

# Unequivocally Different: The Third Civil Standard of Proof

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## I. INTRODUCTION

Mark Lyttle is a brown-skinned, North Carolina-born U.S. citizen.<sup>1</sup> In 2008, an immigration judge ordered Mark removed to Mexico, finding the government had proven with “clear, unequivocal, and convincing” evidence that he was an “alien,” not a U.S. citizen.<sup>2</sup> Immigration and Customs Enforcement then flew Mark in handcuffs and shackles to Hidalgo, Texas, where he was ordered to walk across a bridge into Mexico, his only belongings being the clothes on his back and a deportation order for “Jose Thomas.”<sup>3</sup> Mark tried to reenter the United States three times; however, border patrol officers repeatedly turned him away and threatened him with prison time if he returned.<sup>4</sup> Mark spent the next four and a half months in Mexico, Honduras, Nicaragua, El Salvador, and Guatemala, surviving in shelters, immigration camps, and eventually a Honduran jail.<sup>5</sup> Through the help of a consular office in Honduras, Mark obtained a U.S. passport; only then was he finally allowed to return to his country.<sup>6</sup>

Mark is one of the nearly half a million people removed from the United States every year<sup>7</sup>—thousands of whom are estimated to be U.S.

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1. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 674 (2011).

2. William Finnegan, *The Deportation Machine*, THE NEW YORKER (April 29, 2013), <https://www.newyorker.com/magazine/2013/04/29/the-deportation-machine> (reporting that “[t]he exact reasons for the [prison] intake clerk’s mistakes are unknown—the clerk’s identity is itself unknown—but the vagaries of race and ethnicity obviously played a part.”); *see also* Stevens, *supra* note 1, at 674.

3. Stevens, *supra* note 1, at 674.

4. *Id.* at 675; *see* 8 U.S.C. § 1326(b) (2012) (establishing criminal penalties for reentry of certain noncitizens, including fines, imprisonment up to 10 years, or both).

5. Stevens, *supra* note 1, at 675.

6. *Id.* at 675–76.

7. Press Release, U.S. Dep’t of Homeland Sec., DHS Releases End of Fiscal Year 2015

citizens.<sup>8</sup> Nearly a quarter million of these removals are based on an immigration judge’s finding that the government provided “clear, unequivocal, and convincing” evidence that the person in removal proceedings is an “alien,” not a U.S. citizen.<sup>9</sup>

But despite how often this standard of proof is applied—nearly 500 times every business day of the year in immigration court alone—existing literature on standards of proof has not examined how stringent the “clear, unequivocal, and convincing” standard is.<sup>10</sup> Instead, commentators have almost uniformly accepted that there are only three standards of proof—preponderance, clear and convincing, and reasonable doubt—and in doing so, they have assumed, without analyzing, that the “clear, unequivocal, and convincing” standard is the same as the intermediate, “clear and convincing” standard.<sup>11</sup>

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Statistics (Dec. 22, 2015) [hereinafter “DHS Press Release”], <https://www.dhs.gov/news/2015/12/22/dhs-releases-end-fiscal-year-2015-statistics> (reporting that in fiscal year 2015, the Department of Homeland Security (“DHS”) removed 462,463 individuals from the United States).

8. See Stevens, *supra* note 1, at 629–30 (based on original empirical research, estimating that from 2003–2011, “ICE has incarcerated over 20,000 U.S. citizens, and deported thousands more”); Michael R. Strain, *Donald Trump’s Immigration Plan Would Cause U.S. Citizens To Be Deported*, WASH. POST (Nov. 12, 2015) (citing *id.* and AARTI KOHLI, PETER L. MARKOWITZ AND LISA CHAVEZ, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* (2011), [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf)), <https://www.washingtonpost.com/posteverything/wp/2015/11/12/donald-trumps-immigration-plan-would-cause-u-s-citizens-to-be-deported/> (estimating that based on current data that every year “over 100,000 U.S. citizens [are] mistakenly apprehended, some of whom may end up deported”); Laura Murray-Tjan, *When Will We Stop Deporting U.S. Citizens?*, HUFFPOST (Sept. 2013, 3:03 PM), [http://www.huffingtonpost.com/laura-murraytjan/when-will-we-stop-deporti\\_b\\_3942843.html](http://www.huffingtonpost.com/laura-murraytjan/when-will-we-stop-deporti_b_3942843.html) (“I reveal no great secrets when I say that the United States has deported its own citizens numerous times.”).

9. Brief of Amici Curiae Florence Immigrant and Refugee Rights Project and The Thomas & Mack Legal Clinic, Univ. of Nev. L.V., William S. Boyd School of Law at 10, *Mondaca-Vega v. Lynch*, 137 S. Ct. 36 (2016) (No. 15-1153) 2016 WL 1579993 at \*10 [hereinafter “FIRRP Amicus Brief”] (“In fiscal year 2015 alone, immigration judges found the government met th[e] ‘exacting’ [clear, unequivocal, and convincing] standard in over 124,500 cases”); See also *Woodby v. INS*, 385 U.S. 276, 277 (1966) (“[I]t is incumbent upon the Government in such proceedings to establish the facts supporting deportability by clear, unequivocal, and convincing evidence.”); *Mondaca-Vega v. Lynch*, 808 F.3d 413, 420 (9th Cir. 2015) (observing that the government’s burden to prove alienage is “clear, unequivocal, and convincing”), *cert. denied*, 137 S. Ct. 36 (2016); 8 C.F.R. § 1240.46 (2017) (requiring “clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true”).

10. See DHS Press Release, *supra* note 7.

11. See, e.g., Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT’L L.J. 263, 268–69 (2004) (“Today the U.S. law seems indeed to limit the choice to no more than these three standards from among the range of probabilities stretching from more-likely-than-not to virtual-certainty. The law did not always recognize this limitation, but with time the law acknowledged that the conceivable spectrum of standards had coalesced irresistibly into three.”); Christoph Engel, *Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on a Conflict Between American and Continental European Law*, 33 VT. L. REV. 435, 435 (2009) (“American law has three different standards of proof.”); John Gamino, *Tax Controversy*

This gap in the scholarship reflects a similar gap in our case law. But that is changing. In 2015, the Ninth Circuit Court of Appeals sitting en banc addressed this issue of first impression, and by a narrow majority, held that immigration law’s “clear, unequivocal, and convincing” standard is simply another formulation of the intermediate “clear and convincing” standard familiar to civil law.<sup>12</sup> This holding created a circuit split with the Sixth Circuit Court of Appeals—the only other circuit court to address this issue—which held in 2013 that the “clear, unequivocal, and convincing” standard is a higher standard of proof than the “clear and convincing” standard.<sup>13</sup> In 2016, the U.S. Supreme Court declined to resolve this circuit split; therefore, the remaining ten circuit courts must now grapple with this issue individually.<sup>14</sup>

Like the scholars who have examined standards of proof, the Ninth Circuit’s decision is rooted in the belief that there are only three evidentiary standards; that is, there are only two evidentiary standards in civil proceedings, and one in criminal proceedings.<sup>15</sup> This Article challenges that belief. It argues for the first time in an academic piece that immigration law’s “clear, unequivocal, and convincing” standard is a more stringent standard than the “clear and convincing” standard, and therefore, “clear, unequivocal, and convincing” evidence signifies a third civil standard of proof.

This Article proceeds as follows: Part II provides an overview of standards of proof. Part III provides background on the “clear, unequivocal, and convincing” standard in immigration law. It then argues that pursuant to U.S. Supreme Court precedent, the Immigration and Nationality Act, and canons of statutory interpretation, this standard is unequivocally different than the “clear and convincing” standard. In support of this argument, Part IV examines the numerous policy considerations that further show this heightened standard is not only

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*Overburdened, A Critique of Heightened Standards of Proof*, 59 TAX LAW. 497, 508 (2006) (“For the purpose of . . . civil actions[,] there are two standards of proof—only two.”); see also Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 871 (1992) (discussing the continuum, but analyzing only three standards of proof); Michael Barzee, Comment, *Fifteen Years and Counting: The Past, Present, and Future of Missouri’s Sexually Violent Predator Act*, 82 UMKC L. REV. 513, 531 (2014) (same); Frank LaSalle, Comment, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497, 529 (1995) (same).

12. *Mondaca-Vega*, 808 F.3d at 420.

13. *Ward v. Holder*, 733 F.3d 601, 605 (6th Cir. 2013) (“The ‘clear, unequivocal, and convincing’ standard is a more demanding degree of proof than the ‘clear and convincing’ standard.”). The Board of Immigration Appeals (“BIA”) reached the same finding in 1988. *Matter of Patel*, 19 I. & N. Dec. 774, 783 (BIA 1988).

14. *Mondaca-Vega v. Lynch*, 137 S. Ct. 36 (2016).

15. *Mondaca-Vega*, 808 F.3d at 422 (finding “[t]he Supreme Court has repeatedly emphasized that there are three burdens of proof” and that “[t]hree is enough”).

practical, but it is also necessary to ensure immigration courts reach sound, fair holdings, particularly in cases where one's U.S. citizenship is at stake.

## II. AN OVERVIEW OF STANDARDS OF PROOF

This Part begins by explaining the important function standards of proof serve in our judicial system. Next, it examines the three standards of proof courts and scholars most commonly recognize, in addition to noting several less traditional standards of proof factfinders commonly employ. Finally, it summarizes empirical research on whether a standard's formulation impacts the outcome of a case.

### A. A Standard's Purpose

Before addressing the standards of proof and the functions they serve, it is important to first distinguish the term "standard of proof" from the broader term, "burden of proof."<sup>16</sup> The burden of proof generally encompasses three components: (1) the burden of production, (2) the burden of persuasion, and (3) the standard of proof.<sup>17</sup> The burden of production identifies which party must go forward with evidence on a particular issue raised in litigation; that is, the burden of production identifies who bears "the obligation to make a prima facie case."<sup>18</sup> The burden of persuasion, by contrast, is the "ultimate obligation on a party to persuade the decision maker that the party should prevail on a contested issue."<sup>19</sup> In civil litigation, the plaintiff usually bears the burden of persuasion and production on all elements of a claim, while the defendant bears the burden of persuasion on all elements of affirmative defenses.<sup>20</sup>

While these two components determine which party must go forward with evidence, the standard of proof measures the sufficiency of that evidence.<sup>21</sup> That is, the standard of proof reflects the "degree of certainty required for a judge or jury to find for a party on an issue."<sup>22</sup> Thus, "the term 'standard of proof' specifies how difficult it will be for the party

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16. 2 Charles Tilford McCormick, *McCormick on Evidence* § 342, at 675 (7th ed. 2013) (observing that in the family of legal terms, the "slipperiest" member is the term, "burden of proof").

17. David L. Schwartz, Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J.L. & TECH. 429, 433-34 (2013) (citation omitted).

18. *Id.* at 434 (citation omitted).

19. *Id.* (citation omitted).

20. *Id.* (citation omitted).

21. *Id.* at 433-34 (citations omitted).

22. *Id.* at 433 (citation omitted).

bearing the burden of persuasion to convince the jury of the facts in its favor.”<sup>23</sup> The standard of proof is the focus of this Article.

The standard of proof is a cornerstone of our legal system because of the important functions it serves.<sup>24</sup> For example, in litigation, there is always a risk that the factfinder will reach an incorrect decision; the standard of proof allocates this risk between the parties based on the importance of the rights at stake.<sup>25</sup> Consequently, the greater the value society places on the right at stake, the more stringent the standard of proof.<sup>26</sup>

Because the weight society places on the outcome of a particular case varies significantly, the Supreme Court refers to the standard of proof as a “continuum,” ranging from low to high probabilities of certainty.<sup>27</sup> A continuum is “a continuous sequence in which adjacent elements are not perceptibly different from each other, [yet] the extremes are quite distinct.”<sup>28</sup> The various types of standards of proof are discussed below.

### B. *The Three Standards*

Because the standard of proof often serves to protect litigants’ due process rights and other constitutionally protected interests, the Supreme Court has traditionally been the branch to establish which standard of proof is required in a given case.<sup>29</sup> In doing so, the Court has generally recognized three standards of proof.<sup>30</sup> Although the Court has never suggested that factfinders are limited to only those three standards, scholars, and recently the Ninth Circuit, have reached that conclusion.<sup>31</sup>

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23. *Id.* at 434 (quoting *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 100 n.4 (2011)).

24. *Id.* at 435; *Speiser v. Randall*, 357 U.S. 513, 520 (1958) (observing that “the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents”).

25. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (“The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”).

26. *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (the standard of proof “represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks [the factfinder] should have in the correctness of factual conclusions for a particular type of adjudication”).

27. *See, e.g., Addington*, 441 U.S. at 423.

28. *Continuum*, OXFORD AM. COLLEGE DICTIONARY 300 (2002).

29. *Woodby v. INS*, 385 U.S. 276, 284 (1966) (“[T]he question of what degree of proof is required in [a] proceeding . . . is the kind of question which has traditionally been left to the judiciary to resolve.”).

30. *Addington*, 441 U.S. at 423 (“Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases.”).

31. *See supra* notes 11–12 and accompanying text.

From the lowest to highest degree of probability, these three standards are: (1) preponderance of the evidence, (2) clear and convincing, and (3) beyond a reasonable doubt.<sup>32</sup>

The preponderance of the evidence standard is employed in most civil suits.<sup>33</sup> Under this standard, the plaintiff prevails when its claim is “more likely [true] than not.”<sup>34</sup> In quantified terms, a preponderance requires more than a fifty percent probability.<sup>35</sup> This standard allocates the risk of error to both parties in a “roughly [even]” fashion,” thereby reflecting society’s minimal interest in the outcome of monetary disputes between private parties.<sup>36</sup>

On the opposite end of the continuum is the “beyond a reasonable doubt” standard, which is constitutionally mandated for conviction in criminal cases.<sup>37</sup> This standard requires a probability of approximately ninety percent or higher.<sup>38</sup> Thus, this standard allocates almost all of the risk of error to the government, not only because the rights at stake in criminal cases are of a “transcending value,” but also because of society’s utmost interest in the correct adjudication of our criminal laws.<sup>39</sup> Notably, this standard is commonly assumed to apply in criminal proceedings only; however, it is applied in some civil proceedings too, such as when deciding

32. *Addington*, 441 U.S. at 423–24.

33. *Id.* at 423.

34. *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011) (finding the party bearing the burden of proving the preponderance of the evidence loses if it cannot demonstrate that a fact is “more likely than not”), *cert. denied*, 565 U.S. 1110 (2012).

35. *United States v. Fatico*, 458 F. Supp. 388, 403–04 (E.D.N.Y. 1978) (citing *United States v. Schipani*, 289 F. Supp. 43, 56 (E.D.N.Y. 1968), *aff’d*, 414 F.2d 1262 (2d Cir. 1969) and *MAGUIRE ET AL.*, *CASES AND MATERIALS ON EVIDENCE*, 871–73 (6th ed. 1973)).

36. *Engel*, *supra* note 11, at 439 (quoting *Addington*, 441 U.S. at 423).

37. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 *YALE L. J.* 1299, 1301 (1977).

38. *Fatico*, 458 F. Supp. at 411 (quoting W. BLACKSTONE, *THE LAW OF ENGLAND*, BOOK THE FOURTH 358 (T. Wait and Co., Portland 1807)) (“It is better that ten guilty persons escape than one innocent suffer [sic].”).

39. *Addington*, 441 U.S. at 423–24 (“In a criminal case, . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.”); *see also In re Winship*, 397 U.S. 358, 364 (1970) (“[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”); *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958) (“There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.”).

petitions for civil commitment and in delinquency proceedings against juveniles.<sup>40</sup>

Between the preponderance and the reasonable doubt standards is the “clear and convincing” standard.<sup>41</sup> As the Supreme Court has observed, the formulation of this standard varies; it “usually employs some combination of the words ‘clear,’ ‘cogent,’ ‘unequivocal’ and ‘convincing[.]’”<sup>42</sup> This standard requires a probability of over seventy percent.<sup>43</sup> By definition, it requires “an abiding conviction that the truth of [the] factual contentions” at issue are “highly probable.”<sup>44</sup> Courts reserve this standard for special civil cases involving important individual interests that are “more substantial than mere loss of money,” such as petitions for involuntary civil commitment, petitions to withhold or withdraw life-sustaining treatment, petitions to terminate parental rights, and cases involving the forcible medication of a non-dangerous detainee.<sup>45</sup> This standard is also employed in certain civil cases where moral wrongdoing is implied, such as in libel, fraud, undue influence, parole, or constructive trust suits.<sup>46</sup>

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40. Elizabeth Cloud, Note, *Constitutional Law—First Amendment and Freedom of Thought—Banishing Sex Offenders: Seventh Circuit Upholds Sex Offender’s Ban from Public Parks After Thinking Obscene Thoughts About Children*, 28 U. ARK. LITTLE ROCK L. REV. 119, 125 (2005) (“In *In re Winship*, the Court applied the ‘proof beyond a reasonable doubt’ standard to a civil proceeding for the first time, citing the substantial deprivation of liberty as a major factor in doing so. The reasonable doubt standard has since been adopted by many jurisdictions for deciding civil commitment cases.” (citations omitted)).

41. *Clear and Convincing Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“This is a greater burden than preponderance of the evidence, the standard applicable in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials”).

42. *Addington*, 441 U.S. at 424; Candice T. Player, *Involuntary Outpatient Commitment: The Limits of Prevention*, 26 STAN. L. & POL’Y REV. 159, 170 n.57 (2015) (observing that although “*Addington* left the term ‘clear and convincing evidence’ undefined; . . . lower courts have defined clear and convincing evidence as evidence that makes the existence of a fact ‘highly probable,’ or ‘much more probable than its falsity’”).

43. *Fatico*, 458 F. Supp. at 405 (“Quantified, the probabilities might be in the order of above 70% under a clear and convincing evidence burden.”).

44. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

45. *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (quoting *Addington*, 441 U.S. at 424) (applying the standard to termination of parental rights); *Addington*, 441 U.S. at 432–33 (applying the standard to civil commitment); *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 692 (9th Cir. 2010) (applying the standard to forcible medication of non-dangerous detainees).

46. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 331–32 (1974) (applying the standard to libel); *Woodby v. INS*, 385 U.S. 276, 285 n.18 (1966) (noting this standard’s use in fraud, undue influence, parole, and constructive trust cases); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 824–26 (D.C. Cir. 1977) (applying the standard to securities fraud).

### C. *The Outliers*

In addition to the three standards above, additional evidentiary standards of proof exist; however, these standards have been either ignored in standards of proof literature or characterized as variations of one of the three core standards. For example, “substantial, credible” evidence is a standard of proof courts employ in some administrative law actions and in disputed citizenship hearings made pursuant to 8 U.S.C. § 1255(b)(5)(B).<sup>47</sup> This standard is usually a standard of *review*.<sup>48</sup> However, courts, including the Supreme Court, have employed it as a standard of *proof* and have found it requires only “more than a mere scintilla,” which is less proof than required by the preponderance standard.<sup>49</sup>

Similarly, the “strong-basis-in-evidence” standard also requires less proof than the preponderance standard.<sup>50</sup> The Supreme Court first announced this standard in *Ricci v. DeStefano*, a Title VII employment law case, in 2009.<sup>51</sup> Notably, one scholar has argued that this standard represents a new standard of proof in civil cases.<sup>52</sup>

Finally, immigration courts routinely apply the “clear, unequivocal, and convincing” standard, the focus of this Article. Immigration judges employ this standard to determine whether an individual is a removable “alien,” whether a lawful permanent resident is inadmissible, and whether a person absent from his final removal hearing was provided adequate notice of his removal hearing.<sup>53</sup> One surveyed panel of judges found that

47. *Pacific Micronesia Corp. v. NLRB*, 219 F.3d 661, 665 (D.C. Cir. 2000); *Boateng v. Holder*, No. CV13-00631-PHX-DGC, 2013 WL 5353003 at \*2 (D. Ariz. Sept. 25, 2013) (finding “Petitioner bears the initial burden of producing ‘substantial credible evidence in support of his citizenship claim’”).

48. Edwin A. Bayo & John R. Rimes, *Who Goes First and What is “Competent, Substantial Evidence” in a Proposed Rule Challenge?*, 73 FLA. B.J. 62, 63 (1999) (“As has long been recognized, ‘competent, substantial evidence’ is traditionally a standard of review, not an evidentiary standard.”).

49. *Pacific Micronesia Corp.*, 219 F.3d at 665 (“To meet the requirement of ‘substantial evidence,’ the Board must produce ‘more than a mere scintilla’ of evidence . . . .” (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938))).

50. Herman N. (Rusty) Johnson, Jr., *The Evolving Strong-Basis-In-Evidence Standard*, 32 BERKELEY J. EMP. & LAB. L. 347, 349–50 (2011).

51. 557 U.S. 557, 563 (2009) (“We conclude that race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”).

52. Johnson, *supra* note 50, 349–50, 350 n.5 (“[T]he strong-basis-in-evidence standard represents a new burden of persuasion in civil cases involving *Ricci*-type, disparate impact issues. I will demonstrate that the strong-basis-in-evidence standard should be interpreted as incurring a lesser burden than the preponderance-of-the-evidence standard.” (footnote omitted) (citing Christine Caulfield, *Firefighter Ruling Gives Foggy Answers at Best*, LAW360 (June 30, 2009, 12:00 AM), <http://www.law360.com/employment/articles/108825>)).

53. See 8 U.S.C. § 1229a(b)(5) (2012) (requiring the standard in absentia removal proceedings);

in contrast to the “clear and convincing” standard’s required probability of seventy percent, the “clear, unequivocal, and convincing” standard requires a probability of approximately eighty percent or greater.<sup>54</sup> Commentators, however, uniformly assume that the “clear, unequivocal, and convincing” standard is simply another formulation of the “clear and convincing” standard.<sup>55</sup> This Article’s analysis of this standard therefore fills a gap in literature.

#### *D. The Proven Importance of a Standard’s Formulation*

Existing standards of proof scholarship and empirical research both show that the words the Supreme Court uses to explain the standard of proof are significant for two reasons.<sup>56</sup> As a starting point, the Supreme Court’s original formulation of a standard—rather than its subsequent, simplified formulations of that standard—is essential to determining what degree of proof the Court intended for that standard to require.<sup>57</sup> For example, when originally enunciating the reasonable doubt standard, the Court commonly added the following dependent clauses to explain the meaning of “reasonable doubt”: “not a vague conjecture,” “not a capricious and speculative doubt,” “not an arbitrary doubt,” “not a trivial doubt,” “not a mere possible doubt,” and “not an imaginary doubt.”<sup>58</sup> Over time, however, the meaning of reasonable doubt has been sufficiently established in American jurisprudence, and consequently, the Court no longer uses these dependent clauses, referring to the standard simply as requiring proof beyond a reasonable doubt.<sup>59</sup> This illustrates not only that a standard’s formulation may evolve over time—even when the requisite degree of belief does not—but also that the dependent clauses the Court uses to explain a standard are vital to understanding its originally intended stringency.

Empirical studies also show that the formulation of a standard affects the outcome of a case. For example, in the most recent study on the impact

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*Mondaca-Vega*, 808 F.3d at 417 (employing this standard to determine alienage); *Ward v. Holder*, 733 F.3d 601 (6th Cir. 2013) (employing this standard to inadmissibility of lawful permanent resident).

54. *United States v. Fatico*, 458 F. Supp. 388, 405 (1978) (“In terms of percentages, the probabilities for clear, unequivocal and convincing evidence might be in the order of above 80% under this standard.”).

55. *See supra* note 11.

56. *See, e.g.*, Schwartz & Seaman, *supra* note 17, at 437–41 (providing overview of all past survey and experimental studies on standards of proof).

57. J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 256 (1944).

58. *Id.* at 257.

59. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

of standard formulation, two Harvard scholars tested whether the Supreme Court's addition of a single-sentence jury instruction in *Microsoft Corp. v. i4i Ltd. Partnership* (“*i4i*”), affected the degree of belief required under the “clear and convincing” standard.<sup>60</sup> The study found that the addition of this special jury instruction counterintuitively lowered the standard of proof required, making it statistically indistinguishable from the preponderance standard—the very standard the Court rejected in *i4i*.<sup>61</sup> Therefore, this study, like others before it, concluded that the formulation of a standard makes a “substantial impact” on factfinders’ decisions.<sup>62</sup> Given that *accurate* formulations of a standard may impact the outcome of the case, it necessarily follows that *inaccurate* formulations may as well.

### III. REASONABLE DOUBT’S CIVIL COUNTERPART: IMMIGRATION LAW’S “CLEAR, UNEQUIVOCAL, AND CONVINCING” STANDARD

Part II established that standards of proof serve an important function in our legal system by signaling to the trier of fact the value society has placed on the correctness of the case’s outcome. It also demonstrated that courts already employ at least four standards of proof in civil matters, and that the formulation of a standard significantly impacts the outcome of case.

This Part further challenges the belief that there are only two civil standards of proof. It argues that immigration law’s “clear, unequivocal, and convincing” standard signifies a third civil standard of proof. Because the Supreme Court’s original formulation and explanation of a standard illuminates the intended stringency of a standard, this Part traces the evolution of the “clear, unequivocal, and convincing” standard from its original to current formulations. This Part then analyzes the two circuit court opinions analyzing whether this standard is different than the intermediate, “clear and convincing” standard of proof. And because the Immigration and Nationality Act (“INA”) codifies both the “clear and convincing” and “clear, unequivocal, and convincing” formulations,<sup>63</sup> this

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60. Schwartz & Seaman, *supra* note 17, at 459–69 (testing jury instruction given in *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91 (2011)).

61. *Id.* at 459–60.

62. *Id.* at 469; *see also* United States v. Fatico, 458 F. Supp. 388, 411 (1978) (analyzing results of surveyed circuit court judges’ view of four standards of proof); Underwood, *supra* note 37, at 1309 (observing that previous studies suggest that explanations of a standard can affect the outcome of a case).

63. 8 U.S.C. §§ 1229a(b)(5)(A), (c)(3)(A) (2012).

Part concludes with analysis on how canons of statutory interpretation resolve the question of whether these are different standards of proof.

*A. Origins of the Standard*

What is now the “clear, unequivocal, and convincing” standard familiar to immigration law originated in a series of U.S. Supreme Court denaturalization cases in the 1940s.<sup>64</sup> In those cases, the Court consistently described this standard as the civil equivalent of criminal law’s reasonable doubt standard.<sup>65</sup> The Court has never described the “clear and convincing” standard in this manner, which strongly indicates the Court intended for immigration law’s “clear, unequivocal, and convincing” standard to signify a standard higher than that required of the “clear and convincing” standard.<sup>66</sup>

As background, the denaturalization cases that established this standard occurred in the post-World War I to World War II era, a time when Americans viewed foreignness, immigrants, and viewpoints running contrary to the status quo more harshly than usual; even Jewish refugees fleeing Nazi Germany were unwelcome.<sup>67</sup> This animosity manifested into political pressure that led the government to initiate denaturalization proceedings against countless naturalized citizens who held “unfavorable” political views.<sup>68</sup> This included William Schneiderman, a Russian-born, naturalized U.S. citizen who avidly supported Nazism and Communism.<sup>69</sup> As it had in other denaturalization proceedings, the government claimed

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64. See, e.g., *Klapprott v. United States*, 335 U.S. 601 (1949); *Knauer v. United States*, 328 U.S. 654 (1946); *Baumgartner v. United States*, 322 U.S. 665 (1944); *Schneiderman v. United States*, 320 U.S. 118 (1943).

65. *Id.*

66. See, e.g., *Mondaca-Vega v. Lynch*, 808 F.3d 413, 431 (9th Cir. 2015) (Smith, J., dissenting), *cert. denied*, 137 S. Ct. 36 (2016).

67. David Fontana, Note, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35, 42–43 (2002) (observing that the war in Europe in the late 1930s and early 1940s created political pressure in the United States to stamp out disloyalty derived from Communist and pro-Nazi sympathy in the United States and arguing that this pressure manifested into a denaturalization litigation strategy that included Schneiderman’s denaturalization proceedings); *Here’s Fortune’s Survey on How Americans Viewed Jewish Refugees in 1938*, FORTUNE (Nov. 18, 2015), <http://fortune.com/2015/11/18/fortune-survey-jewish-refugees/#jewish-refugees> (citing survey results from 1938 in which 67.4% of Americans stated “we should try to keep [Jewish refugees] out”).

68. Fontana, *supra* note 67, at 42–43; see also *Schneiderman*, 320 U.S. at 125.

69. See Fontana, *supra* note 67, at 35 (“[I]n 1939, the United States attempted to revoke Schneiderman’s citizenship most likely to strike a blow against [his] possible disloyalty, especially [his] pro-Communist or pro-Nazi behavior at a time when the Soviet Union was fighting against American interests in World War II.”).

Mr. Schneiderman's controversial political views rendered him "disloyal" and therefore he had fraudulently or illegally procured his naturalization decree.<sup>70</sup>

Because immigration statutes did not address what the government's standard of proof was in denaturalization proceedings, the judiciary resolved this question.<sup>71</sup> Lower courts required the government prove fraudulent procurement by a preponderance.<sup>72</sup> In *Schneiderman v. United States*, however, the Supreme Court reversed, finding the preponderance standard was too low given the "precious right of citizenship" that is at stake in denaturalization proceedings.<sup>73</sup> Also driving the Court's decision was its concern that through these denaturalization proceedings, naturalized citizens were being denied their First Amendment right to freedom of thought, which the natural-born citizenry freely enjoyed.<sup>74</sup> The Court further reasoned that in other fraudulent procurement cases, the government's burden was higher than "a bare preponderance of evidence which leaves the issue in doubt."<sup>75</sup> Consequently, Justice Murphy, writing for the majority, announced that in denaturalization proceedings, the government must meet a "heavy" and "exacting" burden by providing "clear, unequivocal, and convincing" evidence which does not leave the issue in doubt.<sup>76</sup>

Two subsequent Supreme Court cases further illuminate the degree of belief the *Schneiderman* standard of proof requires. First, in *Knauer v. United States*, the Court described the government's standard in denaturalization proceedings as requiring evidence "beyond a reasonable doubt"—the standard used in criminal proceedings.<sup>77</sup> Specifically, the Court noted that in the underlying denaturalization proceedings, the lower courts found the government proved "beyond a reasonable doubt" that Mr. Knauer fraudulently procured his denaturalization decree.<sup>78</sup> The Supreme

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70. *Schneiderman*, 320 U.S. at 121–22; *Developments in the Law: Immigration and Nationality*, 66 HARV. L. REV. 643, 722 (1953).

71. *See Schneiderman*, 320 U.S. at 125.

72. *Id.* at 122.

73. *Id.* at 122, 161.

74. *Id.* at 137.

75. *Id.* at 125.

76. *Id.* at 135. Though in passing and over the course of an eighty-eight-page Majority Opinion, the Court also referred to the standard as "clear, unequivocal, and convincing" and as evidence of "clear and convincing character." *Id.* at 123. Similarly, the concurring and dissenting opinions mentioned the standard as requiring evidence that is "clear, unequivocal and convincing," "clear and convincing," "clear, not speculative," and "clear beyond all reasonable doubt." *Id.* at 161 (Douglas, J., concurring); *Id.* at 178, 181 (Stone, C.J., dissenting).

77. *Knauer v. United States*, 328 U.S. 654, 657 (1946).

78. *Id.* at 656.

Court then stated that the standard of proof required to denaturalize a citizen is “‘clear, unequivocal, and convincing’ evidence, which does not leave ‘the issue in doubt.’”<sup>79</sup> And after evaluating the evidence, the Court held “the two lower courts were correct in their conclusions. The standard of proof, not satisfied in either the *Schneiderman* or *Baumgartner* cases, is therefore plainly met here.”<sup>80</sup>

Notably, the Court did not state that the reasonable doubt standard was a higher standard than *Schneiderman* required.<sup>81</sup> To the contrary, a five-sentence concurring opinion in *Knauer* cites the reasonable doubt standard—twice.<sup>82</sup> And the dissenting Justices—one of whom was Justice Murphy, the author of the *Schneiderman* majority opinion—remained silent regarding the *Knauer* majority’s analysis of the *Schneiderman* standard, dissenting on other grounds.<sup>83</sup>

In a second case, *Klapprott v. United States*, decided just six years after *Schneiderman*, the Court issued a plurality opinion that again described the *Schneiderman* standard as requiring evidence beyond a reasonable doubt.<sup>84</sup> The issue in *Klapprott* was whether a naturalized citizen could be denaturalized through a default judgment.<sup>85</sup> The Court held it could not—not only “because of the grave consequences incident to denaturalization proceedings,” but also because the government must prove its case “by clear, unequivocal and convincing evidence which does not leave the issue in doubt,” a burden not satisfied by the defendant simply defaulting.<sup>86</sup> Importantly, the Court further explained, “[t]his burden is *substantially identical* with that required in criminal cases—proof beyond a reasonable doubt.”<sup>87</sup>

Similarly, in a separate concurrence, which Justice Murphy joined, Justice Rutledge observed that “the *Schneiderman* decision . . . required a burden of proof for denaturalization which in effect approximates the burden demanded for conviction in criminal cases, namely, proof beyond a reasonable doubt of the charges alleged as cause for denaturalization.”<sup>88</sup>

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79. *Id.* at 657–58.

80. *Id.* at 660.

81. *See id.* Indeed, had the *Knauer* Court considered the lower courts’ reasonable doubt standard higher than what *Schneiderman* required, it seems one of the Justices would have noted as much, such as by observing that the use of the reasonable doubt standard was a harmless error.

82. *Id.* at 674–75 (Black, J., concurring).

83. *Id.* at 675–79.

84. *Klapprott v. United States*, 335 U.S. 601, 612–13 (1949) (plurality opinion).

85. *Id.* at 602.

86. *Id.* at 612 (citing *Schneiderman v. United States*, 320 U.S. 118, 158 (1943)).

87. *Id.* (emphasis added).

88. *Id.* at 617.

And “in view of the substantial kinship of the proceedings with criminal causes,” “no less [proof] should be required” in denaturalization, regardless of its technical form or label.<sup>89</sup>

Notably, no Justice, including the dissenting Justices—two of whom were members of the *Schneiderman* bench—objected to their brethren’s description of the *Schneiderman* standard as requiring proof beyond a reasonable doubt.<sup>90</sup> Thus, although *Klapprott* was a plurality opinion, the powerful descriptions of the *Schneiderman* standard used by long-time members of the bench—without objection by other members or even the parties—further show that the Court consistently described the standard not as the “clear and convincing” intermediate standard, but as civil counterpart to the beyond a reasonable doubt standard.<sup>91</sup>

As further evidence of the stringency of the *Schneiderman* standard, it should be noted that *Schneiderman* and its progeny largely ended disloyalty denaturalization litigation in the 1940s.<sup>92</sup> Also indicative of the

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89. *Id.* at 618 (citation omitted).

90. *See id.* at 620–31.

91. *Id.* Similarly, the government raised no objections to the lower court’s requirement that the government “establish its contentions affirmatively by evidence clear, convincing and unequivocal—to all practical intents and purposes beyond a reasonable doubt.” *See* Brief of Paul Knauer, Petitioner at 8, *Knauer v. United States*, 328 U.S. 654 (1946) (No. 510), 1946 WL 50569, at \*10 (quoting Trial Court’s Memorandum); *see also* Brief for the United States, *Knauer v. United States*, 328 U.S. 654 (1946) (No. 510), 1946 WL 50570. Nor did the government argue that if the Court found that contrary to the lower courts’ findings that the beyond a reasonable doubt burden had not been met, the Court should remand for the lower court’s correct evaluation of the evidence under the correct legal standard, i.e., the “lower” clear, unequivocal, and convincing standard. *See* Brief for the United States, 1946 WL 50570. The Government also did not rebuff Knauer’s assertion that “[i]n the *Schneiderman* case, . . . this Court changed the civil evidence rule in denaturalization cases from probability to clear, convincing and unequivocal evidence that leaves no doubt . . . .” Brief of Paul Knauer, 1946 WL 50569, at \*42. The government did, however, argue repeatedly that the evidence established “beyond a troubling doubt” that Knauer should be denaturalized. *See* Brief for the United States, 1946 WL 50570 at \*26, 30, 37.

92. Though the Court effectively ended disloyalty denaturalization litigation, this was not without pushback from Congress. *See Developments in the Law Immigration and Nationality*, *supra* note 70, at 723; *see also* Fontana, *supra* note 67, at 68 (“*Schneiderman* prevented the potential denaturalization of hundreds of thousands of Americans.”). For example, in 1950, Congress enacted the Internal Security Act (“ISA”) in an attempt to circumvent these precedents with a burden-shifting framework. *Developments in the Law Immigration and Nationality*, *supra* note 70, at 723. The ISA provided that if, within five years of naturalization, a naturalized citizen affiliated with an organization whose prior association would have prevented his naturalization, a presumption would arise that the naturalized citizen had not attached to the principles of the Constitution and therefore obtained his naturalization decree by fraud. *Id.* The burden would then shift to the naturalized citizen; if he did not rebut this presumption, the government’s prima facie evidence would establish fraudulent or illegal procurement of a naturalization decree. *Id.* This burden-shifting framework was incorporated into the Nationality Act of 1952 and still exists in the current INA. *See* 8 U.S.C. § 1481(b) (2012); Charles H. Hooker, Comment, *The Past as a Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denationalization*, 19 EMORY INT’L L. REV. 305, 340 (2005). Since its enactment, however, scholars have seriously questioned the constitutionality of this provision, which

stringency of the *Schneiderman* standard is the fact that the Court affirmed only one lower court's denaturalization finding amid the politically charged state of the United States during the World War II era.<sup>93</sup>

*B. The Standard's Modern Formulation*

During the era of denaturalization litigation of the 1940s and 1950s, the Supreme Court consistently held that the *Schneiderman* standard required "clear, unequivocal, and convincing evidence which does not leave the issue in doubt."<sup>94</sup> The Court also consistently explained that this standard of proof was akin to the reasonable doubt standard.<sup>95</sup>

But that trend shifted, beginning with *Woodby v. INS*, when the Court adopted an abbreviated formulation of the *Schneiderman* standard for deportation proceedings.<sup>96</sup> As background, in *Woodby*, the lower courts required the government provide "reasonable, substantial, and probative evidence" of a noncitizen's deportability.<sup>97</sup> These courts had derived this standard from two provisions of the INA: first, section 106(a)(4), which stated that a deportation order shall be conclusive "if supported by reasonable, substantial, and probative evidence on the record considered as a whole," and second, section 242(b)(4), which stated that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."<sup>98</sup>

The *Woodby* court, however, found these statutory provisions addressed the judicial standard of *review*, not the government's standard of *proof* in deportation proceedings.<sup>99</sup> In deciding which standard the government should meet, the Court rejected the reasonable doubt standard,

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has never been tested, as it has never been the sole ground upon which the government sought to denaturalize a citizen. *Id.* at 341–43.

93. Decided less than two years after *Schneiderman*, *Knauer* was the only time that the Court affirmed the lower court's decision to denaturalize a citizen in the 1940s. *Knauer*, 328 U.S. at 660.

94. *See supra* note 64.

95. *Id.*

96. *See* *Woodby v. INS*, 385 U.S. 276, 285 (1966). In the 1950s, the Supreme Court held that the *Schneiderman* evidentiary standard also applied in statutory expatriation cases. *Perez v. Brownell*, 356 U.S. 44, 47 n.2 (1958) (citing *Gonzales v. Landon*, 350 U.S. 920 (1955) and *Schneiderman v. United States*, 320 U.S. 118, 158 (1943)). In 1967, however, the Supreme Court overruled these precedents and held that Congress has no power to rob a citizen of his citizenship through involuntary expatriation. *Afroyim v. Rusk*, 387 U.S. 253, 267–68 (1967). Because the expatriation cases do not illuminate the *Schneiderman* standard's location on the continuum of proof, these cases are not further discussed.

97. *Woodby*, 385 U.S. at 277–82.

98. *See id.* at 279–82.

99. *Id.* at 282.

reasoning that deportation proceedings are neither criminal nor punitive.<sup>100</sup> The Court then reasoned that because “[t]he immediate hardship of deportation is often greater than that inflicted by denaturalization,” “[n]o less a burden of proof is appropriate in deportation proceedings.”<sup>101</sup> Consequently, the Court held that government must meet *Schneiderman*’s requirement of “clear, unequivocal, and convincing” evidence in deportation proceedings.<sup>102</sup>

Although the Court explicitly cited *Schneiderman* and adopted its standard, the Court did not include *Schneiderman*’s dependent clause, that the evidence should “not leave the issue in doubt,” nor did the Court describe it as being akin to the reasonable doubt standard, as it previous had in the denaturalization context.<sup>103</sup> Still, it did note that the “clear, unequivocal, and convincing” standard—or “an even higher” standard—was “no stranger” to civil law.<sup>104</sup> Thus, the Court in *Woodby* clearly observed that there is a higher civil standard of proof than the intermediate, “clear and convincing” standard.

Following this decision, lower courts applied and federal regulations incorporated *Woodby*’s abbreviated version of the *Schneiderman* standard, requiring the government prove deportability with the “clear, unequivocal, and convincing” evidence, rather than the longer formulation articulated in *Schneiderman*.<sup>105</sup> But as discussed below, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) not only changed the applicability of this standard, it also codified several new standards of proof and modified key terminology.

Turning first to terminology, prior to IIRIRA, the INA provided for “exclusion” and “deportation” proceedings.<sup>106</sup> The type of proceeding depended on where the noncitizen was apprehended.<sup>107</sup> If a noncitizen were apprehended at the port of entry, he would be placed in “exclusion” proceedings for being “inadmissible.”<sup>108</sup> But if a noncitizen were

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100. *Id.* at 284–85.

101. *Id.* at 286.

102. *Id.*

103. *See id.*; *see also* *Schneiderman v. United States*, 320 U.S. 118, 165 (1943).

104. *Woodby*, 385 U.S. at 285 n.18.

105. *See, e.g.*, 8 C.F.R. § 242.14(a) (1997) (adopting the *Woodby* standard).

106. *Ward v. Holder*, 733 F.3d 601, 603–04 (6th Cir. 2013) (providing background on changes IIRIRA made to “rather confusing terminology” in the INA).

107. *Id.* at 603.

108. *Id.*

apprehended inside the U.S. interior, he would be placed in “deportation” proceedings for either being “deportable” or “inadmissible.”<sup>109</sup>

IIRIRA, however, combined “exclusion” and “deportation” proceedings into “removal” proceedings, yet it retained the two grounds for removability.<sup>110</sup> Thus, today, a noncitizen is removable for being “deportable”—that is, he was previously admitted into the United States, but is now “deportable” under INA § 237(a) for being in violation of the law—or “inadmissible”—that is, he either entered the United States without being admitted or sought to enter the United States without proper travel documents and is therefore “inadmissible” under section 212(a).<sup>111</sup>

IIRIRA also made the following four changes to the standards of proof in the INA:

First, Congress now requires “clear and convincing” evidence of a noncitizen’s deportability.<sup>112</sup> This essentially cabined *Woodby*’s applicability to noncitizens charged with deportability.<sup>113</sup> Hence, where federal regulation incorporated the *Woodby* standard pre-1997, the regulation now requires the IIRIRA “clear and convincing” standard in establishing deportability.<sup>114</sup>

Second, in absentia removal proceedings (in which the noncitizen does not appear at his final removal hearing), Congress requires the government to provide “clear, unequivocal, and convincing” evidence that written notice of the removal hearing was provided and that the noncitizen is removable.<sup>115</sup> Thus, in absentia proceedings, Congress codified the *Woodby* standard for proceedings in which a noncitizen is absent, regardless of whether that noncitizen is charged with being removable due to inadmissibility or deportability.

Third, noncitizens in removal proceedings must prove their admissibility “clearly and beyond doubt.”<sup>116</sup> And fourth, Congress requires the government to satisfy the preponderance standard in several

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109. *Id.*

110. *Id.* at 604.

111. 8 U.S.C. § 1229a(a)(1)–(2) (2012).

112. 8 U.S.C. § 1229a(c)(3)(A); *see also* 8 C.F.R. § 1240.8(a) (2017) (same).

113. *Ward*, 733 F.3d at 604.

114. Compare 8 C.F.R. § 1240.46(a) (2017) (applying to proceedings commenced before IIRIRA went into effect, requiring “clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true”) with 8 C.F.R. § 1240.8(a) (applying to proceedings commenced after IIRIRA went into effect, requiring “clear and convincing evidence that the respondent is deportable as charged”).

115. 8 U.S.C. § 1229a(b)(5)(A).

116. 8 U.S.C. § 1229a(c)(2)(A); 8 C.F.R. § 1240.8(b)–(c) (same).

other sections of the INA.<sup>117</sup> Thus, the INA contemplates four standards of proof for immigration proceedings.

Currently, neither the INA nor agency regulations address all applicable standards of proof in removal proceedings. For example, although case law and agency regulations require the government to prove the alienage of an allegedly inadmissible noncitizen, there is no statute or regulation that specifies the government's requisite standard of proof.<sup>118</sup> To fill this gap, courts apply the *Woodby* standard, requiring the government to provide "clear, unequivocal, and convincing" evidence of alienage.<sup>119</sup>

Recently, two circuit courts were presented the question of whether the *Woodby* standard is simply another formulation for the intermediate, "clear and convincing" standard, or whether it is an "even higher" standard. Those decisions are analyzed below.

### C. *The Circuit Split*

This section explores two circuit courts' analysis of whether "clear and convincing" evidence is a different standard than *Woodby*'s "clear, unequivocal, and convincing" evidence. Several considerations stemming from the prior sections' history of the standard will guide this analysis.

First, what is the most accurate way for courts to frame this legal issue? Both the Sixth and Ninth Circuits framed it as a question of whether the omission of "unequivocal" from the *Woodby* version of the *Schneiderman* standard creates a standard different than the intermediate, "clear and convincing" standard.<sup>120</sup> But *Woodby* clearly adopted *Schneiderman*, and also noted that deportation creates an even greater hardship than denaturalization. Thus, the more precise way to frame this issue would be to compare the entire *Schneiderman* standard—"clear, unequivocal, and convincing evidence that does not leave the issue in

117. See, e.g., 8 U.S.C. §§ 1186a(b)(2), (c)(3)(D) (2012); 8 U.S.C. § 1186b(b)(2) (2012); see also 8 C.F.R. § 1240.8(d) (same).

118. Agency regulations state only that in removal proceedings, the government must first prove the alienage of the noncitizen. 8 C.F.R. § 1240.8(c) (2017) ("In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent.")

119. See, e.g., *Gupta v. Lynch*, 661 Fed. Appx. 737, 739 (2d Cir. 2016); *Murphy v. INS*, 54 F.3d 605, 608 (9th Cir. 1995) (citing *Woodby v. INS*, 385 U.S. 276, 281, 284–85 (1966)); *Sint v. INS*, 500 F.2d 120, 123 (1st Cir. 1974); Daniel Kanström, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L. J. 599, 629 (1991) (observing that "since *Woodby* was decided [in 1967], the BIA and the courts have often evaluated evidence of alienage presented by the [government] to determine if it meets the *Woodby* standard").

120. See *Mondaca-Vega v. Lynch*, 808 F.3d 413, 420 (9th Cir. 2015), cert. denied, 137 S. Ct. 36 (2016); *Ward v. Holder*, 733 F.3d 601, 605–06 (6th Cir. 2013).

doubt”—with the “clear and convincing” standard. This would ensure that courts consider the context in which the Court has employed the “clear, unequivocal, and convincing” standard—to protect a supremely precious right: the right of citizenship and presence in this country; the right to have constitutional rights—an essential function of a standard of proof. But by comparing the truncated *Woodby* standard, one necessarily ignores the important societal concerns considered in *Schneiderman* and *Woodby*. This greatly dilutes the important role standards of proof are meant to play in our legal system.

Second, even if courts ignore *Schneiderman*’s dependent clause that explains what “unequivocal” means, does the addition of the word “unequivocal” to the formulation make a difference to the stringency of the standard? And finally, given that Congress codified both the “clear and convincing” and “clear, unequivocal, and convincing” formulations in the INA, how do canons of statutory interpretation direct courts to resolve whether these standards are satisfied by different degrees of belief? These considerations are explored below.

#### 1. *Ward v. Holder*

The question of where on the continuum of proof the “clear, unequivocal, and convincing” standard lays was first addressed in *Ward v. Holder*, a Sixth Circuit case from 2013.<sup>121</sup> There, a lawful permanent resident left the United States for three years to care for his ailing mother in the United Kingdom.<sup>122</sup> When he returned to the United States, he presented his green card, which had expired, and as a result, immigration officials placed him in removal proceedings on inadmissibility grounds under 8 U.S.C. § 1182(a).<sup>123</sup> The immigration court found that under 8 U.S.C. § 1229a(c)(3), the government was required to provide “clear and convincing” evidence that Ward had abandoned his lawful permanent resident status and was therefore inadmissible.<sup>124</sup>

The Sixth Circuit, however, found that the immigration judge’s reliance on section 1229a(c)(3)’s “clear and convincing” standard was incorrect because that section applies to proving a noncitizen is “deportable,” not “inadmissible,” as Ward was charged with.<sup>125</sup> Instead,

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121. *Ward*, 733 F.3d at 602.

122. *Id.* at 603.

123. *Id.*

124. *Id.* at 604.

125. *Id.* at 606–07.

the court found the correct evidentiary standard for proving inadmissibility due to abandonment of lawful permanent residence status is “clear, unequivocal, and convincing,” as established by Sixth Circuit precedent.<sup>126</sup>

The court then analyzed whether the immigration judge’s omission of the word “unequivocal” from its standard formulation was an error.<sup>127</sup> The court found that it was, based on *Addington v. Texas*.<sup>128</sup> There, the Supreme Court considered what degree of proof is required to satisfy due process “in a civil proceeding . . . to commit an individual involuntarily for an indefinite period to a state mental hospital.”<sup>129</sup> The trial court had applied the “clear, unequivocal, and convincing” standard, the court of appeals had applied the “beyond a reasonable doubt” standard, and the Texas Supreme Court had applied the “preponderance of the evidence” standard.<sup>130</sup>

The Supreme Court held that “clear and convincing” evidence satisfied due process.<sup>131</sup> But because the trial court had required “clear, unequivocal, and convincing” evidence, the Court remanded to the Texas Supreme Court and directed it to decide whether Texas law requires a “burden equal to or greater than the ‘clear and convincing’ standard” required to satisfy due process.<sup>132</sup>

Based on *Addington*, *Ward* found that the omission of “unequivocal” from the standard formulation does make a difference, and consequently held that “[t]he ‘clear, unequivocal, and convincing standard’ is a more demanding degree of proof than the ‘clear and convincing’ standard.”<sup>133</sup> Notably, this is the same conclusion the BIA reached, albeit without analysis, in *Matter of Patel* in 1988.<sup>134</sup>

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126. *Id.* at 607 (“The Immigration Judge could not have relied upon another section of the Act, because the Act nowhere specifies the standard of proof in cases in which the government has alleged that a lawful permanent resident is inadmissible because he or she has abandoned his or her lawful permanent resident status. Instead, the applicable degree of proof—”to establish by clear, unequivocal, and convincing evidence’ that Ward’s status had changed—comes from case law; in our Circuit.” (citing *Hana v. Gonzales*, 400 F.3d 472, 475–76 (6th Cir. 2005) and *Woodby v. INS*, 385 U.S. 267, 277 (1966))).

127. *Id.* at 605.

128. *Id.* (citing *Addington v. Texas*, 441 U.S. 418, 419–20 (1979)).

129. *Addington*, 441 U.S. at 419–20.

130. *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

131. *Addington v. Texas*, 441 U.S. at 433.

132. *Id.*

133. *Ward*, 733 F.3d at 605–06.

134. *Matter of Patel*, 19 I & N Dec. 774, 783 (BIA 1988) (finding without analyzing that under *Addington*, “the clear and convincing standard imposes a lower burden than the clear, unequivocal, and convincing standard . . . because it does not require that the evidence be unequivocal or of such a

## 2. *Mondaca-Vega v. Lynch*

Shortly after *Ward* was decided, the en banc Ninth Circuit Court of Appeals addressed whether immigration law's "clear, unequivocal, and convincing" standard is the same as "clear and convincing" in *Mondaca-Vega v. Lynch* in 2015.<sup>135</sup> There, the government had placed Reynaldo Mondaca in removal proceedings on inadmissibility grounds.<sup>136</sup> Mondaca, however, claimed to be a U.S. citizen by birth, which the government had repeatedly confirmed prior to initiating his removal proceedings; for example, it had issued him a U.S. passport, twice, and recognized his foreign-born children as U.S. citizens based on his status as a U.S. citizen.<sup>137</sup> In his removal proceedings, however, the government claimed Mondaca was actually Salvador Mondaca-Vega, a Mexican citizen.<sup>138</sup>

The flashpoint issue in the case, therefore, was whether the government had established Mondaca-Vega's alienage.<sup>139</sup> Ninth Circuit case law has established that the government must prove "alienage"—an element of "inadmissibility" and an immigration judge's basis for jurisdiction<sup>140</sup>—with "clear, unequivocal, and convincing" evidence.<sup>141</sup> However, the lower court in *Mondaca-Vega* required only "clear and convincing" evidence of alienage.<sup>142</sup>

Thus, like *Ward*, a key issue in *Mondaca-Vega* was whether the lower court had applied the correct standard.<sup>143</sup> And also like *Ward*, *Mondaca-Vega* framed the issue as whether the lower court's omission of

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quality as to dispel all doubt").

135. *Mondaca-Vega v. Lynch*, 808 F.3d 413, 420 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 36 (2016).

136. *Id.* at 418.

137. *Id.*

138. *Id.* at 424 ("The question for the district court was straightforward: Who is the petitioner? Is he Reynaldo Mondaca Carlon, a native and citizen of the United States, or Salvador Mondaca-Vega, a native and citizen of Mexico?").

139. *Id.* at 419–20 ("At issue, then, is whether the government bore its burden of proving the petitioner's alienage.").

140. *See* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923) ("[A]lienage is a jurisdictional fact; . . . an order of deportation must be predicated upon a finding of that fact."), *overruled on other grounds by* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); *Matter of Guevara*, 20 I & N Dec. 238, 242 (BIA 1990, 1991) ("[T]he burden of proof in deportation proceedings is upon the Service to establish the alienage of the respondent, and ultimately his deportability, by evidence that is clear, unequivocal, and convincing.").

141. *Mondaca-Vega*, 808 F.3d at 419.

142. *Id.*

143. *Id.* ("The threshold issue is whether the [lower] court erred in holding the government to a 'clear and convincing' burden of proof.").

“unequivocal” from the standard was an error.<sup>144</sup> But unlike *Ward*, the *Mondaca-Vega* court concluded the two lower courts had not erred, finding the “clear and convincing” standard requires the same degree of belief as the “clear, unequivocal, and convincing” standard.<sup>145</sup>

The court cited several reasons for this conclusion; however, the theme underlying each reason is the court’s belief that there are only three standards of proof, and therefore the most stringent standard of proof in civil law is “clear and convincing.”<sup>146</sup> For example, the court found it “implausible” that “clear, unequivocal, and convincing” could signify a fourth burden of proof—“something between clear and convincing evidence and proof beyond a reasonable doubt”—because the Supreme Court has “repeatedly emphasized that there are three burdens of proof . . .”<sup>147</sup>

But as previously noted, and as a dissenting judge in *Mondaca-Vega* observed, the Supreme Court “has never suggested that standards of proof are limited to these three general levels.”<sup>148</sup> Rather, the Supreme Court has repeatedly recognized a continuum of proof, in addition to acknowledging that a spectrum exists even within the intermediate standard.<sup>149</sup> Indeed, in *Woodby*, the Court observed that *Schneiderman*’s “clear, unequivocal, and convincing” standard—or an “even higher one”—is no stranger to civil law.<sup>150</sup> This alone directly conflicts with *Mondaca-Vega*’s finding that the Supreme Court has found there are only three standards of proof.

*Mondaca-Vega* also conflicts with *Addington*. There, as previously noted, the Supreme Court held that the “clear and convincing” evidence was the standard required to satisfy due process in involuntary commitment proceedings.<sup>151</sup> And because the trial court had required “clear, unequivocal, and convincing” evidence, the Court remanded to the Texas Supreme Court and directed *it* to decide whether Texas law requires a “burden equal to or greater than the ‘clear and convincing’ standard”

144. *Id.*

145. *Id.* at 422.

146. *Id.* (“[T]here are three burdens of proof . . . Three is enough.” (citations omitted)).

147. *Id.* at 421–22 (citations omitted).

148. *Id.* at 429 (Smith, J., dissenting).

149. *See, e.g., Addington v. Texas*, 441 U.S. 418, 423 (1979); *Woodby v. INS*, 385 U.S. 276, 285 n.18 (1966).

150. *Woodby*, 385 U.S. at 285 n.18; *see also California ex rel. Cooper v. Mitchell Bros.’ Santa Ana Theater*, 454 U.S. 90, 93 (1981) (per curiam) (“This Court has, on several occasions, held that the ‘clear and convincing’ standard or one of its variants is the appropriate standard of proof in a particular civil case.”).

151. *Addington*, 441 U.S. at 419–20, 433.

required to satisfy due process.<sup>152</sup> Thus, if there were only three standards of proof as *Mondaca-Vega* found, the Court in *Addington* would have had no reason to leave it to the Texas Supreme Court to determine whether to adopt the “clear, unequivocal, and convincing” standard applied by the trial court—the two would have been formulations of the same standard. But *Addington* remanded.<sup>153</sup> And on remand, the Texas Supreme Court adopted the “clear and convincing” standard of proof, and held that because the trial court had employed the “stricter” “clear, unequivocal, and convincing” standard, the trial judge’s error was harmless.<sup>154</sup>

Moreover, in concluding that there are only three standards, the court in *Mondaca-Vega* also found that “it defies reason to think that a fourth burden of proof could be meaningfully distinguished and distinctly applied.”<sup>155</sup> But as previously noted, empirical research shows otherwise; indeed, research consistently shows that judges can and do distinguish between more than three standards of proof.<sup>156</sup> And even if judges could not, the Supreme Court has repeatedly explained that “clear, unequivocal, and convincing” evidence is akin to the reasonable doubt standard; therefore, immigration judges would be applying a well-established standard, albeit in the civil context,<sup>157</sup> not a “nebulous” standard that requires the “hair-splitting” the *Mondaca-Vega* court expressed concern with.<sup>158</sup>

To that point, however, the court rejected that the “clear, unequivocal, and convincing” standard could be interpreted as meaning “beyond a reasonable doubt,” because “[t]he Supreme Court surely knows how to use the phrase ‘beyond a reasonable doubt’ when it wants to[,but i]n the

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152. *Id.* at 433.

153. *Id.*

154. *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

155. *Mondaca-Vega v. Lynch*, 808 F.3d 413, 422 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 36 (2016).

156. *See, e.g., United States v. Fatico*, 458 F. Supp. 388, 411 (E.D.N.Y. 1978) (analyzing results of surveyed circuit court judges’ view of four standards of proof).

157. In a parenthetical, the court found the reasonable doubt standard could not apply in immigration court, reasoning that “the Court has never required the ‘beyond a reasonable doubt’ standard to be applied in a civil case. This unique standard of proof . . . is regarded as a critical part of the moral force of the criminal law.” *Mondaca-Vega*, 808 F.3d at 421 (quoting *California ex rel. Cooper v. Mitchell Bros.’ Santa Ana Theater*, 454 U.S. 90, 93 (1981) (per curiam)). However, as noted in Part I, this statement was inaccurate when the Supreme Court issued that decision in 1981—*In re Winship* applied the reasonable doubt standard to a civil matter in 1970—and it remains inaccurate today. *See In re Winship*, 397 U.S. 258, 368 (1970) (holding the reasonable doubt standard is required in civil juvenile delinquency proceedings); *see also* Cloud, *supra* note 40, at 125 (observing that numerous states apply the reasonable doubt standard in deciding civil commitment cases).

158. *See Mondaca-Vega*, 808 F.3d at 422.

citizenship context . . . it has never done so.”<sup>159</sup> And the court is right; no Supreme Court case has ever stated that the standard for establishing alienage is “beyond a reasonable doubt.” But to be sure, a nearly half-century long line of Supreme Court cases have consistently described the *Schneiderman* standard as being the “[civil] equivalent to that enforced in criminal cases,” that is, it is “substantially identical with that required in criminal cases—proof beyond a reasonable doubt.”<sup>160</sup> Indeed, in *Knauer*, the Court affirmed the lower court’s application of the reasonable doubt standard, clearly equating it to the “clear, unequivocal, and convincing” standard, which the concurring opinion also referred to as requiring proof beyond a reasonable doubt.<sup>161</sup>

The *Mondaca-Vega* court did not address these precedents, perhaps because some are plurality opinions.<sup>162</sup> However, these plurality opinions are still highly persuasive here given their temporal proximity to *Schneiderman*; indeed, members of the *Schneiderman* bench were the plurality’s authors. And *Knauer* was a majority opinion. Thus, it is not possible to reconcile *Knauer* with *Mondaca-Vega*’s finding that the only way a court could require proof beyond a reasonable doubt is by articulating the “beyond a reasonable doubt” formulation.

Finally, *Mondaca-Vega* compared the Supreme Court’s formulation of the “clear, unequivocal, and convincing” standard and concluded that the Court used it interchangeably with the “clear and convincing” standard.<sup>163</sup> As an example of this, the court noted that *Baumgartner*—a denaturalization case issued less than a year after *Schneiderman*—required “clear, unequivocal, and convincing” evidence, and *Pullman-Standard v. Swint*, described *Baumgartner* as deciding “whether or not the findings of the two lower courts satisfied the *clear and convincing* standard of proof necessary to sustain a denaturalization decree.”<sup>164</sup> Consequently, the *Mondaca-Vega* court decided against “mechanistically conclud[ing] that the phrase [“clear, unequivocal, and convincing”] signifies a burden of proof higher than the familiar intermediate standard simply because it contains the additional word ‘unequivocal.’”<sup>165</sup>

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159. *Id.* at 421.

160. *See, e.g.*, *Kungys v. United States*, 485 U.S. 759, 792 (1988); *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

161. *Knauer v. United States*, 328 U.S. 654, 660 (1946).

162. *See Mondaca-Vega*, 808 F.3d at 422.

163. *Id.* at 420.

164. *Id.* (emphasis added).

165. *Id.*

The court's analysis on this point is misguided for three reasons. First, in its usage comparison, the court did not include the dependent clause that the Court consistently used to explain the meaning of equivocal—proof “that leaves no troubling doubt”—in its analysis.<sup>166</sup> As noted in Part II, scholars have long observed that the Court's use of explanatory phrases is key to understanding the standard's intended stringency, and only *after* that stringency is well-developed in case law and understood by factfinders are those dependent clauses no longer necessary.<sup>167</sup> Here, however, the dependent clause remains necessary to determining what stringency the Court intended for this standard to demand. Thus, the court's starting point—comparing the truncated formulation of the standard with the “clear and convincing” standard—takes its analysis off course.

Second, as proof that the Court uses the standards interchangeably, *Mondaca-Vega* cites *Pullman-Standard*'s footnote reference to *Baumgartner*.<sup>168</sup> *Pullman-Standard* was a Title VII case from the 1980s, while *Baumgartner* was a denaturalization case from 1945.<sup>169</sup> The issue in both cases was whether the Court could review the lower court's factual findings; the standard of proof was not at issue in *Pullman-Standard*.<sup>170</sup> Hence, *Pullman-Standard* referenced *Baumgartner*'s standard of proof only to explain why *Baumgartner* established that certain factual findings are subject to appellate de novo review, one being that the significance of the exacting *Schneiderman* standard of proof would be lost if the whole record were deemed a fact not subject to appellate review.<sup>171</sup> Given that the standard of proof was not at issue, the *Pullman-Standard* statement that *Baumgartner* required “clear-and-convincing” evidence is owed little weight, or as one judge observed, “[the *Pullman-Standard* Court's i]mprecise usage . . . is not a proper basis for concluding that words have no meaning, especially in light of the Supreme Court's clear and unambiguous directive regarding the burden of proof.”<sup>172</sup>

This leads to the *Mondaca-Vega* court's third error, which is that the court did not address the numerous Supreme Court cases that directly

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166. *See id.*

167. McBaine, *supra* note 57, at 256.

168. *Id.*

169. *Pullman-Standard v. Swint*, 456 U.S. 273, 275 (1982); *Baumgartner v. United States*, 322 U.S. 665, 666 (1944).

170. *Pullman-Standard*, 456 U.S. at 285–86, 288.

171. *Id.* at 286 n.16.

172. *Mondaca-Vega v. Lynch*, 808 F.3d 413, 432 (9th Cir. 2015) (Smith, J. dissenting), *cert. denied*, 137 S. Ct. 36 (2016).

analyze and apply the meaning of the “clear, unequivocal, and convincing” standard of proof.<sup>173</sup> This includes *Addington*—which held the “clear and convincing” standard was the appropriate standard in involuntary commitment cases not “clear, unequivocal, and convincing”—and *Knauer*—an immigration case that explicitly held that the “reasonable doubt” standard satisfied the “clear, unequivocal, and convincing” standard.<sup>174</sup>

Ultimately, *Mondaca-Vega*'s reasoning suggests that the Court's use of an imprecise formulation of the standard in one non-immigration case is owed more weight than the Court's precise and consistent formulation of the standard in numerous other immigration cases. But this logic necessarily ignores one of the key functions a standard serves—to signal to the factfinder the value society places on the right at stake and the accurate outcome of the case. For example, each time the Court enunciated the standard of proof required in these immigration cases, the Court explained why such an “unusually high” standard of proof is required: because the rights at stake are fundamental, and because the consequences of deportation are “unusually drastic” and “extraordinarily severe penalty.”<sup>175</sup> The Court has also explained that “[a]ny less exacting standard would be inconsistent with the importance of the right[s] . . . at stake . . . .”<sup>176</sup>

In *Mondaca-Vega*, however, the court found that the intermediate standard sufficiently safeguarded these rights.<sup>177</sup> In reaching this conclusion, the Court observed that in other cases involving fundamental rights, such as in cases terminating parental rights, the Court employs the intermediate, “clear and convincing” standard.<sup>178</sup> But the Supreme Court has made clear that not all fundamental rights are created equal; rather, U.S. citizenship is a supremely regarded right.<sup>179</sup> This is especially true

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173. *Id.* at 420.

174. *Addington v. Texas*, 441 U.S. 418, 432 (1979); *Knauer v. United States*, 328 U.S. 654, 660 (1946).

175. *See Kungys v. United States*, 485 U.S. 759, 776 (1988) (noting “the unusually high burden of proof in denaturalization cases”); *Addington*, 441 U.S. at 432 (explaining “the consequences to the individual were unusually drastic—loss of citizenship and expulsion from the United States”); *Trop v. Dulles*, 356 U.S. 86, 93 (1958) (plurality opinion) (noting that United States citizenship itself is a fundamental right); *Klapprott v. United States*, 335 U.S. 601, 612 (1949) (“recogniz[ing] the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty.”).

176. *Fedorenko v. United States*, 449 U.S. 490, 505–06 (1981).

177. *Mondaca-Vega*, 808 F.3d at 422.

178. *Id.*

179. *See, e.g., Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) (observing that citizenship is an American's “most basic right”); *Schneiderman v. United States*, 320 U.S. 118, 122 (1943) (observing that citizenship in the United States is “[t]he highest hope of civilized men”).

when someone who claims he is a citizen is placed in removal proceedings because, with limited exceptions, the Constitution affords no rights to noncitizens who are outside of the United States.<sup>180</sup> Hence, if an immigration judge errantly finds a citizen is an “alien” and he is removed from this country, he is not only stripped of his fundamental right to citizenship, but he is also stripped of all the other rights afforded by the Constitution. His removal therefore forces him to endure these “drastic deprivations,” in addition to “forsak[ing] all bonds formed here and go to a foreign land where he often has no contemporary identification.”<sup>181</sup> It is for these reasons that throughout United States history, courts have referred to errant deportation as “a penalty little less dreadful than death.”<sup>182</sup> In short, contrary to *Mondaca-Vega*’s reasoning, those whose parental rights are terminated simply do not suffer the same deprivation of rights as citizens who are banished from their home country.

Furthermore, in finding the clear and convincing standard was adequate, the *Mondaca-Vega* court did not address an additional function that standards serve—the allocation of risk of error among the litigants based on the rights at stake. Citizenship is the bedrock of our Republic; “it is U.S. citizens alone who give the government power.”<sup>183</sup> And a key aspect of self-governance requires that the government cannot lightly take away one’s citizenship.<sup>184</sup> By allocating almost all of the risk of error to the government to prove the person it seeks to remove from the country is an “alien,” not a U.S. citizen, the “clear, unequivocal, and convincing” standard of proof therefore protects the precious right of citizenship and also the structure of our government.

This section has highlighted the many reasons why *Mondaca-Vega* cannot be reconciled with Supreme Court precedents, the chief reason

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180. See, e.g., *Hernandez v. United States*, 785 F.3d 117, 120–21 (5th Cir. 2015), *vacated and remanded sub. nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (finding unarmed, fifteen-year-old noncitizen’s parents could not assert constitutional claims after U.S. Border Patrol Agent on U.S. soil shot and killed noncitizen standing on Mexican soil); see also *Denmore v. Kim*, 538 U.S. 510, 521–22 (2003) (“Congress regularly makes rules that would be unacceptable if applied to citizens.”).

181. *Woodby v. INS*, 385 U.S. 276, 285 (1966) (“This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.”).

182. See, e.g., *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“To deport one who so claims to be a citizen obviously deprives him of liberty, . . . [and] [i]t may result also in loss of both property and life, or of all that makes life worth living.” (citations omitted)); *Carmichael v. Delaney*, 170 F.2d 239, 245 (9th Cir. 1948) (“Throughout history[,] banishment or exile has been looked upon as a penalty little less dreadful than death.”).

183. FIRR Amicus Brief, *supra* note 9, at \*6.

184. *Id.*

being that the Court has never limited factfinders to three standards of proof. The Court has repeatedly described the “clear, unequivocal, and convincing” standard as the civil equivalent to the reasonable doubt standard, which puts a significant distance between it and the “clear and convincing” standard on the continuum of proof. Courts analyzing this issue in the future should follow this unbroken line of precedents and conclude that the “clear, unequivocal, and convincing” standard is more onerous than the “clear and convincing” standard.

*D. Statutory Interpretation*

The “clear, unequivocal, and convincing” and the “clear and convincing” standards of proof are both codified in the INA.<sup>185</sup> Therefore, courts may be presented with the question of whether these standards of proof are different in either the context of case law precedent, as both the *Ward* and *Mondaca-Vega* courts were, or in the context of statutory construction. This section analyzes how courts should resolve this issue under the guidance of canons of statutory interpretation. Importantly, this analysis is relevant to both contexts this question may arise in; the conclusion a court reaches necessarily impacts the issue in both the case law and statutory interpretation contexts.

The “starting point in every case involving construction of a statute is the language itself.”<sup>186</sup> Courts therefore assign the plain meaning to every word of the statute at issue.<sup>187</sup> To determine the plain meaning, canons of statutory construction instruct “the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”<sup>188</sup> And “where there is no ambiguity in the words, there is no room for [further] construction.”<sup>189</sup>

Here, applying these rules of construction show that the “clear, unequivocal, and convincing” standard is different than the “clear and convincing” standard. Turning first to the statutory language. In 8 U.S.C. § 1229a(b)(5)(A), Congress requires “clear, unequivocal, and convincing” evidence that the noncitizen to being ordered removed in absentia was served with written notice and that the noncitizen is removable.<sup>190</sup> By

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185. 8 U.S.C. §§ 1229a(b)(5)(A), (c)(3)(A) (2012).

186. *Watt v. Alaska*, 451 U.S. 259, 265 (1981).

187. *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003).

188. *Id.*

189. *Yates v. United States*, 354 U.S. 298, 305 (1957), *overruled in part by Burks v. United States*, 437 U.S. 1 (1978).

190. 8 U.S.C. § 1229a(b)(5)(A).

contrast, in section 1229a(c)(3)(A), Congress requires the government to provide “clear and convincing” evidence that the person it seeks to remove is a deportable noncitizen.<sup>191</sup> Because Congress used different words within the statute to describe the government’s requisite standard of proof for different types of proceedings, Congress therefore must have intended to convey different standards of proof.<sup>192</sup>

To determine the intended stringency of these two standards, a court must determine the plain meaning of “unequivocal.” The INA does not define this term.<sup>193</sup> The Supreme Court, however, has: “The term ‘unequivocal,’ taken by itself, means proof that admits of no doubt, a burden approximating, if not exceeding, that used in criminal cases.”<sup>194</sup> Given that the Court announced this definition prior to the enactment of IIRIRA, courts are to presume Congress was aware of the meaning of unequivocal when it incorporated it into the INA.<sup>195</sup> Thus, Congress intended for the government to meet a higher standard—one that requires “unequivocal” evidence—when seeking to remove someone who is absent from her removal hearing compared to when it seeks to remove someone who is present. This conclusion is bolstered when considering the core function of a standard of proof—to allocate the risk of error based on importance of the rights at stake. And in absentia removal proceedings, not only are the precious rights of citizenship and presence in this country potentially at stake, so are the absent individual’s due process rights to a full and fair hearing.

To conclude otherwise—that is, to conclude that Congress intended for these two standards to carry the same meaning—would require a court to write the word “unequivocal” out of the statute. This would, however, violate the cardinal rule to give meaning to every word in the statute.<sup>196</sup> This would also invert the purpose of a standard of proof. That is, the standard of proof would not safeguard the additional rights at stake in an individual’s absentia removal proceedings; instead, the same burden of proof (and allocation of risk) would apply regardless of whether the noncitizen is present. This result is untenable.

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191. 8 U.S.C. § 1229a(c)(3)(A).

192. See *McCarthy*, 322 F.3d at 656.

193. See, e.g., 8 U.S.C. § 1101 (2012).

194. *Addington v. Texas*, 441 U.S. 418, 432 (1979).

195. *Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 554 (9th Cir. 1991) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988)) (“Congress is presumed to be knowledgeable about existing law pertinent to any new legislation it enacts”).

196. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)) (applying the “cardinal rule that, if possible, effect shall be given to every clause and part of a statute”).

Courts should consider this statutory analysis even if the question of whether these standards are different arises from case law, rather than from the statutory provisions of the INA because the conclusion a court reaches in deciding this question directly impacts the meaning of the standards in both contexts. For example, in *Mondaca-Vega*, the court declined to engage in statutory construction because the “clear, unequivocal, and convincing” standard at issue there was “entirely of judicial construct.”<sup>197</sup> But its holding necessarily directs immigration judges to equate the standards, even in the statutory context. That is, immigration judges in the Ninth Circuit will now require only “clear and convincing” evidence in absentia hearings pursuant to *Mondaca-Vega*. Therefore, *Mondaca-Vega* indirectly rewrote the INA’s statutory language. This too is untenable.

This section shows that the “clear, unequivocal, and convincing” standard in immigration law signifies a third civil standard of proof. This Part shows that separately and together, Supreme Court precedent and the INA regard this standard as reasonable doubt’s civil counterpart. This, in addition to the policy concerns addressed in the next Part, seriously calls into question the wisdom of the widely held belief that there are only three standards of proof.

#### IV. POLICY CONSIDERATIONS

The previous Part’s analysis of case law and statutory interpretation shows that the “clear, unequivocal, and convincing” standard of proof is more onerous than the “clear and convincing” standard. This Part’s exploration of policy considerations lends further support to that conclusion.

##### *A. The Detention and Deportation of U.S. Citizens*

Currently, the government is required to establish the alienage of an individual in removal proceedings with “clear, unequivocal, and convincing” evidence.<sup>198</sup> But given that U.S. citizens are commonly detained and deported, immigration judges are clearly not requiring the government to provide evidence that “does not leave ‘the issue [of alienage] in doubt.’”<sup>199</sup> Instead, immigration judges, like the court in

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197. *Mondaca-Vega v. Lynch*, 808 F.3d 413, 420 (“Our task today is not to apply canons of statutory construction; the burden of proof in alienage determination proceedings is entirely a judicial construct.”), *cert. denied*, 137 S. Ct. 36 (2016).

198. See *supra* note 118.

199. FIRR Amicus Brief, *supra* note 9, at \*7, 12 (arguing that the reason U.S. citizens are

*Mondaca-Vega*, appear to view this standard as requiring “highly probable” evidence of alienage at best.<sup>200</sup> This misunderstanding of the standard’s stringency causes severe, often irreparable consequences.

It is not known with certainty how often the government detains and deports U.S. citizens, largely because it goes unreported.<sup>201</sup> Still, the empirical research of Northwestern professor Jacqueline Stevens and the statements of numerous immigration experts all indicate that the U.S. government detains and deports citizens on a regular basis.<sup>202</sup> Stevens’ research, for example, suggests that in 2010, “well over 4,000 U.S. citizens were detained or deported as aliens, raising the total since 2003 to more than 20,000.”<sup>203</sup> Though this research is anecdotal, and even Stevens acknowledges that this “figure that may strike some as so high as to lack credibility,” numerous other sources, including immigrant rights nonprofits and immigration experts, agree with Stevens’ findings.<sup>204</sup>

In 2008, for example, immigration expert Kara Hartzler testified to Congress that “U.S. citizens are being detained and deported from the United States not monthly or weekly, but on a daily basis.”<sup>205</sup> Hartzler also testified that she saw “40 to 50 cases per month in which individuals with potentially valid claims to U.S. citizenship [we]re being detained and deported.”<sup>206</sup> One of those cases was Thomas Warziniack’s.<sup>207</sup>

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routinely placed in removal proceedings, detained, and deported is because “immigration judges are not holding the government to the exacting ‘clear, unequivocal, and convincing’ standard for establishing alienage”).

200. *Mondaca-Vega*, 808 F.3d at 422; see also *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Security and Int’l. L. of the H. Comm. on the Judiciary*, 110th Cong. 42 (2008) (statement of Kara Hartzler, Att’y, Florence Immigrant and Refugee Rights Project) [hereinafter ICE Hearing], <https://ia600405.us.archive.org/24/items/gov.gpo.fdsys.CHRG-110hhr40742/CHRG-110hhr40742.pdf> (“U.S. citizens are being detained and deported from the United States not monthly or weekly, but on a daily basis.”).

201. See Stevens, *supra* note 1, at 618 (observing that the actual number of U.S. citizens deported is unknowable due largely to DHS’s policy “not to maintain records of U.S. citizens . . . [it] has detained or deported”).

202. See *id.* at 613 n.17, 618, 630; see also ICE Hearing, *supra* note 200, at 42 (statement of Kara Hartzler, Att’y, Florence Immigrant and Refugee Rights Project); FIRR Amicus Brief, *supra* note 9, at \*12.

203. Stevens, *supra* note 1 at 608.

204. *Id.*; FIRR Amicus Brief, *supra* note 9, at \*19 (“While somewhat less common now than in 2008, *amicus* continues to see individuals with potentially valid claims to U.S. citizenship being placed in removal proceedings, detained, and deported on a regular basis.”); see also *supra* note 8 and accompanying text.

205. ICE Hearing, *supra* note 200, at 42 (statement of Kara Hartzler, Att’y, Florence Immigrant and Refugee Rights Project).

206. *Id.* at 40.

207. *Id.*

Thomas was born in Minnesota.<sup>208</sup> He has a mental illness and heroin addiction.<sup>209</sup> After he was arrested on a minor drug charge, he told officers that he was a Russian army colonel who was shot and stabbed in Afghanistan and that he swam to America from a Russian submarine.<sup>210</sup> Thomas was then placed in removal proceedings.<sup>211</sup> Based on this testimony, the immigration judge found the government proved Thomas' alienage with "clear, unequivocal, and convincing" evidence, and he was transferred to an immigration detention facility in Florence, Arizona.<sup>212</sup> Thomas began "working in the prison kitchen for a dollar a day until he had the money to order [a copy of his U.S. birth certificate]," which he eventually obtained and used to prove his citizenship with Hartzler's help.<sup>213</sup>

Peter Guzman, a U.S. citizen born in California who has limited mental capacity, was not able to avoid deportation.<sup>214</sup> In 2007, he was incarcerated for 40 days on a trespassing charge, during which immigration officials "interviewed him and asked if he was a citizen"—despite having records of his citizenship.<sup>215</sup> Peter repeatedly told them he was a U.S. citizen.<sup>216</sup> He also "complained of hearing voices while in custody, and was prescribed anti-psychotic medication."<sup>217</sup> Eventually, Peter agreed to the agents' insistence that he was actually born in Mexico, like his parents were.<sup>218</sup> After Peter signed a voluntary departure order, he was placed on a bus with \$3 and taken to Tijuana.<sup>219</sup> There, he survived for three months by eating out of garbage cans.<sup>220</sup> Peter's mother went to Tijuana to find him; "[w]hen her money ran out after three days, she slept

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208. FIRRP Amicus Brief, *supra* note 9, at \*18.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at \*19.

214. *Id.* at \*22–23.

215. *Id.* at \*22; *see also* ICE Hearing, *supra* note 200 at 30 (statement of James J. Brosnahan, Senior Partner, Morrison & Foerster, LLP) (Mr. Guzman's attorney testified to Congress that "[t]hey had . . . [evidence of Mr. Guzman's citizenship] in their computers, but they didn't look, evidently, so they say.").

216. FIRRP Amicus Brief, *supra* note 9, at \*22.

217. *Id.* at \*23.

218. *Id.*; *see also* ICE Hearing, *supra* note 200, at 30 (statement of James J. Brosnahan, Senior Partner, Morrison & Foerster, LLP) ("And [the interviewing agent] said, 'But your parents were born in Mexico, you can't be a citizen, and sent him back to a holding cell and then brought him back again.'").

219. FIRRP Amicus Brief, *supra* note 9, at \*23.

220. *Id.*

in the closet-sized backroom of a banana warehouse, where she was allowed to stay in exchange for cooking for the warehouse workers . . . .<sup>221</sup>

Mark Lyttle, whose errant deportation to Mexico was discussed in the Introduction, Thomas, and Peter’s experiences are indicative of the demographic of people who are most susceptible to errant detention and deportation: They belong to racial and ethnic minorities, or are mentally ill, homeless, or indigent.<sup>222</sup>

By employing a standard of proof that requires “unequivocal” evidence of alienage—evidence that does not leave the issue of alienage “in doubt”—rather than evidence of alienage that is only “highly probable,” the occurrence of the U.S. government’s detention and deportation of its citizens would decrease, likely dramatically. This higher standard would also signal to the government that more compelling proof of alienage is required; this too would likely curtail the government’s initial placement of citizens in removal proceedings. Also, requiring a standard greater than “clear and convincing” would further safeguard the rights of the vulnerable populations who are most often errantly detained and deported. Further, given that alienage determinations are subject to limited review on appeal, a heightened standard protects the precious right of citizenship that is at stake.<sup>223</sup> Finally, a more onerous standard of proof that allocates almost all of the risk of error to the government to prove the individual is an “alien” would signal to the factfinder how supremely important it is to society that judges order only noncitizens removed. For these reasons, immigration courts should view the “clear, unequivocal, and convincing” standard as requiring higher proof of alienage than the “clear and convincing” standard.<sup>224</sup>

### *B. The Implicit Biases of Immigration Judges*

Requiring “clear, unequivocal, and convincing” evidence of alienage—that is, evidence that does not leave the issue in doubt—will further protect the countless, vulnerable citizens errantly placed in removal

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221. *Id.*

222. *Id.* at \*19.

223. *See, e.g., Mondaca-Vega v. Lynch*, 808 F.3d 413, 417 (9th Cir. 2015) (“The petitioner argues we must review the [lower] court’s findings [of alienage] de novo. We hold, instead, that the ‘clear error’ standard of Federal Rule of Civil Procedure 52(a) applies.”), *cert. denied*, 137 S. Ct. 36 (2016).

224. These reasons also underscore why immigration judges should regard this standard as requiring heightened proof when ordering an individual removed in absentia under 8 U.S.C. § 1229a(b)(5)(A) (2012).

proceedings from the well-documented implicit biases of immigration judges.

Implicit biases—also termed “hidden” and “unconscious” biases—are “bits of knowledge” our brains store about social groups after having frequently encountered them.<sup>225</sup> “Once lodged in our minds, hidden biases can influence our behavior toward members of particular social groups, but we remain oblivious to their influence.”<sup>226</sup> For example, “[w]hen the brain has to process large volumes of information quickly, there is a tendency to rely on experiences rather than on unique details in the present.”<sup>227</sup> When judging people in this strained state, the brain falls back on the “bits of knowledge” it has stored regarding generalizations about race, age, country of origin, religion or gender, rather than evaluating that particular individual.<sup>228</sup> Thus, implicit bias against groups of people is subjective, “largely automatic, and occurs below the level of conscious awareness,” making it difficult for the individual harboring the bias to identify and nearly impossible for others to identify.<sup>229</sup> Indeed, even though we all harbor implicit biases, “most people find it unbelievable that their behavior can be guided by mental content of which they are unaware.”<sup>230</sup>

Research shows that in judicial decision-making, most judges are able to suppress their implicit biases, which prevents bias from clouding their decisions.<sup>231</sup> But this is not necessarily true of immigration judges, largely due to the conditions that immigration judges work under—“fast paced, high pressure and culturally charged.”<sup>232</sup> Experts say that these conditions, coupled with the fact high cognitive loads yield more mistakes make misjudgments “all but inevitable.”<sup>233</sup>

In 2011, Professor Fatma Marouf examined the effect of implicit bias on immigration judges and the BIA.<sup>234</sup> Drawing on her novel research,

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225. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* xii (2013).

226. *Id.*

227. Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 4, 2016), <https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html>.

228. *Id.*

229. Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 483 (2008); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 418 (2011) [hereinafter Marouf, *Implicit Bias*].

230. BANAJI & GREENWALD, *supra* note 225.

231. Marouf, *Implicit Bias*, *supra* note 229, at 428.

232. Dickerson, *supra* note 227.

233. *Id.*

234. Marouf, *Implicit Bias*, *supra* note 229.

she concluded that immigration judges are especially prone to implicit bias because they: (1) do not have the “structural and professional norms to remain impartial and independent”; (2) have limited opportunities to engage in deliberate thinking; (3) have low motivation resulting from high levels of stress and burnout; (4) must decide legally and factually complex cases; and (5) make decisions that are often subjected to limited review by the BIA and federal courts of appeal.<sup>235</sup> Each of these factors further highlights the need for imposing a heightened evidentiary burden on the government when establishing alienage.

First, the structure of immigration judgeships raises concerns over immigration judges’ ability to be impartial and independent. Unlike federal judges who derive their authority from Article III of the Constitution and enjoy the independence that accompanies a lifetime appointment, almost all immigration judges are appointed after serving long careers within the Department of Justice, prosecuting immigration cases.<sup>236</sup> And even as immigration judges, their autonomy remains inhibited; immigration judges still answer to the Attorney General who appointed them.<sup>237</sup> In addition to lacking genuine independence, immigration judges are permitted to interrogate, examine, and cross-examine witnesses.<sup>238</sup> Thus, with over forty percent of individuals in removal unrepresented,<sup>239</sup> an immigration judge can easily abuse his or her authority.

An immigration judge’s neutrality is especially worrisome “when one considers that respondents in removal proceedings do not have any of the protections against bias that characterize criminal trials, such as voir dire and peremptory strikes, although deportation is akin to criminal punishment in its severity.”<sup>240</sup> And as Marouf correctly notes, “[t]he lack of genuine independence of [immigration judges], coupled with their inquisitorial role, creates a situation where the guidelines for appropriate behavior are unclear, which allows implicit bias to go unchecked and contributes to discrimination in deciding cases.”<sup>241</sup>

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235. *Id.* at 429–41.

236. *Id.* at 429; Benedetto, *supra* note 229, at 472.

237. 8 U.S.C. § 1101(b)(4) (2012) (stating that an immigration judge is “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review”).

238. 8 U.S.C. § 1229a(b)(1) (2012).

239. *See* U.S. DEP’T. OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., FY 2015 STATISTICS YEARBOOK F1 (2016) [hereinafter 2015 STATISTICS YEARBOOK], <https://www.justice.gov/eoir/page/file/fysb15/download>.

240. Marouf, *Implicit Bias*, *supra* note 229, at 430.

241. *Id.*

Furthermore, when an individual's implicit and explicit beliefs conflict, the implicit belief becomes the "default," and the explicit belief can override the implicit only if the individual has the cognitive capacity available to do so.<sup>242</sup> And given that immigration judges are extremely overworked, they face severe burnout, low motivation, exhaustion, and even depression.<sup>243</sup> An average immigration judge handles over 1,800 cases per year, more than three times the average caseload of federal judges.<sup>244</sup> Some immigration judges have as many as 6,000 cases each.<sup>245</sup> One judge on the Arlington Immigration Court is described as having to decide twenty-six cases before lunch—spending only seven minutes per case.<sup>246</sup> And this is actually an improvement.<sup>247</sup>

Because immigration law itself is known to be extremely complex in nature—both legally and factually—these conditions that immigration judges must decide cases in "all encourage reliance on intuition, rather than conscious, deliberative thought, which takes more time and energy," making it harder, if not impossible, to suppress implicit bias.<sup>248</sup> This is especially true in the context of discretionary decisions, such as credibility, which are subject to extremely limited review by the BIA and circuit court.<sup>249</sup> As background, when the government provides prima facie

242. *Id.* at 431.

243. *See, e.g.*, Benedetto, *supra* note 229, at 472; Dickerson, *supra* note 227 ("Immigration judges have higher burnout rates than hospital workers and prison wardens . . ."); Marouf, *Implicit Bias*, *supra* note 229, at 429–41; Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 243 (2015) [hereinafter Marouf, *Restraints in Removal Proceedings*] (noting that "[o]ne judge described the job as a 'factory assembly line' while another compared it to the 'drip-drip-drip of Chinese water torture . . .'" (quoting Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 58–59 (2008))).

244. *See* 2015 STATISTICS YEARBOOK, *supra* note 239, at W1; Daniel Costa, *Overloaded Immigration Courts: With Too Few Judges, Hundreds of Thousands of Immigrants Wait Nearly Two Years for a Hearing*, ECON. POL'Y INST. (July 24, 2014), <http://www.epi.org/publication/immigration-court-caseload-skyrocketing/>.

245. Costa, *supra* note 244.

246. Eli Saslow, *In a Crowded Immigration Court, Seven Minutes to Decide a Family's Future*, WASH. POST (Feb. 2, 2014), [https://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-family's-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3\\_story.html](https://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-family's-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html).

247. Marouf, *Implicit Bias*, *supra* note 229, at 432.

248. Marouf, *Restraints in Removal Proceedings*, *supra* note 243, at 433; *see also* Marouf, *Implicit Bias*, *supra* note 229, at 433 (also observing that "IJs generally give their decision orally as soon as the testimony is completed. The use of oral decisions in such complex cases itself interferes with a deliberate, individualized, and analytically sophisticated approach, encouraging instead the use of generic and formulaic responses to factually and legally complex claims" (footnotes omitted)).

249. 8 C.F.R. § 1003.1(d)(3)(i) (2017) (mandating that on appeal to the BIA, "[f]acts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.").

evidence of an individual's alleged alienage, the burden shifts to the individual to provide evidence of citizenship.<sup>250</sup> But if the judge does not find the individual credible, his citizenship evidence is severely discounted.<sup>251</sup> Thus, a judge's alienage finding often rests on the individual's credibility, not on the sufficiency of the government's evidence.<sup>252</sup> And on appeal, the immigration judge's credibility finding is protected by the deferential "clear error" standard of review.<sup>253</sup>

These factors all make immigration judges particularly susceptible to implicit bias.<sup>254</sup> Indeed, numerous case studies and court decisions confirm that implicit bias is a problem particularly among the immigration bench.<sup>255</sup> And in the context of alienage determinations, an immigration

250. *Murphy v. INS*, 54 F.3d 605, 608 (9th Cir. 1995).

251. *Boateng v. Holder*, No. CV13-00631-PHX-DGC, 2013 WL 5353003, at \*2-6 (D. Ariz. Sept. 25, 2013).

252. *Id.*

253. *Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012) (explaining that "[f]acts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous." (quoting 8 C.F.R. § 1003.1(d)(3)(i))).

254. *Marouf, Restraints in Removal Proceedings*, *supra* note 243243, at 242 ("Studies have shown that the conditions of decision-making play a critical role in the behavioral expression of implicit biases by either promoting or impeding deliberative thinking. Judges are more likely to think deliberatively when they take their time to make decisions, provide written opinions, and receive feedback. Unfortunately, immigration judges have none of these luxuries. They carry enormous caseloads and normally issue oral decisions as soon as a merits hearing is over." (citations omitted)).

255. In 2005, for example, Judge Posner of the Seventh Circuit sharply criticized immigration judges ("IJs") for what the court observed as an extensive pattern of judicial bias and inappropriate behavior on the bench. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). Judge Posner cited a long list of Seventh Circuit cases issued within the year, all rebuking the conduct of IJs and the BIA; this list included:

*Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) ("The IJ's opinion is riddled with inappropriate and extraneous comments[.]"); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("This very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case[.]"); *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) ("The procedure that the IJ employed in this case is an affront to [petitioner's] right to be heard[.]"); *Soumahoro v. Gonzales*, 415 F.3d 732, 738 (7th Cir. 2005) (*per curiam*) (finding the IJ's factual conclusion to be "totally unsupported by the record"); *Grupee v. Gonzales*, 400 F.3d 1026, 1028 (7th Cir. 2005) (finding the IJ's unexplained conclusion to be "hard to take seriously").

*Id.*

Judge Posner also cited cases from other circuits, including:

*Qun Wang v. Att'y Gen. of the United States* [sic], 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding"); *Jin Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (finding the IJ's finding to be "grounded solely on speculation and conjecture"); *Fiadjoe v. Att'y Gen. of the United States* [sic], 411 F.3d 135, 154-55 (3d Cir. 2005) (noting that the IJ's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding");

judge's implicit bias can create in an insurmountable hurdle for a citizen, especially if that citizen is unrepresented, a minority, or mentally ill.<sup>256</sup>

Therefore, by requiring the government to prove alienage with “clear, unequivocal, and convincing” evidence—a more onerous standard than the “clear and convincing” standard—the rights of U.S. citizens errantly placed in removal proceedings will more adequately safeguarded from these implicit biases, thereby reducing the occurrence of deported U.S. citizens.

## V. CONCLUSION

This Article challenged the widely held belief that there are only three standards of proof—two for civil proceedings, and one for criminal. It analyzed immigration law's “clear, unequivocal, and convincing” standard under Supreme Court precedent, statutory interpretation, and policy considerations. From this, the Article concluded that the “clear, unequivocal, and convincing” standard signifies a third civil standard of proof, one that is more stringent than the intermediate “clear and convincing” standard. Thus, this Article represents an initial effort to reshape the existing view of standards of proof; rather than restricting factfinders to a defined set of standards of proof, courts and scholars should be guided by the Supreme Court's emphasis that standards of proof exist on a continuum.

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Korytnyuk v. Ashcroft, 396 F.3d 272, 292 (3d Cir. 2005) (“[I]t is the IJ's conclusion, not [the petitioner's] testimony, that ‘strains credulity.’”).

*Id.*

Numerous other circuit courts have also criticized immigration judges' bias. *See, e.g.*, Benedetto, *supra* note 229, at 492 n.149.

256. *See, e.g.*, Benedetto, *supra* note 229, at 490 (“Disparities in the grant rates of immigration judges were successfully correlated to differences in biographical information of the judges. For example, the study found that female immigration judges granted asylum in 53.8% of asylum cases, while male judges granted relief in only 37.3% of asylum cases. In addition, immigration judges with prior work experience on the prosecutorial side of immigration proceedings were 24% less likely to grant asylum than those with no prior government experience. Notably, all judges with immigration law backgrounds appointed by the Bush administration since 2001 had prosecutorial experience.” (citations omitted)); Dickerson, *supra* note 227 (“More than 40 percent of immigrants come to court without a lawyer, but even when lawyers are involved, they say immigrants who are educated, articulate and white have an easier time gaining the court's sympathy.”); Hillary Gaston Walsh, *Forever Barred: Reinstated Removal Orders and the Right to Seek Asylum*, 66 CATH. U. L. REV. 613 (2017) (analyzing data showing that immigration judges grant significantly fewer claims of pro se respondents compared to similar claims made by represented respondents); Teresa Cannistraro, Comment, *A Call for Minds: The Unknown Extent of Societal Influence on the Legal Rights of Involuntarily and Voluntarily Committed Mental Health Patients*, 19 ANNALS HEALTH L. 425, 425 (2010) (“[N]o one seems to understand the extent to which the social stigma against the mentally ill influences decisions of players in the legal system.”).