Citizens All Along: Derivative Citizenship, Unlawful Entry, and the Former Immigration and Nationality Act

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INTRODUCTION

In 1992, at the age of seven, Evaristo Gonzalez entered the United States unlawfully.[1] His father, a naturalized US citizen, filed a petition for an immediate-relative visa, and in 2008, Gonzalez became a lawful permanent resident (LPR). In 2011, Gonzalez pleaded guilty to a felony.[2] Shortly thereafter, the Department of Homeland Security (DHS) initiated removal proceedings.[3]

For the most part, nothing in this factual scenario is unusual: for noncitizens, conviction of certain crimes results in removability,[4] and in fiscal year 2013, Immigration and Customs Enforcement (ICE) removed approximately 110,000 noncitizens convicted of crimes in the United States.[5] However, Gonzalez's case was unusual in one respect: he claimed to be a US citizen through "derivative citizenship."[6] Derivative citizenship is citizenship acquired when an individual's parent or parents become citizens and certain other conditions are met.[7] In Gonzalez's case, the relevant statute was 8 USC § 1432(a)(5), which was enacted as § 321(a)(5) of the Immigration and Nationality Act[8]

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1 *Gonzalez v Holder*, 771 F3d 238, 239 (5th Cir 2014).

2 Id.

3 Id.

4 8 USC § 1227(a)(2)(A).

5 See US Immigration and Customs Enforcement, *FY 2013 ICE Immigration Removals* *1 (DHS), archived at http://perma.cc/YGE8-KW27.

6 *Gonzalez*, 771 F3d at 239.

7 US Citizenship and Immigration Services, *Derivative Citizenship* (DHS), archived at http://perma.cc/6CJU-VPXD.

8 66 Stat 163, 245 (1952), codified as amended at 8 USC § 1432(a)(5) (1994), repealed by Child Citizenship Act of 2000 § 103(a), Pub L No 106-395, 114 Stat 1631, 1632. Although § 1432 was repealed in 2000, it remains operative for individuals like Gonzalez who turned eighteen prior to its repeal. See *Ashton v Gonzales*, 431 F3d 95, 97 (2d Cir

(INA) and which allows for derivative citizenship for a child when one parent is a naturalized citizen and the child "is residing in the United States pursuant to a lawful admission for permanent residence at the time of [the parent's naturalization], *or* thereafter begins to reside permanently in the United States while under the age of eighteen years."[9]

The statute is ambiguous as to whether "lawfully admitted for permanent residence" and "reside permanently" mean the same thing. "Lawfully admitted for permanent residence" is a term defined in the statute as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws."[10] "Permanent" and "residence" are also defined,[11] but "residing permanently" is not, and a composite definition based on the two words does not completely align with the statutory definition of "lawfully admitted for permanent residence."[12] This ambiguity has created a split in the circuits, with the Ninth and Eleventh Circuits holding that "lawfully admitted for permanent residence" and "reside permanently" carry the same meaning and the Second Circuit holding that the phrases have independent meanings.[13]

Resolution of this split, however, is not the focus of this Comment.[14] Instead, this Comment focuses on an unresolved question created by the Second Circuit's reasoning: If LPR status is not required for derivative citizenship, can individuals who entered the country unlawfully but who otherwise meet the derivative citizenship requirements obtain citizenship via operation of § 1432(a)? The Second Circuit has expressly declined to

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2005) (noting that the court must "apply the law in effect when [the petitioner] fulfilled the last requirement for derivative citizenship").

9 8 USC § 1432(a)(5) (1994) (emphasis added).

10 8 USC § 1101(a)(20). For further discussion of these and other relevant statutory definitions, see Part III.A.1.

11 See 8 USC § 1101(a)(31), (33). See also Part III.A.1.

12 See Part III.A.I.

13 Compare *Romero-Ruiz v Mukasey*, 538 F3d 1057, 1062 (9th Cir 2008) (finding identical meanings), and *United States v Forey-Quintero*, 626 F3d 1323, 1326 (11th Cir 2010) (finding identical meanings), with *Nwozuzu v Holder*, 726 F3d 323, 327 (2d Cir 2013) (finding independent meanings).

14 For a detailed treatment of this circuit split, see Christopher Dutot, Note, *Are We Removing Citizens? The Contentious Legal Issue Surrounding the Interpretation of the Former Derivative Citizenship Statute and Why Lawful Permanent Resident Status Is Not Required*, 90 U Detroit Mercy L Rev 333, 340–49 (2013) (arguing that the Second Circuit's reading is superior).

answer this question,[15] and while the Fifth Circuit recently found against Gonzalez on the basis of his unlawful entry,[16] the scope of its decision remains unclear. The Ninth and Eleventh Circuits have not addressed the question, because their interpretation of the statute moots it.[17]

The question is not a trivial one. In 2000, there were 2.6 million foreign-born children residing in the United States who had at least one foreign-born parent.[18] For individuals in this set who are not yet citizens but have at least one parent who is a citizen, a plausible citizenship claim exists provided that they meet the other statutory requirements. However, for those in this group who entered the country illegally, a citizenship claim succeeds only if a court holds that § 1432(a) does not carry an implicit lawful entry requirement.

Further, the question's importance transcends numbers. Courts and administrative bodies make decisions each day that affect people's lives, but few of these decisions are as significant as those concerning citizenship status. A finding that an individual is not a US citizen may lead to his removal, which could lead to disruption of his family and professional life as well as return to a country with which he may have little to no connection.[19] Indeed, if an individual's removal destination is particularly dangerous, finding that individual to be a potentially removable noncitizen may lead to more-severe consequences than a criminal conviction and incarceration would: if such an individual also faces removal after completing a sentence, he faces additional risk to life and limb that would not exist were he simply released in the United States.

This Comment proceeds in three parts. Part I describes the historical background of, and normative justifications for, derivative citizenship. Part II discusses relevant case law interpreting the INA. Part III argues that, in the absence of a dispositive answer through any of the standard modes of analysis, courts

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15 *Nwozuzu*, 726 F3d at 330 n 6.

16 *Gonzalez*, 771 F3d at 245.

17 See *Romero-Ruiz*, 538 F3d at 1062; *Forey-Quintero*, 626 F3d at 1326–27.

18 *United States: Demographics & Social* (Migration Policy Institute), archived at http://perma.cc/96GK-ZZ6A.

19 For illustrations of this phenomenon, see, for example, *Nwozuzu*, 726 F3d at 325–26; *Romero-Ruiz*, 538 F3d at 1060. In *Nwozuzu*, which is discussed extensively in Part II.B, the petitioner entered the United States at the age of four. While it is difficult to discuss any given individual's personal feelings about his nationality, it is fair to say that Nwozuzu's connections to his country of birth may have been limited given the age at which he left.

should interpret the statute not to include a lawful entry requirement, as doing so is preferable given the economic and social benefits of derivative citizenship.

I. THE HISTORY OF, AND NORMATIVE JUSTIFICATIONS FOR, DERIVATIVE CITIZENSHIP

Derivative citizenship has a long history in the United States. This Part discusses the development of the concept and outlines arguments in favor of granting derivative citizenship. Part I.A gives a concise description of US immigration law. Part I.B then offers a brief history of derivative citizenship in the United States. Finally, Part I.C discusses some normative benefits of derivative citizenship.

A. The Structure of Modern US Immigration Law

While this Comment focuses on a narrow provision of law, some background on current immigration policy is useful. What follows is a general discussion of legal and illegal immigration in the United States, as well as a description of some of the important institutions in the US immigration system.

1. Legal immigration and unlawful entry.

To become a "legal" immigrant to the United States, as the general public understands the term, an immigrant must first obtain LPR status.[20] The number of individuals who are eligible to obtain this status in a given year is capped at roughly 675,000, but a higher number of individuals may qualify, as certain categories of individuals are exempt from these statutory caps.[21] Importantly for the purposes of this Comment, one set of individuals exempt from this limit includes immediate family members of US citizens.[22] There are also limits on the percentage of immigrants that may come from any particular country.[23] A set of policy preferences based on family relationships and

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[20] See William A. Kandel, *Permanent Legal Immigration to the United States: Policy Overview* *1 (Congressional Research Service, Oct 29, 2014), archived at http://perma.cc/LJ43-GT67. Note that William A. Kandel's report uses the term "legal permanent resident" as opposed to "lawful permanent resident." The latter is the appropriate term, and it is the one that this Comment uses. For an example of the term's use in the relevant statutory text, see 8 USC § 1229b(b)(2)(A)(i)(II).

[21] See Kandel, *Permanent Legal Immigration* at *2 (cited in note 20).

[22] See id. Other categories include refugees and asylum seekers.

[23] See id at *3.

employment skills guides the allocation of the total number of immigrant visas, which are required in order to legally enter and remain in the United States for the purpose of immigrating.[24] LPR status is generally limited to individuals legally present in the United States. That said, there is one limited exception: under 8 USC § 1229b, the attorney general may cancel the removal of an individual and adjust his status to LPR if certain conditions are met.[25]

If an individual is categorically eligible to enter the United States as an LPR and is granted this privilege, he may apply for citizenship through the US Customs and Immigration Service. Limits exist on the amount of time an applicant may have spent out of the country after his initial entry.[26] Furthermore, potential citizens are asked about their understanding of English, their knowledge of civics and US history, and their willingness to perform military or civilian service.[27]

Of course, lawful entry to the country followed by LPR status and eventual citizenship is not the only path that individuals can take to a life in the United States. Many individuals enter the country outside the bounds of the law. As of 2012, there were 11.4 million immigrants living in the United States without authorization.[28] There are many ways in which immigration law might classify a person's presence as unauthorized. For example, an individual could be in the country on a time-limited visa (such as a student F-1 visa[29]) and stay beyond its expiration. In an example that is more relevant to this Comment, one could enter the country without inspection at the border and simply remain in the United States until discovered by immigration authorities. When discovered, an individual is likely to become involved with the immigration-enforcement system.

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24 See id at *3.

25 8 USC § 1229b(b)(1). These conditions are extended physical presence, good moral character, lack of convictions for certain offenses, and the presence of exceptional and extremely unusual hardship in the event of removal. 8 USC § 1229b(b)(1).

26 See US Citizenship and Immigration Services, *Naturalization Eligibility Worksheet Instructions* *1 (DHS, June 15, 2006), archived at http://perma.cc/P82P-GST2.

27 See id at *3–4.

28 Bryan Baker and Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* *2 (DHS, Mar 2013), archived at http://perma.cc/H9JP-YZR8.

29 For more information about student visas, see generally Bureau of Consular Affairs, *Student Visa: Overview* (Department of State), archived at http://perma.cc/X3WM-RM9A.

2. Institutions in immigration enforcement.

Several institutions are involved in immigration enforcement in ways that are highly relevant to this Comment. To understand them, consider the following hypothetical: An immigrant illegally enters the country and is subsequently discovered. Initially, he is likely to go before an immigration judge in the Executive Office for Immigration Review (EOIR). The EOIR is a branch of the DOJ, and it handles all initial removal proceedings initiated by the DHS.[30] At a hearing, an immigration judge considers arguments presented by both the Government and the individual, and the judge then determines whether the individual should be removed.[31]

Either party may appeal the immigration judge's decision to the Board of Immigration Appeals (BIA). This is a special tribunal within the EOIR whose role is to review the decisions of immigration judges.[32] The BIA chooses whether to publish any given decision; published decisions are precedential, but unpublished opinions are not.[33] While the EOIR sometimes engages in rulemaking,[34] the BIA is solely an appellate body, as the regulations providing for its existence do not give it broad regulatory power.[35] If an individual is dissatisfied with the result he obtains from the BIA, he may appeal to the court of appeals for the relevant geographic circuit.[36]

B. The History of Derivative Citizenship in the United States

Derivative citizenship law has existed in the United States since 1790. This Section considers early American law regarding derivative citizenship, addresses the changes that occurred in 1952 (which remained in place for several decades), and, finally, turns to the present state of derivative citizenship law in light of statutory amendments made in 2000. While the law has changed over time, US immigration policy has consistently contained some form of derivative citizenship law.

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30 See Executive Office for Immigration Review, *EOIR at a Glance* (DOJ, Sept 9, 2010), archived at http://perma.cc/2KMR-33GV.

31 See id.

32 See Board of Immigration Appeals, *Practice Manual* *1 (DOJ, July 27, 2015), archived at http://perma.cc/CP33-ZN5F.

33 Id at *8–9.

34 See id at *137.

35 See 8 CFR § 1003.1(b) (defining the BIA's appellate jurisdiction).

36 See note 81.

1. Early developments.

While the basic concept of derivative citizenship has remained constant throughout history, the requirements for derivative citizenship have varied significantly.[37] Congress passed the first statute granting derivative citizenship in 1790 to provide citizenship for foreign-born children of US citizens.[38]

Subsequently, derivative citizenship law went through numerous iterations.[39] Among these was a prohibition on citizenship for any person convicted of fighting on behalf of Great Britain during the American Revolution, as well as a change allowing derivative citizenship to obtain even when the conditions precedent were not met at birth.[40] An amendment in 1855 contained a more significant change: it restricted derivative citizenship such that it could pass only from fathers to their children.[41] Subsequent changes in 1934 and 1940 made the requirements still more stringent by including a longer residency requirement for both children and parents as well as a loyalty oath.[42]

2. The INA.

In 1952, Congress passed the INA.[43] The INA was a comprehensive overhaul of the US immigration system: it removed certain exclusions, modified the quota system, and authorized skill-based visas, among other things.[44] It also contained a derivative citizenship provision, later codified at § 1432(a), which provided that a foreign-born child of noncitizen parents could become a US citizen "upon fulfillment of the following conditions":

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37 See Michael G. McFarland, Note, *Derivative Citizenship: Its History, Constitutional Foundation, and Constitutional Limitations*, 63 NYU Ann Surv Am L 467, 477–83 (2008) (describing the historical development of derivative citizenship law in the United States).

38 See Act of Mar 26, 1790 § 1, 1 Stat 103, 104.

39 See McFarland, Note, 63 NYU Ann Surv Am L at 477–82 (cited in note 37).

40 See id at 479–80.

41 See Act of Feb 10, 1855 § 1, 10 Stat 604, 604; McFarland, Note, 63 NYU Ann Surv Am L at 479 (cited in note 37).

42 See McFarland, Note, 63 NYU Ann Surv Am L at 481–82 (cited in note 37).

43 66 Stat 163 (1952), codified as amended in various sections of Title 8.

44 See *Revising the Laws Relating to Immigration, Naturalization, and Nationality*, HR Rep No 82-1365, 82d Cong, 2d Sess 28–30 (1952), reprinted in 1952 USCCAN 1653, 1679–81.

> (1) [t]he naturalization of both parents; or
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> (2) [t]he naturalization of the surviving parent if one of the parents is deceased; or
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> (3) [t]he naturalization of the parent having legal custody of the child [under specified conditions]; and if
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> (4) [s]uch naturalization takes place while such child is under the age of sixteen years; and
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> (5) [s]uch child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under . . . this subsection, or thereafter begins to reside permanently in the United States while under the age of sixteen years.[45]

Subsequent legislation changed the age threshold from sixteen to eighteen and expanded the eligibility of adopted children,[46] but this standard for derivative citizenship otherwise remained in place until 2000.

3. The Child Citizenship Act of 2000.[47]

In 2000, Congress again amended the derivative citizenship statute, this time with a substantive revision. The Child Citizenship Act of 2000 (CCA) repealed § 1432[48]—the provision containing the "reside permanently" language at issue in this Comment—and amended 8 USC § 1431 to read as follows:

> (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
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> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
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> (2) The child is under the age of eighteen years.
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> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.[49]

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45 INA § 321(a), 66 Stat at 245, codified as amended at 8 USC § 1432(a) (1994).

46 See Act of Oct 5, 1978 § 5, Pub L No 95-417, 92 Stat 917, 918, codified as amended at 8 USC § 1432 (1994).

47 Pub L No 106-395, 114 Stat 1631, codified as amended in various sections of Title 8.

48 CCA § 103(a), 114 Stat at 1632.

49 CCA § 101(a), 114 Stat at 1631, codified at 8 USC § 1431(a).

Congress intended the CCA to ease the path to citizenship for adopted children who are born abroad.[50] The statute creates a single set of conditions for all children born outside the United States, regardless of whether they are adopted, and it provides a means for adopted children to receive citizenship automatically.[51] By repealing § 1432, the CCA retained the language requiring lawful admission for permanent residence, but it did not keep the "reside permanently" language.[52] It is not clear why Congress chose to remove this language; the legislative history does not speak to the issue.

C. The Normative Justifications for Derivative Citizenship

Traditionally, citizenship is created via two means: *jus soli* and *jus sanguinis*—terms that translate to "right of birthplace" and "right of blood," respectively.[53] *Jus soli* citizenship is derived by birth location, while *jus sanguinis* citizenship is derived by virtue of an individual's familial relationships. In particular, the principles underlying the second form provide normative justifications for derivative citizenship. An understanding of these normative considerations aids the understanding of how one could read the INA to allow for derivative citizenship even in the event of unlawful entry. Justifications include promoting family unity and reducing the prevalence of stateless individuals.[54]

1. Derivative citizenship promotes family unity.

Family unity is an important objective of US immigration law,[55] and derivative citizenship promotes this objective. Professor David Thronson has written on the interaction of immigration and family law, noting that one out of every ten immigrant

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50 See *Adopted Orphans Citizenship Act*, HR Rep No 106-852, 106th Cong, 2d Sess 3–5 (2000) (noting that the bill, which would ultimately become the CCA, was designed to provide automatic citizenship to adopted children born outside the United States).

51 See id at 2.

52 See CCA § 101(a), 114 Stat at 1631, codified at 8 USC § 1431.

53 See McFarland, Note, 63 NYU Ann Surv Am L at 471 (cited in note 37).

54 For a discussion of the benefits of derivative citizenship, see id at 474–77. For a discussion of the costs of derivative citizenship, see id at 474 n 35 (discussing some costs, which largely involve the fact that citizens are often entitled to various state benefits, as well as the fact that derivative citizenship increases the pool of individuals eligible for such benefits and thus increases costs).

55 See Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U Chi L Rev 289, 292–93 (2013) (discussing the importance of family unity to US immigration law and policy).

children lives in a "mixed-status" family in which immediate family members have different immigration statuses.[56] Furthermore, he has observed that a significant number of undocumented immigrants are children, some of whom have a parent who is a citizen.[57]

Derivative citizenship reduces the number of mixed-status families, yielding both normative and economic benefits. Normatively, it is a common view that keeping families united when possible is a positive thing.[58] Indeed, US immigration policy has long held family unity as a goal. For example, the House report accompanying the INA spoke of "the well-established policy of maintaining the family unit."[59] Furthermore, Representative James Dolliver spoke in support of the bill's derivative citizenship provisions on the ground that they would reduce the number of family-unification private bills used for relief in individual situations.[60]

Dolliver's remarks also speak to an economic justification for derivative citizenship: it reduces the resources that government institutions spend to address the concerns of mixed-status families. As Dolliver noted, prior to the INA, Congress was frequently forced to pass private bills for relief.[61] The private bill procedure is a convoluted one; procedural and political hurdles make it an impractical avenue for addressing these issues on any scale larger than that of the individual case.[62] In a similar vein, consider Thronson's arguments about overlap between immigration and family law. In theory, immigration judges and family court judges have very different competencies. However, Thronson suggests that our current immigration system often intertwines immigration law with family law, and it forces courts to make decisions relying on bodies of law outside their

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56 David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 Hastings L J 453, 454 (2008).

57 Id at 454–55 & n 13.

58 See Posner, 80 U Chi L Rev at 292–93 (cited in note 55).

59 HR Rep No 82-1365 at 39 (cited in note 44).

60 See *Revision of Laws Relating to Immigration, Naturalization, and Nationality, HR 5678*, 82d Cong, 2d Sess, in 98 Cong Rec 4308 (Apr 23, 1952) (statement of Rep Dolliver).

61 See id (discussing the previous practice of introducing private bills to provide citizenship to individual children when a child was born or adopted abroad).

62 See Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 Georgetown Immig L J 273, 294–302 (2004) (discussing procedural difficulties and political barriers to the use of private bills in the immigration context).

traditional areas of expertise.[63] Derivative citizenship makes it easier for all family members to have the same status, which in turn likely results in fewer cases with serious family law considerations moving into immigration courts.

2. Derivative citizenship reduces the number of stateless individuals.

Statelessness is a condition that occurs when an individual lacks a specific nationality.[64] This condition may seem strange to many Americans, who are accustomed to birthright (*jus soli*) citizenship. However, not all nations provide birthright citizenship. If an individual does not acquire nationality at birth and his familial relationships do not provide for *jus sanguinis* citizenship, he can be said to be stateless.

Statelessness is normatively undesirable. Individuals without a nationality cannot rely on the protection of a particular state. Stateless individuals often lack "birth registration, identity documentation, education, health care, legal employment, property ownership, political participation and freedom of movement."[65] Stateless persons are also at a higher risk of becoming victims of human trafficking.[66] Scholars have even argued that stateless individuals suffer more harms than aliens abroad, suggesting that, as far as possible, statelessness "should . . . be abolished."[67]

Nationality also benefits states. For one thing, it makes it easier as an administrative matter for families to travel together.[68] States want to offer security to their citizens concerning overseas travel, and nationality essentially places a stamp on individuals by indicating that they fall under that state's protection.[69] Nationality also ensures that foreign-born children of citizens will obtain the rights and privileges of citizenship upon

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63 Thronson, 59 Hastings L J at 456–59 (cited in note 56).

64 See Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 Yale L J 900, 902 (1974) (defining the "stateless person" as someone "without formal membership in any body politic").

65 Jay Milbrandt, *Stateless*, 20 Cardozo J Intl & Comp L 75, 92 (2011), quoting Division of International Protection, *UNHCR Action to Address Statelessness: A Strategy Note* *4 (UNHCR, Mar 2010), archived at http://perma.cc/F4BA-7TVT.

66 See Milbrandt, 20 Cardozo J Intl & Comp L at 92 (cited in note 65).

67 McDougal, Lasswell, and Chen, 83 Yale L J at 902, 905 (cited in note 64).

68 See McFarland, Note, 63 NYU Ann Surv Am L at 474 (cited in note 37).

69 See McDougal, Lasswell, and Chen, 83 Yale L J at 907 (cited in note 64).

their return and will thus desire to stay in and contribute to the country granting nationality.[70]

Furthermore, a state may view assimilation as a positive thing for immigrants.[71] In the case of multiple generations of immigrants, the older generation may have less incentive to assimilate culturally. Given the short-term effects of this lack of assimilation, the state may not be especially concerned about this. However, assimilation of younger immigrant generations presents a concern because the younger generations will likely be present in the host country for longer periods of time. If members of this generation are stateless, and thus do not receive the full benefits and protections of membership in the host country's citizenry, they may be less likely to assimilate. Indeed, citizenship has been shown to promote assimilation. For example, a study published by the Center for American Progress found that in the United States, second-generation Latinos who had citizenship by birth were more likely to assimilate, as measured by factors such as English-language attainment and school completion.[72]

Derivative citizenship can help solve the statelessness problem. A strong derivative citizenship regime prevents the problems that occur when parents who are citizens of a *jus soli* country have children outside its borders in a *jus sanguinis* regime. Derivative citizenship, in that case, reduces the number of stateless individuals.

II. DERIVATIVE CITIZENSHIP AND THE LAWFUL ENTRY REQUIREMENT

Several cases are instructive on the issue of whether § 1432(a) contains an implicit lawful entry requirement. The cases speak primarily to whether "lawfully admitted for permanent residence" and "reside permanently" have the same meaning or independent meanings. If they have the same meaning, then the statute requires lawful admission for permanent resi-

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70 See McFarland, Note, 63 NYU Ann Surv Am L at 474–75 (cited in note 37).

71 See Posner, 80 U Chi L Rev at 293 (cited in note 55) (suggesting that "the emphasis on family reunification in US immigration law accounts for the high level of assimilation of immigrants, which contrasts favorably to the experiences in other countries"). See also id at 297 (describing the "good type of immigrant" as one with the characteristic of "assimilability," among others).

72 Dowell Myers and John Pitkin, *Assimilation Today: New Evidence Shows the Latest Immigrants to America Are Following in Our History's Footsteps* *19–20 (Center for American Progress, Sept 2010), archived at http://perma.cc/P542-VLR8.

dence as a precondition of obtaining derivative citizenship. If they have different meanings, then the presence of the disjunctive "or" suggests that "reside permanently" stands as an independent path to meeting the statutory requirements for derivative citizenship. This distinction raises a subsidiary question, which serves as the focus of this Comment: If the independent-meaning interpretation is correct, is lawful entry implicitly required under the "reside permanently" prong, or may an unlawful entrant who meets the other statutory requirements gain citizenship under § 1432?

To address this question, one must first understand appellate court decisions confronting whether the "lawfully admitted for permanent residence" and "reside permanently" requirements are independent. This Part proceeds in three sections. The first considers the identical-meaning interpretation and describes the reasoning that led the Ninth and Eleventh Circuits to adopt it. The second considers the independent-meaning interpretation, which has been adopted by the Second Circuit. The final Section considers the Fifth Circuit's interaction with the issue: although the court has not directly confronted the question of unlawful entry, it has heard a case implicating this question.

A. The Identical-Meaning Interpretation

Both the Ninth and Eleventh Circuits interpret the second clause of § 1432(a)(5) as having identical meaning to the LPR clause; that is, they hold that one who does not have LPR status cannot gain citizenship under this statute by merely "resid[ing] permanently in the United States."[73] The Ninth Circuit was the first to approach the issue, in the 2008 case of *Romero-Ruiz v Mukasey*,[74] and the Eleventh Circuit subsequently addressed the problem in *United States v Forey-Quintero*.[75]

1. The Ninth Circuit adopts the identical-meaning view.

The petitioner in *Romero-Ruiz* entered the United States unlawfully at the age of four.[76] While he was still under eighteen years of age, his mother was naturalized, and he filed an appli-

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73 8 USC § 1432(a)(5) (1994).
74 538 F3d 1057 (9th Cir 2008).
75 626 F3d 1323 (11th Cir 2010).
76 *Romero-Ruiz*, 538 F3d at 1060.

cation for adjustment of status shortly thereafter.[77] He later left the country temporarily and claimed citizenship upon his return. He was allowed entry but was subsequently adjudged to be removable for having made a false claim to citizenship.[78] In his removal proceedings, he defended on the ground that he was a citizen through derivative citizenship; the BIA, however, rejected this claim in an unpublished opinion.[79] The BIA noted that § 1432(a)(5) attaches the LPR requirement to those "residing in the United States . . . at the time of the naturalization of the parent."[80] As such, it concluded that because Romero-Ruiz was residing in the United States at the time of his mother's naturalization, LPR status was required for him to successfully claim derivative citizenship. Romero-Ruiz petitioned the Ninth Circuit for review of the BIA decision.[81]

In a short opinion, the Ninth Circuit affirmed the BIA's decision. The court noted: "It is a well-established principle of statutory construction that legislative enactments should not be construed to render their provisions mere surplusage."[82] Observing that "reside permanently" was preceded by "thereafter begins" in the statute, the Court found that the reading best avoiding surplusage was one that viewed the "reside permanently" language as merely modifying the timing of the residence requirement, not its substance.[83] The court essentially suggested that because "residing permanently" was a necessary condition of LPR status, reading the two terms independently would render the LPR-status clause superfluous, and that the terms should be read to have identical meanings.[84] The court therefore

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77 Id.

78 Id.

79 See *In re Romero-Ruiz*, 2005 WL 698289, *2–3 (BIA). Most of the BIA's decisions, including *In re Romero-Ruiz*, are unpublished and nonprecedential. Only the few that are selected for publication are considered precedential. See note 33 and accompanying text.

80 *In re Romero-Ruiz*, 2005 WL 698289 at *2, quoting 8 USC § 1432(a)(5) (1994).

81 *Romero-Ruiz*, 538 F3d at 1060–61. The courts of appeals have jurisdiction over final orders of removal. An individual seeking to reverse a BIA removal decision petitions directly to the court of appeals, rather than filing in a federal district court. See 8 USC § 1252(b)(2) ("The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."). While district courts occasionally have a role to play if appellate courts remand for factual determinations, district courts are rarely in a position to make significant legal conclusions concerning removal orders.

82 *Romero-Ruiz*, 538 F3d at 1062 (quotation marks omitted).

83 Id.

84 Id.

denied Romero-Ruiz's petition for review, leaving the order for removal in place.[85]

2. The Eleventh Circuit also adopts the identical-meaning view.

The Eleventh Circuit considered derivative citizenship under § 1432(a) in *Forey-Quintero*. The defendant in that case was convicted of being a previously removed alien found in the United States without permission to reenter.[86] The defendant had entered the United States legally (though not with LPR status) at a young age.[87] Subsequently, his mother filed a Petition for Alien Relative.[88] The defendant would have been eligible for LPR status when a visa became available.[89] However, he did not achieve this status while he was under the age of eighteen.[90] After gaining LPR status at the age of nineteen, he committed an aggravated felony, was removed from the country, and unlawfully attempted to reenter.[91] He was charged with and convicted of illegal reentry, and he was sentenced to forty-six months' imprisonment.[92] He subsequently appealed to the Eleventh Circuit.[93]

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85 Id at 1064.

86 *Forey-Quintero*, 626 F3d at 1324. Such illegal reentry is criminalized. 8 USC § 1326(a)–(b).

87 *Forey-Quintero*, 626 F3d at 1325. Forey-Quintero entered the United States with a border-crossing card. Id. A border-crossing card is a document that allows Mexican nationals to enter the United States on a short-term basis. See Bureau of Consular Affairs, *Border Crossing Card* (Department of State), archived at http://perma.cc/LNS3-W8EF.

88 *Forey-Quintero*, 626 F3d at 1325. A Petition for Alien Relative, also known as Form I-130, is a petition to establish a relationship between two persons, one of whom is a citizen or has LPR status. The citizen or LPR files the petition on behalf of an alien relative. The grant of the petition does not itself grant a visa or other right, but it legally establishes the relationship necessary for the alien relative to file Form I-485 ("Application to Register Permanent Residence or Adjust Status") and to have a visa approved without waiting for a visa number. See generally US Citizenship and Immigration Services, *Instructions for Form I-130, Petition for Alien Relative* (DHS, Mar 23, 2015), archived at http://perma.cc/8TBE-93PX; US Citizenship and Immigration Services, *Instructions for I-485, Application to Register Permanent Residence or Adjust Status* (DHS, June 20, 2013), archived at http://perma.cc/5DBB-USEW.

89 *Forey-Quintero*, 626 F3d at 1325. The INA establishes a system to create numerical limits on issuable visas. The attorney general is empowered to do this, subject to a statutory framework setting out the means of calculating the limits. See 8 USC § 1153.

90 *Forey-Quintero*, 626 F3d at 1325.

91 Brief for Appellee, *United States v Forey-Quintero*, Docket No 09-15330, *5 (11th Cir filed Feb 22, 2010) (available on Westlaw at 2010 WL 783602).

92 See Judgment in a Criminal Case, *United States v Forey-Quintero*, Criminal Action No 08-0353, *2 (ND Ga filed Oct 19, 2009).

93 *Forey-Quintero*, 626 F3d at 1324–25.

The Eleventh Circuit agreed with the Ninth Circuit that the two clauses in § 1432(a)(5) have identical meanings. The decision came after the Ninth Circuit's decision in *Romero-Ruiz* and the BIA's decision in *Matter of Nwozuzu*,[94] and the court used reasoning from both of these opinions to reach its conclusion. It followed the logic of the BIA's opinion in *Matter of Nwozuzu*, which interpreted "reside permanently" to include an implicit requirement that the residence was lawful, given the "realities of the immigration laws."[95] The Eleventh Circuit expounded on this, stating that "a dwelling place cannot be permanent under the immigration laws if it is unauthorized."[96] Essentially, the court reasoned that one's residence cannot conceivably be considered permanent if one faces an ongoing possibility of removal. The court also adopted the logic of *Romero-Ruiz* that an alternative interpretation would result in surplusage.[97] The court stated that an interpretation favoring Forey-Quintero would essentially reward those who had taken minimal steps to legally reside in the United States.[98] Considering all of these factors, the Eleventh Circuit affirmed Forey-Quintero's conviction.[99] Notably, neither *Forey-Quintero* nor *Romero-Ruiz* considered the lawful entry question, likely because their resolution of the identical/independent-meaning issue mooted the question. In other words, because both courts assumed that lawful admission for permanent residence was required, and because such admission necessarily excludes illegal entrants, there was no need to resolve the question whether unlawful entrants could claim the statute's protection.

B. The Independent-Meaning View and the Question of Lawful Entry

In a recent case, the Second Circuit departed from the Ninth and Eleventh Circuits, holding that the two clauses in § 1432(a)(5) should be read to have independent meanings. Under this interpretation, one need not have formal LPR status to gain the statute's protection. In reaching this conclusion, the

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94 24 I&N Dec 609 (BIA 2008). For an extensive discussion of this case, see Part II.B.

95 *Forey-Quintero*, 626 F3d at 1327, quoting *Matter of Nwozuzu*, 24 I&N Dec at 613.

96 *Forey-Quintero*, 626 F3d at 1327 (quotation marks omitted).

97 Id.

98 Id.

99 Id.

court acknowledged the question of lawful entry but declined to answer it.

1. The Second Circuit holds that the two clauses of § 1432(a)(5) have independent meanings.

In the case of *Nwozuzu v Holder*,[100] the Second Circuit considered whether the clauses in § 1432(a)(5) have identical or independent meanings. The petitioner in that case was admitted to the United States as a child of an individual admitted as a nonimmigrant student. However, the petitioner was not granted LPR status until he was twenty-one years old.[101] When he was subsequently placed in removal proceedings after a firearms conviction,[102] he argued that he had "resided permanently" in the United States and therefore was a citizen, as he had met the other requirements of § 1432(a).[103]

The immigration judge agreed with Nwozuzu, but the DHS appealed to the BIA. In what appears to be its only precedential decision concerning this issue,[104] the BIA reversed. It first found that the term "reside permanently" was ambiguous and that both Nwozuzu and the Government offered plausible readings.[105] However, it held that, considered in the context of the definitions provided in the INA, that term excluded statuses other than "lawful permanent residence." The BIA wrote:

> A dwelling place . . . cannot be "permanent" . . . under the immigration laws if it is unauthorized. An alien who entered this country illegally or remains without authorization might maintain a home or residence here, but there is no guarantee that he or she will be able to do so for any length of time. The concept of "residing permanently" therefore includes an implied requirement that the residence be lawful.[106]

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[100] 726 F3d 323 (2d Cir 2013). The petitioner in *Nwozuzu* had his case heard by several different bodies at different times. In this Comment, "*Matter of Nwozuzu*" refers to the precedential BIA decision in 2008. "*In re Nwozuzu*" refers to a subsequent, unpublished, nonprecedential BIA decision in 2009. "*Nwozuzu v Holder*" (or simply "*Nwozuzu*") refers to the petitioner's 2013 appeal to the Second Circuit.

[101] *Matter of Nwozuzu*, 24 I&N Dec at 609.

[102] *Nwozuzu*, 726 F3d at 326.

[103] *Matter of Nwozuzu*, 24 I&N Dec at 610.

[104] The issue was also discussed in *In re Romero-Ruiz*, which was nonprecedential. See *In re Romero-Ruiz*, 2005 WL 698289 at *2.

[105] See *Matter of Nwozuzu*, 24 I&N Dec at 612–15.

[106] Id at 613 (citation omitted).

Notably, the BIA did not adopt the Ninth Circuit's view that the issue is merely temporal. That is, it did not adopt the view that "thereafter begins to reside permanently" simply means that an individual may gain derivative citizenship through § 1432(a) even if he did not have LPR status at the time of his parent's naturalization, as long he gained LPR status after the naturalization.[107] The BIA opinion did not state a view on the temporality issue, instead simply concluding that there were no adequate means of demonstrating that one "resides permanently" absent LPR status.[108]

On appeal, the Second Circuit disagreed. Engaging in a *Chevron* analysis,[109] the court first considered "whether Congress [had] directly spoken to the . . . issue."[110] The court made several observations suggesting that Congress intended the clauses in § 1432(a)(5) to have independent meanings. First, it noted that the two clauses use plainly different terms ("lawful admission for permanent residence" and "reside permanently"), leading to a presumption that Congress intended separate meanings.[111] The court further noted that the term "lawfully admitted for permanent residence" was a term of art defined in the statute, whereas "reside permanently" was not.[112]

The court also looked to other sections of the INA to distinguish between the phrases. For example, the court observed that § 322 of the INA allowed for a citizenship certificate when "the child [was] *residing permanently* in the United States . . . pursuant to a *lawful admission for permanent residence*."[113] It pointed to other pieces of the INA that used the phrases differently as well. For example, § 327 dealt with individuals seeking to regain citizenship after losing it as a result of fighting for another coun-

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107 Recall that the Ninth Circuit held in *Romero-Ruiz* that "the phrase 'or thereafter begins to reside permanently' alters only the *timing* of the residence requirement." *Romero-Ruiz*, 538 F3d at 1062 (emphasis in original).

108 *Matter of Nwozuzu*, 24 I&N Dec at 615.

109 See generally *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984). *Chevron* analysis determines whether agencies receive deference in their interpretations of law. Under *Chevron*, courts first ask "whether Congress has directly spoken to the precise question at issue"; then, if the answer is no, courts ask whether the agency's interpretation is "based on a permissible construction of the statute." Id at 842–43.

110 *Nwozuzu*, 726 F3d at 327, quoting *Chevron*, 467 US at 842.

111 See *Nwozuzu*, 726 F3d at 327, citing *Immigration and Nationalization Service v Cardoza-Fonseca*, 480 US 421, 432 (1987).

112 *Nwozuzu*, 726 F3d at 327–28. Note, however, that "reside" and "permanent" are defined in the INA. See Part III.A.1.

113 *Nwozuzu*, 726 F3d at 328 (brackets and emphasis in original), quoting 8 USC § 1433(a)(5)(A) (1994).

try during World War II, and it gave "lawfully admitted for permanent residence" and "reside permanently" independent meanings.[114] Furthermore, the court relied heavily on the interpretive canon against surplusage, noting that "[i]f one could *only* reside permanently in the United States as a lawful permanent resident, then the phrase 'pursuant to a lawful admission for permanent residence' would have been superfluous."[115] Considering Congress's choice to define one phrase as a term of art, the various distinct uses of the terms throughout the INA, and the canon against surplusage, the court found that the two phrases have independent meanings.

Finding no ambiguity on the face of the text, the court further supported its conclusion by considering the legislative history of the statute. Finding preservation of family unity to be a paramount goal of Congress, it noted that a reading requiring LPR status could create additional burdens for children living abroad at the time of their parents' naturalization.[116] While these children would be eligible for derivative citizenship, LPR status was, in the court's view, a needless procedural formality that could jeopardize the children's ability to gain citizenship through their parents.[117] The court also noted that many subgroups are allowed to reside permanently in the United States without LPR status—for example, crewmen on fishing vessels.[118] Considering these factors, the Second Circuit held that even if the statute was ambiguous, the BIA's reading was unreasonable.[119]

Furthermore, the court noted that, linguistic and interpretive exercises notwithstanding, it had already confronted the issue in *Ashton v Gonzales*.[120] That case addressed whether a subjective *intent* to reside permanently was sufficient to meet the requirements of § 1432(a) when an individual has neither begun to reside permanently in the United States nor applied for LPR status.[121] The court in *Ashton* concluded that this subjective in-

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114 *Nwozuzu*, 726 F3d at 328, citing 8 USC § 1438(b)(2).

115 *Nwozuzu*, 726 F3d at 328 (emphasis in original).

116 Id at 332.

117 Id at 331–32.

118 Id at 333.

119 *Nwozuzu*, 726 F3d at 333. Note that this holding somewhat blurs the *Chevron* inquiry. While the court could have stopped its analysis once it found the statute's text unambiguous (an inquiry appropriate at step one of *Chevron*), it also held the interpretation "unreasonable," which more closely resembles step two of *Chevron*.

120 431 F3d 95 (2d Cir 2005). See also *Nwozuzu*, 726 F3d at 328.

121 *Ashton*, 431 F3d at 98.

tent was insufficient, ruling against the petitioner.[122] However, while it had not explicitly reached the question whether "lawfully admitted for permanent residence" and "reside permanently" had meanings independent of each other, the *Ashton* court had declined to rule out the possibility that "some lesser official objective manifestation" than LPR status could satisfy § 1432(a).[123]

What, exactly, "some lesser official objective manifestation" means remains a mystery. In *Nwozuzu*, the Second Circuit clearly stated that an application for LPR status will suffice (even if the status itself was not required).[124] It also clearly stated that the behavior of relatives, while perhaps relevant, will not be dispositive; applications for LPR status or citizenship by children or parents of the individual in question will not constitute an "objective and official manifestation" for that individual.[125] The court further clarified that this phrase cannot require purely subjective intent on the part of the individual—that is, an individual's testimony stating intent to reside permanently would be insufficient.[126] Thus, questions remain open: Just how "official" must an official manifestation be? For example, is applying for a state benefit an objective manifestation of intent to reside permanently? Is purchasing a home? Courts may soon be forced to provide more-definite rules on this point, particularly if additional circuits adopt the holding of *Nwozuzu*. Further, if courts do adopt this holding, they will likely have to confront an issue that the Second Circuit acknowledged but did not resolve: whether there is a lawful entry requirement to receiving derivative citizenship.

2. The Second Circuit acknowledges the question of lawful entry.

The Second Circuit's opinion also spoke in passing to the question of lawful entry. In a footnote, the court wrote: "Nwozuzu 'was admitted legally into the United States . . . and until he was convicted . . . he did not belong to a class of persons categor-

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122 Id at 99.

123 Id.

124 *Nwozuzu*, 726 F3d at 334.

125 Id. The court found the fact that Nwozuzu's relatives were present in the United States and had been naturalized to be relevant, though not dispositive. It reached this conclusion by noting that the purpose of the statute was, in part, to achieve family unity, and thus that the behavior of family members could support—though not by itself provide for—a claim of objective official manifestation to reside permanently. Id at 332–34.

126 See id at 328–29, citing *Ashton*, 431 F3d at 99.

ically forbidden from immigrating.' Therefore, we need not consider whether the 'reside permanently' clause . . . carries an implicit 'lawful entry' requirement."[127]

While the court did not explicitly consider whether the statute permits a grant of citizenship to an unlawful entrant, the standard that it adopted does not preclude this result. As discussed in Part II.B.1, the court in *Nwozuzu* adopted the language of *Ashton*, stating that "objective official manifestation" of intent to reside permanently is all that § 1432(a) requires.[128] This requirement says nothing about entry requirements. If any of the previously discussed hypotheticals (such as an application for state benefits or the purchase of a home) would in fact suffice, then the court's definition of "reside permanently" could cover an individual who entered the United States unlawfully.

C. The Fifth Circuit Approach and the Archaic Case Law Underlying It

The Fifth Circuit has not formally weighed in on the question whether the two clauses of § 1432(a)(5) have identical or independent meanings, but it has spoken, albeit narrowly, about lawful entry. In *Gonzalez v Holder*,[129] the court concluded—without resolving the categorical question—that the petitioner was barred from § 1432(a) derivative citizenship due to his unlawful entry into the country.[130] *Gonzalez* marks the first and only time to date that a federal court of appeals has taken a position on the question of lawful entry.

1. The *Gonzalez* case.

As noted in the Introduction, the petitioner in *Gonzalez* entered the country unlawfully at the age of seven. His father was naturalized seven years later and filed a petition for an immediate-relative visa on the petitioner's behalf.[131] However, the petitioner

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127 *Nwozuzu*, 726 F3d at 330 n 6, quoting *Ashton*, 431 F3d at 99.

128 *Nwozuzu*, 726 F3d at 333.

129 771 F3d 238 (5th Cir 2014).

130 Id at 245.

131 Id at 239. A US citizen may file a petition for a visa on behalf of a child, spouse, or parent in order for the latter to receive a green card. This is known as an "immediate relative" visa or a "Petition for Alien Relative." See note 88. There are some additional restrictions based on age and marital status, but the measure allows for a fast-track green card for relatives of citizens. Persons with LPR status may also file a petition on behalf of their relatives, though their means to do so are more limited. See generally USCIS, *Instructions for Form I-130* (cited in note 88).

did not gain LPR status until he was twenty-three years old.[132] Prior to this case, the Fifth Circuit had not definitively spoken to the scope of § 1432(a).[133]

The court evaluated the various approaches to interpreting § 1432(a)(5), including the Ninth, Eleventh, and Second Circuits' approaches, as well as the BIA's previous holdings.[134] Ultimately, it did not settle on an answer to the question whether the independent-meaning view or the identical-meaning view was correct. The court instead concluded that Gonzalez's illegal entry, coupled with his failure to ensure lawful presence prior to his eighteenth birthday, was fatal to his claim.[135]

It is worth examining the Fifth Circuit's reasoning in this case closely. The court conceded that the text of the statute did not speak clearly to the question whether lawful presence in the country was required.[136] Nonetheless, the court relied heavily on Gonzalez's illegal entry to find that he did not qualify for derivative citizenship. The court cited its previous decision in *United States v Elrawy*[137] for the proposition that an immigrant whose status has become unlawful—either via illegal entry or by overstaying a visa—cannot escape his illegal status unless an adjustment of status is approved.[138] Subsequently, the court wrote: "We need not decide [the exact meaning of 'permanent' under § 1432(a)(5)] because Gonzalez entered the country illegally and at no time before his eighteenth birthday did he take action to ensure that his presence was lawful."[139] In essence, the court implied that unlawful entry, combined with the absence of any

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132 *Gonzalez*, 771 F3d at 239.

133 In *United States v Juarez*, 672 F3d 381 (5th Cir 2012), the court considered an ineffective assistance of counsel claim that was based in part on the fact that counsel for a defendant similarly situated to Gonzalez had not raised the derivative citizenship claim as a possible defense. Id at 384, 387. In essence, the defendant in *Juarez* argued that, because lack of citizenship was an element of the charges he faced, and because *Ashton* suggested that citizenship might not require LPR status, his lawyer should have raised the issue. Id at 387. The court found in the defendant's favor, but not based on a definitive conclusion that § 1432(a) does not require LPR status. Rather, the court simply observed that the Second Circuit's decision in *Ashton* made the defense plausible enough to give rise to an ineffective assistance of counsel claim. See id.

134 *Gonzalez*, 771 F3d at 240–44.

135 Id at 245.

136 Id at 244 ("It is not readily apparent that the phrase 'reside permanently' contains a legality requirement.").

137 448 F3d 309 (5th Cir 2006).

138 *Gonzalez*, 771 F3d at 244, citing *Elrawy*, 448 F3d at 314.

139 *Gonzalez*, 771 F3d at 245.

attempt to cure the illegality, made derivative citizenship impossible for Gonzalez.

While these facts, together with the principle articulated in *Elrawy*, make a good case for the argument that Gonzalez had not remedied his illegal status, the court did not bridge the gap between this conclusion and the question whether the derivative citizenship provision could have nonetheless operated. It would be one thing if derivative citizenship required an application and if that application required that the individual have a particular legal status. However, derivative citizenship works by operation of law; if Gonzalez met the requirements at any point, he became a citizen.[140] After admitting that the text was unclear, the opinion jumped to the conclusion that Gonzalez's unlawful entry, combined with his failure to apply for an adjustment of status, implied that he did not "reside permanently."[141] The court did so with limited textual and extrinsic support, while purporting not to take a position on the meaning of § 1432(a)(5).

2. Distinguishing the case law supporting the Fifth Circuit's reasoning.

In reaching this conclusion, the Fifth Circuit cited two early twentieth-century Supreme Court opinions to shed light on the question of unlawful entry: *Kaplan v Tod*[142] and *Zartarian v Billings*.[143] Both of these cases came long before the enactment of the INA in 1952; *Kaplan* was decided in 1925 and *Zartarian* was decided in 1907. In *Kaplan*, the petitioner had come to the United States, but before she entered at Ellis Island, officials determined her to be feebleminded[144] and ordered that she be removed.[145] The proceedings were stayed, and she ended up living with her father, who was naturalized.[146] She claimed that her father's naturalization conferred citizenship on her under existing law because she was "dwelling in the United States."[147] The Court held that since she was in a class of persons deemed

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140 See *Charles v Reno*, 117 F Supp 2d 412, 416 (D NJ 2000) (noting that "[a] child's acquisition of citizenship on a derivative basis occurs by operation of law").

141 *Gonzalez*, 771 F3d at 245.

142 267 US 228 (1925).

143 204 US 170 (1907).

144 Persons determined to be feebleminded were excludable under another federal statute. See Act of Mar 26, 1910 § 1, 36 Stat 263, 263–64.

145 *Kaplan*, 267 US at 229.

146 Id.

147 Id at 230.

not admissible, she had never legally "dwelled" in the United States within the meaning of then-current immigration law and thus was not a citizen.[148] In reaching this conclusion, the Court relied on its previous holding in *Zartarian*.[149] In *Zartarian*, the Court held that an individual excluded for having trachoma could not have acquired derivative citizenship, because he "was debarred from entering the United States . . . and, never having legally landed, of course could not have dwelt within the United States."[150]

Though the Fifth Circuit in *Gonzalez* found these two cases instructive, the cases have little bearing on the question of lawful entry in the context of § 1432(a). As a threshold matter, it is notable that both cases involved interpretations of statutory provisions other than those in the INA; consequently, their authority is persuasive at best. Furthermore, there are other reasons to doubt their applicability. Both *Kaplan* and *Zartarian* relied on the notion that the petitioners did not "enter" the United States. The Court held this to be the case despite the fact that the petitioners were physically within the United States' boundaries.[151] This fiction was necessary to prevent the derivative citizenship statute from operating, because otherwise any significant consecutive time spent in the United States would qualify as "dwelling" and would trigger the statute. This holding was hugely consequential for the government—indeed, if the Court did not allow the fiction to exist, the government would have to immediately remove individuals in order to prevent them from attaining derivative citizenship, at least in certain cases. Placing people on the next ship out of the country regardless of where it is headed could easily yield bad results. Given these likely humanitarian consequences, it is clear why the government would want to avoid this result. Theoretically, Congress could have passed a statute altering the rule, but given the pace at which Congress operates, it is not clear whether that would have resolved the issue.

The problems arising out of this strong incentive to remove do not exist with respect to undocumented immigrants living in

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148 Id.

149 *Kaplan*, 267 US at 230.

150 *Zartarian*, 204 US at 175.

151 In a separate case, Justice Oliver Wendell Holmes articulated this fiction as follows: "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate." *United States v Ju Toy*, 198 US 253, 263 (1905).

the United States for an extended period of time without being discovered. The government already has an incentive to search for such persons, but once they are found, the speed at which the government initiates removal proceedings is very unlikely to bear on those individuals' legal statuses. This is because the statute is triggered not by "residing permanently" but by "beginning to reside permanently."[152] At the time of detention, either an individual has "begun to reside permanently" within the meaning of the statute, or he has not. If he has, then he has citizenship (assuming that all other elements of the statute are met), and the government will not be able to remove him. If he has not, then the statute is not triggered; even a broad view of the statute would require some objective, official manifestation of intent to reside permanently—presumably one could not "begin to reside permanently" while in custody awaiting removal. In this case, the government need not resort to drastic measures in order to remove an undocumented immigrant from the country. And although it may be theoretically possible for an individual to make an objective manifestation of intent to reside permanently (as required by *Nwozuzu*) while in custody, it is difficult to imagine what this manifestation would be.

Timing also matters in a more elementary sense: it does violence to the English language to apply the "dwelling" fiction to the situation of an undocumented immigrant living undiscovered in the United States. In *Kaplan* and *Zartarian*, the petitioners' physical presences in the United States were still in their early stages and had been contested since their arrivals.[153] By contrast, in *Gonzalez*, the appellant had lived in the United States for nineteen years prior to the initiation of removal proceedings and had in fact gained LPR status in 2008.[154] This status did not grant him derivative citizenship under the INA, because he was twenty-three years old at the time that he gained it; thus, his claim would have failed if LPR status—rather than merely "residing permanently"—were required. In the context of *Kaplan* and *Zartarian*, one could plausibly argue that the petitioners were not dwelling in the United States but were merely permissively present there. In *Gonzalez*, there was no element of permissiveness vis-à-vis the nineteen years that Gonzalez was living in the United States. There is, in essence, no good substi-

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152 8 USC § 1432(a)(5) (1994).

153 *Kaplan*, 267 US at 229; *Zartarian*, 204 US at 172–73.

154 *Gonzalez*, 771 F3d at 239.

tute language that one can use for his activity—what, indeed, was he doing if not residing permanently? To say that he was not "residing permanently" flouts the meaning of the term.[155]

Furthermore, the petitioners in *Kaplan* and *Zartarian* were members of classes that were categorically barred from immigrating (the mentally challenged in *Kaplan* and those afflicted with contagious diseases in *Zartarian*).[156] While Gonzalez entered the country illegally, this did not categorically mean that he could never have lawfully immigrated, obtained LPR status (indeed, he obtained this status in 2008), or gained citizenship.[157] It was the manner of his entry that was unlawful, not the fact of his entry itself.

These concerns may have motivated the Second Circuit's characterization of *Kaplan* and *Zartarian* as "unhelpful."[158] Obviously, the Fifth Circuit is not bound by the Second Circuit's analysis, and indeed, *Kaplan* and *Zartarian* are arguably instructive cases in this context. For example, it is an accepted canon of statutory construction that Congress legislates against the background of existing Supreme Court precedent.[159] Applying this canon strictly, a court could infer that in passing the INA, Congress adopted the Supreme Court's view (as expressed in these cases) that one who has not legally landed can never be said to be "residing permanently."

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[155] For an example of this type of reasoning, see *Green v Bock Laundry Machine Co*, 490 US 504, 529 (1989) (Scalia concurring) (arguing for an interpretation that does the "least violence to the text" and does not "give [words] a meaning . . . [that they] simply will not bear").

[156] *Kaplan*, 267 US at 229–31; *Zartarian*, 204 US at 173. See also Act of Mar 26, 1910 § 1, 36 Stat at 263–64.

[157] The exact requirements for legally immigrating and gaining a variety of legal statuses are numerous and beyond the scope of this Comment. However, possibly the strongest "punishment" for illegal immigration is the "3/10 bar." This provision, passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 301(b)(1), Pub L No 104-208, 110 Stat 3009-546, 3009-576, codified as amended at 8 USC § 1182(a)(9), bans those who resided in the United States illegally for more than 180 days but less than one year from legal admission for three years. It further bans those illegally present for one year or more from legal admission for ten years. 8 USC § 1182(a)(9)(B)(i). However, this applies only when illegal immigrants leave the country and attempt to reenter. It does not affect those already in the country. This, of course, creates interesting incentives for unlawful entrants to stay. See Alex Nowrasteh, *Removing the 3/10 Year Bars Is Not Amnesty* (Cato Institute, Apr 23, 2014), archived at http://perma.cc/64RZ-SHK5.

[158] *Nwozuzu*, 726 F3d at 330 n 6.

[159] See William N. Eskridge Jr, *Interpreting Legislative Inaction*, 87 Mich L Rev 67, 71 (1988).

In interpreting an amended statute, courts may presume that Congress adopted the prior construction of the statute.[160] In the leading case, *Apex Hosiery Co v Leader*,[161] the Supreme Court applied this canon to a long-standing interpretation of the Sherman Act upon a subsequent amendment.[162] The Court emphasized that because there had been a strong conflict between the Court and Congress as to the law's meaning, and because Congress had taken no action to contradict the Court, it could be assumed that Congress had accepted the Court's interpretation.[163] In the immigration context, however, there is no evidence that there was a particularly visible conflict between judicial and congressional understandings that dictated a conclusion that Congress, by failing to act, was acquiescing to the judicial interpretation. This may be particularly true given the significant amount of time that passed between the *Kaplan* and *Zartarian* decisions and the passage of the INA, in addition to the fact that legislative history suggests that the focus of the INA was not on derivative citizenship.[164] Furthermore, some scholars have suggested that congressional inaction may merit little weight in resolving ambiguities.[165]

As noted above, the Fifth Circuit plainly acknowledged that the text of the INA does not speak to this matter, observing that "[i]t is not readily apparent that the phrase 'reside permanently' contains a legality requirement."[166] After noting this, the court did not embark on an analysis based on legislative history, purpose, intent, or agency deference. Rather, it looked to two very old Supreme Court precedents interpreting a previous statute and tenuously argued that those cases supported an interpretation that lawful entry was required.[167] The court did not acknowledge the possible distinction between someone who enters the country illegally and someone who, for an extrinsic reason, is categorically prohibited from doing so. Thus, the Fifth Circuit's interpretation lacks strong support, and the statutory and temporal differences between the INA and the laws inter-

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160 See id.

161 310 US 469 (1940).

162 Id at 487–89.

163 See id at 488–89.

164 See Part III.A.2.

165 See, for example, Eskridge, 87 Mich L Rev at 93–94 (cited in note 159) (discussing the limitations of interpretations based on congressional inaction).

166 *Gonzalez*, 771 F3d at 244.

167 Id at 245, citing *Kaplan*, 267 US at 230, and *Zartarian*, 204 US at 175.

preted by *Kaplan* and *Zartarian* suggest that acquiescence canons do not save its reasoning.

Finally, it bears mentioning that the Fifth Circuit's approach does not categorically answer the questions posed by unlawful entrants, even if one accepts *Gonzalez*'s holding at face value. The court wrote that Gonzalez's claim failed "because [he] entered the country illegally *and at no time before his eighteenth birthday did he take action to ensure that his presence was lawful*."[168] Earlier in the opinion, the court discussed Gonzalez's failure to apply for an adjustment of status while he was still under the age of eighteen.[169] An application for this adjustment was, presumably, "action to ensure that his presence was lawful" within the meaning of the opinion.[170] Considering these two parts of the opinion in tandem therefore raises the inference that, in the court's view, merely applying for the adjustment prior to his eighteenth birthday could have constituted an "action to ensure that his presence was lawful."[171] Following the court's logic, adjustment could have cured the problem posed by his unlawful entry, even if the adjustment were not approved prior to his eighteenth birthday. Thus, while the opinion on its face suggests a lawful entry requirement, a close reading implies that unlawful entry may not be fatal to a derivative citizenship claim if the claimant takes action to cure his unlawful presence prior to his eighteenth birthday.

* * *

Several different interpretations of § 1432(a)(5) exist. The Ninth and Eleventh Circuits interpret the provision in such a way as to render any question of lawful entry moot. The Second Circuit interprets it in a way that allows for the possibility of an unlawful entrant gaining derivative citizenship, but this court has expressly reserved judgment on the question. The Fifth Circuit has not taken a position on the identical/independent-meaning dispute, but it has found—albeit with weak textual, precedential, and interpretive support—that an unlawful entrant cannot qualify for derivative citizenship without taking timely corrective measures to cure his unlawful status. The Fifth Circuit has not clarified what these measures need to be.

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168 *Gonzalez*, 771 F3d at 245 (emphasis added).

169 Id at 244.

170 Id at 245.

171 Id.

Considering the diversity of approaches, it is fair to say that the question whether unlawful entry disqualifies an individual from derivative citizenship remains open.

III. COURTS SHOULD NOT REQUIRE LAWFUL ENTRY AS A PREREQUISITE FOR DERIVATIVE CITIZENSHIP

Courts reviewing this issue should, contrary to the Fifth Circuit, conclude that § 1432(a) has no lawful entry requirement. While seemingly radical, this conclusion is an appropriate construction of the statute and does not require venturing beyond traditional methods of interpretation such as a textual analysis, a survey of legislative history, and a *Chevron* agency-deference model. Furthermore, this conclusion is normatively desirable. A resolution allowing derivative citizenship claims to proceed even in the presence of unlawful entry could have positive effects on families and provide certainty to a large set of individuals who have connections to the United States but nonetheless lack US citizenship. Finally, the countervailing arguments against this interpretation are unpersuasive given the closed set of individuals to which this holding would apply and the likely incentives that individuals and government actors face.

A. Traditional Tools of Legal Analysis Do Not Establish a Lawful Entry Requirement

Textual analysis, legislative history, *Chevron* analysis, and consideration of subsequent legislative action do not counsel in favor of a lawful entry requirement. Thus, courts may reasonably construe the statute to allow unlawful entrants to claim derivative citizenship if they otherwise meet the requirements of § 1432(a).

1. Textual analysis does not require lawful entry.

A textual analysis should begin with the definitions section of the INA. The circuit court opinions addressing this issue discuss the fact that the terms "lawfully admitted for permanent residence," "permanent," and "residence" are each defined separately in the statute.[172] "Lawfully admitted for permanent residence" is defined as "the status of having been lawfully accorded

[172] See, for example, *Nwozuzu*, 726 F3d at 327–28.

the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws."[173] "Permanent" is defined as "a relationship of continuing or lasting nature, as distinguished from [a] temporary [nature]"; the statute, however, notes that "a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with the law."[174] "Residence" is defined as "the place of general abode," while "the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."[175]

Initially, it might seem as though these definitions are not particularly illuminating. They do not speak to entry at all. The requirement of a "principal, actual dwelling place" is independent of lawful entry. Individuals who are not frequently relocating must live somewhere, and it would stretch logic and language to conclude that someone cannot have a principal, actual dwelling place if his presence in the United States is of questionable legality. The "continuing or lasting nature" language does more work, as there is a plausible argument that something cannot be continual and lasting without being permitted. The BIA essentially took this approach in deciding the identical/independent-meaning question the first time in *Matter of Nwozuzu*.[176] The Eleventh Circuit also found this argument persuasive in *Forey-Quintero*.[177]

This approach has its own challenges, however. First and foremost, it is not clear that it is linguistically accurate on its face; the BIA finds the requirement not in the text of the definitions but rather in its assumption that permanence necessarily excludes a circumstance in which an individual could be removed.[178] Second, the definition of "permanent" includes the possibility of dissolving a permanent relationship "in accordance with the law."[179] Notably, however, the "in accordance with the law" language has been read as modifying only the dissolution of the relationship and not its formation.[180] This implies that one

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173 8 USC § 1101(a)(20).

174 8 USC § 1101(a)(31).

175 8 USC § 1101(a)(33).

176 *Matter of Nwozuzu*, 24 I&N Dec at 613.

177 *Forey-Quintero*, 626 F3d at 1327.

178 See text accompanying notes 94–95.

179 8 USC § 1101(a)(31).

180 See *Ashton*, 431 F3d at 98 (rejecting the Government's argument that this language implied that "residing permanently" required LPR status). The Fifth Circuit

could form a "relationship" within the meaning of the statute without doing so "in accordance with the law."

In essence, such a relationship would be a relationship-in-fact. The notion that a relationship-in-fact is sufficient to meet the statutory definition of "permanent" finds further support in the definition of "residence." As discussed above, "residence" is defined as "the place of general abode," and "the place of general abode of a person means his principal, actual dwelling place in fact, *without regard to intent*."[181] This language suggests that functional considerations, rather than formal requirements, underlie the definitions of "reside" and, by extension, "reside permanently." Congress clearly contemplated mechanisms for a more formal recognition of legal status—after all, it created the concept of "lawful permanent residence." The fact that "lawful permanent residence" explicitly requires one's presence to accord with the immigration laws, while "permanent" and "residence" do not so require, suggests that the latter two terms do not carry a legality requirement.[182]

This argument is further bolstered by the definition of "lawfully admitted for permanent residence": "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws."[183] Notice that this definition includes as a component the term "residing permanently." The definition goes beyond that, though, saying that LPR status requires that one reside permanently "in accordance with the immigration laws." If "residing permanently" were simply coextensive with LPR status, the modifying language would be surplusage.[184] Its presence suggests that one can "reside permanently" either in accordance with the immigration laws or not, but that only the former is sufficient for LPR status. One could still "reside permanently,"

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acknowledged the force of this argument in *Gonzalez*, but ultimately it did not decide the exact meaning of "in accordance with the law." *Gonzalez*, 771 F3d at 245.

181 8 USC § 1101(a)(33) (emphasis added).

182 This interpretation relies on a version of the *expressio unius est exclusio alterius* canon. This canon suggests that when Congress specifically provides for something in one part of a statute but does not do so in another, it should be inferred that Congress intended not to provide for that thing in the latter part. See *Landgraf v USI Film Products*, 511 US 244, 259 (1994).

183 8 USC § 1101(a)(20).

184 Another canon of construction, the canon against surplusage, suggests that all words in a statute should be given meaning such that none is superfluous. See Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 Campbell L Rev 115, 122 (2010).

within the meaning of the statute, without one's presence being legal.

While the definitions section of the INA does not provide a clear answer to the question of lawful entry, § 1432(a)(5) has at least one component that could suggest a lawful entry requirement: the "or thereafter *begins* to reside" language.[185] Assuming that there is no lawful entry requirement, this leads to an unusual result. This language requires that the child "begin" to reside permanently after the triggering naturalization of his parent. Read literally, this would mean that a child who began to reside permanently prior to the parent's naturalization would not be eligible for derivative citizenship. This is odd because it places a major emphasis on when a child began to permanently reside in relation to the parent's naturalization. For example, a child who made an "official objective manifestation"[186] of intent to reside permanently[187] prior to the parent's naturalization would not be eligible, while one who performed the exact same act after the naturalization would be.

When courts interpret statutes, they try to avoid "absurd" results.[188] In conjunction with the lack of a lawful entry requirement, the "begin" language creates an odd result. But is it "absurd" for purposes of the canon against absurd results? If the answer is yes, that creates another question: How should the absurdity be remedied?

To the threshold question of absurdity, the answer is unclear. While courts often speak of "absurd results," they rarely define the term.[189] Professor Veronica Dougherty has discussed a variety of possible definitions, ranging from logical failure (for example, a statute might seemingly require two incongruous actions) to a violation of simple common sense.[190] Other approaches treat the contravention of legislative intent or the creation of a simple "injustice" as rendering a statutory interpretation ab-

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185 8 USC § 1432(a)(5) (1994) (emphasis added).

186 *Ashton*, 431 F3d at 99.

187 This is the language of *Ashton*. Recall that in *Ashton*, the Second Circuit suggested the possibility that a "lesser official objective manifestation" of intent to reside permanently could suffice for a § 1432(a) claim. Id. See also Part II.B.

188 See Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 Am U L Rev 127, 128 (1994) (observing that the absurd-result principle "authorizes a judge to ignore a statute's plain words in order to avoid the outcome those words would require in a particular situation").

189 See id at 139–40.

190 Id at 141–53.

surd.[191] The above interpretation of the word "begins" would bestow citizenship on one group but not another based on arbitrary actions unrelated to each group's relative worthiness for citizenship. Absent evidence of congressional intent, this looks like an absurd result.

One counterargument to the alleged absurdity is as follows. Once a parent is naturalized, the procedural hurdles of bringing a child into the country are lower and citizenship for the child is easier to obtain. As such, prior to parental naturalization, LPR status serves as a signal of commitment—but after parental naturalization, something less suffices. The problem is that this remains difficult to square with the underlying policy goal of family unity.[192] If one accepts parental naturalization as an indicator that the family is serious about residing in the United States, the case for differentiating based on manner of entry is weakened, particularly if, as juveniles, the individuals in question receive a greater degree of lenity for conduct that is otherwise frowned upon.[193] If parental naturalization is really the signal of a family's commitment to the United States, it makes little sense to differentiate based on whether a child began to reside permanently before or after this event. Thus, the absurdity remains.

Accepting absurdity for the sake of argument, courts must determine the proper way to remedy the absurdity. A lawful entry requirement does not accomplish this. Even with a lawful entry requirement, the problem of a lawful entrant who "began" to reside permanently prior to naturalization still exists. The problem can be fixed only if "reside permanently" and "lawfully admitted for permanent residence" are read as having the same meaning. For the reasons previously discussed, this is not the optimal reading of the statute.[194] However, there is a way to both remedy the absurdity and allow each prong to have an independent meaning. Namely, courts should hold that one cannot "begin" to permanently reside for the purposes of a derivative citizenship claim without a combination of "lesser official objective manifestation"[195] (which may on its own be difficult to pin

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[191] See D. Wiley Barker, *The Absurd Results Doctrine,* Chevron*, and Climate Change*, 26 BYU J Pub L 73, 75–76 (2012).

[192] For a discussion of family unity as a policy goal underlying federal immigration law, see Parts I.C.1, III.B.

[193] See note 245.

[194] See Part II.B. See also notes 182–90 and accompanying text.

[195] *Ashton*, 431 F3d at 99.

down temporally) *and* parental naturalization. Put another way, courts should hold that one does not "begin" to reside until two predicate events happen: the official objective manifestation *and* the naturalization of the parent. These events would not need to follow a particular order, but they would both need to occur. This avoids the absurdity while also giving independent meanings to each phrase. Thus, as a way of avoiding an absurd result, this interpretation is superior to simply reading both clauses of § 1432(a)(5) as having identical meanings.

The text does not have a plain requirement of lawful entry. While certain textual considerations could support such a finding to avoid absurd results, on balance, the better reading is that it does not. Textual considerations suggest that to reside permanently does not require a lawful *status*, and one could infer from this that lawful *entry* is not required. In fairness, the statute also does not explicitly say that lawful entry is not required, but this is not dispositive. Given the significance of this issue and the lack of a clear textual signal, a better reading from the text alone is that there is no lawful entry requirement. Other methods of statutory interpretation also suggest that courts could reasonably find that there is no lawful entry requirement.

2. Legislative history, legislative intent, and canons of construction do not compel courts to find a lawful entry requirement.

On its face, the meaning of § 1432(a) is unclear. Courts should therefore look beyond the text of the statute to see whether Congress has evinced a particular purpose or intent concerning a lawful entry requirement. However, the INA's legislative record does not clearly support either interpretation of § 1432(a). Much of the debate concerning the bill focused on the revisions to the quota system.[196] This is not wholly unrelated to derivative citizenship; as originally enacted, the INA exempted from quotas certain family members who were potentially eligible for derivative citizenship.[197] That said, there is little direct evidence, either in the House report for the bill or in the tran-

[196] See, for example, 98 Cong Rec at 4308–11 (cited in note 60) (debating proposals to "liberalize the quota system and make it conform with world conditions").

[197] See HR Rep 82-1365 at 38–39 (cited in note 44) (noting that the INA establishes new quota allocations for the issuance of visas "to spouses and children of alien residents of the United States admitted for lawful permanent residence").

scripts of floor debates, concerning derivative citizenship.[198] Other extrinsic sources, such as President Harry Truman's veto message, likewise fail to shed much light.[199] Despite the fact that very little legislative history and very few extrinsic sources bear on the specific issue of a lawful entry requirement, there is value in examining these sources for indications of a broader congressional intent or purpose to inform the analysis.

Several factors weigh in favor of the view that lawful entry is not required to obtain derivative citizenship. To begin, consider the following language from the House report: "[This bill] implements the underlying intention of our immigration laws regarding the preservation of the family unit. An American citizen . . . will be able to bring his alien minor child as a nonquota immigrant."[200] The report later states that "adequate provision is made for the preferential treatment of close relatives of United States citizens and alien residents consistent with the well-established policy of maintaining the family unit wherever possible."[201] Taken together, these passages indicate that the preference for maintaining family units was of paramount importance to Congress. This preference counsels in favor of a broad reading of the derivative citizenship provisions, since almost by definition they operate to preserve family units.

However, there are also arguments that cut in the other direction. Despite the report's emphasis on family unity, it also contains two passages that indirectly counsel in favor of finding a lawful entry requirement. First, the purpose of the bill, as stated in the House report, was "to enact a comprehensive, revised immigration, naturalization, and nationality code."[202] Second, the report describes individuals who enter the country ille-

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198 This is not to say that the subject never came up. As noted in Part I.C.1, Representative Dolliver spoke to the importance of the derivative citizenship provision. However, Dolliver focused primarily on the provision's value in reducing the number of bills for private relief that Congress would need to pass.

199 See generally President Harry S. Truman, *Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality*, 1952 Pub Papers 441. Truman's veto message expressed some concern for family unity and the citizenship of children. However, it primarily concerned discriminatory quotas and constitutional issues surrounding deportation and separation of powers. Congress was able to override the veto, but it is not clear what conclusion one should draw from the passage of this bill, considering the multiple elements both of Truman's objections and of congressional intent. Ultimately, nothing in the interplay between the executive and legislative branches bears on the question at hand.

200 HR Rep No 82-1365 at 29 (cited in note 44).

201 Id at 38–39.

202 Id at 5.

gally as one of the "principal classes of deportable aliens."[203] If indeed Congress intended to enact a comprehensive reform agenda and simultaneously viewed unlawful entrants as per se deportable, it would seem to have hidden a significant exception to this principle if there were no lawful entry requirement implicit in § 1432(a). Here, *Whitman v American Trucking Associations, Inc*[204] is particularly apposite: "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[205] It is difficult to make a case that Congress intended to dispense with a lawful entry requirement with respect to § 1432(a), absent a clearer indicator that it was doing so.

That said, the elephants-in-mouseholes principle is not fatal to an argument that there is no lawful entry requirement. Had such a requirement clearly existed in law prior to the passage of the INA, the lack of a clear statement would be a stronger argument in favor of inferring a lawful entry requirement. This is due to the presumption against implied repeals, which suggests that courts should not read a later statute as repealing an earlier one unless it does so expressly.[206] However, preexisting derivative citizenship law did not speak directly to the issue. As such, finding that there is no lawful entry requirement does not implicitly repeal any statute, so the presumption against implied repeals does not suggest that lawful entry is required.

It is not clear that either side of the ledger has the better of the argument on the issue of congressional silence. However, given the ambiguities, one cannot say for certain that Congress intended to create a lawful entry requirement. Thus, there is room for a court to conclude that such a requirement is not implicit in § 1432(a).

However, another canon of construction suggests that courts should decline to find such a requirement. This canon is the "immigration rule of lenity,"[207] exemplified by cases such as *Im-*

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[203] Id at 60.

[204] 531 US 457 (2001).

[205] Id at 468.

[206] See Karen Petroski, Comment, *Retheorizing the Presumption against Implied Repeals*, 92 Cal L Rev 487, 488–89 (2004).

[207] See Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 Georgetown Immig L J 515, 519–25 (2003). Scholars have raised questions about how this canon should fare in light of *Chevron*. See generally, for example, id. See also Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U Chi L Rev 1671, 1675 (2007). However, given post-*Chevron* cases such as *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421 (1987), and *Immigration and Nationalization Service v St.*

migration and Naturalization Service v Cardoza-Fonseca.[208] This case centered on the standard required to prove the fear of persecution that is a prerequisite to a grant of asylum.[209] In considering ambiguities in the relationship between the INA in general and the asylum provision in 8 USC § 1158 in particular, the Court in *Cardoza-Fonseca* noted a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[210]

While a derivative citizenship statute and an asylum statute do not necessarily serve the same interests, the Court's principle still has some utility, for two reasons. First, practically speaking, both derivative citizenship and asylum claims may arise in the context of removal proceedings, because a successful claim for either is a defense to removal. In one scenario, a potential subject of removal argues that he should not be removed, on the ground that he qualifies for derivative citizenship; in the other, he argues against removal based on a fear that he will be persecuted in his home country. Since the possibility of removal for the immigrant is the same in either scenario, it stands to reason that the immigration rule of lenity applies in both.

Additionally, the differences between a derivative citizenship defense and a fear of persecution defense (the defense at issue in *Cardoza-Fonseca*) counsel in favor of applying the rule of lenity to the derivative citizenship context.[211] If a court "gets it wrong" in the case of a fear of persecution defense and orders the removal of an individual who is then persecuted, there is certainly a human cost. However, the person who suffers is not a US citizen and makes no claim to be such. Contrast this with "getting it wrong" in the context of a derivative citizenship claim: If the individual claimant is correct, he is a US citizen *by operation of law*. Removing this person effectively entails banishing a US citizen from his country. If one conceives of a state's role as protecting its citizens, this is one of the most egregious

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Cyr, 533 US 289 (2001), it seems as though the canon survives in substance, even if courts do not always refer to it by its name.

208 480 US 421 (1987).

209 Id at 423.

210 Id at 449, citing *Immigration and Naturalization Service v Errico*, 385 US 214, 225 (1966), *Costello v Immigration and Naturalization Service*, 376 US 120, 128 (1964), and *Fong Haw Tan v Phelan*, 333 US 6, 10 (1948).

211 To be eligible for asylum under 8 USC § 1158, an individual must reasonably fear persecution in his home country.

ways in which a state could fail.[212] The question, then, is where the errors are better placed.[213] An overly restrictive interpretation of the derivative citizenship statute will lead to the expulsion of US citizens.

While the comparative negative impact of erroneous expulsions and erroneous grants of citizenship may be a normative question, dicta indicate that care should be taken concerning the possibility of erroneous removal. In *Duarte-Ceri v Holder*,[214] the Second Circuit noted that "[f]aced with two plausible readings of the statutory language . . . the circumstances of this case and principles of statutory construction require us to adopt the interpretation that preserves rather than extinguishes citizenship."[215] Citing several Supreme Court cases, the court observed a general trend urging restraint in cases that may result in removal.[216] *Duarte-Ceri* and the cases it cites suggest that, when faced with ambiguities in a case possibly resulting in removal, courts should favor a finding of citizenship.

3. *Chevron* analysis does not compel courts to find a lawful entry requirement.

Courts generally analyze agency interpretations of statutes under the two-part analysis described in *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc.*[217] First, courts are to assess "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the

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212 For a discussion of this view of the state's role, see Martin Carnoy, *The State and Political Theory* 20 (Princeton 1984) (describing John Locke's vision of the state as an entity growing out of a collective desire to protect one another from base instincts that are present in the state of nature). Other conceptions of the state also include the protection of members as a critical responsibility of the state. See id at 216.

213 There is a significant amount of literature, across multiple bodies of law, arguing that error minimization is an appropriate goal of legal rules. See, for example, Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants pending Removal Proceedings*, 18 Mich J Race & L 63, 109 (2012) (arguing that the risk of error in immigration proceedings is high due to their complexity, and suggesting that counsel is needed as a result); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U Chi L Rev 1, 4 (1990) (arguing that error allocation is an equal goal to error minimization in the criminal context).

214 630 F3d 83 (2d Cir 2010).

215 Id at 88.

216 Id at 89, citing *Kennedy v Mendoza-Martinez*, 372 US 144, 159 (1963), *Delgadillo v Carmichael*, 332 US 388, 391 (1947), and *Fong Haw Tan*, 333 US at 10.

217 467 US 837 (1984).

end of the matter."[218] If the reviewing court finds that Congress has not spoken clearly to the matter, it "does not simply impose its own construction on the statute. . . . [Rather,] the question for the court is whether the agency's answer is based on a permissible construction of the statute."[219] Additionally, there is a third, threshold step, sometimes referred to as "*Chevron* step zero," outlined in *United States v Mead Corp*.[220] Prior to conducting the two-step *Chevron* analysis, courts should determine whether the agency's action has the "force of law."[221] If the action does not have this force, *Chevron* is inapplicable. Agencies are likely to be acting with this force of law when carrying out adjudications.[222] The BIA conducts adjudications that legally bind both the parties and, in the case of precedential decisions, future parties.[223] Importantly, *Matter of Nwozuzu* was designated as precedential.[224] This suggests that the decision is entitled to deference.[225] Indeed, even when the Second Circuit reversed the BIA, it conceded that *Chevron* was the proper framework for reviewing the decision.[226]

In practice, however, *Chevron* deference to the BIA is applied inconsistently.[227] A recent note argues that this inconsistency is problematic, and that a better framework would be to consider the underlying principles of *Chevron* and *Mead* and apply deference only when the BIA's decision is a product of superior institutional competence.[228] In *Matter of Nwozuzu*, however, the BIA relied on tools of statutory construction and linguistics—*not* on its specialized expertise—to rule on the LPR re-

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218 Id at 842.

219 Id at 843.

220 533 US 218 (2001). Professor Cass R. Sunstein has described *Mead* as part of a trilogy of cases making up *Chevron* step zero, with the other two being *Barnhart v Walton*, 535 US 212 (2002), and *Christensen v Harris County*, 529 US 576 (2000). See Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187, 211–18 (2006).

221 *Mead*, 533 US at 227.

222 See id at 229.

223 See BIA, *Practice Manual* at *8 (cited in note 32).

224 See id. Note that *Matter of Nwozuzu* carries the "I&N Dec" reporter abbreviation in its citation, which indicates that it is published.

225 See Paul Chaffin, Note, *Expertise and Immigration Administration: When Does* Chevron *Apply to BIA Interpretations of the INA?*, 69 NYU Ann Surv Am L 503, 519–20 (2013) (discussing how adjudication may be a good indicator of deference).

226 See *Nwozuzu*, 726 F3d at 326–27 (conceding that *Chevron* is the proper framework under which to analyze BIA decisions).

227 For a broad discussion of *Chevron* and its interactions with the BIA, see Chaffin, Note, 69 NYU Ann Surv Am L at 509–25 (cited in note 225).

228 See id at 507–09.

quirement.[229] Furthermore, it did not directly rule on the lawful entry issue. Instead, it merely flirted with a resolution, saying in dicta that "'residing permanently' [ ] includes an implied requirement that the residence be lawful."[230]

Dicta, by definition, do not have the force of law. *Mead* suggests that to be afforded full *Chevron* deference, agency pronouncements must have the force of law. Syllogistically, *Mead* therefore suggests that the BIA's dicta should not be accorded *Chevron* deference. That said, dicta of the BIA may still be useful for a reviewing court. *Barnhart v Walton*[231] is instructive in assessing this use, as it offers rationales for deference, including "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[232] In this case, the legal question is certainly interstitial; it is not squarely presented, but it nonetheless arises inevitably if a particular interpretation of the statute—namely, the version giving the two clauses independent meaning—wins out. This counsels in favor of deference. However, the question's importance to the administration of the statute is unclear. A resolution would likely not radically change how individuals behave, particularly because the set of affected individuals is closed at this point. The statute has been repealed, so the question is not how it will operate going forward but only whether it operated on certain individuals prior to its repeal. As such, it is unlikely that the interpretation will greatly affect primary conduct.

Furthermore, the question is also one of nontechnical statutory interpretation. It does not require expertise, nor is there a long history of agency interpretations one way or another; one cannot say that the BIA has given careful consideration to the issue of lawful entry for a long period of time.[233] This suggests that some of the factors motivating *Chevron* deference in *Barnhart* are not present here. While the BIA is entitled to some deference for its published decisions, dicta supporting these deci-

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229 See text accompanying notes 104–07.

230 *Matter of Nwozuzu*, 24 I&N Dec at 609.

231 535 US 212 (2002).

232 Id at 222.

233 *Matter of Nwozuzu* appears to be the only published case that even raised the issue prior to *Gonzalez*.

sions (particularly on issues that do not require special expertise) need not be accorded the same deference, both as a matter of doctrine and as a matter of practicality.[234] Affording deference to dicta would create a regime so deferential that courts would be severely limited in taking advantage of their own institutional competence in the area of statutory interpretation.[235] Therefore, *Chevron* does not preclude a court from concluding that § 1432(a) does not contain a lawful entry requirement.

4. The repeal of the statute does not clarify the situation.

The specific language of the INA, in the wake of the passage of the CCA, is no longer ambiguous. The CCA eliminated the "or thereafter begins to reside permanently" language from the statute.[236] This amendment completely moots the question whether the clauses have identical or independent meanings; the law now clearly requires LPR status to gain derivative citizenship, so the answer to the identical/independent-meaning question is of no consequence going forward. Can one read anything into this repeal with regard to congressional intent vis-à-vis a lawful entry requirement? The answer is not entirely clear.

First and foremost, there is little evidence that Congress was thinking about lawful entry when it made this change. As discussed in Part I.A.3, the CCA was intended to ease the processes of adopting foreign-born children and ensuring that these children have citizenship. This consideration is rather detached from any discussion of derivative citizenship for unlawful entrants. Also, it is unclear why "or thereafter begins to reside permanently" was taken out of the statute. Furthermore, even if Congress were conscious of the issue, it is not clear what conclusion courts should draw from the revision. One possibility is that Congress understood "or thereafter begins to reside permanently" as creating a pathway to derivative citizenship for unlawful entrants. If so, then the repeal of that language tells us that Congress no longer wanted this to be an option—but it simultane-

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[234] This is merely a justification for denying deference, but in practice, it seems as though courts defer less to executive immigration authorities than *Chevron* might suggest. For a more extensive discussion of this issue and a broader analysis of deference in the context of immigration law, see generally Cox, 74 U Chi L Rev 1671 (cited in note 207); Chaffin, Note, 69 NYU Ann Surv Am L 503 (cited in note 225).

[235] See Chaffin, Note, 69 NYU Ann Surv Am L at 507–09 (cited in note 225).

[236] See notes 51–52 and accompanying text.

ously suggests that those who met § 1432(a)'s requirements prior to its repeal were citizens, regardless of whether they entered unlawfully.

Another possibility is that Congress did not see permanent residency as creating a pathway to citizenship but rather was afraid that the statute was ambiguous and would be interpreted in favor of allowing unlawful entrants to claim derivative citizenship. This could support a finding of a lawful entry requirement, in that a court might want to align itself with some known vision of congressional intent. But if the only known vision of congressional intent is intent at the time of repeal, a court would be justified in taking a different tack if it believed the intent at the time of passage to be different. The repeal also could suggest that Congress sought to clarify the issue for the future, given that it could not retroactively remove citizenship.[237] Congress's intent at the time of the statute's repeal can take the analysis only so far.

It may also be that Congress did not consider the issue at all. Given the multiplicity of possible interpretations, it is difficult to conclude that the repeal compels one interpretation or another. If Congress was indeed not thinking about this issue at the time of repeal, courts are left with only the traditional tools of statutory interpretation (for example, considerations of text and legislative purpose)—tools that, as discussed above, do not require a finding of a lawful entry requirement.

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Various tools of statutory construction and legal analysis suggest that § 1432(a) does not require lawful entry. The text of

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[237] The question whether Congress can withdraw citizenship once it has been bestowed on an individual was considered in *Rogers v Bellei*, 401 US 815 (1971). In that case, the Court considered a law granting citizenship to individuals born abroad to one American parent, thus receiving conditional citizenship at birth under § 301(b) of the INA. Id at 816–17. The grant of citizenship contained conditions subsequent, which the plaintiff failed to meet. Id at 817. The Court held § 301(b) to be constitutional, but noted that, per *Afroyim v Rusk*, 387 US 253 (1967), a person who naturalizes *in the United States* is protected by the naturalization clause of the Fourteenth Amendment and thus cannot lose citizenship involuntarily. See *Bellei*, 401 US at 822–23. See also *Afroyim*, 387 US at 257 (holding that Congress has no "general power, express or implied, to take away an American citizen's citizenship without his assent"). Because the trigger for acquiring derivative citizenship under § 1432(a) is permanent residence in the United States, it would seem that naturalization under that section necessarily takes place in the United States, thus bringing it into the domain of the Fourteenth Amendment and removing Congress's power to strip away citizenship.

the statute does not mandate one conclusion or another. Analysis based on legislative history suggests that competing concerns weigh in favor of either interpretation, and neither set of concerns is dispositive. *Chevron* does not compel a finding of a lawful entry requirement, because the BIA has not spoken to the issue with the force of law. Finally, the repeal of the particular statutory text in question does little to illuminate the issue. Facing no clear answer from the tools of statutory construction, the next Section turns to a consideration of the normative implications of either interpretation, and it argues that it is normatively superior for courts to hold that § 1432(a) does not require lawful entry.

B. Public Policy Considerations Do Not Support a Lawful Entry Requirement

As the previous discussion makes apparent, vagueness plagues § 1432(a). The face of the statute does not establish whether it requires lawful entry. Furthermore, while various modes of statutory analysis may inform the answer, none is dispositive. This Section argues that the optimal interpretation is that § 1432(a) contains no lawful entry requirement. Far from being an unreasoned attempt at amnesty, such an interpretation would represent an effort by courts to work within the confines of their institutional roles to alleviate a pressing policy problem. While it may be counterintuitive, the statute's vagueness allows courts to rule against a lawful entry requirement without straying outside the statutory text.

As discussed in Part I.C, there are several normative justifications for derivative citizenship, and these justifications can inform a reading of § 1432(a). A broad reading of the statute supports family unification. Further, consider the group of persons eligible for derivative citizenship under the statute—they have at least one citizen parent, and they have at least manifested an official intent to reside permanently in the United States.[238] This suggests that these individuals may be more interested in assimilating into US society. If assimilation is a goal, as some scholars have suggested, immigrants who are more attached to the country and thus more likely to assimilate should receive favorable treatment from the immigration laws.[239]

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[238] See 8 USC § 1432(a) (1994). See also *Nwozuzu*, 726 F3d at 334.

[239] See note 55 and accompanying text.

As of 2012, approximately 16.6 million people in the United States were living in families of mixed status.[240] This presents a dilemma. On the one hand, there is an interest in protecting the sanctity of citizenship and enforcing the immigration laws. On the other hand, immigration laws exist to protect the interests of the United States and its citizens, and some of these citizens surely have family members who are in the country illegally. The benefits of strictly enforcing immigration laws against a particular individual accrue broadly (that is, no one citizen benefits acutely from a removal), while the harms accrue narrowly to specific individuals—typically, to noncitizens who are removed.[241] In an efficient system, the benefits should outweigh the harms. However, if the individual to be removed has an immediate family member (in the case of a § 1432(a) claim, a parent) who is a citizen, collateral harm redounds to a US citizen. This calls into question whether, in the case of a removal in which the individual subject to removal has a citizen parent, the cost-benefit calculation weighs against removal.[242]

It is also worth considering what would happen to these individuals if a court were to impose a lawful entry requirement. The choice is not one between citizenship on the one hand and the elimination of the possibility of citizenship on the other. Unlawful entrants may become LPRs and citizens, but the process is cumbersome. Consider the 3/10 bar: as noted previously, this provision of the INA prohibits reentry for a statutorily specified period of time for those who are in the United States illegally

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[240] Joanna Dreby, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities: A View from the Ground* *1 (Center for American Progress, Aug 2012), archived at http://perma.cc/A725-ZLTJ. See also note 56 and accompanying text.

[241] There is a classical public-choice response to this argument—namely, that concentrated interest groups should succeed over the general public. See David A. Skeel Jr, Book Review, *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 Vand L Rev 647, 651–52 (1997). The response to this is twofold: First, those who are present unlawfully have less sway over legislators because they cannot vote. Second, aggressive immigration enforcement may reduce the ability of immigrants and their families to organize, out of fear. For a discussion of the chilling effect of immigration enforcement on immigrant communities, see Jacqueline Hagan, Brianna Castro, and Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 NC L Rev 1799, 1813–18 (2010) ("[R]esearch . . . documents the devastating economic, social, and psychological effects of expanded interior enforcement on immigrant families and the communities where they live.").

[242] See Hagan, Castro, and Rodriguez, 88 NC L Rev at 1813–18 (cited in note 241) (discussing the costs of immigration enforcement on communities). While this research focuses primarily on undocumented immigrants, there is significant overlap in the families of legal residents and undocumented individuals, as previously discussed. See text accompanying note 240.

but who leave to adjust their statuses.[243] This policy draws a fair amount of scrutiny, notwithstanding any consideration of derivative citizenship.[244] In the case of potential derivative citizens, however, it raises additional concerns. If individuals in this set are held not to be citizens, they must wait up to ten years for a chance to return. Because these individuals likely have a relatively strong connection to the United States—given that they have at least one citizen parent and have done something to manifest their intent to remain—the cost of excluding them may be higher on average than the cost of excluding the average unlawful entrant.

Two facts suggest that those individuals who are potentially eligible for citizenship under § 1432(a) merit favorable consideration. First, these individuals began to permanently reside in the United States while under the age of eighteen, which implies that their illegal entries took place while they were minors. The law is generally less punitive toward minors,[245] so the notion that there is a retributive reason to deny citizenship based on illegal entry carries less weight than it otherwise might. Second, they have established intent to reside permanently. This intent, combined with the existence of their US-citizen parents, suggests that these individuals have stronger ties to the United States and are more deserving of citizenship than standard applicants.[246] It is less desirable to deny citizenship to these indi-

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243 See note 157.

244 See, for example, Immigration Policy Center, *So Close and Yet So Far: How the Three- and Ten-Year Bars Keep Families Apart* (American Immigration Council, July 25, 2011), archived at http://perma.cc/H78G-MB5D. See also note 157.

245 See, for example, *Miller v Alabama*, 132 S Ct 2455, 2463–65 (2012) (considering how youth affects sentencing, and collecting cases that demonstrate consistent judicial recognition of the fact that children are different from adults for the purposes of criminal law). See also *Errico*, 385 US at 220 n 9 ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.").

246 The narrative of some immigrants being "deserving" and others "undeserving" is, admittedly, complex and flawed. Nonetheless, it appears to hold sway in court decisions and scholarship about immigration, and it is thus worth considering as a factor in the analysis. See, for example, Posner, 80 U Chi L Rev at 297 (cited in note 55) (describing "the good type of immigrant" as having "two major characteristics: (1) skills that are valuable for domestic employers and (2) assimilability"). For a more detailed discussion of the "good immigrant"/"bad immigrant" dichotomy that frequently rears its head, see Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 Georgetown Immig L J 207, 226–36 (2012) (discussing the ways in which the framing of immigrants as "good" or "bad" affects judicial decisionmaking).

viduals than to others, and thus the inefficiencies of the 3/10 bar have a greater negative effect. Allowing these individuals to qualify for § 1432(a) derivative citizenship would alleviate this issue. There is little benefit to forcing persons potentially eligible for visas to leave the country in order to get on the citizenship track, particularly if they have already evinced intent to remain.

The above analysis suggests that the costs of removal in these circumstances may be higher than usual. But what about the benefits? Here, it makes sense to return again to the goals of the statute and of broader immigration policy. As noted in Part I.C.1, family unification is a key goal of US immigration policy. Floor remarks and the House report accompanying the INA clearly show that this was a goal of the statute.[247] Though Truman vetoed the bill, his veto message may in fact be of some use. Because it simultaneously praised elements of the INA for encouraging family unity while justifying the veto by citing other areas in which the bill did not go far enough (or, in Truman's view, regressed), it suggested a broad policy favoring family unification.[248] Additionally, courts have relied on family unity as an important policy consideration in decisionmaking; consider the Second Circuit's remark in *Nwozuzu* that "[c]learly, Congress did not intend for the children of U.S. citizens to be strictly bound by all the formal requirements of the immigration laws applicable to adults."[249]

The Supreme Court has echoed this sentiment. In *Immigration and Naturalization Service v Errico*,[250] it noted that "Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly" various sections of the INA.[251] Congress's actions suggest a clear public policy favoring leniency when it comes to both the children and families of citizens. When one discusses derivative citizenship, one is *by definition* discussing the possibility of citizenship for family members of US citizens. It makes little sense, then, to infer requirements that do not exist in the text when they would serve to make derivative citizenship more difficult to obtain.

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247 See text accompanying notes 59–60.

248 See note 199.

249 *Nwozuzu*, 726 F3d at 332.

250 385 US 214 (1966).

251 Id at 220.

Immigration has been and remains a significant issue in modern American politics. While immigration policy raises many issues, perhaps the central conundrum is how to address the vast population of undocumented individuals present in the United States. Mass removals may offend individual or group values, but blanket amnesty runs counter to a sense of fairness.[252] These are long-term political and policy problems. Courts are simply not empowered to solve dilemmas like this on their own, nor should they be. This does not mean, however, that a court should never consider the policy implications of interpretations of ambiguous language. Section 1432(a) is vague, but an analysis of the statute's plain text demonstrates that no lawful entry requirement exists. A construction of the statute that does not require lawful entry would provide a means with which to provide certainty of status to a subset of the undocumented population in a way that is consistent with existing law.

C. The Limited Applicability of § 1432(a) Negates the Potential Negative Effects of Finding No Lawful Entry Requirement

While the preceding Section offers a discussion of the benefits of a determination that there is no lawful entry requirement, it is only fair to acknowledge possible costs and lines of argument against this interpretation. However, given the unusual circumstances surrounding § 1432(a) (namely, that it has been repealed and remains in effect only for a discrete subset of people), the arguments against this conclusion lack force.

A simple argument against rules that make citizenship requirements more flexible in regard to undocumented immigrants is that they create perverse incentives. At a time when the undocumented population is swelling, the argument goes, Congress and the courts should not make rules that make it more attractive to enter the country unlawfully.[253] An evaluation of the empirical basis of this claim is outside the scope of this Comment, but on its face, the claim is at least reasonable. Does this argument present a problem for a construction of

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[252] For a discussion of the various conflicting values that underlie immigration enforcement (or the lack thereof), see Christopher Angevine, *Amnesty and the "Legality" of Illegal Immigration: How Reliance and Underenforcement Inform the Immigration Debate*, 50 S Tex L Rev 235, 251–55 (2008) (describing the conflict between the fairness concerns pushing against amnesty versus the reliance interests pushing for it).

[253] See, for example, Lamar Smith, *To End Illegal Immigration, Eliminate the Incentives* (NY Times, Sept 1, 2008), archived at http://perma.cc/W6PY-HV39.

§ 1432(a) that is lenient toward those who have entered the country unlawfully?

In short, no. Because § 1432(a) has been repealed, the universe of individuals covered by the statute is finite. The relevant question is not whether the statute confers citizenship on someone now, but whether it conferred citizenship when the statute was still operative. As such, the class of individuals potentially affected is closed—and shrinking, given that some members will die each year. At this point, the class is set, and no other individuals can join it. That being the case, a construction of § 1432(a) that allows this class eligibility for derivative citizenship cannot have the perverse incentive effects that other policy changes liberalizing citizenship rules might have.

In this case, there is no possibility that citizens with children residing in other countries will observe this change and consequently encourage their children to unlawfully enter the United States, because these children would not be able to meet the requirements of the current statute. The practical problem stems not from the inflow of possible derivative citizenship claimants but from the question of what should be done with respect to those already present in the country. This is analogous to concerns that have motivated state efforts to support undocumented children—for example, even politically conservative states have passed legislation to help these children obtain an education.[254] An impulse may exist to deny citizenship as a punitive measure for immigrants' illegal entries, but such denial of citizenship would have significant negative consequences for immigrants' citizen family members, whose interests US policy purports to protect. Furthermore, given that the possible claimants would have had to enter the country as minors, it is unclear how much punishment is warranted. Who wins when an individual is brought unlawfully into the United States at a young age to reunite with a citizen parent and builds a life here, only to be removed later?

Concerns over the potential creation of a circuit split and resultant gamesmanship are also unwarranted. As demonstrated in Part II.C, the reasoning underlying the Fifth Circuit's reading of § 1432(a) has weaknesses. However, even if the Fifth Circuit persists with its current reasoning and does not reverse itself,

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[254] See Alexandra Jaffe, *Perry in Spotlight as Texas DREAM Act Scrutinized* (CNN, Apr 6, 2015), archived at http://perma.cc/6ANK-YXLX.

differing interpretations across the circuits would not prompt gamesmanship. Even if one circuit's interpretation of the law suddenly became friendlier to unlawful entrants, new undocumented immigrants would not flock there, because § 1432(a) does not apply to them. Further, § 1432(a) stopped applying to new immigrants in 2000, and the population to whom it applies is growing older. The practical costs of uprooting one's life may outweigh the advantages of moving to a jurisdiction in which one has a stronger citizenship claim. This is particularly true because in practice, this issue is litigated only when a person is being removed. Individuals will in all likelihood not seek removal solely as an opportunity for courts to declare them to be citizens, because the risk of removal far outweighs the reward of coming forward. As such, the actual number of individuals to whom § 1432(a) applies is likely very small, and correspondingly, the negative effects of a circuit split would be minimal.

CONCLUSION

Immigration remains a political and policy challenge in the United States. Ambiguities in the law create uncertainty for immigrants (both lawful and undocumented), their families, and their social networks. In particular, the circuit split over the meaning of the now-repealed derivative citizenship statute and the question of a lawful entry requirement remain unresolved.

The text of § 1432(a)(5) does not speak clearly to the existence of a lawful entry requirement, and the legislative history is unavailing. However, both the text and legislative history can easily accommodate an interpretation that there is no lawful entry requirement, and the immigration rule of lenity suggests erring on the side of citizenship rather than removal. To complicate matters further, overriding purposes of US immigration policy cut in both directions on the matter. On the one hand, citizenship for individuals who have entered unlawfully flies in the face of basic fairness concerns and appears to reward bad behavior. On the other hand, the evidence suggests a significant policy preference for family preservation and lenity in interpretation of statutes insofar as they concern the children of naturalized citizens. A *Chevron* analysis is unavailing, as the relevant agency has not spoken directly to the matter after confronting the question. Finally, the statute's repeal and replacement do not offer a clear resolution.

In the face of such ambiguity, what are courts to do? This Comment argues that because traditional interpretive methodologies have failed to answer the question definitively, courts should decline to find a lawful entry requirement. This allows the court system to address an issue of public importance without exceeding its institutional authority. Courts following this approach would not be violating a textual command, as no such command exists. Furthermore, given that the class of individuals whose status could change as a result of this approach is limited and decreasing, this reading does not create the perverse incentives that would exist if the group were open to new members. While courts should not reach beyond their constraints to legislate from the bench, this is not a situation that poses such a problem. Here, courts have an opportunity to promote family stability and individual welfare, all in a way that lies within the text of a statute.