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Persons Who are Not the People: The Changing Rights of Immigrants in the United States

Geoffrey Heeren

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Abstract

Non-citizens have fared best in recent Supreme Court cases by piggybacking on federal rights when the actions of states are at issue, or by criticizing agency rationality when federal action is at issue. These two themes—federalism and agency skepticism—have proven in recent years to be more effective litigation frameworks than some individual rights-based theories like equal protection. This marks a substantial shift from the Burger Court era, when similar cases were more likely to be litigated and won on equal protection than on preemption or Administrative Procedure Act theories. This Article describes this shift, considers the reasons for it, and makes a normative argument that the change is a cause for concern. To make this claim, the Article sets out a theoretical framework of rights of personhood and membership, offers a history of immigrant rights, and suggests that the shift away from equal protection as a mode of analysis might reflect a decreased willingness to recognize non-citizens as members of civil society. The Article critiques this shift as inconsistent with democratic values.

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I. INTRODUCTION

As the Supreme Court recently debated the fate of Arizona's effort to crack down on unauthorized immigration, protestors gathered in the sun-drenched space between the Capitol and the Supreme Court. On the left (facing away from the Court, toward the Capitol), protestors chanted, "*el pueblo unido jamás será vencido*"—the people united will never be defeated.[1] On the right, a protestor held a sign with a simple rejoinder: "We Are a Nation of USA Citizens."[2]

The two slogans raise competing claims about who is entitled to concern and respect in the United States. The sign implied a nation of citizens owes nothing to non-citizens. On the other hand, a united "people" might be composed of more than just citizens; it could include persons with other types of connections to the United States, or it could even refer, in the sense of left-wing politics, to the proletariat. Both, in other words, might be communitarian slogans, with each defining community differently. Read another way, the chant might also be staking a liberal claim—"the people" could simply be all persons, every one of whom is entitled to core freedoms.[3]

Each of these readings reflects a different view about the scope of American rights. Do rights in this country belong to all persons or just to members, and if the latter, who are the rights-bearing members? Inside the Court, the Justices were also concerned about rights, but not individual ones. They considered the proper balance of state and federal rights—whether Arizona's enforcement regime was preempted by federal authority over immigration.

In another era, the Court might have concerned itself more closely with the questions of individual rights invoked by the protestors than the structural questions at the heart of *Arizona v.*

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1. *See* Natalie Camastra, *My Day at the Supreme Court Rallying Against SB1070*, Nuestra Vida, Nuestra Voz (Apr. 25, 2012), http://latinainstitute.wordpress.com/2012/04/25/my-day-at-the-supreme-court-rallying-against-sb1070/.

2. Dana Milbank, *On Immigration Case, Scalia Throws Fair, Impartial to the Wind*, Wash. Post, Apr. 26, 2012, at A2.

3. For a description of the debate between communitarianism and liberalism, see Michael J. Sandel, *Introduction*, *in* Liberalism and Its Critics 1, 5 (Michael J. Sandel ed., 1984). In essence, liberals of both the classical and modern variety take as a given that individuals have rights, and society exists to protect those rights. Communitarians flip this analysis, urging that rights and values have meaning only through the shared experience of members of a community.

United States. In 1982, for example, the Court considered both preemption and equal protection claims in *Plyler v. Doe*, a case in which Texas had attempted to cut off education for undocumented immigrant children.[4] The Court never addressed the preemption issue; it resolved the case on equal protection grounds.[5]

The Equal Protection Clause was enacted within the Fourteenth Amendment, a provision designed to remedy the subordination of slaves by guaranteeing both universal citizenship to persons born in the United States and equal protection of the law to all persons. In the same breath, it speaks of two types of rights: membership and personhood.[6] Its text goes to the heart of the debate outside the Supreme Court as *Arizona* was argued within—the promise and limitation of American rights. Yet *Arizona* did not address the Fourteenth Amendment.[7] One obvious explanation was that the federal government plaintiff was more preoccupied with its own rights than the rights of non-citizens. However, *Arizona* ought to be considered alongside a trend in which immigrant equal protection claims are less likely to be argued today than they were during the *Plyler* era.

In the 1970s and 1980s, the Court applied equal protection review to strike down a variety of legislation discriminating against non-citizens.[8] It seemed for a time that non-citizens' equal protection rights were robust, at least in the context of constitutional claims that did not concern the federal government's power to exclude or deport them.[9] But in the years since, the once sharp contours of the

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4. Plyler v. Doe, 457 U.S. 202, 208–09 (1982) (explaining that the District Court ruled favorably on both the plaintiffs' equal protection and preemption arguments; the Fifth Circuit upheld the equal protection claim but reversed on preemption).

5. *Id.* at 230.

6. U.S. Const. amend. XIV, § 1 (providing both that individuals "born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States" and that all *persons* are entitled to equal protection of the law).

7. *See* Arizona v. United States, 132 S. Ct. 2492 (2012).

8. *See* Bernal v. Fainter, 467 U.S. 216 (1984); Plyler v. Doe, 457 U.S. 202 (1982); Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

9. Scholars have distinguished between immigration and "alienage" cases, which involve the rights of non-citizens outside the context of citizenship, deportation and exclusion. *See* Linda Bosniak, The Citizen and the Alien 54

Court's equal protection analysis for non-citizens have begun to blur and even fade; the Court hasn't decided an equal protection case in favor of an immigrant in decades, the lower courts increasingly reject such claims, and litigators now avoid making them.[10] In another recent case, *Judulang v. Holder*, the Court reprised an equal protection issue resolved by the Second Circuit in 1976, but dealt with it instead on Administrative Procedure Act (APA) grounds.[11] The prior term, a majority of the Court couldn't agree on an appropriate analysis for an equal protection challenge to a citizenship provision, meaning the Court affirmed the lower court decision without issuing an opinion.[12]

The change is by no means complete—substantial exceptions can be found where the lower courts have upheld immigrants' equal protection claims,[13] and several important Supreme Court decisions in the past decades have affirmed immigrant rights other than equal protection.[14] Nonetheless, it is impossible to consider the Burger Court's decisions concerning immigrants and immigration alongside those of recent years without concluding that there has been a change.

The Court's immigration decisions from the past term show that non-citizens can still win federal cases. *Arizona* teaches that preemption theory is one way for non-citizens to win before the contemporary court. *Judulang*, where the Court ruled in the non-citizen's favor on APA grounds, is another good example of a successful strategy. Just as *Arizona* was preceded by a series of lower

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(2006). The Burger Court's principal equal protection decisions were all alienage cases. One explanation for the Court's divergent treatment of alienage and immigration cases is the "plenary power" doctrine, which precludes courts to a large extent from reviewing substantive constitutional claims in the immigration law context. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1627 (1992).

10. *See infra* Part II.D.

11. Judulang v. Holder, 132 S. Ct. 476 (2011).

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

13. *See* Hispanic Interest Coal. of Ala. v. Governor of Ala., No. 11-14535, 2012 WL 3553613 (11th Cir. Aug. 20, 2012); Dandamudi v. Tisch, 686 F.3d 66, 79 (2d Cir. 2012).

14. *See* Zadvydas v. Davis, 533 U.S. 678, 699–700 (2001) (indefinite detention of non-citizens would violate their right to due process); Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (failure to advise non-citizens of the deportation consequences of criminal convictions would violate their Sixth Amendment right to effective assistance of counsel).

court decisions finding state and local anti-immigrant laws to be preempted, *Judulang* can be viewed as part of a larger landscape of federal court decisions criticizing the irrationality of agency action.

For example, Judge Richard Posner of the Seventh Circuit has spearheaded a crusade against the Board of Immigration Appeals (the Board) and its lack of real oversight of an overworked and sometimes sloppy corps of immigration judges. In the process of doing so, he has authored a corpus of decisions that has significantly altered the face of immigration law and made himself into one of the most widely discussed jurists in immigration practice and scholarship.[15] Yet examination of a decade's worth of Judge Posner's immigration law decisions reveals that this pro-immigrant judge rarely ever mentions non-citizen's rights.[16] Instead, he scathingly criticizes the competence of the immigration agency—its adjudicators, laws and regulations, and bureaucratic machinery.[17]

These decisions teach that if an immigration lawyer wants to win an immigration appeal, she should not argue that her client has rights; she should assert that the immigration judge is incompetent, the Board indifferent, the bureaucracy inefficient, and the regulations irrational. Immigrants are the beneficiaries more than the subjects of these decisions. There is, to be sure, a rights principle implicit in them: the right to a fair procedure. This recognition of immigrants' procedural rights is consistent with other recent case law upholding immigrants' procedural rights in criminal cases or cases involving the quasi-criminal area of immigration detention.[18]

The administrative law, criminal procedure, and detention cases all involve rights claims in a traditional Lockeian sense—claims for freedom from heavy-handed governmental action. In contrast, when immigrants make communitarian claims for equal treatment—a share in the privileges and benefits of citizenship—their claims are increasingly rejected. In order to see this shift, it is necessary to understand the breadth of membership rights that immigrants in the

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15. *See, e.g.*, Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. Chi. L. Rev. 1671 (2007) (considering two possible bases for Judge Posner's skepticism of the immigration agency: nondelegation principles or a concern with institutional competence).

16. *See infra* Part II.

17. *See* Cox, *supra* note 15 at 1679–182.

18. *See supra* note 14. For a general discussion of the tendency of courts to rely on procedural due process as a surrogate for substantive constitutional rights, see Motomura, *supra* note 9, at 1656–79.

United States have historically possessed. Until the early twentieth century, some states granted state citizenship rights, including voting, to immigrants, particularly "declarant aliens" who had filed "first papers" stating their intention to naturalize.[19] This no doubt stemmed from a national consensus that immigrants (at least European ones) were future citizens.[20]

The equal protection decisions of the Burger Court can be situated within this larger context of immigrant membership rights. The Burger Court upheld immigrant equal protection challenges to restrictions on licensing, education, financial aid, bar admission, and state welfare benefits—all perks of the type that we tend to associate with membership.[21] The exact contours of "membership rights" versus "rights of personhood" are fuzzy, and, no doubt, constantly shifting. At one time, for example, it was assumed that work was a natural right, but now non-citizens' ability to work is sharply regulated.[22] Even the sanctified American right of free speech does not necessarily belong today to all non-citizens. In a recent D.C. District Court panel decision that the Supreme Court affirmed without opinion, the court held that non-lawful permanent residents' ability to contribute funds to political candidates is unprotected by the First Amendment.[23]

Viewed within this framework, the receptivity of federal courts to claims criticizing the immigration bureaucracy seems like it might have very little to do with immigrant rights. In fact, one reason the narrative of bureaucratic incompetence might work so well is that it taps into popular disaffection with the government's immigration enforcement policies. For decades now, the anti-immigrant right has decried the government's failure to enforce immigration laws in the face of a so-called "invasion" or "flood" of "illegal aliens."[24] Conversely, on the left, immigrant advocates have criticized

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19. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1399–1416 (1993).

20. *See* Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States 115–25 (2006).

21. *See supra* note 8.

22. *See infra* Part II.B.2.

23. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd* 132 S. Ct. 1087 (2012).

24. *See* Peter H. Schuck, Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship 183 (1998).

draconian immigration enforcement.[25] The former Immigration and Naturalization Service (INS) and its successor, Department of Homeland Security (DHS), are agencies with few supporters and many enemies; as a result, it has become dogma that DHS is a bureaucratic bungler, charged with sober responsibilities that it uniformly botches. Conservative judges who have been trained to be suspicious of governmental regulation can readily reverse the agency on the ground that it is irrational or incompetent without drawing popular ire over their incidental support for the one constituency even less popular than governmental bureaucracies: immigrants.

The thesis of this Article is that immigrants do not necessarily gain when their opponents lose. Although courts are willing to enforce the federal government's power to preempt state immigration law and to deeply probe the rationality of immigration decisions, they are less likely to concede what was once a given—that immigrants are largely entitled to equal treatment. Today non-citizens are balkanized into a host of hierarchical categories, and even the Lawful Permanent Residents (LPRs) at the top cannot lay claim to many of the rights of membership that "declarant aliens" enjoyed during an earlier era. Instead, non-citizens now get reasonable treatment, or when they are lucky, the *noblesse oblige* of the Executive. But without substantial and durable rights, they cannot adequately defend the benefits they receive or effectively attack federal programs that hurt them.

Consider two recent Obama Administration initiatives, one that benefits non-citizens, another that hurts them. First, the Administration has a new program for granting Deferred Action to Childhood Arrivals (DACA). Essentially, deferred action is a reprieve from deportation for immigrant youths who would benefit from a repeatedly filed but never passed bill called the Development, Relief, and Education for Alien Minors (DREAM) Act.[26] Second, the Administration has aggressively pursued removal of "criminal aliens" through the Secure Communities program, which facilitates the

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25. *See, e.g.*, Editorial, *No Exit From a Bad Program*, N.Y. Times, Feb. 28, 2011, at A22 (criticizing the Secure Communities enforcement initiative, which mandates that state and local law enforcement agencies cooperate with the federal government to deport immigrants with criminal cases).

26. *See* Julia Preston and John Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. Times, June 16, 2012, at A1; Julia Preston, *Young Immigrants, In America Illegally, Line Up for Reprieve*, N.Y. Times, Aug. 14, 2012, at A8.

deportation of non-citizens apprehended by states and localities.[27] Immigrant advocates have cheered the DACA initiative, but sharply criticized Secure Communities, which they say often subjects long-term residents to deportation for minor traffic infractions. Some states and localities have been sympathetic to these arguments, and localities such as the District of Columbia, Santa Clara County, San Francisco County, and Cook County (Chicago) have all obstructed federal efforts by refusing to comply with DHS detainers for some non-citizens held in criminal detention.[28]

The same principles that allowed non-citizens to prevail in *Arizona* and *Judulang* might be used to defend Secure Communities and to strike down the DACA initiative. DACA was promulgated without Congressional authorization, public comment or participation, or a record of a reasoned decision-making process in which the Agency considered arguments against the initiative as well as those in favor of it. Moreover, the same principles that allowed the federal government to preempt anti-immigrant legislation in Arizona might also justify preemption of local efforts to resist Secure Communities. Thus, federalism and agency skepticism are tenuous proxies for non-citizen rights. In a way, they are even subordinating proxies: preemption analysis affirms the power of the federal government over non-citizens, and the APA is, in large part, an instrument for assuring agencies' accountability to majoritarian preferences, which are often hostile to non-citizens.

This Article contends that rights matter. While agency skepticism and federalism are intriguing tools for non-citizens to appeal to conservative judges, they are poor substitutes for individual rights like equal protection. Part I gives a brief historical overview of the rights of immigrants in the United States, explaining how, at various times, immigrants have enjoyed both rights of personhood and rights that we typically associate with membership. Part II describes the shift away from a jurisprudence of immigrant membership rights to one focused on the rights and responsibilities of the federal government and its agencies. Part III sets out some potential reasons for this shift, including the sharpening of APA "arbitrary and capricious" review, a broad-based anti-regulatory

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27. *See supra* note 25.

28. *See* Mihir Zaveri, *In D.C., No Warm Welcome for Immigration Crackdown*, Wash. Post, June 6, 2012, at B1; Lornet Turnbull, *3 King County Officials Balk at ICE Detainer Program*, Seattle Times (May 9, 2012), http://seattletimes.com/html/localnews/2018167885_scomm09m.html.

movement sanctioned by academic doctrines like Public Choice theory and the Law and Economics movement, and the transference of anti-immigrant sentiment to the agency that regulates immigrants. Part IV argues that something important has been lost in this transition, since the surrogates for individual rights that courts have increasingly come to rely on may not always adequately protect non-citizens. Part V expands on this theme, urging that rights matter to non-citizens because of their prestige and power to protect and matter to everyone else because the equitable distribution of rights is a prerequisite for a just society.

II. A SHORT HISTORY OF IMMIGRANT RIGHTS IN THE UNITED STATES

This nation was seemingly founded on the idea that all persons enjoy core rights of "life, liberty, and the pursuit of happiness."[29] In the years since, Americans have come to little consensus about what these rights mean; scholars cannot even seem to agree on the value of rights.[30] Regardless of how much Americans debate the content of their rights, it is clear that the promise of the Declaration of Independence—that all persons have core freedoms—is one that resonates. Thus, U.S. courts have long agreed that non-citizens are entitled to certain basic rights, like the right to equal protection.[31]

Yet if the Declaration of Independence begins by referencing universal human rights, the Constitution starts by reference to a select club of rights-holding members. In the Preamble, it is "the People" who "secure the blessings of liberty" to themselves and their

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29. The Declaration of Independence para. 2 (U.S. 1776).

30. For a defense and explication of rights, see Ronald Dworkin, Taking Rights Seriously xi, 269 (1977) (defining a right as a "political trump" held by an individual so that a collective goal cannot override it). For a communitarian critique of the "atomistic" notion that rights can have primacy over community, see Charles Taylor, Philosophy and the Human Sciences 187–210 (1985). For a critique of rights from the Marxian standpoint of the early Critical Legal Studies movement, see Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1363–64 (1984) (arguing that rights are unstable, indeterminate, reifying, and reactionary).

31. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that an ordinance prohibiting laundries made of wood that was discriminatorily applied to deny laundry licenses to Chinese nationals violated the Equal Protection Clause). For further discussion of the development of equal protection doctrine in alienage cases, see *infra* Part III.A.

"posterity."[32] And it was quite clear at the time that "the People" did not include all persons within the territory of the United States; many of the drafters owned slaves whose liberty they forcefully restricted.

From the beginning, there was a fierce debate about whether non-citizens were part of "the People." Concerned about the importation of dangerous revolutionary ideas from France, the late-eighteenth-century Congress passed a series of anti-immigrant measures known today as the "Alien Acts."[33] In debates over these measures, Federalists argued that all rights stemmed from the Constitution, which was a kind of compact between citizens; thus, only citizens could assert rights.[34] In contrast, the Jeffersonian Republicans argued that the Constitution referred to persons, not citizens, and that all persons were therefore entitled to constitutional protections.[35] The Republicans also based their arguments on theories of natural rights, human rights, and "mutuality of obligation"—the notion that because immigrants were subject to U.S. law, they were also entitled to invoke the protection of the Constitution.[36]

In the years since, U.S. courts have teetered between these two arguments, ultimately coming to rest at a wobbly compromise between the two. For example, everybody supposedly has a general right of free expression, but only some people have a right to express their opinions through voting.[37] The former right comes from a view about individual autonomy that pervades our

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32. U.S. Const. pmbl.

33. There were three laws making up what are commonly referred to as the "Alien Acts." *See* An Act to Establish an Uniform Rule of Naturalization [Naturalization Act], ch. 54, 1 Stat. 566 (1798) (repealed 1802); An Act Concerning Aliens [Alien Friends Act], ch. 58, 1 Stat. 570 (1798) (expired 1800); and An Act Respecting Alien Enemies [Alien Enemy Act], ch. 66, 1 Stat. 577 (1798) (current version as amended at 50 U.S.C. §§ 21–24 (2006)). One controversial provision of the Alien Friends Act authorized the president to issue ex parte orders of deportation against any resident alien suspected of being "dangerous to the peace and safety of the United States." § 1, 1 Stat. at 570–71.

34. Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 54 (1996).

35. *Id.* at 54, 57.

36. *Id.* at 57–60.

37. *Compare* Bridges v. Wixon, 326 U.S. 135, 161 (1945) (holding that all persons in the United States, including aliens, are entitled to the First Amendment right of free expression) *with* Burdick v. Takushi, 504 U.S. 428, 441 (1992) ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.").

legal system; the latter from our structure of government. It might therefore be said that there are two types of rights in the United States today: rights that belong to every person and rights that belong to "the People" who are members of our political system. Relatedly, there are two potential sources of rights: personhood and polity.

The implications and philosophical roots of these two rights paradigms—personhood and membership—will be explored in Part V. For now it is enough to note that they have each impacted the rights of non-citizens. There are two important points that are necessary to understand how these two paradigms have played out. First, courts are more likely to respect non-citizens' membership rights in certain contexts than in others. Second, non-citizens' legal status has influenced their rights of membership and even personhood.

The context in which courts are least likely to uphold immigrants' membership rights is in deportation and exclusion cases, because of something called the "plenary power" doctrine.[38] The story of plenary power begins with *Chae Chan Ping v. United States*, or the "Chinese Exclusion Case."[39] In *Chae Chan Ping*, the Supreme Court refused to address the country's discriminatory bar on the admission of Chinese immigrants, even in the case of an excluded Chinese resident who had previously been granted the right to re-enter.[40] The Court's justification was that it would generally defer to the political branches of government when it comes to the exclusion or deportation of non-citizens, since they have plenary power in the area of foreign relations. Over the years, the Court has frequently relied on this

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38. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 255 (defining "plenary power" as the Supreme Court's refusal "to review federal immigration statutes for compliance with substantive constitutional restraints"). In addition to immigration, the federal government has exercised similar plenary power over its territories and relations with Native Americans. The fundamental characteristics of plenary power in all three contexts, according to one recent commentary, are that the authority is inferred from sovereignty rather than based in the constitutional text, the Constitution imposes few restraints on its exercise, and its implementation is largely insulated from judicial review. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 8 (2002).

39. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889).

40. *Id.* at 609.

doctrine to support judicial non-intervention in cases involving the removal of non-citizens.[41]

However, in cases outside the context of exclusion and deportation (sometimes called "alienage" cases), the Court has affirmed that immigrants enjoy a host of rights.[42] The boundaries of immigrants' rights are fluid, but at times, non-citizens have enjoyed not only rights of personhood, but considerable membership rights.[43] The allocation of these rights has been complicated by distinctions between different classes of non-citizens—a set of distinctions that has grown increasingly complex and legalistic as immigration law has evolved. Occasionally, these distinctions have even filtered into courts' analyses of rights that historically all persons in the United States have possessed, meaning that non-citizens' basic rights of personhood have sometimes been contested. The remainder of this section will consider some of the individual rights that non-citizens in the United States have possessed.

A. Voting

Today when non-citizens vote they face harsh penalties,[44] but in the early years of the Republic, newly minted states commonly allowed alien inhabitants to vote in local, state, and federal elections.[45] After the War of 1812, the practice of alien voting slowed somewhat, but grew again in the mid-nineteenth century as states increasingly followed Wisconsin's lead in allowing "declarant aliens" to vote.

Until 1952, the law required non-citizens seeking eventual naturalization to file "first papers," indicating an intention to

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41. *Id.*

42. Bosniak, *supra* note 9, at 54.

43. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis. L. Rev. 955, 977–79 (1988).

44. *See* 8 U.S.C. § 1182(a)(10)(D) (2006).

45. *See* Raskin, *supra* note 19, at 1402–03 (discussing the grant of alien suffrage by particular American states at the turn of the nineteenth century); *see also* Motomura, *supra* note 20, at 116–19 (discussing the history of voting rights for "intending citizens," those who had filed a declaration of intent to naturalize); Neuman, *supra* note 34, at 63–71 (surveying history of alien suffrage in the United States).

naturalize.[46] This declaration of intent could be made at any point after arrival, did not deprive the non-citizen of his original nationality, did not legally obligate him to complete the process of becoming a citizen, and did not even require an oath of allegiance to the United States.[47] Nonetheless, it became increasingly common during the nineteenth century for states to allow declarant aliens to vote.[48] The alien suffrage movement accelerated after the Civil War, when many states granted declarant aliens who had fought in the Civil War the right to vote.[49] By World War I, however, a rapid decline had begun, and by 1926 all states had outlawed alien suffrage.[50]

B. Military Service

Non-citizens have long enjoyed (or suffered, depending on how you look at it) the right of military service. During the Civil War, nearly twenty-five percent of the combatants were foreign-born.[51] Pursuant to the Enrollment Act of March 3, 1863, men between the ages of twenty and forty-five "of foreign birth who shall have declared on oath their intention to become citizens" were subject to the draft.[52] After the Civil War, non-citizen combatants were entitled to military pension benefits and appear to have sometimes received them even after having left the United States to return to their countries of origin.[53] However, empirical research suggests that, as a practical matter, non-citizens had less access to pension benefits than citizens and were rewarded less on average than native recruits.[54]

Non-citizens continued to be subject to conscription up until it was abolished in 1973,[55] and to this day most non-citizens in the US (including undocumented aliens) must register for the selective

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46. *See* Nationality Act of 1940, ch. 876, § 331, 54 Stat. 1137, 1153 (1940) (codified at 8 U.S.C. § 731 (1946) (repealed 1952)).

47. Neuman, *supra* note 34, at 65.

48. Raskin, *supra* note 19, at 1407–08.

49. *Id.* at 1414–15.

50. *Id.* at 1416.

51. John W. Chambers II, To Raise an Army: The Draft Comes to Modern America 49 (1987).

52. Enrollment Act, ch. 75, 12 Stat. 731 (1863).

53. Ella Lonn, Foreigners in the Union Army and Navy 613 (1951).

54. Peter Blanck & Chen Song, *"With Malice Toward None; with Charity Toward All": Civil War Pensions for Native and Foreign-Born Union Army Veterans*, 11 Transnat'l L. & Contemp. Probs. 1, 39 (2001).

55. Schuck, *supra* note 24, at 169.

service.[56] Today non-citizens remain an important part of the United States' volunteer military, and there are special provisions of immigration law designed to facilitate citizenship for non-citizens who serve in the military.[57]

C. Public Benefits

Since the origins of welfare programs, non-citizens have received certain public benefits, although their right to do so is equivocal. On one hand, the jurisprudential high-water mark for immigrant equal protection arose in a challenge to state restrictions on immigrant access to welfare benefits. In *Graham v. Richardson*, the Supreme Court held that lawful immigrants are a "suspect" class that has been subjected to historical mistreatment.[58] Thus, the Court found that state laws discriminating against lawful immigrants should be subjected to heightened scrutiny, and that Arizona and Pennsylvania's discriminatory state welfare codes failed to meet this test.[59]

However, in *Mathews v. Diaz* the Court backtracked, holding that the federal government had discretion to withhold medical benefits from refugees that it provided to lawful permanent residents (LPRs) who had lived in the United States for at least five years.[60] With little judicial brake on benefit restriction, the trend since *Mathews* has been towards limiting immigrant access to benefits. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996[61] restricted even lawful immigrants' access to Medicaid, Social Security, and cash welfare benefits.[62]

Taken together, *Graham* and *Mathews* appear to set out a spectrum of membership rights, with the status of the immigrant and identity of the discriminator being the relevant factors. In *Graham*,

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56. *See* 50 U.S.C. app. § 453 (2006).

57. *See, e.g.*, 8 U.S.C. § 1440 (2006) (providing route to citizenship for veterans of foreign wars); *see also* Margaret Stock, Immigration Law and the Military (2012) (analyzing the effects of immigration and citizenship law on U.S. military personnel).

58. Graham v. Richardson, 403 U.S. 365, 372 (1971).

59. *Id.* at 376.

60. Mathews v. Diaz, 426 U.S. 67, 84–85 (1976).

61. Pub. L. 104-193, 110 Stat. 2105.

62. *See generally* Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien,"* 46 Washburn L.J. 263, 272–73 (2007) (outlining the effects of Personal Responsibility and Work Opportunity Reconciliation Act on lawful immigrants).

the discriminators were states; in *Mathews*, it was the federal government, with its plenary power over immigration. In *Graham*, the challengers were LPRs; in *Mathews*, two refugees and one LPR. The holding of *Graham*—that alienage is a suspect class—has mostly been limited in the years since to cases involving LPRs subject to state discrimination.[63]

D. Education

The traditionally state realm of education is an area where non-citizens have enjoyed substantial membership rights. *Nyquist v. Mauclet* involved a relatively straightforward application of *Graham*: the plaintiffs were lawful permanent residents challenging a New York state rule that limited higher education funding to citizens, persons intending to become citizens, or refugees.[64] The Supreme Court found that that the rule triggered strict scrutiny and struck it down.[65]

A more difficult question arose in *Plyer v. Doe*, which concerned the rights of undocumented children to education.[66] The Court stopped short of applying strict scrutiny, acknowledging that

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63. Since *Graham* the Supreme Court has only twice indicated that federal discrimination against non-citizens could violate the Equal Protection Clause. The first was Hampton v. Mow Sun Wong, where the Court considered the constitutionality of a United States Civil Service Commission ban on the employment on resident aliens. 426 U.S. 88, 90 (1976). The Court recognized in Hampton that federal discrimination can trigger equal protection review, but held that equal protection review is more limited where federal, rather than state, action is at issue, and the federal government advances "overriding national interests." *Id.* at 100–01. Nonetheless, the Court ruled in favor of the non-citizen on due process grounds, holding that "[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Id.* at 103. The second case was Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976), where the Court struck down a statute enacted by the Puerto Rican legislature that restricted the ability of non-citizens to practice engineering in the territory. The Court declined to answer the question whether the statute implicated equal protection review under the Fifth Amendment because federal action was at issue, or under the Fourteenth Amendment, which governs state action, but found that the statute would be invalid under either analysis. *Id.* at 601.

64. Nyquist v. Mauclet, 432 U.S. 1, 4–5 (1977).

65. *Id.* at 11–12.

66. Plyer v. Doe, 457 U.S. 202 (1982).

the children's unauthorized status merited different treatment from the lawful immigrants in *Graham*.[67] Instead, it applied a kind of intermediate scrutiny, ultimately finding that Texas's effort to cut off education for unauthorized migrant children was unconstitutional.[68] The Court's finding that Texas's law violated equal protection is probably an outlier, unlikely to be repeated outside the unique context of an important right like education and sympathetic child plaintiffs.[69]

E. Work

Early Supreme Court cases upheld immigrants' right to work in the face of state restrictions, relying heavily on the logic and rhetoric of natural rights. In *Yick Wo v. Hopkins*, the Court struck down a San Francisco ordinance prohibiting unlicensed laundry establishments constructed of wood—an ordinance that was selectively enforced by the city to close down laundries owned by Chinese persons.[70] In finding that San Francisco had violated Yick Wo's constitutional right to equal protection, the Court undertook a relatively lengthy discussion of natural rights, including the right to make a living without being subject to "the mere will of another."[71] The Court instructed that in the American system, "sovereignty itself remains with the people, by whom and for whom all government exists and acts."[72] Yet the Court stressed that the questions before it "are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."[73] For the Court in *Yick Wo*, "the people" were not just the citizens of the United States; they were all persons, who enjoyed a natural right to work.

The Court returned to this theme of inalienable rights early in the twentieth century. In *Truax v. Raich*, the Court struck down an Arizona law prohibiting the employment of more than a certain allotment of non-citizens.[74] According to the Court, the "right to work

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67. *Id.* at 220.
68. *Id.* at 223–24.
69. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 Colum. L. Rev. 2037, 2075–76 (2008).
70. Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).
71. *Id.* at 369–70.
72. *Id.* at 370.
73. *Id.* at 369.
74. Truax v. Raich, 239 U.S. 33 (1915).

for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."[75] At the time, it seemed that work had become well-established as a right of personhood.

In the years since, it has become far less clear that non-citizens have a protected right to work. States may bar immigrants from employment in jobs with a "governmental function,"[76] such as state elective office,[77] the state police,[78] public school teachers,[79] and deputy probation officers.[80] The Court's rationale in these cases relies heavily on the theory of membership rights: such persons "perform functions that go to the heart of representative government."[81] Moreover, it is unquestionable that the federal government can regulate non-citizen employment,[82] and non-citizens who work in violation of these rules cannot seek the same remedies for workplace violations as citizens.[83] In some cases, states can regulate non-citizens' employment too. States are preempted by federal law from criminalizing working without proper documentation,[84] but they can suspend or revoke the licenses of businesses that fail to comply with federal requirements, as long as the state scheme tracks the federal one closely enough.[85] Today, work is a right reserved for members of the U.S. system—citizens and certain privileged immigrants.

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75. *Id.* at 41.
76. Ambach v. Norwick, 441 U.S. 68, 75 (1979).
77. Sugarman v. Dougall, 413 U.S. 634, 647 (1973).
78. Foley v. Connelie, 435 U.S. 291 (1978).
79. *Ambach*, 441 U.S. at 80–81.
80. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).
81. *Sugarman*, 413 U.S. at 647.
82. *See* 8 C.F.R. § 274a.12 (2012) (setting out the classes of aliens authorized to accept employment); *see generally* Juan Carlos Linares, *Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States*, 34 Denv. J. Int'l L. & Pol'y 321, 329–37 (2006) (surveying restrictions, under U.S. guest worker programs, on migrant laborers seeking new employment).
83. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151–52 (2002) (holding that federal immigration statute prohibits awarding of back pay to unauthorized migrant as a remedy for his discharge in violation of labor law).
84. Arizona v. United States, 132 S. Ct. 2492, 2503–05 (2012).
85. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1986 (2011).

F. Property

The early-twentieth-century Supreme Court accepted in *Truax* that the right to work is a basic attribute of personhood, but treated real property like a membership right. In *Terrace v. Thompson*,[86] the Court held that the state of Washington could prohibit non-declarant aliens from owning real property. The Court found it rational to distinguish between declarant and non-declarant aliens, citing declarant aliens' former voting rights and their obligation to serve in the military.[87] Ultimately, the Court was unswayed by the fact that this rule disproportionately affected Asian Americans, who were ineligible to naturalize.[88] It acknowledged the natural rights analysis of *Truax*, but claimed that the right to own property was less universal than the right to work: "The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself."[89]

To this day, alien land restrictions persist in twenty-nine states.[90] When courts have struck down such laws, it has typically been because they restrict citizens' ability to transfer land, not because of immigrants' rights.[91] Although the persistence of antiquated alien land laws may have more to do with inertia than their post-*Graham* constitutionality, a new class of restrictions on non-citizen property rights has lately gained currency. Increasingly, localities and states have adopted restrictions on leasing land to unauthorized immigrants;[92] in a number of cases, courts have found these restrictions to be preempted by federal immigration law.[93] Thus, immigrants have won these cases not as rights holders on their own, but by asserting that they are third party beneficiaries of federal rights. Non-citizen property rights have always been qualified at best,

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86. Terrace v. Thompson, 263 U.S. 197 (1923).
87. *Id.* at 218–19.
88. *Id.* at 220.
89. *Id.* at 221.
90. Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 Geo. Immigr. L.J. (forthcoming 2013), *available at* http://ssrn.com/abstract=2166312.
91. *See* Oyama v. California, 332 U.S. 633 (1948).
92. *See* Tirres, *supra* note 90.
93. *See* Lozano v. Hazleton, 620 F.3d 170, 225 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011) (for further consideration in light of Chamber of Commerce v. Whiting); Villas at Parkside Partners v. City of Farmers Branch, 675 F.3d 802, 814 (5th Cir. 2012), *reh'g en banc granted*, 688 F.3d 801 (5th Cir. 2012).

and have prevailed when packaged with citizens' property rights or the rights of the federal government.

G. Speech

The text of the First Amendment bars Congress from passing any law abridging free speech without limitation as to the status of the speaker.[94] The Supreme Court has interpreted this language to protect a variety of expressive activity beyond pure speech, from artistic expression to association and advertising, to name just a few.[95] In the early twentieth century, the Court occasionally seemed to employ a weaker form of First Amendment scrutiny in cases involving non-citizens in deportation and exclusion proceedings.[96] However, by mid-century, the Court stated unequivocally that "[f]reedom of speech and of press is accorded [to] aliens residing in this country."[97] Thus, in *Bridges v. Wixon*, the Court found that the First Amendment protected the former communist affiliation of the Australian labor organizer, Harry Bridges.[98] Although in *Harisiades v. Shaughnessy* the Court later rejected a broad First Amendment challenge to the statute that made Bridges deportable,[99] it nowhere stated in its decision that non-citizens have lesser First Amendment rights than citizens.[100]

Contemporary decisions cast some doubt on *Bridges*'s holding that non-citizens enjoy full First Amendment protection. In *Reno v. American-Arab Anti-Discrimination Committee*, the Court rejected a selective enforcement claim raised by members of the Popular Front

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94. U.S. Const. amend. I. The 14th Amendment prevents states from violating the First Amendment; it incorporates many of the earlier provisions of the Bill of Rights and bars states from violating them. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

95. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428 (1963) (association); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (commercial speech); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (film licensing).

96. *See* Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 Harv. C.R.-C.L. L. Rev. 183, 193–95 (2000).

97. Bridges v. Wixon, 326 U.S. 145, 148 (1945) (citing Bridges v. California, 314 U.S. 252 (1941)).

98. *Id.* at 147.

99. Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952).

100. *See* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 869 (1989).

for the Liberation of Palestine, who contended that the government had singled them out because of their affiliation with an unpopular group.[101] The Court found that it lacked jurisdiction to assess their claim, but nonetheless opined that where the Government has a legitimate reason to deport an unauthorized immigrant, "[T]he Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."[102] The implication of *American-Arab Anti-Discrimination Committee* is that non-citizens without lawful status might be entitled to less First Amendment protection than lawful residents.

This was essentially the holding of a D.C. District Court panel in *Bluman v. Federal Election Commission*.[103] In *Bluman*, the court considered a provision of the McCain-Feingold campaign finance reform law barring non-citizens other than lawful permanent residents from making campaign contributions.[104] The court read *Harisiades* as support for the proposition "that aliens' First Amendment rights might be less robust than those of citizens in certain discrete areas."[105] It then relied on the political participation line of cases to find that "[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."[106] Although the court purported to apply strict scrutiny to the provision, it rejected arguments that it was seriously over- and under-inclusive as to its alleged purpose of limiting foreign influence over American politics.[107] Ultimately, the court was convinced that LPRs enjoy a special place in the American polity that justified affording them what it considered a membership right.

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101. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 487–88 (1999).

102. *Id.* at 491–92.

103. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (holding that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."), *aff'd*, 132 S. Ct. 1087 (2012).

104. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441e(a) (2006).

105. Bluman, 800 F. Supp. 2d at 287.

106. *Id.* at 288.

107. *Id.* at 290.

The Supreme Court affirmed *Bluman* last term without comment, thus avoiding the messy task of distinguishing *Bluman* from *Citizens United v. Federal Election Commission*, where it had found that corporations have a free speech right that insulates them from governmental regulation of their contributions.[108] Corporate non-persons now have more rights in this arena of First Amendment law than non-citizen persons. The justification for this departure can only be that the courts have found campaign contributions to be a membership right and that corporations are members, but non-citizens other than LPRs are not.

H. Criminal Procedural Rights

In *Wong Wing v. United States*, the Supreme Court held that a Chinese national could not be summarily sentenced to one year of hard labor as a punishment for being in the United States unlawfully.[109] The Court affirmed that non-citizens are entitled to due process, which prevented imposition of an "infamous punishment" without indictment and trial by jury.[110] Since then, courts have assumed that "regardless of alienage, those who stand charged with crimes within the United States are protected by the Fourth, Fifth, and Sixth Amendments in proceedings overseen by Article III judges and adjudicated by grand juries and jury trials."[111] Indeed, the Court's most discussed immigrant rights decision in the last few years is in the area of criminal procedure: in *Padilla v. Kentucky*, the Court held that the failure of a defense attorney to advise his client of the immigration consequences of a guilty plea could constitute ineffective assistance, in violation of the Sixth Amendment right to counsel.[112]

Non-citizens' enjoyment of core criminal procedural protections does not mean that they are on equal footing with citizens in criminal cases. Rather, at the ground level, the intersection of the immigration and criminal enforcement regimes operates in a variety of ways to disadvantage non-citizens.[113] Moreover, one of the most

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108. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

109. Wong Wing v. United States, 163 U.S. 228, 237 (1896).

110. *Id.*

111. Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281, 1292–93 (2010).

112. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

113. *See* Eagly, *supra* note 111, at 1304–19; Gabriel J. Chin, *Illegal Entry As Crime, Deportation As Punishment: Immigration Status and the Criminal*

basic criminal procedural rights—the Fourth Amendment protection against unreasonable searches and seizures—is qualified for non-citizens. For many years, the Court assumed that non-citizens were covered to the same extent as citizens.[114] However, in *Verdugo-Urquidez v. INS* the Court held that the Fourth Amendment did not apply to a search by American authorities of the Mexican residence of a Mexican citizen.[115] Verdugo-Urquidez's Mexican home had been raided by American authorities after he was transported by Mexican police to the United States for prosecution.[116] Confronted with the fact that the Fourth Amendment applies, on its face, to "the People," the Court engaged in some gymnastics to find Mr. Verdugo-Urquidez outside its protection:

> "'[T]he people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[117]

For the first time, the Court seemed to be saying that the Fourth Amendment, long considered a basic right of personhood, was a membership right, restricted to persons with "sufficient connection" to the United States. This wasn't the first time the Court had held that "the people" is a term of art. In the now infamous *Dred Scott* case,[118] Justice Taney found that the words "people of the United States" and "citizens" were synonymous terms: "They both describe

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Process, 58 UCLA L. Rev. 1417, 1423–33 (2011). The simultaneous advancement of criminal and deportation proceedings can mean that in practice, non-citizens get the lowest common denominator for procedural rights. For example, although in a criminal case, non-citizens would generally be entitled like all defendants to release on bond, many non-citizens are subject to mandatory detention in removal proceedings, meaning that even when they are released from state criminal custody, they can still end up in federal criminal custody. Eagly, *supra* note 111, at 1306. This dynamic plays out in several other procedural areas: *Miranda* warnings, search and seizure, and sentencing. *Id.* at 1308–19.

114. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

115. Verdugo-Urquidez v. INS, 494 U.S. 259, 274–75 (1990).

116. *Id.* at 262.

117. *Id.* at 265. *See also* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271 (D. Utah 2003) (holding that "previously deported alien felons" are unprotected by the Fourth Amendment, since they are not part of "the People"), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004).

118. Scott v. Sandford, 60 U.S. 393 (1857).

the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives."[119] Since African Americans were not originally part of this "people," they "had no rights which the white man is bound to respect."[120] *Verdugo-Urquidez* and *Dred Scott* both use communitarian logic to limit the rights of putative outsiders.

I. Due Process

It has been clear since *Wong Wing* that non-citizens are entitled to due process. However, *Wong Wing* involved a criminal punishment for being unlawfully in the United States; in cases since, the Supreme Court has been careful to insist that deportation is not a criminal punishment.[121] Thus, the protections discussed above for non-citizens in criminal proceedings do not necessarily apply in removal proceedings. For example, in *INS v. Lopez-Mendoza*, the Court held that the exclusionary rule does not apply to deportation proceedings.[122]

Overall, the Court has been ambivalent about non-citizens' due process rights in removal proceedings, relying at times on the plenary power doctrine to abdicate any meaningful review.[123] This is particularly the case for non-citizens who are considered to be seeking admission to the United States. The Immigration and Nationality Act has separate grounds of removal for persons in the United States who are "deportable" and for those outside, seeking admission, who are charged as "inadmissible."[124]

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119. *Id.* at 404.

120. *Id.* at 407.

121. *See* Bridges v. Wixon, 326 U.S. 135, 147 (1945); INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

122. *Lopez-Mendoza*, 468 U.S. at 1050. *But see* Bustos-Torres v. INS, 898 F.2d 1053, 1057 (5th Cir. 1990) (holding that illegally coerced statements cannot be used in deportation proceedings under the Fifth Amendment Due Process Clause); Matter of Garcia, 17 I&N Dec. 319, 321 (BIA 1980) (same).

123. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950); Fong Yue Ting v. United States, 149 U.S. 698, 705–06 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

124. *Compare* 8 U.S.C. § 1182 (2006) (grounds of inadmissibility, which until 1998 were called the grounds of "excludability") *with* 8 U.S.C. § 1227 (2006) (grounds of deportability).

In the nineteenth century case *Nishimura Ekiu v. United States*, the Court said that for persons seeking admission, "the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law."[125] Historically, this distinction has elevated form over substance, since persons who have been in the United States for years can still be considered applicants for admission, as long as they have not been formerly granted admission. During the Cold War, for example, the Court upheld the indefinite detention at Ellis Island of a twenty-five year resident of the United States who could not be deported back to his native Romania, and who had been excluded upon his attempted re-entry to the United States based on secret evidence, without having received a hearing.[126]

In contrast, the Court has long held that persons admitted to the United States, at least, must receive due process before being deported. In *Yamataya v. Fisher*, the Court held that due process barred arbitrary deportations, and entitled non-citizens in deportation cases to an "opportunity to be heard upon the questions involving his right to be and remain in the United States."[127] Eventually, the Court held that lawful permanent residents of the United States must receive due process even when they are in exclusion proceedings.[128]

At times, the Court has been willing to engage in a searching review of the level of due process in removal proceedings.[129] It has held that the Government bears the burden to establish alienage and deportability by "clear, unequivocal, and convincing evidence."[130]

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125. *Nishimura Ekiu*, 142 U.S. at 660. Similarly, during the Cold War, the Court upheld a procedure that denied a hearing to non-citizens excluded based on secret evidence, stating, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Ex rel.* Knauff, 338 U.S. at 544.

126. *Ex rel.* Mezei, 345 U.S. at 212–16.

127. Kaoru Yamataya v. Fisher, 189 U.S. 86, 101 (1903). However, the due process that Yamataya received was minimal; the Court was unswayed by the fact that she did not understand English, the language used to conduct the deportation proceedings. *Id.* at 102. Any hearing at all, it seemed, would have satisfied the Court's minimal threshold for due process in *Yamataya*.

128. Landon v. Plasencia, 459 U.S. 21, 37 (1982).

129. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 156 (1945) (reversing a removal order obtained based on unsigned, unsworn hearsay statements).

130. Woodby v. INS, 385 U.S. 276, 277 (1966). However, in cases in which the non-citizen is an arriving alien, the respondent in proceedings bears the burden of proof. *See* 8 C.F.R. § 1240.8(b) (2012).

Moreover, the Court has made clear that even persons ordered deported are entitled to due process. In *Zadvydas v. Davis*, the Court held that immigrants cannot be held indefinitely if they cannot be deported.[131] Under *Zadvydas*, immigrant detainees must receive some process to regularly evaluate the likelihood of their removal, and if they cannot be removed in the reasonably foreseeable future, they must be released.[132]

Zadvydas stands out as one of the Court's two most significant decisions in favor of immigrants' constitutional rights since the Burger Court,[133] the other being *Padilla v. Kentucky*.[134] The two decisions indicate that the Court is still willing to enforce immigrants' basic rights of personhood in the context of criminal procedure and the quasi-criminal arena of detention.

III. AN EROSION OF IMMIGRANT RIGHTS

The above discussion reveals that the entitlement of immigrants to rights in this country has never been a clear-cut issue. Whether immigrants are entitled to rights has always depended on what right is at issue, and where the immigrant stands in the hierarchy of migrants. From the beginning, courts considered some rights to be rights of personhood belonging to everyone. Other rights were associated with membership, and courts have been more likely to afford these to immigrants who were perceived to be members.

Over time, there have been some important changes in this calculus. First, the type of immigrants who are considered to be members has shifted. At one time, any European immigrant who had expressed an intention to naturalize was arguably a member. Today, persons must satisfy rigid legal requirements in order to achieve something close to membership—formal LPR status. Second, the scope of membership rights available to non-citizen members has

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131. Zadvydas v. Davis, 533 U.S. 678, 699–700 (2001). Although the Court has held that the indefinite detention of non-citizens with removal orders would raise serious constitutional issues, it has rejected the claim that the mandatory detention of persons in removal proceedings violates due process. *See* Demore v. Kim, 538 U.S. 510, 531 (2003).

132. *Zadvydas*, 533 U.S. at 699–700.

133. *Zadvydas* relied on a theory of constitutional avoidance to interpret the immigration detention statute narrowly so as to not authorize indefinite detention if removal is not reasonably foreseeable. *Id.* at 689–99.

134. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

changed: today even LPRs cannot assert certain membership rights, like voting. Third, the boundary between rights of membership and personhood has shifted so that some rights formerly considered to belong to all persons, like work, now belong only to members. Fourth, when given the choice between an individual rights-based claim and an alternative theory, courts increasingly decide cases on the alternative theory. Taken together, these changes suggest that there has been some erosion of immigrant rights.

A. Stricter Membership Rules

Membership is an elastic concept. The preeminent form of membership in the United States is citizenship, yet at various times at least some non-citizens have shared in many of the privileges and rights that we tend to associate with membership. Courts have used various tests of membership for allocating rights, including entry, "substantial connection" to the United States, admission as a "lawful permanent resident," and intent to naturalize.[135] In general, the immigrants who have fared best have been those deemed to be on a pathway to citizenship.[136]

As discussed above, declarant aliens could often vote and serve in the military. Today the law continues in many ways to privilege persons on a pathway to citizenship. The clearest way of doing so now is by becoming an LPR. After five years (three years if married to a citizen), an LPR can naturalize.[137] LPRs are privileged over persons with other immigration statuses in countless ways, from their ability to work and travel,[138] to their ability to access

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135. *See* Verdugo-Urquidez v. INS, 494 U.S. 259, 270, 272 (1990) (suggesting that constitutional protections like the Fourth Amendment apply to aliens with a "substantial connection" to the United States); Landon v. Plasencia, 459 U.S. 21, 33 (1982) (holding LPRs are entitled to due process in exclusion proceedings); Terrace v. Thompson, 263 U.S. 197, 218–21 (1923) (finding that the intention of an alien to become an American citizen was a permissible basis for regulating alien property ownership); Kaoru Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (holding due process entitles persons who have entered the United States to a hearing prior to deportation).

136. *See* Motomura, *supra* note 20, at 119–23.

137. 8 U.S.C. §§ 1427(a), 1430(a) (2006).

138. *See* Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 Geo. Immigr. L.J. 201, 205 (2007).

government-subsidized student loans[139] and legal aid,[140] own property in some states,[141] and make political campaign donations.[142]

The primary difference between then and now is that in the nineteenth and early twentieth century, European migrants could place themselves in the category of future citizens with a simple expression of intent to naturalize.[143] Today the pathway to citizenship is circumscribed by rigid legal processes: "adjustment of status" or "consular processing," which are the means for acquiring a green card inside or outside the United States, respectively. In contrast to the relatively straightforward filing of first papers by nineteenth and early twentieth century declarant aliens, green card applicants today must navigate an obstacle course of bureaucratic hoops: a preliminary petition filed by an employer or family member, a long wait for the relevant "visa category" to "become current," the payment of multiple costly fees, the gathering of biometric data, a medical examination, the filing of a lengthy application along with various affidavits and, in some cases, additional supplementary forms, depending upon what bars and grounds of inadmissibility the applicant has unwittingly triggered over the course of her immigration history.[144] On top of all this, applicants may be required to attend an interview with an immigration official[145] who may scrutinize their most personal relationships.

At one time, virtually any European non-citizen could share in a wide range of membership rights, especially if the individual had filed first papers. Today, LPRs who have run a bureaucratic gauntlet are the closest thing to non-citizen members. As the ministerial and substantive requirements for adjustment of status and consular processing tighten, it has become more difficult than ever before to become a non-citizen member.

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139. *See* 34 C.F.R. § 668.33(a)(2)(i) (2012) (setting forth the immigration requirements for participants in a student financial assistance program authorized by Title IV of the Higher Education Act of 1965).

140. *See* Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 Cardozo L. Rev. 619, 624–25 (2011).

141. *See* Tirres, *supra* note 90.

142. *See* 2 U.S.C. § 441e (2006) (prohibiting foreign nationals other than LPRs from making campaign donations).

143. Motomura, *supra* note 20, at 115–16.

144. *See* 8 C.F.R. § 1245.2 (2012) (application for adjustment of status); 8 C.F.R. § 1245.5 (2012) (application for medical examination).

145. *See* 8 C.F.R. § 1245.6 (2012).

B. Narrowing Membership Rights for Non-Citizens

There are some rights that are restricted today to citizens that were formerly available to at least some non-citizen immigrants. The most prominent instance is voting, which was commonly allowed to declarant aliens up until the early twentieth century.[146] But there are other examples of the declining membership rights of non-citizens who have achieved quasi-member status. For example, 1996 welfare reforms limited the ability of LPRs to obtain federal welfare benefits.[147]

During the Burger Court era, equal protection jurisprudence provided a relatively sturdy backstop for the rights of LPRs. During the 1970s and 1980s, the Court struck down a variety of state laws that limited lawful immigrants' access to the type of privileges and services that we tend to associate with membership, such as occupational licensing, welfare, and education.[148] However, the Court drew the line at cases involving some political function, such as state elective office positions, the state police, public school teachers, and deputy probation officers.[149] In these cases, the Court approved of states' efforts to limit LPRs' ability to participate in aspects of civil society.

In the late nineteenth and early twentieth centuries, non-citizens who were considered en route to citizenship enjoyed rights that were relatively coterminous with those of citizens.[150] Today, LPRs—the closest thing to non-citizen "members"—are limited from voting, receiving certain public benefits, and serving in positions with a "political function." It is not only more difficult for a non-citizen to become a member of civil society today; there are certain rights of citizenship that non-citizens will never enjoy.

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146. *See supra* Part I.A.

147. "Qualified aliens" like LPRs can now only receive food stamps and Medicaid if they have resided in the United States for five years, unless they have worked in the United States for 40 qualifying quarters or entered the United States prior to 1996. *See* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 at §§ 1612–13 (1996).

148. *See supra* note 8.

149. *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973); Ambach v. Norwick, 441 U.S. 68, 73–75 (1979); Foley v. Connelie, 435 U.S. 291, 300 (1978); Cabell v. Chavez-Salido, 454 U.S. 432, 447 (1982).

150. *See supra* Part I.A–B.

C. Narrowing Rights of Personhood

Courts have long recognized that regardless of their legal status, non-citizens have core rights of personhood in the United States. The Supreme Court's relatively recent rulings in *Padilla v. Kentucky* and *Zadvydas v. Davis* reaffirm that even the least popular immigrants—so-called "criminal aliens"—are entitled to powerful procedural protections like the right to counsel in criminal cases and the right to review of their civil immigration detention.[151] For the most part, non-citizens' procedural rights are robust. Indeed, if there is a bright spot in the contemporary Court's immigrant rights jurisprudence, it seems to be procedural rights in criminal and quasi-criminal contexts.

Yet even in the area of criminal procedure, membership can matter. *Verdugo-Urquidez* provides that the Fourth Amendment—once assumed to apply to every person—may not apply to non-citizens who lack a substantial connection to the United States.[152] In civil law, there are more examples of areas where rights that were once assumed to belong to all persons are now substantially qualified. At the time of *Yick Wo* and *Truax*, work seemed like a fundamental right that ought to belong to everyone. Today, there is little question that work is a right of membership, restricted to certain privileged classes of non-citizens.[153] The boundary between rights of personhood and membership has also shifted in the area of free speech; *American-Arab Anti-Discrimination Council* and *Bluman* suggest that non-LPRs might have less First Amendment rights in certain contexts than LPRs.[154]

Today it is harder than ever for a non-citizen to achieve something close to membership status. Yet once a non-citizen has secured LPR status, she will enjoy fewer membership rights than during earlier eras. Moreover, non-citizens unable to become LPRs cannot assume today that they can rely on strong rights of personhood. Although procedural protections for unauthorized

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151. Zadvydas v. Davis, 533 U.S. 678, 699–700 (2001); Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

152. Verdugo-Urquidez v. INS, 494 U.S. 259, 274–75 (1990). As noted above, the search in *Verdugo-Urquidez* took place in Mexico, but the prosecution at issue occurred in the United States.

153. *See supra* Part I.E.

154. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491–92 (1999); Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012).

migrants remain largely strong, modern cases allow the government to regulate their employment, limit their speech, and in some cases, even search them without probable cause.[155]

D. Increasingly Popular Substitutes for Individual Rights

Professor Hiroshi Motomura has remarked that ambivalence about immigration has led to a tendency for courts and agencies to uphold immigrants' rights "indirectly and obliquely."[156] Given immigrants' tenuous status as members of civil society, court rulings that they enjoy membership rights are likely to generate controversy. Many people do not agree that immigrants, especially unauthorized ones, should have equal access to the privileges and benefits of membership.[157] However, many would agree with the principle that the federal government, not states, should have exclusive power over immigration. Still more people would concede that agencies should treat persons—even undocumented immigrants—rationally. These two themes—federalism and agency skepticism—have become powerful substitutes in recent years for immigrant rights like the right to equal protection. Federalism and agency skepticism allow immigrants to win cases by litigating in the safer context of federal rights and responsibilities, rather than immigrant rights.

1. Federalism

Courts have often avoided the question of immigrant rights by finding that non-citizens are the third party beneficiaries of other

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155. *See supra* Part I.E, G, H.

156. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 Duke L.J. 1723, 1727 (2010). Professor Hiroshi Motomura identifies five strategies that have allowed unauthorized migrants to indirectly assert rights: "institutional competence" arguments that the wrong decision-maker acted; "comparative culpability" arguments that another actor has done something worse than the unauthorized migrant's immigration violation; "citizen proxy" arguments that mistreatment of an unauthorized migrant will impact a citizen's rights; applying a "procedural surrogate" for a constitutional right, such as a traditional discovery rule; and applying a "phantom norm," a regulatory or statutory right in the absence of a constitutional one. *Id.* at 1726–29.

157. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v Davis, 2001 Sup. Ct. Rev. 47, 92–101 (2001) (discussing the hierarchical treatment of different categories of non-citizens under U.S. immigration law).

rights holders, like citizens.[158] Similarly, in recent years, non-citizens have repeatedly benefited from federal rights in cases where courts have invalidated state immigration legislation because it is preempted by the federal government's exclusive right to regulate immigration. State efforts to regulate immigration are longstanding; indeed, until the late nineteenth century, virtually all immigration law was state law.[159] However, since *Chae Chan Ping v. United States*, the Court has held that immigration is a federal matter.[160] That has not stopped states from endeavoring to regulate immigration, although they have had minimal success in their efforts to do so. The Burger Court struck down an extraordinary amount of state legislation on equal protection grounds.[161] In at least two of these cases, the plaintiffs also raised preemption arguments, but the Burger Court ignored these in favor of its preferred equal protection test.[162] The advantage of equal protection over preemption as a litigation strategy during this era is borne out by the fact that the principal immigration preemption case of the time, *De Canas v. Bica*, came out in favor of the state.[163]

The Court has since made an about-face. Neither the Rehnquist nor the Roberts Court has invalidated a single piece of immigration legislation on equal protection grounds. In the last equal protection challenge to immigration legislation that the Court decided, it ruled against the non-citizen, who had challenged a provision of federal citizenship law that discriminated against

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158. For an example of a case where a non-citizen was able to essentially raise a citizen proxy claim, see Oyama v. California, 332 U.S. 633, 647 (1948) (finding that a California statute barring the transfer of land to persons "ineligible for citizenship" was unconstitutional as applied to the owner of the property, a minor U.S. citizen whose parent was ineligible for citizenship by virtue of his Japanese ancestry and had paid for the property). For a discussion of citizen proxy claims, see Motomura, *supra* note 156, at 1751–55 (noting various ways in which non-citizens have raised citizen proxy claims, such as in deportation cases where non-citizens can seek discretionary relief from removal if they can show hardship to a U.S. citizen relative, or in labor law cases where judges have sometimes reasoned that citizen workers would be prejudiced by a weakening of employment protections for unauthorized migrants).

159. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833, 1835–84 (1993).

160. Chae Chan Ping v. United States, 130 U.S. 581, 605–07 (1889).

161. *See supra* note 8.

162. *See* Plyler v. Doe, 457 U.S. 202, 208–09, 230 (1982); Sugarman v. Dougall, 413 U.S. 634, 646 (1973).

163. De Canas v. Bica, 424 U.S. 351, 356 (1976).

children born out-of-wedlock to citizen fathers.[164] The law required these children to meet more onerous requirements for citizenship than they would have faced had their mother been a citizen.[165] Of course, *Tuan Anh Nguyen v. INS* concerned gender discrimination, meaning that the Court at least purported to apply heightened scrutiny (which it found the statute satisfied), and left unresolved the question whether "some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power."[166] In 2011, the challengers in *Flores-Villar v. United States* resurrected that question in a challenge to a different citizenship provision, and the Court again failed to decide it—this time because no majority of the Court could agree on a coherent approach for resolving the case, meaning that it affirmed the lower court decision *per curiam*.[167]

Flores-Villar reveals that the state of equal protection review in citizenship cases is embattled. Although it is unclear if this ambivalence extends to immigration cases in general, the sheer length of time since the Court has decided an equal protection case in favor of a non-citizen suggests a shift away from immigrant equal protection. On the other hand, it has become increasingly common for courts to find that state immigration legislation is preempted by federal law. In the past several years, a growing number of states and localities have enacted legislation designed to address a perceived problem with illegal immigration.[168] Advocates and the federal government have successfully challenged many of these statutes on preemption grounds, most prominently the Arizona legislation.[169]

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164. Tuan Anh Nguyen v. INS, 533 U.S. 53, 73 (2001).

165. *Id.* at 62.

166. *Id.* at 61.

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

168. The surge began in 2007, when state legislators passed 252 laws relating to immigration, more than two-and-a-half times the 90 bills passed the year before, and more than five times as many as the 45 laws passed in 2005. National Conference of State Legislators, Immigrant Policy Project, 2012 Immigration-Related Laws and Resolutions in the States 2 (2012), *available at* http://www.ncsl.org/Portals/1/Documents/immig/2012ImmigrationReportJuly.pdf. From 2007 through the first half of 2012, states have passed an astonishing 1,716 immigration laws. *Id.*

169. *See* Arizona v. United States, 132 S. Ct. 2492 (2012); Villas at Parkside Partners v. City of Farmers Branch, 675 F.3d 802 (5th Cir. 2012); Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011) (vacating for further consideration in light of Chamber of Commerce of

Arizona's "Support Our Law Enforcement and Safe Neighborhoods Act," or SB 1070, was passed as part of the State's strategy of "attrition through enforcement," an effort to curb the undocumented population in Arizona by making life unpleasant for them.[170] In 2012, the Supreme Court considered the constitutionality of four provisions of SB 1070: Section 2(B), which requires officers to check an arrested person's immigration status with the federal government if they have reasonable suspicion that the person is undocumented; Section 3, making failure to comply with federal alien-registration requirements a state misdemeanor; Section 5, making it a misdemeanor for an unauthorized alien to seek or engage in work in the State; and Section 6 authorizing officers to arrest without a warrant a person who the officer has probable cause to believe is subject to removal.[171] The Supreme Court found that sections 3, 5 and 6 were preempted by federal law but reversed the lower court's injunction against Section 2(B), remanding the case for additional findings as to that provision.[172]

SB 1070, of course, does not just raise preemption concerns. Race, ethnicity, language, and national origin are the inevitable proxies that Arizona law enforcement will use to decide whether to detain, question, and arrest the likely Latino suspects under the law. Targeting persons based on these invidious criteria raises serious issues under the Fourth Amendment and the Equal Protection Clause.[173] Even just subjecting persons to detention for the purpose of assessing their citizenship raises due process and other constitutional concerns.[174] SB 1070 clearly implicates the rights of non-citizens, yet nowhere in the decision are their rights mentioned.

United States of America v. Whiting, 131 S. Ct. 1968 (2011)); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1054–57 (S.D. Cal. 2006).

170. *See Arizona*, 132 S. Ct. at 2497.

171. *Id.* at 2497–98.

172. *Id.* at 2510.

173. *See* Complaint for Declaratory and Injunctive Relief at 6, Friendly House v. Whiting, 846 F. Supp. 2d 1053 (D. Ariz. 2012) (No. CV 10-1061) (challenging SB 1070 on Supremacy Clause, First Amendment, Fourth Amendment, and Equal Protection grounds). Challenges that argue that state or local immigration laws discriminate against persons based on their race or national origin face a high threshold: The plaintiff must show actual discriminatory intent, rather than mere disparate impact under the Equal Protection Clause. *See* Motomura, *supra* note 156, at 1734–35.

174. *See* Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (holding that as a matter of due process, civil detention requires a "sufficiently strong special

Of course, the plaintiff in *Arizona* was the federal government, which is perhaps less interested in raising immigrant rights than in asserting its own power over the states. Moreover, the government brought a facial challenge seeking to enjoin the statute before it went into effect, making it impossible to consider facts showing that the statute operates to discriminate against persons based on their race or other invidious criteria.[175] In other cases, advocacy groups continue to bring equal protection claims, with some modest successes. However, examination of these cases underscores that the playing field has changed significantly since the days of the Burger Court.

For example, in *Dandamudi v. Tisch*,[176] a group of non-LPR non-citizens challenged a New York licensing statute providing that only non-citizens who were LPRs would be granted pharmacy licenses. The plaintiffs raised both preemption and equal protection challenges, and the Second Circuit upheld both. However, it went out of its way to explain that the preemption claim was stronger and that ordinarily it would not address an equal protection claim if the case could be resolved on preemption grounds.[177] It felt constrained to address the equal protection claim only because a provision of the North American Free Trade Agreement deprived some of the plaintiffs of standing to challenge the state law.[178] The Second Circuit's admonition against deciding equal protection claims when preemption theory resolves the case stands in contrast to cases like *Plyler* and *Sugarman*, where the Court chose to decide the case on equal protection rather than preemption grounds.[179]

Today it is clear to most litigators that preemption is likely to be more successful as a strategy than equal protection. For example,

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justification" to outweigh the deprivation of liberty, as well as "strong procedural protections").

175. On the other hand, the federal government might have argued, as the plaintiffs in *Friendly House* did, that the legislative history and circumstances surrounding enactment reflected an intent to discriminate against Hispanic persons. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 173, at 29–31. This strategy was attempted unsuccessfully in Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 540 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

176. Dandamudi v. Tisch, 686 F.3d 66, 69–70 (2d Cir. 2012).

177. *Id.* at 79–81.

178. *Id.* at 81.

179. *See* Plyler v. Doe, 457 U.S. 202 (1982); Sugarman v. Dougall, 413 U.S. 634 (1973).

in *Equal Access Education v. Merten*, the plaintiffs did not even raise an equal protection challenge to a Virginia Attorney General decision barring higher education for undocumented students; they rested their argument on preemption grounds.[180] In recent litigation concerning a section of Alabama law requiring verification of the immigration status of enrolling students, both the federal government and private plaintiffs brought suit, and the federal government sought to have the case decided only on preemption grounds.[181] However, since *Plyler v. Doe* was clearly controlling precedent, the court upheld the private plaintiffs' equal protection claim—a rare example of a recent case affirming immigrants' equal protection rights.[182]

Explanations for equal protection doctrine's fading prominence in recent jurisprudence compared to preemption will be explored more in Part III. For now it is enough to reiterate the larger trend: The Burger Court issued seven decisions upholding immigrant equal protection rights; the Rehnquist and Roberts courts have issued none.[183] Litigators today understand that the best way today to challenge state legislation is not to assert immigrant rights, but federal rights.

2. Agency Skepticism

When federal rather than state action is at issue, non-citizens also seem less likely to win equal protection claims now than during the era of the Burger Court,[184] although the shift is mitigated somewhat by the growing receptivity of courts to claims under administrative law. This shift is epitomized by two cases, the Second Circuit's 1976 decision in *Francis v. INS* and the Supreme Court's

180. Equal Access Educ. v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004).

181. *See* United States v. Alabama, 691 F.3d 1269, 1279 (11th Cir. 2012).

182. Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236, 1249 (11th Cir. 2012).

183. *See supra* note 8.

184. Although the Burger Court issued most of its decisions concerning non-citizens' equal protection rights in state cases, it did suggest in two cases that it would invalidate discriminatory federal action in egregious cases involving non-citizens. Hampton v. Wong, 426 U.S. 88, 101–05 (1976); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 600–01 (1976).

decision last year in *Judulang v. Holder*.[185] The two cases address the same issue, but in a radically different way.

In *Francis*, the Second Circuit considered an anomaly of immigration law: Courts regularly granted discretionary relief called "Section 212(c) waivers" to deportable LPRs who had traveled abroad, but because of the interstices of immigration law, refused to do so for those who had never left the United States.[186] The court found that privileging travelers in this way was irrational, and thus failed to satisfy even the most minimal level of equal protection review.[187] The Board of Immigration Appeals adopted the Second Circuit's holding nationwide[188] and the *Francis* holding was essentially the law of the land until the Board, decades later, modified its eligibility criteria for 212(c) waivers in a way that resurrected the *Francis* problem.[189] Thus, last year the Supreme Court came to consider an issue that most thought had been resolved by a prior generation.

In *Judulang*, the Court reached the same result as the Second Circuit in *Francis*, but its reasoning reveals a dramatically changed judicial culture. The Supreme Court barely even mentioned equal protection; it based its decision on the Administrative Procedure Act (APA).[190] On one hand, this might be viewed as a simple application of the constitutional avoidance principles set out by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*: Courts should not decide

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185. Francis v. INS, 532 F.2d 268 (2d Cir. 1976); Judulang v. Holder, 132 S. Ct. 476 (2011).

186. Section 212 of the Immigration and Nationality Act (INA) sets out the categories of persons who are "inadmissible" (formerly "excludable") from the United States. *See* 8 U.S.C. § 1182 (2006). A separate provision sets out the grounds for deporting persons already present in the United States. *See* 8 U.S.C. § 1227 (2006). The now defunct Section 212(c) waiver, which Congress repealed in 1996, "permitted the Attorney General to grant discretionary relief to an excludable alien, if the alien had lawfully resided in the United States for at least seven years before temporarily leaving the country and if the alien was not excludable on one of two specified grounds." *Judulang*, 132 S. Ct. at 477. Since the statute, by its terms, only applied to the grounds of exclusion, not the grounds of deportability, the immigration agency sometimes only allowed persons charged with exclusion to apply for the waiver, creating the anomaly at issue in *Francis*. For more in depth discussion of the history of the waiver, see *infra* Part V.B.

187. *Francis*, 532 F.2d at 273.

188. *In re* Silva, 16 I. & N. Dec. 26 (1976).

189. *See In re* Blake, 23 I. & N. Dec. 722, 728 (2005); *In re* Brieva–Perez, 23 I. & N. Dec. 766, 772–73 (2005).

190. *Judulang*, 132 S. Ct. at 483–84.

constitutional claims unless absolutely necessary.[191] However, it is odd that *Judulang* is the first time that the APA issue has come to the fore in this context, given the extent of litigation on the issue. The APA existed at the time of *Francis* and during the following decades, but throughout this time, equal protection was the lens through which litigators and courts viewed the issue, not the APA. It is possible that the immigration attorneys who litigated these cases were poorly versed in administrative law. But more likely, something has changed in the law to make the APA a more attractive alternative to equal protection than it was at the time of *Francis*. In fact, there is much reason to believe that this is the case—that APA review has become more robust, even as equal protection review has weakened.[192]

The APA governs both formal agency rulemaking and agency adjudication, and sets out a process for judicial review of both.[193] Courts can reverse agency policies that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[194] The meaning of this standard has shifted over the years and there is now a growing emphasis on "reasoned decisionmaking," with the Supreme Court requiring that the agency's process "be logical and rational."[195] As Justice Kagan pointed out in *Judulang*, that was not the case for the Board's confusing "comparability test" for assessing eligibility for a 212(c) waiver.[196]

Judulang is perhaps most remarkable for what it did not do. Rather than follow the 1976 *Francis* decision affirming that immigrants have a right to equal protection, it rebuked the immigration bureaucracy for failing to meet APA standards of rationality. This shift should come as no surprise; after *Francis*, the circuit courts have rejected similar equal protection claims in every other context they have been raised.[197] On the other hand, lower

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191. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347–48 (1936) (Brandeis, J., concurring).

192. *See infra* Part IV.

193. *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 Tex. L. Rev. 499, 505–06 (2011).

194. 5 U.S.C. § 706(2)(A) (2006).

195. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374–75 (1998).

196. Judulang v. Holder, 132 S. Ct. 476, 484 (2011).

197. *See* Abebe v. Mukasey, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc); Zamora-Mallari v. Mukasey, 514 F.3d 679, 692–93 (7th Cir 2008); Caroleo v. Gonzales, 476 F.3d 158, 168 (3d Cir. 2007); Vo v. Gonzales, 482 F.3d 363, 371–72

courts have been increasingly willing to reverse agency action that they perceive as irrational.

Consider the immigration jurisprudence of Judge Richard Posner, one of the most influential appellate judges. In *LaGuerre v. Reno*, Judge Posner rejected an equal protection challenge along the same lines as the *Francis* claim.[198] The challenge concerned a provision of a 1996 reform that barred 212(c) waivers for non-citizens convicted of certain drug-related offenses who were in deportation proceedings but that did not bar the waiver for aliens charged with exclusion on the basis of the same convictions.[199] Faced with the seeming irrationality of treating LPRs differently depending on whether they had left the country or stayed put, Judge Posner invented a justification: The different treatment could be a "carrot" to encourage deportable LPRs to leave voluntarily.[200] Ultimately, the rationale is facile, because when LPRs leave the United States, they are not generally held at bay outside if they are deemed inadmissible; they are placed on return into "deferred inspection" before becoming subject to removal proceedings inside the United States.[201] These proceedings can continue for years after their reentry, as if they had never left and had been apprehended and placed in deportation proceedings. If they end up losing, "inadmissible" non-citizens are removed at government expense, draining the federal fisc at the same rate as those who never left. There is no cost savings to the government, in other words, in encouraging deportable LPRs to travel outside the United States. Yet regardless of the flaws in this

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(5th Cir. 2007); Valere v. Gonzales, 473 F.3d 757, 762 (7th Cir. 2007); Vue v. Gonzales, 496 F.3d 858, 860–61 (8th Cir. 2007); Kim v. Gonzales, 468 F.3d 58, 62 (1st Cir. 2006); LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998); Komarenko v. INS, 35 F.3d 432, 434–35 (9th Cir.1994). *But see* Blake v. Carbone, 489 F.3d 88, 101–05 (2d Cir. 2007) (adhering to the Second Circuit's decision in *Francis*).

198. LaGuerre v. Reno, 164 F.3d at 1041.

199. *Id.* at 1037.

200. *Id.* at 1041.

201. Technically, removal proceedings are allowed to be conducted for persons held in foreign contiguous territory, 8 U.S.C. § 1225 (2006), but there are no immigration courts outside the United States. Thus, Customs and Border Protection officers typically "defer inspection" of LPRs with criminal convictions until they obtain certified statements of disposition for those convictions. *See* 8 C.F.R. §§ 235.2, 1235.2 (2012). After review of those dispositions, officers may issue a Notice to Appear for removal proceedings at an immigration court inside the United States. *See* 8 C.F.R. §§ 239.1, 1239.1 (2012).

justification, it has become popular with other circuit courts, including the entire Ninth Circuit, sitting en banc.[202]

Despite Judge Posner's skepticism of equal protection claims like LaGuerre's, he often rules in favor of non-citizens, especially in asylum cases. An examination of Judge Posner's immigration decisions over the ten-year period from 2002 through 2011 reveals that he ruled in favor of twice as many non-citizen petitioners as he ruled against.[203] However, only three decisions could be even remotely characterized as finding that the non-citizen's "rights" were in some sense violated, and none of these involved constitutional claims.[204] In fact, Judge Posner often refused to consider constitutional arguments when the issue could be given a more pedestrian characterization.[205] In contrast, all thirty-four pro-immigrant decisions during this time period contained language criticizing the rationality of the

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202. *Abebe*, 554 F.3d at 1207 (citing *LaGuerre*, 164 F.3d at 1041).

203. I conducted a Westlaw search for decisions written by Judge Posner after December 31, 2001, and before January 2, 2012, where the decision used the phrase "Board of Immigration Appeals." This allowed me to find 54 decisions where Judge Posner was the chief author. (I eliminated two decisions where he was in dissent and one where he filed a concurrence.) By searching for the phrase "Board of Immigration Appeals," I was able to pinpoint removal and related cases; all were petitions for review of decisions of the Board of Immigration Appeals or motions or fee petitions related to petitions for review except for one habeas petition that was related to a removal case, Hussain v. Mukasey, 510 F.3d 739 (7th Cir. 2007), and one mandamus case, Samirah v. Holder, 627 F.3d 652 (7th Cir. 2010).

204. *Samirah*, 627 F.3d at 655–65 (finding that the government was required to admit a non-citizen applicant for adjustment of status who had left the United States after the government had granted him advance parole to leave and reenter); Muhur v. Ashcroft, 382 F.3d 653, 655–56 (7th Cir. 2004) (granting the petitioner's motion for attorney's fees under the Equal Access to Justice Act because the petitioner was the prevailing party in her appeal and the government's position was not substantially justified); Miljkovic v. Ashcroft, 366 F.3d 580, 583–84 (7th Cir. 2004) (granting a motion to add the petitioner's wife to a petition for review because the court found that she was a party and the omission of her name was in the nature of a motion to correct a clerical error).

205. For example, in Subhan v. Ashcroft, 383 F.3d 591 (7th Cir. 2004), Judge Posner ruled in the petitioner's favor on statutory and administrative law grounds, meaning that the Court was not required to address the petitioner's due process claim. *Id.* at 595. However, Judge Posner went out of his way to note his skepticism of the claim, stating his "reluctance to emasculate" a jurisdictional statute that barred review of discretionary claims "by equating arbitrary rulings to denials of due process." *Id.* at 595–96.

government actors, often very harshly.[206] Judge Posner's contempt for the immigration agency appears to be so great that even when he ruled in favor of the government, he still regularly criticized the agency, questioning, among other qualities, its rationality, competence, and capacity for legal precision.[207]

Judulang and Judge Posner's influential immigration jurisprudence reveal a growing movement toward closer scrutiny of the immigration agency. But this scrutiny rarely if ever takes the form of courts examining whether the agency has trampled on immigrant rights, other than a generalized right to a fair hearing. Rather, courts increasingly draw on APA and other administrative law principles to probe the rationality of agency action.

IV. WHY THE SHIFT MIGHT HAVE HAPPENED

The multi-faceted changes detailed above—from restrictions on non-citizen voting to changing attitudes about work—no doubt have complex and varied causes. However, it is possible to suggest some reasons for one of the changes outlined above: the jurisprudential shift away from the Burger Court's heyday for immigrant equal protection. First, there have been substantial changes in the Court's doctrine. Over the past several decades, a more conservative Court has narrowly interpreted equal protection law and rights claims in general, significantly transforming the state of American constitutional law in a way that makes it more

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206. In Guchshenkov v. Ashcroft, 366 F.3d 554 (7th Cir. 2004), in response to Judge Posner's scathing opinion, Judge Evans filed a concurrence "to express my concern, and growing unease, with what I see as a recent trend by this court to be unnecessarily critical of the work product produced by immigration judges who have the unenviable duty of adjudicating these difficult cases in the first instance." *Id.* at 560.

207. *See, e.g.*, Gonzales-Balderas v. Holder, 597 F.3d 869, 870–71 (7th Cir. 2010) (criticizing, in three long paragraphs, the immigration judge's use of the word "pretermitted"); Ahmed v. Ashcroft, 388 F.3d 247, 248 (7th Cir. 2007) (describing a Board of Immigration Appeals decision as "a piece of boilerplate mindlessly affixed to a case to which it's irrelevant"); Derezinski v. Mukasey, 516 F.3d 619, 622–23 (7th Cir. 2007) (bemoaning immigration court's failure to include the date, time, and place of an upcoming hearing in order to show cause); Djouma v. Gonzales, 429 F.3d 685, 687 (7th Cir. 2005) (criticizing immigration judge for relying on an incomplete and "garbled" transcript of a Canadian immigration hearing); Mei v. Ashcroft, 393 F.3d 737, 738–38 (7th Cir. 2004) (dwelling, for an entire page, on the failings of a Board of Immigration Appeals decision).

difficult for non-citizens to prevail on individual rights claims.[208] Lawyers have no doubt responded to this shift by searching for alternative theories, and their success has led to increasing positive jurisprudence in these newer areas rather than in the arena of individual rights.

At the same time, the public,[209] policymakers,[210] and the courts[211] have become increasingly frustrated with illegal immigration and the perceived incompetence of the relevant agencies to stop it. Interestingly, this frustration has not translated to greater deference to the states' efforts to regulate immigration, perhaps because doing so would weaken the plenary power doctrine that has served for more than a hundred years as a means of restricting immigrant rights.[212] It has, however, filtered into court decisions in another way: an increase in courts' skepticism of agency competence, such as that evinced by Judge Posner's immigration opinions. This shift dovetails with other trends in administrative law, such as the growing power of the APA. All of these changes have made it easier for non-citizens to prevail in challenges based in federalism or administrative law than individual rights like equal protection, as they often did during the Burger Court era.

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208. *See* Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. Times, July 24, 2010, at A1 (discussing empirical analyses showing collectively that the Roberts Court is more conservative than the Rehnquist or Burger courts, both of which were more conservative than the Warren court).

209. *See Public Favors Tougher Border Controls and Path to Citizenship*, Pew Research Ctr. for the People & the Press, http://pewresearch.org/pubs/1904/poll-illegal-immigration-border-security-path-to-citizenship--birthright-citizenship-arizona-law (last visited Nov. 2, 2012) (indicating that, as of February 2011, 42% of poll respondents want to tighten border security and 61% favored controversial Arizona's SB 1070 law).

210. *See, e.g.*, Julia Preston, *Republican Immigration Platform Backs 'Self-Deportation,'* N.Y. Times The Caucus Blog (Aug. 23, 2012, 10:46 AM), http://thecaucus.blogs.nytimes.com/2012/08/23/republican-immigration-platform-backs-self-deportation (outlining Republican Party policies aimed at curbing illegal immigration).

211. *See, e.g.*, *supra* note 206 and accompanying text; *see also* Arizona v. United States, 132 S. Ct. 2492, 2522 (2012) (Scalia, J., dissenting) ("Federal officials have been unable to remedy the problem [of illegal immigration], and indeed have recently shown that they are unwilling to do so.").

212. *See, e.g.*, *Arizona*, 132 S. Ct. at 2510 (majority opinion) (invalidating several provisions of Arizona's SB 1070 immigration law on preemption grounds).

A. Equal Protection Doctrine

The Supreme Court's interpretation of the Equal Protection Clause has shifted considerably since *Graham v. Richardson*. It is now clear, for example, that discriminatory impact is an insufficient basis for an equal protection claim; a litigant must show actual discriminatory motive or purpose.[213] It might be inferred from *Yick Wo v. Hopkins* that a law with a disproportionate impact on a particular protected class violates equal protection, and up until 1976, a number of lower courts had in fact assumed that was the case. That year, the Court decided *Washington v. Davis*, in which it categorically rejected disparate impact as a basis for an equal protection claim.[214]

The Court's decision in *Washington v. Davis* was foreshadowed by a decision that Justice Rehnquist wrote shortly after he joined the Court: *Jefferson v. Hackney*, in which the Court rejected a *de facto* discrimination claim in the welfare benefits context.[215] Justice Rehnquist had restrictive views of individual rights in general and equal protection in particular,[216] and his influence no doubt contributed over the course of the following decades to a shift in equal protection doctrine. During the Burger Court era, Justice Rehnquist dissented in every single one of the immigration cases that the Court decided on equal protection grounds.[217] As Chief Justice (beginning in 1986), Rehnquist presided over a sweeping revision of court doctrine, one that increased the importance of structural categories like federalism over the individual rights-based analysis of the Warren and Burger courts.[218] During that time, equal protection doctrine grew particularly lean: no new suspect

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213. *See* Vill. of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 264–66 (1977).

214. Washington v. Davis, 426 U.S. 229, 239 (1976).

215. Jefferson v. Hackney, 406 U.S. 535, 549–50 (1972).

216. *See* David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary Review*, 90 Harv. L. Rev. 293, 309 (1976); Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. Pa. L. Rev. 1331, 1343–54 (2006).

217. *See* Bernal v. Fainter, 467 U.S. 216, 228 (1984) (Rehnquist, J., dissenting); Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, J., dissenting); Nyquist v. Mauclet, 432 U.S. 1, 17 (1977) (Rehnquist, J., dissenting); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 606 (1976) (Rehnquist, J., dissenting); *In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, J., dissenting); Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting).

218. Chemerinsky, *supra* note 216, at 1342–43.

classifications or fundamental rights were recognized.[219] More importantly for this Article, the Court did not decide a single equal protection case in favor of a non-citizen—a record that has persisted into the Roberts Court.

The changing composition and doctrine of the Court might explain why it stopped issuing pro-immigrant equal protection decisions, but it does not explain why the Court became more willing to rule in non-citizens' favor on preemption or administrative law grounds. After all, former Chief Justice Rehnquist and some of the other conservative Supreme Court justices have strongly favored states' rights in other areas outside immigration.[220] Yet the generally conservative Justice Kennedy drafted the opinion in *Arizona v. United States*, and Justice Rehnquist's former law clerk, Chief Justice Roberts, joined Justice Kennedy's opinion finding that federal law preempted state efforts to regulate immigration.

Even more remarkably, every single Supreme Court justice signed onto the *Judulang v. Holder* decision finding that the Board of Immigration Appeals's standard for discretionary waivers was arbitrary and capricious in violation of the APA. This is a significant development given that equal protection challenges to the discrimination at issue in *Judulang* failed in seven of eight circuits to consider the issue.[221] The equal protection claim was before the Court in the case,[222] but Judulang's attorney did not emphasize it, and the Court barely mentioned it in its opinion.[223] Once the playing field was shifted from a question of immigrant rights to agency competence, the case proved a surprisingly easy one to win.

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219. *Id.*

220. Shapiro, *supra* note 216, at 294; Chemerinsky, *supra* note 216, at 1360–63.

221. *Compare* Abebe v. Mukasey, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc), Zamora-Mallari v. Mukasey, 514 F.3d 679 (7th Cir. 2008), Falaniko v. Mukasey, 272 F. App'x 742, 748 (10th Cir. 2008), Caroleo v. Gonzales, 476 F.3d 158, 168 (3d Cir. 2007), Dung Tri Vo v. Gonzales, 482 F.3d 363 (5th Cir. 2007), Vue v. Gonzales, 496 F.3d 858, 860 (8th Cir. 2007), Kim v. Gonzales, 468 F.3d 58, 62 (1st Cir. 2006) *with* Blake v. Carbone, 489 F.3d 88, 101–05 (2d Cir. 2007).

222. *See* Brief for Petitioner at 51–53, Judulang v. Holder, 132 S. Ct. 476 (2011) (No. 10-694).

223. The only place where the Court addresses the equal protection claim that defined this issue for 35 years was in a footnote, in which it expressed some skepticism about the claim, but noted that it would not fully consider it, given that the case was being resolved on APA grounds. *Judulang*, 132 S. Ct. at 490, n.8.

B. Popular Opinion

During the 1970s and 1980s, lawmakers, judges, and the public were all concerned in much the same way as today about the creation of a substantial "'shadow population' of illegal migrants—numbering in the millions—within our borders."[224] The prevalence of the Burger Court's decisions addressing state efforts to restrict immigrants' access to state services is evidence in and of itself that the dynamic of the time was somewhat similar to that in states like Arizona and Alabama today. The public was frustrated then with the government's failure to enforce the law; even Justice Brennan referred to "[s]heer incapability or lax enforcement of the laws barring entry into this country."[225]

If there has been a change in the past few decades, it is that these attitudes have calcified. Despite a series of legal reforms over the past twenty-five years designed to combat unauthorized immigration, it seems that an increasing share of the public perceives the federal government to be ineffective at enforcing immigration laws in the face of an "invasion" or "flood" of illegal immigration.[226] As disillusionment with federal enforcement has grown, states have enacted more and more laws relating to immigration. In 2005, states enacted thirty-nine bills related to immigration; in the first half of 2012 alone, states have enacted 111 immigration laws.[227]

There is evidence that even some members of the current Supreme Court share the public's disillusionment with federal enforcement efforts. During the *Arizona v. United States* oral argument, Justice Kennedy articulated the invasion theory in the form of a thinly-veiled hypothetical, asking the Solicitor General to presume that "the State of Arizona has—has a massive emergency, with social disruption, economic disruption, residents leaving the State because of [a] flood of immigrants."[228] At another point, Chief Justice Roberts echoed popular disdain with the federal government's inability to enforce immigration law: "It seems to me that the Federal

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224. Plyler v. Doe, 457 U.S. 202, 218 (1982). For a history of the legal and cultural category "illegal aliens," see Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (2004).

225. Plyler v. Doe, 457 U.S. 202, 218 (1982).

226. *See* Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 Ga. L. Rev. 65, 73–74 (2009).

227. Nat'l Conf. of State Legislators, *supra* note 168, at 2.

228. Transcript of Oral Argument at 61, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

Government just doesn't want to know who's here illegally or not."[229] Justice Scalia offered the harshest attack on the federal government's failure to enforce immigration law in his written dissent in the *Arizona* case, referring contemptuously to the federal government's announcement, unrelated to the *Arizona* case, that it would exercise its prosecutorial discretion to not deport certain immigrant youth through its DACA initiative:

> Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so.[230]

Despite Chief Justice Roberts and Justice Kennedy's personal opinions of federal enforcement efforts, they, unlike Justice Scalia, still ruled in the federal government's favor. The reasons for their deference to the federal government are mostly well-established ones: in *Arizona*, Justice Kennedy wrote at some length about the connection between immigration and the exclusively federal matter of foreign relations[231]—a connection first made in the Chinese exclusion case, *Chae Chan Ping v. United States*.[232] As we saw in Part I, this "plenary power" doctrine has been used repeatedly over the years as a justification for declining to review immigrant rights claims. It is therefore consistent, in a way, for the Court to grow more deferential of federal power over states in immigration matters, at the same time that it is less willing to consider non-citizens' rights claims. Preemption allows the Court to affirm the vulnerability of non-citizens' to federal power while still striking down excessive and politically controversial programs like Arizona's.

Non-citizens benefit from decisions like *Arizona*, but the Court's rationale could easily be used against them to reject future immigrant rights-based challenges to federal power. The end result of the Court's growing preference for analyses based on federalism over individual rights claims is a diminution in precedent concerning individual rights, which over time likely results in a reduction in the

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229. *Id.* at 50.
230. *Arizona*, 132 S. Ct. at 2522 (Scalia, J., dissenting).
231. *Id.* at 2498–500 (majority opinion).
232. Chae Chan Ping v. United States, 130 U.S. 581, 605–06 (1889).

number of rights claims that are raised. There seems to be a correlation between an increase in federalism-based decisions and a reduction in individual rights-based decisions, and perhaps a kind of causal relationship, too, since good lawyers look not just for good theories, but ones that work. The more that preemption succeeds, the more lawyers bring such claims and courts decide them, building momentum for structural claims while individual rights theories come to a standstill.

C. Administrative Law and Theory

Although the Supreme Court ultimately deferred, for the most part, to the federal government in *Arizona*, the opinion and oral argument reveal a profound suspicion of the federal government's competency to enforce immigration laws. This skepticism may be filtering into immigration jurisprudence in other ways, such as the Court's decreasing deference to agency action in cases like *Judulang v. Holder*. Judges who think the federal agency is incompetent to control the borders may be less inclined to think the agency is competent to adjudicate individual cases.

Agency skepticism in immigration matters dovetails with a general anti-regulatory trend that has been building steam in recent decades. Early theories of administrative law were sanguine about administrative agencies: The "expertise" model conceived of agencies as reliable experts, disciplined by "the knowledge that comes from specialized experience."[233] However, over time commentators grew increasingly critical of agencies' capacity to trample on individual liberty without adequate processes.[234] The result was the APA, a compromise between New Deal liberals and conservatives who wanted to radically rein in the new administrative state.[235]

The New Dealers may have had the upper hand in 1946, but over the years since, the APA has evolved into a powerful tool for resisting regulation. In the decades following enactment of the APA, courts engaged in increasingly rigorous review of the evidence

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233. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1678 (1975).

234. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1264 (1986).

235. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1681 (1996).

supporting agency fact-finding and required additional due process for agency action implicating property interests.[236] They began to evaluate both the process of agency policymaking and the underlying substance to ensure that agency policy was rationally related to some legitimate governmental objective.[237] Over time, the standard for assessing whether agency action violates the APA's injunction against arbitrary and capricious conduct became increasingly rigorous.[238]

Today many courts have adopted a very strict version of the arbitrary and capricious test called the "hard look" doctrine, in which they closely scrutinize the agency's reasoning.[239] Although originally the arbitrary and capricious standard was modeled after rational basis equal protection review,[240] there can be little doubt that in their current forms, the APA contains the stricter test. Since the early 1960s, the Supreme Court has held that any conceivable governmental objective will satisfy equal protection rational basis review, regardless of whether it was the one that Congress actually had in mind.[241] Under the APA, in contrast, courts look at the agency's record to understand whether its rules are tailored closely enough to its stated objectives.[242] Hard look review requires that agencies give detailed explanations for their behavior, consider viable alternatives, explain departures from past practices, and make policy choices that are reasonable on the merits.[243] Under the standard set out in *Motor Vehicle Manufacturers Association v. State Farm*, a court can even reverse agency action where it fails "to consider an important aspect of the problem"—in other words, where a reason not

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236. Stewart, *supra* note 233, at 1679.

237. *Id.* at 1679–80.

238. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 476 (2003).

239. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2380 (2001); Levy & Glicksman, *supra* note 193 at 527.

240. *See* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 870 (2007); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 Wash. L. Rev. 419, 430 (2009).

241. *See* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 Cal. L. Rev. 1049, 1057–58 (1979).

242. It has become a maxim of administrative law that agency action must stand or fall based on the agency's stated objectives, not post-hoc rationalizations. *See* SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

243. *See supra* note 239 and accompanying text.

weighed by the agency counsels against the policy.[244] This is a far more rigorous test of rationality than that used in the equal protection context.

The growing power of the APA may owe its intellectual roots to academic doctrines like Public Choice theory and the Law and Economics movement. Both doctrines utilize economic theory to analyze legal or political problems, taking as a given that individuals are rational and self-interested. Public Choice and Law and Economics are heterogeneous (and sometimes related) doctrines. The doctrinal nuances of Law and Economics and Public Choice theory cannot be neatly summarized, and scholars of both doctrines have deep internal disagreements. However, both have had considerable impact on judicial review and the legal culture at large.

Public Choice theory developed between the 1940s and 1960s as a means of conceptualizing group decision-making through econometric modeling.[245] Modern Public Choice scholarship developed a pessimistic outlook on the political process,[246] and was often particularly hostile to administrative agencies, "portraying agency bureaucrats as shirking, self-interested budget-maximizers who thwart the will of the people and good government."[247] Some Public

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244. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

245. *See, e.g.*, Kenneth J. Arrow, Social Choice and Individual Values (1951) (describing for the first time the Impossibility Theorem of voting, which states that rank order voting does not properly express community-wide preferences); James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962) (exploring the societal effects of different public decision-making systems); Duncan Black, *On the Rationale of Group Decision Making*, 56 J. Pol. Econ. 23 (1948) (illustrating how models for determining the outcomes of group votes based on the preference of individual members support the median voter theory). Scholars of Public Choice theory extended the economist's model of utility maximizing behavior to social choice and interest group politics. *See* David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 Vand. L. Rev. 647, 651 (1997). Central to their work was the conceptualization of "politics as exchange"—the notion that "the political sphere is a market in which voters and representatives, like consumers and firms, act as if they are rational, maximizing individuals pursuing their self-interests." Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 Mich. L. Rev. 1746, 1752 (1998).

246. *See* Jerry L. Mashaw, Greed, Chaos, & Governance: Using Public Choice to Improve Public Law 10–21 (1997).

247. David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 Geo. L.J. 97, 99 (2000).

Choice scholars attacked administrative law at its core, arguing against agency delegation.[248] In a general way, Public Choice ideas impacted public opinion, the courts, and policy makers, justifying not only improved due process in administrative proceedings, but also sweeping deregulation.[249]

Law and Economics developed at approximately the same time, in the early 1960s. Heavily shaped by the early academic work of Judge Richard Posner, the Chicago School of Law and Economics contends that the common law is the result of an effort, conscious or not, to induce efficient outcomes. Like Public Choice, Law and Economics contributed in important ways to the deregulatory policy agenda that transformed American society from the 1970s through the 1990s.[250]

It is perhaps no accident that one of the most vocal critics of the immigration bureaucracy is Judge Posner, an important theorist of the Chicago School, who also dabbled in his early days with Public Choice approaches to statutory interpretation.[251] It is natural for Judge Posner to rail against the incompetence of the immigration bureaucracy and irrationality of immigration law because he cut his teeth railing against agency regulation in general.

Of course, most judges are not Law and Economics or Public Choice scholars. However, these ideas have not only gained great currency in the legal academy;[252] they have had a broader cultural

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248. *See* David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982). For a public choice argument in favor of delegation, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81 (1985).

249. Rossi, *supra* note 245, at 1754; Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 Chi.-Kent L. Rev. 1039, 1062–68 (1997).

250. *See* Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 Mich. L. Rev. 1921, 1925 (1993). For an early history of deregulation, see Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight A Revolution*, 57 U. Chi. L. Rev. 521, 522–38 (1990). For a discussion of the way in which cost benefit analysis has impeded health and safety regulation, see Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing 24–122 (2004) (arguing that cost benefit analysis relies in many cases on questionable valuations of invaluable goods like life, health, and environmental quality).

251. Skeel, *supra* note 245, at 660.

252. *See* Merrill, *supra* note 249, at 1068 (noting the ascendency of public choice theory in the legal academy); Posner, *supra* note 250, at 1925–26 (discussing the impact of Law and Economics).

impact in the form of general anti-regulatory sentiment and suspicion of government at all levels.[253] Their ascendance is part of a climate in which judges' level of agency skepticism and their willingness to probe the rationality of immigration agency action through the lens of administrative law has steadily increased. This is not to say that Law and Economics or Public Choice scholars themselves even agree on the importance of intrusive agency review,[254] or that most judges are familiar with these theories, but only that the growth of Law and Economics and Public Choice theory are part of a general intellectual culture of agency skepticism.

Although it is impossible to precisely pinpoint the causes of the shift from the Burger Court's emphasis on immigrant equal protection to the emphasis of courts today on federalism and agency skepticism, we have identified some potential culprits. Chief Justice Rehnquist presided over a revolution against individual rights claims in general and immigrant rights in particular. Preemption analysis allows courts to affirm federal power over immigrants at the same time that they strike down excessive and politically controversial state programs. Agency skepticism is fueled in part by popular disaffection with the immigration agency (and government in general), the prestige of academic doctrines like Public Choice and Law and Economics, and the growing heft of the APA.

V. WHAT HAS BEEN LOST

If non-citizens achieve essentially the same outcome through preemption or agency skepticism as they would as rights holders, one might wonder what has been lost. Why would immigrants need rights if the rights of the federal government were reliably enforced with respect to state discrimination, and courts rigorously applied administrative law principles when federal agency action is at issue?

Immigrant rights matter—for both non-citizens and for society at large—for a variety of reasons. As a practical matter, preemption and agency skepticism will do little for immigrants when discriminatory federal statutes are at issue. Immigrants' interests will not always converge with federal interests; there may be times

253. Merrill, *supra* note 249, at 1053.

254. *Id.* at 1072 (noting that Public Choice scholars do not agree on more intrusive agency review).

when preemption will work against rather than in favor of non-citizens. Similarly, agency skepticism may not always work in favor of non-citizens; pro-immigrant policies are just as susceptible to challenge under administrative law principles as anti-immigrant adjudications. Taken to its logical conclusion, the rationality mandate might swallow much immigration regulation; large swaths of immigration law have evolved through decades' worth of agency memoranda and guidance. This poses the risk of selective enforcement of the APA rationality mandate, and a future judiciary might be just as skeptical of pro-immigrant agency policies as judges are of policies that adversely affect immigrants today.

More broadly, rights matter because they convey autonomy and belonging. The United States' political system was consciously cultivated to assure an egalitarian civil society and has evolved since, albeit in fits and starts, toward greater inclusivity rather than exclusivity.[255] Thus, important democratic values may be prejudiced by a diminution of rights analysis for a minority group. A loss in immigrant rights might be a bellwether for a broader reduction of American rights.

A. Gaps in Federalism

The obvious problem when non-citizens derive their rights from the federal government is that non-citizens' interests will not always converge with the federal government. For example, at the same time that the Obama Administration has fought state anti-immigrant legislation, it has also stepped up its own enforcement efforts against so-called "criminal aliens." The linchpin of this strategy is a program called "Secure Communities," under which DHS receives fingerprint data for persons arrested by local law enforcement; if the arrestee is a non-citizen, DHS issues a detainer asking that the local agency hold the arrestee for up to forty-eight hours while DHS arranges to detain the individual.[256] Many states and localities are eager to cooperate with Secure Communities, but there are also some that have resisted compliance, like the District of Columbia, Cook County (Chicago), San Francisco County, and Santa Clara County.[257]

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255. *See* Lawrence H. Fuchs, The American Kaleidoscope: Race, Ethnicity, and the Civic Culture 5–6 (1990).

256. *Supra* note 28.

257. *Id.*

There are numerous legitimate policy reasons why states and localities may not wish to cooperate with federal enforcement efforts. The program may interfere with community policing efforts, making non-citizens reluctant to come forward to report crimes. Data on Secure Communities suggests that non-citizens arrested for minor traffic offenses have born much of the brunt of the program, despite the fact that it is targeted at non-citizens with serious offenses.[258] The legal authority for DHS detainers is somewhat tenuous,[259] and states and localities may be concerned that they will be subjected to litigation for holding non-citizens beyond the period necessary for their criminal sentence or pre-trial detention.[260] The loss of the primary wage earner for a family, often composed in part of U.S. citizens, typically leaves the family in a state of crisis, and the state may not want to foot the bill for the family's welfare afterward.[261] For that matter, the federal government does not even fully reimburse states and localities for the extra period that they

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258. *See* American Friends Service Committee, Project Voice New England, et al., Restoring Community: A National Community Advisory Report on ICE's Failed 'Secure Communities' Program 5 (2011) (finding that less than one quarter of those apprehended through Secure Communities fell within the category of individuals ICE has defined as its first priority for removal).

259. 8 C.F.R. § 287.7 authorizes certain immigration officials to issue a detainer and mandates that state and local agencies comply with the detainer for a 48 hour period. As authority for this mandate, it cites two provisions of the Immigration and Nationality Act: one governing removal of non-citizens, the other, the powers of immigration officers. 8 C.F.R. § 287.7(a) (2012). However, the removal provision is silent as to the question of detainers. *See* 8 U.S.C. § 1227 (2006). The other provision, 8 USC § 1357(d) does authorize the issuance of immigration detainer to states and localities, but only "[i]n the case of an alien who is arrested by a . . . State[] or local law enforcement official for a violation of any law relating to controlled substances." 8 U.S.C. § 1357(d) (2006). Since the provision only applies on its face to drug cases and fails to reference any time period for detention, there is argument that the DHS regulation is *ultra vires*. Of course the risk of making an argument of this type is that Congress will respond by enacting a statute providing for broader authority.

260. *See, e.g.*, Brian Bennett, *Program Ensnares U.S. citizen; He's suing the FBI and Homeland Security After Being Flagged as an Illegal Immigrant and Held in Prison*, L.A. Times, July 6, 2012, at A9 (describing a lawsuit filed by the National Immigrant Justice Center in Chicago after a U.S. citizen was incorrectly identified through the Secure Communities program as an undocumented immigrant and held for two months in a maximum security prison instead of the drug treatment program to which he had been sentenced).

261. *See* Daniel Kanstroom, Aftermath: Deportation Law and the New American Diaspora 135–39 (2012).

detain non-citizens.[262] In the end, state and local policy makers simply may not agree that non-citizen residents with substantial ties to the state should be separated from their families and deported to countries they often know little about.

As a matter of principle, if the federal government has the right to preempt anti-immigrant rules, it should have a right to preempt pro-immigrant policies too. Some might respond that the federal government's power to compel state and local action is distinguishable from its power to preempt. The Tenth Amendment operates as a significant limitation on federal authority over the states, providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[263] However, as *Arizona v. United States* makes clear, immigration is just such a power, and there is a lengthy historical record of the federal government compelling or enlisting state action in the immigration arena.[264] This might be enough in and of itself to distinguish cases that prohibit the federal government from commandeering state and local action in other contexts.[265] On the other hand, the detainer

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262. A portion of the costs associated with detainers for undocumented individuals with a certain number of prior convictions is covered by a Department of Justice program called the State Criminal Alien Assistance Program (SCAAP). SCAAP only covers about 25% of the relevant costs in most cases. *See* Letter of Richard M. Stana, Director, Homeland Security and Justice Issues, United States Governmental Accountability Office, to The Honorable John N. Hostettler, Chairman, Subcommittee on Immigration, Border Security, and Claims Committee on the Judiciary, House of Representatives (Apr. 7, 2005) at 3, *available at* http://www.gao.gov/new.items/d05337r.pdf.

263. U.S. Const. amend. X.

264. *See* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012). Statutes enacted by the first Congresses required state courts to record applications for citizenship, transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, and register aliens seeking naturalization and issue certificates of registry. Printz v. United States, 521 U.S. 898, 905–06 (1997). Late nineteenth century immigration law enlisted the cooperation of state officials "to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid"; to inspect arriving immigrants and exclude any person found to be a "convict, lunatic, idiot," or indigent; and to send convicts back to their country of origin "without compensation." *Printz*, 521 U.S. at 916 (quoting Act of August 3, 1882, ch. 376, §§ 2, 4, 22 Stat. 214).

265. *See Printz*, 521 U.S. at 933 (finding that provisions of the Brady gun law requiring local officers to conduct background checks on prospective handgun

regulation does impose a financial obligation on local jails, and without clear statutory authority to do so in all cases.[266]

Ultimately, the question whether the federal detainer regulation is valid is complicated. Yet the central point of *Arizona*—that states and localities cannot enact their own immigration policies—weighs against the efforts of localities to resist DHS detainers. Federalism does not provide a principled basis for arguing both that states cannot enact and enforce immigration laws and that localities can resist harsh federal programs. For that, something more is required—that non-citizens have rights of their own. In fact, holding non-citizens based on a mere federal statement that DHS is conducting an investigation into non-citizen status ought to raise serious Fourth Amendment issues.[267] However, the jurisprudence on non-citizens' Fourth Amendment rights has sometimes looked grim.[268]

The main point of this discussion is that if non-citizens have no rights of their own, they might find themselves at the whim of the executive, which may or may not have their interests at heart.[269] History is rife with shameful examples of federal discrimination against non-citizens, from the Palmer raids to Japanese internment.[270] Of course, non-citizens can rely on other rights surrogates to attack federal action, like administrative law arguments. When they grant these claims, courts tacitly acknowledge non-citizens' rights to some extent. Yet, as we will see, administrative

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purchasers imposed an unconstitutional obligation on state officers to execute federal laws).

266. *See supra* notes 259 and 262.

267. Since immigration judges make ultimate determinations as to deportability, the initial decision to apprehend a non-citizen is merely investigatory, and warrantless arrests for investigative purposes are at odds with the Fourth Amendment. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972) ("We allow our police to make arrests only on 'probable cause'. . . . Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system.").

268. *See supra* Part I.B.1.

269. During the Alien and Sedition Act debates, the Democratic-Republicans argued in favor of non-citizen rights precisely because they were concerned about the dangers to the constitutional order of having a large class of persons living in this country at the pleasure of the executive. *See* Neuman, *supra* note 34, at 57.

270. *See* Daniel Kanstroom, Deportation Nation: Outsiders in American History 149–55, 208–14 (2007).

law can be used against non-citizens as easily as it can work in their favor.

B. The Flaws of Agency Skepticism

The premise of the APA—that agencies should act rationally—seems sound. Yet anyone who has ever dealt with a bureaucracy knows that much bureaucratic action has little to do with substantive rationality. Administrative agencies promulgate a host of formal procedural rules—from the ministerial requirements of their forms to the deadlines for filing them—that lack any substantive rationale. Moreover, even many substantive bureaucratic rules are not created through an intentional process; they evolve over time as different types of bureaucrats compete for resources in a changing environment.[271] Evolved agency rules are subject to attack under the reasoned decision making requirement of the APA. However, not all evolved law is harmful to agency constituents.

For example, the 212(c) waiver that the Supreme Court considered in *Judulang v. Holder* never would have existed at all for deportable non-citizens if the INS had not fitfully tried to help deportable non-citizens in compelling cases.[272] If the INS had stuck to the statutory language, which applied on its face only to excludable non-citizens, the 212(c) standard would not have been subject to APA attack. The INS embarked on the path of irrationality when it allowed deportable non-citizens to seek "nunc pro tunc" 212(c) relief in cases when they had previously left the United States.[273] This and other exceptions that the agency carved out to the statutory language compounded the situation that the Second Circuit in *Francis v. INS* found unconstitutional. By the time of *Francis*, the Board had already gerrymandered the statute so much in its efforts to help non-citizens that it no longer had the statutory language to fall back on as a justification for its disparate treatment.[274]

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271. *See* Anthony Downs, Inside Bureaucracy 198–210 (1967).

272. The complicated evolution of the 212(c) standard is beyond the scope of this Article. Much of the history the 212(c) waiver and its predecessor, the Seventh Proviso of the Immigration Act of 1917, § 3, 39 Stat. 874, 875–78 (1917), are set out in Francis v. INS, 532 F.2d 268, 270–71 (2d Cir. 1976).

273. *See In re* L—, 1 I. & N. Dec. 1, 6 (1940) (holding that the Secretary of Labor has the power to grant a nunc pro tunc waiver of exclusion to a person placed in deportation proceedings based on crimes committed before a prior entry date, thereby eliminating the basis for the deportation proceedings).

274. *Francis*, 532 F.2d at 271–72.

After the Second Circuit found that this policy violated equal protection, the waiver again became broadly available to most deportable non-citizens until 1996, when Congress replaced it with "cancellation of removal," a form of discretionary relief that is available to both inadmissible and deportable non-citizens, but not to persons with convictions considered "aggravated felonies."[275] Today 212(c) relief remains available to persons with aggravated felonies only because the Supreme Court, in *INS v. St. Cyr*, found that it would have been impermissibly retroactive for Congress to have eliminated the waiver for persons who pled guilty to crimes in reliance on its existence.[276] The Board implemented the *St. Cyr* decision with regulations,[277] which it later interpreted to mean that only non-citizens charged with a ground of deportability with substantially similar language to a ground of inadmissibility could apply for the waiver.[278]

It is true, as the Court said in *Judulang*, that the factors relevant to this test bear no relationship to the question whether a non-citizen deserves deportation.[279] But the basic feature that made this comparability test irrational is one that Congress created: the formalistic distinction between "deportable" and "inadmissible" non-citizens. This distinction has led to countless instances of arbitrary discrimination, and the courts have approved most of them.[280] Moreover, this distinction is only one of many bizarre aspects of immigration law, which is so full of mechanistic rules, unexpected pitfalls, and traps that courts have taken to repeatedly calling it a "labyrinth."[281] The point is not that DHS and its predecessor INS

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275. 8 U.S.C. § 1229B(a)(3) (2006).

276. INS v. St. Cyr, 533 U.S. 289, 321–26 (2001).

277. 8 C.F.R. § 1212.3 (2012).

278. *In re* Blake, 23 I. & N. Dec. 722, 728 (BIA 2005).

279. Judulang v. Holder, 132 S. Ct. 476, 478 (2011).

280. The grounds of deportation and inadmissibility differ in subtle ways that create inequitable results. For example, a person with a conviction for possession of less than 30 grams of marijuana is not deportable, but is inadmissible, meaning that if she never travels, she can continue to live in the United States, but if she takes a trip abroad, she will be placed in removal proceedings on her return. *Compare* 8 U.S.C. § 1182(a)(2)(C) (2006) (ground of inadmissibility for controlled substances violations), *with* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) (ground of deportation for controlled substance offenses).

281. Avagyan v. Holder, 646 F.3d 672, 679 (9th Cir. 2011); Hernandez v. Mukasey, 524 F.3d 1014, 1018 (9th Cir. 2008); Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005).

have been rational relative to Congress, but just that their actions are no more irrational and in some cases, the agencies' missteps were taken in good faith, in efforts to benefit immigrants.

In the case of the 212(c) rules, the standard had become so corrupted that it benefited non-citizens to strike it down. But a more recent example of agency action better demonstrates that sometimes the APA may not help non-citizens. In August 2012, DHS announced that it would grant a two-year deportation reprieve and confer work permission on the group of immigrant youth who have come to be called "DREAMers." DHS has mandated that in order to be eligible for its new "Deferred Action for Childhood Arrivals" (DACA) program, the non-citizen must have:

- arrived in the United States under the age of sixteen;
- continuously resided in the United States for at least five years preceding June 15, 2012 and have been present in the United States on June 15, 2012;
- currently be enrolled in school, graduated from high school, have obtained a general education development certificate (GED) or have been honorably discharged veterans of the U.S. Coast Guard or Armed Forces;
- not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety;
- be at least fifteen years old; and
- not be above the age of thirty.[282]

Some of these requirements raise questions. For example, unauthorized immigrants are ineligible to serve in the Armed Forces,[283] making that provision seemingly inane. For that matter, why should a fifteen-year-old immigrant be eligible to apply for relief under the program, but not a fourteen-year-old? Perhaps DHS had a reason for including the armed forces provision or limiting relief to persons over the age of fifteen, but we have no idea what they were,

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282. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012) [hereinafter Napolitano Memo], *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

283. 10 U.S.C. § 504 (2006).

since there is no public record of its decision-making process. The agency never gave formal notice of a proposed rulemaking nor invited public comment. The agency's decision to proceed without formal rulemaking has already led to one APA lawsuit: *Crane v. Napolitano*, filed by a group of Immigration and Customs Enforcement agents and the state of Mississippi.[284]

Litigation against the DACA program will have to overcome enormous jurisdictional hurdles.[285] That being said, the principles set out in *Judulang* do not weigh in favor of the DACA program. *Judulang* seemingly adopted the relatively strict version of the APA standard of reasoned decision-making set out in *Motor Vehicle Manufacturers Association v. State Farm*, a standard that empowers courts to closely dissect agency decision-making.[286] Although DHS

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284. *See* Amended Complaint, Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. Oct. 10, 2012).

285. Much of the jurisdictional battle will likely center on whether the DACA program is merely an exercise of DHS's prosecutorial discretion to not deport certain persons, or the conferral of a type of status on non-citizens without Congress having conferred authority on the agency to do so. There are a host of impediments to court review of agency prosecutorial discretion. *See* 5 U.S.C. § 701(a) (2006) (precluding APA review where a statute forecloses review or the decision sought to be challenged is discretionary by law); 8 U.S.C. § 1252(a)(2)(B) (2006) (precluding review of immigration matters subject to the discretion of the DHS Secretary); Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"). *Cf.* 8 U.S.C. § 1252(g) (2006) (precluding review of decisions to *commence* proceedings) (emphasis added). There are also rigorous standing requirements under both Article III of the Constitution and the APA. In order to meet Article III's requirements, the plaintiff must have (1) suffered an "injury in fact" that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). The litigant must also establish standing under the APA, which authorizes review if there is "final agency action" and the injured litigant is within the "'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882–83 (1990).

286. Under *State Farm*, agency action can be struck down "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

gave reasonable explanations for the program,[287] these explanations might not fare well under the probing lens of *State Farm*.

Ultimately, the APA is a two-edged sword, which can be used against immigrants just as easily as it can cut in their favor. A "rational" deportation process, after all, is not necessarily the same thing as a decent or fair one. Although non-citizens have lately fared well with APA-type claims, the tables might turn, and the APA and anti-regulatory sentiment might be used against programs benefitting non-citizens just as they have served to invalidate liberal agency policies in other contexts.[288] Sometimes what will be needed to protect non-citizens will not be an ostensibly value-neutral standard focusing on reasoned decision-making, but one that looks more broadly to substantive fairness—one, in other words, that looks like a right.

VI. WHY RIGHTS MATTER

There has been a robust debate in the legal academy concerning the existence and meaning of rights. In the 1920s and 1930s, legal realists depicted rights as social constructs.[289] Yet there was a powerful backlash to this work during and after World War II,[290] which seemed to demonstrate the importance of political rights as a buffer against fascism. A similar backlash ensued when Critical

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agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

287. *See* Napolitano Memo, *supra* note 282, at 1.

288. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 767–68 (2008) (finding that the political commitments of judges significantly influence the operation of arbitrary and capricious review in EPA and NLRB cases); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717, 1738 (1997) (finding that in industry challenges to EPA action, Republicans had a higher reversal rate than Democrats and for environmental challenges, Democrats had a higher reversal rate than Republicans in all the periods).

289. For a realist critique of property rights, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923) (contending that the market economy was the actual creator of property and entitlements, rather than being a neutral institution that reflected pre-existing property rights).

290. *See, e.g.*, Walter B. Kennedy, *A Review of Legal Realism*, 9 Fordham L. Rev. 362, 373 (1940) ("The fatal divorce of the actual from the ideal or the real from the abstract is a penetrating defect of realism which has ended in this unqualified rejection of rule by law.").

Legal Studies scholars argued in the 1980s that rights are indeterminate and harmful legitimators of economic oppression.[291] Critical Race Studies scholars eloquently rejoined that rights have great instrumental value, noting their centrality to the historical struggle of African Americans for equal treatment.[292]

The vigor of this debate underscores that the United States' national identity has historically been linked to the question of rights. It may be difficult to pinpoint exactly what a right is, but denying the existence of rights strikes many as dangerous, particularly those who have been historically relegated to the margins of society. As Professor Patricia Williams points out, it is easiest for those accustomed to privilege to dispense with rights.[293] To a large extent, rights matter because of what they signify about their holders: autonomy and membership.

A. Rights of Personhood

> *All human beings are born free and equal in dignity and rights.*[294]

At their most basic level, rights imply subjectivity and agency. Thus, persons, not animals or things, have historically had rights.[295] The classical liberal notion of rights as inherent in personhood is something that heavily influenced the drafters of the U.S. Constitution, who believed, according to Lockeian social contract theory, that persons have natural rights, and government has only those rights that persons relinquish to it for their mutual

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291. For an explanation of the Critical Legal Studies critique of rights, see Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1363–64 (1984) (arguing that rights are unstable, indeterminate, reifying, and reactionary). For a response from the Critical Race Studies camp, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988).

292. *See* Patricia J. Williams, The Alchemy of Race and Rights: Diary of a Law Professor 165 (1991); Crenshaw, *supra* note 291, at 1356.

293. Williams, *supra* note 292, at 148.

294. Universal Declaration of Human Rights art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

295. For a philosophical defense of the inalienability of rights as to persons and not things, see Georg W. F. Hegel, Hegel's Philosophy of Right, § 66 (T.M. Knox trans., Oxford Univ. Press 1967) (1821).

protection.[296] John Stuart Mill believed that if government was granted too many powers, it would trample upon the human ingenuity that is essential for the progress of civilization.[297] The drafters of the Constitution took this danger seriously; hence, the Bill of Rights is rather heavy on "negative rights"—the right to be free from interference in one's personal dealings, provided that one is not infringing on the rights of others to do the same.[298]

In the Kantian sense of rights, rights holders are entitled to be treated as an ends in and of themselves, rather than a means for accomplishing other persons' ends, i.e. as things.[299] For both Kant and Hegel, freedom is expressed through alienation, through persons' exercising their will over things.[300] Similarly, Locke believed that property—the ability to take and own things—was one of the three natural rights.[301] One view of rights, then, is that they live in the sometimes-contested territory between persons and things.[302]

The classical liberal notion of rights of personhood appears to have always been central to the American political system. The founders held strongly to the liberal ideas of Locke and Mill, who believed that persons were autonomous agents with natural rights who should retain a sphere of individual liberty free from governmental restraint.[303] Many of the "negative" rights in the Bill of Rights—free speech, freedom from unreasonable searches and seizures, and due process—seem to stem from this notion of rights as inalienable expressions of personhood, emanating from that residual sphere of autonomy untouched by the social contract.

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296. John Locke, Second Treatise of Government, ch. 8, § 95 (C.B. Macpherson ed., Hackett Publishing Inc. 1980) (1690). For a modern articulation of natural rights theory, see Robert Nozick, Anarchy, State, and Utopia ix (1974).

297. John Stuart Mill, On Liberty ch. 4 (1869).

298. For a description of the distinction between positive and negative rights, see Thomas Halper, Positive Rights in a Republic of Talk: A Survey and a Critique 14–20 (2003).

299. Immanuel Kant, Grounding for the Metaphysics of Morals 40–43 (1993).

300. *See* Margaret Jane Radin, Contested Commodities 35 (1996).

301. Locke, *supra* note 296, at ch. 2, § 6.

302. For an argument for conferring rights on natural objects, see Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 455 (1972).

303. *See, e.g.*, The Federalist No. 2, at 8 (John Jay) (Maria Hong ed., 2004) ("Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.").

The founders likely viewed these as natural rights, which is perhaps why they used the terms "people" and "person" instead of "citizen" when enumerating them.[304] Pointing to the universalistic language of the text, Alexander Bickel argued that the American Constitution first and foremost "bestow[s] rights on people and persons, and [holds] itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen."[305]

B. Membership Rights

> *Citizenship is man's basic right for it is nothing less than the right to have rights.*[306]

Rights also connote membership—"rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being."[307] Communitarian theorists urge that individual rights cannot be understood outside the context of community; rights are constituted in the context of belonging.[308] From at least the time of ancient Rome, rights have both signified and stemmed from membership.[309] Today, membership rights from country clubs to advanced economies are desired and contested, so much so that Michael Walzer has observed that "[t]he primary good that we distribute to one another is membership in some human community."[310]

If eighteenth-century social contract theory was a source for rights of personhood, it also gave rise to influential proto-communitarian theories of rights. In contrast to Locke, Jean Jacques Rousseau did not believe that the origin of rights was in nature; he

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304. *See* U.S. Const. amends. I, II, IV, V, X, XIV.

305. Alexander M. Bickel, The Morality of Consent 36 (1975). For a counterargument contending that the founders cared a great deal about citizenship, see Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 Ariz. St. L.J. 1135, 1136 (1996).

306. Perez v. Brownell, 356 U.S. 44, 64 (1957).

307. Williams, *supra* note 291, at 153.

308. *See* David Morrice, *The Liberal-Communitarian Debate in Contemporary Political Philosophy and Its Significance for International Relations*, 26 Rev. Int'l Stud. 235–36 (2000).

309. J. G. A. Pocock, *The Ideal of Citizenship Since Classical Times*, *in* The Citizenship Debates: A Reader 31, 38 (Gershon Shafir, ed., 1998).

310. Michael Walzer, Spheres of Justice 31 (1983).

located it in "the social order."[311] Although Locke believed that free persons retained a sphere of natural rights free from governmental interference, Rousseau's social compact entails complete alienation of each individual's rights to the collective whole, creating a new sphere of collective rights, owned and expressed by "the People," each of whom individually were "citizens."[312] Rights for Rousseau were by definition membership rights, arising out of social, reciprocal obligations, and expressed through the political process.

It is exactly because rights connote membership that they matter for many at the margins of society. As Professor Kenneth Karst remarked, "The rhetoric of rights is vital to a cultural minority in defending the values of belonging, whether the concern be for group solidarity or for integration into the larger society."[313] Yet this empowering feature of membership rights is exactly what makes them dangerous. Just as rights of personhood are partly framed by a binary relationship of persons to things, members have rights of membership via their relationship with non-members. Rights in this sense are often perceived as a zero-sum game; the extension of rights to new members might be considered a dilution just as much as an expansion.[314]

C. Non-Persons and Non-Members

Communitarians and liberals may not agree about the source of rights, but both perspectives hold that rights are valuable. Rights holders are persons who command respect in their relationship with other persons and the state. They are also members of "the people" who may lay claim to membership rights from voting to public benefits.

The shift from the Burger Court's equal protection jurisprudence to the contemporary Court's focus on federalism and agency skepticism represents a net loss of prestige for non-citizens.

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311. Jean Jacques Rousseau, On The Social Contract, paras. 6, 58–65 (G.D.H. Doyle trans., Dover Publications 2003).

312. *Id.*, para. 46.

313. Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 340 (1985).

314. *See, e.g.*, Schuck, *supra* note 24, at 169, 173 (arguing that the extension of due process rights to non-citizens has devalued citizenship). For a critique of Schuck's communitarian perspective, see Bosniak, *supra* note 43, at 1000–06; T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Const. Comment. 9, 28–32 (1990).

Within the panoply of American rights, few resonate more with the public than the right to equal protection, which was enacted to assure that freed slaves were granted full societal membership rights after the Civil War.[315] The clause has since been interpreted as a means for overcoming the shortfalls of representational democracy by protecting "discrete and insular" minorities.[316] But rather than confirming the membership status of non-citizens, cases like *Arizona v. United States* uphold the rights of the federal government over immigrants. And administrative law is at least as focused on assuring agency accountability to the democratic majority as it is on protecting the rights of persons caught up in agency processes.[317]

Preemption analysis and the APA are similar in the sense that immigrants are incidental beneficiaries rather than subjects in their own right. Preemption affirms the power of the federal government over immigrants; the APA affirms the power of courts over agencies. In both cases, immigrants are subordinate.

Rights are not only important for the prestige and protection of immigrants; they also matter for society. Both liberals and communitarians agree, albeit for different reasons, that a just society requires a more or less equal distribution of rights. For example, John Rawls argued that liberty is a social value, which, like economic opportunity, should be distributed equally unless an unequal distribution is to everyone's benefit.[318] Based on Rawls's social

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315. *See* Jacobus TenBroek, Equal Under Law 202 (1965).

316. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 75–76 (construing United States v. Carolene Products Company, 304 U.S. 144, 152 n.4 (1938)).

317. *See* Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243, 246 (1987) (arguing that the purpose of administrative law is to help elected politicians retain control of policymaking); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. Chi. L. Rev. 1137, 1141 (2001) (contending that the purpose of cost-benefit analysis is to ensure that elected officials retain power over agency regulation); Kagan, *supra* note 239, at 2331 ("All models of administration must address two core issues: how to make administration accountable to the public and how to make administration efficient or otherwise effective.").

318. John Rawls, A Theory of Justice 54 (2000). Rawls elaborates that "liberty can be restricted only for the sake of liberty itself." *Id.* at 214. By this he means not that greater liberty for some might justify a lesser liberty for others, but rather that those with the lesser liberty must prefer that status quo because they are compensated in some way for it, in the form of some other advantage. *Id.* at 218. Thus, he assumes that slavery will almost never be just, unless it is in the

contract theory, Professor Ronald Dworkin argues that all persons have a "right to equal concern and respect."[319] By this he means not that all persons have a right to equal treatment, but that all persons have a right to be treated as equals.[320] Thus, more liberties may be apportioned to some persons than others only if the principle of allocation does not treat any person as worthy of less respect than others.

One might argue that sovereignty is a neutral principle that rational non-citizens themselves might choose as a reason for unequal treatment in cases where it is necessary to protect national sovereignty. Thus, despite Rawls and Dworkin's strong defense of equality, a liberal argument might be made for restricting some non-citizen rights, likely those that seem most obviously related to membership, such as voting and certain types of governmental employment. But the sovereignty argument weakens when core rights of personhood are at issue.

This liberal argument for restricting rights dovetails with communitarian arguments. One of the most prominent communitarian thinkers, Michael Walzer, has written in favor of rigid control at the border, since he believes that communities must be allowed to define themselves.[321] But he is clear that this form of control should not intrude on the life of the interior:

> The determination of aliens and guests by an exclusive band of citizens (or of slaves by masters, or women by men, or blacks by whites, or conquered peoples by their conquerors) is not communal freedom but oppression. The citizens are free, of course, to set up a club, make membership as exclusive as they like, write a constitution, and govern one another. But they can't claim territorial jurisdiction and rule over the people with whom they share the territory. To do this is to act outside their sphere, beyond their rights. It is a form of tyranny. Indeed, the rule of citizens over non-citizens, of members over strangers,

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context of an evolving society that formerly subjected the persons who will be slaves to some worse penalty, such as death, perhaps because they are prisoners of war. *Id.*

319. Dworkin, *supra* note 30, at 273.

320. *Id.*

321. Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 52–61 (1983).

> is probably the most common form of tyranny in human history.[322]

Walzer's concern with the mistreatment of non-citizens stems from his ideas about equality. He argues in favor of "complex equality," meaning that persons should be free to achieve monopoly, or supremacy within a particular "sphere," like politics or wealth, but no monopoly should extend across spheres. Thus, wealth should not allow somebody to buy political power, and a nation's authority over the border should not entitle it to deny non-citizens rights unrelated to the national project of self-definition.[323]

In fact, some communitarians have argued that weakening non-citizens' rights can actually undermine community. As Professor Linda Bosniak has pointed out, the exploitability of undocumented workers makes them attractive to some employers, thus creating employment opportunities that induce new non-citizens to enter illegally.[324] Although there are many aspects to the intractable cycle of unauthorized immigration, one solution is to assure that unauthorized migrants' rights are protected.

At the end of the day, rights protect. The Critical Race Studies scholars persuasively argued that rights are political resources and signifiers of worth.[325] Liberals and communitarians might debate the source of rights—personhood or membership—but from a functional perspective, rights signal both, and in a society that values both autonomy and community, both are essential.

VII. CONCLUSION

The Equal Protection Clause was a favorite tool of the Burger Court, which used it to strike down legislation restricting immigrants' access to state services in all cases except those implicating a political function. This exception is counter-textual, since the provision refers to "persons," but in the political function cases, the Court seemed to read "persons" as "the People." Despite the Equal Protection Clause's universal language, U.S. courts have never interpreted it as a mandate that all persons be treated equally in all circumstances. Courts have always looked at the party being discriminated against,

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322. *Id.* at 62.
323. *Id.* at 17–20.
324. Bosniak, *supra* note 43, at 1004.
325. *See supra* note 291 and accompanying text.

the issues at stake, and the justification for the disparate treatment. It is perhaps inevitable that principles of membership will filter into this analysis. Indeed, the history of the Fourteenth Amendment shows that it has always been a right that is deeply embedded in notions of membership. It was passed to remedy the subordination of slaves, but it has been the gateway into the mainstream of American political life for women, and racial and sexual minorities. It is a means of safeguarding "discrete and insular minorities" from the ominous side of democratic politics: majoritarian tyranny.

In this context, the Burger Court's many decisions upholding immigrant equal protection rights sent a powerful signal that non-citizens were members. In the years since, the Court has continued to issue important opinions in non-citizens' favor. Notably, the Rehnquist Court found that the government cannot indefinitely detain non-citizens,[326] and the Roberts Court has held that they are entitled under the Sixth Amendment to attorney advice concerning the deportation consequences of a criminal conviction.[327] The contemporary Court remains committed in criminal and quasi-criminal matters to non-citizens' core rights of personhood. But it has not affirmed what the Burger Court often held—that non-citizens are entitled to equal protection when the government discriminates against them in allocating the benefits of membership.

Instead, the Court has struck down discriminatory state legislation based on the logic of preemption, and has reined in agency action through the APA. Agency skepticism and federalism are substitutes for equal protection with very different implications. Federalism is about power—the power of the federal government over states, and in the immigration context, over non-citizens. The APA is a tool for asserting judicial power over agencies and, by assuring that agencies do not exceed their legislative mandate, the power of the democratic majority over unelected bureaucrats. Unlike the Equal Protection Clause, which is a means for safeguarding the rights of the few, the APA is in large part about agency accountability to the majority.

The shift away from immigrant equal protection may be part of a larger shift away from recognizing non-citizens as members. In the nineteenth and early twentieth century, European immigrants were on a presumed pathway to citizenship, and enjoyed much

326. Zadvydas v. Davis, 533 U.S. 678, 701 (2001).
327. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

broader political participation rights than today. The racialized distinctions of the nineteenth and early twentieth century have now given way to a complex hierarchy of immigration statuses, with Lawful Permanent Residents on the top and undocumented immigrants at the bottom. LPR status is difficult to obtain, and although LPRs have greater membership rights than other immigrants, they have less than the intending citizens of an earlier era. Moreover, as the boundary for members has narrowed, the scope of membership rights has increased. Rights like the rights to work and free speech were once assumed to belong to everyone; today they are sometimes restricted to LPRs or other privileged immigrants.

The dissipating membership rights of immigrants means that they must rely more on the exercise of federal or state discretion in their favor. This reliance, however, may place non-citizens in danger. The APA could be used by anti-immigrant organizations to attack federal programs that benefit non-citizens, like the DACA initiative, just as industry groups have successfully challenged environmental legislation. Conversely, states that have more generous policies toward non-citizens than the federal government could face federal preemption challenges that are the mirror image of *Arizona*.

History teaches that majoritarian tyranny is a real threat to immigrants, who are poorly protected by the political process. The federal government's immigration policies will shift as administrations and priorities change, and the beneficent policies of today may give way to draconian ones tomorrow. Meanwhile, Congress seems to lack the will to create a comprehensive and coherent immigration law. Congressional inertia is feeding public frustration with the immigration system, meaning that states and localities are increasingly taking matters into their own hands, passing laws like Arizona's SB 1070. *Arizona v. United States* will not spell the end to this conflict, and if the only boundaries to it are the principles of federalism, states will not lose every battle.

The Equal Protection Clause is an important shield against majoritarian abuse, yet for non-citizens, it seems less reliable today than in times past. This is not to say that the Court fails entirely to protect non-citizens' rights. Cases like *Padilla v. Kentucky* and *Zadvydas v. Davis* uphold important procedural rights for non-citizens facing deportation. Even *Arizona* recognizes that the prolonged detention of non-citizens as part of an investigation into their status could be constitutionally problematic. For that matter, *Judulang v. Holder* and the asylum jurisprudence of Judge Posner could be read as being about more than just agency rationality; they

might also be invoked for a principle of procedural fairness that is light years beyond the level of due process that the early Court recognized in cases like *Yamataya v. Fisher*.

If there is a direction that can be intuited from the Court's circuitous immigrant rights jurisprudence, it seems towards procedural due process and away from membership rights. The Court respects core rights of personhood when non-citizens are on the verge of serious harm—indefinite detention, deportation based on ineffective assistance of counsel, or a fundamentally unfair hearing. Upholding basic procedural rights within the context of a sometimes Kafkaesque deportation process is an important role for a Court. But this is rights protection at the eleventh hour—when non-citizens are already halfway out the door.

Immigrants have always been liminal figures in American constitutionalism: persons, for purposes of core due process and (most) criminal procedural rights, but only partly members of "the People" when it comes to public benefits or political participation. The debate over how to allocate membership rights to immigrants is a difficult one, which partly turns on their characterization. At different times in U.S. history, non-citizens have been putative, transitional, potential or non-members. Sometimes they have been "guests," but rarely welcome ones. All too often, they have been called invaders, as Justice Scalia described unauthorized migrants in *Arizona*.[328]

In this climate, perhaps the best that can be hoped is for immigrants to invoke individual rights proxies like federalism or agency skepticism. But history, even U.S. legal history, is full of sudden change. The contemporary Supreme Court may prioritize structural rights based on federalism over individual rights and administrative law claims over constitutional ones. But these currently prevailing doctrines evolved from a very different state of affairs—one in which immigrants succeeded to a remarkable extent in pressing claims as equals.

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328. Arizona v. United States, 132 S. Ct. 2492, 2522 (Scalia, J., dissenting). It is worth remembering that the last time the Supreme Court used this rhetoric in an immigration case was *Chae Chan Ping v. United States*, where the Court upheld the discriminatory and shameful practice of Chinese exclusion. Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).