Protecting Human Rights through Domestic Constitutional Law: Canada and the United States—Spain and Germany

Cristina M. Rodríguez (NYU School of Law)

Preliminary Draft—Please do not cite or circulate

[*The excerpt that follows is from a larger project I am pursuing with Ruth Rubio-Marin, of the European University Institute, comparing the protection of immigrants' rights in the United States, Canada, Spain, and Germany. This excerpt focuses primarily on the U.S. case, with some references to important points of similarity and/or divergence from the Canadian model. The material on Germany and Spain is being produced separately*.]

In this Paper, we explore the developments of the last decade concerning recognition of migrants' rights in Canada, the United States, Germany, and Spain. Among the questions we consider are the extent to which rights hierarchies exist in each system that distinguish among political, constitutional, and human rights. We focus on how domestic constitutional norms act as filters to human rights protections. Whereas the main subject of concern in human rights law is the individual person, as such, in the constitutional context, distinctions are drawn between citizens and non-citizens (as well as between different categories of non-citizens, such as permanent residents, illegal immigrants, etc.). The validity of these distinctions varies depending on domain; the political domain has traditionally been reserved to citizens, but social rights and civil liberties apply more broadly to the human being, even at a constitutional level.

Though the creation of citizenship-based hierarchies may seem to limit the rights of migrants, a fairly robust protection has emerged through domestic constitutional law that is likely stronger than what could be expected from the attempt to persuade courts to apply human rights norms directly, though we consider the extent to which human rights norms have shaped the constitutional law of immigrants' rights. We also explore how the recognition of immigrants' rights, particularly the rights of the illegal migrants, has resulted from political as opposed to judicial action. In the United States, for example, important

jurisprudential developments concerning due process and the writ of habeas corpus have curtailed state authority over detention and enforcement. But the greatest possibility for recognition of illegal immigrants' de facto incorporation into the social fabric and their subsequent vested interests in the polity seems located in the political process.

I. *The North American Framework for Protecting Migrants' Rights through Constitutional Law*

Both the United States and Canada are societies largely constituted by immigration—a sociological fact crucial to understanding the fairly robust yet contested terrain of constitutional immigrants rights in each system. Historically, each society has maintained a population with large numbers of foreign-born residents; today, approximately 12% of the U.S. population is foreign born, and 19% of the Canadian population was born abroad.[1] In each system, rapid naturalization and the concomitant integration of large foreign-born populations has played a crucial role in the development of the nation-state.[2]

In the United States, in particular, the development of a constitutional framework for migrants' rights has been an important complement to this institutional construction of new citizens. Our long history of contestation over the status of immigrants within the polity, which has been marked by alternations between inclusion and exclusion depending on the economic, foreign relations, and national security concerns of the day, has been crucial to the

---

[1] Reed Ueda, *Immigration in Global Historical Perspective*, THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965 17 (Mary C. Waters & Reed Ueda, eds. 2007).

[2] In both the United States and Canada, the constitutions commit the naturalization power to the federal government, and Congress and Parliament respectively have devised criteria for naturalization that have varied over time (until the mid-20th century, for example, the U.S. maintained prohibitions on naturalization by certain aliens of Asian origin) but that today render naturalization relatively straightforward and open. In Canada, permanent residents may naturalized after merely three years of residency, and in the United States naturalization is possible after five years of residence, coupled with evidence of minimal English-language skills and profession of loyalty to the Constitution. For an account of these rules, see Patrick Weil, *Access to Citizenship: A Comparison of 25 Nationality Laws*, in CITIZENSHIP TODAY (Aleinikoff & Klusmeyer, eds. 2005).

development of our constitutional culture more generally. With a few exceptions, the protections of the U.S. Constitution apply to persons—a universality that has been a matter of historical necessity and continues to be a point of pride. In both the United States and Canada, lawful immigrants with territorial presence enjoy equal status with citizens vis-à-vis most constitutionally protected rights, with the important exceptions, namely the right to vote and the right to remain.

The crucial line of division, therefore, is drawn not between citizens and non-citizens, but by the border itself—between persons located inside the territory of the nation state and those located outside.[3] Importantly, in the United States (and to a much lesser extent in Canada), the border has come to be defined as a *legal* line rather than a physical one. Its use as a triggering device for constitutional protection therefore has been more dramatic than it may seem at first glance. Territorial presence alone is not sufficient to give rise to the full range of constitutional restraints on government action; instead, the increasingly elusive status of lawfully admitted immigrant must be attained. This basic principle is traceable to the so-called plenary power doctrine, or the federal government's exclusive and non-reviewable power to control who enters and who may remain inside the United States—a power articulated by the Supreme Court in the 1880s based on pre-constitutional conceptions of sovereignty.

And yet, though phrased in absolutist terms, the plenary power has, since its articulation, been subject to repeated and vigorous challenge through the mobilization of foundational constitutional norms that emphasize limited government and the preservation

---

[3] For an excellent discussion of the complex interaction of immigration and alienage law and the ways in which the border reaches inside the United States to justify drawing distinctions between citizens and non-citizens, see LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006).

of individual liberties through judicially enforced procedural guarantees. In the United States today, these twin concepts are being invoked by courts and advocates in two important arenas: in assessing the scope of the government's power to detain noncitizens and in the treatment of unauthorized immigrants. These two debates demonstrate how the turn to constitutional traditions can provide traction for emerging issues in immigrants' rights, particularly in a world of sovereign nation states. In each of these instances, the legal developments that have unfolded in the last decade (in a largely incremental but rights-protective direction) simultaneously draw from the longstanding constitutional framework that structures the status of migrants and modifies that framework in a manner responsive to and reflective of international practice.

In the pages that follow, we briefly set out the structure of immigrants' rights under the U.S. Constitution and the Canadian Charter of Rights and Freedoms, delineating the hierarchies of rights contained therein. We then consider how innovations on the U.S. framework, in particular, are today leading to renewed debate over the scope of protection provided by the Constitution and whether that scope should extend beyond the limits marked by the legal border.

A. *Hierarchies of Rights in Existing Law*

In both the United States and Canada, basic principles of equality under the law and due process of law ("fundamental justice" in Canada[4]) apply universally. These twin protections provide a firm foundation for the protection of immigrants from arbitrary state

[4] This provision is the closest analog to the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution. Drafters of the Charter actually rejected the "due process" formulation, to prevent the debates that have bedeviled U.S. constitutional jurisprudence with respect to whether the due process clause includes a substantive component.

action, as well as state action that infringes the dignitary interests of non-citizens. In both contexts, important Supreme Court decisions have clarified that these core provisions are not limited by citizenship.[5]

Several of the Charter's rights provisions open with the phrase, "everyone shall have the right," including section seven, which guarantees the right to "life, liberty, and security of the person and [the] right not to be deprived thereof except in accordance with principles of fundamental justice." Section 15 of the Canadian Charter of Rights and Freedoms prohibits discrimination (which must include the impairment of human dignity) on various grounds, including grounds analogous to those listed in the Charter, such as race, religion, and sex. In *Andrews v. law Society of B.C.*, the Supreme Court of Canada unanimously struck down a British Columbia law that required members of the bar to be Canadian citizens. The Court found that "citizenship" constitutes an analogous ground, because it is a "personal characteristic" not within the control of the individual and therefore "immutable."[6] Leaving aside the fact that Canada's generous naturalization laws make the characteristic immutable in only limited circumstances and for limited duration, the Court clearly brought non-citizens within the s. 15 fold.

Similarly, the Fourteenth Amendment to the U.S. Constitution, which contains an equal protection and a due process component, has been interpreted to apply to non-citizens. In *Yick Wo v. Hopkins*,[7] the Court made clear that the clause's reference to persons meant that it

---

[5] For a comprehensive account of the constitutional debate in the United States, see RUTH RUBIO- MARÍN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENS AND INCLUSION IN THE UNITED STATES AND GERMANY 131-185(2000).

[6] [1989] 1 S.C.R. 143.

[7] 118 U.S. 356 (1888).

applied to protect the interests of Chinese non-citizens from arbitrary state action. This case solidified the universal applicability of the Equal Protection Clause and was remarkable in its willingness to extend the Constitution to protect Chinese immigrants at the height of the era of Chinese Exclusion, discussed in more detail below. Despite the existence of the exclusion laws, the city of San Francisco was not justified in systematically denying persons of Chinese origin the municipal permits necessary to operate commercial laundries, while granting the permit requests of white citizens.[8]

To be sure, both the Supreme Court of Canada and the United States Supreme Court have upheld state laws that deny immigrants' certain privileges. For example, as a historical matter, states have been permitted to reserve the exploitation of natural resources to citizens, and civil service jobs that represent core government functions can be restricted to citizens, as well. But the non-discrimination principle that has been enforced since the nineteenth century protects lawful non-citizens from most forms of arbitrary treatment. To the extent that a state extends a benefit to citizens, that benefit must be extended to non-citizens as well. As the Court frames it in subsequent cases, non-citizens pay taxes and are subject to conscription. What is more, they do not have the right to vote and so cannot protect their interests through the political process. This combination of factors entitles them to judicial protection.[9]

But these equal protection and due process guarantees provide only a baseline of protection. For reasons explored in more detail in the next part, the Equal Protection Clause

---

[8] In addition, other constitutional rights, such as freedom of speech and freedom from unlawful searches and seizures, are phrased in the Constitution as restraints on government power, not as rights of citizens, and so these provisions protect the interests of all persons.

[9] *See* Graham v. Richardson, 403 U.S. 365 (1971).

does not restrain the federal government's authority to discriminate against non-citizens. Such discrimination is considered par for the course in the federal government's exercise of the immigration power, which itself justifies decisions by the federal government to deny immigrants access to welfare benefits and other things it denominates privileges of citizenship.[10] What is more, the federal government is not restrained by the First Amendment from deporting someone for speech that would otherwise be protected, though historically many members of the Court have expressed extreme unease at the hypocrisy of protecting a non-citizen's right to express Communist views without criminal prosecution but permitting those same views to form the basis for civil deportation.

In addition, two rights have become the defining features of citizenship in both the United States and Canada—the right to vote and the right to remain. With respect to the franchise, the fact that it has evolved to become synonymous with citizenship may be of limited significance,[11] given the relatively generous possibilities for naturalization in both societies. Whatever the claim for non-citizen voting rights might be, the far more consequential divide today is the one explored in Parts B&C below—between immigrants lawfully admitted and immigrants subject to screening. Indeed, it is that divide that also frames the right to remain—that determines to what extent constitutional limitations apply to restrain government power over non-citizens' ability to challenge their removal from the country they may call home.

---

[10] *See* Mathews v. Diaz, 426 U.S. 67 (1976).

[11] *See, e.g.* Peter Spiro, Beyond Citizenship (2007) (making this claim). For an assessment of non-citizen voting as a matter of political economy, see Cristina M. Rodriguez, *From Litigation, Legislation*, 117 Yale L.J. 1132 (2008).

B. *The Detention of non-Citizens, Due Process of Law, and Legal Cosmopolitanism*

Whereas the relatively stable framework outlined above covers the rights of territorially present immigrants whom the state is acknowledged to have admitted, the scope of state authority over the rights of migrants extends well beyond the parameters that framework contemplates. Before immigrants acquire the status that entitles them to invoke the full protection of the Constitution, they must be screened by the state for inclusion. The site of contestation over the last decade in U.S. jurisprudence has been the scope of the government's screening authority.

On a basic level, of course, the state's right to exclude some immigrants is taken for granted in all systems, though considerable literature exists challenging the morality of exclusion on various grounds.[12] The Supreme Court of Canada has interpreted the section seven guarantee of fundamental justice to allow the state to protect itself against truly dangerous persons.[13] In the United States, the power to exclude has been understood historically as quite broad and not limited by any of the rights provisions, including the Equal Protection Clause,[14] discussed above. But recent developments have challenged the breadth of this power. To understand how significant recent developments have been, it is crucial to delve a bit deeper into the definition of the plenary power.

---

[12] For recent and compelling arguments in favor of open borders, based on pragmatic as well as humanitarian rationales, see KEVIN JOHNSON, OPENING THE FLOODGATES (2007). For the classic defense of open borders, see Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251-252 (1987). *See also* Michael Blake, *Universal and Qualified Rights to Immigration*, 4 Ethics and Economics 1 (2006). For a recent discussion of the ethics of who should be permitted into a territory, see Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, THEORETICAL INQUIRIES IN LAW 389, 399 (2007). As Bruce Ackerman frames it in *Social Justice and the Liberal State*, the only justification for exclusion of immigrants is maintenance of the liberal conversation.

[13] Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3, 2002 SCC 1.

[14] Since 1965, a non-discrimination norm has governed U.S. screening policy, though it is far from clear that a court today would strike down a federal law that limited entrance of persons of particular national origins.

In 1889, in *Chae Chan Ping v. United States*,[15] otherwise known as the *Chinese Exclusion Case*, the Supreme Court upheld a series of laws passed by Congress that prohibited the entry of Chinese immigrants, including those who resided in the United States but had left the country temporarily. In upholding the law, the Court traced Congress's power to exclude Chinese laborers not to the Constitution, but to the sovereignty that precedes it. The understanding of sovereignty that justified the exclusion of the Chinese was embodied in the idea that "jurisdiction over its own territory is a proposition which we do not think open to controversy," because it is "an incident of every independent nation."

In articulating the source of the power to exclude, the Court drew its understanding of the then-dominant conceptions of the law of nations, which emphasized the right of every nation to refuse to admit a foreigner when "he cannot enter without putting the nation in evident danger."[16] In *Ekiu v. United States*,[17] the Court re-enforced the nature of the power to exclude as inherent in the existence of the nation state, emphasizing that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." And in *Fong Yue Ting*, where the Court extended this conception of sovereignty to include the power to summarily deport those who have been admitted, it cited Vattel's

---

[15] 130 U.S. 581 (1889) (upholding congressional act of 1888 barring return of Chinese laborers to the United States unless laborer possessed government-issued certificate).

[16] *See id.* at (citing Vattel, Law of Nations). For an scholarly account that dismantles the conclusion that nineteenth century international law justified an unlimited right to exclude, see Nafziger, Am. J. Int'l. Law (1986).

[17] 142 U.S. 651 (1892) (upholding the immigration act of 1891, which codified existing Chinese exclusion laws and provided for exclusive federal inspection of arriving aliens).

Law of Nations for the proposition that the nation's right to refuse to admit a foreigner stems from "what it owes to itself, the care of its safety."

The Court's approach, in the *Chinese Exclusion* cases and other precedents of the era, to identifying the source of the immigration power was of course in some tension with the first principles of American constitutionalism—that the federal government is one of enumerated powers. Rather than ground the power to exclude in an authority delegated by the people, through the Constitution, to Congress, and thus according to the popular conception of sovereignty that shaped the Constitution, the Court turned to a kind of international power politics, or to a conception that emphasizes the "status of the nation-state as one among many in an international world."[18] The idea of external or inherent sovereignty reached its apotheosis in the 1930s, when the Court explained in *Curtiss-Wright*, a controversial and foundational precedent in the law of foreign affairs:

> The broad statement that the federal government can exercise no power except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . . As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.[19]

---

[18] Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 614 (2008).

[19] *United States v. Curitss-Wright Export Corp.*, 299 U.S. 304 (1936). For a leading critique of the logic of this decision, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 23-26 (1972). Henkin actually concludes that *Curtiss-Wright* extends beyond the Chinese exclusion cases, in which the Court treated the immigration power not as extra-constitutional, but as inherent in sovereignty and therefore supplemental to the enumerated provisions in the Constitution. *See id.* at 22. In my view, this distinction is largely one of emphasis, not of substance. To read the Court's definition of the immigration power through a kind of "necessary and proper" lens would be to distort the Necessary and Proper Clause. What is more, the idea of inherent sovereignty seems to be in tension with the conception of popular sovereignty that defines the Constitution.

But the "end-run" around enumeration when it comes to matters related to the "outside" world has its origins in the era of Chinese exclusion. It appears that in the Court's estimation at that time, the absolute power to exclude did not need to be enumerated, because without it, the nation state could not exist; there would be no constitutional project to maintain.[20] Indeed, the Court warned that "[i]f a sovereign could not exclude aliens, it would be to that extent subject to the control of another power."[21]

This move may have reflected then ascendant conceptions of international law, and a Court approaching this question as one of first impression today would arguably be more likely to rely on some combination of the Commerce Clause and the Naturalization Power[22] to find authority for congressional regulation. But the framing of the immigration power as an incident of sovereignty external to the Constitution has exerted extraordinary influence over how we understand the nature of the state's authority over immigration, facilitating the continued treatment of immigration as a constitutional gray area.[23]

---

[20] Survivalist arguments are often invoked in foreign affairs and national security contexts, *i.e.*, in Justice Jackson's words, "the Constitution is not a suicide pact." *See Terminiello v. Chicago.* As Learned Hand has written, "For centuries it has been a accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand; and this applies with especial force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general language." *See* LEARNED HAND, THE BILL OF RIGHTS 14 (1958).

[21] *Chae Chan Ping.*

[22] The fact that the Constitution gives Congress the exclusive power to establish a uniform rule of naturalization is often cited by courts in immigration cases as evidence that the immigration power is exclusively federal. But, of course, naturalization and immigration are hardly synonymous, and relying exclusively on the naturalization power to support not only an immigration power, but also an exclusively federal immigration power, is dubious.

[23] Many scholars have articulated and critiqued the nature of the so-called plenary power and discussed the ways in which the Supreme Court's jurisprudence over time appears to have eroded its force. *See, e.g.*, [string cite]. My purpose in this Paper is not to reinvent this particular wheel, though recent decisions such as *De More v. Kim* and *INS v. Nguyen* underscore that the plenary power still influences constitutional jurisprudence in the immigration context. Instead, I seek to offer an alternative that is consistent with the sovereign interest in border control but that nonetheless acknowledges the de facto limitations on this form of state authority.

Even in the late nineteenth century, however, in the jurisprudence of Chinese exclusion, limitations on the sovereign's power to act summarily against the foreigner were perceived. Whether these limitations were understood as modifying sovereignty, or as articulating a parallel, domestic conception of sovereignty triggered once the focus turned from the extraterritorial to the territorial United States, is less important than the recognition that the logic of exclusion had to have limits. Seeing this makes it possible to ask the question: is it conceptually coherent to talk of territorial limits but not extraterritorial ones?

In *Chae Chan Ping*, for example, Justice Field, writing for the majority, acknowledges that there are exceptions to the "full and complete power of the nation within its own territories," but that they must "be traced up to the consent of the nation itself." In dissent in *Fong Yue Ting*, he takes this a step further, rejecting the majority's conclusion that the power to deport flowed seamlessly from the power to exclude, on the grounds that aliens admitted with the consent of the government could not be deported without constitutional restraint—underscoring that the initial consent of the polity to the alien's presence translated into an obligation of fair treatment in the future. "Arbitrary and despotic power can no more be exercised over them without reference to their persons or property, than over the persons and property of native-born citizens. As men having our common humanity, they are protected by all the guaranties of the Constitution."

Even the majority in *Fong Yue Ting*, which extended the logic of *Chae Chan Ping* to those aliens to whose presence the polity had consented, arguably acknowledged this possibility, when it wrote that Chinese laborers "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." The protection of

common humanity may not have extended to the Chinese, but the sovereign power over foreigners was arguably limited as those aliens who *were* permitted to naturalize and developed ties to the U.S.

In *Yick Wo v. Hopkins*, discussed above, the Court observes: "sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists." From there, the Court underscores that the rights to life, liberty, and the pursuit of happiness are secured by the constitutional principles that are "the monuments showing the victorious progress of the race in securing to men the blessings or civilization under the reign of just and equal laws" and that "the very idea that one man may be compelled to hold his life, or the means of his life, at the mere will of another, seems to be intolerable in any country where freedom prevails." In other words, in this era, the Court is struggling to reconcile two competing conceptions of sovereignty—a statist and absolutist one, and the popular conception of sovereignty unique to American constitutional design at the time.

Today, these views have matured into robust procedural protections for migrants in the midst of the screening process. Justice Field's dissenting views in particular have become constitutionally grounded protections for the rights of non-citizens, developed through the gradual application of the Due Process Clause.[24] Over the course of the twentieth century, however, the Supreme Court has vacillated between greater and lesser application of due process to government screening decisions. Perhaps the most famous dictum in immigration

[24] *See Shaughnessy v. Mezei*, 345 U.S. 206 (1953) (holding that immigrant could be detained at Ellis Island on security grounds even though no country would accept him, raising the spectre of indefinite detention).

jurisprudence is the Court's claim that non-citizens are entitled to whatever process Congress decides to extend to them—a claim clearly at odds with the also prevalent assumption that the Due Process Clause constrains government action.

At the outset of this century, in the months before the attacks of September 11, 2001, the Supreme Court oscillated in the direction of the latter sentiment, in an opinion that many observers regarded as signaling the demise of the plenary power. In *Zadvydas v. Davis*,[25] the Supreme Court interpreted the federal statute governing detention of non-citizens subject to removal to include a limit on the length of time the government could detain a non-citizen ordered removed.[26] In the case, Zadvydas has been ordered removed in light of a felony conviction. The government was unable, however, to find a country who would accept him; he was of Lithuanian origin but was born in a displaced persons camp in Germany, but he could claim neither Lithuanian nor German citizenship, and neither country would accept him. After the government failed to convince the Dominican Republic—his wife's country of citizenship—to accept him, Zadvydas challenged his continued detention on the ground that it had become constructively indefinite. To avoid the constitutional problem that such indefinite detention would raise, the Supreme Court interpreted the statute at issue to require the release of persons in Zadvydas's situation after six months, subject to periodic review for national security or terrorism-related reasons. In

---

[25] Though he rejects the Court's holding as flagrant judicial activism and inconsistent with *Mezei*, Justice Scalia does recognize that government could not torture someone it is holding, even if he had no right to enter. The Court protects some bare minimum of human dignity protected even when the person has no status before the law in the U.S.

[26] The statute reads: "An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if release, shall be subject to [certain] terms of supervision." INA § 241(a)(6).

other words, the Court interpreted the Due Process Clause as giving it the license to modify the scope of Congress's detention authority.[27]

The use of the Constitution to limit congressional decision-making with respect to immigrant screening was greeted as revolutionary. Some scholars have suggested that the Court's willingness to construe immigration statutes to avoid constitutional problems indicates a potential willingness to also construe statutes to avoid the infringement of international human rights.[28] Perhaps more important, the lower courts have given *Zadvydas* considerable teeth, making what would otherwise be politically risky decisions and demonstrating that the Supreme Court's decision was not a one-off case to be distinguished away based on the facts of subsequent cases.[29]

That said, it did not take long for the Court to return to the plenary power doctrine in the name of exercising judicial restraint. The power was clearly at work in another 2001 Court decision, as well as in a follow-on case to *Zadvydas* in 2003. In *INS v. Nguyen*, decided in 2001, the Court ostensibly reserved the question of whether Congress's plenary power

---

[27] *See also* Clark v. Martinez, 543 U.S. 371 (2005) (extending *Zadvydas* to the case of Cubans held in detention since the Mariel boatlift).

[28] *See, e.g.*, David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 Colum. Hum. Rts. L. Rev. 627 (2006) (assessing the role that international human rights law might have to play in the effort to protect, strengthen, and develop legal protections for immigrants and arguing that advocates of the application of human rights norms ought to advanced "modest claims of statutory construction and constitutional interpretation in courts" and more expansive conceptions of international human rights in the "political and popular realms").

[29] *See, e.g.*, *Ly v.* Hansen, 351 F.3d 263 (6 th Cir. 2003) (holding that deportable aliens may not be indefinitely detained without a government showing of a 'strong special justification' and noting that Congress's plenary control must still be exercised within the bounds of the Constitution); *Nadarajah v.* Gonzles, 443 F.3d 1069 (9th Cir. 2006) (granting habeas relief to removable Sri Lankan national on ground that statute permits detention only while removal is reasonably foreseeable). It is also worth noting that the courts of appeals have been active recently in addressing the Border Patrol's increasingly invasive border searches. *See, e.g.*, *United States v. Ickes* 393 F. 3d, 501 (4th Cir. 2005) (holding that there is no First Amendment exception for expressive materials to the relaxation of the Fourth Amendment during border searches); *United States v. Arnold* (CA9 2008) (holding that border control agents who found child pornography on defendant's laptop did not violate the Fourth Amendment despite not having reasonable suspicion to conduct the search).

over immigration justified reducing the equal protection scrutiny given to a derivative citizenship law (no longer in effect today) that made it more difficult for the father of a non-marital child to pass on his U.S. citizenship than for similarly situated mothers.[30] The Court held that the discriminatory law satisfied the intermediate review required of gender classifications. Justice O'Connor's vigorous dissent in the case, which emphasizes the Court's acceptance of gendered stereotypes masquerading as substantial state interests,[31] makes the compelling and in my view correct case that the Court's opinion fails utterly to apply the scrutiny to the government's position that precedent requires in the case of gender classifications. Indeed, it is hard to explain the outcome in *Nguyen* other than by pointing to the context in which it was decided: The Court was forced to evaluate a decision by Congress defining the transmission of membership in the political community against a backdrop of the massive overseas deployment of U.S. troops (Nguyen was the product of a union between a U.S. soldier and a Vietnamese woman in the 1970s), which appears to have

---

[30] The derivative citizenship law then in force permitted mothers to transmit their citizenship to their non-marital children without limitation (other than the requirement that the general requirement that the mother have lived in the U.S. for a certain period of time in her life), but required fathers to claim and prove paternity before the child's eighteenth birthday. The petitioner in *Nguyen* was born overseas but raised in the United States by his father from a young age. His father did not seek to secure his derivative citizenship until after petitioner's 18th birthday, when petitioner ended up in removal proceedings.

[31] Two state interests that justified treating men and women differently in their ability to transmit citizenship to their children born out of wedlock. The first interest was ensuring the verifiability of parentage, something obvious to the mother at birth, but not necessarily to the father, hence the presumption in favor of U.S.-citizen mothers. This presumption is apparently permissible, despite the fact that the *INS* was unlikely to have been present at the birth and therefore faces the same challenge of assessing claims of parentage for fraud, whether a mother or a father makes the claim. The Court's assumption must have been that birth records are more reliable as proof of maternity than as of paternity, because there can be no question as to who has given birth to the child. The second interest accepted by the Court was enhancing the likelihood that the U.S.-citizen parent has had a relationship with the child—a relationship that presumably stands in as a proxy for the child's attachment to the United States. The likelihood of a relationship, the Court concludes, can be presumed for the mother but not for the father, because the mother is necessarily present at birth and therefore more likely to be compelled to nurture the child. This latter state interest and Congress's use of the gender classification to advance it reek of the gendered stereotypes supposedly verboten under the Court's equal protection doctrine. Indeed, in his assessment for the Court of the unique bonds between mother and child, Justice Kennedy foreshadows his sentimental tour de force in *Gonzales v. Carhart* (2007) (upholding federal statute banning so-called "partial birth abortion" procedure).

given rise to a concern in Justice Kennedy's mind that the strict application of equal protection norms would make the United States as a polity responsible for the sexual activity of its male service members.

In 2003, in *De More v. Kim*, the Court reasserts the primacy and inerrancy of Congress represented by the plenary power by upholding a mandatory detention scheme passed in 1996 and rejecting the claim that due process requires individualized hearings before the government can detain a non-citizen pending his removal hearings. Though the Court, over time, had imposed due process-based limits on the scope of Congress's authority to set rules for the treatment of non-citizens that would not be acceptable when applied to citizens, thus imposing external limitations on Congress's sovereign authority, *De More* signaled that the constitutional normalization of immigration law would not run its full course. In that opinion, Chief Justice Rehnquist pointedly reasserted the chestnut that all the process that is due non-citizens is the process Congress decides to extend.[32] In both cases, the sovereignty of the fence continued to exert considerable influence on the Court's constitutional analysis. In *INS v. Nguyen*, the sovereignty concern was of being overwhelmed with new citizens produced as the result of our military ventures. The sovereignty concern in *De More* revolved around public safety and security, a concern whose roots extend back to *Fong Yue Ting* and the articulation of the power to exclude as essential for the protection of national security,

---

[32] *De More* came as a particular blow to advocates and scholars who had long criticized the anti-constitutional nature of the plenary power, because it seemed to reassert the plenary power, which many had believed had been eroded through the application of due process norms to the processes of removal. The conception of sovereignty contained by the plenary power is also reflected in the treatment of the border as a site of relaxed constitutional protection. The authority to search the persons and now laptops of anyone, citizen or non-citizen alike, to protect the territorial integrity of the United States justifies relaxation of privacy or personal liberty concerns.

where national security was defined not just as the rejection of invading armies, but also of the more quotidian public health, safety, and welfare threats posed by aliens.[33]

And yet, the most recent installment in the complicated history of constitutional review of the government's power to detain non-citizens suggests robust judicial and *constitutional* supervision. For seven years, the Court, the President, and Congress engaged in a back-and-forth over the extent of the President's statutory authority to manage the detention of enemy combatants captured in the so-called "War on Terror"—a term the Obama administration has abandoned—at the U.S. Naval base in Guantanamo Bay, Cuba. But in the summer of 2008, the Supreme Court handed down a landmark constitutional decision rejecting a federal statute that stripped the federal courts of habeas jurisdiction and denied the Guantanamo detainees access to the writ of habeas corpus (which enables the individual to challenge his or her detention by the Executive).

In *Boumediene v. Bush*,[34] the Court cited the United States' effective control over Guantanamo, despite the absence of formal sovereignty, to support application of the habeas guarantees of the Constitution to the detainees held at the base. The Court noted, "it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another."[35] The Court thus rejects the idea that the sovereignty in the "legal and technical sense" should determine the

---

[33] These cases could be characterized as immigrants' rights cases, as opposed to sovereignty cases. But even though they demonstrate that the crack in sovereignty that have been permitted have been in order to extend basic constitutional protections to citizens within our territory, it is impossible to separate the conception of sovereignty as border control from the conceptualization of the rights owed immigrants and the constraints the Constitution can be said to place on state action in this context.

[34] 128 S.Ct. 2229 (2008).

[35] Slip op. at 24.

rights afforded to non-citizens held by the United States at Guantanamo.[36] The Court was emphatic that though formal questions of sovereignty and territorial governance are the province of the political branches, Congress and the Executive do not have the power "to switch the Constitution on or off at will," and circumvent the Constitution's limits on their powers by invoking a formalistic conception of sovereignty to shield its actions from review.[37] In other words, the external limitations on the sovereign's behavior must apply when the sovereign is acting as such in both its *de jure* and *de facto* capacities.

As a matter of separation of powers generally, this decision, though arguably late in coming, marks a substantial break with past practice, because it asserts the applicability of the Constitution to the actions of the U.S. government outside its formal territory. As David Cole has framed it, *Boumediene* "pierces the veil of sovereignty" and insists on judicial review to safeguard the human rights of citizens and non-citizens alike.[38] He characterizes the decision as part of a recent "transnational trend" according to which domestic courts of last resort have played an aggressive role in reviewing state security measures that violate individual rights. Other commentators argue that the decision has less to do with traditional separation of powers—indeed it reflects a substantial break from custom in that area—and more to do with a growing commitment on the part of American jurists to a "judicial

---

[36] *Id.* at 23.

[37] *Id.* at 35.

[38] David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 Cato Sup. Ct. Rev. 47, 51 (2008).

cosmopolitanism," or the belief that judges have a constitutional obligation to protect the interests of non-citizens, regardless of what the constitutional structure dictates.[39]

As a matter of immigration law, it is difficult to read *Boumediene* as not modifying the plenary power, as not establishing that the government's screening decisions are subject to due process-based restraints. Of course, the Court in *Boumediene* does not define what due process requires, sending the case back to the lower courts to figure out these minor details. And shortly after the Supreme Court's holding, the Court of Appeals for the D.C. Circuit issued a decision that reaffirmed the Executive's power to detain pursuant to the immigration laws. In *Kiyemba v. Obama*,[40] the court rejected the habeas petitions brought by 17 Chinese Uighurs (a Muslim minority group in China) held at Guatanamo Bay; despite having formally acknowledged that the Uighurs were not enemy combatants, the U.S. government continued to detain them, because returning them to China could result in their torture or persecution, and no other country would accept them. The Uighurs argued that the combination of *Boumediene* and *Zadvydas* required their release, but the D.C. Circuit held that the Court does not have the power to authorize their release into the U.S., noting that the Supreme Court "has, without exception, sustained the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States and on what terms." Because no law expressly authorized the Uighurs' release, the Court had not authority to do so.[41] Though the Court distinguishes *Zadvydas* on the ground that the Due Process Clause does not apply to aliens without property or presence in the sovereign United

---

[39] Eric A. Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, 2008 Cato Sup. Ct. Rev. 23, 24-25 (2008).

[40] __F.3d__, 2009 WL 383618 (D.C. Cir. 2009).

States, that reasoning seems to glide right past the Supreme Court's observations regarding sovereignty in *Boumediene*. Indeed, the court does not grapple with the implications of *Boumediene*, potentially setting up Supreme Court review on the subject. Regardless of how the debate turns out, however, it is reflective of the persistence of the plenary power.

When told chronologically, the story of the rise, fall, and reassertion of the plenary power can leave one feeling as if the Supreme Court's doctrine is first and foremost responsive to political context, rather than to a coherent theory of the relationship between the Constitution and the government's power to screen immigrants. As a legal doctrine, the plenary power essentially has become a doctrine of judicial review according to which the Court polices some questions of process but cedes as a political question most questions of substance. Most of the scholarly commentary critiques this aspect of the doctrine, though as a matter of separation of powers, this understanding of the plenary power seems entirely appropriate. Of course, it's possible that both *De More* and *Nguyen* could have come out differently without requiring the Court to decide a political question, and *Kiyemba* seems in considerable tension with *Boumediene*. The more important point is that all of these cases reflect the Court's willingness, in certain circumstances, to abandon even a limited supervisory role in the immigration context, but in others to reassert that role. Our purpose in recounting the narrative is to emphasize that the scope of government authority to screen non-citizens is perpetually contested, and that the Constitution stands in the background as a domestic bulwark against arbitrary state action, even if the Court is sometimes reluctant to invoke it.

C. *Irregular Migrants and Rights Protection*

The problem of irregular or illegal immigration is certainly not unique to the United States. Spain and Italy, in particular, have recent histories of dealing with illegal immigration through periodic amnesties or regularization laws. But in the United States, the debate over illegal immigration is at the center of the immigration debate, and today the illegal population is estimated to consist of 11-12 million people, approximately 70% of whom are from Mexico and Central America. This population is the product of what one of us has called the "admissions-status trade-off," a dynamic according to which "more immigration translates into diminished support for immigrants' rights, and more robust immigrants' rights translate into less support for immigrants' admission."[42] The United States has consistently made the trade-off in the former sense—a "cultural" preference that is robust today.

To address what is perceived to be a rule-of-law problem—a problem that undermines public confidence in the efficacy and good faith of government—all levels of government in the U.S. have been active of late. At the federal level, the political branches have been trending in the direction of ever-greater enforcement to address this phenomenon, launching high profile raids on worksites, as well as homes, to net and then deport unauthorized immigrants. But perhaps the most important recent regulatory trend on this front has been the involvement of state and local governments in the management of illegal immigration through the adoption of laws that crack down on employers and enlist state and federal law enforcement in immigration policing.

Many of the laws and practices adopted to address illegal immigration present serious due process concerns, at all levels of government. The Bush Administration's emphasis on immigration raids (which the Obama Department of Homeland Security has pledged to

---

[42] Cristina M. Rodriguez, *The Citizenship Paradox in a Transnational Age*, 106 Mich. L. Rev. 1111, 1122 (2008).

modify but not end) has led to the accumulation of socially disruptive indignities imposed upon communities where immigrants work and live, such as the disruption of families and the sudden loss of consumer bases as the result of mass detentions, as well as affronts to due process, such as the mass hearings held in tents with poor translation and limited access to counsel after the July 2008 raid on a meatpacking plant in Postville, Iowa.[43] These policy choices clearly emanate from a robust conception of the plenary power,[44] but they are forms of engagement that challenge our democratic commitments nonetheless. At the state and local level, laws that would deny undocumented immigrants access to housing or seek to prevent unauthorized immigrants from enrolling their children in schools or using basic public services, including public parks and libraries, while not pervasive, still present relatively new legal problems with potentially severe human rights consequences. [45]

That we are dealing with undocumented or unlawful immigration complicates matters considerably, as the legal framework for conceptualizing the "rights" of undocumented immigrants is far from clear. The Supreme Court of Canada has made clear that s. 7 applies

---

[43] A *New York Times* editorial described the government conduct subsequent to the raid, noting that the suspected unlawful immigrants were charged with the serious crime of aggravated identity theft, when they ordinarily would have been charged with administrative violations, and that mass hearings with one lawyer to 17 people were held at a fairgrounds after approximately 30 minutes of consultation per client, subsequent to which almost 300 people agreed to pleas pursuant to which they were sentenced to 5 months in prison. *See The Jungle, Again*, N.Y. Times, Aug. 1, 2008, at A18. *See also* DHS manual providing guidance on securing plea agreements after the raids.

[44] My use of the metaphor of the fence should not be taken as an expression only of a frontier border enforcement mentality. As with raids in the interior, the defense of sovereignty takes many forms. Linda Bosniak's word provides an extended analysis of the myriad ways in which the border actually operates in our interior to assert the line between insiders and outsiders. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006).

[45] For a detailed discussion of this trend in historical context, as well as an assessment of its constitutionality, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567 (2008) (arguing that most if not all state and local measures are constitutional but that many are nonetheless preempted by federal statute and that state and local governments play vital roles in an integrated regulatory scheme that manages migration and helps bring the nation as a whole to terms with high levels of cultural and social change).

to illegal immigrants, extending the protections of fundamental justice to those without legal status.[46] In the United States, the reach of the Constitution is less defined. With respect to federal action, some conception of due process no doubt applies to restrain government action, though the extent of this application is not well specified in the law, as the plenary power has been invoked to justify Congress's decision to apply only summary procedures in cases involving unauthorized immigrants in many circumstances.[47] At the state and local level, *some* federal courts have struck down *some* laws restricting the rights of undocumented immigrants, on the grounds that the laws are either preempted by superior federal law, or violate basic due process norms by depriving persons of liberty or property interests (such as the license to do business or a job) without adequate notice and opportunity to be heard (the hallmarks of due process). But it is far from clear that the alienage framework discussed above would be available to prevent discriminatory state action, precisely because the Court has never resolved whether undocumented immigrants are entitled to the same protections as lawful non-citizens.

The only Supreme Court case on point, *Plyler v. Doe*,[48] is largely responsible for the murky legal waters. In the case, the Supreme Court struck down a Texas law that would have barred undocumented children from attending the public schools. The Court made clear that it did not consider undocumented immigrants a "suspect class," entitled to heightened judicial protection under the Equal Protection Clause, because the fact of being unlawfully present

---

[46] Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3, 2002 SCC 1.

[47] In a recent decision, the Supreme Court rejected the government's interpretation of an aggravated identity theft statute on which DHS had been relying to secure plea bargains from illegal immigrants, demonstrating how the Court, through statutory interpretation, can significantly curtail the Executive's enforcement strategy. Figueroa v. United States __ U.S. __ (2009).

[48] 457 U.S. 202 (1982).

in the United States is morally and legally relevant, or a legitimate basis on which to discriminate. And yet, because the undocumented immigrants at issue were children and therefore not responsible for their status, coupled with the threat that denying children access to a basic education would give rise to a subordinated class of persons within the United States, on top of the Court's recognition that the United States itself was culpable for tolerating illegal immigration, led the Court to strike down the statute. At the same time, the Court intimated that had Congress authorized the state scheme, it might have passed muster—underscoring yet again the persistence of the plenary power. The *Plyler* holding, despite being criticized for deviating from the Court's standard equal protection analysis, has held firm for nearly three decades. But the very particular circumstances in which it arose have meant that lower courts have not extended its rationale to protect the interests of unauthorized immigrants in other contexts.

In reality, the limited application of the alienage framework to unauthorized immigrants may be neither here nor there, as far as the protection of undocumented immigrants' rights is concerned. Not only is an equal protection case difficult to make out as a general matter—for jurisprudential reasons related to the Supreme Court's gradual narrowing of the scope of the guarantee as a restraint on government action through the imposition of an "intent to discriminate" requirement—the political process has given rise to a number of forms of relief that *de facto* protect immigrants' rights, albeit in an ad hoc way. Without discounting the severity of the legal disability of unauthorized status, it is also worth emphasizing that the rule of law discourse employed to erase their legal claims operates largely at the level of rhetoric, theory, and in the laws of Congress on their face, rather than in practice.

Immigration law and policy, in their particulars, address the discrepancy between the rhetoric and reality of migration all the time, through administrative practice, or by relaxing exclusionary principles through discretionary decision-making. The Executive's decision not to prosecute removal, the use of administrative parole to allow migrants with no legal authorization to enter the United States, the granting of relief from removal, and even the occasional retroactive legalization or amnesty of undocumented immigrants, represent mechanisms by which the political branches compensate for the limitations of ex ante visa policy as set by Congress. These ex post forms of permitting entry are the mechanisms through which the government addresses the sociological realities of migration that may overwhelm the law on its face. Indeed, the most telling of these limitations on the United States' *de jure* sovereignty is the fact that the United States (and other liberal democracies) tolerate a great deal of illegal immigration. Whether this tolerance is reflected in deliberate under-enforcement, or just general neglect or incompetence, it is arguably the largest of the cracks in the power to exclude.

Conclusion

Domestic constitutional law has provided a resource-rich foundation for the development of migrants' rights. Though this development has not obscured all lines between citizens and non-citizens, it is arguably unrealistic in a world of nation states to expect the line to disappear altogether, even as claims for closer alignment may be warranted. Despite the normative appeal of treating permanent immigrants as the citizens they might eventually become, as a practical matter, a period of transition will be necessary—a process of naturalization and acculturation whereby formal membership is extended based on reasonable criteria. In the United States and Canada, at least, the general

culture of constitutional rights has given rise to a stable, well-defined, and largely justifiable framework for understanding the rights of legally present non-citizens.

When it comes to the *screening* of immigrants, however, what was once a stable understanding of plenary authority on the part of the nation state has come under judicial and popular pressure. Whether screening is justified by a conception of sovereignty, by the imperatives of democracy, or purely as a practicality, the process of delimiting who has access to the polity in the first place cannot be circumvented. And yet, the scope of the authority to screen has been called into question through the application of domestic constitutional concepts to the consequences of the state's screening decisions. Though much remains unresolved both with respect to the state's authority to detain and the extent to which constitutional rights apply to protect the interests of irregular migrants in the United States, these are the developments worth watching, to trace the evolution of how state power over migration has been circumscribed through law.

But when it comes to the rights of lawful immigrants and restraints on government power in relation to migrants more generally, no matter how rich the jurisprudential resources, the law will still be of only limited use in protecting the interests of migrants. Though it is beyond the scope of this Paper, a complete conceptualization of the resources available to protect the rights of migrants must look also to the political process. Both in the United States and Canada, much of protection and abrogation of the rights of migrants occurs at the statutory level and through the elaboration of institutional cultures of reception, or governmental but non-legal mechanisms of providing migrants with financial,

social, and cultural support.[49] In the United States, in particular, many state and local governments have extended social and economic benefits, as well as de facto legal protections, to non-citizens beyond those that the federal government has chosen or been required to extend. In other words, in the absence of constitutional or other legal mandates, it remains possible to advance the rights of migrants through political and administrative channels. In this context, as in the legal one, the immigrant histories of the United States and Canada provide the templates for policy formation, and the immigrant identities of both societies provide the normative justification for building coalitions to advance the universality of our constitutional commitments, whether through law or practice.

[49] For a fascinating discussion of how different cultures of reception in the United States and Canada influence the relative integration of immigrants into society, see IRENE BLOEMRAAD, BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA (2006).