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Rights Retrenchment in Immigration Law

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This Article analyzes changes in the constitutional status of noncitizens in immigration law over the past generation. It shows that notwithstanding the optimistic predictions of scholars, over the last quarter century, with few exceptions, the Supreme Court has been unwilling to impose a constitutional check on the political branches' immigration policies. Instead, it has reaffirmed and, in some cases, even extended the so-called plenary power doctrine, a doctrine developed to sustain the exclusion of Chinese immigrants in the late 1800s and which effectively removes the entirety of immigration regulation from constitutional scrutiny. The modern Court's stance toward immigration policies tells a story of rights retrenchment, *a scaling back from even the modest gains of the twentieth century. In areas ranging from the right to habeas corpus, procedural due process, discrimination, free speech, and detention, noncitizens today enjoy even fewer constitutional protections than they did at the end of the last century. Far from moving toward a full recognition of the constitutional rights of noncitizens, the modern Court has been moving in the* opposite *direction.*

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Importantly, though, these setbacks have not impacted all noncitizens uniformly. Rather, the Supreme Court generally has been willing to recognize at least some constitutional claims raised by lawfully admitted noncitizens, although such willingness has been far from consistent. As to such claims raised by noncitizens present in the U.S. without authorization or noncitizens seeking initial admission, the Court has been decidedly more skeptical. The minimal constitutional protections previously extended to these groups have been jettisoned to a large extent.

The Article also sketches out a path forward from current jurisprudence, one guided by the normative premise that the continued failure to afford constitutional protections to noncitizens undermines fundamental norms of equality and the rule of law. It argues that our constitutional traditions demand that all categories of noncitizens — including legal permanent residents, temporary lawful visitors, unauthorized individuals, and applicants for initial entry — be entitled to freedom from arbitrary detention, notice of the grounds that will render them deportable or inadmissible, a reasoned explanation for governmental action, and a meaningful opportunity to be heard. Moreover, our national values prohibit the government from discriminating against these individuals on the basis of race, ethnicity, religion, or speech. It acknowledges, however, that classifications based on national origin may be appropriate in limited circumstances. Such reforms would come a long way toward bringing immigration law into the fold of American public law norms.

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INTRODUCTION

Our national lore often (though not always) prides itself as a "nation of immigrants."[1] Most of us can trace our roots to immigrant parents, grandparents, or great-grandparents — one, two or three generations removed. And we continue to be a nation of immigrants, as noncitizens arrive every year in large numbers, seeking new lives in the United States. Almost seven percent of our nation's population, or 21.3 million individuals, are noncitizens.[2] Most are in lawful immigration status: 12.3 million are legal permanent residents and an additional 2.2 million are temporary lawful residents.[3] These individuals work, attend school, pay taxes, and otherwise participate in and contribute to our communities in ways indistinguishable from citizens.[4] The U.S. is also

[1] Then-Senator John F. Kennedy published a book with this title in 1958, which is sometimes credited with catalyzing the massive liberalization of immigration policy in the Immigration Reform Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

[2] *See Population Distribution by Citizenship Status*, KAISER FAM. FOUND. (2019), https://www.kff.org/other/state-indicator/distribution-by-citizenship-status/?dataView=1&currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/8MR4-NAMJ].

[3] Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants [https://perma.cc/697H-7QYZ].

[4] Aside from the right to enter and remain in the United States, the primary distinction in the rights and obligations between citizens and noncitizens is in the latter's ineligibility to vote in all but a small handful of municipal elections, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 63-67 (1996) (documenting emergence and decline of alien suffrage), and ineligibility for jury selection, HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 46 (2006) [hereinafter

home to a large undocumented population, who account for over three percent of our nation's total population, or 10.5 million individuals.[5] Some entered the United States without inspection by, for example, crossing the border surreptitiously. Others entered the U.S. lawfully with a visa but remained after their visa expired. Among the unauthorized, two-thirds have lived in the U.S. for more than ten years,[6] and many live with U.S. citizen family members.[7] These individuals too are members of our local communities, constituting a sizeable shadow population.[8]

What is the constitutional status of these noncitizens? Since 1886, it has been clear that all individuals in the U.S. — citizen and noncitizen alike — are protected by the Constitution's guarantees.[9] Thus, the government may not discriminate against noncitizens on the basis of race in granting laundry licenses;[10] nor may it sentence a noncitizen to

AMERICANS IN WAITING]. Noncitizens and citizens alike may join the military, and both are required to register for the Selective Service System. *See generally* Kathryn S. Mautino & Margaret D. Stock, *Path to Citizenship: Undocumented Veterans Who Served Honorably May Still Be Eligible for Citizenship*, L.A. LAW., Nov. 2012, at 30 (describing opportunities for noncitizens, including undocumented individuals, to obtain citizenship through military service); Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 YALE L.J.F. 552 (2020) (discussing recent policy changes compromising the system through which noncitizens obtain citizenship through military service). For an argument to minimize the distinction between lawful permanent residents and citizens, and to treat the former as "Americans in waiting," see MOTOMURA, AMERICANS IN WAITING, *supra*, at 189-200. For a discussion on the risks of "devaluing" citizenship in this manner, see PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 171-75 (1998).

[5] Budiman, *supra* note 3.

[6] Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s [https://perma.cc/USY7-GZJN].

[7] *See* Jeffrey S. Passel & D'Vera Cohn, *Most Unauthorized Immigrants Live with Family Members*, PEW RSCH. CTR. (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/most-unauthorized-immigrants-live-with-family-members [https://perma.cc/4MB5-3892].

[8] *See generally* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 145-71 (2014) [hereinafter IMMIGRATION OUTSIDE THE LAW] (discussing integration of undocumented individuals into local communities); Jennifer M. Chacon, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709 (2015) (discussing undocumented immigrants to exemplify marginalized populations subject to liminal legal statuses); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463 (2019) (describing breadth of immigration enforcement mechanisms and their impact on the daily lives of undocumented individuals).

[9] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[10] *See id.* at 374.

criminal punishment without trial;[11] and even undocumented noncitizens are constitutionally entitled to a free primary and secondary education.[12] But in a series of decisions dating from the 1880s, the Supreme Court carved out *immigration* regulations, i.e., those relating to the admission and removal of noncitizens, from ordinary constitutional review.[13] Thus while in ordinary domestic matters noncitizens retain constitutional protections, the so-called plenary power doctrine denies such protections in all matters relating to the noncitizen's permission to enter the United States and remain here.[14] Jurisprudential developments from the Civil Rights Movement and the due process revolution of the 1970s transformed the meaning of judicial review throughout public law, yet largely left immigration law as it stood. As Professor Peter Schuck put it, "Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."[15]

But in the late twentieth century, cracks in the plenary power doctrine began to show. Even in cases lying at the core of immigration

[11] *See* Wong Wing v. United States, 163 U.S. 228, 237 (1896).

[12] *See* Plyler v. Doe, 457 U.S. 202, 230 (1982).

[13] *See infra* Parts I.A and I.B.

[14] The doctrine appears to distinguish between "immigration laws," i.e., regulations relating to the entry and removal of noncitizens, versus "alienage laws," i.e., regulations that discriminate on the basis of citizenship for ordinary domestic matters such as access to public education, welfare benefits, driver's licenses, and such. But the line between immigration law and alienage law is notoriously slippery. *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 341-42 (2008) (arguing that distinguishing immigration laws from alienage laws is misguided); *see also* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1057 (1994) (noting tensions in defining alienage as a status category). For example, a decision to deny public education to noncitizens may appear at first blush to be pure domestic regulation, but what if its express purpose is to encourage individuals to self-deport? Such a purpose arguably transforms the regulation into one involving the removal of noncitizens. *See generally* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019) (tracing history of domestic regulations designed to incentivize noncitizens to leave the country). It is also important to note that even in the non-immigration context, noncitizens do not necessarily retain the same degree of constitutional protections afforded to citizens. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 116-17 (1976) (invalidating federal law precluding noncitizens from federal civil service positions but noting that such exclusions could be justified where overriding national interest is shown). *Compare* Graham v. Richardson, 403 U.S. 365 (1971) (invalidating state law denying welfare benefits to noncitizens on equal protection grounds), *with* Mathews v. Diaz, 426 U.S. 67 (1976) (sustaining federal law denying welfare benefits to noncitizens against due process challenge).

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

regulation, the Supreme Court began to exercise limited constitutional review.[16] And in some of these cases, such review led to overturning the immigration decisions of the political branches on constitutional grounds. Commentators predicted that, eventually, the Court would come to recognize that even in the immigration realm, noncitizens possess the full scope of constitutional protections available to citizens. In the words of Professor Stephen Legomsky, "the plenary power doctrine will be frankly disavowed. Constitutional review of immigration legislation will enter another, perhaps final, stage. This next stage will be marked by a return to general principles of constitutional law. It will be unnecessary for courts to distinguish immigration statutes from other federal statutes."[17]

The question of whether and to what extent the Constitution protects noncitizens has become all the more important over the past quarter century. Both Congress and the President have enacted policies fundamentally at odds with constitutional norms. For example,

[16] *See infra* Part I.C.

[17] Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 305. Professor Legomsky hedged his prediction, noting that "judicial willingness . . . to cut away at the notion of plenary Congressional power over immigration" has been "so far episodic." *Id.* at 303. But the general consensus has been that the plenary power doctrine is in decline. *See, e.g.*, Amanda Frost, *Independence and Immigration*, 89 S. CAL. L. REV. 485 (2016) (suggesting that universalist principles espoused in Declaration of Independence are in part responsible for erosion of plenary power doctrine); Kevin R. Johnson, *Immigration in the Supreme Court, 2009-2013: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015) (concluding that immigration law is being "mainstreamed" into ordinary conventional law, spelling demise of plenary power doctrine); Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 879 (2015) ("[T]he due process revolution . . . has dramatically affected the status of non-citizens in a number of immigration and national security cases . . . ushering in new rights protections and weakening doctrines of exceptionalism . . . ."); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011) (suggesting achievement of a "central pivot point" in immigration jurisprudence leading to "more robust judicial protection of the rights of immigrants"); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 608 (1990) [hereinafter *Phantom Norms*] ("Signs of change now appear on the horizon, in the form of expressly constitutional lower court decisions that have refused to accept the plenary power doctrine as controlling."); Schuck, *supra* note 15, at 4 (identifying a "transformation" in immigration law that eschews the plenary power doctrine and instead embraces notions of individual and substantive justice). *But see* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 32 (2015) (suggesting that the reasons for the plenary power doctrine — the need to preserve the nation's ability to conduct foreign affairs in an increasingly complex world — will gain force in the coming years); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 583 (2017) (examining persistence of immigration exceptionalism).

Congress has severely curtailed the procedures available to challenge removal decisions[18] and eliminated judicial review over a wide array of such decisions.[19] It has mandated detention for tens of thousands of individuals — including lawful permanent residents — who have been charged with removal with no opportunity for an individualized hearing on dangerousness or flight risk.[20] At the same time, it has vastly expanded the grounds for which a noncitizen can be deported, including, for example, for "illegally downloading music or possessing stolen bus transfers."[21] The Executive Branch, for its part, has discriminated on the basis of national origin to target individuals from Muslim-majority countries for interrogation and investigation.[22] It has kept individuals, including lawful permanent residents, in long-term detention for years without providing an individualized assessment of flight risk or danger.[23] And, after promising "a total and complete shutdown of Muslims entering the United States," President Donald Trump imposed a ban on the entry of virtually all immigrants from a list of Muslim-majority countries.[24] Such policies have given the courts

[18] *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. IV § 422(a), 110 Stat. 1214, 1270, 1272 (codified at 8 U.S.C. § 1225(b), providing for expedited removal of certain classes of noncitizens at the border as well as from within the U.S. without further hearing or review). For scholarly critiques of moves to eliminate procedural protections in removal proceedings, see generally Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014).

[19] AEDPA § 423 (precluding judicial review over most expedited removal decisions); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, tit. III, § 306(a), 110 Stat. 3009, 3009-607-608 (codified at 8 U.S.C. § 1252(a)(2)) (eliminating judicial review over, *inter alia*, orders against criminal aliens and denials of discretionary relief).

[20] *See, e.g.,* AEDPA tit. IV § 422(a) (codified at 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (mandating detention of individuals stating credible fear of persecution in expedited removal proceedings); IIRIRA, div. C, tit. III § 303(a) (codified at 8 U.S.C. § 1226(c) (mandating detention of criminal aliens)).

[21] Nielsen v. Preap, 139 S. Ct. 954, 978 (2019) (Breyer, J., dissenting) (identifying various crimes constituting a "crime[] of 'moral turpitude'" rendering a noncitizen removable from the United States); *see also, e.g.*, AEDPA, tit. IV, § 435(a) (codified at 8 U.S.C. § 1227(a)(2)(A)(i), expanding circumstances under which a "crime[] of moral turpitude" renders an individual deportable); Congress in 1996 also expanded the types of crimes that qualify as an "aggravated felony," which not only renders the individual deportable but also eliminates eligibility for discretionary relief from removal. AEDPA, tit. IV, § 440(e) (codified at 8 U.S.C. § 1101(a)(43)).

[22] *See infra* Part II.C.

[23] *See infra* Part II.E.

[24] *See infra* Part II.C. The Immigration and Nationality Act ("INA") distinguishes between "immigrants," who enter as legal permanent residents, and "nonimmigrants,"

ample opportunity to finally announce that the "plenary" authority of the political branches over immigration questions is no longer; that noncitizens and citizens alike enjoy the full panoply of rights guaranteed to citizens under the Bill of Rights — from equal protection to due process to the First Amendment. But the modern Supreme Court has declined to do so.

We currently are at a historic inflection point in our nation's immigration law and policy, as we leave behind four tumultuous years of an explicitly anti-immigrant Trump Administration and enter the first years of a Biden Administration which has vowed to protect noncitizen interests.[25] This pivotal moment provides an important opportunity to evaluate the current constitutional status of noncitizens and for mapping out potential paths for reform.

This Article presents a comprehensive assessment of changes in the constitutional status of noncitizens in immigration law over the past quarter century.[26] The last wave of analyses in this vein was published

who are permitted to enter for a limited period for a particular purpose. *See* 8 U.S.C. §§ 1101(a)(15), 1184(b). The Travel Ban allowed the entry of some categories of nonimmigrants from the designated Muslim-majority countries, but barred all immigrants from these countries. It also banned the entry of all immigrant and nonimmigrant nationals from North Korea, as well as certain nonimmigrant Venezuelan government officials. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

[25] In his first day in office, for example, President Biden signed an executive order repealing the Travel Ban, Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 25, 2021), and proposed a bill to Congress to grant a pathway to lawful status to the entire undocumented population currently within the United States as long as they pass criminal and national security background checks and pay their taxes. *See Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system [https://perma.cc/DW7X-FYRH].

[26] Recent immigration law commentaries have analyzed the constitutional implications of particular policies, see, e.g., Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145 (2020) (advocating for constitutional tort remedy for noncitizens' harms in for-profit immigrant detention facilities); Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013) (examining constitutionality of stipulated orders of removal without hearing), and the availability of discrete constitutional rights, see, e.g., Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 UC DAVIS L. REV. 701 (2005) (focusing on right to family unity and non-discrimination); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127 (analyzing application of void for vagueness doctrine on criminal grounds for removal); Landau, *supra* note 17 (examining scope of procedural due process protections); Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1663-79 (2000) (focusing on right to habeas). None of these more recent scholarly treatments, however, has

in the late 1980s and early 1990s.[27] These seminal pieces generally argued that the Court was moving toward a fuller doctrinal recognition of the constitutional rights of noncitizens.[28] This Article hearkens back to that scholarship but finds that developments in the intervening generation tell a different story — one of constitutional *retrenchment*.[29] In areas ranging from the right to habeas corpus; procedural due process; discrimination on the basis of race, national origin or religion; free speech; and detention, it finds that noncitizens today enjoy even *fewer* constitutional protections than they did at the end of the twentieth century.[30] In *D.H.S. v. Thuraissigiam,* the Court announced for the first time that certain noncitizens apprehended and detained *within* the United States enjoy neither a constitutional right to habeas corpus nor a procedural due process right to challenge their detention and removal.[31] In *Trump v. Hawaii,* the Court sustained the President's decision to bar virtually all immigrants from a list of primarily Muslim countries, even in the face of considerable evidence suggesting anti-Muslim animus.[32] In *Reno v. AADC,* one of the oldest cases examined

examined the breadth of constitutional rights afforded (or denied) to noncitizens. *Cf.* Rubenstein & Gulasekaram, *supra* note 17 (examining interrelationships in the operation of "immigration exceptionalism" in areas of (a) individual rights; (b) federalism; and (c) separation of powers).

[27] *See* NEUMAN, *supra* note 4; Legomsky, *supra* note 17; Motomura, *Phantom Norms*, *supra* note 17; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) [hereinafter *Procedural Surrogates*]; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991); Schuck, *supra* note 15.

[28] *See supra* note 17.

[29] *See generally*, Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (theorizing on rights retrenchment in the context of subordination of Black interests).

[30] The significant and considerable intersection of immigration law with criminal law is beyond the scope of this Article. For examples of scholarly treatment of this intersection, see Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Jennifer M. Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010); Jennifer M. Chacon, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Cesar Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 UC DAVIS L. REV. 197 (2018); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

[31] Dep't Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020).

[32] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

here, the Court sustained the government's policy of targeting noncitizens for removal on the basis of First Amendment protected activity.[33] And in *Jennings v. Rodriguez,* the Court rejected application of the doctrine of constitutional avoidance and instead interpreted the Immigration and Nationality Act ("INA") to allow the long-term detention (more than six months) of noncitizens without an individualized opportunity to show that detention was unwarranted.[34] Far from moving toward a full recognition of the constitutional rights of noncitizens, the modern Court has been moving in the *opposite* direction.

Importantly, though, these setbacks have not impacted all noncitizens uniformly. Rather, the Supreme Court generally has been more willing to recognize constitutional claims raised by lawfully admitted noncitizens, although such openness has been far from consistent. As to such claims raised by noncitizens present in the U.S. without authorization as well as noncitizens seeking initial admission, the Court has been decidedly more skeptical. The minimal constitutional protections previously extended to these groups largely have been jettisoned.

This Article then maps out a path forward from current jurisprudence, one guided by the normative premise that the continued failure to afford constitutional protections to noncitizens undermines fundamental norms of equality[35] and the rule of law.[36] In doing so, it acknowledges both the institutional limitations of the judiciary in defining membership in the polity as well as geopolitical realities on the ground that render impracticable a complete break from the plenary power doctrine in certain areas of immigration law. It nonetheless argues that some level of constitutional protections must be afforded to noncitizens.

Specifically, it maintains that ordinary constitutional protections should apply in full to the removal of legal permanent residents within the United States. Such protections would not afford these individuals

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[33] Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC"), 525 U.S. 471 (1999).

[34] Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[35] I borrow from Michael Walzer's conception of equality in terms of equal membership in a territorial state. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 61-63 (1983).

[36] *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (setting forth competing values underlying discourse surrounding concept of the "rule of law"). My analysis emphasizes the importance of having bureaucratic officials constrained by pre-existing rules, the norm of reason-giving, and the availability of judicial review to ensure that the decisions of agency officials conform to law.

with a constitutional right to remain, but it would prohibit removal on the basis of race, ethnicity, religion, speech, national origin, or other grounds inconsistent with our constitutional norms. These individuals further should be entitled to procedural due process protections, as delineated in *Mathews v. Eldridge*,[37] to contest the legality of their removal.[38] It argues that the same protections should apply to other lawfully present noncitizens (e.g., students, guest workers, tourists) as well as to individuals in the United States without authorization, with the caveat that these groups may be classified on the basis of national origin so long as such classification survives intermediate scrutiny,[39] rather than the strict scrutiny that would ordinarily apply outside the immigration context. Finally, it contends that these same protections should be afforded to individuals seeking initial admission into the United States, except that for this group, national-origin classifications should be permitted as long as they satisfy a more robust version of the facially legitimate and bona fide reason standard.[40] Such reforms would come a long way toward bringing immigration law into the fold of American public law norms.

I acknowledge that the Supreme Court, at least as currently constituted, may not be receptive to many of the reforms envisioned. But there may be space for lower courts to maneuver. More fundamentally, while the political branches can and should play important roles in the reform, it remains crucial for these rights to be recognized by the judiciary. Time and again through our nation's history, the processes of electoral politics have conspired to strip noncitizens of legal protections. The political branches simply cannot be relied upon to protect individuals who lack the right to vote; the only route to durable rights for this group is through constitutional reform.

This Article proceeds as follows. Part I recounts the emergence of the plenary power doctrine during the era of Chinese Exclusion, its affirmance at the height of the Cold War, and its subsequent retreat during the latter part of the twentieth century. Part II then turns to the modern era. In areas ranging from habeas corpus doctrine, procedural

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[37] 424 U.S. 319 (1976).

[38] *Id.* at 334-35 (setting forth three-factor balancing test to define the scope of procedural protections constitutionally required).

[39] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (developing intermediate scrutiny standard in the context of sex classifications, concluding that such classifications survive constitutional review only where they are substantially related to an important government interest).

[40] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (sustaining exclusion of applicant for admission against First Amendment challenge where government provides a facially legitimate and bona fide reason for exclusion).

due process, discrimination, free speech, and detention, the Supreme Court's recent decisions have doubled down on the notion that immigration law is to operate as a constitution-free zone. It then describes how some of the headlining cases of recent years, in which noncitizens won before the Court, ultimately obscure the absence of more durable protections for these individuals. Part III engages in a normative assessment of the current state of the doctrine and offers proposals for reform to expand the scope of constitutional protections extended to noncitizens.

I. PLENARY POWER FROM THE LATE NINETEENTH CENTURY TO THE TWENTIETH CENTURY

The federal government did not seriously regulate the entry of noncitizens into the country until the late nineteenth century.[41] But almost as soon as it started, it excluded individuals on the basis of constitutional suspect grounds of race and national origin. In upholding these laws, the Supreme Court announced what became known as the "plenary power" doctrine, foreclosing judicial review over the political branches' decisions relating to the entry, and then the deportation, of noncitizens. This Part recounts the emergence of the plenary power doctrine during the era of Chinese Exclusion, and the affirmation of that doctrine during the Cold War; it then describes the doctrine's retreat later in the twentieth century, as the Court began to exercise meaningful judicial review, in some instances even reversing immigration decision as violative of constitutional norms.

A. The Chinese Exclusion Era

The Supreme Court's 1889 decision in *Chae Chan Ping v. United States* (sometimes referred to as *The Chinese Exclusion Case*) serves as the fountainhead of the plenary power doctrine, insulating immigration law from ordinary constitutional review.[42] Chae Chan Ping came to the United States as a lawful permanent resident in 1875, pursuant to the Burlingame Treaty, which allowed for free migration between China and the United States.[43] But then Congress, under xenophobic pressures largely from California, amended that treaty and in 1882 imposed a ten-

[41] *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1833-34 (1993) (describing dominance of state law over federal law in regulating transborder movements pre-1875).

[42] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[43] Chinese were granted permanent residence but remained ineligible for naturalization under the race-restrictive naturalization laws.

year moratorium on the entry of new Chinese laborers.[44] Those who had entered prior to 1880, however, were free to come and go, as long as they obtained a certificate showing their prior entry. With the requisite certificate in hand, Chae sailed to China to visit family in 1887. While he was away, however, Congress succumbed to increased pressure to curb Chinese migration further and enacted the Scott Act of 1888, which barred the entry of *all* Chinese migrants, including those who possessed certificates for reentry. When Chae sought to return home, he was excluded.

The Supreme Court unanimously sustained Chae's exclusion, announcing that the power to exclude foreigners was inherent in sovereignty and could not be restrained in any way:[45] "If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed . . . [I]ts determination is conclusive upon the judiciary."[46] As to Chae's claim that the certificate entitled him to reenter, the Court responded, "Whatever license, therefore, Chinese laborers may have obtained, previous to the Act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure."[47] After *Chae Chan Ping*, the government was free to exclude noncitizens from the country on the basis of race, and the courts would not intervene.

Four years later, in *Fong Yue Ting v. United States*,[48] the Court extended the plenary-power principle to shield from constitutional scrutiny not only laws that exclude noncitizens at the border, but also those that deport noncitizens from within the United States. The petitioners in this case, like Chae Chan Ping, had resided as lawful permanent residents in the United States for years. Unlike Chae, however, they never left the United States. Pursuant to the Chinese Exclusion Act of 1892, all Chinese nationals were required to obtain a certificate of residence showing their lawful presence, i.e., that they had entered the United States prior to the imposition of the moratorium on new Chinese entries. To obtain the certificate, however, one needed the affidavit of one "credible white witness." Those who failed to procure

[44] That moratorium would be extended multiple times and then imposed indefinitely; it would not be lifted until 1943.

[45] *See Chae Chan Ping*, 130 U.S. at 609.

[46] *Id.* at 606.

[47] *Id.* at 609.

[48] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

the certificate were subject to deportation. The three petitioners had been ordered deported for failing to obtain the requisite certificate of residence. In one of the cases, the judge was persuaded of the noncitizen's lawful presence on the basis of evidence from Chinese witnesses. Nonetheless, for want of a *white* witness, the individual was ordered deported.

In a 5–3 opinion, the Court sustained the deportations. Drawing from the precedent of *Chae Chan Ping*, the Court declared: "The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."[49] In light of the decision in *Chae Chan Ping*, "it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of congress, any right, as a denizen, or otherwise, to be and remain in this country, except by the license, permission, and sufferance of congress, to be withdrawn, whenever, in its opinion, the public welfare might require it."[50] Importantly, it emphasized:

> The order of deportation is not a punishment for crime . . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searched and seizures and cruel and unusual punishments, have no application.[51]

Fong Yue Ting thus refused to recognize any constitutionally cognizable interest on the part of long-time residents within the United States, leaving the political branches free to deport them with no constitutional limit.[52]

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[49] *Id.* at 707.

[50] *Id.* at 723-24.

[51] *Id.* at 730.

[52] It is worth noting that unlike *Chae Chan Ping*, *Fong Yue Ting* was accompanied by vigorous dissents. Justice Brewer would have employed a territorial approach to the Constitution, holding that noncitizens within the United States are entitled to its protections even if noncitizens seeking entry into the United States are not. *See id.* at 738. He further insisted that deportation was, in fact, punishment, "and . . . oftentimes [more] severe and cruel." *Id.* at 740. The dissents of Justice Field, who joined the

Chae Chan Ping and *Fong Yue Ting* have been almost universally condemned. Professor Louis Henkin criticized the decisions as follows:

> [T]he notion that immigration controls are not subject to the constitutional limitations applicable to congressional acts generally [] cry out for the sharpest criticism. . . . The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the rights of admitted aliens to reside here emerged in the oppressive shadow of a racist, nativist mood a hundred years ago. It was reaffirmed during our fearful, cold war, McCarthy days. It has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects. . . . As a blanket exemption of immigration laws from constitutional limitations, *Chinese Exclusion* is a "relic from a different era". . . . Since that era, the Supreme Court has held that the Bill of Rights applies to foreign as well as to domestic affairs, in war as well as in peace, to aliens as well as to citizens, abroad as well as at home. . . . *Chinese Exclusion*—its very name is an embarrassment—must go.[53]

Professor Gabriel Chin notes that those cases were decided at a time when *Plessy v. Ferguson* remained good law,[54] but that the doctrine has now become an "anachronistic" artifact that "has been so thoroughly undermined by its creation to serve white supremacy, changes in international law, and changes in the Court's understanding of judicial review, that there is virtually nothing left of the foundational cases."[55] Professors Adam Cox and Cristina Rodriguez take a slightly different tack, suggesting the holdings were narrowly limited to establishing the primacy of the federal government's role in regulating immigration vis-a-vis the states.[56] While that description might have been plausible at the beginning of the twentieth century, subsequent cases discussed in the next section, including *Knauff and Mezei*, make clear that *Chae Chan Ping* and *Fong Yue Ting* have been understood and deployed by the

majority in *Chae Chan Ping*, and Chief Justice Fuller, expressed similar concerns. *Id.* at 746, 749, 762-63.

[53] Louis Henkin, *The Constitution and United States Sovereignty: A Century of "Chinese Exclusion" and Its Progeny*, 100 HARV. L. REV. 853, 858, 862-63 (1987).

[54] *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 1 (1998).

[55] *Id.* at 12.

[56] *See* ADAM B. COX & CRISTINA M. RODRIGUEZ, THE PRESIDENT AND IMMIGRATION LAW 30-33 (2020).

Court to justify shielding immigration regulations from ordinary constitutional review. And even Professors Cox and Rodriguez appear to concede that the recent decision in *Trump v. Hawaii*, discussed in Part II, cannot be squared with their understanding of those earlier cases.[57]

Nonetheless, it is important to note that even during the Chinese Exclusion era, the Court was not uniformly hostile to the constitutional claims of noncitizens. In 1903, the Supreme Court in *Yamataya v. Fisher* (sometimes referred to as *The Japanese Immigrant Case*) held that a noncitizen mistakenly admitted into the country possesses a constitutional due process right to challenge her removal.[58] In doing so, *Yamataya* created an important procedural due process exception to the scope of the political branches' plenary immigration power. Even at the turn of the twentieth century, noncitizens physically within the United States (as opposed to those seeking admission at the border) were deemed to possess a constitutional right to sufficient procedures to challenge an order deporting them.

More fundamentally, *Yick Wo v. Hopkins*, decided three years *before Chae Chan Ping*, held that the Fourteenth Amendment's guarantee of equal protection applies to citizens and noncitizens alike.[59] In that case, a San Francisco ordinance discriminatorily denied licenses for the operation of laundries to Chinese noncitizens, while granting them freely to white citizens.[60] Invalidating such discriminatory treatment, the Court stated "The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ."[61] *Fong Yue Ting* acknowledged the *Yick Wo* precedent, but reasoned,

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[57] *Id.* at 235; *cf.* Martin, *supra* note 17, at 33, 39 (arguing that *Chae Chan Ping* and *Fong Yue Ting* deployed sovereignty concept to resolve a federalism dispute, but concluding that the cases nonetheless stand for the proposition that immigration decisions are shielded from ordinary constitutional review).

[58] Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903).

[59] Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

[60] *Id.*

[61] *Id.* at 369. Similarly, the Court in *Wong Wing* invalidated a congressional provision imposing, without trial, hard labor as punishment on noncitizens alleged to be unlawfully present. Wong Wing v. United States, 163 U.S. 228, 237 (1896) ("[T]o declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.").

> Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest.[62]

Noncitizens thus are entitled to constitutional protections on all matters, *except* those relating to their admission and continued presence in the United States. As to the latter category of decisions, the plenary power doctrine precludes courts from exercising review to ensure that they comport with constitutional requirements.[63]

B. The Cold War Era

During the Cold War era, the Court reaffirmed and extended the plenary power doctrine. Its 1950 opinion in *Knauff v. Shaughnessy* involved the exclusion of the German wife of a naturalized U.S. citizen-WWII veteran, without hearing on the basis of secret evidence.[64] The Supreme Court, in a 6–3 decision, upheld the exclusion without hearing. Characterizing the ability to exclude noncitizens as "fundamental" to sovereignty, the majority asserted: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[65]

Three years later, the Court went further in *Shaughnessy v. Mezei*.[66] That case concerned a long-time lawful permanent resident, with a U.S. citizen wife and children, who left the United States to visit his dying mother in Rumania in May of 1948. The Iron Curtain had by then descended, however, leaving Mezei stranded in Hungary for nineteen months, until he finally secured an exit visa. When he arrived in the

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[62] Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893).

[63] *See supra* note 14 (discussing slipperiness of distinction between "immigration law" to which the plenary power doctrine applies, and ordinary "alienage law" to which it does not necessarily apply).

[64] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[65] *Id.* at 544.

[66] 345 U.S. 206 (1953).

United States, the government sought to exclude him, without hearing, under the same regulation that had been invoked in *Knauff*. Moreover, because no other country was willing to repatriate him, he remained detained at Ellis Island indefinitely.

In a 5–4 opinion, a majority of the Court again invoked the plenary power doctrine to sustain Mezei's exclusion and consequent indefinite detention. "Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding. . . . For purposes of the immigration laws . . . the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws."[67] As to Mezei's indefinite detention on Ellis Island, the Court acknowledged the "present hardship" but nonetheless concluded that it was for Congress to determine whether Mezei could be admitted.[68] Mezei ultimately spent four years in detention, until the political branches of government granted him parole in 1954, allowing him to return to the United States without formal lawful status.[69]

Both Knauff and Mezei were subject to the "entry fiction" doctrine, under which noncitizens excluded at the border are treated as though they were outside the United States, even though they were both in fact detained on U.S. territory. Nonetheless, as a doctrinal matter, deeming them to be outside the U.S. allowed the Court to deny they had any constitutional interests to protect, even if, as in Mezei's case, the exclusion resulted in the indefinite and potentially permanent detention.

Henry Hart, in his famous Dialectic, criticized both *Knauff* and *Mezei* as unprincipled departures from fundamental norms of the rule of law:

> [A.] The distinctions the Court has been drawing recently, however, are of a different order. They are distinctions between when the Constitution applies and when it does not apply at all. Any such distinction as that produces a conflict of basic principle, and is inadmissible.
>
> Q. What basic principle?
>
> A. The great and generating principle of this whole body of law—that the Constitution always applies when a court is

[67] *Id.* at 213.

[68] *Id.* at 216.

[69] *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 983-84 (1995).

> sitting with jurisdiction in habeas corpus. . . . That principle forbids a constitutional court with jurisdiction in habeas corpus from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by act of Congress. The inquiry remains, if *Marbury v. Madison* still stands, whether the act of Congress is consistent with the fundamental law.[70]

After concluding that those two decisions were undeserving of "intellectual[] respect[]," he continued:

> But the judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.
>
> And so, when justices of the Supreme Court sit down and write opinions in behalf of the Court which ignore the painful forward steps of a whole half century of adjudication, making no effort to relate what then is being done to what the Court has done before, they write without authority for the future.[71]

C. Twentieth Century Progress

Professor Hart's view was at least partially vindicated in the latter part of the twentieth century, as the Supreme Court retreated from the principle of plenary power. Against the backdrop of the Civil Rights Movement, the elimination of race-based exclusion in the Immigration Act of 1965,[72] and the revolution in procedural due process rights ushered in by *Goldberg v. Kelly*,[73] the Court began to exercise review

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[70] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1393-94 (1953).

[71] *Id.* at 1395-96.

[72] Immigration and Nationality Act of 1965 (Hart-Cellar Act), Pub. L. No. 89-236, § 2(a), 79 Stat. 911, 911 (1965) (codified at 8 U.S.C. § 1152(a)(1)) ("[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.").

[73] 397 U.S. 254 (1970).

over the immigration decisions of the political branches, in some cases even reversing those decisions on constitutional grounds.

In *Kleindienst v. Mandel,* decided in 1972, the Supreme Court signaled for the first time that the government's power to exclude was not entirely immunized from judicial review.[74] In that case, Ernest Mandel, a Belgian journalist, had been invited to the U.S. by a group of scholars to participate in a series of conferences at universities and other venues. At the Supreme Court, all parties conceded that Mandel himself had no legally cognizable claim to enter the United States. The Court concluded, however, that the American professors who had invited him to speak *did* have First Amendment interests in his arrival.[75] Under these circumstances, the Court rejected the government's position that it could exclude Mandel for any reason at all, or for no reason, pursuant to the government's plenary power to exclude noncitizens. The Supreme Court instead held that the government must provide at least a "facially legitimate and bona fide reason" for denying the visa.[76]

To be sure, that standard was far less rigorous than the ordinary standard of review for infringements of free speech in the domestic context, and the Court emphasized that as long as a facially legitimate and bona fide reason was provided, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[77] Nonetheless, after *Mandel*, the government was required to provide some explanation for a denial of entry at least for noncitizens with U.S. resident sponsors.

Four years later, in *Fiallo v. Bell*, the Supreme Court again asserted its willingness to review immigration regulations.[78] That case involved the constitutionality of an INA provision that granted preferential treatment to visa applicants on the basis of sex and parental marital status.[79] The government argued that the provision, relating to "a substantive policy regulating the admission of aliens into the United States," was

[74] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[75] *Id.* at 765.

[76] *Id.* at 770.

[77] *Id.*

[78] Fiallo v. Bell, 430 U.S. 787 (1977).

[79] Specifically, unwed mothers and their biological offspring obtained the preferential treatment for immigrant entry, but unwed fathers and their biological offspring did not. Three sets of fathers and their children challenged the provision, arguing it violated their right to equal protection, due process, and their fundamental right to familial relationships. *See id.* at 791.

completely immunized from judicial review.[80] The Court rejected that contention, concluding "[o]ur cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens."[81] It then applied the "facially legitimate and bona fide reason" standard announced in *Mandel* and concluded that the provision survived judicial review. Again, the standard applied by the Court was a far cry from the more rigorous scrutiny typically applicable to this sort of "double-barreled" discrimination.[82] Nonetheless, the Court's willingness to exercise some limited form of review, rather than cast all immigration restrictions outside judicial purview, constituted progress.

The following decade showed an even greater willingness on the part of courts to impose an independent check on immigration decisions. In *Landon v. Plasencia*, the Court retreated from *Mezei* to recognize that returning legal permanent residents possess a procedural due process right to challenge their exclusion.[83] Justice O'Connor, writing for eight Justices, began her analysis with an exegesis of the plenary power doctrine,[84] but continued: "[H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."[85] The Court then went on to expressly hold that returning resident aliens are entitled to procedural due process protections to challenge a denial of admission.[86] In doing so, it did not overturn *Mezei,* but narrowed it considerably, emphasizing that Mezei had been away from the United States "some twenty months."[87] "We need not now decide the scope of *Mezei;* it does not govern this case, for Plasencia was absent from the country only a few days, and the United States has conceded that she as

[80] *Id.* at 793 n.5.

[81] *Id.* at 805.

[82] In the separate area of *citizenship* acquisition, the Supreme Court in a more recent case, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), invalidated on equal protection grounds a statutory provision that made it easier for unwed mothers to transmit citizenship to their offspring than for unwed fathers. The Court clearly distinguished the classifications for the purpose of determining citizenship from *Fiallo*, which involved a regulation relating to immigration and was thus subject only to rational basis review. *See id.* at 1693-94. Interestingly, the remedy the Court ordered in *Morales-Santana* was to impose the *less favorable* treatment on both unwed mothers and fathers. *See id.* at 1700-01.

[83] Landon v. Plasencia, 459 U.S. 21 (1982).

[84] *Id.* at 32 (first citing United States *ex rel.* Knauf v. Shaughnessy, 338 U.S. 537, 542 (1950); and then citing Eiku v. United States, 142 U.S. 651, 659-60 (1892)).

[85] *Id.*

[86] *Id.* at 33.

[87] *Id.* at 34 (alteration in original).

a right to due process."[88] After *Plasencia,* then, returning legal permanent residents possess a procedural due process right to challenge their exclusion, as long as their absence from the United States is not extensive.

As to the scope of the returning LPR's procedural due process rights, the Court identified the three-factor balancing test announced in *Mathews v. Eldridge* as the governing standard. The majority then remanded for the lower court to determine the sufficiency of the proceedings that had been offered to Plasencia.[89] What is important to emphasize here is that the Court did not indicate that the procedural due process analysis should differ in any way because of the immigration context. Rather, it suggested that the framework for analyzing procedural due process rights in immigration cases would be the same as in any other domestic constitutional inquiry.

Finally, in 1983, the Court handed down *INS v. Chadha*, striking down the constitutionality of the legislative veto.[90] That case involved two provisions of the INA. Section 244(a)(1) granted the Attorney General the discretion to suspend the deportation of an individual who was otherwise deportable if certain requirements were satisfied. Section 244(c)(2), however, provided that either house of Congress could veto the suspension if it acted within a certain time frame. If they failed to act, the suspension would convert to a cancellation of deportation, and the individual would be awarded legal permanent resident status. In Chadha's case, in which he had overstayed a student visa, an immigration judge exercised discretion to grant suspension of deportation. Pursuant to section 244(c)(2), however, the House voted to reject the suspension. Chadha filed suit challenging the constitutionality of section 244(c)(2).

The Supreme Court held that the one-house legislative veto violated the separation of powers, evading the rigors of bicameralism and presentment constitutionally mandated in Article I, section 7. Of course, the Court's primary concern was with the legislative veto more generally, given its increasing prevalence throughout the U.S. Code in areas ranging from war powers to energy to government

[88] *Id.*

[89] Justice Marshall would have decided the case without remand, concluding that the procedures provided to Plasencia failed the *Mathews v. Eldridge* standard "because she was not given adequate and timely notice of the charges against her and of her right to retain counsel and to present a defense." *Id.* at 38 (Marshall, J., concurring in part and dissenting in part).

[90] INS v. Chadha, 462 U.S. 919 (1983).

reorganization.[91] But the vehicle in which it chose to strike down the device was an *immigration* case.[92] A purist version of the plenary power doctrine would preclude the Court from reviewing any congressional decision relating to the deportation of a noncitizen. Indeed, Congress had argued that the decision to cancel Chadha's suspension was a "political question" not subject to judicial review. Yet the Court did not stay its hand. Rather, refuting the argument that Congress possesses "unreviewable authority over the regulation of aliens," the Court stated: "The plenary authority of Congress over aliens under [the Constitution] is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."[93] Then, citing cases from the non-immigration realm, it continued "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction."[94] In doing so, the Court declined to afford any particular deference to Congress's decision to order Chadha deported.

These doctrinal developments did not escape the attention of legal scholars. In 1984, for example, Professor Peter Schuck announced a "transformation" of immigration law, one which departed from the notion of plenary power and instead embraced notions of individual rights and substantive justice.[95] The same year, Professor Stephen Legomsky asserted "we have entered a new phase . . . characterized by a judicial willingness, so far episodic, to cut away at the notion of plenary Congressional power over immigration."[96] To be sure, both were cautious in their predictions, noting that the Court had not yet fully renounced plenary power and that remnants of that doctrine

[91] *See id.* at 971 n.8 (White, J., dissenting) (cataloging prevalence of legislative vetoes).

[92] The *Chadha* decision thus likely was motivated more by a desire to impose strict separation-of-powers norms than to protect the rights of individuals. For an exploration of the relationship between separation-of-powers and individual liberty, see Jonathan R. Macey, *How Separation of Powers Protects Individual Liberty*, 41 RUTGERS L. REV. 813, (1989). For a discussion on the tensions of "immigration exceptionalism" as it applies to the different constitutional realms of (1) individual rights; (2) federalism; and (3) separation of powers, see Rubenstein & Gulasekaram, *supra* note 17; *see also* Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. Rev. 77, 77 (2017) (arguing that doctrinal retreats from plenary power principles better explained by judicial mistrust of administrative agencies than judicial solicitude of the rights of noncitizens).

[93] *INS v. Chadha*, 462 U.S. at 940-41 (alterations in original).

[94] *Id.* at 941 (quoting Buckley v. Valeo, 424 U.S. 1 (1976)).

[95] Schuck, *supra* note 15, at 4.

[96] Legomsky, *supra* note 17, at 303.

continued to animate contemporary cases. Nonetheless, scholars generally were optimistic that immigration law was on the road toward incorporation into the mainstream fabric of constitutional jurisprudence, and that decisions relating to the exclusion and removal of noncitizens would no longer be immunized from judicial review.

II. THE MODERN ERA OF CONSTITUTIONAL RETRENCHMENT

Notwithstanding the optimistic predictions of scholars, the modern Supreme Court over the past quarter century has reversed course, reaffirming and even extending the doctrine of plenary power. In cases involving the right to habeas corpus, procedural due process, discrimination, free speech, and detention, the Court has given the political branches virtually free reign to enact policies fundamentally at odds with constitutional norms. This Part tells a story of *retrenchment*, in which noncitizens' prior constitutional victories have been significantly limited and in some cases even reversed.[97] Importantly,

[97] This Article parts ways with scholars who have argued that immigration law is unexceptional, and that ordinary constitutional standards apply. For example, Professor Jack Chin has pointed out that the founding plenary power cases were decided during an era in which domestic constitutional rights were far less robust than today. Analyzing discrimination cases in particular, he argues,

> *At the time they were decided*, many of the terrible immigration cases could have come out the same way even if they involved the rights of citizens under domestic constitutional law . . . . Typically, the Court has upheld discriminatory immigration laws during periods when domestic discrimination against citizens was permitted on the same basis. Therefore, typically the discrimination was consistent with domestic constitutional law.

Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 258 (2000) (emphasis in original).

More recently, Professors Adam Cox and Cristina Rodriguez argue that the plenary power cases have been misunderstood, and that they do not in fact stand for the proposition that immigration law lies outside the constitutional pale. In their view, "[W]hen we put these cases in their proper historical context, it becomes clear that the Court decided each of them in an era when the same policies would have been accepted as a matter of ordinary constitutional law, or at least when the domestic law was in a state of development . . . . This history thus fails to support the conventional scholarly wisdom that constitutional review does not apply to the regulation of immigration." COX & RODRIGUEZ, *supra* note 56, at 235. Professors Cox and Rodriguez do acknowledge, however, that the recent decision in *Trump v. Hawaii* "substantially muddied the picture." *Id.*; *see also* Lucas Guttentag, *The President and Immigration Law: The Danger and Promise of Presidential Power*, JUST SEC. (Oct. 19, 2020), https://www.justsecurity.org/72863/the-president-and-immigration-law-the-danger-and-promise-of-presidential-power/ [https://perma.cc/56M2-7C5D] (contesting Cox's and Rodriguez's analysis of the plenary power cases and concluding, "[i]n short, I read

though, these setbacks have not impacted all noncitizens uniformly. Rather, the Supreme Court generally has been more open to the constitutional claims raised by lawfully admitted noncitizens, while stripping formerly held constitutional rights held by noncitizens within the U.S. without authorization as well as noncitizens seeking initial admission.

A. Habeas and Access to the Courts

Even at the height of plenary power, federal courts had always been willing to assess the merits of statutory and constitutional claims brought by noncitizens detained in the United States challenging their removal through habeas corpus petitions. The 2020 Supreme Court decision in *D.H.S. v. Thuraissigiam*[98] eliminated this fundamental right for noncitizens seeking admission at the border as well as for at least some noncitizens already within the United States.[99]

Thuraissigiam, an ethnic Tamil from Sri Lanka, entered the U.S. without inspection at around 11:00 p.m. in January of 2017 and was apprehended twenty-five yards north of the Mexican border. He claimed asylum on the basis of a prior incident in which he had been kidnapped and severely beaten in Sri Lanka. Ordinarily, an individual — whether apprehended at the border or in the interior of the United States — is entitled to a relatively formal removal hearing before an immigration judge to adjudicate whether he or she will be removed.[100] The INA provides that certain individuals who arrive at the border without proper documentation, however, may be placed in "expedited removal"

the constitutional rights of noncitizens in the U.S. immigration system as having moved in fits and starts, both forwards and backwards. But in *Hawaii* and *Thuraissigiam*, the Court is marching decidedly backwards toward a new precipice"); Aziz Huq, *Three Missing Pieces in* The President and Immigration Law, BALKINIZATION (Dec. 3, 2020), https://balkin.blogspot.com/2020/12/three-missing-pieces-in-president-and.html [https://perma.cc/8TKY-WNCM] (challenging Cox's and Rodriguez's assessment of immigration cases as constitutionally non-exceptional).

98 140 S. Ct. 1959 (2020).

99 Lucas Guttentag, former legal director of the Immigrants' Rights Project of the American Civil Liberties Union, has characterized the opinion as "the most under-reported yet deeply consequential immigration ruling in decades." Guttentag, *supra* note 97. For a critique of Justice Alito's majority opinion in the case, see Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, JUST SEC. (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam/ [https://perma.cc/CTM2-FP5Z].

100 8 U.S.C. § 1229a.

proceedings.[101] The statute further authorizes the Executive branch to expand expedited removal to additional individuals who lack proper documentation and have been physically present in the United States less than two years.[102] If an individual in expedited removal proceedings claims asylum, he or she is entitled to a "credible fear interview" before an asylum officer; if the officer concludes that the individual does not have a credible fear of persecution, then the noncitizen will be ordered deported with the opportunity for only a truncated appeal (usually within twenty-four hours) before an immigration court.[103] The 1996 amendments to the INA preclude any form of judicial review over expedited removal orders.[104] In Thuraissigiam's case, the asylum officer entered a negative credible fear determination, which a supervising officer affirmed. On the truncated appeal, an immigration judge affirmed and ordered Thuraissigiam detained until he could be removed. Thuraissigiam filed a habeas petition, arguing that the executive branch officers misapplied the law of asylum in denying his application and demanded a new hearing.

Article I, section 9 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of

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101 The INA mandates expedited removal for individuals apprehended at the border who lack proper documentation or have fraudulent documents. *Id.* § 1225(b) (citing to individuals inadmissible under 8 U.S.C. §§ 1182(a)(6)(C) (misrepresentation) and 1182(a)(7) (lack of documentation)).

102 The Attorney General exercised this authority in 2004 to extend expedited removal to individuals apprehended within 100 miles of a land border who could not show that they had been in the U.S. for more than fourteen days. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004). In 2006, the program was further expanded to a similar class of individuals apprehended within 100 miles of maritime borders. Documents Required for Travelers Departing from or Arriving in the U.S. at Air Ports-of-Entry from Within the Western Hemisphere, 71 Fed. Reg. 68,412 (Nov. 24, 2006). The Trump administration in 2019 expanded expedited removal to the statutory maximum, applying it to any individual apprehended anywhere in the United States who cannot show continued presence for more than two years. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019). *See generally* CONG. RSCH. SERV., THE DEPARTMENT OF HOMELAND SECURITY'S NATIONWIDE EXPANSION OF EXPEDITED REMOVAL (2020) (explaining that "if those aliens have been physically present in the country for less than two years . . ." the DHS may "apply expedited removal . . . "). That expansion has been challenged in the courts and remains in litigation. *See* Make the Road N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020) (reversing lower court injunction against expansion).

103 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B).

104 *Id.* § 1252(a)(2)(A), (e). Exceptions allow for judicial review over three types of claims: whether claimant is a citizen; whether petitioner was ordered removed; and whether petitioner already enjoys lawful immigrant status as a LPR, refugee, or asylee. *Id.* § 1252(e)(2).

Rebellion or Invasion the public Safety may require it."[105] At its core, the writ guarantees a right to judicial review to challenge the legality of executive detention. In the immigration context, as Professor Gerald Neuman recounts, "[t]he evaluation must include not only the official's general authority to detain and remove aliens, but the legal validity of the grounds asserted for removal, and compliance with any statutory requirements that Congress has made prerequisites to a valid removal order."[106] The Suspension Clause thus guarantees judicial review over questions of law, both constitutional as well as statutory, though not necessarily over questions of fact.[107]

Yet, Justice Alito's majority opinion for the Court denied that Thuraissigiam had any constitutional right to habeas corpus. In doing so, it jettisoned at least a century of precedent. During what historians refer to as the "finality era," from 1891 to 1952, Congress enacted legislation to eliminate judicial review over exclusion decisions to the maximum extent possible. The earliest version of such statutes, enacted in 1891, provided, "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."[108] Notwithstanding statutory language categorially precluding judicial review over exclusion orders, the Supreme Court "in case after case" entertained the merits of challenges to removal orders through habeas petitions.[109]

In the Supreme Court's 1892 decision in *Nishimura Ekiu v. United States*,[110] a Japanese national was denied entry upon landing in San Francisco on the ground that she was likely to become a public charge; she was subsequently detained until she could be repatriated. She filed a habeas petition offering to show facts establishing she was not likely to become a public charge. Nishimura argued that the statutory provision precluding judicial review over claims like hers amounted to

105 U.S. CONST. art. I, § 9.

106 Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 963 (1998).

107 *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence*," 25 SAN DIEGO L. REV. 631, 730 (1988) (concluding that habeas does not guarantee review over factual issues, so long as there is "some evidence" to support the factual conclusions leading to detention).

108 Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085.

109 INS v. St. Cyr, 533 U.S. 289, 306-07 (2001).

110 142 U.S. 651 (1892).

an unlawful suspension of her right to habeas corpus and due process. The Court ultimately rejected her challenge, but in doing so, it first explicitly acknowledged the availability of habeas over legal questions pertaining to noncitizen exclusion: "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful."[111] The Court ultimately concluded, however, that the *factual* question of the petitioner's excludability was not subject to judicial review.[112] In upholding the denial of Nishimura's writ, the Court interpreted the statute narrowly, to preclude judicial review only with respect to questions of fact, even though such a textual limitation was notably absent from the sweeping statute. It was only after construing the statute in this way, to allow judicial review over legal claims but not factual ones, that the Court sustained the statute against constitutional attack. That tradition was preserved even in the infamous cases of *Knauff* and *Mezei*, rejecting petitioners' claims on the merits but nonetheless adjudicating them, as described in the preceding Part.

Had the *Thuraissigiam* majority followed the reasoning in *Nishimura* and the cases decided during the finality era, it would have read the expedited removal statute to preclude judicial review only with respect to factual challenges, but not with respect to challenges on issues of law.[113] Yet Justice Alito declined such a course of action. Instead, he concluded that the Court's exercise of jurisdiction in *Nishimura* was not constitutionally mandated, but merely an exercise of ordinary statutory interpretation.[114] In his view, the long line of cases granting habeas review over immigration cases — including cases like *Mezei* and *Knauff*— were not constitutionally informed; rather, these cases were reviewable simply because the statute, as interpreted by the Court, allowed such review.

Thuraissigiam likewise rejected *Boumediene v. Bush* as precedent,[115] which directed courts to consider three factors to determine whether

[111] *Id.* at 660.

[112] *Id.*

[113] Justice Breyer, joined by Justice Ginsburg, concurred with the majority in part on the ground that, in his view, respondent raised only a factual challenge rather than a legal one. Dep't of Homeland Sec. v. Thuraissigiam 140 S. Ct. 1959, 1991 (2020) (Breyer, J., concurring).

[114] *Id.* at 1976-81.

[115] *Id.* at 1981.

habeas is constitutionally mandated.[116] It distinguished *Boumediene* on the ground that the petitioner in that case sought the traditional habeas remedy of release from detention rather than permission to enter the country.[117] Notwithstanding decades of case law entertaining habeas review over claims by noncitizens challenging a removal order, Justice Alito, writing for the majority, concluded that habeas was inappropriate because Thuraissigiam was not formally challenging the lawfulness of his *detention*, which, in Alito's view, constituted the historical function of the great writ. According to Alito, the relief Thuraissigiam sought was permission to enter the United States, which, Alito reasoned, did not fall within the province of the Great Writ.

The majority also rejected application of *I.N.S. v. St. Cyr*, decided in 2001,[118] which squarely affirmed that the Suspension Clause requires that habeas writs remain available to noncitizens challenging removal orders.[119] St. Cyr was a longtime permanent resident who in 1996 pled guilty to selling a controlled substance. The dispute related to whether he remained eligible for discretionary relief from removal, or whether the subsequent enactment of the Illegal Immigration Reform and Immigrant Responsibility Act precluded such relief. But the threshold question before the Court was whether it possessed jurisdiction to adjudicate St. Cyr's claim at all. The government contended that four separate provisions of the newly enacted Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") stripped the federal courts of jurisdiction. Yet *St. Cyr* flatly rejected the claim that the noncitizen's removal order was beyond the power of the courts' review: "A construction of the Amendments at issue that would entirely preclude judicial review of a pure question of law by any court would give rise to substantial constitutional questions," citing the Suspension Clause. "Because of that Clause, some judicial intervention in deportation cases is unquestionably required by the Constitution."[120] "In case after case,

[116] Boumediene v. Bush, 553 U.S. 723 (2008). The three factors are as follows: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 766. Under these factors, Thuraissigiam presented a stronger claim for habeas protections than the alleged enemy combatants at issue in *Boumediene*, who were detained in Guantanamo Bay, Cuba, rather than within the United States.

[117] *Thuraissigiam*, 140 S. Ct. at 1981.

[118] *Id.*

[119] INS v. St. Cyr, 533 U.S. 289 (2001).

[120] *Id.* at 300 (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

courts answered questions of law in habeas corpus proceedings by aliens challenging Executive interpretations of the immigration laws." It went on to review the merits of St. Cyr's claims and found that the provision rendering him ineligible for discretionary relief did not operate retroactively. It thus granted relief to St. Cyr.[121]

Thuraissigiam dismissed *St. Cyr* as inapposite. Somewhat obliquely, it characterized *St. Cyr* as one of "many cases" in which "the writ could be invoked by aliens already in the country who were held in custody pending deportation."[122] According to the majority, "St. Cyr did not signify the approval of respondent's very different attempted use of the writ, which the Court did not consider."[123] But both Thuraissigiam and St. Cyr involved noncitizens detained in the U.S. who sought to challenge a removal order. And both Thuraissigiam and St. Cyr challenged the executive branch's interpretation of the law requiring his removal; in both cases, detention was merely ancillary to the ultimate relief sought — judicial review to ensure the legality of a decision to remove.

After *Thuraissigiam*, noncitizens denied admission to the United States at the border no longer possess a constitutional right to habeas corpus to challenge their exclusion. Even more consequential, at least some noncitizens *within* the United States and thus exempt from the entry fiction doctrine enjoy no habeas protection to challenge their removal. Taken to its logical extreme, *Thuraissigiam* could mean that any undocumented individual can be summarily detained and removed by immigration officials without judicial review, even if they have resided here for up to two years.[124] Even more drastic, perhaps Congress could amend the statute to allow expedited removal without judicial review for *any* noncitizen charged with removability (except perhaps legal permanent residents such as St. Cyr). Perhaps future courts will limit *Thuraissigiam* to its facts. Justice Alito did emphasize that Thuraissigiam was apprehended only after "he succeeded in making it twenty-five yards into U.S. territory before he was caught."[125] And he expressed concern that affording constitutional protections to such individuals, but not to those apprehended at a port of entry, would

[121] As explained in Calcano-Martinez v. INS, 533 U.S. 348, 350 (2001), Congress acted in 2005 to restore habeas jurisdiction in the courts of appeals.

[122] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1981 (2020).

[123] *Id.*

[124] The expedited removal provision allows the Attorney General to designate which undocumented noncitizens will be subject to it, so long as the noncitizen has been in the country less than two years. *Id.* at 1982.

[125] *Id.*

"create a perverse incentive to enter at an unlawful rather than a lawful location."[126] But even if the decision is narrowed in this way, it nonetheless constitutes a significant retrenchment, a reversal of the former rule requiring that even noncitizens apprehended at the border were entitled to habeas to challenge their exclusions.

B. Procedural Due Process

Procedural due process has long been an exception to the plenary power doctrine's reach.[127] Recall that even during the era of Chinese Exclusion, the Supreme Court recognized in *Yamataya v. Fisher* that a noncitizen who was erroneously admitted into the country possessed a procedural due process right to challenge her subsequent removal.[128] *Yamataya,* though, must be distinguished from the exclusion of noncitizens at the border. Under the entry fiction doctrine, those noncitizens were treated as outside the territorial U.S. and, as such, "Whatever procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[129] But as described in the preceding section, *Landon v. Plasencia* cut back on that notion for returning legal permanent residents stopped at the border, who were vested with procedural due process protections, the scope of which was to be determined by the *Mathews v. Eldridge* framework applicable to ordinary, non-immigration law cases.[130]

More recently, however, the Supreme Court has taken a decidedly less generous approach to the procedural due process claims of first time applicants for admission. The Court made clear in *Kerry v. Din*, decided in 2015, that the more generous rule in *Plasencia* was limited to returning legal permanent residents.[131] The government need not provide such robust process in excluding first time entrants, even first-

[126] *Id.* at 1983.

[127] In 1992, Professor Hiroshi Motomura argued that the Supreme Court had expanded constitutional procedural rights to serve as "surrogates" for the absence of substantive constitutional protections in the immigration sphere. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992).

[128] Yamataya v. Fisher, 189 U.S. 86 (1903). To be sure, the scope of procedural protections was thin at that time. *Yamataya* went on to hold that the respondent's procedural due process rights were satisfied, even though she spoke no English, was unable to consult with friends or family, and did not understand the nature of the removal proceedings that were occurring. *Id.* at 101-02.

[129] U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

[130] Landon v. Plasencia, 459 U.S. 21 (1982).

[131] Kerry v. Din, 576 U.S. 86 (2015).

time entrants with considerable U.S. ties. In *Din*, a United States citizen sought the admission of her Afghan national husband. U.S. embassy personnel denied the request and declined to provide any explanation except to cite the extraordinarily capacious statutory provision barring the entry of those who pose a national security risk. Unlike the earlier Cold War-era case *Knauff v. Shaughnessy*, the petitioner was the U.S. citizen herself, rather than the noncitizen spouse denied entry. Under these circumstances, the Court was badly split on whether and the extent to which procedural due process rights applied. Justice Scalia wrote for three Justices to conclude that Din, as a U.S. citizen who sought to be reunited with her husband, had no constitutionally cognizable interest in having her husband admitted into the country sufficient to trigger procedural due process protections.[132] Writing for a four-person dissent, Justice Breyer would have concluded that Din did have a constitutionally cognizable interest to live in the U.S. with her spouse, and that the failure to provide her with any factual basis for his exclusion violated her procedural due process rights.[133]

Justice Kennedy, joined by Justice Alito, wrote the controlling concurrence. Without deciding whether Din's interests triggered procedural due process protections,[134] he concluded that even if she possessed a right to procedural due process, she received all the process that was due. Specifically, he held that where the government provides a "facially legitimate and bona fide reason" for an exclusion — here, a citation to a capacious national security provision — due process was satisfied.[135] After *Din,* it remains unclear if Americans have a procedural due process interest in the exclusion of a family member, but even if they do, such a right is satisfied with minimal explanation and no hearing to challenge the grounds for exclusion. The *Mathews v. Eldridge* balancing test for determining what types of procedures should be afforded does not apply.

D.H.S. v. Thuraissigiam narrowed the scope of procedural due process protections available to noncitizens even further.[136] Unlike the respondent in *Din* (or in *Kleindienst* for that matter), Thuraissigiam did not have a U.S. citizen or resident asserting their interests in having him admitted. But, crucially, unlike the respondents in those cases, Thuraissigiam was apprehended in the nation's *interior*. The entry fiction had never been applied to such individuals, and it had always

[132] *Id.* at 101.
[133] *Id.* at 107-10.
[134] *Id.* at 102.
[135] *Id.* at 103-04 (quoting Kleindienst v. Mandel, 92 S. Ct. 2576 (1972)).
[136] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020).

been understood that noncitizens within the nation's interior, regardless of their status, maintained a procedural due process right to challenge their removal. *Mezei* stated as much: "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[137] And this principle was reaffirmed more recently in *Zadvydas v. Davis*: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[138] Yet *Thuraissigiam* announced, for the first time, that noncitizens *within* the United States have no entitlement to procedural due process.[139] *Thuraissigiam*'s decision stripping procedural due process rights constitutes a significant reconceptualization of the constitutional status of noncitizens territorially present in the United States.

As described in the preceding section, it is true that the majority emphasized that Thuraissigiam was apprehended only twenty-five yards north of the border and expressed concern that affording constitutional protection to such individuals, while denying them to those apprehended at the border, would incentivize surreptitious entries. But again, decades of precedent suggested that the central doctrinal distinction was between (a) individuals apprehended at a port of entry — and thus deemed outside of the U.S. under the entry fiction doctrine and thereby without any right to procedural due process, and (b) individuals physically within the United States, who were deemed to enjoy constitutional protections. *Thuraissigiam* appears to eliminate that distinction, denying procedural due process protections to both those apprehended at the border *as well as to those apprehended* in the nation's interior.

Thuraissigiam casts a dark shadow on the procedural rights of unauthorized individuals within the U.S. As Justice Sotomayor's dissent pointed out, "Where [the majority's] logic must stop, however, is hard to say. Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems

[137] Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

[138] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

[139] *Thuraissigiam*, 140 S. Ct. at 1982.

unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their families are U.S. citizens or residents."[140] Future courts could read *Thuraissigiam* narrowly, to deny procedural due process rights to noncitizens within the United States only if they are apprehended within twenty-five yards of the border and only if done so almost immediately after entry. A broader reading, however, would undermine decades of precedent suggesting that noncitizens within the United States — whether documented or not — possess a constitutional right to procedural due process to challenge their removal.

As discussed more fully in the next Part, the *Thuraissigiam* opinion inflicts considerable damage to some of our most deeply held constitutional traditions. The right to habeas for those unlawfully detained lies at the core of our conceptions of liberty. And the denial of procedural due process rights undermines rule of law norms requiring the government to provide a reasoned explanation for its actions and eliminates any opportunity to be heard. That the Court denied these rights to an individual *physically present within the United States* conflicts with the longstanding notion that the Constitution applies to all within its physical jurisdiction. The *Thuraissigiam* decision poses a significant threat to our nation's fundamental values.

C. Discrimination

Plenary power emerged as a doctrine to sustain an explicitly race-based immigration policy during the Chinese Exclusion era. Its heyday preceded major shifts in our constitutional understanding, particularly the robust recognition of a constitutional right to be free from discrimination on the basis of race, ethnicity, or national origin. Commentators had long assumed that the modern Court would not countenance that type of flagrant discrimination, excluding nationals of one country or region based on perceptions of racial inferiority, undesirability, criminality, or dangerousness.[141] Indeed, during the twentieth century, it was generally assumed that the Court had precisely such cases in mind when it rejected government claims that decisions

[140] *Id.* at 2013.

[141] *See, e.g.*, Chin, *supra* note 97, at 258 (noting that the discrimination upheld in immigration cases would have been upheld under ordinary domestic law of the time).

relating to the admission of noncitizens were nonjusticiable.[142] But recent developments show that, notwithstanding advances made in the twentieth century, modern courts have proven far less willing to extend anti-discrimination protections to noncitizens than previously imagined.

Lower court opinions in 1979 and then again following the terrorist attacks of 9/11 declined to apply ordinary standards of constitutional review to government policies targeting noncitizens lawfully present in the country on the basis of national origin. In 1979, the Court of Appeals for the District of Columbia in *Narenji v. Civiletti* sustained regulations requiring Iranian nationals in the United States on student visas to report and register to the INS against an equal protection challenge.[143] "Distinctions on the basis of nationality may be drawn in the immigration field by Congress or the Executive . . . . So long as such distinctions are not wholly irrational they must be sustained."[144] *Narenji* must be understood, though, in the context in which it was decided. The regulations were implemented in response to the Iran Hostage Crisis, which began in November 1979 when a militant Iranian student group took over the U.S. Embassy in Tehran and held all of its officials hostage for a total of 444 days. The Attorney General entered an affidavit defending the regulations as "an element in the language of diplomacy by which international courtesies are granted or withdrawn in response to actions by foreign countries. The action implemented by these regulations therefore is a fundamental element of the president's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Tehran."[145] Given the international crisis present, and the direct relationship between the regulations and foreign diplomacy efforts, it should come as little surprise that they were sustained.

Even under these circumstances, however, four judges dissented from the denial of the motion for rehearing en banc. They reasoned, "There can be no doubt but that Congress has broad authority which it may vest in the Executive, to limit immigration on a variety of bases, including nationality. But once an alien has taken up residence in the United States, even temporarily, he or she derives substantial protection

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[142] *See* Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens.").

[143] Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979).

[144] *Id.* at 747.

[145] *Id.*

from the Constitution and laws of this land."[146] Even in the context of the Iran Hostage Crisis, which exemplified the need for deference to sensitive foreign affairs negotiations, at least four D.C. Circuit judges would have closely scrutinized the constitutionality of singling out Iranian students for immigration reporting and registration.

This aversion to national-origin classifications found support in the Supreme Court the following decade. In *Jean v. Nelson*, the Court appeared willing to recognize that noncitizens, even those who are only at the threshold of entry, enjoy a right to be free from discrimination.[147] For nearly thirty years before 1981, the INS generally followed a policy of granting parole to noncitizens who arrived at the border without proper documentation, pending removal proceedings.[148] In response to an influx of undocumented individuals arriving by boat from Haiti and Cuba, however, the Attorney General in 1981 ordered the INS to detain these individuals instead.[149] A class of Haitians detained pursuant to the new policy filed suit, alleging that the decision to detain rather than grant parole constituted unlawful discrimination on the basis of race and national origin.[150] The Eleventh Circuit, sitting en banc, rejected the claim, holding that the Fifth Amendment authorized discrimination on the basis of national origin in administrative parole decisions. On certiorari, a majority authored by Justice Rehnquist reversed and remanded, concluding that the Eleventh Circuit had violated the doctrine of constitutional avoidance. Instead of ruling on the constitutional question of whether national origin discrimination was permissible under the Equal Protection Clause, the Court found that the case should have been resolved on statutory and regulatory grounds. The majority interpreted the statute and regulations at issue — which granted virtually unfettered discretion to executive officials to grant or deny parole — to prohibit discrimination on the basis of national origin, thereby obviating the need for any decision on whether the Constitution required such nondiscrimination.[151] The only remaining question, thus,

[146] *Id.* at 754 (Wright, Robinson, Wald & Mikva, JJ., dissenting from denial of rehearing en banc).

[147] Jean v. Nelson, 472 U.S. 846 (1985).

[148] *Id.* at 849.

[149] *Id.* For background on the administration's differing treatment of Haitians and Cubans during this era, see generally COX & RODRIGUEZ, *supra* note 56, at 56-63.

[150] *Jean*, 472 U.S. at 848.

[151] *Id.* at 854-55.

was whether low-level officials were in compliance with these statutory and regulatory requirements.[152]

Professor Hiroshi Motomura has characterized the *Jean v. Nelson* opinion as driven by a "phantom" constitutional norm of nondiscrimination.[153] "The Court could have expressed [its] reasoning directly in constitutional terms, but had it done so, the Court would have significantly limited the plenary power doctrine . . . . Of course, the Court could have taken that step, but . . . it was unwilling to do so. As long as it would not decide *Jean* on constitutional grounds, the antidiscrimination norm that guided the Court's interpretation of the parole statute and regulations remained a phantom."[154] Motomura remained optimistic, however. He offered the possibility that cases like *Jean* might signify a merely transitional phase, as the Court incrementally proceeds toward a full-throated embrace and application of "real" constitutional norms such as that of nondiscrimination.[155]

Unfortunately, subsequent events suggest that optimism was misplaced. In the aftermath of the 9/11 terrorist attacks, a series of lower court decisions sustained a program targeting lawfully present noncitizens for terrorist investigation on the basis of national origin.[156] In 2002, the Attorney General instituted the National Security Entry-Exit Registration System ("NSEERS"), which included a Special Call-In Registration Program as a component.[157] The program targeted lawfully present noncitizen males who did not have legal permanent resident status and were over the age of sixteen from a list of twenty-four Muslim-majority countries plus North Korea.[158] These individuals were first required to report to an INS facility for registration. Several months later, they were called back to submit to interrogation. According to the Second Circuit, interrogations typically were preceded by a pat-down search and occurred in a closed room while the individuals were seated

[152] *Id.* The dissenting opinion by Justice Marshall, joined by Justice Brennan, criticized the lack of textual support for the majority's interpretation of the relevant statute and regulation: "In my mind, there is no principled way to avoid reaching the constitutional question presented by the case. Turning to that question, I would hold that petitioners have a Fifth Amendment right to parole decisions free from invidious discrimination on the basis of race or national origin." *Id.* at 858 (Marshall, J., dissenting).

[153] *See* Motomura, *Phantom Norms*, *supra* note 17, at 564.

[154] *Id.* at 592.

[155] *Id.* at 612.

[156] *See, e.g.*, Rajah v. Mukasey, 544 F.3d 427, 439 (2d Cir. 2008) (sustaining program and citing cases doing the same).

[157] *Id.* at 433.

[158] *Id.*

in chairs with shackles attached, although the individuals themselves were not shackled.[159] Like the regulations at issue in *Narenji,* the call-in registration program was limited to nonimmigrants, pursuant to a statute that allowed special registration only for those "not lawfully admitted to the United States for permanent residence."[160]

In *Rajah v. Mukasey*, the Second Circuit quoted *Narenji* for the proposition that the government was free to discriminate against lawfully present noncitizens on the basis of national origin so long as it was not "wholly irrational."[161] Addressing petitioners' argument that the program was motivated by anti-Muslim animus, the Court concluded, "one major threat of terrorist attacks comes from radical Islamic groups. The September 11 attacks were facilitated by violations of immigration laws by aliens from predominantly Muslim nations. The Program was clearly tailored to those facts."[162] Not only was there no dissenting opinion, but the Second Circuit joined every other circuit to have considered the issue in upholding the program.[163] In the crisis following the 9/11 terrorist attacks, the lower courts were uniform in their willingness to allow the use of national origin as a proxy for terrorism even for noncitizens lawfully in the United States.

But the clearest example of the judiciary's retreat from the norm of nondiscrimination in the immigration context comes from the Supreme Court's recent decision in *Trump v. Hawaii*, sustaining the Trump Administration's "Travel Ban."[164] In doing so, the Court endorsed an immigration policy tainted with the sort of xenophobia that characterized the Chinese Exclusion Acts of the late nineteenth century.

As a candidate, Donald Trump famously vowed to ban the entry of Muslims from the country, asserting that this group hated America and posed a national security threat.[165] Mere days after his inauguration,

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159 *Id.* at 434.

160 *Id.* at 435 (citing 8 U.S.C. § 1303(a)).

161 *Id.* at 438 (quoting Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979)).

162 *Id.* at 439.

163 *Id.* (citing Kandamar v. Gonzales, 464 F.3d 65, 73-74 (1st Cir. 2006); Ali v. Gonzales, 440 F.3d 678, 681 n.4 (5th Cir. 2006); Zafar v. U.S. Att'y Gen., 461 F.3d 1357, 1367 (11th Cir. 2006); Shaybob v. Att'y Gen., 189 Fed. App'x 127, 129-30 (3d Cir. 2006); Hadayat v. Gonzales, 458 F.3d 659, 665 (7th Cir. 2006) (finding the court had no jurisdiction to review the claim); Malik v. Gonzales, 213 Fed. App'x 173, 174-75 (4th Cir. 2007)).

164 Trump v. Hawaii, 138 S. Ct. 2392 (2018).

165 Justice Sotomayor's dissent catalogs these anti-Muslim statements, including Candidate Trump's promise of a "total and complete shutdown of Muslims entering the United States"; excerpts from his campaign website stating, inter alia, "there is great hatred towards America by large segments of the Muslim population," that "25% of

President Trump passed Executive Order 13,769 (EO-1) to bar the entry of noncitizens from a list of predominantly Muslim countries, stating that the designated countries failed to provide the United States with sufficient information to verify the identities of their nationals.[166] The lower federal courts promptly enjoined EO-1,[167] leading the Administration to rescind it and try again. In its second iteration, Executive Order 13,780 (EO-2), enacted on March 6, 2017, again barred the entry of nationals from a list of predominantly Muslim countries for ninety days,[168] a policy that was again swiftly enjoined by the lower courts.[169] The government petitioned the Supreme Court for a stay of those injunctions, which the Court denied as to foreign nationals with a "credible claim of a bona fide relationship with a person or entity in the United States."[170] Interestingly, at this point of the litigation, the Supreme Court appeared sufficiently troubled by the implications of the Travel Ban on U.S. citizens to allow a partial injunction.

After the ninety-day term of EO-2 expired, President Trump issued the third and final Travel Ban in Proclamation 9645.[171] This version of the Travel Ban imposed an indefinite bar to the entry of foreign nationals, identifying a virtually identical list of countries from the last version, as well as imposing bars on the entry of nationals from two

[polled Muslims] agreed that violence against Americans here in the United States is justified by the global jihad," *id.* at 2435; Trump's statement that "Islam hates us . . . . [W]e can't allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim," *id.* at 2436; and, as President, retweeting anti-Muslim videos titled "Muslim destroys a Statue of Virgin Mary!," "Islamist mob pushes teenage boy off roof and beats him to death," and "Muslim migrant beats up Dutch boy on crutches!" *Id.* at 2438.

166 Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8,977 (Feb. 1, 2017) (barring for a period of ninety days the entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen).

167 Washington v. Trump, 847 F.3d 1151, 1157-58 (9th Cir. 2017).

168 Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209, 13,213 (Mar. 9, 2017). EO-2 restricted the entry of nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen. *Id.* It declined to extend the restriction to Iraqi nationals and purported to create a system for granting case by case waivers. *Id.*

169 Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 579 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741, 760 (9th Cir. 2017).

170 Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017) (per curiam).

171 Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161, 45,162 (Sept. 27, 2017).

non-Muslim countries, Venezuela and North Korea.[172] The proffered rationale was again that the identified countries lacked adequate systems for managing and sharing information about their nationals. Plaintiffs raised two primary claims. First, that the Travel Ban violated the Immigration and Nationality Act. Second, that it violated the Establishment Clause because it disfavored Islam as a religion.

As an initial matter, the Court opined that the threshold question of whether plaintiffs' statutory claims were even justiciable posed a "difficult question."[173] It noted that under the doctrine of "consular nonreviewability," courts generally declined to intervene when the political branches excluded noncitizens from the United States. Quoting *Knauff,* the Court stated that "because the exclusion of aliens is a fundamental act of sovereignty by the political branches, review of an exclusion decision is not within the province of any court, unless expressly authorized by law."[174] For purposes of the present case, the Court assumed, without actually deciding, that the statutory claims were reviewable.[175]

On the merits of the statutory claim, the Court concluded that a complete bar on the entry of nationals from countries with majority Muslim populations was well within the authority that Congress delegated to the President, citing section 1182(f) of the INA, which delegates to the President authority to suspend the entry of any class or classes of aliens upon finding that their entry would be detrimental to national security.[176] Indeed, the Court sustained the Travel Ban even though the INA expressly prohibits discrimination on the basis of nationality in the issuance of immigrant visas.[177] In doing so, the Court relied upon a disingenuous distinction between denying entry on the basis of national origin, which was mandated under the Travel Ban, and

[172] Impacted countries included Chad, Iran, Libya, Somalia, Syria, and Yemen. It also barred the entry of only government officials from Venezuela.

[173] *Trump v. Hawaii*, 138 S. Ct. at 2407.

[174] *Id.* (quoting U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-43 (1950)).

[175] *Id.*

[176] *Id.* at 2408 (citing 8 U.S.C. § 1182(f)). The Court further reasoned that past Presidents had used § 1182(f) to target nationals of specific countries, albeit in considerably narrower circumstances. For example, President Carter suspended the entry of Iranian nationals during the Iran Hostage Crisis, and President Reagan suspended the entry of Cubans in response to Cuba's severance of diplomatic relations with the U.S. Based on the permissive language of the statute coupled with the history of executive practice, the Court found nothing untoward in the President's decision.

[177] *Id.* at 2414. The non-discrimination provision applies only to the issuance of *immigrant* visas; it is silent as to the issuance of *nonimmigrant* visas. *See supra* note 24 (describing distinction between immigrants and nonimmigrants).

denying the issuance of a visa on the basis of national origin, which the statute explicitly prohibits. This position is difficult to reconcile with the uncontested fact that to implement the Travel Ban, consular officers were instructed not to issue visas to nationals of the designated countries. By vesting the President with this unfettered scope of discretion, *Trump v. Hawaii* went even further than *Chae Chan Ping*; in the earlier case, the Court deferred to the power of Congress to bar the entry of foreign nationals. In the contemporary case, the Court deferred to the President's bar against the entry of foreign nationals, even against the dictates of Congress, which prohibits discrimination on the basis of nationality in the issuance of immigrant visas.

On the constitutional claim, while plaintiffs did not pursue an Equal Protection challenge at the Supreme Court,[178] they did argue that the Proclamation violated the Establishment Clause by disfavoring Islam. On that claim, the Court again bowed to the President. Glossing over the repeated anti-Muslim statements issued by the President, the Court declined to apply the ordinary standard of review applicable to Establishment Clause cases: whether a reasonable observer would conclude that the government action was motivated by religious animus. Instead, it employed the standard announced in *Mandel,* in which an immigration decision would be sustained so long as the government provides a "facially legitimate and bona fide reason" for it.[179] While this standard is undoubtedly deferential to the government, the language of the standard in this particular case would seem to counsel in favor of finding a constitutional violation. After all, extensive record evidence suggested that the President's stated reasoning — to encourage certain nations to provide additional information pertaining to its nationals, rather than sheer animus — was not "bona fide." Yet the Court blithely concluded, "A conventional application of *Mandel* . . . would put an end to our review."[180] It then asserted that even if the Court were permitted to look behind the facial neutrality of the Travel Ban, the most intrusive review that would be warranted was rational basis review. Reviewing the record evidence, the Court found "it cannot be said that it is impossible to discern a relationship to legitimate state

[178] Plaintiffs raised an equal protection challenge in *IRAP v. Trump*, one of the two cases consolidated for appeal, but the district court granted relief without reaching the question, Int'l Refugee Assistance Project ("IRAP") v. Trump, 857 F.3d 554, 594-95 (4th Cir. 2017), as did the Fourth Circuit on appeal, Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 255 n.2 (4th Cir. 2018).

[179] *Trump v. Hawaii*, 138 S. Ct at 2419-20 (quoting Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)).

[180] *Id.* at 2420.

interests or that the policy is inexplicable by anything but animus."[181] And, despite the earlier signal sent in its limited injunction of EO-2, the Supreme Court ultimately allowed the Travel Ban to apply all designated nationals, regardless of whether they have ties to U.S. citizens.

Trump v. Hawaii reaches far beyond the lower court decisions in *Narenji* and *Rajah*, which were not only narrower in scope, but were direct responses tailored to particular international crises (the Iran Hostage Crisis and the 9/11 terrorist attacks). In another sense, though, *Trump v. Hawaii* is more limited than those lower court opinions, as the regime it sustained only applies to those who are seeking initial admission to the United States, rather than those already on our shores. Time will tell whether future courts will limit its holding in this way, or whether they will extend it to allow national origin classifications as to noncitizens already physically within the United States.

The Chinese Exclusion Cases have never been formally overturned, despite caustic scholarly criticism. But if there were any doubt, *Trump v. Hawaii* affirms that the central principle espoused in those cases — that the government is free to discriminate on grounds long deemed inherently suspect, as long as it does so in the field of immigration — remains sound today. *Trump v. Hawaii* confirms the place of immigration law as a largely Constitution-free zone.

D. Free Speech

Even during the height of the Cold War, the Supreme Court appeared willing to recognize that noncitizens in the United States, like citizens, enjoy constitutional rights to free speech and assembly. The modern Court, however, has cut back on that protection, at least for noncitizens who are present without authorization.

In the 1952 case of *Harisiades v. Shaughnessy*, the government sought to deport three long-time lawful permanent residents based on their former membership in the Communist party.[182] Among other claims,

[181] *Id.* at 2420-21.

[182] Harisiades v. Shaughnessy, 342 U.S. 580 (1952). In an earlier case, the Supreme Court showed greater sensitivity toward long-time residents who were former Communist party members. In *Kessler v. Strecker*, 307 U.S. 22 (1939), the Court interpreted the statute to authorize the deportation only of current members of the party. It stated, "In the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our Government, must be deported, if at any time in the past, no matter when, or under what circumstances, or for what time, he was a member of the described organization. In the absence of such expression we

they argued that deporting them on that basis violated their constitutional rights to free speech and assembly.[183] The Court rejected the claim, but did so by applying *Dennis v. United States,* the standard applicable to ordinary First Amendment cases at the time *Harisiades* was decided. In doing so, the Court suggested no difference between the scope of free speech rights afforded to citizens and those afforded to noncitizens facing deportation.[184]

The Court arguably went further five years later in *United States v. Witkovich*.[185] In that case, the government ordered Witkovich deported on the basis of his Communist activity; it was unable to repatriate him, however. In such cases, Congress provided that the individual would remain subject to supervision by the Attorney General, who would require the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, and other such information, whether or not related to the foregoing, as the Attorney General may deem fit and proper."[186] Pursuant to that provision, the government interrogated Witkovich as to his membership and affiliation with various groups associated with communism. When Witkovich refused to answer, the government indicted him for willfully failing to provide the requisite information. The government argued that the statute vested virtually limitless discretion on the types of questions that could be asked, but the Court, applying the doctrine of constitutional doubt, employed a far narrower interpretation of the statute, allowing only questions related to "assuring an alien's availability for deportation."[187] The Court, in light of the potential threat to noncitizens' First Amendment rights, precluded the Attorney General from questioning noncitizens regarding their organizational memberships and affiliations.

conclude that it is the present membership, or present affiliation . . . which bars admission, bars naturalization, and requires deportation." *Id.* at 30. In response to that decision, the Communist party purged its rolls of all noncitizens, in the hopes of protecting them from deportation. Congress reacted by enacting legislation making it clear that even prior membership since terminated, warranted deportation. Alien Registration Act of 1940, 54 Stat. 670 (1940).

183 *Harisiades*, 342 U.S. at 591-92.

184 *See id.*

185 353 U.S. 194 (1957).

186 *Id.* at 195 (quoting the Criminal Appeals Act of 1907, 68 Stat. 1232 (codified as amended at 8 U.S.C. § 1252(d)).

187 *Id.* at 201. It is worth noting that Witkovich involved a criminal proceeding, rather than an immigration proceeding. Even during the Chinese Exclusion Era, the Court conceded that criminal, as opposed to mere immigration, proceedings were governed by ordinary constitutional standards rather than the plenary power doctrine. *See* Wong Wing v. United States, 163 U.S. 228, 234-35 (1896).

The Supreme Court has not squarely revisited the issue of whether a noncitizen can be removed on the basis of exercising free speech and assembly rights since its 1969 decision in *Brandenburg v. Ohio* expanding the scope of First Amendment protected activities. In that case, the Court held that the Constitution protects advocacy of ideas to which the government may object, so long as such advocacy does not constitute "incitement to imminent lawless action."[188] The logic of *Hariasides*, which recognized no distinction between the scope of the First Amendment in the immigration context versus the purely domestic context, would suggest that the *Brandenburg* standard should govern whether the government may deport a noncitizen on the basis of advocacy today, and that a noncitizen may not be deported for speech so long as such speech falls short of "incitement to imminent lawless action."[189]

But dicta by the Supreme Court suggests that noncitizens, at least those without lawful status, should be exceedingly wary of engaging in speech disfavored by the government. In January of 1987, the INS arrested and initiated deportation proceedings against the "L.A. Eight" on the basis of their membership in the Popular Front for the Liberation of Palestine ("PFLP").[190] Initially, all eight were charged with violating various provisions of the McCarren Walter Act of 1952 which rendered an alien deportable for belonging to an organization which advocates the doctrines of world communism. The government also charged the six nonimmigrant individuals with routine status violations such as overstaying a visa or failure to maintain student status.[191] After the individuals filed suit, INS dropped the communism charges, preserved the routine status charges against the six nonimmigrants, and charged the remaining two individuals — both of whom were legal permanent residents — with violating a newly enacted provision barring membership in terrorist organizations.[192]

Over the course of several trips, both the trial court and circuit court held that the First Amendment barred the government from deporting noncitizens on the basis of constitutionally protected activity. In its 1989 decision in *AADC v. Meese*, the district court for the Central District of California squarely rejected the government's argument that "aliens do not enjoy First Amendment rights in the deportation

188 Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

189 *Id.*

190 Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC"), 525 U.S. 471, 473 (1999).

191 *Id.*

192 *Id.* at 473-74.

context."[193] Likewise, the Ninth Circuit in its 1995 decision in *AADC v. Reno* interpreted *Harisiades* to require that ordinary First Amendment standards be applied to deportation proceedings, and concluded that "aliens who reside within the jurisdiction of the United States are entitled to the full panoply of First Amendment rights of expression and association."[194]

By the time the case reached the Supreme Court, however, the individuals' only remaining claim was one of selective enforcement. They argued that they were being deported not on the basis of the charges against them, but rather because of their affiliation with a politically disfavored group. Congress, however, had by that time enacted a new provision barring judicial review over cases "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien."[195] Judicial review would only remain available after administrative remedies had been exhausted and a final order of removal had been entered. The Supreme Court concluded that these new provisions eliminated judicial review over the individuals' claims until they obtained a final order of removal.[196]

In what is arguably dicta,[197] the Court addressed the concern that limiting jurisdiction to the record of removal proceedings would preclude the development of a factual record supporting the selective enforcement claims.[198] Although the Court granted certiorari only on the jurisdictional question, declining to exercise review over the merits of the selective enforcement claim, it nonetheless asserted, "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."[199] "When an alien's continuing presence in this country is in violation of the immigration laws, the government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."[200] As an initial matter, this statement is problematic as applied to the legal permanent residents,

193 AADC v. Meese, 714 F. Supp. 1060, 1074 (C.D. Cal. 1989).

194 AADC v. Reno, 70 F.3d 1045, 1063 (9th Cir. 1995).

195 *Reno v. AADC*, 525 U.S. at 478.

196 *See id.* at 487.

197 *See id.* at 510 n.5 (Souter, J., dissenting); *see also* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After* Reno v. AADC, 14 GEO. IMMIGR. L.J. 313, 314 (2000).

198 *See Reno v. AADC*, 525 U.S. at 487-88.

199 *Id.* at 488.

200 *Id.* at 491-92.

whose presence in the United States was not unlawful but for the allegations of terrorist membership. But even as applied to the undocumented noncitizens, the statement suggests that the government is free to target for deportation only those undocumented noncitizens whose viewpoints the government disfavors.[201]

It is worth noting that Justice Scalia's majority opinion acknowledged, "we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."[202] Perhaps a government decision to selectively enforce deportation laws only against Black noncitizens, or Muslim noncitizens, would render a different outcome. But the decision strongly suggests that the government is free to selectively enforce immigration laws against individuals who, for example, participate in a Black Lives Matter demonstration, or advocate for a path to lawful status for Dreamers. Such a conclusion is particularly concerning in light of the fact that, today, an estimated 10.5 million individuals, or almost three percent of our nation's population, lack documented status.[203] Every one of these individuals, it seems, should exercise their rights to free speech and assembly at their peril.

E. Detention

In the area of immigrant detention, too, the Supreme Court has stepped back from earlier signals suggesting an expanded willingness to recognize constitutional protections, particularly for long-term detainees. These cases apply equally to individuals who are lawfully present, including legal permanent residents, as they do to those who lack authorization.

As in other contexts, Congress has acted to circumscribe the statutory rights of noncitizens with respect to detention. In 1996, it legislated a regime of *mandatory* detention — with no opportunity for a bond hearing to determine flight risk or threat to public safety — for a large segment of noncitizens charged with removability. Because the adjudication of removal cases often presents complex matters, coupled with persistent backlogs in the immigration court system, noncitizens

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[201] As Professor Neuman describes, "The Court's opinion in *AADC* leaves the INS free to continue to argue that it may exercise its enforcement discretion without regard to the First Amendment. That attitude is highly threatening to participation by aliens not only in political debate on foreign policy, but in domestic political debate, including criticism of the INS itself." Neuman, *supra* note 197, at 338.

[202] *Reno v. AADC*, 525 U.S. at 491.

[203] *See* Budiman, *supra* note 3.

are often detained for months, if not years, awaiting a final outcome in the removal proceedings.[204] These noncitizens are held in conditions virtually identical to the criminal system; many are held in state and local jails, while others are detained in facilities managed by for-profit prison corporations.[205] Ironically, those noncitizens with the strongest claims to remain often experience the longest detention periods, as they are unwilling to waive their claims, even though they would be guaranteed release.

Initially, the Supreme Court appeared willing to extend constitutional protections to noncitizens ensnared in the detention regime. In its 2001 decision in *Zadvydas v. Davis*, a 5–4 majority of the Court employed the doctrine of constitutional doubt to preclude the indefinite detention of noncitizens who had been ordered removed but could not be repatriated.[206] Upon entry of a removal order, the INA contemplates a ninety-day period during which the noncitizen must be detained while removal is actually effectuated. Section 1231(a)(6) provides, however, that certain aliens, including those "determined . . . to be a risk to the community . . . may be detained beyond the removal period."[207] Kestutis Zadvydas was born to Lithuanian parents at a displaced persons camp in Germany in 1948. He had been a legal permanent resident of the United States since the age of eight, but after a string of criminal convictions, the government ordered him removed. The Government detained Zadvydas beyond the ninety-day statutory period after deeming him a safety risk given his criminal history; his detention threatened to be indefinite, however, as neither Germany nor Lithuania, nor any other country, appeared willing to repatriate him. Similarly, Kim Ho Ma was born in Cambodia, but then fled to refugee camps in Thailand and the Philippines before obtaining legal permanent resident status in the United States at the age of seven. At the age of seventeen, he was convicted for a gang-related shooting, on the basis of which he was ordered deported. Because Ma was considered a public safety risk, and the U.S. has no repatriation treaty with Cambodia, the government detained him beyond the ninety-day deportation period with no end to

[204] *See* Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention,* 69 DUKE L.J. 1855, 1855-59 (2020) (providing overview of immigrant detention system); *see also* Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 2 (2018) (conducting empirical study of immigrant detention and finding that average length of detention was thirty-eight days, but that "tens of thousands were detained for many months or years").

[205] *See* Ryo & Peacock, *supra* note 204, at 31 tbl.2, 32 (tracking facilities in which detainees were held).

[206] Zadvydas v. Davis, 533 U.S. 678 (2001).

[207] 8 U.S.C. § 1231(a)(6).

detention in sight.[208] In both cases, the noncitizens asserted a substantive due process right to be free from indefinite detention.

Justice Breyer, writing for the majority, emphasized the serious substantive due process concerns that would arise were the Court to read section 1231(a)(6) to authorize indefinite or even permanent detention.[209] He thus employed the doctrine of constitutional avoidance to "read an implicit limitation" to the statute, imposing a presumptive time limit of six months.[210] If after that time frame removal "is not reasonably foreseeable," the noncitizen must be released from custody.[211]

Justice Scalia's dissent would have characterized the noncitizens' constitutional interests differently. In his view, "A criminal alien under final order of removal who allegedly will not be accepted by any other country in the reasonably foreseeable future claims a constitutional right of supervised release into the United States. This claim can be repackaged as freedom from 'physical restraint' or freedom from 'indefinite detention,' but it is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here. There is no such constitutional right."[212] In this sense, Justice Scalia's view of the noncitizen's rights — as involving not the claim to be free from detention but rather the claim to enter and live in the United States — invokes the majority opinion in *Mezei,* which

[208] *Zadvydas*, 533 U.S. at 685-86.

[209] *Id.* at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person . . . of liberty . . . without due process of law.' Freedom from imprisonment — from Government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that Clause protects.").

[210] *Id.* at 689.

[211] *Id.* at 699. In doing so, the Court declined to overrule *Mezei*, instead relying on the entry fiction doctrine to distinguish that case. Recall that Mezei was denied entry after leaving the U.S. to travel abroad. The *Zadvydas* Court concluded that the fact that Mezei was effectively stopped at the border "made all the difference" because "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Id.* at 693. It is not at all clear, though, that *Zadvydas* can be so readily distinguished. Mezei, after all, was not a first-time applicant for entry; rather, he was a longtime legal permanent resident of the United States. Also, like Zadvydas and Ma, he faced indefinite and potentially permanent detention because no other country was willing to repatriate him. Indeed, if anything, Zadvydas and Ma posed weaker claims than Mezei, as both had been afforded relatively robust hearings in an immigration court to challenge their removability, whereas Mezei was provided with no hearing at all. It was only after relatively formal procedures were completed that Zadydas and Ma were ordered removed.

[212] *Id.* at 702-03 (Scalia, J., dissenting).

characterized indefinite detention as a mere consequence of the Government's exercise of its conceded authority to exclude the noncitizen from the United States. It also is consistent with the recent majority's opinion in *Thuraissigiam,* which categorized the noncitizen's asserted claim as one not involving freedom from detention, but rather one seeking procedures that would allow him to remain in the United States.

In any event, subsequent cases would show *Zadvydas* to be a high watermark in the detention rights context, one which the Court was not inclined to approach again. Professor Aleinikoff's assessment of the decision as "unlikely to chart a major change in constitutional law" proved prescient.[213] Two years after *Zadvydas*, the Court revisited the issue of immigrant detention in *Demore v. Kim,* and this time found no constitutional infirmity in the challenged practices.[214] Kim had entered the United States at the age of six and obtained lawful permanent resident status two years later. After he was convicted for two crimes, the government initiated removal proceedings against him. Pursuant to the 1996 amendments to the INA, individuals charged with removability on the basis of certain criminal convictions are subject to mandatory detention pending removal proceedings. Kim, who had been detained roughly six months pursuant to this provision, argued that to detain individuals — particularly lawful permanent residents like himself — upon only a charge of removability, absent any individualized hearing to determine whether he posed a flight risk or danger to the community, violated constitutional protections.

A majority of the Court found no such constitutional violation.[215] Chief Justice Rehnquist, writing for the Court, began by emphasizing that noncitizens do not enjoy the same constitutional protections as citizens,[216] and then went on to distinguish the *Zadvydas* decision on two grounds. First, unlike in Zadvydas, where detention no longer

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[213] T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 367 (2002).

[214] *See* Demore v. Kim, 538 U.S. 510, 513 (2003).

[215] *Id.* It is worth noting that Justice O'Connor, joined by Justices Scalia and Thomas, would have gone further to conclude that the INA barred judicial review over Kim's claim altogether, citing 8 U.S.C. § 1226(e), which provides that "*[n]o court* may set aside *any action or decision* . . . regarding the detention or release of any alien." *Id.* at 533 (O'Connor, J., concurring) (quoting 8 U.S.C. § 1226(e)) (first emphasis added). She further opined that "any argument that § 1226(e) violated the Suspension Clause is likely unavailing," reviewing historical practice to conclude that it was only recently that individuals began to bring habeas petitions to challenge detention pending removal hearings. *Id.* at 537.

[216] *Id.* at 521-22 (majority opinion).

served the primary function for which it was intended, i.e., to facilitate the ultimate deportation of the noncitizen because deportation was unlikely, detention in *Kim* "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the alien will be successfully removed."[217] Second, unlike the post-removal-order detention at issue in *Zadvydas*, which was indefinite and potentially permanent, detention pending removal proceedings was, according to the Chief Justice, "of a much shorter duration."[218] Citing government statistics, he noted that "in the vast majority of cases" detention "lasts roughly a month and a half," and lasts "about five months in the minority of cases in which the alien chooses to appeal."[219] He was unpersuaded by the argument, articulated by Justice Souter in dissent (joined by Justices Stevens and Ginsburg), that Kim should enjoy *stronger* constitutional protections than the petitioners at issue in *Zadvydas*, given that Kim was a lawful permanent resident who had not even been adjudicated removable.[220]

Kim, like *Thuraissigiam*, constitutes a sharp departure from deeply held constitutional values. Mandatory detention, often for months on end, for noncitizens merely *charged* with removability, with no opportunity for an individualized hearing to determine whether such pre-decisional detention is in fact warranted (for example to protect the community or secure a flight risk), contravenes our national commitment to freedom from arbitrary detention while also rejecting the notion of individualized justice. And it applies to a category of noncitizens — LPRs — who, as explained more fully in the next Part, possess the strongest claim for equal treatment with their citizen counterparts. In these ways, *Kim* undermines norms of equality and the rule of law and is undeserving of a place in our constitutional jurisprudence.

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[217] *Id.* at 528.

[218] *Id.*

[219] *Id.* at 530. The Solicitor General subsequently admitted to misrepresenting these statistics in the *Demore* litigation. *See* Letter from Ian Heath Gershergorn, Acting Solic. Gen., U.S. Dep't of Just., to Hon. Scott S. Harris, Clerk, Sup. Ct. of the U.S. (Aug. 26, 2016), https://wsj.com/public/resources/documents/Demore.pdf [https://perma.cc/ZVQ8-LNB6].

[220] *See Demore*, 538 U.S. at 551-54 (Souter, J., dissenting). Justice Breyer dissented on different grounds. He would have applied the doctrine of constitutional avoidance to conclude that the provision, which mandated the Attorney General to "take into custody any alien who . . . *is* deportable," did not apply to individuals like Kim, who had not yet been adjudicated as removable. *Id.* at 578 (Breyer, J., dissenting).

In its most recent decision regarding immigrant detention, *Jennings v. Rodriguez* decided in 2018, a split majority once again sought to cabin the reach of *Zadvydas*.[221] In *Rodriguez*, noncitizens who had been detained for at least six months without opportunity for an individualized bond hearing brought a class action to challenge three provisions of the INA, each of which imposed mandatory detention for different categories of noncitizens, including LPRs.[222] The Ninth Circuit, drawing heavily from the reasoning in *Zadvydas*, applied the doctrine of constitutional avoidance to construe the challenged provisions as imposing an implicit six month limit on the length detention, after which the noncitizen would become entitled to a bond hearing to determine whether continued detention remained warranted because, e.g., he or she posed a flight risk or danger to the community. On certiorari, however, the Court reversed and remanded, concluding that the doctrine of constitutional doubt could not be applied, notwithstanding the constitutional concerns raised by a failure to impose an implicit time limit to detention without hearing.[223] Justice Alito, writing for the Court, first characterized *Zadvydas* as "a notably

[221] Jennings v. Rodriguez, 138 S. Ct. 830, 834 (2018).

[222] The first subclass consisted of individuals challenging § 1225(b)(2), which mandates the detention of applicants for admission who would otherwise be subject to expedited removal but who successfully establish a credible fear of persecution warranting further proceedings before an immigration judge. *Id.* at 837. The second subclass consisted of individuals challenging § 1225(b)(2), which mandates the detention of an applicant for admission where an immigration official "determines that [he or she is] not clearly and beyond a doubt entitled to be admitted" into the country. *Id.* The final subclass challenged 1226(c), which mandates the detention of noncitizens already within the United States, many with lawful permanent resident status, who are nonetheless charged with being deportable on the basis of the commission of certain crimes or terrorist activities. *Id.* The named plaintiff, Alejandro Rodriguez, fell within this category; he had enjoyed lawful permanent resident status since 1987. In April 2004, the Government sought to deport him on the basis of two criminal convictions; Rodriguez chose to appeal the decisions of the Immigration Judge and the Board of Immigration Appeals ordering him deported. Pending those appeals, which spanned several years, he remained in custody without any opportunity for a bond hearing to show he posed no flight risk or danger to the community; in May 2007, while Rodriguez's removal case remained before the circuit court, he filed a habeas petition challenging his continued detention without a bond hearing. *Id.* at 833.

[223] Again, at least two Justices would have gone further, concluding that the Court lacked jurisdiction. Justice Thomas joined by Justice Gorsuch reasoned that § 1252(b)(9), which provides that all judicial review over questions "arising from any action taken or proceeding brought to remove an alien from the United States" must be limited to review over a final order of removal, precluded review over the case because the noncitizens had not yet been ordered removed. *Id.* at 853. (Thomas, J., with Gorsuch, J., concurring) They also would have found that such a denial of judicial review did not violate the Suspension Clause. *Id.* at 858.

generous application of the constitutional-avoidance canon," but then went on to distinguish it.[224] Unlike the statutory language at issue in *Zadvydas*, which allowed for some ambiguity of interpretation, "the meaning of the relevant statutory provisions is clear."[225] He stated, "a court relying on that canon still must *interpret* the statute, not rewrite it. Because the Court of Appeals in this case adopted implausible constructions of the three immigration provisions at issue, we reverse its judgment and remand for further proceedings."[226] Importantly, the Court did not reject the constitutional argument that long-term detention requires individualized bail hearings, the position endorsed by the dissent. Rather, it remanded for the lower courts to consider the constitutional argument head on.[227] Nonetheless, it clearly backed away from a reading of *Zadvydas* that long-term detention beyond six months without an individualized hearing warrants employing the doctrine of constitutional avoidance.

F. A Limited Exception: Grounds for Removal

In one discrete area, the modern Supreme Court has been willing to recognize constitutional claims of noncitizens: Congress's identification of grounds for removal. In 2018, the Court in *Sessions v. Dimaya* for the first time held that a crime-based ground for deportation was void for vagueness.[228] That decision grants noncitizens who are otherwise lawfully present within the United States with a constitutional right to fair notice of what grounds will render them deportable.

In *Dimaya,* respondent had been a legal permanent resident in the U.S. since 1992. On two occasions, he was convicted under California's criminal laws for first-degree burglary. The INA provides that an individual convicted of an "aggravated felony" is deportable and generally ineligible for any forms of discretionary relief from deportation.[229] It then defines "aggravated felony" to include a lengthy list of crimes, some serious (e.g., "murder, rape, or sexual abuse of a minor,"),[230] others less so (e.g., "a theft offense (including receipt of

[224] *Id.* at 843.

[225] *Id.* at 848.

[226] *Id.* at 836.

[227] *Id.* at 851.

[228] *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1214-16 (2018).

[229] As the majority put it, "removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he previously resided here." *Id.* at 1211.

[230] 8 U.S.C. § 1101(a)(43)(A).

stolen property) . . . for which the term of imprisonment at least one year [sic]").[231] Included within that expansive definition is "a crime of violence (as defined in section 16 of Title 18 . . .) for which the term of imprisonment at least one year [sic]."[232] The reference to the U.S. criminal code defines the term "crime of violence" to encompass "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[233] After Dimaya's second conviction, the government ordered Dimaya deported, concluding that first-degree burglary constitutes a "crime of violence" as defined by 18 U.S.C. § 16(b).

The Supreme Court vacated the removal order, holding that the definition of "crime of violence" was void for vagueness.[234] Justice Kagan, writing for a 5–4 majority, emphasized the crucial role of the void-for-vagueness doctrine in ensuring that individuals "have 'fair notice' of the conduct a statute proscribes."[235] Moreover, she pointed out the separation-of-powers function of the doctrine, to ensure that "Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."[236] She then relied on *Johnson v. United States*,[237] which invalidated on void for vagueness grounds a provision of the Armed Career Criminal Act ("ACCA") imposing a mandatory minimum sentence after three convictions of a "violent felony," which encompassed an act that "*otherwise involves conduct that present a serious potential risk of physical injury to another*." The *Johnson* Court found the definition unconstitutionally vague first because it required the court to hypothesize the "ordinary case," and then calculate a speculative level of risk of harm based on that ordinary case. The *Dimaya* majority reasoned that the definition of "crime of violence" suffered the same two flaws: it required a court to determine a "typical" or "ordinary" case of burglary, and then speculate as to whether the level of risk of harm in such a case was sufficiently high to warrant inclusion in the definition.

In doing so, the *Dimaya* majority expressly affirmed that the standard applicable to void-for-vagueness claims was not diluted in the immigration context. Four members of the majority emphasized that

231 *Id.* § 1101(a)(43)(G).

232 *Id.* § 1101(a)(43)(F).

233 18 U.S.C. § 16, *invalidated by* Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

234 *See Dimaya*, 138 S. Ct. at 1223.

235 *Id.* at 1212.

236 *Id.*

237 135 S. Ct. 2551 (2015).

"the most exacting vagueness standard should apply in removal cases" in light of the "grave nature of deportation, a drastic measure, often amounting to lifelong banishment or exile."[238] Justice Gorsuch, adding the fifth vote, would have gone further, applying the exacting standard to all noncriminal cases. It is worth noting, though, as the Court did, that "although this particular case involves removal, § 16(b) is a criminal statute, with criminal sentencing consequences. And this Court has held (it could hardly have done other otherwise) that 'we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.'"[239]

As precedent, Justice Kagan cited the 1951 decision in *Jordan v. De George*, which applied the same void-for-vagueness standard to a removal ground as would have applied to a criminal ground.[240] But in *De George,* the challenge ultimately failed, and this failure arguably has larger consequences than the decision in *Dimaya*. In *De George*, respondent had been convicted on two occasions for trafficking in whiskey and spirits while evading taxes.[241] The government characterized these offenses as "crimes involving moral turpitude," which rendered De George deportable under the INA.[242] Justice Vinson, writing for the majority, concluded that the term "crime involving moral turpitude" was sufficiently definite, pointing to lower court opinions that consistently held that an offense involving fraud constituted a "crime involving moral turpitude."[243] "We therefore decide that Congress sufficiently forewarned respondent that the statutory consequence for twice conspiring to defraud the United States is deportation."[244]

Justice Jackson wrote a spirited dissent, joined by Justices Black and Frankfurter, concluding that the term "crime involving moral turpitude . . . has no sufficiently definite meaning to be a constitutional standard for deportation."[245] For example, he cited legislative history suggesting that "picking out a chunk of coal on a railroad track," "stealing of a

[238] *Dimaya*, 138 S. Ct. at 1213 (quotations marks and internal citation omitted).

[239] *Id.* at 1217 (quoting Leocal v. Ashcroft, 543 U.S. 1, 12 n.8 (2004)).

[240] Jordan v. De George, 341 U.S. 223, 231 (1951) (citation omitted) ("Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation. . . . We shall, therefore, test this statute under the established criteria of the 'void-for-vagueness' doctrine.").

[241] *Id.* at 224-25.

[242] *Id.* at 226, 232.

[243] *Id.* at 227.

[244] *Id.* at 232.

[245] *Id.* at 232 (Jackson, J., dissenting).

watermelon or a chicken," or larceny "of a thing which is less than $20 in value" might qualify as a "crime involving moral turpitude."[246] "Can we accept 'the moral standards that prevail in contemporary society' as a sufficiently definite standard for the purposes of this Act? . . . How should we ascertain the moral sentiments of masses of persons on any better basis than a guess?"[247] Nonetheless, today, conviction for a "crime involving moral turpitude" remains a ground for deportability.[248] Thus, even if a noncitizen cannot be deported for engaging in a "crime of violence" because that term is too vague, he or she can be deported for committing a "crime involving moral turpitude" because that term has been deemed sufficiently definite to provide adequate notice of the types of conduct that are prohibited.

Nonetheless, *Dimaya* makes clear that noncitizens are constitutionally entitled to fair notice of what types of conduct will render them deportable. In doing so, it stands in considerable tension with the earlier case of *Harisiades v. Shaughnessy*. That case, described above, involved not only a First Amendment claim but also an *ex post facto* claim, in which petitioners argued that prior membership in the Communist party had not been a ground for deportation at the time they had been members.[249] In a majority opinion authored by Justice Jackson, the Court held that the ex post facto clause does not apply to the immigration removal context: "[E]ven if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the ex post facto provision which has been followed by this Court from earliest times. It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."[250] Under *Harisiades*, a noncitizen may be deported for conduct that was not a deportable offense when conducted; Congress remains free to identify new offenses that render an individual deportable, and apply those provisions

[246] *Id.* at 234 (citing *Hearings Before the H. Comm. on Immigr. & Naturalization on H.R. 10384*, 64th Cong., 1st Sess. 8 (1916).

[247] *Id.* at 237-38.

[248] 8 U.S.C. § 1227(a)(2)(A)(i)-(ii). One leading treatise identifies, state by state, offense by offense, whether given conduct has been found to constitute a "crime involving moral turpitude." *See generally* CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE §71.05[1][d] (discussing the history of "crimes involving moral turpitude" and which specific crimes fall within that definition).

[249] Harisiades v. Shaughnessy, 342 U.S. 580, 593 (1952).

[250] *Id.* at 594.

retroactively to deport noncitizens without running afoul of the ex post facto clause. It is hard to square *Dimaya*'s requirement of "fair notice" with a regime that allows the retroactive application of removal grounds. Perhaps a future Court will recognize this inconsistency and cut back on *Harisiades*' holding, ensuring that noncitizens truly have fair notice of the types of conduct that might subject them to removal, *before* they engage in that conduct.

G. Other Headlining Cases

The above Sections do not mean to suggest that the Court has been consistently hostile to the claims of noncitizens. The Supreme Court has issued roughly two to four immigration law decisions each year during the Roberts Court, and the noncitizens won about half the time. But these cases, while protecting noncitizens' interests, say nothing about the constitutional status of such individuals. In some cases, the reasoning is explicitly statutory or based on administrative law. In other cases, the reasoning is based on federalism principles. In all of them, the individual rights of noncitizens remain at the mercy of the political branches of the federal government.

1. Sub-Constitutional Cases

In the vast majority of modern cases in which the noncitizen prevailed, the Court relied on ordinary methods of statutory interpretation or administrative law.[251] These cases suggest a judicial willingness to interpret statutes narrowly to protect the interests of noncitizens; importantly, though, these cases do not do so under the doctrine of constitutional doubt.[252] They remain silent as to the constitutional status of noncitizens. While laudable for protecting the interests of noncitizens in the short term, these cases too often obscure

[251] *See, e.g.*, Nasrallah v. Barr, 140 S. Ct. 1683, 1688 (2020) (reversing order to remove noncitizen by interpreting a jurisdiction-stripping provision narrowly to allow judicial review over factual findings relating to an individual's application for relief under the Convention Against Torture); Moncrieffe v. Holder, 569 U.S. 184, 187 (2013) (rejecting agency's interpretation that a state conviction for possession of marijuana with intent to distribute constitutes an "aggravated felony" rendering the individual deportable and ineligible for relief from removal); Negusie v. Holder, 555 U.S. 511 (2009) (rejecting agency interpretation of statute that noncitizens who were coerced into participating in the persecution of others were barred from eligibility for asylum).

[252] *Cf.* Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 79 (2017) (arguing that recent Supreme Court willingness to exercise rigorous review in immigration cases is more reflective of distrust of administrative agencies than solicitude toward noncitizen's interests).

the larger trend of withdrawing more durable protections, i.e., those rooted in the Constitution, from those very same individuals. Ultimately, they rely on the political branches to define the rights of noncitizens, and if history is any lesson, such reliance breeds little faith.

The most salient of these cases, the Supreme Court's 2020 decision in *D.H.S. v. Regents of the University of California* invalidating the Trump Administration's efforts to rescind the Deferred Action for Childhood Arrivals ("DACA") program, underscores not only the weakness of statutory and administrative protections, but also the increasing difficulty of raising constitutional claims.[253] In 2012, the Obama Administration announced that it would grant "deferred action" status, providing forbearance from removal for renewable two-year periods, to qualifying young people who lived continuously in the United States for at least five years after they were brought to the United States without documentation as children.[254] Pursuant to long-standing regulations, recipients of deferred action (whether obtained on an individualized or more categorical basis) may apply for work authorization and are not deemed to accrue "bad time" for purposes of calculating the length of

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[253] *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1896 (2020).

[254] Memorandum from Janet Napolitano, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs.; and John Morton, Dir., U.S. Immigr. & Customs Enf't, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/EM3F-HSHP]. "Deferred action," a form of prosecutorial discretion, dates back to at least the 1970s. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246-52 (2010) (providing history of deferred action). Although it is typically granted on an individual case-by-case basis, deferred action had in the past been used to grant relief to pre-identified categories of individuals. For example, after Congress granted a path to lawful citizenship for certain undocumented aliens in the Immigration Reform and Control Act ("IRCA") in 1986, the Reagan and Bush Administrations implemented the "Family Fairness" program to grant deferred action to relatives of IRCA beneficiaries who did not themselves qualify for relief under IRCA. *See* Memorandum from Jeh Johnson, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs.; Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't; and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 2 (Nov. 20, 2014) [hereinafter Memorandum from Jeh Johnson] (describing Family Fairness program, which deferred the removal of an estimated 1.5 million undocumented spouses and minor children). For a discussion on the evolution of DACA within the administrative bureaucracy, see COX & RODRIGUEZ, *supra* note 56, at 174-80.

unlawful presence, which could otherwise lead to future inadmissibility.[255] According to Professors Cox and Rodriguez, from fiscal year 2012 to June 30, 2016, the government received 1,451,195 applications under the DACA program, and approved 87.4 percent of them.[256]

Two years later, on November 20, 2014, the Obama Administration announced, first, that it would be expanding the original DACA program to provide for renewable three-year periods of forbearance, lifting the age restriction, and allowing more recently entered individuals to apply.[257] Second, it announced what came to be known as DAPA, or Deferred Action for Parents of Americans, which would grant deferred action for undocumented parents of U.S. citizens or legal permanent residents as long as they fell within broad eligibility criteria and passed a background check.[258] The plans were estimated to provide relief to up to five million individuals, out of the estimated eleven million undocumented living in the country at the time.[259]

The DAPA program was immediately challenged by a group of states led by Texas. The district court for the Southern District of Texas entered a preliminary injunction,[260] which the Fifth Circuit affirmed.[261] In doing so, the Fifth Circuit found that the new programs likely constituted substantive rules which, under the Administrative Procedure Act, were required to undergo notice-and-comment rulemaking. Moreover, while it conceded the validity of decisions to forbear from removal, it found that the programs' grant of work

[255] 8 C.F.R. § 274a.12 (2021); *see also, e.g.*, Reno v. AADC, 525 U.S. 471, 484 n.8 (1999) (characterizing deferred action as "a regular practice . . . of exercising that discretion (to decline from prosecuting removal) for humanitarian reasons or simply for its own convenience.") (citing 16 C. GORDON S. MAILMAN & S. YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 242.1 (1998)).

[256] COX & RODRIGUEZ, *supra* note 56, at 176 n.75 (citing U.S. Customs and Immigration Services, *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2016 (June 30)*).

[257] Memorandum from Jeh Johnson, *supra* note 254, at 3.

[258] *Id.* The program granted deferred action to individuals with a U.S. citizen or lawful permanent resident son or daughter; resided continuously in the United States since January 1, 2010, were physically present as of the date of the memorandum, were not identified as enforcement priorities in other DHS documents (e.g., noncitizens with certain criminal convictions or recent undocumented arrivals), and presented no other factors that would make the grant of deferred action inappropriate.

[259] Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), https://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html [https://perma.cc/WR9R-7V6G].

[260] Texas v. United States, 86 F. Supp.3d 591, 677 (S.D. Tex. 2015).

[261] Texas v. United States, 809 F.3d 134, 188 (5th Cir. 2015).

authorization and "lawful presence" were in violation of the Immigration and Nationality Act. The Administration sought certiorari, but after the death of Justice Antonin Scalia, the Supreme Court split 4–4, leading to an affirmance of the lower courts' injunctions without opinion.

The original DACA program, though, remained in place. Indeed, newly elected President Trump repeatedly promised to preserve the program. But then, in September of 2017, then-Attorney General Jeff Sessions sent a memorandum to Acting Secretary of Homeland Security Elaine Duke, advising her to rescind DACA, which, in his view, "has the same legal . . . defects that the courts recognized as to DAPA" and was thus "likely" to be struck down by the courts.[262] The following day, Duke issued a memorandum formally terminating the program.[263] She justified the decision on the basis of the litigation finding DAPA unlawful and the Attorney General's letter asserting that DACA was likewise unlawful.[264]

Immigrant advocacy groups immediately filed suit in district courts around the nation. The Northern District of California (*Regents of the University of California v. DHS*)[265] and the Eastern District of New York (*Batalla Vidal v. Nielsen*)[266] entered preliminary injunctions, concluding that plaintiffs were likely to succeed on the merits of their claims that the DACA rescission was arbitrary and capricious in violation of the APA. The district court for the District of Columbia (*NAACP v. Trump*) similarly concluded that Secretary Duke's explanation was insufficient to justify the rescission; rather than ordering an immediate injunction, however, it stayed its order to permit DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority."[267]

Two months later, the new Secretary for Homeland Security Kirstjen Nielsen issued a memorandum which explicitly "declined to disturb"

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[262] *Letter from Attorney General Sessions to Acting Secretary Duke on the Rescission of DACA*, HOMELAND SECURITY, https://www.dhs.gov/publication/letter-attorney-general-sessions-acting-secretary-duke-rescission-daca [https://perma.cc/695T-M6CB].

[263] *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, HOMELAND SEC. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/LB67-48AF].

[264] *Id.*

[265] 279 F. Supp.3d 1011 (N.D. Ca. 2018), *affirmed*, 908 F.3d 476 (9th Cir. 2018).

[266] 291 F. Supp. 3d 260 (E.D.N.Y. 2018).

[267] Nat'l Ass'n for the Advancement of Colored People ("NAACP") v. Trump, 298 F. Supp. 3d 209, 245 (D.D.C. 2018).

the earlier memorandum.[268] Nielsen's memorandum did, however, list three separate rationales for rescission. First, she concluded, as had the Attorney General, that DACA was unlawful. Second, even if DACA was ultimately found to be lawful, the program was at least "legally questionable," which could "undermine public confidence in" the agency's respect for the rule of law and posed a "threat of burdensome litigation." Third, she identified several additional policy reasons for the rescission, including the administration's preference that immigration relief come from Congress; that relief be granted on a case-by-case rather than categorical bases; and to project a message that immigration laws would be enforced against all. While acknowledging that "DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives," she concluded that such "reliance interests" did not outweigh the other factors in favor of rescission.[269]

When the case ultimately reached the Supreme Court,[270] the Chief Justice authored the majority opinion concluding that the DACA rescission was arbitrary and capricious in violation of the APA. The Court concluded that the reasons set forth in the Nielsen memo were not properly before the Court, as they constituted post-hoc rationales in violation of the *Chenery II* principle, which requires that a policy be defended only on grounds contemporaneously proffered.[271]

On the merits of Secretary Duke's reasoning, the Court concluded that even if the conclusion that DACA's provision of work authorization and "lawful presence" violated the INA was appropriate, the agency failed to consider an important alternative — preserving the forbearance program *without* work authorization and lawful presence. Invoking

[268] It is not at all clear why Secretary Nielsen declined the district court's invitation to supply a new memorandum with new rationales for rescinding DACA, instead explicitly "declin[ing] to disturb" Duke's original memorandum. Memorandum from Kirstjen M. Nielsen, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., Regarding Deferred Action for Childhood Arrivals (DACA) 1 (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [https://perma.cc/525N-4RZA].

[269] *Id.* at 3.

[270] The Court granted certiorari after the Ninth Circuit issued an opinion in the *Regents of the University of California* case, but before the D.C. Circuit or Second Circuit completed appeals from the district court cases below. For a discussion of the Supreme Court's emerging practice of granting review before cases fully percolate through the lower courts, see Steven I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 140-41 (2019).

[271] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1908-09 (2020) (citing Sec. & Exch. Comm'n ("SEC") v. Chenery Corp., 332 U.S. 194, 201 (1947)).

State Farm hard look review, the Court concluded that "Secretary Duke 'failed to consider . . . important aspect[s] of the problem' before her."[272] Moreover, the majority concluded that the failure to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns" were fatal.[273]

The DACA decision was a blockbuster opinion, drawing close attention from all of the mainstream media outlets. But the decision in favor of immigrant advocates ultimately offered cold comfort to the program's beneficiaries. After all, the Chief Justice himself started his analysis as follows: "The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so."[274] And, as Justice Kavanaugh noted in dissent:

> The only practical consequence of the Court's decision to remand appears to be some delay. The Court's decision seems to allow the Department on remand to relabel and reiterate the substance of the Nielsen Memorandum [which the majority refused to consider because it did not purport to constitute a new decision], perhaps with some elaboration as suggested in the Court's opinion.[275]

Importantly, the plaintiffs in the various lawsuits challenging DACA's rescission did not limit their claims to statute. Rather, they each raised equal protection arguments. The Ninth Circuit in the *Regents of the University of California* case sustained this claim against a motion to dismiss, concluding that the complaint plausibly alleged an equal protection violation. It affirmed the district court's findings on this

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[272] *Id.* at 1910 (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983)).

[273] *Id.* at 1915.

[274] *Id.* at 1905.

[275] *Id.* at 1935 (Kavanaugh, J., dissenting in part). The exceedingly narrow nature of the Court's opinion became quickly apparent when the new Acting Secretary Chad Wolf issued a memorandum the following month, on July 28, 2020, directing the agency to reject all pending and future initial applications for DACA, and that renewals would be granted for a one-year, rather than the original two-year, period, pending his further review of the program. In yet another twist, however, a federal district court enjoined that memorandum, concluding that Wolf was unlawfully appointed and thus lacked authority to alter the program. Dennis Romero, *Federal Judge Rules Acting DHS Head Chad Wolf Unlawfully Appointed, Invalidates DACA Suspension*, NBC NEWS (Nov. 14, 2020, 2:21 PM PST), https://www.nbcnews.com/news/us-news/federal-judge-rules-acting-dhs-head-chad-wolf-unlawfully-appointed-n1247848 [https://perma.cc/YT4Q-ZFPD].

claim, noting first, the allegations that the DACA rescission disparately impacted Latinos and persons of Mexican heritage (who accounted for ninety-three percent of DACA recipients), second, the President's statements reflecting animus toward Latinos and Mexicans, and third, the unusual history of the rescission, in which the Trump Administration initially endorsed DACA "'as recently as three months before the recission, only to be hurriedly cast aside on what seems to have been a contrived excuse." According to the Ninth Circuit, "[t]his strange about-face, done at lightning speed, suggests that the normal care and consideration within the agency was bypassed.'"[276]

At the Supreme Court level, however, the equal protection claim was rejected. Chief Justice Roberts began by setting forth the elements required for such a claim: "To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision."[277] As to the evidence of disparate impact, the Chief Justice concluded, "because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program." He next concluded that there was nothing unusual about the history of the rescission, and that it reflected instead "a natural response to a newly identified problem."[278] And third, as for the President's statements expressing animus, the Chief Justice found they were "unilluminating."[279] "The relevant actors were most directly Acting Secretary Duke and the Attorney General," implying that even if the President did exhibit animus toward Latinos, such animus could not be imputed to the two officials who serve at his pleasure.[280] This implausible view of the working of the executive branch deserves notice. In any case, he concluded "these statements—remote in time and made in unrelated contexts—do not qualify as 'contemporary statements' probative of the decision at issue."[281] To dismiss these claims without allowing fact-finding suggests that to sustain an equal protection claim, allegations of the decider-in-chief's expressed animus toward a targeted group, and his subordinates' subsequent adoption of a policy disparately harming that targeted group, is not enough to

[276] Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 908 F.3d 476, 519 (9th Cir. 2018) (quoting district court opinion).

[277] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1915 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

[278] *Id.* at 1916.

[279] *Id.*

[280] *Id.*

[281] *Id.*

survive a motion to dismiss. Rather, the expressions of animus presumably must explicitly be linked to the challenged policy in both time and context. Such a conclusion appears to raise the bar considerably for alleging equal protection claims.

Cases like *D.H.S. v. Regents of the University of California* should be lauded for preserving some semblance of legal regularity for noncitizens. But at the same time, by ameliorating some of the harshness of immigration policies in the eyes of the general public, they obscure the more fundamental retrenchment of constitutional protections for these groups. They divert attention from the doctrinal denial of a place for noncitizens in our constitutional system.

2. Immigration Federalism Cases

Another headlining case favoring noncitizens, *Arizona v. United States* in 2012, was decided on constitutional grounds.[282] The constitutional issues did not involve the individual rights of noncitizens, however, but rather the allocation of immigration authority between the federal government and the States. In 2010, Arizona enacted legislation, referred to as S.B. 1070, with 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."[283] It established a state policy of "attrition through enforcement,"[284] one of dozens of state and local laws that sought to make the lives of undocumented noncitizens so difficult that they would self-deport.[285] On certiorari, the Supreme Court held that three of the four challenged provisions were unlawful because they were preempted by federal law. Perhaps most controversially, section six, allowing a state officer to arrest a person if the officer had probable cause to believe the person had committed an offense rendering him removable, was preempted because it posed an obstacle to federal enforcement policy on the ground that officers could arrest an individual for whom the federal government would have exercised discretion against enforcement.[286] To be sure, *Arizona*

[282] Arizona v. United States, 567 U.S. 387 (2012).

[283] Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[284] *Id.*

[285] *See generally* PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 57-67 (2015) (describing spike in anti-immigrant legislation proposed and enacted at the state and local levels).

[286] For a discussion of this application of preemption principles, see Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691 (2014).

constituted an important victory for noncitizens who would have been subjugated under the state laws. Importantly, however, the rationales for invalidating those state provisions were rooted in federal supremacy, *not* the rights of individuals.

And in other immigration federalism cases, noncitizens have fared less well. In *Chamber of Commerce v. Whiting*, the Court upheld an Arizona law requiring employers to use the federal database E-Verify to confirm an employee's work authorization and revoking the business licenses of employers who repeatedly hired noncitizens without work authorization against a preemption challenge.[287] Likewise, in the more recent *Kansas v. Garcia*, the Court upheld against a preemption challenge the state criminal convictions of individuals who had used false social security numbers in their applications for employment.[288] These cases underscore that immigration federalism cases are about the allocation of power between the federal government and the several States; the individual rights of immigrants are not at issue, and the preemption analysis will not always favor noncitizens.[289]

[287] Chamber of Com. of the U.S. v. Whiting, 563 U.S. 582 (2011). The Court concluded that the Arizona law was not preempted by the Immigration Reform and Control Act, which prohibits the employment of unauthorized individuals. IRCA expressly preempts states from imposing civil or criminal penalties on the employers of unauthorized aliens, but includes an explicit savings clause, excepting "licensing and similar laws." *Id.* at 590. Because Arizona's law involved licensing, the Court held that it fell within the savings clause. *Id.* at 597-98. As for the use of E-Verify, IRCA prohibits the federal government from requiring employers to employ the database, but provides incentives to encourage its use. The Court concluded that prohibiting the *federal* government from requiring the use of E-Verify said nothing about whether States could require such use. *Id.* at 590-92. As such, Arizona's provision requiring the use of E-Verify was not preempted. *Id.* at 592.

[288] Kansas v. Garcia, 140 S. Ct. 791 (2020). The Kansas Supreme Court had concluded that the convictions were preempted under federal law which requires employers to collect I-9 forms from new hires to verify their authorization to work, but which provides that no information on the I-9 forms may be used for any purpose other than enforcement of the INA or other listed federal statutes. *Id.* at 794. On certiorari, the Supreme Court held that the convictions were not preempted by that federal provision, because the individuals had used the false social security numbers not only on their I-9 forms, but also on tax-withholding forms required for all new hires. *Id.* at 803-04. It reasoned that the use of information from tax-withholding forms, although identical to the information included in the I-9 form, did not run afoul of federal law. *Id.*

[289] Professor Motomura has argued that preemption doctrines should differ depending on whether they seek to preempt restrictionist state and local laws rather than integrationist ones. MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 8, at 145-54. David Rubenstein notes, however, that the Supreme Court is not likely to adopt this position. David Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 1006-07 (2016).

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Immigrant victories in *Dimaya,* the DACA litigation, and *Arizona*, while important, tend to obscure the growing tenuity of noncitizens' constitutional status. Over the past quarter century, the Supreme Court has been engaged in a project to narrow and even repeal the constitutional rights of noncitizens. In areas ranging from the right to habeas corpus, procedural due process, the right to be free from discrimination, freedom of speech, and detention, noncitizens today enjoy even fewer protections than they did at the end of the last century. Without constitutional protections, their lives remain at the mercy of the political branches.

III. MOVING FORWARD

The retrenchment of constitutional rights detailed in the preceding Part raises important normative implications. The continued absence of constitutional constraints over government decisions to admit, detain, and deport noncitizens undermines basic notions of equality and the rule of law. It denies constitutional freedoms and security to the roughly twenty-one million noncitizens currently living in the United States, almost seven percent of our nation's population.[290] Moreover, it allows for the arbitrary exclusion of millions of noncitizens seeking to enter the United States, many of whom have U.S. citizen family members or employers with a meaningful interest in their admission. Noncitizens exemplify the type of "discrete and insular minority" that is subjugated by majoritarian politics.[291] Yet the current jurisprudence largely leaves these individuals at the mercy of the political branches, under a constant threat of arbitrary exclusion, detention, and deportation.

At the same time, it must be conceded that the ordinary application of constitutional rules to immigration law presents challenges. Distinctions between citizens and noncitizens inhere in the very premise of immigration law. And if the idea of citizenship is to have any substantive value, such distinctions arguably are necessary. Moreover, the sheer volume of noncitizens who seek admission into the United States each year likely makes extensive procedural protections to challenge exclusion decisions impracticable. Perhaps more fundamentally, immigration law routinely treats noncitizens differently

290 *See supra* note 2 and accompanying text.

291 United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n. 4 (1938); *see also* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate." (citations omitted)).

depending on their national origin, and such treatment may well be necessary to account for specific conditions in foreign states. This Part sketches out reforms that would bring immigration law closer to the constitutional norms of equality and the rule of law, while also taking into account those specific aspects of immigration law that may make the ordinary application of constitutional law impracticable.

While the central distinction between citizens and noncitizens cannot be avoided, it does not follow which social goods may be denied to noncitizens by virtue of their lack of citizenship. As Professor Hiroshi Motomura observes, in earlier times — notably when immigration into the country was racially restricted — noncitizens and citizens alike enjoyed, for example, the right to vote in state elections.[292] And, at least since *Plyler v. Doe*, even undocumented noncitizens are entitled to a free primary and secondary education.[293] Noncitizens live amongst us in our communities, holding jobs, going to school, paying taxes, and otherwise contributing to our society in ways indistinguishable from their citizen counterparts. They are our neighbors, employees, and often our family members. The crucial question becomes, then, which goods, or, more specifically, which constitutional rights, can fairly be denied to noncitizens in a country committed to equality principles and the rule of law.

Political philosopher Michael Walzer's theory of political justice identifies the difficulty in reconciling claims of equality with the denial of rights to noncitizens. His arguments regarding guest workers would appear to apply equally to all noncitizens lawfully residing within the United States, and arguably also to those residing here without authorization:

> These guests experience the state as a pervasive and frightening power that shapes their lives and regulates their every move—and never asks for their opinion. Departure is only a formal option; deportation, a continuous practical threat. As a group, they constitute a disenfranchised class . . .
>
> And yet the company of citizens from which they are excluded is not an endogamous company . . . Guest workers . . . are excluded from the company of men and women that includes other people exactly like themselves. They are locked into an

[292] MOTOMURA, AMERICANS IN WAITING, *supra* note 4, at 171-72; *see also* NEUMAN, *supra* note 4, at 63-71 (discussing historical emergence and subsequent demise of alien suffrage).

[293] Plyer v. Doe, 457 U.S. 202 (1982).

> inferior position that is also an anomalous position; they are outcasts in a society that has no caste norms . . .
>
> [T]he principle of political justice is this: that the processes of self-determination through which a democratic state shapes its internal life, must be open, and equally open, to all those men and women who live within its territory, work in the local economy, and are subject to local law.[294]

Notably, Walzer would place applicants for admission in a separate category. These individuals, standing as they do outside our nation's borders, do not enjoy the same claim to equality as those who have made it into the United States. Members of a political state must retain a right of self-determinism to define the criteria for admitting non-members into the polity, in accordance with the norms and social meanings shared by the existing members.[295] According to Walzer, "the right to choose admissions policy . . . is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community . . . Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination."[296] It is only once outsiders enter the community and begin to form the ties attendant to residence there, that principles of equality preclude the state from continuing to deny them membership.

Like Walzer, my assessment of what rights should be afforded to noncitizens depends on status of the noncitizen in question. Specifically, I argue that ordinary constitutional protections should apply in full to those with legal permanent resident ("LPR") status. Such protections would not afford these individuals with a constitutional right to remain, but they would prohibit government classifications (for

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[294] WALZER, *supra* note 35, at 59.

[295] *Id.* at 32. To be sure, this view — that the members of a polity have a right to exclude nonmembers — can be contested. *See, e.g.*, JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION (2013) (outlining positive case for open borders based in part on claims of moral legitimacy); Jeremy Waldron, *Immigration: A Lockean Approach*, (N.Y.U. Sch. of L., Working Paper No. 15-37, 2015), http://ssrn.com/abstract=2652710 [https://perma.cc/P2L3-ARJT] (employing Lockean approach to challenge premise of a state's right to exclude immigrants).

[296] WALZER, *supra* note 35, at 61-62. Walzer does not conclude, however, that the right to exclude is "absolute." Rather, it is limited by the internal principle of what the current members themselves choose, and by the external factor of a Rawlesian mutual aid principle. *Id.* at 62; *see also* Sarah Song, IMMIGRATION AND DEMOCRACY 52-69, 77-92 (2019) (rejecting open borders argument and defending state restrictions on immigration on basis of notion of collective self-determination with qualifications).

purposes of removal or investigation, for example) on the basis of race, ethnicity, religion, speech, national origin, or other grounds inconsistent with our constitutional norms. It would also require fair notice of the grounds that might render them deportable. These individuals further would be entitled to the right to habeas corpus and procedural due process protections, as determined by the *Mathews v. Eldridge* framework applicable outside the immigration context, to contest the legality of their detention and removal.

The same treatment should apply to individuals lawfully within the United States temporarily as well as to noncitizens physically in the United States without authorization, with one important caveat: classifications based on national origin for these individuals should not be subject to the ordinary standard of strict scrutiny, but rather to intermediate scrutiny. Finally, constitutional claims raised by applicants for initial entry should be subject to similar standards as for the preceding two groups. Denials of entry based on race, ethnicity, religion, or speech should be strictly prohibited. Individuals who are denied entry should be entitled to a reasoned explanation for the decision as well as a meaningful opportunity to challenge the denial, the contours of which would be defined under the *Mathews v. Eldridge* framework. Moreover, the right to habeas corpus for individuals excluded at the border and subsequently detained within the U.S. should be restored, allowing such individuals to challenge the lawfulness of these detentions and exclusions in federal court. Classifications of these individuals based on national origin, however, should not be subject to either strict or intermediate scrutiny, but rather a more robust version of the facially legitimate and bona fide reason standard.

A. Legal Permanent Residents

The first category consists of legal permanent residents ("LPRs"), for whom the government explicitly has granted permission to remain in the United States indefinitely, unless they engage in conduct that renders them deportable. These individuals present the strongest case for ordinary constitutional treatment. Under the traditional contractual view of immigration law, where the noncitizen and state are understood to have reached an agreement outlining the terms under which the noncitizen will be allowed into the country and permitted to stay,[297] the government cannot then deport the noncitizen arbitrarily or on grounds

[297] For a discussion of this contractual view of immigration law, see MOTOMURA, AMERICANS IN WAITING, *supra* note 4, at 9-10.

not previously agreed to. Likewise, under a conception of immigration as affiliation, where a noncitizen's claims to equality grow with his or her ties to the United States,[298] legal permanent residents should enjoy the same constitutional status as their citizen counterparts. Current doctrine recognizes some of these protections but not others.[299]

1. Habeas and Procedural Due Process

Even under the current jurisprudence, LPRs possess robust procedural protections to challenge their deportation. For example, *St. Cyr* recognizes that LPRs have a constitutional right to habeas to challenge the legality of their removal.[300] They likewise possess procedural due process rights to challenge their deportation; indeed, under *Landon v. Plasencia,* they possess such rights to challenge a denial of admission even when they temporarily leave the United States, at least if their absence is not lengthy.[301] The scope of their procedural protections is determined by application of the *Mathews v. Eldridge* balancing test,[302] which allows a reviewing court to take into account the immigration context of the inquiry.

Current jurisprudence is less generous, however, on protecting LPRs from arbitrary detention, and the Court has not decided whether such individuals have a constitutional right to be free from lengthy detentions without an individualized hearing. Brief detentions, as part of the arrest of a noncitizen charged with deportability, or to effectuate a removal order that has been entered, may be tolerated.[303] But our constitutional norms prohibit detention that lasts longer, unless the individual have a reasonable opportunity to show that there is no reason for such detention. As mentioned above, contrary to the Court's

298 *See id.* at 10-11.

299 Professor Jennifer Chacón illustrates how even legal permanent residents are subject to "liminal" legal statuses under current doctrine, a "temporally and socially uncertain transitional state of partial belonging that arises out of marginal legal status." Jennifer Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 710 (2015).

300 *See supra* notes 119–120 and accompanying text.

301 *See supra* notes 83–89 and accompanying text.

302 Mathews v. Eldridge, 424 U.S. 319 (1976).

303 *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."). For a critique of the immigration detention regime's ability to meet these goals, see Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137 (2013).

decision in *Demore v. Kim,* Congress's blanket conclusion that all noncitizens charged with certain grounds for removal merit detention undermines our constitutional commitment to freedom from arbitrary detention and norms of individualized justice.[304] And certainly, *extended* detention for longer than six months without an individualized hearing would appear to contradict noncitizens' right to due process protections, although the Court in *Jennings* declined to address that constitutional question.[305] Finally, the use of detention as a deterrent or to encourage individuals to self-deport regardless of the validity of their claim is a form of punishment that must adhere to constitutional procedures.[306]

2. Substantive Grounds for Removal

Even without the plenary power doctrine, Congress generally has carte blanche to define the types of conduct that render a noncitizen removable. Nothing in the Constitution grants noncitizens, even LPRs, a substantive right to remain in the United States. And under ordinary constitutional doctrine, any ground that is not otherwise subject to heightened protections (discussed below) is permissible, as long as it bears a rational relationship to a legitimate government objective. The application of this ordinary deference would easily sustain the deportation of LPRs who, for example, are convicted of drug crimes[307] or even accept public welfare benefits.[308] While such rules may well be bad policy, nothing in the Constitution precludes them.

Importantly, however, individuals must be given clear notice, in advance, of the types of conduct that will lead to deportation. *Dimaya* recognizes this right.[309] It is in considerable tension, however, with *Harisiades*' categorical exemption of deportation grounds from the prohibition against ex post facto laws.[310] *Dimaya* counsels for the earlier case's abandonment, and such abandonment is buttressed by the Court's willingness to recognize that deportation, while not formally criminal punishment, is unique and thus warrants special

304 *See supra* notes 214–220 and accompanying text.

305 *See supra* notes 221–227 and accompanying text.

306 *See* R.I.L.-R. v. Johnson, 80 F. Supp. 3d 164, 187-88 (D.D.C. 2015). *See generally* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237 (2019) (questioning as an empirical matter whether detention actually deters unlawful migration).

307 *See* 8 U.S.C. § 1227(a)(2)(B).

308 *See id.* § 1227(a)(5).

309 *See supra* notes 228–239 and accompanying text.

310 *See supra* notes 248–249 and accompanying text.

protections.[311] Without such reforms, the LPR's life in the U.S., and all of the settled expectations and investments that go along with it, will be subject to arbitrary extinction if he or she engages in conduct that was entirely permissible at the time it was conducted, but only later becomes a ground for removal.

Constitutional norms further preclude deportations or other immigration-related actions based on disfavored classifications such as race, ethnicity, religion, speech, or national origin. The extent to which current doctrine recognizes these norms in the immigration context remains somewhat unclear. The jurisprudence appears to acknowledge that LPRs cannot be deported on the basis of protected First Amendment activity. *Harisiades*, upholding the deportation of former Communist party members, cited *Denis v. United States*, and thus relied on the generally applicable First Amendment principles applicable at the time, rather than invoking special immigration-specific deference principles.[312] To hold otherwise would render virtually meaningless the rights noncitizens undoubtedly retain in the non-immigration context: it would make little sense to prohibit the government from imposing a criminal fine on a noncitizen for publishing an article, but then allow it to *deport* the noncitizen for the same conduct.[313] The Supreme Court should and probably does already recognize that reality.

Whether LPRs can be deported or investigated on the basis of race, ethnicity, religion, or national origin under current doctrine presents a more difficult question. *Fong Yue Ting* suggests they can,[314] but no modern Supreme Court case has tested whether this aspect of its holding remains good law. Nonetheless it is difficult to imagine a court countenancing discriminatory treatment of LPRs on the basis of race or religion today (although *Trump v. Hawaii* makes it somewhat easier).

But national origin presents a more complicated inquiry. After all, not all national origin classifications in immigration law are necessarily

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[311] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356 (2010) (declining to categorize deportation as a mere collateral consequence of criminal punishment and extending constitutional right to effective assistance of counsel to deportation matters).

[312] *See supra* notes 182–184 and accompanying text.

[313] *See* Bridges v. Wixon, 326 U.S. 135, 162 (1945) (Murphy, J., concurring) ("Thus the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom. The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him . . . . [It cannot be that] the Constitution meant to make such an empty mockery of human freedom.").

[314] *See supra* notes 48–52 and accompanying text.

motivated by pernicious animus.[315] Immigration law routinely makes national-origin classifications in ways the system takes for granted. Professor David Martin, who served in the government's immigration agencies for six years across three administrations, has defended the plenary power doctrine on the ground that it is necessary to allow the government to manage delicate foreign affairs issues.[316] His argument appears trained primarily at preserving national-origin classifications. While he concedes the risk that such deference may ultimately sanction invidious motives, he concludes that the risk is necessary given the need to vest the government with the flexibility of "rough-hewn" tools to conduct its affairs with other nation-states.[317] He cites to the Iran Hostage Crisis as an example of such need for deference.[318] In my view, however, even in these circumstances, the classification of *lawful permanent residents* on the basis of national origin would not have been justified. It is notable that the Executive Branch in both the Iran Hostage Crisis[319] and the Special Call-In Registration program of NSEERS[320] targeted only temporary residents, *not* legal permanent residents. Moreover, Professor Martin points out that the government had at one point considered *interning* Iranian nationals residing in the United States as part of its negotiations strategy.[321] In my view, such evidence underscores the need for the judiciary to retain a role to prevent such flagrant abuses of power.

Ultimately, my conclusion that ordinary constitutional standards must apply even to national-origin classifications employed against LPRs rests on our nation's tarnished history.[322] In 1875, Congress enacted the first federal law prohibiting entry of certain classes of noncitizens in the Page Act,[323] which prohibited the entry of criminals and prostitutes, a provision "widely understood as an effort to curb Chinese migration."[324] Then, in 1882, it enacted the first of a series of measures that explicitly excluded ethnic Chinese from entering the

315 For an insightful analysis of the emergence of animus as a doctrine, see William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155 (2019).

316 Martin, *supra* note 17, at 41-42, 50.

317 *Id.* at 42-43.

318 *Id.*

319 *See supra* notes 144–146 and accompanying text.

320 *See supra* notes 156–163 and accompanying text.

321 Martin, *supra* note 17, at 43 n.44.

322 *See generally* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (recounting history of racial exclusions in U.S. immigration laws).

323 Page Act of 1875, ch. 141, 18 Stat. 477.

324 COX & RODRIGUEZ, *supra* note 56, at 27.

United States.[325] The ban on Chinese entries remained in place until as late as 1943, when such patently racist laws became an international embarrassment in light of the racial atrocities of Nazi Germany and the role of China as a U.S. ally in the Second World War.

Chinese were not the only ethnic group targeted by racist immigration laws. Pursuant to the so-called Gentleman's Agreement in 1907, Japanese were generally prohibiting from immigrating to the U.S.[326] In 1917, Congress enacted the "Asiatic Barred Zone," excluding noncitizens from a broad swathe of the globe ranging from Saudi Arabia to the Polynesian Islands.[327] Then, in 1924, Congress imposed a broad prohibition on the entry of any individual "ineligible for citizenship,"[328] which at the time was racially restricted to "free white persons"[329] or "aliens of African nativity . . . [or] persons of African descent."[330]

Nor were white Europeans immunized from immigration policies explicitly motivated by notions of racial inferiority. The National Origins Act of 1924 for the first time imposed quantitative limits on immigration and allocated the number of admissions per country based on that country's share of the population residing in the United States.[331] The national origins system, later characterized as "directed principally at two peoples, the Italians and the Jews,"[332] imposed strict restrictions on newer arrivals from "the races of eastern and southern Europe," who were described as "reproduce[ing] more rapidly on a lower standard of living" and "unduly charg[ing] our institutions for the care of the socially inadequate."[333] These restrictions were explicitly defended as necessary to preserve the racial status quo of the United States.[334] Similarly, as historian Mae Ngai documents, Mexicans, who occupied American territory before "Americans" did, were deemed too foreign as a race to be deemed as true citizens, evident by the forcible repatriation of approximately 400,000 Mexicans, about half of whom

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325 Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58; Scott Act of 1888, ch. 1064, 25 Stat. 504; Geary Act of 1892, ch. 60, 27 Stat. 25; Chinese Exclusion Extension Act, ch. 1630, 33 Stat. 428.

326 COX & RODRIGUEZ, *supra* note 56, at 35-40.

327 Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874; *see also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 18 (2004).

328 Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162.

329 Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790).

330 Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

331 Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159.

332 70 CONG. REC. 3526 (Feb. 25, 1929).

333 H.R. REP. NO. 68-350, at 13-14 (1924).

334 *Id.* (urging that "the basic strain of our population must be maintained").

were actually U.S. citizens, during the Depression.[335] As for naturalization laws, which worked in tandem with immigration rules, the U.S. initially limited naturalization to "free white persons,"[336] and then extended it after the Civil War to "aliens of African nativity and to persons of African descent."[337] In *Ozawa v. U.S.*[338] and *U.S. v. Thind,*[339] the Supreme Court affirmed that neither an individual of Japanese descent nor one of Indian descent satisfied the racial requirements for U.S. citizenship through naturalization.[340]

Too often, calls for national security and the like have served as fig leaves for the orthodoxy of white supremacy. With the benefit of hindsight, it is easy to dismiss concerns about "vast hordes" of Chinese "crowding in upon us," as senseless racism; but at the time, Chinese migration was deemed sufficiently "dangerous to [the nation's] peace and security" to justify being barred.[341] Lest we repeat the errors of our past, courts should be vigilant in enforcing a constitutional right to be free from discrimination, including classifications based on national origin, on the part of legal permanent residents, who have been incorporated into our national fabric with the express consent of the government. These individuals should, to the extent possible, be treated as "Americans in Waiting."[342]

B. Temporary Residents and Visitors

The same reasoning applies to protect the constitutional rights to habeas corpus, procedural due process, free speech, and freedom from discrimination on the basis of race, ethnicity, or religion for lawful temporary residents such as students and guest workers as well as other visitors such as tourists. They, like LPRs, are present in the United States with the government's express consent and have settled expectations for remaining, at least for a specified period. Their investment in living in the U.S. and interest in remaining, are, however, somewhat less than those of LPRs. For this reason, I conclude that the use of national origin classifications against this group may sometimes

335 NGAI, *supra* note 327, at 135, 142.

336 Naturalization Act of 1790, 1 Stat. 103 (1790).

337 Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

338 Ozawa v. United States, 260 U.S. 178, 197 (1922).

339 United States v. Thind, 261 U.S. 204, 215 (1923).

340 For a discussion of the different approaches to racial definition employed in naturalization cases, see NGAI, *supra* note 327, at 38-46.

341 Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

342 MOTOMURA, AMERICANS IN WAITING, *supra* note 4, at 171-73.

be permitted. I argue that courts should employ intermediate scrutiny rather than the strict scrutiny that would ordinarily apply outside the immigration context, when the government classifies temporary residents and visitors on the basis of national origin.

1. Habeas and Procedural Due Process

Temporary residents and visitors lawfully in the United States accused of removability should retain the right to habeas corpus to challenge their removal in court when they are detained. While the Supreme Court has not directly addressed this issue, its reasoning in *St. Cyr*,[343] guaranteeing habeas to LPRs, would seem to apply equally to those who are lawfully present but only for a limited period. Moreover, *Mezei* and *Zadvydas* clearly contemplate that these individuals, like LPRs, possess procedural due process protections.[344] Nothing in *Thuraissigiam* suggests otherwise for noncitizens lawfully admitted into the country. Again, I endorse application of the *Mathews v. Eldridge* balancing test to determine the types of procedural protections that must be afforded, which would allow for an accounting of perhaps meaningful differences between LPRs and lawful visitors. Notably, temporary residents and visitors generally will have a less weighty interest in remaining in the United States than LPRs, which might warrant fewer procedural protections.

On the other hand, temporary residents and visitors should enjoy the same freedom from arbitrary detention as LPRs. Indeed, this freedom should apply equally to all individuals physically within the United States, whether permanently, temporarily, or without authorization. The government simply cannot detain individuals for lengthy periods of time, without showing that the individual is dangerous or poses flight risk, regardless of the individual's immigration status. If the individual is found removable, then the government must remove him or her; it cannot detain them for lengthy periods.[345]

2. Grounds for Removal

As with LPRs, temporary residents and visitors should be entitled to fair notice of the grounds for removal. Nothing in the logic of *Dimaya* suggests its ruling should be limited to LPRs. Courts should also

[343] *See supra* note 109 and accompanying text.

[344] *See supra* notes 137–138 and accompanying text.

[345] *Cf.* Wong v. United States, 163 U.S. 228 (1896) (holding that government may not impose hard labor on deportable noncitizen without first holding a criminal trial).

recognize that the Constitution prohibits the government from classifying these individuals on the basis of race, ethnicity, religion, or ideology.

As to classifications based on national origin, however, I reach a different conclusion than I do for legal permanent residents. While I remain concerned by our nation's historical use of national origin to promote racist ideologies, I reluctantly conclude that the use of national origin classifications among temporary residents and visitors, who have less of a stake in remaining in the United States than LPRs, may in some narrow circumstances be justified. The singling out of Iranian students during the Iran Hostage Crisis, described above, presents an example. Under ordinary standards of constitutional review, such disparate treatment on the basis of national origin would be prohibited unless narrowly tailored to serve a compelling government interest. And, as the old saw goes, strict scrutiny generally is strict in theory but fatal in fact. To allow for the government to take into account such nation-specific circumstances, I conclude that courts should employ intermediate scrutiny to review national-origin classifications deployed against temporary residents and visitors. That is, this group of noncitizens may be classified (for purposes of deportation or investigation, for example) on the basis of national origin, but only where doing so is substantially related to an important government interest.[346] The rigor of this standard would ensure that the government not use national origin as a proxy for race, or general criminality, terrorism or undesirability. For example, the use of national origin in the Special Call-In Registration program of NSEERS[347] would probably not satisfy intermediate scrutiny, as the relationship between national origin and terrorism would not be sufficiently substantial. At the same time, employment of this less rigorous standard would address the concern articulated by Professor Martin that the government be given the "rough-hewn" tools necessary to engage in international diplomacy.

C. Noncitizens Present Without Authorization

The constitutional status that should be afforded to noncitizens present in the United States without authorization is more controversial. Under the traditional view of immigration as contract, noncitizens without legal status arguably would have no claim to constitutional protection because the government never agreed to admit

[346] *Cf.* Craig v. Boren, 429 U.S. 190 (1976) (developing intermediate scrutiny standard and applying it to classifications based on gender).

[347] *See supra* notes 156–163 and accompanying text.

them or let them remain. Yet conceiving immigration as a matter of affiliation rather than contract would award at least some of these noncitizens constitutional protections. As mentioned earlier, this population comprises 3.2 percent of our nation's population, and two-thirds of this group has lived in the United States for ten years or longer.[348] As a matter of fact if not law, they have become integrated into our national fabric. Indeed, if immigration is a matter of affiliation, long-term undocumented residents have a stronger claim to equality than lawful temporary visitors. I conclude that unauthorized noncitizens, like their lawfully present counterparts, should be entitled to habeas corpus as well as procedural due process protections under the *Mathews v. Eldridge* framework. Moreover, I maintain that the same standards of constitutional review should apply in assessing the substantive grounds for removal for unauthorized residents as they do for temporary lawful residents and visitors. That is, ordinary constitutional standards of review should apply for most suspect classifications, but national-origin classifications should be subject to only intermediate scrutiny.

1. Habeas and Procedural Due Process

Like all individuals physically within the United States, noncitizens accused of being present without authorization and thus deportable should retain the right to have a court review the legality of their removal and detention. Their right to habeas corpus, allowing federal court review over questions of law (though not necessarily questions of fact) should be restored in full. These individuals should also be entitled to ordinary procedural due process protections — that is, as defined by the *Mathews v. Eldridge* balancing test — to challenge their removal. While these individuals concededly have a weaker claim to remain in the United States than, for example, legal permanent residents, they arguably have a stronger interest in remaining than lawful tourists. The *Mathews v. Eldridge* framework allows for courts to account for such differences. It can calibrate the procedures to be afforded based on, for example, the length of time the individual has lived in the United States, whether they have family members here, whether they are employed, etc.

Whether current doctrine guarantees these rights to individuals who are present without authorization remains an open question. Earlier cases such as *Mezei* and *Zadvydas* suggested that unauthorized noncitizens possess procedural due process protections.[349] But

[348] *See supra* note 5–6 and accompanying text.

[349] *See supra* notes 137138 and accompanying text.

Thuraissigiam cuts back on that notion, denying both habeas as well as procedural due process to at least some individuals physically within the United States without lawful status.[350] Lower courts should read *Thuraissigiam* narrowly, to apply only to noncitizens lacking documentation who are apprehended within twenty-five yards of the border virtually immediately after a surreptitious entry. For all other undocumented noncitizens within the United States, the right to habeas and procedural due process protections could and should apply.

Finally, like LPRs and other lawfully present noncitizens, undocumented individuals who are detained for long periods pending removal proceedings must be afforded an opportunity to show that they pose no flight risk or danger to safety. Notwithstanding their lack of documentation, as persons physically within the United States, they should retain the right to be free from arbitrary detention, just as they are free from being convicted for a crime without trial.

2. Substantive Grounds for Removal

Nor do our constitutional norms of Equal Protection and the First Amendment permit the government to target undocumented noncitizens for removal, much less interrogation and investigation for non-immigration purposes, on the basis of disfavored categories such as race, ethnicity, religion, or speech. The Supreme Court's treatment of selective enforcement claims in *Reno v. AADC* arguably would allow the federal government to institute a program of deporting only undocumented individuals who are Latinx, or perhaps deport only those who are non-white.[351] Such violence to our constitutional norms warrants a judicial remedy. While the need to protect prosecutorial decisions from extensive judicial inquiry is important, a categorical rejection of selective prosecution claims appears too blunt a tool for that goal. After all, the prosecutors in *AADC* explicitly stated that the reason they were targeting respondents was their membership in a disfavored political organization. Under such circumstances, where it is virtually uncontroverted that the government is targeting certain groups on the basis of an otherwise protected ground such as speech or race or religion, courts should not be powerless to act. And providing the remedy of allowing those noncitizens who are the victims of such

[350] *See supra* notes 99 and 136 and accompanying text.

[351] *See supra* notes 190–201 and accompanying text; *see also* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010) (identifying potential for arbitrariness and abuse in exercise of prosecutorial discretion in immigration law).

conduct to remain in the United States would seem to provide an appropriate deterrent. Such relief would be analogous to congressional provisions that grant lawful status to undocumented noncitizens who are the victims of crime or domestic violence.[352]

As to classifications based on national origin, I again conclude that the use of such classifications among undocumented noncitizens should be subject to intermediate scrutiny. The reasoning is the same as it is for lawful temporary residents and visitors: the need to preclude the use of national origin as a proxy for racist ideology, while at the same time granting the government space to employ "rough-hewn" tools of international diplomacy. In addition, national-origin classifications play an important humanitarian role in ensuring noncitizens without authorization are not repatriated to dangerous countries. Under the Temporary Protected Status ("TPS") program, the government designates certain countries in the midst of armed conflict or natural disasters, and grants nationals of those countries' forbearance from removal for the duration of the emergency.[353] TPS likely would not survive the strict scrutiny ordinarily applicable to national origin classifications outside the immigration context, as it is arguably overinclusive. But it would likely survive intermediate scrutiny, as it is substantially related to an important government interest.

As long as the rights set forth above are respected, undocumented noncitizens have no independent constitutional claim to remain in the United States. To be sure, as a matter of policy, I would argue that they should be granted legal permission to remain given the sizeable contributions they have made to our communities and the inequity of maintaining a shadow population in our midst living in constant fear of deportation.[354] But that is a question for the political branches to decide, not one for constitutional law.[355]

D. Applicants for Entry

Finally, I turn to noncitizens seeking initial admission into the country. The question of these individuals' rights is of growing concern, given the rise in forced migration across the globe. As Professor

[352] *See* 8 U.S.C. § 1101(a)(15)(T), (U).

[353] 8 U.S.C. § 1254a(b)(1).

[354] *See generally* Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463 (2019) (describing breadth of immigration enforcement mechanisms and their impact on the daily lives of undocumented individuals).

[355] For a thoughtful proposal to regularize the status of undocumented individuals, see MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 8, at 208-35.

Motomura notes, "[t]he political focus has shifted to large numbers of new migrants who are fleeing civil war and unrest, famine, environmental calamity, collapsing economies, and other dire conditions."[356] Immigration doctrine has always imposed a clear distinction between those within the territorial United States, and those outside of it.[357] Individuals in this category have the weakest claim to constitutional status, but I nonetheless conclude that they must possess some protection. Principles of equality and the rule of law demand that even these individuals be vested with procedural due process protections to challenge an exclusion. And, these individuals cannot be excluded on constitutionally disfavored grounds of race, ethnicity, religion, or speech, although I would again except exclusion decisions made on the basis of national origin. Given the accepted prevalence of national-origin classifications in our nation's admissions system, I conclude that such classifications should be subject only to a more robust version of the facially legitimate and bona fide reason standard.

1. Habeas and Procedural Due Process

In my view, rule of law norms require that noncitizens denied entry into the United States be vested with a procedural due process right to challenge their exclusion.[358] Under current doctrine, noncitizens do not possess standing to challenge a denial of admission, but citizens with an interest in the noncitizen's admission do, and, moreover, are entitled to a reason for the exclusion.[359] The applicant may be a close family

[356] Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 478 (2020); *see also* Martin, *supra* note 17, at 32 ("[We live] in a world facing new and more challenging forms of violence and conflict, a growing number of weak and failed states, a possible increase in virulently contagious diseases, and more severe migration pressures.").

[357] The primary rationale for this distinction is that the Constitution does not have extraterritorial effect. This territorial distinction, however, has always been far more complicated. *E.g.*, NEUMAN, *supra* note 4, at 72-94.

[358] *Compare* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process of law as far as an alien denied entry is concerned."), *with* Hart, *The Power of Congress*, *supra* note 70, and accompanying text (criticizing *Knauff* as incompatible with norms of rule of law and judicial review).

[359] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that U.S. citizens have First Amendment protected interest in admission of noncitizen invited to speak at conference, but that denial of admission is permissible as long as "facially legitimate and bona fide reason" provided); *cf.* Kerry v. Din, 576 U.S. 86, 87 (2015) (finding no procedural due process violation where government provides "facially legitimate and bona fide reason" for denial of admission, but declining to determine whether U.S.

member, or perhaps, as in *Kleindienst*, merely an individual with whom the U.S. citizen wants to engage in dialogue.

But even for noncitizens without an American petitioning for their admission, rule of law norms counsel for at least some reasoning in support of a denial.[360] As Professor Adam Cox has argued, immigration law routinely impacts the economic and associational interests of citizens.[361] Even short of these types of direct impact, admissions decisions impact the interests of citizens in important expressive ways. "Immigration law plays a central role in national self-definition by regulating entrance into the national political community. Citizens, as members of that community, have a substantial interest in how the existing community is constituted. And immigration law can injure citizens by expressing constitutionally impermissible conceptions of national political identity."[362] As a citizen of Asian descent, I cannot feel "equal" to non-Asians if our country has identified Asians as a race to be undesirable and inadmissible. To protect those citizen interests, as well as to ensure that the decisions of consular and border officials comply with the polity's decisions as to who may enter, the law must require, at a minimum, that some reason be given for the exclusion of a noncitizen; it cannot be the case that such officials can deny entry for any reason or no reason at all.

Again, I endorse application of the *Mathews v. Eldridge* balancing test to determine the scope of procedures afforded to individuals denied admission. The flexibility of this standard allows it to calibrate situations where the noncitizen's interest in entering the United States is particularly great, such as when he or she seeks admission to reunite with close family members or applies for asylum. It also allows for an account of the government's weighty interest in not affording extensive procedures, given the sheer volume of noncitizens who apply to enter the United States (whether as a lawful permanent resident or a mere tourist) in consulates across the globe. Application of this standard is not likely to require a formal hearing, but it would at least help ensure that those applicants with particular interest in entering the U.S. are not arbitrarily denied admission.

citizen spouse possesses constitutionally protected procedural due process right to challenge denial of admission to noncitizen).

360 *See* Fallon, *supra* note 36, at 18.

361 Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 391-92 (2004).

362 *Id.* at 376; *see also* Johnson, *supra* note 322, at 1148-53 (assessing how racial discrimination against noncitizens impacts citizens of color).

I now turn to the special situation of individuals excluded at the border and subsequently detained at a facility inside the United States pending further proceedings. Under the "entry fiction" doctrine, courts treat such individuals as though they remained outside the border, and thus, generally outside the reach of the Constitution's protections. Importantly, though, at least until *Thuraissigiam,* such individuals were understood to possess a constitutional right to habeas to challenge the lawfulness of their detention and exclusion.[363] The holding in *Thuraissigiam* runs contrary to one of the most basic tenets of the rule of law: that the government cannot detain any individual arbitrarily. It would appear to permit the government, with no judicial recourse, to exclude and detain any noncitizen at the border (or even in the nation's interior) for any reason or no reason at all. Such circumstances simply cannot be squared with our constitutional traditions. Rather, noncitizens stopped and detained at the border must retain a right to habeas to challenge the lawfulness of their exclusion and detention in court. Consistent with a century of past practice, the reviewing court would be empowered to review any questions of law raised by the exclusion or detention, but not necessarily questions of fact. This qualification should significantly limit the number of cases sent to federal court, mitigating concerns about practicability.

2. Substantive Grounds for Exclusion

As with individuals present in the United States without authorization, I conclude that ordinary standards of constitutional review should apply to ensure that individuals are not excluded from the United States based on race, ethnicity, religion, speech, or other suspect categories. I conclude, though, that classifications among applicants for entry based on national origin should not be subject to ordinary standards of constitutional review or even intermediate scrutiny, but instead should be subject to a more robust version of the facially legitimate and bona fide reason standard.

National origin classifications play a particularly large role in decisions relating to the admission of a first-time applicant. Such classifications are taken for granted and typically are entirely justifiable. For example, the U.S. frequently enters into bilateral treaties with countries that afford their nationals preferential treatment, such as permission to enter the United States without first securing a visa with the U.S. consulate, as in the visa waiver program.[364] Similarly, the U.S.

[363] *See supra* notes 107–110 and accompanying text.

[364] 8 U.S.C. § 1187.

typically targets specific regions and nations for refugee selection.[365] And at times, Congress acts to grant preferential treatment to the nationals of some countries to account for, for example, historical considerations.[366] Application of intermediate scrutiny in this context would unnecessarily hamstring government policies like these. It would impose a presumption against the use of national origins, undermining the functioning of our overall admissions system. Instead, I endorse a more robust version of the facially legitimate and bona fide reason standard to review admission criteria based on national origin. Under this standard, treating applicants for entry differently based on their national origin would be deemed "facially legitimate," notwithstanding its reliance on a suspect classification, in cases where for example the classification is part of a bilateral agreement that grants reciprocal rights to our nationals. Using national origin classifications on the ground that nationals of particular countries are deemed more likely to engage in criminal conduct or terrorism, by contrast, in my view would not be facially legitimate.[367]

I readily acknowledge, as Aziz Huq has observed, "[g]iven that national origin can often be used as a proxy for either race and religion, the absence of a rule against it in the immigration context will predictably allow leakage of formally impermissible motives into that sphere."[368] To mitigate this risk, the "facially legitimate and bona fide reason" standard needs to be applied with more fidelity to its text than it has in the past. The application of the standard in *Hawaii* seemed to sustain a rationale that was *not* bona fide but rather pretextual. Such applications undermine the rule of law. Future courts should apply the standard to ensure that the stated reason for the national origin classification (e.g., to promote free trade and movement between two countries) is actually bona fide (e.g., not a pretext for discrimination).

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[365] *See id.* § 1157 (setting forth procedures for political branches to identify regional conditions requiring refugee resettlement). *See generally* COX & RODRIGUEZ, *supra* note 56, at 52-78 (describing emergence of executive branch practice of admitting refugees from particular nations unilaterally after World War II and the Cold War).

[366] *See, e.g.*, MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 8, at 194-95 (discussing Cuban Adjustment Act of 1966 and Nicaraguan Adjustment and Central American Relief Act ("NACARA") of 1997).

[367] *But see* Rajah v. Mukasey, 544 F.3d 427, 439 (2d Cir. 2008) ("To be sure, the Program did select countries that were . . . predominantly Muslim . . . . However, one major threat of terrorist attacks comes from radical Islamic groups. The September 11 attacks were facilitated by violations of immigration laws by aliens from predominantly Muslim nations.").

[368] Huq, *supra* note 97.

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It is true that many of these reforms are unlikely to meet a warm reception in the Supreme Court, at least as currently constituted. It is certainly my hope that the political branches of government will secure many of these protections. But ultimately, I remain convinced that such reforms must be recognized by the judiciary. Our nation's historical record is replete with instances in which the political branches stripped noncitizens of rights we consider fundamental to personhood, such as the right to be free from racial discrimination or from arbitrary detention. The political process simply cannot be relied upon to consistently protect the interests of noncitizens who do not vote. Durable protections can only be realized through the courts' interpretation of our Constitution.

CONCLUSION

Notwithstanding the optimistic predictions of commentators, immigration jurisprudence over the past quarter century has been marked by a judiciary increasingly hostile to the constitutional claims of noncitizens. In areas ranging from access to the courts, procedural due process, discrimination, free speech, and detention, the Supreme Court has reversed even the modest gains of the twentieth century. The period is aptly characterized as one of rights retrenchment.

One might counter by pointing out that while the modern Court has denied constitutional protections to noncitizens, it has been relatively active in protecting their interests under statutory or regulatory law. But leaving the rights of noncitizens to the political branches is a dangerous game. As the Court itself has noted, noncitizens are the paradigmatic "discrete and insular class" whose interests are most vulnerable to political majorities.[369] And, if the Trump era has taught us anything, it is to be less sanguine about how far the political branches may be willing to go in harming noncitizens.

The prognosis is not entirely fatal, however. Current doctrine recognizes some constitutional protections for noncitizens, especially legally permanent residents. And it leaves openings for the recognition of additional rights. Some aspects of the doctrine, however, simply cannot be reconciled with constitutional norms of equality and the rule of law and must be formally overturned.

[369] Graham v. Richardson, 403 U.S. 365, 372 (1971).