RESPONSE

Making Litigating Citizenship More Fair

Ming H. Chen[*]

In *Litigating Citizenship*, Cassandra Burke Robertson and Irina D. Manta chart the contours of expanding immigration enforcement in the Trump administration: from criminal aliens and illegal aliens, to legal immigrants, to naturalized citizens.[1] In their own words, their interest is "How do we determine when a particular individual meets—or fails to meet—the legal requirements that determine citizenship under our laws?"[2] More specifically, they want to assess *whether* the government's determinations are fair. Their focus on challenges to citizenship is a much-needed spotlight on the excesses of modern immigration policy and their effect on our democracy.

Their Article includes great examples of how citizenship challenges arise on a daily basis.[3] Recent episodes of citizenship

[*] University of Colorado Law School Associate Professor and Faculty-Director Immigration and Citizenship Law Program. Author of *Pursuing Citizenship in the Enforcement Era* (Stanford University Press, forthcoming 2020).

1. Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757 (2020).
2. *Id.* at 760.
3. *Id.* at 767–81.

determination disputes at the border,[4] denaturalization task forces,[5] and wrongful deportation[6] are richly detailed and placed in historical context. Beyond the in-depth description that brings to life the concept of citizenship challenges, the Article includes an extended reflection on due process and the need for fairness in government advances of individual rights.[7] The authors emphasize the procedural safeguards that need to be placed on the U.S. government to balance out its immense power over comparatively weaker individuals because of the distinctive nature of citizenship contests.[8] Citing Justice Felix Frankfurter's words, "The history of liberty has largely been the history of observance of procedural safeguards."[9]

Due process is a well-chosen vehicle for examining fairness in immigration proceedings. The history of immigration law has been a struggle to secure "procedural safeguards" for immigrants, often directed at recognizing the stakes of noncitizens living inside U.S. borders. As those in the world of immigration law know, pushing for due process is how immigration lawyers get things done. That is because long traditions of sovereignty, plenary power, and deference to executive discretion leave little opportunity for litigating the substance of immigration policies,[10] notwithstanding recent litigation focusing on

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4. The range of passport denials at the border include news stories and litigation from the last year. *See, e.g.*, *Esqueda v. Pompeo*, ACLU MINN. (last visited Mar. 12, 2020), https://www.aclu-mn.org/en/cases/esqueda-v-pompeo [https://perma.cc/6FXU-MHRL]; Dara Lind, *Trump's Stripping of Passports from Some Texas Latinos, Explained,* VOX (Aug. 30, 2018), https://www.vox.com/2018/8/30/17800410/trump-passport-birth-certificate-hispanic-denial-citizens [https://perma.cc/LZ9Z-LMHD]; Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border, Throwing Their Citizenship into Question*, WASH. POST (Sept. 13, 2018), https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html [https://perma.cc/D8AS-Q4YF]; Brandon Stahl, *Minnesota Man and Marine Vet Born in U.S. Files Legal Challenge to Passport Denial*, STARTRIBUNE (May 9, 2019), http://www.startribune.com/minnesota-man-born-in-u-s-files-legal-challenge-to-passport-denial/509719882/ [https://perma.cc/68H6-AD79]; Debbie Weingarten, *My Children Were Denied Passports Because They Were Delivered by a Midwife*, N.Y. TIMES (Sept. 3, 2018), https://www.nytimes.com/2018/09/03/opinion/weingarten-homebirth-border-passports.html [https://perma.cc/9K6N-G3NG].

5. *See, e.g.*, Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html [https://perma.cc/P4B8-VYBM]; Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html [https://perma.cc/V3VC-MZNA].

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

7. Robertson & Manta, *supra* note 1, at 781–84.

8. *Id.* at 799–809.

9. McNabb v. United States, 318 U.S. 332, 347 (1943).

10. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 600 (1990).

substantive constitutional provisions like the Equal Protection Clause[11] and substantive administrative law standards like arbitrary and capricious review.[12]

What Robertson and Manta contribute as well-informed observers looking into the world of immigration law are their skills as procedural experts. Their deft analysis of burden shifting and reliance could only be provided by an experienced litigator or keen proceduralist. Take this passage, where they leverage insider knowledge of how burdens of proof impact removal proceedings:

> When an individual subject to removal proceedings makes a claim of citizenship, the government bears the burden of proof to establish that the individual is a noncitizen. A majority of the U.S. courts of appeals agree that the individual can raise a claim of citizenship at any time in the proceedings—the claim is not forfeited by failure to raise it earlier in the proceedings nor by failure to exhaust administrative remedies prior to judicial review.
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> The government's burden of persuasion in such proceedings is heightened: it must establish noncitizenship by "clear, unequivocal, and convincing evidence." This is unquestionably a higher standard that an individual seeking a declaratory judgment of citizenship would have to meet. Within that standard, however, courts have applied a complex burden-shifting scheme. Although the government bears the initial burden to prove noncitizenship, a mere showing that the individual was born outside the United States is sufficient to create a rebuttable presumption of noncitizenship that then shifts the burden to the person claiming citizenship. Once the burden has shifted, the individual must then either dispute the evidence of birth abroad or show how citizenship was obtained—perhaps through derivative status or naturalization.[13]

They embed their tactical analysis in reflections on core values such as reliance liberty, stability, finality, and fairness that cut across immigration law and bind it to universal legal norms. Or, at least, they bind immigration law to the norms that *ought* to govern government actions against individuals. Their willingness to import universal norms is a valuable contribution to the jurisprudence of immigration law.

The lens of due process also touches on a big and too often overlooked idea: immigrants are part of the American political community and have individual rights that require government justification before they can be deprived or infringed. By design, power flows from the citizens to the state and not the other way around. The

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11. Trump v. Hawaii, 138 S. Ct. 2392 (2018) (discussing Korematsu v. United States, 323 U.S. 214 (1944)).

12. There have been legal challenges to the reasonability of DACA, public charge rules, and asylum changes. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of California, No. 18–587 (U.S. argued Nov. 12, 2019); *Public Charge*, IMMIGRANT LEGAL RESOURCE CTR., https://www.ilrc.org/public-charge [https://perma.cc/WPK2-7UU5] (last visited Mar. 12, 2020); Adam Liptak, *Supreme Court Says Trump Can Bar Asylum Seekers While Legal Fight Continues*, N.Y. TIMES (Sept. 11, 2019), https://www.nytimes.com/2019/09/11/us/politics/supreme-court-trump-asylum.html [https://perma.cc/36WG-4ZTB].

13. Robertson & Manta, *supra* note 1, at 775–76.

authors take a significant analytical step when they link immigrants' rights with constitutional norms for citizens. Immigration advocates have sought to make the case that immigrants and citizens exist on a continuum for years: the rallying cry of recent social movements has been that immigrants' rights are civil rights. Though the specific incidents that give rise to immigrants' rights social movements are multitudinous, citizenship cases are a very convincing way to make this point.[14] The Fourteenth Amendment's Citizenship Clause provides for birthright citizenship and naturalization.[15] Once the threshold of citizenship is crossed, there ought to be little contention about the sanctity of individual rights and liberty. Save the skirmishes for the border or other cases where political boundaries are less settled.

But in the current policy environment, nobody is safe from immigration enforcement—not even U.S. citizens. The forces of exclusion and enforcement extend between borders, rooting out anyone who is not U.S.-born to U.S.-born parents. For that matter, it roots out anyone who is not U.S.-born to a certain kind of parents whom conform to mainstream cultural norms.

The adherence to selective citizenship and the willingness to redraw the bounds of citizenship as part of immigration politics is a new and an old idea.[16] Some people will never belong, as suggested by the government's efforts to curtail birthright citizenship going back to *Dred Scott v. Sandford,*[17] *Elks v. Wilkins,*[18] and *U.S. v. Wong Kim Ark.*[19] Modern legislative proposals to end birthright citizenship for children of undocumented immigrants (derisively called "anchor babies") and executive actions to end birthright citizenship for legal nonimmigrants (derisively called "birth tourism") breathe new life into these old debates.[20] The nearly unbroken trajectory of exclusion shows that the

14. The authors cite Professor Rachel Rosenbloom's argument that "procedural safeguards within an adjudicatory system cannot be premised on a line that the system is itself engaged in drawing." Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2021–22 (2013). That is, procedural safeguards cannot be offered only to citizens because those safeguards are needed to protect the citizenship determination itself. Procedural safeguards must apply at an earlier stage, ensuring that individuals engaged in the legal system—whether they are known to be citizens or not—have a full and fair opportunity to have their claims heard.

15. U.S. CONST. amend. XIV, § 2.

16. Jelani Cobb, *Donald Trump's Idea of Selective Citizenship*, NEW YORKER (July 29, 2019), https://www.newyorker.com/magazine/2019/07/29/donald-trumps-idea-of-selective-citizenship [https://perma.cc/UGL6-E2BD].

17. 60 U.S. 393 (1857).

18. 112 U.S. 94 (1884).

19. 169 U.S. 649 (1898).

20. A recent example of legislation to end birthright citizenship is H.R. 140 Birthright Citizenship Act of 2019, introduced by Rep. Steve King on January 3, 2019, https://www.congress.gov/bill/116th-congress/house-bill/140 [https://perma.cc/8AZC-PK3W].

laws and mores will make sure that marginalized minorities struggle to gain citizenship. The authors are well aware of the racial history of exclusion embedded in the Citizenship Clause.[21] Their recognition of this history of exclusion functions as an important counterweight to the "lofty" goals of naturalized citizenship elsewhere in the citizenship scholarship.[22]

Moving to core case studies of citizenship challenges in the Article, the authors consider procedural unfairness in each of these situations:

- Failures to recognize citizenship—in which they discuss challenges to passports presented at the border, despite the birth of the individual inside the U.S. or to U.S. citizen parents, as in the case of Mark Esqueda[23] and Mary Elizabeth Elg,[24] respectively.[25]

- Denaturalizing citizens—in which they link the infamous denaturalization of Emma Goldman during the red scare[26] with recent government attempts to denaturalize citizens in Operation Janus and still-unfolding proceedings.[27]

President Trump has said that he wants to abolish birthright citizenship by executive order. Patrick J. Lyons, *Trump Wants to Abolish Birthright Citizenship. Can He Do That?* N.Y. TIMES (Aug. 22, 2019) https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html [https://perma.cc/N8NP-ZBQA]. The Trump administration's State Department has instituted a policy to block visas for pregnant women to combat "birth tourism." Temporary Visitors for Business or Pleasure: A Rule by the State Department, 85 Fed. Reg. 4219 (Jan. 24, 2020), https://www.federalregister.gov/documents/2020/01/24/2020-01218/visas-temporary-visitors-for-business-or-pleasure [https://perma.cc/BB3X-ND54].

21. *See* Robertson & Manta, *supra* note 1, at 765.

22. *Id.* at 764 (quoting D. Carolina Núñez*, Citizenship Gaps*, 54 TULSA L. REV. 301, 313 (2019).

23. Stahl, *supra* note 4. *See generally Esqueda v. Pompeo*, *supra* note 4.

24. Perkins v. Elg, 307 U.S. 325 (1939).

25. Robertson & Manta, *supra* note 1, at 767–69, 771–73.

26. *Id.* at 761–66; Emma Goldman, *A Woman Without A Country*, FREE VISTAS, *reprinted in* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC, 187–95 (2013).

27. Robertson & Manta, *supra* note 1, at 780. These denaturalization operations are described in Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, N.Y.U. L. REV. (2019); Amanda Frost, *Alienating Citizens*, 114 NW. L. REV. 241 (2019); *Unmaking Americans: Insecure Citizenship in the United States,* OPEN SOC. JUST. INITIATIVE (2019), https://www.justiceinitiative.org/publications/unmaking-americans [https://perma.cc/A5FF-RV9F].

- Wrongful deportations and other litigation raising various types of tangles U.S. citizens have had with immigration enforcement.[28]

All of these situations add up to a portrait of unstable citizenship, and even more examples could be imagined.[29] The instability is similar to what I found in my interviews with green card holders[30] and what other scholars have reported from surveys of DACA recipients, TPS holders, and other immigrants holding lesser legal protections.[31] This mounting challenge to immigration and naturalized citizenship, the authors argue convincingly, amounts to nothing less than a threat to democracy.[32]

What more could the authors do in this Article? They could extend the scope of their focus on challenges with litigation to recognize the large swath of unreviewable actions of executive discretion. The insulation of immigration-related actions from courts is furthered by the heavy use of guidance within the agency, Congress's jurisdiction-stripping statutes, and the encroachment both of the White House on immigration agencies and of immigration agencies on one another.

They could also extend the scope of their search for remedies beyond the Constitution. Much of immigration law is administrative law[33] and focuses on the Administrative Procedure Act rather than on constitutional norms. The litigation over inclusion of a citizenship question in the 2020 U.S. Census is a recent example. Only partially

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28. Robertson & Manta, *supra* note 1, at 807–09; Lyttle v. United States, 867 F. Supp. 2d 1256 (M.D. Ga. 2012); Turner v. United States, No. 4:13-CV-932, 2013 WL 5877358, at *1 (S.D. Tex. Oct. 31, 2013)*; see* Stevens, *supra* note 6.

29. For example, the rising burdens on the path to citizenship are another way of making citizenship determinations unfair. *Citizenship Delayed: Civil Rights and Voting Rights Implications of the Backlog in Citizenship and Naturalization Applications*, Report of the Colorado Advisory Committee to the U.S. Commission on Civil Rights, *reprinted in* 91 COLO. L. REV. FORUM (2019); Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in Military*, 97 DENV. U.L. REV. (forthcoming 2020).

30. MING H. CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (forthcoming 2020).

31. Roberto G. Gonzales, Kristina Brant, & Benjamin Rother, *DACAmented in the Age of Deportation: Navigating Spaces of Belonging and Vulnerability in Social and Personal Lives*, 43 ETHNIC & RACIAL STUDIES 60 (2019).

32. *See* Robertson & Manta, *supra* note 1, at 810 ("It is only by protecting citizenship interests that constitutional democracy, which rests on the idea of political equality, can function.").

33. *See* Jill E. Family, *Online Symposium: Is Immigration Law Administrative Law? Introduction*, YALE J. REG.: NOTICE & COMMENT (Feb. 8, 2016) https://www.yalejreg.com/nc/online-symposium-is-immigration-law-administrative-law-introduction-by-jill-e-family/ [https://perma.cc/2VZA-G4U5] (noting "the intersections of immigration law and administrative law") (including contributions from Chris Walker, David Rubenstein, Shoba Wadhia, Bijal Shah, and Michael Kagan).

settled in the Supreme Court,[34] the case leaves open questions about how the government could properly add a question inquiring about citizenship status and whether the Executive Order that sets expectations for interagency cooperation and data sharing about citizenship will prove to be unfair.[35]

Part III of *Litigating Citizenship,* on the uncertain constitutional basis for increased procedural safeguards, attempts to build a strong case for heightened procedure based on the "factual complexity" of citizenship.[36] The authors note some of these troublesome facts: most citizens do not carry their birth certificates or passports; some people do not even own these documents; and mental illnesses or poverty may compound the inability to furnish documentary evidence of citizenship.[37] And the authors note that " 'some individuals may be citizens without knowing it, due to the rules governing acquired and derivative citizenship'—rules that have changed just within the last few years."[38] The authors seek a larger role for equity to acknowledge the factual complexities of citizenship.

The notion of equitable defenses would seem to be common sense in other policy arenas. Equitable principles are called upon because many immigration cases are intensely fact-based inquiries and discretion ought to be available to right wrongs. But equity is not a winning argument in immigration law and equitable discretion is fading: tools like JRAD (Judicial Recommendation Against Deportation), deferred action, and administrative closure are being taken away from immigration judges.

Ultimately, immigrants are not treated like U.S. citizens under existing law or equitable principles. They are largely unrepresented by counsel, often do not know the charges against them, and have limited opportunity to appeal adverse findings given the politicized nature of the immigration courts. This does not change even when they face criminal-like consequences such as being jailed in detention—a point that has been made by Cesar Garcia Hernandez, Ingrid Eagley, and

34. *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2567, 2576 (2019) (holding, among other things, that the Constitution permits the Secretary of Commerce to inquire about citizenship in a census questionnaire but invalidating the inclusion of a citizenship question in the 2020 census questionnaire because the Secretary's stated reasons for including such a question were mere pretext).

35. *See* Collecting Information About Citizenship Status in Connection with the Decennial Census, 84 Fed. Reg. 33821 (July 11, 2019) (the Executive Order).

36. Robertson & Manta, *supra* note 1, at 784–85 (quoting Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1824–25 (2013)).

37. Robertson & Manta, *supra* note 1, at 785.

38. *Id.* (quoting Jennifer Lee Koh, *Rethinking Removability,* 65 FLA. L. REV. 1803, 1825 (2013)).

many other crimmigration scholars.[39] This false hope for more robust and equitable treatment of immigrants may not be a blind spot of the authors so much as a blind spot in the law itself. Their faith that due process comparable to what is offered in a criminal context could improve the process available to immigrants is refreshing. However, it is somewhat unrealistic given the losing battle of immigration advocates and scholars to equate immigration-detention with criminal practices in the current political environment.[40]

Still, immigrants and naturalized citizens have constitutional rights, especially due process. The question is: how much due process? That question goes to the heart of heightened procedural protections owed in citizenship cases. After all, if it is only the individual's interests that matter, then the due process protections of ordinary civil litigation should surely be good enough. Courts adjudicate matters such as child custody, workers' compensation benefits, and other civil matters that strike at the core of individuals' lives and concerns every day. What is different about citizenship? The authors argue that the citizenship difference stems from the political order enshrined in the U.S. Constitution.[41] I find this to be the most compelling part of their argument. A court's concern is not whether a particular person is exercising any particular rights of free speech, political association, or exercise of religion; its concern is the potential chilling effect on other people if litigation procedure leaves citizenship protections vulnerable.

Recalling *Afroyim v. Rusk*, the case forbidding involuntary expatriation other than for fraud or illegal procurement of citizenship, the Court discussed the close ties between democracy and citizenship.[42] Justice Black writing for the majority said, "The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive

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39. *See* Cesar Garcia Hernandez, *Desconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 229 (2018) ("Roughly two-thirds of migrants in removal proceedings go without an attorney; for detained migrants, the overwhelming majority do not have access to a lawyer."); *see also* Jennifer Chacon, *Overcriminalizing Immigration*, 103 J. CRIM. L. & CRIMINOLOGY 613, 651 (2012) ("In criminal courts along the southern border, illegal entry pleas are counseled only nominally, with six to ten defendants pleading at a time with the assistance of one public defender."); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 393 (2006) ("Noncitizens in immigration proceedings . . . generally do not have the right to appointed counsel at government expense . . . .").

40. *See, e.g.*, Ingrid Eagley, *Gideon's Migration*, 122 YALE L. J. 2282, 2286 (2013) (arguing that "[i]n th[e] . . . half century after *Gideon* [*v. Wainwright*], the once-separate domains of criminal law and immigration law have merged").

41. Robertson & Manta, *supra* note 1, at 793–99.

42. 387 U.S. 253, 268 (1967); *see also* Robertson & Manta, *supra* note 1, at 779–80; 794–97 (discussing the impact of *Afroyim*).

another group of citizens of their citizenship."[43] For this reason, the authors prescribe that "[p]rotecting citizenship . . . means rethinking litigation procedures" to ensure that they offer protection commensurate with the interests at stake in those suits and that reflect the seriousness of liberty and reliance interests involved in citizenship challenges.[44] This seems right, and it argues against an anomaly in constitutional law: citizenship is subordinated, rather than elevated, to merit increased attention from the courts[45]—and ultimately, the authors persuade, from all of us.

43. *Afroyim*, 387 U.S. at 268.

44. Robertson & Manta, *supra* note 1, at 810.

45. Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 J. GENDER, SOC. POL'Y & L. 411, 434 (2010) ("[U]nder constitutional law . . . lower levels of scrutiny are applied to judicial review of alien (noncitizen), as opposed to citizen, discrimination claims.").