criminal context, of course, the government bears the burden of proof and must prove guilt by the highest standard possible—beyond a reasonable doubt.[244] Although the origin of the rule is murky, by 1970 the Supreme Court agreed that it had "long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required," and explicitly held that due process mandated this heightened burden.[245] In so ruling, the Court focused on the interest of the accused, referring to the liberty interest as one of "transcending value."[246] It also pointed to the value to society, stating that "the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law."[247] In conducting the due process analysis, the Court did not expressly discuss the costs of such a holding—that is, that criminal proceedings are expensive, and that requiring such a high burden of proof necessarily means that some guilty individuals will go free, potentially causing additional societal harm. The implicit conclusion of the Court's holding, however, was that the combination of individual liberty and societal trust in the criminal justice system outweighed the risk that some guilty people would go free.

Even though the Supreme Court hasn't clarified that a heightened burden of proof is constitutionally required in citizenship cases, similar reasoning should apply. Under a due process analysis, both the individual liberty interest and the societal interest in citizenship is extremely high. From a liberty point of view, citizenship ensures that the individual has the right to live, work, and raise a family in the United States. Citizenship also gives individuals a voice in the political life of the country, ensuring that their values and concerns can help shape the future of the nation. This latter interest blends into the societal interest in citizenship. A constitutional system that lodges sovereignty in its citizens possesses a tremendous interest in ensuring that those citizenship rights do not rest on a precarious base.

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

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

[244] In re Winship, 397 U.S. 358.

[245] *Id.*

[246] *Id.* at 364.

[247] *Id.*

Lower courts struggle with the constitutional parameters of several procedural due process issues in citizenship cases, including the question of whether the Supreme Court's earlier use of the word "unequivocal" raised the standard of proof above "clear and convincing,"[248] whether Congress possesses the right to adopt a lower burden of proof, and when the burden of proof should switch from the government to the individual.[249] But if the Supreme Court were to directly analyze the constitutional basis of the burden and standard of proof in citizenship cases, it would very likely follow the same reasoning it applied in *Winship*, where the Court held that proof beyond a reasonable doubt was constitutional required in criminal cases. If so, it could clarify that procedural due process requires a heightened burden of proof in citizenship cases—perhaps even, as some Supreme Court justices wrote earlier, a burden that "approximates the burden demanded for conviction in criminal cases."[250]

2. Jury Trials or Equitable Defenses?

The Supreme Court has inconsistently analyzed the underlying nature of the citizenship claim. It has held that jury trials are not available in denaturalization proceedings because such actions are essentially equitable in nature, rather than legal—and the Seventh Amendment does not apply to actions in equity. In 1913, a defendant appealed his denaturalization by arguing that the trial court erred in refusing to grant him a jury trial on the facts underlying the government's suit against him.[251] The Supreme Court held that he was not entitled to a jury trial on his claim to set aside a denaturalization decree, as "the right asserted and the remedy sought were essentially equitable not legal," and that "[i]n this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention."[252] The same rule would presumably apply to declaratory judgments seeking recognition of citizenship.[253]

But the Court's analogy of the citizenship case to land or patent rights conflicts with later precedent giving heightened protection to citizenship rights and distinguishing

[248] *See supra* Part III.

[249] *Id.*

[250] Klapprott v. United States, 335 U.S. 601, 617-18 (1949) (Rutledge, J., concurring).

[251] Luria v. United States, 231 U.S. 9, 27 (1913).

[252] *Id.* at 27–28 (1913).

[253] Fed. R. Civ. P. 57; Note, *Right To Jury Trial In Declaratory Judgment Actions: A Narrowing Interpretation*, 59 YALE L.J. 168 (1949) ("Courts have long insisted that parties be given the same constitutional right to jury trial in declaratory actions as they have in non-declaratory proceedings.").

citizenship claims from other types of civil litigation.[254] And the country's founders certainly viewed jury trials as essential to protecting fundamental rights: after all, one of the grievances listed in the Declaration of Independence included the king's "depriving us in many cases, of the benefits of trial by jury."[255] Given the founders' emphasis on the jury as one of the fundamental protections of democracy, it would not be unreasonable for the Supreme Court to conclude that the Seventh Amendment's jury-trial right should extend to cases involving citizenship.[256] However, in spite of later defendants seeking to overturn the Court's decision denying the right to a jury trial, the Court has not yet done so, and lower courts have continued to deny jury trials in citizenship cases.[257]

At the same time as the Supreme Court relied on the equitable nature of citizenship cases to deny jury trial rights, however, the Court also held that individuals facing denaturalization cannot raise equitable defenses to the underlying charge (and so, for example, cannot invoke the equitable defense of laches when the government waits years or decades to challenge citizenship).[258] The Court stated that it was inappropriate for courts to "moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings."[259] Likewise, lower courts have held that the government will not be equitably estopped from challenging an individual's citizenship even after having previously granted the individual documents identifying the individual as a citizen.[260]

The Court did not specify whether its approach would apply to citizenship litigation more broadly or just to denaturalization proceedings, but both categories are similar in many respects. Both deal with the status of the individual: citizenship litigation more broadly asks whether the person is a citizen (by birth, by derivative attainment, or

[254] *See* Klapprott v. United States, 335 U.S. 601, 617 (1949) (Rutledge, J., concurring) (explaining that "ordinary civil procedures, such as apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences.").

[255] The Declaration of Independence para. 20 (U.S. 1776).

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

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

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

[259] *Id.*

[260] Lapides v. Watkins, 165 F.2d 1017 (2d Cir. 1948); Uyeno v. Acheson, 96 F. Supp. 510 (W.D. Wash. 1951).

by naturalization), and denaturalization proceedings examine whether an individual fraudulently or illegally obtained citizenship status. The proceedings in both types of cases are intended to settle the status of the individual, not to punish.[261] Furthermore, Congress is constitutionally empowered to set citizenship requirements in naturalization proceedings, and likewise has legislated requirements for derivative citizenship.

The Court's stated deference to Congress cannot logically support a complete avoidance of equitable remedies, however. Even though Congress is active in this arena, courts may still engage in judicial review of the constitutionality of its legislation. Just two years ago in *Session v. Morales-Santana*, the Supreme Court struck down a provision that made it easier for unwed citizen mothers to pass down citizenship to their children born abroad than it was for unwed citizen fathers.[262] The Court held that such a provision violated equal protection.[263] Thus, deference to Congress is not absolute, but must be subject to constitutional requirements. And equitable defenses, which date back to the development of cases in equity, are well established as part of the due process enshrined in equitable proceedings—they are part of the right to be heard.[264]

The Court is likely correct that citizenship litigation tends toward the equitable rather than the legal, and that distinction may be sufficient to deny the right to a jury trial.[265] Despite the fact that citizenship is wholly different from land rights or patent protection, litigation involving such rights carries some commonality—most notably the insufficiency of monetary damages to protect substantive rights. Monetary damages are not generally at issue, and in fact would be wholly insufficient to protect against the mistaken loss of citizenship rights. Although there may be some amount of money that an individual would accept in lieu of voting rights, or as compensation for a lost passport, the greater part of the injury is not to the individual—it is to the democratic system that is built on citizen participation. Even when a citizen makes the choice not to participate in an election, the ultimate result still possesses legitimacy because the result is the sum of the choices exercised by the citizens, including their choice about whether to participate

[261] *See* Trop v. Dulles, 356 U.S. 86, 101-02 (1958) (plurality op.) (concluding that using denationalization as punishment would violate the Eighth Amendment).

[262] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1687, 198 L. Ed. 2d 150 (2017) (explaining that under the statute "only one year of continuous physical presence is required before unwed mothers may pass citizenship to their children born abroad," whereas an unwed father was required to maintain five years of physical presence).

[263] *Id.* at 1701.

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

[265] *But see* Berman, *supra* note 256, at 888 (arguing for an expanded understanding of jury-trial rights).

or not. When citizens are denied the opportunity to exercise those rights, however, the end result loses legitimacy.

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

Raising a defense of estoppel, for example, protects society's interest in the finality of citizenship determinations in situations where the government has long recognized an individual's citizenship status. Once that person has engaged with the community and with the polity over time as a citizen, government action to strip that status creates a sense of insecurity that could dampen willingness to participate in the political life of the country. The equitable defense of laches plays a similar role in protecting the finality interest, and it also counters the risk acknowledged in *Afroyim* that political expediency may cause the government to scapegoat certain citizens. Recognizing an equitable defense of laches when the government has earlier sat on its rights to challenge citizenship protects against a new administration coming into power and targeting individuals or members of minority groups against sudden new scrutiny of status.

3. The Importance of Counsel

Appointing counsel for individuals subject to deportation or denaturalization orders would also go a long way toward protecting against unjust denial of citizenship rights. Is loss of citizenship—whether explicit or *de facto*—meaningfully different than the risk of incarceration noted in *Gideon v. Wainwright*?[266] *Gideon,* after all, was based in procedural due process, concluding that the rights protected by the provision of counsel outweighed the financial costs. The Supreme Court noted the revealed-preference for legal counsel, concluding that the facts "[t]hat government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries."[267] Again, if the judiciary truly explores the constitutional dimensions of citizenship, it may well find that the liberty interests inherent in citizenship are of equal weight to the liberty interests at issue when incarceration is threatened.

[266] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (stating that it is an "obvious truth" that "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

[267] *Id.*

Courts and scholars have explored the possible extension of *Gideon* to other civil contexts. One scholar suggested that there may be a due process right to counsel for unaccompanied migrant children.[268] Judges as well have acknowledged the importance of counsel to accurate decisionmaking: "As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel. Courts have neither the time nor the capacity to be both litigants and impartial judges on any issue of genuine complexity."[269]

The Supreme Court has so far declined to extend a right to counsel outside of cases where incarceration is threatened—that is, where there is a "potential loss of physical liberty."[270] States, however, have experimented with civil *Gideon* rights in cases involving fundamental rights, particularly those involving the parent-child relationship and the threatened termination of parental rights.[271] Family law cases may be well suited for a state version of civil *Gideon*, as the state courts are paramount in such scenarios. But questions of U.S. citizenship are inherently federal. It is true that civil *Gideon* is not likely to be a panacea in citizenship litigation.[272] Certainly, it is no panacea in the criminal sphere—high caseloads and limited funding impair access to criminal justice even when attorneys are provided.[273]

But other methods of rights-enforcement are similarly flawed. It is difficult, for example, for a wrongfully-removed citizen to later recover civil damages. Federal courts have held that such an action may lie when there is no probable cause for arresting and detaining a U.S. citizen.[274] In some cases, the evidence may be strong enough to support a subsequent civil case. In *Lyttle*, for example, the court left pending several civil causes of action, including *Bivens* claims[275] against various federal officials as well as "the Federal Tort Claims Act claims against the United States for false imprisonment, negligence, and intentional infliction of emotional distress."[276] But when the evidence of citizenship is

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

[269] Sweet, *supra* note 237, at 505.

[270] Suzanne A. Kim, *Transitional Equality*, 53 U. RICH. L. REV. 1149, 1195 (2019); *see* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33 (1981) (declining to extend a right to counsel in parental termination cases); Turner v. Rogers, 564 U.S. 431, 441 (2011) (declining to extend a right to counsel in child-support contempt cases).

[271] See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. & P. 245, 245 (2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39169.pdf.

[272] *See* Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1227-29, 1231-34 (2010) (predicting that appointed counsel in civil cases would be of limited utility given the prior poor funding efforts for civil justice).

[273] *Id.*

[274] Gray v. Weselmann, 274 F. Supp. 3d 81, 87 (D. Conn. 2017), *aff'd*, 737 F. App'x 30 (2d Cir. 2018).

[275] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

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

mixed, as it is in most cases, recovery is far less certain. One federal court, for example, held that the evidence of citizenship "[a]t best, . . . gave reason to further investigate plaintiff's residence at the time that his father naturalized in 1990."[277] One possibility is to put a higher affirmative duty on law enforcement officials to determine citizenship before deportation, which would, in turn, make it more likely that wrongfully deported individuals could successfully maintain an action under the Federal Tort Claims Act. Reconsidering what level of inquiry is reasonable under the circumstances can inform the probable cause determination—if greater inquiry is required, then probable cause to detain an individual may evaporate when evidence of citizenship can be easily obtained.[278] But this would require a multi-step process, first heightening expectations and then hoping that the financial incentives of civil litigation could better regulate conduct, an uncertain prospect at best.[279]

Appointing counsel, while still an imperfect protection, is nevertheless the most direct way to avoid some of the greatest miscarriages of justice.[280] Judge Pregerson on the Ninth Circuit recently wrote that he would find a due-process right to counsel in expedited removal proceedings, pointing out that the risk of "erroneous removal is . . . substantial for individuals who are incompetent due to mental illness or disability."[281] This risk extends both to citizens and non-citizens; certainly, mental illness played a large role in the deportation of citizen Mark Lyttle described above,[282] and there are other documented cases of citizens with mental illness being removed from the country in immigration proceedings.[283] Most American citizens cannot afford counsel, and the most vulnerable citizens are the least likely to be able to do so.[284] The Supreme Court previously

[277] *Id.*

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

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

[280] The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens, 15 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 567, 582 (2013) (arguing in favor of a civil *Gideon* in deportation cases).

[281] Renata Robertson, Note, United States v. Peralta-Sanchez, 847 F.3d 1124, 1145 (9th Cir.), *opinion withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), and on reh'g, 705 F. App'x 542 (9th Cir. 2017), *cert. denied sub nom.* Sanchez v. United States, 138 S. Ct. 702, 199 L. Ed. 2d 575 (2018).

[282] *See supra* Part III.

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

[284] Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 45 (2014) ("Conventional legal services are simply beyond the means of most Americans."); Cassandra Burke

stated that it was willing to accept a high cost to ensure that not "one natural born citizen of the United States should be permanently excluded from his country."[285] Without a right to appointed counsel in cases where citizenship is claimed, it will almost certainly be impossible to meet the Court's goal of protecting citizens against the threat of wrongful removal.

V. CONCLUSION

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

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

Protecting citizenship in these cases means re-thinking litigation procedures. Litigation over citizenship status is different from most civil litigation. It often requires factual determinations about events that happened many decades ago—meaning that the question of who bears the burden of proof becomes much more important. Individuals may have a strong reliance interest, especially in cases where the government recognized them as citizens for years or decades before challenging the validity of that citizenship. The liberty interests that arise in a citizenship proceeding may be just as important to the individual as those in a criminal case. Issues of citizenship, moreover, affect the national interest in a way that ordinary civil cases or criminal prosecutions do not. It is only by

Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 195 (2014) (noting the "large population of individuals who need, but cannot afford, legal services"); Soulmaz Taghavi, Montes-Lopez v. Holder: *Applying* Eldridge *to Ensure A Per Se Right to Counsel for Indigent Immigrants in Removal Proceedings*, 39 T. MARSHALL L. REV. 245, 252 (2014) ("[I]mmigrants, an extremely vulnerable population, often either cannot afford counsel or are shuffled through the system before they have a chance to find a lawyer.").

[285] Kwok Jan Fat v. White, 253 U.S. 454, 464 (1920).

protecting citizenship interests that constitutional democracy, which rests on the idea of political equality, can function. It is therefore incumbent on the judicial system to ensure that litigation procedures in citizenship cases offer protection commensurate with the interests at stake in those suits.