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Stateless in the United States: Current Reality and a Future Prediction

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Stateless in the United States: Current Reality and a Future Prediction

Polly J. Price*

ABSTRACT

Statelessness exists in the United States—a fact that should be of concern to advocates of strict immigration control as well as those who favor a more welcoming policy. The predominant reasons for statelessness include the presence of individuals who are unable to prove their nationality and the failure of their countries of origin to recognize them as citizens. Migrants with unclear nationality, already a problem for the United States, obstruct efforts to control immigration by the deportation of unauthorized aliens. These existing problems of national identity will increase exponentially if birthright citizenship in the United States is amended to exclude the children of undocumented aliens. Contrary to common assumptions, proposed changes to U.S. citizenship law would exacerbate statelessness into the next generation when no fallback nationality is available.

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I. INTRODUCTION

In the United States today, there are an unknown number of persons whom no nation will claim as citizens or nationals. Unless the United States apprehends and attempts to deport these persons, the public is unlikely to know about them, and they are likely to continue to live in the shadows—undocumented both from the perspective of U.S. immigration law and with respect to their countries of origin.¹ The attempt to control unauthorized immigration by deporting migrants brings this statelessness to light because no country will take them. There are thousands of persons that the United States has been unable to deport in the last several years alone.² Many others are also likely to be effectively stateless, given that 12 million unauthorized migrants are thought to be living in the United States today.³

The harm of statelessness, as described below, is significant both to the individual and to the United States. But at present this statelessness at least is limited to one generation, because under existing practices of territorial birthright citizenship, the children of

1. In this Article, I sometimes refer to the class of noncitizens in the United States who lack legal immigration status as “undocumented aliens.” This use of the term is not equivalent to “stateless,” although as I explain in this Article, an unknown number of undocumented aliens in the United States are effectively stateless.

2. See *infra* text accompanying notes 190–222 (evidencing the difficulty the United States has faced in deporting migrants).

3. This estimate is based on the Pew Hispanic Center’s 2007 study, concluding that as many as 12.5 million undocumented aliens were then in the United States. In 2008, the estimate was 11.2 million. See Julia Preston, *Decline Seen in Numbers of People Here Illegally*, N.Y. TIMES, July 31, 2008, http://www.nytimes.com/2008/07/31/us/31immig.html?_r=1&partner=rssnyt (reviewing a report by the Center for Immigration Studies, which argued the decline in immigration was due to increased enforcement efforts).

unauthorized immigrants are automatically awarded U.S. citizenship at birth if born in the United States.⁴

The incidence of statelessness would be exacerbated exponentially if the lack of nationality continues into subsequent generations. Proposals to amend the rule of territorial birthright citizenship in the United States—the *jus soli*—aim to deny citizenship to the children of persons who are in the country illegally. Citizenship for these children would instead follow the *jus sanguinis*, meaning citizenship by descent from a parent.⁵ These children would then, like their parents, be subject to “control” through deportation. The proposals rest on the assumption that the children of illegal migrants would retain the nationality of their parents, and thus would not present problems of statelessness. But as this Article will demonstrate, some children born in the United States would in fact be stateless, with no recognized nationality at birth. This is true even though the great majority of undocumented persons in the United States themselves come from *jus soli* nations with *jus sanguinis* traditions governing births outside of the country.⁶

The prediction that restrictions on birthright citizenship in the United States could lead to statelessness has been acknowledged in some of the academic literature on this subject.⁷ But there is as yet no

4. Birthright citizenship comes from the first sentence of the Fourteenth Amendment to the U.S. Constitution: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. Birthright citizenship in the United States is discussed *infra* Part III.A.

5. The award of citizenship at birth, either by *jus soli* or *jus sanguinis*, accounts for the citizenship of ninety-seven out of every hundred people in the world. See Ayelet Shachar, *The Worth of Citizenship in an Unequal World*, 8 THEORETICAL INQUIRIES L. 367, 368 (2007) (analyzing the distributive-justice ramifications of citizenship entitlement through birthright).

6. Based on Department of Homeland Security (DHS) estimates, the vast majority of undocumented immigrants are from Mexico and Latin America: 60 percent (6.7 million) from Mexico, 12 percent (1.3 million) from Central America, 5 percent (575,000) from South America, and 3 percent (350,000) from the Caribbean. MICHAEL HOFER, NANCY RYTINA & BRYAN C. BAKER, DEP’T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 4 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf. These statistics are provided at the end of this Article in the Appendix.

7. See, e.g., GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 183–87 (1996) (discussing the mutuality of obligation between those who must obey the laws of the United States and those whom the U.S. government must protect); PETER H. SHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 136–37 (1985) (arguing that citizenship by birth is inconsistent with the American concept of consent for membership and thus membership by birth should be constrained); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 470–72 (1997) (viewing U.S. history as hierarchies aimed to minimize racial, ethnic, and gender minorities).

full explanation of why statelessness would occur. This Article documents the various ways in which statelessness already occurs in the United States, and it also explains in detail why statelessness will increase under a limited *jus soli*.

Unauthorized immigration is perceived as a major social, economic, and political issue in the United States. Restrictions on U.S. birthright citizenship are among the many proposed and ongoing efforts to deal with unauthorized immigration. Statelessness, already present in the United States, would be increased by these restrictions because (1) statelessness already exists in the Western Hemisphere, from which many, if not most, unauthorized migrants come to the United States, and (2) new restrictions will extend statelessness to second or subsequent generations, as well as create statelessness for some children even when the parent has a recognized nationality. The United States would create a new class of persons who cannot be deported, thereby frustrating the primary objective of restrictions on birthright citizenship.

This Article also fills a void in previous scholarship by showing where and why statelessness already exists in the Western Hemisphere (including the United States). It is widely recognized that differences in how nations award citizenship at birth can lead to statelessness, and that statelessness of some magnitude probably exists in every country in the world. The pure form of *jus soli* in theory minimizes statelessness because the location of one's birth is generally easier to prove than is the nationality of one's parents (and often the nationality of a parent of a parent). Thus, the 1961 Convention on the Reduction of Statelessness (1961 Convention) favors *jus soli* by stipulating that an important measure to avoid statelessness at birth is to provide nationality to children born in the territory who would otherwise be stateless.⁸

The comparative perspective provided here also serves an important function. Relatively stable national boundaries and governments should produce no statelessness on the basis of conflict-of-nationality laws for migrations of persons *within* the Western Hemisphere (from one *jus soli* birth nation to another). The fact that effective statelessness is an existing problem in parts of the Americas is noteworthy in its own right, but it is particularly significant when considering proposed modifications to existing rules awarding citizenship at birth in the United States.

This Article proceeds as follows. Following a background section on the concept of statelessness, it evaluates the causes and prevalence of statelessness already existing in the United States and

8. See Convention on the Reduction of Statelessness art. 1, ¶ 1, Aug. 30, 1961, 1989 U.N.T.S. 175 [hereinafter 1961 Convention] ("A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.")

other parts of the Western Hemisphere. It proceeds to show how statelessness would increase if the United States should alter its birthright citizenship rules, using the Birthright Citizenship Act of 2013 as an example for this proposed change. In its latter sections, this Article explains the mechanisms that would create statelessness for children and why statelessness is an undesirable result both for the individuals involved and for the United States.

II. THE PRESENT PROBLEM OF STATELESSNESS

A. *Statelessness as an International Sociopolitical Concern*

Stateless is a term used in international legal instruments to denote individuals and populations with no enforceable assertion of a nationality.⁹ Whether someone is stateless ultimately depends on the viewpoint of the state with respect to the individual or group of individuals.¹⁰ Identifying stateless persons can prove difficult.¹¹ An estimated 12 million persons are believed to be stateless throughout the world.¹² But the State Department warns that because the data are unreliable, it is impossible to know whether those numbers are growing or shrinking.¹³

The problem of statelessness has been substantial enough to attract international attention since at least 1954. Two international conventions constitute the primary framework for definitions of and

9. See generally U.N. HIGH COMM'R FOR REFUGEES [UNHCR], *THE STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA* ch. 6 (1997), available at <http://www.unhcr.org/3eb7ba7d4.pdf> (defining a stateless individual as someone "who is not considered as a national by any state under the operation of its law").

10. See generally Alison Harvey, *Statelessness: The 'de facto' Statelessness Debate*, 24 J. IMMIGR. ASYLUM & NATIONALITY L. 257, 259 (2010) (demonstrating the need to create a new way to describe individuals who are not stateless, but also not entitled to all the rights of citizenship, rather than using the term *de facto stateless* given the confusion it has introduced into the statelessness debate).

11. As explained by Refugees International: "Some stateless persons may be registered as foreigners, non-national residents, or be categorized as nationals of another state, even in instances where the other state does not consider them as nationals and will not protect them. . . . Questions about nationality and citizenship also arise for children of migrant workers." KATHERINE SOUTHWICK & M. LYNCH, *REFUGEES INT'L, NATIONALITY RIGHTS FOR ALL: A PROGRESS REPORT AND GLOBAL SURVEY ON STATELESSNESS 2* (2009), available at http://www.refintl.org/sites/default/files/RI%20Stateless%20Report_FINAL_031109.pdf.

12. See Jay Milbrandt, *Stateless*, 20 CARDOZO J. INT'L & COMP. L. 75, 76 (2011) (suggesting the issue of statelessness is one of extreme, international importance today, and that a cooperative international network could be a viable solution).

13. See Samuel M. Witten & David J. Kramer, *Imagine This: You Have No Country, No Country Will Claim You*, DIPNOTE: U.S. DEP'T ST. OFFICIAL BLOG (Sept. 16, 2008, 8:30 AM), http://blogs.state.gov/index.php/entries/no_country/ (stating that due to the limited data regarding the stateless, few trends can be delineated, but the State Department is adding the issue to annual country reports to increase awareness).

responses to statelessness: the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention), and the 1961 Convention.¹⁴ In addition, the 1989 Convention on the Rights of the Child obligates signatory states to ensure that every child acquires a nationality.¹⁵ Several regional human rights treaties also address statelessness, including the American Convention on Human Rights.¹⁶ The American Convention, which the United States signed in 1977 but has never ratified, states: "Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality."¹⁷

The 1954 Convention set out a definition of statelessness and listed a number of rights that stateless persons should have. Among other obligations under the 1954 Convention, contracting states must treat stateless persons the same as lawful aliens in that country, including access to wage-earning employment, housing, public education, and public relief.¹⁸ Upon request, contracting states are also obligated to issue travel and identity documents to stateless

14. See Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter 1954 Convention] (seeking to expand the coverage of the term *stateless individual* as it was defined in 1951); see also Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175 (providing that a party to the convention must offer stateless individuals citizenship if the individual was born in its territory and would be stateless otherwise); UNHCR, TEXT OF THE 1961 CONVENTION ON THE REDUCTION OF STATELESSNESS WITH AN INTRODUCTORY NOTE BY THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 3–5 (2011), available at www.unhcr.org/3bbb286d8.html (offering an introduction laying out the points of the Convention).

15. An earlier document, the Convention to Reduce the Number of Cases of Statelessness (concluded in 1973), provided that a child must be granted his or her mother's nationality if the child would otherwise be stateless. This convention has only nine member states. See Anna Dolidze, *Lampedusa and Beyond: Recognition, Implementation, and Justiciability of Stateless Persons' Rights Under International Law*, 6 INTERDISCIPLINARY J. HUM. RTS. L. 123, 131–32 (2011–2012) (examining the Convention's impact on children).

16. See UNHCR, Address Before the Comm. on Juridical & Political Affairs, Org. of Am. States: The Inter-American System and International Protection for Refugees, Asylum Seekers, Returnees, and Internally Displaced, Stateless and Other Persons of Concern to UNHCR: Themes of Common Interest, at 1–2, OAS Doc. No. CP/CAJP-1912/02 (noting "the Americas have been fertile ground for the adoption and development of creative and innovative regional humanitarian responses for treatment of refugees and other persons requiring protection").

17. See American Convention on Human Rights art. 20, § 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (asserting that the right to nationality is universal and birthright is one way to obtain it). For a discussion of some reasons why the United States has not ratified this document, see Mark Kirk, *Should the United States Ratify the American Convention on Human Rights?*, 14 REVISTA IIDH 65, 78–79 (1991), <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/14/dtr/dtr4.pdf>.

18. See 1954 Convention, *supra* note 14, arts. 8, 17, 21–24 (governing wage earning, housing, public education, and public relief under the Convention).

persons within their territory.¹⁹ Further, stateless persons are not to be expelled except on “grounds of national security or public order.”²⁰

The 1961 Convention attempted to strengthen international intervention to reduce statelessness, including a UN mandate. Among other provisions, the 1961 Convention specifies the circumstances in which contracting states should award legal status to stateless persons, including granting citizenship to persons born within their borders who would otherwise be stateless.²¹

A related international agreement is the Convention Relating to the Status of Refugees.²² Designed to protect persons fleeing persecution in their own countries, the Convention defines persons needing protection as well as the responsibilities of the states to which they have fled.²³ The Convention recognizes that while some refugees may not have a nationality, all bona fide asylum seekers are effectively stateless if they cannot return to the country of their nationality.²⁴ Refugees have a right not to be expelled or punished for illegal entry into the territory of a contracting state, as well as the right to be issued identity and travel documents.²⁵ The United States signed the Protocol Relating to the Status of Refugees in 1967, and later enacted legislation incorporating its key provisions.²⁶ In the

19. See *id.* art. 28 (governing travel documents under the Convention).

20. See *id.* art. 31 (governing expulsion under the Convention).

21. See 1961 Convention, *supra* note 8 (agreeing that citizenship shall be given at birth or through an application submitted to appropriate authorities).

22. See UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 2 (Jan. 26, 2007), <http://www.unhcr.org/refworld/docid/45f17a1a4.html> [hereinafter UNHCR Advisory Opinion] (addressing application of the 1951 Convention principle of *non-refoulement* to extraterritorial cases).

23. The Convention Relating to the Status of Refugees, as amended by the 1967 Protocol, defines *refugee* as

[a person who,] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees art. 1, § A(2), July 28, 1951, 189 U.N.T.S. 137, available at <http://www2.ohchr.org/english/law/refugees.htm>.

24. See UNHCR Advisory Opinion, *supra* note 22, at 3 (noting the application of the Convention to both the stateless and any individual who cannot return to the country of his or her nationality).

25. See *id.* at 4 (listing rights made available through the 1951 Convention).

26. See Immigration and Nationality Act § 101(a), tit. 1, Pub. L. 101-132, 66 Stat. 163, 166 (1952) (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)) (adopting the 1951 Convention’s definition of *refugee*); Ritu Ghai, *Deciphering Motive: Establishing Sexual Orientation as the “One Central Reason” for Prosecution in Asylum Claims*, 43 COLUM. HUM. RTS. L. REV. 521, 530 (2012) (arguing Congress intended for

United States, persons who are granted asylum may eventually become U.S. citizens.²⁷

Stateless persons fall into one of two formal categories: “de jure” defines those “not considered as a national by any state under the operation of its law,”²⁸ and “de facto” describes persons outside the country of their nationality who are denied diplomatic protection or assistance by that country.²⁹ The 1961 Convention provides for international protection for de jure stateless persons, but it also recommends that persons who are de facto stateless should be protected as well, to enable them to acquire an effective nationality.³⁰ The Office of the UN High Commissioner for Refugees (UNHCR), a UN agency, is the designated organization to investigate the status of persons who may be stateless and to assist those persons in making claims to the relevant government authorities.³¹ The UNHCR charge also includes “a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.”³²

De facto statelessness has also been used to describe persons unable to document or prove nationality and those whom a government does not recognize as citizens despite a colorable claim to

the statute’s definition to be interpreted similarly to the Convention’s definition of *refugee*).

27. See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 814 (7th ed. 2012) (discussing how asylees “have a routine mechanism for adjusting to permanent resident status after one year in the United States” and how “they are not precluded from adjusting their status if they otherwise qualify, such as through marriage or employment”).

28. 1954 Convention, *supra* note 14, art. 1, ¶ 1. Brad Blitz and Maureen Lynch explain:

Under international law, *de facto* stateless persons are not covered by the provisions of the 1954 Convention relating to the Status of Stateless Persons even though it includes a non-binding recommendation that calls upon states to “consider sympathetically” the possibility of according *de facto* stateless persons the treatment which the Convention offers to *de jure* stateless people.

Brad K. Blitz & Maureen Lynch, *Statelessness: The Global Problem, Relevant Literature, and Research Rationale*, in STATELESSNESS AND THE BENEFITS OF CITIZENSHIP: A COMPARATIVE STUDY 4, 5 (Brad K. Blitz & Maureen Lynch eds., 2009), available at http://www.udhr60.ch/report/statelessness_paper0609.pdf.

29. See *What Is Statelessness?*, UNHCR, <http://www.unhcr.org/pages/49c3646c158.html> (last visited Feb. 19, 2013) (stating that although there is no universally accepted definition for the term, it is traditionally used to refer to someone who is “denied diplomatic and consular protection or assistance of his/her country”).

30. See SOUTHWICK & LYNCH, *supra* note 11, at 1 (pointing to the Final Act of the 1961 Convention’s recommendation to treat de facto stateless individuals as de jure for purposes of acquiring nationality).

31. See DIV. OF INT’L PROT., UNCHR, UNHCR ACTION TO ADDRESS STATELESSNESS: A STRATEGY NOTE 4–5 (2010), available at <http://www.unhcr.org/refworld/docid/4b9e0c3d2.html> (explaining UNHCR’s mandate for resolving the plight of the stateless).

32. *Id.*

that status.³³ The 2010 Expert Meeting on the Concept of Stateless Persons at Prato, Italy, further refined the meaning of statelessness in functional terms: an individual is stateless “if all states to which he or she has a factual link fail to consider the person as a national.”³⁴ No formal process determines that an individual is de facto stateless. Rather, it is an ad hoc classification applicable when an individual is either unable to prove his citizenship, or his country of origin refuses to recognize his citizenship.

The definitions of statelessness in the two international conventions have been widely recognized as deficient in recognizing the full scope of the problem.³⁵ Moreover, relatively few nations are parties to the conventions, leading some commentators to despair of a concerted international effort to address a problem of “significant magnitude and severe consequence.”³⁶ By contrast, every UN member nation—with the exception of the United States and Somalia—has signed on to and ratified the UN Convention on the Rights of the Child, signifying widespread agreement with its mandate that every child has a right to a nationality at birth.³⁷

While this Article focuses on the Western Hemisphere, the phenomenon is and has been worldwide. Recent examples of statelessness across the globe include children born in Thailand whose mothers entered the country illegally,³⁸ similar problems in

33. In international law, the terms *nationality* and *citizenship* are often used interchangeably; I also employ them as equivalents in this Article. See SOUTHWICK & LYNCH, *supra* note 11, at 1 (explaining that both terms are used to define membership by states).

34. Laura Bingham, Julia Harrington Reddy & Sebastian Köhn, *De Jure Statelessness in the Real World: Applying the Prato Summary Conclusions*, OPEN SOCIETY FOUNDATIONS 4 (2011), <http://www.soros.org/sites/default/files/prato-statelessness-20110303.pdf>.

35. See LAURA VAN WAAS, *NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 19–27* (2008) (explaining certain deficiencies found in the 1954 and 1961 Conventions).

36. *Id.* at 27. The number of parties to the 1954 Convention is seventy-six, while the number of parties to the 1961 Convention is fifty. See *Convention Relating to the Status of Stateless Persons: Status*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&lang=en (last visited Feb. 20, 2013); see also *Convention on the Reduction of Statelessness: Status*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=V-4&chapter=5&lang=en (last visited Feb. 20, 2013).

37. See *Convention on the Rights of the Child* art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3, (providing that children will have the right to a name and “the right to acquire a nationality”); see also *Convention on the Rights of the Child: Status*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Feb. 20, 2013).

38. See Milbrandt, *supra* note 12, at 78–79 (finding that many children born in hospitals or villages were not given identification papers).

other countries in Southeast Asia,³⁹ and the Roma in Europe, many of whom are stateless because some EU member states deny them citizenship.⁴⁰ In both of these examples, statelessness occurs because citizenship is not awarded at birth under *jus soli* principles. The solution stipulated in the 1961 Convention is that “[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless,”⁴¹ a principle that advocates for the Roma say is being ignored.⁴² Other instances of statelessness involve displaced refugees. For example, UNHCR believes that Greece is at risk of a “humanitarian crisis” due to the large number of migrants denied asylum, leaving them with no effective nationality.⁴³ Migrants in Greece have come from Africa and Asia, and a large population came from Central and Eastern Europe following the collapse of communist regimes.⁴⁴

The United States maintains a paradoxical and complex stance with respect to statelessness. The nation is not a signatory to either the 1954 or the 1961 conventions on statelessness. One reason given for the United States’ refusal to join the 1961 Convention is that it “limits voluntary renunciation of nationality in ways that would conflict with the right to voluntary expatriation that is recognized under U.S. law.”⁴⁵ Americans may renounce their nationality, even if

39. See generally Alec Paxton, *Finding a Country To Call Home: A Framework for Evaluating Legislation To Reduce Statelessness in Southeast Asia*, 21 PAC. RIM L. & POL’Y J. 623 (2012) (offering recommendations for legislation seeking to end statelessness based on the success experienced by various South Asia enactments).

40. See generally STATELESSNESS IN THE EUROPEAN UNION: DISPLACED, UNDOCUMENTED, UNWANTED (Caroline Sawyer & Brad K. Blitz eds., 2011) (providing comparative accounts of stateless individuals whose populations are either de facto or de jure stateless); Dolidze, *supra* note 15, at 131–32 (describing treaties that specifically aim to prevent statelessness in children); Jessica Parra, *Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements To Reduce and Avoid Statelessness*, 34 FORDHAM INT’L L.J. 1666, 1667 (2011) (finding the Roma to be a marginalized minority due to EU citizenship laws).

41. 1961 Convention, *supra* note 8.

42. See Parra, *supra* note 40, at 1676 (“Many of the parties that have signed the Universal Declaration of Human Rights, however, still have laws and practices that ignore the recognition of the right to a nationality.”).

43. See Sharita Gruberg, *De Facto Statelessness Among Undocumented Migrants in Greece*, 18 GEO. J. POVERTY L. & POL’Y 533, 533–34 (2011) (analyzing the dire circumstances of those who seek asylum in Greece due to the current legal regime and demonstrating the need for a “functioning asylum system”).

44. See *Greece: Facts and Figures*, INT’L ORG. MIGRATION, <http://www.iom.int/cms/en/sites/iom/home/where-we-work/europa/european-economic-area/greece.html> (last updated Sept. 2012) (offering an overview of migration activities involving Greece).

45. Eric P. Schwartz, *Recognizing Statelessness*, DIPNOTE: U.S. DEPT ST. OFFICIAL BLOG (Sept. 8, 2011), http://blogs.state.gov/index.php/site/entry/recognizing_statelessness.

that renunciation would lead to statelessness.⁴⁶ The 1961 Convention, by contrast, prohibits even the voluntary renunciation of citizenship when it would result in statelessness.⁴⁷

The United States nonetheless agrees in principle that statelessness is undesirable, and it pursues diplomatic efforts around the globe to remedy statelessness. It is also the single largest donor to the UN agency tasked with protecting stateless individuals.⁴⁸ According to a State Department publication, “[t]he U.S. government cares about statelessness as an issue that carries repercussions for regional stability and economic development,” among other reasons.⁴⁹ Furthermore, “[t]hrough diplomacy and humanitarian assistance, the US Department of State has sought to elevate statelessness as an important human rights and humanitarian issue in the US foreign policy agenda. The US is committed to continued support for stateless populations.”⁵⁰ The State Department is here focused outside of the United States, not internally.

Within the United States, the State Department takes the position that no one in the country is stateless due to U.S. action or failure to act; all stateless persons here (to the extent they exist, according to the government) owe their status to other nations. Two State Department officials recently maintained that “the US does not contribute to the problem of statelessness, and US law does not treat stateless individuals differently from other aliens.”⁵¹ In other words, and as further detailed below, stateless individuals currently living in the United States became stateless through the actions of other nations. As this Article later argues, that picture changes radically if citizenship is no longer automatic at birth within one of the fifty states. The source of statelessness would then be the United States.

Linda K. Kerber has provided historical examples of statelessness in the United States in her provocative essay, *Toward a History of Statelessness in America*.⁵² Beginning with slavery and ending with Yaser Hamdi, a U.S. citizen captured in Afghanistan and held as an enemy combatant, Kerber notes a cyclical interest in problems of statelessness in this country. Kerber urges an expanded understanding of statelessness, positing that statelessness can increase either with or without civil upheaval:

46. See Nicole Green & Todd Pierce, *Combating Statelessness: A Government Perspective*, 32 FORCED MIGRATION REV. 34, 35 (2009) (explaining the United States’ failure to ratify the 1961 Convention).

47. See *id.* (summarizing the Convention’s stance on voluntary renunciation of citizenship).

48. *Id.*

49. *Id.* at 34.

50. *Id.*

51. *Id.* at 35.

52. See Linda K. Kerber, *Toward a History of Statelessness in America*, 57 AM. Q. 727, 730–31 (2005).

Today, once again, statelessness matters. With the end of the cold war and fall of the Berlin Wall; with the people made refugees by war in the Balkans, Rwanda, and the Sudan; with the fragility of citizenship in entities like Palestine, increasing numbers of people lack secure citizenship. . . . But citizenship ties can be fractured in stasis as well as in movement; liminal people who have not moved physically sometimes find that state boundaries have shifted, and the protections that citizenship were thought to provide suddenly evaporate.⁵³

For Kerber, “[t]o historicize statelessness is to write a history of the practices of race, gender, labor, and ideology, a history of extreme otherness and extreme danger.”⁵⁴

The notion of citizenship as a human right subject to the domestic choices of nations is admittedly problematic, and it has been the subject of much recent debate.⁵⁵ As it is often stated, “Nationality is a fundamental human right and a foundation of identity, dignity, justice, peace, and security.”⁵⁶ The link between the ability to possess rights and one’s nationality began as early as the 1948 Universal Declaration of Human Rights. The Declaration set out for the first time in the international arena a list of fundamental human rights to be universally protected, as a reaction to the upheaval of World War II. The Declaration states that everyone has a right to a nationality, as well as the right not to be arbitrarily deprived of a nationality.⁵⁷ The choice of whom to admit within national borders, and whether to make those persons citizens, remains one of domestic law. The U.S. Supreme Court has long upheld this view, stating in 1892 that “[i]t is an accepted maxim of international law that every sovereign nation has the power . . . to forbid the entrance of foreigners within its dominions, or to admit them only in such cases, and upon such

53. *Id.* at 728–29 (citations omitted).

54. *Id.* at 731.

55. *See, e.g.*, SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* 19 (2004) (arguing that migration and the policy and constitutional issues that arise when people move across state borders are important in developing theories of justice); LINDA BOSNAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 96 (2008) (examining the interplay of the inward and the boundary-conscious perspectives on citizenship); DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* 73–74 (1997) (suggesting traditional meanings of citizenship have been overshadowed by international law); Gerald L. Neuman, *The Resilience of Nationality*, 101 *AM. SOC’Y INT’L L. PROC.* 97, 97–99 (2007) (noting that international restrictions on excluding individuals from nationality reinforce its important nature); Diane F. Orentlicher, *Citizenship and National Identity*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 296, 296 (David Wippman ed., 1998) (studying exclusionary laws in certain nations and the international responses to those laws); Peter J. Spiro, *A New International Law of Citizenship*, 105 *AM. J. INT’L L.* 694, 694–97 (2011) (reviewing literature and discussing the emergence of “international citizenship law”).

56. SOUTHWICK & LYNCH, *supra* note 11, at i.

57. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 15, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (defining a common standard of nationality to be achieved for all people).

conditions as it may see fit to prescribe.”⁵⁸ As one scholar put it, “Citizenship is not only an instrument of closure, a prerequisite for the enjoyment of certain rights, or for participation in certain types of interaction. It is also an object of closure, a status to which access is restricted.”⁵⁹

There also seems to be a contradiction by design in a scheme that posits an affirmative right to citizenship when no nation has an affirmative obligation to grant or recognize it. But Peter Spiro, among others, sees the recent emergence of an international law of citizenship with “broad implications for the nature of the state.”⁶⁰ This international law of citizenship is necessary (if not inevitable), according to Spiro, because the long-term consequences of “situating citizenship practice in the realm of human rights” may be “to diminish the value of citizenship.”⁶¹

As a concrete matter today, stateless individuals are said to lack the protection that nationality provides. Linda Bosniak poses the issue this way:

Most talk about citizenship has concerned two questions: Who is entitled to enjoy citizenship, and what does citizenship entail for its holders? The debate has focused, in other words, on defining the class of citizenship's subjects and on elaborating the meaning of citizenship in substantive terms. . . . Yet most analysts have tended to ignore another set of questions that are fundamental to citizenship. These are questions concerning citizenship's location—that is, questions about where citizenship takes place and where it *should* take place. The reason these questions have largely been disregarded is that citizenship has been conventionally assumed to be a national enterprise; it has been assumed to be an institution or a set of social practices situated squarely and necessarily within the political community of the nation-state.⁶²

This brief overview of statelessness is designed to introduce the topic for further discussion in specific contexts. In Part.III.C, the author will turn to the issue of whether and to what extent statelessness is harmful in the United States.

B. Statelessness in the Western Hemisphere

A striking feature of citizenship practices in the Americas is the near uniformity of primary reliance on *jus soli*. The “New World” is comparatively generous in the provision of citizenship to persons born

58. *Ekiu v. United States*, 142 U.S. 651, 659 (1892).

59. ROGERS BRUBAKER, *CITIZENSHIP AS SOCIAL CLOSURE* 31 (1992).

60. Spiro, *supra* note 55, at 696.

61. *Id.*

62. Linda Bosniak, *Denationalizing Citizenship*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 237, 237 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

within national boundaries, including the children of undocumented persons and temporary visitors.⁶³ Indeed, “[T]he *jus soli* principle has primarily become a Western Hemisphere tradition.”⁶⁴ Yet *jus soli* only prevents statelessness where it is accompanied by meticulous and generally recognized documentation. It is a false sense of security to believe that *jus soli* regimes do not produce stateless persons; effective statelessness can exist in any nation.

As this subpart relates, widespread failures to register existing citizens, displacement due to civil conflict and migration, and discrimination against indigenous groups and others have resulted in a substantial number of persons in the Americas who are effectively stateless. By comparison, the author will also note instances in which even U.S. citizens have had difficulty proving their citizenship, resulting in actual deportations of the country’s own citizens. The statelessness that exists throughout the Americas constitutes one source of statelessness in the United States.

Evidentiary issues become the centerpiece of disputes about the nationality of individuals, especially with respect to the practical problems presented by persons who lack documentation or the means to obtain it. Additional rigor with respect to these issues will better inform ongoing debates about statelessness. The evidentiary issues that already occur throughout the Americas, and the potential relationship of those to United States immigration and citizenship policy, merit an extended examination in the following subpart.

1. De Jure Statelessness in the Americas

As a general rule, de jure statelessness in the Western Hemisphere is thought to be uncommon, in large part because individuals predominantly migrate into *jus soli* regimes from countries that also recognize citizenship status for most births occurring outside the nation. In theory, at least, a colorable claim of citizenship as a matter of law would normally exist for most of the population.

The notable exception is the Dominican Republic, which recently changed from a *jus soli* regime to *jus sanguinis*.⁶⁵ “Hundreds of

63. As noted in a recent study, “In practice, nationality policies built on the principle of blood origin (*jus sanguinis*) rather than birth on the territory (*jus soli*) have made the incorporation of minorities, especially children of migrants, particularly difficult.” Blitz & Lynch, *supra* note 28, at 8.

64. Amitai Etzioni, *Citizenship Tests: A Comparative, Communitarian Perspective*, 78 POL. Q. 353, 353 (2007).

65. See Katherine Culliton-Gonzalez, *Born in the Americas: Birthright Citizenship and Human Rights*, 25 HARV. HUM. RTS. J. 127, 129 (2012) (discussing the Dominican Republic’s legislative and constitutional efforts to switch to a *jus sanguinis* system); see also Richard T. Middleton, IV & Sheridan Wigginton, *A Comparative Analysis of How the Framing of the Jus Soli Doctrine Affects Immigrant Inclusion into*

thousands” of stateless persons are believed to reside there as a result of discriminatory birth registration practices against persons of Haitian descent.⁶⁶ The Dominican Republic for many years awarded citizenship to those born in its territory, with the exception of children of diplomats and those “in transit” through the country.⁶⁷ Dominican government officials in recent years routinely refused to register births of persons of Haitian descent, usually on the ground that Haitian migrants in the country were “in transit,” even if they were long-term residents.⁶⁸ The Inter-American Court of Human Rights ruled in 2005 that the Dominican Republic’s denial of nationality through its refusal to issue birth certificates violated that country’s own constitution.⁶⁹ The Senate of the Dominican Republic issued a resolution rejecting the judgment, followed shortly by a decision of the country’s Supreme Court upholding the previous interpretation that undocumented migrants should be considered as being “in transit.”⁷⁰ In July 2009, the Dominican Constitution was amended to introduce the principle of *jus sanguinis* for births to parents who are in the country illegally.⁷¹

According to the State Department, the Dominican government currently asserts that even children born of Haitian parents who were legal permanent residents in the Dominican Republic cannot be registered as Dominican nationals, allegedly because the Haitian Constitution extends citizenship to those children and simultaneously prohibits dual nationality.⁷² Prior to the Haitian earthquake in 2010, the Dominican government estimated that up to 1.2 million undocumented migrants resided in the country, the overwhelming majority being of Haitian descent.⁷³ An additional 200,000 were

a National Identity, 21 TEMP. POL. & CIV. RTS. L. REV. 521, 521 (2012) (comparing U.S. and Dominican Republic citizenship practices).

66. Stacie Kosinski, Note, *State of Uncertainty: Citizenship, Statelessness and Discrimination in the Dominican Republic*, 32 B.C. INT’L & COMP. L. REV. 377, 383 (2009) (quoting Phillipe LeClerc of the United Nations High Commission on Refugees).

67. See CONSTITUCION POLITICA DE LA REPUBLICA DOMINICANA DE 2002 art. 11 (awarding citizenship to all persons who were born in the territory of the Republic, except for the legitimate children of foreign diplomats residing in the country or foreigners who are in transit).

68. See Kosinski, *supra* note 66, at 383 (describing how the Dominican Republic neglects to register births of people of Haitian descent).

69. *Yean & Bosico Girls v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 141 (Sept. 8, 2005).

70. See *Yean and Bosico v. Dominican Republic: Racial Discrimination in Access to Nationality*, OPEN SOC’Y FOUNDS. (July 1, 2009), <http://www.soros.org/litigation/yeen-and-bosico-v-dominican-republic> (providing a timeline of the implementation of the *Yean & Bosico Girls* judgment).

71. *Id.*

72. U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: DOMINICAN REPUBLIC 18 (2011), available at <http://www.state.gov/documents/organization/160162.pdf>.

73. *Id.*

thought to have entered the country illegally following the earthquake in Haiti.⁷⁴

Thousands of Dominican-born persons of Haitian descent lack citizenship or identity documents. As the State Department reported in 2010:

Government officials continued to take strong measures against citizenship for persons of Haitian descent, including retroactive cancellation of birth and identity documents, many pertaining to persons of Haitian descent. The government stated that such cancellations were based on evidence of fraudulent documentation, but advocacy groups alleged that the revocations targeted persons whose parents were Haitian or whose names sounded Haitian and that the number of revocations was in the thousands. As of March the Central Electoral Board (JCE) had provisionally revoked the birth certificates and cédulas [national identity cards] of 126 children born to Haitian migrants and their children. Some of the births had been recorded decades ago, with several from the early 1970s.⁷⁵

The State Department characterizes these persons as “functionally stateless,” adopting the favored modern terminology while avoiding the *de facto* and *de jure* categorizations from the earlier round of conventions related to nationality.⁷⁶

In addition, *de jure* statelessness can occur in other ways. A migrant in the Americas can lose his or her nationality without gaining another through the operation of citizenship rules that limit the duration or geographic reach of citizenship. These rules include (1) termination of citizenship for emigrants after a period of residency outside of the home country; (2) requirements that extraterritorial births be registered to affirm children’s citizenship; and (3) onerous proof requirements for registration of a birth to an unwed parent.⁷⁷ The latter two pathways can be compensated for if a child acquires the citizenship of the birth country. Because all of these avenues of potential statelessness are relevant to the United States, they are discussed in more detail in Part III below.

2. De Facto Statelessness in the Americas

(a) Latin America

Academic inquiry with respect to citizenship in Latin America has tended to focus on equality, participatory democracy, and access to government services, rather than acquisition of citizenship status

74. *Id.*

75. *Id.*

76. *Id.*

77. *See infra* Part III for examples.

or proof thereof.⁷⁸ As a result, outside of the Dominican Republic, statelessness in the Western Hemisphere has drawn little attention, necessitating reliance on government and human rights groups' reports. These instances of statelessness are predominantly *de facto* rather than *de jure*, resulting when individuals lack any documentation to prove the location of their birth, or when they have sought refuge in another country and cannot return to their own. Documentation especially poses a problem for migrant workers and persons displaced by civil conflict. It is also potentially significant for future migrations, including migration patterns affecting the United States.

Large numbers of persons displaced by civil conflicts potentially face functional statelessness. Several nations in Latin America have encountered significant numbers of refugees fleeing civil conflicts in Colombia and elsewhere.⁷⁹ Some seek regularization of their status by refugee applications in host countries, but many do not. In Brazil, for example, 17,500 unregistered Colombian refugees were thought to be living in the country's Amazon region, in addition to the nearly 4,000 recognized refugees in Brazil.⁸⁰ In addition, nearly 4,000 Haitian immigrants searching for employment entered the country in 2011, entering Brazil via Peru, Colombia, and Bolivia.⁸¹

The number of asylum and refugee claims recognized by Brazil and other countries lags behind the number of applicants, sometimes in substantial numbers. In Bolivia, for example, UNHCR reported in 2008 a recognized refugee population of more than 600 persons that

78. See, e.g., DEBORAH J. YASHAR, *CONTESTING CITIZENSHIP IN LATIN AMERICA: THE RISE OF INDIGENOUS MOVEMENTS AND THE POSTLIBERAL CHALLENGE* 3 (2005) (arguing that Latin American academicians "increasingly find demands for the recognition of group rights and ethnic self-determination"). See generally *CITIZENSHIP IN LATIN AMERICA* (Joseph S. Tulchin & Meg Ruthenburg eds., 2007) (collecting scholarly articles on conceptions of citizenship, democracy, and active citizenship in Latin America).

79. While Latin America is a region with long-standing regional conventions and codified systems for refugees and asylum, due to overwhelming numbers and limited government resources, scholars have noted "the inadequacy of the Inter-American system of asylum to respond—both conceptually and practically—to the challenges of contemporary refugee flows." Roberto Cuellar et al., *Refugee and Related Developments in Latin America: Challenges Ahead*, 3 *INT'L J. REFUGEE L.* 482, 482–83 (1991).

80. See U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: BRAZIL (2009), available at <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119150.htm> (discussing protection of refugees in Brazil as of 2009). In July 2009, Brazil enacted an amnesty for approximately 43,000 persons in the country illegally, with the largest group of beneficiaries being an estimated 17,000 Bolivians, "many of whom benefitted from regularized status to leave exploitive labor conditions." U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: BRAZIL 19 (2011), available at <http://www.state.gov/documents/organization/160156.pdf>.

81. U.S. DEP'T OF STATE, 2011 HUMAN RIGHTS REPORT: BRAZIL 14 (2012), available at <http://www.state.gov/documents/organization/186707.pdf>.

was “steadily increasing.”⁸² But in 2008, the government completed processing and agreed to provide refugee protection in only thirty pending cases, with thirty-five older cases still under review and new applications yet to be considered.⁸³ To the extent these refugees have no proof of citizenship from their country of origin or cannot return to it, they are effectively stateless.

Ecuador and Costa Rica present even starker numbers. The Ecuadorian government received nearly 8,000 applications for refugee status in the first nine months of 2008 alone, adding to a backlog of several thousand pending cases.⁸⁴ Both UNHCR and the Ecuadorian government reported difficulty in dealing with the number of applications. These lags may well result from existing bureaucracies being overwhelmed by applicants. But by failing to grant asylum or refugee status, there may also be an unacknowledged purpose among states to avoid acquiring large numbers of people who need to be looked after.

In 2011, UNHCR estimated that there were over 55,000 recognized refugees in Ecuador.⁸⁵ As of 2008, an additional 133,000 persons were “in need of international protection,” 92 percent of who were thought to be Colombians.⁸⁶ According to several NGOs, despite being required to by law, “the Civil Registry did not always cooperate in registering refugee children or registering children of refugees born in the country.”⁸⁷ Many of these refugees fled their homes without proof of nationality, if they had those documents at all. Some minority and native groups may go without citizenship documentation because they are not familiar with it, cannot acquire it, do not think they need it, or because they cannot afford it.

As of 2009, UNHCR also reported 11,900 recognized refugees in Costa Rica, the majority of whom were from Colombia.⁸⁸ The large influx led to the creation of a separate office within the General Directorate of Immigration to address refugee issues, but the low recognition rates for refugee status led UNHCR to estimate that there were at least 500 additional “persons of concern” in need of

82. See U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: BOLIVIA (2009), available at <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119149.htm>.

83. *Id.*

84. See U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: ECUADOR (2009), available at <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119158.htm> [hereinafter 2008 HUMAN RIGHTS REPORT: ECUADOR].

85. U.S. DEP'T OF STATE, 2011 HUMAN RIGHTS REPORT: ECUADOR 14 (2012), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186512> [hereinafter 2011 HUMAN RIGHTS REPORT: ECUADOR].

86. 2008 HUMAN RIGHTS REPORT: ECUADOR, *supra* note 84.

87. 2011 HUMAN RIGHTS REPORT: ECUADOR, *supra* note 85, at 6.

88. See U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: COSTA RICA (2010), available at <http://www.state.gov/j/drl/rls/hrrpt/2009/wha/136107.htm> [hereinafter 2009 HUMAN RIGHTS REPORT: COSTA RICA].

international protection.⁸⁹ UNHCR also undertook a campaign in Costa Rica to “counter the incorrect perception of Colombian refugees as narcotics traffickers, criminals, or members of the Revolutionary Armed Forces of Colombia.”⁹⁰ As of 2011, the refugee recognition rate continued to be low. Both the Costa Rican government and UNHCR reported that many of these applicants were using the asylum request process to obtain documentation to allow them to transit the country as part of an overall goal to reach the United States.⁹¹ UNHCR has classified rejected asylum seekers in Costa Rica as “persons of concern.”⁹²

The turmoil in Colombia has resulted in an estimated more than 5 million internally displaced persons within that nation’s borders since 1985.⁹³ This estimate greatly exceeds the government’s registered number of 3.9 million due to the high number of indigenous and Afro-Colombian groups affected by displacement.⁹⁴ These groups disproportionately lack access to citizenship documents. Further, Colombia is one of the rare *jus sanguinis* nations in the Western Hemisphere, complicating the determination of who is a citizen of Colombia.⁹⁵ At least one parent must be a citizen or a legal resident of Colombia in order for a child to be considered a citizen at birth.⁹⁶ Thus, many persons born in Colombia are not citizens of that country, and may in fact be stateless.

Panama also has dealt with a large influx of refugees from Colombia. The State Department expressed concern about the lack of an accurate number of those cases, as well as arbitrary detention and deportation of refugees by border officials who did not have a clear understanding of their responsibilities.⁹⁷ Moreover, asylum seekers and refugees were not provided with documentation in a timely

89. U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: COSTA RICA 9 (2011), available at <http://www.state.gov/documents/organization/160159.pdf> [hereinafter 2010 HUMAN RIGHTS REPORT: COSTA RICA].

90. 2009 HUMAN RIGHTS REPORT: COSTA RICA, *supra* note 88.

91. U.S. DEP’T OF STATE, 2011 HUMAN RIGHTS REPORT: COSTA RICA 4 (2012), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186503>.

92. *See id.* (“[T]he UNHCR had to consider an increasing number of rejected asylum seekers as ‘persons of concern’ in need of international protection.”).

93. U.S. DEP’T OF STATE, 2011 HUMAN RIGHTS REPORT: COLOMBIA 10 (2012), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186502>.

94. *Id.*

95. *See* U.S. OFFICE OF PERS. MGMT., CITIZENSHIP LAWS OF THE WORLD 53 (2001), available at <http://www.multiplecitizenship.com/documents/IS-01.pdf> (listing citizenship laws in countries around the world, including Colombia).

96. *See id.* (explaining that “[b]irth within the territory of Colombia does not automatically confer citizenship”).

97. *See* U.S. DEP’T OF STATE, 2011 HUMAN RIGHTS REPORT: PANAMA 5 (2012), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186531> [hereinafter 2011 HUMAN RIGHTS REPORT: PANAMA] (explaining how this “lack of clarity resulted in arbitrary detention and placed asylum seekers at an increased risk of return to countries where their lives or freedom could be threatened”).

fashion, according to the State Department report.⁹⁸ And even when they were, “these documents were not always recognized as valid by public officials.”⁹⁹ UNHCR also classified as “persons of concern” an estimated 15,000 in Panama who were believed to need international protection, including persons denied refugee status and those who did not apply because they feared deportation from Panama, apparently a well-founded fear.¹⁰⁰

Persons displaced by earlier conflicts in the region have also become long-term residents outside of their country of birth, with unclear status. In Nicaragua, for example, some 6,000 Salvadorans who had lived in the country since the civil wars of the 1980s gained legal status only in 2008.¹⁰¹ That new law also waived fines on persons who had been in the country illegally and offered a one-year period to regularize status.¹⁰² However, by 2010, although a detention center was established in Managua for refugees during case processing, the center was underfunded and had capacity for only thirty refugees.¹⁰³ Many other refugees were held in regular jails.¹⁰⁴ Nicaragua granted refugee status to only a small number of the many pending applicants.¹⁰⁵ Among UNHCR’s concerns is the possibility that some refugees are being expelled at the border.¹⁰⁶

Even where civil strife is not a problem, widespread failure to register births poses a significant problem of effective statelessness. For example, several hundred thousand persons in Bolivia lack citizenship documents, preventing them from obtaining international

98. See *id.* (indicating that case review was delayed due to language barrier and potential discrimination).

99. U.S. DEPT OF STATE, 2010 HUMAN RIGHTS REPORT: PANAMA 5 (2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154514.htm>.

100. 2011 HUMAN RIGHTS REPORT: PANAMA, *supra* note 97, at 13. In 2011, 899 displaced persons and 685 of their dependents in Temporary Humanitarian Protection status were located in designated locations administered by the National Office for the Protection of Refugees. These individuals were not allowed to exit these zones without a permit, most of whom were of Afro-Colombian heritage and included some citizens born in Panama as a result of marriages between displaced Colombians and Panamanian citizens. *Id.*

101. U.S. DEPT OF STATE, 2008 HUMAN RIGHTS REPORT: NICARAGUA (2009), available at <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119167.htm> [hereinafter 2008 HUMAN RIGHTS REPORT: NICARAGUA].

102. *Id.*

103. See U.S. DEPT OF STATE, 2010 HUMAN RIGHTS REPORT: NICARAGUA 16–17 (2011), available at <http://www.state.gov/documents/organization/160471.pdf> [hereinafter 2010 HUMAN RIGHTS REPORT: NICARAGUA].

104. See *id.* (discussing the small capacity of Nicaragua’s refugee detention center).

105. See *id.* at 17 (“According to a January UNHCR survey, the government granted refugee status to 120 persons.”).

106. See U.S. DEPT OF STATE, 2009 HUMAN RIGHTS REPORT: NICARAGUA (2010), available at <http://www.state.gov/j/drl/rls/hrrpt/2009/wha/136120.htm> (indicating that only 1 percent of Honduran refugee-status seekers actually stayed in Nicaragua).

travel documents and accessing other government services.¹⁰⁷ Persons born in Nicaragua have difficulty obtaining documentation of that fact, especially in rural areas. According to the 2008 Human Rights Report for Nicaragua, the local civil registries should register births within twelve months, upon the presentation of either a medical or baptismal certificate.¹⁰⁸ But one estimate indicated that 250,000 children and adolescents in Nicaragua lacked legal documentation as of 2008.¹⁰⁹

Persons without a registered birth are unable to obtain a cedula in Nicaragua. As the 2008 Human Rights Report for Nicaragua explains, these persons

had difficulties participating in the legal economy, conducting bank transactions, or voting. Persons who lacked a cedula also were subject to other restrictions in employment, access to courts, and land ownership. Women and children lacking citizenship documents were reportedly more vulnerable to sexual exploitation by traffickers. The government did not effectively implement laws and policies to provide persons the opportunity to obtain nationality documents on a nondiscriminatory basis.¹¹⁰

The Report further notes that the Nicaraguan government “did not effectively implement laws and policies to provide citizens living outside the country access to citizenship documents on a nondiscriminatory basis.”¹¹¹ Apart from equality of treatment and access to citizenship within Nicaragua, migrants outside of the country face problems proving that they are Nicaraguan citizens.

Recent data suggest the registration problem may grow worse. One 2010 estimate showed that more than 460,000 Nicaraguan citizens lacked cedula.¹¹² In 2011, approximately 12.5 percent of the eligible population was thought to lack proof of citizenship.¹¹³ The government also raised the cost of a cedula (including renewal of an expired card) to approximately fourteen dollars, when almost half of its citizens live on less than one dollar per day.¹¹⁴

Haiti’s weak administrative civil registry and consular systems make obtaining documentation extremely difficult, thereby compounding the risk of statelessness for Haitians both in Haiti and

107. U.S. DEPT OF STATE, 2010 HUMAN RIGHTS REPORT: BOLIVIA 14 (2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154495.htm>.

108. 2008 HUMAN RIGHTS REPORT: NICARAGUA, *supra* note 101.

109. *Id.*

110. *Id.*

111. *Id.*

112. See 2010 HUMAN RIGHTS REPORT: NICARAGUA, *supra* note 103, at 17 (examining a recent poll released by M&R Consultants).

113. U.S. DEPT OF STATE, 2011 HUMAN RIGHTS REPORT: NICARAGUA 6 (2012), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dclid=186529>.

114. 2010 HUMAN RIGHTS REPORT: NICARAGUA, *supra* note 103, at 17.

abroad. In 2011, the State Department identified two groups at the greatest risk of statelessness: undocumented Haitians abroad who were unable to acquire documentation and the children of Haitian migrants born abroad in countries with *jus soli* policies that faced the risk of having their second citizenship revoked.¹¹⁵

Migration may also be a cause of failure to register a birth. Costa Rica is one nation experiencing migration from Nicaragua, as its stable government and strong economy draw migrant workers from throughout the Central American region. The State Department has for several years identified problems of statelessness in the border areas Costa Rica shares with Panama and Nicaragua, including this example:

Members of the Ngobe-Bugle indigenous group from Panama came to work on Costa Rican plantations, and sometimes their children were born in rudimentary structures on the plantations. In these cases the children were not registered as Costa Rican citizens because the families did not think it necessary to register the births, but when the families returned to Panama, the children were not registered there either.¹¹⁶

The parents themselves may not have proof of citizenship. A significant hurdle may be to convince these indigenous groups that registration is necessary, especially when fees are required.

A similar problem occurred with other Nicaraguan families who migrated to work on Costa Rican coffee plantations. According to the Report, "The [Costa Rican] government attempted to advise the migrant population to register at birth all children born in the country."¹¹⁷ There is no indication that these births have since been registered in either Costa Rica or Nicaragua.

Peru has also experienced problems documenting births. In 2008, more than one million citizens lacked identity documents and thus could not fully exercise their civil, political, and economic rights as citizens.¹¹⁸ According to a State Department report, "[a]n estimated 15 percent of births were unregistered."¹¹⁹ As of 2011, an estimated 4.7 million Peruvians lacked citizenship documents.¹²⁰ Without citizenship documents, these individuals are heavily marginalized

115. U.S. DEP'T OF STATE, 2011 HUMAN RIGHTS REPORT: HAITI 7-8 (2012), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dclid=186522>.

116. 2009 HUMAN RIGHTS REPORT: COSTA RICA, *supra* note 88.

117. *Id.*; accord 2010 HUMAN RIGHTS REPORT: COSTA RICA, *supra* note 89, at 9 (reporting same).

118. U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: PERU (2009), available at <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119170.htm>.

119. *Id.*

120. U.S. DEP'T OF STATE, 2011 HUMAN RIGHTS REPORT: PERU 6 (2012), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dclid=186536>.

both economically and politically.¹²¹ A recent report states that “[p]oor and indigenous women and children in rural areas were disproportionately represented among those lacking identity documents” due to the absence of a birth certificate.¹²²

In other instances, efforts to provide birth certificates for children of migrants or displaced persons appear to have been more successful. In Panama, for example, the State Department noted a “sustained and successful effort to provide birth certificates to the Panamanian-born children of 542 displaced Colombians,” meaning these children were recognized as citizens of Panama.¹²³ On the other hand, the report notes that in remote areas of the country some parents did not register their children at birth, resulting in “difficulties when later seeking to obtain a birth certificate.”¹²⁴

In Mexico, although there are no official governmental statistics, nongovernmental organizations estimate that up to 30 percent of the children in Mexico remain unregistered,¹²⁵ with one group estimating the total number of unregistered persons at more than 10 million.¹²⁶ Street children, children from single-parent homes in rural areas, indigenous children, children of internally displaced persons or refugees, and unauthorized migrants and minorities unsurprisingly tend to have the highest percentages of unregistered children.¹²⁷ Without registration, access to education, health insurance, and legal protection is denied to these children.¹²⁸ When the children grow up, the lack of citizenship or identity documents prevent them from entering the formal labor market, obtaining a driver’s license or voter registration documents, opening bank accounts, marrying legally, or even registering the births of their own children.¹²⁹ This problem becomes compounded when the unregistered travel to the United

121. *Id.*

122. U.S. DEPT OF STATE, 2010 HUMAN RIGHTS REPORT: PERU 18 (2011), available at <http://www.state.gov/documents/organization/160473.pdf> [hereinafter 2010 HUMAN RIGHTS REPORT: PERU].

123. U.S. DEPT OF STATE, 2008 HUMAN RIGHTS REPORT: PANAMA (2009), available at <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119168.htm>.

124. *Id.*

125. Karen Mercado Asencio, *The Under-Registration of Births in Mexico: Consequences for Children, Adults, and Migrant*, MIGRATION INFO. SOURCE (Apr. 2012), <http://www.migrationinformation.org/Feature/display.cfm?ID=888>.

126. *Be.Foundation. Derecho a la Identidad*, BE.FOUNDATION 1, <http://www.be-foundation.org/befoundation/BE%20FOUNDATION%20English%20version.pdf> (citing Child Rights Information Network).

127. See Mercado Asencio, *supra* note 125 (explaining how the “[u]nder-registration of births in Mexico mainly affects marginalized sectors of the population”).

128. See *id.* (highlighting the damaging effects of under-registration on these already-vulnerable populations).

129. *Id.*

States and become “doubly undocumented.”¹³⁰ Once in the United States, they are ineligible for a Mexican *matrícula consular* or U.S. identification.¹³¹ In effect, they are invisible to both the United States and Mexico.¹³²

The citizenship documentation issues identified by the State Department likely underreport the scope of the problem throughout the region. Worldwide, an estimated 40 million births go unregistered each year.¹³³ Furthermore, the instances of functional or effective statelessness are problematic beyond the borders of any single nation. Interregional migration within Latin America, apart from migrations provoked by civil disorder or natural disaster, is a significant phenomenon, with Argentina, Chile, and Costa Rica among the important destinations.¹³⁴

Economic and other migration has led to increased concern about human rights abuses coinciding with enhanced efforts at border control. For example, a group of undocumented migrants sued in the Inter-American Court of Human Rights over the country’s alleged violent expulsion of them.¹³⁵ Forty-six Nicaraguans had been captured and immediately deported from Costa Rica because they lacked documents.¹³⁶ Some of the Nicaraguans alleged that they had been beaten.¹³⁷ The court held that the undocumented migrants could pursue their claims for the beatings, as well as for their forcible removal, purportedly in violation of Costa Rican law.¹³⁸

However, in most instances, countries view the migrant workers as necessary, especially in agriculture work. Other economic migration examples include the following:

Bolivians migrating to work in the sugar and tobacco industries of northern Argentina; Paraguayans going to subtropical estates in northeast Argentina for horticultural work; Peruvians moving back and forth to harvest bananas and mangos in Ecuador; Nicaraguan peasants

130. See *id.* (describing the trend of “doubly-undocumented” immigrants in the United States,” who due to unregistered birth in Mexico, also cannot prove citizenship in Mexico).

131. *Id.*

132. See *id.* (noting that “doubly-undocumented” immigrants would likely be completely left out of comprehensive immigration reform since they cannot prove their identity).

133. UNICEF, *UNICEF on Deficient Birth Registration in Developing Countries*, 24 POPULATION & DEV. REV. 659, 662 (1998).

134. See Jorge Durand & Douglas S. Massey, *New World Orders: Continuities and Changes in Latin American Migration*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 20, 27 (2010) (“[W]ithin the region, Argentina, Chile, and Costa Rica became important destinations for those from neighboring countries.”).

135. *Guner Espinales v. Costa Rica*, Case 11.529, Inter-Am. Comm’n H.R., Report No. 37/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 6 (2000), available at <http://www.wftrt.org/humanrts/cases/37-01.html>.

136. *Id.* ¶ 2.

137. *Id.* ¶ 6.

138. *Id.* ¶¶ 53–54.

and Panamanian Ngobe Indians traveling to the annual coffee harvest in Costa Rica; Guatemalans migrating seasonally to coffee farms in Chiapas, Mexico; Colombians working on farms in Venezuela's Zulia and Andes provinces; Dominicans going to harvest coffee and sugar cane in Puerto Rico; and Haitians migrating to cut sugar cane and harvest coffee in the Dominican Republic.¹³⁹

In sum, for a variety of reasons, a significant but unknown number of persons residing in Latin America possess uncertain nationality. These reasons include widespread failures to register existing citizens at birth, the difficulty migrants face in obtaining proof of citizenship, the inability of displaced persons to return to their country of origin, and civil disorders that overwhelm another country's ability to process claims for asylum and refugee status. These problems have immediate consequences for the United States due to the presence of illegal entrants from these countries. The Appendix of this Article is a chart with estimates of the countries of birth of the unauthorized immigrant population in the United States, with Latin American nations predominating.¹⁴⁰

b. The United States

Although failure to register births is not common in the United States, it does happen. In 2011, for example, two sisters in Kentucky sued in federal court over eligibility for Social Security, resulting in a settlement in which the sisters were issued documentation by the State Department to establish their citizenship.¹⁴¹ One sister was born at a home in Kentucky, and the other was delivered in the back of a van in Alabama.¹⁴² The births were recorded in a family bible but were otherwise not documented.¹⁴³ Proof of citizenship for Social Security benefits, in fact, constitutes a fertile area of litigation, with the two Kentucky sisters serving as just one example.

The case of Sazar Dent provides another example of the problems that can result from a missing or nonexistent birth certificate. Dent was nearly deported to Honduras in 2010 because he could not prove the citizenship of his U.S.-born adoptive mother with a birth certificate, a key fact for establishing his own derivative U.S.

139. Durand & Massey, *supra* note 134, at 29 (citations omitted).

140. It is worth noting that until 1968, persons from the Western Hemisphere enjoyed unrestricted immigration into the United States. See ALEINIKOFF ET AL., *supra* note 27, at 21.

141. See Brett Barrouquere, *Sisters Settle Suit over Social Security Cards*, SEATTLE TIMES (Nov. 23, 2011), http://seattletimes.com/html/politics/2016834567_apunosocialsecuritynumber.html (reporting that, after a DNA test, the judge ordered issuance of social security cards).

142. *Id.*

143. *Id.*

citizenship.¹⁴⁴ Dent's statement to the Immigration Judge (IJ) noted the absence of his mother's birth certificate: "I believe I inherited U.S. citizenship through this adoption, now I seem to meet all of the I.N.S. requirements for qualifying for it, except [sic] for her birth certificate, because she was born in 1904 and records started being kept on files only since 1911."¹⁴⁵ The IJ ruled against Dent, and in Dent's first appeal to the Board of Immigration Appeals (BIA), he asked for assistance obtaining government records related to his mother's citizenship "because he was in jail and his adoptive mother was dead."¹⁴⁶

The Ninth Circuit's decision turned on the government's failure to provide Dent with information it had concerning his mother's citizenship and her application for citizenship for Dent. The court wrote:

The IJ and the government had focused the case, at that point, on whether Dent's Kansan adoptive mother was a United States citizen, a question to which the government may have already had the answer. (The adoption lawyer had suggested in the letter furnished to the BIA, that her 1950 application for a social security number, providing her date and place of birth, should be sufficient to establish her citizenship.)¹⁴⁷

Dent was ultimately successful on his claim to be a naturalized citizen based upon his adoptive mother's U.S. birth.¹⁴⁸

Birth certificates, however, are susceptible to fraud, and a black market in birth documents exists in the United States.¹⁴⁹ Most knowledge of fraudulent birth documents is derived from cases of passport fraud, in which a false birth record is used in an attempt to acquire U.S. citizenship. In 2001, Usama S. Abdel Whab, a citizen of Egypt, applied for a U.S. passport, stating that he was born in

144. See *Dent v. Holder*, 627 F.3d 365, 369–70 (9th Cir. 2010) (noting the immigration judge's order of removal after finding that Dent's failure to produce his mother's birth certificate, despite ample evidence of her citizenship, constituted a failure to make out a prima facie case).

145. *Id.* at 369.

146. *Id.* at 372.

147. *Id.* at 373.

148. *Id.*

149. A related identity fraud involves U.S. driver's licenses. The Bush administration's Real ID program aimed to make state driver's licenses into de facto national identity cards. See DAVID LYON, IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE 133 (2009) ("[T]he Real ID system for enhancing drivers' licenses . . . may also be seen as a *de facto* national identification system."). Recent news reports have chronicled the ease with which even the enhanced security measures of the Real ID program may be forged. See John McAuliff, *Overseas Forgers' Fake IDs Can Fool Even the Experts*, USA TODAY (June 10, 2012), <http://www.usatoday.com/news/nation/story/2012-06-08/overseas-fake-ids-fool-experts/55479636/1> (describing the technological sophistication of foreign-produced false identification documents).

Brooklyn.¹⁵⁰ In support of this claim, Whab submitted false affidavits from persons supposedly with knowledge of his birth in Brooklyn.¹⁵¹ When asked for additional supporting documents, Whab submitted a forged baptismal certificate.¹⁵² Whab was convicted of making a false statement in an application for a U.S. passport and deported.¹⁵³

A passport applicant must establish both personal identity and U.S. citizenship. As Whab's case indicates, the absence of a birth certificate is not necessarily fatal to obtaining a U.S. passport, since one can submit other (nonfraudulent) proof of birth in the United States. If an individual is unable to produce a birth certificate, he must produce, among other things, proof that no official birth certificate exists.¹⁵⁴ The applicant may also submit "birth affidavits" from persons with knowledge of the birth, "such as the doctor performing the birth or a relative who personally witnessed the birth."¹⁵⁵ But as Sazar Dent's case makes clear, the passage of time can make that proof extremely difficult—both to produce and to verify.

Government officials must show that a potential deportee is eligible for deportation—i.e., that he or she is not a U.S. citizen but rather an alien—by "clear and convincing evidence."¹⁵⁶ In practice before immigration courts, one wonders how often this standard becomes a summary showing by the government, with the burden shifting back to the alleged noncitizen to provide affirmative proof. And in expedited removal proceedings, there is at best only a very limited opportunity to prove U.S. citizenship if the Customs and Border Patrol agent believes otherwise.¹⁵⁷

Indeed, lack of proof of citizenship is the key factor in some mistaken deportations by the U.S. government of its own citizens.¹⁵⁸

150. *Abdel-Whab v. Orthopedic Ass'n of Dutchess*, 415 F. Supp. 2d 293, 295–96 (S.D.N.Y. 2006) (forged baptismal certificate).

151. *Id.* at 295.

152. *Id.*

153. *Id.* at 294 n.1, 295, 302.

154. *Id.* at 296.

155. *Id.*

156. *See generally* *Agosto v. Immigration & Naturalization Serv.*, 436 U.S. 748 (1978) (discussing standard for judicial review of nationality claim).

157. Judicial review through *habeas corpus* is possible (but unlikely without representation by counsel) for persons subject to expedited removal who claim to be U.S. citizens. *See* Immigration and Nationality Act § 235(b)(1)(C), ch. 4, 66 Stat. 163, 198 (1952) (codified as amended at 8 U.S.C. § 1225(b)(1)(C) (2006)) (prescribing the limitations on administrative review); *id.* § 242(e)(2) (codified as amended at 8 U.S.C. § 1252(e)(2) (2006)) (prescribing the limitations on judicial review). For an overview of the expedited review process, see ALEINIKOFF ET AL., *supra* note 27, at 569–75.

158. *See* Lurdes C. da Silva, *Deportation of U.S. Citizens: "It's Just the Tip of the Iceberg,"* DETENTION WATCH NETWORK (Mar. 13, 2008), <http://www.detentionwatchnetwork.org/node/1188> (providing several anecdotes of individuals deported due to lack of proof of U.S. citizenship); Jacqueline Stevens, *U.S. Citizens Detained and Deported: 2010 Fact Sheet*, STS. WITHOUT NATIONS (July 15,

In 2010, as many as 4,000 U.S. citizens were detained or deported as aliens.¹⁵⁹ The total since 2003 exceeds 20,000 according to Jacqueline Stevens in her article, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*.¹⁶⁰ Immigration control laws mandating detention and deportation for hundreds of thousands, without attorneys or, in many cases, without administrative hearings, are largely to blame.¹⁶¹

In a report entitled *Hundreds of U.S. Citizens Wrongfully Deported Each Year*, CNN researchers uncovered the story of Howen Francis, who was deported to Jamaica at the conclusion of a jail sentence for assault.¹⁶² He told immigration authorities that he was a U.S. citizen since he was born in this country, but he did not have access to a birth certificate or to an attorney to help him prove it.¹⁶³ In another instance, a fifteen-year-old girl from Texas, Jakadrien Turner, was deported to Colombia after running away from home and being arrested for shoplifting.¹⁶⁴ Colombian officials returned her to U.S. officials after her family located a birth certificate, proving her U.S. citizenship.¹⁶⁵ The Colombian government expressed dismay that it had issued her a passport, at the behest of U.S. immigration officials, on the basis of what they termed “inaccurate and unrealistic” statements.¹⁶⁶

Stevens also relates the sad tale of Mark Lyttle, born in North Carolina and therefore a U.S. citizen.¹⁶⁷ Because immigration agents did not believe Lyttle was who he claimed to be, Lyttle was deported to Mexico with only a prison outfit.¹⁶⁸ When Lyttle attempted to

2010), <http://stateswithoutnations.blogspot.com/2010/07/us-citizens-detained-and-deported-2010.html> (describing evidence that violations by DHS inhibit the ability of those with potential claims of U.S. citizenship to present proof of these claims in removal proceedings); Marisa Taylor, *Feds Admit Mistakenly Jailing Citizens as Illegal Immigrants*, HOUS. CHRON., Feb. 14, 2008, at A8 (describing the Immigration and Customs Enforcement (ICE) admission before a congressional subcommittee that U.S. citizens had been mistakenly detained).

159. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011).

160. *Id.*

161. *Id.* at 608–09.

162. See Lisa DiVirgilio, *Report: Hundreds of U.S. Citizens Wrongfully Deported Every Year*, SYRACUSE.COM (July 26, 2010, 9:52 AM), http://www.syracuse.com/news/index.ssf/2010/07/report_hundreds_of_us_citizens.htm (describing how Francis's story is part of a potentially larger trend of deportations of U.S. citizens).

163. *Id.*

164. *U.S. Teen Deported by Mistake Returns Home*, SKY NEWS (Jan. 7, 2012, 3:58 PM), <http://news.sky.com/story/915969/us-teen-deported-by-mistake-returns-home>.

165. *Id.*

166. *Id.*

167. See Stevens, *supra* note 159, at 674–76 (describing how Lyttle was repeatedly thwarted in his efforts to prove his U.S. citizenship before finally being allowed to return home).

168. *Id.* at 674.

return to the United States, Customs and Border Patrol agents denied him entry on the ground that he was “in their records” as a deported alien.¹⁶⁹ When he tried again to enter the United States, he was threatened with prison by immigration authorities for falsely representing himself as a U.S. citizen.¹⁷⁰ Lyttle spent nearly five months outside the country in shelters, immigration camps, and a jail.¹⁷¹ Later, he obtained a U.S. passport with the help of a consular officer.¹⁷² Even with this passport, Lyttle was denied entry at the Atlanta airport, but the intervention of a pro bono attorney prevented his once again being flown back to Mexico.¹⁷³ Lyttle narrowly avoided being rendered stateless permanently due to his inability to convince the U.S. government of his American citizenship.

These examples of proof issues that arise with respect to U.S. citizenship are meant to illustrate that even in the United States it is sometimes difficult to prove one’s citizenship or the location of one’s birth.¹⁷⁴ As noted previously, elsewhere in the Americas, proof of nationality presents a much more pervasive problem. These instances illustrate the many evidentiary problems associated with proof of citizenship even with the United States’ comparatively well-organized systems for recording births.

While the U.S. citizens whose stories are discussed above are not technically “stateless,” there exists an unknown but substantial number of persons born elsewhere who are stateless in this country. It is difficult to find estimates of the number of stateless persons now living in the United States. The Immigration and Refugee Board of Canada, however, cited a 2005 report by Refugees International that “several thousand . . . individuals held in U.S. immigration detention facilities are believed to be stateless.”¹⁷⁵ While reports of the

169. *Id.* at 675.

170. *Id.*

171. *Id.*

172. *Id.* at 675–76.

173. *Id.* at 676.

174. Proof of derivative U.S. citizenship—whereby minor children automatically become U.S. citizens upon the naturalization of a parent—is particularly problematic. In June 2012, the blog “States Without Nations” and others reported the lengthy detention by immigration authorities of twenty-six-year-old Jhon Erik Ocampo, despite his claims that he acquired U.S. citizenship automatically by operation of law in 2002 when his mother naturalized. Jacqueline Stevens, *ICE Kidnaps Another US Citizen in Springfield, Illinois*, STS. WITHOUT NATIONS (June 21, 2012), <http://stateswithoutnations.blogspot.com/2012/06/ice-kidnaps-another-us-citizen-in.html>. Ocampo, taken in handcuffs and shackles, spent time in two jails while ICE agents investigated his claim. *Id.*

175. Immigration & Refugee Bd. of Can., *United States: The Treatment of Stateless Persons Living in the United States with No Legal Status; Whether They Are Subject to Detention by Immigration Authorities, and if So, Whether Such Detentions Can Be Challenged Through the Courts; the Rights of Such Individuals if They Are Not in Detention, Such as the Right To Work; Whether There Is a Mechanism To Provide Legal Rights to Stateless Persons When the US Has No Place To Deport Them; Whether*

existence of these persons remain anecdotal, the recent experience of Mikhail Sebastian provides one illustration.¹⁷⁶ An ethnic Armenian born in what is today Azerbaijan, Sebastian arrived legally in the United States in 1996 with a Soviet Union (USSR) passport.¹⁷⁷ With his USSR passport no longer having legal effect, Sebastian was refused a passport by Azerbaijan.¹⁷⁸ Sebastian continued to live in the United States under a special arrangement with the Department of Homeland Security (DHS), but without citizenship of any country.¹⁷⁹ In 2012, he traveled to American Samoa—a U.S. territory—and subsequently was denied reentry into the United States on the ground that he had “self-deported.”¹⁸⁰ American Samoa may become his permanent new home.

While it is impossible to know the total number of persons who are effectively stateless, the number of persons whom the United States is unable to deport shows the existence of a U.S. population of stateless migrants. Deportation from the United States requires the agreement of the recipient country to accept the person, along with issuance of travel documents by that country prior to deportation. International law and numerous treaties, including the 1928 Convention Between the United States of America and Other American Republics Regarding the Status of Aliens (Convention Between American Republics), require countries to accept return of their nationals.¹⁸¹ But in recent years, the United States has been confronted by thousands of cases of aliens with final orders of removal for whom deportation is not possible. Data listing the reason for the refusal of a nation to accept a deportee are not available. In some instances, it may be that repatriation is refused on a specious ground of lack of nationality because the deportee is deemed undesirable by that nation. These categories include alleged or actual criminals and terrorists, the mentally ill, and persons likely to become public charges. An unknown but likely substantial percentage is due to actual disputed nationality. Most of the persons falling into

a Stateless Person's Status Changes if He or She Has Minor Children Who Are US Citizens by Birth, Doc. No. USA102948.E (Oct. 16, 2008), available at <http://www.unhcr.org/refworld/docid/49b92b1ec.html>.

176. See Moises Mendoza, *Stuck in Samoa: The U.S. Refuses To Take Back This “Stateless” Man*, GLOBALPOST, (Oct. 2, 2012), <http://www.globalpost.com/dispatch/news/regions/americas/united-states/121002/stuck-samoa-us-refuses-stateless-Mikhail-Sebastian> (describing the plight of a stateless man deemed to have self-deported while on vacation within U.S. territory).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. See Convention Between the United States of America and Other American Republics Regarding the Status of Aliens art. 6, Feb. 20, 1928, 46 Stat. 163, 2753 [hereinafter Convention Between American Republics] (“States are required to receive their nationals expelled from foreign soil who seek to enter their territory.”).

this category likely come from the pool of undocumented aliens detained by Immigration and Customs Enforcement (ICE) in the U.S. interior, outside of ports of entry. The largest percentage of undocumented aliens in the United States, in turn, comes from throughout Latin America via the border with Mexico.¹⁸²

The DHS does not provide data on deportees who are released or who continue to be held in detention due to failure to obtain agreement with a recipient country. However, reported decisions, such as *Zadvydas v. Davis*¹⁸³ and *Clark v. Martinez*,¹⁸⁴ prove that these situations occur. These cases established that aliens who have been ordered removed from the United States may not be detained indefinitely once removal is no longer foreseeable or when there is no reasonable likelihood of their being deported.¹⁸⁵ If the deportee is suspected of terrorism, the Attorney General can initiate special “Alien Terrorist Removal Procedures” against a noncitizen and hold the person indefinitely if no country is willing to receive him.¹⁸⁶ Similarly, any alien ordered removed whose removal is not reasonably foreseeable may be detained indefinitely if deemed to “pose a special danger to the public.”¹⁸⁷

182. See BLAS NUÑEZ-NETO, ALISON SISKIN & STEPHEN VINA, CONG. RESEARCH SERV., RL33097, BORDER SECURITY: APPREHENSIONS OF “OTHER THAN MEXICAN” ALIENS 12, 25 (2005) (noting that 97 percent of apprehensions by the U.S. Border Patrol occur on the border with Mexico and that the majority of non-Mexican nationals apprehended are from Honduras, Brazil, El Salvador, and Guatemala).

183. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

184. *Clark v. Martinez*, 543 U.S. 371 (2005).

185. See generally Rachel Canty, *The New World of Immigration Custody Determinations After Zadvydas v. Davis*, 18 GEO. IMMIGR. L.J. 467 (2004) (describing the holding and implementation of *Zadvydas* in light of the statutory framework for the detention of aliens); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 S. CT. REV. 47 (2001) (explaining that *Zadvydas* illustrates how the Court has used a categorical approach when examining aliens’ constitutional protections, suggesting an improved list of categories).

186. See Immigration and Nationality Act § 507(b)(2)(C), Pub. L. No. 104-132, 110 Stat. 163, 1266 (1996) (codified as amended at 8 U.S.C. § 1537(b)(2)(C) (2006)) (providing that the Attorney General must make periodic efforts to secure agreement from countries for removal while retaining sole discretion to release the alien).

187. See 8 C.F.R. § 241.14(f)(1) (2012). This regulation provides:

[DHS] shall continue to detain an alien if the release of the alien would pose a special danger to the public, because: (i) [t]he alien has previously committed one or more crimes of violence as defined in 18 U.S.C. 16; (ii) [d]ue to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and (iii) [n]o conditions of release can reasonably be expected to ensure the safety of the public.

Id. The federal circuits have split as to whether the regulations are authorized by the Immigration and Nationality Act (INA). Compare *Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008) (regulations upheld), with *Tran v. Mukasey*, 515 F.3d 478

The Supreme Court stated in *Zadvydas* that if after a period of six months “an alien provides good reason to believe that there is no significant likelihood of removal in the reasonable future, the Government must furnish evidence sufficient to rebut that showing.”¹⁸⁸ The *Zadvydas* Court vacated and remanded two cases to consider whether ongoing negotiations on removal of de facto stateless persons was likely to take place.¹⁸⁹ Especially after *Zadvydas*, then, it is possible to find reported decisions challenging continued detention when deportation has become unlikely. These cases provide at least limited data about the existence of persons with no effective nationality. They exist, however, only if litigation over prolonged detention takes place, and if that litigation results in a reported decision.

Other sources shed light on the scope of the problem. From 2001 to 2004, the DHS Inspector General reported that nearly 134,000 immigrants with final orders of removal had instead been released because of the inability of the U.S. government to repatriate them to their alleged countries of origin.¹⁹⁰ And just last year, hearings on the proposed Keep Our Communities Safe Act of 2011 revealed further details about failed U.S. efforts to deport noncitizens.¹⁹¹ The bill authorized DHS to detain “as long as necessary” certain aliens deemed dangerous who are under orders of removal but cannot be deported.¹⁹² Although reported by the House Committee on the Judiciary in July 2011, no further action was taken in either house of Congress.¹⁹³

The sponsor of the Keep Our Communities Safe Act, Representative Lamar Smith, alleged that from 2009 to 2011, “close to 10,000 immigrants with orders of removal were released because

(5th Cir. 2008) (regulations invalid), and *Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004) (same).

188. *Zadvydas*, 533 U.S. at 680.

189. *Id.* at 702.

190. *Keep Our Communities Safe Act of 2011: Hearing on H.R. 1932 Before the Subcomm. on Immigration Pol’y & Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 1–2 (2011) [hereinafter *Hearing*] (statement of Rep. Lamar Smith, Chairman Member, H. Comm. on the Judiciary), available at <http://judiciary.house.gov/news/05242011%20Statement.html>.

191. See *Keep Our Communities Safe Act of 2011: Hearing on H.R. 1932 Before the Subcomm. on Immigr. Pol’y & Enforcement of the H. Comm. on the Judiciary*, 112th Cong. (2011) (describing, among other things, the release of one of Ashton Cline-McMurray’s murderers when their home country refused to accept them). Hearing documentation referenced below is available at *Hearing Information: H.R.1932, the “Keep Our Communities Safe Act of 2011,” COMMITTEE JUDICIARY*, http://judiciary.house.gov/hearings/hear_05242011.html (last visited Feb. 21, 2013).

192. *Hearing, supra* note 190 (statement of Rep. Lamar Smith).

193. *Keep Our Communities Safe Act of 2011, H.R. 1932, 112th Cong. (2011)*, available at <http://www.govtrack.us/congress/bills/112/hr1932>.

their own countries refused to take them back.”¹⁹⁴ Thomas H. Dupree, Jr., a former Justice Department official, described the causes:

In many instances, however, removal is *not* reasonably foreseeable—the alien’s country of origin may not take him back; our obligations under the Convention Against Torture may not permit our removing him to his country of origin; or his country of origin may simply be unknown.¹⁹⁵

Thus, it is clear from failed deportations that documentary issues originating elsewhere affect the citizenship of the U.S. population of migrants.

If the citizenship of a deportee is in doubt, the first indication is generally the refusal of a nation’s consulate or embassy to issue travel documents for entry into the country.¹⁹⁶ This refusal typically begins diplomatic inquiries by the State Department.¹⁹⁷ Failing resolution at the diplomatic level, an investigation abroad becomes necessary to determine the validity of the claim that a deportee is not a citizen of that country.¹⁹⁸ In *jus soli* regimes, a birth record will suffice. In *jus sanguinis* regimes, the inquiry becomes more complicated, as proof of location of birth in that country is generally insufficient to establish citizenship. Furthermore, the deportee may not have lived in his alleged country of citizenship for many years, making it less likely that country would have evidence of citizenship, such as a passport application. All of these investigations, moreover, require the cooperation of foreign government officials. And while

194. Press Release, U.S. House of Representatives, Comm. on the Judiciary, Chairman Smith Introduces Keep Our Communities Safe Act (May 23, 2011), *available at* <http://judiciary.house.gov/news/05232011.html>.

195. *Hearing, supra* note 190 (statement of Thomas H. Dupree, Jr., Former Principal Deputy Assistant At’y Gen. of the U.S.), *available at* <http://judiciary.house.gov/hearings/pdf/Dupree05242011.pdf>.

196. The INA specifies the order by which destination countries are chosen. *See* Immigration and Nationality Act § 241(b), ch. 4, 66 Stat. 163, 208 (1952) (codified as amended at 8 U.S.C. § 1231(b) (2006)) (detailing complex preferences for country of removal). DHS regulations further detail the process with respect to destination countries, including the assertion that acceptance by the receiving country is not required. *See* 8 C.F.R. § 241.15 (2012). It is difficult to reconcile this view with the known difficulty in returning U.S. deportees, let alone the sovereignty of other nations with respect to whom they will admit. As a matter of process, however, it permits the designation to be made (and the deportee to continue in detention) pending diplomatic efforts.

197. *See* Immigration and Nationality Act § 241(b)(2)(D) (setting forth measures that must be taken when a country is unwilling to accept removal of an alien from the United States into that country).

198. *See id.* (discussing the interrelation between multiple countries’ decisions with regard to the alien).

these inquiries proceed, the deportee must remain incarcerated, at government expense.¹⁹⁹

There may also be extensive proceedings in a federal court on the issue of proof of nationality, prior to any order of removal, at least for those represented by counsel. Take the example of “David Johnson,” alleged to have been born in Jamaica based upon a birth certificate with that name found in a home where Troy Jenkins (as he called himself) lived briefly.²⁰⁰ Jenkins claimed that his citizenship, place of birth, and birth mother’s identity remained unknown.²⁰¹ Since the defendant was subject to deportation proceedings as “David Johnson,” Jenkins’s attorney vigorously contested the government’s allegation of his identity.²⁰² Jenkins’s brother had left him in the care of a neighbor at a very young age, and the brother, Robert Cross, was murdered soon thereafter, terminating Jenkins’s last link to a known family member.²⁰³

The IJ in Jenkins’s case ruled that immigration agents had not met the burden of proving that Johnson was an alien by clear and convincing evidence, because the disputed birth certificate constituted the sole evidence of alienage.²⁰⁴ Some time later, Jenkins applied for a Social Security number, and based on his responses, the Immigration and Naturalization Service moved to reopen removal proceedings.²⁰⁵ With some additional evidence from Jamaica (namely, the birth certificate of Jenkins’s alleged mother), the IJ ruled that the government had met its burden of proving alienage.²⁰⁶ In Jenkins’s appeal to federal court, the Third Circuit conceded: “We understand that this ruling leaves Johnson in legal limbo. He can not prove that he is a citizen of the United States, and the government can not establish that he is not a citizen of the United States.”²⁰⁷ The attempt to deport Jenkins began in 1999 and was still unresolved by the time of the Third Circuit’s decision in 2007. No record explains what ultimately happened to Jenkins.

199. See *id.* § 241(a)(2) (“During the removal period, the Attorney General shall detain the alien.”). See generally Allyson A. Miller, *Lock Them Up and Throw Away the Key: The Comprehensive Enforcement and Immigration Reform Act and the Indefinite Detention of Inadmissible Aliens*, 52 WAYNE L. REV. 1503 (2006) (discussing indefinite detention under current law). For a description of historical practices with respect to investigations of a person’s nationality, see JANE PERRY CLARK, *DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE* 412–13 (1969).

200. *Johnson v. Attorney General*, 235 Fed. App’x 24, 27 (3d Cir. 2007).

201. *Id.* at 26.

202. See *id.* at 27–30 (discussing the evidence put forth by Jenkins’s attorney in the first removal hearing).

203. *Id.* at 26–27.

204. *Id.* at 30.

205. *Id.* at 31.

206. *Id.* at 31–32.

207. *Id.* at 26 n.3.

It should be noted that in some cases, noncitizens facing deportation might destroy or hide proof of their national identity. While those actions might not ultimately prevent deportation, they force U.S. officials to undertake an extensive process to identify the country of origin and to convince that country to accept the deportee as a national. The benefit to the noncitizen may be the ability to stay in the United States, if the government concludes it is unable to secure a recipient nation. On the other hand, the cost to the noncitizen could be substantial, in terms of years spent in detention while the deportation process is pursued. The Immigration and Nationality Act also penalizes any person with a final order of removal who “connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien’s departure.”²⁰⁸ Those persons are subject to a fine or imprisonment of up to four years, if the government can prove the deliberate destruction of documents or other measures to hide nationality.²⁰⁹ In addition, under the proposed Keep Our Communities Safe Act, DHS would be allowed to continue to detain any alien who cannot be deported if, in its judgment, he or she refused to cooperate in establishing nationality.²¹⁰

Another difficulty in establishing nationality may arise when the country from which the alien arrived and the country of his or her citizenship differ. This is an issue particularly with persons crossing without documentation at the border with Mexico.²¹¹ Mexico’s southern border is the major conduit through which undocumented migrants flow from Central America into Mexico and eventually the United States.²¹² Actual estimates of the number of undocumented migrants crossing annually into Mexico vary widely and range from 150,000 to 500,000 per year.²¹³ Deportations from Mexico, if viewed

208. Immigration and Nationality Act § 243(a)(1)(C), ch. 5, 66 Stat. 163, 212 (1952) (codified as amended at 8 U.S.C. § 1253(a)(1)(C) (2006)).

209. *Id.* § 243(a)(1)(D).

210. One of the conditions allowing DHS to detain immigrants beyond the six months specified in *Zadvydas* includes: “The immigrant would have been removed but for the immigrant’s refusal to make all reasonable efforts to comply and cooperate with the Secretary’s efforts to remove him.” Press Release, U.S. House of Representatives, Comm. on the Judiciary, *supra* note 194.

211. Transit through Mexico to reach the United States is a well-documented phenomenon. *See, e.g.*, Catherine E. Shoicet, *In Mexico, Central American Immigrants Under Fire*, CNN (July 14, 2012, 11:02 AM), <http://www.cnn.com/2012/07/14/world/americas/mexico-immigrant-shelter/index.html> (describing transient immigrants in Mexico from Guatemala, Honduras, and El Salvador).

212. *See* Manuel Angel Castillo, *Mexico: Caught Between the United States and Central America*, MIGRATION INFO. SOURCE (Apr. 2006), <http://www.migrationinformation.org/Feature/display.cfm?ID=389> (noting that the majority of Central American nationals coming into the United States cross the border between Mexico and Guatemala).

213. *See id.* (noting the wide estimation range in the number of undocumented Guatemalans seasonally migrating into Mexico); Jennifer Dresel, *Dangerous Journey*.

as a proxy for the number of undocumented aliens entering into Mexico, confirm a steady upward trend since the late 1990s.²¹⁴ The fact that the southern border areas of Mexico are also the sites of extreme poverty and civil unrest compounds the problem.²¹⁵ In 2004–2006, nearly one million aliens were apprehended annually on the southwest border.²¹⁶ The U.S. Border Patrol reported 165,170 apprehensions from countries other than Mexico in 2005 and 108,026 in 2006.²¹⁷

While these statistics comprise a relatively small percentage of the total apprehensions (around 10 percent), they nonetheless constitute a significant indication of the likely total number of non-Mexican residents using that country for transit to the United States. Each one potentially presents a problem of detention, investigation, verification, and disposition. Those numbers do not count other persons who may have entered legally and overstayed a visa, or passed through ports of entry with forged identity documents.

Although the Convention Between American Republics to which the United States is a signatory requires nations of origin to receive their nationals expelled from another state, diplomatic muscle rather than operation of law accomplishes repatriation of deportees in the region.²¹⁸ As Justice Kennedy noted in dissent in *Zadvydas*, the

Migration Through the Transit Land Mexico, HEINRICH BÖLL STIFTUNG (Jan. 13, 2012), <http://www.boell.org/web/145-Dangerous-Journey-Migration-through-the-Transit-Land-Mexico.html> (“Mexico’s Secretariat of Governance . . . estimates that approximately 150,000 people cross the southern border into Mexico without papers every year, while civil society organizations estimate that number at 400,000.”); Danilo Valladares, *Migration—Latin America: Another Wall Blocks Route to U.S.*, INTER PRESS SERVICE (Sept. 15, 2010), <http://www.ipsnews.net/2010/09/migration-latin-america-another-wall-blocks-route-to-us/> (“Some 500,000 migrants cross Mexican territory without permission each year, according to Mexico’s National Commission on Human Rights . . .”).

214. See Jennifer Johnson, *The Forgotten Border: Migration & Human Rights at Mexico’s Southern Border*, LATIN AM. WORKING GRP. EDUC. FUND, Jan. 2008, at 7, (recognizing that deportations of Central Americans has steadily increased each year since the late 1990s).

215. See *id.* at 4 (discussing how Mexico’s southern border has been marked by civil unrest such as the uprising of the Zapatista National Liberation Army in 1994).

216. See ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 6 (2005) (noting that DHS cannot initiate formal proceedings against the nearly one million aliens who cross the southern border every year).

217. U.S. BORDER PATROL, TOTAL ILLEGAL ALIEN APPREHENSIONS BY FISCAL YEAR (2011), available at http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/99_10_fy_stats.ctt/99_11_fy_stats.pdf; see also WOMEN’S REFUGEE COMM’N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA (2012), available at <http://womensrefugeecommission.org/programs/detention/unaccompanied-children> (reporting an increase in unaccompanied minors apprehended at the U.S.–Mexico border who are from other nations in Central America).

218. See Convention Between American Republics, *supra* note 181, art. 6 (requiring the acceptance of expelled nationals seeking entrance to a state’s territory);

return of deportees requires the executive branch to conduct “some of the Nation’s most sensitive negotiations with foreign powers.”²¹⁹

Recently, the United States has used access to temporary worker visas as a mechanism to ensure cooperation for the repatriation of deportees. Under DHS regulations, H-2A and H-2B nonimmigrant visas may be issued only for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated as “participating countries.”²²⁰ Countries included on the list are those that have cooperated in U.S. deportations. The factors include:

- (1) The country’s cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal;
- (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;
- (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and
- (4) such other factors as may serve the U.S. interest.²²¹

Interestingly, the factors include deportation orders against “residents” of a sending nation, in addition to those it would claim as nationals or citizens. The sending countries in the program, therefore, have an incentive to receive back noncitizen migrants who had been living there, presumably including unauthorized migrants. It is difficult to imagine the United States agreeing to those terms in treaties with other nations, but the requirement to accept the return of noncitizens reflects both the reality of migrations and the difficulty of establishing nationality.

Thus, the United States increasingly relies upon a preemptive use of political persuasion to gain acceptance of deportees. This also means that the U.S. government should have fairly specific information about the number of refusals by each recipient country, providing another source of estimates for the number of potentially stateless deportees, but it does not release this data. One can also track which countries are and are not “participating” in the H-2A/H-2B visa program.²²²

Earlier in the twentieth century, some government officials believed the United States should take strong action when a country refused the return of one of its nationals. Following the mass

Clemens Hufmann, *Duty To Receive Nationals?*, 24 *FORDHAM L. REV.* 235, 255 (1955) (recognizing that no cases have arisen where a deportee has drawn a state into a serious diplomatic dispute).

219. *Zadvydas v. Davis*, 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting).

220. Notice, *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 76 *Fed. Reg.* 2915, 2915–16 (Jan. 18, 2011).

221. *Id.*

222. *See id.* at 2916 (providing a list of participating countries).

displacements of World War I and at the height of the Great Depression, the Secretary of Labor proposed a retaliatory measure that would deny all visas for entry into the United States for countries that refused to accept return of their nationals. The bill based on his proposal provided:

[I]f any country refuses to admit or readmit aliens subject to deportation under the law of the United States, and who are citizens or subjects of such country, the Secretary of State may, in his discretion, decline to issue a visa to any national of such country seeking to enter the United States.²²³

The measure failed to pass, allegedly due to “the international repercussions of such a retaliatory policy and because of the lack of relationship between the particular offenders and victims of the policy if carried out.”²²⁴

In 1952, however, Congress did agree to confer this authority on immigration officials.²²⁵ The current version allows the Secretary of State to stop issuing visas to nationals of countries who have refused or delayed the return of their nationals.²²⁶ Indeed, although the language of the statute is mandatory (“the Secretary of State *shall* order”),²²⁷ this authority is rarely used “because of diplomatic ramifications.”²²⁸ A bill introduced in 2008 tried a different approach. It proposed to withhold U.S. financial assistance from countries that refuse to accept return of their nationals.²²⁹

Evidencing continued interest in this problem, a bill introduced in Congress in 2010 would have retained mandatory language for the retaliatory denial of visas by the Secretary of State, but it also would have shifted some of that authority to the Secretary of Homeland

223. CLARK, *supra* note 199, at 416 n.1 (quoting S.J. Res. 207, 71st Leg., 3d Sess. (1931)).

224. *Id.* at 416.

225. Immigration and Nationality Act § 243(d), ch. 5, 66 Stat. 163, 213 (1952) (codified as amended at 8 U.S.C. § 1253(d) (2006)).

226. *Id.*

227. *Id.* (emphasis added). The full text of INA § 243(d) is:

On being notified by the Attorney General that the government of a foreign country denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the Attorney General asks whether the government will accept the alien under this section, the Secretary of State shall order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of that country until the Attorney General notifies the Secretary that the country has accepted the alien.

Id.

228. H.R. REP. NO. 112-255, at 7 n.12 (2011).

229. H.R. 5761, 110th Cong. § 1 (2008).

Security.²³⁰ In addition, H.R. 6018 would have required quarterly reports to Congress that include lists of all countries “which refuse or unreasonably delay repatriation” and the “total number of aliens who were refused repatriation,” divided into categories.²³¹ Had the measure passed, information on failed deportations that is lacking now would be available. Moreover, H.R. 6018 indicates the frustration of at least some members of Congress that these data are not currently obtainable.

Uncertain nationality is not the only obstacle to deportation, and it may or may not be the primary one. It may be that a nation refuses repatriation of an undesirable person even when that person is clearly its citizen.²³² This has been a long-standing concern for the United States. In 1927, for example, the Secretary of Labor (at that time responsible for deportations) called attention to this problem:

In a number of instances the department has been unable to effect deportation of undesirable aliens because of passport complications and the refusal of foreign governments to accept from the United States aliens who should be deported to those countries. These refusals involve criminal and mental defective cases, as well as those who for other reasons have become a burden upon public beneficence. Frequently the foreign Governments decline the responsibility solely on the grounds that by absence from the homeland the alien has become expatriated.²³³

Another reason for the inability to deport someone may be the lack of a diplomatic agreement with a specific country on the issue of return of that country's citizens. In 2008, for example, the United States entered into an agreement with Vietnam for deportation of Vietnamese nationals.²³⁴ The agreement immediately affected 8,000 Vietnamese individuals in deportation proceedings or with final orders of removal.²³⁵ The U.S. government pays the cost of repatriation under the agreement; the Vietnamese government issues travel documents authorizing return, once the deportee is determined to be a national of Vietnam.²³⁶ In 2001, the United States and Cambodia entered into a diplomatic agreement governing

230. H.R. 6018, 111th Cong. (2010) (amending the INA to extend authority to the Secretary of Homeland Security).

231. *Id.* § 243(d)(3).

232. *See generally* CLARK, *supra* note 199, at 414–20 (describing historical examples of nations refusing undesirable persons).

233. DEP'T OF LABOR, ANNUAL REPORT OF THE SECRETARY OF LABOR 191–92 (1927), *as reprinted in* CLARK, *supra* note 199, at 414.

234. *See* Julia Preston, *Vietnam Agrees to the Return of Deportees from the U.S.*, N.Y. TIMES, Jan. 23, 2008, at A21 (describing an agreement between the United States and Vietnam in January 2008, after ten years of negotiations).

235. *Id.*

236. *See* Press Release, Detention Watch Int'l, ICE To Resume Deportations to Vietnam (Jan. 22, 2008), *available at* <http://www.detentionwatchnetwork.org/node/527> (providing an overview of how the repatriation process will work).

deportation, setting the stage for the deportation of some Cambodians, many of whom had arrived in the United States as children.²³⁷

But even if in some cases the United States is unable to deport a person for a reason other than disputed nationality, the result is still effective statelessness. *Zadvydas*²³⁸ and *Martinez*²³⁹ mandate that aliens unable to be deported may not be detained indefinitely, but neither these cases nor U.S. law require the award of U.S. or any other nationality. These persons are released without any clear immigration status. Thus, the 134,000 persons whom the United States allegedly could not deport between 2001 and 2004—and the multiple thousands before and after them—are effectively stateless. No nation will take them, and they have no immigration status in the United States.

On the other hand, it is at least possible for these stateless individuals to obtain work authorization. Under DHS regulations, a stateless person can in principle obtain work authorization if the DHS “makes a specific finding that the alien cannot be removed due to the refusal of all countries . . . to receive the alien, or the removal of the alien is otherwise impracticable or contrary to the public interest.”²⁴⁰ At least with respect to employment of persons whom it is unable to deport, the United States appears to be in compliance with the international conventions on statelessness. The issuance of work permits is discretionary, however, and data are lacking on the number of such work permits issued compared to the number of persons potentially eligible.

It remains unknown, but capable of speculation, whether the assistance of counsel is a necessary aid to obtain both speedy release from detention and work authorization for the effectively stateless. Access by all noncitizens to legal representation in removal proceedings is problematic because there is no right to counsel provided by the government.²⁴¹ The burden is on the noncitizen to pursue release from detention when deportation is no longer

237. See Tom Mintier, *One-Way Ticket for Convicted Cambodians*, CNN (Nov. 19, 2002), <http://edition.cnn.com/2002/WORLD/asiapcf/southeast/11/19/cambodia.returnees> (noting that the agreement requires deportation of non-U.S. citizens convicted and sentenced to prison terms exceeding one year).

238. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (finding that a statute permitting indefinite detention would raise serious Fifth Amendment concerns).

239. See *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (holding that the *Zadvydas* ruling applies equally to each category of alien set out in 8 U.S.C. § 1231(a)(6)).

240. Immigration and Nationality Act § 241(a)(7), ch. 4, 66 Stat. 163, 206 (1952) (codified as amended at 8 U.S.C. § 1231(a)(7) (2006)).

241. See generally Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43 (2011) (arguing for a right to effective assistance of counsel in deportation proceedings).

reasonably foreseeable, a task that would be aided immeasurably by counsel (including informing the detainee that release is even possible).²⁴² The absence of counsel can also prolong the underlying removal proceeding and increase the possibility that a bona fide claim of U.S. citizenship may be missed, among other things. For example, derivative claims to U.S. citizenship are easy to overlook: minor children become U.S. citizens automatically when the parent becomes a naturalized citizen.²⁴³

Moreover, because “reasonable foreseeability” is not clearly defined by the Supreme Court, stateless persons who cannot be deported may face long periods of detention before they are released and become eligible for a work permit. The open-endedness of detention while the U.S. government negotiates return is a long-standing issue. In *Caranica v. Nagle*,²⁴⁴ Nonda Caranica, a colorful character who allegedly ran a house of ill-repute in Marysville, California, was deported from the United States to Greece in the 1920s.²⁴⁵ Caranica claimed not to be a citizen of that country, and the Greek government also refused to accept him on that basis.²⁴⁶ The United States nonetheless kept Caranica in detention.²⁴⁷ A federal court of appeals wrote:

Nor does the fact, averred on information and belief, that the government of the Greek Republic has refused to issue a passport for the removal of the appellant to Greece, and will refuse to permit him to enter that country, because not a native or citizen thereof, entitle the appellant to an immediate discharge. Under the broad discretion vested in him by law, the Secretary of Labor may find other ways or other means to carry out the order of deportation, and the utmost the courts can or will do is to discharge the appellant from further imprisonment if the government fails to execute the order of deportation within a reasonable time.²⁴⁸

The government alleged that Caranica was a Greek citizen because he spoke Greek and had been born in a part of the former Macedonia that later had been absorbed by Greece.²⁴⁹ The author has been unable to discover what ultimately happened to him.

242. In *Zadvydas*, the Court stated that when “an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must furnish evidence sufficient to rebut that showing.” 533 U.S. at 680.

243. In a 2010 case, for example, extended litigation took place over the issue of whether a child was born in the evening or in the morning, to determine whether he was “under the age of 18 years” when his mother naturalized eighteen years later. *Duarte-Ceri v. Holder*, 630 F.3d 83, 91 (2d Cir. 2010).

244. *Caranica v. Nagle*, 28 F.2d 955 (9th Cir. 1928).

245. *Id.* at 956.

246. *Id.*

247. *Id.*

248. *Id.* at 957.

249. *Id.* at 956.

To conclude, the true scope of the problem of statelessness in the United States today is not known. Despite the absence of reliable data with respect to persons for whom deportation is impossible, those cases demonstrate that there are thousands of persons living in the United States with no effective nationality. Further, it is certain that the United States has encountered this issue regionally, when diplomatic efforts have failed to secure a receiving country. This latter point is significant because it is already known that substantial numbers of persons in the Americas are effectively stateless. The shared tradition of *jus soli* in the region does not prevent this hidden problem of statelessness.

These issues of disputed nationality of aliens found within the United States are not trivial, even if the scope of the problem remains uncertain. In instances in which the nationality of a deportee is either unknown or disputed by the alleged country of origin, effective statelessness already exists. The thousands of deportees that no country will take remain stateless in the United States.

III. EXPANDING STATELESSNESS BY RESTRICTIONS ON BIRTHRIGHT CITIZENSHIP

A. *The U.S. Political Landscape*

The preceding discussion of statelessness set the stage for analysis of current proposals to amend birthright citizenship in the United States. This Article demonstrates in the following sections how and why the United States would experience increased statelessness from limitation of its *jus soli* rules, over and above the statelessness that already exists in the country. This new statelessness would be a result of U.S. law, and therefore the U.S. government could no longer claim that “the laws of the United States do not contribute to the problem of statelessness.”²⁵⁰ The Article will also detail the harmful effects of this form of statelessness, both for affected children and for the nation.

Illegal immigration is perceived by many to be a major problem in the United States. Recent estimates have indicated that as many as 12 million unauthorized aliens reside in the United States.²⁵¹

250. Eric P. Schwartz, *Recognizing Statelessness*, DIPNOTE: U.S. DEP'T ST. OFFICIAL BLOG (Sept. 8, 2011), http://blogs.state.gov/index.php/site/entry/recognizing_statelessness.

251. This estimate is based on the Pew Hispanic Center's 2007 study, concluding that as many as 12.5 million undocumented aliens were then in the United States. In 2008, the estimate was 11.2 million. Julia Preston, *Decline Seen in Numbers of People Here Illegally*, N.Y. TIMES (July 31, 2008), http://www.nytimes.com/2008/07/31/us/31immig.html?_r=1&partner=rssnyt.

While some believe that all or most illegal immigrants should be deported, the reality is that, under the current configuration of the immigration control system, the United States is “at capacity” when it deports approximately 400,000 persons per year.²⁵² This accounts for less than 4 percent of the estimated illegal population. The cost to run this system of removal is enormous.²⁵³

Because there are many more undocumented aliens than it is possible to both detect and deport, prosecutorial discretion and other tools allow immigration officials to target immigrants who have committed crimes, or who are otherwise undesirable, for deportation. The Obama administration, for example, announced that low-priority immigrant offenders who posed no threat to society would be allowed to stay and offered work permits.²⁵⁴ More recently, the Obama administration offered “deferred action” for some illegal migrants brought here as children. If the migrants meet certain criteria (including arrival in the United States under the age of sixteen, and being enrolled in or having completed school in the United States), they will not be deported for the next two years, but they still have no legal status or path to citizenship.²⁵⁵ The top priority for ICE continues to be any noncitizen who poses a national security or public safety threat.²⁵⁶ The second priority is “recent illegal entrants,” and

252. See Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enforcement on Priorities for the Apprehension, Detention & Removal of Aliens to Immigration & Customs Employees (June 30, 2010), available at http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf (recognizing that ICE only has the resources to deport approximately 400,000 aliens per year). Included in this number are legal immigrants who may be deported for certain crimes. Not included are persons subject to expedited removal and other summary exclusions at the border, a figure that is said to approach one million per year. See DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 65–67 (2012) (detailing different methods of deformed deportations employed by the United States).

253. See KANSTROOM, *supra* note 252, at 31 (reporting that spending by ICE and U.S. Customs and Border Protection exceeded \$17 billion in 2010, up from \$7.5 billion in 2002).

254. See Devin Dwyer, *Obama Administration Curtails Deportations of Non-Criminal Immigrants*, ABC NEWS (Aug. 18, 2011), <http://abcnews.go.com/blogs/politics/2011/08/obama-administration-halts-deportations-of-non-criminal-immigrants/> (noting that the Obama administration plans to review 300,000 pending deportations and stay those involving individuals not convicted of a crime).

255. See Press Release, Dep’t of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), available at <http://www.dhs.gov/ynews/releases/20120612-apolitano-announces-deferred-action-process-for-young-people.shtm> (setting the criteria for young adults who will qualify for the deferred-action process).

256. See *id.* (including within the criteria for deferred action that the individual has not been “convicted of a felony, significant misdemeanor offense, multiple misdemeanor offense, or otherwise pose a threat to national security or public safety”).

the third priority is “aliens who are fugitives or otherwise obstruct immigration controls.”²⁵⁷

Thus, the reality is that most of the unauthorized migrants in the United States will continue to live here for the foreseeable future. Their undocumented status often means an underground existence. Among other impediments, with no lawful entry to the economy available, those persons cannot legally work and, as a result, often end up in exploitive situations.

Life for their children—if they are born here—can be different. Under U.S. law, any child born in the United States is a citizen, regardless of the immigration status or citizenship of their parents.²⁵⁸ This citizenship rests on the first sentence of the Fourteenth Amendment of the U.S. Constitution: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”²⁵⁹ For these children, citizenship means that they may be eligible for welfare benefits such as Medicaid and food stamps—benefits not available to unauthorized aliens. Any birth on U.S. soil qualifies, with very limited exceptions.²⁶⁰ A birth certificate is the only proof needed for U.S. citizenship.

The number of citizen children born to unauthorized migrants has been estimated to be between 300,000 and 400,000 every year.²⁶¹ One advocacy group claims that as many as one out of ten births in the United States is to an undocumented mother.²⁶² These children are sometimes referred to by the pejorative term *anchor babies* (the author prefers the term *citizens*) for the supposed immigration

257. See Memorandum from John Morton, *supra* note 252 (outlining ICE's priorities).

258. The Fourteenth Amendment's citizenship clause applies to births within the fifty states. Congress has granted citizenship to persons born in Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands. Residents of American Samoa are U.S. citizens if born to a parent who was a U.S. citizen, or they may naturalize. See David Ingram, *American Samoans Ask for Automatic U.S. Citizenship*, CONST. ACCOUNTABILITY CTR. (July 12, 2012), <http://theusconstitution.org/news/american-samoans-ask-automatic-us-citizenship> (explaining that many American Samoans receive a passport that describes them as noncitizen U.S. nationals).

259. U.S. CONST. amend. XIV, § 1.

260. Children of diplomats and invading armies, along with American Indians born on tribal land (whose citizenship is now conferred by statute), are the historic exceptions to *jus soli* in the United States. See generally Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 138–42 (1997) (discussing origins of U.S. birthright citizenship).

261. See Julia Preston, *Births to Illegal Immigrants Are Studied*, N.Y. TIMES, Aug. 11, 2010, http://www.nytimes.com/2010/08/12/us/12babies.html?_r=0 (estimating that 8 percent of the babies born in the United States in 2008 had at least one parent who was an illegal immigrant).

262. Jon Feere, *Birthright Citizenship in the United States: A Global Comparison*, CTR. IMMGR. STUD. 2 (Aug. 2010), <http://www.cis.org/articles/2010/birthright.pdf>.

benefits that come with being the parent of a U.S. citizen. The children are said to create an improper foothold for their illegal families to stay in the United States, thereby circumventing the legal immigration process.

But the “anchor baby” concept is largely a myth. The United States routinely deports parents of citizen children when they are in violation of immigration laws.²⁶³ In the first six months of 2011 alone, the United States deported over 46,000 parents of citizen children.²⁶⁴ Often the citizen children, if minors, go with the deported parents. The citizen children can return at any point, and at age twenty-one they have the right to petition the Attorney General for U.S. residency for a deported parent.²⁶⁵ But if the parent had previously been deported for immigration violations, the petition is likely to be denied. If U.S. citizen children do not leave the country with the deported parent, they often end up in the foster care system.²⁶⁶ A 2011 estimate claimed that there are currently at least 5,100 U.S.-born children in foster care whose parents have either been detained or removed.²⁶⁷ Further, while the Pew Hispanic Center reported that 8 percent of all births in the United States from March 2009 to March 2010 were to illegal immigrant parents, very few of those parents were recent arrivals.²⁶⁸ This fact at least tempers the view that pregnant women routinely enter the United States clandestinely in order to give birth.

263. See, e.g., *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977) (rejecting the claim that deportation of the parents of a U.S.-citizen child would amount to a de facto deportation of the child).

264. See APPLIED RESEARCH CTR., *SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM* 5 (2011), available at <http://arc.org/shatteredfamilies> (listing key facts and research findings).

265. See *Family of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1d383e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=1d383e4d77d73210VgnVCM100000082ca60aRCRD> (last updated Apr. 4, 2011) (tabulating information about available petitions).

266. See generally Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99 (2011) (demonstrating the failures of federal immigration enforcement when children of immigrant parents end up in state child-welfare systems).

267. APPLIED RESEARCH CTR., *supra* note 264, at 6. The U.S. government does not keep records on whether deported parents leave the country with their children or if the state transfers their children to foster care. See Francisco Miraval, *Thousands of Children of Deported Parents Get Stuck in Foster Care*, DENVER POST (Nov. 17, 2011, 9:14 AM), www.denverpost.com/breakingnews/ci_19350445 (“Part of the problem in estimating how many children of deported immigrants are transferred to foster families is that national data simply do not exist.”).

268. See *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISPANIC CTR. 1 (Feb. 1, 2011), <http://www.pewhispanic.org/files/reports/133.pdf> (outlining various demographics regarding children born in the United States).

Nonetheless, the presence of such a large number of undocumented aliens, together with their children who are born here, poses a significant political and social problem. States as well as the federal government have enacted or proposed hundreds of measures designed to deal with unauthorized immigrants by making the United States unattractive, with the aim to create incentives for unauthorized migrants to “self-deport.”²⁶⁹ That effort has included proposals to restrict birthright citizenship in the United States. These proposals would change the automatic award of citizenship at birth to deny citizenship to children born to parents who entered the country illegally. They would also deny citizenship to immigrants who are in the United States on temporary visas, such as student or tourist visas.²⁷⁰ A poll in 2010 showed that 49 percent of Americans favored restricting citizenship at birth to children of U.S. citizens.²⁷¹

The debate over how to change birthright citizenship has two camps: those who believe Congress has the authority to limit birthright citizenship by statute, and those who insist a constitutional amendment is required. The attraction of congressional authority over citizenship is obvious. It is extremely difficult to amend the Constitution, since this requires two-thirds approval of both congressional houses as well as ratification by three-fourths of the states. In the past, the Republican Party called for a constitutional amendment in its platform.²⁷² The view that Congress could accomplish the same thing by legislation is of more recent origin.

Legal scholars have debated this issue at some length, so this Article will not discuss it here.²⁷³ The author shares the view that

269. See, e.g., Michele Waslin, *Discrediting “Self Deportation” as Immigration Policy*, IMMGR. POL’Y CTR. (February 2012), <http://www.ilw.com/articles/2012,0329-waslin.pdf> (describing “attrition through enforcement” as a means to disincentivize illegal aliens to stay in the United States).

270. News media have reported instances of alleged “birth tourism,” with arrangements for a foreign mother to give birth on U.S. soil and then return to her home country. See, e.g., Devin Dwyer, *A New Baby Boom? Foreign “Birth Tourists” Seek U.S. Citizenship for Children*, ABC NEWS (Apr. 14, 2010), http://abcnews.go.com/Politics/birth-tourism-industry-markets-us-citizenship-abroad/story?id=10359956#.T84_ylKwWPo. A writer for the Center for Immigration Studies has even termed U.S. birthright citizenship law as akin to “pass[ing] out candy.” John Feere, *The Alleged Costs of Ending Universal Birthright Citizenship*, CTR. IMMGR. STUD. (Apr. 2012), <http://www.cis.org/Alleged-Costs-of-Ending-Universal-Birthright-Citizenship>.

271. See William Bingle, *Birthright Citizenship: Misguided Calls for Reform*, 43 U. TOL. L. REV. 669, 669–70 (2012) (listing this and other recent surveys).

272. See *The American Birthright*, CHI. TRIB. (Aug. 9, 1996), http://articles.chicagotribune.com/1996-08-09/news/9608090104_1_citizenship-14th-amendment-platform (describing one approach to U.S. birthright reform).

273. See generally PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (arguing that U.S. citizenship is based on political membership by consent and that this is incompatible with the idea of citizenship by birth for the children of illegal aliens); Katherine

Congress has no such authority because the language of the Fourteenth Amendment is clear. Any person—regardless of their parents—acquires citizenship at birth so long as he or she is “subject to the jurisdiction” of the United States.²⁷⁴ Proponents of congressional authority, however, reason that because the parents are in the country illegally, they are not “subject to the jurisdiction” of the United States.²⁷⁵

Without conceding the authority of Congress to change the rule of *jus soli*, this Article will use as an example the Birthright Citizenship Act of 2013 (H.R. 140)—the leading model for legislation to limit birthright citizenship in the United States, which is also equivalent in its terms to a proposed constitutional amendment.²⁷⁶ H.R. 140, sponsored by Representative Steve King of Iowa and

Culliton-Gonzalez, *Born in the Americas: Birthright Citizenship and Human Rights*, 25 HARV. HUM. RTS. J. 127, 129 (2012) (demonstrating “that retraction of birthright citizenship, even through a constitutional amendment, would be legally questionable under international human rights norms applicable to the United States”); Garrett Epps, *The Citizenship Clause: A “Legislative History,”* 60 AMER. UNIV. L. REV. 331 (2010) (arguing that the “history of the [Citizenship Clause’s] framing lends no support to the idea that native-born American children should be divided into citizen and non-citizen classes depending on the immigration status of their parents”); Saby Ghoshray, *Rescuing the Citizenship Clause from Nativistic Distortion: A Reconstructionist Interpretation of the Fourteenth Amendment*, 51 WASHBURN L.J. 261 (2012) (affirming the extension of citizenship rights based on the Fourteenth Amendment); Alberto R. Gonzales, *An Immigration Crisis in a Nation of Immigrants: Why Amending the Fourteenth Amendment Won’t Solve Our Problems*, 96 MINN. L. REV. 1859 (2012) (discussing challenges with birthright citizenship that are outside the reach of the Fourteenth Amendment); James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367 (2006) (discussing his views on the original understanding of the Fourteenth Amendment); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008) (arguing that birthright citizenship under the Fourteenth Amendment entails the “moral relation of the parents to the state,” as identified by Emer de Vattel); Mark Shawhan, *“By Virtue of Being Born Here”: Birthright Citizenship and the Civil Rights Act of 1866*, 15 HARV. LATINO L. REV. 1 (2012) (discussing birthright citizenship in the context of the Civil Rights Act of 1866 and the Fourteenth Amendment); Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329 (2009) (outlining the legislative history of the Citizenship Clause); Margaret D. Stock, *Is Birthright Citizenship Good for America?* 32 CATO J. 139 (2012) (discussing the history of birthright in the United States, some proposed changes, and the likely results of those changes); Charles Wood, *Losing Control of America’s Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465 (1999) (discussing issues with the census and birthright citizenship).

274. U.S. CONST. amend. XIV.

275. See generally Alexander N. Li, Note, *Prospective Allegiance*, 87 N.Y.U. L. REV. 515 (2012) (summarizing the debate).

276. See Birthright Citizenship Act of 2013, H.R. 140, 113th Cong. (2013). Similar legislation was introduced in 1993, as well as in 2009 by Representative Nathan Deal (R-Ga.).

nineteen listed cosponsors,²⁷⁷ would amend § 301 of the Immigration and Nationality Act. The same bill introduced in 2011 had ninety listed cosponsors,²⁷⁸ with the marked drop in support no doubt a reflection of the 2012 elections. The official summary of H.R. 140 states that the proposed act

[a]mends the Immigration and Nationality Act to consider a person born in the United States “subject to the jurisdiction” of the United States for citizenship at birth purposes if the person is born in the United States of parents, one of whom is: (1) a U.S. citizen or national, (2) a lawful permanent resident alien whose residence is in the United States, or (3) an alien performing active service in the U.S. Armed Forces.²⁷⁹

Unlike limitations on *jus soli* in the United Kingdom and Australia, H.R. 140 and similar proposals do not provide a path to legal residency or citizenship for children born to undocumented aliens. A child born of undocumented aliens in the United Kingdom or Australia, and who continues to reside there, can elect citizenship in that country at the age of majority.²⁸⁰ Instead, the working proposition of H.R. 140 and similar proposals²⁸¹ is that a child born in the United States to unauthorized migrants would retain the

277. See *Bill Summary & Status: 113th Congress (2012–2014): H.R.140: Cosponsors*, THOMAS (LIBR. CONGRESS), <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00140:@@P> (last visited Feb. 20, 2013) (listing the cosponsors of the Birthright Citizenship Act of 2011).

278. See *Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011); Bill Summary & Status: 112th Congress (2011–2012): H.R.140: Cosponsors*, THOMAS (LIBR. CONGRESS), <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:/temp/~bdnbBd:@@P%7C/home/LegislativeData.php?n=BSS;c=112%7C> (last visited Feb. 20, 2013).

279. *Bill Summary & Status: 113th Congress (2013–2014): H.R.140: CRS Summary*, THOMAS (LIBR. CONGRESS), <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00140:@@D&summ2=m&> (last visited Feb. 20, 2013). The Birthright Citizenship Act of 2013 was referred to the House Committee on the Judiciary and Subcommittee on Immigration and Border Security in January 2013.

280. The British Nationality Act of 1981 restricted automatic citizenship at birth to children born in the territory to at least one parent who is a citizen or permanent resident, but also provided that children of unauthorized migrants who are born there can nonetheless acquire citizenship with ten years of habitual residency in the country. See AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 116 (2009) (“[A]utomatic citizenship is now only conferred upon children born in the territory to at least one parent who is a citizen or permanent resident.”).

281. In 2011, Senators David Vitter and Rand Paul, both Republicans, introduced a proposed constitutional amendment similar to the Birthright Citizenship Act. Like that Act, the constitutional amendment would deny citizenship at birth in the United States unless “at least one parent is a legal citizen, legal immigrant, active member of the Armed Forces or a naturalized legal citizen.” See Press Release, U.S. Sens. Vitter, Paul Introduce Birthright Citizenship Legislation: Constitutional Amendment Would Resolve 14th Amendment Issue (Jan. 27, 2011), available at <http://www.vitter.senate.gov/newsroom/press/us-sens-vitter-paul-introduce-birthright-citizenship-legislation> (detailing Senators Vitter and Paul’s official support for a constitutional amendment).

nationality of the parent or parents, and like the parent would remain deportable.

H.R. 140 also does not provide U.S. citizenship for children who would otherwise be stateless. The award of nationality to prevent statelessness for children born within a nation is now an international standard, widely adhered to in *jus sanguinis* nations as well as in countries that have limited the reach of *jus soli*. As one example, in the 1990s, some politicians in Canada debated amending that country's rules of birthright citizenship to exclude the children of illegal migrants.²⁸² Notably, the proposal included the provision of citizenship for any child who would otherwise be stateless, as well as for children born to refugees whose claims were later accepted.²⁸³ To date, Canada has not changed its birthright citizenship practices, and any political momentum for change seems to have subsided. Other examples of nations providing citizenship to prevent statelessness include France²⁸⁴ and South Africa.²⁸⁵

Supporters of the Birthright Citizenship Act claim that no child would be born stateless in the United States. In a report entitled *The Alleged Costs of Ending Universal Birthright Citizenship*, John Feere of the Center for Immigration Studies claimed there will be neither the creation of a caste system nor stateless children, for two reasons: (1) the United States will have deported all existing undocumented aliens and prevented others from entering (or overstaying visas), and (2) the nation of the parents' origin will always take them in as citizens.²⁸⁶ The first claim is patently ludicrous; the second claim is simply wrong.

The implicit assumption behind the call to limit territorial birthright citizenship in the United States seems to be that the children of undocumented aliens, as well as their parents, would be deported as a solution to their U.S. presence. To the extent that births to unauthorized migrants in the United States are numerically significant, those restrictions would make thousands more persons into theoretically eligible targets for deportation. The Migration Policy Institute has estimated that the population of illegal alien

282. See Margaret Young, Law & Gov't Div., *Canadian Citizenship Act and Current Issues*, GOV'T CAN. PUBL'NS 2-3 (Aug. 1998), <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp445-e.htm> (discussing various issues with rights of Canadian-born citizens).

283. *Id.*

284. See *id.* ("A child born in France may acquire French citizenship if . . . the child would otherwise have no citizenship.")

285. See *South African Citizenship*, SOUTH AFRICAN HIGH COMMISSION, <http://www.sahc.org.au/citizenship.htm#02> (last visited Feb. 20, 2013) ("A foreign child born in South Africa and who has no claim to another citizenship (stateless) may also acquire South African citizenship by birth. Conclusive proof that the child has no other citizenship, or claim to any other citizenship is required in such cases.")

286. See generally Feere, *supra* 270.

children born without U.S. citizenship would grow to 13.5 million by 2050.²⁸⁷

But deportation is not possible for stateless individuals unless another country is willing to take them. For this and other reasons described below, this Article maintains that the creation of a class of stateless children is a significant argument in favor of retaining *jus soli*.²⁸⁸ Why these children could be stateless is explained in the next subpart.

B. Birthright Citizenship Restrictions and Statelessness in the United States

The de facto statelessness described in this Article—including births undocumented in other countries and the unclear nationality of aliens whom the United States is unable to deport—exists despite the fact that citizenship is almost universally derived from *jus soli* in the Western Hemisphere. As already discussed, the United States already has multiple thousands of persons it cannot deport. There are likely thousands more that it has not (yet) tried to deport but who are also effectively stateless. Undocumented persons in the United States—meaning those without recognized U.S. immigration status—may also be undocumented in their birth countries. And, before reaching the United States, they may have migrated through another nation under undocumented status as well. But if the United States were to limit its *jus soli* regime along the lines of the Birthright Citizenship Act, it would create an additional avenue of statelessness, with graver consequences.

The proposed Birthright Citizenship Act assumes that a child born to undocumented parents would acquire the parents' nationality. But for this to occur, the nation of the parent's reputed affiliation must recognize the child. For at least three reasons, however, a nation might not recognize the child's citizenship, and thus three potential routes to statelessness exist for children under the Birthright Citizenship Act and similar proposals.

First, an effectively stateless person has no nationality to pass on to the child. This Article previously recounted the existence of de facto statelessness in the Americas as a consideration for ongoing migration patterns that affect the United States. This explains the

287. See Margaret Stock, *The Cost to Americans and America of Ending Birthright Citizenship*, NAT'L FOUND. AM. POL'Y 1 (Mar. 2012), <http://www.nfap.com/pdf/NFAPPolicyBrief.BirthrightCitizenship.March2012.pdf> (forecasting the potential rise of illegal alien children born without U.S. citizenship).

288. There are, of course, other arguments for and against changing the rules of birthright citizenship, and the academic literature on this topic is substantial. My consideration of the issue in this Article is focused upon the potential to create statelessness.

presence of some of the migrants in the United States who are unable to prove citizenship in their country of origin. The large number of persons the United States is unable to deport evidences existing issues of effective statelessness in the United States. A stateless parent would not be able to pass any nationality to a child.

What if only one parent is stateless? The Birthright Citizenship Act allows U.S. citizenship if *one* parent is a U.S. citizen or a lawful permanent resident.²⁸⁹ If the other parent is an undocumented alien or even stateless, the child is still a U.S. citizen, and thus avoids passing statelessness into the next generation. What if one parent is stateless, and the other parent is an illegal migrant, but with a clear nationality? Would statelessness be avoided by assigning that parent's nationality? In this circumstance, the nationality of the child would depend upon rules of citizenship by descent, *jus sanguinis*, of that parent's nation. In many cases there will be a great deal of uncertainty. As discussed below, citizenship-by-descent rules include registering births, residency requirements, and rules on births to unwed parents. A child may still end up stateless by operation of the nationality laws of another country.

Marriage to a U.S. citizen or permanent resident, then, is the only certain way to ensure U.S. citizenship for the child under the Birthright Citizenship Act. But births to single mothers are a significant phenomenon among the U.S. population generally, and single mothers can pass on statelessness when they cannot prove their own nationality, or when the United States has attempted to deport them but failed.²⁹⁰

With restrictions on *jus sanguinis* in many countries in the region, it is also possible for second-generation emigrants (the children born in the United States) to lack citizenship in the parents' country, even if the parents' citizenship status there is secure. Thus, the issue of statelessness concerns not only parents who would have difficulty proving their own nationality, but also the laws of other nations with respect to awarding citizenship to children born abroad.²⁹¹

This second path to statelessness is in consequence of *jus sanguinis* rules of other nations that already fail to provide a fallback

289. See Birthright Citizenship Act of 2013, H.R. 140, 113th Cong. (2013) (prescribing the result if only one parent is a U.S. citizen or national).

290. Differences in laws establishing paternity, as well as difficulties in establishing paternity of children born abroad to American fathers, are discussed below.

291. The examples of nationality laws of other countries provided below are from the Western Hemisphere because the majority of illegal migrants in the United States are from this region. However, nations in other parts of the world have similar rules for children born abroad, and an "illegal alien" in the United States can, of course, be from any part of the world because this category includes visa overstays as well as illicit border crossers, tourists, and other temporary visitors.

nationality at birth. All states incorporate at least some form of *jus sanguinis* into their citizenship rules.²⁹² Most nations have generational limits and registration requirements for the transmission of nationality by descent to persons born outside of that country. In Peru, for example, children born to Peruvian parents outside of the country must be registered by their parents by age eighteen in order for the child to obtain citizenship.²⁹³ While some of these registration requirements direct the parents to the nearest consulate or embassy for the citizenship to be recognized (for example, Haiti),²⁹⁴ others are a form of residency requirement, requiring travel to the home country in order to register the birth. Uruguay, for example, awards citizenship for children born abroad to a Uruguayan parent only if the child is registered in person at that country's Civic Register for Vital Records.²⁹⁵

In some countries, a child born abroad must return in order to maintain citizenship. In Chile, a child born abroad to at least one parent who is a citizen of Chile must establish residence in that country before the age of twenty-one.²⁹⁶ Similarly, Colombia requires that a child born abroad must establish residency in Colombia for citizenship by descent.²⁹⁷ Ecuador allows the children born abroad to a native-born Ecuadorian parent to become citizens only if the child becomes a resident of that country.²⁹⁸ Panama limits citizenship by descent from a naturalized Panamanian parent to children who declare their intention to elect Panamanian nationality no later than one year after reaching eighteen.²⁹⁹ In Venezuela, the parents must return with the child to reside in that country before the child reaches the age of eighteen.³⁰⁰ Further, the child born abroad must declare Venezuelan nationality before reaching the age of twenty-five.³⁰¹

Most nations also have complicated rules for determining nationality in cases of out-of-wedlock birth abroad, although the U.S. government publication *Citizenship Laws of the World*, the most readily available source of nationality laws, does not specify what any nation requires in order to establish paternity.³⁰² Further, some

292. See PETER SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 10–11 (2008) (defining *jus sanguinis*).

293. See 2010 HUMAN RIGHTS REPORT: PERU, *supra* note 99, at 18 (discussing citizenship in Peru).

294. U.S. OFFICE OF PERS. MGMT., *supra* note 95, at 90.

295. *Id.* at 210.

296. *Id.* at 50.

297. *Id.* at 53.

298. *Id.* at 68.

299. *Id.* at 155.

300. *Id.* at 213.

301. *Id.*

302. See *id.* at 4 (providing an overview of the report); see also *Citizenship Laws of the World*, MULTIPLECITIZENSHIP.COM, www.multiplecitizenship.com/worldsummary.html

nations require “legitimate” births in order to transmit citizenship abroad. In the Bahamas, a child born abroad legitimately to a father who is a citizen becomes a citizen by descent.³⁰³ Registration is required for any person (eighteen years or older) born in wedlock outside the Bahamas to a Bahamian mother.³⁰⁴ The Bahamas appear to have no process at all for an unwed father to establish paternity.³⁰⁵ The State Department asserts that this citizenship policy, together with the fact that the Bahamas is one of the rare Western Hemisphere nations without *jus soli*, has resulted in “several generations” of stateless persons living in that country and elsewhere.³⁰⁶ Like the Bahamas, Barbados allows fathers to pass their citizenship by descent only if married to the mother.³⁰⁷ Children born out of wedlock to a Barbadian mother may inherit her citizenship.³⁰⁸ In both instances, the child must be registered with the nearest diplomatic representative.³⁰⁹ In Argentina, *both* parents must be Argentine citizens in order for a child born abroad to be a citizen of Argentina.³¹⁰

Several nations in the Western Hemisphere—including, notably, Mexico and Canada—have tightened *jus sanguinis* rules for children born outside of those nations. By constitutional amendment in 1997, Mexico limited the award of its nationality to the first generation born abroad.³¹¹ Similarly, Canada amended its citizenship laws to limit citizenship by descent to one generation born outside of

(last visited Feb. 20, 2013) (“The directory provides a simplified overview, not a detailed legal analysis.”).

303. See U.S. OFFICE OF PERS. MGMT., *supra* note 95, at 26 (explaining procedures for citizenship for the children of male citizens of the Bahamas who are born abroad).

304. See *id.* (stating the procedures for a child born abroad to a mother in wedlock to gain Bahamian citizenship).

305. See *id.* (demonstrating difficulties for an unwed Bahamian father to establish his child’s citizenship).

306. See U.S. DEPT OF STATE, 2011 HUMAN RIGHTS REPORT: BAHAMAS 10 (2012), available at <http://www.state.gov/documents/organization/186698.pdf> (“The narrow window for application, difficult documentary requirements, and long waiting times created generations of de facto stateless persons.”).

307. See U.S. OFFICE OF PERS. MGMT., *supra* note 95, at 29 (stating Barbados’s acceptance of a father passing citizenship by descent if he is married to the mother of the child).

308. See *id.* (highlighting Barbados’s acceptance of a mother’s citizenship being inherited by the child, even if the child was born out of wedlock).

309. See *id.* (reinforcing that the child must be registered with the diplomatic representative).

310. See *id.* at 19 (stating Argentina’s requirements that both parents be citizens for children born abroad to be citizens).

311. See David Fitzgerald, *Nationality and Migration in Modern Mexico*, 31 J. ETHNIC & MIGRATION STUD. 171, 176–77 tbl.1 (2005) (demonstrating Mexico’s history in awarding nationality).

Canada.³¹² For Canada, this change was said to “protect the value of citizenship.”³¹³ For those grandfathered under the prior law, someone who was born in the second generation outside Canada who turned twenty-eight before April 17, 2009, but did not fulfill the residency requirement, is not considered a Canadian citizen.³¹⁴ For both Canada and Mexico, the result under the proposed U.S. Birthright Citizenship Act would be statelessness for the second generation born in the United States, even though the parents would remain Canadian and Mexican citizens.

Mexico is of special interest because it is a contiguous nation and its nationals are thought to constitute the highest percentage of the undocumented immigrant population in the United States.³¹⁵ While Mexico has generational limits on citizenship, it is otherwise relatively generous with respect to awarding Mexican citizenship to the first generation born abroad. A parent who is a native-born or naturalized Mexican is required to register the child at the nearest Mexican consulate, followed by a birth registration in Mexico.³¹⁶ Proving paternity to satisfy Mexican nationality law, however, remains a complicated issue. It is also unclear how many parents can themselves prove Mexican nationality. Undocumented Mexican immigrants may have arrived in the United States without proof of *any* nationality. As noted previously, failure to register births in Mexico has attracted the attention of human rights organizations. Documentation of births—and hence proof of Mexican nationality—is especially problematic in rural and indigenous areas. Canada, the other land-based, contiguous nation, also has generous provisions for extending citizenship to children born outside the country. Only one parent needs to be a Canadian citizen in order to pass on citizenship, but that parent cannot be an adoptive one.³¹⁷ In other words, adoption by a Canadian citizen living abroad does not transmit citizenship to the adopted child.

A third path to statelessness for children includes residency requirements that might terminate the citizenship of the parent, or

312. See *New Citizenship Rules*, CITIZENSHIP & IMMIGR. CAN. (Apr. 20, 2010), <http://www.cic.gc.ca/english/citizenship/rules-citizenship.asp> (explaining Canada's limitations on citizenship by descent).

313. *Id.*

314. See *Retention of Citizenship*, CITIZENSHIP & IMMIG. CAN. (Apr. 21, 2009), <http://www.cic.gc.ca/english/citizenship/retention.asp> (discussing the exceptions for those grandfathered under the prior law).

315. See *infra* Appendix.

316. See U.S. OFFICE OF PERS. MGMT., *supra* note 95, at 133 (explaining the registration requirements for parents who are native-born or naturalized citizens of Mexico).

317. See Young, *supra* note 282, at 2 (“Persons considered to be natural-born Canadian citizens can be born either in Canada . . . or outside Canada if, at the time of birth, one parent is a Canadian citizen.”).

terminate the conditional citizenship of the child born in the United States. Some nations terminate citizenship following residency outside the country for a period of time, on the ground that the subject has "expatriated" him or herself. For example, Germany for many years considered a person to be expatriated if he or she resided abroad for more than ten years.³¹⁸ In an extreme example, Cubans are said to lose their rights as citizens after eleven months abroad, a policy no doubt linked to that nation's restrictions on travel by its own citizens.³¹⁹ The Cuba example is driven by the unique political circumstances of the island, but it is also true that naturalized Canadians formerly were subject to a one-year limit on residency in the United States before losing Canadian citizenship.³²⁰ Canadian law now provides for involuntary loss of citizenship for any naturalized citizen who has spent more than ten years outside of Canada.³²¹

In other examples, El Salvador law provides for involuntary loss of citizenship for absence from the country for more than five years, even for native-born citizens.³²² An involuntary loss of Haitian citizenship can occur when a naturalized Haitian citizen "maintains continuous residence abroad without authorization by Haitian authorities."³²³ Likewise, naturalized Mexican citizens can lose that status by residing outside of the country for five years.³²⁴ The United States has had long experience with foreign governments taking the position that former nationals have expatriated themselves. In 1927, a government official claimed: "Frequently the foreign Governments decline the responsibility [to accept a deportee] solely on the grounds that by absence from the homeland the alien has become expatriated."³²⁵

Even in the United States, extended residence abroad can mean the inability to pass on U.S. citizenship to children. These children could be stateless at birth if born in a country that relies upon *jus sanguinis* for citizenship. Under U.S. law, in order for the child to acquire U.S. citizenship, the citizen parent must have been physically present in the United States for a specified length of time prior to the

318. CLARK, *supra* note 199, at 407.

319. See Victoria Burnett, *New Hints at Looser Rules on Travel Stir Hope in Cuba*, N.Y. TIMES, May 20, 2012, at A8 ("After eleven months abroad, Cubans usually lose their rights as citizens.").

320. See CLARK, *supra* note 199, at 410 ("So a person born in England but living in Canada since early childhood would lose his domicile there if he resided a year in the United States.").

321. See U.S. OFFICE OF PERS. MGMT., *supra* note 95, at 46 (outlining the voluntary and involuntary circumstances in which Canadians will lose citizenship).

322. *Id.* at 71.

323. *Id.* at 90.

324. Fitzgerald, *supra* note 311, at 176-77 tbl.1.

325. CLARK, *supra* note 199, at 414 (quoting the Secretary of Labor).

child's birth.³²⁶ The aim of the physical presence requirement is to prevent the transmission of U.S. citizenship by descent through generations of expatriates who have no connection to the country. From 1934 to 1978, the child born abroad also had to establish residency in the United States or risk losing U.S. citizenship.³²⁷ The most recent statute required the child to be physically present in the United States for five years between the ages of fourteen and twenty-eight.³²⁸

For births to unmarried parents of mixed citizenship, if the mother is the U.S. citizen, the required period of physical presence in the United States is one continuous year at any point in the woman's life.³²⁹ If the father is the U.S. citizen, the required physical presence has been as long as ten years, five of which had to be after the age of fourteen.³³⁰ Under current law, the period of residency for unwed fathers is five years, at least two of which were after attaining the age of fourteen.³³¹ In 2011, the U.S. Supreme Court in a per curiam affirmance upheld the lengthier U.S.-residency requirements for U.S.-citizen fathers who wish to transmit citizenship to their out-of-wedlock children at birth.³³² There also has been substantial litigation to establish the U.S. citizenship of children in the case of

326. See Immigration and Nationality Act § 301, ch. 1, 66 Stat. 163, 235 (1952) (codified as amended at 8 U.S.C. § 1401 (2006)); *id.* § 309. If only one parent is a U.S. citizen, physical presence of five years in the United States, at least two of which were after attaining the age of fourteen years, is required to transmit U.S. citizenship to a child. See *id.* § 301(g). If both parents are citizens, one of them must have had a residence in the United States prior to the birth. See *id.* § 301(c).

327. *Acquisition of U.S. Citizenship by Birth Abroad to U.S. Citizen Parent*, in 7 FOREIGN AFF. MANUAL 1130 (2012), available at <http://www.state.gov/documents/organization/86757.pdf> (outlining procedures for children born abroad to acquire citizenship).

328. The Supreme Court has held that Congress retains the power to impose such residency requirements for U.S. citizens born abroad. See *Rogers v. Bellei*, 401 U.S. 815, 815 (1971) (recognizing congressional authority for imposing residency requirements).

329. Immigration and Nationality Act § 309(c), ch. 1, 66 Stat. 163, 238 (1952) (codified as amended at 8 U.S.C. § 1409(c) (2006)).

330. In *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd*, 131 S.Ct. 2312 (2011), the court noted the physical presence requirement in effect at the time of Flores-Villar's birth:

While § 1409(c) required an unwed citizen mother to be continuously present in the United States for only one year, § 1401(a)(7) required an unwed citizen father to be physically present in the United States for at least ten years before birth, five of these years after his fourteenth birthday, to pass citizenship.

Eric Newhouse, Note, "*He's Not Your Real Dad*": In *United States v. Flores-Villar*, the Ninth Circuit Erroneously Denied Equal Protection that Would Enable a Father to Transmit United States Citizenship to His Foreign-Born Child, 45 CREIGHTON L. REV. 581, 585 (2013) (citing *Flores-Villar*, 536 F.3d at 994–95).

331. Immigration and Nationality Act § 309(a).

332. *Flores-Villar v. United States*, 131 S.Ct. 2312, 2312 (2011).

unwed fathers, due to the complicated statutory scheme for establishing paternity.³³³

While the three paths described above are the primary contributors to the existence of stateless children born in the United States, changing the U.S. rule of birthright citizenship will create additional paths to statelessness. One path is if the country of the parent's origin no longer exists or its boundaries have changed.³³⁴ This phenomenon has occurred in several areas of the world in recent decades.³³⁵ In addition, children born in the United States to refugees and asylum seekers who cannot be returned to their countries of origin could also end up effectively stateless. Not all persons who are granted a reprieve from deportation because of legitimate fear of persecution become eligible for U.S. citizenship or legal permanent residence status. Those children might receive the citizenship of the parent as a matter of law, but they would obtain only a nominal and ineffective nationality because of their inability to return to that country.

In summary, only fail-proof border control can prevent the entrance of persons who are already effectively stateless with respect to their own countries. And only diplomatic muscle can ensure that deportees are accepted for repatriation. An originating nation's refusal to accept the return of an alleged national or habitual resident of that country is at best a matter of political persuasion. It is not a dispute over an enforceable right to repatriation under regimes

333. See, e.g., *Nguyen v. INS*, 533 U.S. 53, 53–73 (2001) (upholding as constitutional the legitimation proof requirements in INA § 309(a)(4)); see also Morgan G. Miranda, *A (Stateless) Stranger in a Strange Land: Flores-Villar and the Potential for Statelessness Under U.S. Law*, 15 J. GENDER RACE & JUST. 379, 382, 416, (2012) (discussing *Flores-Villar* and other litigation as well as legislative history). Among other requirements to establish paternity are the following:

- (4) while the person is under the age of 18 years—
 - (A) the person is legitimated under the law of the person's residence or domicile,
 - (B) the father acknowledges paternity of the person in writing under oath, or
 - (C) the paternity of the person is established by adjudication of a competent court.

Immigration and Nationality Act § 309(a)(4).

334. Refugees International reports the case of a woman living in the United States who became stateless following the collapse of the Soviet Union. Despite her marriage to a U.S. citizen, she remains stateless because she cannot adjust her status. The United States tried but failed to deport her back to the former Soviet republics. She has no immigration status in the United States and no work permit. See SOUTHWICK & LYNCH, *supra* note 10, at 9.

335. One example is a case before the European Court of Human Rights, *Makuc v. Slovenia*. The Slovenian government is alleged to have failed to restore status to over 18,000 citizens who were deleted from civil registries. See *id.* at 7.

currently in place (although some members of Congress would like to strengthen penalties for refusals). But the other paths to statelessness for children, described above, are not under U.S. control, unless the United States can influence the citizenship laws of other nations, as well as ensure documentation of citizenship.

The existence of stateless individuals already in the United States combined with the citizenship rules of other nations means that limitation of birthright citizenship in the United States would produce a new class of stateless children. As Linda Kerber concluded, “[S]tatelessness is no longer so easily measured only by the presence or absence of a passport; it is a state of being produced by new and increasingly extreme forms of restriction and of the creation of new categories of stateless human beings.”³³⁶

C. *The Meaning and Consequences of Expanded, Multigenerational Statelessness*

Finally, this Article turns to the consequences of statelessness in the United States, both for the individuals involved and for the nation. This subpart begins with consideration of the harms of existing statelessness in the United States—i.e., those persons whose statelessness is created outside of the United States. Not only would many of these adverse effects be shared by stateless children born under a revised *jus soli*, but generational statelessness also would bring significant additional problems, as described below.

Individuals who cannot be deported, and who are thus effectively stateless, receive at least some measure of protection from the U.S. government. These individuals may be permitted to work if the government believes that they have cooperated in the attempt to establish a nationality. Section 241(a)(7) of the Immigration and Nationality Act states that a person may be granted employment authorization upon a specific finding that they cannot be removed for lack of a country willing to receive them.³³⁷ Unless classified as a threat to the community, they must generally be released within six months of the determination that a willing recipient country cannot be found or that it is not foreseeable that one can be found.³³⁸ When DHS releases them, they are subject to periodic monitoring and must continue to assist DHS in the attempt to acquire travel documents to facilitate their departure—apparently into perpetuity.³³⁹ At this

336. Kerber, *supra* note 52, at 745.

337. Immigration and Nationality Act § 241(a)(7) (codified as amended at 8 U.S.C. § 1231(a)(7) (2006)).

338. See *Clark v. Martinez*, 543 U.S. 371, 372, 375, 386 (2005) (discussing the presumptive reasonable period of time to detain aliens before release).

339. See 8 C.F.R. § 241.5(a) (2012) (“An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision.”); see also Immigration and

point, DHS may, but is not required to, issue employment authorization.³⁴⁰ The exercise of that discretion is not reviewable by a federal court.³⁴¹ Moreover, the deportee is left without an immigration status in the United States, as well as without an effective nationality.

The possibility of work authorization for persons who cannot be deported does not reference statelessness explicitly. No similar possibility of a work permit is available for other stateless persons living in the United States who are not in removal proceedings. Thus, stateless persons other than deportees are not specifically provided any type of immigration benefits, unless the United States has tried and failed to deport them. There is no mechanism in the United States to systematically identify and protect stateless persons.

Stateless persons outside of the country may qualify for admission into the United States as asylees or refugees, one of the few instances in which U.S.-immigration law references statelessness.³⁴² Under the Refugee Act of 1980, asylum is predicated on a “well-founded fear” of persecution in the home country, while “withholding of removal” is available when an individual’s “life or freedom would be threatened.”³⁴³ Asylum status brings with it more protections than the defensive “withholding of removal” status. Asylees are granted work authorization and can access some public assistance. They also may elect permanent residence status after one year in the United States. Those granted withholding of removal, by contrast, can sometimes receive public assistance and work

Nationality Act § 241(a)(3) (discussing supervision after the ninety-day removal period if the alien is not removed).

340. 8 C.F.R. § 241.5(c) (2012); *see also* Immigration and Nationality Act § 241(a)(7) (discussing employment authorization). Section 241.5(c) of 8 C.F.R. provides:

An officer authorized to issue an order of supervision may, in his or her discretion, grant employment authorization to an alien released under an order of supervision if the officer specifically finds that:

- (1) The alien cannot be removed in a timely manner; or
- (2) The removal of the alien is impracticable or contrary to public interest.

8 C.F.R. § 241.5(c).

341. Immigration and Nationality Act § 241.

342. *Id.* § 101(a)(42) (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)) (defining *refugee*); *see also* 8 C.F.R. § 209.1–2 (2012) (discussing the adjustment of the status of refugees and aliens granted asylum). *See generally* Sarah B. Fenn, Note, *Paripovic v. Gonzales: Defining Last Habitual Residence for Stateless Asylum Applicants*, 40 U.C. DAVIS L. REV. 1545 (2007) (discussing the issues faced by asylum applicants who are stateless).

343. *See* Immigration and Nationality Act § 208 (codified as amended at 8 U.S.C. § 1158 (2006)) (discussing the application and selection of asylum applicants and restrictions on removal to a country where an alien’s life or freedom would be threatened); *id.* § 241(b)(3) (codified as amended at 8 U.S.C. § 1231(b)(3) (2006)) (same).

authorization, but there is no provision to adjust status to that of a lawful permanent resident in the United States. Furthermore, they remain subject to removal from the country at any time to a willing third country: "They may remain in this form of uncertain legal limbo for decades . . ." ³⁴⁴

Stateless persons already living in the United States also may apply for asylum, but with strict limitations. Only a successful asylum application would result in a defined U.S.-immigration status and the possibility to work legally. Yet if the effectively stateless individual is also an unauthorized immigrant—likely to be the case—contacting the U.S. Citizenship and Immigration Services (USCIS) with an ultimately unsuccessful asylum claim could well result in the institution of removal proceedings. Most importantly, noncitizens only have a one-year window to apply for asylum after their arrival in the United States.³⁴⁵ Long-resident undocumented aliens may only discover that they have a valid claim to refugee status well after the one-year deadline. One study criticizing the one-year deadline found that the BIA "denies asylum to large numbers of refugees fleeing persecution on the basis of the asylum deadline alone."³⁴⁶

Thus, statelessness does not pose an absolute bar to obtaining an immigrant visa to enter the United States,³⁴⁷ nor does it pose an insurmountable problem in an asylum or refugee claim. But these avenues are of little relevance to unauthorized migrants living in the United States who are also effectively stateless. The availability of an immigrant visa to enter the United States, even if the would-be immigrant cannot prove nationality, is in practice limited to persons who already have a strong claim for asylum or refugee status. Whether the United States would aid an illegal migrant already living in the United States would turn on the ability of that migrant

344. ALEINIKOFF, *supra* note 27, at 814.

345. See Immigration and Nationality Act § 208(a)(2) (emphasizing that the alien must demonstrate "by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States"); 8 C.F.R. § 1208.4(a)(2), (4)–(5) (2010) (discussing the one-year filing period and certain exceptions including "changed circumstances" and "extraordinary circumstances").

346. See NAT'L IMMIGRANT JUSTICE CTR., HUMAN RIGHTS FIRST & PENN STATE LAW, THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: NO PROTECTION, NO PROCESS 2 (2010), available at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/1YD%20report%20FULL%202010%2010%2020%20FINAL.pdf>.

347. In addition to asylum, another avenue to enter the United States even if stateless is the President's power to "parole in place." Under this provision, the Attorney General "may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." Immigration and Nationality Act § 212(d)(5) (codified at 8 U.S.C. § 1182(d)(5) (2006)).

to gain asylum.³⁴⁸ Long-term illegal residents would face an uphill battle, proving entitlement to this protected status, with the necessity to self-identify as being in the United States illegally.

Given that there is no system to identify or remedy statelessness in the United States, what is the harm of being stateless in this country today? After all, the Due Process Clause covers all persons, including unauthorized migrants and the stateless.³⁴⁹ In many ways, the plight of the stateless in the United States today is the same as that of an unauthorized immigrant with a clear nationality—for example, no access to social welfare or most government services and barriers to participation in the legitimate economy. Unauthorized immigrants also have limited or no access to the legal system and law enforcement for protection, because they have incentives to avoid it. Aggressive immigration enforcement makes immigrant communities afraid to come forward either as crime victims or witnesses, because they do not distinguish the local police from the authorities who may put them in detention and removal proceedings. In addition, human trafficking is a significant problem as well as a likely route of entry for persons with unclear nationality.³⁵⁰ The nation as a whole benefits from the constructive economic energies of its populace—engagement in work, establishment of businesses, provision of services, innovation—but these benefits only accrue when people can participate legitimately in the economy, not when they are forced underground due to lack of legal status. Illegal employment may also depress wages for U.S.-citizen workers.

Furthermore, long-term residents with no U.S.-immigration status constitute a permanent underclass with no path to citizenship, living with the permanent threat of deportation. They cannot participate in the political process, yet they are governed by its laws,

348. Undocumented aliens without a nationality are also eligible for T and U visas, for victims of trafficking and crimes of violence within the United States. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 163, 1464 (2000). Eligibility for T or U status would require a number of waivers, including for unlawful presence. See Immigration and Nationality Act § 212(d)(3), (13)(A) (granting DHS the ability to waive all inadmissibility grounds for T applicants excluding threats to national security, international child abduction, and renunciation of U.S. citizenship for tax purposes); 8 C.F.R. § 212.16(b)(3) (2012) (noting that waivers should be granted especially if inadmissibility would prevent adjustment of status). There is also an express waiver of the passport requirement for T-2, T-3, and T-4 dependents if there is an “unforeseen emergency.” 8 C.F.R. § 212.1(o). Similarly, waivers are possible for U visas, for victims of violence. Immigration and Nationality Act § 212(d)(14). A successful application for T or U visa status can lead to legal permanent residency and U.S. citizenship.

349. See *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (indicating that the Due Process Clause also extends to aliens within the United States); *Plyler v. Doe*, 457 U.S. 202, 202, 210–12 (1986) (reaffirming that the Due Process Clause applies to all persons within the jurisdiction of the United States, regardless of citizenship).

350. See *SOUTHWICK & LYNCH*, *supra* note 11, at 3 (“Statelessness is both a cause and a consequence of trafficking.”).

a fact that undermines participatory democracy in principle and in practice. The existence of this underclass creates problems of exploitation for the noncitizens and also causes social tension and distortion of the democratic process. The presence of this underclass also engenders fundamental unfairness and discrimination, for reasons articulated by Daniel Kanstroom in the context of deportation.³⁵¹ Kanstroom notes, “[A]s the history of deportation shows so clearly, we simply cannot easily disaggregate nationality discrimination from its racial and ethnic aspects.”³⁵² In short, the plight of the unauthorized migrant is generally dire.³⁵³

But an unauthorized migrant with a clear nationality can return to his or her country of origin and pursue life where political, economic, and social participation is possible.³⁵⁴ Stateless people cannot. Illegal immigrants with a firm nationality can also receive consular assistance in matters including protection, travel documents, and judicial proceedings.³⁵⁵ A stateless immigrant cannot. As the Immigration and Refugee Board of Canada noted,

351. See generally DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (laying out the difficulties faced by long-term residents without an immigration status and how they face the constant threat of deportation).

352. *Id.* at 246.

353. In 2003, the Inter-American Court of Human Rights issued an Advisory Opinion at the request of Mexico concerning the legal status and rights of undocumented migrants. The court’s opinion stated unequivocally that such persons are entitled to all international human rights. See Ryszard Cholewinski, *Human Rights of Migrants: The Dawn of a New Era?*, 24 *GEO. IMMIGR. L.J.* 585, 593 (2010). In addition, the UN Human Rights Council has yet to issue publicly a written report following its Universal Periodic Review in 2010. The reviews of all 192 UN member states are designed to ensure that human rights obligations, including those applicable to migrants, are met. See *id.* at 591. The Report of the United States submitted in conjunction with this review is available at U.S. Dep’t of State, *Rep. of the U.S. Submitted to the U.N. High Comm’r for Human Rights in Conjunction with the Universal Periodic Review* (2010), available at <http://www.state.gov/documents/organization/146379.pdf>.

354. Indeed, for the undocumented Mexican population in the United States, “circular” migration back to Mexico is not uncommon. See DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 10 (2002) (“[E]ach year thousands of undocumented migrants and even many legal immigrants decide to return to Mexico.”).

355. One measure of the value of consular assistance would be the frequency with which it is invoked, as well as the reasons for seeking assistance, by those with access. Article V of the Vienna Convention on Consular Relations lists these “consular functions.” Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 *U.S.T.* 77 (entered into force Mar. 19, 1967). These functions include advice and support in the case of an accident, serious illness, or death; advice and support to victims of serious crime overseas; visitation contact with incarcerated nationals; liaison with local police officials in the case of nationals abducted or missing overseas; provision of loans to distressed travelers; help during crises, such as civil unrest and natural disasters; and facilitation of the overseas payment of social welfare benefits; among others. *Consular Assistance*, WIKIPEDIA, http://en.wikipedia.org/wiki/Consular_assistance (last updated Aug. 26, 2012).

“Generally, stateless individuals in the US with no legal status (i.e., they are ineligible for asylum status, withholding of removal, relief under the Convention against Torture) are *quite vulnerable*, though there are some procedural protections against indefinite detention.”³⁵⁶

Compounding the problem is the fact that the United States is unlikely to be able to deport stateless persons, often resulting in a lengthy period of detention.³⁵⁷ This fact—impossibility of deportation—is a problem both for the individual and for the United States. From the government’s perspective, statelessness is undesirable if the goal is the deportation of an unauthorized population. From the individual’s perspective, statelessness can mean lengthy detention during the government’s attempt to remove him or her to another country. This is especially true for those individuals with criminal convictions, including aggravated felonies,³⁵⁸ which under federal immigration law can include crimes that are nonviolent and considered only misdemeanors under state law.³⁵⁹ Furthermore, upon release from detention, the person is effectively stateless, with no U.S. immigration status awarded. In most respects the stateless deportee remains excluded from U.S. society.

There are yet other ways in which statelessness harms the United States. The administrative cost to determine nationality in these deportation cases is not insignificant. The alien may not have had an attorney to pursue his or her identity claim through layers of administrative appeal, and thus the effective statelessness may come as a surprise to the government at the deportation stage. The failure of another nation to accept the U.S. government’s claim of the alien’s nationality will often entail lengthy investigations abroad. The government pays the cost of detention during this time.

356. IMMIGRATION & REFUGEE BD. OF CAN., *supra* note 175 (emphasis added).

357. Many persons facing deportation are in detention, and this is especially true for the latter stages of deportation proceedings. Detention during the removal process is mandatory. Immigration and Nationality Act § 241(a), ch. 5, 66 Stat. 163, 204 (codified as amended at 8 U.S.C. § 1231(a)(2) (2006)). The INA and regulation specify a ninety-day “removal period” with certain exceptions as to release. *Id.* § 241(a)(1), (3); 8 C.F.R. § 241.4 (2012).

358. See 8 C.F.R. § 241.4 (a)(1) (referring to aliens convicted of one or more aggravated felony offenses as “excludable” aliens). See generally Eliot Walker, Note, *Safe Harbor: Is Clark v. Martinez the End of the Voyage of the Mariel?*, 39 CORNELL INT’L L.J. 121 (2006) (discussing the Supreme Court decision in *Clark v. Martinez* in releasing thousands of imprisoned inadmissible aliens).

359. See Immigration and Nationality Act § 101(a)(43) (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)) (identifying the offenses that rise to “aggravated felony”); ALENIKOFF, *supra* note 27, at 749–50 (discussing how some state misdemeanors are considered aggravated felonies under federal immigration law). For a discussion of proportionality in deportation, see Angela Banks, *The Normative and Historical Cases for Proportional Deportation*, EMORY L.J. (forthcoming 2013), available at <http://ssrn.com/abstract+2044801>.

What, then, is the additional harm of the multigenerational statelessness that would ensue from limitation on birthright citizenship in the United States? From a practical standpoint, many more persons would be subject to deportation, with the attendant costs, whether they are stateless or whether they have a nationality. Recent estimates have placed births to the undocumented population as high as 400,000 per year.³⁶⁰ But attempts to deport the stateless ultimately prove futile. The harm to individuals comes from prolonged detention, and harms to the nation would include wasted administrative resources and at least a partially thwarted rationale for changing birthright citizenship in the first place, if enough of these children cannot be deported.

In addition to the impossibility of deporting stateless-children, there are more adverse consequences for children born stateless. Because they cannot "self-deport," these children would live their entire lives in this country without the possibility of full membership in the polity, absent political action. They would have no other home and would become a permanent underclass. Furthermore, they would in turn have no nationality to pass on to their own children, potentially creating multigenerational statelessness in the United States.

The United States would also face censure by the international community.³⁶¹ The American Convention on Human Rights, which the United States has signed but not ratified, states: "Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality."³⁶² The Birthright Citizenship Act would put the United States not only at variance with the American Convention, but also with the 1961 Convention on the Reduction of Statelessness (which the United States has not joined). The 1961 Convention, among other things, stipulates the award of citizenship to persons born in a nation's territory who would otherwise be stateless.³⁶³ It also requires a contracting state to allow UNHCR access within its territory, or otherwise to establish an administrative mechanism to which a stateless person may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authority.³⁶⁴

360. Preston, *supra* note 261.

361. See SOUTHWICK & LYNCH, *supra* note 11, at i ("Because states have the sovereign right to determine the procedures and conditions for acquisition and loss of citizenship, statelessness and disputed nationality must ultimately be resolved by governments. But state determinations on citizenship must conform to general principles of international law.")

362. American Convention on Human Rights, *supra* note 17, art. 20, ¶ 2.

363. See 1961 Convention, *supra* note 8, art. 1 (discussing when a "Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless").

364. *Id.* art. 11.

Moreover, the United States already does not follow all of the provisions of the 1954 Convention, meaning it is unlikely to do so in the event of a change in birthright citizenship. Among other provisions, stateless individuals should have free access to courts.³⁶⁵ Stateless individuals in the United States, like other undocumented aliens, have incentives to avoid this for fear of drawing attention to their status. The right to pursue wage-earning employment or a profession, unless awarded as a matter of discretion following a failed deportation or a successful asylum claim, likewise remains unavailable.³⁶⁶ Access to housing under the 1954 Convention should be on the same basis as (legal) noncitizens generally.³⁶⁷ The undocumented in the United States, and hence also the stateless, are not eligible for public-housing assistance and experience discrimination in both small communities and large urban areas. The 1954 Convention extends the same principle—treatment as favorable as that given to legal noncitizens—to access to higher education.³⁶⁸ Finally, under the 1954 Convention, stateless persons should receive the same treatment as U.S. citizens with respect to public relief and assistance.³⁶⁹

The Birthright Citizenship Act, moreover, would set a course in defiance of the UN Convention on the Rights of the Child, which states that national governments have a duty to grant citizenship to children born in their territory if the child is not recognized as a citizen of another country.³⁷⁰ The right of a child to acquire a nationality, furthermore, requires efforts by the nation where the child is born to assist the family in pursuing a citizenship claim elsewhere.³⁷¹ This onerous task—requiring knowledge of citizenship regimes of nations throughout the world—would certainly be in the interest of the United States to pursue in order to help avoid statelessness and, perhaps, preserve the ability to deport in the future. The United States is not a signatory to the UN Convention on

365. See 1954 Convention, *supra* note 14, art. 16, ¶ 1 (“A stateless person shall have free access to the Courts of Law on the territory of all Contracting States.”).

366. See *id.* arts. 17, 19 (discussing wage-earning employment and professions of stateless persons).

367. See *id.* art. 21 (“As regards housing, the Contracting States . . . shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”).

368. *Id.* art. 22, ¶ 2.

369. See *id.* art. 23 (“The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.”).

370. U.N. Convention on the Rights of the Child, *supra* note 37, art. 7, ¶¶ 1–2.

371. See *id.* ¶ 1.

the Rights of the Child, but every other country in the world is, with the exception of Somalia, which lacks a functioning government.³⁷²

This Article also takes the position that creating statelessness at birth, as well as creating a permanent underclass of noncitizens more generally, constitutes a moral wrong in a democratic nation. These children will not have chosen their situation,³⁷³ nor will they have violated any U.S.-immigration laws. As such, they have a special claim in a liberal society.³⁷⁴ *Jus soli* is democratically superior because it creates the presumption that populations living within a nation's borders are members of the political community, absent proof of nonmembership by birth elsewhere. Place of birth is a burden-of-proof issue that is relatively easy to resolve.

Creating a stateless underclass exposes those people not only to unlawful exploitation, including forced labor, but also to the unprincipled exercise of public authority. For example, statelessness (as well as undocumented status more generally) allows law enforcement to target ethnic subcultures randomly for abusive enforcement on minor matters, because they know individuals in these communities cannot fight back and will likely leave. This is not an unknown phenomenon now, as the Department of Justice's lawsuit against the sheriff of Maricopa County, Arizona, indicates.³⁷⁵ Creating increasing numbers and multiple generations of the stateless will only make it worse.

As Peter Shuck stated, in the context of illegal migrants generally:

372. See UNICEF, *Convention on the Rights of the Child—Frequently Asked Questions*, http://www.unicef.org/crc/index_30229.html (last updated Nov. 30, 2005) (“Only two countries, Somalia and the United States, have not ratified this celebrated agreement. Somalia is currently unable to proceed to ratification as it has no recognized government. By signing the Convention, the United States has signaled its intention to ratify—but has yet to do so.”).

373. See generally Shachar, *supra* note 5, at 367 (discussing citizenship-at-birth allocation rules as the “wealth-preserving” function of citizenship).

374. Cf. Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 395 (2007) (“[I]t is both anti-democratic and morally wrong in liberal terms to allow for treatment of a class of persons who are living among us as social and political outsiders. Territorialism embodies an ethic of inclusiveness and equality: it is the ground (both literally and figuratively) of national community belonging.”); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 268 (“Indeed, consent as a justification for political obligation is least problematic in the case of immigrants.”); David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT’L L. 278, 283 (1985) (“[A] secure citizenship status forms a basic foundation for the shaping of identity and involvement in the polity.”).

375. See Press Release, Dep’t of Justice, Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff’s Office, and Sheriff Joseph Arpaio (May 10, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-crt-602.html> (discussing the contents of the complaint alleging that since 2006, the Maricopa County Sheriff’s Office and Sheriff Arpaio have “intentionally and systematically discriminated against Latinos”).

[The] most important advantage [of a birthright citizenship rule] is that it provides a crude but pragmatic accommodation to a long-standing, apparently intractable policy failure: the substantial ineffectiveness of our border and interior immigration enforcement programs. Our feckless enforcement policies have created a possibility, indeed a certainty, that a large group of illegal aliens are nevertheless long-term or even lifelong residents in the U.S. Without a birthright citizenship rule or other amnesty, these illegals, their children, and their children's children will continue to be outsiders mired in an inferior and illegal status and deprived of the capacities of self-protection and self-advancement. Whatever the disadvantages of birthright citizenship, it has the great virtue of limiting the tragic effects of this problem of inherited outlawry by confining illegal status to a single generation for each family.³⁷⁶

Perhaps one solution is a conditional path to citizenship based on residency of children born in the United States who would otherwise be stateless. The Birthright Citizenship Act does not espouse such a plan, but it would be possible to provide a path to U.S. citizenship at least for children who otherwise would not have a nationality, along the lines of the "foundling" statute already on the books. The statute provides that "a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States" shall be a "national[] and citizen[] of the United States at birth."³⁷⁷ The statute could be amended to specify that "a person of unknown nationality" shall be a U.S. citizen. Or, adopting a more limited approach than that of the United Kingdom, the law could provide for citizenship at the age of majority for children whose nationality is not clear.

There are several problems with these proposals. For one, the parents and child may not know there is any nationality problem at all until it is too late to take advantage of statelessness provisions for children. The parents may not know of or be able to accomplish birth registration in their home country, or they may not be aware of other laws of their home country restricting citizenship by descent. Further, the parents' own nationality may be in doubt. Children born in these situations may well reach adulthood before discovering the nationality issue, and likely then only through a deportation proceeding. The issue of citizenship is not likely to be apparent for some time. This result would be grossly unfair to the child, as well as costly to the nation.

376. ALEINIKOFF ET AL., *supra* note 27, at 77 (quoting *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents, Joint Hearing Before the Subcomm. on Immigration & Claims & Subcomm. on the Constitution, H. Comm. on the Judiciary*, 104th Cong. 100 (1995) (statement of Peter H. Shuck)) (alterations in original) (internal quotation marks omitted).

377. Immigration and Nationality Act § 301(f), ch. 1, 66 Stat. 163, 236 (1952) (codified as amended at 8 U.S.C. § 1401(f) (2006)).

Secondly, some administrative mechanism to determine claims of statelessness would be required, assuming a parent is sufficiently knowledgeable to identify the nationality problem. Applications to establish statelessness would entail complicated factual and legal issues, as the survey of nationality laws above indicates. Any application could well expose the parents, if they are in the country illegally, to deportation proceedings. Of course, determining who is and who is not a citizen among persons living within the United States is far easier under the existing birthright citizenship regime. In contrast, under the proposed Birthright Citizenship Act, the cost to prove citizenship by U.S. parents has been estimated to range from \$1,200 to \$1,600 per child, plus the cost of national identity cards for all U.S. citizens.³⁷⁸

Thirdly, safeguards providing citizenship for stateless children could well produce a moral hazard, with an incentive for parents to hide or destroy proof of nationality in an attempt to create statelessness—and hence U.S. citizenship—for their children. The United States could criminalize those acts, as it does with respect to the deportation process, but this type of fraud is often difficult to detect and entails costly investigation. A similar moral hazard would be present for all births to unauthorized migrants under the proposed Birthright Citizenship Act—an incentive to produce fraudulent proof of U.S. citizenship or legal permanent residence in order for the child to receive U.S. citizenship at birth.

In addition, there must be some process to determine paternity for U.S.-citizen fathers who are not married to the mother of a child. For births overseas to unwed U.S.-citizen fathers, the Immigration and Nationality Act provides a complicated scheme to establish a child's right to U.S. citizenship.³⁷⁹ The authors of the Birthright Citizenship Act seem to have overlooked this issue and have not provided any guidance on how to either weed out false claims of paternity or verify true claims. Presumably, state law would govern the determination of parentage. As a result, there would be fifty different laws regarding the citizenship of a child when U.S.-citizen fathers and noncitizen mothers are not married to each other.

There is potential for abuse and error by local officials, as well. Localities typically issue birth certificates based on hospital records (for those born in hospitals).³⁸⁰ One can imagine the administrative difficulty of determining the nationality of the parents (e.g.,

378. See Stock, *supra* note 287, at 1 (“[There is] a ‘tax’ of \$1,200 to \$1,600 on each baby born in the United States.”).

379. See Immigration and Nationality Act § 309(a)(4) (codified as amended at 8 U.S.C. § 1409(a)(4) (2006)) (establishing the process for citizenship while the child is under eighteen years of age).

380. As Margaret Stock has pointed out, the United States has no national registry of births, unlike many countries. See Stock, *supra* note 287, at 7.

derivative U.S. citizenship, missing or nonexistent U.S. birth certificates). As the discussion of deportation of U.S. citizens indicates, it is not always easy to determine U.S. citizenship. One worry is that the local official would make assumptions based on the race or ethnicity of the parent. This concern animates some of the opposition to a proposal in several state legislatures that would require the issuance of a different type of birth certificate to undocumented parents.³⁸¹

In sum, the issues of existing statelessness in the United States and the prospect of future generations of stateless children should be of concern to all political parties. Stateless children born here would constitute a far more formidable problem because this statelessness can extend for generations and create an underclass that cannot be deported. The undesirability of statelessness seems to be something many can agree upon, including both proponents and opponents of the Birthright Citizenship Act. However, this Article also takes the position that a provision to award citizenship to children who otherwise would not have a nationality is not a workable solution, primarily because of the difficulties of administration, cost, and the potential for error and abuse by both applicants and officials. The fair and effective solution for the United States is to retain its tradition of birthright citizenship.³⁸²

IV. CONCLUSION

This Article assesses existing statelessness in the United States as well as the potential for increased statelessness if the U.S. law of birthright citizenship is restricted. International agreements endorse *jus soli* as the preferred mechanism to avoid statelessness. However, a nearly universal *jus soli* in the Americas fails to resolve nationality in significant instances, as evidenced by the existence of undocumented persons within their states of origin and the inability

381. See Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES, at A1 (discussing the issue of pregnant immigrants alleged to enter the United States in order to give birth).

382. Although this Article has focused on the creation of statelessness as one reason to oppose changing birthright citizenship in the United States, there are other compelling reasons to retain it not addressed here. For an overview of some of these reasons, see Stock, *supra* note 287, at 1. A leading alternative to *jus soli* and *jus sanguinis* focuses upon generations rather than descent or residence, with members of the third generation, the grandchildren of immigrants, automatically entitled to citizenship at birth, while members of the second generation would be entitled to citizenship after having resided in the country for a number of years. Foreign-born children who immigrate at an early age would be entitled to citizenship after residing in the country for ten years, or completing six years in school. See ALEINIKOFF ET AL., *supra* note 27, at 79–80 (citing proposal by the Comparative Citizenship Project of the Carnegies Endowment for International Peace and the Migration Policy Institute).

of the United States to deport persons due to disputes over nationality. In areas where migration is common, the prevention of statelessness relies upon the careful recording of births and easy access to those records, as well as the commitment of the country of origin to accept, return, or render aid to its emigrants. Based on historical migration patterns, it is significant for the United States that the Western Hemisphere contains persons of uncertain nationality—displaced or undocumented at birth, or both.

This Article does not attempt to engage the debate on theoretical bases for citizenship,³⁸³ nor is its purpose to issue a normative call for universal citizenship or residency privileges.³⁸⁴ Rather, it attempts to offer a practical analysis of the various ways by which modification of *jus soli* may create statelessness. The Article's contribution is to detail the mechanisms that would create statelessness, understanding that statelessness in the United States correlates with political decisions about immigration law. Membership boundaries can thus be examined in a larger sphere and with a more complete view.

The Article calls attention to statelessness of two types: that of persons born elsewhere but with no ability to prove citizenship and that of future generations born in this country. The former is not under U.S. control, absent fail-proof border security. The existence of 12 million undocumented aliens suggests that border control cannot be fail-proof, or at least not at any affordable price. The latter—future generations of the stateless, a more formidable problem—is under U.S. control.

The evidence for existing statelessness emanates from two sources: (1) a comparative look at statelessness elsewhere in the Americas and its significance for the United States and (2) the frequency of contested citizenship when the United States attempts to deport undocumented persons. In turn, the prospect for stateless children born in the United States is primarily caused by (1) birth to a parent with no effective claim to a nationality and (2) generational, residency, and other limitations in the citizenship rules of countries with migrant populations in the United States.

The conclusions in this Article have potential for a broader application. A 2010 article in the *Journal of Law & Economics* posits that “when facing increasing immigration, countries with a *jus soli*

383. See generally PETER SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008) (comparing several theories for obtaining citizenship).

384. See generally DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996) (proposing that current theories of political sociology and international relations are rooted in conceptions that are of decreasing relevance); Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175 (2010) (articulating a “civic” notion of citizenship based on political values rather than shared demographic).

regime tend to restrict their legislation, whereas countries with a *jus sanguinis* regime resist innovation.”³⁸⁵ The United States may yet confirm this thesis. Canada also recently considered but rejected an amendment limiting its birthright citizenship rules.³⁸⁶ On the other hand, *jus soli* rules elsewhere in the Americas have remained remarkably free from controversy, even in countries with significant in-migration. Instead, changes in the rules that govern the attribution of citizenship have tended to restrict *jus sanguinis*, rather than limit *jus soli*. Latin American nations have favored increased border control over changes to birthright citizenship law.³⁸⁷ The link with border control—an important political issue in the United States—should not be overlooked.

Questions of the uncertain nationality of some unauthorized migrants would be far more difficult to resolve under a citizenship scheme governed solely by descent. Given migration, displacement, and poor administrative reach in rural areas and indigenous communities in the Americas, it is in the domestic interest of the United States for nations in this hemisphere to retain primary reliance on *jus soli* to assign nationality at birth. The United States should lead by example and seek solutions to perceived problems via immigration reform and border control, rather than limitation of *jus soli*. Citizenship, after all, has been described by Chief Justice Earl Warren as “nothing less than the right to have rights.”³⁸⁸

385. Graziella Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J.L. & ECON. 95, 95 (2010).

386. The proposal in Canada would have limited citizenship at birth in the territory to children born to at least one parent who was a permanent resident or a Canadian citizen. Importantly, this proposal included a provision for citizenship if a child would otherwise be stateless, as well as for children born to refugees whose claims were accepted. See Young, *supra* note 282, § B.

387. See generally, e.g., STEPHEN JOHNSON, JOHANNA MENDELSON FORMAN & KATHERINE BLISS, CTR. FOR STRATEGIC & INT’L STUDIES, POLICE REFORM IN LATIN AMERICA: IMPLICATIONS FOR U.S. POLICY (2012), available at http://csis.org/files/publication/120228_Johnson_PoliceReform_web.pdf (discussing Latin American police reforms, including border patrol).

388. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., Black & Douglas, JJ., dissenting).

Appendix:**SOURCE: Office of Immigration Statistics, DHS³⁸⁹**

Country of Birth of the Unauthorized Immigrant Population: January 2009 and 2000						
Country of birth	Estimated population in January		Percent of total		Percent change	Average annual change
	2009	2000	2009	2000	2000 to 2009	2000 to 2009
All countries	10,750,000	8,460,000	100	100	27	250,000
Mexico	6,650,000	4,680,000	62	55	42	220,000
El Salvador	530,000	430,000	5	5	25	10,000
Guatemala	480,000	290,000	4	3	65	20,000
Honduras	320,000	160,000	3	2	95	20,000
Philippines	270,000	200,000	2	2	33	10,000
India	200,000	120,000	2	1	64	10,000
Korea	200,000	180,000	2	2	14	—
Ecuador	170,000	110,000	2	1	55	10,000
Brazil	150,000	100,000	1	1	49	10,000
China	120,000	190,000	1	2	-37	(10,000)
Other countries	1,650,000	2,000,000	15	24	-17	(40,000)

— Represents less than 5,000. Detail may not sum to totals because of rounding.

389. HOEFER, RYTINA, & BAKER, *supra* note 6, at 4.