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Do Immigrants Have Freedom of Speech?

Michael Kagan
University of Nevada, Las Vegas -- William S. Boyd School of Law

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By Michael Kagan*

The Department of Justice (DOJ) recently argued that immigrants who have not been legally admitted to the United States have no right to claim protections under the First Amendment. This Essay explores the complicated and conflicted case law governing immigrants' free speech rights, and argues that, contrary to the DOJ position, all people in the United States are protected by the First Amendment. Moreover, it argues that for reasons that have not been widely appreciated, Citizens United v. FEC *offers significant doctrinal support for immigrant speech rights because it articulates a strong rule against speech discrimination based on identity rather than content.*

INTRODUCTION

On May 7, 2015, DOJ lawyers in the federal district court in San Antonio, Texas, made a startling argument: immigrants who are not legally admitted into the United States do not have free speech rights under the First Amendment.[1] If DOJ is right, then millions of unauthorized immigrants in the United States could in the future be censored or punished for speaking their minds, undermining the efforts of the many who have already spoken out in support of

*. J.D., University of Michigan Law School; B.A., Northwestern University. Associate Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law. I am grateful for the advice and suggestions that I received from Aaron Caplan. All errors are mine.

1. Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Pineda-Cruz v. Thompson, No. SA-15-CV-326-XR (W.D. Tex. May 7, 2015), 2015 WL 3922298.

comprehensive immigration reform and the Dream Act.[2] Moreover, since the First Amendment covers more than speech, the DOJ argument has implications for other fundamental rights, including freedom of religion.

As I will explain in this Essay, the government did not need to make such a sweeping assertion to defend itself in *Pineda-Cruz v. Thompson*, a case about the treatment of immigrant detainees in the custody of the Department of Homeland Security (DHS). But I will not dwell on the government's motivations for making this argument. This Essay will focus on the narrow free speech question: Is DOJ right? Do immigrants who have not been lawfully admitted have no free speech rights?

This Essay concludes that immigrants who are in the United States have free speech rights, regardless of how they arrived and their current status under the immigration statutes. This Essay further argues that any other result would be anathema to our system of civil liberties. Finally, this Essay posits that the Supreme Court's decision in *Citizens United v. FEC* considerably strengthens immigrants' claims to free speech, because the Court held there that the government may not silence expression based on the identity of the speaker.

I.
THE DEPARTMENT OF JUSTICE'S POSITION IN *PINEDA-CRUZ*

Pineda-Cruz v. Thompson is a class action lawsuit by Central American mothers who arrived with their children as part of an influx of people fleeing gang violence in 2013 and 2014.[3] While previously DHS typically released similarly situated asylum seekers while their cases proceeded in Immigration Court, in June 2014, DHS began detaining mothers and children together.[4] By the time of the lawsuit, DHS had detained around three hundred mothers with their children in a facility in Karnes, Texas.[5] In March 2015, around eighty detainees decided to protest their conditions there.[6] The mothers circulated a petition asserting that their continued detention was unjust and declaring their refusal to eat, a move that initiated a five-day hunger strike.[7]

On April 23, 2015, the mothers filed suit, claiming that the detention center's punishment of their hunger strike violated the First Amendment.[8] They alleged that Immigration and Custom Enforcement officials threatened to take away their children by deporting the mothers and sending the children to

2. *See, e.g.*, DOCUMENTED (Apo Productions 2013); UNITED WE DREAM, http://unitedwedream.org (last visited Aug. 28, 2015).

3. Complaint at 6, Pineda-Cruz v. Thompson, No. SA-15-CV-326-XR (W.D. Tex. Apr. 23, 2015), 2015 WL 1868560.

4. *Id*. at 3.

5. *Id*. at 3–4.

6. *Id*. at 5.

7. *Id*.

8. *Id*. at 13.

different facilities.[9] They also alleged that the leaders of the protest were put into dark and unsanitary isolation cells, and the hunger strikers were fired from detention center jobs.[10]

The government asserted a number of the narrow defenses available to it.[11] With respect to free speech, DOJ pointed to *Turner v. Safley*, which established a test permitting the government to infringe on a person's constitutional rights in prison if the regulation is "reasonably related to legitimate penological interests."[12] Under this favorable standard, DOJ argued that its interests in the security and well-being of detainees justified the measures taken at Karnes.[13] However, in the alternative, DOJ offered a second, broader defense against the plaintiff's constitutional claims: immigrants who have not been lawfully admitted simply have no First Amendment rights at all.[14] According to DOJ, the plaintiffs "are not lawfully present in the United States nor can they claim that they were lawfully admitted."[15] In immigration law, "admission" is "lawful entry . . . after inspection and authorization by an immigration officer."[16] In contrast, "lawful resident aliens" are "present within the constitution's jurisdiction."[17] Also, according to DOJ, the plaintiffs lacked constitutionally relevant connections to the United States because they never had a lawful immigration status and spent relatively little time in the country before being apprehended.[18] For these reasons, DOJ argued that the plaintiffs could not claim protection under the First Amendment, even if their complaints would be valid if lodged by a citizen or lawful resident.

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9. *Id*. at 14.

10. *Id*. at 6–9.

11. For example, DOJ claims that the government has sovereign immunity. Defendants' Memorandum, *supra* note 1, at 4.

12. 482 U.S. 78, 89 (1987).

13. Defendants' Memorandum, *supra* note 1, at 8. The court denied plaintiffs' motion for a temporary injunction without a written decision. Pineda-Cruz v. Johnson, No. 26 Civ. 326 (W.D. Tex. May 8, 2015). According to a media report, Judge Xavier Rodriguez said in open court that plaintiffs had not shown they were likely to prevail but reserved decision on whether they could claim protection under the First Amendment. *See* Jason Buch & Guillermo Contreras, *Karnes Detainees Dealt a Loss in Court*, SAN ANTONIO EXPRESS-NEWS (May 7, 2015, 9:10 PM), http://www.expressnews.com/news/local/article/Karnes-detainees-testify-about-retaliation-6249686.php.

14. Defendants' Memorandum, *supra* note 1, at 5–6.

15. *Id.* at 6.

16. 8 U.S.C. § 1101(a)(13) (2012). In its brief, DOJ did not clarify how much of its argument depended on lack of legal admission versus lack of lawful presence or alternatively, lack of connections to the United States. These are overlapping but distinct concepts. Some non-citizens who are unlawfully present were nevertheless legally admitted, for instance, if they overstayed a tourist visa. But if the main issue is a lack of connections to the United States, an obvious question would arise about how long someone must remain in the United States before acquiring First Amendment rights. If DOJ intended only to argue that recent arrivals lack First Amendment protection, it did not make this clear in its brief. The brief discusses the duration of residency in the United States as only a secondary factor.

17. Defendants' Memorandum, *supra* note 1, at 6.

18. *Id.*

II.
COULD THE DEPARTMENT OF JUSTICE BE RIGHT?: STATING THE STRONGEST POSSIBLE CASE

This Section summarizes the doctrinal foundation for the DOJ argument and the strongest possible case for DOJ's position that non-citizens not lawfully admitted or lawfully present in the United States should not enjoy the protection of the First Amendment. But first, it is important to understand the wide implications of DOJ's argument. DHS estimated in 2012 that 11.4 million people in the United States are not in the country lawfully.[19] Of this group, the majority were not legally admitted.[20] This subset includes people brought to the United States as children, including many who have become "Dreamers" or prominent activists for immigration reform.[21] DOJ's argument would mean that these activists, encompassing 6.8 million people in the United States, do not enjoy the constitutional protection of freedom of speech.[22]

Broadly speaking, there are two main arguments supporting DOJ's position. First, DOJ may argue that the federal government's plenary power to regulate immigration overrides any First Amendment claims that unlawfully admitted immigrants may make. Second, DOJ may argue that unlawfully admitted immigrants are not part of "the people" for constitutional purposes.

A. Plenary Power over Immigration Trumps the First Amendment

There are several cases where the Supreme Court has held that the First Amendment offers little or no constraint on the federal government's power to regulate immigration.[23] In the canon of immigration law, the classic case concerning the intersection of First Amendment rights and the federal government's power to exclude non-citizens is *Kleindienst v. Mandel*. In that 1972 decision, the Supreme Court affirmed the government's authority to refuse a visa to a "Belgian Socialist" who was invited to speak at American universities.[24] The Court recognized that excluding an invited speaker

19. BRYAN BAKER & NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 1 (2013), http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

20. The portion of the unauthorized population that entered legally and overstayed a temporary visa is estimated at 40 percent. *See* Sara Murray, *Many in U.S. Illegally Overstayed Their Visas*, WALL ST. J. (Apr. 7, 2013, 8:19 PM), http://www.wsj.com/articles/SB10001424127887323916304578404960101110032.

21. *See generally* UNITED WE DREAM, *supra* note 2.

22. This estimate is based on the 11.4 million total unauthorized population and the estimate that 60 percent of them entered without being admitted legally.

23. For a general discussion of the plenary power doctrine, see generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

24. Kleindienst v. Mandel, 408 U.S. 753 (1972).

implicated free speech interests, specifically the right of United States citizens to receive information.[25] Nonetheless, the Court found that the federal government's vast plenary power to control entrance into the United States overcame any First Amendment objections.[26]

In other instances, the Court held that the federal government may deport non-citizens because of their political beliefs and associations. In *United States* ex rel. *Turner v. Williams*, the Court approved the deportation of an English anarchist, holding that the inherent sovereign power of the United States to govern admission of non-citizens overcame any First Amendment defenses.[27] In *Galvan v. Press*, the Court reached a similar holding regarding the deportation of a "Mexican Communist" who had been a U.S. resident for thirty-six years.[28] The Court deferred to the political branches to answer questions about who should be allowed into the country, reasoning that "[t]he power of Congress over the admission of aliens and their right to remain is necessarily very broad."[29] The Court allowed Galvan's deportation over the dissents of Justices Black and Douglas who complained, "I am unwilling to say [ ] that despite these constitutional safeguards this man may be driven from our land because he joined a political party that California and the Nation then recognized as perfectly legal."[30]

These cases have not been overruled directly though there is some reason for caution about whether the Court today would go quite as far. Perhaps most famously, in the 1970s, John Lennon successfully resisted deportation in part by arguing that he was a victim of selective prosecution because of his political activism.[31] But federal court jurisdiction to hear such cases was foreclosed by the Supreme Court's 1999 decision in *Reno v. American-Arab Anti-Discrimination Committee*.[32] In that case, the government sought to deport a group of people because of their membership in a leftist Palestinian organization and technical violations of immigration law.[33] The government dropped the political membership ground after the group challenged the deportation as unconstitutional, but the Supreme Court found that the government could proceed on the facially neutral, technical grounds.[34]

25. *Id*. at 763.
26. *Id*. at 766.
27. 194 U.S. 279, 290 (1904).
28. 347 U.S. 522 (1954).
29. *Id.* at 530.
30. *Id.* at 533 (Black, J., dissenting).
31. *See* Lennon v. INS, 527 F.2d 187 (2d Cir. 1975).
32. 525 U.S. 471 (1999).
33. *Id*. at 473–74.
34. *Id.*

Because of the resolution of the case on technical grounds, *American-Arab* sends an ambiguous signal.[35] However, the Court's unequivocal language, which declared that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation,"[36] gives the government a significant sword to wield over the heads of the 11.4 million unauthorized immigrants in the country. Any unlawfully admitted immigration is removable simply because he or she is present in violation of the law.[37] In this way, unlawfully admitted immigrants are subject to a kind of retribution for the same political activities that U.S. citizens can engage in with immunity.[38] Thus, *Williams*, *Galvan*, and *American-Arab* arguably support the DOJ's position in *Pineda-Cruz*: immigrants cannot call on the First Amendment for protection vis-à-vis the federal government.

B. Immigrants May Not be Part of "The People"

DOJ may raise yet a second argument that the protections of the Bill of Rights extend only to "the people," not all "persons" under the Fourteenth Amendment. The Constitution uses "the people" rather than "citizens," limiting "citizens" to those with the right to vote and run for office.[39] In *Pineda-Cruz*, DOJ relied on a series of cases where the Court suggested that some constitutional rights accrue to an immigrant only as he or she gains connections to American society. Of particular note, in *United States v. Verdugo-Urquidez*, the Court said that "aliens receive constitutional protection when they have come within the territory of the United States and developed substantial connections with this county."[40] DOJ may use the reference to "substantial connections" to suggest that unlawful presence in the country depletes a non-citizen's claim to constitutional protections. In fact, the Court in *Verdugo-Urquidez* offered a statement that seems, at least on the surface, highly supportive of DOJ's contention:

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35. The majority in *American-Arab* held open the possibility of a "rare case" where the discrimination based on political opinion is "so outrageous" that the result would be different. *Id.* at 491.

36. *Id*. at 488.

37. *See* 8 U.S.C. § 1227(a)(1)(B) (2012).

38. David Cole has eloquently described this reality. *See* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 377 (2003) ("If a foreign national has no First Amendment rights in the deportation setting, he has no First Amendment rights anywhere; the fear of deportation will always and everywhere restrict what he says.").

39. *See id*. at 370. Indeed, in *Williams*, Chief Justice Fuller wrote, "He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise." United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904).

40. 494 U.S. 259, 271 (1990).

> "[T]he people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[41]

This interpretation is also supported by recent lower court decisions holding that unauthorized immigrants cannot claim the right to bear arms under the Second Amendment. In its divided two-to-one decision in *United States v. Portillo-Munoz*,[42] the Court of Appeals for the Fifth Circuit echoed the Supreme Court, observing that only six provisions of the Bill of Rights are limited to "the people."[43] Based on this foundation, the appellate court found that a non-citizen who is in the United States illegally is not part of the political community known as "the people" in the Bill of Rights.[44]

These intersecting lines of case law provide some doctrinal support for the DOJ's position. But, as we will see in Sections III and IV, there are countervailing doctrines as well.

III.
PUTTING THE ANTI-SPEECH ARGUMENTS IN CONTEXT

A. Plenary Power is Subject to Constitutional Limits

The first counterpoint concerns the government's plenary power to regulate immigration. The Supreme Court's treatment of immigration enforcement has changed considerably since *Williams*, *Galvan*, and even *Verdugo-Urquidez*. Since then, the Court has grown more willing to impose

41. *Id.* at 265.

42. United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011).

43. *Id.* at 440.

44. *Id.* This line of reasoning is potentially very broad, implicating far more than the right to bear arms, and it has led one judge to pointedly dissent from the *Portillo-Munoz* decision. *See id*. at 443 (Dennis, J., dissenting) ("The majority's determination that Portillo-Munoz is not part of 'the people' effectively means that millions of similarly situated residents of the United States are 'non-persons' who have no rights to be free from unjustified searches of their homes and bodies and other abuses, nor to peaceably assemble or petition the government."). The majority hedged on whether other civil liberties could be abridged for immigrants, suggesting that the term "the people" might have a different meaning in different amendments. *Id*. at 440–41. But this may clash with the Supreme Court's premise in *District of Columbia v. Heller* that "the people" is a "term of art" used with a consistent meaning in multiple amendments. 554 U.S. 570, 580 (2008); *see also Portillo-Munoz*, 643 F.3d at 444 (Dennis, J., dissenting) (disputing whether "the people" can have different meanings in different amendments). On the other hand, courts have found that immigrants in the United States can claim Fourth Amendment protections against unreasonable searches and seizures, suggesting that "the people" may indeed mean different things in different amendments. *See, e.g.*, Miranda-Olivares v. Clackamas Cnty., No. 3:12-CV-02317-ST (D. Or. Apr. 11, 2014), 2014 WL 1414305 (detaining an immigrant without a judicial warrant violated the Fourth Amendment).

constitutional constraints on immigration enforcement.[45] Most important of all, in 2001, the Supreme Court in *Zadvydas v. Davis* held that the federal government's power to enforce immigration law "is subject to important constitutional limitations."[46] *Zadvydas* concerned due process rights in detention, but the Court did not limit its decision to that context.[47] Given the importance of freedom of speech, the right also belongs in the category of fundamental rights from which all people in the United States may benefit.[48]

B. Free Speech Does Not Belong Only to "The People"

The second counterpoint concerns the argument that immigrants are not part of "the people" of United States. The Bill of Rights is explicit that only "the people" may claim Second Amendment rights: "the right of the people to keep and bear Arms."[49] But the text of the First Amendment is very different. It is framed as a limitation on government power ("Congress shall make no law"), rather than as a grant of rights to the people.[50] Moreover, the First Amendment ties "the people" only to the right to assemble and petition the government; freedom of speech, the press, and religious exercise are phrased in general terms.[51] As a result, there is nothing in the First Amendment's text suggesting that freedom of speech is limited to "the people," even assuming the group would not include immigrants unlawfully admitted to the United States.[52] This supports the proposition that everyone in the United States enjoys freedom of speech under the First Amendment.

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45. For a general account of the rise and decline of plenary power, see Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. (forthcoming 2015).

46. 533 U.S. 678, 695 (2001).

47. *Id*. at 694 (discussing United States v. Wong Wing, 163 U.S. 228, 237–38 (1896) (striking down a federal statute imposing hard labor on Chinese individuals found unlawfully in the United States and finding that unlawfully present immigrants could not be sentenced to involuntary servitude or slavery)).

48. *Cf.* Procunier v. Martinez, 416 U.S. 396, 429 (1974) (Douglas, J., concurring) ("Free speech and press within the meaning of the First Amendment are, in my judgment, among the pre-eminent privileges and immunities of all citizens.").

49. U.S. CONST. amend. II.

50. U.S. CONST. amend. I; *cf.* United States v. Portillo-Munoz, 643 F.3d 437, 441 (5th Cir. 2011) (distinguishing the Fourth and Second amendments because the Fourth Amendment "is at its core a protective right against abuses by the government" while the Second Amendment "grants an affirmative right").

51. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

52. The textual difference between the First Amendment's treatment of speech, press, and religion, and the right to assemble and petition the government may reflect a distinction between basic rights of personal autonomy on the one hand and rights of self-government on the other.

C. Foreign Location May Matter More Than Citizenship

A third caveat concerns the DOJ's reliance on *Verdugo-Urquidez*. That case does indeed say that First Amendment rights are limited to members of the national community, though the Court did not specify if it meant all First Amendment rights or just freedom of assembly.[53] However the Court in *Verdugo-Urquidez* was not actually deciding anything about the rights of immigrants in the United States. This was a case about the relevance of the Fourth Amendment to the arrest of a Mexican in Mexico.[54] This is also true of *Kleindienst v. Mandel*, since the non-citizen there was outside the United States, seeking permission to enter.[55] Such cases may be explained by the general rule that constitutional rights do not necessarily apply outside U.S. territory, though as the Court made clear in *Boumediene v. Bush*, constitutional rights can apply abroad in some circumstances.[56] There is little need to delve into the extraterritorial question in order to analyze the free speech rights of people who are inside the United States.[57]

D. The Court Has Embraced Immigrant Speech Rights (For Legal Immigrants)

Finally, the Supreme Court has at least twice said that the First Amendment applies to non-citizens in the country. In *Bridges v. Wixon*, the Court said, "Freedom of speech and of press is accorded aliens residing in this country."[58] In *Chew v. Colding*, the Court said in a footnote that neither the First nor Fifth Amendment distinguishes between citizens and "resident aliens."[59] But these cases also highlight a problem. In *Chew*, the Court said: "[O]nce an alien *lawfully enters* and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."[60] The Court in *Chew* did not say whether those who enter unlawfully are not entitled to rights, but its narrow language suggests that at least some rights may not apply. *Bridges* did not include such limiting language, but at the same time, that case involved a lawful immigrant who had lived in the United

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53. *See supra* Section II.

54. The Supreme Court has explained that *Verdugo-Urquidez* stands only for the principle that certain constitutional protections are territorially limited to the United States. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

55. *See supra* Section II.

56. 553 U.S. 723, 759–64 (2008) (adopting a "functional" and "practical" approach to extraterritorial application of constitutional rights).

57. *Cf. Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.").

58. 326 U.S. 135, 148 (1945); *see also* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 497 (1999) (Ginsburg, J., dissenting) ("It is well settled that '[f]reedom of speech . . . is accorded aliens'" (quoting *Bridges*, 326 U.S. at 148)).

59. 344 U.S. 590, 598 n.5 (1953).

60. *Id.* (emphasis added).

States for more than two decades.[61] Because no Supreme Court case has squarely reached the question of whether free speech rights apply to immigrants that entered unlawfully, one may raise doubts about the application of cases that concerned legal immigrants.[62]

E. A Close Question?

In sum, while there is good reason to think that freedom of speech applies to everyone in the United States, there is little definitive case law on point. And, as we have seen, there are cases where the Court has permitted the federal government to single out disfavored political groups at least in the context of deciding whether to exclude or deport a non-citizen. However, a recent case, *Citizens United v. FEC*,[63] has added an important, new dimension to free speech law, which should strongly favor immigrant free speech rights.

IV.
SPEAKER DISCRIMINATION DOCTRINE IN *CITIZENS UNITED V. FEC*

A. Citizens United v. FEC

Free speech law has traditionally focused on content-based censorship, in which the government attempts to prevent discussion about certain subjects or from certain viewpoints,[64] or to restrict people with disfavored ideologies from accessing public fora.[65] To focus on the identity of the speaker is a different type of regulation; the government looks to who the person is, not what the person might say. The DOJ position asserted in *Pineda-Cruz* is an example of such identity-based speech restrictions. A surprising dearth of First Amendment case law directly tackles this kind of speech restriction. But the good news for immigrants is that identity-based speech restrictions were a central issue in *Citizens United*. The bad news, perhaps, is that because *Citizens United* is such a divisive decision, given its impact on campaign finance regulation, there has been little attention paid to this aspect of the decision, and doubts remain as to how to (or if to) apply the Court's reasoning in that case.[66]

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61. *Bridges*, 326 U.S. at 137–38.

62. *Cf.* United States v. Portillo-Munoz, 643 F.3d 437, 441 (5th Cir. 2011) (arguing that the Supreme Court decision that struck down a measure that discriminated against immigrants only applied to lawful immigrants).

63. 558 U.S. 310 (2010).

64. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (holding that prohibitions on content discrimination are "the guiding . . . principle" of First Amendment law); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015) (summarizing the Court's jurisprudence restricting content-based restrictions on expression).

65. *See, e.g.*, Hague v. Comm. for Ind. Org., 307 U.S. 496 (1939) (holding that a city may not prohibit Communists from accessing a public forum).

66. *See generally* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. (forthcoming 2015).

In *Citizens United*, a regulation prohibited a non-profit organization from making independent campaign expenditures because of the non-profit's status. In that case, the non-profit made a film criticizing Hillary Clinton.[67] The Court had to decide whether the identity of the speaker was relevant to free speech law. The majority stated decisively[68]: "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."[69] Because *Citizens United* says that speaker discrimination may offend the Constitution, an identity-based speech restriction should attract heightened scrutiny, just as a content-based speech restriction would.[70]

Despite the broad prohibition on speaker discrimination articulated in *Citizens United*, the Court has approved strict prohibitions on non-citizen expressive activity in the narrow context of campaign finance regulation. The most recent instance was a one-line, per curiam decision in *Bluman v. FEC*, which upheld a federal statute that banned non-citizens from donating to the election campaigns of candidates for federal office.[71] But, if anything, *Bluman* confirms the general principle that speech restrictions targeting immigrants are constitutionally problematic. In the decision affirmed by the Supreme Court, the D.C. Circuit Court of Appeals applied strict scrutiny,[72] the level of scrutiny the Supreme Court required in *Citizens United* for government-imposed identity-based speech restrictions. Moreover, the court of appeals explicitly limited the decision to specific expressive activities "that are part of democratic self-government in the United States."[73] Thus, under this narrow exception, the government may restrict non-citizens from campaign donations, voting, and jury service.[74] But the *Bluman* decision is clear that the compelling interest in self-government that justifies banning campaign donations by immigrants

67. 558 U.S. 310, 365 (2010).

68. For a discussion of the four-justice dissent's views on this aspect of *Citizens United*, see Kagan, *supra* note 66.

69. *Citizens United*, 558 U.S. at 340.

70. The Court acknowledged that some legitimate speech restrictions disadvantage certain classes of people, but that such cases are typically tied to certain government contexts, such as schools or prisons, not to the identity of the people involved. *See id*. at 341 ("[T]hese rulings were based on an interest in allowing governmental entities to perform their functions."); *see also* Kagan, *supra* note 66 (discussing the intersection of speaker discrimination doctrine and case law limiting speech in certain non-public fora).

71. Bluman v. FEC, 132 S. Ct. 1087 (2012) (per curiam).

72. Bluman v. FEC, 800 F. Supp. 2d 281, 285 (D.C. Cir. 2011) (deciding that the regulation could survive even strict scrutiny review and thus, refusing to determine which level of scrutiny applied), *aff'd*, 132 S. Ct. 1087 (2012).

73. *Id.* at 283.

74. *Id.*

"does not bar foreign nationals from issue advocacy."[75] Thus, if anything, *Bluman* supports the general rule that immigrants are not excluded from the protection of the First Amendment.

B. Policy Implications of the Discrimination Doctrine

To appreciate the importance of the speaker discrimination principle, it is worth pausing to consider the implications for democracy if the government could silence undocumented immigrants. Immigration policy is one of the great subjects of political debate of our time. The central debate concerns what should happen to non-citizens who enter or remain in the country unlawfully. The question thus is whether the voices of those most affected by this debate have a right to participate in it. Many of those individuals most affected have already participated, including marching in demonstrations, and in some cases becoming high profile activists honored by the President.[76] Their participation in the national debate attaches a personal face to the policy question, much as the "coming out" movement personalized the campaign for LGBT equality.[77]

A central reason why the First Amendment should protect non-citizens is that, in a democracy, it is essential that the general public hear directly from those affected by a public policy. In the detention context, this principle is illustrated by the contrast between *Turner v. Safley* and an earlier prisoners' rights case, *Procunier v. Martinez*.[78] In *Safley*, the Court approved restrictions on inmate-to-inmate correspondence because "mail between [prisoners in different] institutions can be used to communicate escape plans and to arrange assaults and other violent acts."[79] But in *Procunier*, the Court struck down a prison regulation that prevented inmates from writing letters to people outside the prison system to complain or express grievances about prison conditions.[80] The Court in *Procunier* recognized that censorship of speech impacts both the speaker and the intended audience.[81] More to the point, inmates would lose their ability to tell the public outside the prison about problems directly affecting them inside.[82]

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75. *Id.* at 284; *see also id.* at 288 ("[T]he United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government.").

76. *See, e.g.*, Amanda Sakuma, *Astrid Silva: Obama Lifts One Immigrant's Story Out of the Shadows*, MSNBC.COM (Nov. 20, 2014, 9:41 PM) (updated Nov. 21, 2014, 5:36 PM), http://www.msnbc.com/msnbc/obama-lifts-one-immigrants-story-out-the-shadows.

77. *See* Julie Bolcer, *Poll Shows Power of Coming Out*, ADVOCATE.COM (June 6, 2012, 9:53 AM), http://www.advocate.com/politics/marriage-equality/2012/06/06/poll-shows-power-coming-out (citing data showing dramatic growth since the 1990s in the number of Americans who know that a person close to them is gay, corresponding with a dramatic shift in opinions about marriage equality).

78. 416 U.S. 396 (1974).

79. 482 U.S. 78, 91 (1987).

80. *Procunier*, 416 U.S. at 398–99.

81. *Id.* at 408–09; *see also* Kleindienst v. Mandel, 408 U.S. 753, 762–65 (1972).

82. *Procunier*, 416 U.S. at 413 ("Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements."); *id.* at 427

It is true that if the people affected by a public policy are silenced, their allies can still advocate on their behalf. But this advocacy is more abstract, centering on a voiceless third person who is never heard from directly. In other First Amendment contexts, the Court has recognized that a political message is more potent if the audience can visibly connect it to speakers who have a unique personal connection to the issue.[83] In addition, forcing marginalized people to rely on others to advocate for their interests reinforces a power hierarchy, privileging one person while stripping the person who is directly affected of his or her voice. In explaining why speaker discrimination offends the First Amendment, Justice Kennedy in *Citizens United* wrote that excluding a person or group of people from the right to speak "deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[84] *Citizens United* thus articulates a compelling, progressive reason to encourage a diversity of voices in public life and to closely scrutinize any government attempt to exclude a speaker based on who they are, which is the logical result of the DOJ's argument in *Pineda-Cruz*.

CONCLUSION

The DOJ position in *Pineda-Cruz* should be deeply disturbing; it suggests that millions of people in the United States could be deprived of fundamental rights, starting with, but not necessarily limited to, freedom of speech. The position is arguably supported by case law, especially cases like *Williams*, *Galvan*, and *American-Arab*, which bar First Amendment defenses to deportation, and case law that suggests that unauthorized immigrants may not be part of "the people" in the Bill of Rights. However, the impact of these cases should be limited, given that the Supreme Court has stated that the federal government's immigration authority is subject to constitutional limitations and that non-citizens enjoy freedom of speech when they are inside the United States. Unfortunately, the Court has not directly discussed whether non-citizens have the freedom to speak when they are in the country unlawfully. As a result, despite the alarming implications of the DOJ argument, the case law is not as clear as one might hope.

This is why the speaker discrimination doctrine as articulated by *Citizens United* is both critically important and refreshing. It articulates a general rule that no class of people should be restricted from free expression based on who

(Marshall, J., concurring) ("Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration.").

83. *See* City of Ladue v. Gilleo, 512 U.S. 43, 56–57 (1994) ("A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile.").

84. Citizens United v. FEC, 558 U.S. 310, 340–41 (2010).

they are without a compelling justification from the government. If the immigrant speech question would otherwise be close, the speaker discrimination doctrine explains why it must ultimately be resolved in favor of free speech. Moreover, in *Citizens United*, the Court articulated why DOJ's argument eviscerates American democracy. By arguing that immigrants have no right to speak, DOJ would deprive them of "worth, standing, and respect,"[85] and literally the right to have their voice heard about matters that affect them. That is why, as a matter of First Amendment law, DOJ is wrong to assert that non-citizens who have not been lawfully admitted cannot claim protection under the First Amendment. Everyone in the United States—including non-citizens regardless of their status under immigration law—enjoys the protection of the First Amendment.

85. *Id.*