

## On Rights, Federal Citizenship, and the “Alien”

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### I. INTRODUCTION

After the New Deal Constitution, when the United States Supreme Court revived federalism to curtail federal civil rights protection, some constitutional scholars saw hope in the rebirth of rights based on a conception of “federal citizenship.”<sup>1</sup> Scholars contrasted cases like *United States v. Morrison*,<sup>2</sup> where the Court struck down a federal statute that created federal remedies for victims of domestic violence, with cases like *Saenz v. Roe*,<sup>3</sup> decided a year before *Morrison*, where the Court struck down as unconstitutional a California statute that limited welfare benefits to newly arrived residents. More specifically, while the *Morrison* holding restricted Congress’s reliance on the Commerce Clause to protect individual rights against state or private infringement, the *Saenz* ruling uncharacteristically looked to the Privileges and Immunities Clause of the Fourteenth Amendment<sup>4</sup> to curtail state power based on an individual right to travel. The Court characterized this right to travel as a right “protected not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States.”<sup>5</sup> It is precisely this concept of “federal citizenship” that motivated scholars to conjecture a future role for citizenship in the expansion of individual rights under the United States Constitution.

An expansive interpretation of the Privileges and Immunities Clause was by no means novel. The transformation of national citizenship during the Reconstruction Era following the Civil War was, at least for some, an attempt to attach egalitarian ideals to the conferral of citi-

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1. See, e.g., Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999).

2. 529 U.S. 598 (2000).

3. 526 U.S. 489 (1999).

4. This clause reads: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 2.

5. *Saenz*, 526 U.S. at 502.

zenship to Blacks through the Fourteenth Amendment.<sup>6</sup> Undeniably, the Fourteenth Amendment's overturn of *Dred Scott*<sup>7</sup> was monumental for Blacks in terms of the formal recognition of their status as birthright United States citizens. Unfortunately, status citizenship for Blacks never fully translated into the recognition of rights intended to promote the necessary conditions for their incorporation (and, in turn, women and the poor) as full members of society—i.e., “equal citizens.”<sup>8</sup> The racialized, gendered, and classist attitudes of the time could not escape a bounded construction of nationality that in turn also stripped the Fourteenth Amendment of its substantive power over national citizenship.<sup>9</sup> As one scholar described it:

The hopes and possibilities of the Reconstruction revisions to American constitutional citizenship could not withstand the pressures of Southern Restoration. And the steady but short legal construction of the Reconstruction Amendments and Acts to support broad congressional actions and burgeoning federal legal authority could not withstand the blow of a one Justice majority in the *Slaughter-House Cases*.<sup>10</sup>

In the *Slaughter-House Cases*,<sup>11</sup> injured Blacks failed in their challenge of state monopoly laws that banned slaughter-houses not sanctioned by the state. The Court redirected a civil rights issue into one about questions of the scope of state police powers over monopolies. In doing so, the Court eliminated the United States Constitution's potential for remedying social inequality through a conception of federal citizenship.

With cases like *Saenz* came renewed hope that the Fourteenth Amendment could promote the realization of an egalitarian national citizenship. More specifically, the scope of congressional powers (vis-à-vis states) could be redefined in accordance with the breadth of rights that are fundamental to the exercise of citizenship. From the early civil rights enactments, potential citizenship rights ranged “from the basic rights to contract and testify in court . . . to the more progressive rights of voting, freedom from violence, and ultimately the right to a public sphere free from discrimination.”<sup>12</sup> Scholars have also suggested that the duty of Congress to protect fundamental elements of citizenship should include a right to political participation, including the “rights to vote, to petition Congress, and to appear in court . . . because citizenship implies the right to participate in one's community.”<sup>13</sup> The list has also

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6. James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 479-565 (1999).

7. 60 U.S. (19 How.) 393 (1856).

8. Fox, *supra* note 6, at 519-65.

9. *Id.*

10. *Id.* at 545.

11. 83 U.S. (16 Wall.) 36 (1872). The Supreme Court's decision consolidated several cases involving identical issues and is thus referred to by the general case heading.

12. Fox, *supra* note 6, at 573.

13. Zietlow, *supra* note 1, at 316.

included the right to work or to a basic level of health and subsistence because the social compact of citizenship should require the state to prevent citizens' total disenfranchisement from the civic community.<sup>14</sup> Scholars have also listed a right to education, given its importance in facilitating entrance to the economic, social, and political membership that is central to citizenship.<sup>15</sup>

There is strong appeal in the construction of social and economic rights as fundamental to federal citizenship and as rooted in the United States Constitution. As the richest and most powerful nation, the United States remains sorely behind in recognizing its affirmative duty as a state to guarantee even basic economic and social benefits to its citizens.<sup>16</sup> More problematic still is that against this egalitarian "citizenship ideal stands a powerful and pervasive neoliberal (free market) ideology, asserting that state *abstention* from economic protection is the foundation of a good society."<sup>17</sup> Neoliberal ideology concedes that the market sometimes sacrifices a few individuals yet maintains that overall, it promotes the greater good. The evidence of the vast growth of inequality in the United States and around the world and the ugly face of poverty, however, undermines this claim. Instead, neoliberal policies promote the interest of the wealthiest at the expense of the majority. The imperative of a new conception of rights in the United States is especially strong in light of the United States' push for global markets infused with neoliberal policies.

And yet, framing the debate over social and economic rights in terms of citizenship in the United States risks solidifying the exclusionary boundaries of national citizenship that have characterized United States immigration policies. In a 2002 article, Linda Bosniak insightfully discussed the disconnect among progressive yet mainstream constitutional scholars who ideally view citizenship as a source of progressively inclusive and egalitarian values (universalist citizenship) and immigration scholars who have studied and witnessed citizenship's exclusionary dimension (nationalists or bounded citizenship).<sup>18</sup> A few in the former even suggested that a conception of constitutional "equal citizenship" could respond to the chronic legal marginalization and subordination of the "alien" in the United States. These scholars cited to *Plyler v. Doe*,<sup>19</sup> which guaranteed access by undocumented children to K-12 public schools, as an example where the right to education took on a new

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14. *Id.* at 330.

15. *Id.*; see also Fox, *supra* note 6, at 574.

16. See Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 789-95 (2003).

17. *Id.* at 784.

18. Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285 (2002).

19. 457 U.S. 202 (1982).

meaning when attached to the ideal of a democratic federal citizenry.<sup>20</sup>

In her critique, Bosniak is not entirely dismissive of “alien citizenship” as a possible construct of United States constitutional rights doctrine, insofar as “aliens” have at times enjoyed “substantive citizenship as constitutional persons, [even as] they remain national outsiders in important respects.”<sup>21</sup> Thus, lacking formal citizenship status, “aliens,” for example, have been granted procedural due process rights in the immigration and criminal context, or some substantive rights—such as the right of undocumented children to attend public schools.<sup>22</sup> Yet, Bosniak cautions that to disregard citizenship’s bounded aspects is also to ignore the overwhelming examples of when citizenship’s exclusionary commitment was brought to bear on the “alien” not only at the border but within the nation’s territory.<sup>23</sup>

In this article, I reflect on the entrenchment of nationalist or bounded citizenship in the regulation of the “alien” within the border in the last three decades. I begin there because of the importance of certain legislative and judicial moments that have legitimated and institutionalized anti-alienage doctrines that strip the noncitizen of basic rights. Noncitizens in the United States today, by lacking formal citizenship, are no different in the formal sense than pre-Fourteenth Amendment freed Blacks, who could not even be counted among the citizens of this country. Lack of formal citizenship places the noncitizen, in the worst cases, into conditions that closely resemble slavery.

Consider, for example, the story of José Hernández, an undocumented worker:

José Hernández was good with a machete, so he was the top choice when his boss needed someone to chop down young trees that were choking parts of Florida’s everglades. On one trip to the swamps, the worker flew in by helicopter and quickly cut a stand of sprouting trees. But when they took off again, something went wrong: The Chopper lurched left, then plunged into murky water. A broken rotor blade slashed through Hernández’s left thigh. Doctors saved his life but couldn’t save his leg. To pay for his costly medical care, Hernández filed a workers’ compensation claim, which covered some of his bills. Then, the insurance carriers, Florida Citrus, Business & Industries Fund, discovered that Hernández was in America illegally, without work papers or permission from federal immigration officials. It halted all payments and left Hernández to languish in a low-income Florida nursing home, unable to work to support his wife and four children in Mexico.<sup>24</sup>

As an immigration professor, I expect stories like this to evoke out-

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20. Zietlow, *supra* note 1, at 307.

21. Bosniak, *supra* note 18, at 1294.

22. *Id.* at 1305.

23. *Id.* at 1321.

24. Liz Chandler, *Illegal Immigrants Frequently Denied Compensation*, LAS VEGAS REV. J., Sept. 24, 2006, available at <http://www.realcities.com/mld/krwashington/15527454.htm>.

rage in my students. And they usually do. Inevitably, however, the blame turns on the employer for violating immigration laws to hire and exploit undocumented workers. But when the discussion moves to José's right to receive work benefits for his injuries available to United States citizens, some students turn to José's agency for crossing the border illegally and then procuring fake documents to work for a United States employer. Students worry that if José receives benefits, then the law would sanction his illegality. Because José is not eligible to work, shouldn't he also be disqualified from work benefits? And if the law gives José these work benefits, won't that promote more illegal immigration? And so the discussion goes. Unfortunately, this is not a discussion that is taking place solely in my classroom or immigration classrooms across the country. It is also occurring in state legislatures and state courthouses across the country to justify José's exclusion, and thousands like him, from the receipt of worker's compensation and related benefits.<sup>25</sup>

And this is not where it ends. Under federal law, José is not eligible for federal welfare benefits (like Supplemental Security Income (SSI) or Medicaid) to continue his medical treatment.<sup>26</sup> If he wanted to study to change professions, he would be ineligible for federal student aid and could be charged out-of-state tuition or be denied admission based on his immigration status.<sup>27</sup> Indeed, under today's laws, he cannot even get a driver's license, which he might need to open a bank account, rent an apartment, and apply for loans.<sup>28</sup> In certain states, landlords and banks could face civil or criminal sanctions for renting to José or doing business with him.<sup>29</sup> And in some states it would be illegal for José to congregate in certain public spaces to get some type of work, or to speak his native language.<sup>30</sup>

But is this all constitutional? So far, the answer seems to be that it is, as long as Congress legislates or sanctions the anti-alienage measures when adopted by states. Anti-alienage laws of the early twentieth century show that this is not the first time that states have legislated the outsidersness of the "alien."<sup>31</sup> However, at least in the 1970s, the United States Supreme Court was willing to declare similar state anti-alienage laws unconstitutional on the basis of equal protection challenges or federal preemption. In the seminal *Graham v. Richardson*<sup>32</sup> case, the

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25. See *infra* Part II.A.

26. See *infra* Part II.B.

27. See *infra* Part II.C.

28. See *infra* Part II.D.

29. See *infra* Part II.E.

30. See *infra* Part II.E.

31. J. Allen Douglas, *The "Priceless Possession" of Citizenship: Race, Nation and Naturalization in American Law, 1880-1930*, 43 DUQ. L. REV. 369 (2005).

32. 403 U.S. 365 (1971).

United States Supreme Court designated “aliens,” at least those legally in the United States, a “discrete and insular minority,” thereby triggering a strict scrutiny analysis of state laws restricting noncitizens from accessing public benefits available to citizens.<sup>33</sup> Moreover, until the 1970s, Congress’s exercise of plenary power over immigration, while still constitutionally suspect,<sup>34</sup> did not expand beyond determinations of who could be allowed to immigrate and/or naturalize, who would be excluded, and who would be removed. Not surprisingly then, back in the 1970s, Alexander Bickel, in a famous essay, wrote that citizenship “plays only the most minimal role in the American constitutional scheme.”<sup>35</sup> Bickel wrote, however, before Congress legislated to deny welfare benefits to lawful permanent residents. Four years after *Graham*, the Court in *Mathews v. Diaz*<sup>36</sup> largely sanctioned federal discrimination against noncitizens beyond immigration control and allowed Congress to enact the very type of legislation barred to states under *Graham*.

To an extent, *Graham* foreshadowed the result in *Diaz*. *Graham* also held that states may not “add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and *residence of aliens in the United States . . .*”<sup>37</sup> This language implied that Congress’s power over immigration expanded beyond unfettered discretion to establish eligibility criteria for “alien” legal admission and full membership status as citizens and into the conditioning of their residence once here. The *Diaz* Court’s recognition that the “relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government” largely solidified Congress’s plenary power into areas beyond border control.<sup>38</sup> In essence, since *Diaz*, federal alienage discrimination has survived constitutional scrutiny as long as Congress articulates a relationship between the regulation of noncitizens within the border and immigration policy.

Ever since, Congress has slowly occupied a broader field of “alienage” regulation into areas of noncitizens ordinarily living within the United States border that have no clear relationship to immigration control.<sup>39</sup> Moreover, Congress has even devolved to states some of these powers to discriminate against “aliens,” and some states have creatively interpreted federal regulation of the “alien,” to deny them

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33. *Id.* at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

34. *See, e.g.*, Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

35. Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 369 (1973).

36. 426 U.S. 67 (1976).

37. *Graham*, 403 U.S. at 378 (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)) (emphasis added).

38. *Diaz*, 426 U.S. at 81.

39. *See infra* Part II.

other state rights, such as workers' compensation.<sup>40</sup> Even when states have enacted pro-immigration legislation, anti-immigrant groups cite federal laws that regulate the "alien" in litigation to declare these laws unconstitutional as preempted by federal law.<sup>41</sup>

Concern over *Diaz* and its legacy rests precisely, therefore, in its lack of clarity as to whether there should be limits to the federal government's claim that its inside-the-border regulation of noncitizens is related to immigration policy. *Diaz*, for example, strongly hinted but did not clarify whether federal alienage classifications would survive when the discrimination against noncitizens denied them a fundamental right, not a privilege.<sup>42</sup> This scenario, particularly after 9/11, is not far-fetched. While framed mostly in terms of national security, the federal government has denied noncitizens fundamental due process rights by detaining them indefinitely and incommunicado to investigate and interrogate them for potential terrorist leads.<sup>43</sup> Under the recently enacted Military Commission Act of 2006,<sup>44</sup> any noncitizen unilaterally declared an "enemy combatant" by the Executive could be denied habeas corpus review, face military tribunals, and be charged with crimes on the basis of confessions obtained through torture.<sup>45</sup>

One urgent task, therefore, is to define the scope of federal power to regulate the "alien" beyond the border when the political branches claim to possess plenary powers to do so. Unfortunately, there are huge voids in this area, in part because the increasing anti-immigrant political climate and the narrowing field of rights discourse under United States constitutional doctrine have forced immigrant rights advocates and scholars to adopt litigation strategies, including preemption, that work in the short term but that may ultimately strengthen the treatment of the "alien" as a subject of foreign affairs, and not as a person subject to human rights.<sup>46</sup>

In Part II, I briefly trace the expansion of the federal plenary power

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40. See *infra* Part II.

41. See *infra* Part III.

42. It is clear that the Court in *Diaz* characterized the five-year residency requirement for welfare benefits eligibility as a privilege:

[T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits to *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to share in the bounty that a conscientious sovereign makes available to its citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.

*Diaz*, 426 U.S. at 80.

43. See, e.g., Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5, 11-13 (2004).

44. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

45. *Id.* § 7.

46. See *infra* Part IV.

doctrine within the border, and its devolution, in some cases to states. In Part III, I critically examine the use of the preemptive doctrine as a civil rights strategy to challenge state anti-alienage measures in the absence of a concerted strategy to impose United States constitutional limits to United States federal power over immigrants. In Part IV, I briefly discuss a few legal strategies that could promote greater rights for the noncitizen in the United States. I conclude simply by restating where I started. No doubt it could be beneficial to United States citizens if United States constitutional doctrine recognized greater rights based on federal citizenship. However, constitutional scholars should consider in their analysis how bounded conceptions of citizenship risk perpetuating the exclusion of the noncitizen from the enjoyment of these rights. The danger is all the more real as long as the federal plenary power over the immigrant not only remains unchecked by the United States Constitution at the border but expands beyond the border into the ordinary lives of noncitizens. This is not an insignificant development in the United States today. According to the 2000 United States Census, the foreign-born population numbered 31.1 million, making up 11.1 percent of the overall population in the United States.<sup>47</sup>

## II. REGULATING THE LIVING CONDITIONS OF THE "ALIEN"

### A. *The Undocumented Worker*

A decade after *Diaz*, Congress legislated the conditions of residence of "aliens" by enacting the Immigration Reform and Control Act of 1986 (IRCA).<sup>48</sup> IRCA granted amnesty to millions of undocumented persons but also made it illegal for employers to hire future unauthorized workers and for the undocumented to procure employment. Before IRCA, hiring undocumented workers was essentially legal, except in a few states that passed their own laws to prohibit the practice.<sup>49</sup> Here, Congress's reach to regulate the foreign national significantly expanded beyond the border (excluding or removing those without a work visa) and into the daily lives of immigrant workers (imposing civil or criminal sanctions for their unauthorized hire).<sup>50</sup> True, Congress's power to detect, detain, and deport workers without a visa had always existed and been exercised inside the United States territory, but IRCA was different. And it is only through recent developments that we begin

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47. See U.S. DEP'T OF STATE INT'L INFO. PROGRAMS, FOREIGN-BORN POPULATION SURGES IN THE UNITED STATES (June 10, 2002), <http://usinfo.state.gov/usa/diversity/pr061002.htm>.

48. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

49. See, e.g., Joshua J. Herndon, *Broken Borders: De Canas v. Bica and the Standards that Govern the Validity of State Measures Designed to Deter Undocumented Immigration*, 12 TEX. HISP. J. L. & POL'Y 31 (2006).

50. 8 U.S.C. §§ 1101-1537 (2003).

to fully understand just how different.

IRCA's passage immediately precipitated a number of employer challenges to workers' compensation claims filed by undocumented workers. Initially, state courts consistently found no conflict between IRCA's ban on the knowing employment of undocumented workers and state law protecting workers.<sup>51</sup> However, in 2002, the United States Supreme Court held in *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*<sup>52</sup> that an undocumented worker fired in retaliation for his support of union organizing would be ineligible for backpay (i.e., lost wages resulting from unlawful termination) because such an award would conflict with IRCA's bar on the hiring of undocumented workers. Unfortunately, despite its narrow holding,<sup>53</sup> employers began to use the *Hoffman* decision as a green light to contend that undocumented workers lack state and federal workplace rights. In doing so, employers have resorted to intimidating discovery practices during litigation to compel courts to release the plaintiffs' immigration status, which, even when unsuccessful, deters plaintiffs from coming forward.<sup>54</sup>

The post-*Hoffman* litigation results regarding undocumented workers' rights have been mixed. At the federal level, the Equal Employment and Opportunity Commission (EEOC) disallowed backpay remedies under Title VI<sup>55</sup> suits for discrimination based on national origin.<sup>56</sup> To date, however, the EEOC and other federal agencies have refused to expand *Hoffman* beyond backpay.<sup>57</sup> The National Labor Relations Board (NLRB), for example, barred employers from disallowing votes to unionize by undocumented workers, while the United States Department of Labor has stated that it will vigorously enforce federal worker protection laws, including the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), without regard to immigration status.<sup>58</sup>

At the state level, employers have sought to limit or bar workers' compensation or tort damages to undocumented workers for injury-related awards, and sometimes, even for work actually performed. With

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51. Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. REV. L. & SOC. CHANGE 299 (2006).

52. 535 U.S. 137 (2002).

53. Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 LA RAZA L.J. 103 (2003).

54. See, e.g., Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 47-58 (2005).

55. 42 U.S.C. §§ 2000e-2000e-17 (1994).

56. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS, Directives Transmittal No. 915.002 (2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.

57. de la Vega & Lozano-Batista, *supra* note 54, at 49-50.

58. *Id.* at 52.

few notable exceptions, most state courts have disallowed restrictions on wages for work performed.<sup>59</sup> Typically, under workers' compensation, an employee is entitled to three types of benefits: medical, temporary or total disability, and permanent impairment benefits.<sup>60</sup> The majority of state courts and agencies have also held that *Hoffman* does not preclude awards for medical expenses to undocumented workers.<sup>61</sup> However, some states have relied on *Hoffman* to bar undocumented workers from recovering wage-loss benefits or partial disability benefits under workers' compensation laws resulting from their work-related injuries.<sup>62</sup> Similarly, a few state courts have relied on *Hoffman* to restrict liability in personal injury and tort cases for lost income based on projected earnings.<sup>63</sup> In addition, some courts have determined that vocational rehabilitation under workers' compensation laws may not be awarded to undocumented workers because they are ineligible to work in the United States.<sup>64</sup>

### B. Welfare and the "Not-Qualified Alien"

In 1996, several pieces of congressional legislation continued the trend to regulate the living conditions of the "alien." First, Congress removed the right of most noncitizens, both legal and undocumented, to most federally-funded public benefits. Prior to 1996, documented immigrants, including lawful permanent residents (LPRs), were eligible for most federal public benefits. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),<sup>65</sup> however, enacted new rules for welfare eligibility for immigrants "in order to assure that aliens [are] self-reliant in accordance with national immigration policy."<sup>66</sup> To do so, the PRWORA significantly restricted immigrants' eligibility for federal public benefits and devolved to states the authority to enact similar restrictions for state-funded welfare programs and to enforce the provisions of the PRWORA.

Specifically, under the PRWORA, an immigrant who was not a "qualified alien"<sup>67</sup> became ineligible for most federal public benefits (in-

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59. *Id.* at 52-53.

60. José M. Rivero, *Challenges Facing Immigrant Workers in Obtaining Workers' Compensation Benefits in the Wake of Hoffman Plastics*, 2 ASS'N OF TRIAL LAWYERS OF AMERICA ANN. 2877 (2005).

61. See O'Donovan, *supra* note 51, at 304.

62. *Id.* at 304-06; see also Rivero, *supra* note 60, at Part II.; *Developments in the Law: Jobs and Borders*, 118 HARV. L. REV. 2171, 2230-34 (2005).

63. de la Vega & Lozano-Batista, *supra* note 54, at 44-45.

64. Marjorie A. Shields, Annotation, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R. 5th 523, §§ 4-5 (2004).

65. Pub. L. No. 104-193, 110 Stat. 2105 (1996) [hereinafter PRWORA].

66. 8 U.S.C. § 1601 (a)(5) (Supp. III 1997).

67. Only lawful permanent residents, people granted asylum, refugees, and certain parolees as well as a few other categories of immigrants were considered qualified aliens. *Id.* § 1641(c). The PRWORA further restricted the right of even qualified aliens to apply for certain benefits, including

cluding SSI and Medicaid) with few exceptions.<sup>68</sup> As a result, a state could no longer confer upon ineligible immigrants state welfare benefits partially funded through federal funds.<sup>69</sup> Also, under the PRWORA, states were not required to adopt any particular eligibility criteria for solely state-funded programs but could choose to follow the federal classification in determining eligibility as long as the minimum federal eligibility requirements were followed.<sup>70</sup> The PRWORA, perhaps more importantly, authorized states to do what the United States Supreme Court barred them from doing more than two decades earlier in *Graham*. California's Proposition 187, which sought to deny benefits to the noncitizen, including access to public schools,<sup>71</sup> became the impetus for the 1996 anti-immigrant welfare reforms. Peter Spiro, in particular, describes Proposition 187 as having the "steam valve" effect of pressuring up local anti-immigrant politics into the national landscape.<sup>72</sup> That is exactly what the PRWORA did. The PRWORA authorized states "to prohibit or otherwise limit or restrict the eligibility of [immigrants] . . . for programs of general cash public assistance furnished under the law of the State . . .," as long as these were "not more restrictive than [those] . . . under comparable federal programs."<sup>73</sup> In addition, the PRWORA proscribed states from conferring benefits to undocumented immigrants, except through the affirmative enactment of law by a state legislature after the date of the PRWORA's enactment.<sup>74</sup> Indeed, there have been a few states that have denied benefits to legal immigrants beyond what the PRWORA authorized. Alabama, for example, chose to deny temporary assistance to needy families (TANF) to all immigrants, whether legal or not.<sup>75</sup> Louisiana and Wyoming have also denied Medi-

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food stamps and Medicaid. *Id.* §§ 1612-13 (imposing a five-year United States residence requirement for lawful permanent residents unless they have worked in the United States for forty qualifying quarters or entered the United States prior to 1996).

68. These exceptions include emergency medical assistance; short-term, non-cash, in-kind emergency disaster relief; immunization, testing and treatment of communicable diseases; in-kind services necessary for the protection of life or safety; and programs for housing or community development assistance or financial assistance to the extent the immigrant received such benefit prior to the PRWORA's enactment. *Id.* § 1611(b)(1)(A)-(E).

69. A federal public benefit includes any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

*Id.* § 1611(c)(1)(B).

70. *Id.* § 1622(b).

71. See Emilie Cooper, Note, *Embedded Immigrant Exceptionalism: An Examination of California's Proposition 187, the 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein*, 18 GEO. IMMIGR. L.J. 345 (2004).

72. See, e.g., Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (discussing the "steam-valve" virtues of federalism in immigration policy, under which one state's preferences, frustrated at home, are revisited in Congress).

73. 8 U.S.C. § 1624(a)-(b).

74. H.R. CONF. REP. NO. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649.

75. Ann Morse, et al., *America's Newcomers: Mending the Safety Net for Immigrants*, National

caid benefits to all immigrants, or at least expressed an intent to do so.<sup>76</sup>

The PRWORA additionally delegated enforcement authority to states including a requirement that “an applicant . . . provide proof of eligibility,”<sup>77</sup> and removed any prohibitions and restrictions against any state “from sending to or receiving from [immigration agencies] information regarding the immigration status, lawful or unlawful, of an alien in the United States.”<sup>78</sup> Congress thus transferred to states much of the authority not only to design and implement their own benefit programs but also to determine for themselves eligibility requirements affecting legal immigrants’ qualification for most state and local means-tested programs.<sup>79</sup> As a consequence, state agencies responsible for administering public benefits programs are now required to verify immigration and citizenship status of applicants in order to ensure that neither qualified nor non-qualified “aliens” receive public benefits for which they are ineligible.<sup>80</sup> Verification should only occur when the benefit sought is contingent on citizenship or immigration status and applied only to persons receiving benefits. The PRWORA, however, did not establish clear guidelines that states should follow for verification purposes and instead granted states discretion to adopt their own verification systems. Federal guidelines to states do exist, however. These guidelines recommend, *inter alia*, that state agencies remove questions from applications that are likely to unnecessarily chill participation of immigrant applicants.<sup>81</sup> Further, the PRWORA included some narrow provisions for reporting applicants to immigration authorities that apply solely to three programs (SSI, public housing, and TANF) and required reporting only of persons whom the agency knows are not lawfully present in the United States.<sup>82</sup>

Some states, however, have gone beyond the PRWORA and passed resolutions that would impose civil and criminal penalties against state employees who fail to verify immigration status and report to law enforcement applicants who do not qualify. For example, on November 2, 2004, Proposition 200, also known as the Arizona Taxpayer and Citizen Protection Act,<sup>83</sup> passed with a fifty-six percent approval vote from

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Conference of State Legislatures, available at <http://www.ncsl.org/statefed/execsumm.htm#FedOverview> (last visited Apr. 20, 2007).

76. *Id.*

77. 8 U.S.C. § 1625 (Supp. III 1997) (cited in Friendly House et al., CV-04-546, at 12).

78. 8 U.S.C. § 1644 (Supp. III 1997) (cited in Friendly House et al., CV-04-546, at 12).

79. PRWORA, Pub. L. No. 104-193, §§ 402-03, 110 Stat. 2105 (1996).

80. *Id.* § 432.

81. National Conference of State Legislatures, *Verification of Citizenship and Immigrant Status Required of All Applicants for Public Benefits*, <http://www.ncsl.org/programs/immig/Verification.htm> (last visited Jan. 25, 2007); see also Joan Friedland et al., *Immigrant Benefits and Documentation Issues*, 1390 PLI/CORP. 187, 206-08 (2003).

82. PRWORA, Pub. L. No. 104-193, § 404, 110 Stat. 2105 (1996), amended by Balanced Budget Act of 1997, §§ 564, 5581(a).

83. Proposition 200, [http://www.azsos.gov/election/2004/info/PubPamphlet/Sun\\_Sounds/english/](http://www.azsos.gov/election/2004/info/PubPamphlet/Sun_Sounds/english/)

Arizona voters.<sup>84</sup> Proposition 200 sought to require all Arizona agencies responsible for the administration of state and local public benefits that were not federally mandated to verify the immigration status of any applicant and report to the federal immigration authorities the failure of the applicant to do so.<sup>85</sup> Failure to report the applicant to immigration authorities could carry criminal sanctions for the employee and her supervisor.<sup>86</sup> Proposition 200 also included voting registration and voting poll restrictions, alleging voter fraud by noncitizens.<sup>87</sup> As a result, the measure required would-be voters to present proof of United States citizenship, as well as two forms of identification with a name and address before receiving a ballot.<sup>88</sup>

Critics of Proposition 200 cautioned that the millions of tax dollars needed to administer verification requirements would divert the money away from education, health care, and other social service programs.<sup>89</sup> In addition, critics cautioned that those most affected would be United States citizens who would have to provide proof of citizenship (either a passport or birth certificate), which, in turn, would lead to greater inefficiency in the provision of state services.<sup>90</sup> Critics also cautioned that Proposition 200 would discourage immigrants from procuring health services, such as immunizations and treatment for communicable diseases, potentially increasing the risk of epidemics in Arizona.<sup>91</sup> Information on the effect of Proposition 200 suggests that some critics' fears have been borne out. For example, in Tucson, county officials expressed concern that the passage of Proposition 200 is significantly "reducing the number of women seeking prenatal care and food through the Women, Infants and Children Program," even though the proposition did not apply to those programs.<sup>92</sup>

What is particularly problematic about Proposition 200, however, is

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prop200.htm (last visited Jan. 25, 2007) [hereinafter Proposition 200] (current version at ARIZ. REV. STAT. ANN. § 46-140.01).

84. Not unlike Proposition 187 in California, Proposition 200 was favored by Latino voters, with forty-seven percent voting in its favor. *See Judge Gives Go Ahead for Governor Janet Napolitano to Sign Proposition 200 in Arizona*, THE COMMAND POST, Dec. 10, 2004, [http://www.commandpost.org/oped/2\\_archives/018055.html](http://www.commandpost.org/oped/2_archives/018055.html).

85. Proposition 200, *supra* note 83, at § 6.A.

86. *Id.* § 6.B.

87. *Id.* § 3.

88. *Id.* §§ 3-5.

89. *See, e.g., What's Wrong with Prop. 200?*, <http://web.archive.org/web/20060524041849/http://www.defeat200.org/wrong.php> (last visited Jan. 25, 2007); *see also* Tamar Jacoby, *Flawed Proposition*, WALL ST. J., Sept. 14, 2004 (reporting on the governor's office estimates on the cost of implementation into the tens of millions of dollars).

90. *What's Wrong with Prop 200?*, *supra* note 89.

91. *Id.*

92. Claudine LoMonaco, *Prop. 200 Immigration Effect*, AM. RENAISSANCE, Mar. 3, 2005, available at [http://www.amren.com/mtnews/archives/2005/03/prop\\_200\\_immigr.php](http://www.amren.com/mtnews/archives/2005/03/prop_200_immigr.php); *see also* Elvia Díaz & Robbie Sherwood, *Prop. 200's Effect Minimal: Political Fallout May Loom Large in '06 Races*, THE ARIZ. REPUBLIC, June 5, 2005 (reporting that Proposition 200 has discouraged Latinas from seeking prenatal care).

that its intent and effect was to provoke even greater anti-immigrant feelings during an important Arizona election during which the undocumented became the scapegoat for many of the state's problems.<sup>93</sup> Proposition 200 deceptively included provisions to deny the undocumented benefits for which they were already ineligible under federal law. Indeed, the allegation was one of pernicious fraud, purportedly costing the state of Arizona millions of dollars.<sup>94</sup> In its Findings and Declarations, the proposition reads that Arizona "finds that illegal immigration is causing economic hardship to [Arizona] and that illegal immigration is encouraged by public agencies within [Arizona] that provide public benefits without verifying immigration status."<sup>95</sup> It also states, "illegal immigrants have been given a safe haven in [Arizona] with the aid of identification cards that are issued without verifying immigration status,<sup>96</sup> and this conduct . . . undermines the security of our borders . . ."<sup>97</sup> The emotional appeal to voters is clear: "The citizens of Arizona have spoken: they have had enough."<sup>98</sup> "For too long, our porous borders have allowed millions of immigrants to illegally enter the United States, circumventing our generous immigration laws and undermining our sovereignty."<sup>99</sup> Passage of Proposition 200 "is vital to the security of this state and the sovereignty of our country."<sup>100</sup>

Despite its rhetorical force, Proposition 200 lacked official state findings about the effect of illegal immigration on Arizona's economy, much less any assessment of welfare fraud.<sup>101</sup> Instead, such figures,

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93. The *Arizona Republic* is predicting that the real result of Proposition 200 would be to create a political battleground in upcoming Arizona elections, particularly for Attorney General Terry Goddard, who is up for re-election in 2006, and who, along with Arizona Governor Janet Napolitano, is blamed for the poor implementation of the law and is accused of being soft on illegal immigration. Diaz & Sherwood, *supra* note 92.

94. According to State Representative Russell K. Pearce, welfare fraud cost Arizona taxpayers tens of millions of dollars. Proposition 200, *supra* note 83. Rachel Alexander of IntellectualConservative.com cited the Center of Immigration Studies (CIS) figures that "welfare provided by Arizona taxpayers to illegal immigrants is \$380 million dollars." *Id.* Similarly, Linda Bentley of Carefree argued that "Arizona [] spends more than \$1 billion [] to provide services and benefits to more than half a million illegal aliens" which amounts to an added tax burden of \$700 a year on every household. *Id.*

95. Proposition 200, *supra* note 83, at § 2.

96. This statement, at least as to driver's licenses, is false. Since 1996, Arizona had denied driver's licenses to the undocumented by requiring applicants to establish proof of legal residence. Suzanne Gamboa, *Driver License ID May Show Immigration Status*, THE ARIZ. DAILY STAR, May 3, 2005, available at <http://www.azstarnet.com/sn/printDS/73320>.

97. Proposition 200, *supra* note 83, at § 2.

98. *Id.* (statement by Russell K. Pearce, State Representative).

99. *Id.*

100. *Id.*

101. *Id.* (statement by Jorge Luis Garcia, State Senator). In fact, a measure passed by the Arizona State Legislature requiring an investigation of welfare payments to the undocumented has been thwarted by the failure of legislative leaders to establish the task force to conduct the study. See JACK MARTIN & IRA MEHLMAN, THE COSTS OF ILLEGAL IMMIGRATION TO ARIZONANS: A REPORT BY THE FEDERATION OF AMERICAN IMMIGRATION REFORM (2004) [hereinafter FAIR Report] (discussing H.R. 2848).

which were used in a TV ad campaign in support of the measure,<sup>102</sup> came primarily from a 2004 study conducted by the Federation for American Immigration Reform (FAIR), a group well-known for its anti-immigrant stance.<sup>103</sup> FAIR concluded that illegal immigration overall costs Arizona taxpayers more than \$1 billion per year in K-12 public education, unfunded medical expenses, and incarceration; the cost is approximately \$700 per year for each household headed by a native-born resident.<sup>104</sup> None of these costs, however, were related to Proposition 200's alleged welfare fraud abuse. The only mention in the FAIR study of welfare payments in Arizona was in a paragraph that estimated the state's welfare deficit resulting from illegal immigrants at \$15 million per year. FAIR calculated these costs based on a 2003 national Center for Immigration Studies (CIS, a conservative think tank) study that "concluded that average non-medical welfare payments to illegal-immigrant headed households averaged \$151 per year."<sup>105</sup>

Proposition 200 also included voting registration and voting poll restrictions to curtail alleged voter fraud by noncitizens.<sup>106</sup> As a result, the measure required would-be voters to present proof of United States citizenship, as well as two forms of identification with a name and address before receiving a ballot.<sup>107</sup> Opponents of the measure expressed concern that the law would discourage and harass eligible United States citizen voters from exercising their right to vote by creating a state bureaucracy that would make it more difficult for voters to register.<sup>108</sup> Fears about eligible voter registration problems were not unfounded. From January to June 2005, more than "5,000 Arizonans—most newly transplanted and none believed to be in the country illegally . . . [were] rejected when they registered to vote."<sup>109</sup> In contrast, the effect of curtailing the purported fraud has been minimal. As of June 2005, six

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102. Margot Roosevelt, *Border War in Arizona*, TIME, Oct. 11, 2004, available at <http://www.time.com/time/magazine/article/0,9171,995356,00.html>.

103. The FAIR Report, *supra* note 101.

104. *Id.*

105. *Id.* at n.7 (citing STEVEN CAMAROTA, CTR. FOR IMMIGRATION STUD., BACK WHERE WE STARTED: AN EXAMINATION OF TRENDS IN IMMIGRANT WELFARE USE SINCE WELFARE REFORM (2003)). It is not clear from the FAIR report how FAIR arrived at the \$15 million figure.

106. Proposition 200, *supra* note 83, at §§ 3-5.

107. *Id.*

108. *Id.*

109. Díaz & Sherwood, *supra* note 92 (reporting that this amounts to about one out of every three new registrations in Maricopa, Pima and Pinal Counties); see also C.J. Karamargin, *Prop. 200 Bouncing New Voter Sign-Ups: Pima County Turned Down 59 percent in Last 2 Weeks*, THE ARIZ. DAILY STAR, May 6, 2005, available at <http://www.azstarnet.com/sn/printDS/73883> (reporting that during two weeks in May, Pima County, Arizona officials rejected fifty-nine percent or 423 of the 712 voter registration forms from prospective new voters for failure to meet the new requirements). Challenges to whether Proposition 200's voting requirements violate the Voting Rights Act are being considered in the litigation challenging the measure. The Inter Tribal Council of Arizona, Inc. et al. v. Brewer, Complaint for Declaratory & Injunctive Relief, available at <http://www.lawyerscomm.org/2005website/publications/press/pdf/prop%20200.pdf>. A substantive analysis of the merits of these allegations is beyond the scope of this article.

months after the law's passage, only two welfare applicants have been reported to immigration authorities for seeking state benefits illegally.<sup>110</sup>

Meanwhile, the political rhetoric of Proposition 200 continues to be emotional and divisive. *The Wall Street Journal* insightfully captured the politics of why FAIR and other anti-immigrant groups spent nearly half a million dollars to promote Proposition 200: "They expect it to win big . . . and plan to use these skewed results to advance their agenda in Washington . . . and wave [the victory] around like a bloody shirt . . . . [T]he outcome [would] vindicate[] . . . their claim that the American public doesn't like immigrants and opposes immigration reform."<sup>111</sup> Proposition 200 is merely the beginning of a nation-wide campaign by anti-immigrant groups to sponsor similar bills in Arizona and other states.<sup>112</sup> At least seven other states—Arkansas, Alabama, Colorado, Georgia, Tennessee, Virginia, and Ohio—have introduced bills or ballot measures similar to Proposition 200.<sup>113</sup> Meanwhile in Arizona, encouraged by strong voter support for Proposition 200, Arizona legislators passed legislation that would have denied even more public programs to the undocumented, including adult education classes, child care assistance, and lowered in-state tuition at Arizona public universities.<sup>114</sup> In May 2005, however, Governor Napolitano vetoed the bill, stating, "While I agree that public programs should not be available to those who consciously decide to come here illegally, this bill goes too far by punishing even longtime residents of this state who were brought here as small children by their parents."<sup>115</sup>

### C. The "Alien" College Student

Higher institutions of learning were also affected by the 1996 welfare reforms that restricted student aid eligibility to foreign nationals. Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) proscribed states from conferring upon undocumented immigrants any postsecondary education benefits based

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110. Díaz & Sherwood, *supra* note 92.

111. Jacoby, *supra* note 89.

112. According to the International Relations Center, a nonprofit policy study center established in 1979, since Proposition 200 passed last fall, its backers have presented twenty other bills in the Arizona legislature and have worked to sponsor similar bills in other states targeting immigrants. Margot Veranes & Adriana Navarro, *Anti-Immigrant Legislation in Arizona Leads to Calls for a State Boycott*, <http://www.americas.irc-online.org/am/727> (last visited Jan. 25, 2007).

113. See Stephen Dinan, *Efforts Against Illegals Broadens*, WASH. TIMES, Jan. 22, 2005, at A01; Veranes & Navarro, *supra* note 112; Yvonne Wingett, *Prop. 200 Spurs Efforts Nationwide*, THE ARIZ. REPUBLIC, Jan. 24, 2005, available at <http://www.azcentral.com/specials/special03/articles/0124prop200-america24.html>.

114. H.B. 2030, 47th Leg., 15-191.01 Sess. (Ariz. 2005), available at <http://www.azleg.gov/legtext/47leg/1r/bills/hb2030c.pdf>.

115. *Arizona Governor Vetoes Measures on Immigration*, N.Y. TIMES, May 22, 2005, at 26. That same day, Governor Napolitano also vetoed a bill that would have given Arizona police the power to enforce federal immigration laws. *Id.*

on residency status within the state unless the state was willing to offer the same to any other United States citizen or national regardless of residency status.<sup>116</sup> At the same time, the PRWORA denied postsecondary monetary assistance to the undocumented in the form of grants, loans, and work-study.<sup>117</sup> Any state wishing to make an undocumented person eligible for any state or local public benefit would have to enact a state law affirmatively providing for such eligibility.<sup>118</sup> Subsequently, Congress included section 1623, which appears to withdraw state discretion to grant in-state tuition to undocumented students.<sup>119</sup> That provision reads: “[N]otwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit . . . .”<sup>120</sup>

The effect of these measures has been to discourage higher education institutions from admitting noncitizens into their programs and to strengthen arguments in favor of restricting access. Despite this effect, state responses to the 1996 laws have been mixed. A few states have sought to deny admission to the undocumented into public universities. In Virginia, for example, the attorney general issued a 2002 memorandum to all public universities and colleges and to the executive director of the State Council for Higher Education in Virginia stating, “[T]he Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at all . . . .”<sup>121</sup> This memorandum caused Virginia’s colleges and universities to implement, or to continue to enforce, policies that deny admission to the undocumented.<sup>122</sup> When challenged, the United States District Court of Virginia upheld the admission bar of the undocumented to higher education, as long as the state resorted to federal standards for establishing who is and is not undocumented.<sup>123</sup>

Other state legislatures have passed or introduced legislation to either grant or deny in-state tuition benefits to the undocumented.<sup>124</sup> To date, at least nine states have passed laws to grant in-state tuition to the

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116. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 [hereinafter IIRAIRA] (*amending* 8 U.S.C. § 255(b)(1) (1996)).

117. *Id.*

118. 8 U.S.C. § 1621(d) (Supp. III 1997).

119. Rebecca Ness Rhymer, Note, *Taking Back the Power: Federal vs. State Regulation on Postsecondary Education Benefits for Illegal Immigrants*, 44 WASHBURN L.J. 603, 619-20 (2005).

120. *Id.*

121. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 591 (E.D. Va. 2004) (citing Memorandum from the Commonwealth of Virginia Attorney General, *Immigration Law Compliance Update*, at 5 (Sept. 5, 2002)).

122. *Id.*

123. *Id.* at 602-04.

124. *See, e.g.*, Nat’l Immigration Law Ctr., Chart of State Proposed or Enacted Legislation Regarding Immigrant Access to Higher Education, [http://www.nilc.org/immlawpolicy/DREAM/DREAM\\_Bills.pdf](http://www.nilc.org/immlawpolicy/DREAM/DREAM_Bills.pdf) (last visited Jan. 21, 2007).

undocumented or temporary residents,<sup>125</sup> while two states have passed laws denying benefits.<sup>126</sup> In addition, about twenty-one other states have attempted to adopt legislation to grant in-state tuition to the undocumented, while two have sought to deny it.<sup>127</sup>

Why are there restrictions on undocumented students in higher education but not in K-12 public schools? The principal reason is that constitutional protection against federal or state discrimination targeting the undocumented in higher education has extended only to lawful permanent residents and certain temporary residents (nonimmigrants) who can establish “residency” in the United States. Even before *Plyler*, the United States Supreme Court looked to preemption and/or equal protection to proscribe state discriminatory treatment of immigrants in their access to higher education. In 1977, in *Nyquist v. Mauclet*,<sup>128</sup> the Court struck down New York’s bar to state funded scholarships to all noncitizens except refugees and those lawful permanent residents who had not applied or lacked the intent to apply for citizenship.<sup>129</sup> However, the Court left open the possibility that a different outcome might result if the bar to state scholarships discriminated only against temporary legal migrants (nonimmigrants) who, by federal law, were precluded from establishing the residency requirement that is often required for higher education scholarships.<sup>130</sup> Thus, some states, like Maryland, narrowed *Nyquist’s* scope to permit states to continue discriminating against nonimmigrants, as long as the state measure imposed a residency requirement that also applied to citizens. Subsequently in 1982, days after *Plyler*, in *Toll v. Moreno*,<sup>131</sup> the Court struck down the University of Maryland’s policy of charging out-of-state tuition rates to G-4 visa holders because under federal immigration policy, G-4 visa holders could establish residency. The holding, however, left open the door to distinctions targeting nonimmigrants that could not establish residency in the United States. It also left open the possibility that states could discriminate against undocumented students who, by

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125. These are Texas, California, New York, Utah, Washington, Oklahoma, Illinois, Kansas, and New Mexico. See Nat’l Immigration Law Ctr., Basic Facts About In-State Tuition for Undocumented Immigrant Students, [http://www.nilc.org/immlawpolicy/DREAM/in-state\\_tuition\\_basicfacts\\_041706.pdf](http://www.nilc.org/immlawpolicy/DREAM/in-state_tuition_basicfacts_041706.pdf) (last visited Jan. 21, 2007).

126. The two states are Alaska and Virginia. See Chart, *supra* note 124.

127. See generally María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373 (2005) (Those states in favor include: Colorado, Delaware, Florida, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, and Wisconsin. Those states opposed include Arizona and Virginia.).

128. 432 U.S. 1 (1977).

129. *Id.*

130. *Id.* at 4. In dicta, the Court acknowledged the policy also barred nonimmigrants but stated that “[s]ince many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country, the bar is of practical significance only to resident aliens.” *Id.* (citations omitted).

131. 458 U.S. 1 (1982).

virtue of their unauthorized stay in the United States, would be ineligible for residency. In sum, since *Nyquist* and *Toll*, states have upheld the constitutionality of charging out-of-state tuition fees for higher education to nonimmigrant and/or undocumented students, as long as any state residency requirements are consistent with federal immigration policy.<sup>132</sup>

But why did the Court not extend constitutional equal protection to protect nonimmigrant and undocumented students from discrimination in higher education in the same way that it chose to protect the children in *Plyler*? There are at least two legal explanations. First, higher education is not considered a fundamental or quasi-fundamental right, so that discrimination against foreign nationals is permitted as long as states have a rational basis for the disparate treatment.<sup>133</sup> Second, students in higher education are less likely to be treated as a "protected class" for equal protection purposes given that most are likely to be viewed as young adults with agency and not as the young and "innocent" children in *Plyler v. Doe*. In *Plyler*, the Court did not consider undocumented migrants to constitute a suspect class. Rather, the Court recognized undocumented children as a vulnerable class deserving of protection, in part because penalizing children for their parents' choice to bring them to the United States unlawfully would be unfair.<sup>134</sup> As a result, every year, approximately 65,000 students graduating from United States high schools face limited prospects for completing their education or working legally in the United States because their parents brought them to the United States as undocumented children.<sup>135</sup>

#### D. *Driver's Licenses*

Post-9/11, the issue of driver's license restrictions to the noncitizen took center stage. Like Proposition 187, the driver's license debate began at the state level especially when states learned that some of the 9/11 hijackers used a driver's license to rent apartments, open bank accounts, and board the planes. Erroneously, the argument became that

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132. See, e.g., *Carlson v. Reed*, 249 F.3d 876 (9th Cir. 2001) (upholding denial of in-state residency tuition to TN/TD visa holder); Op. Off. Att'y Gen. No. JM-241 (Dec. 12, 1984), available at <http://www.oag.state.tx.us/opinions/op47mattox/jm-0241.htm> (validating a state statute that permitted nonimmigrants to present evidence to establish residency for purposes of tuition in accordance with federal law). Foreign nationals

who are permitted by Congress to adopt the United States as their domicile while they are in this country must be allowed the same privilege as citizens and permanent residents of the United States to qualify for Texas residency for purposes of tuition at state universities, despite the limitation in section 54.057 of the Texas Education Code.

*Id.*

133. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-39 (1973).

134. *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982).

135. Jeffrey S. Passel, The Urban Inst., Further Demographic Information Relating to the DREAM Act, [http://www.nilc.org/immlawpolicy/DREAM/DREAM\\_Demographics.pdf](http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf) (last visited Jan. 21, 2007).

but for the driver's license, the hijackers would not have been able to engage in the "ordinary tasks" necessary to execute the attack. During the 2001-2002 congressional session alone, twenty-one states enacted driver's license security legislation to restrict or deny immigrants' access to driver's licenses,<sup>136</sup> a trend that continued with few exceptions. By January 2005, twenty-four states had legislation requiring a lawful presence requirement for the issuance of driver's licenses, while only eleven states expressly did not.<sup>137</sup>

In 2004 and 2005, Congress considered driver's licenses to implicate a national security issue and, therefore, stepped in and "federalized" it, imposing national standards on the issuance of driver's licenses. Specifically, the United States Congress signed into law the Intelligence Reform and Terrorism Prevention Act (IRTPA) on December 17, 2004,<sup>138</sup> and the Real ID Act of 2005 on May 10, 2005.<sup>139</sup> IRTPA and the Real ID Act require that all state-issued driver licenses comply with proof of identity standards and machine-readable identity (biometric) information, such as a picture or other unique identifier. In addition, the Real ID Act imposes Social Security Numbers (SSN) and legal residency requirements on state-issued driver's licenses, at least if these are to be used as a form of identification before federal agencies for official purposes.<sup>140</sup> Further, the Real ID Act authorizes the issuance solely of temporary driver's licenses and identification cards for persons holding temporary visas or whose petitions are pending, which expire when the person's authorized stay in the United States expires or after one year if there is no definite end period.<sup>141</sup>

To be eligible to receive federal funding to implement the Real ID Act, states would be required to participate in an interstate database to share information about drivers with other states.<sup>142</sup> States are not obligated to comply with IRTPA and the Real ID Act; however, there are important incentives for states to do so. Residents from states that opt not to comply, for example, would be turned away when they tried to conduct business with a federal agency, unless that person had a federally-issued ID, such as a passport. Recognizing that compliance is likely

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136. *Driver's License Security Issues, Before the Subcomm. on Highways And Transit of the H. Committee on Transportation and Infrastructure*, 107th Cong. (2002) (testimony of State Senator Betty Karnette, Ca.) available at <http://www.ncsl.org/statefed/DLSK02.htm>; see also María Pabón López, *More than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2005).

137. Nat'l Immigration Law Ctr., *Overview of States' Driver's License Requirements*, [http://www.nilc.org/immspbs/DLs/state\\_dl\\_rqrmts\\_ovrvw\\_2006-10-26.pdf](http://www.nilc.org/immspbs/DLs/state_dl_rqrmts_ovrvw_2006-10-26.pdf) (last visited Jan. 21, 2007).

138. The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7212(b)(2)(A)-(F), 118 Stat. 3638.

139. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

140. *Id.* § 202(c).

141. *Id.* § 202(c)(2)(C).

142. *Id.* § 203.

necessary, many states have complained that laws were passed unfunded, and that the cost to states will be high.<sup>143</sup> Nevertheless, within four months of the passage of IRTPA and the Real ID Act, twenty-four states introduced legislation to conform state law to the federal requirements.<sup>144</sup>

A few states, including Tennessee, have issued driving certificates in lieu of driver licenses.<sup>145</sup> These driving certificates are not to be used as a form of personal identification but solely authorize the holder to drive. In fact, “for driving purposes only,” is usually inscribed in the certificate itself to distinguish it from driver’s licenses. Driving certificates, however, solve only part of the problem by licensing foreign motorists to drive and making them eligible for car insurance. These certificates do nothing to address the lack of personal identification that would allow foreign nationals to engage in “ordinary living.” Yet, that is precisely the desired intent. Proponents of driver restrictions wish to avoid converting driver’s licenses into a type of government sanction for unauthorized migrants to live in the United States. Senator Richard J. Durbin stated during a speech to Congress: “If you can produce a driver’s license, we assume you are legal, you are legitimate, you are for real.”<sup>146</sup> The opposite, then, is true. The real intent of driver’s license restrictions is to “delegitimize” foreign nationals by rendering them invisible, robbing them of their personhood, and ultimately, forcing them out of the United States territory entirely.

### *E. What’s Next?*

Perhaps prompted by the success of Proposition 187 to prompt anti-alienage federal legislation (the “steam valve” effect) or of Proposition 200 to sway local elections of federal and state leaders, anti-immigrant groups have doubled their efforts to introduce similar measures at the local level. Groups like FAIR and United States English Inc. have been supporting or promoting local efforts to pass anti-alienage

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143. The National Conference of State Legislatures said that compliance would cost \$500 million to \$700 million, although Rep. Sensenbrenner (R-WI), the sponsor of the REAL ID Act said the cost is closer to \$100 million. Darryl Fears, *Senate Backs Measure to Tighten ID Requirements*, WASH. POST, May 11, 2005, at A14; see also, Suzanne Gamboa, *States May Disobey Driver’s License Rules*, SFGATE.COM, May 10, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2005/05/09/national/w230046D54.DTL>.

144. 2005 State Driver’s License Proposals, National Immigration Law Center, April 2005, [http://web.archive.org/web/20050509030621/http://www.nilc.org/immspbs/DLs/state\\_dl\\_proposals\\_042605.pdf](http://web.archive.org/web/20050509030621/http://www.nilc.org/immspbs/DLs/state_dl_proposals_042605.pdf) (last visited Jan. 28, 2007).

145. Tenn. Immigrant and Refugee Rts. Coalition, *The Tennessee Driving Certificate – Background, Pitfalls, and Lessons Learned*, [http://www.tnimmigrant.org/TN\\_Coalition/Legislation/TNCertificate\\_LessonsLearned.doc](http://www.tnimmigrant.org/TN_Coalition/Legislation/TNCertificate_LessonsLearned.doc) (last visited Jan. 21, 2007).

146. *A License to Break the Law? Protecting the Integrity of Driver’s Licenses: Hearing Before the Subcomm. on the Oversight of Government Management, Restructuring, and the District of Columbia*, 107th Cong. 3 (2002) (statement of Sen. Durbin, Member, S. Comm. on Governmental Affairs) [hereinafter Durbin Statement].

ordinances or include them as propositions in important local elections.<sup>147</sup>

According to the National Conference of State Legislatures, in the year 2006 alone, at least seventy-eight state immigration-related bills have been approved in at least thirty-three states.<sup>148</sup> These ordinances include those similar to the one in Hazelton, Pennsylvania, which imposes fines on landlords who lease apartments and denies business permits to companies that hire the undocumented,<sup>149</sup> and which has spurred other towns to pass similar laws.<sup>150</sup> According to FAIR, more than thirty municipalities have passed, or are considering passing, laws that would restrict immigrant access to housing, jobs, and education.<sup>151</sup> In some states, for example, it is illegal for day laborers to congregate in public spaces.<sup>152</sup> Other states make it a crime for employers to hire day laborers off the streets without first registering with the city, or make it illegal to hire undocumented workers inside the city limits.<sup>153</sup> Additionally, “twenty-seven states have passed laws declaring English to be their official language, four others are considering them, and more than a dozen towns and cities” are adopting or considering similar measures.<sup>154</sup>

It may seem that these efforts might ultimately die down at the local level; and yet, given the current federal climate, they may just end up in federal legislation. In the Spring of 2006, for example, the United States Senate voted for two separate amendments to make English the national language.<sup>155</sup> The House also passed the Border Protection, Anti-Terrorism, and Illegal Immigration Control Act, which defines “alien smuggling” so broadly that it would essentially be a crime to render most assistance to the undocumented.<sup>156</sup> None of these bills ulti-

147. See, e.g., Edward Sifuentes, *FAIR Could Join Escondido to Defend Rental Ban*, THE N. COUNTY TIMES, Oct. 28, 2006, available at [www.nctimes.com/articles/2006/10/29/news/top\\_stories/22\\_03\\_2810\\_28\\_06.txt](http://www.nctimes.com/articles/2006/10/29/news/top_stories/22_03_2810_28_06.txt); Howard Witt, *It's Official: English-only Movement Gains Traction: Hispanic Leaders Alarmed*, CHI. TRIB., Oct. 15, 2006, available at [www.chicagotribune.com/news/nationworld/chi-0610150356oct15.1.5722281.story](http://www.chicagotribune.com/news/nationworld/chi-0610150356oct15.1.5722281.story).

148. Summer Harlow, *Small towns play big role in the battle over border*, THE NEWS J., Oct. 15, 2006, at 1A.

149. *Alien Crackdown Blocked*, WASH. TIMES, Nov. 1, 2006, [www.washtimes.com/national/20061031-102955-6046r.htm](http://www.washtimes.com/national/20061031-102955-6046r.htm).

150. *Illegal Immigrant Laws Face Setbacks*, N.Y. TIMES, Jan. 20, 2007, <http://www.nytimes.com/aponline/us/AP-Illegal-Immigrants-Crackdown.html>.

151. Witt, *supra* note 147.

152. Jim Fitzgerald, *Day Laborers Drop First Amendment Claims in Westchester Case*, THE ASSOCIATED PRESS, Sept. 11, 2006, available at <http://oneoldvet.com/pages/news.09.12.06.php>.

153. See, e.g., Sifuentes, *supra* note 147; *Oologah Adopts Ordinance Targeting Illegal Immigrants*, 7 NEWS, <http://www.kswo.com/Global/story.asp?S=5490192> (last visited Jan. 21, 2007).

154. Witt, *supra* note 147.

155. Carl Hulse, *Senate Votes to Set English as National Language*, N.Y. TIMES, May 19, 2006, available at <http://www.nytimes.com/2006/05/19/washington/19immig.html?ex=1305691200&en=ba019a0b7f448a43&ei=5088&partner=rssnyt&emc=rss>; Susan Jones, *Senate Approves English as National Language*, CNSNEWS.COM, May 19, 2006, <http://www.cnsnews.com/ViewCulture.asp?Page=/Culture/archive/200605/CUL20060519a.html>.

156. H.R. 4437, 109th Cong. (2005), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h109-4437>. Section 202 of the act refers to alien smuggling and related offenses. *Id.*

mately became law, but their passage by either the House or the Senate suggests that their adoption in the future is possible. The urgent question, therefore, is still what, if any constitutional limits, will courts impose on federal or state governments in regulating the daily lives of noncitizens within the border?

### III. PREEMPTION PITFALLS

The focus of civil rights groups has been to challenge state anti-alienage measures before they spread across states or are federalized. The juxtaposition of *Graham* and *Diaz* has sometimes permitted equal protection and federal preemption challenges to state alienage measures, even if similar measures would be upheld if passed by Congress. In contrast, constitutional challenges to federal legislation that regulates the living conditions of noncitizens within the border have been unsuccessful, mostly because courts are too willing to hold that *Diaz* controls. Increasingly, moreover, the preemption and equal protection challenges to state anti-alienage measures are also being squeezed out for two principal reasons.

First, to avoid equal protection constitutional challenges, states have looked to the federal government to sanction discrimination against noncitizens when their own legislation is constitutionally barred, as was the case with Proposition 187. Even in the absence of affirming federal legislation, courts have largely insulated state alienage measures from significant equal protection and preemption challenges. States have successfully redefined the class of protected "persons" under the Fourteenth Amendment as "aliens" to exclude the undocumented and even nonimmigrants from equal protection. While this strategy failed in *Plyler*, the reasoning in that case suggested that a different result could be possible if the class discriminated against did not involve children and/or a quasi-fundamental right.<sup>157</sup>

Second, the same year that the Court ruled on *Diaz*, states also successfully limited federal preemption in *De Canas v. Bica*,<sup>158</sup> particularly as applied to the undocumented, by arguing that not all state legislation that involves "aliens" is related to immigration policy.<sup>159</sup> There, the

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see also Top 10 "Poison Pills" in H.R. 4437, Am. Immigration Law Ass'n., <http://www.aila.org/content/default.aspx?docid=18449> (last visited Jan. 21, 2007).

157. *Plyler v. Doe*, 457 U.S. 202, 219 (1982).

The children who are plaintiffs in these cases are special members of this [undocumented immigrants] underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.

*Id.*

158. 424 U.S. 351 (1976).

159. *Id.* at 355 ("But the Court has never held that every state enactment which in any way deals

United States Supreme Court upheld the constitutionality of a California statute that penalized employers for hiring undocumented workers, reasoning that the protection of California's vital state interests—e.g., strengthening the economy—need not give way to federal preemption to regulate “aliens” in the absence of paramount federal legislation.<sup>160</sup> Deciphering what *De Canas* meant by “paramount federal legislation” has been difficult, but the phrase has generally permitted states to discriminate freely against the undocumented.

As a result of *Plyler* and *De Canas*, states are largely free from any judicial restraint to discriminate against the undocumented, unless the discrimination targets undocumented children, implicates a fundamental right, or contradicts federal legislation. Consider, for example, state denial of welfare benefits to noncitizens after the PRWORA's enactment. For twenty-five years *Graham* barred states from denying noncitizens welfare benefits that it made available to citizens, although states applied *Graham* restrictions solely to laws affecting lawful permanent residents, not to undocumented or nonimmigrant residents.<sup>161</sup> After the PRWORA, however, it became nearly impossible to win a preemption or equal protection challenge to any state provision denying welfare benefits to noncitizens, as long as states employed the PRWORA standards to deny either federal or state public benefits to noncitizens.<sup>162</sup>

The PRWORA also appears to have ousted state power in the field of regulation of public benefits to immigrants. Preemption issues thus may trump even state pro-immigrant legislation seeking to restore through exclusively state-funded programs benefits stripped from immigrants under the PRWORA. Some courts are interpreting the PRWORA to be such a comprehensive regulatory scheme that it restricts immigrant eligibility for all public benefits, however funded. States, therefore, have no power to legislate in the area, even if to restore or grant benefits to noncitizens through exclusively state-funded programs, unless expressly authorized by Congress to do so.<sup>163</sup> Indeed,

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with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised.”).

160. *Id.* at 355-58. Under *De Canas*, paramount federal immigration legislation exists when (1) “the nature of the . . . subject matter permits no other conclusion”; (2) “Congress has unmistakably so ordained” that result”; or (3) state legislation “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ in enacting the INA.” *Id.* at 356, 363.

161. *See, e.g.,* *Sudomir v. McMahon*, 767 F.2d 1456, 1459-62 (9th Cir. 1985); *Khasminskaya v. Lum*, 54 Cal. Rptr. 2d 915 (Cal. Dist. Ct. App. 1996) (holding that state law conditioning general assistance on permanent lawful residence and denying it to an asylum applicant did not violate equal protection). *But cf. Darces v. Woods*, 679 P.2d 458 (Cal. 1984) (holding that denial of AFDC benefits to undocumented family members violated the state’s constitutional equal protection clause).

162. *See, e.g.,* *Alvarino v. Wing*, 684 N.Y.S.2d 845 (N.Y. Sup. Ct. 1998) (upholding denial of state funded food assistance to PRA-ineligible lawful permanent residents); *CID v. S.D. Dep’t of Soc. Servs.*, 598 N.W.2d 887, 892 (S.D. 1999) (upholding state’s termination of Medicaid, food stamps, and Temporary Assistance for Needy Families PRA-ineligible welfare benefits).

163. *See* *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1255 (C.D. Cal. 1997) (“Congress’ intention to displace state power in the area of regulation of public benefits to im-

courts have upheld state legislation post-PRWORA to restore benefits to a select group of legal immigrants but solely when such legislation is pursuant to permissive federal authority.<sup>164</sup>

In contrast, the PRWORA's provision that state legislatures must expressly legislate to confer benefits to the undocumented has been held to proscribe the authority of the subdivision of states to confer benefits on the undocumented in the absence of state legislation.<sup>165</sup> Moreover, when states have legislated to restore state benefits to noncitizens, the PRWORA has "shielded" states from *Graham* constitutional challenges when states later decide to remove those benefits. This is what happened in 2003, when Colorado, citing an enormous budget shortfall, targeted the optional Medicaid program, under which 3,500 PRWORA ineligible legal immigrants had received life-sustaining medical coverage.<sup>166</sup> The Tenth Circuit upheld Colorado's move, choosing to interpret the *Graham* restriction that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause," as solely to require that Congress provide "a clear expression of Congressional intent to permit states to discriminate against aliens before it would tackle the constitutional issue."<sup>167</sup> In other words, the Tenth Circuit reframed the question to ask not "whether Congress can authorize [an equal protection] constitutional violation . . . [but] what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens."<sup>168</sup> The Tenth Circuit then read the PRWORA as expressly granting to states the discretion to assess whether they could bear the burden of providing optional coverage. When a state decides against optional coverage, the Tenth Circuit reasoned, it was simply addressing "Congressional concern (not just parochial state concern) that 'individual aliens not burden the public benefits system.' . . . This may be bad policy, but it is Congressional policy; and we, [the Tenth Circuit], review it only to determine whether it is ra-

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migrants is manifest in the careful designation of the limited instances in which states have the right to determine alien eligibility for state or local public benefits.").

164. *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 407 (Mass. 2002) (discussing Massachusetts's adoption of new supplemental transitional aid to families with dependent children program funded solely with state funds to mitigate the loss of benefits under the PRWORA); *Teytelman v. Wing*, 773 N.Y.S.2d 801, 804 (N.Y. Sup. Ct. 2003) (discussing New York's adoption of its own Food Assistance Program to assist certain groups of legal immigrants who lost benefits as a result of the welfare reform law pursuant to Congress's authorization to states as part of the 1997 revision to the welfare reform).

165. See Op. Off. Att'y Gen. No. JC-0394 (2001), available at <http://www.oag.state.tx.us/opinions/op49cornyn/jc-0394.htm> (finding that the PRA prohibits Harris County Hospital District from providing discounted health care to persons residing in Harris County without regard to their immigration legal status).

166. *Soskin v. Reinertson*, 353 F.3d 1242, 1244-46 (10th Cir. 2004). Coverage included chemotherapy, nursing home care, home health care, surgical care, and life-sustaining prescription drug coverage. *Id.* at 1246.

167. *Id.* at 1254-55.

168. *Id.*

tional.”<sup>169</sup>

Similarly, states like Massachusetts have adopted selective restrictions (i.e., residency or naturalization requirements) in the restoration of benefits once struck down as suspect under *Graham*'s equal protection analysis,<sup>170</sup> applying a rational basis standard to the legislation instead. To do so, courts have reasoned that certain distinctions in congressionally authorized state legislation that give citizens an advantage over noncitizens but restore benefits to some are not invidious when the classification is not suspect—i.e., residency requirements—and the legislation is benign.<sup>171</sup>

Subsequently, on November 30, 2004, the Friendly House and other plaintiffs filed a complaint with a federal district court in Arizona to enjoin the implementation of Proposition 200.<sup>172</sup> Plaintiffs argued that Proposition 200 regulates immigration and the treatment of immigrants within Arizona, and is therefore preempted by federal law.<sup>173</sup> Plaintiffs also argued that because Proposition 200 did not define “state and local public benefits,” it could be interpreted to apply to a wide range of public benefits, including public education, marriage licenses, and the right to counsel in violation of equal protection, substantive due process, and other benefits under the Sixth Amendment.<sup>174</sup> Initially, the United States District Court for Arizona granted a temporary injunction. In December 2004, however, the court lifted the injunction against the enforcement of Proposition 200, finding that the initiative as interpreted by the Arizona Attorney General<sup>175</sup> was not preempted by fed-

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169. *Id.*

170. In *Graham*, the Court rejected attempts to condition welfare benefits on an applicant's possession of citizenship, or, if the beneficiary was not a citizen, on having resided in the country for a specified number of years. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

171. *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 408 (Mass. 2002) (upholding six-month state residency requirement for supplemental transitional aid to families with dependent children); *Doe v. McIntire*, No. 00-3014-F, 2001 WL 95457, at \*5-11 (Mass. Super. Jan. 25, 2001) (upholding six-month state residency requirement for cash assistance benefits). Not all courts, however, have followed this logic. New York state courts, for example, have found the differentiations between different types of noncitizens that are unique to alienage, such as requirements of United States residence of intent to become citizens, is a discrimination that is directed at and harms only noncitizens. *Aliessa v. Novello*, 754 N.E. 2d 1085, 1092-96 (N.Y. 2001); *Teytelman v. Wing*, 773 N.Y.S.2d 801, 808 (N.Y. Sup. Ct. 2003).

172. *Friendly House et al. v. Napolitano*, Complaint for Injunctive and Declaratory Relief, available at <http://www.maldef.org/pdf/ImmR1ghts-AZ-Prop200-Complaint-Dec2004.pdf>.

173. *Id.* para. 43.

174. *Id.* paras. 62, 65, 69. In addition, plaintiffs argued that Proposition 200 violated the procedural due process rights of the state employees required to verify and report immigration status for its failure to prescribe the notice procedures governing the implementation of the measure, as well as the voting rights of citizens by prescribing registration requirements not authorized by federal law. *Id.* paras. 71-103. As these arguments are not directly related to the rights of noncitizens in the area of alienage law, their analysis is beyond the scope of this article.

175. In November of 2004, Arizona Attorney General Terry Goddard issued an opinion answering the question of what was meant by “state and local public benefits” for the purposes of Proposition 200 because the phrase was not defined in the ballot. Op. Off. Att’y Gen. No. I04-010 (2004), available at <http://www.azag.gov/opinions/2004/I04-010.pdf>. Goddard concluded that to avoid a vagueness and preemption challenge to Proposition 200, the term “state and local public benefits”

eral law nor in violation of substantive due process because it complied with the PRWORA and federal immigration standards.<sup>176</sup> The court noted that when enacting the PRWORA, Congress “clearly intended that State and local governments would insure that illegal aliens not receive public benefits.”<sup>177</sup> Plaintiffs appealed the district court ruling to the Ninth Circuit, and on August 9, 2005, the Ninth Circuit dismissed the appeal for want of jurisdiction.<sup>178</sup> More specifically, the Ninth Circuit held that “[p]laintiffs have not met their burden of demonstrating an injury-in-fact,” and consequently remanded the case to the district court without prejudice.<sup>179</sup>

Of course, states still cannot regulate to exceed welfare ineligibility of immigrants beyond the PRWORA,<sup>180</sup> or adopt immigration eligibility standards that differ from those established in the PRWORA.<sup>181</sup> Another exception relates to the verification and reporting requirements of these measures, although courts disagree as to whether the PRWORA devolves this power to states. When reconsidering Proposition 187 in light of the PRWORA, the United States District Court for the Central District of California affirmed that the measure’s immigration verification and reporting provisions regulated immigration by creating a comprehensive scheme to detect and report the presence, and effect the removal of, the undocumented.<sup>182</sup> The court declined to hold that the PRWORA’s provisions permitting cooperation between local and immigration agencies could be interpreted to authorize the proposition’s requirement that state officials, teachers, health care providers and other unknown individuals verify and report illegal immigration

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should be interpreted to include only programs in Title 46 of the Arizona Revised Statutes in order to avoid conflict with the Federal Welfare Reform Act. *Id.* at 10-12. “Title 46 includes programs of different state agencies that are administered at the state and local levels.” *Id.* at 8; *see also, e.g.,* ARIZ. REV. STAT. ANN. § 46-136 (2005) (discussing state work projects for the unemployed, general assistance, food stamps); *id.* § 46-139 (discussing state housing assistance in child protective service cases); *id.* § 46-193 (discussing state respite care for the elderly); *id.* §§ 46-292 to -300.6 (addressing state Temporary Assistance for Needy Families and related programs); *id.* §§ 46-241 to -241.05 (discussing local short-term crisis assistance).

176. *Friendly House et al., v. Napolitano*, Order, CV-04-649, Dec. 22, 2004 (D. Ariz.), available at <http://www.ilw.com/immigdaily/cases/2005,0104-house.pdf>.

177. *Id.* at 12.

178. *Friendly House v. Napolitano*, 419 F.3d 930, 932 (9th Cir. 2005).

179. *Id.* at 932-33.

180. For example, the PRWORA preserved the *Plyler* holding that states cannot regulate to deny access to elementary public schools to children. *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (striking down Section 7 of Proposition 187, which sought to deny public elementary and secondary education to undocumented children because the PRWORA preserved *Plyler* under 8 U.S.C. § 1643).

181. *Id.* at 1257-58 (striking down Section 8 of Proposition 187 denying public postsecondary education because the measure used its own immigration ineligibility criteria other than the “qualified alien” criteria employed by the PRWORA); *see also Kurti v. Maricopa County*, 33 P.3d 499 (Ariz. Ct. App. 2001) (striking down Arizona statute that denied non-emergency health care services to qualified immigrants under federal guidelines).

182. *League of United Latin Am. Citizens*, 997 F. Supp. at 1252.

status.<sup>183</sup> Yet, more recently, the United States District Court of Arizona upheld the constitutionality of Proposition 200's parallel verification and reporting requirements, based solely on the PRWORA's conferral of some enforcement authority on states, which the court construed as evidencing Congress's intent to improve the detection and detention of immigrants present in the United States in violation of the law.<sup>184</sup>

If the post-PRWORA litigation is any indication of the future direction of constitutional challenges to state anti-alienage measures, immigrant advocates must grapple with an increasingly limited number of viable legal strategies to challenge anti-alienage measures in the courts. The federal preemption doctrine can still sometimes work. Its effectiveness, however, hinges on the political climate at the federal level being more favorable to immigrants than it has been at the state level. As such, the doctrine is too wrapped up in the ebbs and flows of politics, which hardly favor immigrants who generally become the scapegoat in times of economic downturn or national security concerns. Thus, for example, right before Congress moved to federal driver's licenses, some civil rights litigants considered challenging New York's denial of driver's licenses to noncitizens based on preemption.<sup>185</sup> With the passage of the IRPTA and the REAL ID Act, however, such a challenge would most likely fail because federal legislation now establishes broad federal authorization for the state restrictions. Indeed, in this climate, a preemption challenge would even undermine the few state attempts to pass legislation that favors the conferral of driver's licenses to all persons, regardless of immigration status.<sup>186</sup>

It may be that capitalizing on the political divergence between the federal and state governments in their treatment of immigrants may not be a bad strategy, at least as long as favorable political conditions are likely to persist at the federal level to counter states' anti-immigrant sentiment. For example, if passed, the proposed Development, Relief, and Education for Alien Minors (DREAM) Act of 2003,<sup>187</sup> which favors greater access for the undocumented to higher education, would become a powerful tool for pro-immigrant plaintiffs to resort to preemp-

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183. *Id.* at 1252 n.9.

184. Friendly House et al., CV-04-546, at 11-14 (on file with author).

185. Nina Bernstein, *Immigrant Group to Sue State Over License Crackdown*, N.Y. TIMES, Aug. 27, 2004, at 5 (discussing plans by the Puerto Rican Legal Defense and Education Fund to file a class-action lawsuit challenging New York's policy of requiring SSN for the issuance of driver's licenses because it usurps federal responsibility).

186. Some scholars have challenged state laws that are pro-immigrant based on a federal preemption argument. See, e.g., Paul L. Frantz, *Undocumented Workers: State Issuance of Driver Licenses Would Create a Constitutional Conundrum*, 18 GEO. IMMIGR. L.J. 505 (arguing that California's attempt to grant driver's licenses to the undocumented is an unconstitutional attempt to regulate and control immigration).

187. S. 1545, 108th Cong. (2003); H.R. 1684, 108th Cong. (2003).

tion to challenge state anti-alienage measures that conflict with federal policy. Similarly, civil rights groups challenged and successfully enjoined the Hazleton housing restriction by citing to provisions of the Immigration and Nationality Act that prohibit the hiring or the "aiding or abetting" of the undocumented.<sup>188</sup> Yet, the converse could also be true. In the absence of the DREAM Act, anti-immigrant groups like FAIR have been employing preemption to challenge state laws granting access to higher education for the undocumented on the basis that these are counter to current federal immigration policy.<sup>189</sup> Some state courts, indeed, have begun to strike down state laws that award in-state tuition to nonimmigrants and the undocumented who are ineligible for United States residency as preempted under IIRIRA and the PRWORA.<sup>190</sup>

Perhaps more importantly in the long run, at least the federal preemption strategy is not free from the adverse effects of anti-alienage laws. First, an argument for federal preemption acquiescence to the *Diaz* rationale uncritically expands Congress's plenary power doctrine beyond immigration control into areas affecting foreign nationals' living conditions within the border. Why should, for example, access to higher education be related to Congress's power over immigration? And why should Congress's power in this area be plenary? Not only should the *Diaz* rationale be distinguished, but its entire holding should be questioned in favor of constitutional doctrine that protects foreign nationals against discrimination as persons, regardless of whether that discrimination is created by states or by the federal government.

The second reason federal preemption challenges to anti-alienage measures have adverse consequences is that by focusing solely on structural issues, preemption challenges punt on the substantive considerations that are vital to challenging the United States' limited conception of rights. The trend in the United States is to deny persons rights to self-determination through access to social, economic, and cultural rights (i.e., positive rights).<sup>191</sup> However difficult it is to win positive

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188. Temporary Restraining Order, *Lozano v. City of Hazleton*, No. 3:06cv1586 (M.D. Pa. 2006), available at <http://www.pamd.uscourts.gov/opinions/Munley/06v1586-prot.pdf>; see also Complaint, *Lozano v. City of Hazleton*, No. 6cv56-JMM (M.D. Pa. 2006), available at [http://www.aclu.org/images/asset\\_upload\\_file582\\_26463.pdf](http://www.aclu.org/images/asset_upload_file582_26463.pdf).

189. The latest preemption challenge involved Kansas state law, KAN. STAT. ANN. § 76-731a, which conferred in-state tuition benefits to all individuals who attended an accredited Kansas high school for three years, regardless of citizenship status. Under this law, undocumented students who met the high school attendance requirement would qualify for in-state tuition. The challenge was brought by out-of-state students and their parents who were ineligible for in-state tuition under the law. On July 5, 2005, a United States District Court for the District of Kansas dismissed the lawsuit based on plaintiff's lack of standing. *Day v. Sebelius*, 376 F. Supp. 1022 (D. Kan. 2005).

190. See, e.g., *Regents of the Univ. of Cal. v. Bradford*, 225 Cal. App. 3d 972, 978-80 (1991) (striking down the university's interpretation of state statute residency requirements to favor the undocumented who were not proscribed by federal immigration law from establishing residency because such an interpretation would be inconsistent with federal immigration law); Op. Off. Att'y Gen. No. I86-091 (Ariz. 1986).

191. See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).

rights arguments, these must be raised boldly, persistently, and creatively. Any evolution in the expansion of rights in the United States will undoubtedly be slow, but it is certain not to happen at all if such arguments are never raised. In this regard, resorting to sound empirical data and other less likely sources of law, including state constitutions and comparative or international law, could be useful to raising the judiciary's consciousness about the pernicious effects of limiting individual rights.

Third, preemption challenges also punt on the important consideration regarding the substance on which social membership and rights should rest. To date, membership in the United States has rested on citizenship rather than on the scope and nature of the relationship that persons maintain as members of society. Yet, the reality is that the United States has a significant number of foreign nationals living within its borders who work, study, have families, own property, pay taxes, and otherwise make significant contributions to this society. It is time for the United States to conceptualize "civil rights" to comport with modern realities to account for the large presence of people of color, especially Latinos/as, in this country who are not citizens.

Immigrant rights advocates are well aware of the drawbacks of preemption challenges without similar efforts to overturn *Diaz*. Still, these groups continue to employ preemption for very pragmatic reasons. The strategic ease with which anti-immigrant groups have resorted to introducing anti-immigrant propositions and local ordinances has resulted in the proliferation of these measures all over the country, resulting in a drain of civil rights resources. During a talk at Lat Crit, Hector Villagra, Director of ACLU in Orange County who has litigated against local anti-alienage ordinances in California, explained that it is simply more feasible to defeat, at least politically, anti-immigrant efforts at a national level because pro-immigrant groups can join forces to influence Congress.<sup>192</sup> Further, Congress's legislative process permits greater public input and deliberation into the legislative process than do local governments. These reasons are very compelling. But as long as Congress continues the trend to legislate beyond the border and regulate the "living conditions" of the alien, the federal political process alone cannot be trusted to protect the rights of immigrants. The time is ripe to reconsider the constitutional limits on the federal governments to regulate the immigrant.

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192. See LatCrit XI Program Schedule: Working and Living in the Global Playground, <http://personal.law.miami.edu/~fvaldes/latcrit/latcrit/documents/LCXIProgramFinal.pdf> (last visited Jan. 21, 2007).

## IV. A NEW CONSTITUTIONAL PARADIGM

To pave the way toward meaningful constitutional protection for noncitizens in the United States, it is imperative that *Diaz* be reconsidered. Courts have yet to offer an adequate doctrinal basis for constitutional exceptionalism in the area of federal alienage discrimination. In *Diaz*, the Court resolved the ultimate question of the extent of federal power over the noncitizen as if the answer were too obvious to warrant serious discussion. Rather, the court applied a lenient version of the rational-basis test, tying, without much explanation, the denial of welfare benefits of lawful noncitizens to Congress's plenary powers over immigration.<sup>193</sup> However, Congress's powers over immigration law regarding the admission, removal, and naturalization of noncitizens, is distinct from "alienage" law or the regulation of noncitizens' conditions of residence, such as access to education, welfare benefits, and employment.<sup>194</sup> The United States Supreme Court, however, appears to erase this distinction when it upholds the only rationale offered for the program: "[T]hose who qualify under the test Congress has chosen [i.e., lawful permanent residents with five years residence in the United States] may reasonably be presumed to have a greater affinity with the United States than those who do not."<sup>195</sup>

Supporters of *Diaz* understand the Court's rationale to fall within a broader conception of immigration control. First, measures that restrict benefits to noncitizens are an indirect means of deterring the entry of long-term residents or immigrants, insofar as benefits are said to function as magnets to immigration (a deterrent rationale).<sup>196</sup> Second, such measures are said to properly preserve benefits of membership to "those deemed to belong within the moral boundaries of the national community" (a membership rationale).<sup>197</sup>

Critics of *Diaz* question that public benefits deter immigration, as immigrants do not ordinarily come here to obtain benefits, but rather to work.<sup>198</sup> Their exclusion, therefore, does not impede entry but increases their social marginalization. Apart from the practical effect of such measures, the question that lingers relates to the legitimacy of Congress to adopt a restrictive notion of national community that draws distinc-

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193. *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

194. See Evangeline G. Abriel, *Rethinking Preemption for Purposes of Alien and Public Benefits*, 42 UCLA L. REV. 1597, 1625-27 (1995); Gerald L. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1897 (1993); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 328 (1977).

195. *Diaz*, 426 U.S. at 83.

196. See Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1053 (1994).

197. See *id.*

198. See *id.* at 1054.

tions favoring citizens over noncitizens.<sup>199</sup>

A. *A New Conception of Membership*

In a powerful law review article written more than two decades ago, Professor Peter H. Schuck discussed two different types of pressures that should radically transform restrictive notions of national community in the United States.<sup>200</sup> The first type he labeled structural changes that include “shifts in basic economic, demographic, social, and political institutions and relationships that inescapably shape immigration policy.”<sup>201</sup> The second consists of changes in “ideology or legal consciousness . . . about the meaning of justice, the rightness or wrongness of certain actions, and the proper role of law and of particular legal institutions.”<sup>202</sup>

Changes in structural conditions, Schuck argued, call into serious question the assumption regarding consent-derived obligation and strong sovereignty that linked and legitimized the elements of a restrictive national community.<sup>203</sup> Among these structural changes, Schuck highlighted the constraining of United States foreign policy, or the increasing interdependence among nations, that erases the “sharp boundary between subject and object, government and alien, us and them, that has characterized” restrictive national policies.<sup>204</sup> Other changes include the United States’ economic dependency on cheap immigrant labor resulting from intensified competitive pressures of a global market, and the ensuing influx of both legal and illegal immigration to the United States.<sup>205</sup> Additionally, Schuck discussed demographic alterations in the United States in recent times that will inevitably influence not only power relationships but shift public attitudes.<sup>206</sup>

Structural changes also erode the moral and legal foundations of a restrictive national community model. Restrictive notions of national community, Schuck explained, substantially reflect an individualist ideology emphasizing the ideas of consent, sovereignty, and restrictive community.<sup>207</sup> Conversely, individualism seeks “to limit reciprocal obligations of sharing and sacrifice, the scope of legal duties, and the force of equitable claims.”<sup>208</sup> “A concept of national sovereignty that ap-

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199. *See id.* at 1087.

200. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 34 (1984).

201. *Id.*

202. *Id.*

203. *Id.* at 35.

204. *Id.* at 36.

205. Schuck refers more broadly to immigration’s effect on the United States economy, especially in the labor market. *Id.* at 37-39, 42-44.

206. *Id.* at 46.

207. *Id.* at 48.

208. *Id.* at 47.

plie[s] the individualistic values of autonomy, self-determination, and consent" finds expression in the extra-constitutional status of federal alienage law, as well as in the right-privilege distinction often employed to exclude noncitizens.<sup>209</sup> In contrast, communitarian values, rooted in a natural rights dimension of liberalism, expand and transfigure the sources of, and justifications for, legal obligations to individuals.<sup>210</sup> Schuck described the shift in two different directions: the dramatic expansion of "circumstances under which the law imposes legally enforceable duties upon both government and private individuals or groups" and "the increasing emphasis upon the vindication of group rights."<sup>211</sup>

Writing in 1984, Schuck was optimistic that *Plyler* could have the same epochal significance for noncitizens that *Brown v. Board of Education*<sup>212</sup> had for Blacks. Schuck read *Plyler* as a rare expression of judicial self-assertion in which the Court was willing to broaden the national community to extend education rights to children, even in the face of congressional policy to exclude undocumented immigrants from the country.<sup>213</sup> More than two decades later, the *Plyler* legacy has been confined to its very facts; no case since *Plyler* has conferred upon the undocumented any other type of privilege or right.<sup>214</sup> To the contrary, *Plyler* is now frequently cited for its statement that the undocumented are not a suspect class, in order to distinguish cases that challenge denial of rights to undocumented adults.<sup>215</sup>

Despite *Plyler's* fate, and maybe because of it, Schuck's insightful observations about the structural and ideological pressures that should bear on the discussion of who should be included in the national community are particularly ripe today. Many of the structural changes described by Professor Schuck have intensified in the last two decades. The increased liberalization of international trade and investment, and the resulting increase in the integration of national economies, is evidenced by the proliferation of free trade agreements and institutions like the World Trade Organization, the European Union, and international financial institutions.<sup>216</sup> In addition, the proportion of foreign-born persons residing in the United States "increased from 4.7 percent in 1970 to 11.1 percent in 2000. The 2000 proportion [was] the highest

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209. *See id.*

210. *Id.* at 49.

211. *Id.* at 49-53.

212. 347 U.S. 483 (1954).

213. Schuck, *supra* note 200, at 54-62.

214. *See, e.g.,* Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, The Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT'L L. 57 (1998).

215. *See, e.g.,* Vasquez-Velezmoro v. INS, 281 F.3d 693 (8th Cir. 2002); *United States v. Coleman*, 166 F.3d 428 (2nd Cir. 1999); *Doe v. Ga. Dep't of Pub. Safety*, 147 F. Supp. 2d 1369 (N.D. Ga. 2001).

216. *See generally* THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999).

since 1930, when 11.6 percent of the population was foreign-born.”<sup>217</sup> Moreover, at least until 9/11,<sup>218</sup> international institutions like the United Nations and the North Atlantic Treaty Organization (NATO) had solidified a growing acceptance for multilateralism in decision-making among nations on an increasing number of worldwide issues.<sup>219</sup>

Professor Schuck’s description of the ideological changes of immigration law has been less prophetic, particularly post-9/11. He predicted that immigration law would shift from a classical to a communitarian conception of rights. Under this model, cases like *Plyler* would pave the way toward a broader conception of national community or membership.<sup>220</sup> Schuck also predicted greater judicial assertion in the area of immigration law,<sup>221</sup> the constitutionalization of exclusion,<sup>222</sup> limits on federal power to classify “aliens,”<sup>223</sup> greater due process protections in deportation proceedings and immigration detention,<sup>224</sup> and the institutional separation of adjudication and enforcement functions.<sup>225</sup>

### B. Challenging *Diaz*

Pre-9/11 cases like *Zadvydas v. Davis*,<sup>226</sup> which imposed limits on indefinite detention post-removal, and *INS v. St. Cyr*,<sup>227</sup> which restored habeas corpus review in immigration cases, gave hope to some of Schuck’s predictions. In response to these decisions, some scholars even pronounced the beginning of the end of the plenary power doctrine in immigration law.<sup>228</sup> Those developments were short-lived. Three months after these holdings, 9/11 happened. Since then, the tide has gone the opposite way.

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217. U.S. Dep’t of State Int’l Info. Programs, Foreign-Born Population Surges in the United States, June 10, 2002, <http://usinfo.state.gov/usa/diversity/pr061002.htm> (last visited Jan. 28, 2007). “From 1860 to 1920, the proportion of foreign-born ranged between 13 percent and 15 percent, reflecting large-scale immigration from Europe.” *Id.*

218. The decision of the United States to wage war on Iraq without Security Council approval threatened significantly the relevance and viability of the United Nations, at least in areas concerning peace and security. The institution has been hard at work to regain its credibility. *See, e.g.*, Kofi A. Annan, *Our Mission Remains Vital*, WALL ST. J., Feb. 22, 2005, <http://www.opinionjournal.com/editorial/feature.html?id=110006324>; The Secretary-General, *Report of the Secretary-General on the Strengthening of the United Nations: An Agenda for Further Change*, U.N. Doc. A/57/387 (Sept. 9, 2002), available at [http://portal.unesco.org/en/file\\_download.php/5014468b7d2a5901a092a6d10146b756unc133e.pdf](http://portal.unesco.org/en/file_download.php/5014468b7d2a5901a092a6d10146b756unc133e.pdf).

219. *See* YOSHIKAZU SAKAMOTO, GLOBAL TRANSFORMATION: CHALLENGES TO THE STATE SYSTEM (1994).

220. Schuck, *supra* note 200, at 54-58.

221. *Id.* at 59-62.

222. *Id.* at 62-65.

223. *Id.* at 65-66.

224. *Id.* at 66-72.

225. *Id.* at 72-73.

226. 533 U.S. 678 (2001).

227. 533 U.S. 289 (2001).

228. *See, e.g.*, Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365 (2002).

Today, congressional and executive acts have undermined judicial limits on immigration powers to exclude, detain, and deny other due process rights to noncitizens in immigration proceedings.<sup>229</sup> Moreover, the "outsiderness" of the noncitizen has seeped into areas beyond immigration control. The "war on terror" has expanded plenary powers over the noncitizen into criminal law,<sup>230</sup> and, as explored in this article, into the regulation of the living conditions of the foreign national within the border. For the most part, the judiciary has imposed few limits on the political branches,<sup>231</sup> and has at times narrowed the scope of judicial limits imposed by cases like *Zadvydas*.<sup>232</sup> This post-9/11 ideological shift back toward classical immigration law requires a response that will challenge the narrow conception of membership and rights in cases like *Diaz*. And until this happens, any attempt to frame rights in terms of

229. See, e.g., Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005); Aldana, *supra* note 43; Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481 (2002); James F. Smith, *United States Immigration Law as We Know It: El Clandestino, The American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747 (2005); Catalina Joos Vergara, *Trading Liberty for Security in the Wake of September Eleventh: Congress' Expansion of Preventive Detention of Noncitizens*, 17 GEO. IMMIGR. L.J. 115 (2002); Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: A New New World?*, 38 U.C. DAVIS L. REV. 815 (2005).

230. See, e.g., Aldana, *supra* note 43; Kevin R. Johnson, *Immigration and Civil Rights After September 11: The Impact on California*, 38 U.C. DAVIS L. REV. 599 (2005); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967 (2005); Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004).

231. For example, in *Rasul v. Bush*, 542 U.S. 466 (2004), the Court recognized habeas corpus jurisdiction in Guantanamo Bay, and in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court held that Hamdi, a United States citizen captured in Afghanistan, must receive fair notice of the factual allegations against him and an opportunity to rebut those allegations. Despite these victories, lower courts were left to decide how much to intervene in the executive's wartime measures, including the curtailment of liberty and due process rights of thousands of foreign nationals. See, e.g., Erwin Chemerinsky, *Unanswered Questions*, 7 GREEN BAG 2D 323 (2003); Randolph N. Jonakait, *Rasul v. Bush: Unanswered Questions*, 13 WM. & MARY BILL RTS. J. 1129 (2005); Charles H. Whitebread, *The Rule of Law, Judicial Self-Restraint, and Unanswered Questions: Decisions of the United States Supreme Court's 2003-2004 Term*, 26 WHITTIER L. REV. 101 (2004). To date, the outcome has favored the Executive. On July 18, 2005, in the first case decided by a Court of Appeals since *Rasul* and *Hamdi*, the D.C. Circuit upheld the constitutionality of the military tribunals established by President Bush to try "enemy combatants," relying, in part, on dicta in *Hamdi* that validated the tribunals. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

232. For example, in the plurality opinion in *Demore v. Kim*, 538 U.S. 510 (2003), the Court upheld the constitutionality of mandatory detention during removal proceedings, despite the language of constitutional due process protections in *Zadvydas*. See M. Isabel Medina, *Demore v. Kim—A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697 (2004). More recently, in *Clark v. Martinez*, 543 U.S. 371 (2005), while the Court extended *Zadvydas'* indefinite detention limits to foreign nationals ordered removed who are inadmissible, e.g., Cuban parolees, language in the opinion undermined the reading of *Zadvydas* as a constitutional holding binding on Congress:

The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it. But for this Court to sanction indefinite detention in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.

*Id.* at 386.

“federal citizenship” will occur within a bounded notion of nationality that will alienate and subordinate those who lack formal citizenship.

### 1. Shifting the Agency of Illegality

The starting point for challenging *Diaz* is to narrow the field of when it is legitimate for Congress to discriminate against the “alien.” Some scholars, like Michael Walzer, distinguish between a nation’s legitimate authority to restrict admission at the border and the regulation of the “alien” once here.<sup>233</sup> According to Walzer, when immigrants live and work in this political community, they must be treated as members of this community, or, if not full members, then they must be on a “swift” track to citizenship or membership.<sup>234</sup> Yet, Walzer’s position presupposes that the sovereign—the state—consented to the admission in the first place. That is, Walzer is primarily concerned with those “aliens” who are within a nation’s territory as lawful permanent or temporary residents.

Immediately, the limitation of Walzer’s approach is that most anti-alienage measures are directed at the undocumented who either crossed the border illegally or violated the terms of their admission. Yet, conventional ideas of morality simply cannot capture the complex and ambiguous character of the relationship between the undocumented and United States society and laws. The mass exodus of undocumented immigrants cannot be blamed solely on the immigrant, particularly when labor recruitment and incentives by United States employers, combined with immigration policy that caters or acquiesces to these pull factors, are significant contributors.<sup>235</sup> It is irreconcilable, therefore, for the United States government and public to “legitimize” de facto the presence of the undocumented by employing them, selling them products and services, and taxing them, while at the same time “delegitimize” them as a matter of law.

Moreover, the illegality of immigrants is not solely a matter of individual choice, but also a legal and social construction as reflected in immigration policy that has been intimately tied to race.<sup>236</sup> In the past, for example, Congress legislated directly to exclude Asians from United States immigration or citizenship.<sup>237</sup> Today, the same exclusion of other

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233. Michael Walzer, *The Distribution of Membership*, in BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1, 1-36 (Peter J. Brown & Henery Sue eds., 1981).

234. *Id.* at 23-26.

235. See BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 118-33, 155-83 (2004) (discussing, *inter alia*, the Bracero program, the 1996 amnesty and accompanying under-enforced employer sanctions); Nestor Rodriguez, “Workers Wanted”: *Employer Recruitment of Immigrant Labor*, 31 WORK AND OCCUPATIONS 453 (2004).

236. See, e.g., VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 162-66 (2005); HING, *supra* note 235, at 1-8.

237. HING, *supra* note 235, at 28-61.

groups from the United States is less direct but the consequences no less dire. Immigration law's numerical restrictions and the elite nature of work visa categories, for example, severely restrain Mexican legal immigration, despite the historical inter-dependence between Mexican workers and United States employers.<sup>238</sup> The majority of Mexican workers in the United States are ineligible for visas, even temporary ones, while most Mexican nationals eligible for family-based immigration must wait years to legalize.<sup>239</sup> Ultimately, then, to view the "alien" illegality as solely a matter of individual choice is to ignore the private and public structures that promote and perpetuate that status.

Challenging anti-alienage measures, then, requires at the outset a reconceptualizing of sovereign consent to admission that takes into account a nation's de facto acquiescence of the undocumented though such measures as his residence and his level of engaged participation in this community. Already, the immigration laws create certain substantive immigration rights on the basis of stakes, primarily for purposes of family unification.<sup>240</sup> The proposal here, however, is to expand "stakes" to account for "aliens'" contributions to United States society through their labor. I am primarily arguing that states ought minimally to regulate employers to require basic labor and worker rights protections to all workers irrespective of immigration status by virtue of the status as workers. The case is simpler when the employer knowingly hires the undocumented worker and exploits him to violate United States labor and worker laws because the employer's "dirty hands" clearly outweigh any wrongdoing on the part of the worker. But even when the worker has "deceived" the employer by producing "fake" documents to work, this fact does not obliterate the employer's obligation to the worker for this labor. If the worker is injured on the job and his injuries render him disabled, that worker should receive all benefits that would have been available to a United States citizen worker similarly situated. It is the "alien's" condition as a worker for his employer and not his immigration status that should govern the regulation the government imposes on the consequences born of that relationship.

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238. *Id.* at 97-111.

239. Today, Mexican nationals who qualify under family-based immigration, except for immediate relatives (spouses or minor unmarried children of United States citizens), must wait between seven and twenty-two years before their visas become available. Adult or married children of United States citizens, for example, have a wait period of twenty-two years. U.S. Dep't of State, Visa Bulletin for July 2005, [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_2539.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_2539.html) (last visited Jan. 21, 2007). In addition, the 3/10 year bar for unlawful stay in the United States severely infringes on family unification. See Emma O. Guzmán, *The Dynamics of The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95 (2000).

240. See, e.g., Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489 (2003).

## 2. Converting Privileges to Rights

Another limitation to Walzer's position that all "aliens" once here should enjoy all rights available to citizens is that, in fact, the rightful boundaries of the rights that should attach to citizenship are "deeply uncertain and highly contested in American law."<sup>241</sup> Another challenge to *Diaz*, then, should focus on defining these parameters by distinguishing between what is considered a denial of a fundamental right or a privilege. In 1977, Professor Gerald M. Rosberg made the following observation about *Diaz*:

It might be that restrained review is appropriate in *Diaz* because of the relative unimportance of the right or opportunity denied to aliens by virtue of the statutory classification. The government provides insurance coverage against medical expenses for those who elect to participate. It is not designed to guarantee medical care for those who cannot otherwise afford it. The case does not involve, in other words, anything that could reasonably be called a "right to medical services."<sup>242</sup>

Minimally, then, *Diaz* should narrowly apply only when the discrimination pertains to a non-fundamental right, and should be disallowed when it affects a fundamental right. This position is consistent with a couple of important fundamental rights cases decided by the United States Supreme Court over more than two centuries which established that there are limits to the exercise of federal governmental power in regulating the immigrant inside the border.<sup>243</sup> In *Wong Wing v. United States*,<sup>244</sup> for example, the Court held that Congress could not criminally punish "aliens" for violating immigration laws without guaranteeing criminal due process.<sup>245</sup> Then, in *Plyler*, the Court guaranteed K-12 public school access to undocumented students, declaring education to be a quasi-fundamental right.<sup>246</sup>

One limitation on the fundamental rights distinction is that it may do little to advance the rights of "aliens" because most anti-alienage measures are said to deny privileges, not fundamental rights. Almost three decades later, the characterization of the welfare benefits in *Diaz* represents the limited conceptions of rights in the United States, at the exclusion of social, economic, and cultural rights. The employment of more progressive sources of law in some cases, state constitutions, or international or comparative law, however, could advance the acceptance of positive or new rights in the United States.

Consider, for example, the resort to state constitutional practices to

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241. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 52 (2006).

242. Rosberg, *supra* note 194, at 286.

243. See BOSNIAK, *supra* note 241, at 53-56.

244. 163 U.S. 228 (1896).

245. *Id.*

246. *Plyler v. Doe*, 457 U.S. 202 (1982).

reconceptualize welfare benefits as rights, not privileges. Despite the PRWORA's devolution, over half of the states are spending their own money to cover at least some of the immigrants who are ineligible for federally funded programs, although these programs offer fewer benefits. Strong public policy reasons, particularly related to the adverse consequences of denying basic health care to immigrants (e.g., increased communicable disease, decreased prenatal and preventive health care, increased complications from untreated chronic diseases) have pushed states to utilize state funds to provide essential health services removed by PRWORA.<sup>247</sup> More importantly, a few states have even recognized a state constitutional right to certain welfare benefits.

Under the United States Constitution, welfare benefits are a "matter of statutory entitlement for persons qualified to receive them," which creates a procedural due process but not a substantive constitutional right for qualified recipients.<sup>248</sup> Past attempts to classify public benefits under the United States Constitution or to link them to fundamental or quasi-fundamental rights have failed.<sup>249</sup> A few state courts, however, have interpreted their state constitutions to create a greater right to welfare benefits than the United States Constitution, a move that could be used to trump federal legislation regulating welfare benefits to immigrants. For example, section 1 of article XVII of the New York State Constitution provides that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."<sup>250</sup>

New York state courts have held that this provision imposes upon the state an affirmative duty to aid the needy: "As this provision demonstrates, care for the needy is not a matter of 'legislative grace,' it is a constitutional mandate."<sup>251</sup> The courts, however, have left to the discre-

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247. Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the "Contract with America" Congress*, 90 KY. L.J. 1043, 1044 (2002).

248. *Atkins v. Parker*, 472 U.S. 115, 128 (1984) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)). In other words, courts have considered that any property rights to public benefits are defined by the statutes or customs that create the benefits. When the statute authorizing the benefits is amended or repealed, the property right disappears. *Id.* at 129; *see also* *Austin v. City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988).

249. One such attempt has been, for example, to expand the scope of *Plyler* to challenge the Omnibus Budget Reconciliation Act of 1981 (OBRA)'s social security number requirement from households before a child could qualify for school meal programs. *Alcaraz v. Block*, 746 F.2d 593, 604 (1984). There, plaintiff's argument was that denying the school meal program to undocumented children implicated such a "weighty" interest that the stricter *Plyler* scrutiny should apply to the program. The Ninth Circuit rejected this rationale, in great part, because unlike in *Plyler*, here, Congress had specifically authorized the SSN requirement. *Id.* at 605. Similarly, the Second Circuit rejected an attempt to argue for a heightened level of scrutiny by pregnant undocumented mothers being denied prenatal care under the rationale that such denial also represented harm to their children. *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001). The Second Circuit rejected the argument that the mothers could make their own right weightier through the harm to their children. *Id.* at 585-86.

250. N.Y. CONST. art. XVII, § 1.

251. *Aliessa v. Novello*, 754 N.E.2d 1085, 1092 (N.Y. 2001).

tion of the legislature the extent of such aid and the manner in which it is provided.<sup>252</sup> The requirement does impose on state legislatures that they may not refuse aid, for reasons unrelated to their need, to those legal residents whom it has already classified as needy.<sup>253</sup> In a few cases, New York courts have refused to allow federal immigration policy to trump state statutes seeking to implement the constitutional affirmative duty to provide for the needy.<sup>254</sup>

Another approach is to challenge the characterization of a law's effect as involving a privilege, not a fundamental right. For example, rhetorically, the driver's license debate as a national security issue has been framed primarily as a denial of a privilege to immigrants, which has muted any significant debate on civil rights implications.<sup>255</sup> However, the denial of driver's licenses has significant civil rights implications for immigrants and noncitizens and must be reconsidered in light of these pernicious effects.<sup>256</sup> The challenge rests in reframing the debate to overcome two tendencies: the undervaluing of the personhood of foreign nationals and the undervaluing of rights generally in the context of war.

The consequences of driver's license denials to the foreign nationals affected are dire. The denial is not simply of a "privilege" to drive. The denial of a driver's license exacerbates the underclass status of thousands of immigrants living in the United States because the inability to drive is not a mere inconvenience; it may, in fact, be necessary to earn a living. Furthermore, denial of a driver's license amounts to a denial of identity. The original purpose of the driver's license may have been (and perhaps should remain) to certify the safety of drivers on the road. However, in the absence of a national identification system in the United States, driver's licenses have become de facto the primary form of identification United States residents must use to conduct most essential activities of daily living, whether with private or public entities.

Driver's licenses are widely accepted and sometimes required to obtain services from federal and state agencies, open a bank account, request credit, rent an apartment, or buy a home, for example. More-

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252. *Teytelman v. Wing*, 773 N.Y.S.2d 801, 809 (N.Y. Sup. Ct. 2003); *Mark G. v. Sabol*, 677 N.Y.S.2d 292 (1st Dept. 1998). *But cf.* *CID v. S.D. Dep't of Soc. Servs.*, 598 N.W. 2d 887, 890-91 (S.D. 1999) (declining to hold that Article VI, § 14 of the South Dakota Constitution does confer a property right to state benefits).

253. *Teytelman*, 773 N.Y.S.2d at 809; *Bernstein v. Toia*, 373 N.E.2d 238 (N.Y. 1977).

254. *See, e.g., Aliessa*, 754 N.E.2d at 1093 (holding that the five-year residency requirement to otherwise eligible immigrants for state Medicaid coverage violated article XVII, § 1 of the state constitution because the requirement had nothing to do with need and deprived immigrants of otherwise basic-necessity benefits).

255. "Alien" status is used to rationalize policies that would be unacceptable if framed in terms of the civil rights of citizens. KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* 4-12 (2004).

256. Kevin Johnson, *Driver's Licenses and Undocumented Immigration: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 215 (2004).

over, the lack of driver’s licenses “deeply affects the nature of undocumented immigrants’ interaction with law enforcement” by increasing the racial profiling of Latinos/as during traffic stops (i.e., for immigration enforcement) while decreasing the trust that local police departments have worked to build for more effective community policing.<sup>257</sup>

The real effect of driver’s license denials is to “delegitimize” foreign nationals by rendering them invisible, ultimately robbing them of their personhood. The 2002 article of James C. Scott, John Tehranian, and Jeremy Mathias, *Government Surnames and Legal Identities*, makes the insightful historical observation that “there is no state-making without state-naming.”<sup>258</sup> By necessity, governments have required names to create the police state, for the development of the private property regime (i.e., sometimes in the context of war and colonization), and, in the modern state, to give rise to the concept of democratic citizenship—that is, to the idea of rights and duties vis-à-vis subjects and states.<sup>259</sup> Today, the granting of “legal identities is intrinsic to any project of governance requiring discriminating intervention in local affairs.”<sup>260</sup> Admittedly, when abused, state identification systems can “enhance the capacity of the state to carry out the most fine-tuned and gruesome projects of surveillance and repression.”<sup>261</sup> They can also, however, serve as the basis of state “interventions that save lives, promote human welfare, without which contemporary life is scarcely imaginable.”<sup>262</sup>

Governments can insist that a person within its jurisdiction make use of her legal identity in all official acts such as birth, marriage, inheritance, legal contracts, wills, taxes, and court filings. Therefore, the greater the sphere occupied by the state and state-like institutions, the more frequent the instances in which an official name becomes the only appropriate identity.<sup>263</sup> The hegemony of state institutions such as schools, Social Security, hospitals, military service, property registration, taxpaying, and transportation, “ensure the dominance of state-identification practices.”<sup>264</sup> Finally, although not compelled, the private sector, including banks, lessors, vendors, and employers can insist on proof of official identity—increasingly driver’s licenses—to conduct

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257. *Id.* at 224-26.

258. James C. Scott, John Tehranian, & Jeremy Mathias, *Government Surnames and Legal Identities*, in NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION 11, 12 (Carl Watner ed., 2004). This paragraph and the following paragraph are substantially quoted from a previous article. See Raquel Aldana & Sylvia R. Lazos Vargas, “Aliens” in Our Midst Post-9/11: Legislating Outsideness Within the Borders, 38 U.C. DAVIS L. REV. 1683, 1721 (2005).

259. Scott, Tehranian, & Mathias, *supra* note 258, at 20-26.

260. *Id.* at 39.

261. *Id.* at 43.

262. *Id.*

263. *Id.* at 41.

264. *Id.*

business. When so much of everyday life depends on state-issued identification systems, individuals who are denied access to such lose the fundamental right to personal identity.

A right to an identity thereby should encompass a public sphere, where the state has a duty to protect and confer the individual's legal or official identity. It is essentially this right that every comprehensive international human rights instrument on civil and political rights conceptualizes. These instruments codify the right of every person to recognition as a person before the law, including the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States.<sup>265</sup> Similarly, the specialized International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families prescribes that "[e]very migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law."<sup>266</sup> It may be that the conferring of other types of identification, like a matricula consular, by foreign governments to their own citizens residing in the United States will remedy some of these problems.<sup>267</sup> However, this trend should not erase the United States' obligation to confer an identity on persons within its territory.

The challenge to framing the consequences of driver's license denials as a fundamental right to a name, however, is that the undocumented, by virtue of their immigration status in the United States, do not have a right to be present in the United States, and technically, therefore, should not have access to the jobs or services that possessing a driver's license could facilitate. This issue returns us to the conception of membership, not on the basis of status, but on the human reality of thousands who live in the United States, sometimes all their lives, without status, and the complex circumstances that perpetuate their non-immigration status.<sup>268</sup> The reality of undocumented immigrants' humanity and their steady integration into United States communities es-

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265. International Covenant of Civil and Political Rights, art. 16, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("Everyone shall have the right to recognition everywhere as a person before the law."); Universal Declaration of Human Rights, art. 6, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 ("Everyone has the right to recognition everywhere as a person before the law."); African (Banjul) Charter on Human and People's Rights, art. 5, June 27, 1981, 21 I.L.M. 58, OAU Doc. CAB/LEG/67/3 rev. 5 (entered into force Oct. 21, 1986); Organization of American States, American Convention on Human Rights, art. 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, does not contain a parallel provision; however, the European Court on Human Rights has interpreted Article 8 of the same, which protects a right to privacy, to encompass a right to a name. *Konstantinidis v. Stadt Altensteig-Standesamt*, Case C-168/91, E.C.R. I-1191 (1993).

266. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, at 262, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49 (1990) [hereinafter Migrant Workers Convention].

267. Johnson, *supra* note 256, at 228-31 (discussing the increasing popularity of the matricular consular card).

268. *See supra* notes 242-248 and accompanying text.

pecially should challenge traditional conceptions of membership. As Schuck observes: "New 'social contracts' between these aliens and American society are being negotiated each day, and these cannot be nullified with invocations of sovereignty, as classically understood."<sup>269</sup> Once the undocumented enter an American community, they quickly establish "significant relationships" with institutions and individuals where they live; some live the rest of their lives in the United States, "immigration law notwithstanding."<sup>270</sup> To their immediate communities, "these individuals are neither strangers nor outcasts but are vital elements in their neighborhoods."<sup>271</sup>

Moreover, the argument that driver's licenses would legitimize the status of the undocumented in this country is simply a fallacy. In the past, Congress conferred legal status upon the undocumented, despite substantial opposition from persons who view amnesty as rewarding illegality.<sup>272</sup> They did so out of recognition of the equity of labor contributions by the undocumented, the stakes from long-term residence in the United States, and a wish to eliminate the underclass. Granting undocumented noncitizens driver's licenses would not confer upon them, however, a right to stay in the United States. Instead, it simply recognizes a reality: the undocumented are persons who are present in the United States. They have names, they breathe, they eat, they feel, they toil, they laugh, and they cry. They exist!

### 3. Uncovering the Racialized Animus of Anti-Alienage Measures

Finally, *Diaz's* challenge should rest on the need to return to a strict scrutiny standard in any alienage discrimination case, based solely on the "relative invidiousness of the particular differentiation."<sup>273</sup> For the noncitizen, the stigmatization and burden born from discrimination has been no less when the source has been the federal government, rather than the states.<sup>274</sup> Yet, the *Diaz* Court applied a rather lenient version of the rational-basis test where a few years earlier it had subjected comparable state legislation to strict scrutiny in *Graham*.<sup>275</sup>

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269. Schuck, *supra* note 200, at 44.

270. *Id.* at 43.

271. *Id.* at 44.

272. HING, *supra* note 235, at 156-62.

273. Rosberg, *supra* note 194, at 287 (quoting Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966)).

274. For a thoughtful discussion of alienage as a suspect classification, see Rosberg, *supra* note 194, at 293-336 (focusing analysis on legal lawful permanent residents and nonimmigrants).

275. *Graham v. Richardson*, 403 U.S. 365 (1971). One unsatisfactory explanation for the different standard is the Court's in-artful framing of the discrimination as a distinction based on different types of "aliens" rather than between citizens and "aliens." *Mathews v. Diaz*, 426 U.S. 67, 82 (1976) ("Since it is obvious that Congress has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden" of demonstrating that line is invalid.)

So why should the Court apply strict scrutiny to federal alienage classifications today? One compelling reason is that the “alien” construction functions as a proxy for race or nationality. In the early state anti-alienage cases like *Yick Wo v. Hopkins*,<sup>276</sup> and *Truax v. Raich*,<sup>277</sup> for example, several times the Court spoke of discrimination based on “race or nationality,” as if the two were essentially interchangeable. Despite the seemingly neutral regulation in those cases, the Court simply recognized their racial animus.<sup>278</sup> In recent times, anti-alienage measures as proxy for race-based discrimination have been well-documented. For example, Kevin Johnson has traced the racial animus that motivated the passage of Proposition 187<sup>279</sup> and the driver’s license debate in California.<sup>280</sup> This context should not be ignored by the courts when considering challenges to the PRWORA or the Real ID Act. The law must ensure that state conduct based on immigration status “does not serve as a proxy for race and allow for circumvention” of constitutional guarantees.<sup>281</sup>

More recently, the Proposition 200 campaign in Arizona, backed by anti-immigration groups, also has been motivated by racial animus. Not only was Proposition 200 a campaign based on unfounded allegations of fraud against the undocumented,<sup>282</sup> it took place in the context of a rising anti-immigrant movement by groups like FAIR and the Minuteman Project.<sup>283</sup> These groups disassociate themselves from racist groups;<sup>284</sup> however, their activities and language are openly hostile to immigrants. The Welcome in the Minuteman Project’s website, for example, describes illegal immigration as an invasion that will destroy American culture:

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276. 118 U.S. 356 (1886).

277. 239 U.S. 33 (1915).

278. In *Yick Wo*, the Court struck down a city ordinance under which all Chinese who owned laundromats had been denied permits by the board of supervisors. *Yick Wo*, 118 U.S. at 356. In *Truax*, the Court struck down an Arizona statute requiring any employer of at least five persons to have no less than eighty percent citizen employees. *Truax*, 239 U.S. at 33.

279. Johnson, *supra* note 256, at 218-19.

280. *Id.* at 232-35.

281. *Id.* at 215.

282. See *supra* Part II.B.

283. The Minuteman Project began in April 2005 as an initiative by a group of private United States citizens from southern Arizona, Chris Simcox and Jim Gilchrist, to monitor the country’s border and capture persons trying to cross the border illegally and hand them over to federal authorities. On April 2, 2005, Project volunteers began to patrol the United States border between Naco and Douglas in Cochise County, a span of twenty-three miles along the Arizona-Sonora border. See Minuteman Project, <http://www.minutemanproject.com/default.asp?contentID=2> (last visited Jan. 21, 2007); Wikipedia, The Minuteman Project, [http://en.wikipedia.org/wiki/The\\_Minuteman\\_Project\\_Inc](http://en.wikipedia.org/wiki/The_Minuteman_Project_Inc) (last visited Jan. 28, 2007).

284. The Minuteman Project’s website, for example, reads: “MMP has no affiliation with, nor will we accept any assistance by or interference from, separatists, racists, or supremacy groups.” Minuteman Project, <http://www.minutemanproject.com/>. Yet, it is reported that coinciding with the April 2005 operation, fliers from a white supremacist group called National Alliance were distributed in Douglas, Nogales, and Bisbee. See Wikipedia, The Minuteman Project, [http://en.wikipedia.org/wiki/The\\_Minuteman\\_Project\\_Inc](http://en.wikipedia.org/wiki/The_Minuteman_Project_Inc) (last visited Jan. 28, 2007).

The Minutemen Project is not a call to arms, but a call to voices seeking a peaceful and respectable resolve to the chaotic neglect by members of our local, state and federal governments charged with applying U.S. immigration law.

It is a call to bring national awareness to decades-long careless disregard of effective U.S. immigration law enforcement. It is a reminder to Americans that our nation was founded as a nation governed by the "rule of law," not by the whims of mobs of ILLEGAL aliens who endlessly stream across U.S. borders.

Accordingly, the men and women volunteering for this mission are those who are willing to sacrifice their time, and the comforts of a cozy home, to muster for something much more important than acquiring more "toys" to play with while their nation is devoured and plundered by the menace of tens of millions of invading illegal aliens.

Future generations will inherit a tangle of rancorous, unassimilated, squabbling cultures with no common bond to hold them together, and a certain guarantee of death of this nation as a harmonious "melting pot."

The result: political, economic and social mayhem.

Historians will write about how a lax America let its unique and coveted form of government and society sink into a quagmire of mutual acrimony among the various sub-nations that will comprise the new self-destructing America.<sup>285</sup>

Moreover, while the Minuteman Project advocates its volunteers to remain "peaceful," civil rights groups fear their activities will lead to false imprisonment and other types of abuses.<sup>286</sup>

Even if racial animus is not explicit in the adoption of anti-alienage measures, courts should still consider applying a stricter standard of reviewing them today because of their disparate impact on communities of color. Although not exclusively, anti-alienage measures principally target the undocumented. Despite the difficulty in counting such persons, it is well-documented that overwhelmingly, they are comprised of Mexicans, Central Americans, and other people of color.<sup>287</sup>

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285. Minuteman Project, *supra* note 283. Similarly, FAIR sometimes employs terms that dehumanize immigrants. In its report on the alleged cost of illegal immigration to the state of Arizona, FAIR uses the phrase "immigrant stock," where stock is a term used to refer to animals kept or raised on a farm. The FAIR Report, *supra* note 101.

286. The ACLU, in fact, monitored the group's activities during the month of April and documented at least one case of unlawful imprisonment. See ACLU of Arizona Denounces Unlawful Imprisonment of Immigrant by Minuteman Volunteer, <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=17965&c=22> (last visited Jan. 21, 2007).

287. According to the Pew Hispanic Research Center, Mexicans make up by far the largest group of undocumented migrants at 5.9 million or fifty-seven percent (of an estimated 10.3 million) in the March 2004 estimates. In addition, another 2.5 million undocumented migrants or about twenty-four percent of the total are from other Latin American countries. About nine percent are from Asia, six percent from Europe and Canada, and four percent from the rest of the world. Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, PEW HISPANIC CTR., at 2, Mar. 21, 2005, <http://pewhispanic.org/files/reports/44.pdf>.

## V. CONCLUSION

As the November 2006 elections neared, almost daily the media reported on yet another anti-alienage measure on the ballot across the nation. Arizona alone had four additional anti-alienage measures on the ballot, all of which passed with wide margin approval (over seventy percent): Proposition 300 to end public funding for in-state tuition for higher education and child-care services for undocumented immigrants; Proposition 100 to deny bail to suspects of serious crimes who are undocumented; Proposition 102 to prohibit punitive damage awards to the undocumented; and Proposition 103 to make English the state's official language.<sup>288</sup>

Civil rights activists are likely to challenge these measures, and many (though not all) will be defeated on the basis of preemption. Meanwhile, however, the scope of federal power to regulate the "alien" within the border will continue to expand as long as the political anti-immigrant climate continues and constitutional doctrine fails to rein in the treatment of the "alien" as a subject of foreign affairs. Bounded notions of citizenship moreover will continue to exclude those who lack formal status as citizen from the conferral of rights. Constitutional scholars who place hope in the attachment of rights to citizenship therefore should consider its effect on the "alien."

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288. *Gov. Won't Change Approach to Immigration Issue*, THE ARIZ. DAILY STAR, Nov. 8, 2006, <http://www.azstarnet.com/sn/hourlyupdate/155077.php>; Chris Ramirez, *Effects of Immigration-Related Ballot Measures Debated*, THE ARIZ. REPUBLIC, Nov. 3, 2006, <http://www.azcentral.com/arizonarepublic/local/articles/1103ImmInitiatives1103.html>.