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## When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment

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# WHEN IMMIGRANTS SPEAK: THE PRECARIOUS STATUS OF NON-CITIZEN SPEECH UNDER THE FIRST AMENDMENT

MICHAEL KAGAN\*

**Abstract:** Although many unauthorized immigrants have become politically active in campaigning for immigration reform, their ability to speak out publicly may depend more on political discretion than on the constitutional protections that citizens normally take for granted. Potential threats to immigrant free speech may be seen in three areas of law. First, the Department of Justice has made a broad claim that immigrants who have not been legally admitted to the country have no First Amendment protection at all. Second, the Supreme Court has approved broad prohibitions on non-citizens spending money on speech that is related to electoral campaigns. Third, the Court has indicated that the federal government might, in its discretion, act to deport immigrants because of their political activities. The Supreme Court should revisit these questions because current case law is in tension with other principles of free speech law, especially the prohibition on identity-based speech restrictions as articulated in *Citizens United v. FEC*. As the Court explained, the First Amendment protects the rights of marginalized people to have a voice and does not allow the government to prefer some speakers over others based on their identity.

## INTRODUCTION

In the 2016 presidential campaign, nearly every candidate had something to say about immigrants. What if immigrants join these debates and speak for themselves? Do they have a constitutional right to participate in American political discourse, or may they do so only by the grace of those in power? Although the First Amendment clearly protects the right of citizens to talk about immigrants, free speech jurisprudence is less clear about whether immigrants may speak up on their own behalf. This article highlights the fact that immigrants' freedom of speech is on insecure legal ground, in large part because the Supreme Court has sent contradictory signals about it. If the White House were to be occupied by a president who is

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hostile to immigrants and intolerant of dissent, immigrant activists could not be confident that the courts would protect their expressive liberty.

The proposition that immigrant freedom of speech is in doubt may be surprising given the surge in public political activism by immigrants in recent years. Many of these activists make their unlawful presence in the United States a central part of their message. The campaign for the Dream Act mobilized unauthorized immigrants who were brought to the country as children.<sup>1</sup> In a nationally televised address, President Obama highlighted the story of Astrid Silva, a Nevada-based activist who, in the President's words, came to the United States with nothing more than "a cross, her doll, and the frilly dress she had on" and who now has multiple university degrees.<sup>2</sup> Ms. Silva later spoke in support of Hillary Clinton at the 2016 Democratic National Convention ("DNC") while other unauthorized immigrants were given other roles at the DNC.<sup>3</sup> A Google image search for "immigrant activism" finds photographs of protesters holding up signs identifying themselves as "undocumented, unafraid." One protest initiative called the "No Papers, No Fear Ride for Justice" organized a tour of immigrant activists on an "UndocuBus."<sup>4</sup> There are bloggers who speak openly about their immigration situation and advise others in similar predicaments about how to pursue educational and career opportunities.<sup>5</sup> A Pulitzer Prize winning journalist, Jose Antonio Vargas, produced a film for CNN called *Documented: A Film By An Undocumented American*.<sup>6</sup> On the surface, it certainly seems that even unlawfully present immigrants feel that they can talk freely about their situations and add their voice to the national debate about immigration policy.

Yet, although such activism has blossomed, the Department of Justice ("DOJ") has argued in federal court that non-citizens who were not legally admitted to the country have no claim to protection under the First Amend-

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<sup>1</sup> See, e.g., *About Us*, UNITED WE DREAM, <http://unitedwedream.org/about/our-missions-goals/> [https://perma.cc/6KWX-5U7E].

<sup>2</sup> Amanda Sakuma, *Astrid Silva: Obama Lifts One Immigrant's Story Out of the Shadows*, MSNBC.COM (Nov. 20, 2014), <http://www.msnbc.com/msnbc/obama-lifts-one-immigrants-story-out-of-the-shadows#55174> [https://perma.cc/M3C6-7FAT].

<sup>3</sup> See Alexander S. Corey, *Nevada Immigration Reform Advocate to Speak at Democratic Convention*, LAS VEGAS REV. J. (July 15, 2016), <http://www.reviewjournal.com/politics/election-2016/nevada-immigration-reform-advocate-speak-democratic-convention>; *Undocumented Immigrants Given Roles at Democratic Convention*, FOXBUSINESS, (July 22, 2016), <http://www.foxbusiness.com/politics/2016/07/22/undocumented-immigrants-given-roles-at-democratic-convention.html>.

<sup>4</sup> NO PAPERS, NO FEAR RIDE FOR JUSTICE, <http://nopapersnofear.org/index.php> [https://perma.cc/E2DP-U6RD].

<sup>5</sup> See MY (UN)DOCUMENTED LIFE, <http://mydocumentedlife.org> [https://perma.cc/V9GV-P6BS].

<sup>6</sup> *See* DOCUMENTED: A FILM BY AN UNDOCUMENTED AMERICAN (CNN Films 2013).

ment.<sup>7</sup> The Supreme Court affirmed a decision holding that federal election law may prohibit immigrants from making even small expenditures to speak for or against candidates in an election.<sup>8</sup> The Supreme Court has also affirmed the power of the federal government to single out certain immigrants for deportation for political activities that would have qualified as protected speech but for their immigration status.<sup>9</sup> It may be that immigrant activism has flourished in recent years not because the activists had a clear legal right to speak but because the Obama Administration has chosen not to try to silence them. A future president may be able to use this discretion very differently. Although current law is somewhat more protective of free expression for legal permanent residents than for other non-citizens in the United States, it is not currently clear whether this is a matter of constitutional law or merely a statutory choice that Congress could opt to revoke.<sup>10</sup>

In March 2016, an Egyptian student legally in the United States was forced to leave the country after a social media outburst against presidential candidate Donald Trump, highlighting how immigrant speech is uniquely vulnerable to suppression.<sup>11</sup> The student, Emadeldin Elsayed, wrote on his Facebook page: “I literally don’t mind taking a lifetime sentence in jail for killing this guy, I would actually be doing the whole world a favor.”<sup>12</sup> He told the Associated Press, “It’s just a stupid post. . . . I don’t know why would they [sic] think I am a threat to the national security of the United States just because of a stupid post.”<sup>13</sup> Indeed, Elsayed’s Facebook post is the kind of vehement political statement that the Supreme Court has previously held to be protected free speech so long as there is no real threat of actual violence.<sup>14</sup> The government declined to pursue criminal charges

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<sup>7</sup> See Federal Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction at 11–13, *Pineda-Cruz v. Thompson*, No. SA-15-CV-326-XR (W.D. Tex. May 7, 2015), 2015 WL 3922298; see also *infra* notes 30–96 and accompanying text.

<sup>8</sup> *Bluman v. FEC*, 132 S. Ct. 1087, 1087 (Mem) (2012); see *infra* notes 97–148 and accompanying text.

<sup>9</sup> *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904); see *infra* notes 149–204 and accompanying text.

<sup>10</sup> See *Bluman v. FEC*, 800 F. Supp. 2d 281, 283, 284 (D.D.C. 2011), *aff’d*, 132 S.Ct. 1087 (Mem) (2012).

<sup>11</sup> See *Take Two, Can Immigrants Threaten a Presidential Candidate?* 89.3 KPCC (Mar. 9, 2016), <http://www.scpr.org/programs/take-two/2016/03/09/47060/can-immigrants-threaten-a-presidential-candidate/> [https://perma.cc/9YNR-THFT]; ASSOCIATED PRESS, *Egyptian Student in Hot Water After Posting Trump Threat*, CBSNEWS (Mar. 3, 2016), <http://www.cbsnews.com/news/donald-trump-threat-egypt-student-facebook-deportation-us-election-2016/> [https://perma.cc/883S-DRXU].

<sup>12</sup> *Take Two*, *supra* note 11.

<sup>13</sup> ASSOCIATED PRESS, *supra* note 11.

<sup>14</sup> See *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (overturning a conviction of a Vietnam-era anti-draft demonstrator who said, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” because the statement was a form of “political hyperbole” and because the

against Elsayed.<sup>15</sup> Moreover, around the same time, Trump himself had made a number of verbal threats of violence against protesters at his rallies, and some actual violence had taken place without any criminal charges filed against Trump for his statements.<sup>16</sup> Yet, because Elsayed was in the United States as a non-citizen on a temporary visa, he was vulnerable to government action triggered by his speech in a way that a citizen would not have been.

To be clear, there are some Supreme Court decisions that say that immigrants *are* protected under the First Amendment. Additionally, there are good arguments that could be used to combat an aggressive attempt by the government to repress immigrant speech. The case law is conflicted, limited in scope, and, in some important ways, simply unclear about how far the government can go. If it chose, the federal government could use this ambiguity to try to control immigrant dissent. This article's first goal is to illuminate this muddle and to highlight the specific ways in which current law makes immigrants vulnerable to a kind of political repression that the Constitution presumably forbids. The second goal is to illustrate arguments drawn from the Supreme Court's case law that should be used to clarify that all people in the United States have freedom of speech, regardless of their immigration status.

Perhaps surprisingly, one of the most promising arguments to this effect comes from the 2010 U.S. Supreme Court decision in *Citizens United v. FEC*.<sup>17</sup> In that case, the Court held that it offends the First Amendment for the government to restrict speech based on the identity of the speaker.<sup>18</sup> Justice Kennedy's majority opinion explained better than any other Supreme Court decision why it is essential to prevent the government from silencing people based on who they are.<sup>19</sup> Unfortunately, the liberal justices on the Court have not been willing to embrace this idea whereas the conservative

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First Amendment protects speech that may be "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials") (internal quotation omitted).

<sup>15</sup> ASSOCIATED PRESS, *supra* note 11.

<sup>16</sup> See Ben Schreckinger, *Trump Cracks Down on Protesters*, POLITICO (Mar. 7, 2016), <http://www.politico.com/story/2016/03/donald-trump-rally-protester-crack-down-220407> [<https://perma.cc/HG2T-KKES>]; Aaron Katersky & Tom Liddy, *Trump Won't Face Inciting a Riot Charges for North Carolina Rally, Sheriff's Office Says*, GOOD MORNING AMERICA (Mar. 15, 2016), <https://gma.yahoo.com/trump-wont-face-inciting-riot-charges-north-carolina-062957255—abc-news-topstories.html> [<https://perma.cc/PEX2-T7AZ>]; Jeremy Diamond, *Donald Trump on Protester: "I'd Like to Punch Him in the Face,"* CNN (Feb. 23, 2016), <http://www.cnn.com/2016/02/23/politics/donald-trump-nevada-rally-punch/index.html> [<https://perma.cc/XE6M-7ME5>].

<sup>17</sup> See also *infra* notes 217–254 and accompanying text. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that governmental restrictions on campaign financing is a violation of the First Amendment).

<sup>18</sup> *Citizens United*, 558 U.S. at 340–41.

<sup>19</sup> See *id.*; *infra* notes 217–254 and accompanying text.

justices have so far declined to apply it in other cases. As a result, both the conservative and liberal justices bear responsibility for leaving immigrant free speech insecure. In fact, the four liberal dissenters from *Citizens United* argued explicitly that the government should be able to selectively repress speech by non-citizens in the United States.<sup>20</sup> This article argues that critics of *Citizens United* who fear the corruptive role of money in election campaigns should nevertheless embrace the speaker discrimination doctrine that it announced; this is an ultimately progressive principle that fills a gap in free speech doctrine – a gap that has left immigrants particularly vulnerable.<sup>21</sup> Meanwhile, the justices who voted for the *Citizens United* decision need to show that this principle is broadly applicable not only in cases involving well-financed independent political campaigns, or they will risk eroding the integrity of their reasoning in this controversial decision.

With respect to terminology, this article often refers to any non-citizen in the United States as an “immigrant.” This corresponds to the way the public and the media tend to talk about immigrants and immigration policy, but it is admittedly not the technically correct terminology. For immigration law specialists, the term “immigrant” is a term of art that does not include people who arrive on a temporary visa basis.<sup>22</sup> Those who arrive on a temporary visa—which may last just a few months for a tourist or years for students and temporary workers—are thus not immigrants within the statutory language.<sup>23</sup> There are also roughly 11 million non-citizens who are unlawfully present in the country, some of whom were never lawfully admitted because they entered without inspection and some of whom overstayed their visas.<sup>24</sup> At a technical level, the most correct term for the people considered in this article would be “non-citizens in the United States.” The technical distinctions among different types of non-citizens, however, reflect statutory categories established by Congress more than people’s actual intentions and social contexts. For example, a legal permanent resident might come to the United States and stay only briefly, whereas an unauthorized immigrant might arrive illegally and stay permanently. Therefore, this article loosely refers to all non-citizens in the United States as immigrants and will specify sub-categories of this group as needed.

The article begins by highlighting three areas of law that illustrate the unsettled nature of immigrant free speech rights. Part I examines the argu-

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<sup>20</sup> See *Citizens United*, 558 U.S. at 420.

<sup>21</sup> See *infra* notes 217–254 and accompanying text.

<sup>22</sup> See 8 U.S.C. § 1101(a)(15) (2012) (defining the term immigrant to include “every alien except” those within specified temporary visa categories).

<sup>23</sup> See *id.* (establishing, among other things, temporary visa categories for visitors for business or pleasure, students, and temporary workers of various types).

<sup>24</sup> See *infra* note 47 and accompanying text.

ment advanced by the DOJ that many immigrants simply cannot claim protection of the First Amendment because they are not part of “the people” for purposes of the Bill of Rights.<sup>25</sup> Next, Part II examines current election law that prohibits election-related expenditures by many immigrants even to the extent of banning them from printing flyers to hand out in a public park.<sup>26</sup> Part III describes the federal government’s power to use selective enforcement of immigration law to deport people because of their political activities.<sup>27</sup> After having highlighted these problematic areas of law, Part IV describes the potential implications of the speaker discrimination principle that the Court articulated in *Citizens United*.<sup>28</sup> Part V discusses how the Court should reconcile freedom of speech with the government’s plenary power over immigration enforcement.<sup>29</sup>

### I. THE BROAD CLAIM: CAN NON-ADMITTED IMMIGRANTS CLAIM FIRST AMENDMENT PROTECTION AT ALL?

The Supreme Court has held that the First Amendment applies to non-citizens.<sup>30</sup> A close reading of the cases where the Court has made this statement, however, raises questions about how deeply the Court has considered the issue. Most problematic, the cases where the Court has dealt with the immigrant free speech issue have involved only immigrants who were in the country legally. In 1945, in *Bridges v. Wixon*—a case involving a legal resident—the Supreme Court said, “Freedom of speech and of press is accorded aliens residing in this country.”<sup>31</sup> In 1953, in *Kwong Hai Chew v. Colding*, the Court, in a footnote, said that neither the First nor Fifth Amendment distinguishes between citizens and “resident aliens.”<sup>32</sup> In neither case did the Court suggest in any way that the First Amendment should not extend to unlawfully present immigrants, but the fact that it never directly addressed that question could, and indeed has, raised doubts.<sup>33</sup>

The limited nature of the Supreme Court’s engagement with immigrant free speech can be seen clearly in the *Bridges* decision. This case concerned Harry Bridges, an Australian who entered and lived in the United States

<sup>25</sup> See *infra* notes 30–96 and accompanying text.

<sup>26</sup> See *infra* notes 97–148 and accompanying text.

<sup>27</sup> See *infra* notes 149–204 and accompanying text.

<sup>28</sup> See *infra* notes 205–254 and accompanying text.

<sup>29</sup> See *infra* notes 255–285 and accompanying text.

<sup>30</sup> See *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that a non-citizen who published communist literature was protected by First Amendment).

<sup>31</sup> *Id.*

<sup>32</sup> *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 n.5 (1953).

<sup>33</sup> *Cf.* *United States v. Portillo-Munoz*, 643 F.3d 437, 441–42 (5th Cir. 2011) (arguing that the Supreme Court decision that struck down a measure that discriminated against immigrants only applied to lawful immigrants).

legally from 1920 to 1938, at which time the government sought to deport him because of his previous affiliation with the Communist Party.<sup>34</sup> The government alleged that Bridges had advocated the violent overthrow of the U.S. government.<sup>35</sup> The foundation for this accusation, however, was that Bridges had been active in trade unions, including leading strikes by longshoremen and sponsoring the publication of a newsletter called the *Waterfront Worker*.<sup>36</sup> Most of the decision is devoted to a factual analysis of Bridges's activities and discussion over what Congress meant by "affiliation" with the Communist Party.<sup>37</sup> The core of the decision was the Court's conclusion that there was no evidence that the *Waterfront Worker* had actually advocated government overthrow.<sup>38</sup> As a result of this analysis, the Court decided that "we have little more than a course of conduct which reveals cooperation with Communist groups for the attainment of wholly lawful objectives."<sup>39</sup>

Whereas most of the decision in *Bridges* focused on the factual and statutory question, the Court addressed freedom of speech in a few sentences as part of its reasoning that "affiliation" with the Communist Party should not be defined broadly:

We cannot assume that Congress meant to employ the term 'affiliation' in a broad, fluid sense which would visit such hardship on an alien for slight or insubstantial reasons . . . . [W]e cannot believe that Congress intended to cast so wide a net as to reach those whose ideas and program, though coinciding with the legitimate aims of such groups, nevertheless fell far short of overthrowing the government by force and violence. Freedom of speech and of press is accorded aliens residing in this country. So far as this record shows the literature published by Harry Bridges, the utterances made by him were entitled to that protection. They revealed a militant advocacy of the cause of trade-unionism. But they did not teach or advocate or advise the subversive conduct condemned by the statute.<sup>40</sup>

This passage shows that the Court in *Bridges* used free speech principles as a tool of statutory interpretation but did not consider the free speech issue in depth. *Bridges* appears to be a case of constitutional avoidance, al-

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<sup>34</sup> *Bridges*, 326 U.S. at 137–38.

<sup>35</sup> *Id.* at 138.

<sup>36</sup> *Id.* at 141, 146.

<sup>37</sup> *See id.* at 141–47.

<sup>38</sup> *Id.* at 146.

<sup>39</sup> *Id.* at 145.

<sup>40</sup> *Bridges*, 326 U.S. at 147–48 (internal citations omitted).



beit before the Court had adopted that precise terminology.<sup>41</sup> The doctrine of constitutional avoidance only required the Court to find the potential for a constitutional problem and then interpret the statute as to minimize the problem.<sup>42</sup> This prevented the Court from saying more about how and why free speech is accorded to immigrants. Had the Court given more explanation, whether this principle applies to all immigrants or only to some could be better concluded, but the Court successfully avoided constitutional adjudication in *Bridges*.<sup>43</sup>

The DOJ addressed the ambiguity about whether the Court's limited statement in *Bridges* extends to immigrants who are in the country unlawfully in April 2015 in *Pineda-Cruz v. Thompson* in the District Court for the Western District of Texas.<sup>44</sup> In this class action lawsuit, which alleged that the Department of Homeland Security ("DHS") had violated the free speech rights of immigration detainees, the DOJ told a district court:

[A]s non-resident aliens who have not gained admission or entry to the United States—and have not established any connections to the United States—Plaintiffs are not entitled to prevail in a lawsuit challenging violations of the Constitutional protections of the First Amendment. It is well settled that certain aliens are not entitled to challenge violations of Constitutional rights and privileges that might be actionable if challenged by American citizens.<sup>45</sup>

Admission to the United States is "lawful entry" after inspection and authorization by an immigration officer.<sup>46</sup> Thus, the DOJ argued that the

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<sup>41</sup> See generally *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.").

<sup>42</sup> *Id.*

<sup>43</sup> See *Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC")*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring) (quoting *Bridges*, 326 U.S. at 148) ("It is well settled that '[f]reedom of speech and of press is accorded aliens residing in this country.'). *AADC* also involved immigrants who were in the country legally, some on temporary visas and some as permanent residents. *Id.* at 474.

<sup>44</sup> See Federal Defendants' Memorandum, *supra* note 7, at 11–13; Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CAL. L. REV. CIR. 84, 84 & n.1 (2015), [http://www.californialawreview.org/wp-content/uploads/2015/09/KAGAN\\_84.pdf](http://www.californialawreview.org/wp-content/uploads/2015/09/KAGAN_84.pdf).

<sup>45</sup> Federal Defendants' Memorandum, *supra* note 7, at 11–13.

<sup>46</sup> 8 U.S.C. § 1101(a)(13) (2012). In its brief, the 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. 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 the 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.

roughly 6.8 million immigrants who entered the country without inspection and who remain here unlawfully have no protection under the First Amendment.<sup>47</sup> Taken literally, this startling suggestion appears to mean that millions of people not only have no claim to freedom of speech but also no freedom of religion as protected by the First Amendment.

Although *Pineda-Cruz* was resolved without the court ruling on the First Amendment question, the fact that the government argued that so many immigrants simply cannot state a claim for relief based on the First Amendment is a notable sign that immigrant free speech rights are not constitutionally secure.<sup>48</sup> The DOJ's claim does not mean that the government is right. This article will argue that anyone in the United States may claim constitutional protection of free speech. However, the fact that the DOJ made this argument highlights the reality that this is not a settled question—especially because the government could point to case law that seemingly supported its position.<sup>49</sup>

The DOJ argument depends on whether having connections to “the people” is a prerequisite for claiming protection under the First Amendment. Some rights in the Constitution are explicitly limited to “the people.”<sup>50</sup> If free speech is limited in this way, some immigrants are certainly excluded because some sub-groups of immigrants do not have as strong connections to the country as others. In the Supreme Court's 1990 decision in *United States v. Verdugo-Urquidez*, the Court said:

“[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

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<sup>47</sup> In 2012, the DHS estimated that 11.4 million people were in the United States without authorization. See Bryan Baker & Nancy Rytina, OFF. OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JAN. 2012, at 1 (2013), [http://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2012\\_2.pdf](http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf) [<https://perma.cc/LQ5Q-WEEU>]. This includes many people who were admitted and who overstayed their visas. The portion of the unauthorized population that entered legally and overstayed a temporary visa is estimated at forty percent. See Sara Murray, *Many in U.S. Illegally Overstayed Their Visas*, WALL STREET J. (Apr. 7, 2013, 8:19 PM), <http://www.wsj.com/articles/SB10001424127887323916304578404960101110032> [<https://perma.cc/JQ3F-MQC5>]. Thus, the estimate of unlawfully present immigrants who were not admitted would be 6.8 million.

<sup>48</sup> The DOJ offered the First Amendment argument in the alternative. Even assuming the First Amendment applied, the government successfully argued that detainees' free speech could be limited under *Turner v. Safley*, 482 U.S. 78 (1987). See Kagan, *supra* note 44, at 86. In September 2015, the plaintiffs voluntarily dismissed the lawsuit. Notice of Voluntary Dismissal, *Pineda-Cruz*, 5:15CV00326 (2015).

<sup>49</sup> See *infra* notes 87–96 and accompanying text.

<sup>50</sup> See, e.g., U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

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.<sup>51</sup>

This quote figured prominently in the DOJ brief in *Pineda-Cruz*, in which the DOJ argued that immigrants who had not been legally admitted could not claim First Amendment protection.<sup>52</sup>

In the battle to define who “the people” refers to in the Constitution, the Second Amendment has been a particular flashpoint.<sup>53</sup> For example, in both the Second and Fourth Amendments, the right is explicitly tied to “the people.” The Second Amendment states, “[T]he right of *the people* to keep and bear arms, shall not be infringed.”<sup>54</sup> Similarly, the Fourth Amendment states, “[T]he right of *the people* to be secure . . . against unreasonable searches and seizures, shall not be violated.”<sup>55</sup> In 2011, in *United States v. Portillo-Munoz*, the U.S. Court of Appeals for the Fifth Circuit relied on *Verdugo-Urquidez* to conclude that an immigrant who was in the country illegally does not have the right to bear arms under the Second Amendment.<sup>56</sup>

In the Fifth Circuit decision about immigrants and the right to bear arms, a dissenting judge expressed alarm that this would mean 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.”<sup>57</sup> The proposition that excluding some immigrants from “the people” for purposes of certain constitutional rights deserves more careful consideration. In 2008, in *District of Columbia v. Heller*, the United States Supreme Court quoted from *Verdugo-Urquidez* in concluding that “the people” is a “term of art” used with a consistent meaning in multiple amendments to refer to people with connections with the national community.<sup>58</sup> The main holding in *Heller*, however, was simply that “the people” is a broader category than the “militia,” so that the right to bear arms cannot be limited to

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<sup>51</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>52</sup> Federal Defendants’ Memorandum, *supra* note 7.

<sup>53</sup> See MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS*, at xiv (2007) (describing the right to bear arms as “one of the arenas in which we as Americans try to figure out who we are”); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1680–81 (2012) (describing gun rights as indicative of racial hierarchies in the United States).

<sup>54</sup> U.S. CONST. amend. II (emphasis added).

<sup>55</sup> *Id.* amend. IV (emphasis added).

<sup>56</sup> *Portillo-Munoz*, 643 F.3d at 440.

<sup>57</sup> *Id.* at 443.

<sup>58</sup> *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

members of a well-regulated militia.<sup>59</sup> *Heller* holds only that all of the rights ascribed to “the people” in the Constitution are individual rights, not collective rights.<sup>60</sup>

The Court’s proposition in *Heller* that “the people” is a consistent term of art is contestable as supported by a detailed textual and historical examination of the phrase in the Constitution conducted prior to the *Heller* decision.<sup>61</sup> This examination concluded, much as the Court in *Verdugo-Urquidez*, that “when the Constitution speaks of ‘the people’ rather than ‘persons,’ the collective connotation is primary.”<sup>62</sup> The term does not only appear in the Bill of Rights; it is also used to prescribe bi-annual elections to the House of Representatives.<sup>63</sup> This focus on the national political community is a “republican reading” of the text.<sup>64</sup> Maintaining an entirely constant meaning for the phrase wherever it is used, however, is not possible:

The Fourth Amendment is trickier: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” Here, the collective “people” wording is paired with more individualistic language of “persons.” And these words obviously focus on the private domain, protecting individuals in their private homes more than in the public square.<sup>65</sup>

Non-citizens were probably not part of “the people” though neither were women and children.<sup>66</sup> Because this article focuses on the First Amendment, the Fourth Amendment is especially pertinent because both amendments mix individualist rights with a reference to the collective “people.” It would be a gross error, not to mention impractical, to suggest that only those people registered or eligible to vote for the House of Representatives have a right to security of their persons or freedom from unreasonable searches.

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<sup>59</sup> *Id.* at 580–81 (“[T]he ‘militia’ in colonial America consisted of a subset of ‘the people’—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to ‘keep and bear Arms’ in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as ‘the people.’”).

<sup>60</sup> *Id.* at 580 (“Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”).

<sup>61</sup> Akil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 889–914.

<sup>62</sup> *Id.* at 892; see *Verdugo-Urquidez*, 494 U.S. at 265.

<sup>63</sup> Amar, *supra* note 61, at 893; see U.S. CONST. art. I, § 2.

<sup>64</sup> Amar, *supra* note 61, at 893.

<sup>65</sup> *Id.* (quoting U.S. CONST. amend. IV). This usage of “people” must be considered in light of James Madison’s expectation that juries would play a key role in adjudicating warrants and suggests juries as the embodiment of “the people” in the Constitution. *Id.* at 894.

<sup>66</sup> *Id.* at 904.

One simple means of answering the question of free speech is limited to “the people” is to look at the text of the First Amendment. Although the Constitution’s actual words sometimes receive surprisingly little attention, on the present question, the text may offer a clear answer.<sup>67</sup> The text of the First Amendment is quite different from the Second Amendment, which also suggests a variance in the usage of the phrase “the people.”<sup>68</sup> The text does limit free assembly and the right to petition the government to “the people.”<sup>69</sup> It also refers to other rights in broad, abstract terms: “the freedom of speech, or of the press” and “the free exercise [of religion].”<sup>70</sup> Thus, whatever “the people” refers to, free speech is not one of the rights for which it matters. At most, the reference to the First Amendment in *Verdugo-Urquidez* should be understood as referring to freedom of assembly but not to freedom of speech. This distinction is appropriate because assembly is a collective form of expression, and as a “republican reading” suggests, “the people” refers to collective rather than individualistic identity. The trouble here is that, although the Supreme Court has engaged in a close reading of “the people” in the context of the right to bear arms, the Court in *Verdugo-Urquidez* was far more cursory in its reference to other parts of the Constitution where “the people” is used.

To return to the civil liberties of immigrants, there is nothing necessarily objectionable about the Fifth Circuit’s narrow holding that unauthorized immigrants may be banned from owning a firearm. In *Heller*, the Supreme Court made clear that the Second Amendment permits a state to prohibit certain classes of people from firearms ownership, such as felons and the mentally ill.<sup>71</sup> As the dissenting judge in *Portillo-Munoz* worried, however, it may be quite dangerous to exclude whole classes of people from being able to claim constitutional rights connected in any way to “the people.”<sup>72</sup> A better way to frame this problem might follow what Justice Scalia wrote in *Heller*: “[L]ike most rights, the right secured by the Second Amendment is not unlimited.”<sup>73</sup> The question is always whether a specific restriction on a

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<sup>67</sup> See Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 147 (2007) (“Most constitutional opinions do not [dwell on the Constitution itself]. Constitutional cases nowadays typically involve the application of settled constitutional precepts that all parties accept as binding. . . . At times the Constitution’s language can come to resemble a pea covered by a stack of judicial mattresses—a grain of sand no longer visible, though presumably resting deep inside the pearl of judicial elaboration.”).

<sup>68</sup> See Ian Bartrum, *Wittgenstein’s Poker: The Limits of Public Meaning Originalism and the Value of Contested Constitutionalism* (unpublished manuscript) (on file with author).

<sup>69</sup> U.S. CONST. amend. I (“the right of the people peaceably to assemble, and to petition the government for a redress of grievances”).

<sup>70</sup> *Id.*

<sup>71</sup> *Heller*, 554 U.S. at 626.

<sup>72</sup> *Portillo-Munoz*, 643 F.3d at 443 (Dennis, J., dissenting).

<sup>73</sup> *Heller*, 554 U.S. at 626.

specific right has an adequate justification. Although felons and the mentally ill may be restricted from firearms purchases, it is inaccurate to say that they have no protection under the Fourth Amendment against unreasonable searches and seizures, much less that they have no right to free expression or religion. This reasoning should also apply for immigrants. Moreover, “the people” in the Second Amendment should not be assumed to mean precisely the same thing as it does in the First and Fourth.

A close reading of *Verdugo-Urquidez* offers an additional reason why that case should not be taken as a precedent for excluding immigrants from constitutional rights in the United States. *Verdugo-Urquidez* concerned *extraterritorial* application of the Fourth Amendment. In that case, a criminal defendant sought to challenge an arrest that had been carried out in Mexico.<sup>74</sup> With that fairly unusual scenario in mind, the Court discussed the connection between certain rights and “the people.” In this discussion, territorial boundaries were a critical factor, arguably the most important factor. The Court said, somewhat loosely, that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”<sup>75</sup> The holding was simply that the Fourth Amendment did not apply to an arrest of a Mexican in Mexico because the right against unreasonable searches and seizures belongs to the people of the United States. In subsequent cases, the Court explained that *Verdugo-Urquidez* stands only for the principle that certain constitutional protections are territorially limited to the United States.<sup>76</sup> This territorial limitation may be a useful tool to reconcile protection of free speech with the federal government’s plenary power over immigration. It may help to explain why free speech seems to carry less weight in a case where an immigrant is seeking to enter the United States, as was the case in the United States Supreme Court opinion in 1972 in *Kleindienst v. Mandel*, compared to a case like *Bridges*, which concerned an immigrant already inside the country.<sup>77</sup> This issue will be addressed in Part V.

The fundamental question seems to be whether some rights that are protected in the United States require the formal consent of the United States. Immigrants who are unlawfully present in the country are here without that consent. In its *Pineda-Cruz* brief, the DOJ claimed that immigrants who have not been legally admitted lack “connections” to the United

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<sup>74</sup> *Verdugo-Urquidez*, 494 U.S. at 271.

<sup>75</sup> *Id.*

<sup>76</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

<sup>77</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972); *Bridges*, 326 U.S. at 135. In *Kleindienst*, the Court focused on the right of Americans to receive communications from a foreigner, rather than focusing on the speech rights of would-be immigrant. Even with this framing, the visa denial was affirmed. 408 U.S. at 762–63, 769–70.

States.<sup>78</sup> That is a contestable point, as many unlawfully present immigrants have been in the country for lengthy periods and have well-developed familial, social and economic ties to the country.<sup>79</sup> Even recent arrivals may have familial ties to the United States.<sup>80</sup> If connections matter, one might ask why legal status is the only relevant criteria. Perhaps “connections” is really a poor choice of words. The real issue may be consent, or lack thereof, to be part of the United States.

Consent of the United States was central to the U.S Supreme Court’s holding in 1884 in *Elk v. Wilkins* that a Native American born in the United States could be denied the right to vote.<sup>81</sup> The Court then said that the members of Indian tribes “owed immediate allegiance to their several tribes, and were not part of the people of the United States.”<sup>82</sup> One reason the Court gave for this, as it related to the petitioner in that case, was that “he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen, by the state or by the United States.”<sup>83</sup> Along these lines, one could analogize from Native Americans of the late Nineteenth Century to undocumented immigrants of the Twenty-First Century, in that they are present and often deeply rooted in the United States, and yet the United States government has not accepted their residence here. Yet, to modern readers the treatment of racial minorities by the Supreme Court of the late Nineteenth Century is generally seen as appalling. The 1924 Indian Citizenship Act overturned the Court’s holding in *Elk*. This historical and moral evolution should lead to some caution about adopting similar reasoning today.

Nevertheless, the basic idea that civil liberties require mutual consent has not gone away. Some have argued that nations are consensual political communities and the country’s right to determine its membership justified compromising the rights of would-be immigrants.<sup>84</sup> The main implication of this idea, however, is that a country may prevent foreigners from entering,

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<sup>78</sup> Federal Defendants’ Memorandum, *supra* note 7, at 12.

<sup>79</sup> See T. Alexander Aleinikoff, *Aliens, Due Process and ‘Community Ties’: A Response to Martin*, 44 U. PITT. L. REV. 237, 244–46 (1983) (noting that community ties may develop even without formal admission to the community).

<sup>80</sup> See, e.g., Teresa Wiltz, *Unaccompanied Children from Central America, One Year Later*, HUFFINGTONPOST (Aug. 24, 2015), [http://www.huffingtonpost.com/entry/unaccompanied-children-from-central-america-one-year-later\\_us\\_55db88b4e4b04ae497041d10](http://www.huffingtonpost.com/entry/unaccompanied-children-from-central-america-one-year-later_us_55db88b4e4b04ae497041d10) [<https://perma.cc/3YL7-YUUI>] (“Most of the children were released to family members; a few of them have no family in the U.S. and have been placed with foster families.”).

<sup>81</sup> *Elk v. Wilkins*, 112 U.S. 94, 99 (1884).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 39 (1983).

even when they have compelling reasons to do so.<sup>85</sup> This is a contestable proposition, but it does not speak to the question of what rights a foreigner should have once inside the United States. Even if there are some rights that require national consent, others would seem to be inherent in all people. For example, presumably no one would arbitrarily deprive foreigners of the right to life, no matter what their immigration status. In *Elk*, the question was about the right to vote, not the more basic right to free speech. The right to vote is distinct from speech and can be subject to more identity-based restrictions, such as by citizenship and age, whereas free speech normally applies to a broader group of people—children under eighteen or ex-felons, for example.<sup>86</sup>

In addition to the issue of national consent, the DOJ's suggestion in *Pineda-Cruz* that only legally admitted immigrants can claim to be part of "the people" evokes an additional old debate about immigrant rights.<sup>87</sup> The impetus for this debate was a "due process crisis involving excludable aliens" caused by a surge of asylum-seekers arriving to the United States, especially Haitians and Central Americans, in the 1980s.<sup>88</sup> The crisis would eventually lead to a major overhaul of the American asylum system, but that was yet to come. The problem debated was fundamental and in many ways timeless: under what circumstances does the United States owe constitutional rights—starting with procedural due process—to someone who arrives uninvited?

One view argued that more due process was owed to citizens and legal permanent residents than to first time applicants for admission.<sup>89</sup> For this view, the process that is due to a person depends on their degree of membership in the national community, with citizens being at the core of the community and first-time applicants for admissions being in the "outermost ring of membership."<sup>90</sup> Though unauthorized immigrants admittedly develop strong ties to the United States, in this view, these ties are not "mutual and reciprocal," in the sense that the country had not consented to their arri-

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<sup>85</sup> See Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 LAW & ETHICS HUM. RTS. 109, 140–41 (2013) (discussing the implications of Walzer's views for refugee rights).

<sup>86</sup> See, e.g., *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978) ("[A] State's historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign's obligation to preserve the basic conception of a political community.") (internal quotations and citation omitted); *Sugarman v. Dougall*, 413 U.S. 634, 648–49 (1973) (noting that citizenship may be a requirement for the "right to vote or to hold high public office").

<sup>87</sup> Compare David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 208–34 (1983), with Aleinikoff, *supra* note 79, at 244–46.

<sup>88</sup> Martin, *supra* note 87, at 168.

<sup>89</sup> *Id.* at 191–92.

<sup>90</sup> *Id.* at 210–16.



val, and thus do not count for as much in terms of constitutional rights.<sup>91</sup> This essentially is the same argument that the DOJ made in *Pineda-Cruz*.

An opposing view raised two important objections to the community membership theory of immigrant rights. First, the essence of constitutional rights is about limiting the power of government, not about determining the degree of protection owed to different people.<sup>92</sup> This reframing is important because constitutional protection is typically most important for those marginalized from the national community, not those whose membership is most secure.<sup>93</sup> The focus on government power also fits the text of the First Amendment.<sup>94</sup> Second, to define immigrants' constitutional rights according to immigration statutes would rob courts of any yardstick by which to measure the constitutionality of those very laws.<sup>95</sup> Congress defines, by statute, who may be legally admitted to the country, who may be a legal permanent resident, and ultimately who may naturalize as a citizen. If these categories also determine the applicability of constitutional rights, then Congress would have the power to limit the reach of the Constitution by mere statute. Such a possibility would endanger the principle of constitutional supremacy under which statutes must conform to the Constitution.<sup>96</sup> It would introduce a dangerous loophole to the system of constitutional rights.

For these reasons, the DOJ proposition that non-admitted immigrants have no claim to First Amendment protection is unconvincing. Even if this broad claim ultimately fails (or, rather, should fail, since it has yet to be directly adjudicated), the fact remains that the Supreme Court has not square-

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<sup>91</sup> *Id.* at 230–31.

<sup>92</sup> Aleinikoff, *supra* note 79, at 240 (“But why, we may ask, should different levels of ‘reciprocal obligations’ translate into greater protections ‘owed’ by the state to the person? Is it not arguable that the due process clause establishes procedural and substantive limits on the government’s ability to inflict harm, and that it applies with equal force on behalf of all persons within the United States?”).

<sup>93</sup> *Id.* (“[A]re not those in the outer rings of membership arguably in need of greater protection because they are not permitted to participate in the political process and traditionally have been the subjects of discriminatory legislation?”).

<sup>94</sup> U.S. CONST. amend. I (“Congress shall make no law . . .”).

<sup>95</sup> Aleinikoff, *supra* note 79, at 241–42 (“One might argue that these obligations are a result of the operation of law: the granting of immigration status and the imposition of certain obligations on the alien create reciprocal obligations owed to the alien by the community. The trouble with this view is that it would give Congress plenary power to decide the due process issue through definition of classes of aliens and imposition (or not) of particular obligations. . . . Congress has broad power to decide who may enter and who must leave, but the Court will independently assess the procedures Congress adopts to carry out those decisions.”).

<sup>96</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank. . . . [A] law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”).

ly addressed it. Moreover, there are reasons to wonder how broadly the Supreme Court's statement in *Bridges* about free speech rights of aliens can be confidently interpreted. These doubts form a backdrop to two specific applications of free speech law where the Court has indeed allowed substantial limitations on immigrants' freedom of speech. These will be addressed in Parts II and III.

## II. LIMITATIONS ON ELECTION-RELATED SPEECH BY NON-CITIZENS

Even if all immigrants have First Amendment protection, Congress—with approval from the Supreme Court—has carved out an exception for election-related speech for immigrants who are not legal permanent residents. This exception represents a sharp contrast with the Court's treatment of other campaign finance restrictions. The Supreme Court famously struck down restrictions on independent campaign expenditures by organizations in *Citizen United v. FEC*, in 2010, and on aggregate campaign contribution limits in *McCutcheon v. FEC*, in 2014.<sup>97</sup> One may reasonably wonder how much practical impact campaign finance law might have on most affected immigrants, who presumably do not have the resources to make large campaign contributions. The restrictions that have been enacted, however, have considerable reach. They ban small money donations to candidates as well as private independent “expenditures” that could involve no more than photocopying fliers to express a view for or against a candidate.<sup>98</sup> Thus, these election restrictions impact a kind of private speech that is normally thought of as core to the First Amendment.

Given that many undocumented or unauthorized immigrants have become politically mobilized in favor of immigration reform, these restrictions could potentially limit activists' expressive choices or be used later to punish them.<sup>99</sup> Moreover, the Supreme Court's approval of such restrictions at a time when it has dismantled other campaign finance regulations as undue violations of the right to free speech shows that immigrants cannot be confident that the justices see their right to expression as falling clearly within the First Amendment.

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<sup>97</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014); *Citizens United v. FEC*, 558 U.S. 310, 341 (2010); see also *infra* notes 127–136 and accompanying text.

<sup>98</sup> See *infra* notes 127–136 and accompanying text.

<sup>99</sup> In the 2016 election, some prominent undocumented activists made public endorsements, though it is not clear if they technically expended funds to do so. See, e.g., Astrid Silva, *I Stand with Hillary Because She Stands with Immigrant Families*, UNIVISION NOTICIAS (Feb. 3, 2016), <http://www.univision.com/noticias/opinion/astrid-silva-i-stand-with-hillary-because-she-stands-with-immigrant-families> [<https://perma.cc/9EDH-FSP3>]; Tamara Keith, *Clinton Charms DREAMers on Immigration*, NPR (May 6, 2015), <http://www.npr.org/sections/itsallpolitics/2015/05/06/404649454/clinton-charms-dreamers-on-immigration> [<https://perma.cc/YCR7-WUE3>].

Congress has steadily expanded the ban on non-citizen contributions to election campaigns since the 1960s.<sup>100</sup> Originally, agents of foreign governments and organizations were prohibited from donating directly to candidates for office.<sup>101</sup> In 1974, during the Watergate era, Congress banned all foreign nationals, except for legal permanent residents, from donating directly to candidates.<sup>102</sup> In 2002, Congress expanded that ban to include donations to candidates and political parties as well as independent expenditures related to an election.<sup>103</sup> In 2012, in *Bluman v. FEC*, the United States Supreme Court upheld this ban without decision.<sup>104</sup>

The federal law at issue in *Bluman* bans foreign nationals, except for legal permanent residents, from making “a contribution or donation of money or other thing of value . . . in connection with a federal, state, or local election.”<sup>105</sup> Violation of this statute can constitute a federal crime punishable by up to one year in prison if it involved spending \$2000 or more in a single year, with progressively stiffer sentences possible for larger violations.<sup>106</sup> Violations totaling less than \$2000 can lead to civil penalties up to \$10,000 if the violation was “knowing and willful” and up to \$5000 even if there is no finding that the offense was “knowing and willful.”<sup>107</sup>

The speech ban affirmed in *Bluman* goes farther than restricting donations to candidates and parties. It applies to any spending “in connection with” an election. It thus prohibits non-citizens from “making expenditures to expressly advocate the election or defeat of a political candidate; and from making donations to outside groups when those donations in turn would be used . . . to finance express-advocacy expenditures.”<sup>108</sup>

The case law on this provision has focused on monetary donations, though the statute potentially extends even farther. It applies to a contribution of any “thing of value.”<sup>109</sup> That phrase might be read to ban non-citizens from volunteering their time and labor in relation to election cam-

<sup>100</sup> See *Bluman v. FEC*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 132 S.Ct. 1087 (Mem) (2012).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 284.

<sup>104</sup> *Bluman v. FEC*, 132 S. Ct. 1087, 1087 (Mem.) (2012); see also Alyssa Markenson, *What's at Stake? Bluman v. Federal Election Commission and the Incompatibility of the Stake-Based Immigration Plenary Power and Freedom of Speech*, 109 NW. U. L. REV. 209, 238 (2014) (“Until *Bluman*, the Court had never held that the speech of aliens lawfully in the United States could be criminalized where it could not be if spoken by citizens.”).

<sup>105</sup> 52 U.S.C. § 30121(a)–(b) (2012) (defining foreign nationals as all foreign citizens, except for lawful permanent residents).

<sup>106</sup> See *id.* § 30109(d)(1)(A) (listing penalties for violations over \$2000).

<sup>107</sup> *Id.* § 30109(a)(6)(B)–(C).

<sup>108</sup> *Bluman*, 800 F. Supp. 2d at 284.

<sup>109</sup> 52 U.S.C. § 30121(a).

paigns. The Federal Election Commission (“FEC”) has issued two contradictory decisions on whether “uncompensated volunteer services” are permissible.<sup>110</sup> Even if volunteering is allowed, current law would prohibit a non-citizen who is not a legal permanent resident—in other words, a student, temporary worker, or an unauthorized immigrant—from spending her own money to take out an ad in a newspaper or on Facebook that says, “Support Candidate X” or “Oppose Candidate Y.”

For example, consider the situation of Mexican immigrants who were outraged when presidential candidate Donald Trump said, “When Mexico sends its people, they’re not sending their best. . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.”<sup>111</sup> A Mexican immigrant in the United States—whether a student or an unauthorized immigrant—would be in a unique position to respond to that statement, both in terms of personal motivation and in possessing a rhetorical capacity to personalize a pointed response. Yet, under the law affirmed by the Supreme Court, a Mexican citizen, if not a legal permanent resident, may not spend her own money to print posters that say, “My family are not rapists. Don’t vote for Trump.” In *Bluman*, one of the plaintiffs was banned from printing his own leaflets supporting President Obama that he wanted to distribute in Central Park in New York City.<sup>112</sup> Thus, if an immigrant were to distribute leaflets protesting an anti-immigrant candidate, relying on the false belief that such conduct is protected free speech, she could be subject to a civil fine.<sup>113</sup> In Part IV below, this article will discuss more about why this kind of speech, in which content and speaker identity combine to form a persuasive message, is uniquely valuable and should be protected by the Constitution.<sup>114</sup>

Because the Supreme Court issued no opinion to explain its decision in *Bluman*, all that remains is the lower court decision, which fails to explain its conclusion persuasively. The district court in *Bluman* reasoned that the ban on political activities by non-citizens could survive strict scrutiny.<sup>115</sup> A

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<sup>110</sup> See FED. ELECTIONS COMM’N, FOREIGN NATIONALS 1, 3 (July 2003) (describing a 1987 case permitting volunteer services to a presidential campaign, and a 1981 case prohibiting a non-citizen from donating artwork to a Senate campaign).

<sup>111</sup> Ian Schwartz, *Trump: Mexico Not Sending Us Their Best; Criminals, Drug Dealers and Rapists Are Crossing Border*, REAL CLEAR POLITICS (July 16, 2015), [http://www.realclearpolitics.com/video/2015/06/16/trump\\_mexico\\_not\\_sending\\_us\\_their\\_best\\_criminals\\_drug\\_dealers\\_and\\_rapists\\_are\\_crossing\\_border.html](http://www.realclearpolitics.com/video/2015/06/16/trump_mexico_not_sending_us_their_best_criminals_drug_dealers_and_rapists_are_crossing_border.html).

<sup>112</sup> *Bluman*, 800 F. Supp. 2d at 285.

<sup>113</sup> See 52 U.S.C. § 30109(d)(1)(A) (listing civil penalties in cases where the violation is not necessarily knowing or willful).

<sup>114</sup> See *infra* notes 205–254 and accompanying text.

<sup>115</sup> *Bluman*, 800 F. Supp. 2d at 285.

panel of three judges found that Congress had a concern about “foreign nationals’ financial influence on elections” and that there is a compelling interest in “preventing foreign influence over the U.S. political process.”<sup>116</sup> The panel analogized participation in electoral campaigns to other activities that may be limited to U.S. citizens, such as voting, serving on a jury, or working as a police officer or public school teacher.<sup>117</sup> These functions constitute “activities of American democratic self-government.”<sup>118</sup> As discussed in Part I, these are also the kinds of activities that the Bill of Rights considers to be rights of “the people,” and thus may indeed be limited to members of the national community. It is doubtful, however, whether the First Amendment’s protection of speech properly belongs in that category.

An initial problem with the district court’s reasoning is that immigrants are not the only people in the United States who cannot vote or serve on juries. This is also true of children under eighteen, but a federal district court has found that a limit on campaign donations by minors is likely a violation of the First Amendment.<sup>119</sup> Under *Citizens United*, corporate entities have a constitutional right to make expenditures related to elections though corporations cannot vote, much less work as school teachers or serve on juries.<sup>120</sup> Acknowledging these weaknesses in its own argument, the district court in *Bluman* said that the key criteria for making campaign expenditures is not really about performing any particular function but rather about being “American:”

The statute does not serve a compelling interest in limiting the participation of *non-voters* in the activities of democratic self-government; it serves the compelling interest of limiting the participation of *non-Americans* in the activities of democratic self-government . . . . Plaintiffs point out that many groups of people who are not entitled to vote may nonetheless make contributions and expenditures related to elections—for example, minors, American corporations, and citizens of states or municipalities other than the state or municipality of the elective office. But minors, American corporations, and citizens of other states and municipalities are all members of the American political community.<sup>121</sup>

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<sup>116</sup> *Id.* at 284, 288.

<sup>117</sup> *Id.* at 287.

<sup>118</sup> *Id.* at 288.

<sup>119</sup> *Towbin v. Antonacci*, 885 F. Supp. 1274, 1294 (S.D. Fla. 2012).

<sup>120</sup> *Citizens United*, 558 U.S. at 341.

<sup>121</sup> *Bluman*, 800 F. Supp. 2d at 290.

The notion of an American corporation is puzzling because non-Americans might own corporate shares or even serve as corporate officers. For multinational corporations, both the corporate identity and the source of revenue may be a matter of accounting convenience rather than a reflection of corporate identity, because money is fungible and the location of corporate registration might reflect a taxation strategy more than business identity.<sup>122</sup> Moreover, even if a corporation were based in the United States and operated solely in the United States, foreigners could buy up a majority of its shares. If the concern is about controlling foreign influence on American politics, such a corporation could be seen as a serious threat.<sup>123</sup> The FEC has struggled to cope with this problem. The FEC has advised that “a domestic subsidiary of a foreign corporation” may not donate in connection with an American election if “these activities are financed by the foreign parent or owner.”<sup>124</sup> Thus, according to the FEC, a foreign corporation operating in the United States might still donate if the donations are supported solely by American business activities.<sup>125</sup> Accordingly, the FEC seems to focus less on the identity of the corporation as American or foreign and more on its main place of business and the source of the money used in the political activity.<sup>126</sup> If the corporation is effectively controlled from abroad, it is unclear why a political donation is less concerning just because the revenue originated in the United States.

Another significant problem with the reasoning of the district court in *Bluman* concerns the concept of “foreign influence.” This concept of influence seems very close to the broad conception of corruption that the majori-

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<sup>122</sup> See *id.* at 624 (“The global economy has removed the ease with which one may determine whether a corporation is foreign. Besides considering a corporation’s place of incorporation—a mere legal formality—one may clarify the ‘foreign’ nature of a corporation by examining the composition of a corporation’s workforce, the division of ownership, the make-up of its board of directors, the location of its headquarters, and the countries in which it holds the highest market share. None of these elements alone is dispositive of when foreign interests play a meaningful role. For example, General Electric, an iconic American corporation incorporated in New York, has its headquarters in Connecticut but more employees overseas than in the United States.”).

<sup>123</sup> See, e.g., Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 LOY. L.A. L. REV. 951, 997 (2011) (arguing that “[t]he political branches of the U.S. government should enjoy wide constitutional latitude to regulate the political speech of not only foreign corporations but foreign-controlled and foreign-owned American corporations as well”).

<sup>124</sup> FED. ELECTION COMM’N, *supra* note 110.

<sup>125</sup> See generally Scott L. Friedman, *First Amendment and “Foreign-Controlled” U.S. Corporations: Why Congress Ought to Affirm Domestic Subsidiaries’ Corporate Political-Speech Rights*, 46 VAND. J. TRANSNAT’L L. 613 (2013) (arguing that it would be problematic to treat domestic subsidiaries differently from wholly American corporations).

<sup>126</sup> See *id.* at 632.

ty of the Supreme Court rejected in *Citizens United* and in *McCutcheon*.<sup>127</sup> In those cases, the Court found that the government's interest in preventing political corruption must be limited to "quid pro quo" corruption.<sup>128</sup> Quid pro quo corruption involves "a direct exchange of an official act for money"<sup>129</sup> and is similar to criminal bribery.<sup>130</sup> By contrast, the dissent in *McCutcheon* argued for a broader understanding of the anti-corruption interest so as to also include "undue influence" because politicians will be "too compliant with the wishes of large contributors" and will grant them "disproportionate access."<sup>131</sup> The concern about foreign influence in *Bluman* seems consistent with this broader conception about undue influence beyond quid pro quo bribery. The Court has, however, rejected this view, at least when it concerned large donations by Americans and American companies. The plurality in *McCutcheon* said "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."<sup>132</sup>

It is instructive that the Constitution itself contains a provision aimed at preventing foreign influence over American government. The Foreign Gifts Clause prohibits any office holder from accepting "any present" from a foreign state.<sup>133</sup> The Foreign Gifts Clause interestingly prohibits gifts regardless of whether there was any direct exchange and thus shows that the Framers were concerned about undue influence even in the absence of quid pro quo corruption. Proponents of campaign finance regulation have cited the Foreign Gifts Clause to support the claim that the Constitution embraces a broad anti-corruption concern.<sup>134</sup> Certainly, if this position is correct, then it would be permissible to restrict expenditures of foreign money in U.S. elections—but it would also be permissible to restrict large expenditures by wealthy Americans and corporations. However, the Foreign Gifts Clause applies only to gifts attributable to a foreign sovereign, and thus is far more narrowly focused than the statute affirmed in *Bluman* which applies to non-citizens as private individuals.<sup>135</sup> Other writers have argued for an even nar-

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<sup>127</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion); *Citizens United*, 558 U.S. at 360 ("[I]ngratiation and access . . . are not corruption.").

<sup>128</sup> *McCutcheon*, 134 S. Ct. at 1441, 1450.

<sup>129</sup> *Id.* at 1441; *id.* at 1466 (Breyer, J., dissenting).

<sup>130</sup> *Id.* at 1466 (Breyer, J., dissenting).

<sup>131</sup> *Id.* at 1469, 1470 (internal quotations omitted).

<sup>132</sup> *Id.* at 1441 (Roberts, J., plurality).

<sup>133</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>134</sup> See generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 361–62 (2009) (relying on the provisions of the Constitution, including the Foreign Gifts Clause, to argue that courts should treat an anti-corruption interest as a significant constitutional principle).

<sup>135</sup> *Id.* ("[N]o Person holding any Office . . . shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign state.").

rower reading of the Foreign Gifts Clause, applying only to appointed office holders, and thus having little bearing on regulation of campaigns for elected offices.<sup>136</sup> This view is closer to that of the *McCutcheon* plurality, but it raises a question about why campaign expenditures by immigrants should be singled out for regulation.

Though not the focus of this article, the dissent in *McCutcheon* provides a persuasive view regarding the anti-corruption interest.<sup>137</sup> The concern that unregulated political donations corrode democracy does not depend on whether the donations are made by a large corporation, a union, or wealthy non-citizens who live in the United States.<sup>138</sup> The Court has already addressed this issue, however, and has settled on the narrower quid pro quo definition of corruption, rejecting concern about “general influence” flowing from political donations.<sup>139</sup> This makes it difficult to explain *Bluman*. The Court needs to explain how expenditures by non-citizens raise a compelling concern about undue influence, even without evidence of a quid pro quo exchange, whereas expenditures by American corporations or American individuals do not. The decisive variable here seems not to be money because the *Citizens United* majority is not generally concerned about money enhancing access to politicians. How can it be that large scale political spending by an American-based corporation poses no compelling risk of corruption, but an immigrant distributing leaflets in a park does? The key variable that explains *Bluman* is not how much money a non-citizen is willing or able to spend on politics nor the potential for influence stemming from the speech. It is the fact that the speaker is not an American.

The statutory provision allowing election expenditures by legal permanent residents but not by other immigrants complicates the speech problem further. In effect, this means that Congress has been able to pick and choose among speakers.<sup>140</sup> If Congress allows a category of people to acquire legal permanent resident status, it also allows them to express themselves more freely in elections. On the flip side, Congress can also limit speech rights by passing immigration statutes limiting legal permanent resi-

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<sup>136</sup> See Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 181–82 (2013), [http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1065&context=nulr\\_online](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1065&context=nulr_online).

<sup>137</sup> For a compelling argument on this issue, see Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 65 (2013), [http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvol126\\_lessig.pdf](http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvol126_lessig.pdf) (arguing that there is a compelling and constitutionally legitimate government interest in curtailing “dependence corruption,” through which elected officials depend on the wealthy to support their electoral campaigns, rather than depending on the people at large).

<sup>138</sup> See, e.g., *id.* at 66 (arguing that dependence on large donors ties politicians to a “tiny slice” of the public).

<sup>139</sup> *McCutcheon*, 134 S. Ct. at 1451.

<sup>140</sup> See Markenson, *supra* note 104, at 231–33.



dence. Such a law is difficult to square with the Court's recent election law cases that are founded on the premise that Congress may not favor some speakers over others based on their identity.<sup>141</sup> *Bluman* appears to be based on the theory that non-citizens' constitutional rights depend on the degree to which they have a stake in American society.<sup>142</sup> This theory was typical of the Supreme Court's immigration decisions in the mid-Twentieth Century but seemed to fade in its influence in more recent cases about the procedural due process rights of non-citizens in immigration detention.<sup>143</sup> A legal permanent resident may have lived in the United States for just a few days if she entered on the right visa, whereas temporary workers or students—as well as millions of unauthorized immigrants—may have been here for years. By enacting or revising immigrant visa regulations, Congress can also dial up or dial down the freedom that different people in the United States have to express themselves. In other words, *Bluman* effectively allows a statute to control the reach of the Constitution. This is the same problem described in Part I with the proposition that immigration law should limit the definition of “the people” in the Constitution.

Because non-citizens cannot vote, the central question is whether they may engage in speech so as to try to persuade citizens how to use their voting power. Congress has effectively decreed that citizens and legal permanent residents may try to persuade voters, but other non-citizens may not.<sup>144</sup> In other election speech cases, however, the Court has said that the government may not decide which speech should and should not be permitted to potentially influence an election. For example, in *McCutcheon*, Chief Justice Roberts wrote for the plurality that “Congress may not . . . restrict the political participation of some in order to enhance the relative influence of others.”<sup>145</sup> This is why the Court has rejected efforts to “level the playing field” in order to neutralize the disproportionate influence available to those with more money through which to broadcast their message.<sup>146</sup> This article returns to this problem in Part IV.

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<sup>141</sup> See *id.* at 225.

<sup>142</sup> See *id.* at 217.

<sup>143</sup> *Id.* at 218–23.

<sup>144</sup> See 52 U.S.C. § 30121(a)–(b) (2012) (defining foreign nationals as all foreign citizens, except for lawful permanent residents).

<sup>145</sup> *McCutcheon*, 134 S. Ct. at 1441.

<sup>146</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2836 (2011) (“Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election—a dangerous enterprise and one that cannot justify burdening protected speech. . . . The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the unfettered interchange of ideas—not whatever the State may view as fair.”) (internal quotations and citations omitted).

The urgent question here is why Congress should be able to ban speech by non-citizens rather than leave it to the voters themselves to decide how to respond to their attempts at persuasion. Certainly, there may be varying opinions about whether it is a good thing for non-Americans to participate in American electoral debates. In other situations, the Court has warned that “the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process.”<sup>147</sup> Moreover, there is more at stake than just the expressive rights of immigrants themselves. Some citizens may want to hear what the immigrants have to say—especially given the prominent role of immigration policy in our political discourse.<sup>148</sup> The Court has cogently addressed these concerns in announcing a rule against speaker discrimination, which will be discussed in more detail in Part IV.

### III. SELECTIVE IMMIGRATION ENFORCEMENT TO REPRESS IMMIGRANT DISSENT

Typically, concern about free speech focuses on forms of prior restraint before speech, or criminal punishment or civil liability after expressive activity. Immigrants, however, have a unique, additional vulnerability that does not impact citizens: they can be deported. Deportation can be an efficient means for the government to eliminate troublesome political opponents. It may also function as a punishment for political activity even if the law does not formally categorize it that way. The threat of deportation may act as a deterrent that silences other immigrants. Plainly explained: “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.”<sup>149</sup> Unfortunately, the Supreme Court has yet to fully recognize this problem.

In 1904, the Supreme Court in *U.S. ex rel. Turner v. Williams* first dealt with politically motivated deportation.<sup>150</sup> On October 23, 1903, federal officers arrested John Turner in New York City. He was then detained at Ellis Island while he fought deportation through a petition for a writ of habeas

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<sup>147</sup> *McCutcheon*, 134 S. Ct. at 1449. Elsewhere, the plurality notes that a majority of the public may wish to limit the amount of overall spending, but that unpopularity of speech is irrelevant to First Amendment protection of political campaign speech just as it is irrelevant to protection of flag burning and hate speech. *Id.* at 1441.

<sup>148</sup> See Markenson, *supra* note 104, at 236 (noting that restricting non-citizen speech may harm “a citizen’s right to hear” their opinions).

<sup>149</sup> David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 377 (2003).

<sup>150</sup> *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904).

corpus.<sup>151</sup> Turner was an English citizen, and was accused by the U.S. government of being an anarchist.<sup>152</sup> He had given a speech in New York calling for general labor strikes and was found in possession of anarchist publications.<sup>153</sup> The federal government sought to deport him based on a statute enacted just seven months before his arrest that excluded “anarchists” from entry to the United States.<sup>154</sup> Turner, however, was already in the country. The same statute also stated “nothing in this act shall exclude persons convicted of an offense purely political, not involving moral turpitude.”<sup>155</sup> Turner argued that the law violated the First Amendment, and his case reached the Supreme Court. He lost.

To a reader familiar with immigration law as it exists today, *Turner* is an odd decision because the Court never says what Turner’s immigration status actually was. The Court never even states clearly how long he had been in the country, nor how he had entered—much less whether his entry was legal or illegal. He claimed that he had applied for citizenship six years before his arrest, and that is the only fact regarding his immigration history.<sup>156</sup> One can only assume that his citizenship application was unsuccessful, but apparently, he had resided in the United States for several years.

The lower court decision in *Turner* gave little additional information; it dispatched the First Amendment claim with a single sentence: “As to abridgment of the freedom of speech, that clause deals with the speech of persons in the United States, and has no bearing upon the question what persons shall be allowed to enter therein.”<sup>157</sup> This made no sense, of course. Turner was not trying to enter the country; he was already here. He was arrested because he gave a speech in *New York City* and was taken by federal agents to Ellis Island.<sup>158</sup> Federal agents took him from the interior of the country to the border. In 1903, the Supreme Court’s jurisprudence gave little reason to distinguish between entry and expulsion—what we would today call admission and removal. The 1889 Chinese Exclusion Case, the seminal Supreme Court case establishing federal power over immigration, was about a Chinese man who wanted to enter at a port.<sup>159</sup> Four years later, in 1893, in *Fong Yue Ting v. United States*, the Supreme Court found that the judiciary had little role in reviewing the arrest and expulsion of a Chi-

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<sup>151</sup> *Id.* at 280.

<sup>152</sup> *Id.* at 280–81.

<sup>153</sup> *Id.* at 283.

<sup>154</sup> *Id.* at 282, 284.

<sup>155</sup> *Id.* at 284.

<sup>156</sup> *Id.* at 280.

<sup>157</sup> *U.S. ex rel. Turner v. Williams*, 126 F. 253, 255 (S.D.N.Y. 1903), *aff’d*, 194 U.S. 279 (1904).

<sup>158</sup> *U.S. ex rel. Turner*, 194 U.S. at 280.

<sup>159</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889) (“The Chinese Exclusion Case”).

nese man who had been living in New York City for more than ten years.<sup>160</sup> This is, to some extent, an anachronism. By mid-century, the Court began to make a significant distinction between would-be immigrants stopped at the border and those who are already inside the country. In 1950, in *Shaughnessy v. United States ex rel. Mezei*, the Supreme Court said that non-citizens who have entered the United States have a claim to due process before they are deported, even if they had entered illegally.<sup>161</sup> By contrast, when non-citizens are stopped at the border, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>162</sup>

The following quotation from the *Turner* decision demonstrates how the Court flatly refused to acknowledge that deporting a man because of his political expression has any implications for freedom of speech:

We are at a loss to understand in what way the act is obnoxious to [the First Amendment] objection. It has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or of the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. 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.<sup>163</sup>

According to the Court, so long as he is free to speak his mind somewhere else, there is no free speech violation.<sup>164</sup> This rationale is hard to take seriously. If the police were to ban a political group from speaking on the National Mall because the government disapproved of their ideology, would it be legitimate to say, “You are still free to speak somewhere else?”

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<sup>160</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698, 702 (1893).

<sup>161</sup> *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953).

<sup>162</sup> *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

<sup>163</sup> *U.S. ex rel. Turner*, 194 U.S. at 292.

<sup>164</sup> *Id.* (“He is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom.”).

The Court's limited conception of free speech in *Turner* was typical of its time. It wasn't until the 1930s that the Court began to extend more meaningful First Amendment protection to labor activists.<sup>165</sup> Yet, it is not entirely clear that the Court has evolved in the same way with regard to the connection between immigration and speech. *Turner* was followed by two McCarthy era cases that similarly dismissed any First Amendment protection against ideologically motivated deportations. In 1952, in *Harisiades v. Shaughnessy*, the Supreme Court allowed the government to retroactively apply a 1940 law that authorized deportation of longtime residents due to their former membership in the Communist Party, even if their membership ceased before the law was enacted.<sup>166</sup> In 1954, in *Galvan v. Press*, the Supreme Court reached a similar holding regarding the deportation of a former member of the Communist Party who was born in Mexico and who had been a U.S. resident for thirty-six years.<sup>167</sup> 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."<sup>168</sup> The Court allowed Galvan's deportation over the dissent of Justices Black, 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."<sup>169</sup>

In the 1970s, there were indications that the Court might revise the *Turner* approach primarily by drawing a distinction between people applying to enter the United States and those who were already here. In 1972, in *Kleindienst v. Mandel*, the United States Supreme Court considered the government's authority to refuse a visa to a Belgian socialist who was invited to speak at American universities.<sup>170</sup> The Court recognized that excluding an invited speaker implicated free speech interests of United States citizens to receive information, a principle that it would later echo in *Citizens United*.<sup>171</sup> Free speech involves the rights of listeners as well as speakers. Nonetheless, the Court found that the federal government's vast plenary

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<sup>165</sup> See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 514–16 (1939). See generally Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement*, 80 VA. L. REV. 291, 291 (1994) ("During the New Deal era of the mid- to late-1930s, the right to free speech dramatically changed in America.").

<sup>166</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952).

<sup>167</sup> *Galvan v. Press*, 347 U.S. 522, 522 (1954).

<sup>168</sup> *Id.* at 530.

<sup>169</sup> *Id.* at 533 (Black, J., dissenting).

<sup>170</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 756 (1972).

<sup>171</sup> *Id.* at 763; see *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

power to control entrance into the United States overcame any First Amendment objections.<sup>172</sup> The Court held that because of “plenary congressional power to make policies and rules for exclusion of aliens,” a decision to exclude a would-be foreign visitor should stand so long as it is “on the basis of a facially legitimate and bona fide reason.”<sup>173</sup> This is a very lenient standard for the government compared to the heightened scrutiny that would normally be triggered by a fundamental rights violation, but it seems to apply only with regard to a denial of a visa to enter the country.<sup>174</sup> Even in that situation, the *Kleindienst* Court suggested a half step retreat from the Court’s position in *Turner* that the First Amendment was not even implicated at all. The Court held open the possibility that there might be some extreme case in which the government lacked a sufficiently legitimate reason to deny a visa.<sup>175</sup>

At the time of the *Kleindienst* case, it seemed that courts might react differently when the government used its immigration power to expel a political opponent who was already in the country. Around that time, the Nixon Administration initiated deportation proceedings against former Beatle John Lennon.<sup>176</sup> Lennon was already in the United States, and was seeking to avoid deportation. He was widely known for his anti-war activism and had been under surveillance by the Federal Bureau of Investigation (“FBI”) because of his political activities.<sup>177</sup> Rather than rely on an overtly ideological exclusion like the bar on Communists and anarchists, however, the government sought to have him excluded because of a 1968 British conviction for possession of cannabis resin.<sup>178</sup> Lennon argued that he was the victim of selective enforcement and that the government’s real reasons for targeting him were entirely political.<sup>179</sup> He found a receptive audience for this argument with the Court of Appeals for the Second Circuit. The panel stated, “The courts will not condone selective deportation based upon secret politi-

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<sup>172</sup> *Kleindienst*, 408 U.S. at 766.

<sup>173</sup> *Id.* at 769–70.

<sup>174</sup> *See, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015) (plurality opinion) (refusing to apply heightened scrutiny to government’s rejection of visa application for a husband of a naturalized citizen).

<sup>175</sup> *Kleindienst*, 408 U.S. at 771.

<sup>176</sup> *See* *Lennon v. Immigr. & Naturalization Serv.*, 527 F.2d 187, 190 (2d Cir. 1975) (describing initiation of deportation proceedings in 1972).

<sup>177</sup> *See* Adam Cohen, *While Nixon Campaigned, the F.B.I. Watched John Lennon*, N.Y. TIMES (Sept. 21, 2006), [http://www.nytimes.com/2006/09/21/opinion/21thu4.html?\\_r=0](http://www.nytimes.com/2006/09/21/opinion/21thu4.html?_r=0) [<https://perma.cc/LE29-PC79>].

<sup>178</sup> *Lennon*, 527 F.2d at 188.

<sup>179</sup> *Id.* at 195. *See generally* Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK. L. REV. 279 (1973) (reviewing the government’s application of removal statute to Lennon); SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14–17* (2015) (same).

cal grounds.”<sup>180</sup> The Second Circuit, however, avoided relying on the selective enforcement ground, holding instead that the British criminal law under which Lennon had been convicted did not constitute a conviction of marijuana possession under immigration law because the British law had no knowledge requirement in the crime.<sup>181</sup>

Had the Second Circuit’s dicta carried the day, the First Amendment could act as a check on politically motivated deportations from inside the United States. Instead, the selective prosecution question reached the Supreme Court in 1999 in *Reno v. American-Arab Anti-Discrimination Committee* (“AADC”), and the Court declared, “As a general matter—and absurdly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.”<sup>182</sup>

*AADC* appears to raise the specter that immigrants could be driven to silence for fear of deportation.<sup>183</sup> The majority in the decision noted that selective prosecution defenses rarely prevail in the criminal context because there is a presumption that prosecutors act lawfully.<sup>184</sup> The Court, however, refused to allow non-citizens to even attempt to surmount that challenge because executive discretion in immigration enforcement is especially broad.<sup>185</sup> Somewhat ironically, this embrace of prosecutorial discretion in *AADC* has been widely cited in support of President Obama’s executive actions that aggressively use grant-deferred action to benefit millions of immigrants who are unlawfully present.<sup>186</sup> Yet, the most direct application of *AADC* would be if a future president who is hostile to immigrant activism deliberately sought to deport unauthorized immigrants who had publicly campaigned for immigration reform.

The majority decision in *AADC* echoes the *Turner* Court’s reluctance to acknowledge that the threat of deportation could impact freedom of speech. The Court in *AADC* reasoned that selective prosecution is less of a concern in immigration than in criminal cases because deportation is “not imposed as a punishment.”<sup>187</sup> For this proposition, the Court relied on a mid-Twentieth Century case concerning detention of non-citizens in which the majority failed to address free speech concerns involved with the at-

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<sup>180</sup> *Lennon*, 527 F.2d at 195.

<sup>181</sup> *Id.* at 193.

<sup>182</sup> *Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), 525 U.S. 471, 488 (1999)

<sup>183</sup> See Cole, *supra* note 149.

<sup>184</sup> *AADC*, 525 U.S. at 489.

<sup>185</sup> *Id.* at 489–90.

<sup>186</sup> See *infra* notes 255–285 and accompanying text.

<sup>187</sup> *AADC*, 525 U.S. at 491.

tempt to deport alleged members of the Communist Party.<sup>188</sup> Recently, some lower courts have cast doubt on the continued relevance of McCarthy era cases, dismissing them as “a product of their time.”<sup>189</sup> Two years after *AADC*, the Supreme Court held that immigration enforcement “is subject to important constitutional limitations.”<sup>190</sup> The Court has not made clear whether the First Amendment is one of those limitations, though *AADC* suggests that it is not.

The reasoning that deportation is not punishment, and thus does not pose as serious a threat to free speech as criminal prosecution, is difficult to reconcile with recent Supreme Court cases in which the Court has recognized that for many immigrants, deportation can be a worse consequence than imprisonment.<sup>191</sup> It is also difficult to square this logic with other First Amendment cases in which the Court has found free speech violations in non-criminal contexts with fairly minimal sanctions. For example, the Court has found that a confidential state bar reprimand of an attorney could infringe the First Amendment, even without a license suspension or any public sanctioning of the attorney.<sup>192</sup> The Court has also found free speech to be infringed by the imposition of a fine of \$100.<sup>193</sup> The Court has further applied First Amendment protections in the context of tort cases.<sup>194</sup> It is thus not convincing to explain the result of *AADC* by reference to either the non-criminal nature of immigration enforcement or the relative severity of the consequences. It seems that the Court was simply reluctant to fully extend free speech protections into the realm of immigration enforcement.

Nevertheless, there are subtle indications in *AADC* that the ground has shifted considerably since the era of the *Turner* decision and that the holding of the *AADC* case may be tied quite closely to its facts. The Court concluded, “[W]e need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome. Whether or not there be such exceptions, the general rule certainly applies here.”<sup>195</sup>

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<sup>188</sup> *Id.* (citing *Carlson v. Landon*, 342 U.S. 524, 537 (1952)); see also *Carlson*, 342 U.S. at 555–56 (Black, J., dissenting) (arguing that detention of immigrants because of their Communist beliefs threatens the First Amendment).

<sup>189</sup> See *Rodriguez v. Robbins*, 804 F.3d 1060, 1076 (9th Cir. 2015).

<sup>190</sup> *Zadvydas v. Davis*, 533 U.S. 682, 695 (2001).

<sup>191</sup> See *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010); *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 323 (2001).

<sup>192</sup> See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033 (1991).

<sup>193</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 338, 357 (1995).

<sup>194</sup> See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that First Amendment prohibits tort liability for protected speech in a public forum); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (applying First Amendment limits on tort of intentional infliction of emotional distress for public figures).

<sup>195</sup> *AADC*, 525 U.S. at 491.



Based on the reasoning of the AADC court, there is a general rule that there is no selective deportation defense to deportation, but the possibility that there could be an extreme case in which a free speech-based selective prosecution argument might prevail still exists. In this respect, it is probably relevant that the non-citizens in *AADC* were uniquely unsympathetic, and the government's arguments for discretion were uniquely compelling. The case began in 1987 when the government sought to deport eight members of the Popular Front for the Liberation of Palestine ("PFLP"), which "the Government characterizes as an international terrorist and communist organization."<sup>196</sup> In *AADC*, Immigration and Naturalization Service ("INS") officials made public statements that the real reason for pursuing deportation was the respondents' political affiliation that gave rise to the selective enforcement issue.<sup>197</sup> In explaining why this defense could not be raised, the Court noted that there could be sensitive foreign policy and intelligence concerns in a deportation decision.<sup>198</sup> The respondents' suspected membership in a potential terror group operating in the context of the Israeli-Palestinian conflict seemingly makes these concerns especially strong. The Court explains its holding in terms that are tied closely to this somewhat unusual factual context.<sup>199</sup>

Initially, the INS charged the immigrants in the *AADC* case with advocating world communism, designated as a ground for deportation by the immigration statute, and also with technical violations of immigration law, such as overstaying visas.<sup>200</sup> When the eight respondents challenged the constitutionality of the world communism ground, the INS dropped it, relying instead on the technical grounds.<sup>201</sup> Therefore, in the late 1990s, the government avoided testing the rule that had prevailed half a century earlier in *Harisiades* and *Galvan*. Despite ruling against the immigrants' free speech claims, the Court in *AADC* never cited *Harisiades*, *Galvan*, or *Turner*—although the Court did not directly repudiate them. This is often the manner in which immigration law doctrine evolves, without a blockbuster case overruling precedent in the mode of *Brown v. Board of Education*. There is indeed good reason to doubt the doctrinal foundations of the earlier cases. In 1952, the Court thought that membership in "an organization advocating overthrow of government by force" was not protected free

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<sup>196</sup> *Id.* at 473.

<sup>197</sup> *Id.* at 474.

<sup>198</sup> *Id.* at 491.

<sup>199</sup> *Id.* at 491–92 ("When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.").

<sup>200</sup> *Id.* at 473.

<sup>201</sup> *Id.* at 473–74.

speech.<sup>202</sup> Thus, the immigration cases involving membership in the anarchist or Communist movements were not unusual for their eras, even if the speakers were not immigrants. In *Brandenburg v. Ohio*, in 1969, the Court found that advocacy of political violence can indeed be protected by the First Amendment.<sup>203</sup> The immigration cases of the early and mid-Twentieth Century stand out in large part because of the free speech jurisprudence that came later.

The factual context of *AADC* suggests a delicate political dance involving the courts and the executive branch in which the Court may be simultaneously reluctant to get involved while gently warning the government to tread carefully so as not to force the judicial hand. Indeed, the executive branch has become more reluctant to take actions that the courts might not be willing to tolerate. This is demonstrated by the INS dropping the world communism ground of deportation so that the courts would not be asked to directly rule on an explicitly ideological ground of deportation. The Court, meanwhile, warns that it might rule differently in a future case in which the government action was more outrageous. This might be the case if an immigrant were subject to deportation because of political activities more focused on domestic American concerns where foreign policy interests appeared less compelling and where there is no plausible connection with violence. In this way, the Second Circuit's dicta regarding selective prosecution of John Lennon might still hold up, in the sense that a legendary popular musician might have made a more compelling champion of immigrant speech rights than members of a Palestinian militant group.

This article will argue in Part V below that the factual context offers a way to minimize the clash that would otherwise result between free speech law and the *AADC* decision.<sup>204</sup> To be clear, freedom of speech should not depend on how the government labels the speaker, on the topic on which the speaker chooses to express herself, nor on whether the speaker has a mainstream popular following. *AADC* leaves immigrants with a precarious ability to express themselves freely. This is especially true for the millions of immigrants who are unlawfully present and can be deported on facially neutral technical grounds. It does not, however, close the door entirely to immigrant free speech and leaves plenty of room for the Court to narrow the holding in a future case.

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<sup>202</sup> *Harisiades*, 342 U.S. at 591–92. It is ironic that in *Harisiades*, the Court said that advocacy of political violence is forbidden because political change should be sought through the electoral process. *Id.* at 592. Similar to *Bluman*, the Court found that immigrants do not necessarily have a right to advocate change through electoral campaigns.

<sup>203</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

<sup>204</sup> See *infra* notes 255–285 and accompanying text.

## IV. THE SPEAKER DISCRIMINATION DIMENSION

Immigrants' freedom of speech is far from secure under existing jurisprudence. This article has demonstrated this through three examples. First, there is no Supreme Court case clearly holding that unlawfully present immigrants have First Amendment protection coupled with the assertion by the Department of Justice, at least in one case, that they do not.<sup>205</sup> Second, election laws—affirmed in the *Bluman* decision—ban immigrants, except for legal permanent residents, from expressive activities that would otherwise be considered core free speech.<sup>206</sup> Third, in the *AADC* case the Supreme Court prevented immigrants from claiming selective prosecution as a defense against deportation targeting foreigners with militant political associations.<sup>207</sup>

In this Part, this article will bring into this discussion a new development in free speech law that should lead the Court to bolster the constitutional protection of immigrant speech: the doctrine of speaker discrimination. The United States Supreme Court first articulated the doctrine in 2010, in *Citizens United v. FEC*, and it was hotly contested between the majority and dissent in that 5-4 decision.<sup>208</sup> Invoking this doctrine to bolster the speech rights of immigrants thus poses a challenge to the eight justices who remain on the Court. This article will argue that despite these challenges, *Citizens United* provides a powerful justification for protecting the free speech of all people in the United States, regardless of immigration status.

There are perhaps two important reasons why the Supreme Court has yet to fully embrace immigrant free speech. The first is the ambivalence of both the judges and the general public about the place of immigrants in American society—particularly with regard to those who are here unlawfully. This ambivalence finds expression in debates about whether immigrants can claim constitutional rights and in the legacy of the plenary power doctrine.<sup>209</sup> The plenary power doctrine has long allowed immigration law to exist in a parallel universe, largely insulated from the civil liberties revolution in constitutional law in the Twentieth Century.<sup>210</sup> The plenary power doctrine has receded significantly in cases involving the procedural due process rights of immigrants inside the United States.<sup>211</sup> The Court, howev-

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<sup>205</sup> See *supra* notes 30–96 and accompanying text.

<sup>206</sup> See *supra* notes 97–148 and accompanying text.

<sup>207</sup> See *supra* notes 182–204 and accompanying text.

<sup>208</sup> See *Citizens United v. FEC*, 558 U.S. 310, 348, 422 (2010).

<sup>209</sup> See *supra* notes 30–96 and accompanying text.

<sup>210</sup> See Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 135–42 (2015).

<sup>211</sup> See Kevin R. Johnson, *Immigration and the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 67 OKLA. L. REV. 57, 59 (2015).

er, has yet to invalidate an immigration policy or decision based on substantive constitutional rights.<sup>212</sup> The *AADC* and *Kleindienst* decisions are leading examples of this trend.

The second difficulty with applying the First Amendment to anti-immigrant speech restrictions relates to limitations of traditional free speech doctrine. The source of immigrants' difficulties obtaining First Amendment protection is their unique status, not the nature or content of what they might actually say. By contrast, free speech law has traditionally been concerned with repression of disfavored opinions rather than with speech restrictions that target people based on their identity or status. As the Supreme Court said recently, "The guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum."<sup>213</sup>

As this quotation illustrates, free speech analysis has been focused on detecting content discrimination and in defining different types of fora.<sup>214</sup> Judicial scrutiny increases when speech restrictions apply in public fora and is more deferential in non-public fora or in a category known as a limited public forum.<sup>215</sup> Likewise, scrutiny is heightened when government limits speech based on its content or viewpoint and is less strict when a regulation is content-neutral.<sup>216</sup>

The trouble for immigrants is that speech restrictions that target non-citizens are neither content-based nor forum-based; they are identity-based.<sup>217</sup> As a result, traditional free speech analysis may be partially blind to the kinds of speech restrictions to which immigrants are most vulnerable. That was the case for the restrictions on independent campaign expenditures in *Bluman*. That, as it turns out, was also the case with the independent expenditure rule that the FEC sought to enforce against Citizens United for seeking to broadcast an anti-Hillary Clinton film during the 2008 presidential campaign. This speaker-identity gap was a central issue in *Citizens*

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<sup>212</sup> See, e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015) (refusing to apply heightened scrutiny to government's rejection of visa application for husband of naturalized citizen).

<sup>213</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (internal quotations omitted).

<sup>214</sup> See Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 *FORDHAM L. REV.* 2587, 2587–88 (2007).

<sup>215</sup> See Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 *WILLAMETTE L. REV.* 647, 651 (2010); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (holding that content-based discrimination is permissible in limited public fora but that viewpoint discrimination is not permissible).

<sup>216</sup> See RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH* § 3:1 (2014) ("The characterization of a law as content-based or content-neutral is enormously important, for it often effectively determines the outcome of First Amendment litigation.").

<sup>217</sup> See Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 *FLA. ST. L. REV.* 765, 769–72 (2015) (describing the "speaker identity gap" in free speech law).

*United* because the independent election expenditure rule at issue did not target groups based on their opinions.<sup>218</sup> Instead, the rule restricted non-profit organizations, corporations, and unions based on their institutional status—in other words, who they were, not what they wanted to say.<sup>219</sup> The majority in *Citizens United* addressed this problem head on: “[T]he First Amendment protects speech and speaker, and the ideas that flow from each.”<sup>220</sup> Elsewhere, the majority said, “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.”<sup>221</sup> This statement suggests that a speech restriction based on identity should trigger heightened scrutiny just like a content-based restriction, and strict scrutiny is what the Court applied in *Citizens United*.<sup>222</sup> Unfortunately, *Citizens United* is an unusually politicized decision. The subsequent debate about the decision raised questions about the majority’s commitment to the legal reasoning that it announced, whereas the division on the Court made the dissenters less willing to see potential areas of doctrinal agreement.<sup>223</sup>

The premise that speaker discrimination is equivalent to content discrimination proved contentious with the four dissenters. In fact, the four liberal dissenters cited the example of “foreigners” as a class of speakers that they thought could be targeted for speech restrictions in certain contexts. Justice Stevens wrote:

The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. In contrast to the blanket rule that the majority espouses, our cases recognize that the Government’s interests may be more or less compelling with respect to different classes of speakers, and that the constitutional rights of certain categories of speakers, in certain contexts, “are not automatically coextensive with the rights” that are normally accorded to members of our society.<sup>224</sup>

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<sup>218</sup> *Id.* at 781.

<sup>219</sup> *Id.* at 782.

<sup>220</sup> *Citizens United*, 558 U.S. at 341.

<sup>221</sup> *Id.* at 340.

<sup>222</sup> *See id.*

<sup>223</sup> *See* Kagan, *supra* note 217, at 767, 815–818.

<sup>224</sup> *Citizens United*, 558 U.S. at 420–22 (Stevens, J., dissenting) (internal quotations and citations omitted) (quoting *Morse v. Frederick*, 551 U.S. 393, 396–97, 404 (2007)).

On its face, the dispute about speaker discrimination in *Citizens United* appears to invert the presumed sympathies of the liberal-conservative blocks on the Court. The majority expressed concern about “disadvantaged” members of society.<sup>225</sup> Meanwhile, the four liberal dissenters expressed a willingness to tolerate speech restrictions that target “students, prisoners, members of the Armed Forces, foreigners, and [public] employees.”<sup>226</sup> These are groups not normally associated with the economic elite, including many people of color and many people who represent significant parts of the Democratic Party’s electoral constituency.

The liberal justices in the dissent based their argument on confusion about First Amendment cases that focus on unique non-public fora.<sup>227</sup> The Court has actually never said that students, soldiers, or even prisoners have less freedom of speech than other people as a general matter. Instead, the government has a legitimate need to exert greater control over their expressive activities in certain non-public fora. For example, teenage high school students have freedom of speech, but “the constitutional rights of *students in public school* are not automatically coextensive with the rights of adults in other settings.”<sup>228</sup> The same is true for soldiers’ free speech versus speech restrictions on military bases.<sup>229</sup> Likewise, the Court has approved limitations on speech for prison inmates inside the penal context because of the need to maintain order.<sup>230</sup> The Court has, however, struck down limitations on prisoners’ rights to write letters to people outside prison.<sup>231</sup> The dissenters blur the line between speech restrictions that target certain types of people and regulations that control speech because of the legitimate needs of certain types of government institutions.

There are two exceptions, however, where the Court has approved speech restrictions based on speaker identity. One of these, arguably, is for public employees. In 1973, in *Civil Service Commission v. National Association of Letter Carriers*, the United States Supreme Court upheld restrictions on certain election campaigning by federal employees. The Hatch

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<sup>225</sup> *Id.* at 340–41 (Kennedy, J., majority opinion).

<sup>226</sup> *Id.* at 420–22 (Stevens, J., dissenting).

<sup>227</sup> See Kagan, *supra* note 217, at 817.

<sup>228</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (emphasis added).

<sup>229</sup> See *Parker v. Levy*, 417 U.S. 733, 758 (1974); see also DEP’T OF DEF., Instruction No. 1325.06, 8 (2009), <http://www.dtic.mil/whs/directives/corres/pdf/132506p.pdf> [<https://perma.cc/X3K3-8TAY>] (establishing applicable defense regulations that contain separate and very different provisions for “on-post” and “off-post demonstrations”). For off-post demonstrations, members of the Armed Forces are prohibited from participating only if they are on-duty, in uniform, or if the demonstration would be a “breach of law and order” or would likely result in violence.

<sup>230</sup> *Jones v. N.C. Prisoner’s Union*, 433 U.S. 119, 125, 129 (1977).

<sup>231</sup> *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (“Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements.”).

Act prohibited federal employees from taking “an active part in political management in political campaigns.”<sup>232</sup> It prohibited public employees from many political activities, even on their own time and in a private capacity.<sup>233</sup> Congress amended the Hatch Act, however, to permit most federal employees to participate in election campaigns in a private capacity.<sup>234</sup> A recent Supreme Court case involving speech by public employees focused on whether the expression is part of their official duties.<sup>235</sup>

The other exception is for non-citizen participation in election campaigns as seen in the *Bluman* decision.<sup>236</sup> It is noteworthy that both of these examples concern election-related speech. For the four justices who dissented in *Citizens United* and in *McCutcheon*, there is a straightforward rationale. For these justices, the election context raises unique concerns about improper influence over government beyond quid pro quo corruption.<sup>237</sup> As previously discussed in Part III, the majority rejected this broad anti-corruption interest. It would thus seem harder for the four remaining justices from the majority to explain why public employees and immigrants may be singled out for exclusion from participation in election campaigns. In *McCutcheon*, Chief Justice Roberts wrote for the plurality of the Supreme Court: “There is no right more basic in our democracy than the right to participate in electing our political leaders.”<sup>238</sup> As the Supreme Court jurisprudence stands now, private corporations seem to have a constitutional right to

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<sup>232</sup> See *Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 550 (1973) (quoting 5 U.S.C. § 7324(a)(2) (1993)).

<sup>233</sup> *Id.* at 556 (affirming Congress's power to ban federal employees from “holding a party office, working at the polls, acting as a party paymaster for other party workers . . . organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party . . . [or] actively managing the campaign of a partisan candidate for public office”).

<sup>234</sup> See U.S. Off. of Special Couns., *The Hatch Act: Permitted and Prohibited Activities for Most Federal Employees* (Feb. 2016), <https://osc.gov/Resources/HA%20Poster%20Lesser%20Restricted%202016.pdf> [<https://perma.cc/A845-FHU3>].

<sup>235</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (holding that public employees can be fired for statements they make as part of their job responsibilities); see also *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 198–99 (2d Cir. 2010) (holding that public employee's filing of grievance was official act and thus was not protected by the First Amendment).

<sup>236</sup> See *supra* notes 97–148 and accompanying text.

<sup>237</sup> The Hatch Act separately banned a federal employee from using “his official authority or influence for the purpose of interfering with or affecting the result of an election.” *Letter Carriers*, 413 U.S. at 550. That more overt misuse of official office to influence an election would seem closely analogous to criminal bribery, but in 1973, the Court affirmed the Act's ban on private campaigning as well because of a more general concern that “partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.” *Id.* at 564. This concern is quite similar to the “general influence” concern that the plurality of the Court rejected in *McCutcheon v. FEC*. 134 S. Ct. 1434, 1434 (2014) (plurality opinion).

<sup>238</sup> *McCutcheon*, 134 S. Ct. at 1440–41.

a kind of expression that immigrants and public employees do not. It is difficult to understand why that should be.

The partisan political dimensions are difficult to ignore. *Citizens United* is generally seen as favoring Republicans because it opens doors to electioneering by well-off interests that generally favor the more conservative party. By contrast, public employees and immigrants are generally seen as central to the Democratic Party coalition. This highlights a serious challenge for the four justices who supported *Citizens United* and *McCutcheon*. The immediate reaction to the Court's new statement about speaker discrimination offending the First Amendment was that the Court did not really mean it. In his dissent in *Citizens United*, Justice Stevens wrote, "While that glittering generality has rhetorical appeal, it is not a correct statement of the law."<sup>239</sup> The speaker discrimination part of *Citizens United* has been dismissed as being overly sweeping and faced skepticism about whether the Court will follow through.<sup>240</sup> The *Bluman* decision is an example supporting this cynicism.<sup>241</sup> In *Bluman*, the district court relied on the *Citizens United* dissenters to justify excluding immigrants from election-related expression that seems to bolster the idea that the legal argument advanced by the *Citizens United* majority is not an authoritative statement of the law.<sup>242</sup>

This article argues that the doubt about the speaker discrimination is also regrettable because what the Court said on this subject in *Citizens United* was right. Despite what Justice Stevens wrote, the speaker discrimination was not really new.<sup>243</sup> Although the Court had never before clearly articulated the rule that speaker discrimination should trigger heightened scrutiny, it had recognized that speaker identity is an important part of speech. For example, in *City of Ladue v. Gilleo*, the United States Supreme Court, in 1994, recognized a First Amendment right to post political signs outside one's home because doing so uniquely attaches the content of the sign to the identity of the speaker and in so doing changes the message.<sup>244</sup>

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<sup>239</sup> *Citizens United*, 588 U.S. at 394 (Stevens, J., dissenting).

<sup>240</sup> Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 420–22, 448–49 (2013) (noting that doubts have already been expressed about whether the Court really meant to announce a broad new principle and voicing skepticism about whether the Court will follow it in the future).

<sup>241</sup> *Id.* at 448.

<sup>242</sup> See *Bluman v. FEC*, 800 F. Supp. 2d 281, 289 (D.D.C. 2011), *aff'd*, 132 S.Ct. 1087 (Mem) (2012).

<sup>243</sup> See Kagan, *supra* note 217, at 802–06 (arguing that the speaker discrimination principle can be seen in much earlier First Amendment cases, such as *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972)).

<sup>244</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 56–57 (1994) ("Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else. . . . Precisely because of their location, such signs provide information about the identity of the 'speaker'. . . . A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may



The Court has relied on a similar insight in recognizing a right to anonymous speech—that is, to deliberately separate the content of speech from the speaker’s identity.<sup>245</sup>

Consider the implications of the connection between identity and message in the context of speech by immigrants. When he announced his presidential campaign, Donald Trump—who calls for all unlawful immigrants to be deported and for the construction of a “beautiful” wall on the Mexican border—suggested that Mexican immigrants are rapists.<sup>246</sup> This statement was immediately and widely condemned, but most of those speakers were not themselves immigrants or Mexican. It is different for a Mexican immigrant to object to what Trump says than for a non-immigrant. Previous jurisprudence, such as *City of Ladue*, suggests that the First Amendment protects the ability of a speaker to connect message and identity in this way. *Citizens United* says that the government offends the First Amendment if it imposes speech restrictions against a certain type of speaker. Yet, as discussed in Part II, under current law and affirmed as constitutional in *Bluman*, this expression is actually prohibited and could lead to criminal prosecution or civil fines. That leaves immigrants constitutionally handicapped in attempting to combat speech with speech in the context of an election campaign.

Such identity-based speech restrictions do not only impact the would-be immigrant speaker. They impact American citizens who would be interested in hearing what immigrants have to say, especially given the prominence of immigration as an issue in public policy debates. The Court has recognized in the past that censorship impacts the audience as well as the would-be speaker, imperiling the public’s ability to hear the perspectives of those impacted by a particular public policy.<sup>247</sup> That is why, for instance, prison inmates need to be able to communicate their complaints about pris-

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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. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.”).

<sup>245</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995) (“[A]n author generally is free to decide whether or not to disclose his or her true identity.”); see also *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002) (striking down ordinance requiring a permit in order to engage in door-to-door canvassing); *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 204 (1999) (holding that measure requiring people collecting petition signatures to wear identity badges violates the First Amendment); *Talley v. California*, 362 U.S. 60, 65 (1960) (holding that ordinance banning anonymous leafleting violates the First Amendment).

<sup>246</sup> See Schwartz, *supra* note 111.

<sup>247</sup> See *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (noting that preventing Americans from hearing a foreign speaker of their choice infringed the Americans’ free speech liberty).

on conditions to the outside world.<sup>248</sup> Justice Kennedy's majority decision in *Citizens United* defended the speaker discrimination principle by expressing concern about marginalized segments of society: "By taking the right to speak from some and giving it to others, the Government 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."<sup>249</sup> Critical race theorists and feminist scholars similarly argued that a voice in national discourse connotes standing in society.<sup>250</sup> In this way, there is a compelling, progressive, and inclusive principle at the heart of *Citizens United*.

Justice Kennedy's statement about protecting the right of the disadvantaged to have a voice in public debates eloquently explains what immigrant activists have been doing by putting themselves forward in public view in the effort to promote immigration reform. They are demonstrating their worth in society and implicitly demanding respect. They are also insisting on the opportunity to speak for themselves, rather than relying on others to talk about them. For these reasons, it should be a serious concern that existing law is so unsettled about whether they have a right to express themselves in this way. *Citizens United*'s articulation of the speaker discrimination principle offers a potentially powerful tool to repair this weakness in free speech jurisprudence and should be brought to bear wherever the government singles out immigrants to be excluded from public discourse. To do this, the justices who supported *Citizens United* need to be willing to show that the free speech principle they relied on in that case does not only apply to well-financed organizations. At the same time, the liberal justices who dissented should revisit their objections to a laudable premise of an admittedly controversial decision.

To resolve this problem, the Court's unexplained per curiam decision in *Bluman* should be overruled. Although *stare decisis* carries considerable persuasive force, the Court has not followed it as rigidly in constitutional cases.<sup>251</sup> An exception may also be made to *stare decisis* when a decision "was an abrupt and largely unexplained departure" from another recent precedent.<sup>252</sup> *Bluman*, as a one line per curiam decision, contains no explanation at all and appears inconsistent with *Citizens United* to such an extent

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<sup>248</sup> See *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 (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.").

<sup>249</sup> *Citizens United*, 558 U.S. at 340–41.

<sup>250</sup> See Kagan, *supra* note 217, at 797, 801.

<sup>251</sup> See *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) ("[O]ur considered practice [has] not [been] to apply *stare decisis* as rigidly in constitutional [cases] as in non-constitutional cases.") (internal quotations omitted).

<sup>252</sup> *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47 (1977).

that it is cited by some to show that *Citizens United* lacks intellectual integrity.<sup>253</sup> The Roberts Court ought to be very concerned about the suggestion that a central pillar of one of its most controversial decisions cannot be taken seriously as a precedent. This bolsters allegations that the majority of the Court simply favors conservative interests in the guise of free speech.<sup>254</sup> Such doubts are a threat to the very idea of constitutional law, transforming civil liberties cases into partisan exercises.

## VI. WRESTLING WITH PLENARY POWER

If the Supreme Court were to clarify that all people in the United States have First Amendment protection, regardless of immigration status, and were also to correct its error in *Bluman v. FEC*, millions of immigrants would still face a major threat to their freedom of speech. Under a broad reading of *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, any of the 11 million immigrants who are unlawfully present might be targeted for deportation if they engaged in dissident political activity.

*AADC* has been cited recently as support for the general principle that the President has discretion to decide how to enforce immigration law, which is a justification for President Obama's expanded use of deferred action in immigration policy.<sup>255</sup> Indeed, the decision includes text that is supportive of wide discretion in deferred action policies.<sup>256</sup> This discretion has led to increased focus on the presidency as a source of immigration policy even if Congress does not change the statutes. An influential article on executive power over immigration wrote: "[T]he inauguration of a new President can bring with it remarkable changes in immigration policy."<sup>257</sup> In *AADC*, however, prosecutorial discretion was used *against* the immigrants who claimed a selective prosecution defense. If this means then that there is

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<sup>253</sup> See McConnell, *supra* note 240, at 448 (citing *Bluman v. FEC*, 132 S. Ct. 1087 (Mem. (2012))).

<sup>254</sup> Erwin Chemerinsky, The Roberts Court and Freedom of Speech, Speech at the Federal Communications Bar Association's Distinguished Speaker Series (Dec. 17, 2010), in 63 FED. COMM. L.J. 579, 579, 582 (2011) (arguing that the Roberts Court has not consistently defended free speech, except when consistent with conservative ideology).

<sup>255</sup> See, e.g., Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA School of Law, et al., to President Barack Obama, 1 n.2, (May 28, 2012), <https://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf> [<https://perma.cc/S3EE-YGNW>] (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.* ("AADC"), 525 U.S. 471 (1990); WADHIA, *supra* note 179, at 111–112, 124 (discussing *AADC* as an endorsement of deferred action).

<sup>256</sup> *AADC*, 525 U.S. at 483–84 ("[T]he INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. . . . A case may be selected for deferred action treatment at any stage of the administrative process.").

<sup>257</sup> Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464 (2009).

no First Amendment limit to prosecutorial discretion, then the above statement might be quite ominous. It could mean that the election of a new President could bring dramatic new restrictions on immigrants' ability to express themselves freely in the United States if it is true that immigrants have no selective enforcement defense against deportation based on the pretext of ideologically neutral violations of the immigration law.<sup>258</sup>

A broad, straightforward reading of *AADC* leads to a number of disturbing outcomes. Because it provides a sword that the government may wield over millions of people, the threat of deportation has the potential to silence an entire class based on who they are. This is in tension with the Court's statements about speaker discrimination in *Citizens United*, in which the Court spoke about the importance of marginalized voices having standing to express themselves. It is not just free speech at stake. Could the government selectively take action against immigrants based on religion to deport as many Muslims on technical immigration violations as possible? If there is no First Amendment selective prosecution defense, then the answer seems to be yes.

The Court in *AADC* noted that, even when allowed, selective prosecution is a difficult defense to prove.<sup>259</sup> Were it not for this decision, however, selective prosecution might be somewhat easier to prove today than it was in the 1990s. Under Obama Administration policies, the DHS has published detailed guidance specifying who should be a priority for immigration enforcement.<sup>260</sup> The result of these policies is that the vast majority of unlawfully present immigrants are not priorities for enforcement unless they have a criminal record.<sup>261</sup> Thus, if an outspoken immigrant activist were to be processed for deportation without having a criminal record or otherwise falling within one of the DHS' official priorities, it would seem more likely that the deportation was triggered by her political activities. As yet, there is little reason to think that this is happening. If anything, the Obama Administration has utilized discretion to aid protesters who favor immigration reform.<sup>262</sup> If a future administration took a more aggressive or hostile stance,

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<sup>258</sup> See *AADC*, 525 U.S. at 488.

<sup>259</sup> *Id.* at 489 ("Even in the criminal-law field, a selective prosecution claim is a *rara avis*.").

<sup>260</sup> See Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/ZMD9-8AXF>].

<sup>261</sup> See Julia Preston, *Most Undocumented Immigrants Will Stay Under Obama's New Policies, Report Says*, N.Y. TIMES (July 23, 2015), <http://www.nytimes.com/2015/07/23/us/politics/most-undocumented-immigrants-will-stay-under-obamas-new-policies-report-says.html> [<https://perma.cc/5NLT-YJG3>].

<sup>262</sup> See, e.g., Cooper Rummell, *Arizona 'Dreamers' Make Emotional Visit to Homeland*, KTAR NEWS (Oct. 10, 2014), <http://ktar.com/story/92883/arizona-dreamers-make-emotional-visit-to>

immigrants might have no protection. The executive branch could choose to deport those immigrant activists who it found most troublesome politically while leaving those immigrants who either keep their heads down or who seem less threatening to the government. Unauthorized immigrants would be unable to use speech to establish their worth and standing in society, as *Citizens United* says that all speakers should be able to do.

There is a way to read *AADC*, however, so as to avoid this clash with free speech principles—though perhaps not the most evident reading from the text. Nevertheless, there are notes of caution in the *AADC* decision. The first was the fact that the government itself withdrew the Communism ground for deportation, and thus avoided re-testing the constitutionality of explicitly ideological grounds for removal.<sup>263</sup> The second was that the Court left the door open for a selective prosecution case that would be “outrageous” enough to prevail.<sup>264</sup> This open door to a future selective prosecution claim suggests that the Court does not entirely reject the relevance of First Amendment concerns in the deportation context.

It is plausible that the holding of *AADC* should be limited to its relatively unusual facts, in which the deported immigrants were guilty of serious offenses that could alternatively have been prosecuted criminally. The immigrants in that case were accused of membership in a terrorist organization.<sup>265</sup> The government explained the basis for this allegation in its brief to the Supreme Court.<sup>266</sup> The PFLP had been responsible for multiple bloody attacks around the world.<sup>267</sup> An FBI investigation identified one of the respondents through confidential sources during security preparations for the 1984 Los Angeles Olympic Games that suggested that he was “organizing fundraising events on behalf of the PFLP at which money was solicited for the stated purpose of supporting the organization’s ‘fighters.’”<sup>268</sup> The other seven respondents were accused of supporting this fundraising activity.<sup>269</sup>

Today, this conduct could constitute the crime of providing material support to a terrorist organization under the Anti-Terrorism and Effective Death Penalty Act of 1996.<sup>270</sup> When there is probable cause to sustain a

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homeland/ [https://perma.cc/8P7Z-345J] (reporting that “dreamers” who made a brief visit to Mexico permitted to re-enter the United States).

<sup>263</sup> See *AADC*, 525 U.S. at 473–74.

<sup>264</sup> *Id.* at 491–92.

<sup>265</sup> *Id.* at 473.

<sup>266</sup> Brief for the Petitioners at 1, *AADC*, 525 U.S. 471 (1998) No. 97-1252, 1998 WL 411431 at \*4–5.

<sup>267</sup> *Id.* at 1 & n.1.

<sup>268</sup> *Id.* at 4.

<sup>269</sup> *Id.*

<sup>270</sup> 18 U.S.C. § 2339B (1996) (“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both.”).

criminal charge, prosecutors have wide discretion whether to actually prosecute and how to do so, taking into account resource concerns, equities of a particular case, and the public interest.<sup>271</sup> If federal authorities believe that an immigrant may be guilty of a criminal terrorism offense and also a technical immigration violation, they would face an important decision. A criminal prosecution would allow for long imprisonment, eliminating a potential threat, but would also entitle the defendant to extensive trial rights. In addition to meeting a high burden of proof, the government might have to produce sensitive evidence and subject sensitive witnesses to cross-examination. By contrast, deporting the person on technical immigration law grounds would probably be more efficient and would not require the government to reveal its intelligence sources. Though it would remove a person from U.S. territory, he or she might remain free to act from abroad—unless a foreign government would take action to detain him or her. These are precisely the kinds of sensitive tactical decisions that are entrusted to executive discretion.

A wrinkle here is that the material support crime was not yet on the books in the 1980s when the events leading to the *AADC* case transpired. Thus, criminal prosecution may not have been an option in this case. But this is not actually the point. So long as the conduct that led to selective enforcement could be constitutionally criminalized, then deportation could not be said to impair protected free speech. The Government made this argument to the Supreme Court, by which time the material support crime had been enacted: “the activities that allegedly would be ‘chilled’ by the deportation proceedings—the provision of material support to the PFLP—are currently the subject of civil and criminal prohibitions under other federal laws.”<sup>272</sup>

In 2010, in *Holder v. Humanitarian Law Project*, the United States Supreme Court affirmed this view, finding that the material support ban does not violate the First Amendment.<sup>273</sup> Because providing material support for terrorist organizations is not constitutionally protected speech, a selective prosecution defense based on engaging in such activity must fail.<sup>274</sup> This rationale explains the holding in *AADC* and would have far narrower implications for immigrant political activism generally.

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<sup>271</sup> See WADHIA, *supra* note 179, at 36–37.

<sup>272</sup> Brief for the Petitioners, *AADC*, *supra* note 266, at 43.

<sup>273</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) (“[I]n prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.”).

<sup>274</sup> *Cf. id.* at 14, 39 (rejecting a pre-enforcement challenge to the materials support ban by people who said they had provided support to an organization in the past and would again in the future if not for the law).

Reading *AADC* as a case about conduct that never was protected by the First Amendment puts the selective prosecution question in a new light. Concededly, parts of *AADC* indicate that there is no First Amendment selective prosecution defense against deportation. The Court's penultimate summary of its holding at the end of the decision is narrower: "When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."<sup>275</sup> This leaves open the possibility that were the government to selectively target immigrants for deportation because of political activities that are protected by the First Amendment—say, someone like John Lennon, as discussed in Part III—then it might be a case of "discrimination so outrageous" that the government's normal plenary power may be overcome.<sup>276</sup>

The difficulty in deciding how broadly to read *AADC* reflects a wider problem in immigration law, evident also in older cases like *Kleindienst*.<sup>277</sup> Both cases involved an apparent clash between a fundamental right and a government decision to act against a particular non-citizen. In both cases, the Court held in favor of the government's plenary power while, at the same time, holding the door open for a different conclusion in an undefined future case. This leaves unclear whether substantive decisions about immigration must bend to accommodate fundamental rights like freedom of speech and, if so, when.<sup>278</sup> Is plenary power over immigration so strong that it permits actions by the government that otherwise would clearly violate the Constitution? After *AADC*, the Court said that plenary power is subject to "important constitutional limitations" but other than procedural due process it is not entirely clear what these limitations might be.<sup>279</sup> The current situation can be summarized by the following: "Slowly chipping away at the plenary power doctrine, the Supreme Court has increasingly protected the procedural due process rights of noncitizens facing removal from the country. Nevertheless, the core of the doctrine [of plenary power] continues

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<sup>275</sup> *AADC*, 525 U.S. at 491–92.

<sup>276</sup> *Id.* at 491.

<sup>277</sup> See *supra* notes 30–96 and accompanying text.

<sup>278</sup> See Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. F.I. 21, 24, 27 (2015), <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1164&context=mlr.fi>.

<sup>279</sup> *Zadvydas v. Davis*, 533 U.S. 682, 695 (2001). *Zadvydas* concerned procedural due process and has been invoked since in other procedural process cases.

to protect the substantive immigration judgments of Congress from judicial review.”<sup>280</sup>

The Court’s reluctance to review substantive immigration decisions was again on display in 2015 in *Kerry v. Din*, where the United States Supreme Court turned away a claim by a U.S. citizen that the government had arbitrarily infringed her fundamental rights by denying a visa to her spouse.<sup>281</sup> The Court splintered in its attempt to provide a rationale for this decision, suggesting considerable confusion about where the doctrine stands. *Din* makes clear that there are at least four justices who think that fundamental rights—in this case, the right to marriage—should limit plenary power.<sup>282</sup> The best view appears to be that the Court is moving in half steps, assessing case by case whether to expand constitutional scrutiny over immigration.<sup>283</sup> The Court’s incremental approach has been helped by the government pulling back from positions that would have forced a more direct conflict—such as dropping the Communism ground for deportation in *AADC*.

Much depends on whether the government maintains the restraint that it has exercised vis-à-vis immigrant activists. If it does not, the Court will once again face a choice about applying substantive constitutional limits on immigration control. Free speech is an ideal first case for the Court to apply such a limit. First, the claim here would be only that all people inside the United States have freedom of speech and thus there would be no conflict with the holdings of *Kleindienst* or *Din*, which concerned people seeking visas to enter the country. Second, because most immigration enforcement is not based on political ideology, imposing a First Amendment limitation on plenary power would not radically change the practice of immigration law.<sup>284</sup> Third, preventing the government from picking and choosing who may speak is important for our democracy for reasons articulated by Justice Kennedy in the *Citizens United* decision. Indeed, there may be something special about the rights guaranteed by the First Amendment, which allow them to overcome plenary power even when other fundamental rights claims fail.<sup>285</sup>

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<sup>280</sup> Johnson, *supra* note 211, at 59; see also Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1983 (2013) (“[T]he government’s power to deport [is] as absolute and unqualified as its power to exclude those arriving at the border”).

<sup>281</sup> *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015).

<sup>282</sup> See Kagan, *supra* note 278, at 22.

<sup>283</sup> See *id.* at 28–29.

<sup>284</sup> *Contra id.* at 28 (applying equal protection to immigration would lead to more radical change than applying free speech protections).

<sup>285</sup> Cf. Steve Vladeck, *What’s Missing from Constitutional Analyses of Donald Trump’s Muslim Immigration Ban*, JUST SECURITY (Dec. 10, 2015), <https://www.justsecurity.org/28221/missing-constitutional-analyses-donald-trumps-muslim-immigration-ban/> [<https://perma.cc/CZZ8-5UK8>]



## CONCLUSION

Securing the constitutional right of all immigrants to speak freely in the United States is increasingly urgent for two reasons. First, there has been a flourishing of immigrant-led activism in support of immigration reform. Second, the 2016 presidential campaign has featured anti-immigration positions that are unusually hostile by recent standards of mainstream politics. These two trends have a high potential for collision in ways that may put immigrant free speech rights under the microscope. Even if Donald Trump is not elected president, an immigrant may run afoul of election law for engaging even in fairly small expressive activities opposed to his candidacy. If he or any similarly anti-immigrant candidate were to be elected, immigrant activists could find themselves targeted for deportation. Even the Obama Justice Department has argued that immigrants who entered the country illegally can claim no protection of the First Amendment.

This situation exists because the Supreme Court through the years has sent ambivalent and conflicting signals about immigrant free speech rights. It has never quite said that immigrants do not all have freedom of speech. It has, however, never unequivocally said that they all do. Additionally, it has issued recent decisions that affirm government power to limit immigrant speech, either in the election campaign context or in terms of selective enforcement of immigration law. To a great extent, a muddled situation has developed because the executive branch has shown a certain amount of restraint in how it has used its powers, so that recent cases have not asked the Court to apply McCarthy era or early Twentieth Century case law that—while never overruled—appears anachronistic in light of more recent developments in free speech jurisprudence and immigration law.

A threat to the freedom of speech of a class of people because of who they are does not fit neatly in the content-focused analysis that has been traditionally used in free speech cases. Instead, the speaker discrimination doctrine articulated in *Citizens United* appears both to describe the problem and to capture the idea that immigrant activists are sending a valuable message by putting their immigration status front and center in their activism. Speaker identity changes speech in powerful ways, which is why it is dangerous to allow the government to silence certain speakers based on who they are. The Court should recognize that immigrant speech is important enough to be protected by the First Amendment, both for immigrants in the United States and for American citizens who may benefit from hearing what they have to say.

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(arguing that the special nature of the free exercise clause may give it unique weight as a check on plenary power over immigration).

The trouble is that presidential discretion may be used differently as soon as a new president is inaugurated. A situation could easily arise in which, even if the government does not overtly act, a lawyer may need to warn immigrant activists that they are at risk and should consider self-censorship. In order to ensure that all people in the United States enjoy free speech protection, the Supreme Court needs to do three things. First, the Court should clarify that the statement in *Bridges* that the First Amendment covers non-citizens applies regardless of whether someone is in the country lawfully. This principle, combined with the speaker discrimination doctrine drawn from *Citizens United* and other cases, is the foundation for the next necessary steps. The second step is for the Court to reconsider *Bluman*, which is in tension both with the speaker discrimination doctrine and the Court's rejection of generalized fears of corruption through election expenditures. Finally, the Court needs to clarify the holding of *AADC*, so as to make clear that selective prosecution can be used as a defense against deportation if the punished speech would be protected under the First Amendment. This is not an easy wish list. Right now immigrant free speech is quite precarious constitutionally. This is cause for concern, and if a new President uses prosecutorial discretion aggressively against immigrants who are currently sheltered by the Obama Administration, it may become a serious crisis.

