RETURN OF THE NEW MEXICAN-AMERICAN DIASPORA

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Over half a million U.S.-born children call Mexico home. During the last twenty years, aggressive immigration enforcement has forced U.S.-born children of undocumented Mexican immigrants to leave the United States, in order to avoid family separation. This expulsion of Mexican-American children is nothing new. History demonstrates the far-reaching legal consequences of expelling U.S.-born children from the United States.

In the early to mid-20th century, mass expulsions of ethnic Mexicans living in the United States forced Mexican-American children to emigrate to Mexico. Often, the Mexican-born children of expelled Mexican-Americans acquired U.S. citizenship at birth, a status called acquired citizenship. Acquired citizens have a fundamental right to return to the United States. However, acquired citizenship is complex and eludes even skilled professionals. Acquired citizens bear the burden of proving their citizenship through a document-intense process. Many expelled Mexican-Americans and their Mexican-born children were indigent and faced difficulty asserting acquired citizenship. Indigent acquired citizens do not receive appointed counsel in citizenship adjudications. As a result, acquired citizens have been wrongfully detained, removed, and even incarcerated, in violation of their right to return.

This Article argues how recent expulsions of Mexican-American children will create a new generation of acquired citizens born in Mexico. Without assistance of counsel, many of these acquired citizens will "return" to the United States and struggle to assert their acquired citizenship. Further, this Article argues indigent acquired citizens have a Fifth Amendment Due Process right to appointed counsel in citizenship adjudications abroad. Consular citizenship adjudications receive scarce attention by scholars yet represent the earliest opportunity to vindicate one's acquired citizenship.

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INTRODUCTION

"All we got is the family unbroke."

—Ma, Grapes of Wrath[1]

During the last twenty years, Mexico has become home to a surprising group of emigrants. They do not come from a war-torn nation, nor do they come freely. These emigrants are U.S. citizens—expelled by their own country.[2] Since 2000, the United States has removed as many as three million Mexican immigrants from its borders.[3] In doing so, the United States has forced Mexican-American children to emigrate to

1. JOHN STEINBECK, GRAPES OF WRATH (1939).

2. *See infra* Section II.E.2. (reviewing the "Great Expulsion" of Mexican-American children from the United States). This Article employs the term "expulsion" to describe the de facto deportation of U.S.-born children of undocumented immigrants and should not be confused with expulsions under Title 42, Section 265 of the Public Health Service Act. *See* CUSTOM & BORDER PROT. *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, (July 16, 2021), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics; *infra* note 265 (discussing de facto deportation).

3. *See Latest Data: Immigration and Customs Enforcement Removals*, TRANSACTION REC. ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/remove/ (last accessed July 25, 2021) (reflecting 3,518,937 removals of Mexican citizens between 2000 and 2019). This figure is not a precise measurement of the number of Mexican citizens removed, as an individual may be removed more than once.

Mexico, in order to remain with their undocumented parents.[4] Today, there are over half a million U.S.-born children living in Mexico, forming part of the world's largest American diaspora.[5] This mass expulsion raises the question: what will happen to members of this new Mexican-American diaspora?

Studies across disciplines highlight the human costs of immigration enforcement on children.[6] However, the far-reaching legal consequences of expelling U.S.-born children remain scarcely discussed. History demonstrates the complicated legacy mass removals have in the realm of citizenship.[7] During the early to mid-twentieth century, mass expulsions of ethnic Mexicans in the United States forced millions of Mexican immigrants and their U.S.-born children out of the country.[8] Many of these Mexican-Americans children were raised in Mexico, where they eventually had children of their own.[9] A child born abroad to a U.S. citizen may automatically obtain citizenship at birth, a status called acquired citizenship.[10] Like all citizens, acquired citizens possess the fundamental right to enter the United States, also known as the right to return.[11]

The intricate statutory scheme that governs acquired citizenship was designed, in part, to restrict ethnic Mexicans from becoming citizens and entering the United States.[12] Asserting acquired citizenship is document-intensive, involving

4. *See infra* Section II.E.2 (reviewing the "Great Expulsion" of Mexican-American children). For simplicity's sake, this Article employs the term "Mexican-American" to refer to U.S. citizens of Mexican descent. Of course, nationality law does not dictate how one may self-identity, and not all self-identifying Mexican-Americans necessarily possess U.S. citizenship.

5. *See id*. In total, approximately 1.5 million U.S. citizens live in Mexico. *See U.S. Relations With Mexico,* U.S. STATE DEP'T, https://www.state.gov/u-s-relations-with-mexico/ (Sept. 29, 2020).

6. *See generally, e.g.*, Thomas S. Dee & Mark Murphy, *Vanished Classmates: The Effects of Local Immigration Enforcement on School Enrollment*, 57 AM. EDUC. RSCH. J. 694 (2019). (reduced school enrollment); Nicole L. Novak et al., *Change in birth outcomes among infants born to Latina mothers after a major immigration raid*, 46 INT'L J. OF EPIDEMIOLOGY 839 (2017) (adverse birth outcomes); Ajay Chaudry et al., *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, THE URB. INST., Feb. 2010, https://www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.PDF (housing instability, food hardship, and "potentially severe psychological and behavioral changes").

7. *See infra* Part II (reviewing past mass expulsions of Mexican immigrants and their U.S.-born children and the generational return of their acquired-citizen descendants).

8. *See infra* Sections II.A (reviewing the Mexican "Repatriation"), C (reviewing Operation Wetback); note 135 (explaining why the Mexican "Repatriation" and Operation Wetback constitute acts of ethnic cleansing).

9. *See infra* Section II.D (reviewing the generational return of Mexican-born acquired citizens).

10. *See infra* Section I.B (reviewing the history and current provisions of acquired citizenship). Acquired citizenship has been referred to as derivative citizenship. *See, e.g.*, Santamaria v. Holder, No. 11 Civ. 1267 GBD JLC, 2012 WL 566073, at *2 (S.D.N.Y. Feb. 21, 2012); Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 277 (2015). However, derivative citizenship can also refer to the transmission of citizenship *after* birth through a parent's naturalization. *See, e.g.*, Bagot v. Ashcroft, 398 F.3d 252, 253-54 (3d Cir. 2005); M. Isabel Medina, *Derivative Citizenship: What's Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got To Do with It?*, 28 GEO. IMMIGR. L.J. 391, 434-38 (2014). Therefore, some courts, scholars, and practitioners employ the more specific term of acquired citizenship to refer to the acquisition of citizenship abroad at the moment of birth. *See, e.g.*, Jaen v. Sessions, 899 F.3d 182, 186 (2d Cir. 2018); Tova Indritz & Jorge Baron, *Immigration Consequences of Criminal Convictions*, 3 CULTURAL ISSUES IN CRIMINAL DEF. 241, 258 (2010); Lee J. Terán, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 583, 608 n.119 (2012); IMMIGR. LEGAL RES. CTR., *Acquisition & Derivation Quick Reference Charts*, (Sep. 24, 2020), https://www.ilrc.org/acquisition-derivation-quick-reference-charts (last accessed June 12, 2022).

11. *See infra* Section I.A (reviewing citizens' right to return).

12. *See infra* Section I.B.1 (reviewing the history of acquired citizenship law).

witness affidavits, employment records, school records, and—in more recent times—blood testing.[13] Mexican-Americans expelled to Mexico often grow up in working-class households and lack the documentation to substantiate their Mexican-born children's acquired citizenship.[14] Moreover, acquired citizens were not, and are not, afforded counsel as of right.[15] Consequently, acquired citizens descending from U.S. citizens expelled generations ago have been detained, removed, and incarcerated under the false assumption they are undocumented immigrants.[16]

Tragically, the recent expulsions of U.S.-born children of undocumented Mexican immigrants have set in motion a similar chain of events.[17] Many of these Mexican-American children had no choice but to follow their parents to Mexico, where they may eventually transmit U.S. citizenship to their own children.[18] History demonstrates these Mexican-born acquired citizens will eventually "return" to the United States.[19] When they do, many acquired citizens will lack the means to assert their U.S. citizenship. These historical forces perpetuate a devastating cycle of detention, removal, and incarceration of Mexican-American acquired citizens.

Over the years, scholars and policymakers have proposed heightened due process protections to prevent the removal of U.S. citizens.[20] Appointing counsel in removal proceedings constitutes a common-sense reform to an immigration system that continues to remove citizens.[21] However, the plight of indigent acquired citizens seeking to *enter* the United States receives little attention.[22] Generally, the earliest opportunity an acquired citizen has to assert their citizenship is by applying for a passport at a U.S. consulate in their country of birth.[23] Consular officers are State Department employees charged with adjudicating the citizenship of foreign-born

13. *See infra* Part III (reviewing the procedural and evidentiary requirements and challenges of asserting acquired citizenship).

14. *See infra* Section II.D.

15. *See infra* Part III (reviewing the different manners of asserting acquired citizenship, none of which afford appointed counsel); Section IV.C (contending there is a due process right to appointed counsel in consular citizenship adjudications).

16. *See infra* Sections II.D, III.D (reviewing erroneous citizenship adjudications and unjust treatment of acquired citizens).

17. *See infra* Section II.E.2.

18. *See id*. (case of Martin).

19. *See infra* Section II.D. Acquired citizens who have never resided in the United States do not "return" to the United State in the literal sense. However, as this Article will discuss, acquired citizens possess a fundamental right to enter the United States. *See*, *e.g.*, Nguyen v. INS, 533 U.S. 53, 67 (2001); *infra* note 58 (specific international guarantee of entry for acquired citizens entering the country for the first time). Courts have termed this right as the right to return. *See infra* Part II.B (reviewing the right to return). *See also infra* note 31 (use of the term "generational return").

20. *See infra* notes 460-462.

21. *See infra* Section III.D.

22. *See infra* Part IV (reviewing the right to counsel in consular citizenship adjudications). Professor Terán provides a thorough discussion on consular adjudications of acquired citizenship and acquired citizenship generally. *See* Terán, *supra* note 10. *See also, Petition for Rulemaking to Promulgate Regulations Governing Access to Counsel*, AM, IMMIGR,. LAW. ASS'N, May 25, 2017, at n.1, https://www.aila.org/infonet/request-rulemaking-on-access-to-counsel (arguing that citizen and noncitizen claimants in consulates should have access to privately-retained counsel without conceding that the government is not required to appoint counsel in some or all situations).

23. *But see* 8 U.S.C. § 1185(b); 22 U.S.C. § 2705(1) (discussing Consular Report of Birth Abroad ("CRBA") which may be submitted by U.S. citizens on behalf of their foreign-born children under the age of 18).

Americans in connection with passport applications.[24] Consular officers provide limited assistance to acquired citizens who assert complex citizenship claims, which can elude even skilled professionals.[25] The wrongful denial of a passport perpetuates the cycle of detention, removal, and incarceration.[26] The availability of counsel in consular citizenship adjudications is, thus, crucial to preventing the unjust treatment of acquired citizens.[27]

Affording assistance of counsel in consular citizenship adjudications is not just a matter of policy. The Due Process Clause of the Fifth Amendment requires fundamental fairness in proceedings which pit the government interest against the private interest at stake.[28] Recently, a district court held that restricting access to counsel in consular citizenship adjudications violated due process.[29] Even so, the right to obtain and access counsel does not help those acquired citizens who cannot afford to hire an attorney. Consulates leave indigent acquired citizens to their own devices, jeopardizing their birthright citizenship and infringing upon their right to return—simply because they are poor. Such a result defies fundamental fairness.[30]

This Article contends the recent expulsion of U.S.-born children of Mexican descent will give rise to a new generation of acquired citizens born in Mexico. Further, this Article contends consulates must afford assistance of counsel in consular citizenship adjudications to indigent acquired citizens seeking to "return" to the United States. Part I reviews the right to return, the history of acquired citizenship law, and the current provisions governing acquired citizenship. Part II reviews the history of mass expulsions which have given rise to acquired citizens born in Mexico, the generational return of acquired citizens, and immigration policies which have resulted in a new Mexican-American diaspora.[31] Part III discusses the process that "returning" acquired citizens must undertake to assert their citizenship and how the lack of assistance of counsel during this process has resulted in their removal and incarceration. Finally, Part IV discusses why indigent acquired citizens possess a Fifth Amendment Due Process right to appointed counsel in consular citizenship adjudications.[32]

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24. *See infra* Section III.A (reviewing consular citizenship adjudications).

25. *See infra* Section III.D.

26. *See id*. (case of Daniel).

27. This Article employs the term "consular citizenship adjudications" to refer to the two principal manners in which consular officers adjudicate citizenship claims abroad: passport applications and CRBAs. As acquired citizens who end up detained, removed, and incarcerated are adults, this Article's discussion on consular citizenship adjudications centers around passport applications.

28. *See* Lassiter v. Dep't of Social Services, 452 U.S. 18, 24-25 (1981); Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

29. *See* Salem v. Pompeo, 432 F. Supp. 3d 222, 238-39 (E.D.N.Y. 2020) (holding that a consulate's exclusion of counsel during passport and CRBA application interviews violates due process). *See infra* Section IV.A.

30. *See* Section IV.C.

31. This Article employs the term "generational return" to describe the act of acquired citizens, born to expelled U.S. citizens, migrating from their country of birth to the United States.

32. While focusing on the Mexican-American experience, this Article's analyses and recommendations are applicable to the descendants of expelled Americans of all backgrounds. Guatemalans, Hondurans, and Salvadorans increasingly constitute a larger proportion of immigrants removed from the United States *See* TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, *supra* note 3 (reflecting the proportion of removed immigrants who were Mexican fell from 62% to 47% and the proportion of removed immigrants from Guatemala, Honduras, and El Salvador rose from 32% to 44% between 2016 and 2019); Jeffrey S. Passel & D'Vera Cohn, *Mexicans decline to less than half of the U.S. unauthorized immigrant population*

I. THE RIGHT TO RETURN FOR ACQUIRED CITIZENS

United States citizenship is "a right no less precious than life or liberty."[33] Citizenship is acquired at birth or through a process of naturalization after birth.[34] While almost all children born in the United States are citizens,[35] the criteria for acquiring citizenship at birth abroad can be exceedingly complex.[36] Regardless of how one becomes a citizen, all citizens have a fundamental right to return to the United States.[37] This section reviews the fundamental right to return, the troubled history of acquired citizenship, and the complex statutory scheme that governs acquired citizenship.

A. The Fundamental Right to Return

The right of a U.S. citizen to return to the United States is inherent in the concept of citizenship.[38] However, few courts have felt compelled to address a citizen's right to return.[39] Instead, courts often addressed a citizen's right to return within the larger context of the right to travel, including travel abroad.[40] Courts have held that Congress may reasonably restrict travel abroad and it has done so, often based on foreign policy considerations.[41] Over time, however, courts have distinguished the

for the first time, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/. The spread of acquired citizenship in Central America merits its own study.

33. Klapprott v. United States, 335 U.S. 941, 616 (1949) (Rutledge, J., concurring).

34. *See infra* Section I.A.

35. *See infra* note 64 (listing exceptions).

36. *See infra* Section I.B; Part III.

37. *See infra* Section I.A.

38. *See* Worthy v. United States, 328 F.2d 386, 394 (5th Cir. 1964). For an international comparison of citizens' right to return, *see generally*, Siegfried Wiessner, *Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447 (1986).

39. *See* United States v. Ju Toy, 198 U.S. 253, 269 (1905) (Brewer, J., dissenting) ("The right of a citizen is not lost by a temporary absence from his native land, and when he returns he is entitled to all the protection which he had when he left."); United States v. Wong, 169 U.S. 649, 702 (1898) ("It is conceded that, if he is a citizen of the United States, the acts of congress known as the 'Chinese Exclusion Acts,' prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him."); *Worthy*, 328 F.2d at 394 ("It is not to be wondered that the occasions for declaring this principle have been few."); In re Look Tin Sing, 21 F. 905, 910-11 (C.C.D. Cal. 1884) ("[N]o citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of congress.").

40. *See* Kent v. Dulles, 357 U.S. 116, 125-26 (1958) ("In Anglo-Saxon law [the] right [to travel] was emerging at least as early as the Magna Carta…. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values…. Freedom to travel is, indeed, an important aspect of the citizen's liberty."); Browder v. United States, 312 U.S. 335, 338 (1941) ("[S]urely the close connection between foreign travel and reentry to this country is obvious.").

41. *See* Zemel v. Rusk, 381 U.S. 1, 15-16 (1965) (upholding a law restricting travel to Cuba where the restriction was supported by "the weightiest considerations of national security"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs. Latitude in this area is necessary to ensure effectuation of this indispensable function of government."); Shachtman v. Dulles, 225 F.2d 938, 941 (D.C. Cir. 1955) ("The right to travel…is a natural right subject to the rights of others and to reasonable regulation under law."); *Worthy*, 328 F.2d at 393 ("The right of the Congress…to impose reasonable restrictions upon foreign travel is not dependent upon the existence of a state of war, but may be exercised under the broad power to enact legislation for the regulation of foreign affairs."); Mohamed v. Holder, 266 F. Supp. 3d 868,

right of a citizen to return or enter the United States from the right of a citizen to travel abroad.

In a 1964 case, the Fifth Circuit acknowledged Congress's authority to criminally punish citizens who left the United States without a passport.[42] Simultaneously, the court held Congress could not criminally punish a citizen for *returning* to the United States without a passport.[43] The court declared that citizens have a fundamental right to enter the United States and cannot be asked to choose between criminal punishment and banishment.[44] Other courts have recognized a citizen's right to return as part of a fundamental, if not absolute, right of a U.S. citizen to live in the United States.[45]

In 1990, the Fifth Circuit again underscored the fundamental nature of the right to return when it upheld an injunction requiring the Immigration and Naturalization Service ("INS") to follow minimal procedures when citizens applied for entry.[46] The Supreme Court went even further in *Nguyen v. INS*, when it described the right of a citizen to enter the United States as "absolute," in the context of acquired citizenship.[47] Although this description of the right to return lies in dicta,[48] the Court clearly characterized acquired citizens' right to return or enter the United States as equivalent to that of citizens born or naturalized in the country.[49]

The right to return attaches far beyond the United States' borders. In 2014, a district court held that the government infringed upon a citizen's right to return by

878 (E.D. Va. 2017) ("[T]he United States also has a long history of judicially sanctioned restrictions on citizens' international travel in the interests of foreign affairs and national security[.]").

42. *See Worthy*, 328 F.2d at 392.

43. *Id.* at 394.

44. *Id.* The statute requiring citizens to only enter the United States with a passport remains in effect. *See* 8 U.S.C. § 1185(b). However, to the extent the statute would operate to exclude a citizen from the United States, § 1185(b) is likely unconstitutional. *See Worthy*, 328 F.2d at 394; MacEwan v. Rusk, 228 F. Supp. 306, 310 n.7 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965).

45. *See* Ayala-Flores v. INS, 662 F.2d 444, 446 (6th Cir. 1981) ("[Once the citizen-child] reaches the age of discretion, [she] will be able to decide for herself where she will live, and at that time, she will be free to return and make her home in this country"); Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977) ("It is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad[.]"); United States v. Valentine, 288 F. Supp. 957, 980 (D.P.R. 1968) ("The only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States; a citizen cannot be either deported or denied reentry.").

46. *See* Hernandez v. Cremer, 913 F.2d 230, 235, 237-38 (5th Cir. 1990); *see also* Iracheta v. United States, No. B:14-135, 2015 WL 13559948, at *12, n.13 (S.D. Tex. June 19, 2015).

47. *See Nguyen*, 533 U.S. at 67 ("a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders").

48. Nguyen did not squarely deal with the right to return but, rather, the constitutionality of the requirement that fathers of foreign-born children born out of wedlock acknowledge paternity in order to transmit citizenship. *See id.*, 533 U.S. at 56-57; Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1117 n.25 (N.D. Cal. 2018). *See also* J. Nicholas Murosko, *Communicable Diseases and the Right to Re-Enter the United States*, 24 WM. & MARY BILL RTS. J. 913, 922 (2016) (arguing that a citizen's right to return to the United States is fundamental but not absolute). Nonetheless, some fundamental rights are absolute. *See*, *e.g.* Jenkins v. Anderson, 447 U.S. 231, 251 (1980) (Marshall, J., dissenting) (right to testify in own defense); Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1541 n.15 (2015) (right to not be enslaved outside a criminal justice sentence). *See also* Fikre v. FBI, 23 F. Supp. 3d 1268, 1282 (D. Or. 2014) (acknowledging the *Nguyen* court's characterization of the right to return was absolute but not determining what level of scrutiny applied).

49. *See Nguyen*, 533 U.S. at 67; *see also* Schneider v. Rusk, 377 U.S. 163, 165 (1964) ("[T]he rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive.").

placing him on the FBI's No Fly List, which prevented him from boarding his flight from Kuwait to the United States.[50] In that case, the government argued that it never denied the citizen-plaintiff reentry into the United States because the right to return only attaches when a citizen presents themselves at a port of entry or at the border.[51] Based on this logic, the government could prevent or impede a citizen's ability to reach the United States without restriction.[52] The district court disagreed, stating that a citizen's right to return "entails more than simply the right to step over the border after having arrived here."[53] Instead, the right to return attaches whenever a citizen desires, and the government's efforts to prevent or impede a citizen from reaching the United States infringe upon their right to return.[54]

Additionally, the United States has adopted two major international documents enshrining the right to return of its citizens: the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR").[55] The UDHR declares that "*everyone* has the right to return to his country."[56] While not a treaty, the UDHR is the lodestar of human freedom adopted throughout the world, including the United States.[57] The ICCPR, in turn, is a treaty specifically enshrining an acquired citizen's right to enter their country for the first time.[58] Both the ICCPR and the UDHR represent the United States' commitment to accept all of its citizens who seek to cross its borders and the universal prominence of the right to return.

50. *See* Mohamed v. Holder, 995 F. Supp. 2d, 520, 522 (E.D. Va. 2014); *Terrorist Screening Center*, FBI (2010), https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center-1 ("Inclusion on the No Fly List prohibits a known or suspected terrorist from boarding a commercial aircraft that departs from or arrives in the United States.").

51. *Mohamed*, 995 F.Supp. 2d at 536.

52. *Id.*

53. *Id.*

54. *Id.* (citing Newton v. INS, 736 F.2d 336, 343 (6th Cir. 1984)). In another No Fly List case, a district court in the District of Oregon held that the government could not deprive citizens abroad of all viable means to return to the United States. *See* Fikre v. FBI, 23 F. Supp. 3d 1268, 1282 (D. Or. 2014). Ultimately, both the *Fikre* and *Mohamed* courts decided against a finding of an unconstitutional infringement on the right to return. *See id*. at 1282; *Mohamed*, 995 F. Supp. 2d at 537. In *Fikre*, the court reasoned that the citizen-plaintiff still had a viable means of returning to the United States by consulting the embassy. *See Fikre*, 23 F. Supp. 3d at 1282. In *Mohamed*, the court reasoned that the four-to-five-day delay in the citizen-plaintiff's return caused by his placement on the No Fly List did not unduly burden his right to return. *See Mohamed*, 995 F.Supp. 2d at 537. If the right to return is absolute, as indicated by the Supreme Court *Nguyen*, then the government infringements in *Fikre* and *Mohamed* would appear to be unconstitutional.

55. G.A. Res. 217 (III) A, Art. 13(2), Universal Declaration of Human Rights (Dec. 10, 1948).); G.A. Res. 2200A (XXI), Art. 12(4), International Covenant on Civil and Political Rights (June 8, 1992).

56. G.A. Res. 217 (III) A, *supra* note 55, Art. 13(2) (emphasis added).

57. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 n.23 (2004) ("[T]he Declaration does not of its own force impose obligations as a matter of international law."); John P. Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, The International Protection of Human Rights 39, 50 (Evan Luard ed.1967) (quoting Eleanor Roosevelt calling the Declaration "a statement of principles . . . setting up a common standard of achievement for all peoples and all nations").

58. *See* G.A. Res. 2200A (XXI), *supra* note 55, Art. 12(4) ("No one shall be arbitrarily deprived of the right to enter his own country."); Human Rights Council, General Comment No. 27: Art. 12, Para. 19, (Nov. 2, 1999) ("It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality)."). Until Congress passes enabling legislation, the ICCPR is not enforceable in domestic courts. *See Sosa*, 542 U.S. at 734-35.

In sum, an acquired citizen has a right to return to the United States whenever they desire. The federal government cannot impede or prevent an acquired citizen from reaching and entering the United States. While the right to return is arguably absolute,[59] for purposes of this Article, it suffices to understand that the right to return is fundamental in stature.[60]

B. Acquired Citizenship

In American nationality law, there are "two sources of citizenship, and two only: birth and naturalization."[61] Citizenship by birth follows two principles: *jus sanguinis*, the transmission of citizenship by parentage; and *jus soli*, the transmission of citizenship by birthplace.[62] The two forms of birthright citizenship enjoy different legal protections. The Fourteenth Amendment guarantees citizenship to those born in the United States,[63] with very few exceptions.[64] In contrast, Congress determines who acquires citizenship when born outside the United States and has historically altered these criteria on the basis of race and gender.[65] The modern statutory scheme governing acquired citizenship carries on this troubled legacy in ways that make it difficult for acquired citizens to assert their citizenship.[66]

59. Recently, the federal government has barred U.S. citizens from returning to the country by air unless they possess a negative COVID-19 test or evidence of COVID-19 vaccination or recovery. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *Requirements for Negative Pre-Departure COVID-19 Test Result or Documentation of Recovery from COVID-19 for All Airline or Other Aircraft Passengers Arriving into the United States from Any Foreign Country* (Dec. 2, 2021), https://www.cdc.gov/quarantine/pdf/Amended-Global-Testing-Order_12-02-2021-p.pdf. Such a measure infringes upon an absolute right to return. However, just as the district court in *Fikre* glossed over the Supreme Court's "absolute" characterization of the right to return based on national security concerns, courts may further degrade the right to return amid the proliferation of deadly infectious diseases. *See Fikre*, 23 F.Supp. 3d at 1282.

60. Unfortunately, some courts continue to entangle a citizen's fundamental right to return with the lesser right of traveling abroad. *See*, *e.g.*, Wilwal v. Nielsen, 346 F. Supp. 3d 1290, 1307 (D. Minn. 2018) (holding that a citizen did not have a fundamental right to "international travel" where the citizen-plaintiff was prevented from reentering the United States).

61. *See* Miller v. Albright, 523 U.S. 420, 423 (1998) (citing United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898)).

62. *See id*. at 478 (Breyer, J., dissenting); *Citizenship by Birth*, 41 HARV. L. REV. 643, 645 (Mar. 1928).

63. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

64. *See Wong Kim Ark*, 169 U.S. at 693 ("children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes"); Note, *Citizenship by Birth*, 41 HARV. L. REV. 643 (Mar. 1928) ("There has never been any doubt that the proviso incorporated the common law exceptions of children of foreign sovereigns, ambassadors, and soldiers in invading armies.").

65. *See* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have the Power…To establish a uniform Rule of Naturalization[.]"); Rogers v. Bellei, 401 U.S. 815, 827 (1971) (upholding Congress's residence requirements on citizens born abroad to a citizen-parent because a citizen born outside the United States does not come within the Fourteenth Amendment's definition of citizens as those "born or naturalized in the United States."); *Wong Kim Ark*, 169 U.S. at 688 ("But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the constitution to establish an uniform rule of naturalization."); *infra* Section I.B.1.

66. *See infra* Section I.B.2.

1. History

Over the country's history, race and gender have played key roles in the evolution of American nationality law. Lawmakers often intertwined race and nationality with gender in effort to exclude individuals deemed undesirable from the United States.[67] Early statutes discriminated against women that made it more difficult, if not impossible, for women to transmit U.S. citizenship abroad.[68] Jurists linked gender with foreign nationality, such that a woman risked losing her citizenship if she married a foreign national.[69] Expatriation prevented women from marrying foreigners and transmitting U.S. citizenship to their foreign-born children.

The most extreme law for expatriating women was the Expatriation Act of 1907.[70] The law stripped a woman of her citizenship if she married a foreigner, even when she continued to reside in the United States.[71] Following ratification of the Nineteenth Amendment, Congress largely repealed the Expatriation Act of 1907.[72] In its place, however, Congress explicitly tied race and ethnicity to the retention and transmission of citizenship.[73] Under the Cable Act of 1922, a woman lost her citizenship if she married a noncitizen ineligible for citizenship, which included most immigrants from Asia at the time.[74] Subsequently, Congress imposed quotas limiting or excluding immigrants on the basis of national origin, including immigrants of

67. *See, e.g.*, *infra* notes 68-70, 74 (statutes and cases tying a female citizen's nationality, and therefore her child's nationality, to that of her foreign husband).

68. The Naturalization Act of 1790, in somewhat ambiguous terms, permitted mothers to transmit citizenship abroad only where the father had at some point resided in the United States. *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795); Miller v. Albright, 523 U.S. 420, 460-68 (1998) (Ginsburg, J., dissenting) (reviewing the history of sex-based classifications in acquired citizenship law). In 1855, Congress restricted acquired citizenship to the children of male citizens who had at some point resided in the United States—women could not transmit citizenship in their own right. *See* Naturalization Act of 1855, § 2, 10 Stat. 604.

69. *See* Shanks v. Dupont, 28 U.S. 242, 243 (1830) (holding that a U.S.-born woman's marriage to a British citizen and her voluntary departure to the United Kingdom "operate[d] as a virtual dissolution of her allegiance" to the United States); Ruckgaber v. Moore, 104 F. 947, 948-49 (E.D.N.Y. 1900) ("[T]he political status of the wife follows that of her husband, with the modification that there must be withdrawal from her native country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage."); Pequignot v. City of Detroit, 16 F. 211, 217 (E.D. Mich. 1883) (holding that a French woman who became a U.S. citizen through marriage, divorced, and subsequently remarried a French citizen lost her U.S. citizenship even if she continued living in the United States). *Cf.* Comitis v. Parkerson, 56 F. 556, 562-63 (E.D. La. 1893) (holding that a U.S.-born woman who married an Italian citizen and never left the United States retained her citizenship after marriage). For a history on the expatriation of American women, *see* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998).

70. *See* Expatriation Act of 1907, Pub. L. No. 59-193, § 3, 34 Stat. 1228 (repealed 1940); BREDBENNER, *supra* note 69, at 57.

71. *See* Expatriation Act of 1907 § 3; Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915) (upholding the Expatriation Act of 1907). The 1907 law incorrectly assumed that an American woman who married a foreigner assumed the nationality of her husband by operation of his country's laws. As such, the law reduced some American women to statelessness. *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 426 (2005).

72. *See* Married Women's Independent Nationality (Cable) Act, Pub. L. No. 67-346, 42 Stat. 1021b; Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 180 (2017).

73. *See* Cable Act, § 3; Collins, *supra* note 72, at 183.

74. Cable Act, § 3; Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (repealed 1952) (excluding immigrants from the "Asiatic barred zone," which included the Indian subcontinent, southeast Asia, much of the Middle-East, Polynesia, and Siberia); Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58, 1882 (repealed 1943) (excluding Chinese immigrants).

Asian, Southern European, and Eastern European origin.[75] Thus, a woman could lose her citizenship on the basis of her husband's race or ethnicity.[76] In this manner, Congress extinguished maternal lines of U.S. citizenship for a generation of foreign-born children.

Ultimately, Congress repudiated the race-based expatriation of American women. The Naturalization Act of 1931 permitted a woman to retain her citizenship after marrying a noncitizen ineligible for citizenship, thus removing racial bars to the retention and transmission of citizenship.[77] Subsequently, Congress passed the Citizenship Act of 1934, "establish[ing] complete equality between American men and women in the matter of citizenship[.]"[78] In order for a parent to transmit citizenship abroad, they simply needed to have resided in the United States at some point prior to their child's birth, regardless of the other parent's race or nationality.[79] The 1934 law did, however, introduce a residence requirement for children born abroad to citizen-noncitizen couples to acquire citizenship at birth,[80] also known as a physical presence requirement.[81] A child born abroad to a citizen and a noncitizen had to continuously reside in the United States for at least five years prior to turning eighteen years old.[82]

Nevertheless, racial anxieties and traditional views on gender swiftly permeated their way back into public discourse on acquired citizenship. Immigration authorities and policymakers widely believed mothers were the natural caregivers of children, particularly of children born out of wedlock.[83] They assumed an unwed father cared little about his nonmarital child.[84] Policymakers deemed an unwed mother to be her child's "natural and sole guardian."[85] In addition, the extension of acquired citizenship to more foreign-born children stirred tensions over their ethnicity.[86] The State Department worried that the Citizenship Act of 1934 had "spread citizenship over the face of the earth," permitting children who were "alien in all their characteristics" and "in no true sense American" to enter the United States.[87]

75. *See* Immigration (Johnson-Reed) Act of 1924, Pub. L. 68-139, 43 Stat. 153 (repealed 1965). Mexican immigrants were excluded from this "National Origins Formula" due to the American economy's reliance on Mexican workers, which only increased as Southern and Eastern Europeans were excluded from the United States. *See* Terán, *supra* note 10, at 596-7; *infra* Section II.A (reviewing the early 20th century migration of Mexicans to the United States). Ultimately, exception from the quota system was of little avail to many Mexicans, who were subject to mass expulsions during the 1930s. *See infra* Section II.A.

76. The Cable Act of 1922 also prevented a female immigrant from naturalizing if her husband was ineligible for citizenship. Cable Act § 3. The racial bar on naturalization and retention of citizenship left many Asian women worse off than under the Expatriation Act of 1907. *See* Volpp, *supra* note 71, at 432-42.

77. *See* Act of Mar. 3, 1931, Pub. L. 71-829, 46 Stat. 1511, § 4.

78. Citizenship Act of 1934, Pub. L. 73-250, 48 Stat. 797; Miller v. Albright, 523 U.S. 420, 466 (1998) (citing S. Rep. No. 865, at 1 (1934)).

79. *See* Citizenship Act of 1934.

80. *See id*.

81. *See generally* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (using both terms interchangeably).

82. Citizenship Act of 1934.

83. *See* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, And Nation*, 123 YALE L.J. 2134, 2201-05 (2014).

84. *See Morales-Santana*, 137 S. Ct. at 1691-92.

85. *Id*.

86. *See* Collins, *supra* note 72, at 184.

87. *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the H. Comm. on Immigr. and Naturalization*, 76th Cong. 40-41 (1940) (statement of State Department legal adviser Richard W. Flournoy).

Accordingly, State Department officials proposed a lengthy physical presence requirement on parents for transmitting U.S. citizenship to their foreign-born children.[88]

The State Department's proposal came amid the Mexican "Repatriation," where, as discussed below, government officials expelled thousands of U.S. citizens of Mexican descent from the country.[89] These mass expulsions left open the possibility that the descendants of expelled Mexican-Americans would acquire U.S. citizenship at birth, thereby permitting their generational return to the United States.[90] Although the State Department did not cite the Mexican "Repatriation" in its proposal, State Department officials hoped a much longer physical presence requirement on parents would restrict ethnic Mexicans from acquiring citizenship at birth and entering the United States.[91]

Against this backdrop, Congress made it more difficult for children of citizen-noncitizen couples to acquire citizenship at birth abroad.[92] Under the Naturalization Act of 1940, a child born to a citizen and a noncitizen only acquired citizenship if the citizen-parent had resided in the United States for ten years, at least five of which were after the age of sixteen.[93] Such children also had to live in the United States for five years before the age of twenty-one to acquire citizenship.[94] However, Congress carved out an exception. Citizen-mothers of children born *out of wedlock* only had to reside in the United States at some point prior to the child's birth, provided the child's paternity was not established by legitimation or court order.[95] The law also spared her child from the five-year physical presence requirement for foreign-born children.[96] As an unwed father would have presumably abandoned the mother of his child, policymakers found heightened physical presence requirements unnecessary to guard against the noncitizen-father's "alien…characteristics."[97]

In contrast, citizen-fathers and their children born out of wedlock to noncitizen-mothers had to fulfill the same lengthy physical presence requirement as wedlock births.[98] Citizen-fathers also had to legitimate their nonmarital child or obtain a court order adjudicating his paternity prior to the child turning twenty-one years

88. *See id*.

89. *See infra* Section II.A.

90. *See supra* note 31 (defining generational return).

91. *See Hearings on H.R. 6127, supra* note 87 (statement of State Department legal adviser Richard W. Flournoy) ("A child may have been brought here an infant in arms, a Chinese baby or a Mexican baby, and who then married a Chinese or a Mexican girl. He lives there and marries a Chinese or a Mexican in Mexico, as the case may be, and they have children. They are born citizens of the United States under the law as it now exists. It is spreading citizenship pretty widely."); Collins, *supra* note 83, at 2206 (observing that expanded residence requirements bolstered racial bars to immigration that had been compromised by the Citizenship Act of 1934).

92. *See* Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137-1140, § 201.

93. Nationality Act of 1940, § 201(g).

94. *Id*. The earlier Citizenship Act of 1934 imposed a residence requirement on children but none on parents. *See* Pub. L. 73-250, § 1, 48 Stat. 797.

95. Nationality Act of 1940, § 205. This de minimis residence requirement also applied, and continues to apply, to two citizen-parents of a child born abroad. *See id.* at, § 201(c); 8 U.S.C. § 1401(c).

96. *See* Nationality Act of 1940, § 205.

97. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1691-92 (2017) ("foreign ways"); *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the H. Comm. on Immigr. and Naturalization*, 76th Cong. 40-41. *See also* Collins, *supra* note 72, at 183-84.

98. *See* Nationality Act of 1940, §§ 201(g), 205.

old.[99] Accordingly, the Naturalization Act of 1940 reintroduced sex-based classifications motivated, in part, by fears of ethnic Mexicans acquiring U.S. citizenship.

Congress has since liberalized the conditions for acquiring citizenship in some ways, while restricting them in others, often in parallel with changing attitudes towards immigration.[100] The Immigration and Nationality Act of 1952 removed explicitly racial bars to immigration and codified the modern statutes regulating acquired citizenship: 8 U.S.C. § 1401 for wedlock births and § 1409 for out-of-wedlock births.[101] The law lowered the age by which parents had to reside in the United States to transmit citizenship, from sixteen to fourteen.[102] The law also repealed the non-legitimation requirement for nonmarital children of citizen-mothers.[103] However, the law modestly heightened the minimal residence requirement for unwed citizen-mothers of citizen-noncitizen couples to a continuous period of one year.[104] In 1978, Congress repealed the physical presence requirement for foreign-born children of citizen-noncitizen couples.[105]

Amid souring attitudes towards immigration during the 1980s,[106] Congress enacted major amendments to the acquired citizenship provisions.[107] The Immigration and Nationality Act Amendments of 1986 ("INAA") formed part of a broader series of legislation aimed at discouraging fraudulent and unauthorized entry into the United States while "grandfathering in" undocumented immigrants who were already in the country.[108] The INAA significantly reduced the physical presence requirement for

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99. *Id*.

100. *See* Rogers v. Bellei, 401 U.S. 815, 826 (1971) ("[F]or the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child.").

101. *See* Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1483. However, the law maintained national origins quotas until the Immigration and Nationality Act of 1965 ("INA"). *See* Section II.E.1.

102. Pub. L. No. 82-414, 66 Stat. 163, § 301(a)(7) (codified at 8 U.S.C. § 1401(g)).

103. Pub. L. No. 82-414, 66 Stat. 238, § 309(b) (codified at 8 U.S.C. § 1409(c)).

104. *Id*.

105. Act of October 10, 1978, Pub. L. 95-432, 92 Stat 1046.

106. By 1986, negative views on immigration had increased significantly, with half of the public opposing further immigration, compared to just one-third in 1965. *See Immigration*, GALLUP, https://news.gallup.com/poll/1660/immigration.aspx (last accessed Aug. 1, 2021) (graph entitled "In your view, should immigration be kept at its present level, increased or decreased?"). Opposition to immigration coincided with a rise in unauthorized immigration from Mexico following the end of the guest worker program for Mexican nationals, known as Bracero, and the enactment of the INA. *See infra* Section II.E.1 (reviewing the "Great Migration" of undocumented Mexican immigrants between the 1980s and the early 2000s).

107. Immigration and Nationality Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655.

108. Days before passing the Immigration and Nationality Amendments of 1986, Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), which legalized over a million undocumented immigrants in the country while imposing financial and criminal penalties on employers who hired undocumented immigrants, in the hopes of disincentivizing further unauthorized entry into the United States. *See* Pub. L. No. 99-603, 100 Stat. 3359. Congress also passed the Immigration Marriage Fraud Amendments of 1986, which established a two-year conditional permanent resident status for noncitizen spouses and children who became permanent residents through marriage and subjected immigrants guilty of marriage fraud to deportation and incarceration. *See* Pub. L. No. 99-639, 100 Stat. 3537, (codified as 8 U.S.C. § 1325(c)). Further, Congress passed "tough on crime" laws that authorized the deportation of immigrants who committed certain offenses, including drug offenses. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342–7344, 102 Stat. 4181 (amending 8 U.S.C. §§ 1101(a), 1252(a)); Anti-Drug

unwed citizen-parents to five years, at least two of which had to be after the age of fourteen.[109] However, the INAA radically altered how foreign-born children to unwed fathers acquired citizenship at birth.[110] Under the INAA, legitimation or court adjudication of paternity alone became insufficient.[111] Acquiring citizenship through an unwed father now also requires clear and convincing evidence of a blood relationship between father and child.[112] Additionally, the INAA introduced a requirement for acquired citizenship that unwed fathers agree in writing to provide financial support to the child until the age of eighteen.[113]

2. Current Provisions

The INAA's discriminatory treatment of unwed citizen-fathers and their foreign-born children has not gone unchallenged. In 2017, the Supreme Court held that the disparate residence requirements for citizen-mothers and citizen-fathers violated the Fifth Amendment's equal protection guarantee.[114] However, the Court remedied the disparity by extending the substantially longer residence requirement to citizen-mothers, despite the requirement's racist origin.[115] Today, citizen-fathers and citizen-mothers in citizen-noncitizen couples must meet the five-year physical presence requirement in order to transmit citizenship to their foreign-born child.[116] The Supreme Court has left the INAA's paternity provisions for unwed fathers intact.[117]

Acquired citizens bear the burden of proving their acquired citizenship by the preponderance of the evidence.[118] Given the added evidentiary burdens of the INAA and substantial physical presence requirement for parents of nonmarital children, asserting acquired citizenship poses greater difficulty for children born out of wedlock—especially children of citizen-fathers and noncitizen mothers. The following tables summarize the different criteria for acquiring citizenship from an unwed citizen-parent at birth abroad:[119]

Abuse Act of 1986, Pub. L. No. 99-570, §§ 1002, 1751, 100 Stat. 3207 (amending 8 U.S.C. §§ 1182(a)(23), 1251(a)(11), 21 U.S.C. § 841(b)(1)).

109. Pub. L. No. 99-653, 100 Stat. 3655 (codified at 8 U.S.C. § 1401(g)).

110. *See id*. (codified at 8 U.S.C. § 1409(a)).

111. *See* Pub. L. No. 99-653, 100 Stat. 3655, Nov. 14, 1986 (codified at 8 U.S.C. § 1409(a)). Until then, Congress had not required proof of a blood relationship to acquire citizenship from an unwed father, despite the availability of paternity blood testing since the 1940s. *See generally, e.g.*, Berry v. Chaplin, 74 Cal. App. 2d 652 (Cal. Ct. App. 1946). Notably, most states do not require biological evidence to establish paternity. *See* Hong, *supra* note 10, at 298.

112. 8 U.S.C. § 1409(a)(1).

113. 8 U.S.C. § 1409(a)(3).

114. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1701 (2017).

115. *Id*.

116. *Id*.

117. *See* Nguyen v. INS, 533 U.S. 53, 60-71 (2001) (holding that legitimation requirement for acquiring citizenship solely from a citizen-father did not violate the Fifth Amendment's equal protection guarantee); Miller v. Albright, 523 U.S. 420, 433-41 (1998) (holding that the blood relationship requirement for acquiring citizenship solely from a citizen-father did not violate the Fifth Amendment's equal protection guarantee).

118. *See* 8 C.F.R. § 341.2(c) (2021) (N-600 applications); 22 C.F.R. § 51.40 (2021) (passport applications); Matter of Tijerina–Villarreal, 13 I. & N. Dec. 327, 330 (B.I.A. 1969) (removal proceedings).

119. Presently, acquiring citizenship from two citizen-parents only requires that one parent have resided in the United States at any time prior to birth and, if the child is born out of wedlock, that the father meet the paternity requirements outlined in Table B. *See* 8 U.S.C. §§ 1401(c), 1409(a). *But see Chart B:*

Table A: Acquiring Citizenship at Birth Abroad Through an Unwed Citizen-Mother[120]	
Child's date of birth	**Parental physical presence requirement**
If the child was born prior to June 13, 2017 …	Mother must have been physically present in the United States prior to the child's birth for a continuous period of one year.
If the child was born on/after June 13, 2017 …	Mother must have been physically present in the United States prior to the child's birth for five years, at least two of which were after the age of fourteen.

Table B: Acquiring Citizenship at Birth Abroad Through an Unwed Citizen-Father[121]	
Parental physical presence requirement	Father must have been physically present in the United States prior to the child's birth for five years, at least two of which were after the age of fourteen.
Paternity requirements	1. Blood relationship between father and child established by clear and convincing evidence. 2. Father must agree in writing to provide financial support to child until the age of eighteen. 3. Prior to the child turning eighteen, one of the following must occur: • Father acknowledges paternity in a sworn written statement. • Father's paternity established by court adjudication.

Acquisition of Citizenship: Determining if Children Born Abroad and Out of Wedlock Acquired U.S. Citizenship at Birth, n.8, IMMIGR. LEGAL RES. CTR. (Sep. 24, 2020), https://www.ilrc.org/sites/default/files/resources/natz_chart_b-9-24-20.pdf (noting dispute over applicability of paternity requirements in out-of-wedlock births where both parents are citizens). This Article focuses on the descendants of U.S. citizens expelled to Mexico. As such, this Article centers its discussion on acquired citizens born to citizen-noncitizen couples.

120. As this Article focuses on citizens recently expelled to Mexico and their future descendants, Table A only reflects the rules in effect for the past several decades. *See* 8 U.S.C. § 1401(g), 1409(c); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1691-92 (2017). For a tabulation of older acquired citizenship criteria, *see Chart B*, *supra* note 119.

121. Table B only reflects the rules in effect for the past several decades. *See* 8 U.S.C. § 1401(g), 1409(a). For a tabulation of older criteria for acquiring citizenship from an unwed father, *see Chart A: Acquisition of Citizenship: Determining whether Children Born Outside the U.S. Acquired Citizenship at Birth*, IMMIGR. LEGAL RES. CTR. (July 14, 2020), https://www.ilrc.org/sites/default/files/resources/natz_chart-a-2020-7-14.pdf; *Chart B*, *supra* note 119 ("If #s 1–4 are met, use CHART A to determine if a child acquired citizenship at birth").

	• The child is legitimated under the law of the child's residence or domicile as the father's child.

Accordingly, acquired citizens must contend with a burdensome statutory scheme that was designed, through its substantial physical presence requirement, to restrict ethnic Mexicans from acquiring U.S. citizenship.[122]

II. THE CYCLE OF EXPULSION AND EXPANSION OF ACQUIRED CITIZENSHIP

Since the 1830s, Mexicans and Mexican-Americans have endured racially-motivated expulsions from the United States.[123] These mass expulsions have resulted—and continue to result—in generations of acquired citizens born in Mexico. In 1836, the Republic of Texas expelled *Tejanos* in order to eliminate obstacles to colonization by settlers.[124] Many *Tejano* refugees fled south to Mexico.[125] After the Mexican-American War ended in 1848, hundreds of Mexican-born children of expelled *Tejanos* "returned" to Texas to reclaim their family's lost property.[126] Possibly, these children of expelled *Tejanos* formed the first generation of acquired citizens brought about by a mass expulsion.[127]

By far the most sweeping expulsions of ethnic Mexicans from the United States occurred in the last hundred years when the country's Mexican population grew substantially.[128] During the Great Depression, mass expulsions of Mexicans forced countless U.S. citizens of Mexican descent out of the United States.[129] What became known as the Mexican "Repatriation" was followed by a massive deportation effort in

122. Recently, a district court in the District of Nevada held that the statute criminalizing illegal reentry violates equal protection under the Fifth Amendment because the original statute was enacted with a discriminatory purpose. *See* United States v. Gustavo Carrillo-Lopez, No. 3:20-cr-00026-MMD-WGC, ECF No. 60 (D. Nev. Aug. 18, 2021). *Cf.* United States v. Rios-Montano, 19-CR-2123-GPC, ECF No. 82 (S.D. Cal. Dec. 8, 2020) (denying defendant's motion to dismiss indictment charging illegal entry because defendant failed to show that the statute, enacted in its current form in 1990, was motivated by racial discrimination). An analogous argument could be made that the provisions imposing a substantial physical presence requirement for a citizen-parent to transmit citizenship to their child born abroad is unconstitutional, as Congress introduced the requirement to prevent ethnic Mexicans and Chinese from acquiring U.S. citizenship. *See supra* Section I.B.1, note 91.

123. *See* José Ángel Hernández, *Contemporary Deportation Raids and Historical Memory: Mexican Expulsions in the Nineteenth Century*, 35:2 AZTLÁN J. OF CHICANO STUDIES 115, 119 (2010).

124. *See id.* at 121. *Tejanos* are Texans of Hispanic descent. *Tejano*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/tejanos (last accessed Aug. 1, 2021).

125. *See* José Ángel Hernández, *supra* note 123, at 124.

126. *See id. See supra* note 31 (defining generational return).

127. *Tejanos* living in Texas on the day it declared independence were deemed citizens of Texas. *See* Tex. Const., 1836, Gen. Provisions, § 10. *Tejanos* subsequently expelled from Texas arguably retained their Texas citizenship and became U.S. citizens after the republic's admission into the Union. *See* Boyd v. Nebraska, 143 U.S. 135, 169 (1892). The Mexican-born children of expelled *Tejanos* may have acquired U.S. citizenship at birth, subject to the rules then in effect. *See supra* Section I.B.1 (reviewing early rules governing acquired citizenship).

128. *See infra* Sections II.A-B, E.

129. *See infra* Section II.A.

the mid-1950s called Operation Wetback.[130] These campaigns to rid the country of its ethnic Mexican population were followed by a generational return of Mexican-born acquired citizens to the United States.[131] Most of these acquired citizens came from working-class background and struggled to assert their acquired citizenship.[132]

More recently, aggressive immigration enforcement has resulted in a "Great Expulsion" of Mexicans from the United States.[133] These mass removals have forced thousands of U.S.-born children of undocumented Mexican immigrants to emigrate to Mexico.[134] This section discusses the history of expulsion and generational return of Mexican-Americans and how policy failures have created the conditions for a new generation of acquired citizens that will one day seek to "return" to the United States.

A. The Mexican "Repatriation"

Nearly a century ago, the United States conducted one of the most sweeping acts of ethnic cleansing in its history since the nineteenth-century removals of Native Americans.[135] During the early 1900s, increasing numbers of Mexicans immigrated to the United States searching for work in the country's burgeoning farms and industries.[136] The outbreak of the Mexican Revolution in 1910 turned this migration

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130. *See infra* Section II.C. The word "wetback" is an extremely offensive and disparaging term once used to refer to undocumented Mexican immigrants. *See Wetback*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/wetback (last accessed Aug. 1, 2021).

131. *See infra* Section II.D; *supra* note 31 (generational return).

132. *See id*. *See also* Part III (reviewing the processes for asserting acquired citizenship and the challenges acquired citizens face).

133. *See infra* Section II.E.2.

134. *See id*.

135. There is no internationally-recognized definition for ethnic cleansing. *See* UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml (last accessed Aug. 1, 2021). A 1993 United Nations commission investigating human rights violations in Yugoslavia defined ethnic cleansing as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area," including through "forcible removal, displacement and deportation of civilian population." *See id*. Domestically, some courts have adopted the dictionary definition of ethnic cleansing, which may include forced expulsion of an ethnic group. *See, e.g.*, Knezevic v. Ashcroft, 367 F.3d 1206, 1212 (9th Cir. 2004) ("the systematic attempt to eliminate an ethnic group from a country or region as by *forced expulsion* or mass execution") (emphasis added); *Ethnic cleansing*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/ethnic%20cleansing (last accessed Aug. 1, 2021) ("the *expulsion*, imprisonment, or killing of an ethnic minority by a dominant majority in order to achieve ethnic homogeneity") (emphasis added). The Mexican "Repatriation" and Operation Wetback specifically targeted ethnic Mexicans and purposely caused their expulsion from the United States. *See* FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (rev. ed. 2006) (reviewing the Mexican "Repatriation"). Moreover, both campaigns resulted in the removal of U.S. citizens of Mexican descent. *See* KELLY LYTLE HERNÁNDEZ, MIGRA! A HISTORY OF THE U.S. BORDER PATROL 171 (2010); BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 216. Accordingly, the Mexican "Reparation" and Operation Wetback constituted acts of ethnic cleansing. *See* Kevin R. Johnson, *The Forgotten Repatriation of Persons of Mexican Ancestry and Lessons for the War on Terror*, 26 PACE L. REV. 1, 6 (2005) (observing that the Mexican "Repatriation" would be classified as an act of ethnic cleansing if it occurred today). For other historical acts of ethnic cleansing, *see generally*, GARY CLAYTON ANDERSON, ETHNIC CLEANSING AND THE INDIAN (2014) (ethnic cleansing of indigenous Americans); ELLIOT JASPIN, BURIED IN THE BITTER WATERS: THE HIDDEN HISTORY OF RACIAL CLEANSING IN AMERICA (2008) (ethnic cleansing of African-Americans between the 1860s and the 1920s); JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS (2008) (ethnic cleansing of Chinese-Americans during the late 1800s).

136. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 8.

into an exodus.[137] Meanwhile, Congress turned its attention to the influx of "undesirable" immigrants from Asia, as well as Southern and Eastern Europe.[138] In 1917, Congress imposed literacy tests on immigrants and barred most Asian immigrants outright.[139] The literacy tests effectively barred most immigrants from impoverished countries, including the vast majority of Mexicans.[140] However, labor demands during World War I led Congress and the Immigration and Naturalization Service ("INS") to exempt Mexican workers from literacy tests and other requirements for entry.[141] Along with authorized Mexican workers, undocumented immigrants from Mexico continued crossing into the United States in large numbers.[142] By the end of the 1920s, more than 10 percent of Mexico's population was living in the United States.[143]

In response to the rise in unauthorized border crossings, Congress authorized the creation of the United States Border Patrol ("Border Patrol") under the Immigration Act of 1924.[144] Border Patrol focused not on impeding the unauthorized entry of Mexicans but on enforcing the racial and ethnic bars to immigration

137. *See id.* at 9.

138. In 1907, lawmakers led by Senator William P. Dillingham convened a commission to study the impact of immigration on the United States. *See Brief Statement of the Conclusions and Recommendations of the Immigration Commission with Views of the Minority*, GOVERNMENT PRINTING OFFICE (1910). The Dillingham Commission concluded that "new immigrants," largely from Southern and Eastern Europe, disproportionately committed crimes, brought down living and workplace standards, were less intelligent, and were uninterested in assimilating into American society. *Id*. at 8-9, 25, 28-30, 33-34. The Commission viewed Mexican immigrants in a similar light. *Id*. at 33. *See generally* John M. Lund, *Boundaries of Restriction: The Dillingham Commission*, 6 U. VERMONT H. REV. 33 (1994) (reviewing the Dillingham Commission).

139. *See supra* Immigration Act of 1917, note 74. The subsequent Immigration Act of 1924 extended the "Asiatic barred zone" to Japan. Pub. L. 68-139, 43 Stat. 153; *see also* Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (excluding Chinese immigrants since 1882).

140. In 1910, over seventy percent of the population of Mexico aged fifteen or older could not read or write. *See Panorama Educativo de México*, INSTITUTO NACIONAL PARA LA EVALUACIÓN DE LA EDUCACIÓN, at 2, https://www.inee.edu.mx/wp-content/uploads/2019/03/CS03c-2010.pdf (table entitled "Porcentaje de población analfabeta de 15 años o más (1895/2008)") (last accessed Aug. 1, 2021).

141. The Immigration Act of 1917 exempted temporary workers from literacy tests, head taxes, and contract labor laws otherwise applicable to immigrants. *See* Pub. L. No. 64-301, § 2, 39 Stat. 874, 875; James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 243 (1995). In 1918, the INS authorized a waiver of these conditions for Mexican migrant workers. *See* Department Order No. 52641/202; U.S. IMMIGR. SERV. BULL. Vol. I, No. 3, at 1-4 (1918); Smith, *supra* note 141, at 243.

142. Between 1900 and 1930, over 300,000 authorized Mexican immigrants and as many as one million unauthorized Mexican immigrants settled in the United States. *See* Smith, *supra* note 141, at 242. Due to the irregular nature of unauthorized immigration and the vastness of the southern border, the number of Mexicans who immigrated to the United States during the early 1900s may be even higher.

143. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 9. It is worth noting that during the early 1900s, Mexico's population was very small relative to the population of the United States. *See Historical Statistics of the United States: Colonial Times to 1970*, tbl. A 6-8, U.S. CENSUS BUREAU (Sept. 1975), https://www.census.gov/history/pdf/histstats-colonial-1970.pdf (United States population of 106,461,000 in 1920); Claudia Montserrat Martínez Stone, *Antecedentes Históricos*, UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO, http://www.economia.unam.mx/secss/docs/tesisfe/MartinezSCM/anteced.pdf (last accessed Aug. 1, 2021) (Mexico population of 14,335,000 in 1920).

144. Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153 (authorizing the creation of the United States Border Patrol ("Border Patrol")); Labor Appropriation Act of 1924, 43 Stat. 205, 240 (establishing the Border Patrol).

established under the Immigration Act.[145] As discussed above,[146] the law imposed national origins quota system that excluded all Asians and restricted Southern and Eastern Europeans from entering the country.[147] Due to the American economy's reliance on Mexican workers, the quotas did not restrict immigration from Mexico.[148] Nonetheless, the uncontrolled migration of Mexicans into the United States demonstrated the porousness of the country's borders to "undesirable" immigrants, alarming lawmakers.[149]

Despite this comparatively permissive attitude towards Mexican immigrants, the United States did not welcome Mexicans with open arms.[150] Government officials believed Mexican immigrants were inherently "dirty" and subjected them to grossly inhumane practices, such as regularly stripping Mexicans naked when applying for entry and delousing them with toxic chemicals—to sometimes deadly effect.[151] Eugenicist policymakers also saw Mexicans as mortal threats to the country's Anglo-dominated society.[152] Employers' pecuniary interests and Border Patrol's scarce

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145. *See* LYTLE HERNÁNDEZ, *supra* note 135, at 32 ("The majority of persons standing trial in U.S. District Courts were Chinese, Japanese, Eastern European, and East Indian immigrants who had evaded U.S. immigration restrictions by entering the United States without sanction. Therefore, to prevent unlawful entry into the United States, three days after passing the [Immigration Act of 1924], Congress set aside one million dollars to establish [the Border Patrol]."); BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 11.

146. *See supra* note 75 (discussing the National Origins Formula).

147. Until recently, Customs and Border Protection—Border Patrol's parent agency—characterized the national origins quotas as mere "numerical limits" to immigration. *See Border Patrol History*, U.S. CUSTOMS AND BORDER PROT. (May 1, 2021) https://web.archive.org/web/20210501044802/https://www.cbp.gov/border-security/along-us-borders/history. In reality, the Border Patrol was founded to enforce the racial and ethnic bars to immigration promulgated by the Immigration Act of 1924. *See* KELLY LYTLE HERNÁNDEZ, *supra* note 135, at 32.

148. *See supra* note 75 (discussing the National Origins Formula).

149. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 11.

150. *See id.*

151. In 1917, public health officials constructed a "disinfecting apparatus" in American cities along the border with Mexico in response to outbreaks of typhus. *See Annual Report of the Surgeon General of the Public Health Service of the United States*, U.S. DEP'T OF THE TREASURY, at 73, 76 (1917). Immigration and public health officials in these cities made Mexican immigrants strip off their clothes inside "disinfecting plants" and bathe in toxic chemicals. *See id*. at 80. Working-class Mexicans in particular were subjected to the humiliating process on a regular basis. *See id*. Border officials were aware of the danger posed by delousing individuals with toxic chemicals. A year earlier, the El Paso jail forced inmates to wash their clothes and bathe in "disinfection solution." *See* DAVID DORADO ROMO, RINGSIDE SEAT TO A REVOLUTION: AN UNDERGROUND CULTURAL HISTORY OF EL PASO AND JUAREZ: 1893-1923, 226-8 (2005). Someone in the jail lit a match, and dozens of mostly Mexican inmates were burnt to death. *See id*. Rumors that the burning was intentional contributed to the Bath Riots, during which hundreds of women protesting the delousing process stormed a bridge connecting El Paso with Juarez. *See id*. Despite the incident, public health officials adopted chemical baths for delousing Mexican immigrants. *See* U.S. DEP'T OF THE TREASURY, *supra* note 151, at 73, 76. The chemical delousing of Mexicans along the border inspired Nazi Germany's adoption of Zyklon B during the Holocaust. *See* SCOTT CHRISTIANSON, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 131 (2010); Romo, *supra* note 151, at 240-3 (citing Gerhard Peters, Durchgasung von Eisenbahnwagen mit Blausäure. Anzeiger für Schädlingskunde, Vol. 13, Heft 3, 35-41 (1937) (featuring photos of "disinfection chambers" in El Paso)). The United States continued delousing Mexicans immigrants with toxic chemicals until in the late 1950s. *See* Romo, *supra* note 151, at 237; 9 Bender's Immigration Bulletin 715 (2004).

152. *See, e.g.*, Proceedings and Debates, 70th Cong., 2nd Sess. 3620, Feb. 16, 1929 ("They are poisoning the American citizen. They are of a class that come across the line which are very undesirable from that standpoint alone.") (quoting Representative W.T. Fitzgerald) ("They are badly infected with tuberculosis and other diseases; there are many paupers among them; there are many criminals; they work for lower wages; they are objectionable as immigrants when tried by the tests applied to other aliens.") (quoting Representative John Box); Letter from founding President of Stanford University David Starr Jordan to Charles Davenport, June 1, 1925 ("[I]n shutting out cheap labor from Southern Europe and other

resources hindered attempts to deport and exclude undocumented Mexican immigrants.[153] But when employers no longer required labor, they cooperated with authorities to apprehend and deport undocumented workers.[154] Employers and officials treated Mexican immigrants as a repugnant and disposable source of labor—to be tolerated only when needed.[155]

A sharp reversal of fortune halted this selective enforcement of immigration laws. During the Great Depression, government officials and the public scapegoated Mexicans for the lack of jobs, and sought their wholesale removal from the country.[156] Although the country's Mexican population had grown substantially, Mexicans still constituted only 1 percent of the national population.[157] Nonetheless, proponents of expelling Mexicans rallied around the banner of "jobs for real Americans."[158] Between 1929 and 1936, federal, state, local, and private actors collaborated to expel more than one million ethnic Mexicans from the United States.[159] In what is misleadingly

quarters, we are bringing in the worst possible kind, the Mexican peon, who for the most part can never be fit for citizenship, and is giving our stock a far worse dilution than ever came from Europe."); Letter to Albert Johnson from Madison Grant, 1 April 1923 ("The case with Mexicans today is exactly the same as it was with the Chinese fifty years ago."). *See also* NANCY ORDOVER, AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM 6 (2003) ("By warning against Latin American, Asian, eastern and southern European, and North African immigration, twentieth-century eugenics was a significant tool in the hands of those seeking to construct and preserve an Anglo-Saxon nation."), ("[O]ne notices, by the names of the individuals found in institutions, that the lower or less progressive races furnish more than their quota. In the schools for delinquents at Whittier, California, and at Gainesville, Texas, about half of those names were American and the other half were Mexican or foreign sounding.") (quoting Harry Laughlin) ("The alarming influx of Mexican peons tends to inject another serious problem into American life.") (quoting the periodical Eugenical News).

153. *See House Hearings before the Committee on Immigration and Naturalization*, 69th Cong., 1st Sess. at 16, 22 (1926) (Department of Labor officials noting difficulty enforcing immigration laws due to resistance from employers and insufficient funds allotted by Congress); BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 11 (describing the selective enforcement of immigration laws on Mexican immigrants).

154. *See id*.

155. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 274 (1997) (attributing historical shifts in immigration enforcement towards Mexican immigrants to a "need for a disposable labor force of aliens").

156. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 120, 330; ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION 40 (1974); Eric L. Ray, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 U. MIAMI INTER-AM. L. REV. 171, 174 (2005) ("[L]ocal, state, and national officials were bombarded with demands to 'curtail the employment of Mexicans' and that they 'be removed from the relief rolls and shipped back to Mexico.'"); Jesse La Tour, *The Roots of Inequality: The Citrus Industry Prospered on the Back of Segregated Immigrant Labor*, FULLERTON OBSERVER (Dec. 17, 2019), https://fullertonobserver.com/2019/12/17/the-roots-of-inequality-the-citrus-industry-prospered-on-the-back-of-segregated-immigrant-labor/ ("The American Community…felt that the jobs done so patiently by Mexicans for so many years should now be given to them. 'Those' Mexicans instead of 'our' Mexicans should 'all be shipped right back to Mexico where they belong'…And so, one morning we saw nine train-loads of our dear friends roll away back to the windowless, dirt-floor homes we had taught them to despise.") (quoting Druzilla Mackey, teacher responsible with "Americanizing" Mexican farm workers); Diane Bernard, *The time a President Deported 1 million Mexican Americans for supposedly stealing U.S. jobs*, THE WASHINGTON POST (Aug. 13, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/08/13/the-time-a-president-deported-1-million-mexican-americans-for-stealing-u-s-jobs/.

157. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 67.

158. *See id*. at 330.

159. *See id*. at 120, 151; Hoffman, *supra* note 156, at 83 (reviewing the "repatriation" program administered by the City of Los Angeles); *Mexican Families Being Deported at County Expense*, BOULDER DAILY CAMERA (May 25, 1932) (reporting on Boulder County, Colorado's "repatriation" of Mexicans); Bernard, *supra* note 156 (noting that the federal government reimbursed local governments for expelling

referred to as the Mexican "Repatriation,"[160] immigration authorities and local officials did not distinguish between Mexican immigrants and U.S. citizens of Mexican descent.[161] Immigrants and citizens who "looked" Mexican were detained and shipped to Mexico.[162]

Executors of the Mexican "Repatriation" also employed a punitive strategy that would later become a cornerstone of American immigration enforcement.[163] On the eve of the Great Depression, Congress passed the Immigration Act of 1929.[164]

Mexicans and collaborated with private businesses to deny employment to Mexicans in order to force their emigration from the country). In order to save costs, immigration authorities placed relatively few Mexican immigrants in formal removal proceedings and opted to "encourage" Mexicans to depart. *See* Hoffman, *supra* note 156, at 167; *INS Records for 1930s Mexican Repatriations*, DEP'T OF HOMELAND SEC. (July 29, 2020), https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations. Most of the so-called "repatriations" were not voluntary but achieved through varying degrees of coercion. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 64-79 (systematic denial of bond and long waiting periods for trial of Mexicans in immigration custody, immigration raids aimed at terrorizing Mexicans into leaving the United States, deporting Mexican parents of U.S.-born children, denying Mexicans in immigration detention access to counsel); *America's Forgotten History Of Mexican-American 'Repatriation'*, NATIONAL PUBLIC RADIO (Sep. 10, 2015), https://www.npr.org/2015/09/10/439114563/americas-forgotten-history-of-mexican-american-repatriation (cutting welfare payments to Mexican families); Bernard, *supra* note 156 (denying employment to Mexicans). *See also* MELITA M. GARZA, THEY CAME TO TOIL: NEWSPAPER REPRESENTATIONS OF MEXICANS AND IMMIGRANTS IN THE GREAT DEPRESSION 109 (2018) (citing a contemporaneous report that questioned the voluntariness of emigration of Mexicans from the United States to Mexico during the 1930s).

160. "Repatriation" involves the removal of an individual to their country of origin. *See Repatriation*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/repatriation (last accessed Aug. 1, 2021) ("the act or process of restoring or returning someone or something to the country of origin, allegiance, or citizenship"); *Voluntary Repatriation: International Protection Handbook*, United Nations High Commissioner for Refugees (1996), https://www.unhcr.org/en-us/publications/legal/3bfe68d32/handbook-voluntary-repatriation-international-protection.html ("In international human rights law, the basic principle underlying voluntary repatriation is the right to return to *one's own country*.") (emphasis added). However, most Mexicans "repatriated" to Mexico were U.S. citizens. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 216.

161. *See* Ray, *supra* note 156 ("Latino or those looking like Latinos were rounded up, put on flatbed trucks and driven to the border.") (quoting Ignacio Pina, witness to the Mexican "Repatriation"). Ominously, the 1930 U.S. Census introduced for the first and only time an independent racial group for "Mexicans" and specifically asked census-takers whether they or their parents were born in Mexico. *See* David Hendricks & Amy Patterson, *The 1930 Census in Perspective*, National Archives (2002), https://www.archives.gov/publications/prologue/2002/summer/1930-census-perspective.html. The creation of a census category for Mexicans may have been linked to the government's expulsion of ethnic Mexicans from the United States; *see also* Kim Parker et al., *Chapter 1: Race and Multiracial Americans in the U.S. Census*, PEW RSCH. CTR. (June 11, 2015), https://www.pewresearch.org/social-trends/2015/06/11/chapter-1-race-and-multiracial-americans-in-the-u-s-census/ (reviewing the census history of counting Hispanics).

162. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 341 ("Individuals who looked 'Mexican' were accosted in the street by immigration officials with the intent of ascertaining their status in the United States."); Ray, *supra* note 156; David M. Kennedy, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945 165 (1999) ("Immigration officials in Santa Barbara, California, herded Mexican farm workers into the Southern Pacific depot, packed them into sealed boxcars, and unceremoniously shipped them southward."). Local governments also deprived Mexicans of public assistance, forcing them to emigrate under pain of starvation. *See id.* 89-118. In 1932, a committee led by former Attorney General George W. Wickersham found that the manner in which authorities were "repatriating" supposed Mexican immigrants were "unconstitutional, tyrannical, and oppressive." *See* Ray, *supra* note 156 (citing the Wickersham Commission report).

163. *See infra* Section II.E.2. (discussing increasingly aggressive prosecution of criminal immigration offenses during the last thirty years).

164. Immigration Act of 1929, Ch. 690, 1151-1152 Stat. 1018 (1929) (repealed 1952).

Spearheaded by white supremacists bent on excluding Mexicans,[165] the law criminalized unauthorized entry and re-entry into the United States.[166] During the Mexican "Repatriation," immigration authorities terrorized Mexicans and Mexican-Americans with criminal prosecution and imprisonment unless they agreed to deportation.[167] Courts denied bond to accused undocumented immigrants and subjected them to long periods of pretrial detention.[168] The threat of languishing in jail pending trial coerced many Mexicans into "voluntarily" leaving or submitting to deportation.[169] The U.S.-born children of such immigrants often had no choice but to leave their country for Mexico to remain with their parents.[170] Approximately 60 percent of individuals forced out of the United States during the Mexican "Repatriation" were U.S. citizens.[171] The co-option of the criminal justice system in enforcing immigration law commenced a century-old practice of attempting to control immigrants with fear of incarceration and family separation,[172] a practice that has only recently entered public discourse.[173]

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165. The Immigration Act of 1929, also known as the "Undesirable Aliens Act of 1929" or "Blease's Law," was a legislative compromise between nativist lawmakers who blamed Mexicans for society's ills and employers reliant on undocumented workers. *See Proceedings and Debates*, 70th Cong., 2nd Sess. 3619, Feb. 16, 1929 ("These Mexicans also come into Wisconsin in droves, and take the places of American citizens in the factories and on the farm. Often we see the spectacle of war veterans walking the streets unable to obtain employment because of the unfair competition of cheap Mexican labor.") (quoting Representative John C. Schafer), ("[T]hey are objectionable as immigrants when tried by the tests applied to other aliens.") (quoting Representative John Box); KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965 138 (2017). *Cf. Proceedings and Debates*, 70th Cong., 2nd Sess. 3526, Feb. 15, 1929 ("I fear there is a spirit pervading our country today reflected in these immigration bills that is a menace to the country—a spirit of intolerance and bigotry not only to religions but to races.") (quoting Representative James Francis O'Connor). The law was spearheaded by Senator Coleman Livingston Blease, a pro-lynching segregationist, and Secretary of Labor and later Senator James J. Davis, a eugenicist. *See* Ian MacDougall, *Behind the Criminal Immigration Law: Eugenics and White Supremacy*, PROPUBLICA (June 19, 2018), https://www.propublica.org/article/behind-the-criminal-immigration-law-eugenics-and-white-supremacy. Blease's Law authorized the federal government to wield the criminal justice system as a deterrent to unauthorized immigration from Mexico—a practice which continues today. *See infra* Section II.E.2 (discussing increased criminalization of unauthorized immigration).

166. Immigration Act of 1929, Ch. 690, 1151-1152 Stat. 1018 (1929) (repealed 1952). The modern provisions criminalizing unauthorized entry and reentry are codified in 8 U.S.C. § 1325 (illegal entry) and § 1326 (illegal reentry). *See* Pub. L. No. 82-414, title II, §§ 275, 276, 66 Stat. 229. An earlier law criminalized unauthorized entry into the United States but only while the country was at war. *See* Passport Act of 1918, Pub. L. No. 65-154, ch. 81, §§1-3, 40 Stat. 559, 559.

167. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 65.

168. *See id*. at 64-67. The unlawful denial of pretrial release for undocumented immigrants is common in federal courts today. *See generally*, Michael Neal, *Zero Tolerance for Pretrial Release of Undocumented Immigrants*, 30 B.U. PUB. INT. L.J 1 (Winter 2021).

169. *See* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 64-65.

170. *See id*. at 216.

171. *See id*. Among those Americans expelled was Cruz Reynoso, future Associate Justice of the California Supreme Court. *See* Johnson, *supra* note 135, at 4.

172. *See* Patrick Kirby Madden, *Illegal Reentry and Denial of Bail to Undocumented Defendants: Unjust Tools for Social Control of Undocumented Latino Immigrants*, 11 HASTINGS RACE & POVERTY L. J. 339, 357–61 (2014); Doug Keller, *Re-thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 66 (2012) (reviewing the history of criminal immigration prosecutions).

173. *See, e.g.*, Todd J. Gillman, *Julián Castro would repeal illegal entry as a crime. Is that an 'open borders' policy?*, THE DALLAS MORNING NEWS (Aug. 2, 2019), https://www.dallasnews.com/news/politics/2019/08/02/julian-castro-would-repeal-illegal-entry-as-a-crime-is-that-an-open-borders-policy/.

B. The Bracero Era

After the Mexican "Repatriation" uprooted Mexican-Americans from their homes,[174] the American economy began experiencing an agricultural labor shortage.[175] When World War II broke out, the labor shortage forced the federal government to launch a guest worker program with Mexico.[176] In 1942, the United States and Mexico signed an agreement permitting the large-scale importation of Mexican workers, starting the Bracero program.[177] The Bracero program permitted American employers to contract farm workers (Braceros) from Mexico so long as they paid a minimum wage and guaranteed a humane work environment.[178] Nearly a quarter of a million Braceros worked in the United States during World War II, constituting a crucial component of the home front in several states.[179]

The Bracero program also contributed to unauthorized immigration from Mexico.[180] Word of the Bracero program drew more Mexican workers to the United States than the program authorized.[181] Employers were more than willing to hire undocumented workers outside the constraints of the Bracero program.[182] Border Patrol and INS agents often turned a blind eye to undocumented workers, especially during harvest seasons.[183] Undocumented labor formed the backbone of borderland economies, and immigration authorities were loath to disturb politically powerful ranchers and growers.[184] Moreover, the outbreak of the Korean War led Congress to

174. For discussion on the hardships of Mexican-Americans expelled to Mexico during the Mexican "Repatriation", *see* BALDERRAMA & RODRÍGUEZ, *supra* note 135, at 237-264.

175. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 19 (2010).

176. *See id.*

177. *See id.*

178. Despite the program's requirements, Braceros reported deplorable working conditions and unfair practices, such as being withheld wages and receiving poor housing and food. *See id.* at 25. The exploitation of the Braceros contributed to the program's eventual downfall. *See infra* Section II.E.1.

179. *See* CALAVITA, *supra* note 175, at 21.

180. *See id*. at 33-34.

181. *See id*. Between 1944 and 1953, Border Patrol made over 3 million border apprehensions. *See Nationwide Illegal Alien Apprehensions Fiscal Years 1925 – 2019*, U.S. BORDER PATROL (Jan. 2020) https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Apprehensions%20%28FY%201925%20-%20FY%202019%29.pdf. Contemporaneous estimates placed the total number of unauthorized entries from two to four times the number of border apprehensions. *See* Eleanor M. Headley, *A Critical Analysis of the Wetback Problem*, 21 LAW AND CONTEMPORARY PROBLEMS 334, 339 (1956).

182. *See Immigration: The Wetbacks*, TIME MAGAZINE 24, col. 2 (Apr. 9, 1951) ("U.S. farmers, by & large, boycotted [the Bracero program in 1951]. They had come to consider the wetbacks as a cheap, natural resource, as rightfully theirs as rain or good soil. Forced to choose between lawbreaking or paying legally imported Mexican 'Nationalists' a fair wage, many farmers chose, without hesitation, to break the law.").

183. *See* CALAVITA, *supra* note 175, at 34-35.

184. For example, Texas Governor Robert Allan Shivers was among the largest employers of undocumented workers in the state. *See id*. at 35. Yet immigration authorities purposely avoided his ranch for fear of political repercussions.

reauthorize the Bracero program.[185] Along with Braceros, many undocumented workers continued entering the United States into the 1950s.[186]

In 1951, a presidential commission on migratory labor concluded that foreign farmworkers severely depressed farm wages.[187] The commission also claimed undocumented Mexican immigrants had spread disease and lowered health standards in areas they transited.[188] At the same time, Mexican-American civic groups reported increased discrimination in connection with growing animosity towards undocumented Mexican immigrants.[189] Rather than address anti-Mexican discrimination or access to public health services, journalists cast undocumented Mexicans as dire threats to American society.[190] Journalists also tied unauthorized immigration with Cold-War fears over communists infiltrating the United States.[191] For example, the remote possibility that a foreign agent would carry an atomic bomb across the southern border into the United States became a serious public concern.[192] Through such sensationalized reporting, journalists helped portray undocumented Mexican immigrants as dangerous to the country's survival.[193]

C. Operation Wetback

Anti-Mexican sentiment came to a boil at the end of the Korean War.[194] A post-war recession saw a surge in unemployment.[195] The federal government sought

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185. *See id*. at 2, 45-46; JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 110 (1980). Whether the Korean War provoked another labor shortage was disputed. A presidential commission report on migratory labor issued during the war concluded that labor shortages were better met by more efficient use of American workers and recommended that foreign labor only be employed as a last resort. *See* REP. PRESIDENT'S COMMISSION ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE 3-4 (1951), Available at: https://oac.cdlib.org/ark:/28722/bk0003z5t83/FID1. The commission suspected growers exaggerated the extent of agricultural labor shortages due to their preference for cheap foreign labor. *See* CALAVITA, *supra* note 175, at 32-33.

186. *See* CALAVITA, *supra* note 175, at 33-34 (discussing the relationship between the Bracero program and unauthorized entry into the United States); U.S. BORDER PATROL, *supra* note 181 (reflecting over half a million border apprehensions in 1952).

187. *See* REP. PRESIDENT'S COMMISSION ON MIGRATORY LABOR, *supra* note 185, at 4-7; Avraham Astor, *Unauthorized Immigration, Securitization and the Making of Operation Wetback*, 7 LATINO STUDIES 5, 15 (Mar. 2009). Recent study indicates the contrary. *See* Michael A. Clemens et al., *Immigration Restrictions as Active Labor Market Policy: Evidence from the Mexican Bracero Exclusion*, 108 AMERICAN ECONOMIC REV. 1468 (June 2018) (finding that the Bracero program did not depress agricultural wages).

188. *See* Headley, *supra* note 181, at 347.

189. *See id*. at 345-46 (testimonial of the general counsel of a Mexican-American veterans association); Astor, *supra* note 187, at 20 (discussing the opposition of Hispanic civic associations towards the employment of Mexican labor, which they saw as threatening Hispanic-Americans' assimilation into American society).

190. *See, e.g.*, Astor, *supra* note 187, at 15 (discussing articles written by New York Times columnist Gladwin Hill); TIME MAGAZINE, *supra* note 182 (comparing Mexican immigrants to "locusts" which "were working the economic ruin of dozens of farming towns").

191. *See* Astor, *supra* note 187, at 14-19 (reviewing how unauthorized immigration of Mexico became linked with the hysteria surrounding spread of communism).

192. *See The Wetbacks*, CBS RADIO (1954), Available at: https://oildale.s3.amazonaws.com/wp-content/uploads/2012/11/22164128/cbs-radio-the-wetbacks-1954.mp3.

193. *See* Astor, *supra* note 187, at 16.

194. *See* LILIA FERNÁNDEZ, BROWN IN THE WINDY CITY 60 (2014); JUAN GONZALEZ, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA 222 (2001).

195. *See* U.S. BUREAU OF LAB. STAT., https://data.bls.gov/timeseries/LNS14000000 (reflecting a doubling of the unemployment rate between 1953 and 1954).

to expel unwanted Mexican immigrants,[196] this time under the pretext of protecting national security.[197] Between 1953 and 1954, Border Patrol and INS agents conducted a massive deportation campaign called Operation Wetback.[198] INS agents set up roadblocks throughout the southwest and conducted sweeping raids throughout South Texas, Chicago, and Mississippi.[199] The dragnet-style methods of Operation Wetback resulted in the mistreatment and expulsion of U.S. citizens of Mexican descent.[200] Deportations also forced U.S.-born children out of the United States to remain with their undocumented parents.[201] Further, Operation Wetback saw a rise in criminal immigration prosecutions, resulting in the incarceration of thousands of Mexicans.[202] Over a million immigrants were expelled from the United States during Operation Wetback,[203] along with an undetermined number of U.S. citizens.[204]

196. *See* AMANDA FROST, YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS 172 (2021); LYTLE HERNÁNDEZ, *supra* note 135, at 169 (detailing Operation Wetback).

197. *See, e.g.*, *Hearings on Supplemental Appropriation Bill, House of Representatives 215* (1954) ("Who can say that Communists and subversives do not cross the Rio Grande?…. [I]t was recently discovered that approximately 100 present and past members of the Communist Party had been crossing daily into the United States in the El Paso area; also that the number of present and ex-members of the Communist Party residing immediately across the border from El Paso number about 1,500, and it has been established that there exists an active liaison between the Communist Party of Mexico and the Communist Party in the United States.") (quoting Acting INS Commissioner Benjamin Habberton). Attorney General Herbert Brownell Jr. dismissed claims of communist infiltration from Mexico as baseless. *See* Jeet Heer, *Operation Wetback Revisited*, THE NEW REPUBLIC (Apr. 25, 2016), https://newrepublic.com/article/132988/operation-wetback-revisited. However, Brownell strongly agreed that the porousness state of the southern border required an immediate solution—through violence, if necessary. *See* ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS 52 (2020); Ralph Guzmán, *Ojinaga, Chihuahua and Wetbacks*, EASTSIDE SUN (Oct. 15, 1953) ("A few weeks ago, Herbert Brownell, the U.S. Attorney General, wanted to shoot wetbacks crossing into the U.S.").

198. While INS officially launched Operation Wetback in 1954, sweeping deportation operations actually began in 1953. *See* LYTLE HERNÁNDEZ, *supra* note 135, at 169-217.

199. *See id.* at 171.

200. *See* JUAN PEREA, IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 197 (2001); FROST, *supra* note 196, at 173-74 (detailing the case of Joe Vigil, a Mexican-American who was almost deported because he did not have his U.S. birth certificate with him when detained by INS agents); GARCÍA, *supra* note 185, at 216.

201. *See* Terán, *supra* note 10, at 600, n.82.

202. Prosecutions for immigration offenses rose 30 percent in 1954, resulting in 14,000 illegal entry and illegal reentry convictions. *See* Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ended June 30, 1954, at 9, Dept. of Justice. Interestingly, 1951 saw a similar number of prosecutions. *Id*. (chart entitled "Convictions in Courts for Violating Immigration and Nationality Laws"). This suggests immigration authorities began intensifying enforcement well before Operation Wetback. *See* United States Attorneys' Statistical Report, Fiscal Year 1955, DEP'T. OF JUST., cht. 7 (Sep. 1955) (reflecting rising criminal-immigration prosecutions as early as 1948). *See also* LYTLE HERNÁNDEZ, *supra* note 135, at 173 (noting Border Patrol began aggressively enforcing immigration laws on the southern border 10 years prior to Operation Wetback).

203. *See* LYTLE HERNÁNDEZ, *supra* note 135, at 171-73; *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2018*, DHS (Jan. 6, 2020), https://www.dhs.gov/immigration-statistics/yearbook/2018/table39 ("returned"). Among those immigrants deported around this time was Rosaura Revueltas, the star actress of the film *Salt of the Earth*. *See* William Grimes, *Rosaura Revueltas, 86, the Star Of a Pro-Labor Film of the 50's*, N.Y. TIMES (May 2, 1996), https://www.nytimes.com/1996/05/02/arts/rosaura-revueltas-86-the-star-of-a-pro-labor-film-of-the-50-s.html.

204. *See* PEREA, *supra* note 200, at 197 (2001); GONZALEZ, *supra* note 194, at 222; GARCÍA, *supra* note 185, at 216.

D. The Generational Return of Acquired Citizens

The Mexican "Repatriation" and Operation Wetback dispossessed countless Mexican-Americans of their homeland. The precise number of expelled citizens who returned to the United States is unknown.[205] What it is known is that many expelled citizens had children in Mexico before returning.[206] Returning citizens often struggled to prove they were born in the United States and, consequently, also struggled to prove that their Mexican-born children acquired U.S. citizenship at birth.[207] Most expelled citizens became farmers, laborers, and housekeepers who lacked documentation of their birth and their physical presence in the United States,[208] required to transmit citizenship to their Mexican-born children.[209] As a result, an undetermined number of Mexican-born acquired citizens were denied their right to return to the United States, incarcerated, and effectively de-nationalized.[210] Their stories serve as a troubling reminder of the downstream impact expelling U.S.-born children has on their descendants and the difficulties acquired citizens of working-class backgrounds face in asserting acquired citizenship.[211]

E. The New Mexican-American Diaspora

Once again, mass expulsions of Mexican immigrants have forced Mexican-American children out of the United States. During the last twenty years, immigration authorities have removed millions of Mexican immigrants from the country.[212] This "Great Expulsion" has forced out thousands of U.S.-born children along with their undocumented parents.[213] Mexico is now home to over half a million U.S.-born children,[214] many of whom, as history demonstrates, will settle in Mexico and create a new generation of acquired citizens.[215] To understand how this new Mexican-American diaspora came to be and the implications of mass expulsions, it is first necessary to understand the policies that led to a resurgence of unauthorized immigration from Mexico.

205. *See* Terán, *supra* note 10, at 602.

206. *See id*.

207. *See id*. at 603-7.

208. *See id*. at 606, 641, 645, 665-66 (cases of C.J. and P.H., whose citizen-mothers worked housekeepers) (case of S.R., who struggled to prove his citizen-father's physical presence in the United States because his father worked as a farmer and rancher for employers who did not deduct Social Security payments).

209. *See supra* Section I.A.2.

210. *See* Terán, *supra* note 10, at 641, 665-6 (case of C.J., who was wrongfully convicted of falsely claiming citizenship) (case of P.H., who was wrongfully prosecuted for illegal reentry).

211. *See infra* Section III.D (modern examples of indigent acquired citizens who struggled to assert acquired citizenship).

212. *See* TRANSACTIONAL REC. ACCESS CLEARINGHOUSE *supra*, note 3; *infra* Section II.E.2.

213. *See infra* Section II.E.2.

214. *See id.*

215. *See supra* Section II.D.

1. "The Great Migration"

In the years following Operation Wetback, unauthorized immigration from Mexico to the United States dropped precipitously.[216] Although the Department of Justice attributed lower numbers of illegal entries to "successful control of the southern border,"[217] other factors were also at play. After Operation Wetback, the federal government loosened regulations of the Bracero program in response to pressure from disgruntled agricultural employers.[218] As a result, hundreds of thousands of Mexican workers were able to enter the United States legally through the late 1950s and 1960s.[219] In addition, Mexico experienced a lengthy economic expansion in the decades following World War II.[220] This "Mexican miracle" brought some measure of stability to a country ravaged by revolution.[221] These conditions, however, quickly faded.

During the 1960s, the presence of the Braceros grew increasingly unpopular. The public decried the exploitation of undocumented workers while airing the same grievances made against Mexican immigrants years earlier.[222] In 1964, Congress eliminated the Bracero program, stripping hundreds of thousands of Mexicans of the principle means for working in the United States legally.[223] A year later, Congress overhauled the country's immigration laws in response to broader calls for racial equality.[224] The Immigration and Nationality Act of 1965 ("INA") eliminated the national origins quota system and imposed a yearly cap of 20,000 visas per country.[225]

While facially race-neutral, the visa cap placed immigrants from large nations, such as China and Mexico, at a severe disadvantage in obtaining visas relative to smaller European nations.[226] Yet demand for labor in the United States remained

216. Between 1954 and 1964, border apprehensions fell from 1,028,246 to 42,879. *See* U.S. BORDER PATROL, *supra* note 181; Keller, *supra* note 172, at 88 fig.2. Prosecutions of criminal immigration offenses also plummeted after 1954. *See* United States Attorneys' Statistical Report, Fiscal Year 1957, U.S. DEP'T OF JUST., cht. 7 (Sep. 1957).

217. Annual Report of the Attorney General of the United States, FY 1958, U.S. DEP'T OF JUST. 395 (1958).

218. *See* TIMOTHY J. HENDERSON, BEYOND BORDERS: A HISTORY OF MEXICAN MIGRATION TO THE UNITED STATES 85 (2011).

219. *See* CALAVITA, *supra* note 175, Appx. B (Mexican Foreign Workers Admitted under the Bracero Program, 1942-1964).

220. *See* HENDERSON, *supra* note 218, at 61-63.

221. *See id.*

222. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 158-166 (2004); Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPUL. DEV. REV. 1, 2 (2012); *supra* Section II.B.

223. *See* NGAI, *supra* note 222, at 157-58, tbl.4.1; CALAVITA, *supra* note 175, Appx. B.

224. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 435 (1981).

225. *See* Pub. L. No. 89-236, § 2, 79 Stat. 911. *See also* Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (raising the visa cap to 25,620 per country). In addition to the visa cap, the INA created a path to residency for immediate relatives of U.S. citizens. *See* Pub. L. No. 89-236, §§ 1, 4, 79 Stat. 911. Immigrants with immediate relatives who are citizens are not subject to the visa cap. *Id.* In contrast, immigrants who do not have an immediate relative-citizen are generally subject to a visa cap. *Id*. *See infra* note 228 (discussing the H-2A visa for agricultural workers, which is not subject to a cap).

226. *See* NGAI, *supra* note 222, at 258-263.

high,[227] and the large number of willing workers from Mexico far surpassed the INA's paltry visa cap.[228]

Congress's failure to conform its immigration laws with the geographic and economic reality of the United States all but guaranteed a resurgence of unauthorized immigration from Mexico.[229] Border apprehensions rose exponentially during the late 1960s and the 1970s.[230] To make matters worse, Mexico entered a long period of economic stagnation, culminating in what is known as the "lost decade" of the 1980s.[231] During this period, the Mexican government, under pressure from the United States and the international community,[232] slashed subsidies for foodstuffs and public services even as unemployment rose and millions of Mexicans fell into poverty.[233] Consequently, half of Mexico's population could no longer afford basic living

227. *See Unemployment Rate*, U.S. BUREAU OF LAB. STAT., retrieved from Federal Reserve Bank of St. Louis (Mar. 7, 2021), https://fred.stlouisfed.org/series/UNRATE (reflecting a historically low unemployment rate of 3.4 percent in 1968); Daniel J. B. Mitchell, *Wage Pressures and Labor Shortages: The 1960s and 1980s*, 20:2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 191, 222-23 (1989) (noting a "flood" of labor shortage reports in 1965).

228. In 1960, for example, over 300,000 Braceros worked in the United States—over ten times the number of visas later allotted to Mexican nationals under the INA. *See* NGAI, *supra* note 222, at 157, tbl. 4.1; CALAVITA, *supra* note 175, Appx. B. The Bracero program was not the only legal means for Mexican nationals to legally work in the United States. The INA of 1952 created the H-2 visa, which was later divided into the H-2A visa for agricultural workers and the H-2B visa for non-agricultural workers. *See* Pub. L. No. 82-414, § 101(a)(15)(H), 66 Stat. 163; Immigration Reform and Control Act of 1986, Pub. L. 99-603, § 301, 100 Stat. 3359. However, unlike the Bracero program, the H-2 visa program was highly restricted. *See* Philip Eric Wolgin, Beyond National Origins: The Development of Modern Immigration Policymaking, 1948-1968, at 130 (2011) (unpublished Ph.D. dissertation, University of California, Berkeley), available at: https://digitalassets.lib.berkeley.edu/etd/ucb/text/Wolgin_berkeley_0028E_11224.pdf; Philip Martin, *Evaluation of the H-2A Alien Labor Certification Process and the U.S. Farm Labor Market*, at 14-16, U.S. DEP'T OF LABOR (Sep. 18, 2008), https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2013_04.pdf.

229. *See* Conf. Rep. on S.1200, 99th Cong., 2d Sess. (1986), *reprinted in* 132 Cong. Rec. H10583-01 (daily ed. Oct. 15, 1986) ("The most basic cause of the problem is the mistake made 21 years ago in the [INA], which placed an unrealistic ceiling on immigration from countries within the Western Hemisphere. From that day forward, legal entry became all but impossible for the vast majority of those who sought to come here because they could find work and freedom and dignity here. All that was required until that time was the showing of good character and the offer of a good job. The quota that was imposed by the 1965 act was unrealistically low, it did not recognize the fact that our southern border is only a political—not an economic or social—boundary.") (statement by Rep. Gonzalez); NGAI, *supra* note 222, at 261.

230. *See* U.S. BORDER PATROL, *supra* note 181 (reflecting 42,879 border apprehensions in 1964 and 634,777 border apprehensions in 1974).

231. *See generally*, JUAN CARLOS MORENO-BRID & JAIME ROS, DEVELOPMENT AND GROWTH IN THE MEXICAN ECONOMY: A HISTORICAL PERSPECTIVE CH.7 (2009) (reviewing the Mexico's "lost decade"); *Financial Crisis Management: Four Financial Crises in the 1980s*, GAO/GGD-97-96, at 19-34, U.S. GEN. ACCT. OFF. (May 1997) (reviewing the Mexican debt crisis of 1982).

232. In 1982, the Mexican government announced it could no longer service its debts. *See* U.S. GEN. ACCT. OFF., *supra* note 231, at 20. American banks held nearly one-third of the debt and risked insolvency if Mexico defaulted. *See id*. 20-21 ($25 billion out of $80 billion). In order to prevent default, the Federal Reserve and the Department of the Treasury extended Mexico emergency financial assistance. *See id*. 19. In exchange, however, they required the Mexican government commit to an International Monetary Fund stabilization program entailing deep cuts to public spending. *See id*.; JAMES M. BOUGHTON, SILENT REVOLUTION: THE INTERNATIONAL MONETARY FUND, 1979-1989 299, 306 (2001).

233. *See* Agustín Escobar Latapí & Mercedes González de la Rocha, *Crisis, restructuring and urban poverty in Mexico*, 7 ENV'T & URBANIZATION 57, 60 (Apr. 1995).

necessities.[234] Like generations before them, Mexicans turned north in search of a better livelihood.[235] Without a practical means of working in the United States legally, millions of Mexicans immigrated without authorization.[236]

Faced with a renewed migration northward, Congress attempted to "close the back door" on unauthorized immigration without resorting to draconian enforcement measures.[237] The Immigration Reform and Control Act of 1986 ("IRCA") legalized over a million undocumented Mexican immigrants while imposing criminal and financial penalties on employers who hired undocumented immigrants.[238] However, legalization created a pull factor for immigrants to cross into the United States to reunite with their newly legalized family members.[239] Further, the IRCA's penalties on employers were scarcely enforced and had little effect in disincentivizing further unauthorized entry into the country.[240] Border apprehensions dropped immediately following the IRCA's enactment but were on the upswing by 1990.[241]

The post-IRCA resurgence in unauthorized immigration heralded one of the largest waves of undocumented Mexican immigrants to the United States.[242] Between 1990 and 2000, the undocumented Mexican population more than doubled—from two million in 1990 to nearly five million in 2000.[243] This "Great Migration" took on a

234. *See id*. at 61 (41 million in 1990); *Censo General de Población y Vivienda 1990*, INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA, https://www.inegi.org.mx/sistemas/olap/consulta/general_ver4/MDXQueryDatos.asp?proy=cpv90_pt (reflecting a national population of approximately 81 million people in 1990).

235. *See* HENDERSON, *supra* note 218, at 99.

236. *See id*. at 4-5; U.S. BORDER PATROL, *supra* note 181 (reflecting over a million yearly border apprehensions between 1983 and 1987). However, many Mexicans benefited from the INA's pathway to legal residence for immigrants with relatives in the United States and from amnesty under the IRCA. *See* Massey & Pren, *supra* note 222, at 9-10 (noting the rise of authorized Mexican immigrants, from 442,000 in the 1960s to 2.8 million in the 1990s).

237. *See* Elmer W. Lammi, *The Rev. Theodore Hesburgh, who ran a presidential commission. . .*, UNITED PRESS INT'L (Feb. 25, 1983), https://www.upi.com/Archives/1983/02/25/The-Rev-Theodore-Hesburgh-who-ran-a-presidential-commission/1338414997200/ (noting that the head of the commission on immigration policy urged amnesty rather than a mass expulsion of Mexican immigrants); *see also* Samuel W. Bettwy, *A Proposed Legislative Scheme to Solve the Mexican Immigration Problem*, 2 SAN DIEGO INT'L. L.J. 93, 110-15 (2001) (reviewing legislative attempts to address unauthorized immigration resulting from deficiencies of the INA, including the IRCA, the 1986 and 1988 diversity visa programs, the Immigration Act of 1990, and the Legal Immigration Family Equity Act and Amendments of 2000); *supra* note 108 (listing several immigration-related legislations during the 1980s).

238. *See* Pub. L. No. 99-603, 100 Stat. 3359; IMMIGRATION REFORM AND CONTROL ACT: REPORT ON THE LEGALIZED ALIEN POPULATION, IMMIGRATION AND NATURALIZATION SERVICE 8, tbl. 3 (Mar. 1992) (reflecting that 1,162,461 Mexican nationals, or 70% of all applicants, were legalized under the IRCA).

239. *See* Rubén Hernández León & Víctor Zúñiga, *Introduction to the Special Issue: Contemporary Return Migration from the United States to Mexico—Focus on Children, Youth, Schools and Families*, 32 MEXICAN STUD. 171, 172 (2016). *But see* Pia M. Orrenius & Madeline Zavodny, *Do Amnesty Programs Reduce Undocumented Immigration? Evidence from IRCA*, 40 DEMOGRAPHY 437 (2003) (finding that the IRCA did not contribute to unauthorized immigration in the long run).

240. *See* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 205-11 (2007).

241. *See* U.S. BORDER PATROL, *supra* note 181 (891,147 in 1989 and 1,103,353 in 1990).

242. *See* Hernández & Zúñiga, *supra* note 239, at 173.

243. *See Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, U.S. IMMIGR. & NATURALIZATION SERV. at 1 (Jan. 31, 2003), https://www.dhs.gov/xlibrary/assets/statistics/publications/Ill_Report_1211.pdf.

different character from earlier Mexican migrations.[244] Earlier Mexican migrations to the United States were largely circular.[245] However, following the IRCA's enactment, the United States federal government began bolstering border security and carving out the due process rights of immigrants.[246] Throughout the 1990s, Border Patrol increased deterrence efforts and fortified the southern border, particularly around urban areas.[247] These measures rechanneled migration routes through perilous terrain, leading to the deaths of thousands of migrants.[248] Congress also passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[249] The law expanded expedited removal and mandatory detention of immigrants, stripped courts of judicial review over prior orders of removal and discretionary forms of relief, heightened the immigration consequences of criminal convictions, and increased the penalties for entering the country illegally.[250]

Rather than stop the flow of undocumented immigrants, harsher immigration policies transformed the circular pattern of migration between Mexico and the United States.[251] Faced with the higher stakes of travelling across the border repeatedly,

244. *See* Hernández & Zúñiga, *supra* note 239, at 173; Douglas S. Massey et al., *Border Enforcement and Return Migration by Documented and Undocumented Mexicans*, 41 J. ETHNIC. MIGRATION. STUD. 1015, 1015 (2015); *supra* Section II.A (discussing earlier migrations from Mexico to the United States).

245. The Bracero program required Braceros to return to Mexico after the expiration of their work authorization. *See* Massey et al., *supra* note 244. Similarly, undocumented Mexican workers took on seasonal work in the United States and periodically returned to their families in Mexico. *See id.* For example, between 1965 and 1985, approximately 85% percent of undocumented entries were offset by return migration from the United States to Mexico. *See id*. at 5.

246. From the late 1980s to mid-1990s, most Americans believed there were too many immigrants in the United States. *See* GALLUP, *supra* note 106 (graph entitled "In your view, should immigration be kept at its present level, increased or decreased?"). Federal efforts to stem unauthorized immigration coincided with popular state initiatives to strip undocumented immigrants of basic services, most infamous of them being California's Proposition 187, also known as the "Save Our State" initiative. *See* Cal. Gov't Code § 53069.65 (West 2012); Cal. Educ. Code § 48215(a) (West 2006); Cal. Welf. & Inst. Code § 10001.5 (West 2001); Cal. Health & Safety Code § 130(a) (West 1990).

247. *See generally*, CHAD C. HADDAL ET AL., CONG. RSCH. SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER (2009), https://fas.org/sgp/crs/homesec/RL33659.pdf.

248. Since 1994, over 8,000 migrants have died trying to cross the United States-Mexican border. *See Southwest Border Deaths by Fiscal Year*, U.S. BORDER PATROL, https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Southwest%20Border%20Sector%20Deaths%20%28FY%201998%20-%20FY%202019%29_0.pdf (last accessed Aug. 1, 2021) (reflecting 7,805 deaths between 1998 and 2019); Wayne A. Cornelius & Claudia E. Smith, *Putting People in Harm's Way*, L.A. TIMES (Sept. 21, 1998) (noting 313 deaths between 1994 and 1998). This figure does not include migrants who have died on the Mexican side of the border.

249. Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, titles I–VI, 110 Stat. 3009–546 (1996).

250. *Id.* at 3009-546, 3009-575, 3009-579, 3009-607, 3009-627. *See also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 412, 423, 435, 440–442, 110 Stat. 1214, 1269, 1271-80 (1996) (removing habeas corpus review over deportation orders of immigrants with certain criminal convictions, restricting eligibility for visas, expanding the list of deportable offenses, limiting grounds for collateral attack of prior orders of removal in criminal illegal reentry cases, and restricted judicial review of deportation orders); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342–7344, 102 Stat. 4181 (Nov. 18, 1988) (subjecting immigrants to deportation for committing an "aggravated felony"); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1002, 1751, 100 Stat. 3207 (expanding the types of drugs that make immigrants inadmissible).

251. *See* Massey et al., *supra* note 244, at 1016.

undocumented immigrants increasingly settled in the United States permanently.[252] As a result, undocumented immigrants from Mexico developed even stronger familial and social ties to the United States.[253] Between 1995 and 2005, the population of U.S.-born children with undocumented parents soared from 1.3 million to 3.8 million.[254] In this manner, decades of policy failures spurred the rise of a large population of Mexican-American children whose livelihoods depended on their parents' unlawful presence in the country. These children would become casualties of the country's largest expulsion yet of Mexicans in the United States.

2. "The Great Expulsion"

The turn of the twenty-first century saw the start of a "Great Expulsion" of undocumented immigrants from the United States.[255] The terrorist attacks of September 11th, 2001, drew renewed scrutiny over immigration enforcement and border security.[256] As during the 1950s, government officials linked national security with preexisting fears over immigration, this time by asserting that terrorists threatened to illegally cross into the United States.[257] In the early 2000s, Congress allocated

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252. Scholars refer to this unintended consequence of stringent immigration enforcement as the "caging effect." *See id*. *See also* CARLA N. ARGUETA, CONG. RSCH, SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 28-29 (2016), https://fas.org/sgp/crs/homesec/R42138.pdf.

253. *See* Jeremy Slack et al., *In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, 3 J. ON MIGRATION AND HUM. SEC. 109, 110 (2015). Millions of undocumented immigrants who entered the United States during this period remain in the country. *See* Michael Hoefer et al., *Estimates of the Unauthorized Immigration Population Residing in the United States: January 2055*, U.S. DEP'T OF HOMELAND SEC. at 4 tbl.1 (Jan. 2015), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf (reflecting that in 2015 there were 3.6 million undocumented immigrants in the United States who first entered the country over 20 years prior).

254. *See* Jeffrey S. Passel & D'Vera Cohn, *3. Most unauthorized immigrants live with family members*, PEW RSCH. CTR. (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/most-unauthorized-immigrants-live-with-family-members/ (chart entitled "Most children living with unauthorized immigrant parents are born in the U.S.").

255. *See* Cynthia Feliciano & Rubén G. Rumbaut, *Coming of Age Before the Great Expulsion: The Story of the CILS-San Diego Sample 25 Years Later*, 43 ETHNIC AND RACIAL STUD. 199 (2019); Hernández & Zúñiga, *supra* note 239, at 173.

256. Following the attacks, negative attitudes towards undocumented immigrants and immigration generally spiked. *See* GALLUP, *supra* note 106 (reflecting 63% of Americans in 2003 were worried about unauthorized immigration, up from 52% in 2000; 58% of Americans in 2002 favored decreasing immigration, up from 41% in 2000; and 65% of Americans in 2004 believed immigrants hurt the economy, up from 40% in 2000).

257. *See, e.g.*, 147 Cong. Rec. H6248-H6252, Oct. 3, 2001 ("[I]f we ignore this any longer and another event, God forbid, another event of a similar nature as those on September 11 occurs, and occurs as a result of our inability or unwillingness to protect ourselves from people who come here to do us evil, then we are culpable in that event. I, for one, Mr. Speaker, choose to do everything I can and speak as often as I can and as loudly as I can about the need to control our own borders . . . [T]he defense of the Nation begins with the defense of our borders.") (quoting Representative Tom Tancredo); SAN ANTONIO EXPRESS NEWS (Sept. 19, 2001), ("The fundamental question" is "how are we going to ensure the security of our borders?") (quoting Senator Maria Cantwell). *See also* CHAD C. HADDAL, CONG. RSCH. SERV., RL32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL (2010), https://fas.org/sgp/crs/homesec/RL32562.pdf; Peter Andreas, *A Tale of Two Borders: The U.S.-Mexico and U.S.-Canada Lines After 9-11*, THE CTR. FOR COMPAR. IMMIGR. STUD., UNIV. OF CAL., SAN DIEGO 1, 6 (2003), https://ccis.ucsd.edu/_files/wp77.pdf ("Remove the word 'terrorism' and put in the words 'drug trafficking' or 'illegal immigration' and the new discourse of border security is strikingly familiar, mimicking the older discourse that has characterized U.S. border relations with Mexico."). No terrorists are known to have ever illegally entered the United States through Mexico. *See* David J. Bier & Alex Nowrasteh, *45,000 "Special Interest Aliens" Caught since 2007,*

billions of dollars more to border security and immigration enforcement.[258] In 2005, the Department of Justice instituted Operation Streamline, a zero-tolerance policy towards illegal entries and reentries solely along the border with Mexico.[259] Consequently, removals and prosecutions of criminal immigration offenses soared.[260]

As in the past,[261] heightened immigration enforcement failed to stop unauthorized immigration from Mexico. Between 2000 and 2008, the undocumented Mexican population grew from 4.8 million to over 7 million.[262] The number of U.S.-born children with undocumented parents also peaked at approximately five million.[263] Nonetheless, removals of immigrants firmly settled in the United States threatened to uproot U.S.-born children from their homes.[264] In order to avoid family separation, many of these children were forced to emigrate from the United States to their parents'

but No U.S. Terrorist Attacks from Illegal Border Crossers, CATO INST. (Dec.2018), https://www.cato.org/blog/45000-special-interest-aliens-caught-2007-no-us-terrorist-attacks-illegal-border-crossers.

258. Between 2000 and 2011, Congress more than tripled Border Patrol's budget, from $1.06 billion to $3.55 billion. *See The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL fig. 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf. The newly-created Immigration and Customs Enforcement ("ICE") agency also saw its budget nearly double within the same period. *See id.* fig. 2. ($3.3 billion in 2003 and $5.8 billion in 2011).

259. *See In re Approval of the Jud. Emergency Declared in Dist. of Ariz.*, 639 F.3d 970, 974 (9th Cir. 2011).

260. In 2000, there were 184,775 removals and less than 15,000 illegal entry and reentry prosecutions. *See 2000 Statistical Yearbook of the Immigration and Naturalization Service*, U.S. DEP'T OF JUST. 1, 234 (2002), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2000.pdf; *Compendium of Federal Justice Statistics, 2000*, BUREAU OF JUST. STAT. fig. 1.2 & tbl. 2.2 (2002), https://www.bjs.gov/content/pub/pdf/cfjs00.pdf (2,199 immigration cases disposed by U.S. magistrates and 13,414 prosecuted in U.S. district court; 80% of which were illegal entry offenses). In 2010, there were 387,242 removals and 77,269 illegal entry and reentry prosecutions. *See 2010 Yearbook of Immigration Statistics*, U.S. DEP'T OF HOMELAND SEC. 1, 94, tbl.36 (2011), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2010.pdf; *Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019*, U.S. DEP'T OF JUST. (2019), https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year#:~:text=October%2017%2C%202019-,Department%20of%20Justice%20Prosecuted%20a%20Record%2DBreaking%20Number%20of%20Immigration,more%20than%2025%20years%20ago.

261. *See supra* Section II.E.1.

262. *See* Michael Hoefer et al., *Estimates of the Unauthorized Immigration Population Residing in the United States: January 2008*, U.S. DEP'T OF HOMELAND SEC. (2009), https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202008.pdf; U.S. IMMIGR. & NATURALIZATION SERV., *supra* note 243.

263. *See* Passel & Cohn, *supra* note 254.

264. *See, e.g.*, Coleman v. United States, 454 F. Supp. 2d 757, 760 (N.D. Ill. 2006) (6-year-old citizen challenged removal order of undocumented Mexican mother who had been abandoned by the father and, thus, had no other family in the United States); Kruer ex rel. S.K. v. Gonzales, 2005 WL 1529987, at *1-*2 (E.D. Ky. June 28, 2005) (14-year-old and 12-year-old citizens requested an emergency stay of undocumented Mexican mother's deportation because she was their sole surviving parent).

country of origin[265]—most often Mexico.[266] In 2006, Mexico began receiving a large influx of children from the United States.[267] These de facto deportations of U.S. citizens signaled a "Great Expulsion," not just of undocumented Mexican immigrants, but of Mexican-American children.[268]

The Great Recession between 2008 and 2009 further catalyzed this expulsion of Mexican-American children.[269] As during the Great Depression, rising unemployment and anti-Mexican sentiment led to a scapegoating of immigrants.[270] Immigration enforcement escalated with the piloting of the Secure Communities enforcement program in 2008.[271] Secure Communities was an information-sharing partnership in which the FBI automatically shared the fingerprints of arrestees booked in local and state detention facilities with the Department of Homeland Security ("DHS"). The program allowed DHS to swiftly identify undocumented arrestees and place them in immigration custody, regardless of their criminal record or lack thereof.[272] Economic hardship, fear of removal, and fear of family separation drove many undocumented Mexican immigrants to "self-deport" with their U.S.-born

265. Whether a U.S.-born child emigrated to Mexico following their parent's removal often depended on the child's age, with the youngest nearly always emigrating with their undocumented parent or shortly after the parent's removal. *See* Email from Deborah A. Boehm, Professor of Anthropology, Univ. of Nev., Reno (Oct. 16, 2020); Chaudry et al., *supra* note 6, at viii (observing that in 8 of 20 mixed status families separated by deportation, some or all of the U.S.-born children emigrated to their parent's country of origin). Scholars refer to this involuntary departure of U.S.-born children as "de facto deportation." *See, e.g.*, Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 529 (1995). Courts recognize that deportations can cause the involuntary departure of U.S.-born children but reject "de facto deportation" as a defense to their parent's removal. *See, e.g.*, Payne-Barahona v. Gonzales, 474 F.3d 1, 2-3 (1st Cir. 2007); Gallanosa v. United States, 785 F.2d 116, 120 (4th Cir. 1986); Ayala-Flores v. INS, 662 F.2d 444, 445 (6th Cir. 1981); Mamanee v. INS, 566 F.2d 1103, 1105-6 (9th Cir. 1977); Acosta v. Gaffney, 558 F.2d 1153, 1157-58 (3d Cir. 1977); Cervantes v. INS, 510 F.2d 89, 92 (10th Cir. 1975); Enciso-Cardozo v. INS, 504 F.2d 1252, 1253 (2d Cir. 1974); Cortez-Flores v. INS, 500 F.2d 178, 180 (5th Cir. 1974); Aalund v. Marshall, 461 F.2d 710, 714 (5th Cir. 1972). *Cf.* Alison M. Osterberg, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751 (2009) (arguing that U.S.-born children have a Fifth Amendment due process right to family unity); Friedler, *supra* note 265, at 531-35 (arguing that a U.S.-born child's involuntary departure from the United States due to her parents' deportation violated her right to remain in the United States and her right to an education).

266. *See* TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, *supra* note 3 (reflecting that, between 2001 and 2010, the proportion of removed immigrants who were Mexican ranged from 56% to 80%).

267. *See* Hernández & Zúñiga, *supra* note 239, at 174, 178.

268. *See id.* at 173; *supra* note 265 (discussing de facto deportation).

269. *See* Hernández & Zúñiga, *supra* note 239, at 173.

270. *See* Vickie D. Ybarra et al., *Anti-Immigrant Anxieties in State Policy: The Great Recession and Punitive Immigration Policy in the American States, 2005-2012*, 16 STATE POL. & POL'Y Q. 313, 313 (2016) (finding that economic stressors during the Great Recession combined with increases in Hispanic populations led to a rise in punitive state immigration policies); GALLUP, *supra* note 106 (reflecting that the proportion of Americans against immigration rose from 40% to 50% in 2008 and the proportion of Americans who believed immigration was "a good thing" declined from 67% to 57% between 2006 and 2010).

271. *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Feb. 9, 2021), https://www.ice.gov/secure-communities.

272. *See id.*

children.[273] By 2010, approximately 310,000 U.S.-born minors had emigrated to Mexico.[274]

Between 2010 and 2013, DHS fully implemented Secure Communities, leading to the highest number of removals in recent memory.[275] In 2013 alone, over 72,000 undocumented parents of U.S.-born children—many with little to no criminal history[276]—were removed from the United States.[277] Constitutional challenges led DHS to replace Secure Communities with a priority-based system, ostensibly targeting "felons not families."[278] Nonetheless, mass removals of mostly low-risk immigrants continued.[279] By 2015, the number of U.S.-born minors living in Mexico stood at around 550,000.[280]

President Donald J. Trump took immigration enforcement to its most punitive extreme. In addition to banning immigrants of mostly Muslim-majority countries,[281]

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273. *See* Claudia Masferrer et al., *Immigrants in their Parental Homeland: Half a Million U.S.-born Minors Settle Throughout Mexico*, 56 DEMOGRAPHY 1453, 1457 (2019). *See also* Victor Zúñiga & Edmund T. Hamann, *Children's voices about 'return' migration from the United States to Mexico: the 0.5 generation*, CHILDREN'S GEOGRAPHIES, 6-7, tbl.2 (2020) (reflecting children's narratives of why they relocated from the United States to Mexico and noting that "for children, the most important motive for returning was the desire to live together. Family reunification seems to be the way migrant families are facing the legal, economic, and political macro-conditions that acted against them.").

274. *See* Hernández & Zúñiga, *supra* note 239, at 178.

275. *See* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 271 (fully implemented on Jan. 22, 2013); TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, *supra* note 3 (reflecting a record 407,821 removals in 2012); David Grant, *Deportations of illegal immigrants in 2012 reach new US record*, THE CHRISTIAN SCIENCE MONITOR (Dec. 24, 2012), https://www.csmonitor.com/USA/2012/1224/Deportations-of-illegal-immigrants-in-2012-reach-new-US-record#:~:text=Deportations%20have%20been%20up%20in,removed%20from%20the%20United%20States.&text=The%20United%20States%20deported%20more,Customs%20Enforcement%20(ICE)%20reports.

276. *See* TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, *supra* note 3 (reflecting approximately 74% of immigrants removed in 2013 had no criminal history or were level 3 offenders—immigrants with only a misdemeanor conviction); U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ALIEN CRIMINAL RESPONSE INFORMATION MANAGEMENT SYSTEM (ACRIME) & ENFORCEMENT INTEGRATED DATABASE (EID) 2 (2010), https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-020-a-eidacrime-september2010.pdf.

277. *See Deportation of Aliens Claiming U.S.-Born Children, Second Semi-Annual, Calendar Year 2013*, U.S. DEP'T OF HOMELAND SEC. at 4, https://www.hsdl.org/?view&did=817387 (32,488 during the second half of 2013); *Deportation of Aliens Claiming U.S.-Born Children, First Semi-Annual, Calendar Year 2013*, U.S. DEP'T OF HOMELAND SEC. at 4, https://www.hsdl.org/?view&did=817386 (39,410 during the first half of 2013).

278. Barack Obama, President of the U.S., *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), WHITE HOUSE ARCHIVES ("[W]e're going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids. We'll prioritize, just like law enforcement does every day."); *see* U.S. DEP'T OF HOMELAND SEC., POLICIES FOR THE APPREHENSION, DETENTION, AND REMOVAL OF UNDOCUMENTED IMMIGRANTS n.1 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (list of opinions finding Fourth Amendment violations by the detention of undocumented immigrants by local and state authorities); U.S. DEP'T OF HOMELAND SEC., PRIORITY ENFORCEMENT PROGRAM – HOW DHS IS FOCUSING ON DEPORTING FELONS (July 30, 2015), https://www.dhs.gov/blog/2015/07/30/priority-enforcement-program- %E2%80%93-how-dhs-focusing-deporting-felons.

279. *See* TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, *supra* note 3 (reflecting approximately 72% of immigrants removed in 2015 and 2016 had little to no criminal history).

280. *See* Masferrer et al., *supra* note 273, at 1455.

281. *See* Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sep. 24, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (commonly known as the "Muslim ban").

President Trump singled out Mexicans as serious threats to the country's security.[282] In 2017, DHS reinstated Secure Communities in order to "protect our communities."[283] A year later, federal prosecutors began prosecuting *all* immigration offenses, in violation of prosecutorial responsibilities.[284] This zero-tolerance policy resulted in the highest number of criminal immigration prosecutions ever, as well as the practical imprisonment of undocumented children separated from their parents at the border.[285] While Central American immigrants increasingly constituted a greater proportion of undocumented immigrants removed from the country,[286] the federal government continued to remove and prosecute undocumented Mexicans with U.S.-born children.[287]

In January 2021, President Joseph R. Biden rescinded Secure Communities and the zero-tolerance prosecution of immigration offenses.[288] Nonetheless, the

282. *See, e.g.*, Donald Trump, *Presidential Announcement Speech* (June 16, 2015) ("When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."). This rhetoric evoked the anti-Mexican animus which led to the Mexican "Repatriation" and Operation Wetback. *See* Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1442, 1472 (2019); *supra* Sections II.A, B.

283. Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et al. 3 (Feb. 20, 2017) (implementing Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

284. *See* Press Release, U.S. DEP'T OF JUST., *Att'y Gen. Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018),* https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry; CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-4.4(a) & (f) (2017) (the prosecutor should consider the possibility of a noncriminal disposition and, in doing so, may consider the defendant's background and characteristics); ABA Model Code of Professional Responsibility, Canon 2, EC 7-13 & 7-14 (prosecutors have a duty to seek justice—not merely to convict—and to use their discretion to refrain from litigating a matter that is obviously unfair); U.S. Attorney's Manual, U.S. DEP'T OF JUST., 9-27.220 & 9-27.250 (prosecutors must consider whether there exists an adequate non-criminal alternative before commencing prosecution). *See also* Rescinding the Zero-Tolerance Policy for Offenses Under § 1325(a), U.S. DEP'T OF JUST. (Jan. 26, 2021) ("A policy requiring a prosecutor to charge every case referred for prosecution under 8 U.S.C. § 1325(a) without regard for individual circumstances is inconsistent with our principles.").

285. *See Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019*, U.S. DEP'T OF JUST., *supra* note 260 (over 100,000 illegal entry and reentry prosecutions in 2019); Kristina Davis, *U.S. officials say they are highly confident to have reached tally on separated children: 4,368*, L.A. TIMES (Jan. 1, 2018), https://www.latimes.com/world-nation/story/2020-01-18/u-s-officials-say-they-are-highly-confident-to-have-reached-tally-on-separated-children-4-368.

286. *See* TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, *supra* note 3 (reflecting the proportion of removed immigrants who were Mexican fell from 62% to 47% and the proportion of removed immigrants from Guatemala, Honduras, and El Salvador rose from 32% to 44% between 2016 and 2019).

287. *See* Deportation of Parents of U.S.-Born Children, Second Half, Calendar Year 2019, U.S. DEP'T OF HOMELAND SEC. (July 22, 2020), https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_second_half_cy_2019.pdf (13,656 undocumented parents of U.S.-born children removed between July 2019 and December 2019); Deportation of Parents of U.S.-Born Children, First Half, Calendar Year 2019, U.S. DEP'T OF HOMELAND SEC. (Apr. 13, 2020), https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_first_half_cy_2019.pdf (14,324 undocumented parents of U.S.-born children removed between January 2019 and June 2019); Deportation of Parents of U.S.-Born Children, Second Half, Calendar Year 2018, U.S. DEP'T OF HOMELAND SEC. (July 22, 2018), https://www.dhs.gov/sites/default/files/publications/ice_-_removal_of_aliens_claiming_u.s.-born_children_second_half_cy_2018.pdf (15,553 undocumented parents of U.S.-born children removed between July 2018 and December 2018).

288. *See* Exec. Order No. 13993, 86 FED. REG. 7051 (Jan. 20, 2021); Rescinding the Zero-Tolerance Policy for Offenses Under § 1325(a), *supra* note 28. It is worth noting the COVID-19 pandemic

ramifications of the "Great Expulsion" will reverberate for generations. Today, there are well-over half a million U.S.-born minors living in Mexico[289]—over 6 percent of the entire American population abroad.[290] These Mexican-American children belong to predominantly working-class families of indigenous or mixed-race ancestry and face unequal access to public services in Mexico due to their U.S. citizenship.[291]

A recent case illustrates how removals have displaced Mexican-American children from the United States. Martin was born to a working-class family in Mexico.[292] In 2006, Martin immigrated to the United States without authorization to find work. Martin settled in Mississippi, where he found a job as a construction worker. Over time, Martin married, had children, and built his own home. However, in 2019, Martin was arrested for driving without a license. The arresting officers notified Immigration Customs and Enforcement ("ICE"), which detained Martin and removed him to Mexico. Separated from his wife and young children, Martin returned to the United States through the Chihuahuan Desert. Border Patrol agents arrested Martin, and federal prosecutors charged him with illegal reentry. With their father behind bars and again facing removal, Martin's children had no choice but to emigrate to Mexico in order to reunite with their father. Martin was convicted of illegal reentry and removed to Mexico, where he lives freely with his wife and U.S-born children.

Such de facto deportations also endanger Mexican-American children. Ana, an undocumented immigrant from Mexico, lived and worked in Nevada for over a decade.[293] She had two U.S.-born daughters, ages twelve and six. In 2018, ICE agents detained and removed Ana, despite only having a seven-year-old misdemeanor conviction for theft. Ana's removal forced her daughters to emigrate to Mexico in order to remain with their mother. Ana and her daughters settled in Veracruz, where violence was endemic. In 2019, Ana's teenage cousin was murdered along with other students after a soccer game. Ana and her family joined street protests calling for the Mexican National Guard to intervene and defend public safety. Several months later, Ana attended a family gathering at her uncle's house. During the gathering, a group of masked gunmen arrived on a Mexican municipal police truck and stormed the residence. The gunmen assaulted members of Ana's family, hurled threats, and pointed

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ended zero-tolerance prosecution of immigration offenses months prior to the rescinding of the zero-tolerance memo. *See* Ryan Devereaux, *Mass Immigration Prosecutions on the Border are Currently on Hold. What Comes Next Is Uncertain*, THE INTERCEPT (Mar. 18, 2020), https://theintercept.com/2020/03/18/immigration-border-prosecution-coronavirus/.

289. *See* Masferrer et al., *supra* note 273, at 1455. In addition to Mexican-American children residing in Mexico, some U.S.-born children of deported Mexican immigrants frequently move between the United States and Mexico. *See* Boehm, *supra* note 265. *See also* Ted Hamann, *Why the TIDAL Framework Applies in Baja California*, Unpublished paper accepted for the Presidential Session "Beyond the Border Crisis: Addressing the Intersection of Trauma, Identity, and Language (TIDAL) among Im/Migrants and Refugees," AM. EDUCATIONAL RSCH. ASS'N (2020) (estimating over 200,000 transnational students in Mexican schools, including students with U.S. citizenship).

290. *See Consular Affairs by the Numbers*, U.S. DEP'T OF STATE (Jan. 2020), https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf (noting that approximately 9 million U.S. citizens live abroad).

291. *See* Jill Anderson, *Bilingual, Bicultural, But Not Yet Binational: Undocumented Immigrant Youth in Mexico and the United States*, The Wilson Center at 8, 14 (Oct. 2016), https://www.wilsoncenter.org/sites/default/files/media/documents/publication/bilingual_bicultural_not_yet_binational_undocumented_immigrant_youth_in_mexico_and_the_united_states.pdf.

292. The author has assigned the pseudonym "Martin" to protect his client's privacy.

293. The author has assigned the pseudonym "Ana" to protect his client's privacy.

a gun at her seven-year-old daughter's head before departing. Children like Ana's and Martin's form part of the new Mexican-American diaspora.

III. ASSERTING ACQUIRED CITIZENSHIP

Eventually, expelled Mexican-Americans who settle in Mexico will have children of their own, creating a generation of acquired citizens. Although immigration from Mexico has declined considerably, recent years have seen an upturn.[294] If history is any indication, the United States can expect the generational return of these acquired citizens in the coming decades.[295] Many of these Mexican-born children and their U.S. citizen-parents will be unaware of the children's acquired citizenship.[296] When they do learn of their U.S. citizenship, acquired citizens will have to contend with a complex statutory scheme that was designed, in part, to exclude ethnic Mexicans from the United States.[297]

Asserting acquired citizenship can be an arduous task. As noted, acquired citizens bear the burden of proving by a preponderance of the evidence that they acquired citizenship at birth.[298] Proving a citizen-parent's physical presence in the United States is among the most difficult components of asserting acquired citizenship. Adjudicators often deny claims with insufficient documentary evidence of physical presence.[299] Establishing physical presence may require birth certificates, hospital records, baptismal records, school records, social security records, employment records, and witness statements.[300] Children of citizen-mothers and noncitizen-fathers face greater difficulty in substantiating physical presence, as women are more likely to be employed in work that is less documented.[301] Marshaling enough evidence may prove impossible for acquired citizens who cannot afford an attorney.[302]

Further, the heightened evidentiary requirements for acquired citizens born to unwed citizen-fathers are harsher on citizens born in Mexico, where out-of-wedlock births are the norm.[303] Legitimation requires interpreting and applying foreign and

294. *See* Ana Gonzalez-Barrera, *Before COVID-19, more Mexicans came to the U.S. than left for Mexico for the first time in years*, PEW RSCH. CTR. (July 9, 2021) https://www.pewresearch.org/fact-tank/2021/07/09/before-covid-19-more-mexicans-came-to-the-u-s-than-left-for-mexico-for-the-first-time-in-years/.

295. *See supra*, Section II.D.

296. *See* Terán, *supra* note 10, at 590, 639.

297. *See supra* Section I.A.2.

298. *See* 8 C.F.R. § 341.2(c) (2012) (N-600 applications); 22 C.F.R. § 51.40 (passport applications); Matter of Tijerina-Villarreal, 13 I & N Dec. 327, 330 (B.I.A. 1969) (removal proceedings).

299. *See* Terán, *supra* note 10, at 638.

300. *See infra* Sections III.A, III.B (listing forms of evidence submitted with passport and N-600 applications).

301. *See* Terán, *supra* note 10, 633.

302. *See* Polly J. Price, *Jus Soli and Statelessness: A Comparative Perspective from the Americas*, *in* Citizenship In Question: Evidentiary Birthright and Statelessness, 40 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017); *infra* Section III.D (case of Daniel).

303. *See* Organisation for Economic Co-operation and Development, *SF2.4: Share of births outside of marriage*, 1 (Sept. 2020), http://www.oecd.org/els/family/SF_2_4_Share_births_outside_marriage.pdf (reflecting 69% of births in Mexico occur outside of marriage).

domestic laws.[304] While biological evidence is technically not required under the law,[305] immigration authorities have at times needlessly required DNA evidence to establish a blood relationship.[306]

There are multiple avenues of asserting acquired citizenship, each with their own challenges. Outside the United States, an acquired citizen may apply for a passport at a U.S. consulate.[307] Inside the United States, an acquired citizen may file an application for a certificate of citizenship with U.S. Citizenship and Immigration Services ("USCIS").[308] Alternatively, an acquired citizen in the United States may file a passport application at a domestic passport office.[309] If an acquired citizen is detained in the United States and ordered removed by an immigration judge, they may obtain adjudication of their citizenship by filing a petition for judicial review.[310]

Acquired citizens who file a passport application, certificate of citizenship application, or petition for judicial review are not applying for citizenship but are seeking government recognition of their birthright citizenship.[311] The cost and complexities of asserting acquired citizenship pose major hurdles to indigent acquired citizens.[312] Yet none of these procedures for adjudicating citizenship afford counsel as of right, contributing to the wrongful detention, removal, and incarceration of acquired citizens.[313]

A. Consular Citizenship Adjudications

Unless an acquired citizen is still a minor,[314] the first opportunity an acquired citizen has to assert their U.S. citizenship is by submitting a passport application with

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304. *See, e.g.*, Iracheta v. Holder, 730 F.3d 419, 426 (5th Cir. 2013) (holding that, under the laws of Tamaulipas, Mexico, a father legitimates his child when the father lists his name on the child's birth certificate); Hong, *supra* note 10, at 294-308 (reviewing legitimation laws across different states).

305. *See* Miller v. Albright, 523 U.S. 420, 437 (1998) ("Nothing in subsection (a)(1) requires the citizen father or his child to obtain a genetic paternity test. [W]hich is relatively expensive, normally requires physical intrusion for both the putative father and child, and often is not available in foreign countries."); 8 FAM 304.2-1(c) (2019) (noting the "the expense, complexity, and logistical delays inherent in parentage testing").

306. *See infra* Section III.D (case of Daniel).

307. *See infra* Section III.A.

308. *See infra* Section III.B.

309. *See* 8 U.S.C. § 1104(c) (2020).

310. *See infra* Section III.C.

311. *See supra* Section I.B.

312. *See infra* Section III.D.

313. *See id*.

314. A U.S. citizen who has a child overseas may submit a CRBA on behalf of their minor child. U.S. DEP'T OF STATE, *Birth of U.S. Citizens and Non-Citizen Nationals Abroad*, https://travel.state.gov/content/travel/en/international-travel/while-abroad/birth-abroad.html (last accessed Aug. 1, 2021); U.S. DEP'T OF STATE, *Application for Consular Report of Birth Abroad of a Citizen of the United States of America*, https://eforms.state.gov/Forms/ds2029.PDF (last accessed Aug. 1, 2021). As with all other manners of adjudicating citizenship, the CRBA places the burden of proving the elements of acquired citizenship on the applicant; in this case, the child's parents. *See* 8 FAM 304.2-2(a) (2019). Further, a foreign-born child of a U.S. citizen may assert their citizenship under the Child Citizenship Act of 2000. *See* Pub. L. No. 106-395, 114 Stat. 1631, Oct. 30, 2000 (codified as 8 U.S.C. § 1431 (2020)). Under the Child Citizenship Act, a child automatically acquires U.S. citizenship after birth where a parent is a citizen, the child is still a minor, and the child is lawfully residing in the United States in the custody of the citizen-parent. *Id*. The law is of no avail to acquired citizens who are unaware of their citizenship as a child or who "illegally" immigrate to the United States later in life. *See* Terán, *supra* note 10, at 590, 639; Email from

a U.S. consulate in their country of birth.[315] For applicants 16 years or older, a passport application costs $130 with an additional $35 execution fee.[316] The secretary of state is responsible for conducting consular functions, including issuing passports.[317] The secretary of state may only issue passports to individuals "owing allegiance to the United States,"[318] a status encompassing citizens and noncitizen nationals.[319]

Citizens seeking entry into the United States must bear a valid U.S. passport, which serves as conclusive proof of U.S. citizenship.[320] The secretary of state delegates passport adjudications to consular officers abroad,[321] as well as to passport offices in the United States.[322] Often, acquired citizens in their countries of birth visit consulates seeking visas, unaware they are U.S. citizens.[323] Before issuing a visa, consular officers must determine whether applicants are U.S. citizens by reviewing the applicants' evidence.[324] Given the complexities of acquired citizenship, consular officers may fail to detect a visa applicant's citizenship.[325] The risk of missing a citizenship claim is particularly acute in Mexico-based consulates, which have the highest volume of visa applications.[326] If a consular officer determines an applicant has a citizenship claim, the consular officer must notify the applicant.[327] Generally, the consular officer must refuse issuing a visa until they are satisfied that the applicant is not a U.S. citizen.[328]

Beatrice McKenzie, Professor of History, Beloit College (Nov. 7, 2020) (noting consular officers regularly encounter individuals who are unaware they may be a citizen).

315. *See* U.S. DEP'T OF STATE, Application for a U.S. Passport (Form DS-11), (Apr. 2022), https://eforms.state.gov/Forms/ds11.pdf.

316. *See* U.S. DEP'T OF STATE, *Passport Fees*, https://travel.state.gov/content/travel/en/passports/how-apply/fees.html (last accessed June 15, 2022).

317. *See* 8 U.S.C. § 1104(a) (2020); 22 U.S.C. § 211a (2020).

318. 22 U.S.C. § 212 (2020).

319. 8 U.S.C. § 1101(a)(22) (2020). For example, children born in the unincorporated territory of American Samoa do not automatically acquire citizenship at birth but are deemed to be nationals of the United States. *See* Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015) (holding that the Fourteenth Amendment does not guarantee birthright citizenship to individuals born in American Samoa), *cert. denied*, 579 U.S. 902 (2016). American nationals enjoy at least the same rights of legal permanent residents, including the right to reside and work in the United States and the right to naturalize. *See* Matter of Ah San, 15 I & N Dec. 315 (B.I.A. 1974).

320. *See* 8 U.S.C. § 1185(b) (2020); 22 U.S.C. § 2705(1) (2020).

321. *See* 8 U.S.C. § 1104(a); 22 CFR §§ 50.4, 51.22(2); 1 FAM 255.1(d), 255.1-1(e)(7)(a)-(d); 8 FAM 103.1-1, 103.1-3, 301.4-1(A)(3).

322. *See* 8 U.S.C. § 1104(c) (2020); 1 FAM 253.1-6, 1-7 (2015). Domestic passport offices use the same passport application as consulates. *See* Application for a U.S. Passport (Form DS-11), *supra* note 315. For the disadvantages of filing for a passport rather than a certificate of citizenship, *see* Terán, *supra* note 10, at 637-38.

323. *See* 8 FAM 307.1-6(a) (2018); Terán, *supra* note 10, at 590, 639; McKenzie, *supra* note 314.

324. 22 CFR 40.2(a); 8 FAM 103.1-1(c) (2018); 9 FAM 301.3-3(a), 504.9-7 (2021).

325. *See, e.g.*, *infra* Section III.D (case of Daniel).

326.In 2019, U.S. consulates in Mexico issued approximately 1.5 million visas, or about 17% of the total number of visas issued by U.S. consulates throughout the world. *See* U.S. DEP'T OF HOMELAND SEC., TABLE IV, SUMMARY OF VISAS BY ISSUING OFFICE, FISCAL YEAR 2019, (2019), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-%20TableIV.pdf.

327. 8 FAM 307.1-6(b)(1), (c) (2018).

328. 8 FAM 307.1-6(b)(2) (permitting the issuance of a non-immigrant visa to a potential citizen who is unable or unwilling to delay travel to the United States), (c) (prohibiting the issuance of an immigrant visa to a potential citizen until the citizenship claim is resolved); 9 FAM 301.3-3(a), (d) (2021).

Consular officers are limited to evaluating and adjudicating the passport application based on the applicants' evidence.[329] The passport application requires the applicant's foreign birth certificate; proof of their parent's U.S. citizenship; their parents' marriage certificate, if applicable; an affidavit establishing their U.S. citizen-parent's physical presence in the United States prior to the applicant's birth; and any additional evidence the consular officer deems necessary to establish the elements of acquired citizenship.[330] The consular officer may require DNA evidence of a blood relationship when the officer determines there is insufficient credible evidence.[331]

As discussed below, citizens have a constitutional right to counsel in passport adjudications—if they can afford it.[332] Locating witnesses and obtaining documentary evidence of a U.S. citizen-parent's physical presence poses challenges to acquired citizens abroad, especially if they do not speak English or do not have the means of reaching out to entities or individuals in the United States. Without assistance of counsel, indigent acquired citizens may lack the means to gather the evidence necessary to assert their citizenship.[333]

The State Department disfavors forms of evidence often submitted by low-income acquired citizens, such as midwife birth certificates and witness affidavits.[334] Historically, Mexican mothers in American border cities sought midwives to deliver their children because they could not afford hospital costs or were denied hospital care due to their immigration status.[335] Subsequently, descendants of U.S.-born children provided midwife birth certificates in connection with passport applications.[336] In other instances, descendants of U.S.-born children provided delayed birth certificates and witness affidavits attesting to the child's birth.[337] Consular officers often denied these applications on the ground that midwife and delayed birth certificates lacked the same validity of hospital or state-produced records, even with substantiating affidavits and witness testimony.[338]

Further, acquired citizens may face consular officers who find them not "deserving" of U.S. citizenship.[339] As discussed above, race and gender have played key roles in determining who acquires citizenship at birth abroad.[340] A consular officer's own attitudes towards race, gender, and social class may influence their

329. *See* 22 CFR §§ 51.40, 51.41, 51.43, 51.45; 8 FAM 103.1-1(c) (2018), 304.2-2(a) (2019).

330. *See* Sabra v. Pompeo, 453 F. Supp. 3d 291, 299-301 (D.D.C. 2020) (summarizing the process and requirements of passport applications for acquired citizens); Application for a U.S. Passport Application (Form DS-11), *supra* note 315, at 2.

331. 8 FAM 304.2-1(c) (2019).

332. *See infra* Part IV (reviewing the right to counsel in consular citizenship adjudications); *see also* 8 FAM 301.4-1(E)(1) (2018) (requiring consular officers to advise citizen-claimants to consult an attorney).

333. *See, e.g.*, Section III.D (case of Daniel).

334. *See* Elisabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 Immigr. Briefings 1, 6 (2017); Terán, *supra* note 10, at 637.

335. *See* Alana Semuels, *The Midwives of El Paso*, THE ATLANTIC (Feb. 4, 2016), https://www.theatlantic.com/business/archive/2016/02/midwives-el-paso/459969/.

336. *See* Terán, *supra* note 10, at 637-38 (case of J.Z.).

337. *See id.*

338. *See id.*

339. *See* Beatrice McKenzie, *Birthright Citizenship Documents Regimes in U.S. History*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS, 129 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017).

340. *See supra* Section I.A.2.

decision-making in ways that make it more difficult to assert acquired citizenship.[341] For example, consular officers may request DNA testing in passport applications based on stereotypes surrounding an acquired citizen and their parent's background.[342] Biased consular officers may also engage in misconduct, such as pressuring Mexican-born acquired citizens without an attorney into signing statements admitting they fraudulently procured their U.S.-born parent's birth certificate.[343]

Faced with these challenges, an acquired citizen may forgo the passport application altogether and seek alternative means of entering the United States, such as requesting a visa.[344] In this situation, the consular officer is under no obligation to adjudicate the citizenship claim and may issue a visa to the applicant, if eligible.[345] Issuing a visa to an acquired citizen may lead DHS to refuse to recognize their U.S. citizenship later on in life, resulting in acquired citizens being detained and placed in removal proceedings if they lose their lawful immigration status.[346] If an acquired citizen proceeds with the passport application and is denied, the denial serves to physically exclude them from the United States unless they successfully appeal the passport denial.[347]

Appealing a passport denial from outside the United States is an onerous process.[348] Under 8 U.S.C. § 1503, passport applicants outside the United States who have previously been in the country or who are under the age of 16 may seek a certificate of identity from a consular officer.[349] The certificate permits the passport applicant to seek admission into the United States to petition for a declaratory judgment establishing their citizenship.[350] On its face, the statute precludes older

341. *See* McKenzie, *supra* note 339, at 129-130.

342. *See, e.g.*, Parham v. Clinton, 2009 WL 2870671, at *2 (S.D. Tex. Aug. 31, 2009) (consular officer requiring DNA test because Filipina mother married to an American soldier had previously worked as an entertainer); *infra* Section III.D (case of Daniel, where USCIS and consular officers required DNA test from indigent Mexican-born acquired citizen with history of drug abuse, despite strong evidence of blood relationship). *See also* Rachel E. Rosenbloom, *From the Outside Looking in: Passports in the Borderlands*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS, 144 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017) (noting the "long history of racialized presumptions of fraud in adjudicating U.S. passport applications").

343. *See* Terán, *supra* note 10, at 638, n.319; *see, e.g.*, Salem v. Pompeo, 432 F. Supp. 3d 222, 227 (E.D.N.Y. 2020) (false confessions).

344. *See, e.g.*, Sabra v. Pompeo, 453 F. Supp. 3d 291, 304 (D.D.C. 2020) (noting citizen-mother objected to DNA testing for passport application of her child born outside hospital setting in Palestine due to the anticipated processing time); *infra* Section III.D (case of Daniel, who crossed into the United States "illegally" due to inability to obtain requested evidence so he could reunite with disabled daughter); Terán, *supra* note 10, at 638 (noting attorneys prefer that acquired citizens assert citizenship in the United States rather than at consulates because consular officers are not likely to accept delayed or midwife birth certificates).

345. *See* 8 FAM 301.4-1(E)(1), (H) (2018); 9 FAM 301.3-3(d) (2021).

346. *See, e.g.*, Stevens, *infra* note 417, at 623 n.333-34 (examples); *infra* Section III.D (case of Daniel).

347. *See, e.g.*, Terán, *supra* note 10, at 638 (denying a Mexican-born, acquired citizen a passport application and issuing a visa).

348. *See* Gonzalez Boisson v. Pompeo, 459 F. Supp. 3d 7, 17 (D.D.C. 2020); Villafranca v. Tillerson, 2017 WL 9249483, at *8 (S.D. Tex. Mar. 6, 2017).

349. 8 U.S.C. § 1503(b) (2020). If the consular officer denies the certificate of identity, the passport applicant may only seek judicial review under the Administrative Procedures Act ("APA") after appealing to the Secretary of State. 5 U.S.C. § 704 (2011); 8 U.S.C. § 1503(b) (2021); Hinojosa v. Horn, 896 F.3d 305, 312 (5th Cir. 2018) (granted declaratory relief under the APA), *cert. denied*, 139 S. Ct. 1319 (2019).

350. 8 U.S.C. § 1503(a)-(b) (2020).

applicants who have never been in the country—a significant number of acquired citizens[351]—from challenging their passport denials.[352] Even if an applicant obtains a certificate of identity, the applicant may need to travel great distances to a United States port of entry to seek admission. When the applicant applies for admission at the port of entry, border officials may detain and even jail the applicant pending the resolution of their citizenship claim.[353] Citizens in immigration custody have falsely admitted to non-citizenship in order to be released from detention sooner.[354] Thus, an acquired citizen who is denied a passport by a consular officer faces major risks and challenges to asserting their citizenship.

B. USCIS Application for Certificate of Citizenship

Unfortunately, the limited assistance in consular citizenship adjudications may result in indigent acquired citizens entering the United States without a proper adjudication.[355] Acquired citizens who are unaware of their citizenship or who are wrongfully denied a passport, may enter the United States "illegally" or with an improperly-issued visa.[356] Once in the United States, an acquired citizen may seek adjudication of their citizenship by filing an N-600 application for certificate of citizenship with USCIS.[357] A certificate of citizenship serves as an official record of acquired citizenship which, unlike a passport, never expires.[358]

At minimum, acquired citizens must provide USCIS their birth certificate and an official record establishing a parent's U.S. citizenship.[359] Acquired citizens born in wedlock must also provide their parents' marriage certificate.[360] Failure to produce these documents carries a presumption of ineligibility for acquired citizenship.[361] The applicant may rebut the presumption through "secondary" evidence, such as church records, school records, census records, and affidavits.[362] The N-600 application instructions list forms of evidence that may establish a citizen-parent's physical

351. As noted, many acquired citizens are unaware of their citizenship until they visit a U.S. consulate later in life. *See* Terán, *supra* note 10, at 590, 639; McKenzie, *supra* note 314.

352. *See, e.g.*, Vavrinek v. Vavrinek, 2013 WL 655401, at *5 (N.D. Ill. Feb. 21, 2013).

353. *See* Rusk v. Cort, 369 U.S. 367, 375 (1962), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99, 97 (1977).

354. *See infra* Section III.D (listing examples).

355. *See, e.g.*, *infra* Section III.D (case of Daniel).

356. *See* Terán, *supra* note 10, at 654 n.389; *infra* Section III.D (case of Daniel).

357. *See* 8 U.S.C. § 1452(a) (2020); 8 C.F.R. § 341.1 (2020); U.S. CITIZENSHIP & IMMIGR. SERVS., Application for Certificate of Citizenship (Form N-600), https://www.uscis.gov/sites/default/files/document/forms/n-600.pdf (Feb. 13, 2017).

358. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., Policy Manual, ch.1.A, https://www.uscis.gov/policy-manual/volume-12-part-k-chapter-1 (last accessed Aug. 1, 2021).

359. *See* 8 CFR § 341.1; U.S. CITIZENSHIP & IMMIGRATION SERVS., Instructions for Application of Certificate of Citizenship at 8-9, https://www.uscis.gov/sites/default/files/document/forms/n-600instr.pdf (Feb. 13, 2017).

360. *See* Instructions for Application of Certificate of Citizenship, *supra* note 359, at 8.

361. *See* 8 CFR § 103.2(b) (2022). *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., Application for Certificate of Citizenship pursuant to Section 320 of the Immigration and Nationality Act on Behalf of Applicant: Self-Represented, 2008 WL 3990513 (denying N-600 application because claimant failed to provide parents' marriage certificate or any secondary evidence).

362. *See* 8 CFR § 103.2(b) (2022); Instructions for Application of Certificate of Citizenship, *supra* note 359, at 10.

presence in the United States, including school records, social security records, deeds or lease agreements, and affidavits from third parties.[363]

Like in consular citizenship adjudications, acquired citizens have the right to obtain counsel in N-600 proceedings at their own expense.[364] Unlike consular officers, however, USCIS officers provide some assistance to acquired citizens.[365] Once an N-600 application is filed, USCIS assigns an officer to assess the citizenship claim.[366] The USCIS officer will interview the applicant and witnesses with personal knowledge relevant to the applicant's claim.[367] If the applicant is unrepresented, the USCIS officer must help the applicant introduce available evidence into the record.[368] If the USCIS officer determines evidence is lacking, they may send the applicant a "request for evidence" letter identifying the missing evidence and providing a deadline by which the applicant must provide the evidence.[369] The USCIS officer may also conduct their own investigation, including obtaining information from USCIS databases or systems.[370]

The degree to which a USCIS officer investigates an N-600 application is discretionary.[371] USCIS is saddled with a large number of applications for immigration benefits every year, such as requests for asylum, employment authorization, lawful permanent residence, and naturalization.[372] Due to the burden of such a large caseload, it is easy for USCIS to neglect acquired citizenship investigations. Further, scholars are concerned about the disproportionate number of USCIS adjudications centered around concerns for fraud.[373] Scholars also worry about non-attorney USCIS officers applying the complex laws that govern acquired citizenship.[374] Under these competing pressures, a USCIS officer may forgo a thorough investigation of an N-600

363. *See* Instructions for Application of Certificate of Citizenship, *supra* note 359, at 9.

364. 8 C.F.R. §§ 292.1(a), 341.2(f) (2022); U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS Policy Manual, vol.12, part K, chs. 12.1(a), 12.4, https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm12-external.pdf.

365. *See* 8 C.F.R. § 341.2(f) (2022).

366. *See* 8 C.F.R § 341.5(a) (2022).

367. *See* 8 C.F.R § 341.2.(a)(2), (b), (d)-(e) (2022); Instructions for Application of Certificate of Citizenship, *supra* note 359, at 3. If an acquired citizen seeking a certificate of citizenship has already received an adjudication on their citizenship, such as by obtaining a valid passport, the USCIS officer may not require an interview. *See* 8 C.F.R. § 341.2(a)(1)(ii) (2022).

368. *See* 8 C.F.R § 341.2(f) (2022).

369. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS Policy Manual, vol.1, part E, ch.6(f)(3), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6; *see, e.g.*, Rios-Valenzuela v. Dep't of Homeland Sec., 506 F.3d 393, 396 (5th Cir. 2007).

370. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS Policy Manual, vol.1, part E, ch.6(f)(2), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6 (performing additional research).

371. *See id.*

372. *See* Ryan Baugh, *Refugees and Asylees: 2019*, Dep't of Homeland Sec. tbl.6a (Sept. 2020) https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf (96,952 asylum requests in 2019); U.S. DEP'T HOMELAND SEC., *USCIS Final FY 2019 Statistics Available*, (Jan. 16, 2020), https://www.uscis.gov/news/alerts/uscis-final-fy-2019-statistics-available (2.2 million applications for employment authorization and 834,000 naturalizations granted in 2019); U.S. DEP'T OF HOMELAND SEC., *Table 20. Petitions for Naturalization Filed, Persons Naturalized, and Petitions for Naturalization Denied: Fiscal Years 1907 to 2019*, (Oct. 28, 2020), https://www.dhs.gov/immigration-statistics/yearbook/2019/table20 (830,560 naturalization petitions filed in 2019); Terán, *supra* note 10, at 629.

373. *See* Terán, *supra* note 10, at 630-31.

374. *See id.*

application, leaving the burden entirely on an acquired citizen, who may not be able to afford an attorney, to develop their claim.

Notwithstanding assistance from USCIS, the extraordinary filing fee for N-600 applications poses a major obstacle to asserting acquired citizenship. USCIS funds nearly all of its expenditures through fees rather than appropriations.[375] The agency charges N-600 applicants a fee of $1,170—over *nine times* the passport application fee.[376] Effectively, acquired citizens pay a hefty tax to vindicate their birthright citizenship, raising constitutional concerns.[377] This citizenship tax disproportionately impacts Mexican-Americans, who make up a majority of acquired citizens.[378] Though most N-600 applicants qualify for a fee waiver,[379] many acquired citizens are essentially undocumented.[380] Such "undocumented citizens" lack official records of their income and generally cannot receive public benefits which demonstrate financial hardship.[381] USCIS has denied fee waivers to acquired citizens for lack of documentation.[382] Moreover, the denial of a fee waiver prolongs the adjudication of an N-600 application, which can take as long as sixteen months.[383] The longer waiting period falls harshly on indigent acquired citizens in jail on false charges of illegal entry or reentry. Federal judges routinely jail undocumented immigrants pending trial, regardless of the circumstances.[384] Acquired citizens who contest illegal entry or reentry charges and who receive a fee waiver denial must languish in jail until they can pay the application fee or appeal the denial.[385]

As with passport applicants, N-600 applicants must exhaust administrative remedies before seeking declaratory relief under 8 U.S.C. § 1503.[386] If the N-600 applicant does not administratively appeal the denial within thirty days, they may, under certain circumstances, file a motion to reopen the N-600 application.[387]

375. *See House Immigration Subcommittee Holds Hearing on Proposed USCIS Fee Increases*, 84 No. 8 Interpreter Releases 408 (Feb. 20, 2007) (citing USCIS Director Emilio T. González).

376. *See* Instructions for Application of Certificate of Citizenship, *supra* note 359, at 11; Passport Fees, *supra* note 316.

377. *See generally*, Juan Esteban Bedoya, *Price Tags on Citizenship: The Constitutionality of the Form N-600 Fee*, 95 N.Y.U. L. REV. 1022 (Oct. 2020).

378. *See* Terán, *supra* note 10, at 594 n.44.

379. 65.8% of N-600 applicants assisted by CUNY Democracy Now! qualified for a fee waiver. *See* Samantha Deshommes, Re: U.S. Citizenship And Immigration Services Fee Schedule, DHS Docket No. USCIS 2019-0010; RIN 1615-AC18 (Dec. 10, 2019), https://www.presidentsalliance.org/wp-content/uploads/2019/12/2019-12-10-University-of-Texas-San-Antonio-Comment-on-Fee-Schedule.pdf (citing Allan Wernick, Director, CUNY Citizenship Now! (Nov. 19, 2019)); USCIS, Request for Fee Waiver (Form I-912) (Sept. 3, 2021), https://www.uscis.gov/sites/default/files/document/forms/i-912.pdf.

380. *See* Interview with Irma Whitely, Investigator for the Federal Public Defender's Office, Western District of Texas.

381. *See id.*

382. *See id.*

383. *See, e.g.*, USCIS, *Processing Times*,, https://egov.uscis.gov/processing-times/ (last accessed Aug. 1, 2021) (input N-600 and El Paso, TX); Interview with Irma Whitely, *supra* note 380.

384. *See generally*, Neal, *supra* note 168.

385. While some USCIS offices expedite N-600 applications of detained citizens, USCIS may still take months to make a decision. *See* Terán, *supra* note 10, at 639 n.326; Interview with Irma Whitely, *supra* note 380.

386. *See* 8 U.S.C. § 1503(a) (2020); 8 C.F.R. § 103.3(a) (2022) (USCIS Administrative Appeals Office).

387. *See* 8 C.F.R. §§ 103.3(a)(2)(i), 103.5(a)(2) (2022).

C. Judicial Review of Removal Order

Before an acquired citizen asserts their citizenship, immigration authorities may detain them under the false assumption that they are an undocumented immigrant.[388] An acquired citizen may be detained after losing their improperly-issued visa or residence status. They might also be detained when entering or reentering the country "illegally."[389] In either case, DHS issues a notice to appear that initiates removal proceedings.[390] An immigration judge presides over the removal proceeding and must determine if the individual is an inadmissible or deportable noncitizen.[391] DHS may only institute removal proceedings against noncitizens, and an acquired citizen may assert their U.S. citizenship as a defense to removal.[392] However, as previously noted, the burden falls on the acquired citizen to prove their citizenship.[393] Removal hearings involving acquired citizenship can last several days and entail the testimony of many witnesses.[394] The immigration court system does not afford claimed citizens assistance of counsel, no matter the strength of their citizenship defense.[395]

If the immigration judge determines there is sufficient evidence of U.S. citizenship, they must terminate the removal proceeding.[396] However, the immigration judge does not have the authority to adjudicate citizenship.[397] After termination of the proceedings, an acquired citizen remains without lawful status and may be subject to future detention and removal.[398] If instead, the immigration judge rejects the

388. *See id*.

389. *See, e.g.*, Rios-Valenzuela v. Dep't of Homeland Sec., 506 F.3d 393, 395-96 (5th Cir. 2007); *infra* Section III.D.

390. 8 U.S.C. § 1229a (2020). Noncitizens detained without inspection soon after entering the United States are subject to expedited removal. 8 U.S.C. § 1225(b)(1)(A)(i) (2020). Ordinarily, individuals processed via expedited removal are not afforded a hearing before an immigration judge. *Id*. An exception applies to individuals claiming U.S. citizenship. 8 C.F.R. §§ 235.3(b)(5)(iv); 235.6(a)(2)(ii) (2022). Such individuals who affirm their citizenship under oath have the right to a hearing before an immigration judge. *Id.* at § 235.3(b)(5)(iv). However, individuals who have a prior removal do not have a right to a hearing to assess their citizenship. 8 U.S.C. § 1231(a)(5) (2020); *see infra* note 407 (discussing reinstatement of removal).

391. 8 U.S.C. § 1229a(a)(1) (2020).

392. 8 U.S.C. §§ 1101(a)(3), 1229(a)(1) (2020); Gonzalez-Alarcon v. Macias, 884 F.2d 1226, 1276 (10th Cir. 2018).

393. *See* Matter of Tijerina-Villarreal, 13 I & N Dec. 327, 332 (B.I.A. 1969). Ordinarily, the government must prove non-citizenship by clear and convincing evidence. *See* Woodby v. INS, 385 U.S. 276, 286 (1966). However, evidence of foreign birth, as in the case of acquired citizens, carries a presumption of non-citizenship. *See* Matter of Hines, 24 I&N Dec. 544, 546 (BIA 2008), *overruled on other grounds by* Matter of Cross, 26 I & N Dec. 485 (B.I.A. 2015).

394. *See, e.g.*, Campbell v. Barr, 387 F. Supp. 3d 286, 296 n.5 (W.D.N.Y. 2019) (noting that parties to a removal proceeding entailing an acquired citizenship defense expected evidentiary hearings to last approximately three to four days and involve the testimony of seven to nine witnesses).

395. *See* 8 U.S.C. § 1362 (2020) ("the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel") (emphasis added). However, the presiding immigration judge must advise the alleged noncitizen of their right to hire an attorney and the availability, if any, of pro bono legal services. 8 C.F.R. § 1240.10(a)(1)-(2) (2022).

396. 8 U.S.C. § 1252(b)(3)(B) (2020).

397. *Id*.

398. *See, e.g.*, Rios-Valenzuela v. Dep't of Homeland Sec., 506 F.3d 393, 396 (5th Cir. 2007) (noting the "legal limbo" of a citizen after an immigration judge terminated his removal proceeding); *infra* Section III.D (case of Daniel).

citizenship defense and enters an order of removal, the acquired citizen may file a petition for review with the court of appeal.[399]

Theoretically, a petition for review "provide[s] a failsafe against inadvertent or uninformed execution of a final removal order against a person with a claim to United States citizenship."[400] However, the petition does not automatically stay a claimed citizen's deportation and requires swift action to avoid execution of the removal order.[401] If there is no genuine issue of material fact concerning citizenship, the court of appeal must adjudicate the citizenship claim.[402] Otherwise, the court of appeal must transfer the proceeding to the district court for a hearing and issuance of a declaratory judgment.[403]

Through this maze of administrative and judicial proceedings, acquired citizens who cannot afford to hire an attorney remain without the assistance of counsel.[404] The expectation that most acquired citizens can—alone—navigate such a complex adjudicatory system while substantiating their acquired citizenship is unrealistic.[405]

Previously removed acquired citizens are worse-off. Generally, a previously removed noncitizen is subject to reinstatement of the removal order.[406] An individual subject to reinstatement has no right to a hearing before an immigration judge,

399. Noncitizens must exhaust administrative remedies before seeking judicial review over an order of removal. *See* 8 U.S.C. § 1252(d)(1) (2020). Unlike in appeals of N-600 denials, however, courts have exempted citizen claimants from the exhaustion requirement in removal proceedings. *See* Gonzalez-Alarcon v. Macias, 884 F.3d 1266, 1272 (10th Cir. 2018); Poole v. Mukasey, 522 F.3d 259, 264 (2d Cir. 2008); Omolo v. Gonzales, 452 F.3d 404, 407 (5th Cir. 2006); Minasyan v. Gonzales, 401 F.3d 1069, 1075 (9th Cir. 2005); Moussa v. INS, 302 F.3d 823, 825 (8th Cir. 2002). Otherwise, "it would be possible to unintentionally relinquish U.S. citizenship. . .. The Constitution does not permit American citizenship to be so easily shed." Rivera v. Ashcroft, 394 F.3d 1129, 1136 (9th Cir. 2005), *superseded by statute on other grounds as stated in* League of United States Latin Am. Citizens v. Wheeler, 899 F.3d 814 (9th Cir. 2018).

400. Theagene v. Gonzales, 411 F.3d 1107, 1110 n.4 (9th Cir. 2005).

401. *See* Nken v. Holder, 556 U.S. 418, 433 (2009) (characterizing a stay of removal as an exercise of judicial discretion and not a right); 8 U.S.C. § 1252(b)(3)(B) (2020).

402. *See* 8 U.S.C. § 1252(b)(5)(A) (2020). *See, e.g.*, Iracheta v. Holder, 730 F.3d 419, 427 n.8 (5th Cir. 2013); *Minasyan*, 401 F.3d at 1074, n.8.

403. *See* 8 U.S.C. § 1252(b)(5)(B) (2020). *See, e.g.*, Campbell v. Sessions, 737 Fed. App'x. 599, 603 (2d Cir. 2018); Batista v. Ashcroft, 270 F.3d 8, 17 (1st Cir. 2001).

404. However, some individuals in removal proceedings may be represented by pro bono attorneys. *See, e.g.*, J.E.F.M. v. Lynch, 837 F.3d 1026, 1028, 1030 (9th Cir. 2016) (hearing a case where juvenile noncitizens were unrepresented in removal proceedings and later represented by the ACLU on petitions for review).

405. *See* Watson v. United States, 865 F.3d 123, 141 (2d Cir. 2017) ("'The determination of whether a foreign-born person has derived citizenship involves complex legal and factual issues, and often requires consideration of foreign law and events that occurred outside the United States.' U.S. citizens like Watson are often forced to go it alone in navigating these 'complex legal and factual issues' involving the interpretation and application of foreign law without counsel to assist them. Such respondents have limited capacity to gather evidence while detained pending removal, and are provided with little instruction into the applicable laws and doctrines, and yet have the burden of affirmatively establishing their citizenship to end removal proceedings and defeat the government's claim of deportability."); Leslie v. AG of the U.S., 611 F.3d 171, 181 (3d Cir. 2010) ("[M]any aliens subject to removal proceedings are unfamiliar with the complex adjudicatory process by which immigration laws are enforced. Many courts have recognized that 'our immigration statutory framework is notoriously complex.' The complexity of removal proceedings renders the alien's right to counsel particularly vital to his ability to 'reasonably present[] his case.'"); United States v. Covarrubias, No. 3:18-cr-00099-LRH-CLB, 2020 WL 1170216, at *3 (D. Nev. Mar. 11, 2020) ("The concept of derivative and acquired citizenship is complex, with many potential avenues for a defendant to prove that he is a citizen of the United States.").

406. 8 U.S.C. § 1231(a)(5) (2020).

regardless of a claim to U.S. citizenship.[407] An acquired citizen may file a petition for judicial review with the court of appeal,[408] but doing so is a race against time. Immigration officers may execute the reinstatement "at any time after the reentry,"[409] and, in the past, have done so before the citizen could file a petition for review or a motion to stay the removal order.[410] Once officers execute a removal, most acquired citizens lack the means and savviness to assert their citizenship from outside the country.[411]

D. Detaining, Removing, and Incarcerating Acquired Citizens

Combined with the complexity of nationality law, meager due process protections and aggressive immigration enforcement have resulted in the detention and removal of thousands of U.S. citizens. A 2018 study of Immigration and Customs Enforcement ("ICE") detainers in Travis County, Texas, determined that between 2006 and 2017 over 3 percent of detainer requests targeted individuals who claimed U.S. citizenship.[412] ICE did not execute approximately one-third of those detainers, presumably because ICE determined the subjects were U.S. citizens.[413] Extrapolating this study's data to the whole country, ICE may have targeted over 19,000 U.S. citizens between 2006 and 2017,[414] including many acquired citizens.[415] Due to Texas's proximity to Mexico, this study may have identified a disproportionately high number of acquired citizens targeted by ICE. Even so, a separate study of ICE detainers from across the United States found that acquired citizens are generally overrepresented in

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407. *See id*. The arresting immigration officer is only required to attempt to verify the claim of citizenship. 8 C.F.R. § 241.8(a), (a)(3) (2022). For "unadjudicated" citizens, there will be no official record of U.S. citizenship. An individual who is reinstated may make a statement contesting the reinstatement, but the statement is treated as merely "an oral request for discretionary relief from reinstatement." Ruiz v. Holder, 547 F. App'x. 656 (6th Cir. 2013); 8 C.F.R. § 241.8(b) (2022).

408. *See* 8 U.S.C. § 1252(b) (2020); Vega-Anguiano v. Barr, 982 F.3d 542, 545 (9th Cir. 2019) ("[T]he phrase 'final order of removal' in § 1252(a)(1) covers both a final removal order and a final reinstatement order."); Iracheta v. Holder, 730 F.3d 419, 422-23 (5th Cir. 2013); Warner v. Ashcroft, 381 F.3d 534, 536 (6th Cir. 2004).

409. 8 U.S.C. § 1231(a)(5) (2020). *See Ruiz*, 547 F. App'x. at 659 (noting that only twenty-one minutes passed between the time the immigration officer served the notice of intent to reinstate and the reinstatement of the prior removal order).

410. *See, e.g.*, *Iracheta*, 730 F.3d at 421-22, 427 (noting defendant, who the court determined was a U.S. citizen, had been removed to Mexico through reinstatement just days before he filed a petition for review).

411. *See* Hong, *supra* note 10, at 298.

412. *See* David J. Bier, *U.S. Citizens Targeted by ICE: U.S. Citizens Targeted by Immigration and Customs Enforcement in Texas*, CATO INST. (Aug. 29, 2018), https://www.cato.org/immigration-research-policy-brief/us-citizens-targeted-ice-us-citizens-targeted-immigration-customs (814 citizen-claimants, or 3.3% of all detainers).

413. *See id*. (228 citizen-claimants, or 0.9% of all detainers).

414. *See id*. (multiplying 0.9% times the total number of ICE detainers during the period, 2,115,333). *See also* Aarti Kohli et al., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, The Chief Justice Earl Warren Institute of Law and Social Policy, U. of California, Berkeley Law School at 4 (Oct. 2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (finding that, between October 2008 and April 2011 alone, an estimated 3,600 U.S. citizens were apprehended by ICE).

415. *See, e.g.*, David J. Bier, *Details of 155 Immigration Detainers for U.S. Citizens*, CATO INST. (June 3, 2020), https://www.cato.org/blog/details-155-immigration-detainers-us-citizens (listing the wrongful detentions of acquired citizens German Fidel Cueto, Garland Creedle, Levy Jean, Edward Oktla Sumary, Lorenzo Palma, Marta Alicia Cerda Cervantes, Elizabeth Anne Gilbreath, Luis M. Rodriguez, Jose Jimenez Moreno, Angelica Davila, Juan Alameda, Rene Saldivar, Irving Palomo, and Hector Veloz).

the population of targeted citizens, in part due to the complexity of acquired citizenship claims.[416]

In 2011, Professor Jacqueline Stevens studied the population of U.S. citizens in removal proceedings.[417] Professor Stevens reviewed cases of detainees at the Eloy and Florence Detention Centers in Arizona between 2006 and 2008 and found that at least one percent of detainees were U.S. citizens.[418] Approximately one-third of these detainees were acquired citizens.[419] Extrapolating this data nationally, over a thousand citizens may be detained and placed in removal proceedings each year,[420] including hundreds of acquired citizens.[421] However, it is worth noting ICE has issued fewer detainers in recent years, possibly lowering the rate of misidentifying and detaining citizens.[422]

How many U.S. citizens the government has removed from the United States remains unclear.[423] However, data obtained by Professor Stevens and Northwestern University's Deportation Research Clinic reflects that between 2011 and 2017 immigration judges ordered the removal of most individuals who claimed U.S. citizenship in removal proceedings.[424] Citizens who face removal proceedings endure months of detention[425] that contribute to false confessions of non-citizenship and a high rate of removal.[426] An earlier survey by Professor Stevens revealed that between 2003 and 2011 a majority of citizens agreed to removal in exchange for release from detention.[427] Fortunately, the assistance of counsel may ameliorate the chilling effect of detention on asserting citizenship.[428] According to the data from Northwestern,

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416. *See id.*

417. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 623 (2011).

418. *See id.* (eighty-two of 8,027 citizens detained whose cases were terminated due to citizenship).

419. *See id.* (twenty-eight out of eighty-two, or 34% of citizens detained).

420. *See Latest Data: Immigration and Customs Enforcement Arrests*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/arrest/ (last accessed Aug. 1, 2021) (average of 120,000 ICE arrests per year between 2015 and 2018, 1% of which is 1,200).

421. *See id.* (multiplying 120,000 times 34%, which amounts to 408 per year).

422. *See Latest Data: Immigration and Customs Enforcement Detainers*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/detain/ (last accessed Jan. 30, 2022) (309,697 ICE detainers in 2011 compared to 165,768 in 2019). The drop in immigration enforcement action during the COVID-19 pandemic has also—at least temporarily—likely lowered the numbers of U.S. citizens being detained. *See id.* (90,382 ICE detainers in 2020).

423. *See* Stevens, *supra* note 417, at 608 (estimating 20,000 citizens were detained *or* deported between 2003 and 2011).

424. *See* Jacqueline Stevens, *United States Citizens in Deportation Proceedings: Immigration Court "Code 54" Adjournments, January 1, 2011 to June 9, 2017*, Deportation Research Clinic, Northwestern U. tbl.1. https://deportationresearchclinic.org/USCData.html (last accessed Aug. 1, 2021) (56% ordered removed).

425. *See id.* at tbl.3 (average of 134 days in detention before final order). *See, e.g.*, Campbell v. Barr, 387 F. Supp. 3d 286, 296 (W.D.N.Y. 2019) (immigration detention of a claimed citizen for over three years).

426. *See* Stevens, *supra* note 417, at 631, 654.

427. *See id.* at 626 (out of fifty-five deported citizens, thirty-one agreed to deportation to leave detention).

428. *See* Stevens, *supra* note 424, at tbls. 4 & 5 (reflecting that 30% of detained citizen-claimants who have an attorney obtain relief from removal compared to 17% of detained citizen-claimants who do not have an attorney).

access to counsel nearly doubles the chance that detained citizen-claimants will avoid removal.[429]

Immigration officials' unfamiliarity with nationality law further increases the chances of removing a U.S. citizen. Immigration judges and officers are poorly trained in nationality law and may encounter a citizen multiple times without detecting a citizenship claim.[430] Many immigration judges also do not inquire into U.S. citizenship.[431] The case of Frank Serna is instructive in this regard. In 2012, an immigration judge ordered Serna's detention despite previously being released due to evidence of U.S. citizenship.[432] Serna claimed he was a U.S. citizen but could not articulate his claim to the immigration judge or afford to hire an attorney.[433] Despite Serna's best efforts, the immigration judge refused to hear his citizenship claim, detained him for over a year, and ordered him removed.[434] Subsequently, a different immigration judge reviewed Serna's case and terminated the removal proceeding based on evidence of U.S. citizenship.[435] In an interview by Professor Stevens, the immigration judge who ordered Serna's removal admitted fault and stated immigration judges receive insufficient training on citizenship matters.[436]

Once removed, U.S. citizens face an uphill battle in asserting their citizenship and right to return to the United States. A prior removal cements the presumption of non-citizenship in the eyes of immigration authorities and exposes the citizen to future removal and incarceration if they return to the country.[437] In 2004, an acquired citizen deported to Mexico attempted to return to the United States but was arrested and charged criminally with illegal reentry.[438] The citizen chose to plead guilty to be released from jail sooner.[439] In 2005, an acquired citizen pled guilty to illegal reentry and received a sentence of thirty months in prison.[440] In 2007, an acquired citizen was released from prison after spending more than a quarter of his life behind bars for false allegations of illegal reentry and personation of a U.S. citizen.[441] Judges may also deny bond in illegal entry and reentry cases, pressuring citizens to admit guilt so they can

429. *See id.*

430. *See* Jacqueline Stevens, *The Alien Who Is a Citizen*, *in* CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS, 229 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017); Terán, *supra* note 10, at 639.

431. *See* Stevens, *supra* note 417, at 719 (citing Professor Rachel Rosenbloom of Northeastern Law School).

432. *See* Jacqueline Stevens, *Ex-Immigration Judge Jimmie Benton to US Citizen: Go Tell It to the Government*, STATES WITHOUT NATIONS (Nov. 7, 2013), http://stateswithoutnations.blogspot.com/2013/.

433. *See id.*

434. *See id.*

435. *See id.*

436. *See* Stevens, *supra* note 430, at 233.

437. *See, e.g.*, Rios-Valenzuela v. Dep't of Homeland Sec., 506 F.3d 393, 396 (5th Cir. 2007) (acquired citizen charged with illegal reentry for returning to the United States). *See* Stevens, *supra* note 417, at 628-29, 678-82 (case of Mario Guerrero).

438. *See* Bier, *supra* note 415 (case of George Ibarra).

439. *See id.*

440. *See* United States v. Martinez, No. 3:05-cr-00256-DB, ECF No. 17 (W.D. Tex. Apr. 22, 2005).

441. *See* Stevens, *supra* note 417, at 678-82 (case of Mario Guerrero).

be released from jail.[442] Once convicted, citizens risk being removed from the United States, perpetuating the cycle of detention, removal, and incarceration.[443]

A recent case demonstrates how, on all levels, the systems for detecting and adjudicating citizenship can fail acquired citizens. Daniel was born in Mexico to an American father and a Mexican mother.[444] His parents had four other children, all born in Mexico. His parents did not marry until after Daniel and his siblings were born. However, his father identified himself in each of their birth certificates, legitimating them as his children under the law.[445]

Daniel's father was unaware his children acquired U.S. citizenship when they were born. When Daniel turned 15, his father petitioned him to "immigrate" to the United States as a lawful permanent resident ("LPR").[446] Daniel visited the U.S. consulate in Juarez, Mexico to apply for an immigrant visa, which is necessary for admission into the United States as an LPR.[447] The consular officer failed to detect Daniel's acquired citizenship and improperly issued him an immigrant visa. Similarly, Daniel's father petitioned his four other Mexican-born children to "immigrate" to the United States. In each case, the consular officer failed to detect their acquired citizenship and issued them immigrant visas. Border officials admitted Daniel and his siblings into the United States as LPRs.

While in the United States, Daniel married, had children, and worked as a laborer to support his family. Daniel also struggled with substance use disorder. A mental health professional diagnosed Daniel with bipolar disorder. Daniel lacked the finances for ongoing mental health treatment, and he self-medicated with marijuana. Eventually, Daniel was convicted of marijuana possession twice and other non-violent misdemeanors stemming from his drug use. Daniel lost his LPR status and was placed in removal proceedings.

Meanwhile, Daniel's four siblings learned through an immigration attorney that each of them acquired U.S. citizenship at birth through their father. Each of Daniel's siblings filed an N-600 application with supporting evidence, including their birth certificates, their parents' marriage certificate, and their father's social security records substantiating his requisite physical presence for out-of-wedlock births.[448] USCIS granted the applications, officially recognizing each of Daniel's siblings as a U.S. citizen.

In light of this discovery, Daniel retained an immigration attorney to terminate his removal proceeding and file an N-600 application asserting acquired citizenship. The immigration judge found sufficient evidence of citizenship to terminate the removal proceeding. However, Daniel could not afford to pay his attorney's fees. Accordingly, after being released from immigration detention, Daniel filed an N-600 application pro se. During the USCIS interview, the USCIS officer

442. *See* Neal, *supra* note 168, at 50-51.

443. *See, e.g.*, Bier, *supra* note 415 (case of George Ibarra);

444. The author has assigned the pseudonym "Daniel" to protect his client's privacy.

445. For purposes of acquired citizenship, the child is legitimated as the father's child based on the law of the child's residence or domicile. *See supra* Section I.B.2, tbl.B. Under Mexican law, a father legitimates his child when the father lists his name on the child's birth certificate. *See* Iracheta v. Holder, 730 F.3d 419, 426 (5th Cir. 2013).

446. *See supra* notes 225, 236 (discussing family-based immigration under the INA).

447. *See* 8 U.S.C. § 1255(a) (2020).

448. *See supra* Section I.B.2, tbl.B.

requested a DNA test. The USCIS officer did not explain why USCIS needed a DNA test to establish a blood relationship between Daniel and his father.[449] USCIS never required Daniel's siblings to procure a DNA test. Daniel's claim was virtually identical to the successful claims of his siblings,[450] and each of their requests already contained substantial evidence of a blood relationship with their father. Daniel's subjection to a DNA test may have been influenced by a reluctance to recognize an acquired citizen with a substance abuse disorder and a criminal record.[451] In any event, Daniel could not afford the DNA test.[452] USCIS denied his N-600 application.

For years, Daniel lived in the United States as an "undocumented citizen." Shortly before his father passed away, Daniel obtained a positive DNA test, proving with almost absolute certainty that he was his father's biological son. But before he could reopen his N-600 application, Daniel was again placed in removal proceedings. Daniel could not afford to hire an immigration attorney and reopen his N-600 application. Moreover, Daniel was unable to articulate the facets of his acquired citizenship claim.[453] Fearing his deportation was a forgone conclusion, Daniel failed to appear at his removal hearing. The immigration judge ordered Daniel be removed in absentia. Evidently, the immigration judge failed to consider the prior judge's termination order and evidence of Daniel's U.S. citizenship,[454] which were available in Daniel's "Alien" File.[455] Daniel was detained and removed to Mexico.

Once in Mexico, Daniel visited the U.S. consulate in Juarez. Daniel reported to the consular officer that he was a U.S. citizen and wanted a passport to go back to the United States. He also reported that he had previously filed an N-600 application but due to his removal he no longer possessed all the supporting evidence, including the positive DNA test. The consular officer advised Daniel that he needed to recover the evidence himself and turned him away.

Stranded in Mexico, Daniel struggled to readjust to life in a country he had not lived in since childhood. He no longer spoke Spanish fluently or had close relatives

449. *See* Miller v. Albright, 523 U.S. 420, 437 (1998) (noting that genetic paternity testing is not required to assert acquired citizenship).

450. *See also* Vazquez v. Pompeo, 2020 WL 7249830, at *4 (S.D. Tex. Nov. 2, 2020) (denying passport to a claimed acquired citizen where State Department issued passport to brother based on "identical or nearly identical evidence"); Terán, *supra* note 10, at 637-38 (describing case of J.Z., whose daughter was denied a passport by the consulate even though she provided the same evidence from her siblings' successful N-600 applications).

451. *See supra* Section III.A (discussing citizenship adjudications influenced by "deservedness," race, gender, and social class).

452. DNA tests for immigration purposes typically start at approximately $500. *See, e.g.*, LabCorp, Legal and At-home Tests, https://www.labcorpdna.com/dna-testing?filter=legal (last accessed May 31, 2021); Validity Genetics, U.S. Immigration and VISA Relationship DNA Testing, https://validitygenetics.com/us-immigration-visa-test (last accessed May 31, 2021); DNA Paternity Testing NJ, Immigration DNA Testing Fees, https://dnapaternitytestnj.com/immigration-dna-testing-fees (last accessed Aug. 1, 2021).

453. *See also* Bier, *supra* note 415 (describing case of George Ibarra, an acquired citizen who knew he was a citizen but did not understand the law well enough to defend himself after being detained and placed in removal proceedings).

454. Similarly, in the case of Frank Serna, an immigration judge ignored the prior judge's termination order based on evidence of citizenship and ordered Serna removed. *See* Stevens, *supra* note 432.

455. Commonly referred to as an A-file, an "Alien" File is a file maintained by government agencies for each noncitizen the government encounters and may include the noncitizen's passports, identification cards, photographs, and prior immigration records, such as immigration judge orders and prior N-600 applications. *See* Dent v. Holder, 627 F.3d 365, 368 (9th Cir. 2010).

in Mexico. Further, Daniel's wife died of cancer, leaving his youngest daughter essentially an orphan in the United States. His daughter had cerebral palsy and used a wheelchair. Daniel was her primary caretaker and, thus, responsible for her medical and financial needs—neither of which he could fulfill from Mexico. Under these pressures, Daniel returned to the United States. ICE officers apprehended Daniel in El Paso, and federal prosecutors charged him with illegal reentry.

Ironically, the criminalization of his rightful return to the United States provided Daniel with the assistance of counsel he needed. The federal public defender ("FPD") investigated Daniel's acquired citizenship claim. After obtaining the missing evidence Daniel needed from his siblings, his prior attorney, and his "Alien" file,[456] the FPD collected the substantial filing fee necessary to reopen Daniel's N-600 claim and filed a motion to reopen.[457] Nearly half a year after Daniel's arrest, USCIS granted the motion and adjudged Daniel to be a U.S. citizen. A federal judge dismissed the illegal reentry charge and ordered Daniel's ICE detainer withdrawn. After multiple detentions, a deportation, and months of incarceration, Daniel received his certificate of citizenship.

IV. APPOINTED COUNSEL IN CONSULAR CITIZENSHIP ADJUDICATIONS

Over the years, scholars and policymakers have proposed reforms to an immigration system that continues to remove U.S. citizens.[458] In particular, appointing counsel in removal proceedings has garnered growing support,[459] including among judges.[460] Indeed, empirical studies demonstrate that represented individuals are far

456. *See* 18 U.S.C. § 3006A(a)(1) (2020). Some Federal Defender offices permit their attorneys to file N-600 applications with USCIS on their client's behalf. Where the author practices, for example, Assistant Federal Defenders may enter an appearance before USCIS in order to file an N-600 application for clients who claim acquired or derivative citizenship.

457. *See* USCIS, Instructions for Notice of Appeal or Motion (Form I-290B), at 6 (Dec. 2, 2019), https://www.uscis.gov/sites/default/files/document/forms/i-290binstr.pdf (requiring filing fee of $675).

458. *See, e.g.*, Hong, *supra* note 10, at 347-52 (replacing removal proceedings involving claims of citizenship with administrative proceedings along the lines of USCIS's N-600 application process, or transferring such proceedings directly to federal district court); Terán, *supra* note 10, at 676 (right to appointed counsel in removal proceedings); *see also* ACLU Foundation, *American Exile: Rapid Deportations that Bypass the Courtroom,* American Civil Liberties Union, 44-54, 108-09 (Dec. 2014), https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf (restricting use of expedited removal and reinstatement of removal procedures).

459. *See, e.g.*, Andrew L. Hanna, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257 (2019); Andrés D. K. Kwon, *Defending Criminal(ized) "Aliens" After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034 (2016); Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1868 (2013); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012); Terán, *supra* note 10, at 676; Aliza B. Kaplan, *Disabled and Disserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings*, 26 GEO. IMMIGR. L.J. 523 (2012); Stevens, *supra* note 417, at 714.

458. *See* C.J.L.G. v. Barr, 923 F.3d 622, 639 (9th Cir. 2019) (Paez, C.J., concurring) ("I would recognize a due process right to counsel for indigent children in removal proceedings."); Watson v. United States, 865 F.3d 123, 136, 143 (2d Cir. 2017) (Katzmann, C.J., concurring in part and dissenting in part) ("[C]oupled with the sometimes limited ability even a U.S. citizen has to assert a valid claim of citizenship in the absence of the assistance of counsel…. I believe the time has come to extend the right to counsel to immigration removal proceedings[.]"). *See also* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1051-58 (C.D. Cal. 2011) (holding that mentally incompetent noncitizen in removal proceedings was entitled to appointed counsel under the Rehabilitation Act of 1973).

more likely to obtain relief from removal than unrepresented individuals, including among those claiming U.S. citizenship.[461] Daniel's case exemplifies how assistance of counsel can break the cycle of the detention, removal, and incarceration of acquired citizens.[462]

In contrast to assistance of counsel in removal proceedings, assistance of counsel in consular citizenship adjudications has received little attention by the same scholars and policymakers. As noted, the earliest opportunity an acquired citizen has to assert their U.S. citizenship is at a U.S. consulate.[463] Correctly adjudicating acquired citizenship claims at the consulate-level would prevent the cycle of detention, removal, and incarceration from arising in the first place. Accordingly, affording counsel in consular citizenship adjudications promotes not only greater accuracy but also greater efficiency in adjudications. In anticipation of the generational return of Mexican-American acquired citizens, consulates should afford counsel to indigent acquired citizens. However, affording counsel in consular citizenship adjudications is not just a matter of policy. Acquired citizenship claims are inherently complex. Despite the high stakes at risk, acquired citizens are afforded scarce procedural protections. Consulates must appoint counsel to indigent acquired citizens in accordance with the Due Process Clause of the Fifth Amendment.

A. Due Process in Consular Citizenship Adjudications

Recently, a district court in the Eastern District Court of New York addressed the citizen's right to counsel in consular citizenship adjudications.[464] In *Salem v. Pompeo*, acquired citizens born in Yemen filed for a preliminary injunction against the Department of State seeking to enjoin the U.S. embassy in Djibouti from restricting their right to counsel in passport and Consular Report of Birth Abroad ("CRBA") interviews.[465] Specifically, the Djibouti embassy, which adjudicated Yemeni-based citizenship claims, prohibited attorneys from attending the interviews on the ground that attorneys interfered with the ability of consular officers to adjudicate citizenship claims and detect fraud.[466] The State Department was "resolute" that the acquired citizens had "absolutely no right to counsel" in consular citizenship adjudications.[467] In response, the acquired citizens and their parents contended that the interview policy

461. *See* Stevens, *supra* note 424, at tbls. 4 & 5 (reflecting that 30% of claimed citizens in detention who have an attorney obtain relief from removal compared to 17% of claimed citizens in detention who do not); Jennifer Stave, *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, VERA INST. OF JUST., 24, tbl.3 (Nov. 2017), https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf (observing that 46% of represented individuals in removal proceedings nationally received a successful outcome, compared to 6% of unrepresented individuals); Peter L. Markowitz et al., *Assessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 385 tbl.5 (2011) (observing between a 15-to-63% difference in success rate between unrepresented and represented individuals in New York removal proceedings).

462. *See supra* Section III.D. *See also* Terán, *supra* note 10, at 641 (discussing case of C.J., who successfully asserted his acquired citizenship with the assistance of counsel after being convicted of making a false claim to citizenship).

463. *See supra* Section III.A.

464. *See* Salem v. Pompeo, 432 F. Supp. 3d 222 (E.D.N.Y. 2020).

465. *Id*. at 226. *See supra* note 314 (discussing CRBAs).

466. *See Salem*, 432 F. Supp. 3d at 228.

467. *Id*. at 230.

violated their right to counsel under the Due Process Clause of the Fifth Amendment.[468]

In deciding the controversy, the district court first found that passport and CRBA interviews abroad, though informal, are "adjudications with vast implications on individual liberty interests and thereby require due process."[469] The district court then applied the balancing test for procedural due process claims set out by the Supreme Court in *Mathews v. Eldridge*.[470] A court must consider three factors when determining what due process is required in agency adjudications: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[471]

Applying the first *Mathews* factor, the district court observed that the private interests of the acquired citizens "cannot be overstated."[472] Denying a passport to a U.S. citizen abroad is "tantamount to denationalization, a punishment that the Supreme Court has ruled 'more primitive than torture.'"[473] The district court also alluded to the fundamental right to return, stating that "[d]enying a passport to a U.S. citizen *abroad* is far more serious [than withholding a passport inside the United States] as it strands the individual outside the country and effectively deprives them of their most basic 'right to have rights.'"[474]

The district court did not explicitly weigh the second *Mathews* factor. However, the court noted that most passport and CRBA applicants—i.e., acquired citizens and their parents—are often illiterate and cannot speak English.[475] In fact, the petitioners in *Salem* noted instances where consular officers provided non-English speakers with English-language forms "that, in effect, were false confessions that renounced their right to citizenship."[476] These factors increased the chance that consular officers would erroneously deny a passport to unrepresented acquired citizens and, thus, deny recognition of their acquired citizenship. Given the immense stakes in consular citizenship adjudications, the district court found it "paramount" that interviews "be performed in a way that minimizes the risk of erroneous adjudications."[477]

Finally, regarding the third *Mathews* factor, the district court noted that having counsel present in consular citizenship adjudications created "only a minimal

468. *See id*. at 237-39. The acquired citizen-claimants also argued that they had a right to counsel in consular citizenship adjudications under the Administrative Procedure Act. *See id*. at 230-33, 237. The district court found both a statutory and a constitutional right to counsel in consular citizenship adjudications. *See id*. 237-39.

469. *Id*. at 238.

470. *See id.* at 238-39.

471. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

472. *See Salem*, 432 F. Supp. 3d at 238.

473. *Id*. (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

474. *Id*. (quoting *Trop*, 356 U.S. at 102). *See supra* Part II (discussing the fundamental right to return and the lesser right to travel abroad) (emphasis added).

475. *Salem*, 432 F. Supp. 3d at 238.

476. *Id*. at 227.

477. *Id*. at 238.

administrative burden on the Government."[478] The court also noted that counsel would offer an "important safeguard" to abuses of government power and procedural errors.[479] Accordingly, the district court ruled that the embassy's policy restricting counsel in passport and CRBA interviews violated due process.[480] In doing so, the district court broke new ground by recognizing Fifth Amendment due process right to counsel in consular citizenship adjudications. Nonetheless, the right to obtain and access counsel is realistically of little use to indigent acquired citizens, as hiring an attorney can cost several thousand dollars.[481] This Article takes the procedural due process analysis in *Salem* one step further and contends that indigent acquired citizens have a constitutional right to *appointed* counsel in consular citizenship adjudications.

B. Fifth Amendment Right to Appointed Counsel

The Supreme Court has only sparingly discussed when the Due Process Clause requires appointed counsel in a non-criminal proceeding.[482] With few exceptions,[483] the Supreme Court has refused to recognize a categorical right to appointed counsel in civil matters.[484] In *Lassiter v. Dep't of Social Services*, the Court held that even when the *Mathews* factors lean towards a due process right to appointed counsel, an indigent person is presumptively not entitled to counsel unless their physical liberty is at stake.[485] The *Lassiter* Court determined whether indigent parents had a due process right to appointed counsel in termination of parental status proceedings.[486] As the proceedings did not threaten a parent with incarceration, the Court weighed the *Mathews* factors against the presumption that due process did not require appointed counsel. The Court held that while parents have an important interest in the outcome of termination proceedings and the cost of appointed counsel is relatively minor, the balance of the *Mathews* factors failed to rebut the presumption.[487] The Court reasoned that the proceedings presented a high risk of an erroneous deprivation in only limited situations, such as when an indigent parent is incapacitated.[488] Instead of recognizing a categorical right, the Court adopted a case-

478. *Id*. at 238-39.

479. *Id*.

480. *See id*. at 238. Ultimately, however, the *Salem* court denied the citizen-claimant's motion for preliminary injunction because the embassy in Djibouti rescinded its counsel-restricting policy. *See id*. at 236. Accordingly, the citizen-claimants failed to demonstrate imminent risk of irreparable harm. *See id*. at 235-36 (citing Rodriguez ex rel. Rodriguez v. DeBuono, 175 F.3d 227, 235 (2d Cir. 1999)).

481. *See infra* note 521 (listing attorney's fees for N-600 applications, which are similar in substance to passport applications for acquired citizens).

482. *See, e.g.*, Turner v. Rogers, 564 U.S. 431, 448-49 (2011) (holding that an indigent individual does not have a categorical due process right to appointed counsel in civil contempt proceedings); Lassiter v. Dep't of Social Services, 452 U.S. 18, 33-34 (1981) (holding that indigent parents in parental termination proceedings do not have a categorical due process right to appointed counsel); Vitek v. Jones, 445 U.S. 480, 496-97 (1980) (four-justice plurality finding that prisoners have a due process right to appointed counsel in mental hospital transfer proceedings); In re Gault, 387 U.S. 1, 35–42 (1967) (holding that juveniles have a due process right to appointed counsel in delinquency proceedings). The Sixth Amendment protects the right to appointed counsel in criminal proceedings. *See* Gideon v. Wainwright, 372 U.S. 335, 339-343 (1963).

483. *See* In re *Gault*, 387 U.S. at 35-42.

484. *See Turner*, 564 U.S. at 448-49; *Lassiter*, 452 U.S. at 33-34.

485. *See Lassiter*, 452 U.S. at 26-27.

486. *See id*. at 27.

487. *See id*. at 27, 31.

488. *See id*. at 31.

by-case approach for determining whether due process requires appointed counsel for indigent parents in termination proceedings.[489]

More recently, the Supreme Court elaborated on the *Mathews* test for determining when due process requires appointed counsel in non-criminal proceedings.[490] In *Turner v. Rogers*, the Court weighed three additional considerations: (1) whether the issue in question is "straightforward," (2) whether there exists an "asymmetry of representation," and (3) the availability of "substitute procedural safeguards."[491] A recent opinion from the Ninth Circuit applied these *Turner* factors in the context of immigration proceedings.[492]

In *C.J.L.G. v. Barr*, Circuit Judge Richard Paez wrote a concurring opinion applying the *Turner* factors to determine whether indigent juveniles in removal proceedings had a due process right to appointed counsel.[493] Judge Paez answered in the affirmative.[494] In weighing the first *Turner* factor, Judge Paez noted that immigration law, especially regarding asylum claims, is "exceedingly complex."[495] Second, Judge Paez noted that individuals in removal proceedings face government lawyers specifically trained to enforce immigration laws.[496] Finally, Judge Paez reviewed the procedural safeguards in removal proceedings and found them inadequate to protect the rights of juveniles.[497] Specifically, Judge Paez noted that while immigration judges must advise individuals in removal proceedings of their right to retain counsel, "the ability to pay for counsel is little solace to an indigent child."[498] Judge Paez observed that removal proceedings do not provide a meaningful substitute for appointed counsel.[499] Immigration judges are "neutral fact-finders" saddled with an "enormous" workload that severely compromises their ability to develop a full record, much less act effectively on behalf of unrepresented children.[500] Judge Paez found the notion that an immigration judge can fulfill their obligations while ensuring unrepresented children receive a fair hearing "strains credulity."[501] A child's parent is even worse-positioned to substitute for counsel due to the complexities of immigration law.[502] Judge Paez concluded that the *Turner* factors, combined with the significant liberty interest at stake in removal proceedings and the benefits counsel could bring, rebutted the *Lassiter* presumption and required appointed counsel for juveniles eligible for relief from removal.[503]

C. *Due Process Right to Appointed Counsel in Consular Citizenship*

489. *See Lassiter*, 452 U.S. at 31-32 (citing *Scarpelli*, 411 U.S. at 788).
490. *See* Turner v. Rogers, 564 U.S. 431, 448 (2011).
491. *See id*. 446-48; C.J.L.G. v. Barr, 923 F.3d 622, 632-33 (9th Cir. 2019) (Paez, J., concurring).
492. *See C.J.L.G.*, 923 F.3d at 632-39 (Paez, J., concurring).
493. *See id.*
494. *See id.* at 639.
495. *See id.* at 635.
496. *See id.*
497. *See id.* at 635-8.
498. *Id.* at 636.
499. *See id*. 636-38.
500. *Id*. at 636-37.
501. *Id*. at 637.
502. *See id.*
503. *See id.* at 639.

Adjudications

As discussed, *Salem* recognized a due process right to retain counsel in consular citizenship adjudications.[504] But had the acquired citizens in *Salem* lacked the means to hire counsel, they could have been stranded outside the United States indefinitely. This is the quandary awaiting many Mexican-American acquired citizens in their generational return to the United States. Given the extremely high stakes in consular citizenship adjudications, the complexity of nationality law, and limited procedural protections offered at consulates, the *Mathews* test strongly supports a due process right to appointed counsel in consular citizenship adjudications.[505]

The *Salem* court cogently described the private interest at stake in consular citizenship adjudications.[506] In many respects, U.S. citizenship confers the very "right to have rights."[507] An erroneous adjudication of citizenship, such as a passport denial, obstructs a U.S. citizen's ability to enter the United States, in violation of their fundamental right to return.[508] Excluding a citizen from the United States deprives them of other core rights of citizenship, including the right to work and the right to live freely in the United States.[509] A passport denial may deprive a citizen of their family, companions, and, in effect, "all that makes life worth living."[510] Daniel's case illustrates the devastating impact refusing a passport can have—separating a single father from his disabled daughter in the United States.[511] The Supreme Court has gone so far as to find that the denial of a passport to a citizen outside the United States is "cruel and unusual," when employed as a form of punishment.[512]

Adjudications of acquired citizenship claims are particularly susceptible to error.[513] As discussed, the provisions governing acquired citizenship can be exceedingly complex, requiring careful analysis of domestic and foreign laws.[514] Acquired citizenship eludes immigration officers, consular officers, and even immigration judges and lawyers.[515] The disturbing number of detentions and removals of acquired citizens demonstrates the difficulty in detecting and correctly adjudicating acquired citizenship claims.[516] Moreover, indigent acquired citizens often speak little English and face great challenges navigating the waters of nationality law alone.[517]

504. *See* Salem v. Pompeo, 432 F. Supp. 3d 222, 237-39 (E.D.N.Y. 2020); *supra* Section IV.A.

505. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

506. *See Salem*, 432 F. Supp. 3d at 238.

507. *Id*. (quoting Trop v. Dulles, 356 U.S. 86, 102 (1958)).

508. As noted, citizens legally must present a passport in order to enter the United States. *See* 8 U.S.C. § 1185(b).

509. *See* Truax v. Raich, 239 U.S. 33, 41, (1915); Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977).

510. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

511. *See supra* Section III.D (case of Daniel).

512. *See Trop*, 356 U.S. at 98-104 (holding that refusal to issue a passport to a U.S.-born individual who became stateless due to deserting from the military violated the Eighth Amendment).

513. *See supra* Section III.D (listing numerous examples of incorrect determinations by immigration officials, resulting in the detention, removal, and incarceration of acquired citizens).

514. *See* Watson v. United States, 865 F.3d 123, 141 (2d Cir. 2017); United States v. Covarrubias, No. 3:18-cr-00099-LRH-CLB, 2020 WL 1170216, at *3 (D. Nev. Mar. 11, 2020). *See supra* Section I.B.2, tbl. B; note 445 (applying Mexican law on legitimation of a child born out of wedlock).

515. *See supra* Section III.D (cases of Serna and Daniel).

516. *See supra* note 421 (estimating over 400 acquired citizens detained each year between 2015 and 2018).

517. *See* Salem v. Pompeo, 432 F. Supp. 3d 222, 238 (E.D.N.Y. 2020).

Non-English speakers are also susceptible to misconduct by consular officers, resulting in wrongful passport denials.[518]

Admittedly, the government has "weighty" interests in efficiently enforcing immigration laws and in protecting national security from threats outside the United States.[519] Nevertheless, acquired citizens have a *fundamental* interest in entering the United States.[520] Moreover, appointed counsel in consular citizenship adjudications actually serves the government's interest because the fiscal burden of affording counsel to indigent acquired citizens pales in comparison to the cost and liabilities of erroneous citizenship adjudications. Attorneys may charge anywhere from $500 to $2,500 for assisting acquired citizens assert their citizenship.[521] On the other hand, ICE spends $133.99 per day to detain an individual and approximately $11,000 in total to remove an individual from the United States.[522] The cost of erroneous citizenship adjudications grows further when the government wrongfully prosecutes acquired citizens for criminal immigration offenses. The government spends $102.60 per day to incarcerate inmates and $155 per hour for appointing defense counsel in illegal entry and reentry cases.[523] As acquired citizenship claims typically require months to investigate and adjudicate, administratively and criminally detaining an acquired citizen comes at a hefty cost to the government.[524] The wrongful detention and removal of an acquired citizen may also entitle the aggrieved citizen to tens of thousands of dollars in damages.[525] Based on these expenses and liabilities, Daniel's

518. *See id.* at 227-28; Terán, *supra* note 10, n.319.

519. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 33-34 (2010); Landon v. Plasencia, 459 U.S. 21, 34 (1982).

520. *See supra* Section I.A.

521. This fee estimate is based on attorneys' fees for N-600 applications, which are similar in substance to passport applications for acquired citizens. *See, e.g.*, *Immigration Lawyer Fees*, Musil Law Firm, https://www.musillawfirm.com/immigration-services/immigration-lawyer-fees/ (last accessed Apr. 17, 2022) ($2,500); *Naturalization & Citizenship*, Fickey Martinez Law Firm, https://www.fickeymartinezlaw.com/practice-areas/naturalization-citizenship/ (last accessed Apr. 17, 2022) ($2,000); *Immigration*, Sheri Hoidra Law Office, https://www.sherihoidralaw.com/fees/immigration/ (last accessed Apr. 17, 2022) ($1,250); *Citizenship and Naturalization Fees*, Green Chavez Law Firm, https://www.greenchavez.com/citizenship-and-naturalization-fees (last accessed Apr. 17, 2022) ($1,000); *Immigration Fee Schedule of Lin & Valdez L.L.P.*, Lin & Valdez L.L.P., https://www.linlawfirmusa.com/wp-content/uploads/2019/07/ourfees.pdf (last accessed Apr. 17, 2022) ($500).

522. Budget Overview Fiscal Year 2018, U.S. Immigration and Customs Enforcement at 14 (2018), https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf; *See* Octavio Blanco, *How much it costs ICE to deport an undocumented immigrant*, CNN (Apr. 13, 2017), https://money.cnn.com/2017/04/13/news/economy/deportation-costs-undocumented-immigrant/index.html.

523. *See Annual Determination of Average Cost of Incarceration Fee (COIF)*, 84 FED. REG. 63,891 (Nov. 19, 2019); Criminal Justice Act Guidelines, § 230.16 Hourly Rates and Effective Dates in Non-Capital Cases, U.S. COURTS, https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_16 (last accessed Aug. 1, 2021) (entitling court-appointed counsel up to $155 per hour in non-capital cases).

524. *Supra* Section III.B (discussing N-600 adjudications).

525. *See, e.g.*, Christine Hauser, *U.S. Citizen Detained by ICE Is Awarded $55,000 Settlement*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/ice-detains-woman-california.html ($55,000 for wrongful detention); *United States Agrees to Settle Lawsuit Alleging Wrongful Deportation*, AM. IMMIGR. COUNCIL (July 2, 2015), https://www.americanimmigrationcouncil.org/news/united-states-agrees-settle-lawsuit-alleging-wrongful-deportation ($32,500 for wrongful deportation); Esha Bhandari, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case Against the Federal Government*, ACLU (Oct. 5, 2012), https://www.aclu.org/blog/speakeasy/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal-government ($175,000 for wrongful deportation).

ordeal may have cost the government upwards of $100,000 or more, not including the prosecutorial and judicial resources wasted on his criminal proceeding.[526] The government would have significantly mitigated its liabilities had it provided Daniel with assistance of counsel when he asserted his acquired citizenship at the Juarez consulate. Considering the government has potentially detained hundreds of acquired citizens in recent years,[527] attorney-assisted adjudications of acquired citizenship claims at consulates would save the government a considerable sum of money.

As noted, *Salem* found that counsel's presence during consular citizenship adjudications created a "minimal administrative burden."[528] Appointing counsel to indigent acquired citizens presents an additional challenge—how to secure counsel's presence at passport interviews abroad. Workplace adaptations to the COVID-19 pandemic demonstrate how consulates can accommodate remote access to counsel during passport interviews.[529] Within a few months after the start of the pandemic, courts across the United States adopted video teleconference applications in order to conduct hearings and some criminal trials.[530] Establishing a video link with an attorney during a passport interview would be a relatively simple administrative task. Consulates could also utilize remote simultaneous interpretation platforms, negating the need for on-site translators and facilitating the scheduling of video conferences with attorneys in different time zones.[531] Integrating recent innovations in passport interviews would minimize the inconvenience to the government while safeguarding U.S. citizens' right to counsel. Moreover, appointed counsel would reduce the workload of consular officers by allowing attorneys to identify legal issues underpinning complex citizenship claims and introduce evidence in an organized, expedient manner.[532] The State Department has also admitted that attorneys can help "weed out 'bad' cases" and discourage falsifying information.[533]

The *Turner* factors also support the necessity of providing appointed counsel in consular citizenship.[534] Firstly, asserting acquired citizenship is far from

526. This approximation includes $11,000 for Daniel's prior removal, $15,000 for Daniel's 5-month long incarceration, the Author's estimated attorney's fees for Daniel's representation in federal court and USCIS, and damages for Daniel's wrongful removal and incarceration. *See* Blanco, *supra* note 522 (cost of removal); *Annual Determination of Average Cost of Incarceration Fee (COIF)*, *supra* note 523 ($102.60 per day of incarceration); U.S. COURTS, *supra* note 523 ($155 per hour of legal work); *supra* note 525 (listing damages of other detained and removed citizens ranging from $32,500 to $175,000).

527. *See supra* note 421 (estimating over 400 acquired citizens detained each year between 2015 and 2018).

528. Salem v. Pompeo, 432 F. Supp. 3d 222, 238-39 (E.D.N.Y. 2020).

529. *See generally*, Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875 (2021). Even before the pandemic, attorneys based in the United States used video teleconference applications to prepare their clients for interviews at consulates. *See* Jan M. Pederson, *The Fundamentals of Lawyering at Consular Posts*, AM. IMMIGR. LAWS. ASS'N, 33 (2017), http://ailaoh.org/wp-content/uploads/2018/10/Fundamentals-of-Lawyering-at-Consular-Posts.pdf.

530. *See* Bannon & Keith, *supra* note 529. at 1880-85.

531. *See, e.g.*, LANGUAGE LINE SOLUTIONS, https://www.languageline.com/s/ (last accessed Apr. 18, 2022); INTERACTIO, https://www.interactio.io/ (last accessed Jan. 30, 2022); INTERPREFY, https://www.interprefy.com/ (last accessed Jan. 30, 2022).

532. *See Petition for Rulemaking to Promulgate Regulations Governing Access to Counsel*, *supra* note 22, at 20.

533. *See* Pederson, *supra* note 529, n.4 (citing Department of State (DOS) Cable, 83 State 323769 (Nov. 1983) from Cornelius D. Scully, III, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, to U.S. Consulate, Taipei.).

534. *See* Turner v. Rogers, 564 U.S. 431, 446-48 (2011).

straightforward. Acquired citizens must analyze varying domestic and foreign laws and procure a wide array of documentary evidence while living outside the United States.[535] A deep asymmetry of counsel also exists in consular citizenship adjudications. While not practicing attorneys, consular officers may refer acquired citizenship claims to State Department attorneys.[536] State Department attorneys provide employees with guidance and advisory opinions on complex claims to citizenship.[537] Further, State Department attorneys devise the agency regulations and instructions which consular officers must apply in adjudicating citizenship claims.[538] Essentially, an acquired citizen asserting their citizenship is up against an international "law firm" specialized in nationality law. Finally, State Department regulations provide minimal safeguards in consular citizenship adjudications. While consular officers must request missing information and provide an explanation for denying a passport,[539] they do not assist indigent acquired citizens in tasks critical to developing their citizenship claims, such as gathering missing records from agencies and employers or affidavits from witnesses in the United States. Consular officers also face massive workloads, particularly in Mexico-based consulates.[540] It is unrealistic to expect overworked consular officers to protect the right to return of unrepresented acquired citizens while effectively adjudicating visas, CRBAs, passports, and countless other applications. Current regulations provide no safeguard that could even remotely substitute for appointed counsel.

Considering the extremely high stakes in consular citizenship adjudications, the complexity of acquired citizenship, and the relatively low burden appointed counsel would impose on the government, the *Mathews* and *Turner* factors handily rebut the *Lassiter* presumption. To find otherwise would uphold a system which hinges an acquired citizen's right to return on their ability to pay and essentially forces indigent acquired citizens to choose between banishment and punishment.[541] Such a system defies fundamental fairness and must not persist.[542]

CONCLUSION

As Mexican-American children uprooted from their homes rebuild their lives in Mexico, the historical parallels between the Mexican "Repatriation," Operation Wetback, and recent expulsions of Mexican immigrants become clear. Over time, this new diaspora will give rise to a generation of acquired citizens born in Mexico. History demonstrates that many of these acquired citizens will eventually embark on a

535. *See supra* Section I.B.2, tbls. A & B; Part III.

536. *See* U.S. Dep't of State, Vol. 1, Foreign Affairs Manual § 255.1-1(e)(8) (nationality and citizenship determinations by Office of American Citizens Services ("ACS")), 255.1-3(b)(1)(b) (legal advice by Office of Legal Affairs to ACS on citizenship matters).

537. *See* U.S. Dep't of State, Vol. 1, Foreign Affairs Manual § 255.1-3(b)(4) (nationality determinations by Office of Legal Affairs).

538. *See* U.S. Dep't of State, Vol. 1, Foreign Affairs Manual § 255.1-3(b)(1)(h), (j).

539. *See* U.S. Dep't of State, Vol. 8, Foreign Affairs Manual § 103.1-7

540. *See supra* note 326.

541. *See* 8 U.S.C. §§ 1185(b) (requiring citizens present a passport when entering the United States), 1325 (criminalizing undocumented entry), 1326 (criminalizing undocumented reentry); Mohamed v. Holder, 995 F. Supp. 2d, 520, 536 (E.D. Va. 2014) (holding the right to return attaches wherever a citizen desires to return); Fikre v. FBI, 23 F. Supp. 3d 1268, 1282 (D. Or. 2014) (holding the government cannot deprive a citizen of all viable means of returning to the United States).

542. *See* Worthy v. United States, 328 F.2d 386, 394 (5th Cir. 1964) .

generational return to the United States. When they do, many acquired citizens will struggle to assert their U.S. citizenship. Asserting acquired citizenship is a costly, document-intensive process governed by a complex statutory scheme that was designed to restrict ethnic Mexicans from entering the United States. Many acquired citizens will come from working-class backgrounds and have little knowledge of acquired citizenship. Many will not speak English or have the means to hire an attorney to assist them. As such, a new generation of Mexican-American acquired citizens risks falling into the same cycle of detention, removal, and incarceration that has harmed past generations.

It is not enough that acquired citizens receive appointed counsel in removal proceedings. Due process requires appointed counsel for indigent acquired citizens in consular citizenship adjudications. A wrongful passport denial violates an acquired citizen's fundamental right to return to the United States and strips them of their very "right to have rights." Acquired citizenship eludes even skilled professionals and is liable to erroneous adjudications. Consulates provide little to no assistance to acquired citizens asserting their citizenship, leaving those who cannot afford to hire an attorney on their own. Appointed counsel may spell the difference between vindicating one's birthright citizenship and de-nationalization. Daniel's ordeal also demonstrates the cascading effects of failing to provide counsel to indigent acquired citizens and how appointed counsel in consulates can break the devastating cycle of detention, removal, and incarceration.

"[C]itizenship is a most precious right" for *all* U.S. citizens.[543] The rights of acquired citizens are no less precious. The time has come to treat acquired citizens with the fairness and dignity demanded by due process and relegate the injustices inflicted on Mexican-American acquired citizens to the past.

543. Kungys v. United States, 485 U.S. 759, 783 (1988) (Brennan, J., concurring).