

Citizenship Secured

Aaron R. Petty and Timothy M. Belsan†*

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* Appellate Immigration Judge, U.S. Department of Justice; Adjunct Professor, University of Illinois College of Law; Senior Research Associate, Refugee Law Initiative, School of Advanced Study, University of London; B.A., Northwestern University; J.D., University of Michigan; M.St., University of Cambridge; Ph.D., Leiden University.

† Professorial Lecturer in Law, The George Washington University Law School; Former Director, Enforcement Section, Officer of Immigration Litigation, U.S. Department of Justice; B.A., Newman University; J.D. Washburn University. The views expressed herein are those of the authors alone and do not necessarily reflect those of the U.S. Department of Justice, the United States, or any other organization with which either author is affiliated.

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I. INTRODUCTION

Citizenship “is our oldest and most ubiquitous political category.”¹ Recently, in some corners of the globe, it has been contested in novel and extreme ways.² India, for example, struck nearly two million Bengalis from the National Register of Citizens after they failed to prove residence or descent from someone resident in India prior to 1971.³ The Indian government presumes these individuals to be unlawful migrants from Bangladesh, and they may now be functionally stateless.⁴ Kuwait and Saudi Arabia recently announced that they were working to revoke the citizenship of individuals who publicly voice opinions supportive of Israel.⁵

In a series of three articles, Cassandra Burke Robertson and Irina D. Manta suggest that the United States is not far off this path.⁶ In order to counter what they perceive—incorrectly—to be the product of political expediency,⁷ and the possibility that the legality of denaturalization is harmful to democratic participation,⁸ Robertson and Manta propose several changes: that courts should deem revocation of citizenship constitutionally impermissible under both the substantive and procedural aspects of the Due

¹ ELIZABETH F. COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS 9 (2009) [hereinafter COHEN, SEMI-CITIZENSHIP].

² Samir Nazareth, *From India to the US, a Citizenship Crisis Is Burning Across the World*, S. CHINA MORNING POST (Jan. 11, 2020, 11:30 AM), <https://perma.cc/6RAB-J5LC>.

³ Atul Dev, *India Is Testing the Bounds of Citizenship*, ATLANTIC (Aug. 31, 2019), <https://perma.cc/4JKM-T4X4>.

⁴ *Id.*

⁵ Edy Cohen, *Denial of Citizenship as a Weapon of Repression in the Arab World*, BEGIN-SADAT CTR. FOR STRATEGIC STUD. (Jan. 23, 2020), <https://perma.cc/43AK-9WYL>.

⁶ See generally Cassandra Burke Robertson & Irina D. Manta, *Inalienable Citizenship*, 99 N.C. L. REV. 1425 (2021); Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757 (2020); Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402 (2019).

⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1427–28; Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 409–14, 461 (specifically suggesting that Operation Janus is the product of political expediency). We previously explained the origins—and limits—of Operation Janus, rebutting the political expediency theory. See generally Timothy M. Belsan & Aaron R. Petty, *Civil Revocation of Naturalization: Myths & Misunderstandings*, 56 CAL. W. L. REV. 1 (2019).

⁸ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 405 (“even if the program results in only a few hundred additional proceedings, it still creates a culture of fear that permeates through the community of immigrants and naturalized citizens”).

Process Clause,⁹ that various heightened standards should apply when questions of citizenship are contested in litigation,¹⁰ and that, once documentation of citizenship is provided to an individual, substantive challenges to the citizenship so documented—e.g., the circumstances of birth or eligibility for naturalization—should be prohibited entirely, or at least severely limited.¹¹

From a descriptive standpoint, Robertson and Manta’s trilogy is an important contribution. It makes a sizeable amount of history accessible, it covers much of the relevant Supreme Court case law over the past century, and it adds some heft and clarity to the largely superficial discussion about denaturalization that has been taking place in the media.¹² It also, quite appropriately, takes the Supreme Court to task for never having fleshed out, or even really having made an attempt at establishing, a coherent theory of citizenship, despite a wealth of scholarship exploring various concepts of “belonging” from legal, psychological, sociological, and other perspectives. These are all worthwhile objectives, and the authors handle them well.

The specific proposals for legislative and judicial change, however, face both doctrinal and theoretical difficulties. They are also beset by an unfortunate number of basic factual errors, which undermine (and sometimes contradict) their legal analysis and ultimately overwhelm the contribution as a whole.¹³ Most significantly, the authors muddle the difference between expatriation (also called *denationalization*¹⁴) and denaturalization to an

⁹ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 462–64.

¹⁰ Robertson & Manta, *Litigating Citizenship*, *supra* note 6, at 799–809.

¹¹ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1473–74.

¹² Belsan & Petty, *supra* note 7. See, e.g., *infra* note 163 (collecting media reports). For more on the history of denaturalization, see WEIL, *infra* note 54; AMANDA FROST, YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS (2021).

¹³ We agree that this subject area may be “difficult to research”—see Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1445—but this does not adequately explain the prevalence of factual errors. Denaturalization cases, like all immigration-related cases in federal court, are subject to a limitation on remote electronic access to court records because they routinely contain significant amounts of personal information such as Social Security numbers, tax returns, and medical information, see FED. R. CIV. P. 5.2(c). These records remain available for public inspection in person. *Id.* This differs from sealed records, which are not publicly available at all. See ROBERT TIMOTHY REAGAN, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 2 (2010), <https://perma.cc/E8B5-NE9C>.

¹⁴ Lack of terminological precision, which may be due in part to differing national laws on the ways in which citizenship may cease to exist, is endemic in the literature. Matthew Gibney, for example, expressly uses denaturalization and expatriation interchangeably. Matthew J. Gibney, ‘A Very Transcendental Power’: *Denaturalisation and the Liberalisation of Citizenship in the United Kingdom*, 61 POL. STUD. 637, 637 n.2 (2013) [hereinafter Gibney, *Transcendental Power*]; see also Matthew J. Gibney, *Denationalisation and Discrimination*, 46 J. ETHNIC & MIGRATION STUD. 2251, 2552 (2020) (equating “revocation”—a term used in the United States to refer to denaturalization—as a type of involuntary expatriation); Craig Forcese, *A Tale of Two Citizenships: Citizenship Revocation for “Traitors” and “Terrorists”*, 39 QUEEN’S L.J. 551, 563 (2014) (conflating denaturalization with expatriation under U.S. law); SELYA BENHABIB, THE RIGHTS OF OTHERS:

alarming degree. Constitutionally speaking, the difference between the two could not be greater.¹⁵ But rather than acknowledge the difference and engage on this issue, the authors bury it, without explaining how the clear unconstitutionality of the former supports their novel theory of the unconstitutionality of the latter. The discussion of several recent denaturalization cases betrays a substantial lack of familiarity with the very procedures the authors contend are unconstitutional, and unfamiliarity with immigration litigation generally undercuts some of their suggestions for alternative enforcement models. At base, it is difficult to understand how there is a substantive due process right to keep *anything*—including citizenship—that was fraudulently acquired, and Robertson and Manta make only a minimal attempt to tie their approach to the Supreme Court’s existing jurisprudence on recognition of substantive due process rights. Ultimately, the authors’ concerns seem to be more grounded in their unease with some (but not all)¹⁶ exercises of prosecutorial discretion¹⁷ and their sense that

ALIENS, RESIDENTS AND CITIZENS 50, 54, 68, 71, 134 (2004) (using “denaturalization” to refer to loss of citizenship generally, and especially expatriation in inter-war Europe); *but see* Audrey Macklin, *A Brief History of the Brief History of Citizenship Revocation in Canada*, 44 MAN. L.J. 425, 427 (2021) [hereinafter Macklin, *A Brief History*] (noting that denaturalization is “limited to the revocation of citizenship acquired through immigration and subsequent naturalization” but treating it as a subcategory of denationalization). For ease of reference, this Article will use the term “expatriation” only when referring to the extinguishment of lawfully existing citizenship (and will differentiate between voluntary and involuntary expatriation as necessary).

¹⁵ See *infra* Part II.B.1; see also Macklin, *A Brief History*, *supra* note 14, at 451 n.65 (“the U.S. Constitution effectively precludes citizenship stripping”).

¹⁶ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 407 (noting use against Nazis), 453 (noting that the denaturalization of war criminals “did little to disrupt an overall sense of citizenship security” and the American “ethos of ‘Never Again’ meant that it included no room for those who supported the atrocities perpetrated by the Nazi regime”); Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1428 (noting its “most notable use was as a mechanism to bring escaped Nazi war criminals to justice”).

¹⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6. For more on the role of prosecutorial discretion in removal proceedings, see generally Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INST. L.J. 243 (2010). To be clear, we take no issue with debate related to whether it is wise *policy* to use limited government resources to pursue specific individual denaturalization cases, categories of cases, or denaturalization cases altogether. Indeed, we believe further study would likely assist policymakers in that regard. See *infra* Part IV.B (calling for further empirical study on the attitudes of naturalized citizens toward the small minority who fraudulently naturalize). But the wisdom of undertaking particular cases or types of cases are policy decisions, not legal questions, and the temptation to call for reinterpretation of well-settled law as an answer to disagreement with passing policy choices is a dangerous game best avoided. *Kimble v. Marvel Entm’t*, 576 U.S. 446, 455 (2015) (describing *stare decisis* as a “foundation stone of the rule of law”); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (*stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”).

“citizenship security”¹⁸ may be diminished by the recent increase in filings, despite that increase largely being tied to a closed set of potential cases.¹⁹

Our approach follows three lines of inquiry informed by, though not identical to, the main points in each of Robertson and Manta’s articles, each of which is impaired by what we see as a fatal category error (among more minor factual errors, which we address along the way). In Part I, we suggest that lawfully obtained citizenship is not what some have described as a “liminal” immigration status.²⁰ Citizenship, whether acquired at birth or through lawfully completing the naturalization process, is citizenship full stop, and both are equivalent in all respects apart from the constitutional limitations on eligibility to hold high offices.²¹ No citizen, whether natural-born or naturalized, may be expatriated involuntarily. Yet, expatriation forms the core of Robertson and Manta’s novel suggestion that denaturalization—rescission of naturalization acquired unlawfully—is impermissible as a matter of due process. Conflation of the two appears to be what leads to the authors’ rather anomalous proposition that there can be no process that is constitutionally adequate to take away citizenship unlawfully or fraudulently acquired.²²

¹⁸ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1429 (suggesting, without support, that denaturalization produces a “profound chilling effect”); Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 453 (“The few denaturalizations of alleged Nazi concentration-camp guards and other war criminals during the fifty years between 1967 and 2017 did little to disrupt an overall sense of citizenship security.”).

¹⁹ OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-16-130, POTENTIALLY INELIGIBLE INDIVIDUALS HAVE BEEN GRANTED U.S. CITIZENSHIP BECAUSE OF INCOMPLETE FINGERPRINT RECORDS 4 (2016), <https://perma.cc/7HU7-H4SD> [hereinafter OFF. OF INSPECTOR GEN.] (“Because fingerprints are no longer taken on paper cards, this number will not grow.”).

²⁰ Rose Cuison Villazor, *Interstitial Citizenship*, 85 *FORDHAM L. REV.* 1673, 1677 (2017) (suggesting noncitizen nationals of the United States hold a “liminal” form of membership); *see also* Antje Ellermann, *Discrimination in Migration and Citizenship*, 46 *J. ETHNIC & MIGRATION STUD.* 2463, 2464 (2020) (“whereas legal precarity has long been associated with undocumented and temporary immigration status, over the past two decades precarity has penetrated all immigration status, including those that have long been understood as secure and ‘permanently permanent.’”).

²¹ It is commonly stated that citizenship under both methods is constitutionally equivalent except for eligibility to be President. *Luria v. United States*, 231 U.S. 9, 22 (1913) (“Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.”). There are, however, three other constitutional disabilities on naturalized citizens—two impose temporary disabilities on qualification to serve in Congress: a naturalized citizen must have held such status for seven years to serve in the House of Representatives and nine to serve in the Senate. *See Knauer v. United States*, 328 U.S. 654, 658 n.3 (1946) (citing U.S. CONST. art. I, §§ 2–3). The Twelfth Amendment extends the prohibition on eligibility to be President to the Vice President as well. U.S. CONST. amend. XII (“no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

²² “Almost all recent writing on the formal rules governing citizenship . . . has concentrated on citizenship’s acquisition rather than its withdrawal.” Gibney, *Transcendental Power*, *supra* note 14, at 639; *see also* Christian Barry & Luara Ferracioli, *Can Withdrawing Citizenship Be Justified*, 64 *POL. STUD.* 1055, 1055 (2015) (noting that political philosophers have paid “considerable attention” to the question of when citizenship can be granted, but have “generally neglected” when it can be withdrawn). Of the small literature discussing revocation, it has generally been with regard to expatriation, particularly in relation to terrorism. Émilien Fargues, *Simply a Matter of*

In Part II, we address the perceived need for additional procedural protections that are available with respect to litigation implicating citizenship status indirectly. This theme cuts across all three articles, but the predominant flaw is that Robertson and Manta erroneously equate the existence (or denial) of a document evidencing citizenship as the equivalent of citizenship (or denial of citizenship) itself. This is mistaken in both directions: neither is a U.S. birth certificate itself U.S. citizenship, nor is the denial of a U.S. passport the denial of U.S. citizenship. Because this type of litigation does not change one's citizenship status, but rather establishes historic facts which may have attendant legal consequences, proposals in favor of additional finality, such as a statute of limitations or applicability of laches, are neither necessary nor warranted. Moreover, while Congress certainly could create a limitations period for civil denaturalization, doing so would be extremely unwise. Most importantly, it would dramatically impede the government's ability to rescind the naturalization of war criminals and other human rights abusers—the central focus of civil denaturalization for the past fifty years, one that Robertson and Manta appear to condone, and its most enduring long-term function.

In Part III, we expand our lens to place denaturalization in the context of citizenship theory more broadly and suggest that attempting to establish irrevocability—or any other criterion—as a necessary element of citizenship is an ultimately futile enterprise. Even leaving aside social connotations, citizenship is invariably a variegated concept that is not susceptible to essentialist definitions. We instead propose, consistent with the description of citizenship as a bundle of rights, that the obvious difference between natural-born and naturalized citizens' susceptibility to denaturalization would be more

Compliance With the Rules? The Moralising and Responsibilising Function of Fraud-Based Citizenship Deprivation in France and the UK, 23 *CITIZENSHIP STUD.* 356, 357 (2019). Even revocation on the basis of being a “foreign fighter” or suspected terrorist aroused little public debate or protest in Europe, where such nationality laws were passed between 2014 and 2019 in Austria, Belgium, the Netherlands, Italy, Germany, and Denmark. Rutger Birnie & Rainer Bauböck, *Introduction: Expulsion and Citizenship in the 21st Century*, 24 *CITIZENSHIP STUD.* 265, 270 (2020). With few exceptions, revocation of citizenship based on fraud in its procurement has been of little concern. See *Johanessen v. United States*, 225 U.S. 227, 241 (1912) (“[a]n alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practised upon the court, without which the certificate of citizenship could not and would not have been issued.”); Fargues, *supra* note 22, at 357; KAMAL SADIQ, *PAPER CITIZENS HOW ILLEGAL IMMIGRANTS ACQUIRE CITIZENSHIP IN DEVELOPING COUNTRIES* 102 (2009) (“scholars have paid insufficient attention to—actually not even entertained the possibility of—fraudulent documents giving illegal immigrants access to citizenship”). Of the few authors to discuss it, fraud-based revocation is typically presented as a “rather uncontroversial mode of involuntary loss of citizenship” to “guarantee the consistency of the naturalization process against applicants who do not respect the rules.” *Id.*; Matthew J. Gibney, *Denationalization*, in *THE OXFORD HANDBOOK OF CITIZENSHIP* 363 (Ayelet Shahar et al. eds., 2017) [hereinafter Gibney, *Denationalization*]; Rainer Baübock & Vesco Paskalev, *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*, 30 *GEO. IMMIGR. L.J.* 47, 79 (2015) (“if the fraud is not trivial, then there is an obvious justification for the deprivation.”); Shai Lavi, *Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach*, 61 *UNIV. TORONTO L.J.* 783, 789 (2011). Even Patti Tamara Lenard, who argues against denaturalization from a philosophical (rather than legal) perspective, concedes that it is sometimes justified. See generally Patti Tamara Lenard, *Constraining Denaturalization*, 64 *POL. STUD.* 1055 (2020).

productively characterized as an instance of “interstitial citizenship,” as described by Rose Cuison Villazor.²³ The absence of complete finality—for those who naturalized unlawfully—does not mean naturalized citizenship is not citizenship or is a lesser form of it.

We conclude by suggesting that fraud in the procurement of naturalization is inherently inconsistent with U.S. citizenship, not merely because it is disallowed, but because it is antithetical to the foundation of a common American identity: a commitment to the rule of law.

II. LAWFUL NATURALIZATION IS NOT A LIMINAL STATUS

There has been increased interest recently in the “liminal” status of immigrants—that is, the “temporally and socially uncertain transitional state of partial belonging.”²⁴ Robertson and Manta suggest, indirectly, that the existence of the possibility of civil denaturalization renders citizenship acquired through naturalization one such liminal status because what was previously assumed to be a permanent status is now less so.²⁵

A. Denaturalization vs. Expatriation

At the outset, it may be helpful to set the U.S. approach to denaturalization in its international context. Generally speaking, states have substantial discretion to determine who is or may become a national or citizen.²⁶ As Hiroshi Motomura observes, “[t]he United States is, by law and tradition, more open to naturalization than many other countries are.”²⁷ The barriers to naturalization are generally lower than elsewhere, and naturalization is “comparatively unremarkable and even routine” in part because, unlike many other countries, acquiring U.S. citizenship is “unburdened by deep issues of

²³ Villazor, *Interstitial Citizenship*, *supra* note 20, at 1677.

²⁴ Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. L. REV. 709, 710 (2015); *see also* DAVID A. MERTIN, MIGRATION POLICY INSTITUTE, TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION (2005).

²⁵ *See, e.g.*, Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1443.

²⁶ Forcese, *supra* note 14, at 560.

²⁷ HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 145 (2006).

ethnocultural identity.”²⁸ As noted previously, the United States has welcomed about half a million new citizens annually for the past several years.²⁹

Given that naturalization in the United States is comparatively simple and easy, one might be justified in assuming that it is simple and easy to take away as well. Not so. Despite being relatively straightforward and routine, citizenship acquired through naturalization in the United States is also comparatively secure relative to citizenship acquired the same way in other developed democracies. Statelessness is generally disfavored,³⁰ but all states, even those states that have ratified the UN Convention on the Reduction of Statelessness—and the United States has not—may revoke naturalization for fraud in its procurement.³¹ Denaturalization is permitted under international law on a variety of grounds in addition to fraud, limited in those states that have ratified the Convention only by the possibility of statelessness.³²

Outside of the United States, denaturalization based on prohibited post-naturalization conduct is generally permitted. “Within Europe alone, twenty-two states permit denaturalization for behaviour believed to be prejudicial to the state (or for a variant on that concept, such as unauthorized service in a foreign military).”³³ France permits denaturalization for acts detrimental to the interests of France if committed within ten years of naturalization (or 15 if the detrimental act is terrorism).³⁴ Several Commonwealth countries go further, permitting denaturalization based solely on executive discretion.³⁵

²⁸ *Id.* at 145–46; see also D. Carolina Núñez, *Mapping Citizenship: Status, Membership, and the Path in Between*, 2016 UTAH L. REV. 477, 505 (2016) [hereinafter Núñez, *Mapping*]; PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 34 (2008); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 163 (1998) (“United States citizenship—relative to most other countries and to earlier periods in American history—is notably easy to obtain [and] difficult to lose”). The liberalization of naturalization is not limited to the United States; it is seen in many liberal democracies. See Fargues, *supra* note 22, at 357 (noting “the process of acquisition is less demanding for individuals wishing to join the national community” in Europe now than it has been historically).

²⁹ Belsan & Petty, *supra* note 7, at 21 n.103 (providing support that, despite the COVID-19 pandemic, preliminary data suggests the United States will again welcome at least 500,000 new citizens during Fiscal year 2020—i.e., October 1, 2019 through September 30, 2020); see also USCIS, *Naturalization Statistics*, <https://perma.cc/5H4Z-9BQ6> (last visited Aug. 25, 2022) (noting USCIS welcomed 625,400 new citizens during Fiscal Year 2020).

³⁰ United Nations Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

³¹ Forcese, *supra* note 14, at 560–61 (citing United Nations Convention on the Reduction of Statelessness, *supra* note 30).

³² *Id.*

³³ *Id.* at 561. In addition to post-naturalization conduct, “fraud has been a key concern of the British and French governments in citizenship and migration policies in recent years . . .” Fargues, *supra* note 22, at 358.

³⁴ Forcese, *supra* note 14, at 562.

³⁵ *Id.* Canada permitted revocation of citizenship on national security grounds between 2014 and 2017, but then reverted to its earlier position. Macklin, *A Brief History*, *supra* note 14, at 426–29. Canada’s position is very similar to that of the United States, which permits revocation of citizenship only “for naturalization obtained by fraud or misrepresentation of a material fact” where the “misconduct would necessarily have occurred prior to citizenship acquisition.” *Id.* at 429.

Citizens of the United Kingdom may be denaturalized for whatever reasons the Home Secretary deems good and sufficient, i.e., “conducive to the public good.”³⁶ Legislation in Australia and New Zealand is similarly broad.³⁷ The United Kingdom’s power of denaturalization in particular is notable for having been exercised nearly 400 times in the past 15 years alone—a number made possible by a law that permits *ex parte* procedures, secret appeals, and limited rights to challenge the government.³⁸

Loss of citizenship in the United States is close to the polar opposite. There are two ways for a U.S. citizen to lose their citizenship. One is expatriation.³⁹ Any citizen—natural born or naturalized—may expatriate. The use of the active voice here is intentional. As noted previously, involuntary expatriation is prohibited, having been declared unconstitutional by the Supreme Court in *Afroyim v. Rusk* in 1967.⁴⁰ But voluntarily relinquishing U.S. citizenship is permitted.⁴¹

³⁶ Forcese, *supra* note 14, at 562; Immigration, Asylum and Nationality Act 2006, c. 13, § 56 (UK).

³⁷ Forcese, *supra* note 14, at 562 (Australia, in particular, permits denaturalization where “it would be contrary to the public interest for the person to remain an Australian citizen”).

³⁸ Birnie & Bauböck, *supra* note 22, at 270 (noting that the UK is Europe’s “most eager citizenship stripper”); Patrick Weil & Nicholas Handler, *Revocation of Citizenship and Rule of Law: How Judicial Review Defeated Britain’s First Denaturalization Regime*, 36 L. & HIST. REV. 295 (2018); Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 QUEEN’S L.J. 1, 17 (2014) (noting that all but one recent revocation on grounds of national security were done while the subject was abroad); Gibney, *Denationalization*, *supra* note 22, at 373 (noting that in the UK and Australia denationalization is an administrative act with few procedural protections). Patrick Weil further notes that “[b]etween 2006 and 2015, the Home Secretary revoked the nationality of at least 53 Britons as part of a program targeting British citizens allegedly linked to militant or terrorist groups.” Patrick Weil, *Denaturalization and Denationalization in Comparison (France, the United Kingdom, the United States)*, 43 PHIL. & SOC. CRITICISM 417, 418 (2017) [hereinafter Weil, *Denaturalization*]. See generally Tufyal Choudhury, *The Radicalisation of Citizenship Deprivation*, 37 CRITICAL SOC. POL’Y 225 (2017).

³⁹ 8 U.S.C. § 1481. Voluntary expatriation is a relatively novel phenomenon. Historically, “‘alienation of allegiance’ – that is the renunciation of one’s nationality (known today as expatriation) – was unknown, unrecognized, or illegal in most of Europe, especially in Britain.” CHRISTOPHER A. CASEY, NATIONALS ABROAD: GLOBALIZATION, INDIVIDUAL RIGHTS AND THE MAKING OF MODERN INTERNATIONAL LAW 18 (2020); see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357–58 (facsimile ed. 1765, 1979). Thus, even after naturalizing as U.S. citizens, the UK persisted in treating Fenians as British subjects, capable of committing treason against the Crown and not entitled to U.S. consular assistance. See generally LUCY E. SALYER, UNDER THE STARRY FLAG: HOW A BAND OF IRISH AMERICANS JOINED THE FENIAN REVOLT AND SPARKED A CRISIS OVER CITIZENSHIP (2018). The United States, whose entire existence depends on recognition of voluntary association, is somewhat of a historical outlier in this respect. See, e.g., Letter from James Madison to Mr. Murray (June 16, 1803), in 3 A DIGEST OF INTERNATIONAL LAW 735 (John Bassett Moore ed., 1906) (“There can be no doubt that, on the same principle which admits of aliens being naturalized in the United States, they may afterwards cast off the character of American citizen . . .”).

⁴⁰ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

⁴¹ 8 U.S.C. § 1481 ; 7 FAM 1200 *et seq.* The popularity of renouncing U.S. citizenship has been increasing in recent years, a trend that some have attributed to the United States’ status (alongside Eritrea) as one of only two countries in the world that tax their citizens’ income worldwide. See Jo Craven McGinty, *More Americans Are Renouncing Their Citizenship*, WALL ST.

The only way a U.S. citizen may involuntarily lose their citizenship is by denaturalization.⁴² Unlike in the U.K., denaturalization in the United States requires a public judicial (not secret administrative) process,⁴³ is limited to ineligibility in the procurement of naturalization (including, but not limited to, fraud),⁴⁴ and therefore cannot be based on conduct that post-dates the acquisition of citizenship.⁴⁵ Only naturalized U.S. citizens, however, can be denaturalized; citizens who acquire citizenship at birth do not naturalize and are thus incapable of failing to fulfill statutory requirements for naturalization.⁴⁶ This difference forms the core of Robertson and Manta's constitutional objections.

B. Substantive Due Process Objections

We begin with two points of agreement: first, no citizen can be involuntarily stripped of citizenship. Second, the Constitution does not condone classes of citizenship.⁴⁷ The existence of denaturalization (whether civil or criminal) implicates neither. The Supreme Court's approval of denaturalization, which Robertson and Manta characterize as "a loophole, found only in a footnote,"⁴⁸ reflects not just a statutory and constitutional

J. (Oct. 17, 2020, 5:30 AM), <https://perma.cc/ZS8Y-5WTE>; see also *Americans Continue Giving Up Citizenship at Record Levels*, BAMBRIDGE ACCTS., <https://perma.cc/2KAS-DKJF> (last visited Aug. 25, 2022).

⁴² What evidence is sufficient to establish *voluntary* relinquishment is a long-standing question. See T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471 (1984). More recently, this issue was debated with respect to the Terrorist Expatriation Act of 2010. S. 3327, 111th Cong. Support and concern were voiced by both Democrats and Republicans, who did not align neatly along partisan lines. Notably, Speaker Nancy Pelosi supported the "spirit" of the legislation and then-Secretary of State Hillary Clinton suggested that "People who are serving foreign powers – or in this case, foreign terrorists – are clearly in violation . . . of the oath which they swore when they became citizens." Former House Speaker John Boehner expressed opposition. See Charlie Savage & Carl Hulse, *Bill Targets Citizenship of Terrorists' Allies*, N.Y. TIMES, May 7, 2010.

⁴³ *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000) (en banc).

⁴⁴ 8 U.S.C. § 1451(a).

⁴⁵ See *infra* note 124 and accompanying text; see also *infra* Part II.B.2 (noting that denaturalization under military-specific provisions has not been tested post-*Afroyim*).

⁴⁶ *United States v. Kairys*, 782 F.2d 1374, 1383 (7th Cir. 1986) ("the difference in treatment is due to the inherent differences in the two types of citizenship; for natives there are no pre-citizenship acts to prescribe").

⁴⁷ See *infra* note 124 and accompanying text.

⁴⁸ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1428; see also *id.*, at 1438. Amanda Frost has similarly characterized denaturalization for fraud or illegality as a "tiny loophole" in a footnote. Gabriel Chin, *The Supreme Court's Role in Defining American Citizenship*, SCOTUSBLOG (Jan. 27, 2021, 10:23 AM), <https://perma.cc/E94J-5868>; see also Hannah Allam & Razzan Naklawi, *He Pleaded Guilty in a Terrorism Case and Did His Time. Now the Government Wants to Strip Him of His American Citizenship*, WASH. POST (Dec. 18, 2021, 9:09 AM) <https://perma.cc/9QVG-YKPS>.

difference, but also a deep conceptual divide.⁴⁹ Denaturalization is not a form of impermissible involuntary expatriation, the existence of denaturalization does not render naturalized citizenship second-class, and—though it should not need to be said—there is no substantive due process right to retain the proceeds of fraud.

1. Denaturalization Is Not Involuntary Expatriation

Unlike expatriation, which extinguishes lawful citizenship, denaturalization does not act upon the *status* of being a citizen, but rather upon the naturalization *process*—the acquisition of citizenship.⁵⁰ Either the citizen was never legally eligible to become a citizen in the first place (for example, by committing fraud in the course of obtaining a visa or permanent residency or committing a crime that, by law, conclusively establishes a lack of good moral character), or procured the naturalization through some form of fraud in the naturalization proceeding itself.⁵¹ Denaturalization, therefore, is a judgment that the citizenship that was documented in fact never existed in law—it was void *ab initio*⁵² in the same way that a contract can be rescinded or a marriage annulled where one party withholds material information from the other, or where a legal impediment (e.g., lack of consideration or mutual mistake of fact in the case of a contract; consanguinity or existing marriage in the case of marriage) prevents judicial recognition of the legality of the putative transaction or change of status.⁵³ As Matthew Gibney explains:

All states have rules enabling them to revoke the citizenship of the naturalized if it is proven that their citizenship was fraudulently acquired or otherwise attained through deception.

⁴⁹ Political philosopher Patti Tamara Lenard has examined denaturalization and expatriation separately, but the literature on revocation of citizenship small, and there are few in-depth treatments of the difference between the two procedures. Compare Lenard, *Constraining Denaturalization*, *supra* note 22 with Patti Tamara Lenard, *Democracies and the Power to Revoke Citizenship*, 30 ETHICS & INT'L AFFAIRS 73 (2016) (addressing expatriation). See also Patti Tamara Lenard, *Democratic Citizenship and Denationalization*, 112 AM. POL. SCI. REV. 99, 103 n.10 (2018) (noting that the propriety of revoking citizenship acquired by fraud demands a different analysis from expatriation generally).

⁵⁰ *Kairys*, 782 F.2d at 1383 (“Congress has the power to regulate the naturalization process”).

⁵¹ 8 U.S.C. § 1451(a); see Belsan & Petty, *supra* note 7, at 27–30 (explaining these two causes of action in detail).

⁵² 8 U.S.C. § 1451(a) (providing that revocation of naturalization and cancellation of the certificate “shall be effective as of the original date of the order and certificate, respectively”); *United States v. Rebelo*, 646 F. Supp. 2d 682, 690 (D.N.J. 2009), *aff'd*, 394 F. App'x 850 (3d Cir. 2010) (“Denaturalization, if granted, renders the naturalization void *ab initio*.”).

⁵³ Lavi, *supra* note 22, at 789 (suggesting that revocation of citizenship fraudulently acquired “may better be thought of as citizenship annulment” and, in the Canadian context, should remain an administrative procedure); see also Liav Orgad, *Naturalization*, in THE OXFORD HANDBOOK OF CITIZENSHIP 337, 339–41 (Ayelet Shahar et al. eds., 2017); Kerry Abrams, *Citizen Spouse*, 101 CAL. L. REV. 407 (2013) (carrying forward the citizenship-as-marriage analogy); see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 13 (AM. L. INST. 2011) (noting rescission based on “fraud in the factum” renders a putative transaction void and not merely voidable). For further discussion of immigration (though not specifically naturalization) as contract, see generally MOTOMURA, *supra* note 27.

Such laws have often been considered as analogous to the invalidation of other legal statuses or contracts (like patent or marriage certificates) granted under fraudulent circumstances. In this case, it is typically reasoned that the citizenship or nationality never lawfully existed in the first place and thus may be cancelled *ab initio*.⁵⁴

Robertson and Manta suggest that there may be a property interest in citizenship⁵⁵—noting that citizenship may be conceptualized as a complex type of property—protectable under the due process clause.⁵⁶ Property has long been analogized to a “bundle of rights”⁵⁷ or “a bundle of privileges, powers, and immunities.”⁵⁸ The comparison between citizenship and property dates to at least the 1950s, if not earlier.⁵⁹ Ayelet Shachar has suggested that birthright citizenship, in particular, is a form of property because it is inheritable and its transmission shares some features with entailed real property.⁶⁰ Similarly,

⁵⁴ Gibney, *Denationalization*, *supra* note 22, at 363 (emphasis in original); *see also* Birnie & Bauböck, *supra* note 22, at 270 (“nearly all nationality laws have provisions for the annulment of naturalization if citizenship has been acquired by fraud”); PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 56 (2013) (“Today all democracies provide for the possibility of voiding a citizenship recently granted if a naturalized person is found to have lied about a criminal record prior to accession to citizenship.”).

⁵⁵ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1458, 1462–63, 1473–74.

⁵⁶ *Id.* at 1463 n.251 (citing AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009)).

⁵⁷ Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 659 n.79 (2013) (citing Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746 (1917) (“Property law has long recognized that property is a ‘bundle of rights.’”)).

⁵⁸ Forcese, *supra* note 14, at 555 (quoting Lavi, *supra* note 22) (noting that citizenship consists of “a bundle of privileges, powers, and immunities”); *see* Villazor, *Interstitial Citizenship*, *supra* note 20, at 1679 n.26 (collecting authority). The “bundle of rights” language, generally associated with property or equivalent analogies, has also been expressly applied to citizenship. *See* COHEN, *SEMI-CITIZENSHIP*, *supra* note 1, at 6 (“[c]itizens have access to an intertwining set or ‘braid’ of fundamental civil, political, and social rights, along with rights of nationality.”); Ayelet Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 POL. THEORY 253 (2007); Núñez, *Mapping*, *supra* note 28, at 484 (noting a “suite of rights and privileges”); Saskia Sassen, *The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics*, in *DISPLACEMENT, ASYLUM, MIGRATION* 176, 177, 203 (Kate E. Tunstall ed., 2006) (noting “the formal bundle of rights at the heart of the institution [of citizenship]”).

⁵⁹ Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1180–81 n.89 (1955); *see also* Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 604 (1999) (reviewing ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)); Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT’L L. 279, 292 (1994). As early as 1909, Attorney General George Wickersham noted that denaturalization proceedings may disturb “personal and property rights.” Department Circular Letter No. 107 from George W. Wickersham, Att’y Gen., to the Dep’t of Just. (Sept. 20, 1909) (on file with author) [hereinafter Wickersham letter].

⁶⁰ Ayelet Shachar, *The Worth of Citizenship in an Unequal World*, 8 THEORETICAL INQUIRIES L. 367, 368–69 (2007). Shachar’s argument understands “birthright” as encompassing citizenship acquired at birth both through the place of birth and parentage. *Id.* at 369. The analogy to fee tail is helpful, but imperfect. Children or grandchildren of immigrants may acquire citizenship *jus soli* in addition to or instead of acquiring the citizenship of their parents *jus sanguinis*. *See* Patrick

English courts have treated ranks of nobility as an “incorporeal hereditament,”⁶¹ a category that also includes property-like rights such as rents and easements.⁶²

To continue with the analogy, naturalization is not property itself, but a property transaction, i.e., a contract for the transfer of property.⁶³ Naturalization, after all, confers a bundle of rights upon the new citizen. However, whereas expatriation extinguishes the property rights of an owner “lawfully in possession,” denaturalization unwinds the transaction that granted it.⁶⁴ As with rescission generally, denaturalization operates based on a defect in the transaction.⁶⁵

Naturalization is not affiliation with a state on what amounts to a quitclaim deed—the United States does not accept all comers, whomever they might be, on an as-is basis. Congress, exercising its exclusive constitutional authority to provide a Uniform Rule of Naturalization,⁶⁶ has set conditions.⁶⁷ And, like the conveyance of property on a warranty deed, when the warranted conditions are not satisfied (or when their absence has been concealed by fraud)

Weil, *From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalized World*, 9 INT’L J. CONST. L. 615, 623–24 (2011) [hereinafter Weil, *From Conditional to Secured*]. Additionally, some states, including the United States, limit the *jus sanguinis* transmission of citizenship to children born to parents who lack a sufficient connection to the country, normally by failing to meet residence requirements. See, e.g., 8 U.S.C. § 1401(c), (g). Weil goes further, suggesting that citizenship is unlike property in that it can be transmitted without depletion because the birth of a child does not remove the parent’s citizenship. Weil, *From Conditional to Secured*, *supra* note 60, at 624. But citizenship, being incorporeal, need not obey Lavoisier’s law of conservation of mass. It may be created, without any relative depletion in the value of anyone else’s. See SPIRO, *supra* note 28, at 30 (“If citizenship were a valuable commodity . . . then one would witness a much broader attack on expansive birth citizenship”). In any event, the possibility of transmission alone (whether subject to depletion or not) is not determinative of whether something is “property.” See David Horton, *Indescendibility*, 102 CAL. L. REV. 543 (2014).

⁶¹ See Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 58 n.246 (2003).

⁶² See David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1395–96 (1996).

⁶³ Cf. *Luria v. United States*, 231 U.S. 9, 23 (1913) (“In other words, it was contemplated that his admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.”); *MOTOMURA*, *supra* note 27, at 15–62 (discussing immigration-as-contract).

⁶⁴ Macklin, *A Brief History*, *supra* note 14, at 438 (“The logic of citizenship revocation for fraud or misrepresentation is that it unwinds the effect of the misleading conduct and restores the situation that would have been obtained had the truth been disclosed.”).

⁶⁵ Compare 8 U.S.C. § 1451(a) (providing for revocation of naturalization based on illegal procurement—i.e., lack of statutory qualification—and material misrepresentation) with DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 625 (3d ed. 2002) (noting that grounds for rescission include both mutual mistake of fact and fraud).

⁶⁶ U.S. CONST., art. I, § 8, cl. 4 (ascribing to Congress the power to “establish an uniform Rule of Naturalization”); *Fedorenko v. United States*, 449 U.S. 490, 506–07 (1981) (“Congress alone has the constitutional authority to prescribe rules for naturalization”).

⁶⁷ 8 U.S.C. §§ 1427(a)(1), 1429.

the transaction may be rescinded.⁶⁸ It is “reversed in kind,”⁶⁹ “[e]verything must be returned, and the chips fall where they may.”⁷⁰

Because denaturalization operates on the transaction that grants citizenship rather than the status of citizenship itself, the cases *Robertson* and *Manta* rely on for their constitutional theory are simply inapposite. *Trop*, *Mendoza-Martinez*, *Perez*, *Schneider*, and *Afroyim* are about expatriation—the involuntary loss of citizenship based on post-naturalization conduct.⁷¹ Conduct that post-dates the acquisition of citizenship cannot result in its extinguishment⁷² because it would render citizenship acquired by naturalization second-class. But there is no second-class citizenship where there was no lawful citizenship at all.⁷³

The authors go on to suggest that “*Afroyim* and *Schneider* may be enough to find civil denaturalization unconstitutional.”⁷⁴ Those two cases are curious authority for the proposition, since both hold precisely the opposite. *Schneider* explained that “the rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress.”⁷⁵ “[S]atisfying . . . the requirements set by Congress” and “free of fraud” correspond directly to the two causes of action in 8 U.S.C. § 1451(a)—illegal procurement, and procurement by misrepresentation or concealment of material fact, respectively.⁷⁶ Not only is *Schneider* not enough to find civil denaturalization

⁶⁸ LAYCOCK, *supra* note 65, at 623–29. While there has been relatively little discussion of naturalization-as-contract, the contract-based theories of immigration are rather common. Admission to the United States has been analogized to a contract. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (describing removal as being “held to the terms under which he was admitted”). Many types of visas have conditions attached to them: for example, “F” visas require the student to maintain enrollment, 8 C.F.R. § 214.2(f)(6), and “K” fiancée visas require the holder to marry the sponsor shortly after arrival, 8 C.F.R. § 214.2(k)(5). Citizenship differs only in that there is no condition subsequent to fulfill. On the question of immigration generally as contract, see MOTOMURA, *supra* note 27, at 15–37. See also Rose Cuison Villazor, *Chae Chan Ping v. United States: Immigration as Property*, 68 OKLA. L. REV. 137 (2015); Cristina M. Rodriguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1113 (2008).

⁶⁹ LAYCOCK, *supra* note 65, at 628.

⁷⁰ *Id.* at 629.

⁷¹ *Robertson & Manta*, (*Un*)*Civil Denaturalization*, *supra* note 6, at 440–45, 460–64.

⁷² *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967); see also *infra* note 125.

⁷³ See *Knauer v. United States*, 328 U.S. 654, 658 (1946) (noting “[c]itizenship obtained through naturalization is not a second-class citizenship”); Núñez, *Mapping*, *supra* note 28, at 492 (“In essence such denaturalization rules call into question the validity of naturalization and the legitimacy of the acquired citizenship.”); cf. *Rogers v. Bellei*, 401 U.S. 815, 835–36 (1971) (referring to the phrase “second-class citizenship” as a “cliche [that] is too handy and too easy, and, like most cliches, can be misleading”).

⁷⁴ *Robertson & Manta*, (*Un*)*Civil Denaturalization*, *supra* note 6, at 460.

⁷⁵ *Schneider v. Rusk*, 377 U.S. 163, 166 (1964).

⁷⁶ Compare *Kungys v. United States*, 485 U.S. 759, 767 (1988) (discussing procurement by misrepresentation or concealment of a material fact); *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) (discussing illegal procurement); see also Belsan & Petty, *supra* note 7, at 27–30 (explaining in detail these two causes of action).

unconstitutional, *Schneider* specifically held that the rights of citizenship accorded to naturalized citizens are contingent on the legality of the underlying naturalization.

The authors' treatment of *Afroyim* is only marginally better. They begin by conflating expatriation and denaturalization, suggesting that *Afroyim* limits the government's undifferentiated ability to "take citizenship away" and that this would "seem to preclude today's denaturalization efforts."⁷⁷ They concede, however, that *Afroyim* expressly excludes denaturalization from its holding that involuntary expatriation is unconstitutional.⁷⁸ (It seems this exclusion was rather obvious and uncontroversial to the Court, which explained, "[o]f course, as the Chief Justice said in his dissent [in *Perez*], naturalization unlawfully procured can be set aside.")⁷⁹

To bypass the clear holdings of *Afroyim* and *Schneider*, Robertson and Manta suggest that "the underlying concern of *Afroyim* was that denaturalization could be wielded as a political weapon" and so "the opinion's logic covers the situations we see today," including Operation Janus.⁸⁰ As an initial matter, the Supreme Court has prohibited this sort of teleological approach to avoiding the confines of precedent.⁸¹ As the Seventh Circuit has explained,

⁷⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1428.

⁷⁸ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 461 n.369 (citing *Afroyim v. Rusk*, 387 U.S. 253, 267 n.23 (1967)); Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1428, 1458.

⁷⁹ The *Afroyim* court adopted Chief Justice Warren's statement that "of course, naturalization unlawfully procured can be set aside." *Perez v. Brownell*, 356 U.S. 44, 66 (Warren, C.J., dissenting). Moreover, the Supreme Court cited the pertinent language and principle from *Afroyim* four years later in *Rogers v. Bellei*, 401 U.S. 815 (1971), in which it upheld as constitutional a statute establishing a residency requirement in order to retain U.S. citizenship acquired by virtue of having been born abroad to parents, one of whom is an American citizen. *See id.* at 835 (citing *Afroyim*, 387 U.S. at 267 n.23 as standing for the proposition that "even Fourteenth Amendment citizenship by naturalization, when unlawfully procured, may be set aside" and noting that "[a] contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress").

⁸⁰ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 461; *see also* Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1458.

⁸¹ As the Seventh Circuit has explained:

Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Nat'l Rifle Ass'n v. Chicago, 567 F.3d 856, 857 (7th Cir. 2009), *rev'd and remanded on other grounds sub nom. McDonald v. Chicago*, 561 U.S. 742 (2010) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.⁸²

Robertson and Manta do not have even a line of decisions seemingly inconsistent with *Afroyim* and *Schneider* to support their position—they simply call for courts to discard precedent directly on point in order to maintain consistency with their expansive understanding of *Afroyim*'s “logic.”⁸³ That is simply not how adjudication in the common law tradition works.

Their reading of *Afroyim*⁸⁴ is wrong too. The possibility that a portion of the citizenry could be involuntarily expatriated by congressional or executive fiat is an entirely separate and far greater threat than whether particular individuals naturalized notwithstanding their ineligibility to do so. The concern raised in *Afroyim* was that historically, and especially in totalitarian regimes, citizens could (and sometimes did) lose their citizenship for political reasons, i.e., holding unpopular or contrarian political views, or being perceived by those in power as a political opponent.⁸⁵ Moreover, the Court was acutely aware that involuntary expatriation poses the potential of rendering an individual stateless.⁸⁶ Neither of these issues are inherently relevant to

⁸² *Nat'l Rifle Ass'n*, 567 F.3d at 858.

⁸³ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 461.

⁸⁴ *Id.*

⁸⁵ See *Knauer v. United States*, 328 U.S. 654, 658–59 (1946) (“Any other course would run counter to our traditions and make denaturalization proceedings the ready instrument for political persecutions.”). Hannah Arendt, in particular, was specifically concerned with the expatriation of minorities, and particularly where expatriation resulted in stateless refugees. See, e.g., BENHABIB, *supra* note 14, at 49–71 (and note the terminological issues discussed therein); MATTHEW J. GIBNEY, *THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES* 2–3 (2004). The Court was clearly familiar with Arendt's political philosophy, as it borrowed some of her language. See *infra* note 418. For a discussion of involuntary expatriation by totalitarian regimes prior to World War II, see JOHN HOPE SIMPSON, *THE REFUGEE PROBLEM: REPORT OF A SURVEY* 232–35 (1939) (discussing Soviet, Italian Fascist, and Nazi denationalization decrees, and noting that “[t]hese States have deprived, and are still depriving, sections of their former nationals of their nationality or citizenship because of their opposition to the totalitarian creed, or because they are members of a particular race or faith”); Louise W. Holborn, *The Legal Status of Political Refugees, 1920–1938*, 32 AM. J. INT'L L. 680, 680 n.2 (1938) (noting the fascist Italian government withdrew consular assistance without formal expatriation, while the Soviet and Turkish governments did engage in formal and involuntary expatriation).

⁸⁶ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (“In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country.”). As relevant here, Arendt's concern was the right to belong to some recognized political community, as opposed to being de facto or de jure stateless. Selya Benhabib, *The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights*, 2 *JUS COGENS* 75, 79 (2020). The “right to have rights,” however, does not imply a right to belong to a particular political community. *Id.* (noting the right to “belong to some kind of organized community”) (quotation omitted); see also Paul Weis, *Human Rights and Refugees*, 10 INT'L MIGRATION 20 (1972) (“Refugees may be stateless or not. It is not their nationality status but the absence of protection

denaturalization. Because denaturalization is only permissible where the naturalization was never legally effective, it should return the individual to the status held prior to the putative naturalization: a lawful permanent resident in the United States and citizen of their prior home country.⁸⁷

Even if one were to accept that denaturalization can be politically *convenient* (because, for example, a particular administration deems immigration enforcement a political objective), following *Afroyim*, denaturalization is limited to those who never lawfully naturalized, i.e., where there is a pre-existing basis for the legal action.⁸⁸ Grounds arising after naturalization (whether politically vindictive or simply indicative of potential foreign allegiance)⁸⁹—e.g., marrying a foreigner, voting in a foreign election, serving in a foreign military, desertion, membership in disfavored organizations, holding disfavored or anti-democratic political views, or spending a particular length of time abroad—are all now impermissible as grounds for revoking naturalization.⁹⁰

With respect to the authors' discussion of Operation Janus, we have previously explained why concerns regarding political motivation are unfounded. The operation resulted from a massive investigation, a decade in the making, that required (but did not always receive) adequate funding, and referrals from which happened to coincide with an administration that chose to publicize filings in press releases.⁹¹ But even if one accepts the tenuous premise that denaturalizations today are or were subject to being brought on the basis of political motivations,⁹² the conclusion that denaturalization is

by a State which is a determining element of their refugee character.”). Thus, involuntary expatriation, which leaves one without a country (except for those holding multiple nationalities), is prohibited in the United States while denaturalization, which denies the efficacy of having lost one's previous nationality upon taking up another, is not.

⁸⁷ See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., *Effects of Revocation of Naturalization*, in USCIS POLICY MANUAL, VOL. 12, PART 3(A) (2021), <https://perma.cc/52K8-N2ZL>.

⁸⁸ See, e.g., *Vance v. Terrazas*, 444 U.S. 252, 265 (1980) (“under *Afroyim* Congress is constitutionally devoid of power to impose expatriation on a citizen”).

⁸⁹ The possibility of residual foreign allegiance of naturalized citizens, and the waning of perpetual allegiance as a doctrine of international law, was a significant concern in the 19th and early 20th Centuries, in part because it raised questions of protection of nationals abroad and liability for military service. See CASEY, *supra* note 39, at 56–57.

⁹⁰ *Vance*, 444 U.S. at 265; *Afroyim*, 387 U.S. at 268; *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000) (en banc).

⁹¹ See Belsan & Petty, *supra* note 7, at 9–16; see generally OFF. OF INSPECTOR GEN., *supra* note 19.

⁹² It is not clear that Robertson and Manta accept their own premise. They observe in their most recent article, perhaps in light of our detailed explanation of its history (see Belsan & Petty, *supra* note 7, at 9–16) that Operation Janus “had roots in the Obama administration.” Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1446; see also Robertson & Manta, *Litigating Citizenship*, *supra* note 6, at 780. They also suggest that Operation Janus “prioritize[es] the files of individuals from countries associated with the current popular fears and anxieties” in order to satisfy “[c]urrent political expediency.” Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 461. Yet they also assert that “[t]he effort focuses on individuals from ‘special interest

therefore unconstitutional is only possible through a misreading of Supreme Court precedent.

Afroyim and *Schneider* specifically permit denaturalization, and nothing in *Fedorenko* or *Kungys* or *Maslenjak* or any other case the Supreme Court has considered casts any doubt on this.⁹³ The Court's concern in *Afroyim* and *Schneider* was with the potential for expatriation of political opponents or those exercising First Amendment rights—expatriation of the sort that occurred in Europe in the 1930s and 40s, and which would still have been on the minds of Justices in the 1960s.⁹⁴ But whether lawful denaturalization is perceived to be politically advantageous and whether it is wielded against political opponents are entirely separate inquiries, and, precisely because *Afroyim* limited denaturalization to pre-naturalization conduct, a defendant's current political views cannot be a basis for denaturalization. For the same reasons, we reject the authors' proposition that the state interest in protecting the nation's political fabric is better served in other ways.⁹⁵ The argument is a non sequitur. Denaturalization has nothing to do with currently held political views; it is retrospective and concerned only with eligibility to naturalize *at the time of naturalization*. Civil denaturalization unwinds a transaction and provides no authority to go further.

Robertson and Manta raise two other objections in connection with substantive due process. First, they suggest that “protection of Congress's naturalization power can be accomplished on the front end with careful review of the naturalization application through an administrative process that is likely both less expensive and more systematic in rooting out potential fraud or error.”⁹⁶ This seems clearly wrong. As in the asylum context, naturalization depends in large part on people telling the truth.⁹⁷ Eligibility often turns on

countries,' related to national-security priorities," *id.* at 410, and specifically those that “American intelligence identifies . . . as likely exporters of terrorism.” *Id.* at 410 n.35 (quoting Cato, *Coming to America: The Weaponization of Immigration*, 46 WASHBURN L.J. 309, 326 (2007)). It should go without saying that, while “special interest countries” may *correlate* with those associated with “popular fears and anxieties,” it does not follow that fears and anxieties dictate priorities.

⁹³ Although the *Maslenjak* court reversed the conviction under 18 U.S.C. § 1425, and with it the automatic denaturalization of the defendant, the Court made clear that it was only addressing a specific subsection of the criminal statute, see *Maslenjak v. United States*, 137 S. Ct. 1918, 1925 n.2 (2017), and reaffirmed its prior holding in *Kungys* related to civil denaturalization, *id.* at 1929–31 (“The jury could have convicted if that earlier dishonesty . . . were itself a reason to deny naturalization—say, because it counted as ‘false testimony for the purpose of obtaining immigration benefits’ and thus demonstrated bad moral character.”) (internal alterations omitted).

⁹⁴ *Cf.* *Knauer v. United States*, 328 U.S. 654, 658–59 (1946) (noting that, if permitted, denaturalization based on political activity post-dating naturalization included a potential for vindictive or political use). See also *supra* note 85.

⁹⁵ Robertson & Manta, (*Un*)*Civil Denaturalization*, *supra* note 6, at 464.

⁹⁶ *Id.* at 463; see also Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1460 (suggesting that “protecting Congress's naturalization power could be better accomplished on the front end through careful naturalization processes”).

⁹⁷ As the Ninth Circuit has observed:

conduct abroad, especially in the common scenario where having “illegally procured” naturalization is premised on having never been lawfully admitted due to misrepresentations or omissions in an application for a visa or for refugee status.⁹⁸

The information available to a naturalization examiner is generally limited to the file, what the applicant discloses in the interview, and what can be reasonably determined through publicly available information and official records.⁹⁹ Material information bearing on naturalization eligibility can be, and sometimes is, withheld.¹⁰⁰ In the Operation Janus cases, a substantial number of applicants withheld information that would have disclosed a prior removal order under a different identity.¹⁰¹ This type of fraud was often

An asylum seeker’s incentive to lie is not curtailed by fear of the IJ’s scrutiny or the government’s fact checkers. These are only small obstacles that can be easily overcome. The major check on the asylum seeker’s incentive to lie is an oath to tell the truth, and the asylum seeker’s belief that he or she will be held to that oath. It is fair to say that the asylum process is ultimately an honor system—it depends largely on the assumption that asylum seekers will take the oath seriously, and that they will be truthful in their testimony.

Martinez v. Holder, 557 F.3d 1059, 1065 (9th Cir. 2009); *see also* *Singh v. Holder*, 638 F.3d 1264, 1270 (9th Cir. 2011) (noting that “[a]sylum cases also differ in that expense, difficulty, or impracticability may render it impossible to prove the falsity of an asylum seeker’s allegations of fact”). Fraud in the asylum process hurts honest refugees and asylum seekers more than anyone, by reducing the political will to help those who truly need help. As the Ninth Circuit explained in a different case:

[I]t’s hard to believe that Congress will long allow the program to continue when it rewards people who lie their way into the United States. Eventually, Congress and the public will catch on that asylum has become a fast-track vehicle for immigration fraud, and the asylum statute will be repealed or amended so as to make it even more difficult for honest asylum seekers to obtain relief. The ultimate victims will be the tired, poor, huddled masses who will find the golden door slammed in their faces.

Angov v. Lynch, 788 F.3d 893, 909 (9th Cir. 2015); *see also* MATTHEW E. PRICE, *RETHINKING ASYLUM: HISTORY PURPOSE, AND LIMITS* 10 (2009) (“If the public perceives that the asylum system is being used as a loophole by ordinary immigrants, and that resettlement rights are not being reserved only for those who show the kind of special treatment that clearly justifies an exception from the usual rigors of the immigration law, resistance toward asylum will increase.”) (internal quotation omitted).

⁹⁸ Virtually all denaturalizations of Nazis were of this variety: for having failed to qualify for, and misrepresented material facts regarding, eligibility for refugee status under the Displaced Persons Act of 1948, Pub. L. No. 80–774, 62 Stat. 1009 (June 25, 1948). *See, e.g.*, *Fedorenko v. United States*, 449 U.S. 490 (1981) and the discussion of *United States v. Lileikis*, 929 F. Supp. 31, 32 (D. Mass. 1996) and *infra* Part III.B.3.

⁹⁹ *See, e.g.*, *United States v. Khan*, No. 3:17-cv-965-J-PDB, 2020 WL 1650599, at *15–*19 (M.D. Fla. Apr. 3, 2020) (describing naturalization examinations).

¹⁰⁰ ALLAN GERSON, *LIES THAT MATTER 2* (2021) (“despite the fact that the law automatically barred entry into America of those whose applications were marred by material misrepresentations, such misrepresentations were rarely spotted”); ALLAN A. RYAN, JR., *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA* 5 (1984) (“The overwhelming majority of Nazi criminals came through the front door, with all their papers in order. They came here not by conniving with lawless government officials but by the infinitely easier method of simply deceiving the honest ones.”).

¹⁰¹ Belsan & Petty, *supra* note 7, at 14.

successful until the technology to detect it became available.¹⁰² Similarly, undisclosed criminal conduct that occurred but has not been detected by law enforcement (for example, because a victim of sexual assault has not come forward) cannot be addressed unless it is admitted by the perpetrator.¹⁰³ Affiliation with terrorist organizations may not be detected because there is no central registry to check, and support for such organizations is often covert. Evidence of membership in military units that engaged in human rights abuses or evidence of participation in atrocities may be locked away in a foreign vault. Where evidence of ineligibility is available—because it is disclosed, or because there is a domestic criminal conviction, evidence of which can be readily accessed—front-end processes are more likely to work.¹⁰⁴ But few denaturalization cases are based on facts that could have been discovered at the time of naturalization, and virtually all involve an intentional misrepresentation by the applicant.¹⁰⁵

Moreover, even if ferreting out all of these misrepresentations on the front-end was a logistical possibility (and it is not), the volume of naturalization applicants in comparison to the number of denaturalization cases pursued clearly does not justify the scope of the front-end review the authors propose.¹⁰⁶ “Careful review” of the sort that would render denaturalization superfluous would also grind lawful naturalization to a halt. No amount of insecurity could plausibly justify the tremendous delays and numerous prophylactic denials of naturalization that would inevitably result if revocation for fraud was not possible.

Separately, the authors also suggest that “there are tremendous incentives to avoid immigration fraud”¹⁰⁷ and that “[g]etting caught during the immigration or naturalization process means being permanently barred from the United States and potentially spending time in prison for immigration

¹⁰² *Id.* at 13–14.

¹⁰³ This fact pattern is unfortunately a common one pursued in civil denaturalization cases. *See id.* at 25 n.119 (cataloging at least eleven cases involving concealed sex crimes, many against minors).

¹⁰⁴ *See, e.g.*, U.S. DEPT OF HOMELAND SEC., OFF. OF IMMIGR. STAT., 2019 YEARBOOK OF IMMIGRATION STATISTICS tbl. 20 (2020), <https://perma.cc/C24E-JGKR> (detailing historic adjudication statistics for naturalization applications—a nondiscretionary decision—between 1907 and 2019, including 97,789 denials in FY 2019 alone).

¹⁰⁵ Revocation of citizenship where naturalization was procured by concealment of a material fact or willful misrepresentation inherently requires some form of fraud in the acquisition of citizenship. *See* 8 U.S.C. § 1451. Illegal procurement may be charged based on an underlying misrepresentation, for example, where the individual provided false testimony and therefore lacked the good moral character required by statute, *see* 8 U.S.C. §§ 1101(f)(6), 1427, or where the individual committed fraud in the in the acquisition of a visa or permanent residency, without which the defendant would not have been subsequently eligible to apply for naturalization. *See Fedorenko v. United States*, 449 U.S. 490 (1981); *see also supra* note 98.

¹⁰⁶ *See, e.g., id.* at 23–24 (noting that “the number of annual civil denaturalization cases . . . account[s] for less than 0.001% of the number of new naturalized citizens each year.”).

¹⁰⁷ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 463.

fraud.”¹⁰⁸ For this suggestion, the authors rely on 8 U.S.C. § 1182(a)(6)(C)(i).¹⁰⁹ We disagree on both points. The possibility of “getting caught” is not a significant deterrent to naturalization applicants.¹¹⁰ As the Ninth Circuit has explained, “[a]n asylum seeker’s incentive to lie is not curtailed by fear of the IJ’s scrutiny or the government’s fact checkers. These are only small obstacles that can be easily overcome.”¹¹¹ This is equally true in the naturalization context, if not more so, because, unlike removal proceedings, naturalization proceedings are not adversarial. Yet, they likewise rest on the assumption that the applicant has provided truthful information.¹¹² As for the bar on admissibility, it simply does not apply to misrepresentations during the naturalization process. In general, the only people eligible to apply for naturalization are lawful permanent residents.¹¹³ Having already been admitted to the United States, lawful permanent residents are subject to the removability provisions of Section 1227, not the inadmissibility provisions of Section 1182.¹¹⁴ They are not seeking admission. Moreover, although lying during a naturalization interview is a basis for denying naturalization, it is not, standing alone, a ground on which a lawful permanent resident may be ordered removed.¹¹⁵ For those who have something to hide, there are tremendous incentives to lie, a small likelihood of being caught, and a nearly nonexistent likelihood of serious repercussions.

2. The Existence of Denaturalization Does Not Create Classes of Citizenship

The fact that naturalized citizens may be subject to denaturalization for not having lawfully naturalized does not create two classes of citizens in the sense that some citizens have more substantive rights than others. First,

¹⁰⁸ *Id.* at 463–64.

¹⁰⁹ *Id.*

¹¹⁰ As the Ninth Circuit—which hears more immigration cases than any other federal court—noted in 2015, “the risk of getting caught [committing immigration fraud] is low” and “[g]aining a lawful foothold in America is an incalculable benefit.” *Angov v. Lynch*, 788 F.3d 893, 901 (9th Cir. 2015) (“Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated.”).

¹¹¹ *Martinez v. Holder*, 557 F.3d 1059, 1065 (9th Cir. 2009); *see also* Belsan & Petty, *supra* note 7, at 24 (noting, “[a] naturalized citizen has better lifetime odds of being struck by lightning than of being named as a defendant in a civil denaturalization action”).

¹¹² *United States v. Ciurinkas*, 148 F.3d 729, 732 (7th Cir. 1998).

¹¹³ 8 U.S.C. § 1427(a); *see also* 8 U.S.C. §§ 1439, 1440 (noting the sole exception to the requirement that an applicant be a lawful permanent resident is for those applying to naturalize based on military service).

¹¹⁴ *See* *Matter of Chavez-Alvarez*, 26 I&N Dec. 274, 282 (BIA 2014); *Matter of Alyazji*, 25 I&N Dec. 397, 397 (BIA 2011). That would, in most instances, remain true even where a lawful permanent resident travels abroad and returns because, with few exceptions, lawful permanent residents returning from short trips abroad are deemed by law not to be seeking admission. *See* 8 U.S.C. § 1101(a)(13)(C).

¹¹⁵ Removal may, however, be sought based on a criminal conviction for the same or related acts. *See, e.g.*, 8 U.S.C. §§ 1101(a)(43)(S), 1227(a).

though, a point of clarification: there is a tendency to think of expatriation as applying to natural born citizens and denaturalization as applying to naturalized citizens.¹¹⁶ That is not accurate. All citizens, regardless of how they gained that status (i.e., whether natural born or naturalized), may expatriate voluntarily,¹¹⁷ and no citizens, regardless of how they gained that status, may be involuntarily expatriated.¹¹⁸ Denaturalization only applies with respect to naturalized citizens, but it is in addition to, rather than instead of, expatriation.

The Supreme Court has clearly and consistently explained that the Constitution does not provide for classes of citizenship. Writing for the Court, Chief Justice Marshall explained in 1824 that “[a] naturalized citizen . . . becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native.”¹¹⁹ The Supreme Court reaffirmed this in 1913, adding the constitutional qualification that Article I disqualifies naturalized citizens from the presidency.¹²⁰ Fifty years later, *Schneider* affirmed the same principle, again using the “equal footing” language, but cautioned that “equal footing” assumed the naturalized citizen had “satisf[ied], free of fraud, the requirements set by Congress.”¹²¹ In *Luria*, the Supreme Court, with full cognizance of the possibility of revocation of naturalization, held that illegal procurement did not discriminate between the native and the naturalized.¹²² Requirements for naturalization, and revocation for failing to meet them, only apply in the naturalization context because of the “inherent differences” between the ways in which citizenship can be acquired—“for natives there are no pre-citizenship acts to prescribe.”¹²³

Equal treatment, as envisioned in *Schneider*, is the equal treatment between citizens lawfully holding that status. Naturalized citizens cannot be denied political rights given to the native-born (apart from the constitutional exceptions), nor can they be made less secure in their citizenship. But equality does not mandate aggressive ignorance when citizenship is held on the basis of fraud in the procurement or by failing to meet a constitutionally-authorized

¹¹⁶ See, e.g., Weil, *From Conditional to Secured*, *supra* note 60, at 626 n.47 (incorrectly suggesting that “denationalization is the forced loss of a native born citizenship while denaturalization concerns only naturalized citizens”).

¹¹⁷ 8 U.S.C. § 1481.

¹¹⁸ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

¹¹⁹ *Osborn v. Bank of U.S.*, 22 U.S. 738, 827 (1824).

¹²⁰ *Luria v. United States*, 231 U.S. 9, 22 (1913).

¹²¹ *Schneider v. Rusk*, 377 U.S. 163, 166 (1964). The provision at issue in *Schneider* (living abroad in country of birth) applied to naturalized citizens differently than native-born (at least those born in the territory of the U.S.). It also operated as expatriation, because living abroad after naturalizing by definition can only take place *after* naturalization. It would be unconstitutional even if it was not limited to those returning to their country of birth, but also expatriated any citizen, naturalized or native-born, for living abroad for a certain period of time. See *Vance v. Terrazas*, 444 U.S. 252, 265 (1980).

¹²² *Luria*, 231 U.S. at 23–24.

¹²³ *United States v. Kairys*, 782 F.2d 1374, 1383 (7th Cir. 1986).

and congressionally-imposed requirement.¹²⁴ Thus, while denaturalization on the basis of conduct that pre-dates and disqualifies one from naturalizing has never been held unconstitutional, statutes purporting to invalidate citizenship on the basis of post-naturalization conduct, which could provide opportunities for politically-motivated expatriation, have been unconstitutional for more than half a century.¹²⁵

Two statutes are worth briefly mentioning: first, 8 U.S.C. § 1451(c) provides for an evidentiary presumption that a naturalized citizen lacked the requisite attachment to the Constitution at the time of naturalization if, within five years of naturalizing, the citizen affiliates with an organization that would have resulted in ineligibility to naturalize had the affiliation occurred prior to naturalizing.¹²⁶ Although this is, on its face, merely a burden-shifting device,¹²⁷ some have suggested it is impermissible.¹²⁸ The constitutionality of burden shifting in this context has not been tested.¹²⁹ Two further parallel provisions, 8 U.S.C. §§ 1439(f) and 1440(c), provide an additional basis for denaturalization of individuals who naturalized under the expedited naturalization process specific to military members, where such individuals are discharged under other than honorable conditions within five years of

¹²⁴ *Id.* at 1383 (“It does not act unequally upon naturalized citizens to remove their citizenship when they have failed to comply with the requirements of naturalization.”); *Luria*, 231 U.S. at 24 (illegal procurement “makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancelation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally”).

¹²⁵ *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Schneider*, 377 U.S. at 166; *Trop v. Dulles*, 356 U.S. 86, 92–93 (1958) (“Citizenship is not a license that expires upon misbehavior And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct, no matter how reprehensible that conduct may be.”); *Baumgartner v. United States*, 322 U.S. 665, 679 (1944) (Murphy, J., concurring) (“American citizenship is not a right granted on a condition subsequent”); *Schneiderman v. United States*, 320 U.S. 118, 166 (1943) (“Rutledge, J., concurring) (“If this is the law and the right the naturalized citizen acquires, his admission creates nothing more than citizenship in attenuated, if not suspended, animation. He acquires but prima facie status, if that.”).

¹²⁶ 8 U.S.C. § 1451(c) (specifically providing that, when satisfied, this provision authorizes a court to revoke the naturalization “as having been obtained by concealment of a material fact or by willful misrepresentation”).

¹²⁷ S. REP. NO. 81-1515, at 730 (1950) (“The subcommittee wishes to emphasize that this recommendation is not intended to place a condition subsequent upon naturalization. Its effect will be to create a rule of evidence”).

¹²⁸ 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, 673 (2015).

¹²⁹ The sole case we are aware of to have addressed 8 U.S.C. § 1451(c) applied the burden-shifting framework but did not address its constitutionality. *United States v. Paris*, No. 17-cv-295-SMY, 2020 WL 532890, at *4 (S.D. Ill. Feb. 3, 2020). The Supreme Court has, however, upheld a similar presumption under an earlier iteration of the denaturalization statute in *Luria v. United States*, 231 U.S. 9 (1913), rejecting a due-process-based attack. The Court upheld a provision in the 1906 denaturalization statute related to establishing permanent residence in a foreign country within five years of naturalizing, concluding that the statute “prescribe[d] a rule of evidence, not of substantive right” and went “no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome.” *Id.* at 25.

naturalizing.¹³⁰ Potential difficulties with this statutory authority were noted almost seventy years ago,¹³¹ and, although it continues to be referenced in some current military regulations,¹³² we are aware of no reported cases relying on either of these provisions post-dating *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (holding that involuntary denationalization for avoiding military service during a time of war was unconstitutional) (which itself predated *Afroyim*).

Interestingly, the only statute we have been able to locate that substantively differentiates between citizens on the basis of how citizenship was acquired concerns expatriation. Upon renouncing citizenship, a U.S. citizen is normally required to pay certain taxes,¹³³ but this requirement is waived if the individual was a dual citizen at birth and continues to be a citizen of that other country.¹³⁴ The intent seems to be to avoid penalizing individuals who, by accident of their mother's travels, happened to be born within the United States, but otherwise have little to no connection to the United States (U.K. Prime Minister Boris Johnson comes to mind).¹³⁵ The effect, however, is that while all naturalized citizens must pay to expatriate, only some birthright citizens are required to do so.¹³⁶

3. There Is No “Deeply Rooted” Right to Anything Wrongfully or Unlawfully Acquired

Robertson and Manta next suggest that citizenship is a fundamental right protected by substantive due process.¹³⁷ Thus, as the argument goes, the government cannot deprive someone of their citizenship absent a compelling

¹³⁰ 8 U.S.C. §§ 1439(f), 1440(c). These are parallel revocation provisions that apply to expedited naturalization for military members who acquired expedited citizenship on the basis of military service during peacetime, § 1439(a), or during a period of declared hostilities, § 1440(a), respectively.

¹³¹ See John P. Roche, *Statutory Denaturalization: 1906–1951*, 13 UNIV. PITT. L. REV. 276, 303 (1952) (“In effect, this section provided for conditional naturalization. Any person naturalized under its provisions was on probation for the duration of his service in the armed forces. This open authorization of second-class citizenship appears to rest on a highly questionable constitutional footing. By its provision, citizenship is put on the same level as sergeant’s stripes—to be worn during good behavior.”).

¹³² See Army Regulation 635-200, *Active Duty Enlisted Administrative Separations*, § VIII, ¶¶ 1-37 to 1-39 (Dec. 19, 2016).

¹³³ 26 U.S.C. § 877. This tax is commonly called the “exit tax.”

¹³⁴ 26 U.S.C. § 877(c)(2).

¹³⁵ See Laura Saunders, *U.K. Foreign Secretary Boris Johnson Renounced U.S. Citizenship in 2016*, WALL ST. J. (Feb. 8, 2017, 5:41 PM), <https://perma.cc/U65W-6PZ3>; Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT’L L. 193 (2017) (discussing taxation of accidental Americans); Peter Nyers, *The Accidental Citizen: Acts of Sovereignty and (Un)making Citizenship*, 35 ECON. & SOC’Y 22 (2006).

¹³⁶ 26 U.S.C. § 877A(g)(1)(B); Núñez, *Mapping*, *supra* note 28, at 491 n.70.

¹³⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1458–60.

state interest; and, here, the interest is insufficiently compelling and the remedy insufficiently precise.¹³⁸

While this would be a powerful argument against expatriation had *Afroyim* not settled the issue already, it is far less powerful with respect to denaturalization. Framing the issue as a question of retaining *citizenship* writ large (to include both expatriation and denaturalization) is itself insufficiently precise to justify the authors' claim. The conclusion of unconstitutionality is available only because they assume the efficacy of the acquisition—in other words, they take it as given that illegal naturalization nonetheless confers lawful citizenship. Moreover, the authors take no note of the conduct of the putative citizens in rendering themselves subject to denaturalization.¹³⁹

The current touchstone of substantive due process is *Washington v. Glucksburg*.¹⁴⁰ *Glucksburg* held that a “fundamental” right—that is, one protected by substantive due process—may be recognized only where the right is “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”¹⁴¹ *Glucksburg* also requires a “careful description” of the right asserted.¹⁴²

For the reasons discussed above, the general label of “citizenship” does not accurately denote the fundamental right being asserted. Denaturalization does not deprive one of citizenship lawfully held, but rather retracts citizenship unlawfully or fraudulently acquired. Because civil denaturalization under 8 U.S.C. § 1451(a) cannot revoke lawful citizenship, the “careful description” required by *Glucksburg* is narrower than mere “citizenship.” To test whether the statute authorizing civil denaturalization is unconstitutional, as Robertson and Manta argue, then the description of the fundamental right at issue can be no broader than the scope of the statute.¹⁴³ Thus, the authors’ asserted fundamental right is, in reality, to retain citizenship illegally procured or procured by concealment of a material fact or willful misrepresentation.

While citizenship standing alone may be a fundamental right, denaturalization addresses the predicate to that right, not the right itself. Indeed, citizenship unlawfully acquired is void *ab initio*—it is not citizenship

¹³⁸ *Id.* at 1459–60.

¹³⁹ *Rosenberg v. United States*, 60 F.2d 475, 475 (3d Cir. 1932) (citing *United States v. Spohrer*, 175 F. 440, 442 (C.C.D.N.J. 1910)) (“An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant. Fraud cannot be substituted for facts”) (internal quotations and citations omitted).

¹⁴⁰ *Washington v. Glucksburg*, 521 U.S. 702 (1997).

¹⁴¹ *Id.* at 720–21 (internal quotations and citations omitted).

¹⁴² *Id.* at 721.

¹⁴³ *See, e.g., id.* at 723–24 (consulting the text of the challenged state statute in reformulating the asserted right); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1087 (9th Cir. 2015) (“refin[ing] the asserted right to account for the particularized scope of the challenged law”).

at all. While the prohibition on involuntary expatriation may be supported by the substantive due process clause of the Fifth Amendment,¹⁴⁴ there can be no substantive due process right to retain unlawfully acquired citizenship¹⁴⁵ because there can be no property or liberty interests in a nullity.¹⁴⁶

Moreover, nearly all denaturalization cases allege either that citizenship was acquired by concealment of a material fact or willful misrepresentation, or that it was illegally procured due to a misrepresentation in an earlier immigration application (or both).¹⁴⁷ At a fundamental level, it is difficult to see how there is a substantive due process right to keep anything acquired by fraud.¹⁴⁸ There is no non-frivolous argument in favor of an “objective, deeply rooted” right to retain anything unlawfully acquired, and defrauding the government is not “implicit in the concept of ordered liberty,” but antithetical to it.¹⁴⁹

Even if one could plausibly suggest a right (fundamental or otherwise) to retain unlawfully acquired citizenship, it is not immediately obvious that revocation of that citizenship would be prohibited. Robertson and Manta suggest that Congress’s naturalization power can be protected in the examination process.¹⁵⁰ We explained above why that is implausible, but even if it were not, Congress’s power over naturalization is not simply a competing governmental interest to be weighed in the strict scrutiny analysis in the same manner that reducing exposure to second-hand smoke¹⁵¹ or enhancing the quality of life in drug-plagued neighborhoods¹⁵² are weighed against the limitations on liberty enacted to achieve those ends.

¹⁴⁴ U.S. CONST. amend. V. This would be in addition to the Citizenship Clause of the Fourteenth Amendment, the ground on which the *Afroyim* court rested its holding. *Afroyim v. Rusk*, 387 U.S. 253, 286–87 (1967).

¹⁴⁵ *Johannessen v. United States*, 225 U.S. 227, 241 (1912) (“An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued.”); *United States v. Multani*, No. 19-cv-01789, 2021 WL 633638, at *4–*5 (W.D. Wash. Feb. 28, 2021) (applying *Glucksburg* to conclude that civil denaturalization does not implicate a fundamental right, but rather “merely the cancellation of an ill-gotten benefit”).

¹⁴⁶ A similar rationale precludes the argument that denaturalization constitutes a “penalty” subject to the general five-year statute of limitations on civil actions. *See infra* Part III.B.1.

¹⁴⁷ Belsan & Petty, *supra* note 7, at 28–30.

¹⁴⁸ *Johannessen*, 225 U.S. at 241–42 (“As was well said by Chief Justice Parker in *Foster v. Essex Bank*, 16 Massachusetts, 245, 273, ‘there is no such thing as a vested right to do wrong.’”); *Rosenberg v. United States*, 60 F.2d 475, 476 (3d Cir. 1932) (“[I]t is quite evident that the alleged right of this petitioner to be a citizen of the United States had no foundation whatever, because it was based on the foundation of a fraudulent and canceled naturalization certificate . . . the certificate of naturalization was simply a paper fraud and conferred at the time of its grant no rights whatever upon Louis Rosenberg, because . . . its issuance was procured by fraud.”).

¹⁴⁹ *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (internal citation omitted).

¹⁵⁰ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1460.

¹⁵¹ *Giordano v. Conn. Valley Hosp.*, 588 F. Supp. 2d 306, 314 (D. Conn. 2008).

¹⁵² *Johnson v. City of Cincinnati*, 310 F.3d 484, 502 (6th Cir. 2002).

Congress's power to define a uniform rule of naturalization is not merely a policy objective, but an express constitutional power entrusted to it alone.¹⁵³ Even if there is a Fifth Amendment substantive due process right to citizenship rights for naturalized citizens, and a right under the Fourteenth Amendment to equal treatment of all citizens, both natural-born and naturalized (per *Afroyim*), the constitutionality of denaturalization for conduct preceding naturalization that rendered the individual ineligible for citizenship is the only way to square those rights with Congress's exclusive authority under Article I to establish a uniform rule of naturalization.¹⁵⁴ After all, the "Constitution requires a *uniform* Rule of Naturalization."¹⁵⁵ A constitutional prohibition on revocation of citizenship granted to ineligible individuals in violation of law is the antithesis of uniformity.

Moreover, it is axiomatic that one should normally try to avoid reading one constitutional provision in such a way that would render another inoperative or superfluous.¹⁵⁶ A balancing test would have the potential to render the Uniform Rule Clause at least partially inoperative. Congress's authority under the Uniform Rule Clause¹⁵⁷ (together with the Necessary and Proper Clause)¹⁵⁸ and the Executive's authority under the Take Care Clause¹⁵⁹ are more than sufficient to provide a constitutional footing for denaturalization. The authority to create a uniform rule implicitly includes the power to enforce it.¹⁶⁰

C. Procedural Due Process Objections

In addition to substantive due process objections, Robertson and Manta raise procedural due process challenges to civil denaturalization as well. The authors note that the justice system relies on the presentation of evidence, but incorrectly suggest that it "did not happen in the 2017 proceeding" involving Baljinder Singh because he did not appear to defend the action.¹⁶¹

¹⁵³ U.S. CONST. art. I, § 8, cl. 4; *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) ("Congress alone has the constitutional authority to prescribe rules for naturalization . . .").

¹⁵⁴ *Fedorenko*, 449 U.S. at 506 ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress.") (quoting *United States v. Ginsberg*, 243 U.S. 472, 474 (1917)); cf. *Graham v. Richardson*, 403 U.S. 365, 378–80 (1971) (noting the impermissibility of state laws that "encroach upon exclusive federal power").

¹⁵⁵ *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1283 (9th Cir. 2020) (quoting *United States v. Texas*, 809 F.3d 134, 187–88 (5th Cir. 2014)).

¹⁵⁶ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 550 (2012); *Rhode Island v. Palmer*, 253 U.S. 350, 407 (1920) (Clarke, J., dissenting).

¹⁵⁷ U.S. CONST. art. I, § 8, cl. 4.

¹⁵⁸ U.S. CONST. art. I, § 8, cl. 18.

¹⁵⁹ U.S. CONST. art. II, § 3.

¹⁶⁰ *Knauer v. United States*, 328 U.S. 654, 673 (1946) ("We have no doubt of the power of Congress to provide for denaturalization on the grounds of fraud. The Constitution grants Congress power 'To establish an uniform Rule of Naturalization.' Article I, Section 8. The power of denaturalization comes from that provision and the 'necessary and proper' Clause in Article I, Section 8.")

¹⁶¹ Robertson & Manta, *Litigating Citizenship*, *supra* note 6, at 783.

The facts of that case, which is notable only because it happened to be the first judgment resulting from Operation Janus, have been set out at length elsewhere.¹⁶² We note, though, that it has been repeatedly and inaccurately reported that Singh has no criminal history.¹⁶³ In fact, Singh is a convicted felon whom the Third Circuit later described as having been “in serious trouble with the law.”¹⁶⁴ In 2011, he pleaded guilty in a New York federal court to conspiracy to distribute and possession with intent to distribute more than a kilogram of heroin, more than fifty kilograms of marijuana, and MDMA (ecstasy).¹⁶⁵ The conviction, however, post-dated his naturalization and was therefore immaterial to the government’s claims in the denaturalization action.¹⁶⁶

Robertson and Manta suggest that *United States v. Singh* was the Department of Justice’s “very first denaturalization”¹⁶⁷ (by which they must mean first denaturalization resulting from Operation Janus, since they discuss many older cases elsewhere). And while the government’s allegations were uncontested because Singh did not appear,¹⁶⁸ it is inaccurate to suggest that

¹⁶² Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 414–18; Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1447.

¹⁶³ See Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, NEW YORKER (June 18, 2018), <https://perma.cc/KJ5M-DYFA>; Masha Gessen, *Trump, “Shitholes,” and the Nature of “Us”*, NEW YORKER (Jan. 12, 2018), <https://perma.cc/9ED7-HW6J>. See also Amanda Frost, *Alienating Citizens*, 114 NW. UNIV. L. REV. ONLINE 48, 69 (2019) (noting that Singh “appears to have no criminal history”) (emphasis added); Robertson and Manta are inconsistent in this respect. Compare Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 414 (noting the absence of any reported criminal history) with Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1447 (suggesting Singh had “no criminal record whatsoever”). Where the authors are impugning the exercise of prosecutorial discretion, factual details like this matter.

¹⁶⁴ *Singh v. Attorney General of the U.S.*, 12 F.4th 262, 267 (3d Cir. 2021).

¹⁶⁵ *United States v. Singh*, No. 08-cv-868, Dkt. 1 (E.D.N.Y. Dec. 12, 2008); *id.* Dkt. 143 (E.D.N.Y. Apr. 14, 2011). In subsequent litigation, Singh acknowledged, through counsel, his use of both identities as well as his criminal conviction. See *Singh v. Anderson*, No. 20-cv-3647 (D.N.J. Apr. 3, 2020); see also *Singh v. Attorney General of the U.S.*, 12 F.4th 262 (3d Cir. 2021). We understand that there are some limitations on the ability of authors to conduct research in this area because denaturalization cases, like all immigration cases, are subject to restrictions on remote access to documents through PACER under Federal Rule of Civil Procedure 5.1. See *supra* note 13.

¹⁶⁶ While post-oath conduct may be relevant to denaturalization, such conduct—unlike pre-oath conduct—cannot form the basis for denaturalization under 8 U.S.C. § 1451(a). *Vance v. Terrazas*, 444 U.S. 252, 265 (1980); *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967); but see 8 U.S.C. §§ 1439, 1440 (providing statutory authority for denaturalization of military members who naturalize under expedited provisions and are subsequently discharged within a specified period under other than honorable conditions).

¹⁶⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1446.

¹⁶⁸ While the case was uncontested because Singh did not appear and defend himself, the government’s evidence was not *untested*. The Supreme Court has been clear that the lower courts must ensure that the government’s case meets the standard of proof on the merits. *Klapprott v. United States*, 335 U.S. 601, 612–13 (1949) (holding that a court should not revoke an individual’s naturalization “until the Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance.”); see also *United States v. Mohammad*, 249 F. Supp. 3d 450, 457 (D.D.C. 2017) (“[T]he government cannot obtain judgment in a civil denaturalization action by default.”).

the government's case centered on "an affidavit stating that Singh's failure to show up for an asylum hearing more than twenty years ago was a result of intentional fraud."¹⁶⁹ The affidavit was not the evidence and the failure to appear was not the fraud.

First, an "affidavit of good cause" is a statutory prerequisite to filing a denaturalization complaint.¹⁷⁰ But it serves a gatekeeping function (similar to a grand jury),¹⁷¹ and is not required to be made on personal knowledge.¹⁷² It is therefore not evidence.¹⁷³ Moreover, Singh's failure to appear in immigration court was not the fraud, though it did result in a deportation order; rather, the fraud was his subsequent asylum, adjustment, and naturalization applications under one name that disclosed neither the prior use of a different name, nor the existence of the deportation proceedings.¹⁷⁴

Robertson and Manta suggest that due process protections were lacking because the complaint and summons were served not on the defendant himself, but on another person of suitable age and discretion at his residence.¹⁷⁵ As they acknowledge, this procedure is permitted under Rule 4(e)(2)(B) of the Federal Rules of Civil Procedure.¹⁷⁶ Notice is an element of procedural due process in all civil actions.¹⁷⁷ It follows that, if notice was permitted by rule but constitutionally deficient in this case, Rule 4(e)(2)(B) is itself constitutionally unsound. That would call into question other types of service permitted by state law and incorporated into federal practice by reference.¹⁷⁸ In particular, it would suggest that service by publication—which is far less likely to result in actual notice (and which is expressly permitted by statute in denaturalization actions when the defendant is abroad or absent from the judicial district in which they last resided)—is unconstitutional. The Supreme

¹⁶⁹ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 457.

¹⁷⁰ 8 U.S.C. § 1451(a).

¹⁷¹ *United States v. Zucca*, 351 U.S. 91, 99 (1956) (noting the affidavit of good cause is a "procedural prerequisite"). Because the affidavit is merely a procedural prerequisite at the time proceedings are initially instituted, it bears little, if any, significance once the case has been filed. *Lucchese v. United States*, 356 U.S. 256, 257 (1958) ("The affidavit [showing good cause] must be filed with the complaint when the [denaturalization] proceedings are instituted."). *See also* *United States v. Dang*, 488 F.3d 1135, 1143 (9th Cir. 2007) ("An affidavit of good cause is only required at the initiation of a denaturalization proceeding.").

¹⁷² *Maisenberg v. United States*, 356 U.S. 670, 672 (1958); *Nowak v. United States*, 356 U.S. 660, 662 (1958).

¹⁷³ *Costello v. United States*, 365 U.S. 265, 280 n.4 (1961) (distinguishing the "affidavit of good cause" from the "evidence").

¹⁷⁴ *See* *United States v. Singh*, No. 17-cv-7214, 2018 WL 305325, at *4–*5 (D.N.J. Jan. 5, 2018).

¹⁷⁵ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 416–17.

¹⁷⁶ *Id.* at 418 n.79.

¹⁷⁷ *See, e.g.*, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

¹⁷⁸ FED. R. CIV. P. 4(e) ("Unless federal law provides otherwise, an individual . . . may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.").

Court has held otherwise.¹⁷⁹ The “possibility of conceivable injury” is not the standard.¹⁸⁰ Rather, if the means of service are “reasonably certain to inform those affected,” the constitutional requirements are satisfied.¹⁸¹ The moral hazard of requiring personal service in all cases is obvious—it would encourage potential defendants to abscond.¹⁸²

The authors suggest that “[t]he procedural protections offered in a criminal action make denaturalization more difficult to achieve—and therefore do more to protect against the erroneous deprivation of citizenship.”¹⁸³ This is a fallacious comparison. A greater degree of difficulty does not necessarily increase the accuracy of the result, and may actually diminish it. Furthermore, most of the procedures discussed—summary judgment, jury trials, and confrontation¹⁸⁴—do not offer the protection the authors assume they provide.

The availability of summary judgment in civil proceedings streamlines proceedings, but it is unclear how it disadvantages defendants. Summary judgment is only available when the material facts are undisputed.¹⁸⁵ Defendants can, and often do, move for summary judgment at the close of discovery because it is to their benefit, just as it is for plaintiffs, to avoid unnecessary trial.¹⁸⁶ No purpose would be served by requiring a trial to determine agreed facts.

Where the facts are in dispute, it is far from clear that juries are better (in terms of accuracy) at finding facts than judges.¹⁸⁷ “Indeed, those commenting on the history of the jury have tended to emphasize the trials in which the jury acted politically by rendering a just verdict *despite* the law and *despite* the

¹⁷⁹ *Mullane*, 339 U.S. at 315. Notably, the civil denaturalization statute expressly provides for service by publication “in the manner provided for service . . . upon absentees by the laws of the State . . . where such suit is brought.” 8 U.S.C. § 1451(b).

¹⁸⁰ *Id.* (quoting *Am. Land Co. v. Zeiss*, 219 U.S. 47, 67 (1911)).

¹⁸¹ *Id.*

¹⁸² The problem would be particularly acute for the government, because in most cases the government is required to seek out-of-court settlements before filing a complaint in court, thus providing advance notice to the defendant that the lawsuit will be filed and service of process attempted. See Exec. Order No. 12988, *Civil Justice Reform*, 61 Fed. Reg. 4729 (Feb. 7, 1996).

¹⁸³ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 458.

¹⁸⁴ The absence of counsel does not significantly advantage the government, as the government must always meet its burden on the merits. *Klapprott v. United States*, 335 U.S. 601, 612–13 (1949); *United States v. Mohammad*, 249 F. Supp. 3d 450, 457 (D.D.C. 2017). Additionally, courts are generous with pro se litigants. See *generally* *Haines v. Kerner*, 404 U.S. 519 (1972).

¹⁸⁵ FED. R. CIV. P. 56(a).

¹⁸⁶ See, e.g., *United States v. Becker*, No. CV 18-2049-GW(AGR), 2019 WL 6167396 (C.D. Cal. June 20, 2019); *United States v. Rahman*, No. 18-10530, 2020 WL 1915692 (E.D. Mich. Apr. 20, 2020).

¹⁸⁷ *Schiro v. Summerlin*, 542 U.S. 356, 358 (2004) (“for every argument why juries are more accurate factfinders, there is another why they are less accurate”); Cooper Ellenburg, *Lie Detection: A Changing of the Guard in the Quest for Truth in Court?*, 33 L. & PSYCH. REV. 139, 139 (2009) (noting “jury verdicts may be inaccurate more than one would readily believe”) (citing Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305 (2007)).

evidence of guilt.”¹⁸⁸ The possibility of jury nullification is clearly an increased risk of *inaccuracy*.

In addition, the accuracy of juries is directly tied to their ability to understand the evidence; as the subject matter of a trial increases in complexity, the ability of a jury to understand—and thus accurately determine—the underlying facts decreases.¹⁸⁹ Where unanimity is required, even one juror who is unable to understand the case may cause an inaccurate result. Judges are better equipped to understand and manage the sources of information—often old, often foreign—that denaturalization cases bring with them. Judges are also likely less prone to tampering than juries.

The Sixth Amendment right to confrontation would add little protection. The authors offer no examples where anyone was denaturalized based on testimonial evidence admitted under a hearsay exception, but that would have been excluded had the Sixth Amendment confrontation right applied. Additionally, applying the confrontation right in this context would substantially impair cases that involve atrocities, including genocide, where the defendant intended to kill the victims for persecutory reasons, but not specifically in order to make them unavailable to testify. The absence of that intent to prevent the witnesses’ testimony would not trigger the forfeiture-by-wrongdoing doctrine.¹⁹⁰ Finally, it would prevent the introduction of deposition testimony from unavailable witnesses (including those located abroad), which diminishes, rather than enhances, the truth-seeking function of a trial.

On the other hand, denaturalization proceedings under civil rather than criminal procedures have several benefits for defendants. For example, they are not arrested. As Robertson and Manta note, people sometimes plead guilty in order to avoid the possibility of harsher punishment.¹⁹¹ And while many defendants elect not to contest the government’s allegations in civil denaturalization cases, there is little room for negotiation similar to criminal plea bargaining—where a federal defendant can be granted benefits related to the sentencing guideline calculations for accepting responsibility—thus avoiding inducements to improvident pleas. Additionally, in civil investigations, the government lacks the authority to seek a probable cause

¹⁸⁸ Daniel P. Collins, *Making Juries Better Factfinders*, 20 HARV. J.L. & PUB. POL’Y 489, 489 (1997) (emphasis added); see also Simon Jenkins, *Our Justice System Is in Crisis, So Why Not Abolish Jury Trials?*, GUARDIAN (Jan. 22, 2021, 6:14 AM), <https://perma.cc/9F3R-8FHW> (suggesting that juries “have nothing to do with justice except often to distort it.”). Jenkins echoes the position of Oliver Wendell Holmes who, over a century earlier, observed that “[t]he man who wants a jury has a bad case” and that “in my experience, I have not found juries specially inspired for the discovery of the truth . . . they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice.” Collins, *supra* note 188, at 492 n.14 (quotations omitted).

¹⁸⁹ Kwangbai Park, *Estimating Juror Accuracy, Juror Ability, and the Relationship Between Them*, 35 L. & HUM. BEHAV. 288 (2011); Jenkins, *supra* note 188 (noting that in one fraud case in which the author was a juror “the evidence was a total mystery”).

¹⁹⁰ *Giles v. California*, 554 U.S. 353 (2008).

¹⁹¹ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 420–21 nn.103–04.

warrant to search and seize evidence, and defendants have far more wide-ranging opportunities to seek discovery from the government in civil cases than in criminal prosecutions.¹⁹²

The relative benefits to defendants and to the accuracy of the process are not obviously better or worse in criminal proceedings than they are in civil cases. They are just different.

III. PROCEDURAL PROTECTIONS AND THE NATURE OF CITIZENSHIP

A. *Ceci n'est pas une citoyenneté*

Robertson and Manta suggest that “rescinding recognition of native-born status” “remov[es] citizenship.”¹⁹³ Because the government is not required to initiate denaturalization proceedings to conclude that an individual was not born in the United States (or was not subject to its jurisdiction at birth), they call these types of cases “unofficial” denials of citizenship.¹⁹⁴ Denying a right of citizenship to someone who is not and never was a citizen determines a question of historic fact—the place of birth or diplomatic status at birth; it does not alter any existing status (even one obtained unlawfully, as denaturalization does). More fundamentally, the suggestion that issuance of a passport or birth certificate conclusively determines citizenship confuses citizenship with *evidence* of citizenship¹⁹⁵—a classic example of the reification fallacy.

In 1929, Belgian surrealist René Magritte painted “The Treachery of Images” (*La trahison des images*)—an art deco smoking pipe above the legend “Ceci n'est pas une pipe” (“This is not a pipe”).¹⁹⁶

¹⁹² Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 855–56 (1995) (noting that no criminal discovery procedures are comparable in scope to civil discovery).

¹⁹³ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1428–29; *see also id.* at 1470.

¹⁹⁴ *Id.*

¹⁹⁵ Atle Grahl-Madsen, *Protection of Refugees by Their Country of Origin*, 11 YALE J. INT'L L. 362, 370 (1986) (“While the passport plays an important role in diplomatic and consular protection, it is only a prima facie proof of citizenship.”).

¹⁹⁶ René Magritte, *La trahison des images (Ceci n'est pas une pipe)*, in L.A. CNTY. MUSEUM OF ART (1929), <https://perma.cc/LN4G-86T3>.

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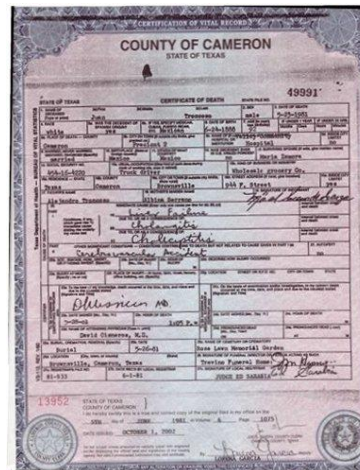
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As Magritte explained, “It’s quite simple. Who would dare pretend that the REPRESENTATION of a pipe IS a pipe? Who could possibly smoke the pipe in my painting? No one. Therefore it IS NOT A PIPE.”¹⁹⁷ In short, the representation is not the thing itself.

Likewise, neither of these is a citizenship:



Citizenship may be many things, but it is fundamentally an abstraction. Robertson and Manta would have the map be the territory.¹⁹⁸

¹⁹⁷ Zuzanna Stańska, *Painting of the Week – René Magritte, The Treachery of Images*, DAILY ART. MAG. (Nov. 6, 2016), <https://perma.cc/SK24-37S3>.

¹⁹⁸ The map/territory analogy is generally credited to Alfred Korzybski, *A Non-Aristotelian System and Its Necessity for Rigour in Mathematics and Physics*, reprinted in *SCIENCE AND SANITY* 747–

1. Passports

A passport is, at its core, a travel document.¹⁹⁹ Generally speaking, travel documents identify the bearer and the bearer's nationality. The issuing authority, invoking principles of international law, requests the authorities of foreign governments through whose territory the bearer may be traveling to protect the bearer and, if necessary, render assistance. U.S. passports, for example, bear the following inscription: "The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection."²⁰⁰

Today, a passport is a functional requirement in most instances for international travel, and, generally, countries issue passports only to their own nationals. Where there is a recognized (or assumed) right to international travel, "[t]his presumed connection between citizenship and possession of a state's passport is, of course, the basis for the colloquial reference to the latter as an indication of possession of the former."²⁰¹

But it is not a colloquial reference. A passport, when used in international travel, is fundamentally an expression of nationality, not citizenship.²⁰² The two are closely related, but not identical.²⁰³ "Both identify the legal status of

61 (1931), though Korzybski acknowledged earlier work by Eric Temple Bell. Both followed Lewis Carroll's fictional map "on the scale of a mile to the mile" in *Sylvie and Bruno Concluded* (1893). The phrase has since entered general academic usage, particularly in anthropology, through the work of Gregory Bateson's *Steps to an Ecology of Mind* (1972) and Jonathan Z. Smith's *Map Is Not Territory: Studies in the History of Religions* (1978). *But see* SADIQ, *supra* note 22 (suggesting that in those countries that cannot readily distinguish citizen from foreigner, fraudulently acquiring documents evidencing citizenship provides functional "documentary citizenship").

¹⁹⁹ 8 FAM 101.1-1(b).

²⁰⁰ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 83 (2015) (Scalia, J., dissenting); *see also* Craig Robertson, *Passports in American Culture and Law*, 14 *INSIGHTS ON L. & SOC.* 4, 4 (2013-2014).

²⁰¹ JOHN C. TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 222 (2d ed. 2018)

²⁰² *Id.* at 114 ("As elsewhere, the ultimate result would be to promote the institutionalization of documentary controls designed to . . . distinguish clearly between nationals and others."); *Muthana v. Pompeo*, 985 F.3d 893, 909 n.11 (D.C. Cir. 2021) ("[A] passport 'does not confer citizenship upon its recipient.'") (quoting *Hizam v. Kerry*, 747 F.3d 102, 109 (2d Cir. 2014)).

²⁰³ COHEN, *SEMI-CITIZENSHIP*, *supra* note 1, at 9, 174 (noting that nationality is "generally treated as a single right to which other rights of citizenship are closely bonded" and that rights of nationality and citizenship are protected under different provisions of the Universal Declaration of Human Rights); CASEY, *supra* note 39, at 50 ("citizenship in domestic law and nationality in international law are not necessarily coextensive terms. [They] emphasize two different aspects of the same notion . . . 'Nationality' stresses the international, 'citizenship' the national, municipal aspect.") (internal quotations omitted); Maximilian Koessler, "Subject," "Citizen," "National," and "Permanent Allegiance", 56 *YALE L.J.* 58, 63 (1946) ("Citizenship,' in modern usage, is not a synonym of nationality or a term generally used for the status of belonging to a state, but means specifically the possession by the person under consideration, of the highest or at least of a certain higher category of political rights and (or) duties, established by the nation's or state's constitution."). Thus, during the period when a declaration of intent was required prior to naturalization, which required the applicant to renounce their allegiance *prior* to naturalizing as

an individual in terms of state membership. But citizenship is largely confined to the national dimension, while nationality refers to the context of an interstate system.”²⁰⁴ The United States, as suggested in the inscription quoted above, provides passports to non-citizen nationals as well as its citizens.²⁰⁵ But “[i]n principle, states may elect to give passports to anyone they choose.”²⁰⁶ And, in fact, “[s]tate practice in the issuance of passports is so varied . . . that it is impossible to establish a connection in international law between the issuance of a passport and the acquisition or tenure of nationality.”²⁰⁷ Not only do some states issue *travel documents* to foreigners, but some states issue *passports* to certain foreigners.²⁰⁸ Moreover, states may issue passports to facilitate travel even of non-nationals under their protection, and certain international organizations may also issue travel documents.²⁰⁹

The criteria for issuance of travel documents—especially refugee travel documents—was a matter of substantial controversy in the inter-war period.²¹⁰ Following World War I, the Bolshevik Revolution, and the famines of 1919–22, perhaps up to 1.75 million people migrated *en masse* from Russia, some of whom were involuntarily stripped of their citizenship as perceived political enemies.²¹¹ Turkey soon followed suit with respect to ethnic Armenians (at

a citizen, this renunciation may have been sufficient to make the applicant a *national* and eligible for U.S. consular assistance while traveling abroad. CASEY, *supra* note 39, at 55. Some were able to avail themselves of such consular protection, often to avoid paying taxes or military service in their country of origin. *Id.* at 69. The return of new U.S. citizens *following* naturalization, and then seeking consular assistance abroad, sometimes with no intention of returning to the United States, was the impetus for denaturalization on the basis of foreign residence in the first denaturalization acts. *Id.* at 71–73.

²⁰⁴ Sassen, *supra* note 58, at 180. The difference was more pronounced prior to decolonization, as residents of a territory under colonial dominion would be *nationals* of the colonial power while outside the empire, but not *citizens* in the sense of entitlement to the full array of political power domestically. In the United States, the only remaining non-citizen nationals are residents of American Samoa and Swains Island, 8 U.S.C. § 1408, and certain inhabitants of the Commonwealth of the Northern Mariana Islands, who opted to become non-citizen nationals rather than U.S. citizens, *see* Public Law No. 94-241 § 302, 90 Stat. 263 (Mar. 24, 1976), and even that status is uncertain. A federal judge in the District of Utah recently ruled that U.S. nationals are entitled to citizenship under the Fourteenth Amendment. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019), *rev'd* 1 F.4th 862 (10th Cir. 2021). Previously, the most numerous group of noncitizen nationals of the United States were probably Filipinos. *See* TORPEY, *supra* note 201, at 125.

²⁰⁵ *See* TRAVEL.STATE.GOV, *Certificates of Non Citizen Nationality*, <https://perma.cc/428N-FDRW> (last visited Aug. 25, 2021).

²⁰⁶ TORPEY, *supra* note 201, at 222.

²⁰⁷ *Id.* (citing RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* 150 (2d rev. ed. 1988)).

²⁰⁸ *Id.*

²⁰⁹ The United Nations issues a *laissez-passer* to certain officials. United Nations, *Guide to the Issuance of United Nations Travel Documents* (2012), <https://perma.cc/Z5W6-KSYW>.

²¹⁰ *See generally* CLAUDENA M. SKRAN, *REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME* (1995).

²¹¹ CASEY, *supra* note 39, at 110; TORPEY, *supra* note 201, at 154; SKRAN, *supra* note 210, at 32–40; James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L. Q. 348, 351 (1984); Holborn, *supra* note 85, at 680 n.2, 685.

least those who were not killed in the 1915 genocide),²¹² and the fascist Italian regime, while stopping short of denationalization, withdrew consular protection from some citizens.²¹³ In July 1922, representatives of sixteen governments joined an arrangement to provide a travel document—a “Nansen passport”—to identify displaced persons of Russian origin.²¹⁴ Within just over a year, another sixteen governments had joined. Importantly, the success of the program was due in large part to the terms of the agreement, which provided that states could issue and reciprocally honor Nansen passports without granting citizenship rights or even admitting the bearer.²¹⁵ In May 1924, the League of Nations extended the program to Armenians.²¹⁶ A 1928 Arrangement extended the authority of the High Commissioner to perform certain consular functions on behalf of refugees.²¹⁷

Thus, “[t]he widespread deviations from the standard assumption of a connection between *citizenship* and access to a passport” disproves the common assumption that a passport signifies citizenship.²¹⁸ Instead, the “principal function of a passport in international law is to demonstrate the identity and *nationality* of the bearer.”²¹⁹

With regard to the United States, the Foreign Affairs Manual provides that “A U.S. passport is one of the most valuable travel and identity documents in the world because it identifies the bearer as a U.S. citizen/non-citizen U.S. national, and thereby may facilitate the bearer receiving the benefits associated with U.S. citizenship/non-citizen U.S. nationality, identity, and entitlement to a U.S. passport.”²²⁰ But it is only acceptable as proof of citizenship (or nationality) when actually issued to a citizen (or national).²²¹ Denial of a passport application to an applicant whose citizenship is in doubt is not a declaration of non-nationality, but a determination that the applicant

²¹² TORPEY, *supra* note 201, at 156 (noting that “[a]fter a Turkish assault on Smyrna (Izmir) in September 1922 . . . more than a million Anatolian Greek and Armenian refugees poured into Greece within a few weeks”); SKRAN, *supra* note 210, at 42–48; Hathaway, *supra* note 211, at 352.

²¹³ TORPEY, *supra* note 201, at 155; SKRAN, *supra* note 210, at 55–57.

²¹⁴ TORPEY, *supra* note 201, at 157–58; SKRAN, *supra* note 210, at 104–05. The Nansen passport takes its name from Fridtjof Nansen, the League of Nations High Commissioner for Refugees. “Russian origin” refers to subjects of the erstwhile Russian empire—the individuals themselves were of a variety of ethnic origins, perhaps half of whom were ethnically Russian. TORPEY, *supra* note 201, at 154.

²¹⁵ TORPEY, *supra* note 201, at 158; SKRAN, *supra* note 210, at 104–05.

²¹⁶ TORPEY, *supra* note 201, at 158; SKRAN, *supra* note 210, at 105.

²¹⁷ TORPEY, *supra* note 201, at 159; SKRAN, *supra* note 210, at 108.

²¹⁸ TORPEY, *supra* note 201, at 222 (emphasis added); *see also* Grahl-Madsen, *supra* note 195, at 367 (“A passport . . . is not always trustworthy as an identity document or proof of citizenship”).

²¹⁹ *Id.* (emphasis added).

²²⁰ U.S. DEP’T OF STATE, VOL. 8 FOREIGN AFFAIRS MANUAL § 101.1-1(g) (2018).

²²¹ 22 U.S.C. § 2705(1); 8 FAM § 101.1-1(g); Grahl-Madsen, *supra* note 195, at 370 (“The real test of citizenship in most states, including the United States, is whether the bearer actually possesses the nationality of the state . . .”).

has insufficiently proven their nationality. It reflects, at most, “unequal access to rights,”²²²—the substantive right itself is not unequal.

2. Birth Certificates

The authors’ suggestion that birth certificates be deemed conclusive of citizenship when issued by “the government” is perhaps even more problematic.²²³ The federal government, which has exclusive authority over matters of nationality and citizenship, does not issue birth certificates for children born in the United States. Individual states (or sub-state entities such as counties and municipalities) issue them, and they do so generally based on an affidavit, with no investigation into the actual location of birth²²⁴ and certainly no investigation as to the diplomatic status of the infant, which is a matter solely within federal purview.²²⁵ Birth certificates are meant to document the fact of a birth, not citizenship, because states (and their subdivisions) lack the authority to conclusively determine a legal status reserved to the federal government alone. Thus, they cannot be *conclusive* evidence of citizenship by birth in the United States.

That said, birth certificates are properly *presumptive* evidence of citizenship because it is fair to assume that virtually everyone issued a birth certificate by a state or sub-state entity was, in fact, born in the United States. Apart from children of diplomats who are born in the United States but excluded from citizenship by virtue of the Fourteenth Amendment, and those whose birth certificates were issued on the basis of a fraudulent representation as to the place of birth,²²⁶ it is difficult to envision situations where a genuine birth certificate could be obtained for someone who is not a citizen. But the exceptions remain. A U.S. birth certificate is not citizenship itself and, while extremely probative, it cannot conclusively demonstrate the citizenship of its bearer. *Conclusively* establishing citizenship is not the function of birth

²²² Núñez, *Mapping*, *supra* note 28, at 491 n.69.

²²³ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1474 (advocating for a rule that “once the government has . . . given [an individual] a U.S. birth certificate . . . that individual has truly been accepted into the polity and can enjoy full rights for perpetuity” without recognizing any differentiation in exclusive authority between state and federal governments); compare U.S. CONST. art. I, § 8 (providing federal legislative power over naturalization and foreign affairs), with U.S. CONST. amend. X (reserving to the states or to the people all power not specifically granted to the federal government).

²²⁴ See *Birth Certificates*, AM. BAR ASS’N (Nov. 20, 2018), <https://perma.cc/Z95V-665E> (noting that “birth certificates are issued by the states,” and “[w]ithin each state, the management of birth certificates might be further decentralized, with data collected and certificates issued at the county or municipal level” based on data submitted “by parents, doctors, midwives, and hospitals”).

²²⁵ See U.S. CONST. art. II, § 3; Guar. Tr. Co. of N.Y. v. United States, 304 U.S. 126, 138 (1938) (noting the Executive has exclusive authority in matters of diplomatic relations with foreign nations and the President’s “action in . . . receiving . . . diplomatic representatives is conclusive on all domestic courts”).

²²⁶ See, e.g., Pauline Arrillaga, *Midwife Pleads Guilty in Birth Certificate Scam*, ASSOCIATED PRESS (June 12, 1996), <https://perma.cc/D87H-2TL5> (noting that, of ten midwives charged with federal crimes, nine pleaded guilty and one absconded).

certificates, and adjudication of citizenship is beyond the power of the authorities that issue them.

The cases cited by Robertson and Manta exhibit the difficulties in assuming that a birth certificate is dispositive of citizenship status. The case of Hoda Muthana, in particular, is a prime example because the parties did not dispute whether she was born in the United States as reflected on her birth certificate—all agreed she was born in New Jersey.²²⁷ Rather, the sole dispute was whether, at the time of her birth, her father was a diplomat entitled to privileges and immunities, rendering him and his family not “subject to the jurisdiction” of the United States as required to obtain birthright citizenship under the Fourteenth Amendment.²²⁸ Such facts would not be reflected on the face of the birth certificate itself, but rather require careful review of historical records maintained by the United States Department of State.²²⁹ Ultimately, however, the facts once ascertained by the court dictate the result—either she was born a United States citizen or she was not.

The other passport-denial cases the authors cite inherently involve fraud, though the question to be litigated is whether it is the United States or another country that was defrauded. In most such cases, the individual has birth certificates from both the United States and Mexico, each of which purports to document birth within its own territory. In the Rio Grande Valley, the two sides of the border are entwined socially and economically.²³⁰ “Individuals cross the border to work, shop, and go to school; own property on both sides; and have families that span the divide.” Thus, for individuals living along the border, it may be beneficial to claim citizenship in both countries—the U.S. for travel and work, and Mexico for social benefits.²³¹ Yet, “[a] person born in

²²⁷ *Muthana v. Pompeo*, 985 F.3d 893, 899 (D.C. Cir. 2021).

²²⁸ *Id.*

²²⁹ *Id.* at 908 (“we must accept the State Department’s formal certification to the Judiciary as conclusive proof of the dates of diplomatic immunity”).

²³⁰ SPIRO, *supra* note 28, at 26; *see also* Roberto José Andrade Franco, *The Unstoppable Dreams of USMNT Prodigy Ricardo Pepi*, ESPN (Oct. 6, 2021), <https://perma.cc/9W5M-2ZU5> (“It was a life common to many El Pasoans. Monday through Friday, while working or at school, they stayed on the north side of the Rio Grande. On weekends and the random weeknight, the Pepis returned to the south side of the river to spend time with family still living in Juárez, Mexico. ‘We consider it one city, one community . . . It doesn’t really matter if you live in El Paso or live in Juárez, you cross that bridge as much as you can.’”).

²³¹ *See* Steven Meili, *Constitutionalized Human Rights Law in Mexico: Hope for Central American Refugees?*, 32 HARV. HUM. RTS. J. 103, 129 (2019) (noting that a CURP card, issued to Mexican citizens, residents, and certain visitors, is required to access “a variety of economic rights and benefits, including . . . healthcare, and education.”); Emily Green, *There Are About 600,000 Children in Mexico Who Were Born in the US But Struggle to Claim Citizenship*, WORLD (June 26, 2018, 12:00 PM), <https://perma.cc/L3A8-QG4S> (noting claims by Mexican parents that they were denied access to Mexican public schools for their U.S.-born children until they claimed the children were born in Mexico); Alexander Becker et al., *The Naturalization of U.S.-Born Children in Mexico: A Mixed Methods Analysis of Current and Prospective Practices* 5 (IMUMI Final Report, May 2014) <https://perma.cc/ZUA5-8FD9> (“Although these U.S.-born children of Mexican descent have the right to dual America-Mexican citizenship, they may not be able to access the services of either country if they are not properly documented.”).

Ciudad Juárez to Mexican citizen parents is not a U.S. citizen at birth.”²³² The question in cases where an individual has multiple birth certificates is a factual one: in which country was the individual actually born? Given that multiple midwives were convicted of fraudulently registering individuals as having been born in the United States, a conclusive presumption that only Mexico is ever defrauded would be naïve.

Apart from the historically rather simple matter of perpetrating midwife fraud in border towns, treating a birth certificate as dispositive of citizenship status would obliterate the “subject to the jurisdiction thereof” clause from the Fourteenth Amendment. Indeed, that constitutional language expressly addresses situations where the individual was indisputably born in the United States. While a conclusive presumption would perhaps have benefitted Hoda Muthana, it would both negate express constitutional language and create substantial diplomatic problems, both for foreign diplomats in the United States and for the children of U.S. diplomats born abroad.²³³

For example, according the children of foreign diplomats citizenship would lead to the anomalous situation where a visiting foreigner would be eligible for consular assistance, but the child of a diplomat, as a “citizen” of this country, would not²³⁴—a particularly odd result where the child’s own parent could be the consul. The more immediate impact is financial. Few foreign diplomats would be pleased if the government of the United States, to which they were accredited at the time of their child’s birth, attempted to tax their child’s earnings, anywhere in the world, for life, until a fee of over \$2,000 is paid to relinquish this questionable U.S. “citizenship.”²³⁵ Diplomatic immunity is generally granted on a reciprocal basis, so, if the authors’ view prevails, the United States can expect similar treatment for its own diplomats and their children.²³⁶

Separately, Robertson and Manta suggest that the inability of courts to equitably confer naturalization under *Pangilinan* “need not apply when the government challenges the original existence of citizenship rights.”²³⁷ As a threshold matter, it is difficult to square this putative authority (which would presumably emanate from Article III) with Congress’s *exclusive* authority under Article I to define a uniform Rule of Naturalization, and its having done so only as authorized in Title 8, “and not otherwise.”²³⁸ Beyond this, *Pangilinan* carries at least as much force (probably more) in the context of refusal to recognize citizenship as it does through *Fedorenko* in the context of

²³² SPIRO, *supra* note 28, 27.

²³³ Muthana v. Pompeo, 985 F.3d 893, 905–06 (D.C. Cir. 2021), *cert. denied* 147 S. Ct. 757 (2022).

²³⁴ Vienna Convention on Consular Relations art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 (Apr. 24, 1963); *see also* Medellín v. Texas, 552 U.S. 491 (2008).

²³⁵ McGinty, *supra* note 41.

²³⁶ Muthana, 985 F.3d at 905.

²³⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1471.

²³⁸ 8 U.S.C. § 1421(d).

denaturalization. *Pangilinan* itself held that courts cannot declare someone to be a citizen when they are not—meaning they have not satisfied the requirements set by Congress, the only body having constitutional authority to craft such requirements beyond those expressly provided in the Constitution.

The authors suggest that the difference lies in the Filipino servicemen in *Pangilinan* never having been issued documentation of citizenship status, while the plaintiffs in *Muthana* and *Hizam* were refused renewal of their passports after having previously been issued them.²³⁹ This points to a more fundamental problem: as discussed above, neither having “long been recognized” as a citizen—meaning having documentation evidencing one’s citizenship—nor exercising rights conferred by that acceptance, is citizenship itself.²⁴⁰ At most, the issuance of documentation would give rise to a sort of “citizenship by estoppel”—which, due to the constitutional limitations noted above, is exactly what *Pangilinan* rejected.²⁴¹

B. Finality and the Future of Human Rights Enforcement

Doubling down on their position that an individual’s reliance on citizenship status is more important than whether that status was lawfully obtained, the authors suggest denaturalization is, as a constitutional matter, constrained to “a narrow period in which citizenship decisions are subject to review or reconsideration.”²⁴² They suggest, initially, that finality and reliance principles dictate that once an individual has been accorded naturalization, the government should lack any ability at all to revoke that status, regardless of how it was obtained.²⁴³ In what appears to be a recognition of the extreme nature of such a suggestion, they immediately fall back on the proposals that the judiciary or Congress impose a truncated statute of limitations,²⁴⁴ and that the Supreme Court overturn its own long-standing precedent to allow individuals to rely on equitable defenses like estoppel and laches.²⁴⁵ Both proposals, however, are based on an incomplete understanding of the state of the law and the broader societal interests at stake.

²³⁹ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1469–70.

²⁴⁰ *Contra* Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1427–28.

²⁴¹ *Muthana*, 985 F.3d at 910 (citing *INS v. Pangilinan*, 486 U.S. 875, 885 (1988); *Fedorenko v. United States*, 449 U.S. 490, 506 (1981); U.S. CONST. art. I, § 8).

²⁴² Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1429.

²⁴³ *Id.* at 1474 (“The most clean-cut solution is to eliminate all mechanisms for civil and criminal denaturalization.”). *See also* Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 454–64 (arguing that civil denaturalization is inconsistent with both substantive and procedural due process).

²⁴⁴ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1473.

²⁴⁵ *Id.* at 1473–74.

1. Statutes of Limitation

There is not now, nor has there ever been, a statute of limitations for civil denaturalization. The authors seek to change a status quo that has existed for more than a century, suggesting the judiciary should reconsider decades-old precedent regarding the language and intent of a statute based on press releases,²⁴⁶ and that Congress should enact a thirty- to sixty-day statute of limitations, which would be by far the shortest statute of limitations in the entire United States Code.²⁴⁷ Both are unwarranted and would injure the United States as a whole while incentivizing the worst of society to commit fraud, and rewarding those who succeed.

As a preliminary matter, the authors' suggestion that it is counterintuitive that criminal denaturalization has a statute of limitations while civil denaturalization does not²⁴⁸ seems to assume that the two processes are interchangeable. They are not. First and foremost, a criminal prosecution for naturalization fraud under 18 U.S.C. § 1425 is primarily just that—a *criminal* action, in which the defendant, if convicted, faces possible penalties, including incarceration and a fine, in addition to revocation of citizenship.²⁴⁹ Denaturalization in such cases is a ministerial act that follows on the primary, criminal penalties imposed following criminal procedure.²⁵⁰ And those criminal penalties can be significant; in some cases, defendants have received a sentence of as much as 22 years in prison.²⁵¹ When faced with such penalties, including the possible deprivation of freedom in particular, it is not at all counter-intuitive that Congress chose to set a statute of limitations for criminal charges under 18 U.S.C. § 1425. Indeed, the very purpose of the statute of limitations in a criminal case

[I]s to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions . . . to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.²⁵²

²⁴⁶ *Id.* at 1466–67.

²⁴⁷ *Id.* at 1473.

²⁴⁸ *Id.* at 1456.

²⁴⁹ 18 U.S.C. § 1425.

²⁵⁰ *United States v. Maduno*, 40 F.3d 1212, 1218 (11th Cir. 1994); *United States v. Inocencio*, 328 F.3d 1207, 1209 (9th Cir. 2003).

²⁵¹ *See United States v. Worku*, No. 12-cr-346-JLK, 2014 WL 2197537 (D. Colo. May 27, 2014).

²⁵² *United States v. Marion*, 404 U.S. 307, 323 (1971) (quoting *Toussie v. United States*, 397 U.S. 112, 114–115 (1970)); *see also Stogner v. California*, 539 U.S. 607, 615 (2003) (“[Legislative] judgment [regarding criminal statute of limitations] typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.”) (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979); 4 W.

Unlike a criminal prosecution under 18 U.S.C. § 1425, civil denaturalization is neither an “official punishment” nor a penalty for improper conduct.²⁵³ Rather, it is a restoration of the *status quo ante*—the situation that should have been absent the unlawful acquisition of naturalization.²⁵⁴ This distinction is a critical one, and it has been the source of significant recent litigation in civil denaturalization cases.²⁵⁵ Numerous individuals have argued that, in light of the Supreme Court’s 2017 decision in *Kokesh v. SEC*,²⁵⁶ civil denaturalization is a “penalty” and, as such, actions under 8 U.S.C. § 1451(a) are subject to the generic five-year statute of limitations under 28 U.S.C. § 2462.²⁵⁷ So far, none of them have been successful.

The authors note this litigation, commenting that “[s]ome lower courts have answered that question in the negative.”²⁵⁸ In fact, in an unusual showing of uniformity, *all* federal courts to have addressed this argument have held that denaturalization is not a penalty for purposes of the generic five-year statute of limitations.²⁵⁹ Indeed, the courts have not found the question to be a particularly close call, and some have rejected the suggestion that a statute of limitations applies to civil denaturalization as completely devoid of support.²⁶⁰

LAFAYE ET AL., CRIMINAL PROCEDURE § 18.5(a), at 718 (1999); WHARTON, CRIMINAL PLEADING AND PRACTICE § 316, at 210)).

²⁵³ *United States v. Phathey*, 943 F.3d 1277, 1282–83 (9th Cir. 2019).

²⁵⁴ *Id.* (citing *Johannessen v. United States*, 225 U.S. 227, 242–43 (1912); *Trop v. Dulles*, 356 U.S. 86, 98–99 (1958); *United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir. 1984)).

²⁵⁵ *See, e.g., Phathey*, 943 F.3d at 1277 (holding that the five-year limitations period in 28 U.S.C. § 2462 is inapplicable in civil denaturalization actions); *United States v. Rahman*, No. 19-cv-1113, 2020 WL 5236931 (D.N.H. Sept. 2, 2020); *United States v. Becker*, No. 18-cv-2049, 2019 WL 6167396 (C.D. Cal. June 20, 2019).

²⁵⁶ *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017), *superseded by statute*, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501(a), 134 Stat. 3388, 4625–26 (Jan. 1, 2021) (to be codified at 15 U.S.C. § 78u(d)).

²⁵⁷ *See, e.g., Phathey*, 943 F.3d at 1277; *Rahman*, No. 19-cv-1113, 2020 WL 5236931; *Becker*, No. 18-cv-2049, 2019 WL 6167396.

²⁵⁸ *Robertson & Manta, Inalienable Citizenship, supra* note 6, at 1466.

²⁵⁹ *Phathey*, 943 F.3d at 1283; *United States v. Hongyan Li*, 619 F. App’x 298, 302–03 (5th Cir. 2015); *United States v. Rebelo*, 394 F. App’x 850, 853 (3d Cir. 2010); *United States v. Hauck*, 155 F.2d 141, 143 (2d Cir. 1946); *United States v. Prat*, No. 1:21-cv-20547, 2022 WL 138475, at *2 (S.D. Fla. Jan. 14, 2022); *United States v. Singh*, No. 20-cv-58, 2021 WL 1193623, at *2–3 (S.D. Ohio Mar. 30, 2021); *United States v. Multani*, No. 19-cv-1789, 2021 WL 633638, at *2 (W.D. Wash. Feb. 28, 2021); *United States v. Tall*, No. 19-cv-549, 2021 WL 640691, at *7–8 (E.D.N.C. Feb. 18, 2021); *United States v. Martinez*, 507 F. Supp. 3d 793, 798–99 (S.D. Tex. 2020); *United States v. Donkor*, 507 F. Supp. 3d 423, 429–30 (E.D.N.Y. 2020); *Rahman*, No. 19-cv-1113, 2020 WL 5236931, at *2; *United States v. Dhanoa*, 402 F. Supp. 3d 296, 301 (D.S.C. 2019); *United States v. Wasel*, No. 17-cv-12296, 2020 WL 4584168, at *2 (E.D. Mich. Aug. 10, 2020); *Becker*, No. 18-cv-2049, 2019 WL 6167396, at *5; *United States v. Malik*, No. 15-cv-9092, 2019 U.S. Dist. LEXIS 66354, at *3–4 (D. Kan. Apr. 17, 2019); *United States v. Borgono*, No. 18-cv-21835, 2019 WL 1755709, at *4 (S.D. Fla. Apr. 18, 2019); *United States v. Wang*, 404 F. Supp. 2d 1155, 1158 (N.D. Cal. 2005).

²⁶⁰ *See, e.g., Borgono*, No. 18-cv-21835, 2019 WL 1755709, at *4 (“[T]here is simply no legal support for the application of § 2462’s limitations period.”); *see also Rahman*, No. 19-cv-1113, 2020 WL 5236931, at *2 (“[F]ederal circuit and district courts have uniformly held that the catch-all statute

Robertson and Manta disagree with every federal court to have considered the issue for two reasons. First, they believe that the well-established principle that civil denaturalization is not a penalty is no longer warranted because, in their view, “it is impossible to say that denaturalization is no longer intended as punishment.”²⁶¹ They base their conclusion on the “explicit statements of the Trump administration” in press releases,²⁶² in the light of which they view courts’ disagreement with their view as “rather puzzling.”²⁶³ Second, they contend that the Ninth Circuit’s analysis of *Kokesh* and its applicability to civil denaturalization in *United States v. Phathey*—the only circuit court to have addressed the argument to date—is “deeply flawed” based on the circuit court’s omission of critical limiting language from the Supreme Court’s decision.²⁶⁴ Specifically, they contend that the *Kokesh* Court identified only two possible conclusions: “a pecuniary sanction is either used for punishment and general deterrence, or it is compensation to a private victim.”²⁶⁵ Concluding that civil denaturalization “can only be the former,” the authors suggest that it, like a pecuniary sanction used for punishment, is a penalty and must be subject to the generic statute of limitations.²⁶⁶

The authors’ conclusion is fatally unsound for at least two reasons. First, they incorrectly attribute the purpose of a statute to how it is used and discussed by the executive branch, rather than to the will and design of the legislative branch that created it.²⁶⁷ It is axiomatic that the purpose of a federal statute is based on the will and design of Congress as laid out in the words and context of the statute it enacts (and when ambiguous, the legislative history), not the Department of Justice or any particular administration.²⁶⁸ The purpose of a statute, as expressed in its language, does not change with the winds of political preference. The Supreme Court’s determination of *Congress’* intent in

of limitations does not apply to denaturalization actions.”); *Wasel*, No. 17-cv-12296, 2020 WL 4584168, at *2 (“The Court will not break from decades of precedent finding that no statute of limitations applies to civil denaturalization, nor will it disagree with every court to have considered the argument . . .”); *Becker*, No. 18-cv-2049, 2019 WL 6167396, at *5 (“[T]he Court would not break from every other district court to consider this issue, and decades of contrary cases in the Ninth Circuit and the Supreme Court . . .”); *cf. Hauck*, 155 F.2d at 143 (characterizing this argument, with regard to § 2462’s predecessor statute, as “a hopeless clutching at straws; that statute is completely irrelevant.”).

²⁶¹ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1466.

²⁶² *Id.* at 1467.

²⁶³ *Id.* at 1467 (“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.”); *id.* at 1468 (concluding that “the explicit statements of the DOJ . . . suggest that punishment is very much the primary goal” of civil denaturalization actions).

²⁶⁴ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1468.

²⁶⁵ *Id.* at 1468.

²⁶⁶ *Id.* at 1467–68.

²⁶⁷ *Id.* at 1466–67.

²⁶⁸ *See, e.g., Smith v. Doe*, 538 U.S. 84, 92 (2003); *United States v. Rahman*, No. 19-CV-1113-PB, 2020 WL 5236931, at *4 (D.N.H. Sept. 2, 2020).

enacting 8 U.S.C. § 1451(a) remains constant, absent action by Congress that changes the analysis.²⁶⁹

Second, Robertson and Manta overly simplify the Supreme Court's holding in *Kokesh*, and in the process mistake the key holding as it informs courts' analyses in the context of civil denaturalization. In *Kokesh*, the Securities and Exchange Commission ("SEC") sought disgorgement of \$34.9 million due to the plaintiff's violation of the Investment Company Act of 1940.²⁷⁰ Because the Supreme Court had previously held that the generic civil statute of limitations (28 U.S.C. § 2462) applies when the SEC seeks a statutory monetary penalty,²⁷¹ the question left for and addressed by the Supreme Court in *Kokesh* was "whether § 2462, which applies to any 'action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise,' also applies when the SEC seeks disgorgement."²⁷² Ultimately, the Supreme Court held that "[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues."²⁷³ The Court defined a "penalty" as "a punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws."²⁷⁴ From this definition, the Court articulated two principles:

First, whether a sanction represents a penalty turns in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual" Second, 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.²⁷⁵

Robertson and Manta latch on to the final clause of the second principle in their reading of *Kokesh* as it applies to civil denaturalization, arguing that the *Phathey* court failed to consider this critical language.²⁷⁶ As a preliminary matter, it bears noting that the *Phathey* court actually quoted the very

²⁶⁹ United States v. Malik, No. 15-cv-9092, 2019 U.S. Dist. LEXIS 66354, at *3 (D. Kan. Apr. 17, 2019).

²⁷⁰ *Kokesh v. SEC*, 137 S. Ct. 1635, 1641 (2017).

²⁷¹ *Gabelli v. SEC*, 568 U.S. 442, 445 (2013).

²⁷² *Kokesh*, 137 S. Ct. at 1641.

²⁷³ *Id.* at 1639 (quoting *Huntington v. Attril*, 146 U.S. 657, 667 (1892)).

²⁷⁴ *Id.* at 1642 (internal punctuation omitted).

²⁷⁵ *Id.*

²⁷⁶ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1468 ("[T]he Ninth Circuit quotes the Supreme Court's *Kokesh* decision in an abbreviated manner that leads to incorrect conclusions . . .").

language that Robertson and Manta argue it ignored.²⁷⁷ More fundamentally, however, that language has little if any applicability to civil denaturalization as it specifically addresses when a *pecuniary* sanction operates as a penalty.²⁷⁸ Congress has not authorized pecuniary sanctions under 8 U.S.C. § 1451.

To the extent that *Kokesh* is at all relevant to civil denaturalization, the most salient principle is that whether an equitable remedy is a penalty or is merely remedial turns on whether it returns a party to the *status quo ante* or authorizes action beyond those that are merely remedial.²⁷⁹ In *Kokesh*, the Supreme Court reasoned that disgorgement was not remedial because it “sometimes exceeds the profits gained as a result of the violation,” and, in such instances, “does not simply restore the status quo; it leaves the defendant worse off.”²⁸⁰

Civil denaturalization, however, does not operate like disgorgement. There are no profits at all, so the question of disgorgement (or accounting for profits or unjust enrichment) simply does not arise. Moreover, civil denaturalization does not result in a fine or any other penalty assessed against the defendant.²⁸¹ If the government is successful, the sole outcome authorized by the statute is that the defendant is returned to the immigration status previously held, and must return official documents bearing indicia of citizenship.²⁸² For this reason, every court to have considered the question post-*Kokesh* has reached the same conclusion: civil denaturalization is not a penalty and, thus, there is no statute of limitations for civil denaturalization actions.²⁸³ That is the same conclusion the Supreme Court reached in 1961, noting the absence of a statute of limitations.²⁸⁴ It is also consistent with Attorney General Wickersham’s understanding of civil denaturalization in 1909, which he “construed to be remedial rather than penal in its nature; for the protection of the body politic rather than for the punishment of the individuals concerned.”²⁸⁵ It should be no surprise at all that lower courts have uniformly held that a securities-fraud case did not overrule *sub silentio* more than a century of consistent understanding that civil denaturalization is not subject to a statute of limitations.

²⁷⁷ *United States v. Phathey*, 943 F.3d 1277, 1282 (9th Cir. 2019) (quoting *Kokesh* for the proposition that “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’ rather than to compensate victims.”).

²⁷⁸ *Kokesh*, 137 S. Ct. at 1642.

²⁷⁹ *Id.* at 1644.

²⁸⁰ *Id.* at 1644–45.

²⁸¹ See 8 U.S.C. § 1451(a) (providing that the civil denaturalization action results in the revocation of the order admitting an alien to citizenship and canceling of the certificate of naturalization); 8 U.S.C. § 1451(f) (requiring return of such documents by the alien to the government).

²⁸² *Id.*

²⁸³ See *supra* Part III.B.1.

²⁸⁴ *Costello v. United States*, 365 U.S. 265, 283 (1961) (“Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud.”).

²⁸⁵ Wickersham letter, *supra* note 59.

As an alternative proposal to suggesting the courts break with decades of precedent, the authors suggest that Congress enact a brief statute of limitations of “thirty or sixty days” following an individual’s naturalization.²⁸⁶ They argue that such a concise period “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.”²⁸⁷ While Congress could, of course, enact a statute limiting the time within which the government could file a civil denaturalization action,²⁸⁸ the authors’ suggestion fails to consider the broad range of purposes for civil statutes of limitation and the numerous real-world implications of their extraordinary proposal.

Unlike statutes of limitations in the criminal context, “[l]ittle consensus exists on the purposes compelling the creation of civil statutes of limitations.”²⁸⁹ Indeed, civil statutes of limitations are designed to “promote a variety of overlapping and inconsistent policies,” and, when creating a statute of limitations, a legislature must “strike a balance between competing policies.”²⁹⁰ As one author has noted, “[h]ow that balance is struck [has] significant allocative consequences, not just between victims and wrongdoers but for society as a whole.”²⁹¹ “The overarching aim of [civil] statutes of limitations is to balance the needs of plaintiffs against those of defendants and of society.”²⁹² In arguing that there should be a very short statute of limitations, Robertson and Manta focus on the impact on defendants (or potential

²⁸⁶ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1473. Robertson and Manta refer to this period as “a brief post-naturalization appeals period,” *id.*, and appear to take this exceedingly short period from the length of time a party typically has to appeal a court judgment, *see id.* at 1472.

²⁸⁷ *Id.* at 1473.

²⁸⁸ *Id.* Robertson and Manta’s suggestion that a statute of limitations apply in the context of passport denials is not fully fleshed out. *Id.* Statutes of limitations apply to *plaintiffs*, and, in passport denial cases, it is always the putative citizen, not the government, who is the plaintiff. 8 U.S.C. § 1503. What the authors seem to be calling for is a conclusive presumption that, after a certain number of years, previous evidence of citizenship (e.g., a prior passport) would become incontrovertible.

²⁸⁹ Andrew C. Bernasconi, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants’ Constitutional and Statutory Rights*, 50 AM. UNIV. L. REV. 979, 994 (2001); Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 514 (1997) (“It is probably futile to attempt to isolate a single purpose from among those listed that sensibly could be assigned a greater general importance than all of the others.”).

²⁹⁰ Ochoa & Wistrich, *supra* note 289, at 514. Ochoa and Wistrich identify the competing policies as including: promoting repose; minimizing the deterioration of evidence; placing the parties on equal footing; promoting cultural values of diligence; encouraging the prompt enforcement of substantive law; avoiding retrospective application of contemporary standards; and reducing the volume of litigation. *Id.* at 460–500.

²⁹¹ *Id.* at 514; FLEMING JAMES JR. ET AL., CIVIL PROCEDURE § 6.6, at 310 (4th ed. 1992) (“[P]roviding speedy and efficient justice works to the greater benefit of some sectors of society than to others. If civil justice were dramatically improved in its expeditiousness, some political interests would suffer.”).

²⁹² Carli McNeill, *Seeing the Forest: A Holistic View of the Rico Statute of Limitations*, 85 NOTRE DAME L. REV. 1231, 1232 (2010).

defendants) in denaturalization cases,²⁹³ and do not meaningfully grapple with the severe consequences that eliminating civil denaturalization as an available remedy would have on *other* individuals in the United States, including many members of immigrant communities.

The suggestion to limit the government's ability to challenge a USCIS determination to a month or two²⁹⁴ is particularly problematic. Functionally, it is unclear how the government would go about challenging *itself*. Moreover, a timeline of mere weeks would be efficacious only in those instances where USCIS knows it is improperly naturalizing someone and proceeds to do it anyway, only to then turn around days later and decide it should take it back. This would, in effect, amount to no limitations period at all.

This proposal would undoubtedly lead to additional delays in processing applications and, by extension, for each of the hundreds of thousands of individuals applying for naturalization each year.²⁹⁵ If the government is unable to meaningfully and appropriately seek to revoke previously granted naturalization applications—even under a heavy burden—when it discovers fraud, then it will predictably take substantially more time before adjudicating each application in order to reduce the likelihood that any individual decision may be erroneous. The second- and third-order effects of such a change have the potential to grind lawful naturalization to a halt and overwhelm the federal courts with tens of thousands of challenges to unlawful delay.²⁹⁶

Indeed, in the late 1990s, Congress imposed increased screening requirements for all naturalization applicants, which resulted in significant delays, and which were further expanded after the September 11, 2001 terror attacks.²⁹⁷ Those delays resulted in a mass of litigation, with plaintiffs arguing that such delays substantially harmed them.²⁹⁸ As we have noted previously, the odds that any individual naturalized citizen will ever face denaturalization proceedings are almost infinitesimally small, and those who do find themselves as defendants in denaturalization actions are usually quite familiar with the reasons why.²⁹⁹

²⁹³ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1473.

²⁹⁴ *Id.*

²⁹⁵ Belsan & Petty, *supra* note 7, at 21–22, 22 n.103 (discussing the number of applications filed each year).

²⁹⁶ As it stands, approximately one federal lawsuit under 8 U.S.C. § 1447(b) challenging a delay in adjudication of a naturalization application is filed every day. See TABLE C–2—U.S. DIST. COURTS—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (DEC. 31, 2020) (2020), <https://perma.cc/Q8T2-LC5Q>.

²⁹⁷ Department of Justice Appropriations Act, 1998, Pub. L. No. 105–119, 111 Stat. 2440, 2448–49 (1997); *Ahmadi v. Chertoff*, No. C 07-03455, 2007 WL 3022573, at *1 (N.D. Cal. Oct. 15, 2007); see also 8 C.F.R. § 335.2(b).

²⁹⁸ See, e.g., *Ali v. Frazier*, 575 F. Supp. 2d 1084, 1087 (D. Minn. 2008) (noting that the FBI background check process had “become a bottleneck” and resulted in “a new genre of case [that] has proliferated in the past few years: name-check litigation”).

²⁹⁹ Belsan & Petty, *supra* note 7, at 23–24.

Yet many if not most successful applicants, individuals who are never impacted by denaturalization, would be impacted adversely by the authors' proposal, forced to wait additional months and perhaps years before being granted citizenship. That delay is essentially an externality borne not by those committing fraud—who might be denaturalized—but rather by the overwhelming majority of applicants, who have complied with the law in every respect.³⁰⁰ In what would be a rather cruel twist, this likely would impact refugees from war zones the most—because those are the populations most likely to have committed disqualifying acts that are difficult to investigate and, thus, the applicants most likely to be delayed pending lengthy investigation.³⁰¹

The authors also fail to address major distinctions between the context of an appeal from an adverse judicial decision (from which they derive their thirty- to sixty-day proposal) and a statute of limitations.³⁰² Such a short timeline is feasible for an appeal deadline in litigation because the parties already have all of the facts and a crystallized disagreement. When the court issues a decision, the losing party knows that it lost. Not so in the context of a naturalization adjudication. Presumptively, if the immigration authorities knew that an individual was committing fraud or was not qualified for naturalization—and certainly if they believed they had sufficient evidence to prove it by “clear, unequivocal, and convincing evidence”—they would never grant the application in the first place. It is only where the fraud is undiscovered (or perhaps suspected but without sufficient evidence to deny an application) that the individual is permitted to naturalize, it later turns out, in violation of the criteria established by Congress. The authors offer no explanation for why it would be reasonable to assume that the government could discover the fraud, collect all of the evidence it needs to prove such fraud

³⁰⁰ *Id.* at 15–16.

³⁰¹ It is unclear what the authors mean by suggesting that USCIS is not investigating applicants “properly.” Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1473. The whole immigration system, including naturalization, depends to a very great extent on the honesty of individuals. *Singh v. Holder*, 643 F.3d 1178, 1182 (9th Cir. 2011). Nearly all applicants are honest. But a few are not and, of those, there is often no available evidence to make that determination at the time a naturalization examination is conducted. For example, the Operation Janus cases depended on people honestly stating whether they had used other names or had previously been in removal proceedings; technological limitations in the early 1990s, coupled with the immense volume of naturalizations, precluded meaningful investigation. There was no possible way to compare millions of paper fingerprint records one by one. Belsan & Petty, *supra* note 7, at 13–14. Victims of sexual abuse may not speak out until years (or decades) after the fact, if ever. *See, e.g.*, *United States v. Vilchis*, No. 19-cv-8034, 2021 WL 1784803, (N.D. Ill. May 5, 2021). Convictions and other misconduct in foreign countries may be concealed. *See, e.g.*, *United States v. Shalabi*, No. 19-13709, 2020 WL 4282200 (E.D. Mich. July 27, 2020). Evidence relating to war criminals may be inaccessible. *See United States v. Lileikis*, 929 F. Supp. 31, 35 (D. Mass. 1996); *see also infra* notes 346–64 and accompanying text. When applicants lie under oath and evidence of the truth cannot reasonably be obtained, the examiner has done nothing wrong.

³⁰² Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1472.

in a court of law, and file its revocation action within thirty to sixty days of the initial decision.³⁰³

The authors' proposal would encourage rather than discourage increased immigration fraud. Fraud is already a major issue in immigration adjudications, one that the Ninth Circuit has referred to as "common" and a "deplorable state of affairs" caused by "an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful."³⁰⁴ Dangling the carrot of irrevocability regardless of methods or what has been concealed during the process, particularly if that irrevocability kicks in immediately or even within 60 days of taking the oath, as the authors propose, would exacerbate and encourage fraud, likely with disastrous second- and third-order consequences.³⁰⁵

2. Laches & Equitable Estoppel

Robertson and Manta further suggest that the Supreme Court should overturn its decision in *Fedorenko* and "allow the immediate implementation of equitable defenses, like equitable estoppel or laches, to cases of citizenship denial."³⁰⁶ The authors base this suggestion on their assumption that, if courts could "fully grasp the significance and property-like nature of the citizenship interest," they would fall in line and allow equitable defenses.³⁰⁷ Neither the assumption nor the rest of the analysis hold.

First, and primarily, the reason judicially-created equitable defenses are not allowed in denaturalization cases is because the U.S. Constitution grants the power "[t]o establish a uniform Rule of Naturalization" to Congress and Congress alone.³⁰⁸ To permit courts to sanction bending of the rules, or to ignore where rules have clearly been broken, would usurp the constitutional

³⁰³ Moreover, such a timeline might result in *more* denaturalization suits being filed, as the government would face the urgent need to file any case that, on first blush, appears colorable so as to avoid allowing the statute of limitations to run. Depriving the government of additional time to investigate a case before filing thus would appear plausible to cause an increased number of protective cases being filed, some percentage of which might turn out to be less warranted after further investigation.

³⁰⁴ *Angov v. Lynch*, 788 F.3d 893, 901 (9th Cir. 2015).

³⁰⁵ See *supra* note 97; see also *infra* note 479 and accompanying text.

³⁰⁶ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1474. Ironically, the authors value finality when it comes to individuals but not when it comes to the law—they would have the Supreme Court overturn decades-old precedent simply based on "the complete change in composition of Supreme Court justices between the *Fedorenko* decision in 1981 and today." *Id.* at 1471. That is not, nor should it be, the standard for overturning Supreme Court precedent. See *Alleyne v. United States*, 570 U.S. 99, 121 (2013) (Sotomayor, J., concurring) ("No doubt, it would be illegitimate to overrule a precedent simply because the Court's current membership disagrees with it."); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) ("the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before"); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

³⁰⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1473.

³⁰⁸ U.S. CONST., art. I, § 8, cl. 4.

authority expressly and exclusively afforded to a different branch of government.³⁰⁹ Indeed, this constitutional authority issue was the very basis for the Supreme Court's decision in *Fedorenko* that Robertson and Manta so dislike.³¹⁰ And there has been no relevant change to the Constitution since *Fedorenko* or the many cases that came before it.³¹¹

Second, courts' own discussions of the significance of citizenship interests suggest that they have a high view of such interests and weigh them heavily. Indeed, the Supreme Court has referred to U.S. citizenship as a "priceless treasure,"³¹² and the "highest hope of civilized men."³¹³ Lower courts have repeatedly used similar language.³¹⁴ Moreover, the exceedingly high burden of proof they impose on the government in denaturalization cases—proof by clear, unequivocal, and convincing evidence not leaving the issue in doubt,³¹⁵ a standard the Supreme Court has suggested is equivalent to the criminal burden of proof³¹⁶—further reinforces the significance that the courts attribute to citizenship interests.³¹⁷ It is unclear exactly whether Robertson and Manta disbelieve such statements and evidence from the written decisions issued by courts, or how exactly they believe courts should weigh the interests more heavily.

Third, laches and estoppel are equitable doctrines,³¹⁸ and are subject to the requirement that one who seeks to invoke equity "must come with clean hands."³¹⁹ This principle requires courts to consider whether the individual seeking equitable relief "acted fairly and without fraud or deceit as to the controversy in issue."³²⁰ In a civil denaturalization case, the controversy at

³⁰⁹ See *Fedorenko v. United States*, 449 U.S. 490, 506 (1981); *INS v. Pangilinan*, 486 U.S. 875, 885 (1988).

³¹⁰ See *Fedorenko*, 449 U.S. at 517–18.

³¹¹ Cf. *Maney v. United States*, 278 U.S. 17, 23 (1928) (noting, during the time when federal judges adjudicated naturalization applications, that where "a record . . . discloses on its face that the judgment [granting a certificate of naturalization] transcends the power of the judge[, it] may be declared void in the interest of the sovereign *who gave to the judge whatever power he had.*") (emphasis added).

³¹² *Fedorenko*, 449 U.S. at 507 (quoting *Johnson v. Eisenstrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting)).

³¹³ *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

³¹⁴ See, e.g., *United States v. Salem*, 496 F. Supp. 3d 1167, 1173 (N.D. Ill. 2020) ("People all around the globe want to become U.S. citizens, and rightly so.").

³¹⁵ *Schneiderman*, 320 U.S. at 135.

³¹⁶ See *Klapprott v. United States*, 335 U.S. 601, 612 (1949); see also RYAN, *supra* note 100, at 251 ("This standard of proof made our work far more exacting—as a practical matter, we had the same burden as the prosecution in criminal cases . . .").

³¹⁷ *Fedorenko*, 449 U.S. at 505–06.

³¹⁸ See, e.g., *Price v. Fox Ent. Grp., Inc.*, No. 05 Civ. 5259, 2007 WL 1498321, at *1 (S.D.N.Y. May 22, 2007).

³¹⁹ *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945).

³²⁰ *Id.* at 814–15.

issue is nearly always whether the defendant naturalized by fraud or deceit.³²¹ Thus, in addition to being a constitutionally improper defense, laches and estoppel would neither streamline nor resolve most, if any, denaturalization litigation; the court would still need to determine the ultimate issue: whether the defendant's naturalization was obtained by fraud or deceit.³²²

Finally, applying laches or equitable estoppel against the government in denaturalization cases would, in at least some situations, impose on the United States as a whole a penalty for an individual government employee's crimes or negligence. Take, for example, the case of Robert Schofield, a crooked USCIS adjudicator in Northern Virginia who illegally helped over 400 immigrants obtain U.S. naturalization certificates in return for payments exceeding \$600,000.³²³ In that case and other such cases, at least one government employee—the co-conspirator inside man—will have known that the individuals were not eligible for naturalization, starting the laches clock. It is thus foreseeable under Robertson and Manta's proposed approach that, unless the United States promptly discovers the fraud (which the criminal-employee will have every incentive to conceal) and institutes denaturalization actions against each person, the individuals who bribed their way into citizenship would be permitted to keep it permanently. Such an unjust and outrageous outcome is precisely the reason why laches does not run against the government when it is acting in its sovereign capacity.³²⁴ As the Supreme Court has noted, that rule is based on "the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers."³²⁵ It is hard to imagine that such public policy concern is not even greater where defendants themselves defraud or conceal material facts from the government during the naturalization process,³²⁶ which is the type of conduct that results in civil denaturalization actions.³²⁷

³²¹ See Belsan & Petty, *supra* note 7, at 26–32.

³²² Cf. *United States v. Milstein*, 401 F.3d 53, 64 (2d Cir. 2005).

³²³ *L. Xia v. Tillerson*, 865 F.3d 643, 646 (D.C. Cir. 2017); Kathryn E. Boughton, *Put Up or Shut Up: L. Xia v. Tillerson and the Government's End Run Around Judicial Denaturalization*, 51 ARIZ. ST. L. J. 371, 371 (2019); Jerry Markon, *Citizenship Supervisor Is Accused of Fraud*, WASH. POST (June 30, 2006), <https://perma.cc/CQ8V-ALXD>; *DHS Official Admits Taking Bribes to Fake Documents*, CNN (Dec. 1, 2006, 4:46 PM EST), <https://perma.cc/6PRT-DFY6>.

³²⁴ See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest."). Several courts have applied this rule in civil denaturalization cases. See, e.g., *United States v. Mandycz*, 447 F.3d 951, 964–65 (6th Cir. 2006); *United States v. Hamed*, 976 F.3d 825, 830–31 (8th Cir. 2020); *United States v. Arango*, 686 F. App'x 489, 491 (9th Cir. 2017) (Wallace, J., concurring).

³²⁵ *Costello v. United States*, 365 U.S. 265, 281 (1961) (quoting *United States v. Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373)).

³²⁶ *Lopez v. Pompeo*, 923 F.3d 444, 447 (5th Cir. 2019) (Ho, J., concurring) ("[T]he privilege of citizenship must be vigorously protected against fraud and deceit."); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) (collecting cases to support the proposition that "the public interest in enforcement of the immigration laws is significant.").

³²⁷ See Belsan & Petty, *supra* note 7, at 26–32.

3. No Safe Haven

For generations, civil denaturalization has played a central role in ensuring that those responsible for global atrocities do not find shelter on American shores. A statute of limitations would tremendously limit what is often the only means at the government's disposal to ensure that genocidaires, war criminals, and other human rights abusers cannot escape their past under the cloak of U.S. citizenship. Instead, it would reward those who lie about their past and escape detection for long enough by giving them the right to remain in the United States indefinitely. Facilitating impunity for those who have engaged in atrocities and war crimes is contrary to both the national interest and basic human decency. But identifying, investigating, and litigating such cases requires time. There is no substitute.

At the close of the Second World War, the Secretaries of State and War and the Attorney General sent a memorandum to President Roosevelt. The cabinet members explained that:

[T]he crimes to be punished have been committed upon such a large scale that the problem of identification, trial and punishment of their perpetrators presents a situation without parallel in the administration of criminal justice. In thousands of cases, it will be impossible to establish the offender's identity or to connect him with the particular act charged. Witnesses will be dead, otherwise incapacitated and scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular offenses one of appalling dimensions.³²⁸

Nuremberg was not the end to these challenges. The Displaced Persons Act of 1948 declared that those who assisted in persecution were ineligible for visas.³²⁹ Some individuals, however, concealed their conduct and obtained visas under false pretenses.³³⁰ Some of them later naturalized.³³¹ But their naturalization was unlawful because they were never eligible for visas or lawful permanent residency in the first place.³³² They were subject to denaturalization and, if denaturalized, deportation.³³³

"The US government has engaged in the targeting and removal of war criminals since the creation of the Office of Special Investigations (OSI) within

³²⁸ Memorandum for the President: Trial and Punishment of Nazi War Criminals (Jan. 22, 1945), reprinted in 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 296 (1949).

³²⁹ Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009.

³³⁰ See, e.g., Michael Levenson, *Judge Orders Deportation of Tennessee Man Who Served as Nazi Camp Guard*, N.Y. TIMES (Mar. 5, 2020), <https://perma.cc/24VJ-VCNP>.

³³¹ See, e.g., Matthew S. Schwartz, *Last Known WWII Nazi Living in U.S., Deported to Germany Last Year, Is Dead at 95*, NPR (Jan. 11, 2019, 6:49 AM), <https://perma.cc/89TA-A9G6>.

³³² See, e.g., *Fedorenko v. United States*, 449 U.S. 490 (1981).

³³³ See Schwartz, *supra* note 331.

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the DOJ in 1979.”³³⁴ Between 1979 and 2012, the Office of Special Investigations prosecuted 86 denaturalization matters against suspected Nazis and removed most of them.³³⁵ Many of the difficulties in piecing together war records have changed little since Nuremberg:

[T]he Axis-related documents of the period had been largely destroyed, either inadvertently during and after combat, or else intentionally by the Nazis themselves when they saw that the war was soon to be lost and realized that incriminating evidence had to be obliterated. The documents that somehow survived the conflagration were scattered among archives throughout Europe and the United States, and many of these collections were still deemed so sensitive by the governments possessing them that . . . we were barred from them. The collections we could gain access to were poorly (if at all) indexed and many, if not most, of the documents required one to be able to decipher Nazi parlance and coding.³³⁶

“For many years, OSI worked exclusively on hunting residents who had been Nazis,” but, “[b]y the 1990s, it had begun to shift its focus toward prosecuting perpetrators of human rights violations in more recent conflicts.”³³⁷ Specific legislative authority to investigate and denaturalize naturalized citizens described in 8 U.S.C. § 1182(a)(3)(E) followed in 2004.³³⁸

Such human rights violation cases, some of which are prosecuted criminally and some of which result in civil denaturalization actions, are frequently investigated by the Human Rights Violators and War Crimes Center, a “fusion cell” combining the FBI’s International Human Rights Unit and ICE’s Human Rights Violators and War Crimes Unit, as well as other federal partners.³³⁹ The HRVWCC “is tasked with finding and assisting in the removal of immigrants who may have committed international human rights abuses in their countries of origin.”³⁴⁰ Since prior to 9/11, investigations have ranged from Nazis and Balkan war criminals, to Latin American soldiers

³³⁴ Jamie Rowen & Rebecca Hamlin, *The Politics of a New Legal Regime: Governing International Crime through Domestic Immigration Law*, 40 L. & POL’Y 243, 250 (2018).

³³⁵ Weil, *Denaturalization*, *supra* note 38, at 425.

³³⁶ ELI M. ROSENBAUM & WILLIAM HOFFER, BETRAYAL: THE UNTOLD STORY OF THE KURT WALDHEIM INVESTIGATION AND COVER-UP xix (1993).

³³⁷ Rowen & Hamlin, *supra* note 334, at 250.

³³⁸ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5505, 118 Stat. 3638.

³³⁹ Beth Van Schaak, *FBI’s War Crimes Unit on the Chopping Block*, JUST SEC. (Feb. 10, 2019), <https://perma.cc/UM6X-CW4U>; *Human Rights Violators & War Crimes Center*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://perma.cc/543S-7RBM> [hereinafter *Human Rights Violators & War Crimes*].

³⁴⁰ Rowen & Hamlin, *supra* note 334, at 243; *Human Rights Violators & War Crimes*, *supra* note 339.

supporting dictatorships, and to conflict zones across the African continent.³⁴¹ These included many conflicts where “cases did not always line up neatly with U.S. foreign policy goals,” including those where “the U.S. government had not been involved, or had intervened ‘on the wrong side of the conflict.’”³⁴²

But civil denaturalization as a core method of preventing the impunity of human rights abusers has not shifted. “In theory, lawmakers and most citizens want to punish, or at least remove . . . people”³⁴³ who “camouflaged crimes against humanity prior to their immigration.”³⁴⁴ It is still correct to say that “[n]owadays in America, denaturalization targets crimes against humanity.”³⁴⁵

The difficulties, however, have not changed either. What the Secretaries explained to President Roosevelt still holds true, and is perhaps even more challenging today because of the individualized nature of the inquiries. Rather than investigating only Nazis, human rights investigations are now, out of necessity, balkanized, with resources and focus spread across the globe. At the same time, “seeking to discover the acts of a single individual across the temporal expanse of fifty years and a distance of an ocean and half a continent is a daunting task.”³⁴⁶ Sometimes, it still relies on “fragmentary, largely unindexed records lying in dusty archives scattered in a dozen countries, some of which were very reluctant to provide public access.”³⁴⁷ Michael MacQueen, a former historian at both OSI and the HRVWCC, related one such example: after a subject of investigation dared a then-junior prosecutor to “show me something that I signed,”³⁴⁸ MacQueen did just that. But it took a long time:

The case languished for a decade, until MacQueen went to Lithuania to examine dog-eared Nazi records that had become available to Americans after the fall of the Soviet Union. MacQueen scoured the Lithuanian archives for days without success. Finally, he found a canvas-bound book with the names of nearly twenty-nine hundred wartime prisoners held in Vilnius typed in Russian.³⁴⁹

³⁴¹ LARA J. NETTELFIELD & SARAH E. WAGNER, *SREBRENICA IN THE AFTERMATH OF GENOCIDE* 186 (2014).

³⁴² *Id.* at 206.

³⁴³ Rowen & Hamlin, *supra* note 334, at 244.

³⁴⁴ Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 422 (citing WEIL, *supra* note 54, at 179).

³⁴⁵ Weil, *Denaturalization*, *supra* note 38, at 425.

³⁴⁶ *United States v. Hajda*, 963 F. Supp. 1452, 1457 (N.D. Ill. 1997).

³⁴⁷ ROSENBAUM & HOFFER, *supra* note 336, at 116; *see also* RYAN, *supra* note 100, at 252 (“OSI depended heavily on the cooperation and goodwill of other governments.”).

³⁴⁸ ERIC LICHTBLAU, *THE NAZIS NEXT DOOR: HOW AMERICA BECAME A SAFE HAVEN FOR HITLER’S MEN* 213 (2014).

³⁴⁹ Eric Litchblau, *The Painstaking Hunt for War Criminals in the United States*, *NEW YORKER* (July 22, 2018), <https://perma.cc/Y7CM-PRHC>.

The subject, Aleksandras Lileikis, had signed the arrest order as “chief of the special security police in Vilnius.”³⁵⁰ Then MacQueen “found twenty more signatures just like it.”³⁵¹

Robertson and Manta themselves explain that “the relevant underlying facts may go back decades, requiring a court to examine an individual’s life in a foreign country many years ago . . . it is not uncommon for memories to fade and records—if they ever existed in the first place—to be lost or destroyed.”³⁵² This is correct.³⁵³ Human rights cases—particularly those involving war crimes or other government-sponsored atrocities—typically cannot be investigated and addressed prior to naturalization because the evidence is so often unavailable,³⁵⁴ which presents a very real challenge if an arbitrary, compressed timeline were imposed on civil denaturalization cases.

Lileikis issued the dare to find his signature in 1983.³⁵⁵ The case was not filed until 1994.³⁵⁶ Lileikis naturalized in 1976³⁵⁷—18 years before the

³⁵⁰ *Id.* (emphasis omitted).

³⁵¹ *Id.*

³⁵² Robertson & Manta, *Litigating Citizenship*, *supra* note 6, at 785.

³⁵³ See, e.g., Michael G. Heyman, *Language and Silence: The Supreme Court’s Search for the Meaning of American Denaturalization Law*, 5 GEO. IMMIGR. L.J. 409, 433 (1991) (noting that “the passage of time inevitably worked to the advantage of the naturalized citizen and posed a substantial obstacle to the government” in denaturalization cases).

³⁵⁴ See, e.g., GERSON, *supra* note 100, at 4 (noting that, to get around the prohibition in the Displaced Persons Act on admission to those who assisted in the persecution of civilians “many who clamored for entry into America had to resort to fraud, misrepresenting the nature of their work during the war years. And to set the record straight would require careful examination and collection of original documents from the *Wehrmacht* and German SS personnel files. There were now predominately in the possession of the Soviet Union.”); *id.* at 16 (“It was a daunting challenge. The atrocities had occurred decades earlier and thousands of miles away. Much of the documentary proof, including records from the death camps, had been destroyed; other evidence was controlled by the Soviet Union, and the Cold War was still going at full tilt.”); LICHTBLAU, *supra* note 348, at 214 (“Some of the documents were lightly singed; it looked like the Nazis had started burning some of the records on their way out of town, but ran out of time.”); Melina Delkic, *Meet the Man Who Hunts Bosnian Serb War Criminals Living in the U.S.*, NEWSWEEK (Jan. 12, 2018, 7:00 AM), <https://perma.cc/TE6C-FXE7> (noting, “MacQueen said part of the problem is missing documents. In the Balkans, Serbian military groups were often ‘sitting on’—sometimes even destroying—crucial wartime documents that would have led to the capture of those who committed atrocities. ‘At the time that most of the entrants to the U.S. from the Balkans came as refugees, there was no access to wartime records which would show that they have lied on their applications, been involved in crimes, sometimes massive crimes’”); David Johnston, *U.S. Seeks to Deport Man Accused of Collaborating With Nazis*, N.Y. TIMES (Sept. 22, 1994), <https://perma.cc/5ZG8-W42D> (noting that *Lileikis* “was significant because it relied heavily on archives under the control of the Lithuanian Government”); ROSENBAUM & HOFFER, *supra* note 336, at 331 (“we knew that it was Waldheim himself who was charged with custody of—and had quite possibly been the one who destroyed—the most sensitive records at Army Group E headquarters”); RYAN, *supra* note 100, at 256 (“We asked the Soviets for any membership rosters or payroll records . . .”).

³⁵⁵ Litchblau, *supra* note 349.

³⁵⁶ *United States v. Lileikis*, 929 F. Supp. 31, 32 (D. Mass. 1996). By the time the case was filed, Eli Rosenbaum, the junior prosecutor who knocked on Lileikis’s door in 1983, was running the Office of Special Investigations. LICHTBLAU, *supra* note 348, at 222.

³⁵⁷ Johnston, *supra* note 354.

complaint was filed. A statute of limitations would have meant this case—which MacQueen considers one of his most important achievements in a career not short on achievements³⁵⁸—could never have been brought. The historical record confirms that there is nothing unusual about the amount of time it took to bring this case to court.³⁵⁹

The evidence in human rights cases (and in more serious cases generally, including terrorism) is of greater import, but harder to obtain. Uncovering a recent disqualifying domestic conviction is fairly simple; proving a crime against humanity, or even membership in an organization known to have committed such crimes, is a far more complex undertaking.³⁶⁰ Often, such cases require enlisting the aid of foreign governments to provide access to archives or certified copies of documents—a process which itself may require navigating time-consuming diplomatic channels—as well as locating witnesses and arranging interviews, sometimes with witnesses who may not want to relive the relevant events.³⁶¹ There may be political sensitivities that are not obvious to outsiders. Prosecutors are not always eager to take on such cases.³⁶² And much of the work is itself tedious.³⁶³

Jamie Rowen and Rebecca Hamlin ask, “once someone has been admitted to the United States and granted permanent residency, or even citizenship, how does the law facilitate the reversal of that decision based on acts

³⁵⁸ Lichtblau, *supra* note 349.

³⁵⁹ Belsan & Petty, *supra* note 7, at 23 n.113 (collecting long-pending cases); *see also* Debbie Cenziper & Will Fitzgibbon, *Rogue Americans Stashed Assets Offshore, Eluding Victims and Impeding Investigators*, WASH. POST (Oct. 4, 2021), <https://perma.cc/L823-7AR5> (“Though some countries respond quickly to information requests . . . others wait months or years to provide information through a mutual legal assistance treaty.”). Former Justice Department officials explained, “It takes forever to draft. It takes forever to get it approved It takes even longer to get a response, and even longer to get a response that actually provides substance” and that “[e]verybody thinks the Justice Department has unlimited powers, except for people who have worked in the Justice Department.” *Id.*

³⁶⁰ For example, in the case of Hermine Brausteiner, simply obtaining a certified conviction record from the Austrian government took nearly a year. *See* RYAN, *supra* note 100, at 48. *See generally* S. Rep. No. 108-209, 108th Cong., 2d Sess. 7 (Nov. 24, 2003) (“Not enough is being done about the new generation of international human rights abusers living in the United States, and these delays are costly. Such delays make documentary and testimonial evidence more difficult to obtain. Stale cases are the hardest to make No war criminal should ever come to believe that he is going to find safe harbor in the United States.”).

³⁶¹ RYAN, *supra* note 100, at 53; Delkic, *supra* note 354.

³⁶² Lara Nettelfield, *Srebrenica's Forgotten Legacy: War Criminals in the U.S.*, BALKAN INSIGHT (July 11, 2014, 4:52 PM), <https://perma.cc/SZ2J-G52E> (suggesting that the HRVWCU “has struggled to find prosecutors willing to take on these cases, which result in low sentences, bring little professional glory, and involve complicated jurisdictional issues. Witnesses are difficult to come by and often fear retribution back home. They must win the trust of survivor communities as well.”); RYAN, *supra* note 100, at 43–44 (noting, “Nazi cases were unpromising, unfamiliar, and uncertain” and “investigating Nazis was too much work for too little return. Few investigators were willing to put in the time.”).

³⁶³ RYAN, *supra* note 100, at 256 (“Most of our cases were made by the tedious method of examining old documents We . . . began the slow process of going through the names one by one, comparing them to INS immigration files.”).

committed long ago and far away?”³⁶⁴ The answer is: the law facilitates it by providing time. Unfortunately, there are many more Aleksandras Lileikises in the United States.³⁶⁵ But unlike the mother and six-year-old girl that Lileikis ordered executed, victims are increasingly resettling in the United States as well—often in the same communities as their persecutors.³⁶⁶

For example, in Colorado, a naturalized citizen who came to the United States as a refugee ran into a man in Denver who he knew as his former prison guard in Ethiopia—a man who killed and brutalized inmates and who was also a naturalized former refugee.³⁶⁷ Similarly, in Pennsylvania, a citizen who was Liberia-born and came to the United States as a refugee following the killing of his mother, brother, and several other relatives, lived and worked mere miles from the man who oversaw the very massacre in which such murders occurred—and who also came to the United States as a refugee.³⁶⁸ These examples are just some of the more recent occurrences.³⁶⁹

By some estimates, there are hundreds of human rights violators and war criminals who have unlawfully obtained some status in the United States, many of them naturalizing before their crimes come to light.³⁷⁰ So long as such individuals are allowed to retain their unlawfully obtained U.S. citizenship, they cannot be removed from the United States. Thus, “finality” in such situations benefits the perpetrator at the cost of the victims who fled to the United States for a safe haven. Robertson and Manta’s proposed “solution”

³⁶⁴ Rowen & Hamlin, *supra* note 334, at 244.

³⁶⁵ Annie Hylton, *How the U.S. Became a Haven for War Criminals*, NEW REPUBLIC (Apr. 29, 2019), <https://perma.cc/3Z74-TGX3> (“Authorities estimate that as many as two-thousand human rights violators and war criminals have sought refuge in U.S. diaspora communities.”).

³⁶⁶ *Id.* (quoting a federal prosecutor as noting that “[f]requently, it is the case that you have alleged perpetrators walking among or living within some proximity to the people of the communities whom they victimized.”).

³⁶⁷ Tom McGhee, *Ethiopia’s Red Terror Takes Center Stage in Denver Immigration Trial*, DENVER POST (Oct. 18, 2013), <https://perma.cc/7CQS-YKGV>; Greg Gordon, *Guard in Ethiopian ‘Red Terror’ Gets 22 Years for Lying to Gain Naturalization*, MCCLATCHY (May 27, 2014), <https://www.mcclatchydc.com/news/crime/article24768136.html>.

³⁶⁸ Peter Fabricius, *Lutheran Church Massacre: The Long Arm of the Law Reaches a Suspected Liberian War Criminal in Philadelphia*, DAILY MAVERICK (Feb. 22, 2018), <https://perma.cc/F62M-ZHTP> (“Many of these human rights defenders were refugees themselves in the US and were forced to live in the same community as alleged perpetrators.”).

³⁶⁹ Twenty years ago, similar incidents in Atlanta and New York prompted Congress to expand OSI’s authority beyond Nazi war criminals, to include denaturalizing any alien who engaged in torture, genocide, or extrajudicial killing abroad. *See* S. Rep. No. 108-209, 108th Cong., 2d Sess. 1–2, 4 (Nov. 24, 2003) (noting a victim of torture in Ethiopia discovered that she and her torturer, Kelbessa Negewo, worked in the same hotel in Atlanta and multiple victims of the brutal Revolutionary Front for the Progress of Haiti (FRAPH) were shocked to find its death squad leader, Emmanuel “Toto” Constant, living in Queens).

³⁷⁰ *See* Hollie McKay, *War Criminals Among Us: Inside the Quiet Effort to Prosecute and Deport Violators Disguised as Refugees*, FOX NEWS (July 8, 2019), <https://perma.cc/2LKH-Q5FJ> (noting that U.S. Homeland Security Investigations, “has more than 170 active investigations into suspected human rights violators and is currently pursuing more than 1600 leads and removal cases involving suspected human rights violators in the U.S.”).

would allow for the victims to be re-victimized. It should go without saying that “[n]o torture victim should encounter their foreign torturers in a neighborhood in the United States.”³⁷¹

C. Prosecutorial Discretion

In 1909, shortly after the first denaturalization statutes were enacted, Attorney General Wickersham wrote to the United States Attorneys with what might today be called “prosecutorial guidelines.”³⁷² He cautioned that the gravity of such proceedings counseled that they not be instituted “unless some substantial results are to be achieved thereby in the way of the betterment of the citizenship of the country.”³⁷³ However, he continued that this did not mean that “such proceedings should not be instituted in any case where willful and deliberate fraud appears, as the perpetration of such fraud would indicate lack of the moral qualifications for citizenship.”³⁷⁴

Robertson and Manta ask why DOJ prosecutors are not using their discretion to pursue the cases that pose the greatest threat, rather than those that are easier to win.³⁷⁵ In one particularly ironic and ill-informed illustration,

³⁷¹ S. Rep. No. 108-209, 108th Cong., 2d Sess. 4 (Nov. 24, 2003).

³⁷² Wickersham letter, *supra* note 59.

³⁷³ *Id.*

³⁷⁴ *Id.* (noting that denaturalization was not favored where citizenship was initially illegally procured, but the individual has since “conducted himself as a good citizen and possesses all the necessary qualifications for citizenship.”) *Id.* The historical context is illuminating because the number of denaturalization cases increased over 1,000 percent between 1907 and 1909; the prevailing view was that the mandatory language of the denaturalization statute required U.S. Attorneys to act when competently informed of illegally procured citizenship, but U.S. Attorneys lacked the necessary resources. *See* WELL, *supra* note 54, at 23–30. The effect of the circular was to reduce the crushing workload by enabling U.S. Attorneys to decline cases involving recent immigrants coerced into applying for citizenship, in particular when machine politics were involved. *Id.* at 30. However, cases would still be pursued to remedy deliberate fraud and to protect the integrity of the system. *Id.* at 30–31.

³⁷⁵ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1455. The suggestion presents a false dichotomy. “Important” and “easy to win” are not opposite ends of the same spectrum. An important case, say one involving a terrorist, may be easy to win if the terrorist has been convicted in a criminal proceeding and the conviction establishes some ineligibility to naturalize was concealed. In those situations, issue preclusion will generally prevent further inquiry into the underlying facts, making the “important” terrorist case reasonably “easy” to win simply by introducing the criminal record into evidence. *See* United States v. Faris, No. 17-cv-295, 2020 WL 532890, at *4 (S.D. Ill. Feb. 3, 2020); United States v. Shalabi, No. 19-cv-13709, 2020 WL 4282200, at *3 (E.D. Mich. July 27, 2020). A comparatively lower-priority case against, for example, a repeat sex offender (who is not a terrorist), may be “hard” to prove if there is evidence of sexual offenses that pre-date naturalization (e.g., victim statements), but no convictions for any criminal conduct that occurred prior to naturalization. In that instance, the earlier pre-naturalization criminal conduct would still have to be proven through witness testimony and other evidence, which is a comparatively “harder” undertaking. *See* United States v. Vilchis, No. 19-cv-8034, 2021 WL 1784803 (N.D. Ill. May 5, 2021). Importance, however, is relative and may also depend on available resources, competing priorities, or other factors. The assessment of difficulty, as well, may evolve over time as further investigation uncovers (or fails to uncover) evidence, and may differ among jurisdictions due to variations in substantive law.

they point to *United States v. Shalabi*,³⁷⁶ a case decided on the length of the defendant's residence abroad, as a purported example of pursuing easy targets at the expense of important ones.³⁷⁷

Shalabi was a terrorist case. The complaint alleged that Shalabi provided material support to Hamas while living abroad in the West Bank (specifically, hiding acetone, an ingredient for making bombs, for a known bomb-maker).³⁷⁸ It further alleged that Shalabi was convicted of that conduct and served time in an Israeli prison—facts he concealed while applying for naturalization.³⁷⁹ Hence, his extended absence from the United States.

Shalabi did not oppose his denaturalization on the ground of the length of his residence abroad³⁸⁰—likely because if he had challenged either his alleged conduct or his foreign conviction, he would have lost. Foreign conviction records, when certified pursuant to treaties—including the one between the United States and Israel—are difficult to challenge.³⁸¹ (Indeed, Shalabi conceded that he had, in fact, pled guilty and been convicted.³⁸²) And, if he had lost, issue preclusion would have prevented him from relitigating that alleged conduct and foreign conviction in immigration court.³⁸³ As a result, Shalabi would not only have been removable, but would also have almost certainly faced mandatory detention under the terrorism-related provisions of the Immigration and Nationality Act during the pendency of his immigration court proceedings.³⁸⁴ He also would have been ineligible for many forms of relief.³⁸⁵ Nothing about *Shalabi* suggests that the government is seeking out cases where U.S. Citizenship and Immigration Services simply gets the math wrong in calculating continuous residence or physical presence.

As for adherence to stated priorities, it is difficult to think of many cases that would be a higher priority than someone who has been convicted of

³⁷⁶ *Shalabi*, No. 19-cv-13709, 2020 WL 4282200, at *1.

³⁷⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1455.

³⁷⁸ See Complaint at 1, *United States v. Shalabi*, No. 19-cv-13709, 2020 WL 4282200 (E.D. Mich. July 27, 2020), <https://perma.cc/4DEC-KE6V>.

³⁷⁹ *Id.*

³⁸⁰ *Shalabi*, No. 19-cv-13709, 2020 WL 4282200, at *3.

³⁸¹ See, e.g., *United States v. Odeh*, 815 F.3d 968, 981 (6th Cir. 2016) (discussing the admissibility of documents certified pursuant to a Mutual Legal Assistance Treaty with Israel).

³⁸² *Shalabi*, No. 19-cv-13709, 2020 WL 4282200, at *1.

³⁸³ See *Okpala v. Whitaker*, 908 F.3d 965, 968, 971 (5th Cir. 2018); *Szehinskij v. Att'y Gen. of U.S.*, 432 F.3d 253, 255 (3d Cir. 2005); see also *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).

³⁸⁴ 8 U.S.C. § 1226(e)(1)(D).

³⁸⁵ *Bojnoordi v. Holder*, 757 F.3d 1075, 1077 (9th Cir. 2014) (“aliens who have engaged in terrorist activities are precluded from seeking several forms of relief from removal, including asylum, withholding, and CAT protection in the form of withholding, but remain eligible for deferral of removal under the CAT.”) (quoting *Haile v. Holder*, 658 F.3d 1122, 1125–26 (9th Cir. 2011)).

supporting a designated foreign terrorist organization.³⁸⁶ As further discussed below, “easy to win” is not an appropriate label for any case that requires coordination with a foreign government and authentication of foreign records, even where the ultimate ground for revocation is lack of continuous residence. Cases that may appear easy to win only look that way because they have first been exhaustively investigated.

IV. CITIZENSHIP AS A CONTESTED CATEGORY

In light of the theoretical, doctrinal, and occasional factual difficulties noted above, denaturalization’s constitutionality is not a particularly useful framework for exploring the inherent difference between naturalized and natural-born citizens’ general susceptibility to it. *Afroyim* makes clear that lawfully acquired citizenship is permanent (at the discretion of the citizen). But the suggestion that there are no constitutionally adequate means to rescind unlawfully acquired citizenship turns on an implicit assumption that permanency—in its thickest, most categorical form—is an essential element of citizenship. As the argument goes, if naturalization can be undone (for any reason, including fraud or illegality), then what naturalization gives is an inferior form of citizenship or is not really citizenship at all. As explained above, the comparison between unlawful naturalization and other ways in which citizenship can be acquired misstates the question; *lawful* naturalization is equivalent to citizenship at birth in all substantive respects save the constitutional exceptions on eligibility to hold high public office, while unlawful naturalization is no naturalization at all.

But even if one were to blur the difference between the existence of a status and its underlying legality,³⁸⁷ it is difficult to accept the notion that citizenship includes, as an essential element, absolute categorical permanency in the face of fraud or illegality in its procurement. Apart from the significant practical difficulty that this is not the law anywhere,³⁸⁸ the attempt to essentialize citizenship in this way is itself misguided.

A. The Futile Search for Certainty

In general, the definition of an abstract concept may take one of two forms: an “essentialist” definition, in which one or more features are necessary for the concept to fall within a given category, or a “multifactor” or “polythetic” definition, in which no one feature is necessary or sufficient.³⁸⁹

³⁸⁶ 8 U.S.C. § 1189; Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52650, 52650 (Oct. 8, 1997); *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://perma.cc/L5FJ-HV9R> (last visited Aug. 25, 2022).

³⁸⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1461 (“It cannot answer that these individuals were never citizens in the first place—they clearly were, until revocation.”).

³⁸⁸ See *supra* note 54.

³⁸⁹ Aaron R. Petty, *Accommodating “Religion”*, 83 TENN. L. REV. 529, 541 (2016). Binary modes of inquiry have been especially challenged in the social sciences because they tend to obscure what

Citizenship is one such polythetic concept.³⁹⁰ Any attempt to essentialize it—to identify sticks in the bundle which, if absent, change the nature of the bundle as a whole—quickly fails because there is no “agreed upon definition of citizenship rights” in the first place.³⁹¹ As Cohen observes, “many people carry different versions of a basic rights bundle”³⁹² and “[a]ll manner of exceptions to rules of inclusion abound.”³⁹³ Thus, rather than engage in a likely futile attempt to draw bright lines between rights that are essential to citizenship and those that are not, we suggest that the difference between natural-born and naturalized citizens’ susceptibility to denaturalization—a difference of potential permanency—simply reflects one of many differences in formal rights that close examination of citizenship reveals in other contexts as well.³⁹⁴

William Connolly has described citizenship in terms of W.B. Gallie’s notion of an “essentially contested concept.”³⁹⁵ Such concepts are “internally complex in that [their] characterization involves reference to several dimensions, and when the agreed and contested rules of application are relatively open, enabling parties to interpret even those shared rules differently as new and unforeseen situations arise.”³⁹⁶ D. Carolina Núñez has suggested that,

they purport to analyze and reduce “what are actually relational claims to claims about one or another of the terms in a relational argument.” IAN SHAPIRO, *THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES* 14 (2005).

³⁹⁰ COHEN, SEMI-CITIZENSHIP, *supra* note 1, at 2, 4 (noting “[t]he concept of citizenship is ancient, and yet its meaning remains contested to this day . . . [it] has never been a unitary concept, nor can it even be neatly characterized as binary.”); Saskia Sassen, *The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics*, 46 BERKELEY J. SOCIO. 4, 9 (2002) (“Though often talked about as a single concept and experienced as a unitary institution, citizenship actually describes a number of discrete but related aspects in the relation between the individual and the polity.”).

³⁹¹ Angela M. Banks, *Bringing Culture Back: Immigrants’ Citizenship Rights in the Twenty-First Century*, 57 SANTA CLARA L. REV. 315, 320 (2017).

³⁹² Elizabeth F. Cohen, *Dilemmas of Representation, Citizenship, and Semi-Citizenship*, 58 ST. LOUIS UNIV. L.J. 1047, 1049 (2014) [hereinafter, Cohen, *Dilemmas*].

³⁹³ COHEN, SEMI-CITIZENSHIP, *supra* note 1, at 4; *see also* Rogers M. Smith, *Equality and Differentiated Citizenship: A Modern Democratic Dilemma Tocquevillean Perspective*, in ANXIETIES OF DEMOCRACY: TOCQUEVILLEAN REFLECTIONS ON INDIA AND THE UNITED STATES 85, 90 (Partha Chatterjee & Ira Katznelson eds., 2012) [hereinafter Smith, *Equality*] (“American law never did and still does not actually define citizenship statuses in wholly uniform and identical fashion, nor will it ever do so. It continues to structure, and indeed to add or elaborate, many forms of differentiated citizenship—not only state, national, and quasi-colonial; native and naturalized; human and corporate; but also juvenile and adult, single and multiple nationality, homosexual and heterosexual—including some differential treatment on the basis of race and gender.”).

³⁹⁴ Villazor, *Interstitial Citizenship*, *supra* note 20, at 1677.

³⁹⁵ Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 451 n.12 (2000) (quoting WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10 (1993)); COHEN, SEMI-CITIZENSHIP, *supra* note 1, at 13 (noting “the term ‘citizenship’ has come to mean many things to many people.”).

³⁹⁶ CONNOLLY, *supra* note 395, at 10 (quoting W.B. Gallie, *Essentially Contested Concepts*, in PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1955–56 (1956)); *see also* LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 3, 12 (2006) (noting that “in conventional usage, citizenship’s meanings are conflated” and rejecting an essentialist conception of citizenship); *see generally* Christian Joppke, *Transformation of Citizenship: Status, Rights*,

“[p]erhaps because of its close association with abstract notions of belonging, the term ‘citizenship’ can refer to many different concepts,” including social standing, participation, rights, identity, work, and status.³⁹⁷ Linda Bosniak, for example, has suggested that it can refer to a legal status, identity, legal rights, or political engagement.³⁹⁸ Núñez, for her part, differentiates what she calls “formal” citizenship—the government-issued legal status (and the rights that go along with it)—from “substantive” citizenship that includes “more abstract notions of membership and belonging.”³⁹⁹ And what “citizenship” means is not just abstract, but also contingent—it is highly “country-specific.”⁴⁰⁰ For purposes of our discussion of revocation of formal citizenship, it is not necessary to examine its affective aspects. Moreover, citizenship in the United States is primarily viewed in legal, rather than relational, terms.⁴⁰¹

But even limiting the discussion to legal aspects, citizenship remains a polythetic concept. The rights and obligations of citizenship have been described in various ways,⁴⁰² in part because U.S. citizenship, despite conferring a formally equal status, actually “come[s] in many shapes and

Identity, 11 CITIZENSHIP STUD. 37 (2007); Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994).

³⁹⁷ Núñez, *Mapping*, *supra* note 28, at 481, 485–86, 502–03. On the question of “citizenship” being country-specific, *see id.* at 510–11 (noting that in Germany it is necessary to have already become “thoroughly and deeply German” in order to naturalize, with naturalization merely affirming a social integration that has already taken place).

³⁹⁸ Bosniak, *supra* note 395, at 455–89.

³⁹⁹ Núñez, *Mapping*, *supra* note 28, at 482, 486.

⁴⁰⁰ *Id.* at 493. This differentiation may also be conceptualized vertically or hierarchically—among different entities or sovereignties—in addition to horizontally between people within a single polity or in comparison between polities. *See, e.g.*, WILLEM MAAS, MULTILEVEL CITIZENSHIP 124 (Univ. of Pennsylvania Press 2013).

⁴⁰¹ Pamela J. Conover, *Citizen Identities and Conceptions of the Self*, 3 J. POL. PHIL. 133 (1995). Núñez observes that “formal” or legal citizenship is both over- and under-inclusive with respect to “substantive” citizenship. Núñez, *Mapping*, *supra* note 28, at 505. For example, those who entered the United States without inspection as children—DREAMers—may have an affective attachment to the United States that matches those of some citizens at birth. Indeed, it is not uncommon for DREAMers to have younger siblings born on U.S. soil who are raised together and share similar values and attitudes. COHEN, SEMI-CITIZENSHIP, *supra* note 1, at 86–87. Regardless of where they are born, both will “go to school in the United States, they will learn English, they will have more ties to the United States than any other country . . . and will consider themselves American.” Núñez, *Mapping*, *supra* note 28, at 525, 525 n.199. It is over-inclusive in that it is accorded to some individuals with little or no affective ties to the United States. *See supra* note 135. Additionally, legal citizenship recognizes as formal citizens many people who may experience difficulty in actually exercising the rights of citizenship. *See, e.g.*, Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 629–30 (1995); Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER & POL’Y 1, 1 (1994); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1113–15 (1991); *see generally* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

⁴⁰² *See, e.g.*, Banks, *supra* note 391, at 318 (“human rights, resident rights, and membership rights”); T.H. Marshall, *Citizenship and Social Class*, in CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT 78 (1964) (social rights, civil rights, and political rights).

sizes.”⁴⁰³ Therefore, although it is “typically framed as a binary concept,”⁴⁰⁴ citizenship is actually better described as a “gradient rather than binary.”⁴⁰⁵

At the outset, it is important to differentiate between those rights and obligations that inhere in citizenship itself and those that do not depend upon citizenship status. In the United States, “models of membership that extend rights to non-citizens are largely territorialized” where “denizenship” is more significant than citizenship.⁴⁰⁶ Angela Banks refers to some of these rights as “human rights” and others as “resident rights.”⁴⁰⁷ T. Alexander Aleinikoff, noting the limited impact of precatory international instruments in domestic law, groups all of these together as territorial rights.⁴⁰⁸ Linda Bosniak suggests both.⁴⁰⁹ For our purposes, the source of the rights matters less than the scope of their application—they apply to everyone within the geographic territory of the United States.

By territorializing rights, one could argue that aliens share in some “rights” of citizenship.⁴¹⁰ Linda Bosniak explains that “noncitizens are, in fact, not always and entirely outside the scope of those institutions and practices and experiences we call citizenship.”⁴¹¹ Alternatively, one could take Peter Spiro’s approach that these are not rights of citizenship at all, precisely because “resident aliens have essentially equivalent rights.”⁴¹² Regardless of whether the situation is characterized as aliens sharing in rights of citizenship or citizenship being defined in part by those rights that aliens lack, it comes to the same conclusion: many rights do not hinge on citizenship status.

Most importantly, “[i]n the realm of civil rights—that is, rights of the person to protections against arbitrary official action, to free expression, and the like—resident aliens enjoy equivalent rights to the citizenry. Indeed such

⁴⁰³ Cohen, *Dilemmas*, *supra* note 392, at 1048.

⁴⁰⁴ Villazor, *Interstitial Citizenship*, *supra* note 20, at 1675.

⁴⁰⁵ Cohen, *Dilemmas*, *supra* note 392, at 1048. “Gradient” here means essentially the same thing as “polythetic.” See also COHEN, SEMI-CITIZENSHIP, *supra* note 1, at 14 (“citizenship is a category composed of multiple elements, each of which can be accorded to people in full or in partial, gradated bundles”).

⁴⁰⁶ T. Alexander Aleinikoff, *Between National and Post-National: Membership in the United States*, 4 MICH. J. RACE & L. 241, 243 (1999) [hereinafter Aleinikoff, *National and Post-National*]; see also *id.* at 256 (“membership rights of aliens under U.S. law are largely territorially-based.” (emphasis in original)); see also Ellermann, *supra* note 20, at 2463; BENHABIB, *supra* note 14, at 126; see generally THOMAS HAMMAR, DEMOCRACY AND THE NATION STATE (1990).

⁴⁰⁷ Banks, *supra* note 391, at 322–24.

⁴⁰⁸ Aleinikoff, *National and Post-National*, *supra* note 406.

⁴⁰⁹ BOSNIAK, *supra* note 396, at 34 (noting rights inhere based on both “territorial presence and . . . personhood”).

⁴¹⁰ *Id.* at 15, 77–101.

⁴¹¹ *Id.* at 3, 89.

⁴¹² SPIRO, *supra* note 28, at 65; see also SCHUCK, *supra* note 28, at 163–64 (“These changes have reduced almost to the vanishing point the marginal value of citizenship as compared to resident alien status.”).

rights are enjoyed by all who are territorially present, regardless of their immigration status.”⁴¹³ Bosniak makes the related point that rights afforded to defendants in criminal matters, “expressive, associational, and religious freedom rights, to the protection of the state’s labor and employment laws, and to the right to education and other social benefits” are provided without regard to citizenship.⁴¹⁴ Individual states are generally prohibited from discriminating on the basis of citizenship status in the provision of social benefits under state law.⁴¹⁵ And it is not merely social or civil rights that are detached from citizenship status, some political rights are as well. The “whole Number” of “free Persons” are counted in the census and apportionment.⁴¹⁶ And with respect to obligations, taxes are imposed without regard to citizenship status.⁴¹⁷ Several scholars have suggested that, because so few rights turn on citizenship status, and the most important ones do not, the legal dimension of citizenship is for most purposes not particularly significant.⁴¹⁸

⁴¹³ SPIRO, *supra* note 28, at 66–67; *see also* Aleinikoff, *National and Post-National*, *supra* note 406, at 241 (“Settled immigrants (sometimes even unlawful immigrants) may make claims to some forms of ‘membership’ rights, such as entitlements to national benefit programs and educational opportunities, protection under non-discrimination laws, and due process rights in deportation proceedings.”); *Id.* at 248 (“The Supreme Court has regularly affirmed that most of the Constitution’s protections extend to non-citizens”); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 52–71 (1996).

⁴¹⁴ BOSNIAK, *supra* note 396, at 34. On the question of applicability of constitutional rights in criminal proceedings, *see* *Wong v. United States*, 163 U.S. 228, 237 (1896).

⁴¹⁵ SPIRO, *supra* note 28, at 89; *see also* *Plyler v. Doe*, 457 U.S. 202 (1982).

⁴¹⁶ U.S. CONST. art. I, § 2, cl. 3.

⁴¹⁷ SPIRO, *supra* note 28, at 65 (“Taxes are based largely on residence”).

⁴¹⁸ *Id.* at 66; *see also* Fargues, *supra* note 22, at 357 (noting citizenship “has become less relevant in terms of rights”); BENHABIB, *supra* note 14, at 126; SCHUCK, *supra* note 28, at 163–64, 166 (noting citizenship “confers few legal or economic advantages over the state of permanent resident alien” and that the territorialization of rights has “reduced almost to the vanishing point the marginal value of citizenship as compared to resident alien status” and that exceptions are political in nature, and include the right to vote, to serve on juries, and to hold certain elective and appointive offices); RYAN, *supra* note 100, at 342 (“For the ex-citizen, daily life changes little. He is entitled to welfare benefits, including Social Security, he loses no home, or income, or police protection, or freedom in any tangible sense. He loses his vote in presidential elections, and his right to a passport.”); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 36 (Yale Univ. 1975) (arguing the Constitution “bestow[s] rights on people and persons, and ‘hold[s] itself out as bound by certain standards of conduct in its relation with people and persons, not with some legal construct called ‘citizen.’”). Aleinikoff made essentially the same point two decades earlier:

[Chief Justice] Warren’s characterization [of citizenship as “the right to have rights”] is a dramatic overstatement of the importance of citizenship in the United States today. Aliens residing in the United States—even illegal aliens—are protected by the Constitution. They are entitled to nearly all the public and private opportunities and benefits afforded citizens. The deportation of aliens is significantly constrained by the fifth amendment’s due process clause. A central benefit of citizenship in other countries—the ability to transmit citizenship to one’s children—is far less important in the United States because, by virtue of the fourteenth amendment, children born to aliens in this country are automatically American citizens. Citizenship, of course, does carry with it certain benefits, including the ability to travel on a U.S.

What remains generally involve access to territory and political rights. These include, to varying degrees and in varying combinations, rights to enter⁴¹⁹ and remain,⁴²⁰ to vote,⁴²¹ to serve on a jury,⁴²² to hold certain public offices,⁴²³ and possibly the right to bear arms.⁴²⁴ Of these, some are creatures of statute accorded (but not guaranteed) to citizens, while others are constitutionally mandated rights of citizenship that cannot be abrogated, but which may be extended to noncitizens as well.

passport, to claim protection by the U.S. government overseas, and the right to vote and hold office. But it is far more accurate to adopt the characterization of citizenship employed by the Court in recent equal protection cases—as membership in the political community entitling a person to exercise part of the sovereign power of the nation—than to describe it as the ‘right to have rights.’ It is primarily residence in the United States, not citizenship, that affords rights to individuals.

Aleinikoff, *Theories of Loss of Citizenship*, *supra* note 42, at 1486. Chief Justice Warren borrowed the phrase “the right to have rights” from Hannah Arendt. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (Harcourt 1976) (1951); see also Rogers M. Smith, *Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-First Century*, 122 HARV. L. REV. 907 (2009) [hereinafter Smith, *Beyond Sovereignty*]. In a similar vein, the Eighth Circuit recently held that birthright citizenship is not a “fundamental personal right” that applies in unincorporated territories under the *Insular Cases*. See *Fitisemanu v. United States*, 1 F.4th 862, 878–81 (10th Cir. 2021). Judge Lucero, writing only for himself, questioned “whether citizenship is properly conceived of as a personal right at all. As I see it, citizenship usually denotes jurisdictional facts, and connotes the Constitutional rights that follow . . . a means of conveying membership in the American political system rather than a freestanding individual right.” *Id.* at 878.

⁴¹⁹ *Nguyen v. INS*, 533 U.S. 53, 67 (2001) (a citizen has “the absolute right” to enter the United States); see Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271 (2008); see also Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 375 (2004).

⁴²⁰ *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922) (citizens have the right to remain in the United States); *Fong v. United States*, 149 U.S. 698, 762 (1893). Of course, this is not to say that citizens have never been erroneously deported, or that citizenship status was never incorrectly determined. See Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606 (2011). The right to remain implicitly includes the right to work, which some commentators have listed separately. See, e.g., RICHARD SOBEL, *CITIZENSHIP AS A FOUNDATION OF RIGHTS: MEANING FOR AMERICA* 58–71 (2016).

⁴²¹ 52 U.S.C. § 10101(a)(1) (extending franchise to all eligible voters); *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (noting that a “State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions.”); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (holding that all qualified citizens have a right to vote).

⁴²² *Foley*, 435 U.S. at 296 (“Similar considerations support a legislative determination to exclude aliens from jury service.”).

⁴²³ See, e.g., U.S. CONST. art I, § 2, cl. 2; U.S. CONST. art I, § 3, cl. 3; U.S. CONST. art II, § 1, cl. 5; 10 U.S.C. § 532(a)(1); *Cabell v. Chavez-Salido*, 454 U.S. 432, 444–47 (1982) (upholding citizenship requirement for state public office).

⁴²⁴ See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008) (referring throughout to the right of the “citizen”); see Pratheepan Gulasekaram, “The People” of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521 (2010) (suggesting *Heller’s* logic of a right based on self-defense would render a limitation on this right to the citizenry irrational); see also Pratheepan Gulasekaram, *Aliens With Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007) (discussing restrictions on noncitizens’ access to firearms).

Even within this limited subset of rights, however, “citizenship rights may be disentangled from formal citizenship . . . citizenship is far more fluid and malleable than its conventional framing suggests.”⁴²⁵ The rights associated with citizenship may not align in the same way for all citizens, yet all still constitute citizenship, just as property may inhere in various combinations of rights.⁴²⁶

Take voting, the “right most closely associated with citizenship in both popular understandings and in political theory.”⁴²⁷ While the franchise is certainly indicative of citizenship, it is both under- and over-inclusive as a proxy. Even under a framework of nominally equal citizenship, some citizens lack the franchise. Up until the last third of the Twentieth Century, differentiated types of citizenship was the global norm. Troubling as they were, “[n]ational and state laws denied to women, minors, and varieties of nonwhite citizens certain political, civil, and economic rights enjoyed by white men.”⁴²⁸ Even today, children only have “the status of citizens in a thin sense” because they are “entitled to one right symbolic of citizenship—the passport—but not to another—the vote.”⁴²⁹ Ruth Lister suggests that the franchise, specifically in national elections, “is what divides denizens (people with a legal and permanent residence status) from citizens, since denizens, in theory, normally enjoy full social and civil rights.”⁴³⁰ Thus, under Lister’s construction, children as non-voters have only thin citizenship. Taking into account the difference between citizenship and nationality noted above, it would be even thinner than she suggests.⁴³¹ Other citizens, most notably convicted felons, may be denied

⁴²⁵ Villazor, *Interstitial Citizenship*, *supra* note 20, at 1678–79; *see also* Rogers M. Smith, *The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 103–28, 104–05 (Gerald E. Neuman & Tomiko Brown Nagin eds., 2015) [hereinafter Smith, *Differentiated Citizenship*] (noting the presumption that “citizenship should, in principle and in practice, be a nearly or wholly universal status, and a nearly or wholly uniform status . . . has never matched the real structures of citizenship laws in the United States or, in varying ways, other modern democracies.”); SMITH, *supra* note 59.

⁴²⁶ *United States v. Craft*, 535 U.S. 274, 278 (2002) (noting that “property” may be composed of a “collection of individual rights which” may be found in various combinations); Hohfeld, *supra* note 57, at 746 (“[P]roperty’ . . . consists of a complex aggregate of rights (or claims), privileges, powers, and immunities.”); *Cf. Collins v. Weinberger*, 707 F.2d 1518, 1522–23 (D.C. Cir. 1983) (“The benefits and burdens of being a U.S. citizen . . . constitute a complex package.”).

⁴²⁷ BOSNIAK, *supra* note 396, at 89.

⁴²⁸ Smith, *Beyond Sovereignty*, *supra* note 418, at 912; Smith, *Equality*, *supra* note 393, at 92 (“American women *were* citizens of the republic, but they did not share in civic powers and duties of governance or military service, nor did they possess most economic rights.”). There is a rich literature on the gap between formal citizenship and citizenship as lived experience, with some recent additions surveyed in D. Carolina Núñez, *Citizenship Gaps*, 54 *TULSA L. REV.* 301 (2019).

⁴²⁹ Ruth Lister, *Why Citizenship: Where, When and How Children?*, 8 *THEORETICAL INQUIRIES L.* 693, 695, 701 (2007).

⁴³⁰ *Id.* at 704. This formulation raises interesting questions of the status of residents of U.S. territories such as Puerto Rico and, prior to the 23rd Amendment, the District of Columbia.

⁴³¹ We agree with Lister’s contention that passports are symbolic of citizenship, subject to points discussed in the more nuanced discussion of passports in *supra* Part III.A.1.

the franchise as well.⁴³² And, of course, citizens who are residents of U.S. territories are denied the right to vote in Presidential elections and are collectively denied voting representation in Congress.⁴³³

While it is not true that *all* citizens are eligible to vote, as a historical matter (and increasingly, today) it is also not the case that *only* citizens are eligible to vote. Historically, “[i]n many countries of the Atlantic world, aliens could . . . sometimes vote in elections.”⁴³⁴ In the Nineteenth Century, aliens could vote in the majority of states,⁴³⁵ and it was not until 1928 that aliens were excluded from participating in federal elections.⁴³⁶ Even today, aliens in the United States can sometimes vote in state and local elections, though not in significant numbers.⁴³⁷ In any event, the current bar on noncitizen participation in national elections does not appear constitutionally mandated. Moreover, campaign contributions may exert greater (permissible) political influence than an individual vote.⁴³⁸

Other rights and obligations typically associated with citizenship are not much more helpful in assessing what rights inhere in and define citizenship. There is no mandatory military or other national service, and the draft is moribund.⁴³⁹ While the Selective Service System remains, it applies to noncitizen nationals and resident aliens (whether lawfully resident or not) as well as citizens.⁴⁴⁰ Jury duty is restricted to citizens, though this is a relatively minor obligation, and likely considered by some as a disincentive to

⁴³² *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (upholding felon disenfranchisement laws); *see generally* JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006). In some jurisdictions, some mentally ill people may be ineligible to vote as well.

⁴³³ Smith, *Differentiated Citizenship*, *supra* note 425, at 110.

⁴³⁴ CASEY, *supra* note 39, at 48. Voting in local elections is a right of resident aliens in the European Union; New Zealand and Denmark permit long-term residents to vote in national elections). SPIRO, *supra* note 28, at 92.

⁴³⁵ SCHUCK, *supra* note 28, at 166 (“aliens enjoyed the franchise in many states during the 19th Century.”).

⁴³⁶ *Id.* (citing Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931)); Peter Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 879 (2015); BOSNIAK, *supra* note 396, at 89; SCHUCK, *supra* note 28, at 166; NEUMAN, *supra* note 413, at 63–71, 139–49; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 UNIV. PA. L. REV. 1391, 1460–67 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

⁴³⁷ SPIRO, *supra* note 28, at 72–73, 92 (“A few oddball jurisdictions, most notably Takoma Park, Maryland, allow legal resident aliens to vote in local elections. In New York City, even undocumented aliens could vote in school board elections if they had children in the public schools (before the recent abolishment of the school board there).”); *see also* Raskin, *supra* note 436, at 1460–67.

⁴³⁸ SPIRO, *supra* note 28, at 87–88.

⁴³⁹ *Id.* at 58 (“[c]onscription is a thing of the past in the United States . . . and thus imposes no duty on anyone”).

⁴⁴⁰ Proclamation No. 5366, 45 Fed. Reg. 45247 (July 3, 1980).

naturalization. Transmission of citizenship to one's children is not a right of citizenship. On one hand, most children of citizens will become citizens through birth in the United States, making *jus sanguinis* transmission superfluous in most cases. On the other hand, there is no absolute right to *jus sanguinis* transmission; indeed, children born abroad with only one U.S. citizen parent who has spent insufficient time residing in the U.S. will not acquire U.S. citizenship at birth.⁴⁴¹

Citizenship status is certainly relevant to rights tied to physical location, because citizens have an unqualified right to enter and remain in the United States.⁴⁴² But this right of entry extends to noncitizen U.S. nationals as well,⁴⁴³ who, like citizens, are not subject to removal.⁴⁴⁴ Others can be denied entry, or removed against their will⁴⁴⁵ (though lawful permanent residents without criminal convictions can largely “rest easy about [their] entitlement to remain in the United States”).⁴⁴⁶

In an attempt to ascertain what is essential to citizenship, Elizabeth Cohen observes that “[i]n specifying citizenship one is confronted with the problems associated with the Sorites Paradox,” which relates “to the difficulty arising from any attempt to assign an exact point at which a definitional threshold has been met, particularly when the definition itself is not entirely precise.”⁴⁴⁷ “Sorites,” the Greek word for “heaps,” refers to the problem of ascertaining when in the process of removing one grain at a time, a heap of sand ceases to be a heap.⁴⁴⁸

The Sorites Paradox illustrates why any attempt to essentialize a polythetic concept is bound to fail: categories of this sort cannot be reduced

⁴⁴¹ 8 U.S.C. § 1433 (2008).

⁴⁴² Villazor, *Interstitial Citizenship*, *supra* note 20, at 1676; *Nguyen v. INS*, 533 U.S. 53, 67 (2001).

⁴⁴³ Villazor, *Interstitial Citizenship*, *supra* note 20, at 1714; 22 C.F.R. § 40.2(a).

⁴⁴⁴ Villazor, *Interstitial Citizenship*, *supra* note 20, at 1716–17 (citing *Barber v. Gonzales*, 347 U.S. 637 (1954)). Unlike citizens, who cannot be involuntarily expatriated, noncitizen nationals may be involuntarily denationalized by statute or treaty. *Rabang v. Boyd*, 353 U.S. 427 (1957).

⁴⁴⁵ See, e.g., *Kerry v. Din*, 576 U.S. 86 (2015) (plurality opinion) (no fundamental right of noncitizen to enter the United States); *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952) (noncitizens unlawfully present have no fundamental right to remain).

⁴⁴⁶ SPIRO, *supra* note 28, at 61. Lawful permanent residents returning from abroad are generally not required to show they are admissible (their admission for permanent residence travels with them, except in certain circumstances), see 8 U.S.C. § 1101(a)(13)(C), and they are entitled to due process in exclusion proceedings, *Landon v. Plasencia*, 459 U.S. 21 (1982), whereas other aliens—even those with a visa—are entitled only to the amount of process Congress chooses to provide. See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (reaffirming “more than a century of precedent” holding that Congress has the constitutional authority to decide what level of process, if any, should be afforded to individuals who have not been admitted to the United States). Banks agrees that the right to enter or remain is the most significant right of citizenship, but adds that citizenship colors the incorporation patterns of immigrants. Banks, *supra* note 391, at 318–19.

⁴⁴⁷ COHEN, SEMI-CITIZENSHIP, *supra* note 1, at 34.

⁴⁴⁸ *Id.*

further. The denotation of “citizenship” relies on generalized common understandings, not a specified set of conditions. “[I]n any liberal democratic state there will not be one single version of a perfectly whole citizenship.”⁴⁴⁹ So trying to treat categorical permanency in this way is fundamentally misguided. There is no satisfactory basis for demanding that “citizenship” ends where there is any possibility—however remote—of a lack of permanence. Ascribing permanence—or anything else—as an essential element of citizenship is mistaken because citizenship is “not a single thing.”⁴⁵⁰ “[T]he line between the two cannot be traced to any one point of law, trait, or action.”⁴⁵¹ Trying to do so would not only be arbitrary—as any essential definition of a polythetic concept would be—but it would also be inconsistent with other citizenship rights, few of which are unqualifiedly absolute.⁴⁵²

B. Ethical and Expressive Value

Given the relative dearth of literature addressing denaturalization, it is unsurprising that little attention has been paid to the ethical and expressive value of enforcing the rules. What little literature there is usually addresses the justification for denaturalization from the point of view of defendants—those who may be subject to denaturalization.⁴⁵³ The assumption seems to be that the only parties with an interest in denaturalization are the defendant and the government.⁴⁵⁴ No one, as far as we are aware, has seriously discussed the ethical implications of denaturalization on the overwhelming majority of naturalized citizens who followed the rules.⁴⁵⁵ How does the existence of denaturalization affect *them*?

Robertson and Manta claim that denaturalization creates or exacerbates a lack of “citizenship security” in general,⁴⁵⁶ though their only evidence is a general discussion of the psychology of identity.⁴⁵⁷ Still, at least for some

⁴⁴⁹ Cohen, *Dilemmas*, *supra* note 392, at 1052.

⁴⁵⁰ COHEN, *SEMI-CITIZENSHIP*, *supra* note 1, at 34.

⁴⁵¹ *Id.* at 36.

⁴⁵² While U.S. law guarantees citizens an unqualified right of access to U.S. territory, *see* *Nguyen v. INS*, 533 U.S. 53, 67 (2001), U.S. citizenship cannot be reduced to that right alone, and it is uncertain if a right to enter and remain—though likely common—is an essential element of citizenship generally.

⁴⁵³ *See, e.g.*, Robertson & Manta, *Inalienable Citizenship*, *supra* note 6; Lenard, *Constraining Denaturalization*, *supra* note 22; Robertson & Manta, *Litigating Citizenship*, *supra* note 6; Frost, *supra* note 163; Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6.

⁴⁵⁴ Of late, most authors seem to have equated the government’s interest with that of the incumbent administration or as a purely institutional concern. There is essentially no discussion of the interest of the government either in enforcing the law for its own sake as a rule of law issue, or in acting as the agent of the people speaking through their elected representatives. On the role enforcement plays in securing broader policy objectives, *see infra* note 481.

⁴⁵⁵ Belsan & Petty, *supra* note 7, at 15–16 (discussing the rate of fraud in naturalizations).

⁴⁵⁶ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1429, 1441, 1462; Robertson & Manta, *(Un)Civil Denaturalization*, *supra* note 6, at 453.

⁴⁵⁷ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1438–44.

individuals, they may be correct, though perhaps not for others. The fact that a great many lawful permanent residents never pursue naturalization⁴⁵⁸ and that the naturalization oath requires one to renounce their prior nationality⁴⁵⁹ suggests that the process appeals to many who have or seek an affective attachment to the United States. Those who had to wait a long time for a priority date to become current just to obtain a visa,⁴⁶⁰ and then wait again to accrue the necessary time as a lawful permanent resident before they are eligible to naturalize, may resent those who gamed the system. The scrupulously honest may not give a damn for the liars, and the honest may feel that if the dishonest cannot be punished, they should at least not benefit from their misconduct. We simply do not know, and it is obviously inappropriate to treat all naturalized citizens as a monolith. Further study (ideally, empirical study) is needed to sort it out.

Additionally, there are surely moral and ethical implications of allowing cheaters to profit. Unfortunately, there has been little philosophical analysis of cheating as such,⁴⁶¹ and thus even less on tolerance of cheating. With respect to cheating itself, Herbert Morris explains:

A person who violates the rules has something others have – the benefits of the system – but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased.⁴⁶²

Morris posits three principles, two of which are relevant here.⁴⁶³ First, the possibility of enforcement provides assurance to those who follow the rules that

⁴⁵⁸ See Ana Gonzalez-Barrera et al., *The Path Not Taken: Two-Thirds of Legal Mexican Immigrants Are Not U.S. Citizens*, PEW RES. CTR. (Feb. 4, 2013), <https://perma.cc/H8ZD-TAHB>.

⁴⁵⁹ 8 U.S.C. § 1448.

⁴⁶⁰ Immigrant visas, apart from those for immediate relatives of U.S. citizens and lawful permanent residents, are generally capped at a particular number for each preference category for each fiscal year (and sometimes further limited by the specific country of origin). See U.S. Dep't of State – Bureau of Consular Affairs, *The Visa Bulletin*, TRAVEL.STATE.GOV, <https://perma.cc/7Z5E-EJ4P> (last visited Feb. 14, 2022) (collecting monthly visa bulletins listing statutory caps and priority dates by application type and preference category). A visa petition, once approved, is given a “priority date”—the date the petition was filed—which determines the beneficiary’s place in line for an available visa in their particular category. See 22 C.F.R. § 42.54. A preference category very roughly corresponds to the degree of relationship to the U.S. citizen or permanent resident sponsoring the intending immigrant. See 8 U.S.C. § 1153. Where the number of approved petitions greatly exceeds the number of available visas, an approved visa petition may sit idle for years or even decades waiting for the priority date to become current. See *generally* Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014).

⁴⁶¹ See Stuart P. Green, *Cheating*, 23 L. & PHIL. 137, 139, 141 (2004).

⁴⁶² Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 478 (1968).

⁴⁶³ The third concerns punishment, which, for the reasons discussed *supra* Part III.B.1 is not relevant to civil denaturalization.

others will as well.⁴⁶⁴ This supports the overall functioning of the whole system by encouraging general compliance; it “serves a moralising and responsabilising function vis-à-vis the applicants.”⁴⁶⁵ Second, unequal distribution of benefits is inherently unjust and should be avoided.⁴⁶⁶ The possibility of rescission encourages compliance, which in turn prevents unequal distributions.⁴⁶⁷

“There exists a belief that a central function, perhaps the central function of citizenship is to make members of a polity equal, and that it does so by fashioning a single, unitary political identity.”⁴⁶⁸ But denaturalization does not create inequality, and limiting or preventing denaturalization does not remove it. It simply relocates the inequality elsewhere. Instead of a purported “inequality” in law—one that is required by the inherent differences between obtaining citizenship at birth and by naturalization⁴⁶⁹—we would instead have inequality in fact between naturalized citizens who were honest and naturalized citizens who were not. We have explained why the legal premise is incorrect. But as a policy matter, it is hard to see how turning a blind eye to deception is a superior result.

Indeed, the imperative to do *something* is particularly acute in many of the most common types of denaturalization cases. Engaging in terrorist activity or participating in mass atrocities demands a response—often as a matter of national security,⁴⁷⁰ and nearly always because doing nothing where something can be done is to be tacitly complicit.⁴⁷¹ Where criminal prosecution

⁴⁶⁴ Morris, *supra* note 462, at 477 (“it is only reasonable that those who voluntarily comply with the rules be provided some assurance that they will not be assuming burdens which others are unprepared to assume.”).

⁴⁶⁵ Fargues, *supra* note 22, at 359.

⁴⁶⁶ Morris, *supra* note 462, at 477 (“fairness dictates that a system in which benefits and burdens are equally distributed have a mechanism designed to prevent a maldistribution in the benefits and burdens”).

⁴⁶⁷ *Id.* at 477–78.

⁴⁶⁸ COHEN, SEMI-CITIZENSHIP, *supra* note 1, at 3.

⁴⁶⁹ *United States v. Kairys*, 782 F.2d 1374, 1383 (7th Cir. 1986).

⁴⁷⁰ *See, e.g.*, Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. No. 115-441 § 3, 132 Stat. 5586, 5586 (2019) (“It shall be the policy of the United States to regard the prevention of atrocities as in its national interest”); Aaron R. Petty, *Mass Atrocity Prevention Operations: A SOF Core Activity in Support of Great Power Competition*, 7 SPECIAL OPERATIONS J. 55, 56 (2021) (citing multiple National Security Strategies and noting successive administrations “have reiterated the centrality of preventing mass atrocities to both national security and American values”); *see also* U.S. DEP’T OF JUST. CIV. DIV., FY 2017 BUDGET AND PERFORMANCE PLANS 32 (2016), <https://www.justice.gov/jmd/file/820951/download> (discussing the “expected . . . dramatic[] increase [in] denaturalization dockets by hundreds of cases” and stating that “[f]unding is a national security priority and a public safety necessity.”); S.C. Res. 2178 (Sept. 24, 2014) (calling on member states to, *inter alia*, dedicate resources and adopt legislation to constrain the international mobility of foreign fighters).

⁴⁷¹ *See* AMOS N. GUIORA, THE CRIME OF COMPLICITY: THE BYSTANDER IN THE HOLOCAUST (2017); *see also* Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid*

is not an option—whether for lack of territorial jurisdiction, because the statute of limitations has passed, or for some other reason—denaturalization may be the only tool available to express societal disapproval for some of the most reprehensible acts humanly possible.

Lax enforcement of naturalization requirements also may have second-order effects on the asylum process. Neither the U.N. Convention on the Status of Refugees,⁴⁷² nor its supplemental Protocol,⁴⁷³ require states to permit refugees or asylees a path to naturalization.⁴⁷⁴ The United States provides one anyway, and a comparatively speedy and generous one at that.⁴⁷⁵

The potential problem stems from the fact that a high proportion of naturalization fraud repeats or fails to correct the same fraud originally perpetrated in an earlier asylum application or petition for classification as a refugee.⁴⁷⁶ Sometimes, refugees affected by war conceal their own persecutory conduct.⁴⁷⁷ Other times, such as with the Operation Janus cases or a similar wave of cases in the U.K. a decade ago, “former asylum seekers . . . provid[ed] false information about where they came from or who they are.”⁴⁷⁸

While the objective in protecting the integrity of the naturalization process and the rule of law has merit in its own right, there are also more immediate

Sexual Crimes, 92 S. CAL. L. REV. 1317 (2019). Many denaturalization cases involve unreported sexual assaults, often on children. *See, e.g.*, *United States v. Vilchis*, No. 19-cv-8034, 2021 WL 1784803 (N.D. Ill. May 5, 2021) (describing the denaturalization of a former Olympian and gymnastics coach who sexually assaulted minor gymnasts under his instruction over multiple decades); *United States v. Valenzuela*, 931 F.3d 605 (7th Cir. 2019) (describing a denaturalization that occurred following conviction for aggravated criminal sexual abuse of a minor family member). These too demand a response, though not as a matter of national security. *See generally* Macklin, *A Brief History*, *supra* note 14, at 426–27 (noting, “[c]ontemporary citizenship revocation policies, especially those invoked in the name of national security, serve both instrumental and symbolic goals.”).

⁴⁷² Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

⁴⁷³ Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; for the United States Nov. 1, 1968).

⁴⁷⁴ James C. Hathaway & R. Alexander Neve, *Making Refugee Law Relevant Again*, 10 HARV. HUM. RTS. J. 115, 119 (1997).

⁴⁷⁵ *See* 8 U.S.C. § 1159(b) (stating that a refugee or asylee is eligible for lawful permanent resident after one year of physical presence in the United States after asylum is granted); 8 U.S.C. §§ 1427(a)(1), 1430, 1440 (noting that after meeting requirements of 8 U.S.C. § 1159(b) a former asylee or refugee is eligible for naturalization on the same terms as everyone else—typically naturalization eligibility begins after five years of permanent residence, three if they marry a citizen, and less than that if they serve in the Armed Forces).

⁴⁷⁶ *See* 8 C.F.R. §§ 207, 208 (stating that classification as a refugee is the procedure that applies to those outside of any country of their nationality but not in the United States and application for asylum is the procedure for those who are physically present in the United States or at a port of entry at the time of the application).

⁴⁷⁷ *See, e.g.*, *United States v. Firishchak*, 468 F.3d 1015 (7th Cir. 2006); *Szehinskyj v. Att’y Gen. of United States*, 432 U.S. 253 (3d Cir. 2005); *United States v. Yetisen*, 370 F. Supp. 3d 1191 (D. Or. 2019); *In re Extradition of Handanović*, 829 F. Supp. 2d 979 (D. Or. 2011).

⁴⁷⁸ Fargues, *supra* note 22, at 366 (noting that “[b]etween October 2012 and February 2014, such cases counted for 13 of the 14 nullity decisions taken.”).

and less abstract reasons for doing so. If citizenship is easy to obtain, but the process is routinely abused, retrenchment may ensue. And if a significant number of naturalization fraud cases are grounded in asylum fraud, the political will to offer refuge may diminish as well.

If the public perceives that the asylum system is being used as a loophole by “ordinary” immigrants, and that “resettlement rights are not being reserved only for those who show the kind of special threat that clearly justifies an exception from the usual rigours of the immigration law,” resistance toward asylum will increase.⁴⁷⁹

And if resistance to asylum increases, people facing real threats may be placed in physical jeopardy. Furthermore, if those who abuse the system ultimately naturalize with no consequences, naturalization may be made more difficult as well—which would be unfortunate, given the very small proportion of naturalized citizens who obtained that status unlawfully.⁴⁸⁰ Lack of accountability for the dishonest jeopardizes the security of the honest, particularly the honest who are not *yet* citizens. By protecting the integrity of the naturalization process, enforcement buttresses the political will for both naturalization itself and the routes that lead to it.⁴⁸¹

C. Denaturalization as Interstitiality

Rose Cuison Villazor, in an important article on the rights of non-citizen nationals, has argued that the existence of a status between that of alien and citizen⁴⁸² disrupts the usual binary alien/citizen dichotomy.⁴⁸³ Elizabeth Cohen used a similar term, “semi-citizenship,” building on the earlier work of Iris Marion Young’s identification of “differentiated citizenship.”⁴⁸⁴ But whereas

⁴⁷⁹ ALEXANDER BETTS & PAUL COLLIER, *REFUGEE: RETHINKING REFUGEE POLICY IN A CHANGING WORLD* (2017); see PRICE, *supra* note 97; see also David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in *REFUGEE POLICY: CANADA AND THE UNITED STATES* 30, 34–39 (Howard Adelman ed., 1991) (“As public confidence in the asylum system – intended to distinguish ‘refugees’ from broader movements of people – collapsed, far-right parties gained growing support, and by early 2016 Europe had virtually closed its doors.”).

⁴⁸⁰ Belsan & Petty, *supra* note 7, at 15–16.

⁴⁸¹ David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 417–18 (2014) (“The assurance of a reasonably functional enforcement regime would provide a vital barrier against shifting political winds and incipient anti-foreigner demagoguery, thus helping the United States sustain wise immigration policy.”); David A. Martin, *Eight Myths About Immigration Enforcement*, 10 LEGIS. & PUB. POL. 525, 551–52 (2007) (“the only politically durable foundation for generous legal immigration policy in the future is the assurance that immigration is under control . . . Reliable enforcement, in short, empowers generous legal immigration policy in the long run.”).

⁴⁸² Villazor, *Interstitial Citizenship*, *supra* note 20, at 1677. *But see, supra* note 204 (noting that the status of non-citizen national has been declared unconstitutional in a federal district court, and the appeal is currently pending).

⁴⁸³ See also COHEN, *SEMI-CITIZENSHIP*, *supra* note 1, at 4 (noting citizenship “has never been a unitary concept, nor can it even be neatly characterized as binary”).

⁴⁸⁴ See YOUNG, *supra* note 401.

Cohen and Young addressed citizenship both as a formal legal matter and as a lived experience, Villazor's contribution is to examine the disaggregatability of citizenship rights solely in the context of formal legal categories. She notes that "unbundling" the bundle of sticks may be useful as a policy matter to create new statuses, thus avoiding congressional stalemates that result from all-or-nothing approaches.⁴⁸⁵ And, as Peter Spiro, Alexander Aleinikoff, and others have forcefully shown,⁴⁸⁶ "it is not necessarily the case that one has to have formal citizenship to enjoy rights that have been conventionally linked with this formal status."⁴⁸⁷

The converse holds as well. Naturalization illegally or fraudulently procured is a nullity. But even assuming it was not, lacking a right conventionally associated with citizenship—e.g., the right to vote (for felons and minors), or, for naturalized citizens, the unquestionable permanence that native-born citizens enjoy for lack of a parallel to denaturalization—does not render the status held something other than citizenship or an inferior form of it. To carry forward the property-transaction analogy once more, the fact that someone has an easement across your land or a lien on your house does not make your land and house something other than property. An encumbrance *conditions* the exercise of property rights, it does not extinguish them.

V. CONCLUSION

Aristotle thought it evident that "there are different kinds of citizens."⁴⁸⁸ This is not the case in the United States. The formal status of citizenship is unitary. Within the category of "citizen," however, not everyone possesses all of the same rights or possesses them to the same degree, both as a formal legal matter and in the actual exercise of those rights. But those differences do not lead inexorably to the conclusion that the law tolerates classes of citizens. With respect to those who acquired citizenship by naturalization, the mere fact that naturalization unlawfully procured can be set aside does not mean naturalized citizens are second-class citizens, or that naturalization grants something less than full citizenship.

Citizenship laws do more than regulate membership in a political community; they "reveal much about how a nation conceives of itself."⁴⁸⁹ It is unsurprising that the United States, "unburdened by deep issues of ethnocultural identity,"⁴⁹⁰ conceived largely in political terms, and whose founding mythology centers (however imperfectly) on ideas of equality and

⁴⁸⁵ Villazor, *Interstitial Citizenship*, *supra* note 20, at 1722; *see also* BENHABIB, *supra* note 14, at 171 (discussing disaggregation of citizenship).

⁴⁸⁶ *See supra* notes 406–13 and accompanying text.

⁴⁸⁷ Villazor, *Interstitial Citizenship*, *supra* note 20, at 1722.

⁴⁸⁸ ARISTOTLE, *THE POLITICS* bk. III: ch 5 at 35 (1996).

⁴⁸⁹ Daniel Kanstroom, *Wer Sind Wir Wieder? Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany*, 18 *YALE J. INT'L L.* 155, 158 (1993).

⁴⁹⁰ MOTOMURA, *supra* note 27, at 145–46.

justice, should insist that the law be followed to the letter in the most intimate of political acts an individual may make. “[J]oining the political community requires compliance with a common understanding of what binds their citizens together.”⁴⁹¹ What binds us together is our “shared values rather than shared origins,”⁴⁹² and specifically a common faith in the rule of law. Failing to adhere to the rule of law when joining a political community *defined* by that standard is not merely deceptive, but a betrayal as well.⁴⁹³ The government cannot “cancel the very root of its own legitimacy” via denaturalization—it derives no legitimacy from those who are not, and never were, lawful citizens.⁴⁹⁴

⁴⁹¹ Fargues, *supra* note 22, at 357.

⁴⁹² Ayelet Shachar, *On the Verge of Citizenship: Negotiating Religion and Gender Equality*, in *THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM* 1037 (Paul Schiff Berman ed., 2020); *see also* Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 *MICH. L. REV.* 1440, 1441–42 (1986) (quoting From the Diaries of Felix Frankfurter (Joseph Lash, ed., 1975) (“American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution”).

⁴⁹³ *Id.* at 363 (“In the UK, cheating and lying were similarly presented as wrong for threatening the very purpose of naturalization.”); *see also* RYAN, *supra* note 100, at 342 (“[A]s pervasive as our commitment to democratic ideals may be, we tell him, it cannot tolerate you.”).

⁴⁹⁴ Robertson & Manta, *Inalienable Citizenship*, *supra* note 6, at 1461; *see also* RYAN, *supra* note 100, at 343 (“[W]hat is important is that we have righted the balance of citizenship by withdrawing it from him. We have, in a small measure, restored its integrity for the rest of us.”).