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Immigrant Rights, Integration, and the Common Good

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Summary

As the US immigration debate has reached a crossroads and the US foreign-born population has grown to nearly 36 million persons in recent years, the need to clarify the relationship between rights and integration has never been more significant.

As the opposing sides of the immigration debate often misconstrue the precise interplay of "rights" and "integration" and as such confusion often stymies public discourse, this paper advances a more nuanced, mutually enforcing understanding of these two key concepts.

This paper advances the argument that, to be more effective policy tools, "rights" need to more closely linked with "unalienable," self-evident rights, those that undergird our constitutional democracy, while "integration" must reflect a commitment to such shared values and a simultaneous openness on behalf of the American people to the myriad contributions immigrants make to our country.

I. Introduction

The interplay between the "rights" and the "integration" of immigrants constitutes a defining feature of the American experience. The United States has no formal or coordinated immigrant integration policy, but it has nonetheless been a nation where integration occurs. With some painful exceptions, immigrants and their progeny have been able to become Americans. This has been due, in part, to a constitutional framework that gives the federal government broad power to regulate immigration, but that extends its core protections to all "persons," including non-citizens.

In recent years, the opposing sides in the immigration debate have misconstrued "rights" and "integration" and have pitted these concepts against each other. Anti-immigrant groups argue that a growing litany of individual rights, divorced from any sense of the "general welfare," threatens to balkanize the nation. Immigrant advocates fear that notions like "assimilation" and "integration" reject the diverse cultural and social contributions of immigrants. This paper posits a mutually enforcing view of "rights" and "integration" that reflects our constitutional tradition, as well as the aspirations of immigrants. By this view, "rights" entail civic responsibilities and further the "common good." [1] "Integration," in turns, demands a commitment to shared values, and an openness to the myriad contributions of immigrants.

The need to clarify the relationship between rights and integration has assumed overriding significance in recent years for two reasons. First, the US foreign-born population has grown to nearly 36 million persons.[2] These include roughly13 million naturalized citizens, 12 million lawful permanent residents (LPRs), and 11 million undocumented persons.[3]

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This historic population plays a central role in defining US institutions like the family, the work place, schools, places of worship, and the armed forces. The success of these institutions — and the nation's welfare — will increasingly depend on the contributions of immigrants. Second, immigration and welfare reform legislation in 1996 sharply distinguished between US citizens and LPRs, making it far more difficult for immigrants and their families to integrate. The vision that underlies the 1996 legislation, subsequent federal and state legislation, and pending "reform" proposals in Congress has been to make life so difficult for the undocumented and certain other immigrants in the United States that they will be forced to leave, and others will be deterred from coming.

This paper does not dispute the need to control US borders. It argues, however, that honoring "rights" — correctly understood — allows immigrants to integrate and to contribute fully to their adopted nation. This, in turn, serves the national interest. The paper concludes that "rights" must be incorporated into an immigrant integration agenda.

II. Historical Background and Legal Framework

US citizenship has been famously, albeit inaccurately, defined as the "right to have rights."[4] In fact, constitutional rights apply to "persons," a term that encompasses non-citizens. The US Constitution protects "the right of the people peaceably to assemble"; "the right of the people to be secure ... against unreasonable searches and seizures"; the right of any "person" not to be subject to double jeopardy, not to incriminate herself, not "to be deprived of life, liberty, or property, without due process of law," and not to have "property taken for public use, without just compensation"; the right to legal counsel and an impartial trial in criminal cases; the right of "any person" not to be deprived by a state of "life, liberty, or property, without due process" and the right to "equal protection of the laws."[5] The application of these core protections to non-citizens represents a fundamental form of "integration" into our constitutional system.[6]

At the same time, courts have consistently held that the political branches of the federal government enjoy "plenary" authority to regulate immigration. Not every restriction on *immigrants* implicates the federal *immigration* power which governs who can enter, who can stay, and who must leave. In addition, Congress and the Executive must exercise their authority over immigration in ways that reflect constitutional norms. Nonetheless, non-citizens have scant constitutional rights in immigration matters. Curiously, the US Constitution does not expressly delegate to Congress the power to regulate immigration.[7] Courts have instead located the federal government's power to regulate immigration in the nation's inherent power of self-determination or, put differently, as an incident of national sovereignty.

A. Rights That Apply to "Persons"

For 120 years, US courts have recognized that non-citizens — as persons — enjoy a panoply of civil rights. In 1886, the Supreme Court in *Yick Wo v. Hopkins* invalidated a municipal ordinance that targeted Chinese aliens by making it unlawful to house a laundry business in a building not constructed of stone or brick.[8] It held that the Fourteenth Amendment applied "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of

nationality."[9] In *Wong Wing v. United States*, the Court considered the Chinese exclusion bill of 1892, which required imprisonment at hard labor of Chinese aliens prior to their deportation.[10] Citing *Yick Wo*, the Court held that "all persons within the territory of the United States are entitled to the protection guaranteed" by the Fifth and Sixth amendments, particularly the right to indictment by a grand jury and not to be "deprived of life, liberty, or property without due process of law."[11] More recently, courts have recognized that freedom of speech and of the press extends to non-citizens;[12] that foreign corporations must receive just compensation for Fifth amendment takings;[13] and that the undocumented must receive *Miranda* warnings prior to custodial interrogations.[14]

Education represents a core concern for immigrants who come in search of greater opportunity for themselves and their children. In *Plyler v. Doe*, the Court held that undocumented children enjoy an equal protection right to free public education.[15] It reasoned that the "Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory."[16] It did not consider undocumented status a "constitutional irrelevancy," or education a "fundamental right."[17] However, it concluded that the statute imposed a "lifetime hardship on a discrete class of children not accountable for their disabling status" and would deny them "the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[18]

The right to pursue a livelihood also strongly resonates in the US constitutional tradition.[19] The Supreme Court has re-enforced the comparative openness of the US labor market by invalidating alienage restrictions on employment. *Hampton v. Mow Sun Wong*, for example, involved a challenge to a federal regulation that denied competitive civil service jobs to non-citizens.[20] The Court held that the regulation deprived "a discrete class of persons of an interest in liberty on a wholesale basis." [21] It found a due process violation in the absence of any justification for the classification within Civil Service Commission's area of authority.[22] In *Takahashi v. Fish and Game Commission*, the Court held unconstitutional a California statute that denied commercial fishing licenses to non-citizens (primarily Japanese LPRs) who were ineligible for citizenship under federal law.[23] It held that the statute, in imposing "discriminatory burdens upon the entrance or residence of aliens," conflicted with the federal scheme for regulating immigration and violated the Fourteenth Amendment's protection of "all persons."[24] Likewise, in *Sugarman v. Dougall*, the Court invalidated on equal protection grounds a New York state statute that limited "competitive" civil service jobs to US citizens.[25] The state argued that the positions needed to be filled by persons (citizens) with undivided loyalty to the state. The Court reasoned that the New York scheme was not "precisely drawn" to meet this purpose. In particular, its "citizenship" requirement applied to relatively low-grade employees, but not to elected officials or high office holders.[26]

Conversely, the Court has upheld citizenship requirements for jobs that are "bound up with the operation of the State as a governmental entity" and that are "fundamental to the definition and government of a State."[27] By this reasoning, certain government positions should be open only to those who fully identify with the polity. *Ambach v. Norwick* involved an equal protection challenge to a state statute that denied employment to elementary and secondary school teachers

who were eligible for citizenship, but who did not intend to become US citizens. The Court found that public school teachers performed a core government function and that the classification rationally furthered the state's educational goals.[28] The Court has also upheld citizenship requirements for police[29] and probation officers.[30]

In 2002, the Supreme Court weakened the statutory protections available to undocumented workers. In *Hoffman Plastics, Inc. v. NLRB*,[31] it held that undocumented persons who are illegally fired for union organizing cannot be awarded back pay, the strongest remedy for violations of the National Labor Relations Act (NLRA).[32]

The Constitution does not guarantee citizens (or non-citizens) a minimal standard of "social or economic" well-being.[33] However, it guards against discriminatory classifications *by states* in the provision of public benefits. In *Graham v. Richardson*, for example, the Court invalidated a state statute that provided welfare benefits to US citizens and to LPRs who had lived in the United States for 15 years or longer.[34] The Court recognized LPRs as "persons" under the Fourteenth Amendment, characterizing them as a "prime example of a 'discrete and insular' minority" and strictly scrutinized this "inherently suspect" classification.[35] It found that the state's rationale (limiting expenses) did not justify the discriminatory classification.[36] It further held that by imposing an "auxiliary burden" on the entry and residence of select non-citizens, the state restriction conflicted with federal policy in an area of exclusive federal authority.[37] This holding, of course, did not speak to federal restrictions on public benefit eligibility.

B. The Plenary Power of Congress and the Executive to Regulate Immigration

While non-citizens possess rights in non-immigration matters, Congress has "plenary" authority to make laws (implemented by the Executive) governing the admission and exclusion of non-citizens. The so-called "plenary power" doctrine has an unedifying provenance; it arose from challenges to the infamous Chinese exclusion bills of the late 19th century. In 1882, legislation suspended immigration by Chinese laborers for ten years, barred them from naturalization, and created a certificate of re-entry for those traveling outside the country. In 1884, this certificate became the exclusive means to establish a "right of entry." In 1888, Congress barred entry to all Chinese laborers, whether or not they had obtained a certificate prior to their departure. In *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, the Court rejected a challenge to this legal regime, holding that the power to exclude was "an incident of every independent nation."[38] In 1892, legislation suspended Chinese immigration for another ten years and provided for the deportation of all unlawfully present Chinese laborers unless they could obtain a certificate of residence within a year, or could show that their failure to obtain a certificate had been unavoidable and that they were residents of the United States at the time of the Act's passage, as attested to by at least one "credible white" witness. In *Fong Yue Ting v. United States*, the Court upheld this scheme based on the "inherent and inalienable right" of a sovereign nation to regulate immigration.[39]

Roughly 60 years later, the Court considered the cases of two non-citizens who had been excluded based on confidential determinations that their admission would prejudice the public interest. Ellen Knauff, the alien wife of a US citizen, had been detained for more than a year at

Ellis Island after seeking admission to naturalize. The Court held that her exclusion implicated a "fundamental act of sovereignty" inherent in the Executive's power over foreign affairs.[40] It held that "[w]hatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien" and "[w]hatever the procedure authorized by Congress, it is due process as far as an alien denied entry is concerned."[41] *Shaughnessy v. United States ex. rel. Mezei* concerned the exclusion and detention of the LPR spouse of a US citizen.[42] The Court affirmed the "entry" doctrine by which constitutional rights apply to non-citizens who enter the country, but not to those stopped at the border.[43]

In *Kleindienst v. Mandel*, the Court considered a First Amendment challenge to the denial of admission to a Marxist author.[44] It held that the alien enjoyed "no constitutional rights of entry" and it refused to "look behind" a denial made for a "facially legitimate and bona fide reason."[45] In *Fiallo v. Bell*, the Court adopted this standard of review to reject a due process and equal protection challenge to a statute that granted special preference immigration status to the illegitimate children of US citizen and LPR mothers, but not fathers.[46] It found that the statutory distinction raised a policy issue "entrusted exclusively to the political branches."[47]

Courts have been loathe to invalidate federal classifications even when they (arguably) do not implicate the federal power to regulate immigration. In *Matthews v. Diaz*, for example, the Court upheld the denial of Medicare benefits to LPRs who had lived in the United States for less than five years.[48] It recognized that even "one whose presence is unlawful, involuntary, or transitory" enjoys due process protections, but found that the statute's alienage restrictions implicated the federal authority "to regulate the conditions of entry and residence of aliens."[49] It noted that Congress "regularly makes rules that would be unacceptable if applied to citizens" and the fact "that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens enjoy all the advantages of citizenship..."[50] In its treatment of federal benefit restrictions as an acceptable "immigration" enforcement tool, the Court anticipated welfare reform legislation in 1996.

C. Legislation Restricting Rights and Limiting Membership Claims

Naturalized citizens enjoy the full rights and responsibilities of membership in our constitutional democracy.[58] By contrast, LPRs cannot vote in federal or state elections, cannot hold certain public offices, and can be removed for a growing range of offenses. In other ways, however, LPRs have traditionally enjoyed the non-political rights (attributes/benefits) of US citizens. They have worked, attended public schools, raised families, participated in government programs, and served in the armed forces. Immigration and welfare reform legislation in 1996 altered this paradigm, making citizenship a far more significant criteria in public benefit eligibility and more difficult to obtain. The legislation has particularly hurt families whose members have different immigration statuses.[59]

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the Welfare Act" or "the Act") sharply distinguished between US citizens and LPRs.[60] This scheme, which uses public benefit restrictions as a means of immigration control, has survived legal challenge.

Prior to the Act, citizens and LPRs had mostly qualified on equal terms for federal benefits, and state attempts to restrict eligibility had been invalidated. The Welfare Act limited eligibility for "federal public benefits" to US citizens and "qualified aliens," a category that includes LPRs and others.[61] It barred even "qualified aliens" from Supplemental Security Income (SSI) and food stamps, with an exception for LPRs who had completed 40 "qualifying quarters" of work for the purposes of Social Security coverage,[62] and for two other groups.[63] It gave states the option to provide Temporary Assistance to Needy Families (TANF), Medicaid, and State Children's Health Insurance Program (SCHIP) benefits to "qualified aliens."[64] Every state subsequently opted to provide TANF and (with the exception of Wyoming) Medicaid to "qualified aliens" who had arrived by the Act's passage.

The Welfare Act, however, barred even "qualified aliens" from "means-tested" federal benefits — SSI, TANF, food stamps, (non-emergency) Medicaid and SCHIP — for five years after "entry."[65] It also provided for "sponsor-to-immigrant" deeming (i.e. attribution of the sponsor's income to the immigrant for the purposes of determining benefit eligibility), which disqualifies many LPRs from these benefits after five years.[66] In addition, several states have chosen to deny TANF and Medicaid to post-enactment immigrants who have met the five-year requirement.

The Act barred "unqualified" immigrants (including the undocumented) from "federal public benefit" programs. The undocumented qualify only for limited emergency and public health benefits, including emergency Medicaid, non-cash disaster relief, immunizations, and school lunches.[67] The Act required states to enact laws if they intended to extend public benefits to the undocumented.[68]

Since passage of the Welfare Act, certain benefits have been restored to certain groups. For example, Congress has restored: (1) SSI to most LPRs who resided in the United States prior to the Act's passage;[69] (2) food stamps to immigrant children, the elderly and the disabled who entered pre-enactment;[70] (3) food stamps to "qualified aliens" receiving disability assistance, persons who have been "qualified" for five years or more, and children.[71] Despite the ameliorating legislation, the basic architecture of the Welfare Act — the hard distinction between US citizens and LPRs — remains intact.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the 1996 Immigration Act") created a web of restrictions that prevent and inhibit the integration of large numbers of immigrants and their families.[72] Thus, it works at cross purposes to family reunification, a defining priority of the US legal immigration system.[73] It also conflicts with jurisprudence that, in other contexts, recognizes the right to live with family.[74] Finally, it fails to reflect the growing population of US "mixed status" families, and the deep ties to the United States that non-citizens develop over time.

The 1996 Immigration Act undermined families in three ways.[75] First, it significantly expanded the crimes for which LPRs could be removed. At the same time, it sharply limited and, in many cases, removed discretion from Immigration Judges to allow removable persons to remain in the United States based on the severity of their crimes, rehabilitation, family ties, employment, and other equities. As a result, thousands of long-term LPRs have been removed for relatively minor

crimes that they committed years in the past, with disastrous consequences for their families. Second, the Act made it more difficult for low-income US citizens and LPRs to sponsor family members for visas. It required the petitioner/sponsor to demonstrate "the means to maintain" an income (for the family) of 125 percent of the federal poverty line and to maintain the immigrant at that level until he or she naturalizes or works for 40 "qualifying quarters."[76] This commitment can be legally enforced against the sponsor by the sponsored alien or the federal or state government.[77] Even with the ability to secure co-sponsors, 20 percent of US citizens and LPRs who come to charitable agencies to immigrate family members cannot meet the income requirement.[78] In other cases, they must stagger the immigration of family members over many years. Third, the Act created a series of multi-year and permanent bars to admission based on unlawful presence in the country, removals, misrepresentations to immigration officials, and claims (even mistaken) to citizenship. These bars make it impossible for thousands of non-citizens to gain legal status.

The 1996 Immigration Act also barred states from providing in-state tuition to in-state, undocumented residents for post-secondary education.[79] This has limited the opportunities of low-income students, many of whom were brought to the United States as children and who are, for all intents and purposes, Americans.

Immigrant families who are not affected by the myriad provisions in the 1996 Immigration Act (perhaps a minority) still encounter multi-year backlogs in the family-based immigration system. These result from numerical caps on visas granted by qualifying relationship ("preference category") and by nationality. DHS processing periods further prolong the process. Affected families either face long-term separation or they remain together (but unsettled and insecure) in the United States. Backlogs and delays inhibit integration not only by destabilizing families, but also by delaying the naturalization process which serves as a focal point for "integration" activities, including English language classes, civics instruction, and home ownership seminars.

The driving vision behind many post-1996 legislative proposals has been to make it so burdensome to remain that certain non-citizens — particularly the undocumented — will be forced to leave.[80] It has long been a crime to enter the United States illegally. However, "The Border and Immigration Enforcement Act of 2005" makes it a federal crime *to be* in the United States in undocumented status. Most agree that it would be preclusively expensive — by one estimate it would cost $206 billion over five years[81] — to remove the nation's 11 undocumented persons. It would also impoverish millions of families and devastate the economy.[82] Criminal prosecution for illegal presence seems even less feasible. Similarly, the REAL-ID Act of 2005 seeks to compel states to deny drivers' licenses to the undocumented for security reasons.[83] This will make life harsher for the undocumented and will lead to more drivers without licenses and insurance, but it will not enhance US security. To the contrary, it will remove non-citizens from databases used by police throughout the country and drive them further outside the government's reach.

V. Conclusion

The US immigration debate has reached a crossroad. Immigration "reform" legislation could extend legal status to broad categories of undocumented persons, it could further push the undocumented (and other non-citizens) to the nation's margins, or it could seek to put some limited percentage of the undocumented on a path to citizenship but make life even more tenuous for others. As it stands, immigrants (including the undocumented) enjoy significant rights in non-immigration matters, including the right to secondary education. On the other hand, the undocumented cannot legally work, and large categories of LPRs can be separated from their families through deportation.

While we cannot know the final shape of immigration reform, we can at least clarify the terms of the debate and the interests at stake. Up to this point, "rights" language has not offered a productive framework for evaluating the underlying issues. To the contrary, the immigration debate exemplifies how claims of competing "rights" can stymie public discourse.[84] Advocates argue that US immigration laws offend the right to family reunification, to make a living, and to just working conditions. Yet many US residents, particularly in border states, maintain that migrants violate their rights to security and to property. Some employers think that their right to earn a living is compromised by immigration policies that prevent them from hiring willing (immigrant) workers. Some US citizens think that immigrant laborers undermine their right to just wages and working conditions. Many immigrants believe that they have a right to live with their families in the United States. Others think that undocumented persons, even those approved for family-based visas, violate the rights of those who obey the law by remaining outside the country until they can legally enter.

If they are to become an effective policy tool, "rights" need to be conceptualized differently. Too often, claimed "rights" mask desired social outcomes, but do not closely relate to the kind of self-evident values or "unalienable rights" like "life, liberty, and the pursuit of happiness" that undergird our constitutional democracy.[85] Not every position labeled a "right" amounts to one.

At the same time, extending to non-citizens certain "privileges," "attributes," or "benefits" of membership in US society contributes to their integration and to the common good. As a practical matter, for example, when immigrants can access health insurance, it benefits public health efforts, decreases the (inefficient and expensive) use of emergency rooms, and helps to maintain a strong workforce. Provision of certain benefits to particularly needy non-citizens — the very poor, the disabled, the elderly, the infirm — allows them simply to function, a minimal pre-condition to integration. The application of labor and workplace protection laws to immigrants prevents unscrupulous employers from using them to depress wages and standards for all workers. The education of immigrant children trains them to contribute to their adopted country. A viable path to legal status preserves families, strengthens the US workforce, decreases predation against non-citizens, and enhances security. Providing legal counsel to persons in removal proceedings furthers our nation's interest in the best decisions being made under its laws.

Rights and "benefits" also foster the participation of immigrants in mediating institutions — like families, places of worship, schools, workplaces, and labor unions — that promote their integration. These institutions impart practical skills (language, job training) and civic values (consensus building, tolerance, participation). They instill a sense of belonging, of support and of

the ability to influence the larger community. Conversely, the process of "integration" vindicates rights on a fundamental level. "Rights" theories typically view humans as "social" beings, whether by nature (in religious traditions) or by social necessity (in state traditions). For this reason, exclusion from institutions like family, school, the work place, or the polity offends human rights. Similarly, since human identity finds expression in culture, the "integration" process must be able to accommodate the cultural contributions of immigrants. A process that attempted to bring persons into the national community, but that denied or erased what contributed to their person-hood, would necessarily violate their rights and could not be viewed as integration at all.

One might argue that rights not only allow immigrants to integrate, but in a nation created to protect them, rights are the "good" that is "common" to all of us. In *Plyler v. Doe*, the Court recognized that without rights, immigrants cannot integrate or contribute fully to the common good: "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[86]

Immigrants aspire to be treated as full members of US society. For them, this means embracing US political and civic values, without forfeiting their cultural identities. It also means contributing to their adopted countries through their labor, industry, values, families and faith. They may not use terms like rights, integration, or the common good. However, their lives and aspirations testify to the inter-connectedness of these concepts. An immigrant integration agenda would do well to honor their vision.

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ENDNOTES

[1]In this paper, the term "rights" refers to the rights guaranteed to "persons" under the US Constitution. These "rights" can be distinguished from the "privileges," "attributes" or "benefits" that may attach to non-citizens as members of US society. The paper argues that extending both "rights" and membership privileges/attributes/benefits to non-citizens expedite their integration.

[2]J. Passel, "Estimates of the Size and Characteristics of the Undocumented Population" (Pew Hispanic Center, Mar. 21, 2005) at 7 [hereinafter ""Characteristics of the Undocumented"].

[3]*Id.* at 1, 3; *see also*, A. Erlich and D. Dixon, "Spotlight on Naturalization Trends," *Migration Information Source* (Migration Policy Institute, Nov. 1, 2005).

[4]*Perez v. Brownnell*, 356 US 44, 64 (1958) (Warren, Black, and Douglas dissenting).

[5]US Const., amends. I, IV, V, VI, XIV, § 1.

[6]This paper focuses on three categories of foreign-born persons: naturalized citizens, lawful permanent residents (known as "immigrants" under US law), and the undocumented. The Quota Act of 1921 (42 Stat. 5) established the "immigrant" category and distinguished "immigrants" from those allowed to enter for a temporary period ("non-immigrants.") The paper uses the term "immigrant" in its colloquial sense to refer to all foreign-born persons.

[7]Congress can "regulate Commerce with foreign Nations, and among the Several States"; "establish an uniform Rule of Naturalization"; "declare War"; and make the "necessary and proper" laws to execute these powers. US Const.,art. I, § 8, cls. 3, 4, 11, 18.

[8]118 US 356, 6 S.Ct. 1064 (1886).

[9]*Id*. at 1070.

[10]163 US 228 (1896).

[11]*Id*. at 238.

[12] *Bridges v. Wilson*, 326 US 135, 148 (1995).

[13]*Russian Volunteer Fleet v. United States*, 282 US 481 (1931)

[14]*United States v. Casimiro-Benitez*, 533 F.2d 1121, 1124 (9th Cir.), *cert denied*, 429 US 926 (1976); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979).

[15]457 US 202 (1982)

[16]*Id*. at 210, 215.

[17]*Id*. at 223.

[18]*Id*.

[19]*See Greene v. McElroy*, 360 US 474, 492 (1959) ("... the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment [citations omitted]."); *see generally* Thomas Jefferson, First Inaugural Address, Washington, D.C., March 4, 1801 ("... a wise and frugal Government, which shall restrain men from injuring one another; shall leave them otherwise free to regulate their own pursuits of industry and improvement; and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities.")

[20] 426 US 88 (1976)

[21]*Id*. at 103.

[22]*Id*. at 116.

[23]334 US 410 (1948).

[24]*Id*. at 419-420; *see also Truax v. Raich*, 239 US 33, 42 (1915) (Arizona law requiring employer with more than five workers to employ at least 80 percent US citizens violates equal protection and is "tantamount to the assertion of the right to deny ... entrance and abode" in conflict with federal immigration authority.)

[25]413 US 634 (1973).

[26]*Id*. at 643.

[27]*Ambach v. Norwick*, 441 US 68, 73-75 (1979).

[28]*Id*. at 79-81.

[29]*Foley v. Connelie*, 435 US 291, 297 (1978) (holding that "the right to govern is reserved to citizens" and police "exercise an almost infinite variety" of public powers.)

[30]*Cabell v. Chavez-Salido*, 454 US 432, 447 (1982) (A probation officer "may personify the State's sovereign powers; from the perspective of the larger community, the probation officer may symbolize the political community's control over, and thus responsibility for, those who have been found to have violated the norms of social order.")

[31]122 S. Ct. 1275 (2002).

[32]29 USC §§151-169.

[33]*Dandridge v. Williams*, 397 US 471, 487 ("[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.")

[34]403 US 365 (1971).

[35]*Id*. at 372, 376.

[36]*Id*. at 376.

[37]*Id*. at 379-380.

[38]130 US 581, 608-609 (1889).

[39]149 US 698, 711 (1893)

[40]*Knauff v. Shaughnessy,* 338 US 537, 542 (1950).

[41]*Id*. at 543-544.

[42]345 US 206 (1953).

[43]*Id*. at 21; *but see Landon v. Plascencia* , 459 US 321, 329-330 (1982) (Recognizing the due process rights of a lawful permanent resident attempting to re-enter the country after a brief departure: "[O]nce an alien gains admission to our country and begins to develop ties that go with permanent residence his constitutional status changes accordingly.") .

[44]408 US 753 (1972).

[45]*Id*. at 770.

[46]430 US 787 (1977)

[47]Id. at 798.

[48]426 US 67 (1976).

[49]*Id*. at 77, 84.

[50]*Id*. at 78-80.

[58]Two main distinctions also exist between native-born and naturalized citizens. First, under the US Constitution (art. II, § 1, cl. 5), only a "natural born" citizen can serve as President of the United States. Second, naturalized citizens can be denaturalized in limited circumstances. INA §1451.

[59]More than three million US-born children live in households headed by undocumented persons. "Characteristics of the Undocumented" at 3; *see also*, M. Fix and W. Zimmerman, "All Under One Roof: Mixed Status Families in an Era of Reform" (Urban Institute, 1999); M. Fix and J. Passel, "Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform" (Urban Institute, 1999).

[60]Pub. L. No. 104-193, 110 Stat. 2105.

[61]The term "qualified alien" refers to LPRs, asylees, refugees, parolees for periods of at least one year, those granted withholding of deportation, and conditional entrants. Welfare Act § 431.

[62]Welfare Act § 402(a)(2)(B).

[63]The two other groups of eligible non-citizens were: (1) refugees, asylees and persons granted withholding of deportation, for the first five years after entry as a refugee or after the grant of asylum or withholding; (2) lawfully residing active duty military and veterans, as well as their spouses and unmarried, dependent children. Welfare Act §402(a)(2)(A), (C).

[64]Welfare Act §402(b)(1).

[65]Welfare Act §403(a).

[66]Welfare Act §421(a). "Qualified aliens" exempt from the five-year bar include refugees, asylees, those granted withholding of deportation; lawfully residing veterans, active duty military, and their spouses and depend children; and Cuban and Haitian entrants. Welfare Act §§403(b), (d).

[67]Welfare Act §§ 401(b)(1), 411(b).

[68]Welfare Act § 411(d).

[69]The Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (Aug. 5, 1997).

[70]Agriculture Research, Extension and Education Reform Act, Pub. L. No. 105-185 (June 23, 1998), §§ 4401 (May 13, 2002). This act also extended refugee eligibility for Food Stamps from five to seven years.

[71]The Farm Security and Rural Investment Act, Pub. L. No. 107-171, §4401 (May 13, 2002).

[72]Pub. L. No. 104-208, 110 Stat. 3009.

[73]The most common path to lawful permanent residence — responsible for 65 percent of the immigrant visas awarded — is through a qualifying relationship to a US citizen or LPR. US Department of Homeland Security, Office of Immigration Statistics, "2004 Yearbook of

Immigration Statistics," Table 7, available at
http://uscis.gov/graphics/shared/statistics/yearbook/.

[74]*Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 US 18, 27 (1981); *see also*, The Universal Declaration of Human Rights, Art. 16(3) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.")

[75]*See* Catholic Legal Immigration Network, Inc., *Placing Immigrants at Risk: The Impact of our Laws and Policies on American Families* (2000); American Bar Association, Commission on Immigration, *American Justice Through Immigrants' Eyes* (2004).

[76]INA §§ 213A(a)(1)(A), 213A(a)(2)-(3), 213A(f)(1)(E).

[77]INA § 213A(a)(1)(B); *see also* C. Wheeler, "Alien vs. Sponsor: Legal Enforceability of the Affidavit of Support," 10 *Bender's Immigration Bulletin*, No. 23 (Dec. 1, 2005).

[78]Catholic Legal Immigration Network, Inc., *The Affidavit of Support and Its Effect on Low-Income Families* (Aug. 2000) at 13.

[79]8 INA §1623(a).

[80]State legislation that targets immigrants has also proliferated. N. Riccardi, "States Take on Border Issues," *Los Angeles Times* (Jan. 16, 2006).

[81]Rajeev Goyle and David A. Jaegar, Ph.D, "Deporting the Undocumented: A Cost Assessment" (Center for American Progress, July 2005).

[82]The foreign-born represent 15 percent of the US workforce. US Department of Labor, Bureau of Labor Statistics, "Labor Force Characteristics of Foreign-Born Workers in 2004) (May 12, 2005). Roughly one-third of these workers — 5 percent of all US workers — do not have legal status. "Characteristics of the Undocumented" at 4.

[83]Pub. L. No. 109-13, 119 Stat. 231.

[84]*See* Mary Ann Glendon, *Rights Talk* (Free Press, 1991) at 12, 14 (Glendon argues that in the United States "rights" tend to be formulated in absolute and individual terms, without reference to "ends" or to responsibilities.)

[85]*See* L. Henkin, "The Idea of Rights and the United States Constitution," *The Age of Reason* (1990) at 83-97, *reprinted in* L. Henken, G. Neuman, D. Orentlicher, D. Leebron, *Human Rights* (Foundation Press, 1999) (arguing that the Declaration of Independence sets forth the underlying "theory of American constitutionalism.")

[86]*Plyler v. Doe*, 457 US at 230.