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The Citizenship Line: Rethinking Immigration Exceptionalism

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THE CITIZENSHIP LINE: RETHINKING IMMIGRATION EXCEPTIONALISM

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Abstract: It is not possible to police the movement of "aliens" without first determining who is and is not a citizen. Yet little scholarly attention has been devoted to the nature of citizenship determinations or their implication for our understanding of immigration enforcement as a whole. Thousands of U.S. citizens are caught up in immigration enforcement actions every year, and dozens of cases have come to light in which erroneous deportations can be traced to the lack of procedural protections within the deportation system, manifested in summary proceedings, lengthy detention, and lack of access to counsel. Such cases compel us to reconceptualize citizenship as not just a status that precedes immigration enforcement but also one that is, in a functional sense, produced by such enforcement. This insight has important consequences for both theoretical understandings of citizenship and constitutional analysis of immigration enforcement. Drawing on historical and contemporary material, this Article proposes a new understanding of "immigration exceptionalism," exploring its implications for the rights of both citizens and noncitizens and highlighting its central reliance on the notion that citizenship status can function as a threshold jurisdictional inquiry. Arguing that such reliance is misplaced, this Article proposes a wholesale reconsideration of immigration enforcement's procedural norms.

Introduction

As immigration enforcement continues its stunning expansion in the United States, individuals across a range of statuses—documented and undocumented, citizen and noncitizen—are increasingly feeling its

* Associate Professor, Northeastern University School of Law. I am grateful to Linda Bosniak and Hiroshi Motomura for their guidance at numerous stages of the writing of this Article; to Kerry Abrams, Libby Adler, Martha Davis, Daniel Kanstroom, Jennifer Lee Koh, Stephen Lee, Jacqueline Stevens, and the participants in the 2012 Immigration Law Teacher's Workshop and the Northeastern University School of Law Faculty Colloquium for their comments on earlier drafts; to Jaime Diez and Lisa Brodyaga for sharing their insights regarding the litigation of citizenship claims; and to Jessica Brokaw, Gavi Bogin-Farber, Giovanni DiMaggio, Rebekkah Provine, Anielka Sanchez Godinez, Isela Ramos, and Becky Schapiro for excellent research assistance.

effects.[1] The substantive provisions of the Immigration and Nationality Act ("INA") apply only to "aliens," defined as those who are "not . . . citizen[s] or national[s] of the United States."[2] It is impossible, however, to police the movement of noncitizens without first determining who is and is not a citizen. Scholars and advocates have long argued that immigration enforcement has widespread effects on U.S. citizens who are racially profiled as foreign.[3] Yet scholarship is only just beginning to consider the nature of citizenship determinations and their implication for our understanding of immigration enforcement as a whole.[4]

This Article argues that acknowledging the presence of U.S. citizens within the immigration enforcement system calls into question

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[1] Since 2003, immigration enforcement has fallen primarily to two agencies within the Department of Homeland Security ("DHS"): Immigration and Customs Enforcement ("ICE"), which enforces immigration laws in the interior; and U.S. Customs and Border Protection ("CBP"), which enforces immigration laws at U.S. borders and ports of entry. 6 U.S.C. §§ 252, 271, 291 (2012). Historically, a variety of agencies and departments have enforced immigration laws, including the Department of the Treasury and the now-disbanded Immigration and Naturalization Service ("INS"). 6 U.S.C. § 291 (2012); Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390 (repealed 1943); U.S. Citizenship and Immigration Services, Overview of INS History 4–5 (2012), *available at* http://www.uscis.gov/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf. As this Article discusses immigration enforcement efforts dating from the late nineteenth century, it employs the term "immigration enforcement" to refer to the enforcement actions of whichever governmental agency has been tasked with enforcing immigration laws at the relevant time at issue.

[2] 8 U.S.C. § 1101(a)(3) (2012). The INA governs the admission and deportation of noncitizens as well as many aspects of citizenship itself. For a critique of the use of the term "alien" in legal and political discourse, 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, 273 (1997) (arguing that "[t]he term alien serves as a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering").

[3] *See, e.g.*, Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 Wash. U. L.Q. 675, 677–78 (2000); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 654 (2011) (describing "[w]idespread, unlawful and ethnic profiling at the borders, in workplaces, and in prisons").

[4] *See, e.g.*, Jennifer Lee Koh, *Rethinking Removability in Immigration Law*, 65 Fla. L. Rev. (forthcoming Dec. 2013) (discussing citizenship claims as one example of "complex removability"); Stevens, *supra* note 3 (presenting empirical research on the detention and deportation of U.S. citizens); 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 (2012) (describing challenges faced by Mexicans who claim U.S. citizenship on the basis of their births to U.S. citizen parents); Laura Donohue, Note, *The Potential for a Rise in Wrongful Removals and Detention Under the United States Immigration and Customs Enforcement's Secure Communities Strategy*, 38 New Eng. J. on Crim. & Civ. Confinement 125 (2012) (arguing that immigration enforcement strategies after September 11, 2001 caused the detention and deportation of many U.S. citizens).

some basic tenets of the U.S. Supreme Court's immigration jurisprudence. A person who claims, but has not yet established, citizenship stands on the divide not only between two divergent outcomes (the right to remain versus the potential to be deported), but also between two different conceptions of procedural justice. Case law, statutes, and regulations grant more robust due process protections to citizenship claims than to other claims that arise within the removal process.[5] This distinction exemplifies a larger divide that relegates noncitizens to a constitutional netherworld with regard to immigration enforcement procedures. Yet a closer look at the experiences of U.S. citizens within this system, both past and present, reveals the elusiveness of a clear boundary between noncitizens and citizens. The relaxed procedural norms of immigration law have shown a tendency to migrate into the treatment of citizenship determinations.[6] So have the racial fault lines of immigration law: known cases in which U.S. citizens have been detained and deported tend to reflect the immigration enforcement priorities of the day, with the majority of early cases involving Chinese Americans and the majority of contemporary cases involving Latinos, particularly Mexican Americans.[7]

Although most citizenship claims are easily documented, there remain many U.S. citizens who have a tenuous evidentiary hold on their status.[8] Citizenship determinations occur in many forms, from an officer's snap judgment about whom to question to prolonged litigation before agency adjudicators and courts. In some contexts, such as passport control at an airport, a citizenship determination may be routine and unremarkable. Yet a person taken into custody in a workplace raid or upon release from the county jail may have no ready means of proving citizenship. There are many examples—stretching from the late nineteenth century to the present day—of cases in which U.S. citizens have had to wage protracted battles to prove their citizenship, or have been deported prior to being able to do so. The case law is filled

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[5] *See infra* notes 210–235 and accompanying text. Before 1996, noncitizens apprehended at the border were placed in "exclusion" proceedings, and those apprehended in the interior were placed in "deportation" proceedings. In 1996, Congress consolidated these two types of proceedings under the new term "removal." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1229). This Article uses the term "removal proceedings" when discussing post-1996 proceedings. It also uses the term "deportation" in its colloquial sense to refer collectively to orders of deportation, exclusion, and removal.

[6] *See infra* notes 236–255 and accompanying text.

[7] *See infra* notes 303–314 and accompanying text.

[8] *See infra* notes 31–115 and accompanying text.

with unrecorded births and birth certificates whose authenticity is questioned.[9] Citizenship claims based on descent often require would-be citizens to prove not only their parents' or grandparents' places of birth, but also that the relatives spent the requisite amount of time in the United States to convey citizenship to a child.[10] In some cases, valid documentation of citizenship is readily available but never enters the official record due to the summary nature of immigration proceedings, the inherently coercive effects of detention, and the lack of legal representation for detainees.[11]

Incidents in which U.S. citizens have been subject to deportation or prolonged detention are often characterized as mistakes or outliers.[12] I argue that rather than relegating such incidents to the margins, we should recognize the extent to which they are woven into the fabric of immigration enforcement. At the dawn of federal immigration restriction in the late nineteenth century, the U.S. Supreme Court set immigration law apart from other areas of constitutional doctrine by deeming Congress's power to be "plenary" with regard to both the admission and deportation of foreign nationals.[13] The plenary power doctrine has diminished in scope over the decades, but immigration law has continued to stand apart in both its procedural and substantive aspects.[14] Although this "immigration exceptionalism" has drawn extensive attention from immigration law scholars, commentary tends to focus primarily on its implications for the rights of noncitizens.[15] Here, I

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[9] Terán, *supra* note 4, at 603–06; Rachel E. Rosenbloom, In the Borderlands of Citizenship: Birth Registration Along the U.S.-Mexico Divide 15 (Sept. 25, 2012) (unpublished manuscript) (on file with author).

[10] *See* 7 Charles Gordon et al., Immigration Law and Procedure § 93.02[5][c]–[d] (rev. ed. 2012).

[11] *See infra* notes 78–79 and accompanying text (describing an immigration detainee who was unable to gather documentation of citizenship because of his detention).

[12] *See, e.g.*, *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 2 (2008) [hereinafter *ICE Hearing*] (statement of Rep. Steve King, Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law) (noting the safeguards in place to prevent the deportation of U.S. citizens and stating that "[t]o deal with all of [immigration enforcement] without a single mistake would be asking too much of a mortal"); Paloma Esquivel, *Suit Filed over Man's Deportation Ordeal*, L.A. Times, Feb. 28, 2008, at B4, *available at* http://articles.latimes.com/2008/feb/28/local/me-guzman28 (quoting an ICE official describing Guzman's case as "one-of-a-kind").

[13] *See infra* notes 126–128 and accompanying text.

[14] *See infra* notes 133–152 and accompanying text.

[15] *See infra* note 129 and accompanying text (citing scholarship that discusses the implications of immigration exceptionalism for noncitizens). Although this literature has generally not considered the direct effects of plenary power on U.S. citizens, some of it has

set forth a broader understanding of immigration exceptionalism, highlighting its implications for the rights of both citizens and noncitizens. This more expansive version of immigration exceptionalism, which I call the "citizenship line," stands on three principles: first, that the government has heightened powers with regard to the admission or deportation of noncitizens; second, that U.S. citizens are exempt from the exercise of such powers and therefore must be accorded not only greater substantive rights but also enhanced procedural protections; and third, that citizenship therefore must be treated as a threshold jurisdictional question.

The citizenship line, which is embodied in case law, statutes, regulations, and agency policies, reflects an understanding of citizenship that is generally echoed in scholarship as well—that the population of the world is easily divided into two groups: those who are U.S. citizens and those who are not.[16] In practice, though, it is fairly easy to misclassify a U.S. citizen as a noncitizen. Such misclassifications often stem from the relaxed procedural safeguards embodied in the immigration enforcement system, including lack of counsel, the prospect of prolonged detention, and summary proceedings.[17] This phenomenon suggests the need to understand citizenship not just as a status that precedes immigration enforcement but as one that can be produced, at least in a functional sense, by such enforcement.

Courts and agency officials in the early days of immigration enforcement widely acknowledged this understanding of citizenship as a potentially unstable status, shaped not only by relevant doctrine but by the procedures used to determine it. They also openly acknowledged the role of race in resolving cases where the evidentiary record was unclear.[18] In the present era, however, with the proliferation of documentary evidence of citizenship, the end of formal racial classifications in the immigration laws, and the development of a set of ostensible safeguards for citizenship claims, this aspect of citizenship is rarely, if ever, acknowledged.[19] I argue that recent deportations of U.S. citizens reveal

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insightfully explored plenary power's collateral effects on citizens. *See, e.g.*, Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. Colo. L. Rev. 1361, 1390–91 (1999); Hiroshi Motomura, *Immigration and* We the People *After September 11*, 66 Alb. L. Rev. 413, 422 (2003).

[16] *See infra* notes 282–294 and accompanying text.

[17] *See infra* notes 239–255 and accompanying text.

[18] *See infra* notes 295–300 and accompanying text.

[19] *See infra* note 163 and accompanying text.

its continuing relevance, and the enduring fragility of the citizen-alien distinction that forms the bedrock of immigration law.

There are many vantage points from which one might launch a critique of immigration enforcement in general and of the U.S. immigration enforcement system in particular. Some have compellingly questioned the wisdom or legitimacy of imposing restrictions at the border.[20] Many have questioned the substantive norm—so central to U.S. immigration jurisprudence, but out of step with international human rights norms[21]—that even long-term residents with significant ties to the United States have no fundamental right to be territorially present beyond the protections of international refugee law or the meager forms of relief provided by federal statute.[22] In contrast to these substantive criticisms of immigration exceptionalism, this Article focuses on exceptionalism's procedural aspects. It offers an argument that, while perhaps more modest in scope than these substantive critiques, is entirely new: that this system reveals itself to be premised on a distinction between citizens and noncitizens that has not proven strong enough to bear the weight that the courts have placed on it.

Part I of this Article provides four recent examples of U.S. citizens who have been erroneously deported or denied entry to the United States.[23] Part II briefly reviews plenary power and immigration exceptionalism and then introduces a new and more expansive understanding of exceptionalism as a system that has implications for both citizens and noncitizens.[24] Part III traces the development of the citizenship line from the late nineteenth century to the present and describes its failure

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[20] *See, e.g.*, Jacqueline Stevens, States Without Nations: Citizenship for Morals 81–85 (2010). *See generally* Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, Rev. Pol., Spring 1987, at 251 (arguing that three major contemporary approaches to political theory justify open borders); Kevin R. Johnson, *Open Borders?*, 51 UCLA L. Rev. 193 (2003) (describing moral, economic, and other policy justifications for opening borders).

[21] *See* Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 Emory L.J. 1243, 1251–60 (2013); *see also* Beharry v. Reno, 183 F. Supp. 2d 584, 600 (E.D.N.Y. 2002) (contrasting U.S. deportation doctrine with customary international law), *rev'd and remanded*, 329 F.3d 51 (2d Cir. 2003); Maria v. McElroy, 68 F. Supp. 2d 206, 231–35 (E.D.N.Y. 1999) (same), *abrogated by* Restrepo v. McElroy, 369 F.3d 627 (2d Cir. 2004). *See generally* Angela M. Banks, *Deporting Families: Legal Matter or Political Question?*, 27 Ga. St. U. L. Rev. 489 (2011) (contrasting American and European approaches to deportation).

[22] *See, e.g.*, Joseph H. Carens, Immigrants and the Right to Stay 7–8 (2010); Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States 190–200 (2006); Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 Scholar 437, 530–32 (2013).

[23] *See infra* notes 31–115 and accompanying text.

[24] *See infra* notes 116–162 and accompanying text.

to achieve the goal of protecting U.S. citizens from immigration enforcement.[25] In Part IV, I present four interrelated arguments regarding this failure and what it tells us about immigration enforcement and about the nature of citizenship.[26] I first argue that citizenship claims that arise within the immigration adjudication system are not ordinary jurisdictional disputes but rather reveal a deep contradiction at the core of the Supreme Court's immigration jurisprudence.[27] I then argue that this insight should lead to a new understanding of the relationship between citizenship as a legal status and citizenship in the broader sense of full membership in society, an understanding that takes into account the important and underexplored role that the procedural norms of immigration enforcement play in shaping the functional boundaries of citizenship.[28] Next, I argue that the role of race in the adjudication of citizenship claims may not be as obvious as it was a century ago, but nevertheless remains significant.[29] Finally, I argue that deportations of U.S. citizens signal the existence of much broader problems within the immigration enforcement system, and that an effective solution cannot focus solely on citizenship claims but rather requires a wholesale rethinking of the system's procedural norms.[30]

I. The Fragility of Citizenship

On April 9, 1970, a headline in the *Los Angeles Times* proclaimed, "Native American Deported to Mexico in 'Tragic' U.S. Error."[31] The article described the case of Fernando Ontiverof, "[a] mentally retarded Mexican-American youth—a native of Santa Barbara—[who] was reunited with his family in Van Nuys Wednesday after having been deported to Mexico in what immigration officials termed a 'tragic error.'"[32] Ontiverof was reportedly taking legally prescribed tranquilizers that affected his ability to communicate.[33] Michael Fargione, then-Deputy Regional Commissioner for the Immigration and Naturalization Service ("INS"), explained that "the youth kept mentioning his

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[25] *See infra* notes 163–255 and accompanying text.
[26] *See infra* notes 256–326 and accompanying text.
[27] *See infra* notes 260–266 and accompanying text.
[28] *See infra* notes 268–294 and accompanying text.
[29] *See infra* notes 295–314 and accompanying text.
[30] *See infra* notes 315–326 and accompanying text.
[31] Ken Lubas, *Native American Deported to Mexico in 'Tragic' U.S. Error*, L.A. Times, Apr. 9, 1970, at 1.
[32] *Id.*
[33] *Id.*

sister's home as his home. We had no way of knowing he was born in Santa Barbara."[34] After the INS transported Ontiverof to Tijuana and left him there, a family friend eventually found him begging for food near Mexico City and helped return him to his parents.[35]

Under both Supreme Court precedent and statutory law, only those who lack U.S. nationality or citizenship are subject to the statutory requirements governing admission and deportation.[36] Nevertheless, since the earliest days of federal immigration restriction, U.S. citizens have frequently come into contact with immigration enforcement.[37] Moreover, the exponential expansion of immigration enforcement over the past few decades has increased the potential for individuals with a variety of statuses—from undocumented immigrants to those in lawful immigrant or non-immigrant status to those who are U.S. citizens—to interact with such enforcement in one form or another.[38] A hallmark of the new immigration enforcement system is its increasing integration

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[34] *Id.*

[35] *Id.*

[36] 8 U.S.C. § 1101(a)(3) (2012); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). For a discussion of the distinction between citizens and nationals, see 8 U.S.C. § 1408; Stephen H. Legomsky & Cristina M. Rodriguez, Immigration and Refugee Law and Policy 6 (5th ed. 2009).

[37] *See infra* notes 169–209 and accompanying text.

[38] Annual deportations have increased more than twentyfold in the past thirty years, from 17,379 in 1981 to 391,953 in 2011. *Aliens Removed or Returned: Fiscal Years 1892 to 2011*, Dep't of Homeland Sec., http://www.dhs.gov/yearbook-immigration-statistics-2011-3 (follow "Table 39" hyperlink) (last visited Oct. 17, 2013). Prosecution of immigration-related crimes, such as illegal entry or reentry, has increased tenfold since 1980. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1, 21 (2012). Another way to gauge the scope of the expansion of immigration enforcement is through federal appropriations. From 2004 to 2013, federal spending on interior immigration enforcement increased from $960 million to nearly $2.7 billion. Marc R. Rosenblum & William A. Kandel, Cong. Research Serv., R42057, Interior Immigration Enforcement: Programs Targeting Criminal Aliens 24 (2012). This expansion has been particularly evident in funding for programs for the removal of non-citizens arrested or convicted of criminal offenses, which increased thirtyfold between 2004 and 2011—from $23 million to $690 million—before dropping slightly to $608 million by 2013. *Id.* The federal government now spends more on the various immigration enforcement agencies than on all other federal criminal law enforcement agencies combined. *See* Doris Meissner et al., Migration Policy Inst., Immigration Enforcement in the United States: The Rise of a Formidable Machinery 11 (Jan. 2013), http://www.migrationpolicy.org/pubs/enforcementpillars.pdf (analyzing the 2013 fiscal year, in which the U.S. government spent $18 billion on immigration enforcement compared to the combined $14.4 billion it spent on the Federal Bureau of Investigation, the Drug Enforcement Agency, the Secret Service, the U.S. Marshals Service, and the Bureau of Alcohol, Tobacco, and Firearms). For an analysis of the growth of the deportation system, see Daniel Kanstroom, Aftermath: Deportation Law and the New American Diaspora 3–18 (2012).

with the criminal justice system.[39] Individuals who have any contact with law enforcement and are suspected of being foreign nationals are at risk of being funneled into the detention and removal process.[40]

Statistics on the number of U.S. citizens detained or deported are elusive, but a few recent studies suggest some starting points. One study of the files of 8,027 detainees held in a pair of immigration detention facilities in Arizona between 2006 and 2008 found that 1% of those in detention were ultimately determined by immigration judges to be U.S. citizens,[41] whether by acquired citizenship,[42] derived citizenship,[43] or citizenship by birth in the United States.[44] Additionally, a 2009 report by an affiliate of the New York City Bar Association revealed that 8% of detainees surveyed at a New York City immigration detention center had derivative citizenship claims that appeared to be valid.[45] A survey of immigration attorneys in Minnesota found that 38% of attorneys who had represented detained clients between 2007 and 2009 reported having represented at least one detained U.S. citizen.[46] Finally, a 2011 report by the Warren Institute at the University of California at Berkeley found that 1.6% of those apprehended by Immigration and Customs Enforcement ("ICE") through its Secure Communities program were U.S. citizens.[47]

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[39] *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash. & Lee L. Rev. 469, 471–73 (2007) (describing the emerging literature on the convergence of immigration law and criminal law); Juliette Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 376 (2006) (coining the term "crimmigration").

[40] *See* Legomsky, *supra* note 39, at 472, 482–86 (describing the vast array of criminal convictions that may result in deportation); Stumpf, *supra* note 39, at 383–84 (same).

[41] Stevens, *supra* note 3, at 622.

[42] "Acquired citizenship" refers to citizenship automatically conveyed at birth from a U.S. citizen parent to a child born abroad. *See* 8 U.S.C. §§ 1401(c)–(e), 1401(g)–(h), 1401a, 1409 (2012).

[43] "Derivative citizenship" refers to citizenship automatically derived by a child under the age of eighteen, under specified circumstances, upon the naturalization of a parent. *See id.* § 1431.

[44] The Fourteenth Amendment to the U.S. Constitution grants citizenship to all those "born or naturalized in the United States, and subject to the jurisdiction thereof." U.S. Const. amend. XIV, § 1, cl. 1.

[45] City Bar Justice Ctr., NYC Know Your Rights Project 12 (2009), http://www2.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf.

[46] Jacob Chin et al., *Attorneys' Perspectives on the Violation of the Civil Rights of Immigrants Detained in Minnesota*, CURA Rep., Spring/Summer 2010, at 16, 18.

[47] Aarti Kohli et al., The Chief Justice Earl Warren Inst. on Law & Soc. Policy, Secure Communities by the Numbers: An Analysis of Demographics and Due Process 4 (2011), http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf. Secure Communities is a DHS program that facilitates the sharing of data between ICE and

Cases similar to Ontiverof's have been documented with increasing frequency over the past few years.[48] Drawing on cases reported in scholarly articles, media reports, and the private files of attorneys, this Part provides four examples, involving five individuals, that illustrate the ways in which immigration enforcement impacts U.S. citizens. Section A discusses Peter Guzman, who accepted "voluntary" departure after being induced to sign a document that he could not understand stating he was not a citizen.[49] Section B discusses "Antonio," who was deported after being unable to gather evidence of his citizenship during his ten months in immigration detention.[50] Section C discusses Laura Nancy Castro and Yuliana Castro, who were denied entry into the United States after their mother was coerced into falsely admitting that their birth certificates were fraudulent.[51] Finally, Section D describes Mark Lyttle, who was deported after an immigration court hearing in which he gave up his citizenship claim out of fear that he would be subject to lengthy detention if he fought his case.[52]

A. *Peter Guzman*

Peter Guzman (sometimes referred to as Pedro Guzman), who was born and raised in Southern California, accepted "voluntary"[53] departure after signing documents he did not understand.[54] Guzman came into contact with immigration enforcement in 2007 while in criminal

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state and local law enforcement agencies. *See Secure Communities*, U.S Immigr. & Customs Enforcement, http://www.ice.gov/secure_communities/ (last visited Aug. 25, 2013).

[48] *See* Stevens, *supra* note 3, at 620 (referring to thirty-two cases of U.S. citizens who were deported since 2003); Terán, *supra* note 4, at 651–54 (describing several cases in detail and referring to dozens of illegal reentry cases handled by federal defender offices in Texas that resulted in findings of U.S. citizenship).

[49] *See infra* notes 54–66 and accompanying text.

[50] *See infra* notes 67–85 and accompanying text.

[51] *See infra* notes 86–100 and accompanying text.

[52] *See infra* notes 101–115 and accompanying text.

[53] Voluntary departure is governed by 8 U.S.C. § 1229c (2006). It functions as an alternative to an order of removal. *See* 8 U.S.C. § 1229c; *see also* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. Rev. 475, 486–491 (2012) (describing removal proceedings and the voluntary departure process).

[54] *See, e.g.*, *ICE Hearing*, *supra* note 12, at 33 (statement of James J. Brosnahan and Mark D. Rosenbaum); Esquivel, *supra* note 12; Daniel Hernandez, *Pedro Guzman's Return*, LA Wkly., Aug. 7, 2007, http://www.laweekly.com/2007-08-09/news/pedro-guzman-s-return/; Jacqueline Stevens, *Thin ICE*, Nation, June 23, 2008, at 21, 21–22, *available at* http://www.thenation.com/article/thin-ice#.

custody on a minor vandalism charge.[55] He declared himself a U.S. citizen at his booking.[56] Nonetheless, ICE officials later interviewed him regarding his status pursuant to an agreement between the Los Angeles County Board of Supervisors and the Department of Homeland Security under the 287(g) Program, through which local law enforcement personnel may perform immigration enforcement functions otherwise left to the federal government.[57] Guzman attended special education classes as a child and reportedly has difficulty reading and writing.[58] He cannot remember his home phone number.[59] He has complained of hearing voices and was prescribed antipsychotic medication one week after his arrest.[60] At the interview regarding his citizenship status, at which no attorney was present, Guzman signed a document written in Spanish that he could not understand.[61] The document stated that he was a Mexican citizen with no legal status in the United States, and that he agreed to voluntarily depart to Mexico.[62] On the basis of this statement, ICE transported Guzman by bus to Tijuana and left him there.[63]

Despite a lawsuit by the American Civil Liberties Union, widespread media attention, and sustained search efforts by his family members, Customs and Border Protection ("CBP") repeatedly turned Guzman away at border crossing points.[64] Guzman wandered in Mexico for three months, eating out of garbage cans.[65] He was eventually able

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[55] *ICE Hearing*, *supra* note 12, at 33 (statement of James J. Brosnahan and Mark D. Rosenbaum). Guzman was originally arrested for trespass, but later pleaded guilty to vandalism before coming into contact with immigration enforcement. *Id.*

[56] *Id.*

[57] *See id.* at 32; *see also* 8 U.S.C. § 1357(g) (2012) (authorizing DHS to enter into agreements with state and local governments to promote cooperation on immigration enforcement matters); Dep't of Homeland Sec. & L.A. Cnty. Bd. of Supervisors, Memorandum of Understanding 1 (Jan. 25, 2005), *available at* http://www.ice.gov/doclib/foia/ memorandumsofAgreementUnderstanding/losangeles_county_board_of_supervisors.pdf (authorizing cooperation between the DHS and Los Angeles jail authorities on immigration enforcement matters).

[58] *ICE Hearing*, *supra* note 12, at 32 (statement of James J. Brosnahan and Mark D. Rosenbaum).

[59] *Id.* (statement of James J. Brosnahan and Mark D. Rosenbaum).

[60] *Id.* at 33 (statement of James J. Brosnahan and Mark D. Rosenbaum).

[61] Second Amended Complaint at 11, Guzman v. United States, No. 2:08-cv-03127-GHK-SS (C.D. Cal. July 16, 2010).

[62] *ICE Hearing*, *supra* note 12, at 33 (statement of James J. Brosnahan and Mark D. Rosenbaum).

[63] *Id.* (statement of James J. Brosnahan and Mark D. Rosenbaum).

[64] Esquivel, *supra* note 12.

[65] *Id.*

to return to the United States only because CBP took him into custody at the border after his name showed up on a database indicating that there was a criminal warrant out for his arrest due to his failure to appear at a probation hearing.[66]

B. *"Antonio"*

"Antonio"[67] was born in Mexico in 1954.[68] His mother, a U.S. citizen, was born in Texas in 1922 and lived in the United States for her entire life, first in Texas and later in California.[69] In the early 1950s, while living in Brownsville, Texas, she was involved for several years with a Mexican man who lived just across the border in Matamoros, Mexico.[70] The couple had two children, Antonio and his brother, both of whom were born in Matamoros.[71] The children lived with their mother in Brownsville during their early years.[72] By the time Antonio was four, however, he and his brother went to live with a family friend in Matamoros who raised them for about five years, at which point they began living with their father.[73] Antonio visited his mother periodically after that and in 1977 he applied for a certificate of citizenship.[74] Although the application that he submitted was marked as recommended for approval, his case was later closed because he failed to submit additional requested evidence.[75] In 1986, his mother died.[76]

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[66] Hernandez, *supra* note 54. Guzman's suit for constitutional violations eventually settled. *See* Guzman v. United States, No. 2:08-cv-03127-GHK-SS (C.D. Cal. May 11, 2010) (court order granting settlement).

[67] The name of this individual has been changed to protect his privacy, and identifying information has been removed from all citations relating to his case. Many thanks to Attorney Jaime Diez for providing information about this case.

[68] Antonio's Application for Certificate of Citizenship and supporting documents (Mar. 20, 2003) (on file with author).

[69] *Id.* These facts are sufficient to make Antonio a U.S. citizen from birth by action of law. *See* 8 U.S.C. § 1409(c) (2012) (granting citizenship to an out-of-wedlock child born abroad to a U.S. citizen mother where the mother has been present in the United States for one year prior to the child's birth); Gordon et al., *supra* note 1010, § 93.02[5][c]–[d].

[70] Antonio's Application for Certificate of Citizenship, *supra* note 68 (affidavits of Antonio and his father).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] Antonio's Application for Certificate of Citizenship, *supra* note 68.

Antonio was placed in removal proceedings in 2001 and was held in immigration detention for ten months.[77] He explained to the immigration judge that he could not gather proof to support his citizenship claim while detained.[78] Unable to persuade the judge to release him and unable to afford an attorney, he finally gave up fighting his case and was removed to Mexico.[79] Following his removal, he applied for a passport at a U.S. consulate in Mexico, but was again unable to gather the necessary proof to support his claim.[80]

Having determined that he would not be able to establish citizenship from outside of the country, Antonio reentered the U.S. without inspection, at which point he was apprehended and charged with the federal crime of illegal reentry following removal.[81] Now the subject of a criminal charge, he was entitled to a court-appointed attorney. Because U.S. citizenship is a defense to an illegal reentry claim,[82] the court-appointed attorney obtained the assistance of an immigration attorney in filing a new application for a certificate of citizenship.[83] After six months, the government dismissed the illegal reentry charge based on the apparent strength of Antonio's citizenship claim and released him from criminal custody.[84] He was nevertheless held in immigration detention for six more months, until his application for a certificate of citizenship was finally granted.[85]

C. *Yuliana and Laura Nancy Castro*

Yuliana and Laura Nancy Castro were born in Texas, in 1980 and 1984 respectively, to parents who were Mexican citizens residing in Mexico.[86] Both grew up in Mexico and eventually settled in Texas and

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[77] Email from Jaime Diez to author (June 19, 2013, 15:33 EST) (on file with author).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Indictment (Oct. 8, 2002) (on file with author); *see* 8 U.S.C. § 1326(a).

[82] *See* 8 U.S.C. § 1326(d) (2012) (providing for the collateral attack on the validity of an underlying removal order within a criminal proceeding on illegal reentry charge, under specified circumstances); *see also* United States v. Mendoza-Lopez, 481 U.S. 828, 837–39 (1987) (holding that an illegal reentry conviction under the prior version of 8 U.S.C. § 1326 would violate the defendant's Fifth Amendment right to due process if based on a deportation proceeding that lacked fundamental fairness).

[83] Email from Jaime Diez, *supra* note 77.

[84] Motion to Dismiss Indictment (Apr. 9, 2003) (on file with author).

[85] Email from Jaime Diez, *supra* note 77.

[86] Fourth Amended Class Action Complaint at 12, Castro v. Freeman, No. 1:09-cv-00208 (S.D. Tex. June 1, 2011) [hereinafter *Castro* Complaint]. Under the Fourteenth Amendment, the Castro sisters are American citizens by virtue of their births in the United

began raising families there.[87] In August 2009, after visiting family in Mexico, they attempted to return from Matamoros, Mexico to Brownsville, Texas with their mother, Trinidad Muraira de Castro.[88] Under the Western Hemisphere Travel Initiative ("WHTI"), which went into effect in June 2009, U.S. citizens must have a passport to enter the United States at a land border crossing.[89] CBP, however, had a publicized policy of permitting applicants for admission to show a birth certificate and a receipt for the passport application instead of a passport.[90] Crossing the border soon after the WHTI had gone into effect, Laura Nancy presented a U.S. passport, and Yuliana presented her Texas birth certificate and passport application receipt.[91] Their mother presented a visitor visa.[92]

CBP officers subjected the three women to extensive questioning regarding the veracity of Yuliana and Laura Nancy's citizenship claims.[93] Officials took the three women into separate rooms and held them for over ten hours, during which time officials "interrogated, mocked, harassed, and threatened [them] with deportation or imprisonment" and repeatedly asked them to sign confessions that the birth certificates were fraudulent.[94] CBP denied them food and water and refused requests to call for help or speak to relatives who had come to the border crossing to look for them.[95] Yuliana Castro, who was recovering from childbirth and travelling with her newborn baby, later described hearing her baby cry uncontrollably outside the examination

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States. *See* U.S. Const. amend. XIV, § 1, cl. 1. Many thanks to attorneys Jaime Diez and Lisa Brodayaga for providing information about this case.

[87] *Castro* Complaint, *supra* note 86, at 12; Jazmine Ulloa, *Born to Be Barred*, Tex. Observer, May 2010, at 7, 7, *available at* http://www.texasobserver.org/cover-story/born-to-be-barred.

[88] *Castro* Complaint, *supra* note 86, at 13; Ulloa, *supra* note 87, at 7; Jazmine Ulloa, *Record: Mother, Daughters Detained Because Birth Certificate from Midwife*, Brownsville Herald, Jan. 2, 2010, http://www.brownsvilleherald.com/articles/midwife-106964-brownsville-daughters.html.

[89] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7209, 118 Stat. 3638, 3823–24, *amended by* Pub. L. No. 109-295, § 546, 120 Stat. 1355, 1386–87 (2006), *and* Pub. L. No. 110-53, § 723, 121 Stat. 266, 349–50 (2007) (codified as amended at 8 U.S.C. § 1185 (2012)); *see* 22 C.F.R. § 53.1 (2013).

[90] *Castro* Complaint, *supra* note 86, at 11.

[91] Ulloa, *supra* note 87, at 7.

[92] *Id.*

[93] Castro v. Freeman, No. 1:11-cv-00087 (S.D. Tex. Apr. 26, 2011); Ulloa, *supra* note 87, at 8.

[94] Ulloa, *supra* note 87, at 8; *accord Castro*, No. 1:11-cv-00087, at 3.

[95] *Castro* Complaint, *supra* note 86, at 13; Ulloa, *supra* note 87.

room during her interrogation.[96] According to her description, "the officer continued harassing me, yelling at me, and telling me that I was Mexican and that he was going to deport me. . . . After a while, I realized I had no way out since he told me no matter what I did, to him I was Mexican."[97] After approximately ten hours, Trinidad Muraira de Castro signed a statement saying that her daughters' birth certificates were fraudulent and that they were not U.S. citizens.[98] Immigration officials then confiscated the women's documents, recorded the applications for entry as withdrawn, and forced them to return to Mexico.[99] The Department of State later recognized the validity of the Castros' citizenship claims, after they filed suit for a declaratory judgment in federal court.[100]

D. *Mark Lyttle*

Mark Lyttle was born in North Carolina and lived his entire life in the United States before being deported to Mexico in 2008.[101] Lyttle, who has a history of mental illness and cognitive impairment, came into contact with ICE following a misdemeanor assault charge stemming from an incident that occurred while he was a patient at a psychiatric hospital.[102] After interviewing Lyttle in the prison mental health ward in which he was being held, an ICE agent filled out a form that identified Lyttle as Jose Thomas and alleged that he had entered the United States from Mexico without authorization at age three.[103] The agent insisted that Lyttle sign it without allowing him to review the contents

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[96] Ulloa, *supra* note 87, at 8.

[97] *Id.* (quoting Yuliana Castro).

[98] *Id.*

[99] *Id.*

[100] *Castro*, No. 1:11-cv-00087, at 3.

[101] Lyttle v. United States, 867 F. Supp. 2d 1256, 1266 (M.D. Ga. 2012); Complaint at 1–2, Lyttle v. United States, No. 4:10-cv-00142 (E.D.N.C. Oct. 13, 2010) [hereinafter *Lyttle* Complaint]; Stevens, *supra* note 3, at 675–77; Kristin Collins, *N.C. Native Wrongly Deported to Mexico*, Charlotte Observer, Aug. 30, 2009, at 1B, *available at* http://www.charlotteobserver.com/2009/08/30/917007/nc-native-wrongly-deported-to.html; William Finnegan, *The Deportation Machine*, New Yorker, Apr. 29, 2013, at 24. *See generally* Posts with Label Mark Lyttle, States Without Nations, http://stateswithoutnations.blogspot.com/search/label/Mark%20Lyttle (providing extensive coverage and commentary on Mark Lyttle's cases).

[102] *Lyttle* Complaint, *supra* note 101, at 7.

[103] *Id.* at 9. ICE chose to interview Lyttle based on an intake form filled out by a prison official that erroneously listed his ethnicity as "Oriental," his citizenship as "alien," and his birthplace as Mexico. *Id.* at 8.

of the form.[104] Lyttle signed the statement saying that he was Jose Thomas, but signed it with his own name.[105] The agent later filed a report stating that Lyttle's claim to having been born in North Carolina was dismissed because Lyttle did "not possess any documentation to support his claim."[106] As the removal process continued, Lyttle continued to state that he was a U.S. citizen, but again signed forms that identified him as Jose Thomas, under similarly coercive circumstances.[107] Lyttle was ordered removed by an immigration judge at a hearing in which he had no counsel.[108] Asked later why he did not appeal the removal order, Lyttle replied, "I was going to appeal until I found out that it would be six months to two years [in detention] before I'd have a chance [to have the case heard], and even if I did that, they still wouldn't believe me."[109]

ICE subsequently deported Lyttle to Mexico.[110] Eight days later, he made an unsuccessful attempt to reenter the United States and was removed within hours.[111] He was later deported from Mexico, and endured a four-month odyssey in Honduras, Nicaragua, and Guatemala, during which time he was jailed and suffered numerous health problems.[112] Lyttle finally managed to get the U.S. consulate in Guatemala to contact his brother, who sent proof of his citizenship.[113] Lyttle then traveled back to the United States on a temporary passport, but was nevertheless initially placed once again in removal proceedings upon his arrival.[114] He was released two days later.[115]

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[104] *Id.* at 10.

[105] *Id.*

[106] Collins, *supra* note 101.

[107] *Id.*

[108] *Lyttle*, 867 F. Supp. 2d at 1272 (stating that "it is reasonable to infer that the [immigration judge] simply rubber-stamped the false conclusion and unsupported record constructed by . . . ICE Defendants that stated Lyttle was a citizen of Mexico").

[109] Jacqueline Stevens, *U.S. Kidnaps Mark Lyttle, Leaves Him Stateless in Mexico, Honduras, Nicaragua, Guatemala*, States Without Nations (Apr. 24, 2009, 8:35PM), http://stateswithoutnations.blogspot.com/2009/04/us-kidnaps-mark-lyttle-leaves-him.html (quoting interview with Mark Lyttle).

[110] *Lyttle*, 867 F. Supp. 2d at 1272

[111] *Id.* at 1272–73.

[112] *Id.* at 1273.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 1272.

II. Citizens, Noncitizens, and Exceptionalism

The deportation of a U.S. citizen has no basis in law.[116] The interesting question, then, is not *if* such cases represent errors but rather *what kind* of problem they reveal. How do we make sense of cases in which U.S. citizens have been deported? A common response to these incidents is that they are, as the 1970 *L.A. Times* headline put it, "tragic . . . error[s]."[117] Such a response suggests that the problem lies solely in the functioning of the threshold sorting mechanism that determines who is and who is not subject to immigration enforcement. In other words, these are the right procedures, but they have been directed at the wrong people. The remainder of this Article argues that such a response falls short in that it assumes the existence of a clear line dividing citizens from noncitizens and fails to acknowledge the role of immigration procedures themselves in shaping the functional boundaries of citizenship. Rather than simply signaling a shortcoming in the sorting mechanism, such cases raise fundamental questions about immigration enforcement and its procedural norms.

To lay the groundwork for this argument, this Part considers how the immigration enforcement system is, doctrinally speaking, supposed to work. Section A provides a brief overview of plenary power and immigration exceptionalism as traditionally conceived.[118] Section B adds a new dimension to this account by considering immigration exceptionalism as a system that embodies assumptions not just about the rights of noncitizens but about the rights of citizens and the nature of citizenship as well.[119]

A. *Immigration Exceptionalism*

Within immigration law, the statutory line drawn by citizenship status is stark. The requirements set forth by the INA, from visa criteria to grounds of deportability, apply solely to those who are "not . . . citizen[s] or national[s] of the United States."[120] Immigration courts,

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[116] *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[117] *See* Lubas, *supra* note 31, at 1; *accord ICE Hearing*, *supra* note 12, at 3 (statement of Rep. Steve King, Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law) (noting the safeguards put in place to prevent deportation of U.S. citizens and stating that "[t]o deal with all of [immigration enforcement] without a single mistake would be asking too much of a mortal"); Esquivel, *supra* note 12 (quoting an ICE official who described Guzman's case as "one-of-a-kind").

[118] *See infra* notes 120–152 and accompanying text.

[119] *See infra* notes 153–162 and accompanying text.

[120] 8 U.S.C. § 1101(a)(3) (defining "alien").

which have the power to order the forcible removal of a noncitizen from the United States, have no jurisdiction over U.S. citizens.[121] Immigration officers have no authority to detain them.[122]

The relationship of citizenship status to the Constitution is more complex. The Bill of Rights has proved to be "a futile authority for the alien seeking admission for the first time to these shores,"[123] but "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[124] Territoriality alone, however, does not resolve all constitutional questions. Even when considering the rights of those present on U.S. soil, the U.S. Supreme Court has returned on numerous occasions to one central axiom: "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[125]

The starting point for any discussion of immigration exceptionalism is the plenary power doctrine. The fundamental premise of the plenary power doctrine, as stated in the 1892 Supreme Court case *Nishimura Ekiu v. United States*, is that "every sovereign nation has the

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[121] *See* 8 U.S.C. § 1229 (2012) (establishing the requirements for the initiation of removal proceedings against "aliens"); *Ng Fung Ho*, 259 U.S. at 284 ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact.").

[122] Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, to Field Officer Directors, Special Agents in Charge, and Chief Counsels 1 (Nov. 19, 2009) [hereinafter Guidance on Citizenship Claims], *available at* www.ice.gov/doclib/detention-reform/pdf/usc_guidance_nov_2009.pdf (providing the most recent guidance in a series of memoranda, and stating that "[a]s a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a [U.S. citizen]"); *see also* Andrew Becker, *Observe and Deport*, Mother Jones (Apr. 23, 2009, 8:35 AM), http://www.motherjones.com/politics/2009/04/observe-and-deport (quoting Representative Zoe Lofgren who stated, "There's no jurisdiction for the government to arrest or detain, or let alone deport, citizens. That's otherwise known as kidnapping . . . ."). Outside of the immigration context, a host of other federal statutes distinguish between citizens and noncitizens in areas such as public benefits, employment, investment, and business ownership. *See* Mathews v. Diaz, 426 U.S. 67, 78 & n.12 (1976).

[123] Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

[124] Zadvydas v. Davis, 533 U.S. 678, 693 (2001). The U.S. Supreme Court has long held that a noncitizen who is territorially present and facing removal has the right to notice and an opportunity to be heard. *See* Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86, 101 (1903).

[125] Demore v. Kim, 538 U.S. 510, 521 (2003) (quoting *Mathews*, 426 U.S. at 79–80). On the relationship between territoriality and constitutional rights, see generally Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership (2006); Gerald L. Neuman, Strangers to the Constitution (1996).

power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[126] Early cases paint this power to exclude as one that the federal government may "exercise at any time when, in the judgment of the government, the interests of the country require it," without interference by the courts.[127] The case law from this era also recognizes the government's power to deport to be as absolute and unqualified as its power to exclude those arriving at the border.[128]

A number of scholars have chronicled the emergence of cracks in the plenary power doctrine over the decades.[129] Plenary power exerts less influence on the procedural rights of noncitizens than on their substantive rights.[130] It exerts less influence on the rights of those apprehended in the United States than on those standing (literally or figuratively) at the border.[131] Finally, at the border, the doctrine exerts less

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[126] 142 U.S. 651, 659 (1892).

[127] Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889); *accord Nishimura Ekiu*, 142 U.S. at 659.

[128] Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).

[129] *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 55–66 (1998) [hereinafter Chin, *Segregation's Last Stronghold*]; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 258 [hereinafter Legomsky, *Immigration Law*]; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. 925, 931–37 (1995); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 564–80 (1990); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1637–46, 1650–56 (1992) [hereinafter Motomura, *Curious Evolution*]; Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 62–73 (1984); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 Geo. Immigr. L.J. 339, 341–46 (2002); *see also* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 Geo. Immigr. L.J. 257, 258 (2000) (arguing that at the time the foundational plenary power cases were decided, the Supreme Court could have reached the same result even if the cases had involved the rights of citizens under domestic constitutional law); Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 Admin. L. Rev. 565, 587–90 (2012) (arguing that in the context of nonlegislative rules, immigration law is in step with the rest of federal administrative law).

[130] *Compare* Harisiades v. Shaughnessy, 342 U.S. 580, 586–87 (1952) (declining to recognize any substantive right to remain in the United States for a longtime legal resident facing deportation), *with Yamataya*, 189 U.S. at 90 (recognizing the procedural right to notice and opportunity to be heard in deportation proceedings).

[131] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

influence on the rights of returning lawful residents than on the rights of new arrivals.[132]

Despite this gradual weakening of plenary power, however, immigration law remains largely outside mainstream American constitutional jurisprudence. This phenomenon can best be seen by looking at the least "exceptional" aspect of immigration law: the rights of those apprehended in the interior of the United States who face deportation. The Supreme Court has long recognized the right to procedural due process under the Fifth Amendment for noncitizens who fall within this category.[133] Yet those who find themselves in removal proceedings encounter a system that lacks many of the safeguards generally associated with adjudications that involve deprivations of liberty, separation from family members, and other weighty interests. Respondents in removal proceedings have the right to counsel but not at the government's expense.[134] They have the right to present evidence in their defense but without the benefit of many key protections of the criminal system, such as the hearsay rule, the exclusionary rule, and *Miranda* warn-

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[132] Landon v. Plasencia, 459 U.S. 21, 32–33 (1982); *see also* Legomsky, *Immigration Law*, *supra* note 129, at 260 (arguing that these gradations may neglect important individual interests); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v Davis, 2001 Sup. Ct. Rev. 47, 49 ("Though the Court often enforces such gradations, it has not been entirely revealing or convincing about the differences, and certainly has failed to make clear just what dividing lines count for various categorical distinctions."). In addition, the line drawn by citizenship has never been as stark outside immigration law as within it. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 237 (1896) (striking down a statute providing for imprisonment at hard labor, without trial by jury, for Chinese immigrants unlawfully present in the United States); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that the selective application of a San Francisco ordinance to Chinese-owned laundries violated the Equal Protection Clause of the Fourteenth Amendment); Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down a Texas law that denied public education to undocumented children). This fault line can be characterized as the distinction between immigration law and alienage law. *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. Pa. L. Rev. 341, 351–53 (2008) (critiquing the distinction between immigration law and alienage law). The plenary power doctrine, however, has never been reducible to this distinction. *See Mathews*, 426 U.S. at 78 (applying the plenary power doctrine to uphold federal restrictions on public benefits for noncitizens). Ingrid Eagly and Jennifer Chacon have both argued persuasively against the common assumption that noncitizens are treated the same as citizens within the realm of criminal law. *See* Jennifer Chacon, *Managing Migration Through Crime*, 109 Colum. L. Rev. Sidebar 135, 140–47 (2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281, 1337–59 (2010).

[133] *See Yamataya*, 189 U.S. at 101.

[134] 8 U.S.C. § 1229a(b)(4)(A)–(B) (2012); 8 C.F.R. § 1240.10(a)(1), (4) (2013).

ings.[135] Many detainees face mandatory detention without an individualized determination that they are a danger or a flight risk.[136]

The pairing of limited procedural safeguards with very high stakes sets removal proceedings apart from other legal proceedings. Detention can last for months or years while proceedings and appeals are pending.[137] Deportees face separation from home, family, and community and, for some, the return to a country of persecution.[138] Immigration Judge Dana Marks captured this distinctive combination when she compared the hearings of asylum applicants to "holding death penalty cases in traffic court."[139] Although Judge Marks was referring in particular to those who face potential persecution if removed from the United States, the Supreme Court has repeatedly recognized the high

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[135] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984). The Supreme Court categorizes removal proceedings as civil rather than criminal. *See id.* ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."). The Court thus held in its 1984 decision in *INS v. Lopez-Mendoza* that the exclusionary rule, which generally prohibits the admission of evidence obtained in searches that violate the Fourth Amendment, applies to immigration stops only in the case of "egregious" violations. *Id.* at 1050–51. The Court's groundbreaking 2010 decision in *Padilla v. Kentucky*—holding that criminal defendants have a constitutional right to be informed of the immigration consequences of a guilty plea—has prompted commentary on the potential for transcending the civil versus criminal distinction that has traditionally limited the constitutional rights of noncitizens within the realm of immigration proceedings. *See* 559 U.S. 356, 374 (2010); Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. Rev. 1461, 1494–1509 (2011); Peter L. Markowitz, *Deportation Is Different*, 13 U. Pa. J. Const. L. 1299, 1339–60 (2011). *See generally* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289 (2008) (critiquing, pre-*Padilla*, the designation of deportation as civil); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 Admin. L. Rev. 305 (2000) (same).

[136] *See Demore*, 538 U.S. at 529–31. The INA mandates detention for certain noncitizens while their removal proceedings are pending, including most people who are deportable because of criminal activity and most of those apprehended at the border. 8 U.S.C. § 1226(c)(1); 8 C.F.R. § 236.1(c)(4)–(5). Those who are not subject to mandatory detention may seek a bond hearing before an immigration judge if the Department of Homeland Security declines to release them. 8 U.S.C. § 1226(a)(1)–(2). To be released, a detainee must demonstrate that he or she "would not pose a danger to the safety of other persons or of property . . . [and] is likely to appear for any scheduled proceeding." 8 C.F.R. § 236.1(c)(3).

[137] Legomsky & Rodriguez, *supra* note 36, at 651.

[138] *See Ng Fung Ho*, 259 U.S. at 284; *Fong Yue Ting*, 149 U.S. at 759 (Field, J., dissenting).

[139] Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. Times, Feb. 9, 2010, at A14, *available at* http://www.nytimes.com/2010/02/09/us/09immig.html (quoting Immigration Judge Dana Marks).

stakes of deportation more generally.[140] This disjuncture has grown as immigration enforcement has expanded in recent decades and has taken on many characteristics of the criminal justice system. The current state of immigration enforcement has been described as representing the "worst of both worlds," with the harsh enforcement methods of the criminal justice system, but few of its constitutional protections.[141] The inadequacies of the current immigration adjudication system have prompted criticisms by the American Bar Association, advocacy groups, and scholars in recent years.[142] There are growing calls for both a reorganization of the immigration court system[143] and the provision of ap-

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[140] *See, e.g.*, *Ng Fung Ho*, 259 U.S. at 284 ("[Deportation] may result . . . in loss of both property and life; or of all that makes life worth living."); *Fong Yue Ting*, 149 U.S. at 759 (Field, J., dissenting) ("As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted.").

[141] Legomsky, *supra* note 39, at 472. Stephen Legomsky has described the convergence of immigration law and criminal law as being asymmetric:

> Those features of the criminal justice model that can roughly be classified as enforcement have indeed been imported. Those that relate to adjudication—in particular, the bundle of procedural rights recognized in criminal cases—have been consciously rejected. Rather than speak of importation of the criminal *justice* model, then, a more fitting observation would be that immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal *enforcement* model while rejecting the criminal *adjudication* model in favor of a civil regulatory regime.

Id.

[142] *See generally* Comm'n on Immigration, Am. Bar Ass'n, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf (providing a critique of the immigration adjudication system and proposing reforms); Chi. Appleseed Fund for Justice, Assembly Line Injustice: Blueprint to Reform America's Immigration Courts (2009), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf (same); Chi. Appleseed Fund for Justice, Appleseed, Reimagining the Immigration Court Assembly Line (2012), *available at* http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf (critiquing the changes made in the immigration court system between 2009 and 2012); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. Kan. L. Rev. 541 (2011) (discussing various factors leading to shortcomings in immigration adjudications); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595 (2009) (analyzing the government's growing use of explicit and implicit waivers to bypass formal removal proceedings).

[143] *See* Comm'n on Immigration, *supra* note 142, at 2-28 to -42; Preston, *supra* note 139.

pointed counsel to some or all categories of individuals in removal proceedings.[144]

Paramount among the features that make immigration enforcement unique within the American legal system are the mandatory detention provision of the INA, which prevents many respondents in removal proceedings from being eligible for release on bond,[145] and the fact that courts have not recognized either detention or the threat of

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[144] *See* Sam Dolnick, *Improving Immigrant Access to Lawyers: Advocates Gather to Discuss 'Substantial Threat' to Justice*, N.Y. Times, May 4, 2011, at A24. *See generally* Comm'n on Immigration, *supra* note 142 (arguing that granting a right to representation would increase the fairness and efficiency of the immigration system); Immigration & Nationality Law Comm., N.Y. City Bar Ass'n, Report on the Right to Counsel for Detained Individuals in Removal Proceedings (2009), *available at* http://www2.nycbar.org/citybar justicecenter/images/stories/pdfs/report-on-the-right-to-counsel-20071793.pdf (arguing that due process rights require appointment of counsel to indigent persons facing removal); Erin Corcoran, *Bypassing Civil* Gideon*: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. Va. L. Rev. 643 (2012) (advocating for legislative reform to provide non-attorney accredited representatives to all indigent noncitizens in removal proceedings); Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 Yale L.J. 2394 (2013) (arguing that lawful permanent residents facing removal have a due process right to appointed counsel); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 Harv. J. on Legis. 331 (2013) (arguing for a right to counsel for unaccompanied minors facing immigration proceedings); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63 (2012) (arguing for a constitutional right to counsel for persons subject to mandatory detention pending removal proceedings); Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court-Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. Pa. J.L. & Soc. Change 1 (2013) (arguing for court-appointed counsel for mentally ill persons in immigration proceedings).

[145] *See* 8 U.S.C. § 1226(c) (2012); Dora Schriro, U.S. Dep't of Homeland Sec., Immigration Detention Overview and Recommendations 2 (2009), *available at* http:// www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (stating that 66% of detainees on September 1, 2009 were subject to mandatory detention). On detention, see Amnesty Int'l, Jailed Without Justice 44–46 (2009), *available at* http://www.amnesty usa.org/research/reports/usa-jailed-without-justice?page=show (advocating for a presumption against detention and for increased judicial scrutiny of immigration detention); Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 Harv. Nat'l Sec. J. 85, 141–52 (2011) (discussing the vast reach of the immigration detention system); Noferi, *supra* note 144, at 68; Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Const. L.Q. 1087, 1113–18 (1995) (describing inhumane conditions at immigration detention facilities); Frances M. Kreimer, Note, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. Rev. 1485, 1512–21 (2012) (arguing that the immigration detention system has evolved into a system of domestic crime control and thus should be subject to more stringent constitutional scrutiny).

deportation to trigger a constitutional right to appointed counsel.[146] Although the Supreme Court has applied heightened scrutiny to civil confinement in other contexts, it has declined to do so with regard to the detention of those in removal proceedings,[147] concluding that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[148]

Another arena in which immigration law continues to stand apart is in the use of racial profiling in immigration enforcement. While recognizing the continuities between racial profiling within and outside immigration law, scholarship on the subject has nevertheless noted the persistence of a jurisprudential double standard that has been far more

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[146] *See* Legomsky, *supra* note 39, at 526; Noferi, *supra* note 144, at 68 ("Procedurally, immigration removal proceedings uniquely provide for preventive pretrial detention without counsel pursuant to underlying proceedings without counsel.").

[147] *Compare* Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (holding that an individual committed after pleading not guilty by reason of insanity could not be held once he had recovered his sanity absent full civil commitment proceeding), *In re* Winship, 397 U.S. 358, 365–66 (1990) (importing high procedural standards associated with criminal proceedings to juvenile delinquency proceedings because "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts" (quoting *In re* Gault, 387 U.S. 1, 36 (1967))), Jones v. United States, 463 U.S. 354, 361 (1983) ("It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (internal quotation marks omitted)), *and* Addington v. Texas, 441 U.S. 418, 431–33 (1979) (holding that in order to satisfy the Due Process Clause, the standard of proof in civil commitment hearings must be "clear and convincing"), *with Demore*, 538 U.S. at 529–31 (allowing detention of immigration detainees without individualized bond determination). In its 2011 decision in *Turner v. Rogers*, the Supreme Court held that the Fourteenth Amendment did not require court-appointed counsel in a civil contempt hearing stemming from non-payment of child support, even though the defendant faced up to twelve months of incarceration. 131 S. Ct. 2507, 2520 (2011). The Court, however, noted that the opposing party in such cases was often unrepresented by counsel, and suggested, in dicta, that the result might be different in a case in which the party seeking to collect child support was the state. *See id.* The Court also noted that its holding did not extend to unusually complex cases in which a defendant "can fairly be represented only by a trained advocate." *Id.* at 2520 (internal quotation marks omitted). Thus, *Turner* would seem to be of little relevance in the immigration context, where courts have repeatedly recognized the complexity of the statutory scheme. *See, e.g.*, Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004) ("[I]mmigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth." (quoting Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987)) (internal quotation marks omitted)).

[148] *Demore*, 538 U.S. at 528. *But see Zadvydas*, 533 U.S. at 682 (holding that the INA requires individualized custody review for those subject to indefinite detention due to the inability of the United States to effect removal).

accepting of the practice within immigration enforcement.[149] In addition to repeatedly upholding the use of race as a criteria for admission,[150] the Supreme Court has shown more tolerance for race-based stops within the context of immigration enforcement than it has in other contexts,[151] holding that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" in the decision to make an immigration stop.[152]

B. *Bringing Citizenship into View*

Immigration exceptionalism has generally been viewed as an approach to the treatment of noncitizens, based on one founding principle: that a sovereign nation has heightened power to determine the rights of noncitizens to enter or remain within the territory. Yet to set forth a standard for the treatment of noncitizens begs the question of how citizens should be treated. A more expansive description of immigration exceptionalism would thus include a second principle: that U.S. citizens are *not* directly subject to the heightened powers wielded by sovereign nations in the realm of immigration enforcement.[153]

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[149] *See* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543, 1550 (2011) (noting the Court's greater acceptance of racial profiling within immigration enforcement and stating that such cases "import a pernicious aspect of immigration exceptionalism into criminal procedure"); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is There a Plenary Power Doctrine?, 14 Geo. Immigr. L.J. 289, 293 (2000) (observing that "[s]alient differences exist between the lawful role of race in criminal and immigration law enforcement").

[150] *See* Chin, *Segregation's Last Stronghold*, *supra* note 129, at 3–4 & nn. 4–13 (citing cases from United States courts of appeals that "honor an unbroken line of Supreme Court decisions holding that 'Congress may exclude aliens of a particular race from the United States'" (quoting *Yamataya*, 189 U.S. at 97)).

[151] *See* Johnson, *supra* note 149, at 294; Johnson, *supra* note 3, at 692–96.

[152] United States v. Brignoni-Ponce, 422 U.S. 872, 886–87 (1975); *accord* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (upholding referrals to secondary inspection at immigration checkpoints based on Mexican appearance). Racial profiling of Arabs, Muslims, and South Asians has drawn particular attention in the wake of the attacks of September 11, 2001. *See generally* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L. 295 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 Conn. L. Rev. 1185 (2002); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 Asian L.J. 1 (2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002).

[153] The application of immigration laws often impacts U.S. citizens who wish to have a particular noncitizen present in the United States. Although U.S. citizens have challenged

This principle gives rise not only to the substantive right to remain in the United States but also to procedural rights. Citizenship has been recognized by the Supreme Court as being "a most precious right," subject to the highest possible protection under the Due Process Clause.[154] Discussing border control during the Chinese Exclusion era,[155] the Court proclaimed in 1920 in *Kwock Jan Fat v. White*, "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."[156] This doctrine, which we might call "citizenship exceptionalism," can be seen as a carve-out within immigration law in which the Constitution applies with full force, an exception to the exception.[157] Citizenship exceptionalism, which has been the sub-

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the application of such laws as direct violations of their own constitutional rights, the courts have maintained a rigid distinction between such cases and cases that allege the actual apprehension, detention, and removal of U.S. citizens. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 794–95 (1977) (rejecting argument that effects of INA on constitutional rights of U.S. citizen family members necessitated a higher level of judicial scrutiny); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (rejecting a First Amendment action by U.S. citizens seeking to compel the Attorney General to grant a visa to Belgian Marxist Ernst Mandel to attend academic conferences and events in the United States).

[154] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963); *accord* Fedorenko v. United States, 449 U.S. 490, 507 (1981) (referring to citizenship as a "priceless treasure" (quoting Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting))).

[155] The Chinese Exclusion Era spanned from 1882 to 1943. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 280–81 (1996). Immigration laws that initially excluded only the Chinese were subsequently broadened to prohibit Asian immigration more generally. *See id. See generally* Lucy E. Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law 69–91 (1995).

[156] 253 U.S. 454, 464 (1920); *see also* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (stating that "the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race," and confirming that the Court's "holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship").

[157] Although the Supreme Court accords special treatment to factual claims regarding citizenship, the Court has equivocated about whether such treatment extends to substantive challenges to the statutory requirements for citizenship by descent. In the 1998 Supreme Court case *Miller v. Albright*, the Court upheld a statute distinguishing between citizenship by descent passed from mothers and fathers, in part because of the deferential standard of review required in immigration cases. 523 U.S. 420, 434 & n.11 (1998) (plurality opinion). Justice Stephen Breyer's dissent criticized the plurality's approach on this issue, arguing that statutes conferring citizenship at birth should not receive a lenient standard of review, because they involve the rights of citizens, not aliens. *Id.* at 480–81 (Breyer, J., dissenting). This debate continued in the 2001 Supreme Court case *Nguyen v. INS*, in which the majority stated in dicta that, had the Court not found that the statute in question survived conventional equal protection scrutiny for gender-based distinctions, it

ject of little commentary, manifests itself in numerous aspects of contemporary case law, statutes, regulations, and agency policy.[158] For example, citizenship determinations benefit from more robust judicial review than other factual claims that arise in removal proceedings.[159] Another example can be found within expedited removal, a fast-track deportation procedure that bypasses the immigration courts but does not apply to those who claim U.S. citizenship.[160] Part III describes this doctrine in more detail and traces its development over the course of the twentieth century.

The addition of this second principle in turn necessitates a third. A system built on exceptionalism can function only if everyone subject to immigration enforcement can be categorized as either a citizen or noncitizen. Thus, the third pillar of this system is that citizenship determinations function as a threshold inquiry, a jurisdictional prerequisite to a removal proceeding. The Supreme Court declared in the 1922 case *Ng Fung Ho v. White* that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."[161] As with citizenship exceptionalism, this component of the citizenship line has been the subject of little analysis.[162]

In sum, this system rests on not one but three interlocking principles: first, that the government may exercise power over noncitizens within the realm of immigration law that would be unacceptable if applied to citizens; second, that U.S. citizens must be exempt from this exercise of executive power; and third, that a threshold inquiry can de-

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would have had to consider whether a more lenient standard of review should apply in light of the deference traditionally accorded to Congress on immigration matters. 533 U.S. 53, 72–73 (2001). In dissent, Justice Sandra Day O'Connor argued that plenary power had no relevance in a citizenship case, stating that "[t]he instant case is not about the admission of aliens but instead concerns the *logically prior* question whether an individual is a citizen in the first place." *Id.* at 96–97 (O'Connor, J., dissenting) (emphasis added).

[158] *See, e.g.*, *Ng Fung Ho*, 259 U.S. at 284; 8 C.F.R. 253.3(b)(5) (2013); Guidance on Citizenship Claims, *supra* note 122, at 1.

[159] *See, e.g.*, *Ng Fung Ho*, 259 U.S. at 284; *infra* notes 226–227 and accompanying text.

[160] *See infra* notes 229–230 and accompanying text.

[161] *Ng Fung Ho*, 259 U.S. at 284; *accord* Frank v. Rogers, 253 F.2d 889, 890 (D.C. Cir. 1958) ("Until the claim of citizenship is resolved, the propriety of the entire proceeding is in doubt.").

[162] Some scholarly interest in this matter is beginning to emerge. *See generally* Stevens, *supra* note 3 (presenting empirical research about the frequency of immigration detentions and deportations of U.S. citizens); Terán, *supra* note 4 (describing challenges faced by Mexicans who claim U.S. citizenship on the basis of their births to U.S. citizen parents).

termine who falls into which category. I refer to this system as the "citizenship line."

III. The Citizenship Line in Action

The doctrinal framework that I refer to here as the citizenship line is intended to ensure that the government's heightened powers in the realm of immigration are confined to the treatment of noncitizens. The notion that citizens can be distinguished from noncitizens through a threshold jurisdictional inquiry is so fundamental to contemporary immigration enforcement that courts rarely bother to discuss it these days.[163] This has not always been the case, however.[164] In the early days of federal immigration restriction, courts struggled extensively with how to approach the question of distinguishing citizens from noncitizens.[165]

Section A of this Part recounts the treatment of citizenship claims in the period between the 1880s and the 1920s, when the citizenship line emerged as a key axis of the American legal system.[166] Section B then traces the development of safeguards to protect U.S. citizens beginning in the 1920s and continuing to the present day.[167] Finally, Section C argues that despite the development of a seemingly comprehensive legal framework for insulating citizens from the government's broad immigration enforcement powers, the factors that historically led to the misclassification of U.S. citizens are still integral to the system.[168]

A. *The Emergence of Citizenship as a Problem*

Distinguishing between citizens and noncitizens has been a key function of immigration enforcement agencies from the earliest days of

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[163] *See, e.g.*, Joseph v. Holder, 720 F.3d 228, 230 (5th Cir. 2013) (citing Ng Fung Ho v. White, 259 U.S. 279, 284 (1922), for the principle that alienage is an essential jurisdictional fact, without further elaboration); Duarte-Ceri v. Holder, 630 F.3d 83, 87 (2d Cir. 2010) (same).

[164] *See infra* notes 193–209 and accompanying text.

[165] *See infra* notes 193–209 and accompanying text.

[166] *See infra* notes 169–209 and accompanying text. A different sort of citizenship line, one in complete alignment with the color line, can of course be seen earlier, embodied in *Dred Scott v. Sandford*, in which the Supreme Court held that African-Americans, whether slaves or free persons, were racially barred from U.S. citizenship. 60 U.S. (19. How.) 393, 404 (1857).

[167] *See infra* notes 210–235 and accompanying text.

[168] *See infra* notes 236–255 and accompanying text.

federal immigration restriction.[169] As the Commissioner General of Immigration stated in his annual report in 1905, the officers of the Bureau of Immigration were "ever alert and willing, equally efficient in detecting the inadmissible alien and the pretended citizen."[170]

The problem of distinguishing citizens from noncitizens arose from the combination of two roughly contemporaneous developments in the late nineteenth century: the passage of the Fourteenth Amendment and the enactment of the first federal immigration restrictions. With the 1868 passage of the Fourteenth Amendment, the United States adopted a constitutional guarantee of birthright citizenship for those born within the territorial jurisdiction of the United States, creating for the first time a form of U.S. citizenship free of racial restrictions.[171] Seven years later, Congress enacted the first federal immigration restrictions in the form of the Page Act, a facially race-neutral law regarding the exclusion of prostitutes and contract laborers that was primarily intended to exclude Chinese women.[172] The Chinese Exclusion Act of 1882, which barred Chinese laborers from entering the United States, soon followed.[173] Thus, U.S. citizenship opened up across racial lines at virtually the same time that the border started closing in racially specific ways.[174]

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[169] *See* Dep't of Treasury, Annual Report of the Commissioner-General of Immigration to the Secretary of Commerce and Labor for the Fiscal Year Ended June 30, 1905, at 111 (1905).

[170] *Id.*

[171] U.S. Const. amend. XIV, § 1, cl. 1. Racial restrictions limited citizenship through naturalization until 1952. Ian Haney López, White by Law 31–34 (2006); *see* Act of March 26, 1790, ch. 3, 1 Stat. 103 (repealed 1952) (imposing racial restrictions on naturalization). Before the passage of the Fourteenth Amendment, birthright citizenship was racially restricted under the Supreme Court's decision in *Dred Scott*. 60 U.S. (19 How.) at 404; *see also* Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in* Flores-Villar v. United States, 91 B.U. L. Rev. 1485, 1492–93 (2011) (explaining the less explicit role played by race in citizenship by descent).

[172] Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 643 (2005) ("The text, legislative history, historical context, and enforcement of the Page Law indicate that one of its animating purposes was to prevent the Chinese practices of polygamy and prostitution from gaining a foothold in the United States."); *see* Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

[173] The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

[174] For an insightful discussion of the connection between the end of slavery and the beginning of federal immigration restrictions, see Neuman, *supra* note 125, at 51 ("The uncoupling of migration from slavery as a result of the Civil War made federal regulation possible . . . ."); *see also* Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 Cath. U. L. Rev. 921, 922–24 (2012) (discussing scholarship on the connection between slavery and immigration restrictions).

Historians of the Chinese Exclusion era have documented the ways in which the complex dynamic between the Fourteenth Amendment and racially targeted immigration laws played out in the decisions of immigration inspectors.[175] In an era in which passports were optional and many births went unrecorded, Chinese Americans returning to the United States from China often had little documentation to prove their citizenship claims.[176] In a substantial proportion of adjudications at ports of entry, the decision to admit or exclude hinged on a citizenship claim,[177] and immigration officials suspected (with good reason) that a large number of such claims were false.[178] The presence of citizens among the arrivals in China—and in particular, citizens without clear documentation of citizenship status—thus created a conundrum.[179] Immigration officials had unparalleled discretion to decide whom to admit and whom to turn away;[180] yet their authority extended only to noncitizens.[181] By what procedures should citizenship status be determined? In other words, on which side of the plenary power doctrine did citizenship claims lie?

Agency officials were unequivocal in their response: citizenship claims were like any other claim to an exemption from the Chinese Exclusion Act and were subject to identical treatment.[182] Such treatment could include being held in cramped and unsanitary conditions for months,[183] subjected to questioning without the assistance of coun-

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[175] *See, e.g.*, Erika Lee, At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943, at 100–09, 200–07 (2003); Salyer, *supra* note 155, at 69–91.

[176] *See* Lee, *supra* note 175, at 100–09, 200–07.

[177] Salyer, *supra* note 155, at 272 n.168 (stating that "70 percent of the Chinese refused admission at San Francisco in 1898 were those claiming to be born in the United States, who relied solely on testimony to support their cases").

[178] *See* Lee, *supra* note 175, at 200–07; Salyer, *supra* note 155, at 44. For example, many Chinese immigrants entered the United States as "paper sons." Salyer, *supra* note 155, at 44. Under this practice, an American citizen of Chinese descent would claim the birth of a son following a visit to China and would sell the right to enter the United States as his son to a young Chinese man. *Id.*

[179] Salyer, *supra* note 155, at 44.

[180] *See id.* at 109, 166.

[181] *See* The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943); *In re* Tom Yum, 64 F. 485, 489 (N.D. Cal. 1894).

[182] *See* Lee, *supra* note 175, at 106–09 (discussing the treatment of citizenship claims by inspectors); Salyer, *supra* note 155, at 98–101 (same).

[183] *See* Salyer, *supra* note 155, at 166.

sel.[184] Attorneys were not permitted to examine evidence until after a decision had been reached,[185] and appeals had to be filed within two days of the adjudicator's decision.[186]

Agency officials also imported the so-called "white witness" rule mandated by Congress with regard to claims by Chinese immigrants into the realm of citizenship determinations.[187] The Geary Act of 1892 provided that Chinese laborers who had come to the United States before the effective date of the law would be deported if they could not produce either an official record or the testimony of a "credible white witness" attesting to their timely arrival in the United States.[188] In 1893, Congress enacted a law requiring Chinese merchants returning to the United States to produce not only a certificate from the Chinese government attesting to their merchant status but also "two credible witnesses other than Chinese" to attest that they had previously conducted business as a merchant in the United States.[189] Congress never mandated such rules for citizenship claims.[190] Nevertheless, John Wise, the customs collector in San Francisco from 1892 to 1898, imposed a requirement that anyone of Chinese descent claiming U.S. citizenship had to prove such a claim through the testimony of two white witnesses.[191] His successor tried to ease up on this requirement, but he was swiftly reprimanded by the Secretary of the Treasury.[192]

Although immigration agency officials were happy to treat Chinese Americans just like Chinese immigrants, federal judges found the question of alleged citizens more vexing. One of the most striking aspects of the cases from these early days of immigration restriction is the confession by courts of their uncertainty about the facts before them. A judge

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[184] *Id.* at 166 ("[I]n 1907, the [B]ureau [of Immigration] conceded to Chinese the right to have an attorney and interpreter present during admission hearings, though they were forbidden to participate in the proceeding.").

[185] *Id.* at 109.

[186] *Id.* at 166. In 1906, the time for appeal was lengthened to five days. *Id.*

[187] *Id.* at 65.

[188] Geary Act, ch. 60, § 6, 27 Stat. 25 (1892) (repealed 1943); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (upholding the white witness rule).

[189] Act of Nov. 3, 1893, ch. 14, § 2, 28 Stat. 7, 8 (repealed 1943); *see also* Li Sing v. United States, 180 U.S. 486, 495 (1901) (upholding the Act of November 3, 1893). The 1893 amendments also altered the wording of the provision regarding Chinese laborers, changing "credible white witness" to "one credible witness other than Chinese." Act of Nov. 3, 1893, ch. 14, § 2.

[190] SALYER, *supra* note 155, at 65.

[191] LEE, *supra* note 175, at 106; SALYER, *supra* note 155, at 65.

[192] SALYER, *supra* note 155, at 66.

in the U.S. District Court for the Southern District of New York remarked in 1911, "It is impossible in this class of cases to be sure what the truth is."[193] Elaborating on the difficulty of fact finding in such cases, the judge went on to explain that citizenship claims are "easily fabricated, and . . . difficult to be disproved. . . . It is easy to decide such cases on the theory that all such claims are false. Probably many of them are false, but some of them must be true . . . ."[194] A federal judge in California wrote to a California congressman, "[I]f you could have attended court and listened to the hearing of any of these cases, you would have recognized how . . . impossible it is to distinguish a genuine case from a fraudulent one."[195]

The distinction between citizenship claims and other types of exemptions from the Chinese Exclusion Acts became especially significant in the early 1890s, when the Supreme Court and Congress severely curtailed judicial review of immigration cases. In 1892, the Supreme Court in *Nishimura Ekiu v. United States* held that an inspector's factual determinations with regard to a noncitizen's excludability were final unless Congress provided for judicial review.[196] In 1894, Congress enacted legislation providing that the inspector's decision was subject to review only by the Secretary of the Treasury.[197]

Following these developments, federal courts faced the question whether citizenship claims merited special treatment.[198] Judge William Morrow of the U.S. District Court for the Northern District of California concluded in the 1894 case *In re Tom Yum*[199] that they did. Holding that those claiming to be citizens would be permitted to continue filing habeas corpus petitions, the court explained that the determination whether an applicant was a citizen or an alien was not just an ordinary fact, but rather was "the very fact upon which the jurisdiction of [immigration enforcement] depends."[200]

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[193] United States v. Leu Jin, 192 F. 580, 581 (S.D.N.Y. 1911) (referring to cases in which arriving passengers from China claimed citizenship by virtue of birth in the United States).

[194] *Leu Jin*, 192 F. at 580.

[195] Salyer, *supra* note 155, at 78 (quoting correspondence from Judge Hoffman to California Congressman Charles N. Felton).

[196] Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

[197] Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390 (repealed 1943).

[198] *See e.g.*, United States v. Ju Toy, 198 U.S. 255, 263 (1905); United States v. Sing Tuck, 194 U.S. 161, 168 (1904); *Tom Yum*, 64 F. at 490.

[199] 64 F. at 490.

[200] *Tom Yum*, 64 F. at 490. The writ of habeas corpus allows a person in government custody to challenge the legality of the confinement. *Id.* at 487; Black's Law Dictionary 788 (9th ed. 2009). On the role of habeas corpus in judicial review of deportation and exclu-

The Supreme Court, however, was not as quick to reach this conclusion. Following the defeat of a Congressional bill that would have barred habeas review of citizenship claims, the Court decided two cases that together dramatically reduced the power of such review.[201] In 1904, in *United States v. Sing Tuck*, the Court held that U.S. citizens seeking writs of habeas corpus had to first exhaust administrative remedies.[202] In 1905, in *United States v. Ju Toy*, the Court held that the fact finding of the agency was final, even on the question of citizenship.[203] In the eyes of the Court, there was no reason to exempt such claims from the general principles enunciated in the plenary power cases:

> If, for the purpose of argument, we assume that the 5th Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the [plenary power] cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws.[204]

In short, citizenship claims were just another part of immigration adjudication. Although the Court flirted with applying the Due Process Clause of the Fifth Amendment, it quickly reverted to a plenary power analysis.[205]

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sion proceedings, see Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 461–66 (2006); Rachel E. Rosenbloom, *Is the Attorney General the Custodian of an INS Detainee? Personal Jurisdiction and the "Immediate Custodian" Rule in Immigration-Related Habeas Actions*, 27 N.Y.U. REV. L. & SOC. CHANGE 543, 547–51 (2002); Jonathan Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2521–2536 (1998). The U.S. District Court for the Northern District of California's 1894 decision in *In re Tom Yum* turned on whether citizenship was a jurisdictional question or a mere question of fact properly within the custom officials' jurisdiction. 64 F. at 487.

[201] *See Ju Toy*, 198 U.S. at 263; *Sing Tuck*, 194 U.S. at 168; SALYER, *supra* note 155, at 111.

[202] 194 U.S. at 169. The petitioners in *Sing Tuck* stated to the border official that they were born in the United States. *Id.* at 166. After being denied entry, they were informed of their right to an administrative appeal, which they refused and instead filed a writ of habeas corpus. *Id.* Justice David Brewer wrote a vigorous dissent. *See id.* at 173 (Brewer, J., dissenting) ("Why should any one who claims the right of citizenship be denied prompt access to the courts? If it be an 'inestimable heritage,' can Congress deprive one of the right to a judicial determination of its existence, and ought the courts to unnecessarily avoid or postpone an inquiry thereof?").

[203] 198 U.S. at 263.

[204] *Id.* As a result of *Sing Tuck* and *Ju Toy*, the number of habeas petitions plummeted. *See* SALYER, *supra* note 155, at 170.

[205] *See Sing Tuck*, 198 U.S. at 263.

Three years later, in 1908, the Supreme Court adopted a more sympathetic tone in *Chin Yow v. United States*.[206] It recognized that "[t]he statutes purport to exclude aliens only" and concluded that the fact-finding powers of immigration enforcement agencies must "yield" to the rights of citizens to enter the country and of alleged citizens to prove their citizenship.[207] The Court limited its decision in *Chin Yow*, however, to claims of procedural irregularities in the determination of citizenship.[208] Those whose citizenship claims were rejected by agency adjudicators in proceedings that conformed to the relatively lax procedural requirements at ports of entry still had no recourse to the courts.[209]

B. *Efforts to Solve the Problem of Citizenship*

Although the Supreme Court signaled an unwillingness to carve out protections for citizenship cases, some circuit courts sought ways to set such cases apart by interpreting *Ju Toy* and *Sing Tuck* narrowly. For example, the 1906 case *Moy Suey v. United States* involved a man taken into custody within the United States and charged with being a Chinese laborer present without authorization.[210] The U.S. Court of Appeals for the Seventh Circuit distinguished the case from Supreme Court precedent concerning individuals apprehended at the border.[211] While recognizing that Congress "unquestionably" had the power to exclude noncitizens and to prescribe the conditions under which such exclusion took place, the court held that it was an "entirely different" matter when a person present in the United States claimed citizenship.[212] "Nativity gives citizenship, and is a right under the Constitution," the court reasoned. "It is a right that congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts, in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away."[213]

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[206] *See* 208 U.S. 8, 12 (1908).

[207] *Id.*; *see also* Kwock Jan Fat v. White, 235 U.S. 454, 464 (1920) (holding that judicial review was available where crucial testimony was left out of the record upon which a determination was made).

[208] 208 U.S. at 11 ("If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther.").

[209] *See id.*

[210] 147 F. 697, 697 (7th Cir. 1906).

[211] *Id.* at 698.

[212] *Id.*

[213] *Id.*; *see also Gee Cue Beng*, 184 F. at 385–86 (citing *Moy Suey*, 147 F. at 697) (holding that an individual apprehended within the United States was entitled to judicial review of

By the 1920s, the racial and political landscape of immigration restriction had begun to change.[214] Documents, including visas and U.S. passports, were coming into wider use, and a shift was occurring at the border from examining bodies to examining papers.[215] Further, European immigrants were now subject to numerical quotas.[216] The Palmer Raids in 1919 had snared many European immigrants suspected of being subversives, some of whom turned out to be citizens.[217] With immigration enforcement now affecting immigrants across racial lines, reformers began raising concerns about its harshness.[218]

Against the backdrop of these changes, the Supreme Court came to recognize special protections for citizenship cases. Two deportation cases consolidated in the 1922 case *Ng Fung Ho v. White* concerned individuals claiming to be U.S. citizens by virtue of their births abroad to U.S. citizen fathers.[219] Immigration enforcement officials subjected them to lengthy inquiries upon their arrival in the United States and deemed them to be citizens.[220] Months after their admissions, they were arrested, charged with being Chinese laborers present without authorization, and ordered deported.[221] Although the Court found no

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his claim that he was born in the United States); Pang Sho Yin v. United States, 154 F. 660, 662 (6th Cir. 1907) (same).

[214] *See generally* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation in the United States, 1921–1965*, 21 Law & Hist. Rev. 69 (2003) (describing the significant changes in immigration restrictions beginning in the 1920s).

[215] Craig Robertson, The Passport in America: The History of a Document 160–83 (2010) (discussing the focus on bodies); *id.* at 184–214 (discussing the transition to documents).

[216] Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (repealed 1965); Act of May 19, 1921, ch. 8, Pub. L. No. 67-5, 42 Stat. 5 (repealed 1965); Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 21 (2005) (discussing the history of national origins quotas).

[217] *See* Salyer, *supra* note 155, at 233 (discussing the case of a U.S. citizen detained in the Palmer Raids). During the Palmer Raids, authorities arrested 10,000 immigrants suspected of being anarchists and deported 500 of them. Ngai, *supra* note 214, at 74.

[218] Ngai, *supra* note 214, at 90 ("[T]he protest against unjust deportations stemmed from the fact that European and Canadian immigrants had come face-to-face with a system that had historically evolved to justify arbitrary and summary treatment of Chinese and other Asian immigrants."); *see also* Daniel Kanstroom, Deportation Nation 159 (2007) ("The government's use of its deportation power has rarely inspired as much passion as it did in the aftermath of the Palmer Raids."); Salyer, *supra* note 155, at 211 (connecting the Palmer Raids to a new focus within the courts on the rights of U.S. citizens within immigration enforcement).

[219] *Ng Fung Ho*, 259 U.S. at 281–82.

[220] *Id.* at 282.

[221] *Id.*

procedural irregularities that warranted judicial review, it held that review was available based merely on the nature of the facts at issue.[222] Echoing Judge Morrow's decision in *In re Tom Yum*, the Court reasoned that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."[223] The Court held:

> To deport one who so claims to be a citizen obviously deprives him of liberty . . . [and may] result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.[224]

In *Ng Fung Ho*, the Supreme Court finally embraced a notion that had been percolating for several decades in the lower courts: that citizenship claims should be set apart from the rest of immigration law.[225] *Ng Fung Ho* represents the beginning of the Supreme Court's recognition of a doctrine of citizenship exceptionalism. Statutory and administrative developments over the course of the twentieth century have bolstered this doctrine. For example, in 1961, when Congress added a judicial review provision to the INA, it included special procedures for citizenship claims, according them de novo review in the federal courts.[226] Citizenship claims have continued to be subject to de novo review in recent years, even as Congress has stripped the courts of jurisdiction to review many other aspects of removal proceedings.[227] Over the past two decades, as Congress has enacted fast-track removal proce-

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[222] *Id.* at 284.

[223] *See id.*; *Tom Yum*, 64 F. at 290.

[224] *Ng Fung Ho*, 259 U.S. at 284.

[225] *See id.* at 284–85.

[226] Immigration and Nationality Act, Pub. L. No. 87-301, sec. 5, § 106, 75 Stat. 650, 651 (1961) (repealed 1996).

[227] *Compare* 8 U.S.C. § 1252(b)(5) (2012) (providing for de novo judicial review of citizenship claims), *with* 8 U.S.C. § 1252(a)(2) (barring judicial review of a variety of removal defenses), *and* 8 U.S.C. § 1252(b)(4) (providing for deferential standard of review on issues other than citizenship). Commentary has been critical of the court-stripping provisions of the 1996 amendments to the INA. *See, e.g.*, Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 Geo. Immigr. L.J. 233 (1998); Lee Galernt, *The 1996 Immigration Legislation and the Assault on the Courts*, 67 Brook. L. Rev. 455 (2001); Lucas Guttentag, *Immigrants' Rights in the Courts and Congress: Constitutional Protections and the Rule of Law After 9/11*, 25 Wash. U. J.L. & Pol'y 11, 17 (2007); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 Tex. L. Rev. 1615, 1630–31 (2000).

dures that bypass the immigration courts entirely,[228] it has to some extent included special carve-outs for citizenship claims. For example, since 1996, noncitizens apprehended at or near the border who have no entry documents or have documents that are deemed fraudulent face expedited removal without access to counsel or the opportunity for a hearing before an immigration judge.[229] A citizenship claim raised within expedited removal, however, triggers a full hearing before an immigration judge, the right to counsel, and the right to appeal the immigration judge's order.[230] Under Board of Immigration Appeals ("BIA") case law, those deemed subject to mandatory detention may nevertheless request a hearing to argue that, as U.S. citizens, they should be released.[231]

In the wake of publicity over Peter Guzman's case, ICE issued guidance on the treatment of citizenship claims. The guidance directs ICE officers to consult with the Office of Chief Counsel in cases that exhibit "some probative evidence" of citizenship.[232] It prohibits the detention of the individual making the claim when the "evidence of U.S. citizenship outweighs evidence to the contrary."[233] Further, if an individual makes a claim to U.S. citizenship either before or after ICE officers serve her with a Notice to Appear at a removal proceeding, ICE must "fully investigate the merits" of such claim and make such an in-

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[228] *See, e.g.*, 8 U.S.C. §§ 1225(b)(1)(A) (expedited removal); 1228(b) (administrative removal); 1231(a)(5) (reinstatement of removal).

[229] *See* 8 U.S.C. § 1225(b)(1)(A); 8 C.F.R. § 235.3(b)(5) (2013).

[230] 8 C.F.R. § 235.3(b)(5) (providing for referral to immigration judge in expedited removal proceeding where a citizenship claim is made). Another fast-track procedure, administrative removal, allows for the speedy removal of individuals who are not lawful permanent residents and who have certain criminal convictions. 8 U.S.C. § 1228(b). The relevant regulations fail to specify a carve-out for citizenship claims, but they do provide for referral to an immigration judge for a full removal hearing where the officer determines that the individual is "not amenable to [administrative] removal," which presumably includes a nonfrivolous citizenship claim. 8 C.F.R. § 238.1(d)(iii). In fact, Mark Lyttle was initially ordered removed through the administrative removal process but then appeared before an immigration judge because he raised a citizenship claim. *See Lyttle* Complaint, *supra* note 101 at 19; *supra* notes 101–115 and accompanying text (describing Mark Lyttle's case).

[231] *See In re* Joseph, 22 I. & N. Dec. 799, 806 (B.I.A. 1999). In *In re Joseph*, the Board of Immigration Appeals held that a lawful permanent resident was entitled to a hearing on whether he was properly included in the category of those subject to mandatory detention. *Id.* at 800. A person claiming citizenship could make use of a "*Joseph* hearing" to argue that the government was unlikely to meet its burden to establish alienage and that mandatory detention was therefore not applicable.

[232] *See* Guidance on Citizenship Claims, *supra* note 122, at 1 (emphasis omitted).

[233] *Id.*

vestigation a priority.[234] The individual must be released if after the investigation the officer determines that the individual's claim is "credible on its face" or if there is "probative evidence" that the individual is a U.S. citizen.[235]

C. The Long Shadow of Immigration Law

The reforms that began with *Ng Fung Ho* and that are now embodied in legislation, regulations, and agency policies are intended to draw a line between citizenship claims and the rest of the removal process.[236] Together, these safeguards comprise the architecture of the citizenship line. Yet these safeguards are not comprehensive even on a formal level. The starkest example of this is reinstatement of removal, a common fast-track procedure through which those with former removal orders can be subsequently removed with no hearing; the reinstatement statute provides no exception for citizenship claims.[237] Moreover, citizenship claims made at the border continue to enjoy fewer protections than those made in the interior.[238]

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[234] *Id.* at 2.

[235] *Id.*

[236] As already noted, this line has been most clear with regard to *factual* disputes about whether a particular person is or is not a citizen. *See supra* note 157 and accompanying text. The line has been less clear with regard to substantive challenges to the statutory requirements for citizenship. *See supra* note 157 and accompanying text.

[237] 8 U.S.C. § 1231(a)(5) (2012); *see* Terán, *supra* note 4, at 655–75 (discussing the effects of the reinstatement statute on U.S. citizens and arguing that the statute is unconstitutional). Although the reinstatement statute contains no carve-out for citizenship claims, a person subject to reinstatement may file a petition for review in a federal circuit court of appeals. For a recent example of such a case, see Iracheta v. Holder, No. 12-60087, 2013 WL 4836087, at *3–6 (5th Cir. Sept. 11, 2013) (remanding with instructions to vacate reinstated order upon a finding of citizenship). The Fifth Circuit's 2013 decision in *Iracheta v. Holder* serves as a perfect illustration of the issues explored in this Article, as it involves an individual who has been a U.S. citizen since birth but was subject to deportation in 1992, 1995, and 1999. *Id.* at *1. The petitioner, Sigifredo Saldana Iracheta, was again deported in 2012 when DHS reinstated his 1999 removal order, after finding that he had not made a probative claim to citizenship. *Id.* Along the way, Saldana Iracheta had filed applications for a certificate of citizenship in 2002, 2003, 2005, and 2007, all of which had been denied due to the lack of sufficient documentation of his father's physical presence in the United States. *Id.*

[238] For example, if ICE apprehends a U.S. citizen within the United States and places her in removal proceedings, the government has the burden to establish alienage by clear and convincing evidence, just as the government would have the burden to establish any ground of removal. *See* 8 U.S.C. § 1229a(c)(3)(A). When someone seeking admission to the United States claims to be a citizen, however, the burden of proving citizenship lies with the applicant. *See id.* § 1229a(a)(2)(A); *In re G— R—*, 3 I. & N. Dec. 141, 154 (B.I.A. 1948). Further, like anyone else seeking admission at a port of entry, a person who claims

Perhaps most significantly, even where statute and case law provide robust protections for citizenship claims, immigration exceptionalism continues to shape the conditions under which such claims arise (or, more to the point, are foreclosed). The cases described in Part I illustrate the extent to which citizenship determinations occur deep inside a system that has been profoundly shaped by immigration exceptionalism. As illustrated by the examples provided in Part I, cases in which U.S. citizens have been deported generally involve individuals who concede alienage while in custody, without the benefit of counsel.[239] These conditions have become more prevalent in recent years as immigration

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U.S. citizenship has no statutory right to counsel. Representation and Appearances: Clarifying Right to Representation, 45 Fed Reg. 81,732 (Dec. 12, 1980) (clarifying 8 C.F.R. § 292); *see* 8 C.F.R. § 292.5(b) (2013); Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, *in* 2 U.S. Comm'n on Int'l Religious Freedom, Report on Asylum Seekers in Expedited Removal 232, 238 (2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf. In some cases, such a deprivation will be temporary. Pursuant to the statute and regulations governing expedited removal, a person who claims citizenship may not be subjected to expedited removal without the opportunity for a hearing before an immigration judge. *See* 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. § 235.3(b)(5). Yet the case of the Castro family provides an example of how this process often works in practice. *See supra* notes 86–100 and accompanying text (describing the Castro family's case). The Castro sisters, like many others at the U.S.-Mexico border, were not formally removed but rather were deemed to have withdrawn their applications for admission. *See supra* notes 86–100 and accompanying text. Although they later retained counsel and brought suit for a declaratory judgment and injunctive relief in federal court, such an action is beyond the ability of many individuals who are turned away at the border.

[239] Not all of these cases present examples of traditional immigration detention. For example, Peter Guzman accepted "voluntary" departure while still in criminal custody, and the Castro sisters withdrew their citizenship claims while detained for interrogation at the border. *See supra* notes 53–66, 86–100 and accompanying text. Detention severely limits the ability of respondents to obtain counsel and to litigate their removal cases. *See* César Cuahtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 Berkeley La Raza L.J. 17, 42 (2011); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L. Rev. 1647, 1667–75. Studies have shown stark disparities in the success rates in removal proceedings between detained and nondetained respondents, and within each group, between those with legal representation and those without. The Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357, 363–64 (2011) (finding that 3% of those who were detained and lacked counsel prevailed in their removal proceedings, as compared to 18% of detained respondents with counsel, 13% of nondetained respondents without counsel, and 74% of nondetained respondents with counsel); *see also* Kanstroom, *supra* note 135, at 1511 (describing disparities between represented and unrepresented respondents in removal proceedings).

detention rates have ballooned,[240] with 84% of detainees lacking legal representation.[241] Many of the key issues that influence the outcome of a removal proceeding—including, above all, the decision of individuals to accept removal rather than pursuing an appeal—can be traced to the inherently coercive nature of confinement.[242] Pressures to give up citizenship claims are particularly acute at the most informal end of the spectrum, for instance when U.S. citizens sign stipulated orders of removal,[243] agree to voluntarily depart, or withdraw applications for admission at the border. A case such as Antonio's, however, shows that the prospect of spending years in detention can affect the actions of those in formal proceedings before immigration judges as well.

To grasp how the procedural norms of immigration law impact U.S. citizens, consider the experience of Mario Guerrero, a U.S. citizen who was deported from the United States twice and spent a quarter of his life in prison on charges of illegal reentry before a court recognized his citizenship claim. The former INS categorized Guerrero as a lawful permanent resident when he moved from Mexico to the United States with his U.S. citizen father as a child.[244] He and his siblings, however, had suspected for many years that they might be citizens on the basis of their father's U.S. citizenship.[245] Guerrero was deported following a criminal conviction in 1993.[246] In a 2009 interview, he explained that he did not pursue his citizenship claim at that point due to the prospect of a lengthy detention:

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[240] *See* Meissner et al., *supra* note 38, at 11; Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Immigration Enforcement Actions: 2011, at 4 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (noting that the annual number of individuals held in immigration detention rose from 85,730 in 1994 to 429,247 in 2011).

[241] *See* Comm'n on Immigration, *supra* note 142, at 5–8.

[242] In 2009, the U.S. Supreme Court in *United States v. Corley* recognized the coercive effects of such confinement in the criminal context, remarking that "custodial police interrogation, by its very nature, isolates and pressures the individual, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed . . . ." *Id.* (citations omitted) (internal quotation marks omitted).

[243] *See* Koh, *supra* note 53, at 497–521, 527–37 (describing stipulated orders of removal and their tendency to induce detained immigrants to waive viable claims).

[244] *See* Stevens, *supra* note 3, at 678–82 (discussing Guerrero's case based on court records and interviews).

[245] *Id.* at 678 n.317.

[246] *Id.* at 679.

> [T]hey told me, "You fight deportation or you sign the paper. If you don't sign, you might spend a year here." All I wanted to do is get out because I already spent a year. I signed the paper and I got out. They told me I was giving up my rights but nothing was for sure. I could spend another year in jail or get out.[247]

He later returned to the United States, was imprisoned for illegal reentry following removal, and eventually was deported again.[248] When Guerrero was asked in a subsequent interview whether he raised his citizenship claim in this second deportation proceeding, he responded:

> No, [the adjudicator] never addressed me individually. There was no lawyer, no nothing. He was just reading the thing that we were getting deported. He talked some stuff. I don't remember what he said. He just talked for 10 to 20 minutes. They just figured I was deported before, so they just say we're going to deport him again. I didn't do no talking, no nothing. I just had to be there in a little room, and then they took me back to my cell and that was it.[249]

Mario Guerrero's words illustrate the barriers that U.S. citizens encounter within the immigration adjudication system. There is more to his story, however, and his description of his subsequent experience sheds further light on the relationship between procedural safeguards and the adjudication of citizenship claims. Guerrero reentered the United States a second time, and was once again prosecuted for illegal reentry.[250] This time, his court-appointed criminal defense attorney investigated his citizenship claim as a potential defense to the reentry charge.[251] She ultimately proved that he was a U.S. citizen on the basis of evidence provided by Guerrero's father regarding Guerrero's grandmother's marriage in the United States and the father's own frequent trips across the border.[252]

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[247] *Id.* at 679 n.320 (quoting Mario Guerrero).

[248] *Id.* at 681. Illegal reentry following removal is a federal offense. 8 U.S.C. § 1326(a) (2006).

[249] Stevens, *supra* note 3, at 680–81 (alteration in original) (quoting Mario Guerrero).

[250] *Id.* at 681.

[251] *Id.*

[252] Mario Guerrero described what it was like to be represented by counsel:

> This time I had a real good lawyer. This lady, she investigated real good and she proved [U.S. citizenship] by my grandmother being married in Tucson, and [my father] always coming across. She fought the case and won. I spent

Guerrero's case demonstrates an ironic byproduct of the criminalization of immigration law, namely the increased chances that noncitizens (or U.S. citizens who have been designated as noncitizens) will receive appointed counsel. As illustrated by Guerrero's and Antonio's cases, some deported U.S. citizens later reenter the United States and are criminally prosecuted on charges of illegal reentry.[253] As criminal defendants, they are entitled to appointed counsel without regard to their immigration status.[254] Citizenship is a defense to an illegal reentry charge, and thus a number of citizenship claims have come to light through the efforts of counsel to defend against such charges.[255]

IV. Rethinking Citizenship, Rethinking Exceptionalism

Thus far, this Article has highlighted the disjuncture between the doctrinal scheme, which appears to insulate citizens from the government's broad immigration powers, and the actual operation of the detention and deportation system, past and present. How should we make sense of this disjuncture? Although it may seem obvious that the deportation of a U.S. citizen signals a problem within the immigration system, there are multiple ways of answering the questions of what the problem is and why (or even if) it should trouble us. Section A explores these questions and ultimately argues that deportations of U.S. citizens are not ordinary examples of jurisdictional disputes or adjudicatory errors but rather reveal deep contradictions within immigration jurisprudence.[256] Sections B, C, and D then consider what an understanding of

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> another year in jail while she was fighting the case. My dad came up with evidence that he's been living in the U.S. before we were born by all kinds of research. This lawyer did a real good job.

Id. (alterations in original) (quoting Mario Guerrero).

[253] On illegal reentry prosecutions, see Chacon, *supra* note 132, at 143; Eagly, *supra* note 132, at 1281; Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 Loy. U. Chi. L.J. 65, 123–39 (2012).

[254] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (recognizing a criminal defendant's Sixth Amendment right to counsel).

[255] *See supra* note 82; Terán, *supra* note 4, at 652–54. This phenomenon is evident not only in cases involving U.S. citizens but also in cases in which other errors occurred in removal proceedings, such as the erroneous denial of an opportunity to apply for discretionary relief. *See* Koh, *supra* note 53, at 520–23; Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 Geo. Immigr. L.J. 455, 465–80 (2005); Anthony Distinti, Note, *Gone but Not Forgotten: How Section 212(c) Relief Continues to Divide Courts Presiding over Indictments for Illegal Reentry*, 74 Fordham L. Rev. 2809, 2825–38 (2006).

[256] *See infra* notes 260–266 and accompanying text.

the citizenship line might contribute to both scholarly discussions about the nature of citizenship and practical responses to the deportation of U.S. citizens. Section B argues that the procedural norms of immigration enforcement play an underexplored role in shaping the functional boundaries of citizenship and should prompt a reconsideration of the relationship between citizenship as a legal status and citizenship in the broader sense of full membership in society.[257] Section C argues that the adjudication of citizenship claims continues to be racialized, albeit in ways that are less obvious than they were a century ago.[258] Finally, Section D argues that the appropriate response to the deportation of U.S. citizens is not to strengthen citizen-specific safeguards but rather to pursue a wholesale reconsideration of the procedural norms of immigration enforcement.[259]

A. *The Problem of Citizenship*

By definition, the deportation of a U.S. citizen represents a failure within the immigration adjudication system. But does it represent a problem for the system as a whole? If so, what kind of problem?

One possible response is that the "problem" of citizenship claims within immigration enforcement is not really a problem at all but rather a variation on a theme that has already been extensively addressed within the law. It is well established that courts and agency adjudicators have initial jurisdiction to determine if a case falls under their own jurisdiction, a feature of the legal system that inevitably results in some hardship for those who are wrongly named in a proceeding.[260] Given that litigants in a variety of contexts must frequently submit to a particular forum for the purposes of arguing that the forum lacks jurisdiction, one might ask whether it is any more troubling to compel an individual to establish citizenship before an immigration judge as a threshold jurisdictional question.

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[257] *See infra* notes 268–294 and accompanying text.

[258] *See infra* notes 295–314 and accompanying text.

[259] *See infra* notes 315–326 and accompanying text.

[260] *See* United States v. United Mine Workers of Am., 330 U.S. 258, 293 (1947); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 49–50 (1938). When faced with a case in which a civil defendant questioned on grounds of personal jurisdiction the authority of a court to impose sanctions for failure to comply with jurisdiction-related discovery requests, the Supreme Court described the petitioner as "attempting to create a logical conundrum out of a fairly straightforward matter." Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 696 (1982).

Another possible response is that deportations of U.S. citizens simply illustrate the impossibility of constructing an error-free adjudication system. The detention and occasional deportation of some number of U.S. citizens among the hundreds of thousands of people who cycle through immigration enforcement every year is, in this view, the result of a small but inevitable error rate.[261] Innocent people are sometimes convicted of crimes, and civil defendants who have done nothing wrong sometimes face legal liability. It is widely accepted that no adjudication system can be entirely error-free.

Each of these arguments contains an element of validity. It would be difficult to imagine a functioning system of immigration enforcement that lacked any power to take action against those who claim to be citizens. Indeed, many citizenship claims turn out to be invalid, either because of questions of law that are resolved in the government's favor or because the claim was simply false. Thus, as long as there is some sort of immigration restriction that is being enforced, it is inevitable that some number of U.S. citizens may have to prove their citizenship as a threshold jurisdictional question. Furthermore, if one concedes that some U.S. citizens will enter this system, one must also recognize the possibility that some adjudication errors may occur.[262]

Yet ultimately this response is unsatisfying, for reasons that are rooted in the citizenship line. No discussion of adjudicatory error takes place in a vacuum. Rather, risk of error is inextricably linked to the degree of procedural safeguards imposed.[263] For well over a century, the

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[261] *See ICE Hearing*, *supra* note 12, at 3 (statement of Rep. Steve King, Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law) (noting the safeguards in place to prevent deportation of U.S. citizens and stating that "[t]o deal with all of [immigration enforcement] without a single mistake would be asking too much of a mortal").

[262] Jacqueline Stevens has estimated the incidence of U.S. citizens being detained at 1% and the incidence of actual removal of U.S. citizens at .05%. *See* Stevens, *supra* note 3, at 675 & n.75. Stevens characterizes these estimates as conservative. *Id.* Such statistics would be in line with, and perhaps lower than, estimates of wrongful convictions, and within the margins that legal scholars have deemed acceptable in the criminal context. *See id.* at 632 (discussing literature on wrongful convictions and factors that distinguish U.S. citizen detention and removal).

[263] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (noting that the "identification of the specific dictates of due process generally requires consideration of three distinct factors[:]" first, "the private interest that will be affected by the official action;" second, "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 third, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

Supreme Court has signaled its willingness to tolerate procedural norms in immigration enforcement that it will not tolerate in other contexts, based on the principle that the government has plenary power when controlling the right of noncitizens to enter or remain within its sovereign territory.[264] A fundamental premise of this system is that U.S. citizens are not subject to such powers.[265] This premise has enabled the Supreme Court to countenance conditions within the immigration enforcement system—summary proceedings, lengthy detention, lack of counsel—that it has not tolerated in either the criminal context or in civil contexts that implicate similar interests, such as civil commitment and juvenile detention.[266] Yet if one takes seriously the role of immigration enforcement in drawing the boundaries of citizenship, a system premised on the maintenance of two sets of procedural norms begins to collapse in on itself. Without a stable citizenship line upon which to rely, any procedural distinction between citizens and noncitizens becomes difficult to justify, even if the Court's jurisprudence on the substantive rights of noncitizens remains intact. Far from being ordinary jurisdictional disputes, citizenship claims reveal a deep contradiction at the heart of the doctrinal framework that undergirds immigration enforcement—a framework that has served to keep such enforcement analytically separate from other areas of the law that involve analogous assertions of state power against individuals.

B. *The Boundaries of Citizenship*

If the citizenship line does indeed reveal an unresolved problem at the core of the doctrine that governs immigration enforcement, what conclusions might be drawn from this insight? One area in which this insight may be of use is in conceptualizing the nature of citizenship as a legal status and its relationship to citizenship in the broader sense of full membership in society.

Over the past two decades, citizenship has captured the attention of scholars across a wide range of disciplines.[267] Much of this work has started from the premise that there is a disjuncture between citizenship status (generally conceived as a yes-or-no question) and the identity or rights associated with citizenship (generally conceived as defying easy

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[264] *See supra* notes 126–128 and accompanying text.

[265] *See supra* notes 226–235 and accompanying text.

[266] *See supra* note 147 and accompanying text.

[267] *See* Bosniak, *supra* note 125, at 17–36 (providing summary and critique of recent citizenship scholarship).

dichotomies).[268] Those advocating for expansive definitions of membership, particularly with regard to undocumented immigrants, have sought to disaggregate territoriality, affiliation, and legal status and to reconceptualize their relationship to membership.[269] For example, Linda Bosniak has argued that "our conception of citizenship must be a divided one. It must be a conception that approaches citizenship status and citizenship rights as analytically distinct facets of citizenship which are not always in alignment."[270]

While normative arguments within the field of membership theory have generally sought to expand the rights of noncitizens by decoupling membership from legal status, scholarship within the fields of history and critical race theory has often approached the disjuncture from the other side. This work has focused on the experiences of those who possess formal citizenship status but have been denied full membership rights through marginalization along lines of race, gender, class, and sexuality.[271] Of particular relevance here, a subset of this work focuses on the phenomenon of "alien citizenship," the denial of full membership rights to those U.S. citizens racially marked as foreign.[272] Historian Mae Ngai describes alien citizenship as presenting an inherent contradiction: "the nullification of the rights of citizenship—from the right to

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[268] *See, e.g.*, Linda Bosniak, *Constitutional Citizenship Through the Lens of Alienage*, 63 Ohio St. L.J. 1285, 1293 (2002) (arguing for a disaggregation of these two elements of citizenship to enable the recognition that "that those lacking the formal status of citizenship nevertheless enjoy rights commonly associated with citizenship"); *see also* Ariela Gross, What Blood Won't Tell 8 (2008) ("Therefore it makes sense to think about citizenship in two dimensions: first, formal legal citizenship, and second, full social and political citizenship.").

[269] *See, e.g.*, Seyla Benhabib, The Rights of Others: Aliens, Residents, and Citizens 136–38 (2004); Carens, *supra* note 22, at 32–33; Michael Walzer, Spheres of Justice: Spheres of Pluralism and Equality 61–63 (1983); Bosniak, *supra* note 268, at 1293; Stumpf, *supra* note 39, at 377.

[270] Bosniak, *supra* note 268, at 1293.

[271] The literature on this topic is vast. For recent examples, see generally Margot Canaday, The Straight State: Sexuality and Citizenship in Twentieth Century America (2009) (exploring the concept of sexual citizenship through the lens of immigration law, welfare, and the military); Ediberto Román, Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique 119–46 (2010) (arguing that racial and ethnic minorities in the United States have experienced inferior citizenship status due to racial subordination).

[272] *See, e.g.*, Devon Carbado, *Racial Naturalization*, Am. Q., Sept. 2005, at 633, 641; Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 Pace L. Rev. 1, 13 (2005); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 Fordham L. Rev. 2521, 2521 (2007); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261, 277 (1997); Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 Asian L.J. 71, 72–73 (2001); Volpp, *supra* note 152, at 1580–83.

be territorially present to the range of civil rights and liberties—without formal revocation of citizenship status."[273] Critical race theorist Devon Carbado has extended the concept of alien citizenship to argue that naturalization is "not simply . . . a formal process that produces American citizenship but also . . . a social process that produces American racial identities."[274] He has described this process of "racial naturalization" as being "simultaneously a process of exclusion and inclusion. Underwriting these claims is a distinction between American identity, on the one hand, and American citizenship, on the other."[275]

Cases in which U.S. citizens have been deported should lead us to reevaluate the relationship between citizenship-as-status and citizenship-as-membership. Such cases show that alien citizenship can signal not only a disjuncture between status and rights, but also a shifting of the boundaries of formal status itself. Although we may take it for granted that citizenship-as-membership is a complex and multifaceted question, perhaps we need to view citizenship *status* through a similar lens. What would it mean to approach citizenship status as something other than the relatively clear-cut, yes-or-no question it is generally assumed to be?

Scholarship on legal indeterminacy has shown that judicial and administrative processes that purport to sort people by status can at times produce the very categories that they seek to police. For example, immigration adjudicators of the Chinese Exclusion era distinguished Chinese laborers (barred under the Chinese Exclusion Acts) from exempt classes such as merchants, students, and travelers.[276] Although the statutory language implied that distinguishing merchants from laborers was a simple task, the administrative record reveals that "'merchant' status was fluid and shifting, and inspectors repeatedly encountered difficulties discerning class status by its presumed physical markers, particularly as these markers came to be used by the Chinese as a way to construct a 'passable' identity."[277]

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[273] Ngai, *supra* note 272, at 2522. Ngai's reference to the denial of the right to be territorially present relates to the "repatriation" of over 400,000 ethnic Mexicans during the Great Depression, many of whom were U.S.-born children of immigrant parents. *See generally* Raymond Rodríguez & Francisco E. Balderrama, Decade of Betrayal: Mexican Repatriation in the 1930s (1995) (recounting the history of the repatriation program, including its effects on U.S. citizen children).

[274] Carbado, *supra* note 272, at 637.

[275] *Id.*

[276] *See* The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

[277] Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 Law & Soc. Inquiry 1, 9 (2000); *see* Salyer, *supra* note 155, at 95.

Scholarship on the legal construction of racial categories has explored similar themes. Ian Haney López has examined how courts dealt with challenges to the racial restrictions that were contained in the naturalization laws until 1952.[278] In ruling on challenges brought by immigrants claiming to be white for the purpose of naturalization, courts employed two different epistemologies, relying alternately on "scientific" and "common sense" understandings of race, reaching varying results depending on their chosen method.[279] Ariela Gross has used "race trials" in nineteenth and early-twentieth century America, including freedom suits by slaves and cases in which race was relevant to issues such as access to education, the admissibility of testimony, or property distribution, to show that race "could be based, at different times, on appearance, ancestry, performance, reputation, associations, science, national citizenship, and cultural practice."[280] These examples demonstrate that categories such as race and class are not self-evident but rather are constructed through legal and social practices.[281]

Citizenship status does not, perhaps, fall neatly into this paradigm. As a legal status conferred by the state, citizenship is a question that genuinely does have only two possible answers—yes or no—in a way that questions about race and class clearly do not. Nevertheless, cases of U.S. citizens who become entangled in immigration enforcement reveal that citizenship is constructed in distinct but related ways. Citizenship status may be potentially knowable in a way that race or class are not, for example through a birth certificate on file or through evidence that may exist to prove a parent's birth and requisite residence in the United States.[282] Yet the fact-finding procedures

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[278] Haney López, *supra* note 171, at 35–77; *see* Act of March 26, 1790, ch. 3, 1 Stat. 103 (repealed 1952) (imposing racial restrictions on naturalization). The Supreme Court considered the scope of the racial restrictions on naturalization in two cases. *See* United States v. Bhagat Singh Thind, 261 U.S. 204, 211 (1923); Ozawa v. United States, 260 U.S. 178, 197 (1922).

[279] Haney López, *supra* note 171, at 35–77; *see Thind*, 261 U.S. at 211; *Ozawa*, 260 U.S. at 197.

[280] Gross, *supra* note 268, at 9, 12.

[281] *See id.* at 11 ("[T]he margins of a category create the core. People revealed what race meant to them only when they needed to adjudicate its boundaries. And in drawing those boundaries, they were creating race.").

[282] Although in most contemporary cases citizenship can be clearly established, there have been cases in which there is simply no documentation of birth available, or in which such documentation points in two different directions. *See, e.g.*, Ayala-Villanueva v. Holder, 572 F.3d 736, 740 (9th Cir. 2009) (discussing conflicting documents regarding who was the petitioner's father); Murphy v. INS, 54 F.3d 605, 607 (9th Cir. 1995) (discussing case of a

at issue profoundly shape the evidentiary records available to adjudicators in such cases, and thus citizenship status, although knowable, remains unknown to the adjudicators making key determinations.[283] Such cases present an epistemological problem for a system predicated on a threshold status inquiry and suggest the need for a more complex understanding of citizenship as a formal status.

Scholarship by political scientist Kamal Sadiq on unauthorized migrants within Asia has identified the phenomenon of "paper citizens": those who acquire citizenship in their country of residence simply by amassing identity documents through various, often extralegal, means.[284] The existence of these paper citizens challenges conventional understandings of the relationship between status and membership.[285] Indeed, in many countries, paper citizens participate fully in their new societies, for example, by voting and travelling abroad.[286] Like the "paperless" citizens discussed in this Article, these paper citizens put pressure on our understanding of the citizenship line.

The existence of paper citizens challenges what Sadiq has termed the "distinguishability assumption," the notion that there is a clear line between citizens and noncitizens.[287] Sadiq notes that "the distinguishability assumption, the notion that a state can separate citizens from foreigners, is endemic to the literature on immigration and citizenship. It is the implicit basis for a literature detailing the differential, unequal treatment that illegal immigrants receive in contrast to citizens, for instance."[288] He then argues that this literature is "conceptually blind, however, to the complex, poorly understood role of documents in bridging the divide between a citizen and a foreigner. The conceptual wall separating a citizen and an immigrant remains firm in this discussion, anchored by taken-for-granted assumptions about the legal infrastructure of citizenship."[289] He identifies the distinguishability assumption as a product of the experiences of Western Europe and North America, where states exercise sovereign control through highly devel-

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man claiming to have been born by homebirth in the U.S. Virgin Islands with no birth certificate); Rosenbloom, *supra* note 9, at 4–5.

[283] *See supra* notes 77–79 and accompanying text.

[284] Kamal Sadiq, Paper Citizens: How Illegal Immigrants Acquire Citizenship in Developing Countries 4–5 (2009).

[285] *Id.* at 15–25.

[286] *Id.* at 137.

[287] *Id.* at 7.

[288] *Id.*

[289] *Id.*

oped bureaucracies that track individuals and monitor their status, and where unauthorized immigration is viewed as an anomaly, a problem to be solved, rather than as the norm.[290] He argues that this model holds little relevance for the countries that he studies.[291]

Sadiq's particular focus on undocumented migrants within Asia and on the political construction of citizenship leads him to emphasize regional differences and the importance of documents in constituting citizenship.[292] His central insight about the distinguishability assumption, however, carries broader significance and might inform our understanding of the evidentiary fragility of citizenship status in the United States. First, cases in which U.S. citizens have been deported suggest that the distinguishability assumption warrants scrutiny not just in countries with less highly developed immigration bureaucracies but in the United States as well. Second, the distinguishability assumption is relevant not just to the question of who obtains citizenship but also of who loses it. And finally, if one looks at citizenship not merely as a yes-or-no question of legal doctrine but rather as a complex evidentiary question, and if one looks not only at the acquisition of citizenship but at the loss of it, it becomes clear that what is at issue is not just the presence or absence of documents, but also the procedures through which factual claims of citizenship are evaluated. In other words, the fact that Peter Guzman and Mark Lyttle had birth certificates on file made no difference in the determination of their status. They were not literally paperless, but nevertheless became functionally paperless.

None of this is to say that citizenship status is entirely constructed by such proceedings. We can still maintain some understanding of citizenship status as existing apart from a particular (erroneous) adjudication of alienage. One can thus talk about a case like Peter Guzman's as involving someone who is "really" a U.S. citizen but whose citizenship status has been ignored and thus effectively nullified. Yet we must also understand citizenship as something that can be functionally lost through such a process. For every case that comes to light, where someone like Peter Guzman manages to return to the United States, many others never surface.[293]

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[290] Sadiq, *supra* note 284, at 15.

[291] *Id.*

[292] *Id.*

[293] By definition, such cases cannot be documented, and thus cannot be counted. *See* Stevens, *supra* note 3, 618–29 (discussing existing data on deportations of U.S. citizens). In addition to those whose citizenship claims are never recognized, many may spend years deprived of their citizenship rights before eventually prevailing on a citizenship claim. *See*

Citizenship, then, is not just a category that precedes immigration enforcement and determines the path that an enforcement action will follow. It is also a status that is produced by the administrative and judicial procedures associated with immigration enforcement. Moreover, as Mario Guerrero's description of his immigration and criminal proceedings vividly conveys, citizenship status is not just produced by the enforcement process; it is produced *differently* by different enforcement processes. A person apprehended by immigration officers and charged with being a "removable alien" emerges from such a process categorized as either a citizen or noncitizen. A person who is criminally charged in a federal district court with illegally entering or reentering the United States emerges from the resulting judicial proceeding deemed either a citizen or noncitizen. Crucially, the citizenship determinations that emerge from such processes are often different due to differences in the procedures themselves, most notably the right to appointed counsel.[294] The results of such proceedings are determined not only by the existence of documents and other forms of evidence—i.e., by "paper"—but also by the nature of the procedures themselves.

C. *Race and the (Alien) Citizenship Line*

The citizenship line also provides a useful framework for considering the role of race in the construction of U.S. citizenship. The historical evolution of the citizenship line over the past century tells an important story about the shifting yet enduring role of race in shaping the boundaries of citizenship.

In the early decades of immigration restriction, when courts and agency officials openly admitted their inability to tell true citizenship claims apart from false ones, the nascent administrative state sought to solve the distinguishability problem primarily through race. Agency officials openly admitted this practice.[295] In 1899, for example, the Treasury Secretary endorsed a recommendation regarding the adjudication of Chinese American citizenship claims that stated that "the Chinese are an undesirable addition to our society—that their presence is a disturbing element that tends only to evil and corruption, and that every presumption, every technicality and every intendment should be

id. at 685–86 (discussing two erroneous deportations of U.S. citizens that each took ten years to resolve).

[294] *See supra* notes 244–255 and accompanying text.

[295] *See* SALYER, *supra* note 155, at 66–67.

held against their admission, and their testimony should have little or no weight standing alone."[296]

Courts generally provided a more sympathetic forum for such claims,[297] but exhibited biases of their own.[298] In an 1891 case involving a sixteen-year-old boy who claimed to have been born in the United States, Supreme Court Justice David Brewer stood alone in finding fault with the agency's treatment of Chinese American citizenship claims: "The government evidently rested on the assumption that because the witnesses were Chinese persons they were not to be believed. I do not agree with this."[299] In another dissent thirteen years later, he was still making the same point:

> Must an American citizen, seeking to return to this his native land, be compelled to bring with him two witnesses to prove the place of his birth or else be denied the right to return and all opportunity of establishing his citizenship in the courts of his country? No such rule is enforced against an American citizen of Anglo-Saxon descent, and if this be, as claimed, a government of laws and not of men, I do not think it should be enforced against American citizens of Chinese descent.[300]

With the proliferation of documentation related to birth and citizenship status over the course of the twentieth century, contested citizenship claims occur today under very different circumstances than they did a century ago. Most international travelers now carry passports.[301] Most births in the United States now take place in hospitals, and the vast majority of people born in the United States have registered births.[302] There will probably never again be large numbers of

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[296] *Id.* at 67.

[297] *See id.* at 20 (noting that habeas courts in the early years of Chinese exclusion granted up to 85% of the petitions received).

[298] *See In re* Louie You, 97. F. 580, 581 (D. Or. 1899) (noting that the court was "not willing to establish the precedent of admitting Chinese persons," where such a person had "admittedly remained out of the country for so great a length of time, unless some white witness, or some fact not depending on Chinese testimony, corroborates the testimony of the Chinese witnesses relied upon to establish the identity of the person who seeks a landing"); *see also In re* Jew Wong Loy, 91 F. 240, 242 (N.D. Cal. 1898) (expressing doubts about the credibility of Chinese witnesses).

[299] Quock Ting v. United States, 140 U.S. 417, 422–23 (1891) (Brewer, J., dissenting).

[300] United States v. Sing Tuck, 194 U.S. 161, 178 (1904) (Brewer, J., dissenting).

[301] Robertson, *supra* note 215, at 191.

[302] *See* Ctrs. For Disease Control & Prevention Nat'l Ctr. for Health Statistics, U.S. Dep't of Health & Human Servs., Technical Appendix from Vital Statis-

passengers arriving at international ports of entry claiming U.S. citizenship without any papers to prove it. Nor will courts or agency officials openly cite race as a reason to deny such claims.

Yet race remains profoundly present in the adjudication of contemporary citizenship claims. The vast majority of recent cases that have come to light regarding deportations of citizens have involved individuals deported to Latin America and the Caribbean, and in particular to Mexico.[303] To understand why, one must recognize that citizen-

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tics of the United States, 2002, Natality 12 (2003) [hereinafter U.S. Dep't of Health & Human Servs.], *available at* http://www.cdc.gov/nchs/data/techap02.pdf (stating that an estimated 99% of all live births in the United States were registered in 2002).

[303] No comprehensive records exist regarding U.S. citizens who have been deported or denied entry to the United States. Nevertheless, some tentative conclusions can be drawn, based on known cases, regarding the national origin (actual or imputed) of those citizens who have been subject to such actions. Of the thirty-five such cases with which I am familiar, based on documentation gathered by myself and by Professor Jacqueline Stevens, thirty-two cases (91%) involve individuals deemed to be from countries in Latin America and the Caribbean. List of Deported U.S. Citizens, Compiled by Jacqueline Stevens and Rachel E. Rosenbloom, Revised, (Nov. 4, 2013) (on file with author). Mexico alone accounts for twenty-six cases (74% of the total), with other countries in the region trailing far behind: Jamaica (two cases), Dominican Republic (two cases), and Colombia and Honduras (one case each). *Id.* Only three cases involve deportations to countries in other regions of the world: one to Italy, one to Armenia, and one to Laos. *Id.* Not included in these figures are the many cases that have come to light regarding individuals who have been detained for months or years while awaiting resolution of their citizenship claims. *See, e.g.*, Flores-Torres v. Holder, 680 F. Supp. 2d 1099, 1100–01 (N.D. Cal. 2009) (habeas corpus petition of individual detained for over three years who was ultimately found to be a U.S. citizen); Phil Fairbanks, *Dominican Wins 10-Year Battle to Become U.S. Citizen*, Buff. News, (May 16, 2013, 1:23PM), http://www.buffalonews.com/20130515/dominican_wins_10_year_battle_to_become_u_s_citizen.html (describing U.S. citizen detained for over six years). Rather, these figures include only U.S. citizens who were physically taken out of, or barred from entering, the United States—in some cases, multiple times—between the mid-1990s and the present, and who later prevailed on citizenship claims; the one exception is the Laos case, which involves a man who was subject to a final order of removal for over five years but was not physically removed due to the fact that the U.S. government faced difficulties repatriating deportees to Laos. *See* Bill Ong Hing, *Detention to Deportation—Rethinking the Removal of Cambodian Refugees*, 38 U.C. Davis L. Rev. 891, 899 (2005) (explaining that "[t]he lack of diplomatic ties with countries like Vietnam and Laos prevents the return of nationals to those countries"). Professor Lee Terán has documented dozens of additional cases involving U.S. citizens removed to Mexico, many of whom were later prosecuted for reentry. *See* Terán, *supra* note 4, at 653–54 (referring to numerous such cases, including twelve handled by the Laredo office of the Federal Public Defender just in one year (2011), and sixteen handled by a single investigator at the El Paso Public Defender Office between 2009 and 2012). The inclusion of these cases in a statistical analysis would result in an even more pronounced emphasis on Mexican Americans. The prominence of Mexican Americans within U.S. citizen deportation cases is consistent with the prominence of Mexicans within immigration enforcement actions generally. *See* John Simanski & Lesley M. Sapp, Dep't of Homeland Sec., Immigration Enforcement Actions: 2011, at 3 (Sept. 2012), http://www.dhs.gov/sites/default/files/publications/immigration-

ship determinations are shaped not only by the procedural norms that govern evidentiary determinations once an individual has entered the immigration enforcement system, but also by who enters the system in the first place. It is in this regard that the racial disparities of contemporary U.S. citizen deportations can best be understood.

As a matter of formal doctrine, factors such as race and the ability to speak unaccented English have no bearing on citizenship status. But they bear significantly on decisions of officers about whom to question and how to question them.[304] Immigration officials have in particular scrutinized Mexican American citizenship claims as Mexicans have replaced the Chinese as the primary target of immigration enforcement over the course of the twentieth century.[305] As Yuliana Castro recalled of her interrogation at the border, "After a while, I realized I had no way out since he told me no matter what I did, to him I was Mexican."[306] Decades of circular migration, cross-border communities, and even immigration enforcement practices[307] themselves have resulted in the existence of many U.S. citizens who do not "look" or "act" like U.S. citizens in the eyes of agency adjudicators. This is particularly evident with U.S. citizens who were born and raised in Mexico or born in the United States and brought to Mexico as young children.[308] As in the

statistics/enforcement_ar_2011.pdf (reporting that Mexican nationals accounted for 76.3% of apprehensions in 2011). It should be noted, however, that it is far out of proportion to the percentage of Mexican Americans within the U.S. citizen population: of the approximately 285 million U.S. citizens who reside in the United States, only 23.9 million (8.2%) are of Mexican birth or descent. *See* Thomas A. Gryn & Luke J. Larsen, U.S. Census Bureau, Nativity and Citizenship Status in the United States: 2009, at 2 (Oct. 2010), http://www.census.gov/prod/2010pubs/acsbr09-16.pdf (reporting that as of 2009, there were 268,489,000 native-born citizens in the United States and 16,846,000 naturalized U.S. citizens); Ana Gonzalez-Barrera and Mark Hugo Lopez, *A Demographic Portrait of Mexican-Origin Hispanics in the United States*, Pew Hispanic Center 5–6 (May 1, 2013), http://www.pewhispanic.org/files/2013/05/2013-04_Demographic-Portrait-of-Mexicans-in-the-US.pdf (reporting that as of 2012, 33.7 million people of Mexican birth or descent live in the United States, of whom 71% are U.S. citizens).

[304] *See* U.S. Dep't of Health & Human Servs., *supra* note 302, at 12; *see also* United States v. Brignoni-Ponce, 422 U.S. 872, 886–87 (1975) (allowing immigration officials to consider "Mexican appearance" when making stops).

[305] Johnson, *supra* note 149, at 295. *See generally* Ngai, *supra* note 217 (discussing racialization of the "illegal alien" as Mexican).

[306] Ulloa, *supra* note 87 at 8; *see supra* notes 87–100 and accompanying text.

[307] Many of the acquired citizenship cases involve the children of U.S. citizens who were "repatriated" to Mexico as children during the 1930s. *See* Terán, *supra* note 4, at 599.

[308] *See* Terán, *supra* note 4, at 586–88. In a related phenomenon, the State Department has refused to recognize as valid many birth certificates from Southwestern border states submitted by Mexican Americans as proof of citizenship to support passport applications. *See* Rosenbloom, *supra* note 9, at 1.

case of the Castro sisters, Mexican Americans are often suspected of fraud even when they present facially valid documentation of citizenship.[309]

In addition to the profiling that the Castro sisters faced at the border, racial profiling also plays a significant role in interior enforcement.[310] Nationally, immigration officers disproportionately interrogate and initiate removal proceedings against undocumented immigrants from Latin America as compared to undocumented immigrants from Asia or Europe.[311] State and local police, who have taken on a greater role in immigration enforcement over the past decade, often racially profile immigrants.[312] In addition, the increasing incor-

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[309] For example, Luis Alberto Delgado, a nineteen-year-old U.S. citizen, was detained after a traffic stop despite producing a copy of his birth certificate, a Texas state identification card, and a Social Security card. *See* Susan Carroll, *Man Born at Ben Taub Returns After He's Wrongly Deported*, Hous. Chron., Sept. 14, 2010, http://www.chron.com/news/houston-texas/article/Man-born-at-Ben-Taub-returns-after-he-s-wrongly-1694617.php; Kari Huus, *Wrongfully Deported American Home After 3 Month Fight*, NBC News, (Sept. 16, 2010, 4:40PM) http://www.msnbc.msn.com/id/39180275/ns/us_news-immigration_a_nation_divided/t/wrongfully-deported-american-home-after-month-fight/#.UPCdnLRUOYs. In another incident, a border patrol officer tore up a birth certificate presented by a teenager who was born in Los Angeles and raised in Phoenix. Stevens, *supra* note 3, at 656 n.207. Jacqueline Stevens notes the following:

> I recorded seven cases of U.S. citizens denied entry at the U.S.-Mexican border despite presenting copies of U.S. birth certificates. All individuals had Hispanic surnames and were under eighteen years old the first time Border Patrol agents prevented them from returning to the United States. Each was turned away on two to fifteen occasions.

Id. at 656 n.209.

[310] *See* Johnson, *supra* note 149, at 17; Johnson, *supra* note 3, at 678; Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 Law & Contemp. Probs. 1, 17 (2009).

[311] *See* Johnson, *supra* note 3, at 702; Johnson, *supra* note 310, at 17. Data on worksite raids in New York in the late 1990s demonstrates that immigrants from Mexico and Central and South America comprised more than 95% of those arrested in workplace raids, even though they represented just over 35% of the population of undocumented immigrants in New York in the period in question. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1112 (2004). The disparity was particularly pronounced for Mexicans, who made up only 4% of the local undocumented population but 54% of those arrested in workplace raids. *Id.* at 1113. A review of a randomly selected sample of investigation files revealed that INS agents targeted their raids at workplaces with large numbers of Hispanic workers. *Id.* They regularly considered factors such as "hearing 'Spanish language' or 'Spanish music,' or observing 'Hispanic appearance' or clothing 'not typical of North America.'" *Id.*

[312] For example, a study of arrest data from Irving, Texas found that after the Irving police department began participating in the Criminal Alien Program run by DHS, arrests of Latinos for petty crimes increased by 150%. *See* Trevor Gardner II & Aarti Kohli,

poration of immigration enforcement into the criminal justice system means that racial disparities within the criminal justice system have been imported into the realm of immigration.[313]

Alien citizens—those who, despite formal citizenship status, are racially marked as foreign—are far more likely than others to end up in the immigration enforcement system in the first place. Once inside this system, they encounter structural barriers to prevailing on their citizenship claims. These two dynamics, working in concert, result in a system in which alien citizenship results not only in the denial of full membership but in the loss of citizenship status itself.[314] In this way, race has continued to shape the boundaries of citizenship long after formal racial distinctions have been removed from the law.

D. *Beyond Exceptionalism*

The citizenship line has implications not just for how we think about the nature of citizenship but also for how we respond on a practical level to the deportation of U.S. citizens. A common response to such cases is to call for enhanced safeguards to identify and assist potential citizens. Such measures might include requiring Department of Homeland Security officers to screen individuals for possible citizenship claims and to inform those who have a U.S. citizen parent of the laws regarding acquired citizenship;[315] improving enforcement of existing policies that call for those with citizenship claims to be released from custody while their proceedings are pending; and providing appointed counsel for all those claiming citizenship.[316]

The Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program 4 (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

[313] *See generally* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 97–139 (rev. ed. 2012) (discussing the racial disparities in the criminal justice system); David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (1999) (same).

[314] An erroneous determination of alienage does not preclude someone from later prevailing on a citizenship claim, and therefore should not be conflated with a formal revocation of citizenship. On a practical level, however, this distinction may be moot, as such a determination can functionally divest someone of citizenship status for a period of years or even permanently.

[315] *See* Terán, *supra* note 4, at 640, 642–43; *see also* Margaret D. Stock, *Citizenship and Computers*, Benders Immigr. Bull., Aug. 15, 2010, at 1, 1 (proposing improvements to record-keeping and data-sharing among DHS agencies regarding naturalization).

[316] *See* Terán, *supra* note 4, at 676–77.

Such proposals, if implemented, would markedly improve on the current state of affairs. Furthermore, from an advocacy perspective there is a clear advantage to adopting such a strategy, as it would build on the special status that the Supreme Court has historically accorded to citizenship claims. Yet it is important to recognize the extent to which this response itself is embedded within the framework of the citizenship line. These measures would, in effect, seek to shore up the citizenship line, reinforcing the insulation between citizenship claims and the rest of the immigration enforcement system.

This strategy raises two concerns. First, on a normative level, a strategy that focuses specifically on U.S. citizens risks reinforcing the exceptionalism that has plagued immigration law since the nineteenth century. Cases involving citizens grab headlines and focus public attention on the shortcomings of the immigration enforcement system. Maintaining too narrow a focus on such cases, however, obscures the extent to which the same factors—summary proceedings, lack of counsel, prolonged detention— foreclose valid claims for asylum and other forms of relief, leading to erroneous deportations that are arguably no less troubling than the deportation of U.S. citizens.[317] U.S. citizen deportations reveal defects that impact the entire immigration enforcement system, not simply the U.S. citizens within it.

On a more pragmatic level, the history of the citizenship line over the course of the twentieth century provides a cautionary tale about the effectiveness of such an approach. Since the 1920s, the repeated response to the problem of U.S. citizens within immigration enforcement has been to try to erect barriers between citizenship claims and "ordinary" immigration matters. Although these safeguards have provided the appearance of insulating citizens from the reduced due process protections accorded to noncitizens, they have not actually eliminated the deportation of citizens.[318] They have perhaps even hindered attempts to address the effects of immigration enforcement on U.S. citizens by obscuring those effects. This is the root problem of the citizenship line: procedural safeguards within an adjudicatory system cannot

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[317] *See* Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. Haw. L. Rev. 139, 149–53 (2010) (describing the frequency of wrongful deportations of noncitizens); *see also* Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immigr. L.J. 167, 196 (2006) (estimating that between 1996 and 2005, approximately 20,000 bona fide asylum seekers were wrongly turned away from U.S. borders).

[318] *See supra* notes 236–255 (arguing that the legal protections put in place to protect citizens from deportation are not adequate).

be premised on a line that the system is itself engaged in drawing. Seeking to separate out U.S. citizen cases is akin to granting the right to counsel in the criminal context only to those suspects who manage to maintain their innocence even after prolonged questioning without legal representation.

What would it mean, instead, to abandon the citizenship line? In other words, what would immigration enforcement look like, doctrinally, if we begin to let go of the framework of immigrants' rights and instead view the system as one that directly impacts significant numbers of citizens as well as noncitizens every day? Such a change in perspective would shift the focus away from plenary power, with implications far beyond the relatively small proportion of cases that involve citizens. If one takes away the assumption that those in removal proceedings are noncitizens, it is difficult to see how a court could countenance prolonged detention without any individualized determination of dangerousness or flight risk,[319] or fast-track removal procedures that bypass the immigration courts.[320]

The right to appointed counsel presents a more complex question. Given the designation of removal proceedings as civil rather than criminal,[321] recognizing the presence of citizens among the detained population would not in itself necessitate any dramatic shift in the Supreme Court's jurisprudence. The Court's recognition of a right to counsel in areas such as juvenile detention and civil commitment,[322] however, provide compelling analogies to the situation of someone facing immigration detention and possible removal from the United States.[323] The U.S. citizen deportation cases that have come to light provide powerful examples of the difference that access to counsel makes, due to the growing number of cases in which those who have been misclassified as noncitizens within removal proceedings later prevail on citizenship claims when prosecuted for illegal reentry.[324]

Abandoning the procedural aspects of immigration exceptionalism would not in itself create an error-free adjudication system; the criminal courts provide ample evidence that coercive conditions and

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[319] *See supra* notes 145–148 and accompanying text.

[320] *See supra* notes 154, 225–235 and accompanying text.

[321] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (discussing effects of designation of immigration as civil rather than criminal).

[322] *See supra* note 147 and accompanying text.

[323] *See supra* note 144. There have been growing calls for developing systems for appointed counsel, most prominently by Judge Robert Katzmann of the Second Circuit. *See* Dolnick, *supra* note 144.

[324] *See supra* notes 244–255 and accompanying text.

adjudicatory errors can occur even with heightened constitutional protections.[325] Furthermore, even such a radical shift in perspective would not address the substantive aspects of immigration exceptionalism, including the Court's longstanding refusal to consider factors such as proportionality or family unity within the context of deportation.[326] Nevertheless, abandoning the citizenship line and bringing immigration enforcement into the mainstream with regard to procedural protections would significantly transform a system that is currently designed to encourage individuals to abandon legal claims—citizenship-related and otherwise—rather than to pursue them.

Conclusion

Approaching the detention and deportation system through the lens of citizenship reveals a deep contradiction within the foundation of immigration exceptionalism. Despite repeated attempts to shore up the citizenship line since the 1920s, the distinction between citizen and noncitizen has not proven strong enough to bear the weight that courts have placed on it. Incidents in which U.S. citizens are detained or deported are often characterized as rare and tragic errors. Yet the misclassification of citizens as noncitizens occurs routinely, not just due to a failure to follow protocol but often due to the protocol itself. This insight has the potential to contribute both to scholarly discussions of citizenship and to advocacy strategies to reform the immigration enforcement system. Although a common and understandable reaction to the erroneous deportation of U.S. citizens is to seek to strengthen the safeguards that separate citizens from noncitizens, a wiser course would be to do just the opposite, by implementing increased procedural protections throughout the immigration enforcement system without regard to claimed citizenship status. An enduring solution can come only from abandoning the conceit that an adjudication system can simulta-

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[325] For a concise account of the innocence movement and associated scholarship, see generally Daniel S. Medwed, *Innocentrism*, 2008 U. Ill. L. Rev. 1549. *See also* Alexander, *supra* note 313, at 84–89 (describing the structural barriers that steer indigent defendants toward accepting guilty pleas rather than going to trial).

[326] For critiques of the substantive aspects of immigration exceptionalism, see, e.g., Chin, *Segregation's Last Stronghold*, *supra* note 129, at 3 (referring to the plenary power doctrine as a relic of racism from the *Plessy v. Ferguson* era); Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 Cath. U. L. Rev. 1115, 1168 (2002) (calling plenary power a violation of international law); Schuck, *supra* note 129, at 3 (referring to the plenary power doctrine as being out of step with contemporary public law norms); *see also* Motomura, *Curious Evolution*, *supra* note 129, at 1699–1704 (exploring the interplay between procedural and substantive claims).

neously employ two separate sets of procedural norms, based upon a citizenship line that the system itself is engaged in drawing.