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"ALIEN" LITIGATION AS POLITY-PARTICIPATION: THE POSITIVE POWER OF A "VOTELESS CLASS OF LITIGANTS"

Daniel Kanstroom*

> Well-funded illegal alien activists in Southern California have found a new way to attack Americans fighting for secure borders and enforcement of current immigration laws. The fight has moved from the streets where they wave the [sic] their Mexican flag to America's civil courtrooms.
>
> —Quote from an article posted on *Ron Paul Forums*, Feb. 9, 2010[1]

> Immigration policy shapes the destiny of the Nation.
>
> —*Arizona v. United States*[2]

> Again and again, the cure for corruption, withdrawal, and alienation is . . . aliens.
>
> —Bonnie Honig, *Democracy and the Foreigner*[3]

INTRODUCTION

The framing title of this Symposium—Noncitizen Participation in the American Polity—seems to present an obvious contradiction: How can noncitizens, who are by legal definition "aliens"[4] and often seen as "outsiders;"[5] who are frequently de

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[1] Nemesis, Comment on RON PAUL FORUMS (Feb. 10, 2010, 12:48 PM), http://www.ronpaulforums.com/showthread.php?230730-Illegal-Aliens-sue-for-the-right-to-work-in-US (quoting Kimberly Dvorak, *Illegal Alien Lawsuits Continue to Clog the Courts in California*, EXAMINER.COM (Feb. 9, 2010), http://www.examiner.com/article/illegal-alien-lawsuits-continue-to-clog-the-courts-california).

[2] 132 S. Ct. 2492, 2510 (2012).

[3] BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 4 (2001).

[4] *See, e.g.*, 8 U.S.C. § 1101(a)(3) (2006) ("The term 'alien' means any person not a citizen or national of the United States."). This Article will use the term "alien" where legally precise, and "noncitizen" more generally, as that is less pejorative in common discourse. Those noncitizens who lack legal status will be termed "undocumented" for the same reason. *See, e.g.*, Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004) ("Scholarly and popular concerns about the phrase 'illegal alien' abound, pointing out that the phrase is racially loaded, ambiguous, imprecise, and pejorative." (footnotes omitted)).

[5] *See* ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA 166 (3d ed. 2006) ("The multiplication of outsiders is not a model for a viable society. . . . If immigrants

scribed as lacking full "membership" in society;[6] and who rarely, if ever, have the right to vote, participate in the polity? In particular, can the undocumented—who by definition have violated U.S. law, who face the existential epithet of being "illegal aliens," and who have been well-described as living under "a regime of enforced invisibility"[7]—possibly do so? Are they even part of the polity? And if they do somehow manage to participate, how should we assess such actions?

The apparent contradiction is largely illusory. Noncitizen participation in the American polity (including the participation of undocumented noncitizens), though mostly undertaken by means other than voting, has long been a reality in the United States.[8] This historical fact remains true notwithstanding such current initiatives as Arizona's cynical policy of "attrition through enforcement."[9]

This Article examines such participation and considers a provocative normative claim: noncitizen polity-participation is a crucial, positive engine of constitutional evolution and, as such, an essential component of politico-legal legitimacy. Justice Kennedy's opinion was clearly right, in *Arizona v. United States*, to affirm that "[i]mmigration policy shapes the destiny of the Nation."[10] This is equally true of noncitizen polity-participation in its various forms.[11] Litigation by noncitizens is a surprisingly large—and surprisingly under-appreciated—aspect of the deep truth also noted by Justice Kennedy, that "[t]he history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here."[12]

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do not feel that they are fully part of this society, as American as everyone else, then we are failing." (quoting RICHARD D. LAMM & GARY IMHOFF, THE IMMIGRATION TIME BOMB: THE FRAGMENTING OF AMERICA (1985))).

[6] *See, e.g.*, Demore v. Hyung Joon Kim, 538 U.S. 510, 544 (2003) (Souter, J., dissenting) ("And if they choose, they may apply for full membership in the national polity through naturalization."); *In re* Griffiths, 413 U.S. 717, 722 (1973) ("Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society.").

[7] CRISTINA BELTRÁN, THE TROUBLE WITH UNITY 134 (2010).

[8] *See, e.g.*, 2 U.S.C. § 441(e)(b)(2) (2006) (allowing campaign contributions by noncitizens lawfully admitted for permanent residence); Bridges v. Wixon, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country").

[9] Arizona v. United States, 132 S. Ct. 2492, 2497 (2012) (noting that Arizona's "Support Our Law Enforcement and Safe Neighborhoods Act," which has the stated purpose to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States," seeks to establish an official state policy of "attrition through enforcement" (quoting ARIZ. REV. STAT. ANN. § 11-1051 note (2012) (West))).

[10] *Id.* at 2510.

[11] It goes well beyond the classic question of whether citizenship can possibly be thought of as "the right to have rights." *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 379 (2004); *see also* Afroyim v. Rusk, 387 U.S. 253, 267–68 (1967); Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

[12] *Arizona*, 132 S. Ct. at 2510.

Litigation by noncitizens is always a controversial topic, especially when cases are brought by the undocumented or their advocates. As a prominent retired ICE agent has put it:

> Allow me to understand this correctly. Illegal aliens, people who have committed a crime by entering this country illegally, and who continue to commit additional crimes by using counterfeit documents to project a status they are not entitled to, are suing cities and citizens for disrupting their RIGHT to work in the US, even though they have no such right? . . . It's time for the good citizens of this country to fight back through the courts . . . .[13]

An online commenter responded, "They do have nerve. How on earth can anyone living in a country *illegally* have the audacity to sue for ANYTHING. . . . Only in America."[14]

Such sentiments have percolated up into legislative proposals. In 2010, Texas State Representative Leo Berman (R-Tyler) introduced a bill that sought to prevent people who are in this country illegally from filing lawsuits or other claims in Texas courts.[15] "If he is in the United States illegally, he shouldn't have access to our courts," explained Berman.[16] Even federal judges have expressed concerns of this type. In 2010, the District Court for the Northern District of Oklahoma considered challenges to the Oklahoma Taxpayer and Citizen Protection Act of 2007, which had sought to prohibit various forms of polity-participation by noncitizens.[17] Although the undocumented plaintiffs had Article III standing, the court would not consider their claims for "prudential" reasons.[18] As the judge noted, courts have traditionally refused "to entertain cases" brought by "plaintiffs with unclean hands."[19] However,

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[13] Kimberly Dvorak, *Illegal Alien Lawsuits Continue to Clog the Courts in California*, EXAMINER.COM (Feb. 9, 2010), http://www.examiner.com/article/illegal-alien-lawsuits-continue-to-clog-the-courts-california (quoting retired ICE Agent John Sampson, who now runs CSI Consulting and Investigations) (internal quotation marks omitted).

[14] Benicar, Comment on *Illegal Alien Lawsuits Continue to Clog the Courts in California*, CITY-DATA FORUM (Feb. 10, 2010, 8:01 AM), http://www.city-data.com/forum/illegal-immigration/891903-illegal-alien-lawsuits-continue-clog-courts.html#ixzz1zwtGfj9x.

[15] H.B. 294 82d Leg. (Tex. 2011), *available at* ftp://ftp.legis.state.tx.us/bills/82R/billtext/html/house_bills/HB00200_HB00299/HB00294I.htm.

[16] Jim Forsyth, *Proposal Would Strip Illegals of Access to Texas Courts*, WOAI LOCAL NEWS (Dec. 13, 2010), http://radio.woai.com/cc-common/news/sections/newsarticle.html?feed=119078&article=7938306#ixzz1zwv3DY6U.

[17] Nat'l Coal. of Latino Clergy, Inc. v. Henry, No. 07-CV-613-JHP, 2007 WL 4390650, at *2 (N.D. Okla. Dec. 12, 2007); *see also* Chamber of Commerce v. Edmondson, 594 F.3d 742, 750 (10th Cir. 2010) (granting a partial preliminary injunction).

[18] *Nat'l Coal. of Latino Clergy*, 2007 WL 4390650, at *8.

[19] *Id.* at *9.

the judge moved from this basic principle of equity to the conclusion that the "illegal alien Plaintiffs seek nothing more than to use this Court as a vehicle for their continued unlawful presence in this country."[20] To allow them to do so, the judge concluded, would make him an "*abetter of iniquity*," a result he found "unpalatable."[21] The judge then adopted what he termed:

> a new, and narrow, prudential limitation on standing. An illegal alien, in willful violation of federal immigration law, is without standing to challenge the constitutionality of a state law, when compliance with federal law would absolve the illegal alien's constitutional dilemma—particularly when the challenged state law was enacted to discourage violation of the federal immigration law.[22]

Such logic has inspired others. The unpublished Oklahoma opinion was prominently featured in the brief authored by attorney/activist Kris Kobach before the Third Circuit Court of Appeals in *Lozano v. City of Hazelton*.[23] The brief argued that "this prudential standing rule" was "based firmly in Supreme Court precedent."[24] The "closing of the courthouse doors," wrote Kobach, was justified for "those tainted with inequitableness or bad faith related to the matter in which they now seek relief."[25] This argument was properly rejected by the Third Circuit Court of Appeals as "particularly troubling."[26] But the court's reasoning on this point was summary.[27]

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[20] *Id.*

[21] *Id.* (emphasis added).

[22] *Id.*

[23] 620 F. 3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011); Appellant's Reply Brief, Lozano v. City of Hazelton, 620 F. 3d 170 (3d Cir. 2010) (No. 07-3531), *vacated*, 131 S. Ct. 2958 (2011).

[24] Appellant's Reply Brief at *7, *Lozano*, 620 F.3d 170 (No. 07-3531) (arguing further that it was also based upon "the equitable maxim that . . . 'he who comes into equity must come with clean hands'"(citing *Nat'l Coal. of Latino Clergy*, 2007 WL 4390650, at *24)).

[25] *Id.* (quoting *Nat'l Coal. of Clergy*, 2007 WL 4390650, at *24). For this reason, the brief argued, "[i]llegal alien Appellees similarly lack standing to challenge local barriers that impede their unlawful presence." *Id.*

[26] Lozano v. City of Hazleton, 630 F. 3d 170, 193 n.18 (3d Cir. 2010).

[27] The court described the argument as "particularly troubling" because, "both in substance and tone, [it] fail[ed] to appreciate that whatever a person's immigration status, an alien is surely a 'person' entitled to Due Process Clause protections." *Id.* at 194 (quoting Plyler v. Doe, 457 U.S. 202, 210 (1982)) (internal quotation marks omitted). The Supreme Court therefore has "considered judicial challenges brought by persons lacking lawful immigration status, even when 'compliance with federal law' would have absolved 'the illegal alien's constitutional dilemma.'" *Id.* at 194 (citations omitted) (citing *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), for the proposition that "[t]he right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights").

Debates about the propriety and wisdom of noncitizen ("alien") litigation as polity-participation are hardly new. Most modern concern is about the undocumented. But historically, courts have had to engage similar questions against an ever-changing backdrop of legal statuses. The *Dred Scott*[28] case, for example, was most specifically about federal diversity jurisdiction.[29] The primary question, according to Chief Justice Roger Taney, was related to citizenship status and the possibility of litigation in federal courts:

> The question is simply this: Can a negro whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?[30]

The Court's answer was clear and easy to report. As stated in the *New York Daily Times*, the holding was: "Negroes, whether slaves or free, that is, men of the African race, *are not citizens of the United States by the Constitution*."[31] This meant that, as the Plaintiff was held not to be a citizen of Missouri, there could be no diversity jurisdiction and the case had to be dismissed.[32] An essential underlying idea was that

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[28] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superceded by constitutional amendment*, U.S. CONST. amend. XIV.

[29] Indeed, as that was the technical basis for the holding, the rest was, strictly speaking, dicta, notwithstanding Justice Taney's arguments to the contrary. As Chief Justice Roger Taney had put it,

> The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent whose ancestors were of pure African blood and who were brought into this country and sold as slaves.

Id. at 400.

[30] *Id.* at 403.

[31] *Decision of the Supreme Court in the Dred Scott Case*, N.Y. DAILY TIMES, Mar. 7, 1857 (emphasis added), *available at* http://www.nytimes.com/learning/general/onthisday/big/0306.html#article.

[32] *See id.* ("As the plaintiff was not a citizen of Missouri, he, therefore, could not sue in the Courts of the United States. The suit must be dismissed for want of jurisdiction.") The Court conceded that there were many cases, "civil as well as criminal, in which a Circuit Court of the United States may exercise jurisdiction although one of the African race is a party." *Dred Scott*, 60 U.S. at 425. However, Justice Taney simply noted:

> [T]hat broad question is not before the court. The question with which we are now dealing is whether a person of the African race can be a citizen of the United States, and become thereby entitled to a special

for purposes of national citizenship, "[t]he words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing."[33]

To understand this sort of reasoning, we must engage some difficult definitional and interpretive questions. Although we can define citizens and noncitizens with a fair degree of legal precision,[34] such other terms as participation and polity are inherently much more complex.[35] Indeed, the terms' definitions inform our understanding of the aspirations and potentially exclusionary aspects of citizenship itself.[36]

Polity-participation is prototypically accomplished by voting, the practice most directly linked to political legitimacy in a democracy.[37] As Martin Luther King, Jr. once famously asserted, an "unjust law," by definition, "is a code inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote."[38] Surprisingly to many, there is no clear text based federal constitutional right to vote in U.S. elections (even for citizens) though the judiciary has long recognized its significance and need for protection.[39] However,

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> privilege by virtue of his title to that character, and which, under the Constitution, no one but a citizen can claim.

Id.

[33] *Id.* at 404 ("They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.").

[34] There are, of course, many (many!) articles and books on the history, meaning, and complexities of the concept of citizenship itself. To list them all here would be cumbersome and probably impossible. I will refer to various theorists as appropriate as the Article proceeds.

[35] *See generally* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006).

[36] As Professor Saskia Sassen notes, "In its narrowest definition citizenship describes the legal relationship between the individual and the polity. This relation can in principle assume many forms, in good part depending on the definition of the polity." Saskia Sassen, *The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics*, 2 GLOBALIZATIONS 79, 81 (2005) [hereinafter Sassen, *The Repositioning of Citizenship and Alienage*]. For an earlier version of this paper, see Saskia Sassen, *The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics*, 46 BERKELEY J. SOCIOLOGY 4 (2002); *see also* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 3 (1991) ("The struggle for citizenship in America has, therefore, been overwhelmingly a demand for inclusion in the polity . . . ."); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 455 (2000) (noting diverse interpretations of the relationship between citizenship, polity, and community participation).

[37] Recent challenges to "voter ID" laws illustrate the continuing struggle to ensure equal opportunity to vote even among U.S. citizens. *See, e.g.*, Ethan Bronner, *Legal Battles Erupt as Voters Fear Exclusion by Tough ID Laws*, N.Y. TIMES, July 20, 2012, at A1 (describing "a number of voter-identification suits across the country that could affect the participation of millions of voters" and advocates arguments that such laws "ensur[e] the integrity of elections" and "[prevent] voter fraud").

[38] Martin Luther King, Jr., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE 289, 294 (J. M. Washington ed., 1986).

[39] *See* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam); Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("This equal right to vote is not absolute." (internal quotation marks

voting is the one act of civic engagement that is almost universally denied to noncitizens in the United States.[40] Indeed, voting may be a ground for the removal of a noncitizen,[41] as well as for criminal charges.[42] The constitutional rights to run for

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omitted)); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtably the right of suffrage is a fundamental matter . . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[V]oting . . . [t]hough not regarded strictly as a natural right . . . nevertheless . . . is regarded as a fundamental political right . . . ."). *But see* Burdick v. Takushi, 504 U.S. 428, 433 (1991) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" (quoting Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979))). "The Judiciary is obliged to train a skeptical eye on any qualification of that right." Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 210 (2008) (Souter, J., dissenting) ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (citing *Reynolds*, 377 U.S. at 562)). For examples of the Court denying a right to suffrage, see *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (holding that a Native American born into the Chinook Tribe was not a U.S. citizen under the Fourteenth Amendment) and *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 176 (1874) (upholding a statute denying the franchise to women).

[40] Historically, this has been a much more open subject. Many states and territories (and the colonies) allowed foreigners to vote. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1392–93 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1092–93 (1977); *cf.* CHILTON WILLIAMSON, AMERICAN SUFFRAGE 9, 15 (1960). It was only in 1931 that a political scientist could opine that "[f]or the first time in over a hundred years, a national election was held in 1928 in which no alien in any state had the right to cast a vote for a candidate for any office—national, state, or local." Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114 (1931).

[41] The Immigration and Nationality Act speaks to unlawful voting.

> (A) In general. Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.
>
> (B) Exception. In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

8 U.S.C. 1227(a)(6) (2006).

[42] The statute reads:

> (a) It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, unless—
>
> (1) the election is held partly for some other purpose;

federal elective offices and various rights not to be discriminatorily denied the vote are also expressly limited to citizens.[43]

The most basic justification for such limitations is the view that voting is a *sine qua non* of democratic membership, and that citizenship is the legal proxy for such membership.[44] The arguably unjust aspects of this system regarding noncitizens are mitigated by the doctrine that even "illegal aliens" are persons entitled to due process protections by the Fourteenth Amendment's protection of *jus soli* citizenship, by *jus sanguinis* laws, and by the relatively open nature of contemporary U.S. naturalization.[45] A common rejoinder to advocates of noncitizen voting is thus: "If immigrants really want to become part of their community, why don't they make the commitment to become U.S. citizens?"[46] This is a complex and important debate; but my purpose in this Article is not to revisit it.[47]

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(2) aliens are authorized to vote for such other purpose under a State constitution or statute or a local ordinance; and
(3) voting for such other purpose is conducted independently of voting for a candidate for such Federal offices, in such a manner that an alien has the opportunity to vote for such other purpose, but not an opportunity to vote for a candidate for any one or more of such Federal offices.

18 U.S.C. § 611 (2006). Many states have similar laws. *See, e.g.*, N.J. STAT. ANN. § 19:4-1 (West 2010) (requiring citizenship and residency to vote).

[43] U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. II, § 1; U.S. CONST. amend. XV § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). The limitation of the right against discriminatory denial of the vote does not mean that noncitizens cannot vote. The Nineteenth Amendment is similarly limited: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX. However, the Seventeenth Amendment is not expressly limited to citizens, using the term, "people." U.S. CONST. amend. XVII.

[44] "Mark Krikorian, executive director of the Center for Immigration Studies, told [the Harvard Political Review], 'The idea that we are somehow looking down at immigrants by not letting them vote until they jump through very easy hoops is willfully incorrect.'" Simon Thompson, *Voting Rights: Earned or Entitled?*, HAR. POL. REV. (Dec. 3, 2010), http://hpronline.org/united-states/voting-rights-earned-or-entitled/.

[45] *But see* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 3 (2007) (noting difficulties and costs of naturalization); David S. North, *The Long Grey Welcome: A Study of the American Naturalization Program*, 21 INT'L MIGRATION REV. 311, 325–26 (1987) (noting inefficiencies in INS naturalization procedures); Thomas A. Gryn & Luke J. Larsen, *Nativity Status and Citizenship in the United States: 2009, American Community Survey Briefs*, U.S. CENSUS BUREAU (Oct. 2010), http://www.census.gov/prod/2010pubs/acsbr09-16.pdf (finding that in 2009, 44% of foreign-born U.S. residents are citizens).

[46] Thompson, *supra* note 44 (quoting Hans von Spakovsky, a senior legal fellow at the Heritage Foundation).

[47] For a most interesting analysis of the difficulties with the very concept of citizenship and low U.S. naturalization rates, see Alan Hyde, *Overcoming Citizenship: Five Practical Steps for Overcoming the Hierarchy of Nationality* (2012) (unpublished paper) (on file with the William & Mary Bill of Rights Journal).

Citizenship status is of course a much narrower concept than either polity-membership or polity-participation.[48] Although the category of citizenship articulates certain legal rights and responsibilities, "the mechanisms through which this articulation is shaped and implemented can be . . . [usefully] distinguished from the status itself."[49] Indeed, as Saskia Sassen has noted, the meaning of citizenship is "partly produced by the practices of the excluded."[50] This insight is truer still of polity-participation.[51] Noncitizens—even if undocumented—are powerfully present in the United States, as in many other countries.[52] These "unauthorized yet recognized" people participate in the community where they reside—raising families, schooling children, holding jobs, etc.[53] Such informal enactments of dimensions of citizenship may "produce an at least partial recognition of them as full social beings."[54]

This Article focuses on litigation as a form of polity-participation. I use as a touchstone Robert Jackson's choice of phrase in the 1950 case of *Wong Yang Sung v. McGrath*.[55] When describing the noncitizens whose procedural rights were at issue in deportation hearings (arguably governed by the new Administrative Procedure Act) Jackson called them "a *voteless class of litigants*."[56] He continued to describe them as people "who not only lack the influence of citizens, but who are strangers

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[48] *See* BOSNIAK, *supra* note 35 (2006). As the Supreme Court put it in 2002: "Although the word 'citizen' may imply (and in 1789 and 1875 may have implied) the enjoyment of certain basic rights and privileges, a 'subject' is merely '[o]ne who owes allegiance to a sovereign and is governed by that sovereign's laws.'" JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 99 (2002) (citations omitted).

[49] Sassen, *The Repositioning of Citizenship and Alienage*, *supra* note 36, at 83; *see also* AYELET SHACHAR, THE BIRTHRIGHT LOTTERY 37 (2009) (comparing the acquisition of citizenship at birth to inheriting untaxed property by noting that "birthright citizenship mechanisms provide cover through their presumed naturalness for what is essentially a major (and currently untaxed) transmission of wealth and enabling resources from one generation to another"). *See generally* JACQUELINE STEVENS, REPRODUCING THE STATE (1999) (describing how political society changes individuals through citizenship); JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS (2010) (exploring the moral and social implications of citizenship).

[50] Sassen, *The Repositioning of Citizenship and Alienage*, *supra* note 36, at 84. Many citizens, are, of course, excluded from full polity-participation due to race, ethnicity, religion, gender, sexual orientation, poverty, felony disenfranchisement, etc. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding the constitutionality of California's felon disenfranchisement statute).

[51] As Sassen puts it, "citizenship is becoming a normative project whereby social membership becomes increasingly comprehensive and open ended." Sassen, *The Repositioning of Citizenship and Alienage*, *supra* note 36, at 85.

[52] *Id.* (noting that daily activities and an "informal social contract" bind undocumented immigrants to their communities).

[53] *Id.* Such practices may "earn them citizenship claims . . . even as the formal status and, more narrowly, legalization may continue to evade them." *Id.*

[54] *Id.*

[55] 339 U.S. 33 (1950).

[56] *Id.* at 46 (emphasis added).

to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused."[57] This phrasing prompts questions: What relationship between voting and litigation and what understandings of noncitizen polity-participation does such a nomenclature imply? Is litigation by "voteless" noncitizens, perhaps ironically, related to processes of democratic self-government? If so, should it be encouraged or limited?

Part I of this Article explores models of noncitizen polity-participation from a philosophical perspective and then through the lenses of citizenship and the idea of the polity. Part II then explores various examples of noncitizen litigation and explores the substantial influence of such cases well beyond the immigration or the "aliens' rights" arenas. My focus is particularly on what "votelessness" has to do with noncitizen litigation: i.e., the relationship between those two ideas as we seek to understand such litigation as legitimate—perhaps essential—polity-participation. The point is *not* to justify current exclusions or to somehow use access to courts as a substitute for the full and free polity-participation that a (properly) weak version of citizenship and a truly strong version of human rights protections would entail. Rather, the goal is to develop a strong rejoinder to those who decry or seek to restrict litigation by "illegal aliens" and other noncitizens.

Jackson's phrase illuminates how litigation by noncitizens, both defensive and affirmative, is a powerful form of polity-participation. This will undoubtedly strike some readers as a strange assertion. Litigation is more typically seen as an *alternative* to polity-participation than as a form of it.[58] Some aspire to maintain a bright-line distinction between law and politics. As a recent *New York Times* editorial criticized a Supreme Court decision: "In this labor union case, there is no getting around that the legal approach is indistinguishable from politics."[59] But one does not have to be a doctrinaire legal realist to see that such a rigid dichotomy cannot withstand much scrutiny. Although the contingency of legal reasoning has been well-described as "the most corrosive message of legal history"[60] the message is by now fairly well-accepted.[61] An overly formal or rigid line between politics and law obscures both the inevitably political aspects of legal decisionmaking and the inevitably legal aspects of majoritarian democratic power in a constitutional democracy.[62] It seeks to separate

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[57] *Id.*

[58] *See, e.g.*, Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making*, 86 TEX. L. REV. 1837, 1840 (2008) ("Tort litigation has traditionally been understood as a means of dispute resolution . . . .").

[59] Editorial, *The Anti-Union Roberts Court*, N.Y. TIMES, June 22, 2012, at A18.

[60] *See, e.g.*, Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW 13 (David Kairys ed., 2d ed. 1990).

[61] Aron Ketchel, *Deriving Lessons for the Alien Tort Claims Act from the Sovereign Immunities Act*, 32 YALE J. INT'L L. 191, 207–08 (2007) (presenting examples of interference in legal disposition by the executive and legislative branches of government).

[62] The controversy surrounding the *Bush v. Gore* decision derived in part from the fact that it demonstrated both of these problems simultaneously. *See* Bush v. Gore, 531 U.S. 98,

phenomena that are inherently intertwined, indeed that depend for their legitimacy upon each other. As Robert Post has put it, "[j]udicial decision making is always enveloped within a larger political context that endows judicial work with legitimacy and effectiveness."[63] It is as much a reductionist mistake to view politics as the realm of irrational preferences as it is to view law as the realm of transcendent "neutral principles."[64] Simply put, "no sharp disjunction can be legislated between law and life, between judge and context, between neutrality and value."[65]

This may seem a rather commonplace insight when stated at a high level of generality. The focus on noncitizen litigation, however, illuminates not only the inevitably intertwined nature of law and politics but also the uniquely significant role played by outsiders in the revitalizing enterprise of U.S. constitutional discourse. Consider the cover title of *Time* magazine's recent story about young, undocumented people in the United States: *WE ARE AMERICANS*.[66] But then there is an asterisk: **Just not legally*.[67] We all know what this means: functional societal membership may differ from legal status. But for those who equate polity-membership with legal citizenship status, it is a powerful and dangerous claim.[68]

Its implicit power, like that of assertions by undocumented noncitizens of legal rights, may explain the strong negative responses it provokes. For example, those who opposed Legal Services funding for cases brought by "illegal aliens,"[69] described such litigation as the *promotion of illegal immigration*.[70] Kenneth Boehm,

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111 (2000) (Rehnquist, C.J., concurring); *see also* Bush v. Palm Beach County Canvassing Bd, 531 U.S. 70 (2000).

[63] Robert Post, Festschrift, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1322 (2010).

[64] *Id.* at 1323. As Post later argues, law should be understood "as a specific social practice expected to promote social solidarity in a particular way." *Id.* at 1340.

[65] Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 220 (1999).

[66] Feifei Sun, *Behind the Cover: America's Undocumented Immigrants*, TIME, June 14, 2012, at 1.

[67] *Id.*

[68] It challenges our understanding of the relationship between noncitizens' polity-participation and the law itself.

[69] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 50 (1996) ("None of the funds appropriated . . . to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that provides legal assistance [to] any alien, unless the alien is present in the United States and is [a legal permanent resident, is a close relative to a citizen and has an application pending for status as a lawful permanent resident, has been granted asylum or admission as a refugee including conditional entry as a refugee prior to April 1, 1980, whose order of deportation has been withheld by the Attorney General, or belongs to a narrow category of lawfully admitted agricultural workers].").

[70] *Solving the Core Problem of the Legal Services Program: Hearing on the Legal Services Corporation Reauthorization Before the Subcomm. on Commercial and Admin. Law*

who served as counsel to the LSC board of directors from 1991 to 1994,[71] likened LSC programs representing noncitizens to "heavy lobbying efforts, abortion litigation, referendum campaigns and a host of other prohibited activities."[72] Boehm's fears are powerfully framed in ways that show how much is at stake in the debate:

> Imagine a national network of experienced lawyers available to illegal aliens, free of charge, to sue government at the local, state, and national levels to obtain housing, education, welfare, and other governmental benefits. Imagine further that this national network of lawyers was also available to lobby, participate in referenda campaigns, and provide public relations services on behalf of their illegal alien clientele, again free of charge because the network was largely subsidized with federal funds. For good measure, imagine that this network of activist lawyers was also available to fight deportation of illegal aliens, even those with serious criminal records.[73]

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of the H. Comm. On the Judiciary, 104th Cong. (1995) (statement of Penny Pullen, Former Director, The Legal Services Corporation). Such views connect with those of critics who attacked the Legal Services Corporation (LSC) for "pursuing a 'radical agenda' and for 'engaging in dubious litigation that is of no real benefit to poor people.'" Recent Legislation, *Congress Imposes New Restrictions on Use of Funds by the Legal Services Corporation*, 110 HARV. L. REV. 1346 (1997).

[71] *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary: Hearing Before the Subcomm. on Government Programs and Oversight of the H. Comm. on Small Business*, 105th Cong. (1998) (statement of Kenneth Boehm, Chairman, National Legal and Policy Center) [hereinafter Boehm Testimony].

[72] *Legal Services Corporation: A Textbook Case of an Unaccountable Program: Hearing on the Legal Services Corporation Reauthorization Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Kenneth Boehm, Chairman, National Legal and Policy Center).

[73] Ken Boehm, *Legal Services Corporation Programs Aid Illegal Immigrants*, 29 IMMIGR. REV. 15 (1997), *available at* http://www.cis.org/LegalServicesCorporation-FederalFunding ImmigrantActivists. In 1998 congressional testimony, Boehm linked representation of "illegal aliens" to a parade of horribles: "The fact that legal services lawyers have litigated to expand the welfare state, overturn elections, challenge political redistricting, promote gay rights, oppose welfare reform, and support welfare for illegal aliens is beyond dispute." Boehm Testimony, *supra* note 71, at 5; *see also* Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321, 358 (1998) (describing issues with the LSC program). As Boehm more recently put it, "It was when they were giving legal assistance to illegal aliens, getting involved in redistricting cases, prison litigation and drug-related evictions, that they got in trouble." *See* Peter Flaherty, *Boehm Takes Aim at Legal Services Corporation in National Law Journal Interview*, NAT'L LEGAL & POL'Y CENT. (Mar. 14, 2011), http://nlpc.org/stories/2011/03/14 /boehm-takes-aim-legal-services-corporation-national-law-journal-interview.

One could—and many others besides Kris Kobach and Kenneth Boehm do—view noncitizen litigation as an *annoyance*, something to be, at most, grudgingly tolerated, if not limited, discouraged, or eliminated.[74] As Peter Schuck piquantly put it some years ago, "We should stop crying wolf about nativism . . . [and we should celebrate] America's openness to self-supporting, law-abiding newcomers who don't demand special breaks."[75] Such "special breaks" included what others have called basic due process protections in deportation proceedings.[76]

How might one respond to such statements? The most common rejoinder views litigation by undocumented or deportable noncitizens in a sort of *protective* or *tragic* mode.[77] On this view, rights litigation by noncitizens is a necessary corrective to (arguably legitimate) political exclusion from voting.[78] Such litigation is on this view necessary to prevent extreme exploitation and to rectify and prevent certain types of wrongful conduct against noncitizens. Undocumented noncitizens are, for example, "especially vulnerable" to workplace exploitation.[79] They may find it almost impossible to enforce workplace protection rights due to fear of deportation.[80] Indeed, even those who are legally present may be vulnerable to exploitation because of lack of language skills, lack of familiarity with the legal system, isolation, and dependency on employers for "housing, food and other necessities of life."[81] There is surely important truth to all of this. But it is an incomplete and, I will suggest, unduly defensive model. It relies upon simplistic understandings of polity-participation and of constitutional democracy itself, especially in a self-styled "nation of immigrants."[82]

This Article offers a much more affirmative model. I contend that noncitizen polity-participation through litigation (whether defensive or affirmative) is neither

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[74] *See, e.g.*, PETER SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 148 (1998).

[75] *Id.* at 148.

[76] *See, e.g.*, Editorial, *For Want of a Good Lawyer: Deportation Without Representation*, N.Y. TIMES, Dec. 25, 2011, at SR14 ("Current laws have denied basic due process protections to people held in immigration detention."). Schuck's view was that "'[b]eating the system' has become a game it seems that almost any resourceful alien equipped with easily obtained fraudulent documents or a competent lawyer can successfully play." SCHUCK, *supra* note 74, at 70.

[77] *See* Sure-Tran, Inc v. NRLB, 467 U.S. 883, 892 (1984) (noting the necessity of alien litigation as an enforcement mechanism preventing the creation of "a subclass of workers").

[78] *See, e.g.*, William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1082 (2000) (describing how fear of deportation inhibits undocumented workers, or documented workers with undocumented people in their family, from enforcing their legal rights).

[79] *Id.* at 1075.

[80] *Id.* at 1082.

[81] *See* Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 492–94 (2003).

[82] *See* Foley v. Connelie, 435 U.S. 291, 294 (1978) ("As a Nation we exhibit extraordinary hospitality for those who come to our country, which is not surprising for we have often been described as a 'nation of immigrants.'" (footnote omitted)).

a tragic corrective nor an annoyance. Rather, it is part of the dynamic process of defining the polity itself and of mediating the inevitable tension between majoritarian power and the "rule of law." Indeed, it should be seen as an *essential* component of the revitalizing project of American constitutional democracy. As Bonnie Honig has suggested, we should reframe the traditional question: "*How should 'we' solve the problem of foreignness?*"[83] That question inevitably leads us to ask what "we" should do about "them." A more intriguing and useful inquiry is: "*What problems does foreignness solve for us?*"[84]

We should thus rethink the legal role of "illegal aliens" whom Mae Ngai elegantly named "impossible subjects."[85] Ngai's essential point was that the "illegal alien [w]as a . . . legal and political subject, whose inclusion within the nation was . . . a social reality and a legal impossibility."[86] Actual participation in the workforce, in local communities, in small businesses and in schools and other community entities was accompanied by a lack of basic rights and the exclusion from citizenship.[87] There is surely value in this characterization, but I want to consider reframing noncitizens (including in particular those with no legal status) as not only *possible* subjects, but as *inevitable* subjects. This approach thus connects with that of Hermann Cohen: "[I]n the alien, [therefore], man discovered the idea of humanity."[88] Through noncitizens' legal participation in the polity, we discover richer, more just ideas of participation and of the polity itself.

My aim, to reiterate, is not to *justify* the disenfranchisement of noncitizens. Judith Shklar and Jamin Raskin have strongly articulated normative and practical arguments in favor of voting by noncitizens.[89] As Raskin has put it, "[T]he current blanket exclusion of noncitizens from the ballot is neither constitutionally required

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[83] HONIG, *supra* note 3, at 4.

[84] *Id.*

[85] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

[86] *Id.* at 4. In this, she echoed Marianne Constable, who—a decade earlier—noted that, "the 'unlawfulness' or 'illegality' of the illegal alien is such that the alien individual seems not quite an autonomous legal subject, being neither legally-recognized citizen nor legally-recognized stranger." Marianne Constable, *Sovereignty and Governmentality in Modern American Immigration Law*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY 249, 260 (Austin Sarat & Susan S. Sibley eds., 1993). Therefore, Constable continued, "they come to resemble under the law . . . the regulatable resources of the territory more than its self-determining subjects." *Id.*

[87] *See* Ngai, *supra* note 85.

[88] *See, e.g.*, DAVID COLE, ENEMY ALIENS 233 (2003) (internal quotation marks omitted) (quoting THE SONCINO PRESS, JEREMIAH 52 (A. Cohen ed., H. Freeman trans., 7th impression 1973)).

[89] JUDITH N. SHKLAR, AMERICAN CITIZENSHIP 37 (1991) (noting that "natural-rights theory makes it very difficult to find good reasons for excluding anyone from full political membership in a modern republic"); Raskin, *supra* note 40.

nor historically normal."[90] This is especially true of disenfranchisement at the local level since resident aliens, "who are governed, taxed, and often drafted just like citizens—have a strong democratic claim to being considered members, indeed citizens, of their local communities."[91] Jeremy Waldron has highlighted the powerful psychological and emotional costs of exclusion from voting.[92] As Waldron notes, exclusion from the right to participate in collective decisions causes an insult that:

> does not require [an individual] to think that his vote—if he had it—would give him substantial and palpable power. He knows that if he has the right to participate, so do millions of others. All he asks . . . is that he and all others be treated as equals in matters affecting their interests, their rights, and their duties.[93]

One must also take care not to overstate the ability of courts to effect major social change.[94] Still, people who do not (and who *may* not) vote participate in the polity in important ways. Through litigation, they help to *define* the rules of constitutional democracy.[95] Ultimately, then, this Article advocates that we focus more seriously on how, as Alex Aleinikoff once put it, "the story of non-members and members of 'quasi-polities' may be as significant as the story of disfavored full members."[96]

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[90] Raskin, *supra* note 40, at 1394; *see also* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177 (1874) ("[C]itizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage.").

[91] Raskin, *supra* note 40, at 1394; *see also* HIROSHI MOTOMURA, AMERICANS IN WAITING 8–9 (2006) (arguing in favor of treating "lawful immigrants as Americans in waiting," presumptively entitled to all the prerogatives of membership); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 10 (1990) ("[*I*]*f* membership is to be the guiding principle for constitutional analysis of the immigration power, then the circle of membership should include permanently residing aliens.").

[92] These are very different concerns from the simply instrumental idea that voting equates with power.

[93] JEREMY WALDRON, LAW AND DISAGREEMENT 239 (1999).

[94] *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004) (arguing that many have vastly overstated both the Supreme Court's indignation and ability to protect the rights of politically weak racial minorities). *But see* David E. Bernstein & Ilva Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 593, 626–40 (2004) (explaining ways in which courts have had significant impacts).

[95] As the Supreme Judicial Court of Massachusetts noted recently, "[l]ack of the franchise is a substantial, although certainly not the sole, concern underlying the rule that classification on the basis of alienage is generally suspect." Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262, 1278 n.20 (Mass. 2011).

[96] T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1690 (2001).

I. WHAT IS NONCITIZEN PARTICIPATION IN THE POLITY?

> Gentlemen, I regard all of you here present as kinsmen, intimates, and fellow citizens by nature, and not by convention. For like is akin to like by nature, but convention, which tyranizes the human race, often constrains us contrary to nature.
>
> —Plato, *Protagoras*[97]

> So now I am alone in the world, with no brother, neighbour or friend, nor any company left me but my own. . . . So now they are strangers and foreigners to me; they no longer exist for me . . . . But I, detached as I am from them and from the whole world, what am I?
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> —Jean-Jacques Rousseau, *Reveries of the Solitary Walker*[98]

A. Frameworks

Do noncitizens participate in the polity? Should they? If so, how? What does such participation mean in terms of political legitimacy, justice, and fairness? Many Western liberal philosophers of political legitimacy have tended to marginalize or bracket concerns about noncitizens' polity-participation.[99] Although questions of how to treat either the "entrance seeker who wishes to become one of us" or "the foreign resident among us"[100] have acquired practical and moral importance, "only scant political philosophical attention has been devoted to them."[101] Locke and Kant "took the bounded community to be the locus of political justice and left those bounds themselves unchallenged."[102] John Rawls, in *Political Liberalism*, posed the basic problem of legitimacy as how "there may exist over time a stable and just society of free and equal *citizens* profoundly divided by reasonable though incompatible

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[97] PLATO, PROTAGORAS 33 (Stanley Lombardo & Karen Bell trans., 1992).

[98] JEAN-JACQUES ROUSSEAU, REVERIES OF THE SOLITARY WALKER 27 (Peter France trans., 1979).

[99] *See, e.g.*, William James Booth, *Foreigners: Insiders, Outsiders and the Ethics of Membership*, 59 REV. POL. 259, 263 (1997).

[100] *Id.* at 263. For example, "the alien who though not [or not yet] a citizen is still more bound to us than someone simply passing through, referred to by Simmel as 'Der Gast, der bleibt' ('The guest who stays.')." *Id.* at 264. *See* Almut Loycke, *Der Gast, der Bleibt. Dimensionen von Georg Simmels Analyse des Fremdseins*, *in* DER GAST, DER BLEIBT: DIMENSIONEN VON GEORG SIMMELS ANALYSE DES FREMDSEINS 103–09 (1992).

[101] Booth, *supra* note 99, at 264–65. Indeed, "what ought to have been eminently questionable has scarcely achieved the status of a question." *Id.* at 265.

[102] *Id.* at 265. *See also* Veit Bader, *Citizenship and Exclusion: Radical Democracy, Community, and Justice. Or, What Is Wrong with Communitarianism?*, 23 POL. THEORY 211 (1995) (considering reasons for the historical neglect of these questions).

religious, philosophical, and moral doctrines?"[103] Rawls's most well-known answers were confined to citizens: "[P]olitical power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all *citizens*, as reasonable and rational, can endorse in the light of their common human reason."[104] To be sure, some, like John Stuart Mill, have offered regrets about the strong "distinction between their fellow countrymen and foreigners" while still supporting it as necessary in the current state of things.[105] But in many respects, as Bruce Ackerman has noted, political philosophy has rather "unthinkingly" accepted the idea "that we have the right to exclude non residents from our midst."[106] From this, it might seem a relatively short leap to exclude those who are among us from participating in the polity at all. Hence, enforcement by attrition.[107]

Thinkers of a more communitarian cast have offered justifications for such exclusions. Aristotle asserted that "no one would choose the whole world on condition of being alone, since man is a political creature and one whose nature is to live with others."[108] On this view, "man is by nature a political animal."[109] As Jeremy Waldron notes, "[w]e are most distinctively human, according to the Aristotelian tradition, when we talk with one another and come to share common views about the social good, about right and wrong, about justice and injustice."[110] From such

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[103] JOHN RAWLS, POLITICAL LIBERALISM xviii (1993) (emphasis added). In 2001, Rawls restated his inquiry thus: "[I]n the light of what reasons and values—of what kind of a conception of justice—can *citizens* legitimately exercise . . . coercive power over one another?" JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 41 (Erin Kelly ed., 2001) (emphasis added) [hereinafter RAWLS, JUSTICE AS FAIRNESS].

[104] RAWLS, JUSTICE AS FAIRNESS, *supra* note 103, at 41 (emphasis added). This is not to say that Rawlsian principles cannot be used to generate a theory of the rights of noncitizens, within or across nation-states. Professor Joseph H. Carens has suggested that "many of the reasons that make the original position useful in thinking about questions of justice within a given society also make it useful for thinking about justice across different societies." Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, *in* THE RIGHTS OF MINORITY CULTURES 331, 334 (Will Kymlicka ed., 1995) (citation omitted). But Rawls himself never did so. *See* John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36 (1993). When he sought to apply his theory of justice beyond the framework of a bordered community, Rawls almost exclusively focused on relations between states. *See* JOHN RAWLS, THE LAW OF PEOPLES (2002).

[105] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 311 (1862).

[106] BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 93 (1980).

[107] *See supra* note 9.

[108] ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE 238 (David Ross trans., 1954); *see also* Waldron, *supra* note 93, at 137.

[109] ARISTOTLE, THE POLITICS 37 (Carnes Lord trans., 1984). The primary proof of this for Aristotle was that "man alone among the animals has speech. . . . [S]peech serves to reveal the advantageous and the harmful, and hence also the just and the unjust." *Id.*

[110] Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 772 (1992). Such conversational abilities allow us to achieve "collectively . . . a better view than any individual could have attained on her own." *Id.* This is a "collective

Aristotelian foundations one can rather easily move to Michael Walzer's famous assertion that "[t]he primary good that we distribute to one another is membership in some human community."[111] Such "membership structures all [of] our other distributive choices: it determines with whom we make those choices, from whom we require obedience and collect taxes, [and] to whom we allocate goods and services."[112] Thus, the exclusion of noncitizens (physically and politically) may be justified by the right of communities to self-determination. Individual rights claims do not necessarily count as trump.[113] As Walzer provocatively put it, "[t]he distribution of membership is not pervasively subject to . . . justice."[114] Outside of community one must rely on such notions as hospitality or charity[115] or, perhaps—in modern legal parlance—discretion.[116]

The most direct rejoinder to the communitarian model is a cosmopolitan one. The Greek word *kosmopolitês*, which may be translated as "citizen of the world," embodies the aspirational (or, perhaps, empirically describable) idea that all human beings, regardless of their political affiliation, constitute a single community.[117]

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wisdom of the multitude." *Id.* It is perhaps not a great leap from this premise to more controversial proposals such as "English only" laws. And many contemporary communitarians are more than happy to jump in this way. *See generally id.*

[111] MICHAEL WALZER, SPHERES OF JUSTICE 31 (1983).

[112] *Id.*

[113] Indeed, Walzer strongly asserts (rather problematically in my view) that "[e]very substantive account of distributive justice is a local account" that cannot be overridden by "external or universal principles." WALZER, *supra* note 111, at 314. Thus, even an apparently unjust caste system in India must be accepted if the members of the community believe it to be natural or just. One obvious problem with this model is how one deals with lack of education or exposure to critical insights among the lower classes.

[114] *Id.* at 61.

[115] ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 146, 148 (1988); *see also* Booth, *supra* note 99, at 270.

[116] The right to community self-determination is not completely unconstrained, however; and it does not necessarily justify unfettered internal discrimination based on citizenship status. Indeed, as Carens notes, Walzer strongly defends "an obligation to provide aid to those in" extreme "need,"—even complete strangers who are aliens—if we can help them "without excessive cost to ourselves." Carens, *supra* note 104, at 342. Further, if people are admitted as residents and participants in the economy (there is some ambiguity here as to undocumented workers), they have the right to naturalize as citizens. *See* WALZER, *supra* note 111, at 60; Carens, *supra* note 104, at 342–43. This right derives from a basic principle of communal self-determination which would conflict with a permanent caste system. Carens, *supra* note 104, at 342; *see* WALZER, *supra* note 111, at 60. "Democratic citizens," Walzer writes, "have a choice: if they want to bring in new workers they must be prepared to enlarge their own membership." WALZER, *supra* note 111, at 61. Finally, "new states or governments may not simply expel existing inhabitants even if they are regarded as alien by" a majority group. Carens, *supra* note 104, at 343; *see also* WALZER, *supra* note 111, at 61–62 (discussing the ability of some residents to deny citizenship to other residents).

[117] *See* Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, BOS. REV. (1994), *available at* http://bostonreview.net/BR19.5/nussbaum.php.

There are, of course, many variants of cosmopolitan thought, ranging from Diogenes the Cynic's famously vague claim to be such a "citizen of the world"[118] to Martha Nussbaum's nuanced argument that support for nationalist sentiments "subverts, ultimately, even the values that hold a nation together, because it substitutes a colorful idol for the substantive universal values of justice and right."[119]

A cosmopolitan conception of human identity rejects the notion of a hard line between citizens and noncitizens. The accident of birth should on this view be largely irrelevant to one's identity, rights, and commitments. As Jeremy Waldron once elegantly put it:

> The cosmopolitan may live all his life in one city and maintain the same citizenship throughout. But he refuses to think of himself as *defined* by his location or his ancestry or his citizenship or his language. Though he may live in San Francisco and be of Irish ancestry, he does not take his identity to be compromised when he learns Spanish, eats Chinese, wears clothes made in Korea, listens to arias by Verdi sung by a Maori princess on Japanese equipment, follows Ukrainian politics, and practices Buddhist meditation techniques. He is a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self.[120]

In terms of moral obligation, the strongest cosmopolitan view is that the duty to provide aid to foreigners is the same as that which applies to locals or compatriots.[121] This does not mean of course that cosmopolitans are necessarily blind to the potential dangers of a complete dismissal of the importance of cultural or ethnic communities. As Waldron recognizes, "a world in which deracinated cosmopolitanism flourishes is not a safe place for minority communities."[122] But apart, perhaps, from

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[118] DIOGNES LAERTIUS, 2 LIVES OF THE EMINENT PHILOSOPHERS 65 (R.D. Hicks trans., 1981).

[119] Nussbaum, *supra* note 117. See *generally* MARTHA C. NUSSBAUM ET AL., FOR LOVE OF COUNTRY 5 (Joshua Cohen ed., 1996).

[120] Waldron, *supra* note 110, at 754 (1992).

[121] *See, e.g.*, KWAME A. APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS xii (2006); WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 165 (1989); MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE (2006); ONORA O'NEILL, BOUNDS OF JUSTICE (2000); PETER SINGER, ONE WORLD (2002); Nussbaum, *supra* note 119.

[122] Waldron, *supra* note 110, at 761. He continues by noting that:

> [o]ur experience has been that they wither and die in the harsh glare of modern life, and that the custodians of these dying traditions live out their lives in misery and demoralization.
>
> We are dealing, in other words, with conceptions of man and society which, if not actually inconsistent, certainly are opposed in some important sense. Each envisions an environment in which the other is, to a certain extent, in danger.

Id.

such minority protection, the cosmopolitan view tends towards a highly robust affirmation of noncitizen participation in the polity, expansively defined. As Martha Nussbaum has put it, "[w]e should recognize humanity wherever it occurs, and give its fundamental ingredients, reason and moral capacity, our first allegiance and respect."[123]

Jürgen Habermas has suggested other useful ways of thinking about the relation between noncitizens' polity-participation and constitutional democracy. His recognition of a deep structural connection between the legal institutionalization of human rights and the necessary communicative conditions for (legitimate) political will-formation explains not only the utility but perhaps also the inevitability of noncitizens' legal participation.[124] The relevant relationship, for our purposes, was sketched by Habermas as follows: "Informal public opinion-formation generates 'influence'; influence is transformed into 'communicative power' through the channels of political elections; and communicative power is again transformed into 'administrative power' through legislation."[125] Noncitizens clearly participate in this transmission of power at step one: informal public opinion-formation. But "law" is never a static end state.[126] As noted, it has inevitably political components that are channeled through judicial interpretations. Thus, noncitizens, when they litigate, are integrally part of this cyclical, iterative process.

Finally, we should consider *agonistic* models.[127] Chantal Mouffe argues that "we need a democratic model able to grasp the nature of the political."[128] "This," she continues, "requires developing an approach, which places the question of power and antagonism at its very center."[129] More specifically (and more relevant for our purposes)

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[123] Nussbaum, *supra* note 117.

[124] JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER 192 (Ciaran Cronin and Pablo De Greiff eds., 1998).

[125] J. Habermas, *Three Normative Models of Democracy*, *in* 1 CONSTELLATIONS 8 (1994); *see also* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 192 (William Rehg trans., 1996). As Abdollah Payrow Shabani has noted, "This influence, carried forward by communicative power, gives law its legitimacy, and thereby provides the political power of the state its binding force." Abdollah Payrow Shabani, Paper Presented at Twentieth World Congress of Philosophy, Habermas' Between Facts and Norms: Legitimizing Power? (Aug. 10–15, 1998), *available at* http://www.bu.edu/wcp/Papers/Poli/PoliShab.htm.

[126] As Habermas writes, "human rights belong structurally to a positive and coercive legal order which founds actionable individual legal claims." HABERMAS, *supra* note 125, at 192.

[127] *See* ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY (2d ed. 1985) (arguing that social objectivity is constituted through acts of power); CHANTAL MOUFFE, THE DEMOCRATIC PARADOX (2000).

[128] CHANTAL MOUFFE, DELIBERATIVE DEMOCRACY OR AGONISTIC PLURALISM 13 (2000).

[129] *Id.*; *see* Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RES. 745, 752 (1999) [hereinafter Mouffe, *Deliberative Democracy*] (explaining that democratic theory needs to acknowledge the ineradicability of antagonism and the impossibility of achieving a fully inclusive rational consensus); *see also* Chantal Mouffe, *Citizenship and Political Identity*, 61 OCTOBER 28 (1992).

she writes "that any social objectivity is ultimately political" and must "show the traces of *exclusion* that governs its constitution."[130] Put more systematically:

> Politics aims at the creation of unity in a context of conflict and diversity; it is always concerned with the creation of an "us" by the determination of a "them." The novelty of democratic politics is not the overcoming of this us/them [opposition—which is an impossibility—] but the different way in which [it] is established. What is at stake is how to establish this us/them discrimination in a way that is compatible with pluralist democracy.[131]

The goal, in short, "is to construct the 'them' in such a way that it is no longer perceived as an enemy to be destroyed, but an 'adversary', i.e., somebody whose ideas we combat but whose right to defend those ideas we do not put into question."[132]

Bonnie Honig has similarly argued strongly for a commitment to maintaining fidelity to the *remainders* of politics.[133] These are "those persons who do not fit the requirements of the orders in which they happen to find themselves living."[134] Attention must be paid to those "undone *oughts* that haunt political life and to those parts of all persons that are ill fitted to dominant norms and forms of subjectivity and kinship, whether we mark this ill-fittedness as queer, feminine, unconscious, criminal or resistant."[135] Such "[a]gonistic cosmopolitanism . . . engenders acts of citizenship and claims of right across borders, on behalf of the remainders of the state system."[136]

In the more specific context of U.S. legal culture, we must also bear in mind the important rights-based insights listed by David Cole that explain why we should resist "the temptation to trade [*their*] rights for [*our*] security."[137] As Cole notes, such a trade ("the double-standard") "is: (1) illusory in the long run; (2) likely to prove counterproductive as a security matter; (3) a critical" component of later-regretted "overreaction

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[130] Mouffe, *Deliberative Democracy*, *supra* note 129, at 752 (emphasis added).

[131] *Id.* at 755.

[132] MOUFFE, *supra* note 128, at 15.

[133] *See generally* BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS (1993) (discussing a type of politics that she calls "virtù," or a contestatory politics of virtue and virtù, also called "agonism").

[134] Gary Browning, *An Interview with Bonnie Honig*, 7 CONT. POL. THEORY 434, 436 (1998).

[135] *Id.* (emphasis added). The agonistic cosmopolitan approach is ambivalent and wary of Kantian or Habermasian international extensions of law. *See id.* at 439–40. The concern is that "they are themselves modes of governance that will engender their own remainders and injustices, while also relieving constituencies very often of the felt need for democratic responsibility and activism." *Id.*; *see also* SEYLA BENHABIB, ANOTHER COSMOPOLITAN (Robert Post ed., 2006).

[136] Browning, *supra* note 134, at 440.

[137] COLE, *supra* note 88, at 11 (emphasis added).

in times of crisis; . . . [(4)] constitutionally and morally wrong."[138] But what is wrong is not only rights-deprivation, it is also *voice* deprivation.[139] Note the essential weaving together of politics and law that this combined view demands.[140] Who is most likely to bring the most important forms of truly revitalizing litigation? Outsiders, the marginalized, and the oppressed are the obvious answers.[141]

B. Citizenship, Rights, and Polity-Participation

As Alexander Bickel noted in 1973, "[i]n the view of both the ancients and of modern liberal [U.S.] political theorists, the relationship between the individual and the state is largely defined by the concept of citizenship."[142] Citizenship may control not only membership; but, according to some, "[i]t is by virtue of . . . it, that [the

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[138] *Id.* at 7.

[139] As Jack Balkin has argued, a forward-looking redemptive commitment has always been a crucial part of U.S. constitutional history. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007); *see also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 7 (1998) (highlighting the three great *jurisgenerative* "constitutional moments" of the Founding, Reconstruction, and the New Deal). To the extent that the U.S. polity essentially views the Constitution as a form of "civic religion," its dynamic, evolutionary legitimacy relies upon certain original constitutional understandings of "We the People." Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229, 272–73 (2011). As Ken Kersch has rightly noted, this is a very different vision from standard legal academy accounts of originalism, which emphasize restoration, not redemption. *Id.* at 271–72.

[140] Indeed, it is worth pondering the obvious fact that the framers were not citizens.

[141] Consider Bruce Ackerman's distinction between constitutional "monists" from "dualists." The monist (interestingly, Ackerman cites Robert Jackson as one) "treats *every* act of judicial review as presumptively anti-democratic, and strains to" solve the "'countermajoritarian difficulty' by . . . ingenious argument." Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 465 (1989). "In contrast," writes Ackerman, "the dualist sees" courts' "preservationist function . . . as an absolutely essential part of a well-ordered democratic regime." *Id.* "The courts," on this view, "*serve* democracy by protecting the hard-won judgments of a mobilized citizenry against fundamental change by political elites who have failed to establish the requisite kind of mobilized support from the citizenry at large." *Id.* Ackerman, unfortunately, does not much consider the essential importance of noncitizens' legal claims to this dualist dynamic. This is a critically important aspect. It goes beyond the claims of those denominated by Ackerman as "rights foundationalists." The point is not only that "rights trump democracy." It is that *certain kinds of rights claims*—those brought by noncitizens—especially enhance the dynamic evolution of U.S. constitutional democracy.

[142] Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 369 (1973) [hereinafter Bickel, *Citizenship*]; *see also* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 33 (1975) [hereinafter BICKEL, MORALITY].

individual] has rights."[143] Remarkably, though, as Bickel highlighted, "national citizenship plays only the most minimal role in the American constitutional scheme."[144] Article I requires that members of the House of Representatives and members of the Senate be citizens.[145] Article II requires that the President and Vice-President be natural born citizens.[146] Otherwise, citizenship is "noticeably absent" from the rest of the document.[147] The concept was ambiguously used (when used at all) by the Framers.[148] It surely was not seen as a proxy for the possession of basic human rights.[149] "The Preamble," as Bickel noted, "speaks of '*We the people* of the United States,' not, as it might have, of *we the citizens* of the United States at the time of the formation of

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[143] BICKEL, MORALITY, *supra* note 142, at 33; *see also* Bickel, *Citizenship*, *supra* note 142, at 369.

[144] BICKEL, MORALITY, *supra* note 142, at 33; *see also* Bickel, *Citizenship*, *supra* note 142, at 369.

[145] U.S. CONST. art. I, § 2.

[146] U.S. CONST. art. II, § 1, cl. 5.

[147] *See* Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1508 (1986) ("[I]n looking at the text, one is struck initially by the lack of importance of citizenship . . . . Nothing in [A]rticle III requires that federal judges be citizens, nor does anything in the Constitution require that ambassadors, federal officials, or governmental employees of any kind be citizens.").

[148] *See, e.g.*, U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). The first judicial exegesis of this provision was apparently in 1825:

> What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.

The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 76 (1873); *see also* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) ("[T]he privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by *virtue of their being citizens*." (emphasis added)). But the key constitutional understanding, according to Justice Miller was reciprocity not rights. *See The Slaughter-House Cases*, 83 U.S. at 77. The Court in *The Slaughter-House Cases* held that:

> [i]ts sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

Id.

[149] *See, e.g.*, Bickel, *Citizenship*, *supra* note 142, at 369–70 (noting the only definitions/uses of "citizenship" in the Constitution); *see also* Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 238–39 (2011).

this Union."[150] A quick scan of the language of the Bill of Rights shows the same thing: First, "Congress shall make no law";[151] Second, "the right of the people";[152] Third, "any house";[153] Fourth, "[t]he right of the people";[154] Fifth, "[n]o person";[155] Sixth, "the accused";[156] Seventh, "the right of trial by jury";[157] Eighth, "[e]xcessive bail shall not be required";[158] Ninth, "retained by the people";[159] and Tenth, " or to the people."[160] As Attorney General Edward Bates carefully opined in 1862, in reaction to the *Dred Scott* case:

> In my opinion, the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other.[161]

It was, of course, in the wake of Civil War, that national citizenship came to be seen generally in a more substantive way.[162] The "rights of man" were increasingly conceived of as a more general, amorphous set which framed certain more specifically (federally) guaranteed rights of citizens.[163] Section 1 of the Fourteenth Amendment begins with the first Constitutional definition of citizenship: "All persons born or naturalized in the United States."[164] It concludes, however, by barring any state from depriving "*any person* of life, liberty or property without due process" or from denying "to *any person* . . . the equal protection of the laws."[165] This was, in short, a work

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[150] BICKEL, MORALITY, *supra* note 142, at 36 (emphasis added); *see also*, Bickel, *Citizenship*, supra note 142, at 370.

[151] U.S. CONST. amend. I.

[152] U.S. CONST. amend. II.

[153] U.S. CONST. amend. III.

[154] U.S. CONST. amend. IV.

[155] U.S. CONST. amend. V.

[156] U.S. CONST. amend. VI.

[157] U.S. CONST. amend. VII.

[158] U.S. CONST. amend. VIII.

[159] U.S. CONST. amend. IX.

[160] U.S. CONST. amend. X.

[161] Citizenship, 10 Op. Att'y Gen. 382, 388 (1868). It is rather chilling to note that the actual question presented was: "Is a man legally incapacitated to be a citizen of the United States by the sole fact that he is a *colored*, and not a white man?" *Id.* at 383.

[162] *See* James Fox, *Fourteenth Amendment Citizenship and the Reconstruction-Era Black Public Sphere*, 42 AKRON L. REV. 1245, 1247–48 (2009); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 47–49 (1987).

[163] *See generally* Fox, *supra* note 162; Kaczorowski, *supra* note 162.

[164] U.S. CONST. amend. XIV, § 1.

[165] *Id.* (emphasis added).

in progress.[166] The constitutional text still reveals a vision of government in which citizenship may be required for national voting and for a few constitutionally designated positions; but, it is not a constitutional prerequisite "for any other form of participation in government nor for benefiting from the individual rights guaranteed by the Constitution."[167]

The plaintiffs' lawyers in *The Slaughter-House Cases* argued that "[t]he doctrine of the 'States-Rights party' . . . [had been that] there was no citizenship in the whole United States, except *sub modo* and by the permission of the States."[168] According to that (discredited, losing) theory, they argued, "the United States had no integral existence except as an incomplete combination among several integers."[169] The Fourteenth Amendment, they argued, "forever destroyed" such doctrines.[170] The key to the consolidation of "the several 'integers' into a consistent whole" was national citizenship.[171] "The tie between the United States and every citizen in every part of its own jurisdiction has been made intimate and familiar."[172] Although this theory did not prevail in its first major Supreme Court appearance, the concept of national citizenship achieved new meaning and importance. As Justice Bradley wrote in his dissent in *The Slaughter-House Cases*:

> Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty and property. These are the fundamental rights which can only be taken away by due process of law . . . [t]hese rights, I contend, *belong to the citizens* of every free government.[173]

The linkage between citizenship status and rights became especially important for voting. The Fifteenth Amendment states that "[t]he right *of citizens* of the United States to vote shall not be denied or abridged . . . by any State on account of race,

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[166] As Justice Bradley put it in his dissent in the *Slaughter-House Cases*:

> It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, *if they did not possess them before*.

The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 119 (1872) (Bradley, J., dissenting) (emphasis added).

[167] Schauer, *supra* note 147, at 1509.

[168] *The Slaughter-House Cases*, 83 U.S. at 52.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 53.

[173] *Id.* at 116 (Bradley, J., dissenting) (emphasis added).

color, or previous condition of servitude."[174] As Justice Miller noted, "The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union."[175]

National citizenship also came to be seen as the vertex of a power triangle, the bases of which were "allegiance" and "protection."[176] As Senator Lyman Trumball, the floor manager of the Fourteenth Amendment, had put it:

> How is it that every person born in these United States owes allegiance to the Government? . . . [C]an it be that our ancestors struggled through a long war and set up this Government, and that the people of our day have struggled through another war, with all its sacrifices and all its desolation, to maintain it, and at last that we have got a Government which is all-powerful to command the obedience of the citizen, but has no power to afford him protection? . . . Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. This Government . . . has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.[177]

Five years later, John Bingham cited Daniel Webster for the idea that, "[t]he maintenance of the Constitution . . . . relies on individual duty and obligation. . . . [T]he Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights and interests."[178]

Symbolically, these uses of citizenship status after the Civil War were, at least in part, a reaction to Justice Taney's *Dred Scott* reasoning that black people "had no rights which the white man was bound to respect . . . and that the negro might justly and lawfully be reduced to slavery for his benefit."[179] As Bickel put it, "The original

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[174] U.S. CONST. amend. XV, § 1 (emphasis added).

[175] *The Slaughter-House Cases*, 83 U.S. at 71.

[176] Speaking in 1859, John Bingham asserted that citizenship rights included:

> The equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil . . . . [T]hat all men, before the law, are equal in respect of those rights of person which God gives and no man or state may rightfully take away.

CONG. GLOBE, 35TH CONG., 2D SESS. 985 (1859).

[177] CONG. GLOBE, 39TH CONG., 1ST SESS. 1757 (1866) (statement of Sen. Lyman Trumball); *see also* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 425, 432 (2d ed. 2005).

[178] *See* CONG. GLOBE, 42ND CONG., 1ST SESS. 85 (1871) (quoting 3 DANIEL WEBSTER'S WORKS 469, 470).

[179] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superceded by constitutional amendment*, U.S. CONST. amend. IV. As Justice Field noted in his dissent to *The Slaughter-House Cases*, Chief Justice Taney's syllogism had proceeded as follows:

Constitution's innocence of the concept of citizenship was thus violated in the *Dred Scott* case."[180] With the Civil Rights Act of 1866,[181] the concept of citizenship was revived, as a status upon which a set of rights depended.[182] Bickel argues that this was simply "a matter of syntactic compulsion, of stylistic necessity, . . . a matter of the flow of the pen."[183] However, it is clear that the framers (and supporters) of the post–Civil War amendments saw national citizenship as the most plausible and practical legalistic framing for the expansive protective powers they envisioned.[184] The strongest potential implications of this model were thwarted by the Court in *The Slaughter-House Cases*, especially with respect to the privileges and immunities clause.[185] However, the powerful rhetoric of citizenship status as the source of rights endures, as in Justice Warren's famous Arendtian overstatement that citizenship is "the right to have rights."[186] The possible unintended negative consequences of this model were demonstrated by Chief Justice Rehnquist, who once argued that because

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> [T]he words "people of the United States" and "citizens" were synonymous terms; that the people of the respective States were the parties to the Constitution; that these people consisted of the free inhabitants of those States; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that they and their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any State to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that therefore the descendants of persons brought to this country and sold as slaves were not, and could not be citizens within the meaning of the Constitution.

The Slaughter-House Cases, 83 U.S. at 95 (Field, J., dissenting).

[180] BICKEL, MORALITY, *supra* note 142, at 40.

[181] Act of April 9, 1866, ch. 31 § 1, 4 Stat. 27.

[182] *Id.*

[183] *Id.*

[184] As Justice Miller noted in *The Slaughter-House Cases*, there had been great controversy about the definition of citizenship and the relevance of the Supreme Court's opinion in *Dred Scott*. *The Slaughter-House Cases*, 83 U.S. at 72–73. "No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals." *Id.* at 72. Indeed, Miller stated that the *Dred Scott* decision had "met the condemnation of some of the ablest statesmen and constitutional lawyers of the country [but] had never been overruled . . . [were it] to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution." *Id.* at 73. Joseph Story, also opined contemporaneously that the purpose of the first clause of the Fourteenth Amendment was "to put at rest forever the question whether colored persons were to be recognized as citizens." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (Thomas M. Cooley ed., 4th ed., 1873).

[185] *See The Slaughter-House Cases*, 83 U.S. at 74–75.

[186] Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

there is a constitutional "basic difference between citizens and aliens," alienage classifications are not subject to "strict scrutiny."[187]

In general, however, noncitizens' rights claims have long been a powerful counter-narrative to voting exclusion and a *leitmotif* in U.S. politico-legal discourse.[188] It is now well-settled that, "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[189]

James Madison, in his critique of the Alien and Sedition laws of the Adams Administration, sought to explain why aliens who were "not parties to the Constitution" still could not legitimately be subjected to "an absolute power."[190] As Madison wrote,

> [even if] aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them. . . .
>
> If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial.[191]

Madison further noted that "[a]liens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage."[192] Madison's formulation that "aliens are not parties to the Constitution"[193] implies a link among full membership (as a "party"), polity-participation, and rights. Thomas Jefferson's concern that, if oppressive laws are tolerated against the "friendless alien" then oppressive actions against the citizen "will soon follow" similarly defends fundamental rights by noncitizens.[194] Such a concern could indicate a citizen-centric view of rights (i.e., the only defect in a law that oppresses aliens is that it *might*

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[187] *Sugarman v. Dougall*, 413 U.S. 634, 649–50 (1972) (Rehnquist, C.J., dissenting) (stating that alienage is not a suspect classification which requires strict scrutiny).

[188] Indeed, even the Declaration of Independence itself cited impediments to naturalization among its "long train of abuses." THE DECLARATION OF INDEPENDENCE para. 2, 9 (U.S. 1776).

[189] Plyler v. Doe, 457 U.S. 202, 210 (1982).

[190] James Madison, *Madison's Report on the Virginia Resolutions*, *in* THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 556 (Jonathan Elliot, ed., 2d ed. 1876).

[191] *Id.*; *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 58 (1996).

[192] Madison, *supra*, note 190, at 556; *see also* NEUMAN, *supra* note 192.

[193] Madison, *supra* note 190, at 556. It is odd because of the ambiguity as to who was a pre-constitutional citizen or alien.

[194] *See* Thomas Jefferson, *Kentucky Resolutions*, *in* DOCUMENTS OF AMERICAN HISTORY 181 (Henry Commager ed., 7th ed. 1963).

someday be deployed against citizens). But this was surely not Jefferson's point, nor is it a defensible theory in a constitutional democracy that takes minority and aliens' rights at all seriously. The better reading is that this concern indicates an awareness that we are all in this polity, this democratic/constitutional enterprise together, regardless of status. On this view, polity-participation by noncitizens is inevitably connected to the nature and evolution of all rights claims.[195]

Consider in this light the evocative power of the public testimony offered by undocumented "Dreamers." As one twenty-one-year-old college student, Marie Gonzalez, testified in 2007, she had resided in the U.S. since she was five years old.[196] After the harrowing day when a caller from the governor's office requested that her family members "confirm" their immigration status, her life became "a haze of meetings with attorneys, hearings, and rallies."[197] Two support groups were formed by her church, community members, and fellow students.[198] One—its very name a powerful sign of polity-participation by the undocumented—was called "*We Are Marie*."[199] Though Marie was allowed to stay in the United States for one year,

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[195] It is not very far from this to *Carolene Products*, footnote 4. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Political activists have seen the power of connecting noncitizens' rights to the nature of the U.S. polity itself, as compared with abstract rights claims. In a pamphlet they authored as they faced deportation from the United States to Russia, Emma Goldman and Alexander Berkman strenuously evoked this tradition:

> And, finally, the most infamous and most inhuman method of Czarist Russia, the method that sacrificed hundreds of thousands of the finest and bravest men and women of Russia, and systematically robbed the country of the very flower of its youth, is now being transplanted on American soil, in these great United States, the freest democracy on earth. The dreaded Russian *administrative process* the newest American institutions! Sudden seizure, anonymous denunciation, star chamber proceedings, the third degree, secret deportation and banishment to unknown lands. O shades of Jefferson, Thomas Paine, and Patrick Henry! That you must witness the bloodiest weapon of Czarism rescued from the ruins of defunct absolutism and introduced into the country for whose freedom you had fought so heroically!

ALEXANDER BERKMAN & EMMA GOLDMAN, DEPORTATION, ITS MEANING AND MENACE 17 (1919).

[196] *See Comprehensive Immigration Reform: The Future of Undocumented Immigrant Students: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 8 (2007) (testimony of Marie Gonzalez) [hereinafter *Comprehensive Immigration Reform*]; *see also*, Rene Galindo, *Embodying the Gap Between National Inclusion and Exclusion: The "Testimonios" of Three Undocumented Students at a 2007 Congressional Hearing*, 14 HARV. LATINO L. REV. 377, 384 (2011).

[197] *Comprehensive Immigration Reform*, *supra* note 196, at 9–11.

[198] *Id.* at 10.

[199] *Id.*

her parents were ordered deported.[200] She rode with them on a float in a Fourth of July parade the day before they were to leave the United States.[201]

Such symbols as "*We Are Marie*" and July 4 parades are uniquely powerful. This is because the undocumented experience describes a "belonging that is at the same time a non-belonging."[202] One young woman poignantly testified that, without the DREAM Act, she would be "a perpetual foreigner in a country where I have always considered myself an American."[203] In 2011, Jose Antonio Vargas described his life as an undocumented immigrant as "living a different kind of reality."[204] Though he was clearly present in society, he lived:

> in fear of being found out. It means rarely trusting people, even those closest to me, with who I really am. It means keeping my family photos in a shoebox rather than displaying them on shelves in my home, so friends don't ask about them. It means reluctantly, even painfully, doing things I know are wrong and unlawful. And it has meant relying on a sort of 21st-century underground railroad of supporters, people who took an interest in my future and took risks for me.[205]

Polity-participation, analogized as a sort of "coming out," clearly makes a person visible. It may also make one a political subject.[206] Indeed, the courageous willingness to testify publicly transports undocumented Dreamers from the "liminal space of non-recognition"[207] into both public consciousness and a more tangible, functional sort of membership status. This is more than a rights claim: it embodies rights, polity-participation, and moral discourse.

"Aliens," Professor Peter Schuck once wrote derisively, "lack full membership in the moral and political communities that create and sustain our system of justice."[208] The polity-participation of the Dreamers strongly challenges this assertion. As to "political communities," it is true that direct electoral participation in American politics by noncitizens has long been severely constrained: by voting laws, by the threat

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[200] *Id.* at 9.

[201] *Id.* at 10.

[202] Galindo, *supra* note 196, at 382–83.

[203] *Comprehensive Immigration Reform*, *supra* note 196, at 15.

[204] Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES MAG., June 26, 2011, at MM22.

[205] *Id.*

[206] *Id.*; *see also* Galindo, *supra* note 196, at 382–83.

[207] *See id.* at 382 (citing JACQUES RANCIÈRE, DISAGREEMENT: POLITICS AND PHILOSOPHY (1999)).

[208] Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

of deportation,[209] and by such decisions as *Bluman v. FEC*,[210] in which the Court upheld restrictions on various forms of political involvement by foreigners.[211] But do "aliens" lack full membership in "moral" communities? This is a much harsher and more debatable claim. Leaving aside the substantial problem of defining the boundaries of a "moral community," (and what "full membership" could possibly mean, morally), it is true that the moral claims made by noncitizens, even those who live in the United States with families, have often fared poorly.[212] (Such claims were rather sharply described by Schuck as "provisional, contingent and seldom compelling.")[213] But losing an argument does not mean that one is not part of a community of discourse. The relationship between moral and political membership and "our system of justice" is intricate and boundaries are porous. While exclusion from voting, intimidation-by-deportation, and even a certain moral marginalization have surely limited noncitizens' ability to leverage political power, alternative pathways have often been found to achieve voice and politico-legal influence, and to develop and sustain new conceptions of justice itself.[214]

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[209] *See* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 4–5 (2012) [hereinafter KANSTROOM, AFTERMATH]; KANSTROOM, *supra* note 45, at 2.

[210] 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012). *See generally* James Ianelli, *Noncitizens and Citizens United*, 56 LOY. L. REV. 869 (2010) (discussing the effects of voting laws on noncitizens).

[211] *Bluman*, 800 F. Supp. 2d at 292.

[212] *See* Peter H. Schuck, *The Message of Proposition 187*, 26 PAC. L.J. 989, 998–99 (1995); SCHUCK, *supra*, note 74, at 1, 18, 44.

[213] SCHUCK, *supra* note 74, at 1.

[214] This is not new. The phenomenon was also a big part of Jefferson's presidential victory in 1800, in the wake of the Alien and Sedition Acts debacle. *See* KANSTROOM, *supra* note 45, at 46–63. From the beginning of the Republic to the present, politicians and pundits ranging from Thomas Jefferson and John Adams to Woodrow Wilson and, more recently, Pete Wilson, Pat Buchanan, Joe Arpaio, Barack Obama, and, perhaps, Mitt Romney have noted and debated such phenomena in the realms of local and state politics and national lobbying efforts. *See, e.g.*, *id.* (discussing the views on immigration of Thomas Jefferson and John Adams, particularly in reference to the Alien and Sedition Acts); *Feds: Ariz. Sheriff Arpaio Violated Civil Rights*, CBS NEWS, Dec. 15, 2011, http://www.cbsnews.com/8301-201_162-57343614/feds-ariz-sheriff-arpaio-violated-civil-rights/?tag=mncol;lst;1 (discussing Joe Arpaio's views on illegal immigration as well as an investigation into his treatment of illegal immigrants within his custody); Elizabeth Llorente, *Former Gov. Pete Wilson, Immigration Hardliner, Named Honorary Romney Campaign Chair*, FOX NEWS LATINO, Feb. 6, 2012, http://latino.foxnews.com/latino/politics/2012/02/06/mitt-romney-names-former-gov-pete-wilson-immigration-hardliner-as-honorary/ (discussing the views of Mitt Romney and Pete Wilson on immigration within the Hispanic/Latino community); Barack Obama, Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011), http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas (detailing a first-hand account of Barack Obama's political views on the issue of immigration). In recent years, naturalization by noncitizens and voter enrollment have

C. What/Who Is the Polity?

> In this way we are easily led into errors both of fact and principle. We see individuals, who are known to be citizens, in the actual enjoyment of certain rights and privileges, and in the actual exercise of certain powers, social and political, and we, inconsiderately, and without any regard to legal and logical consequences, attribute to those individuals, and to all of their class, the enjoyment of those rights and privileges and the exercise of those powers as incidents to their citizenship, and belonging to them only in their quality of citizens.
>
> —Opinion of Hon. Edward Bates, *Citizenship*[215]

> The Stranger is close to us, insofar as we feel between him and ourselves common features of a national, social, occupational, or generally human, nature.
>
> —Georg Simmel[216]

Before we explore how litigation works as noncitizen polity-participation, let us briefly consider the idea of "the polity." Polity is a peculiarly intriguing word, with important etymological complexities. It derives from the Greek word, *polis*,[217] which most literally meant "city,"[218] though it could refer to citizenship and to the body of citizens in a city-state.[219] The Latin noun, *politia*, is also related to the more

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tended to highlight—one might say—the "panic" in Hispanic; Don Wolfensberger, *Woodrow Wilson, Congress and Anti-Immigrant Sentiment in America: An Introductory Essay*, WOODROW WILSON INT'L CENTER FOR SCHOLARS (Mar. 12, 2007), http://www.wilsoncenter.org/sites/default/files/immigration-essay-intro.pdf (discussing Woodrow Wilson's views on immigrants in America during his presidency). *See generally* GERALDO RIVERA, HIS PANIC: WHY AMERICANS FEAR HISPANICS IN THE U.S. (2008). A 2011 essay posted on the website of the Center for Immigration Studies (CIS) bemoaned the role of the Carnegie Endowment in supporting and celebrating the rising political power of newly naturalized Latino voters. Jerry Kammer, *The Carnegie Corporation and Immigration: How a Noble Vision Lost Its Way*, CENTER FOR IMMIGR. STUD. (2011), http://www.cis.org/carnegie-immigration. The CIS author notes "that recent immigrants and their children had doubled their presence in the U.S. electorate between 1996 and 2008, totaling 10 percent of registered voters." *Id.* He then quoted Elizabeth Wood Johnson in what he perceived as an ominous warning: "Candidates—especially those in close elections—would do well to take heed." *Id.*

[215] Citizenship, *supra* note 161, at 383–84.

[216] GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 402–08 (K. H. Wolff ed. & trans., 1950).

[217] πόλις in Ancient Greek. Anitra Laycock, *Poetry & Polity: Tragic Perspectives on the Nature of Political Association*, 13 ANIMUS 22, 22 (2009).

[218] SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2269 (6th ed. 2007) [hereinafter OXFORD ENGLISH DICTIONARY].

[219] *See generally* MOGENS HERMAN HANSEN, POLIS: AN INTRODUCTION TO THE ANCIENT GREEK CITY-STATE (2006).

instrumental term, *policy* (which denotes a "course of action or principle adopted or proposed by a government party, individual . . . any course of action adopted as advantageous, or expedient").[220] Polity, in early English usages, meant, simply, "[c]ivil order or organization . . . an organized civil society."[221] The modern usage is perhaps best defined as "an organized society" or "the state as a political entity."[222] *Webster's Third New International Dictionary* defines "polity" as: "political organization" or "civil order;" it may also be defined, more simply, as "a form of government" or "a politically organized unit."[223] The term is also sometimes used to legitimate particular values through generalization. Justice Powell, for example, once described part of the Voting Rights Act as an "encroachment" that was "especially troubling because it destroys local control of the means of self-government, one of the central values of *our polity*."[224]

As a description of social groups, polity is broader than such concepts as race or ethnicity. For example, H.A.L. Fisher wrote in 1936 of how the Scandinavian "races" came to be accepted as "members of the polity of Europe."[225] A smaller polity may, however, also be defined particularly, as having, for example a Celtic, a feudal, a Presbyterian, or a democratic nature.[226] The most fundamental meaning of polity is thus general: the "body politic," the state or an organized society.[227]

Definitions of polity do not require citizenship or even the state.[228] The state is a particular form of organization for the polity. Citizenship is a particular, status-based

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[220] OXFORD ENGLISH DICTIONARY, *supra* note 218, at 2268.

[221] *Id.* at 2270

[222] *Id.* Oliver Goldsmith once described how "[t]he polity abounding in accumulated wealth, may be compared to a Cartesian system, each orb with a vortex of its own." OLIVER GOLDSMITH, THE VICAR OF WAKEFIELD 120 (Arthur F. Hansen ed., 1911).

[223] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1775 (unabridged ed. 2002).

[224] City of Rome v. United States, 446 U.S. 156, 201 (1980) (Powell, J., dissenting) (emphasis added).

[225] OXFORD ENGLISH DICTIONARY, *supra* note 218, at 2270 (quoting H.A.L. FISHER, A HISTORY OF EUROPE, 183 (1936)).

[226] *See id.* ("A particular form of government or political organization."). An interesting example of this usage occurred in 1811, when President James Madison vetoed a bill incorporating the Protestant Episcopal Church in the town of Alexandria in what was then the District of Columbia. 22 ANNALS OF CONG. 982–83 (1811). Madison vetoed the bill on the ground that it violated "the essential distinction between civil and religious functions, and violate[d], in particular, the article of the Constitution of the United States, which declares, that 'Congress shall make no law respecting a religious establishment.'" *Id.* As Madison explained: "The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated." *Id.*; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 703–04 (2012) (discussing Madison's veto of the bill).

[227] OXFORD ENGLISH DICTIONARY, *supra* note 218, at 261.

[228] Justice Stevens once invoked "the polity" in a decision involving zoning. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 433 (1989) (Stevens, J., concurring) ("Zoning is the process whereby a community defines its essential character.

way of defining, organizing or limiting one's relationship to the state and to the polity. In a well-known First Amendment case (involving a "four-letter expletive"), the Supreme Court saw the two concepts as related, but distinct:

> [The First Amendment] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce *a more capable citizenry and more perfect polity* and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[229]

A quarter century earlier, Justice Cardozo invoked a values-based conception of "our polity" to determine the propriety of judicial oversight of state actions. "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'?"[230] In sum, when thinking about "noncitizen participation in the polity" of the United States, broad understandings not only of modes of participation but also of the definition of the polity itself are justified both etymologically, normatively, and historically.[231]

D. Aliens

Who, then, is an "alien?" Compared to "polity," the term might seem simple enough, owing to the binary "citizen/alien" divide. Alienage is, however, a residual and (thus rather untidy) category, with no independent definition. An alien (or

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Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually—or more often unilaterally—destructive."). He also once invoked the intriguing and unusual concept of the "international polity." United States v. Maine, 475 U.S. 89, 102 (1986) ("In the absence of evidence limiting use of Nantucket Sound to the inhabitants of its shores, there is no reason to exempt these waters from such rights as innocent passage traditionally enjoyed in common by all members of the international polity.").

[229] Cohen v. California, 403 U.S. 15, 24 (1971) (emphasis added).

[230] Palko v. Connecticut, 302 U.S. 319, 328 (1937) (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).

[231] A democratic polity that is committed to basic civil and human rights must carefully calibrate the balance between majority rule and minority voice. This is an especially salient problem in times of national insecurity. *See generally* KANSTROOM, *supra* note 45 (describing the Alien and Sedition Acts, the Palmer Raids, the McCarthy era, and post–9/11 actions).

noncitizen) is essentially a person who is not a citizen.[232] As to citizenship we do, of course, have some legal definitions (both constitutional and statutory), categorized as *jus soli*, *jus sanguinis*, derivation, and naturalization.[233] But in practice, even these apparently clear categories may break down, both as to definitions and as to rights. For example, we now know that many people who were born in the United States have been wrongly deported due to an inability to prove their citizenship status (combined with insufficient attention to the issue by ICE and even some Immigration Judges).[234] Those who may have derived citizenship through their parents, in one of the myriad complex possible scenarios that have changed repeatedly over the years, face even greater hurdles in proving their citizenship status.[235] The fact is that a non-trivial number of citizens *mistakenly* participate in (or are treated by others within) the polity as noncitizens.[236] Conversely, some noncitizens may participate as citizens, though this may be illegal, as in the case of using a false passport, misrepresenting oneself as a citizen to gain employment, or voting.[237]

As Professor Rogers Smith has noted, many think of "American citizenship" as something that "should be and now largely is an essentially uniform status, conferring the same legal rights and duties on all those who possess it."[238] But this has never been either "wholly empirically true or normatively uncontested."[239] Historically, of course, the meaning of U.S. citizenship has varied tremendously for women, minors, and Native American Indians and many other members of racial and ethnic minority groups.[240] Naturalized citizens have a more tenuous status than do native-born citizens.[241] There are still substantial complexities for citizens of Puerto Rico, Guam, American Samoa, Northern Marianas, and the U.S. Virgin Islands who cannot vote in U.S. national elections.[242] There has been continuing debate as to whether one

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[232] KANSTROOM, AFTERMATH, *supra* note 209, at 30 (2012) (quoting 8 U.S.C. § 1101(a)(3) (2006)).

[233] *See, e.g.*, U.S. CONST. amend. XIV, § 1, cl. 1; 8 U.S.C. § 1401 (2006).

[234] KANSTROOM, *supra* note 45, at 98–102.

[235] *Id.* at 100.

[236] *See, e.g.*, Lee J. Teran, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 583 (2012) (describing how many children, in particular those born abroad to a U.S. parent, do not know that they have a claim to citizenship and may still be deported when living in the United States).

[237] Why is the wrongful designation by ICE of a citizen as a noncitizen not similarly illegal? I am grateful to Jackie Stevens for this framing.

[238] Rogers M. Smith, *Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-First Century*, 122 HARV. L. REV. 907, 907 (2009) (book review).

[239] *Id.* at 907; *see also* ROGERS M. SMITH, CIVIC IDEALS 14 (1997).

[240] SMITH, *supra* note 239, at 912–14. In addition, as Smith notes, "[c]orporations came to possess a form of jurisdictional citizenship. Overseas merchants could sometimes gain a form of 'commercial' citizenship." *Id.* at 912.

[241] *See, e.g.*, 8 U.S.C. § 1481 (2006) (listing bases for denaturalization and expatriation).

[242] The Electoral College system authorizes such voting only in admitted states and the District of Columbia. *See* De La Rosa v. United States, 229 F.3d 80 (2000) (citing U.S.

may be a citizen of Puerto Rico but not a citizen of the United States.[243] And one must note, too, the extremely serious, racialized problem of millions of disenfranchised U.S. citizen felons.[244]

The residual, noncitizen category is itself multifaceted, encompassing millions of undocumented people, short-term visitors, "parolees" who are deemed not legally present, many temporary visa statuses, refugees, asylum-seekers, and applicants for a host of other statuses and permanent residents.[245] As the Supreme Court has put it, "the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country."[246] Rights may vary greatly with status.[247] For

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CONST. amend. XXIII, § 1). Puerto Ricans and other U.S. citizens residing in Puerto Rico cannot vote in presidential elections. *See id.* at 83 (citing Igortua v. United States, 842 F. Supp. 602 (D.P.R. 1914)).

[243] *See* Colon v. U.S. Dep't of State, 2 F. Supp. 2d 43, 46 (1998), *aff'd*, 170 F.3d 191 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1003 (1999), *reh'g denied*, 528 U.S. 1107 (2000). A United States citizen, born in Puerto Rico and a resident of Puerto Rico, executed an oath of renunciation before a U.S. consular officer in the Dominican Republic. *Id.* at 44. The State Department rejected the renunciation, because the Plaintiff had demonstrated no intention of renouncing all ties to the United States in that he wanted to remain a resident of Puerto Rico. *Id.* at 45. The court rejected Colon's petition for a writ of mandamus directing the Secretary of State to approve a Certificate of Loss of Nationality because, although "claiming to renounce all rights and privileges of United States citizenship" he wanted to "continue to exercise one of the fundamental rights of citizenship, namely the right to travel freely throughout the world and when he wants to, to return and reside in the United States." *Id.* at 46; *see also* Ramirez de Ferrer v. Mari Brás, 144 D.P.R. 141 (1997) (reaffirming Puerto Rican citizenship); Hon. Fernando Bonilla, P.R. OP. Sec. Just. 2006-41 (2006).

[244] The Sentencing Project reports that, as of 2010, some 5.85 million citizens were disenfranchised due to criminal records, a figure that is approximately 9% higher than 2004; and a dramatic rise from the estimated 1.17 million disenfranchised in 1976. Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, THE SENTENCING PROJECT (2012), http://www.sentencingproject.org/detail/news.cfm?news_id=1334&id=133.

[245] *Forced Apart (by the Numbers), Appendix H*, HUMAN RIGHTS WATCH (showing the many categories of noncitizen), http://www.hrw.org/sites/default/files/reports/appendixh.pdf.

[246] Mathews v. Diaz, 426 U.S. 67, 78–79 (1976).

[247] Viet Dinh has argued that "[a]t a practical level, drawing the line at permanent residents does not weed out corrupting foreign influence in our political process, but it does preclude meaningful participation and inculcation of American values for scores of noncitizens seeking to be full Americans." Viet D. Dinh, *A Matter of Distinction*, N.Y. TIMES, Jan. 5, 2012, http://www.nytimes.com/roomfordebate/2012/01/05/should-foreign-money-be-allowed-to-finance-us-elections/the-us-should-encourage-engagement; *see also* Brief for the Ill. Coal. for Immigrants & Refugee Rights and the Nat'l Immigrant Justice Ctr. as Amici Curiae Supporting Petitioners, Bluman v. FEC, 132 S. Ct. 1087 (2012) (No. 11-275) (arguing, *inter alia*, that "[t]here is no meaningful constitutional distinction between aliens classified as 'permanent residents' under the INA and other foreign citizens residing in this country").

example, lawful permanent residents have been recognized as having a greater array of constitutional rights than do the undocumented.[248]

Two decades ago, Professor Rogers Brubaker asserted that the distinction between citizens and foreigners was "conceptually clear, legally consequential, and ideologically charged."[249] While the distinction is surely legally consequential and ideologically charged, its conceptual clarity—both in theory and in practice—must, I think, be qualified and questioned. This, I suggest, argues in favor of a relatively fluid, functional approach to noncitizen polity-participation.

II. NONCITIZEN LITIGATION AS POLITY-PARTICIPATION

> The rule . . . has its impact on an identifiable class of persons who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community. Aliens are not entitled to vote and, as alleged in the complaint, are often handicapped by a lack of familiarity with our language and customs. . . . By reason of the Fifth Amendment, such a deprivation must be accompanied by due process.
>
> —*Hampton v. Mow Sun Wong*[250]

A. What Does "Votelessness" Have to Do with Participation?

Noncitizens (especially the undocumented) face major impediments to polity-participation in the United States. As Dean Kevin Johnson has described: "[l]ocked out of the political process, this discrete and insular minority has the threat of deportation hanging over its head like the Sword of Damocles."[251] It is often the very vulnerability of noncitizens that leads them into courts where they may participate in a potentially more protective environment.[252]

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[248] The judges who decided the *Bluman* case explicitly noted that they were *not* deciding whether Congress could constitutionally extend the current statutory ban to "lawful permanent residents who have a more significant attachment to the United States than the temporary resident plaintiffs in this case." Bluman v. FEC, 800 F. Supp.2d 281, 292 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012). Such an extension, they wrote, "would raise substantial questions not raised by this case." *Id.*

[249] ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 21 (1992).

[250] 426 U.S. 88, 102–03 (1976) (footnote omitted).

[251] Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1544 (1995).

[252] *See, e.g.*, Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1264–65 (2008).

This brings us back to Justice Robert Jackson's phrase: "a voteless class of litigants," used in the case of *Wong Yang Sun v. McGrath*.[253] The case involved a challenge to certain practices that had long been a part of U.S. deportation law but that were violative of the newly enacted Administrative Procedure Act (APA).[254] Justice Jackson was well aware of, and had strong opinions about, some of the deportation excesses of his time.[255] His adjectival description of deportees as "voteless" might imply that aliens, *because* they were "a voteless class" were entitled to greater protections under the APA, as it should be interpreted, than were citizens.[256] This reading, clearly related to the concept of special rights protections for "discrete and insular minorities,"[257] is supported by the phrase that follows Jackson's naming of the "voteless class:" "who are strangers to the laws and customs in which they find themselves involved."[258] Note how this extends Madison's model: it moves from "*even if* [aliens are not parties to the Constitution]" to "*because*."[259] The exclusion from political power is not merely irrelevant, it is a *reason* for greater judicial protection.[260] A constitutional due process holding could logically follow, protecting deportees' procedural rights, regardless of the technical requirements of the APA.[261] The phrase, "a voteless class of litigants" is thus intriguingly evocative. It straddles (and to some degree blurs) the line between politics and law.[262]

The problem for noncitizens is deeper than minority status, however. They do not get out-voted; they cannot vote at all.[263] A further complication is that—unlike

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[253] 339 U.S. 33, 46 (1950).

[254] *Id.* at 35.

[255] *See* KANSTROOM, *supra* note 45, at 204–05.

[256] *See Wong Yang Sung*, 339 U.S. at 46.

[257] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[258] *Wong Yang Sung*, 339 U.S. at 46.

[259] *See supra* notes 184–85 and accompanying text.

[260] Similarly, Jackson's focus on noncitizens' lack of voting rights could also mean that he assumed that if they had had the right to vote then deportation proceedings would not have been exempted from APA coverage. What was then § 7(a) of the APA (now codified as § 556(b)) excepted deportation proceedings from the APA as "the conduct of specified classes of proceedings . . . by or before boards or other employees specially provided for by or designated under statute." 5 U.S.C. § 556(b) (2006). The 1966 codification, however, was intended "to restate, without substantive change," the pre-existing sections of the APA. *See* Pub. L. No. 89-554, 80 Stat. 631 (1966).

[261] In its second sense, however, the phrase, "a voteless class of litigants" could also imply an overestimation of the power that minorities might gain by having the right to vote. As noted, above, Martin Luther King, Jr. once defined "just law" in this way: "[A] code that a majority compels a minority to follow that it is willing to follow itself." KING, *supra* note 38, at 294.

[262] This problem, of course, is not confined to racial, ethnic or religious minorities. Welfare recipients have the right to vote. *See* F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 S. CT. ECON. REV. 141 (1997). But that surely does not mean that *Goldberg v. Kelly*, 397 U.S. 254 (1970), was superfluous.

[263] Hampton v. Mow Sung Wong, 426 U.S. 88, 102 (1976).

race—the difference between citizens and aliens is an ostensibly legitimate differentiation. Citizenship status is no longer based on race but on place of birth, parentage, or naturalization choices. The citizen/alien divide is arguably just because it applies, generally, to all people, in all nation-states, on the basis of criteria (place of birth, parentage, voluntary naturalization) that are themselves seen as, if not perfectly just, then at least not invidious.[264] The problems it may cause are thus more typically seen as questions of basic human rights, of the limits of discrimination, or of proportionality in enforcement, than as fundamental questions of political legitimacy.[265] And yet Justice Jackson's description of noncitizens (especially deportees) as a "voteless class of *litigants*" invokes the relationship between politics and law as both are undertaken by noncitizens. This relationship is marked by more than simply an expansion or contraction of noncitizens' rights claims as such. In this sense, noncitizen litigation has long been a powerful and essential revitalizing force that may benefit not only the litigants themselves (if they win) but also the polity as a whole. Indeed, this revitalizing benefit may result from lost cases as much as from successful ones: it is the fact of meaningful participation that counts.

B. Legal Exclusions of Noncitizens from Polity-Participation

The Supreme Court has often examined the exclusion of noncitizens from certain forms of polity participation.[266] Its approach, well described as a "doctrinally inelegant history,"[267] has evolved considerably over time.[268] It differs dramatically in the state versus the federal context;[269] and is profoundly deferential when immigration control is implicated.[270] As the Court itself has candidly noted, the cases "have not formed an unwavering line over the years."[271]

In the early twentieth century, the Court upheld state laws prohibiting "aliens" from owning land,[272] possessing a shotgun or rifle for hunting wildlife,[273] as well as laws that excluded noncitizens from public works contracts.[274] The Court developed

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[264] *See generally* Sugarman v. Dougall, 413 U.S. 634 (1973).

[265] *Id.* at 648–49.

[266] *See* Bernal v. Fainter, 467 U.S. 216, 219–20 (1984).

[267] Schauer, *supra* note 147, at 1509.

[268] *Id.* at 1509–10.

[269] *Id.* at 1511–12.

[270] KANSTROOM, *supra* note 45, at 178.

[271] Cabell v. Chavez-Salido, 454 U.S. 432, 436 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 72 (1979)) (internal quotation marks omitted).

[272] Frick v. Webb, 263 U.S. 326 (1923).

[273] Patsone v. Pennsylvania, 232 U.S. 138 (1914) (upholding state law that prohibited the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and "to that end" making it unlawful for any such person to own or be possessed of a shotgun or rifle).

[274] Crane v. New York, 239 U.S. 195 (1915). *But see* Truax v. Raich, 239 U.S. 33 (1915) (upholding private employment rights).

a "special public interest" doctrine that deferred to a state's concern with "the restriction of the resources of the state to the advancement and profit of the members of the state."[275] Members meant citizens.[276] In 1915, then Judge Cardozo had justified such polity-exclusion in rather stark terms: "The people," he wrote, "viewed as an organized unit, constitute the state."[277] And the "members of the state are its citizens."[278] "Society thus organized, is conceived of as a body corporate" which may "enter into contracts, and hold and dispose of property . . . through agencies of government."[279] These agencies, in turn, "are trustees for the people of the state."[280] To be sure, there were certain limitations on the powers of those agencies in which citizens had an interest.[281] But Judge Cardozo's most crucial point was that "an alien has no such interest, and hence results a difference in the measure of his right."[282]

This approach began to change in the 1940s as the Court came to see such laws as increasingly unjustifiable. In *Takahashi v. Fish and Game Commission*,[283] the Court concluded that California could not use federally created "racial ineligibility for citizenship as a basis for barring Takahashi from earning his living as a commercial fisherman" in coastal waters.[284] Though the Court's reasoning was rather summary, Justice Murphy's concurrence offered a strong anti-discrimination rationale.[285] He noted that the statute was "but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since

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[275] People v. Crane, 214 N.Y. 154, 161, *aff'd sub nom.* Crane v. New York, 239 U.S. 195 (1915) (holding that a state statute regarding employment of laborers is not unconstitutional under the equal provision clause of the Fourteenth Amendment because it makes distinctions between aliens and citizens); *see also* Clarke v. Deckebach, 274 U.S. 392 (1927) (upholding denial of license to run a billiard parlor); Heim v. McCall, 239 U.S. 175 (1915) (upholding state law which forbade contractors' use of noncitizen employees).

[276] *Crane*, 214 N.Y. at 160.

[277] *Id.* at 160.

[278] *Id.* (citing United States v. Cruikshank, 92 U.S. 542, 549 (1876); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875)).

[279] *Id.*

[280] *Id.*

[281] *Id.* at 161. For example, government "may not by arbitrary discriminations having no relation to the public welfare, foster the employment of one class of its citizens and discourage the employment of others." *Id.* "Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust." *Id.*

[282] *Id.*

[283] 334 U.S. 410 (1948).

[284] *Id.* at 412; *see also* Oyama v. California, 332 U.S. 633, 649 (1948) (Black, J., concurring). *See generally* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1063–64 (1979) (discussing the Court's use of the Supremacy Clause in alien-based discrimination claims); Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980) (arguing that a preemption model should replace equal protection analysis in alienage jurisprudence).

[285] *See Takahashi*, 334 U.S. at 427 (Murphy, J., concurring).

the turn of the century."[286] In a strong call for a revitalized equal protection jurisprudence, Murphy concluded:

> We should not blink at the fact that § 990, as now written, is a discriminatory piece of legislation having no relation whatever to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program, not because their fishing activities constitute a clear and present danger to the welfare of California or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests.[287]

Even state laws without such racial connections that discriminate on the basis of alienage must now generally withstand "strict" judicial scrutiny.[288] In *Graham v. Richardson*,[289] the Court held that "[s]tate laws that restrict[ed] the eligibility of [noncitizens] for welfare benefits merely because of their alienage conflict[ed] with . . . overriding national policies in an area constitutionally entrusted to the Federal Government."[290] More importantly, though, the Court held that these state statutes had created "two classes of needy persons [who were] indistinguishable except" for their citizenship status.[291] Noting that an alien is a "person" for equal protection purposes, the Court further recognized alienage as a suspect classification that requires "heightened judicial solicitude."[292] As the Court now put it, "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[293] The Court has since invalidated state statutes that denied noncitizens the right to pursue various occupations, including permanent state civil service positions,[294] membership in the State Bar,[295]

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[286] Id. at 422 (citing *Oyama*, 332 U.S. at 650 (Murphy, J., concurring); *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting)).

[287] *Id.* at 426.

[288] Graham v. Richardson, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (footnotes and citations omitted)).

[289] 403 U.S. 365 (1971).

[290] *Id.* at 378.

[291] *Id.* at 371.

[292] *Id.* at 371–72.

[293] *Id.* at 372 (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

[294] *See* Sugarman v. Dougall, 413 U.S. 634 (1973).

[295] *See In re* Griffiths, 413 U.S. 717 (1973).

and the practice of civil engineering.[296] Such cases have also reflected the rejection of the "right/privilege" doctrine for purposes of due process analysis.[297]

One exclusionary formulation is of particular interest for this Article: the Court has endorsed the idea that noncitizens may legitimately be excluded from those forms of polity-participation that are deemed to be "intimately related to the process of democratic self-government."[298] The Court has tried to distinguish "between the economic and sovereign functions of government."[299] In so doing, it has echoed the argument that, "although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community."[300] Though the theoretical basis for such a distinction is, to my mind, exceedingly problematic, one can see why it seems a serviceable model for the Court given the basic ambiguities of citizenship discussed above. Examples of acceptable exclusions have included serving as jurors, working as police or probation officers and even teaching in public schools.[301] Cases involving schools and teachers have inspired especially intricate reasoning. Teachers, held the Court in *Ambach v. Norwich*,[302] like police officers, possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation.[303] "Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."[304] More specifically, the Court concluded that "a teacher has an opportunity to influence the attitudes of students toward government, the political

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[296] *See* Examining Board v. Flores de Otero, 426 U.S. 572 (1976); *see also* Bernal v. Fainter, 467 U.S. 216, 219–20 (1984) (discussing the Court's invalidation of statutes denying aliens the right to pursue certain occupations); Nyquist v. Mauclet, 432 U.S. 1, 11 (1977) (discussing the Court's decisions in *Sugarman* and *Griffiths*).

[297] *See Graham*, 403 U.S. at 374; *see also* Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[298] Bluman v. FEC, 800 F. Supp. 2d 281, 292 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (quoting *Bernal*, 476 U.S. at 220).

[299] Cabell v. Chavez-Salido, 454 U.S. 432, 438 (1982).

[300] *Id.*

[301] *See, e.g.*, *id.* (upholding a law barring foreign citizens from working as probation officers); *see also* Ambach v. Norwick, 441 U.S. 68 (1979) (upholding a law barring foreign citizens from teaching in public schools unless they intend to apply for citizenship); Foley v. Connelie, 435 U.S. 291 (1978) (upholding a law barring foreign citizens from serving as police officers); Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974) (upholding a law barring foreign citizens from serving as jurors); *cf.* Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973) (finding state civil service restriction unconstitutional, but noting that "citizenship is a permissible criterion for limiting" the "right to vote or to hold high public office").

[302] 441 U.S. 68 (1979).

[303] *Id.* at 76.

[304] *Id.* at 78–79.

process, and a citizen's social responsibilities."[305] "This influence" was held to be "crucial to the continued good health of a democracy."[306]

Is the use of citizenship status a valid proxy for such qualities? In the public school teacher case, four Justices dissented vigorously, noting that these statutes originated "in the frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day."[307] The dissenters questioned whether citizenship status made a person a proper role model for attitudes towards government and social responsibilities.[308] The dissenters also challenged the majority's most basic assumptions about education and polity-participation.[309] "Is it better," they polemically asked:

> to employ a poor citizen teacher than an excellent resident alien teacher? Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America?[310]

Describing the citizenship bar as "artificial" and "a stultifying provision," they saw it as "disregarding . . . the diverse elements that are available, competent, and contributory to the richness of our society and of the education it could provide."[311] When these dissenters later joined a Court majority, they revisited the relationship between political self-definition and polity-participation in the context of public school education. The outcome was different. In *Plyler v. Doe*,[312] the Court thus noted that if undocumented children were not educated, then the "stigma of illiteracy [would] mark them for the rest of their lives."[313] This would "deny them the ability to live within the structure of our civic institutions" and would foreclose

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[305] *Id.* at 79.

[306] *Id.*

[307] *Id.* at 82 (Blackmun, J., dissenting) (noting that this particular citizenship requirement had its origin in 1918 N.Y. Laws, ch. 158, effective Apr. 4, 1918).

[308] The dissenters pointed out that both teachers in the case had been in this country for over 12 years. *Id.* at 84–85. Each was married to a United States citizen. *Id.* at 85. Each met all the requirements, other than citizenship, for a public school teacher. *Id.* And, perhaps most importantly, each was "willing, if required, to subscribe to an oath to support the Constitutions of the United States and of New York." *Id.*

[309] *Id.* at 87; *see also* Note, *Aliens' Right to Teach: Political Socialization and the Public Schools*, 85 YALE L.J. 90, 108–11 (1975).

[310] *Ambach*, 441 U.S. at 87 (Blackmun, J., dissenting).

[311] *Id.* at 88.

[312] 457 U.S. 202 (1982).

[313] *Id.* at 223.

any possibility of their contributing "in even the smallest way to the progress of our Nation."[314]

Such reasoning goes to the heart of our understanding not only of citizenship and the polity, but also of constitutional democracy itself. The Court, unsurprisingly, has vacillated. In a case involving qualifications for police officers, "a State's historical power to exclude aliens from participation in its democratic political institutions" was said to be "part of the sovereign's obligation to preserve the basic conception of a political community."[315] Exclusion of "aliens" was not seen by the Court, as it might have been, as a "*deficiency* in the democratic system" but rather as a "*necessary* consequence of the community's process of political self-definition."[316] The act of becoming a citizen, on this view,

> is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking.[317]

Indeed, Chief Justice Burger bluntly stated in *Foley*, with Aristotelian flourish, that "the right to govern is reserved to citizens."[318]

To be sure, the legal exclusion of noncitizens from this sort of polity-participation in the United States has limits. As Chief Justice Burger also noted in 1971:

> The decisions of this Court with regard to the rights of aliens living in our society have reflected fine, and often difficult, questions of values. As a Nation we exhibit extraordinary hospitality to those who come to our country, which is not surprising for we have often been described as "a nation of immigrants."[319]

As noted, "the Court has treated certain restrictions on [noncitizens] with 'heightened judicial solicitude,' a treatment deemed necessary since aliens [in a formulation by Chief Justice Burger that followed Justice Jackson's] have no direct voice in the

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[314] *Id.*

[315] Foley v. Connelie, 435 U.S. 291, 295–96 (citations omitted) (quoting Sugarman v. Dougal, 413 U.S. 634, 647–48 (1973)) (internal quotation marks omitted).

[316] Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (emphasis added).

[317] *Foley*, 435 U.S. at 295 (citation omitted).

[318] *Id.* at 297.

[319] *Id.* at 294 (citation omitted).

political processes."[320] To put this another way, the tension between acceptable political exclusion from polity-participation and anti-discrimination norms has led the Court to hold that the political function exception, described above, must be very narrowly construed.[321] Otherwise the exclusionary exception would swallow the rule and depreciate the powerful significance that constitutional law attaches to protection of a discrete and insular minority.[322]

In the federal context, the Court has tended to defer much more to the political branches. The level of scrutiny in such cases is looser, and the underlying theory of the importance of citizenship tends to be stronger.[323] Thus, "overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State."[324] As the Court rather crudely put it in *Mathews v. Diaz*[325]: "Neither the overnight visitor, the unfriendly

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[320] *Id.* (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971), and citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

[321] Nyquist v. Mauclet, 432 U.S. 1, 11 (1977). One might see it as a parsing of the national community into separate political versus economic spheres. *See, e.g.*, MARK GIBNEY, STRANGERS OR FRIENDS 61 (1986).

[322] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 161–62 (1980) (arguing in favor of special judicial solicitude due to exclusion from political participation).

[323] *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

[324] *See id.* at 101. The Court assumed "without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service." *Id.* at 116; *see also* Jalil v. Campbell, 590 F.2d 1120, 1123 (D.C. Cir. 1978) (recognizing that the President may bar noncitizens from employment in the federal civil service by executive order); Vergara v. Hampton, 581 F.2d 1281, 1286 (7th Cir. 1978) (noting that national interests may justify a citizenship requirement in federal service).

[325] 426 U.S. 67 (1976). In *Mathews*, the Court upheld a Federal law that excluded noncitizens from Medicare unless they were permanent residents who had lived in the United States for at least five years. *Id.* at 80, 82. The Court accepted that:

> [i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."
>
> In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*.

Id. at 79–80 (footnotes omitted).

In light of the government's plenary power to regulate "aliens" within its borders subject only to a "narrow standard of review," the Court deferred to Congress and found that neither the requirement of permanent residency nor the durational residency requirement was "wholly irrational." *Id.* at 81–83.

agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests."[326]

Similarly, the Court has recently upheld a lower court ruling rejecting noncitizens' constitutional challenges to a federal law that bans certain foreign nationals, except for lawful permanent residents, from making certain politically related expenditures.[327] Even in cases dealing with federal laws, however, the Court has expressly rejected the assertion "that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."[328] Finally, as noted, in the realm of immigration control and deportation measures, deference reaches its peak.[329]

C. Vanguard Rights Litigation

Legal claims of rights made by and on behalf of noncitizens have powerfully influenced the development of U.S. constitutional law and rights theory.[330] Prominent obvious examples include the vigorous constitutional debates spurred by the Alien and Sedition Acts,[331] the *Dred Scott* case, *Yick Wo v. Hopkins*,[332] free speech and free association cases involving noncitizens in the early and mid-twentieth century,[333] and *Plyler v. Doe*. Less obvious examples include the Guantánamo cases (especially

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[326] *Id.* at 80. The Court continued: "The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence." *Id. See generally* Johnson, *supra* note 251, at 1519–28; Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 994–1002 (analyzing the application of the plenary power doctrine to noncitizen benefit restrictions).

[327] Bluman v. FEC, 899 F. Supp. 2d 281 (D.D.C. 2011) (upholding the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96), *aff'd*, 132 S. Ct. 1087 (2012). The law prohibits expenditures that "expressly advocate the election or defeat of a political candidate." *Id.* at 284. It also bars contributions to political parties or to outside groups if funds would be used for candidates, parties, or express advocacy. *Id.* As construed by the D.C. District Court, the statute does not purport to bar issue advocacy. *Id.*

[328] *Mow Sun Wong*, 426 U.S. at 102.

[329] *See generally* KANSTROOM, *supra* note 45 (examining the nature and history of the U.S. government's power to detain and deport).

[330] I am grateful to my colleague, Kari Hong, for reminding me that the history of coverture provides interesting and important analogies to this pattern.

[331] 1 Stat. 566 (1798); 1 Stat. 570 (1798); 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24 (1918)); 1 Stat. 596 (1798).

[332] 118 U.S. 356 (1886).

[333] *See generally* COLE, *supra* note 88.

Boumediene v. Bush)[334] *Padilla v. Kentucky*,[335] and much current litigation about state and local anti-immigration laws, such as *Chamber of Commerce v. Whiting*,[336] and *Arizona v. United States*.[337]

Such litigation may compel reconsideration of citizenship itself. *Dred Scott*, for example, showed that "[a] relationship between government and the governed that turns on citizenship can always be dissolved or denied [because] [c]itizenship is a legal construct, an abstraction, a theory."[338] Cases brought by "aliens" have also contributed to important expansions of noncitizens' rights, as in *Yick Wo*,[339] *Plyler*,[340] and *Padilla*.[341] These cases—perhaps with the ironic benefit of hindsight—may be called "vanguard" rights litigation. The relative openness of the U.S. legal system to *vanguard* claims—as contrasted with the exclusion of noncitizens from voting—has also facilitated a remarkable degree of noncitizen participation in broad legal transformations that are not necessarily associated with immigration law, alienage law, or citizenship status.[342]

Yick Wo, for example, though its precise holding, and its precedential value pre–*Brown v. Board of Education*[343] have been contested,[344] was surely an essential step

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[334] 128 S. Ct. 2229 (2008). The promise of *Boumediene*, that detainees would have a meaningful opportunity to challenge their detention in federal court, has not been kept. As Judge Tatel noted in his dissent in *Latif v. Obama*, that, "it is hard to see what is left of the Supreme Court's command in *Boumediene*." 677 F.3d 1175 (D.C. Cir. 2012) (applying a presumption of regularity to government reports and remanding the case to determine the petitioner's credibility, despite the court's reliance on his declaration in their finding that the government report was "not sufficiently reliable" to justify detention); *see also* Latif v. Obama, 666 F.3d 746 (2011), *cert. denied*, 132 S. Ct. 2741 (2012). Mr. Latif died, alone in his cell, after ten years in custody at Guantanamo. *See* Marc Falkoff, Op-Ed., *A Death at Gitmo*, L.A. TIMES, Sept. 20, 2012, http://www.latimes.com/news/opinion/commentary/la-oe-falkoff-gitmo-detainee-death-20120920,0,4034278.story.

[335] 130 S. Ct. 1473 (2010).

[336] 131 S. Ct. 1968 (2011).

[337] 132 S. Ct. 2492 (2012).

[338] BICKEL, MORALITY, *supra* note 142, at 53.

[339] 118 U.S. 356 (1886) (equal protection).

[340] 457 U.S. 202 (1982) (education).

[341] 130 S. Ct. 1473 (2010) (effective assistance of counsel as to deportation consequences).

[342] *See, e.g.*, *Yick Wo*, 118 U.S. 356.

[343] 347 U.S. 483 (1954).

[344] *See* Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359. Chin argued that the traditional view of *Yick Wo* was mistaken and that the case "was about neither race discrimination nor prosecution." *Id.* Rather, "[r]ead in the context of the jurisprudence of its time . . . [the case] is completely consistent with *Plessy v. Ferguson* and stands primarily for the mundane point that a valid treaty trumps inconsistent state law." *Id.* at 1359–60. *But see* David Bernstein, *Revisiting* Yick Wo v. Hopkins, 2008 U. ILL. L. REV. 1393 (highlighting the fact that *Yick Wo* explicitly cited the Fourteenth Amendment and that contemporary commentators—including retired Justice Miller—saw it as constitutionally expansive).

in the evolution of equal protection and due process discourse and doctrine.[345] Indeed, a recent LexisNexis search for the term "*Yick Wo*" in the federal court cases database showed 1,675 hits, of which many had nothing at all to do with aliens or noncitizens.[346] *Padilla*, as we shall see, has already inspired deep rethinking of the notion of collateral consequences in criminal constitutional law as well as the role of counsel more generally.[347]

To be sure, cases brought by noncitizens are not always successful for them. Nor are the consequences for citizens' rights claims always expansive. Besides *Dred Scott*, the most well-known examples of "plenary power" reasoning, *Chae Chan Ping v. United States*[348] and *Fong Yue Ting v. United States*,[349] laid the conceptual "plenary power" groundwork for later cases involving both citizens and noncitizens.[350] Apart from the often criticized dreadful effects that such cases have had on noncitizens' rights claims,[351] they can exert gravitational force in other areas of law.[352] Their principles may, in Robert Jackson's evocative metaphor, "lie[ ] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[353] There can be little doubt that some of the Bush Administration's policies in the wake of 9/11 were facilitated by a legacy of judicial deference to government power regarding virtually any government action denominated as immigration enforcement, even though some such policies involved citizens.[354]

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[345] *See id.* at 1373; Lenese Herbert, *On Precedent and Progeny: A Response to Professor Gabriel J. Chin's "Doubts About* Yick Wo,*"* 2008 U. ILL. L. REV. 1415. Professor Herbert argued that, despite its doctrinal limitations or the complexities of its motivation, the expansive reading of *Yick Wo*, has triumphed. *See id.* "Its story, placed in the context of and alongside many other similar stories, making a significant story of impact." *Id.* at 1424. One might note in this celebratory mode that there is a Yick Wo Elementary School. *See* YICK WO ELEMENTARY SCH., http://www.yickwo.org/yves/about (last visited Dec. 6, 2012).

[346] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (public education and racial integration); Lawrence v. Texas, 539 U.S. 558 (2003) (sodomy laws); DeShaney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189 (1989) (Fourteenth Amendment liberty rights). Search results on file with the *William & Mary Bill of Rights Journal*.

[347] *See infra* notes 437–59 and accompanying text.

[348] 130 U.S. 581 (1889).

[349] 149 U.S. 698 (1893).

[350] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944). *See generally* KANSTROOM, *supra* note 45.

[351] *See, e.g.*, *Korematsu*, 323 U.S. at 245–46 (Jackson, J., dissenting).

[352] *See generally* Juliet Stumpf, *The Implausable Alien:* Iqbal *and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231 (2010) (examining the "subterranean impact of immigration law" on *Iqbal* and worrying about the "tremendous impact" the case may have on the "survival of civil complaints [more] generally").

[353] *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

[354] *See* KANSTROOM, *supra* note 45, at 229–31; *see also* COLE, *supra* note 88, at 74.

Vanguard rights cases are neither inevitably brought—nor are they always resolved—on constitutional grounds. Consider *Ashcroft v. Iqbal*,[355] which presaged heightened pleading standards in a wide range of civil cases alleging government misconduct.[356] Javaid Iqbal was arrested in November 2001, on fraud-related charges and was placed in pretrial detention at the Metropolitan Detention Center in Brooklyn, New York.[357] He claimed that on the day he was transferred to the special unit, prison guards, without provocation, "picked him up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room."[358] He averred that after being attacked a second time he sought medical attention but was denied care for two weeks.[359] His complaint further alleged that prison staff in the special unit subjected him to unjustified strip and body cavity searches,[360] verbally berated him as "a terrorist" and "Muslim killer,"[361] refused to give him adequate food,[362] and intentionally turned on air conditioning during the winter and heating during the summer.[363] He also claimed that prison staff interfered with his attempts to pray and engage in religious study,[364] and with his access to counsel.[365]

Iqbal alleged that FBI officials had carried out a discriminatory policy by designating him as a person "of high interest" in the investigation of the September 11 attacks solely because of his "race, religion, and/or national origin."[366] In his *Bivens* action,[367] Iqbal contended that then–Attorney General Ashcroft and then–FBI Director Mueller "were at the very least aware of the discriminatory detention policy and condoned it (and perhaps even took part in devising it), thereby violating his First and Fifth Amendment rights."[368]

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[355] 129 S. Ct. 1937 (2009).

[356] *See, e.g.*, Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60 (3d Cir. 2011); Anor v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3404 (2010).

[357] Iqbal v. Hasty, 490 F.3d 143, 147–48 (2d Cir. 2007), *rev'd by* 556 U.S. 662 (2009).

[358] Amended Complaint and Jury Demand at para. 113, Iqbal v. Ashcroft, 490 F.3d 143 (2d Cir. 2007) (No. 04-CV-1809).

[359] *Id.* at para. 187–88.

[360] *Id.* at para. 136–40.

[361] *Id.* at para. 87.

[362] *Id.* at para. 91.

[363] *Id.* at para. 84.

[364] *Id.* at para. 153–54.

[365] *Id.* at para. 168.

[366] *Id.* at para. 51. He had been "placed in the detention center's Administrative Maximum Special Housing Unit for over six months while awaiting the fraud trial." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1955 (2009).

[367] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (holding that federal officials may be liable for injuries caused by their Fourteenth Amendment violations).

[368] *Iqbal*, 129 S. Ct. at 1955 (Souter, J., dissenting).

The Court majority held that knowledge and acquiescence in subordinates' use of discriminatory criteria to classify detainees is insufficient to state a *Bivens* claim.[369] Thus, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct."[370] As the majority continued, "purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities."[371]

This, as the dissent highlighted, was a significant restriction that had neither been briefed nor argued.[372] Moreover, the majority also offered a noteworthy reading of Federal Rule of Civil Procedure 8(a)(2), which requires only that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[373] The Court held that Iqbal had failed to meet even this low standard.[374] The majority found that Iqbal had asserted that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh "conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[375] He had alleged that Ashcroft was the "principal architect" of this invidious policy,[376] and that Mueller was "instrumental" in adopting and executing it.[377] The majority, however, called his claims "bare assertions," that amounted "to nothing more than a 'formulaic recitation of the elements.'"[378] Most strikingly, the majority conceded that, if taken as true (as they should be at this stage of litigation), Iqbal's "allegations [were] consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin."[379] But the majority then enunciated a rather strict

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[369] *Id.* at 1949.

[370] *Id.*

[371] *Id.*

[372] *Id.* at 1957 (Souter, J., dissenting).

[373] FED. R. CIV. P. 8(a)(2).

[374] *Iqbal*, 129 S. Ct. at 1950–51. The Court also held that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

[375] *Iqbal*, 129 S. Ct. at 1951 (citing Amended Complaint and Jury Demand at para. 96, Iqbal v. Ashcroft, 490 F.3d 143 (2d Cir. 2007) (No. 04-CV-1809)).

[376] Amended Complaint and Jury Demand at para. 10, *Iqbal*, 490 F.3d 143 (No. 04-CV-1809).

[377] *Id.* at para. 11.

[378] *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 555).

[379] *Id.*

new standard: that "given more likely explanations, *they do not plausibly establish this purpose*."[380]

The potential significance of this holding as a precedent was well stated by Justice Souter in his dissent. The majority had effectively (and without argument or briefing on the relevant point) "do[ne] away with supervisory liability under *Bivens*,"[381] and had misapplied the pleading standard.[382] Their concerns were prescient: *Iqbal* has had profound effects.[383] Indeed, the case has modified the pleading standard in many types of cases, especially those brought by minorities and noncitizens.[384] As Erwin Chemerinsky noted:

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[380] *Id.* (emphasis added). The Court continued:

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

Id. at 1951–52 (quoting *Twombly*, 550 U.S. at 567) (citation omitted).

[381] *Id.* at 1955–57 (Souter, J., dissenting). Ashcroft and Mueller had "made the critical concession that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability." *Id.* at 1957. The dissenters saw the Court's holding as broad and preclusive: "Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely." *Id.*

[382] *Id.* at 1958–61.

[383] Justice Ginsburg, perhaps just a bit intemperately, has said that the case "messed up" the civil pleading standard. Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Remarks for Second Circuit Judicial Conference (June 12, 2009) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_06-12-09.html).

[384] *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010) (arguing that *Iqbal* creates an unduly "thick" model for complaints); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (concluding that the percentage of Rule 12(b)(6) motions granted in cases alleging civil rights violations increased from 50% under *Conley* to 55% under *Twombly* to 60% under *Iqbal*); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 28 (2009) (arguing that discrimination, antitrust, conspiracy, and products liability claims are affected by *Iqbal*); Comment,

> It is difficult to overstate the importance of this case since it sets the standard for pleading in almost every civil case in federal court. It is unclear how a district court is to decide whether allegations are "plausible." This standard would seem to give a great deal more discretion to district courts in deciding whether to dismiss cases.[385]

In one measure of *Iqbal*'s influence, "in the single year after it was decided, [the case was] cited six times by the Supreme Court, over 300 times by the courts of appeals, and more than 6,500 times by district courts."[386] Moreover, "[t]he pleading requirement set out in *Iqbal* has" had restrictive effects in cases that go "beyond the *Bivens* claims at issue in that case" to such other causes of action as Section 1981 and Title VII.[387]

D. Immigration Law Cases

Noncitizens' claims *within* the existing immigration system may also have more general legal impact, such as greater judicial oversight of administrative agencies. An early example of this phenomenon is the 1915 case of *Gegiow v. Uhl*.[388] In *Gegiow*, a group of "aliens" who had sought to enter the United States were detained for deportation by the Acting Commissioner of Immigration at the Port of New York, who found that they were inadmissible on the ground that they were "likely to become public charges."[389] The reason was based on the state of the labor market in the city (Portland, Oregon) to which they were headed.[390]

The Supreme Court, in a unanimous opinion authored by Justice Holmes, rejected the government's reliance upon the fact that, this was "a group of illiterate laborers," only one of whom, spoke "even the ordinary Russian tongue."[391] The government had asserted "that their ignorance tended to make them form a clique to the detriment of the community."[392] The Court, in a typical Holmesian formulation, saw

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Federal Jurisdiction and Procedure, 123 HARV. L. REV. 252, 261–62 (2009) (arguing that *Iqbal* imposes impossible pleading burdens and confers too much discretion on judges); Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly*,* Iqbal*, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 927–28 (2010) (arguing that civil rights cases are adversely affected by *Iqbal*).

[385] Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 413, 415 (2009).

[386] Ramzi Kassem, Iqbal *and Race: Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1444 (2010).

[387] *Id.*

[388] 239 U.S. 3 (1915).

[389] *Id.* at 8.

[390] *Id.* at 8–9.

[391] *Id.* at 8.

[392] *Id.*

this as merely, "a trouble incident to the immigration of foreigners generally which it is for legislators not for commissioners to consider."[393] Thus, it was to "be laid on one side."[394] The Court further determined that an alien could not be declared "likely to become a public charge" on the ground that the labor market in the city of his immediate destination was "overstocked."[395] The operative statute was interpreted to mean, contrary to the Commissioner's reading, that "[t]he persons enumerated . . . are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions."[396]

The significance of the Supreme Court's ruling in *Gegiow* can be best understood by comparing it to the opinion it reversed.[397] The Second Circuit Court of Appeals had seen the matter as quite simple and easily controlled by prior precedent.[398] The sole question, they ruled, was "whether there was any evidence to sustain the finding of the immigration officials that each of these aliens is liable to become a public charge."[399] In an earlier case,[400] the Second Circuit had "considered the action of the immigration officers final in every case where there was any evidence to support it."[401] The reasons were basic: first, summary processes were both necessary and

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[393] *Id.*

[394] *Id.*

[395] *Id.* at 10. The Court noted that the operative statute, the Act of February 20, 1907, authorized exclusion of "[p]ersons likely to become a public charge," and that this class was "mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes and so forth." *Id.*

[396] *Id.* The "public charge" exclusion was "presumably . . . to be read as generically similar to the others mentioned before and after." *Id.* As Justice Holmes further noted, "[t]he statute deal[t] with admission to the United States, not to Portland" and "contemplate[d] a distribution of immigrants after they arrive." *Id.* It would have been "an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked," let alone one city. *Id.* "Detriment to labor conditions [was] allowed to be considered," but only as to the whole, "continental territory of the United States, and the matter [furthermore was] to be determined by the President." *Id.* Thus, the Court could not "suppose that so much greater a power was entrusted by implication in the same act to every commissioner of immigration . . . or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge." *Id.*

[397] *See* United States *ex rel.* Gegiow v. Uhl, 215 F. 573 (2d Cir. 1914), *rev'd by* 239 U.S. 3 (1915).

[398] *Id.* at 574–75.

[399] *Id.* at 573. The law said "that the decision of the appropriate immigration officers, if adverse to the admission of the alien, shall be final unless reversed on appeal to the Secretary of the Department of Labor." *Id.* "[T]he decision of the board of special inquiry [had been] affirmed by the Secretary of the Department of Labor." *Id.*

[400] United States *ex rel.* Rosen v. Williams, 200 Fed. 538 (1912), *cert. denied*, 232 U.S. 722 (1914).

[401] *Gegiow*, 215 F. at 574.

desirable.[402] Moreover, "the members of these boards [had] . . . the great advantage of seeing the immigrant and determining from personal observation and examination his fitness to enter the country."[403] The Second Circuit, to say the least, did not exhibit a welcoming attitude towards "huddled masses yearning to breathe free."[404] As one judge wrote, "[i]t is plain from a reading of the law that degenerates or those so constituted mentally, physically or morally that they may be a burden upon or a menace to society, are not wanted here."[405]

As to the *Gegiow* litigants, the court highlighted that, "no one of the immigrants can speak our language or any language that is understood in this country."[406] They came "from a remote province of Russia and [had] no one [in the U.S. who was] under legal obligation to support them."[407] "They know no trade and only one can read or write in his own language. . . . They were not employed and no actual promise of employment had been given them."[408] Thus, wondered the court,

> how long after reaching Portland would it be before these immigrants became public charges? As soon as [their funds were] exhausted, what is to support them? What is to prevent them from being thrown upon the charity of the town? It is, true that they may succeed in obtaining work, but it is . . . equally true, that they may not do so.[409]

And it was "the latter contingency which ma[de] them undesirable aliens."[410] "Certainly," said the court, "we cannot find that the decision of the board, that they are likely to become public charges, has no evidence to support it; on the contrary, the conclusion seems to follow directly from the facts."[411]

The differences in approach are fundamental. The lower court, in essence, held that "Congress has placed the determination of these questions in the hands of trained officials and their conclusions upon disputed questions of fact are final and conclusive."[412] The Supreme Court, heralding the sort of greater scrutiny of the

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[402] *Id.* ("In the nature of the case these inquiries must be swift and summary. The formality of court proceedings cannot be had and is not expected where, in many cases, witnesses cannot be produced for examination and cross-examination.").

[403] *Id.*

[404] EMMA LAZARUS, SELECTED POEMS 58 (John Hollander ed., 2005).

[405] *Gegiow*, 215 F. at 574.

[406] *Id.*

[407] *Id.*

[408] *Id.*

[409] *Id.*

[410] *Id.*

[411] *Id.*

[412] *Id.* at 575.

administrative process that would, a generation later, culminate in the passage of the Administrative Procedure Act, demanded much more.[413]

Gegiow was soon cited by the Supreme Court in support of a proposition that was perhaps implicit within it but upon which Justice Holmes had not much expounded: that a legally admitted alien must have "the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union."[414] In *Truax v. Raich*,[415] the Court considered an Arizona statute that required that at least eighty percent of an employer's workforce had to be citizens of the United States.[416] The law's supporters "sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction."[417] But the Supreme Court concluded that such authority, though broad, did not empower a State "to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood."[418] Indeed, the Court asserted that:

> [i]t requires no argument to show that the right to work 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 [Fourteenth] Amendment to secure. If this could be refused solely upon the ground of [*either*] race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.[419]

More recent examples of this sort of immigration-related *vanguard* litigation include *Wong Yang Sun v. McGrath*,[420] and the fascinating recent case of *Judulang*

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[413] *See* Mahler v. Eby, 264 U.S. 32, 43–44 (1924) (holding that warrants of deportation could not issue until executive officials made individualized findings that aliens were undesirable residents). The effect of *Gegiow* in the Second Circuit appears, however, to have been rather limited in deportation cases. *See, e.g.*, United States ex rel. Georgian v. Uhl, 271 F. 676, 677 (2d Cir. 1921) (upholding deportation on political speech grounds with minimal, if any, judicial scrutiny).

[414] Truax v. Raich, 239 U.S. 33, 39 (1915).

[415] 239 U.S. 33 (1915).

[416] *Id.* at 35.

[417] *Id.* at 41.

[418] *Id.*

[419] *Id.* (citations omitted) (citing Coppage v. Kansas, 236 U.S. 1, 14 (1915); Allgeyer v. Louisiana, 165 U.S. 578, 589, 590 (1897); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Barbier v. Connolly, 113 U.S. 27, 31 (1885); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884)). In support of this proposition, the Court cited both some cases that involved noncitizens and some that did not. *Id.*

[420] One might also view *Marcello v. Bonds* in this way. 349 U.S. 302 (1955). Although the noncitizen lost, and as Justices Felix Frankfurter and Hugo Black noted in dissent, an important due process point was missed by the Court: "A fair hearing necessarily includes

v. Holder.[421] The *Judulang* case resolved a tortuously complicated question about a so-called "relief provision" of deportation law known as Section 212(c).[422] In a disarmingly simple opinion, the Court unanimously concluded that the policy used by the Board of Immigration Appeals was "arbitrary and capricious" under the APA.[423] The Court used the esoteric vehicle of an immigration case not only to vindicate the noncitizens' rights but also, quite possibly, to reinvigorate a rather robust version of "arbitrary and capricious" review.[424]

E. Boundary Cases

Hoffman Plastic Compounds, Inc. v. National Labor Relations Board[425] exemplifies how the Court is sometimes called upon to mark the boundaries between immigration enforcement and noncitizens' polity-participation. The National Labor Relations Board (NLRB) had ordered back pay to an undocumented worker who was laid off from his job because of union activities that are protected under the National Labor Relations Act (NLRA).[426] The Supreme Court, in a 5–4 decision, held that such an award to the undocumented worker conflicted with the policies of U.S. immigration laws, particularly the Immigration Reform and Control Act of 1986 (IRCA),[427] which prohibited employment of certain undocumented noncitizens.[428] The noncitizen employee had presented false documentation when he was hired.[429] The Supreme Court majority concluded that back pay should not be awarded "for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[430] Put simply, Justice Rehnquist saw a clear hierarchy of legal values. Although the employer had violated labor law, he opined, "awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations."[431]

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an impartial tribunal." *Id.* at 315 (Black, J., dissenting). *See generally* Daniel Kanstroom, *The Long, Complex, Futile Deportation Saga of Carlos Marcello, in* IMMIGRATION STORIES 113 (David A. Martin & Peter H. Schuck eds., 2005).

[421] 132 S. Ct. 476 (2011).

[422] *Id.* at 477.

[423] *Id.* at 479.

[424] I predict that this version will have, as we say, "legs" in other administrative law arenas.

[425] 535 U.S. 137 (2002).

[426] *Id.* at 140; *see* ch. 372, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. § 151 *et. seq*. (2006)).

[427] Pub. L. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

[428] *Hoffman*, 535 U.S. at 140. IRCA requires employees to present documents establishing identity and authorization to work at the time they are hired. *Id.* at 148 (citing 8 U.S.C. § 1324a(a)(1)). An employer must check those documents and cannot knowingly hire someone who is not authorized to work. *Id.*

[429] *Id.* at 140–41.

[430] *Id.* at 149.

[431] *Id.* at 150. As the Court noted, "[l]ack of authority to award backpay does not mean that the employer gets off scot-free." *Id.* at 152. "The Board [had] already imposed other

Justice Breyer, in dissent, saw the matter quite differently.[432] He highlighted that *all* the relevant agencies (including the Department of Justice) had told the Court that the Board's "backpay order would *not* interfere with the implementation of immigration policy."[433] Indeed, their view was that, "it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent" and was thus lawful.[434] The most specific concern was that "in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity."[435] The key distinction, in the terms of this Article, was that the majority read immigration policies quite broadly to limit noncitizens' polity-participation through labor organizing, whereas the dissenters recognized the complexity of immigration enforcement and the dangers of lowering the costs to employers of labor law violations.[436]

F. Proxy Cases

Noncitizens' legal cases sometimes involve a more complex, dialogic phenomenon: the rights claims of noncitizens may serve as *proxies* for more general, fundamental consideration of the analogous rights claims of citizens. Put another way, the legal system's adjudication may mark a new conceptualization of the right itself.

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significant sanctions against Hoffman . . . . These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices." *Id.* (citing Hoffman Plastic Compounds, Inc. v. Arauz, 306 N.L.R.B. 100, 100-01 (1992)).

[432] The dissent was joined by Justice Stevens, Justice Souter, and Justice Ginsburg. *Id.* at 153 (Breyer, J., dissenting).

[433] *Id.*

[434] *Id.*

[435] *Id.* at 154.

[436] Including, ironically, the possibility that this would increase the "incentive to find and to hire illegal-alien employees." *Id.* at 155. It is interesting in this regard to note how much was *not* decided in *Hoffman*. As the U.S. Department of Labor interprets the decision:

> The Supreme Court's decision does not mean that undocumented workers do not have rights under other U.S. labor laws. . . . The Supreme Court did not address laws the Department of Labor enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labor protections for vulnerable workers. . . . The Department's Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented.

Fact Sheet #48, U.S. DEP'T OF LABOR (July 2008), http://www.dol.gov/whd/regs/compliance/whdfs48.htm ("The FLSA requires employers to pay covered employees a *minimum wage* and, in general, time and a half an employee's regular rate of pay for *overtime hours*. The MSPA requires employers and farm labor contractors to pay the wages owed to migrant or seasonal agricultural workers when the payments are due. . . . Enforcement of these laws is distinguishable from ordering back pay under the NLRA.").

A recent example of this phenomenon is the link between *Padilla v. Kentucky* and *Missouri v. Frye*.[437]

In *Padilla v. Kentucky*, the Court upheld a noncitizen's claim that his criminal defense counsel was ineffective due to allegedly incorrect advice concerning the risk of deportation.[438] This was a path-breaking decision, virtually unprecedented in the long history of U.S. deportation law.[439] In a formulation that implicitly adopts a strong version of due process protections for deportees, the Court recognized that "[d]eportation as a consequence of a criminal conviction [has such a] close connection to the criminal process [that it is now] uniquely difficult to classify it as either a direct or a collateral consequence."[440] The two systems, in short, have become inextricably linked. As a result of these changes, "[t]he 'drastic measure' of deportation or removal is now *virtually inevitable* for a vast number of noncitizens convicted of crimes."[441] The Court said that deportation had become "*an integral part*—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[442] From this logic, one can see why substantial due process protections, if not the more specific protections normally tied to the criminal justice system, are warranted.[443] *Padilla* was a very significant decision for deportation law, with virtues of both logic and justice. Though largely styled as a Sixth Amendment right-to-counsel decision, the case raised many constitutional questions about the formalistic distinction between criminal punishment and deportation.[444] Indeed, *Padilla* might portend a constitutional reconciliation between the Court's historical formalism and a more appropriate realism. This new constitutional norm for *post-entry social-control* deportation, which I have termed the *Fifth-and-a-Half*

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[437] 132 S. Ct. 1399 (2012).

[438] Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

[439] *See generally* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011).

[440] *Padilla*, 130 S. Ct. at 1482. Further, the Court recognized that "[t]he landscape of federal immigration law has changed dramatically." *Id.* at 1478. In the past, "there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation." *Id.* But now, the regime contains a much expanded class of deportable offenses, and it has "limited the authority of judges to alleviate the harsh consequences of deportation." *Id.*

[441] *Id.* (emphasis added) (citation omitted).

[442] *Id.* (emphasis added) (footnote omitted).

[443] *See generally* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

[444] The former, of course, is a criminal sanction, with extensive, specific constitutional protections. *Id.* at 1902–03. The latter has been said to be civil or, at most, "quasi-criminal." *Id.* at 1921. *Padilla* implicitly challenges this model. It cannot be squared with the historical, formalist relegation of deportation to the realm of civil collateral consequences in which, for example, there is no clear constitutional right to counsel. *See* Kanstroom, *supra* note 439, at 1473.

Amendment, embodies both the flexible due process guarantees of the Fifth Amendment and—at least for certain types of deportation—some of the more specific protections of the Sixth Amendment, such as a right to counsel.[445] Beyond this, consider the effects of *Padilla* outside the immigration/deportation context.[446]

In *Frye*, the respondent had been charged with driving with a revoked license.[447] Due to three prior convictions for the same offense, he was charged with a felony that carried a potential four-year prison term.[448] The prosecutor sent Frye's counsel a letter, offering two possible plea bargains, including an offer to reduce the charge to a misdemeanor and to recommend a ninety-day sentence.[449] Frye's counsel did not convey the offers to him, and they expired.[450] Less than a week before Frye's preliminary hearing, he was again arrested for driving with a revoked license.[451] He then pleaded guilty with no underlying plea agreement and was sentenced to three years in prison.[452] In post-conviction motions, he alleged that his counsel's failure to inform him of the earlier plea offers had denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to the misdemeanor had he known of the offer.[453] The Supreme Court, in a majority opinion written by Justice Kennedy, held that the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, as it applies at "all 'critical' stages of the criminal proceedings."[454] The Court then prominently cited *Padilla v. Kentucky*, as a case in which "[t]he Court made clear that 'the negotiation of a plea bargain is a critical'" stage for ineffective-assistance purposes and in which the Court had rejected the argument made by the State in *Frye* that a knowing and voluntary plea supersedes defense counsel's errors.[455]

One might, at first, think that the fact that *Padilla* involved noncitizens is irrelevant, a sort of artifact. But this is not correct. There was something crucial for Justice Stevens about Padilla's rights claim that was deeply tied to his status as a noncitizen. That, in turn, spurred a revitalization of the rights claim that was then reinforced for citizens (and of course for noncitizens, too) in *Frye*.[456] As Justice Kennedy noted in the majority opinion in *Frye*, the *Padilla* Court had "held that a

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[445] *See* Kanstroom, *supra* note 439, at 1473.

[446] For an interesting exploration of the potential impact of *Padilla*, see Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87 (2011).

[447] Missouri v. Frye, 132 S.C t. 1399, 1404 (2012).

[448] *Id.*

[449] *Id.*

[450] *Id.*

[451] *Id.*

[452] *Id.* at 1404–05.

[453] *Id.* at 1405.

[454] *Id.* (citing Montejo v. Louisiana, 556 U.S. 778, 786 (2009)).

[455] *Id.* at 1406 (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2012)).

[456] *Id.*

guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the *immigration consequences* of the conviction."[457] The Court, more generally, had made clear in that context that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[458] Thus, *Padilla*—a case that straddled the Fifth and Sixth Amendments in its conceptual underpinnings and that was grounded on a noncitizen's rights claim—provided the conceptual grounding for the Court's affirmative answer to the basic question at issue in *Frye*: "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected."[459]

G. Federalism Cases

Noncitizens have often sought to distinguish between the federal government's power to regulate immigration and that of states and localities.[460] In the 1915 case of *Truax v. Raich*,[461] discussed above, which involved an Arizona law mandating that eighty percent of employees be U.S. citizens,[462] the Court had reasoned that "reasonable classification implies action consistent with the *legitimate* interests of [a] State, and . . . these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power."[463] "The authority to control immigration—to admit or exclude aliens"—had previously been determined to be "vested solely in the Federal Government."[464] Therefore, assertion by a state of authority to deny to lawfully admitted noncitizens the opportunity of earning a livelihood

> would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where

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[457] *Id.* (emphasis added).

[458] *Id.* (quoting *Padilla*, 130 S. Ct. at 1486). It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. *Cf.* Brief for Respondent at 27, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651) (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

[459] *Frye*, 132 S. Ct. at 1404.

[460] *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 10–17 (1982) (invalidating a state university policy to charge nonresident fees to nonimmigrants lawfully domiciled in the state); Hines v. Davidowitz, 312 U.S. 52 (1941) (invalidating a Pennsylvania law which burdened noncitizens as inconsistent with federal law); *cf.* DeCanas v. Bica, 424 U.S. 351 (1976) (holding that federal law did not preempt California law prohibiting employment of undocumented immigrants).

[461] 239 U.S. 33 (1915).

[462] *Id.* at 35.

[463] *Id.* at 42 (emphasis added).

[464] *Id.* at 42 (citing Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893)).

> they cannot work. . . . The practical result would be that those lawfully admitted to the country would be segregated in such of the States as chose to offer hospitality.[465]

The apparent clarity of this model was substantially called into question by *DeCanas v. Bica*,[466] which involved a challenge to a California statute that had provided that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the [country] if such employment would have an adverse effect on lawful resident workers."[467] The Supreme Court concluded that the California statute was not an unconstitutional attempt to regulate immigration, even if it had some "speculative and indirect impact on immigration."[468] Moreover, the statute was not preempted under the Supremacy Clause by the Immigration and Nationality Act.[469] The state statute was seen as being within the state's police power to regulate employment, which at the time had not been completely precluded by federal laws. Ten years after *DeCanas*, however, Congress passed 8 U.S.C. § 1324a which makes it "unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien."[470] As we have seen, this federal control over employment had powerful effects in *Hoffman*.

In *Chamber of Commerce v. Whiting*,[471] the Court revisited these questions in the context of an Arizona law regulating the employment of undocumented noncitizens.[472] The plaintiff argued that the federal statute preempted the state statute, which provided for suspension and revocation of business licenses for entities employing unauthorized noncitizens.[473] The Arizona statute also required employers to verify employees' immigration status using an online database.[474] The federal statute expressly preempts "any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[475] The Court held that the Arizona statute was not preempted, because "Arizona's procedures simply implement the sanctions that Congress expressly allowed the States to pursue through licensing laws."[476] The Court also noted that Arizona had acted in an area of traditional state

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465 *Id.*
466 424 U.S. 351 (1976).
467 *Id.* at 352 (citing CAL LAB. CODE § 2805(a)) (West 2012).
468 *Id.* at 355–56.
469 *Id.* at 358.
470 8 U.S.C. § 1324a(a)(1)(A) (2006).
471 131 S. Ct. 1968 (2011).
472 *Id.* at 1973.
473 *Id.* at 1977.
474 *Id.* at 1985 (citing ARIZ. REV. STAT. ANN. § 23-214(A) (2010) (West)).
475 8 U.S.C. § 1324a(h)(2) (emphasis added).
476 *Whiting*, 131 S. Ct. at 1971.

concern, as "[r]egulating in-state businesses through licensing laws" is not an area of exclusive federal interest.[477]

CONCLUSION: NONCITIZEN PARTICIPATION BY LITIGATION

> To discover the Constitution, we must approach it without the assistance of some philosophical guide imported from another time and place.
>
> —Bruce Ackerman, *Constitutional Politics/Constitutional Law*[478]

> Becoming a citizen of the world is often a lonely business.
>
> —Martha Nussbaum, *For Love of Country*[479]

Although Athenian democracy barred much formal polity-participation by women, slaves, colonial subjects, and aliens, Aristotle, a noncitizen *metic* (roughly, a legally resident alien), wrote that one should not posit as citizens all those people "without whom you could not have a city."[480] "Citizenship," he thought, "required a certain excellence."[481] Slaves and aliens, as Michael Walzer put it, "stood within the arena, simply by virtue of being inhabitants of the protected space of the city-state; but they had no voice there. . . . They were the subjects of a band of citizen-tyrants, governed without consent."[482]

This is thankfully not the case in the United States today, notwithstanding the arguable arbitrariness of birthright citizenship status,[483] and the very serious disadvantages to polity-participation and threats to life plans and family that noncitizens face.

The overlapping interests of citizen and noncitizen community groups have resulted in powerful coalitions in both the social and the political spheres.[484] But,

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[477] *Id.*

[478] Ackerman, *supra* note 141, at 454.

[479] NUSSBAUM, *supra* note 119, at 15.

[480] WALZER, *supra* note 111, at 54 (quoting ARISTOTLE, *supra* note 109, at 93); *see also* I.F. STONE, THE TRIAL OF SOCRATES 10 (1988).

[481] WALZER, *supra* note 111, at 54.

[482] *Id.*

[483] Joseph Carens contends that "[c]itizenship in Western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life chances . . . . [It] is hard to justify when one thinks about it closely." Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 252 (1987).

[484] Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991) (noting how collaborations between womens' rights activists and immigrant groups successfully overturned aspects of the immigration marriage fraud laws and developed gender guidelines for persecution in asylum claims). Similarly, lesbian and gay organizations worked successfully with immigrant rights groups to convince Congress to repeal the statutory provision that had allowed exclusion from admission into the United

counterintuitively perhaps, the contribution of noncitizens to public discourse and to the polity is often most effectively accomplished through the legal system. Noncitizens, including the undocumented, are uniquely positioned to understand, to critique, and to improve the meaning of citizenship and constitutional democracy. This is both *despite* and *because of* the threats and disadvantages they experience.[485] For noncitizens, law is a uniquely powerful and crucially important form of communicative interaction. Indeed, the law's "potential to" connect what Habermas called the "lifeworld to the systemic machinery of the economy and the administrative state" is a most powerful form of polity-participation in the U.S. system of a constitutional scheme of rights not exclusively based on citizenship status.[486] Through the legal system, noncitizens are thus a crucial part of a "circular process that recursively feeds back" into engagement and debate.[487] Since legitimate lawmaking both responds to and generates communicative power from below, noncitizens play a central role in translating communicative power into administrative power and law.

As one who has made his career delineating the oppressive aspects of our regime of deportation, I fully recognize that this perspective may seem a bit Polyanna-ish. My goal has most certainly *not* been to justify current exclusions or to somehow use access to courts as a substitute for the full and free polity-participation that a (properly) weak version of citizenship and a truly strong version of human rights protections would entail. Until that happens, however, those who decry or seek to restrict litigation by "illegal aliens" should face the strong rejoinder that such cases—in longstanding, durable, crucially important ways—have benefited not only "them," but all of us, together.

States on the basis of sexual orientation. *See, e.g.*, James R. Edwards Jr., *Homosexuals and Immigration: Developments in the United States and Abroad*, CENTER FOR IMMIGR. STUDIES (May 1999), http://cis.org/Immigration%2526Homosexuals-PolicyTowardHomosexuals. I recognize that the various spheres cannot be perfectly disaggregated.

[485] As Kevin Johnson once noted, "[u]ndocumented immigrants, and to a lesser extent lawful permanent residents, are at a distinct disadvantage in the United States. Locked out of the political process, this discrete and insular minority has the threat of deportation hanging over its head like the Sword of Damocles." Johnson, *supra* note 251, at 1544; *see also* Matsuda, *supra* note 484, at 1183.

[486] William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969, 992 (1998).

[487] HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 125, at 130.