

# IMMIGRANTS AND THE RIGHT TO PETITION

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*Today in the United States, millions of undocumented persons are working long hours for illegally low pay, in workplaces that violate health and safety codes, for employers who defy labor and antidiscrimination laws. Many more fall victim to criminal activity, forced into involuntary servitude and subjected to physical abuse. Yet these immigrants often do not report their harsh conditions and cruel treatment for fear that they will attract the attention of immigration officials and be deported. Law enforcement policies that deter noncitizens from reporting crimes are surely unwise, undermining public safety and health and entrenching undocumented immigrants in a caste hierarchy. In this Article, Professor Michael Wishnie argues that those policies may be unconstitutional as well—violating noncitizens' First Amendment right to "petition the Government for a redress of grievances." The Article begins with the Supreme Court's 1990 suggestion that noncitizens are not among "the people" whose rights the Framers intended to safeguard in the First and Fourth Amendments. To confront the Court's reasoning on its own historical terms, Professor Wishnie examines the rich history of petitioning by noncitizens from early English tradition through the early nineteenth century, illustrating that the Founders did not intend to exclude noncitizens from "the people" whose rights would be established. Professor Wishnie then develops a theory of "extraordinary speech" to protect noncitizen petitioning and demonstrates how such a theory coheres with related doctrines of court access, unconstitutional conditions, and equal protection. Applying the theory, he concludes that some policies discouraging immigrant communications to law enforcement officials are so burdensome as to violate the First Amendment.*

I worked [selling trinkets] in New York for about five years . . . .  
When I did not want to work or tried to run away, [a ringleader]  
had me beaten up. I and several of my friends were shocked with a  
stun gun because we tried to run away . . . . [The ringleader] told me  
and the others that the INS would put us in jail if we tried to leave  
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<sup>1</sup> Statement of Gregorio Zarma Goyo at 1, *United States v. Paoletti-Lemus*, No. 97-Cr-768 (E.D.N.Y. submitted May 6, 1998) (on file with the *New York University Law Review*).

[Her employers] deceived Ms. Okezie into coming to the United States from Nigeria when she was 13 years old . . . . Ms. Okezie was required to work in [their] home without pay . . . . [Her employers] repeatedly hit or beat Ms. Okezie . . . with belts and with their hands and fists . . . . [They] repeatedly threatened to have Ms. Okezie deported if she complained or failed to complete her assigned tasks to [their] satisfaction . . . .<sup>2</sup>

## INTRODUCTION

At the close of the 2001 term, the Supreme Court declared that the First Amendment right to petition is “one of the most precious of the liberties safeguarded by the Bill of Rights . . . and . . . is implied by the very idea of a government, republican in form.”<sup>3</sup> Petitioning is the act of presenting a communication to the legislative, executive, or judicial branch of government, orally or in writing, to seek redress of a grievance.<sup>4</sup> In this Article, I examine whether noncitizens, including undocumented immigrants, are among “the people” whose right to petition is constitutionally guaranteed,<sup>5</sup> and, more broadly, by what

<sup>2</sup> Verified Complaint ¶¶ 1, 27, 24, *Okezie v. Udogwu*, No. 99 Civ. 3345 (S.D.N.Y. filed May 7, 1999) (on file with the *New York University Law Review*). I served as co-counsel to Mr. Goyo, *supra* note 1, and Ms. Okezie and worked on the Petition cited *infra* note 55.

<sup>3</sup> *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal citations and quotations omitted) (holding that federal labor law may not impose liability on employer for losing retaliatory lawsuit absent evidence that suit was objectively baseless). The Petition Clause, though obscure, was featured in two other decisions of the Court in the 2001 term. See *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (explicating scope of right to court access, characterized as arising from, *inter alia*, right to petition); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 761 n.13 (2002) (rejecting Justice Breyer's argument that Petition Clause establishes right to sue otherwise immune state before federal administrative tribunal).

<sup>4</sup> At English common law, a petition was a written communication to Parliament or the Crown expressing a grievance and requesting relief. See *infra* notes 91-93 and accompanying text. Contemporary American law recognizes the First Amendment right to petition as protecting communications to all three branches of government. See, e.g., *BE & K Constr. Co.*, 536 U.S. at 525 (noting that Clause protects right to petition judicial branch); *McDonald v. Smith*, 472 U.S. 479 (1985) (analyzing communications to executive branch under Petition Clause); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (interpreting Sherman Act to allow communications to legislative branch, as prohibiting such communications would raise serious constitutional issues under Petition Clause). Oral as well as written communications are protected as petitioning activity. See, e.g., *Comm. on Prof. Ethics, Ass'n of the Bar of the City of N.Y.*, Formal Op. No. 1991-4 (Eugene M. Wypyski ed., 1992) (asserting that right to petition protects communications to government officials, even where government is represented opposing party, notwithstanding noncontact rule of ethics), available at 1991 WL 639878. Petitioning thus includes communications with law enforcement officials to report crimes or other unlawful activity and to request relief.

<sup>5</sup> U.S. Const. amend. I (“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”).

judicial standard an infringement on petition rights should be scrutinized.

My inquiry is prompted by the Supreme Court's declaration that many noncitizens are excluded from the protections of the First Amendment.<sup>6</sup> More fundamentally, it is motivated by the circumstances of the millions of undocumented persons who live in the United States,<sup>7</sup> many of whom work long hours for illegally low pay, in workplaces that violate health and safety codes, for employers who defy labor and antidiscrimination laws.<sup>8</sup> Many of those workers are loathe to report their harsh working conditions for fear they will attract the attention of immigration authorities. Many other undocumented immigrants are victims of criminal activity but hesitate to report it for fear of deportation.<sup>9</sup> Beatrice Okezie, a young Nigerian girl held in involuntary servitude in a private home,<sup>10</sup> and Gregorio Zarma Goyo, one of the deaf Mexican peddlers who were forced to

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<sup>6</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“‘[T]he people’ protected by the . . . First . . . Amendment[ ] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”). This declaration has emboldened Congress to enact some statutory limitations on First Amendment activity by immigrants and to debate others. See *infra* notes 78-82 and accompanying text. It has also led state and federal prosecutors to argue that immigrants are not among the “people” who possess Fourth Amendment rights against unreasonable searches and seizures. See *infra* notes 75-76 and accompanying text.

<sup>7</sup> The most recent figures from the U.S. Immigration and Naturalization Service (INS) estimate that in October 1996 there were approximately five million undocumented immigrants in the country, with an annual growth rate of 275,000 persons per year. 1999 Stat. Yearbook of the Immigr. and Naturalization Service 241, available at <http://www.ins.gov/graphics/aboutins/statistics/FY99Yearbook.pdf>. Following the 2000 census, leading demographers substantially increased that estimate. See, e.g., Cindy Rodriguez, *Census Bolsters Theory Illegal Immigrants Undercounted*, *Boston Globe*, Mar. 20, 2001, at A4 (reporting that government and academic estimates of undocumented population range from six to eleven million persons).

<sup>8</sup> For discussion on unlawful employment practices against undocumented immigrants see, for example, Ctr. for Urban Econ. Dev., Univ. of Ill. at Chi., *Chicago's Undocumented Immigrants: An Analysis of Wages, Working Conditions, and Economic Contributions* (2002) [hereinafter *Chicago's Undocumented Immigrants*]; U.S. Gen. Accounting Office, GAO/HEHS-95-29, *Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops* (1994); U.S. Gen. Accounting Office, GAO/HRD-89-10, “Sweatshops” in New York City: A Local Example of a Nationwide Problem (1989); U.S. Gen. Accounting Office, GAO/HRD-88-130BR, *Sweatshops in the U.S.: Opinions on Their Extent and Possible Enforcement Options* (1988).

<sup>9</sup> See Robert C. Davis & Edna Erez, *Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System*, Nat'l Inst. of Justice: Research in Brief, May 1998, at 1 (analyzing and reporting victimization rates of immigrants).

<sup>10</sup> See Michael Cooper, *Woman in Child Servitude Case Faced a Neglect Complaint* in 1988, *N.Y. Times*, July 16, 1999, at B1 (describing abuse of Ms. Okezie).

sell trinkets in the streets, subways, and airports of New York,<sup>11</sup> are but extreme examples.

It would seem a foolish policy to discourage millions of people from communicating with law enforcement officials about unlawful activity. Yet this is, in effect, what our federal, state, and local governments have done by refusing to guarantee that complainants will not be deported for petitioning law enforcement agencies for redress. The consequence has been to embolden lawbreakers who prey on immigrants, frustrate civil and criminal law enforcement generally, undermine public safety and health, entrench undocumented immigrants in a caste hierarchy, and foster an underground economy that depresses the terms and conditions of employment for all workers.<sup>12</sup>

Policymakers have responded with modest steps to address the burdens on petitioning that result in the exclusion of undocumented immigrants from the mainstream of law enforcement. Congress has enacted “whistleblower” protections for certain immigrants, including battered women and children,<sup>13</sup> criminal informants,<sup>14</sup> and victims of international trafficking,<sup>15</sup> as well as certain other crime victims<sup>16</sup> who petition authorities for redress. On the civil side, Congress has established whistleblower protections for H-1B visa holders who report la-

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<sup>11</sup> See Joseph P. Fried, 2 Sentenced in Mexican Peddling Ring, *N.Y. Times*, May 8, 1998, at B3 (reporting sentencing of peddling conspirators who victimized Mr. Goyo).

<sup>12</sup> See, e.g., Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* 63-65, 74-81, 174-203 (1997) (discussing immigrant-smuggling networks, lack of government law enforcement, and widespread economic exploitation of new immigrants in Chinatown, New York); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 *Yale L.J.* 2179 (1994) (explaining how risk of deportation deters immigrants from reporting labor and employment violations); Elizabeth Ruddick, *Silencing Undocumented Workers: U.S. Agency Policies Undermine Labor Rights and Standards*, 23 *Immigr. Newsl.* 3 (1996) (asserting that enforcement of labor and employment laws is frustrated when government policies threaten to deport immigrants who report unlawful workplace conditions).

<sup>13</sup> See Battered Immigrant Woman Protection Act of 2000, Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37 (codified in scattered sections of 8 U.S.C.). The Battered Immigrant Woman Protection Act was passed as Title V of the Violence Against Women Act of 2000 (VAWA), which was enacted as division B of the Victims of Trafficking and Violence Protection Act of 2000. See §§ 1-2, 114 Stat. at 1464-65. For current statutory provisions protecting abused noncitizens, see, for example, 8 U.S.C. § 1229b(b)(2) (2000) (originally codified at 8 U.S.C. § 1254(a)(3) (1994) (enacted by § 1505, 114 Stat. at 1524)) (allowing attorney general to cancel deportation for battered spouse or child).

<sup>14</sup> See § 1101(a)(15)(S) (enacted by Violent Crime Control Enforcement Act of 1994, Pub. L. No. 103-322, § 130003, 108 Stat. 1796, 2024).

<sup>15</sup> See § 1101(a)(15)(T) (enacted by Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107(e)(1), 114 Stat. 1464, 1474-75).

<sup>16</sup> See § 1101(a)(15)(U)(i), (iii) (enacted by Battered Immigrant Woman Protection Act, § 1513, 114 Stat. at 1533) (protecting noncitizens subjected to “substantial physical or mental abuse” resulting from number of crimes, including rape, torture, involuntary servitude, kidnapping, extortion, and assault).

bor abuses,<sup>17</sup> and the U.S. Department of Labor (DOL) has narrowed its information-sharing agreement with the U.S. Immigration and Naturalization Service (INS) to encourage undocumented workers to report wage and hour violations.<sup>18</sup> Following the September 11, 2001 terrorist attacks, the vital importance of facilitating unimpeded immigrant petitioning achieved brief popular attention when the INS Commissioner asked all persons to report missing loved ones and pledged not to use "immigration status information provided to local authorities in the rescue and recovery efforts."<sup>19</sup> These measures are few and limited, however, and represent only minor deviations from the rule that undocumented immigrants petition government authorities at their peril. Deterring immigrants from communicating with law enforcement officials is surely unwise. This Article argues that it may be unconstitutional as well, violative of the First Amendment right to petition.

Analysis of immigrants' right to petition is illuminating for several reasons. First, it has significant consequences for the welfare of millions of noncitizens and for the effectiveness of law enforcement policies touching the lives of all residents of the nation.<sup>20</sup> Second, analysis of the petition rights of noncitizens has important implications for understanding the scope of other First and Fourth Amendment rights of immigrants—protections that, like the right to petition, are reserved by constitutional text to "the people" and have been dra-

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<sup>17</sup> See § 1182(n)(2)(C)(iv). The H-1B visa program offers temporary employment visas to specialized workers. See § 1101(a)(15)(H)(i)(b). Although the statute directs the INS and U.S. Department of Labor (DOL) to protect the immigration status of H-1B complainants, § 1182(n)(2)(C)(v), the agencies have yet to implement a program. See 20 C.F.R. § 655.801(c) (2002) (announcing that H-1B whistleblower "may be allowed to seek other appropriate employment in the United States . . . . Further information concerning this provision should be sought from the Immigration and Naturalization Service").

<sup>18</sup> Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor (Nov. 23, 1998), in 227 Daily Lab. Rep. (BNA) E-1 (Nov. 25, 1998) [hereinafter 1998 MOU]; see also Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. Pa. J. Lab. & Emp. L. 529, 547-51 (2002) (analyzing 1998 revision of MOU).

<sup>19</sup> News Release, Immigration and Naturalization Serv., U.S. Dep't of Justice, Statement by INS Commissioner James Ziglar (Sept. 21, 2001), available at <http://www.immigration.gov/graphics/publicaffairs/newsrels/NYCterrorist.htm>.

<sup>20</sup> On the general inadequacy of statutory protections for whistleblowers, see, for example, Trystan Phifer O'Leary, *Silencing the Whistleblower: The Gap Between Federal and State Retaliatory Discharge Laws*, 85 Iowa L. Rev. 663 (2000) (critiquing current statutes); Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 Admin. L. Rev. 581 (1999) (analyzing state statutes); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Admin. L. Rev. 531, 576-79 (1999) (summarizing proposed statutory reforms to federal civil service provisions).

matically pressured by law enforcement strategies since September 11.<sup>21</sup> Analysis of the right to petition also has important implications for a range of legal doctrines grounded in the Petition Clause, from the right of access to courts to the *Noerr-Pennington* doctrine of anti-trust law to no-contact rules of legal ethics.<sup>22</sup> Finally, consideration of the petition rights of noncitizens in particular sheds light on the contemporary meaning of membership in a national community and on the limits of the governmental power to regulate the lives of territorially resident noncitizens.

Part I of this Article reviews the available empirical data on immigrant victimization and reporting rates regarding illegal activity, both criminal and civil. Part II addresses the Supreme Court's 1990 conclusion, based on a cursory historical analysis, that many immigrants, especially undocumented immigrants, are excluded from "the people" whose rights the Framers intended to secure by the First Amendment.<sup>23</sup> To challenge the Court's conclusion on its own historical terms, I examine the history of petitioning by noncitizens in the Founding era, from petitions by Acadian and Domingan refugees to those of Native American and foreign veterans of the Revolutionary War. A few of these narratives are presented here in a refutation of the Supreme Court's conclusion that the Framers intended to exclude immigrants from protections afforded "the people" in the Bill of Rights. In Part III, I develop a theory of petitioning as "extraordinary speech," contending that text, history, purpose, and reason support subjecting petitioning restrictions to close judicial scrutiny. Such an approach would cohere with the principles animating doctrines related to petitioning jurisprudence, including free speech, court access, unconstitutional conditions, and equal protection. Applying this theory to contemporary law enforcement agency policies, I conclude that some policies so burden the petition rights of immigrants as to violate the First Amendment.<sup>24</sup> Finally, Part IV attempts to anticipate and dispel principal objections to a theory of robust petition rights for

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<sup>21</sup> See *infra* notes 75-82 and accompanying text.

<sup>22</sup> See *infra* notes 289-98 and accompanying text.

<sup>23</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("While this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the . . . First . . . Amendment[ ] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.").

<sup>24</sup> I do not argue that immigrants who petition are thereby entitled to an affirmative grant of lawful immigration status. My conclusion is narrower: Immigrants who exercise their constitutional right to communicate a grievance to the government may not therefore be deported. An undocumented immigrant who reports a crime or otherwise petitions the government is of course subject to removal if the INS discovers her independently of her petitioning activity.

noncitizens, including in particular those based on the “plenary power” doctrine of immigration law.

## I

### IMMIGRANT ACCESS TO LAW ENFORCEMENT

Before analyzing immigrants’ right to petition, it is necessary to inquire whether law enforcement policies burden immigrant petitioning. Despite the emergence of a powerful “victim rights” movement in recent years,<sup>25</sup> criminologists and other social scientists have conducted almost no rigorous studies exploring whether, and if so why, immigrants underreport crimes.<sup>26</sup> Nor, despite the recent shift in the labor movement’s attitude toward immigrant workers,<sup>27</sup> have labor market researchers systematically determined whether immigrant workers underreport wage and hour, health and safety, antidiscrimination, or other workplace violations. There is some evidence, however, that immigrants, especially undocumented immigrants, hesitate to report crimes and other unlawful activity that they experience or witness.

#### A. *Communication Regarding Criminal Activity*

Intuitively, it seems likely that immigrants, especially undocumented immigrants, are deterred from reporting crimes they suffer for fear that they or a family member will be deported. Impressionistic statements by law enforcement officials<sup>28</sup> and agencies<sup>29</sup> support this

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<sup>25</sup> In 1996 Congress enacted substantial portions of the legislative agenda of the victim rights movement. See Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1214, 1229-32 (enacting Mandatory Victims Restitution Act of 1996) (codified at 18 U.S.C. §§ 3663-3664 (2000)).

<sup>26</sup> See Robert C. Davis et al., Access to Justice for Immigrants Who Are Victimized: The Perspectives of Police and Prosecutors, 12 *Crim. Just. Pol’y Rev.* 183, 186 (2001) (“Empirical data about victimization and crime reporting among immigrant populations are virtually nonexistent.”).

<sup>27</sup> For years, the AFL-CIO supported the “employer sanctions” provisions of the immigration laws, 8 U.S.C. § 1324a (2000), which obligate employers to verify the immigration status of their employees. In 2000, the AFL-CIO reversed course and called for their repeal, as well as enactment of a whistleblower status for immigrants who report labor violations and amnesty for many undocumented persons. See AFL-CIO Executive Council, Statement on Immigration (Feb. 16, 2000), at <http://www.aflcio.org/aboutaflcio/ecouncil/ec0216200b.cfm>.

<sup>28</sup> See, e.g., Michael Riley, Immigration Bill Has Police Uneasy: Officials Say They’re Unprepared to Add INS Cases, *Denver Post*, Apr. 22, 2002, at A1, 2002 WL 6565693 (quoting Denver Chief of Police Gerry Whitman as stating, “If a victim thinks they’re going to be a suspect (in an immigration violation), they’re not going to call us.”); Nat’l Immigration Forum, Opposition to Local Law Enforcement of Immigration Laws (May 22, 2002), at [http://www.immigrationforum.org/currentissues/articles/052002\\_quotes.htm](http://www.immigrationforum.org/currentissues/articles/052002_quotes.htm) (quoting Waco Chief of Police Alberto Melis as admitting, “I worry that there are people who don’t ask for help because they have fear of the police.” (citing Waco Police Chief

intuition, as does research on immigrant victimization and reporting in other countries.<sup>30</sup> In the United States, researchers have contended that, apart from immigration status, there are a number of barriers to immigrants accessing law enforcement services, including language difficulties<sup>31</sup> and prior experience with oppressive authorities in countries of origin.<sup>32</sup> Yet it appears that there have been no rigorous empirical studies examining the impact of immigration status alone on crime reporting.<sup>33</sup>

There have, however, been two recent exploratory studies of immigrant crime reporting. In the first, a team funded by the U.S. Department of Justice surveyed district attorneys and chiefs of police from the nation's fifty largest cities.<sup>34</sup> "[T]wo thirds (67%) of the officials stated that they believed that recent immigrants reported crimes less frequently than other victims."<sup>35</sup> The law enforcement officials stated that their beliefs were based on statements by community lead-

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Asks Immigrants Not to Be Afraid to Report Crimes, *Waco Trib.-Herald*, Apr. 15, 2002)); see also Philip B. Taft, Jr., *Policing the New Immigrant Ghettos*, in *Crime and the New Immigrants* 5, 15 (Harold M. Launer & Joseph E. Palenski eds., 1989) ("Some police officials believe that immigrant crime statistics and calls for service are artificially low. . . . Among illegal immigrants, victims are afraid of calling the police because they fear deportation.").

<sup>29</sup> See, e.g., Crime Victims Inst., Tex. Office of the Attorney Gen., *Final Report: The Impact of Crime on Victims: A Baseline Study on Program Service Delivery* 119 (1997-1998), [http://www.oag.state.tx.us/AG\\_Publications/pdfs/cvi\\_final\\_part1.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/cvi_final_part1.pdf) (recognizing that focus groups "expressed concern . . . [that] undocumented victims do not access [victim] services for themselves or their families. Fear of deportation and distrust of government agencies are barriers . . ."); Tex. Office of the Governor—Criminal Justice Div., *Victim Assistance Grant Program: 2001 Texas State Wide Assistance Report*, <http://www.ojp.usdoj.gov/ovc/fund/sbsmap/ovcpftx1.htm> (last updated June 26, 2002) (relating complaint that "there is a fear of contacting police and/or filing a police report due to immigration status and deportation issues").

<sup>30</sup> See, e.g., Peter L. Martens, *Immigrants as Victims of Crime*, 8 *Int'l Rev. of Victimology* 199, 211-12 (2001) (surveying literature and concluding that in Sweden, "immigrants more often than Swedes have been a victim of serious violence"); see also Hans-Joerg Albrecht, *Minorities, Crime, and Criminal Justice in the Federal Republic of Germany*, in *Minorities, Migrants, and Crime: Diversity and Similarity Across Europe and the United States* 86, 105 (Ineke Haen Marshall ed., 1997) (noting elevated victimization rates among ethnic minorities, mainly immigrants).

<sup>31</sup> William E. Davis, *Language and the Justice System: Problems and Issues*, 10 *Just. Sys. J.* 353 (1985).

<sup>32</sup> Mark R. Pogrebin & Eric D. Poole, *Culture Conflict and Crime in the Korean-American Community*, 4 *Crim. Just. Pol'y Rev.* 69 (1990).

<sup>33</sup> Davis et al., *supra* note 26, at 186.

<sup>34</sup> *Id.* The survey sought information on four topics: immigrant crime reporting, consequences of underreporting, reasons for underreporting, and official efforts to reduce barriers. *Id.* at 187; see also Davis & Erez, *supra* note 9 (providing preliminary report on same study).

<sup>35</sup> Davis et al., *supra* note 26, at 187. Of one hundred surveys sent, the researchers received sixty completed and nine partially completed questionnaires, including responses from thirty-seven police administrators and thirty-two prosecutors. *Id.* at 186.



ers, personal experience, media reports, and police data.<sup>36</sup> The same study related that thirty-five percent of the law enforcement officials believed “underreporting of crimes by recent immigrants posed a serious problem” for the criminal justice system as a whole, and another twenty-eight percent of respondents considered immigrant underreporting at least a minor problem.<sup>37</sup> Respondents also emphasized that one consequence of immigrant underreporting is the misallocation of law enforcement resources away from neighborhoods with large immigrant populations that, statistically, appear to be low-crime communities.<sup>38</sup> The respondents posited several possible causes for immigrant underreporting, particularly language barriers,<sup>39</sup> but also a “fear of becoming involved with the authorities,”<sup>40</sup> which may be a proxy for fear of deportation.<sup>41</sup>

A second study by the same authors attempted to survey immigrant crime victims themselves in Jackson Heights, Queens and Logan, Philadelphia.<sup>42</sup> The authors concluded that of the causal factors examined, only the type of crime was “a significant predictor of who reports crime.”<sup>43</sup> For several reasons, however, the methodology of this study undermines the usefulness of its conclusions. Most critically, the samples in both cities were drawn entirely from victims who *had reported* a crime, either to a law enforcement official or to a social service agency, and thus are not likely representative of the views of immigrants who *fail to report* crimes.<sup>44</sup> The authors acknowledge the study’s limitations, characterizing it as “exploratory” and conceding that neither the New York nor Philadelphia samples were representative of immigrant crime victims as a class.<sup>45</sup>

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<sup>36</sup> Davis & Erez, *supra* note 9, at 2.

<sup>37</sup> Davis et al., *supra* note 26, at 188. Eighteen percent of respondents answered that immigrant underreporting was not a problem and twenty-one percent had no opinion. *Id.* at 188-89.

<sup>38</sup> *Id.* at 188.

<sup>39</sup> *Id.* at 190.

<sup>40</sup> *Id.* at 189.

<sup>41</sup> “[F]ear of authorities and or deportation” was specifically mentioned by ten percent of the law enforcement respondents. *Id.* at 190.

<sup>42</sup> This second survey is analyzed in both Davis & Erez, *supra* note 9, at 4-7 and in Robert C. Davis et al., *Immigrants and the Criminal Justice System: An Exploratory Study*, 13 *Violence and Victims* 21 (1998).

<sup>43</sup> Davis & Erez, *supra* note 9, at 4-5; Davis et al., *supra* note 42, at 24-25.

<sup>44</sup> The Jackson Heights sample consisted of the 237 immigrant victims who had sought assistance from a local victim-services office in a one-year period, of whom the researchers interviewed eighty-seven by telephone. The Philadelphia sample appears even more problematic: It was a convenience sample of victims “nominated” by local police, prosecutors, and social service workers, all of whom had already “reported their victimizations to the police.” Davis et al., *supra* note 42, at 23-24.

<sup>45</sup> *Id.* at 23-24, 28.

### B. Communication Regarding Civil Violations

The civil violations most frequently encountered by immigrants are probably those that occur in the workplace,<sup>46</sup> where even undocumented immigrants are protected by some federal<sup>47</sup> and state<sup>48</sup> labor and employment laws. But very little empirical research has been done on the labor market conditions of undocumented immigrants.<sup>49</sup>

<sup>46</sup> Robert L. Bach, *Becoming American, Seeking Justice: The Immigrants' Legal Needs Study 8-9* (Inst. for Research on Multiculturalism and Int'l Labor, Binghamton Univ., 1996) (observing that in survey on legal needs of immigrants, "employment problems were the most frequent unmet needs," after adjustment for immigration status); *id.* at 28 (concluding that results of survey "show[ ] that employment was perhaps the most serious problem"). Another survey of 1653 documented and undocumented immigrants found that "[u]ndocumented immigrants report working in unsafe conditions at considerably higher rates relative to immigrants with legal status. Moreover, immigrants without legal status also report [to researchers] alleged wage and hour violations at considerably higher rates relative to documented workers." Chicago's Undocumented Immigrants, *supra* note 8, at v. "[Ten percent] of undocumented immigrants reported that they are/were paid less than the federal minimum wage . . . on their current/most recent job." *Id.* at 12.

<sup>47</sup> See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (accepting that undocumented worker was statutory "employee" under National Labor Relations Act, but finding him ineligible for back pay after wrongful discharge where employer was unaware of employee's unauthorized status); Nancy Montwieler, *EEOC Limits Undocumented Workers' Relief Based on Recent Supreme Court Decision*, 126 Daily Lab. Rep. (BNA) A-2 (July 1, 2002) (noting announcement by Equal Employment Opportunity Commission (EEOC) chair that, after *Hoffman Plastic*, it "will continue to investigate and protect undocumented workers against employment discrimination"); Scalia Clarifies Labor Department Positions on New Supreme Court Employment Rulings, 120 Daily Lab. Rep. (BNA) C-1 (June 21, 2002) (quoting Solicitor of Labor stating *Hoffman Plastic* decision "should not bar recovery of minimum wages" for undocumented workers under Fair Labor Standards Act (FLSA)); see also *NLRB v. Kolkka*, 170 F.3d 937 (9th Cir. 1999) (determining that undocumented workers are statutory "employees" eligible to vote in NLRB representation elections); *A.P.R.A. Fuel Oil Buyers Group, Inc. v. NLRB*, 134 F.3d 50 (2d Cir. 1997) (holding worker eligible for back pay under NLRA where employer knows of worker's undocumented status from date of hire); *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (applying FLSA to undocumented worker). See generally Michael J. Wishnie, *Emerging Issues for Undocumented Workers, Cross-Border Human Resources—Labor and Employment Issues*, Proc. NYU 54th Annual Conference on Labor (forthcoming 2003) (on file with the *New York University Law Review*) (analyzing labor and employment rights of undocumented workers after *Hoffman Plastic* decision).

<sup>48</sup> See, e.g., *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998) (holding undocumented worker eligible for workers' compensation benefits); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138 (La. Ct. App. 1996) (same); *Nizamuddowla v. Bengal Cabaret, Inc.* 415 N.Y.S.2d 685 (App. Div. 1979) (ruling that state minimum wage laws cover undocumented worker); see also Cal. Dep't of Indus. Relations, *All California Workers Are Entitled to Workplace Protection*, at <http://www.dir.ca.gov/QAundoc.html> (announcing labor agency will continue to seek back pay in retaliation cases "without regard to the worker's immigration status" after *Hoffman Plastic*) (last visited Apr. 8, 2003).

<sup>49</sup> Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States*, 12 J. Population Econ. 91, 93 (1999) (concluding that undocumented status results in wage penalty but conceding that "little systematic research exists on the labor market status of ille-

Furthermore, though common sense suggests that undocumented workers are reluctant to report labor and employment violations to law enforcement agencies for fear they will expose themselves to deportation—and that this reluctance fosters further exploitation<sup>50</sup>—there has been little empirical research on the extent and causes of immigrant underreporting. A 2001 survey of documented and undocumented immigrants by the Center for Urban Economic Development at the University of Illinois-Chicago found widespread underreporting of workplace safety violations.<sup>51</sup> Further, “[o]f the reasons identified for not reporting [unsafe working conditions] to OSHA [the Occupational Safety and Health Administration] . . . 30% relate specifically to the fear that workers might be deported if they report the conditions.”<sup>52</sup> The same survey indicated that immigrants

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gal immigrants”); see also Julie A. Phillips & Douglas S. Massey, *The New Labor Market: Immigrants and Wages After IRCA*, 36 *Demography* 233, 244 (1999) (finding significant wage penalty based on immigration status after Immigration Reform and Control Act of 1986).

<sup>50</sup> See, e.g., Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 *Wis. L. Rev.* 955, 986 (“Undocumented immigrants commonly decline to report private or official abuse and are frequently unwilling to pursue civil claims in court . . . .”); *id.* at 993-94 (contending that likelihood that typical undocumented worker would report wage and hour or safety violations “to the state . . . declined due to her fear of exposing herself to deportation”); see also Building Understanding, *Creating Change: A Report on the AFL-CIO Forums on Immigrant Workers’ Rights* 5 (2000) (“Many immigrant workers, documented and undocumented, work and live in fear of the INS, and as a result are wary of asserting their rights under our labor and employment laws.”); Foo, *supra* note 12, at 2182 (explaining that fear of retaliation via INS keeps immigrant workers “silent about the abuses they endure in sweatshops”); Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 *Harv. C.R.-C.L. L. Rev.* 407, 417 (1995) (“[Federal and state laws] promote the creation of an immigrant workforce whose fear of losing its jobs and being deported are easily exploitable.”); Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 *Yale J. Int’l L.* 195, 201 (1992) (arguing that undocumented workers “are unwilling to assert their [labor] rights for fear of deportation”).

<sup>51</sup> Of the study’s respondents, nineteen percent of documented immigrants and thirty-six percent of undocumented immigrants reported unsafe working conditions, but “only 6% of immigrants who indicated that they work in unsafe conditions said that they had contacted [OSHA].” *Chicago’s Undocumented Immigrants*, *supra* note 8, at 27-28; see also Occupational Safety and Health Administration’s *Efforts to Protect Immigrant Workers: Hearing Before the Subcomm. on Employment, Safety, and Training of the S. Comm. on Health, Educ., Labor and Pensions*, (Feb. 27, 2002) (statement of John L. Henshaw, Asst. Sec’y of Labor for Occupational Safety and Health) [hereinafter Henshaw] (recognizing Subcommittee’s concern that “immigrants, and particularly Hispanic immigrants, face a greater risk of occupational injury or death than other populations”), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=TESTIMONIES&p\\_id=286&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=286&p_text_version=FALSE).

<sup>52</sup> *Chicago’s Undocumented Immigrants*, *supra* note 8, at 28.

experience a significant number of wage and hour violations but did not explore the extent of reporting to labor officials.<sup>53</sup>

In addition, a nonscientific survey of lay advocates and attorneys conducted in 1995 by the National Immigration Project of the National Lawyers Guild (NLG) supports the view that undocumented workers underreport labor violations for fear of deportation.<sup>54</sup> Finally, a collection of statements by lay advocates and attorneys in immigrant communities gathered by Yale Law School students in 1998<sup>55</sup> also recorded a strong consensus that undocumented workers underreport labor and employment violations for fear of deportation.<sup>56</sup>

Law enforcement agencies themselves have recognized that undocumented workers underreport workplace violations. In 1998, the U.S. Department of Labor (DOL) declared that a "key goal" of its revised information-sharing agreement with INS was "to allay fears in the immigrant community that prevent complaints about labor abuses by unscrupulous employers from being filed."<sup>57</sup> OSHA officials con-

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<sup>53</sup> Id. at 29 ("Analysis of the data indicates a strong positive correlation between undocumented status and complaints [to survey researchers] related to the underpayment or non-payment of wages . . . and working without breaks . . .").

<sup>54</sup> Ruddick, *supra* note 12, at 1. NLG researchers canvassed community organizations, immigration and labor lawyers, legal service providers, and union organizers in six states with large immigrant populations. The respondents reported "[a]lmost unanimously," id. at 1, that undocumented workers are reluctant to report labor and employment violations to law enforcement agencies for fear of retaliation by the INS. See id. at 5 (providing examples of "undocumented workers' desire to avoid all contact with the federal DOL").

<sup>55</sup> The statements were collected in a petition filed pursuant to the North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499, the labor side agreement to the North American Free Trade Agreement. See Yale Law Sch. Workers' Rights Project et al., *Petition on Labor Law Matters Arising in the United States* (1998) (on file with the *New York University Law Review*) [hereinafter *Petition*].

<sup>56</sup> *Petition*, *supra* note 55, at 22-26; see also Declaration of Steven T. Nutter, Western States Regional Director of UNITE ¶ 5 ("[W]orkers fear that reporting employer wage and hour violations will lead to an INS inspection or raid."), included in *Petition*, *supra* note 55; Declaration of Julie A. Su, Asian Pacific American Legal Center of Southern California ¶ 8 ("Workers are fearful that seeking redress for violations of the minimum wage laws from a federal agency may lead to deportation."), included in *Petition*, *supra* note 55.

<sup>57</sup> U.S. Newswire, Labor Department, INS Sign Memorandum of Understanding to Enhance Labor Standards Enforcement to Aid U.S. Workers, Nov. 23, 1998, LEXIS, Nexis Library, U.S. Newswire File. The revised MOU itself states that it is intended to reduce the ability of employers to "use the enforcement powers of the [INS] to intimidate or punish" undocumented workers who report labor standards violations. 1998 MOU, *supra* note 18, at 2-3; see also Steven Mandel, U.S. Dep't of Labor, Remarks at U.S. Department of Justice Press Conference (Apr. 23, 1998), <http://www.usdoj.gov/archive/ag/speeches/1998/apr2398.htm> (acknowledging that immigrant workers in certain industries "tend to be very vulnerable, because they tend to be undocumented and they are often unwilling to come to us with complaints"); U.S. General Accounting Office, GAO-02-861T, *Immigration Enforcement: Challenges to Implementing the INS Interior Enforcement Strategy 7* (2002) (statement by Richard M. Stana before the Subcomm. on Immigr. and Claims,

cede that “sometimes workers are afraid to speak out about unsafe or unhealthful conditions for fear of being deported.”<sup>58</sup> Similarly, Department of Justice officials have acknowledged that “[u]nauthorized workers are particularly vulnerable to threats to report them to INS.”<sup>59</sup> Regional officials of federal labor and employment agencies have also registered their belief that immigrants underreport violations.<sup>60</sup>

In short, there is little empirical data but widespread consensus among law enforcement officials, lawyers, lay advocates, and immigrants themselves that noncitizens tend to underreport illegal activity, due in part to fear of deportation.<sup>61</sup> Recognition of a robust right to petition—one that forbids law enforcement agencies from reporting immigrants to the Immigration and Naturalization Service solely because the noncitizen has exercised her petition rights—would encourage immigrants to report illegal activity and assist government agencies in enforcing the laws against those who prey on both immigrants and citizens.

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House Comm. on the Judiciary), <http://www.house.gov/judiciary/stana061902.pdf> (“If employees perceived that [U.S. Department of] Labor investigators were trying to determine their immigration status and possibly report those who may be unauthorized to INS, it would have a ‘chilling effect’ on employees’ willingness to report workplace violations.”).

<sup>58</sup> Henshaw, *supra* note 51.

<sup>59</sup> U.S. Equal Employment Opportunity Comm’n (EEOC), Dep’t of Justice, No. 915.002, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Oct. 26, 1999), <http://www.eeoc.gov/docs/undoc.html>, rescinded by Recission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (June 27, 2002), <http://www.eeoc.gov/docs/undoc-rescind.html>, reprinted in 2 EEOC Compliance Manual (BNA) No. 289, at § 622:0065 (2002).

<sup>60</sup> See, e.g., L.M. Sixel, Aggressive Stance Urged for EEOC: Witnesses Describe Abuse of Immigrants, *Houston Chron.*, June 23, 1999, at C1 (commenting on acknowledgment by regional DOL official that undocumented workers do not report sexual harassment and violations of wage-and-hour laws for fear of deportation).

<sup>61</sup> While not implicating concerns about criminal or labor law enforcement, research into immigrant underreporting of medical problems reveals a similar dynamic. See, e.g., Marc L. Berk & Claudia L. Schur, The Effect of Fear on Access to Care Among Undocumented Latino Immigrants, 3 *J. Immigrant Health* 151, 153-54 (2001) (observing that, in survey of 756 undocumented Latino immigrants, thirty-nine percent reported “that they had been afraid of not receiving medical service because of their undocumented status” and “one-third of undocumented Latinos who expressed fear were unable to obtain at least one of the . . . services” they sought); Sana Loue et al., The Effect of Immigration and Welfare Reform Legislation on Immigrants’ Access to Health Care, Cuyahoga, and Lorain Counties, 2 *J. Immigrant Health* 23, 29 (2000) (“Although not reaching statistical significance . . . undocumented individuals consistently indicated that they would refrain from seeking care or delay seeking care due to fear of the immigration consequences.”).

## II

## IMMIGRANTS AND THE RIGHT TO PETITION

The threshold question in examining immigrant rights under the Petition Clause is whether the Clause applies to noncitizens at all. In 1990, the Supreme Court suggested that noncitizens, particularly undocumented persons, are excluded from the protections enshrined in the First and Fourth Amendments. The statements arose in *United States v. Verdugo-Urquidez*,<sup>62</sup> a case in which the Court concluded that the Fourth Amendment did not compel suppression of evidence obtained by U.S. law enforcement officials who conducted a warrantless search of a Mexican citizen's private home in Mexico.<sup>63</sup> Relying on a "textual exegesis" that he conceded was "by no means conclusive,"<sup>64</sup> Chief Justice Rehnquist concluded for the Court that "'the people' protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>65</sup>

The rationale for the Court's decision was largely originalist, driven by its examination of the text of the Constitution,<sup>66</sup> the drafting history of the Fourth Amendment,<sup>67</sup> and its determination that "'the people' seems to have been a term of art."<sup>68</sup> Most importantly for the purposes of this Article, the Court declared that the applicability of the Fourth Amendment to "illegal aliens in the United States" was an

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<sup>62</sup> 494 U.S. 259 (1990).

<sup>63</sup> *Id.* at 261-62.

<sup>64</sup> *Id.* at 265. Justice Brennan's dissent, in contrast, included a detailed review of the history of the Fourth Amendment. *Id.* at 286-89 (Brennan, J., dissenting).

<sup>65</sup> *Id.* at 265.

<sup>66</sup> *Id.* at 265-66.

<sup>67</sup> *Id.* at 266.

<sup>68</sup> *Id.* at 265-66 (contrasting term "the people" in Fourth Amendment to terms "person" and "accused" in Fifth and Sixth Amendments). The Court's textual analysis was limited to listing provisions of the Constitution, pointing out that the term "the people" is employed in the Preamble, the First, Second, Fourth, Ninth, and Tenth Amendments, and Article I, Section 2, Clause 1, whereas "person" is used in the Fifth and Sixth Amendments. *Id.* As for the history of the Fourth Amendment in particular, Chief Justice Rehnquist offered a brief overview of colonial opposition to British writs of assistance, noted opposition to the Federalist claim that a Bill of Rights was unnecessary because the new federal government possessed limited powers, and cited no evidence distinguishing searches or seizures of citizens and noncitizens. Nevertheless, the Court then asserted:

The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.

*Id.* at 266.

open question,<sup>69</sup> as undocumented persons are not obviously among “the people” protected from an unreasonable search and seizure, notwithstanding prior decisions that assumed undocumented immigrants possess Fourth Amendment rights.<sup>70</sup> Somewhat bafflingly, Justice Kennedy disagreed with Chief Justice Rehnquist’s analysis but nonetheless joined the majority opinion in full, providing the fifth vote for the Court’s opinion.<sup>71</sup>

The Court’s intimation that noncitizens are not included among “the people” protected by the Constitution recalls some of the most shameful moments of American legal history, from Justice Taney’s decision in *Dred Scott*<sup>72</sup> back to the Federalist defenses of the 1798 Alien and Sedition Acts.<sup>73</sup> Commentary has condemned the *Verdugo-Urquidez* Court’s conclusory statements, primarily in the context of Fourth Amendment jurisprudence.<sup>74</sup> Justice Kennedy’s evident disa-

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<sup>69</sup> Id. at 272; see also id. at 283 n.6 (Brennan, J., dissenting) (“[The majority] implicitly suggests that the Fourth Amendment may not protect illegal aliens in the United States.”). Justice Stevens concluded that legal immigrants were among “those ‘people’ who are entitled to the protection of the Bill of Rights,” id. at 279 (Stevens, J., concurring in judgment), but reserved comment “on illegal aliens’ entitlement to the protections of the Fourth Amendment.” Id. at 279 n.\*.

<sup>70</sup> See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (analyzing and rejecting merits of Fourth Amendment claim of undocumented immigrant).

<sup>71</sup> *Verdugo-Urquidez*, 494 U.S. at 276 (Kennedy, J., concurring) (“I cannot place any weight on the reference to ‘the people’ in the Fourth Amendment as a source of restricting its protections.”).

<sup>72</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-06, 409-11 (1857) (holding that slaves and free blacks alike are not among “the people” whose rights are safeguarded by Constitution); id. at 411 (“[The] negro race [is] a separate class of persons, and . . . they were not regarded as a portion of the people or citizens of the Government . . .”).

<sup>73</sup> See Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 54 (1996) (explaining that Federalist proponents of Alien and Sedition Acts argued that “aliens were not parties to the Constitution; it was not made for their benefit; and they had no rights under it”).

<sup>74</sup> See, e.g., Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive United States v. Verdugo-Urquidez?*, 56 Mo. L. Rev. 213, 228 (1991) (criticizing textual exegesis of *Verdugo-Urquidez* plurality as “strained” and in contradiction with earlier Supreme Court precedent); Rene L. Valladares & James G. Connell, III, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 Am. Crim. L. Rev. 1293, 1295, 1333 (1997) (recognizing various commentators who have “properly criticized” *Verdugo-Urquidez* because “[t]he existence of a Fourth Amendment violation must be determined from the circumstances of the search, and not from the immigration status of the person searched”); Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants’ Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. Cal. L. Rev. 999, 1012-15 (1992) (criticizing *Verdugo-Urquidez* Court’s Fourth Amendment analysis); cf. Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Guitterez and the Tort Law/Immigration Law Parallel*, 35 Harv. C.R.-C.L. L. Rev. 57, 69 (2000) (disfavoring consequences of “substantial connection” test); Matthew B. Kurek, Note, *United States v. Guitterez: A Functional Approach to a Vexing Issue*, 30 U. Tol. L. Rev. 359, 381 (1999)

greement with the distinction between "people" and "person," not to mention the extraterritorial circumstances of the search at issue in *Verdugo-Urquidez*, should have limited the impact of the decision. But Chief Justice Rehnquist's opinion has had very real consequences for noncitizens physically resident within the United States.

Since *Verdugo-Urquidez*, federal and state courts have treated the applicability of the First and Fourth Amendments to legal and illegal noncitizens as unsettled,<sup>75</sup> and in several cases, the U.S. Department of Justice has argued that neither the First nor Fourth Amendment applies to undocumented persons.<sup>76</sup> The *Verdugo-Urquidez* statements may have contributed to the Court's subsequent rejection of First Amendment arguments by immigrants singled out for deportation based on their disfavored speech and associational activities.<sup>77</sup> And they may have emboldened Congress to restrict First

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(criticizing "substantial connection" test of *Verdugo-Urquidez* as "inconsistent"); Joseph Ricchezza, Note, Are Undocumented Aliens "People" Persons Within the Context of the Fourth Amendment?, 5 Geo. Immigr. L.J. 475, 499 (1991) (labeling range of opinions in *Verdugo-Urquidez* "[a] morass").

<sup>75</sup> See *United States v. Barona*, 56 F.3d 1087, 1093-94 (9th Cir. 1995) (observing that after *Verdugo-Urquidez*, applicability of Fourth Amendment even to lawful resident aliens is "yet to be decided"); *United States v. Guitierrez*, 18 Immigr. Rep. (MB) A3-26, A3-31 (N.D. Cal. 1997) (citing *Verdugo-Urquidez* in denying motion to suppress on grounds that criminal defendant was undocumented immigrant and not covered by Fourth Amendment), available at 1997 U.S. Dist. LEXIS 16446, \*16-17, vacated, 983 F. Supp. 905, 912-16 (N.D. Cal. 1998) (reversing prior ruling and holding undocumented defendant may invoke Fourth Amendment), rev'd on other grounds, 203 F.3d 833 (9th Cir. 1999) (unpublished table decision), available at 1999 U.S. App. LEXIS 32230; *Torres v. State*, 818 S.W.2d 141, 143 n.1 (Tex. Crim. App. 1991) (citing *Verdugo-Urquidez* and holding undocumented defendant may not raise Fourth Amendment objection to search or seizure), rev'd en banc on other grounds, 825 S.W.2d 124 (Tex. Crim. App. 1992).

<sup>76</sup> See, e.g., *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995) (rejecting INS argument that "the foreign policy powers which permit the political branches great discretion to determine which aliens to exclude from entering this country . . . authorize those political branches to subject aliens who reside here to a fundamentally different First Amendment associational right"), vacated on other grounds, 525 U.S. 471 (1999); *Guitierrez*, 983 F. Supp. at 911 ("[T]he Government argues that in the context of illegal or undocumented aliens courts are required to determine, as a threshold matter, whether a criminal defendant has a sufficient 'connection' to the United States so as to fall within the ambit of the Fourth Amendment.").

<sup>77</sup> Some have described the Court's decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), which held that a claim of selective enforcement in immigration proceedings generally must be raised only in administrative proceedings, as indicating that immigrants lack First Amendment rights. See Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 Harv. C.R.-C.L. L. Rev. 183, 205 (2000) ("[In *Reno v. American-Arab Anti-Discrimination Committee*, the Court] implied that aliens who were unlawfully present in the United States did not enjoy the protection of the First Amendment."). But see Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 Geo. Immigr. L.J. 313, 314 (2000) ("Although it is possible that members of the majority do believe that the First Amendment does not sig-



Amendment activities by immigrants: In addition to debating campaign finance legislation that would prohibit contributions by noncitizens,<sup>78</sup> Congress enacted sweeping antiterrorism legislation in 1996<sup>79</sup> and 2001<sup>80</sup> targeting immigrants for deportation based on speech or political affiliation,<sup>81</sup> and even familial associations.<sup>82</sup> Accordingly, the inclusion of noncitizens among “the people” whose right to petition is guaranteed by the First Amendment cannot be assumed.

Naturally, the obscure Petition Clause has not been at the center of the debate about the applicability of the First and Fourth Amendments to noncitizens. Nonetheless, the reasoning of the *Verdugo-Urquidez* majority could encompass the Petition Clause along with the rest of the rights guaranteed to “the people” by the First and Fourth Amendments.<sup>83</sup> But examination of the history of petitioning

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nificantly constrain federal deportation power, that is not what the opinion says, and may not be a necessary implication of its reasoning.”).

<sup>78</sup> See Note, Campaigns, Contributions and Citizenship: The First Amendment Right of Resident Aliens to Finance Federal Elections, 38 B.C. L. Rev. 771, 773-75 (1997) (providing overview of legislation proposed in wake of 1996 campaign finance scandals); Note, “Foreign” Campaign Contributions and the First Amendment, 110 Harv. L. Rev. 1886, 1890 (1997) (same).

<sup>79</sup> See Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of U.S.C., including titles 8 and 18) [hereinafter IIRIRA].

<sup>80</sup> Uniting and Supporting America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.).

<sup>81</sup> See 8 U.S.C. § 1182(a)(3)(B)(i)(V) (2000) (establishing “membership” in certain organizations as grounds for inadmissibility); § 1182(a)(3)(B)(iv)(IV)-(V) (defining to “[e]ngage in terrorist activity” as including solicitation of funds or recruitment of personnel); see also *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491-92 (1999) (rejecting challenge to deportation of Palestinian activists based on speech and associational activities).

<sup>82</sup> See § 1182(a)(3)(B)(i)(VII) (“[Any alien who] is the spouse or child of an alien who is inadmissible [as terrorist] is inadmissible . . .”). These modern antiterrorism immigration provisions follow a long, often shameful, history of singling out immigrants for deportation based on their disfavored speech or association. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (rejecting First Amendment challenge to deportation of alleged members of Communist Party); *Bridges v. Wixon*, 326 U.S. 135 (1945) (vacating deportation order that had been based on labor activist’s alleged membership in and affiliation with Communist Party); *Schneiderman v. United States*, 320 U.S. 118 (1943) (invalidating denaturalization proceeding brought on grounds that citizen was Communist at time of application for citizenship); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (rejecting First Amendment challenge to exclusion order against anarchist).

<sup>83</sup> Even crediting the *Verdugo-Urquidez* distinction between “people” and “persons,” incorporation of the Petition Clause via the Fourteenth Amendment Due Process Clause, which protects all “persons,” compels the conclusion that noncitizens have a federal constitutional right to petition state and local authorities for the redress of grievances. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The fundamental concept of liberty

at the time of the Founding demonstrates that the right was exercised by noncitizens, including immigrants, Native Americans, and slaves, as well as by other marginalized members of the polity, such as women, Jews, and free blacks.<sup>84</sup> Foreigners, including those with little “connection with this country,”<sup>85</sup> successfully petitioned Congress, at times with the support of Framers like James Madison and Alexander Hamilton.<sup>86</sup> Moreover, the concept of “citizenship,” like the degree of one’s “connection with this country,” was ambiguous at the Founding and did not function as the sort of classifier of rights claimed by the *Verdugo-Urquidez* Court.<sup>87</sup>

In the absence of evidence that the drafters of the First Amendment sought to alter the scope or practice of the right to petition by limiting its exercise only to “persons who are part of a national community or who have otherwise developed sufficient connection with this country”<sup>88</sup>—and research has revealed none—the rich historical evidence of noncitizen petitioning confirms that the Petition Clause protects all persons present in the nation, regardless of their immigration status. It thereby contradicts the *Verdugo-Urquidez* Court’s conclusion that the Framers intended to exclude noncitizens, or at least those without a sufficient connection to the national community, from the protections guaranteed to “the people” by the First and Fourth Amendments. I do not contend that history is determinative in the interpretation of constitutional text. But if the *Verdugo-Urquidez*

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embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.”); Laurence H. Tribe, *American Constitutional Law* 772 (2d ed. 1988) (“[T]he due process clause [of the Fourteenth Amendment] has been held to protect . . . the first amendment freedom [ ] [to] petition . . .”); cf. *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (holding that undocumented children are “persons” protected by Fourteenth Amendment).

<sup>84</sup> Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *Fordham L. Rev.* 2153, 2182 (1998) (noting petitioning in colonial era by “those usually conceived of today as having been completely outside of direct participation in the formal political culture, namely women, blacks (whether free or slave), Native Americans, and, perhaps, even children” (citations omitted)); Norman B. Smith, “Shall Make No Law Abridging . . .”: An Analysis of the Neglected, but Nearly Absolute, Right of Petition, 54 *U. Cin. L. Rev.* 1153, 1178 n.159 (1986) (“Before universal suffrage, those who did not possess the franchise frequently resorted to petitioning as a means of influencing governmental action. This group included those who did not meet the property qualifications, slaves and free blacks, women, and aliens.”).

<sup>85</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>86</sup> See *infra* Parts II.C.1 (discussing right to petition under colonial governments), II.C.2 (discussing practice of states under Articles of Confederation), II.C.3 (discussing drafting of petition clause), and II.C.4 (discussing petitioning by noncitizens to First Congress).

<sup>87</sup> See *infra* notes 134-35 and accompanying text (arguing that concept of “citizenship” was “unsettled” at time of Founding).

<sup>88</sup> *Verdugo-Urquidez*, 494 U.S. at 265.

principle is to be defended, it must be done on grounds other than the historical arguments relied on by the Court.

### A. *English Traditions*

Petitioning is an ancient tradition,<sup>89</sup> one that by some accounts gave rise to the more familiar expressive freedoms of speech, assembly, and the press.<sup>90</sup> Foundational English documents from the Magna Carta<sup>91</sup> to the Bill of Rights of 1689<sup>92</sup> recognized a right to petition the King and Parliament for redress of both public and private grievances.<sup>93</sup> As one historian of English petitioning concluded, "By the time of the American Revolution, petitioning had become extremely popular in England; it was no longer checked or penalized and was frequently successful."<sup>94</sup>

English law did not limit petitioning based on citizenship status. Though seventeenth-century English law recognized distinctions be-

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<sup>89</sup> On early English petitioning, see Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 596-603 (1999) (summarizing development of right to petition from Magna Carta to mid-eighteenth century); see also Mark, *supra* note 84, at 2163 & n.24 (dating practice of petitioning to before Magna Carta); Smith, *supra* note 84, at 1154 (naming "the earliest petition recorded in our Anglo-American constitutional history" as petition in 1013 to Aethelred the Unready, enumerating grievances and summoning king who had fled England during Danish invasion).

<sup>90</sup> James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 904 (1997) ("As a lawful mode of protest, the right to petition gave rise to the freedoms of speech, press, and assembly . . ."); Smith, *supra* note 84, at 1168 ("Petitioning's cognate rights, speech, press, and assembly, were late to emerge as constitutional liberties.").

<sup>91</sup> The Magna Carta provides:

[I]f we or our justiciar or our bailiffs or any of our servants offend against anyone in any way, or transgress any of the articles of peace or security, and the offence is indicated to four of the aforesaid twenty-five barons, those four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we have it redressed without delay.

J.C. Holt, *Magna Carta* 470-71 (2d ed. 1992) (quoting Magna Carta (1215)).

<sup>92</sup> Bill of Rights, 1689, 1 W. & M. Stat. 2, c. 2 (Eng.) (declaring that "it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal").

<sup>93</sup> Mark, *supra* note 84, at 2165-66; Smith, *supra* note 84, at 1156 (describing how "petitioning emerged as the medium for both individual and general requests for legal change and adjustment").

<sup>94</sup> Smith, *supra* note 84, at 1166; see also Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4, 20 (2001) ("[T]here was consensus about a great deal of fundamental law, particularly in the eighteenth century . . . includ[ing] . . . the existence of certain inalienable rights, such as the right . . . to petition the government . . ."); Mark, *supra* note 84, at 2163 ("[R]equests for a redress of grievances initially had a tenuous quality and only after centuries of experience became such a part of English political life that they lay at the core of English constitutionalism.").

tween subjects and noncitizens, as well as gradations within each category,<sup>95</sup> and though English "subjectship" law imposed a range of disabilities on those who were not subjects, such as restrictions on ownership of real property,<sup>96</sup> all persons were capable of and did participate in petitioning.<sup>97</sup> As Professor Gregory Mark has demonstrated: "[Petitions] were a mechanism, indeed the formal mechanism, whereby the disenfranchised joined the enfranchised in participating in English political life. . . . At some point or another, members of virtually every stratum of society exercised the right on a wide variety of topics . . . ."<sup>98</sup>

### B. *Citizenship and Petitioning in Colonial America*

Robust petitioning was also a central feature of political life in the American colonies.<sup>99</sup> Petitioning in the colonies dates to within days of the arrival of the first British settlers in Jamestown, when "a murmur and grudg[e] against certayne preposterous proceedings, and inconvenyent Courses" prompted a petition by disgruntled colonists to the Jamestown Council.<sup>100</sup>

As in England, petitioning facilitated resolution of private disputes, supplied colonial assemblies with crucial information regarding the concerns and views of residents, and enabled assemblies to expand their legislative jurisdictions. Not insignificantly, it also ensured that even the disenfranchised had an opportunity to participate in political

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<sup>95</sup> James H. Kettner, *The Development of American Citizenship, 1608–1870*, at 5 (1978) (listing different classes of subjects and aliens, including natural-born subjects, naturalized subjects, and denizens, as well as perpetual aliens, alien friends, and alien enemies).

<sup>96</sup> *Id.* at 5–9.

<sup>97</sup> 1 William Blackstone, *Commentaries* \*143 (describing "the right of petitioning the king, or either house of parliament, for the redress of grievances" as right "*appertaining to every individual*" (emphasis added)).

<sup>98</sup> Mark, *supra* note 84, at 2169–70; see also *id.* at 2170 ("Virtually everyone . . . had the right to petition.").

<sup>99</sup> Raymond C. Bailey, *Popular Influence upon Public Policy: Petitioning in Eighteenth-Century Virginia* 166 (1979) ("[B]y 1607 the right of petition had long been recognized as a fundamental right of free Englishmen, and Virginians quickly initiated its use in the colony."); Andrews, *supra* note 89, at 604 ("[M]ost colonists viewed the right to petition their local governmental bodies as a fundamental 'common law' right."); Kramer, *supra* note 94, at 27 (describing "the right to petition, together with its companion, the right of free speech," as second in importance only to voting as means of popular interpretation and enforcement of eighteenth-century fundamental law); Mark, *supra* note 84, at 2175 ("Not only did the colonies explicitly or implicitly affirm the right to petition, they did so repeatedly. In no case did the colonial affirmation of the right narrow the English right." (footnotes omitted)).

<sup>100</sup> Bailey, *supra* note 99, at 14–15 (quoting notes of Council and citing *The Works of Captain John Smith* liii (Edward Arber ed., 1967)).

life.<sup>101</sup> Petitioning was central to political life. More than half of all statutes enacted in six legislative sessions in eighteenth-century Virginia, for example, began as popular petitions.<sup>102</sup> Similarly, in the Connecticut Assembly's May 1773 session, "over five-sixths of the resolutions were direct responses to residents' petitions."<sup>103</sup>

A variety of colonial instruments memorialized the right to petition. Colonial charters and letters patent generally conferred the rights of Englishmen upon colonists,<sup>104</sup> at least as they existed as of the date the document was executed,<sup>105</sup> and thereby conveyed the right to petition across the Atlantic. Indigenous colonial documents also codified the right to petition, beginning with the Body of Liberties adopted by the Massachusetts Bay Colony in 1641, which explicitly guaranteed the right to noncitizens: "Every man *whether Inhabitant or fforreiner*, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting . . . to present any necessary motion, complaint, petition, Bill or information . . . ." <sup>106</sup> Other colonies uniformly recognized and accepted the right to petition,<sup>107</sup> although not all were as explicit as Massachusetts that foreigners enjoyed that right.<sup>108</sup>

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<sup>101</sup> Smith, *supra* note 84, at 1172. Although there were efforts to punish colonial petitioners for seditious libel, in the years before the Revolution there were "no more than half a dozen prosecutions . . . and all of them resulted in acquittals or convictions reversed on appeal." *Id.* at 1171.

<sup>102</sup> Bailey, *supra* note 99, at 64.

<sup>103</sup> Stephen A. Higginson, Note, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 144 n.9 (1986).

<sup>104</sup> See Bailey, *supra* note 99, at 13-14 (reviewing language of Virginia, Massachusetts, Maryland, and Carolina charters); Mark, *supra* note 84, at 2175 & n.92 (reprinting language of charters); see also 8 Documentary History of the First Federal Congress of the United States of America xiii (Kenneth R. Bowling et al. eds., 1998) [hereinafter Documentary History] ("As part of their constitutional patrimony, the earliest English immigrants to North America carried with them the Englishman's assumptions about the right to petition.").

<sup>105</sup> See William F. Duker, A Constitutional History of Habeas Corpus 95-98 (1980) (demonstrating that conquest of infidel lands such as American colonies resulted in extension of law of England in force at time of conquest, insofar as "was applicable to colonial life"); see also 1 Joseph Story, Commentaries on the Constitution of the United States § 156 (2d ed. Boston, Charles C. Little & James Brown 1851) (stating that in each colonial charter, "either expressly or by necessary implication it is provided that the laws of England so far as applicable shall be in force there").

<sup>106</sup> A Coppie of the Liberties of the Massachusetts Collonie in New England (1641) (emphasis added), reprinted in 1 Documents on Fundamental Human Rights: The Anglo-American Tradition 122, 124 (Zechariah Chafee, Jr. ed., 1963) [hereinafter Documents on Fundamental Human Rights].

<sup>107</sup> See, e.g., Higginson, *supra* note 103, at 147-49 (summarizing enactment of petitioning rules in colonial Connecticut).

<sup>108</sup> Colonial Virginia, for example, declared "[t]hat it is the undoubted privilege of the *inhabitants* of this colony, to petition their sovereign for redress of grievances." Virginia

Quasi-national documents also confirmed recognition of a right to petition. In 1765, the Stamp Act Congress affirmed "the right of the British subjects in these colonies to petition the King or either House of Parliament,"<sup>109</sup> and the First Continental Congress declared that the colonists "have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal."<sup>110</sup> The Declaration of Independence itself recited that "We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."<sup>111</sup>

In contrast to the historical analysis in *Verdugo-Urquidez*, but consistent with English traditions, petitioning was a right exercised by all members of colonial society<sup>112</sup> without regard to a petitioner's formal membership in "a national community or . . . otherwise [having] developed sufficient connection with this country."<sup>113</sup> Disenfranchised white males, such as prisoners<sup>114</sup> and those without property,<sup>115</sup> as well as women,<sup>116</sup> free blacks,<sup>117</sup> Native Americans,<sup>118</sup> and

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Resolutions (May 16, 1769) (emphasis added), reprinted in 1 Documents on Fundamental Human Rights, *supra* note 106, at 176, 176).

<sup>109</sup> Declaration of Rights and Grievances (1765), reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 196, 198 (1971).

<sup>110</sup> Declarations and Resolves of the First Continental Congress (1774), reprinted in 1 Schwartz, *supra* note 109, at 215, 217.

<sup>111</sup> The Declaration of Independence para. 30.

<sup>112</sup> Bailey, *supra* note 99, at 41 ("[A]ll classes [in colonial Virginia] utilized petitions to express their requests and grievances."); *id.* at 43 ("The right of petition was not restricted by any requirements involving class, sex, or even race."); Mark, *supra* note 84, at 2175 ("In no case did the colonial affirmation of the right [to petition] narrow the English right."); Higginson, *supra* note 103, at 153 ("Not only the enfranchised population [of colonial Connecticut], but also unrepresented groups—notably women, felons, Indians, and, in some cases, slaves—represented themselves and voiced grievances through petitions." (footnotes omitted)); see also Ruth Bogin, *Petitioning and the New Moral Economy of Post-Revolutionary America*, 45 *Wm. & Mary Q.* 391, 392 (1988) (examining state petitions from mid-1760s to mid-1790s and concluding "[p]etitions, although used by all levels of American society, give us the voice of people who seldom if ever proclaimed their social goals and political opinions in other written forms").

<sup>113</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>114</sup> Petitions by disenfranchised prisoners are discussed in Mark, *supra* note 84, at 2181-82, and Higginson, *supra* note 103, at 146.

<sup>115</sup> Bailey, *supra* note 99, at 43-44 (describing petitions from indigent Virginians).

<sup>116</sup> *Id.* at 44 (discussing petitions from women in colonial Virginia); Mark, *supra* note 84, at 2183-84 (same in colonial Georgia); Higginson, *supra* note 103, at 153 n.74 (same in colonial Connecticut).

<sup>117</sup> Bailey, *supra* note 99, at 44-45 (recounting petitions from free blacks in Virginia).

<sup>118</sup> Mark, *supra* note 84, at 2186 (describing petitions by Native Americans); Higginson, *supra* note 103, at 144 n.9, 150 n.51, 151 & n.58 (same in colonial Connecticut).

even slaves,<sup>119</sup> exercised their right to petition the government for redress of grievances.

The tradition of immigrant petitioning in the colonies extends back to at least 1621, when the petition of a “Dutchman’s son” for permission to return home was approved by the Virginia Assembly.<sup>120</sup> Moreover, petitioning for private acts of naturalization—necessarily undertaken by noncitizens—occurred in, at the least, colonial New Hampshire, Massachusetts, Rhode Island, New York, and New Jersey.<sup>121</sup> Overall, “the historical record appears to be devoid of colonial authority denying that a person had the right to petition based on any of the factors associated with disenfranchisement.”<sup>122</sup>

The acceptance of immigrant petitioning in the colonial era is revealed most dramatically in the Acadian refugee crisis of the late 1750s. French Catholic settlers in the Canadian Maritime Provinces, the Acadians became subjects of Great Britain under the Treaty of Utrecht. They refused to swear allegiance to Britain, however, leaving uncertain their formal citizenship status.<sup>123</sup> The local British authorities considered the Acadians foreigners—“French” or “French neutrals”—and this view was shared widely throughout the American colonies.<sup>124</sup>

To stifle resistance to the Crown, in 1755 the British deported thousands of Acadians from Nova Scotia to the American colonies.<sup>125</sup> The arrival of the Acadians prompted colonial proposals to resettle

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<sup>119</sup> Bailey, *supra* note 99, at 44 (discussing post-1776 petitions by slaves in Virginia after enactment of manumission statute); Higginson, *supra* note 103, at 144 n.9 (mentioning petition from slave in colonial Connecticut).

<sup>120</sup> Bailey, *supra* note 99, at 16.

<sup>121</sup> See 1 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 487-89 (1953); see also Higginson, *supra* note 103, at 144 n.9 (noting that in May 1773 session of Connecticut colonial assembly, “petitioners prompted a naturalization bill”).

<sup>122</sup> Mark, *supra* note 84, at 2190.

<sup>123</sup> Naomi E.S. Griffiths, *The Contexts of Acadian History, 1686–1784*, at 113 (1992) (noting that citizenship status of Acadians was ambiguous); Geoffrey Plank, *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* 104, 145 (2001) (same); see also Fred Anderson, *Crucible of War: The Seven Years’ War and the Fate of the Empire in British North America, 1754–1766*, at 113 (2000) (discussing efforts to make Acadians “ordinary subjects of the British Crown”).

<sup>124</sup> Plank, *supra* note 123, at 104 (stating Acadians uniformly referred to as “French” by English speakers). The Acadians were considered variously as “border people of the English empire,” “temporarily conquered people,” or “prospective British subjects.” Griffiths, *supra* note 123, at 36. American colonists “had no idea of whether to greet the new [Acadian] arrivals as prisoners-of-war, subjects of the British Crown temporarily removed from a battle zone, trustworthy if misunderstood neutrals, or ‘intestine Enemies.’” N.E.S. Griffiths, *Petitions of Acadian Exiles, 1755–1785: A Neglected Source*, 11 *Histoire Sociale-Social Hist.* 215, 217 (1978) (citations omitted).

<sup>125</sup> See Anderson, *supra* note 123, at 113-14; Plank, *supra* note 123, at 149.

them across each colony; budgetary struggles to accommodate the financial hardships imposed on local communities; and legislation providing for "binding out" of Acadian children as indentured laborers.<sup>126</sup> The refugees responded as the disenfranchised long had done in Britain: by petitioning.<sup>127</sup> Acadian petitions were directed to the King,<sup>128</sup> other authorities in Britain,<sup>129</sup> and even to French and Spanish officials.<sup>130</sup> Acadians in Massachusetts and Pennsylvania petitioned in opposition to legislation authorizing the forced binding out of children by local officials and won repeal of the measures in both colonies.<sup>131</sup> Refugees in Maryland and Massachusetts petitioned for permission to leave the colony or to be reunited with relatives.<sup>132</sup> At least one group of Acadians actually petitioned to determine their citizenship status.<sup>133</sup>

The lack of a relationship between citizenship status and the right to petition was not unusual in colonial America. "Citizenship" was a fundamentally unsettled concept in the colonies and did not serve as the classifier of rights implied by the *Verdugo-Urquidez* majority; even a political right of the highest order, the franchise, was frequently extended to noncitizens under colonial laws.<sup>134</sup> While the colonists generally did consider themselves subjects of Britain, subjectship law in

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<sup>126</sup> See generally Griffiths, *supra* note 123, at 95-127; Plank, *supra* note 123, at 149-50.

<sup>127</sup> Griffiths, *supra* note 124, at 216.

<sup>128</sup> See Griffiths, *supra* note 123, at 103 & n.22 (citing Petition to the King of Great Britain, c. 1760, reprinted in L. Smith, *Acadia: A Lost Chapter in American History* 369 (1884)).

<sup>129</sup> *Id.* at 116 (recounting petition from Acadians resettled in Pennsylvania to Penn brothers in London regarding restitution of property seized during war); Griffiths, *supra* note 124, at 218 & n.20 (describing 1763 petition by Acadians in British seaports to Sick and Hurt Board of Admiralty requesting relocation).

<sup>130</sup> Griffiths, *supra* note 124, at 216, 220-21.

<sup>131</sup> See Griffiths, *supra* note 123, at 108 & n.39 ("[French] spelling and grammar [in one Massachusetts petition] indicate that it was most probably written by the Acadians themselves."); *id.* at 115-16 & nn.76-77 (quoting petitions from Acadians in Pennsylvania). In their Pennsylvania petition, the Acadians pleaded that the binding out of their children made them "the most unhappy People that ever appeared, if, after having lost what God had given us, for the Subsistence of our Families, we see ourselves forced to tear our Children from the Arms of our tender Wives." Griffiths, *supra* note 124, at 218 (quoting Philadelphia petition).

<sup>132</sup> Griffiths, *supra* note 123, at 109 (noting Acadian petitions to Massachusetts authorities seeking to reunite with relatives); *id.* at 117 (commenting on Acadian petition to justices of peace of Cecil County, Maryland for assistance to depart for "the Mississippi").

<sup>133</sup> Griffiths, *supra* note 124, at 221 (quoting Philadelphia petition that asked, "Be pleased to tell us whether we are Subjects, Prisoners, Slaves or Freeman?").

<sup>134</sup> See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1399 (1993) ("[Colonial law] generally required only that voters be local 'inhabitants or residents,' and not British citizens. . . . Thus, many alien 'inhabitants' who met the appropriate property, wealth, race, religion, and gender tests possessed the right to vote in the colonies.").



the colonies diverged from that in Britain, with the colonies' own relatively liberal naturalization policies beginning to reflect concepts of volitional and contractual, rather than natural and permanent, allegiance.<sup>135</sup> Given that the meaning of the term "citizen" was ambiguous in the colonial period and that the exercise of other political rights such as the franchise were not dependent on citizenship, it is unsurprising that noncitizens in the colonies also exercised the right to petition.

In short, noncitizens possessed and exercised the right to petition during the colonial period. The right is memorialized in colonial-era legal instruments and manifested in the practice of noncitizen petitioning from 1621 through the applications of the Acadians in the 1750s. Noncitizen petitioning was also consistent with the exercise of the right by others not obviously "part of a national community,"<sup>136</sup> as well as with the exercise of other political rights, such as the franchise, by noncitizens. Finally, the absence of evidence of colonial alienage classifications for petition rights comports with the reality of an inchoate, indeterminate concept of citizenship in the colonies.

### *C. Citizenship and Petitioning in the Early United States*

The *Verdugo-Urquidez* notion that the First Amendment protects only members of a national community or those with a sufficient connection to it does not square with the history of petitioning by noncitizens and others marginally tied to the "national community" in the early years of the United States. Nor is it consistent with the absence of alienage classifications in early congressional rules regarding petitions, nor with the occasional championing of noncitizen petitions by leaders of the Founding generation. And in light of the uncertainties at the Founding about the very meaning of the term "citizenship," an intent on the part of the Framers to limit the right to petition on this basis seems highly improbable.

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<sup>135</sup> Kettner, *supra* note 95, at 9; see also Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 70-86 (1997) (analyzing developing views of citizenship during colonial era). Colonial law also saw an erosion of the English classification of subjects, in particular of the distinctions between native-born and naturalized subjects. Smith, *supra*.

<sup>136</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (Rehnquist, C.J.) ("'[T]he people' protected by the [First Amendment] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.'").

## 1. *Revolution and Confederation*

If the colonial experience had unsettled the English notion of subjectship, the colonists' declaration of independence from Britain further destabilized the concept. The emerging trend toward a citizenship status based on consent continued through the revolutionary and Founding periods, but uncertainties over the meaning of state and national citizenship—and an unwillingness to confront the citizenship status of Native Americans and blacks—ensured that the term “citizen” lacked settled meaning in the early United States.<sup>137</sup>

Under the Articles of Confederation, naturalization rules were determined by each state,<sup>138</sup> leading to nonuniform standards<sup>139</sup> and the result that, throughout the 1780s, there was no common national understanding of the term “citizenship.” At the Constitutional Convention in 1787, there was widespread frustration with divergent state naturalization rules, and Federalists and Anti-Federalists agreed that, under the new Constitution, naturalization should be uniform and the exclusive responsibility of the federal government.<sup>140</sup> The participants in the convention were not explicit, however, as to what the contents of the new naturalization rules should be. Nor was there agreement on other manifestations of citizenship.<sup>141</sup>

The lack of a common understanding of “citizenship” had no apparent effect on petitioning, however, since petitioning had never depended on citizenship status. In the early postcolonial period, petitioning remained a vital mode of political participation<sup>142</sup> and its exercise was not limited to citizens. The Articles of Confederation did not expressly codify the right to petition,<sup>143</sup> but a broad Privileges and

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<sup>137</sup> See Kettner, *supra* note 95, at 9-10; Smith, *supra* note 135, at 116 (“Issues of state versus national identity and slavery, especially, were so explosive that the framers avoided raising them whenever possible and left them largely unresolved.”).

<sup>138</sup> Articles of Confederation art. IV (1781).

<sup>139</sup> See Michael T. Herz, *Limits to the Naturalization Power*, 64 *Geo. L.J.* 1007, 1009 (1976) (discussing criticism of divergent state naturalization rules during Confederation).

<sup>140</sup> See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 *N.Y.U. L. Rev.* 493, 534 & n.223 (“At the Constitutional Convention and during the ratification period . . . even Anti-Federalists seemed to agree that in this area a unitary national rule had to prevail.”).

<sup>141</sup> See Neuman, *supra* note 73, at 64 (“In the immediate post-Revolutionary period, citizenship in an individual state was the dominant concept. The 1787 Constitution added a concept of national citizenship . . . but did not specify the intended relationship between citizenship in a state and in the nation.”); Smith, *supra* note 135, at 116 (noting Constitution left ambiguities in meaning of citizenship).

<sup>142</sup> 8 *Documentary History*, *supra* note 104, at xi (“[P]etitioning became—after elections—the primary mechanism for popular participation in the political process.”).

<sup>143</sup> The only express reference to petitioning is in Article IX, which authorized petitions “between two or more States concerning boundary, jurisdiction or any other cause whatever.” Articles of Confederation, art. IX (1781).

Immunities Clause accomplished the same purpose.<sup>144</sup> Of note, this Privileges and Immunities Clause appears to have protected petitioning and other rights of noncitizens.<sup>145</sup>

## 2. *State Constitutions and Declarations of Rights*

Many early state constitutions and declarations of rights codified the right to petition, including seven before the Constitutional Convention in 1787.<sup>146</sup> The text of the early state constitutions secured the right to petition, variously to “every man” or “the people,” without apparent intention to exclude immigrants and consistent with the English and colonial traditions that fully embraced petitioning by all persons territorially resident.<sup>147</sup> Of states that memorialized the right before 1787, Maryland’s constitution and the Delaware Declaration of Rights provided that “every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner.”<sup>148</sup> Pennsylvania and Vermont guaranteed the right of “the people . . . to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.”<sup>149</sup> North Carolina used the same language as Pennsylvania and Vermont, except that it deleted the final listing of modes of petitioning, “by address, petition, or remonstrance.”<sup>150</sup> Massachusetts

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<sup>144</sup> Id. art. IV.

<sup>145</sup> Id. (“[T]he *free inhabitants* of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States . . . .” (emphasis added)); see also Mark, *supra* note 84 at 2196 (“Through petition, non-discrimination gave free alien residents access to the mechanisms of government, with all the political protection and access to redress of private grievances and claims that the right to petition entailed.”). For a discussion of the possible application to undocumented immigrants of a “fugitive from justice” exception to the right to petition, see *infra* notes 443-449 and accompanying text.

<sup>146</sup> Maryland, Delaware, Pennsylvania, North Carolina, Vermont, Massachusetts, and New Hampshire all guaranteed the right to petition in their constitutions or declarations of rights before 1787, and other states followed thereafter, including Kentucky (1792), Tennessee (1796), Ohio (1802), Mississippi (1817), Connecticut (1818), Maine (1819), Missouri (1820), Rhode Island (1842), New Jersey (1844), and New York (1846). See generally *The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (Francis Newton Thorpe ed., 1909) [hereinafter Thorpe].

<sup>147</sup> See *supra* notes 95-98 and accompanying text, and notes 112-133 and accompanying text.

<sup>148</sup> Del. Declaration of Rights § 9 (1776), reprinted in 1 Schwartz, *supra* note 109, at 276, 277; Const. of Md., A Declaration of Rights § XI (1776), reprinted in 3 Thorpe, *supra* note 146, at 1686, 1687.

<sup>149</sup> Pa. Declaration of Rights § XVI (1776), reprinted in 1 Schwartz, *supra* note 109, at 263, 266; Vt. Declaration of Rights § XVIII (1777), reprinted in 1 Schwartz, *supra* note 109, at 319, 324.

<sup>150</sup> Const. of N.C., A Declaration of Rights § XVIII (1776), reprinted in 5 Thorpe, *supra* note 146, at 2787, 2788.

and New Hampshire also guaranteed the right of “the people” to request redress of grievances by petition and remonstrance, though like Maryland and Delaware they required that the practice be undertaken “in an orderly and peaceable manner.”<sup>151</sup>

What is more significant than the precise formulations used by each state to enshrine the right to petition in its constitution was that the practice of petitioning continued as it had before. The poor, slaves, free blacks, and women—all disenfranchised, none members of the formal political polity—continued to express their grievances and request official relief by way of petition to state legislatures.<sup>152</sup>

### 3. *Drafting of the Petition Clause*

During the ratification debates on the Constitution, some antifederalists criticized the Constitution’s failure to safeguard the right to petition.<sup>153</sup> Though this was not a principal line of attack,<sup>154</sup> debates at the state ratifying conventions nevertheless were an important influence on the drafters of the Bill of Rights, and conventions in six states yielded proposals, not always adopted in the state conventions, for constitutional provisions to protect the right to petition. Of these six proposals, one would have guaranteed the right to petition to “every man,”<sup>155</sup> two to “every person,”<sup>156</sup> two to “every freeman,”<sup>157</sup>

<sup>151</sup> Mass. Declaration of Rights § XIX (1780), reprinted in 1 Schwartz, *supra* note 109, at 339, 343; N.H. Bill of Rights § XXXII (1783), reprinted in 1 Schwartz, *supra* note 109, at 375, 378-79.

<sup>152</sup> Bogin, *supra* note 112, at 396 n.16 (describing petitions by slaves and free blacks regarding “political or legal status” and 1788 petition by sixty-six Charleston seamstresses for higher import duties on clothing); *id.* at 407-12 (analyzing petitions by impoverished debtors in New Hampshire, New Jersey, Delaware, Maryland, and Carolinas).

<sup>153</sup> 8 Documentary History, *supra* note 104, at xiv (noting antifederalist objection of “Centinel” that unaccountable Congress “may deprive you even of the privilege of complaining” (internal quotation omitted)); Mark, *supra* note 84, at 2205-07 (collecting antifederalist writings on failure to include right to petition in Constitution).

<sup>154</sup> 8 Documentary History, *supra* note 104, at xiv (“Antifederalists raised the issue only rarely during the ratification debate . . .”).

<sup>155</sup> At the Maryland convention, delegates rejected a set of antifederalist amendments offered by former Governor William Paca, including a guarantee that “every Man hath a Right to petition the Legislature, for the Redress of Grievances, in a peaceable and orderly Manner.” 17 The Documentary History of the Ratification of the Constitution: Commentaries on the Constitution Public and Private 237, 240 (John P. Kaminski & Gaspare J. Saladino eds., 1995). Paca’s failed amendments were reprinted widely, however, and had some influence on the debate in other state conventions. *Id.* at 237-39. The Paca proposal tracked the language of § 11 of Maryland’s 1776 state constitution. See Md. Const. § 11 (1776), reprinted in Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 140 (1997).

<sup>156</sup> See Cogan, *supra* note 155, at 140 (reprinting proposals from state conventions of New York and Rhode Island). New York’s ratifying convention proposal was more expansive than the petition clause of its Bill of Rights, which guaranteed the petition rights only

and one to “the people.”<sup>158</sup> In addition, by the time the First Congress met in Philadelphia, four other states had adopted petition clauses in their state constitutions or declarations of right, of which one secured the right to “every man” and three to “the people.”<sup>159</sup> Thus in 1789, James Madison and the other authors of the federal Petition Clause worked against a background of state enactments phrased variously in terms of “the people” or every “person,” “freeman,” or “man.”<sup>160</sup>

On June 8, 1789, Madison proposed the amendment that became our First Amendment, modeling it on the proposal from the Virginia ratifying convention. Madison’s draft provided: “The people shall not be restrained . . . from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.”<sup>161</sup> The most important aspect of Madison’s proposal for immigrants in a post-*Verdugo-Urquidez* world, of course, is the decision to protect the petition rights of “the people,” rather than the various alternatives used in some state constitutions and ratifying convention proposals.

One could speculate that Madison understood that women, slaves, and other disenfranchised people engaged in important petitioning activity, and thus rejected the arguably narrower “every man” and “every freeman” formulation, though I am not aware of evidence to this effect.<sup>162</sup> But there is also no evidence for the Supreme Court’s

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of “the Citizens of this State.” N.Y. Bill of Rights § 10 (1787), reprinted in Cogan, *supra* note 155, at 141.

<sup>157</sup> See Cogan, *supra* note 155, at 140 (reprinting proposals from North Carolina and Virginia). The North Carolina state constitution of 1776 had spoken of the right of “the people” to apply for redress of grievances. Const. of N.C., A Declaration of Rights § XVIII (1776), reprinted in 5 Thorpe, *supra* note 146, at 2787, 2788.

<sup>158</sup> See Cogan, *supra* note 155, at 139 (reprinting Massachusetts Minority proposal from Massachusetts state convention).

<sup>159</sup> Del. Declaration of Rights § 9 (1776) (“[E]very man”); N.H. Const. pt. I, art. XXXII (1783) (“The people”); Pa. Const. art. XVI (“[T]he people”); Vt. Const. § 18 (1787) (“[T]he People”), reprinted in Cogan, *supra* note 155, at 140-42. See *supra* notes 146-51 and accompanying text (summarizing word choice in all state constitutions that secured right to petition).

<sup>160</sup> Four of the six state ratifying conventions to propose a petition clause actually employed more than one term in the same provision. New York, Rhode Island, North Carolina, and Virginia all proposed securing the right of “the people” to assemble, while in the same sentence phrasing the petitioning right in terms of “every person” or “every freeman.” See Cogan, *supra* note 155 at 139-40.

<sup>161</sup> 1 Annals of Cong. 451 (Joseph Gales ed., 1789); 2 Schwartz, *supra* note 109, at 1026.

<sup>162</sup> The ratifying conventions of two slave-holding states, Virginia and North Carolina, proposed guaranteeing the petition rights of every “freeman” and the right of “the people” to assemble, see *supra* note 160, further undermining the argument that the Founders attached particular significance to the term “the people.” See Bailey, *supra* note 99, at 43 (explaining that in Colonial Virginia, right to petition “was not restricted by any requirements involving class, sex, or even race”).

statements in *Verdugo-Urquidez*. The Petition Clause drafters apparently did not understand the terms “the people,” “every person,” and “every man” to be anything but synonyms (to the extent they gave the terms any thought at all).<sup>163</sup> Nor is there evidence in the legislative history of the Petition Clause that its framers sought to restrict the petitioning rights of immigrants, nor that they desired to leave petitioners such as the much-publicized Acadian refugees outside the protection of the Clause. By July 1789, the same First Congress was considering a petition from an immigrant—on which it granted relief in September 1789.<sup>164</sup> If the *Verdugo-Urquidez* analysis were correct, one would expect to find at least some evidence of an intent to exclude immigrants from the protections of the Clause.<sup>165</sup>

The central congressional debate on the Petition Clause concerned an unsuccessful effort to extend the provision to include a right to “instruct” legislators and thereby bind them in their deliberations and voting.<sup>166</sup> Although the participants in this debate did not directly address the status of noncitizens as “people,”<sup>167</sup> the discussion may offer some indirect support for the view of the *Verdugo-Urquidez* ma-

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<sup>163</sup> In a House debate, Elbridge Gerry referred to “the petitions and instructions of our constituents,” 1 Annals of Cong., supra note 161, at 765-66, which arguably suggests an assumption that only constituents—the enfranchised—could petition. Gerry, however, was addressing a motion to include a right to instruct representatives. Even if he were implying a dramatic break from historic practice by yoking petition rights to the franchise, this still would not have yielded an alienage classification for petitioning because noncitizens were not categorically excluded from the vote. See Raskin, supra note 134, at 1399-1400 (describing alien suffrage in American colonies and after independence).

<sup>164</sup> See infra notes 193-204 and accompanying text.

<sup>165</sup> Over the course of House and Senate debate, Madison’s draft Petition Clause, see text accompanying note 161 supra, was amended in two principal ways: by substituting the verb “petition” for “applying . . . by petitions, or remonstrances” and by substituting the object “government” for “Legislature.” The various drafts, amendments, and votes are set forth in Cogan, supra note 155, at 129-39; see also Andrews, supra note 89, at 611-21 (tracing legislative history of Petition Clause). James Pfander has argued that the First Congress’s substitution of the term “government” for “Legislature” demonstrates an intent that the right to petition all three branches of government be secured by the Petition Clause. Pfander, supra note 90, at 956-59.

<sup>166</sup> Representative Tucker moved to add a formal right of instruction to the proposed amendment, 2 Cong. Reg., 1st Cong., 1st Sess. (Aug. 15, 1789), reprinted in Cogan, supra note 155, at 143, 144. After extended debate on popular sovereignty, the dangers of regionalism and factionalism, the value of a deliberative national body, and the impact on ratification prospects of including controversial provisions together with consensus amendments, Tucker’s motion was defeated forty-one to ten. Id. at 198-217, reprinted in Cogan, supra note 155, at 144-58; see also Mark, supra note 84, at 2209-12 (reviewing congressional debate); id. at 2209 n.252 (describing colonial practice of “instruction,” in which representative was obligated to vote in particular manner by constituents).

<sup>167</sup> The only comments regarding who constitutes “the people” capable of instruction was an exchange prompted by Representative Livermore, who wondered whether “the people” refers to “a part of the people in a township or district, or . . . the state legislatures?” 2 Cong. Reg., 1st Cong., 1st Sess. (Aug. 15, 1789), reprinted in Cogan, supra note

jority since some members of the Congress seem to have contemplated that only those with the franchise would be among “the people” capable of “instruction,” as evidenced by frequent references to instruction by “constituents.”<sup>168</sup>

These references to instruction by “constituents,” however, are insufficient to demonstrate that Congress intended to exclude noncitizens from the protection of the Petition Clause. Not all voters were citizens.<sup>169</sup> Moreover, newspaper accounts of the House debate record a statement by Madison that seems to equate “the people” with “inhabitants.”<sup>170</sup> Other members spoke of instruction by “inhabitants” or “freemen,” and the records of the debate do not indicate that any member understood these words as terms of art.<sup>171</sup> Most importantly, there simply was not an explicit discussion of the right of immigrants to petition in the debate on the right to instruct.

Against the widespread English and colonial-era practice of petitioning by all members of society, regardless of citizenship or social status, the absence of any discussion of an intent to restrict petitioning by noncitizens in the congressional or ratification debates on the Petition Clause strongly undermines the originalist *Verdugo-Urquidez* distinction between “the people” and “persons.”

#### 4. *Petitioning in the First Congresses*

Almost from the moment the First Congress convened, members of all sectors of society, including noncitizens, exercised the right to petition. Within days of achieving a quorum, each chamber of the

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155, at 143, 153. Two representatives answered that state legislatures should not be able to instruct members of Congress. *Id.* at 154 (statements of Reps. Sedgwick and Ames).

<sup>168</sup> See, e.g., *id.* at 147 (statement of Rep. Clymer) (“[I]f our constituents chuse to instruct us . . .”); *id.* at 149 (statement of Rep. Gerry) (referring to instruction by “constituents”); *id.* at 150 (statement of Rep. Madison) (same); *id.* at 153 (statement of Rep. Vining) (“Suppose our constituents were to instruct us to make paper money . . . every honest mind must shudder at the thought.”); *id.* at 155 (statement of Rep. Wadsworth) (referring to instruction by “constituents”).

<sup>169</sup> Raskin, *supra* note 134, at 1399-1400.

<sup>170</sup> Madison objected to instruction in part on the ground that “inhabitants” of one geographic or electoral district could not possibly speak for “the people” as a whole. See, e.g., *Daily Advertiser*, Aug. 17, 1789, at 2, reprinted in Cogan, *supra* note 155, at 158, 159 (“[W]ho are the people? Is every small district, the PEOPLE? and do the inhabitants of this district express the voice of the people, when they may not be a thousandth part . . . ?”). The Congressional Register records the same sentiment but without the predicate question. 2 Cong. Reg., 1st Cong., 1st Sess. (Aug. 15, 1789), reprinted in Cogan, *supra* note 155, at 143, 150 (“But I do not believe the inhabitants of any district can speak the voice of the . . . whole people.”).

<sup>171</sup> See 2 Cong. Reg., 1st Cong., 1st Sess. (Aug. 15, 1789), reprinted in Cogan, *supra* note 155, at 143, 145 (statement of Rep. Hartley) (commenting on instruction by “inhabitants”); *id.* at 150 (statement of Rep. Madison) (same); *id.* at 154 (statement of Rep. Sedgwick) (commenting on instruction by “freemen”); *id.* at 155 (statement of Rep. Page) (same).

First Congress established procedures for the receipt and consideration of petitions.<sup>172</sup> Notably, the rules adopted by the House<sup>173</sup> and Senate<sup>174</sup> in the First Congress contained no alienage classification or other limitations on the capacity of noncitizens to petition.<sup>175</sup>

There was a significant amount of federal petitioning in the first years of the nation, much of which related to war claims<sup>176</sup> or commerce.<sup>177</sup> The First Congress alone received more than six hundred petitions,<sup>178</sup> some of which led to the enactment of "private bills"<sup>179</sup> pursuant to a legislative authority understood as linked to the people's right to petition.<sup>180</sup> The majority of petitions were addressed to the House, as the chamber designated to originate appropriations legisla-

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<sup>172</sup> The House reached quorum on April 1, 1789 and adopted rules for the acceptance of petitions six days later. 1 H. Journal, 1st Cong., 1st Sess. 6, 10 (1789); see 8 Documentary History, *supra* note 104, at xvi-xviii (summarizing early House practice under April 7, 1789 rules of procedure). The Senate achieved a quorum on April 6, 1789 and on April 18 adopted a standing order governing petitions. S. Journal, 1st Cong., 1st Sess. 7, 14 (1789).

<sup>173</sup> On April 7, 1789, the House resolved:

Petitions, memorials, and other papers addressed to the House, shall be presented through the Speaker, or by a member in his place, and shall not be debated or decided on the day of their first being read, unless where the House shall direct otherwise; but shall lie on the table to be taken up in the order they were read.

1 H. Journal at 10 (1789).

<sup>174</sup> On April 18, 1789, the Senate resolved: "Before any petition or memorial, addressed to the Senate, shall be received and read at the table, whether the same shall be introduced by the President, or a member, a brief statement of the contents of the petition or memorial shall verbally be made by the introducer." S. Journal, *supra* note 172, at 14.

<sup>175</sup> See 8 Documentary History, *supra* note 104, at xvi-xvii (discussing early petitioning procedures).

<sup>176</sup> See Marc D. Yacker, *Private Bills and Federal Charters* 4 (Cong. Research Serv. Rep. No. 79-110, 1979) (stating that of nine private bills passed by First Congress, five concerned "matters of military pay, pension or service").

<sup>177</sup> For example:

A petition of William Hoy was presented to the House, and read, setting forth that he has discovered an infallible cure for the bite of a mad dog, and praying that an adequate compensation may be made him for his labor and assiduity in the discovery, which, in that case, he will make public.

1 H. Journal, 1st Cong., 1st Sess. 113 (1789).

<sup>178</sup> 7 Documentary History, *supra* note 104, at xi.

<sup>179</sup> Private legislation is intended to aid private persons and not to function as ordinary legislation of general applicability. See generally Yacker, *supra* note 176; Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684, 1684-85 (1966) [hereinafter Note, *Private Bills*]; Comment, *The Constitutionality of Private Acts of Congress*, 49 Yale L.J. 712 (1940).

<sup>180</sup> See, e.g., Note, *Private Bills*, *supra* note 179, at 1685 ("Lawmakers have viewed their consideration of private bills as based on the right of individuals under the first amendment to petition for redress of grievances. . . . Enactment of private bills no doubt makes meaningful the right to petition . . . ."); Robert Hopper & Juan P. Osuna, *Remedies of Last Resort: Private Bills and Deferred Action 2* (Immigr. Briefings No. 97-6, 1997) ("The First Amendment . . . specifically the [Petition Clause] has often been cited as the authority for private bills.").



tion,<sup>181</sup> which then frequently referred them to the Treasury or War Departments for a recommendation.<sup>182</sup> As in English and colonial American societies, early petitioners to Congress included subordinated members of society,<sup>183</sup> such as noncitizens,<sup>184</sup> women,<sup>185</sup> Jews,<sup>186</sup> and Native Americans.<sup>187</sup> Consistent with House and Senate rules devoid of alienage classifications, and with the longstanding English and American tradition of embracing petitions from all sectors of a diverse society, the "First Congress never once refused to accept a petition."<sup>188</sup>

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<sup>181</sup> 8 Documentary History, *supra* note 104, at xviii.

<sup>182</sup> *Id.* at xvii-xviii.

<sup>183</sup> *Id.* at xxv ("Perhaps more than any other type of document from the First Congress, the petitions reflect the entire range of America's demographic diversity at the time.")

<sup>184</sup> See, e.g., Report of the Committee on Claims (Dec. 28, 1795), reprinted in 7 Documentary History, *supra* note 104, at 83-84 (reporting February 1790 petition of James Perry and Thomas Hayes, British citizens seeking compensation for property seized during war); *id.* at 161 (recording February 1791 petitions for commutation, or compensation for military service, of Antoine Claude de Marcellin and George Le Roy, French who served in Revolutionary War and were "desirous to return to their Native country" with benefit of "the favourable disposition your honourable Body has always Shewn towards foreigners").

<sup>185</sup> See, e.g., *id.* at 264 (reprinting 1790 petition of Sarah Stirling, which requested commutation based on her deceased husband's wartime service and resulted in enactment of private bill, An Act for the relief of the persons therein mentioned or described, ch. 45, 6 Stat. 4 (1790)); *id.* at 270-74 (recording fifteen petitions by widows and orphan children, which resulted in enactment of private bill, Act of Mar. 27, 1792, ch. 13, 6 Stat. 6 (1792) ("An Act for the relief of certain Widows, Orphans, Invalids, and other persons.")); *id.* at 545-46 (reprinting March 1790 petition of Ann Baylor requesting settlement of account of late father-in-law).

<sup>186</sup> See, e.g., *id.* at 10-11 (recounting February 1790 petition by David Franks, son of "a prominent merchant of Jewish descent," requesting payment on vouchers for provision of labor and supplies during Revolutionary War); *id.* at 56-59 (reporting July 1790 petition of Simon Nathan, "active in [New York's] Jewish community," to recover money from Virginia); see also *id.* at 73-74 (describing petition of Joseph Henry as assignee of claim of Mattias Bush, prominent Philadelphia Jew); 8 Documentary History, *supra* note 104, at xxv (noting petitions to First Congress of "Jews such as Jacob Isaacs").

<sup>187</sup> See, e.g., 7 Documentary History, *supra* note 104, at 6-8 (describing February 1790 petition of Jehoiakim McToksine, member of Moheconnuck Indian Nation, requesting compensation for service as interpreter and guide during Revolutionary War and resulting in appropriation to petitioner of \$120 in March 1790); *id.* at 378 (describing petition of "seven Oneida and Tuscarora Indians or their widows" for compensation for wartime service).

<sup>188</sup> 8 Documentary History, *supra* note 104, at xvi. The authors of the Documentary History of the First Congress of the United States of America report that on only two occasions did a member of Congress attempt "to deny official recognition of a petition on the basis . . . of the identity of the individual who brought it forward." *Id.* at xix. The first involved an objection to a petitioner's representation that he spoke on behalf of the entire state of North Carolina and the second to an abolitionist petition by Quakers whose "treasonous pacifism," in the view of some, had rendered them "noncitizens who had placed themselves outside the government's recognition." *Id.* at xix-xx. On the struggle in the late 1830s to restrict abolitionist petitioning, see *infra* notes 429-42 and accompanying text.

Many noncitizens petitioned Congress for compensation for their wartime contributions.<sup>189</sup> In fact, the first and third private bills enacted by the First Congress were in response to petitions by German war veterans,<sup>190</sup> and the fifth private bill was enacted in response to the petition of a "Canadian sufferer or refugee."<sup>191</sup> Another early petition that provoked extensive congressional debate, this time by the Third Congress, sought assistance for French refugees from Haiti who had fled political unrest and landed in Baltimore.<sup>192</sup>

The following are brief histories of three early petitions by noncitizens, each of which resulted in enactment of a private bill. The strength of these petitioners' connections to the national community are varied. At one extreme is the Baron de Glaubeck, a German soldier who fought in the Revolutionary War, departed for Europe upon the cessation of hostilities, and later returned to the United States in order to petition for a financial award. At the other end are French refugees from Haiti, who arrived in Baltimore in 1793 and petitioned immediately, despite having no ties to the United States whatsoever. Between these, on the spectrum of ties to the national community, are the de Grasse daughters, who came to the United States from France, destitute and without personal connections to the country, but who petitioned for assistance on the strength of their deceased father's wartime contributions. Their ties to the national community, while weaker than those of Glaubeck, were arguably greater than those of the French refugees from Haiti. Despite the many objections raised to each of these eventually successful petitions, the *Verdugo-Urquidez*

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<sup>189</sup> Among the first petitions submitted, for example, were applications from French veterans. *Id.* at xxv; 7 Documentary History, *supra* note 104, at xv & n.4 (describing failed petition of French volunteer Louis-Pierre Penot Lombart, chevalier de la Neuville).

<sup>190</sup> See Act of Sept. 29, 1789, ch. 26, 6 Stat. 1 (allowing Baron de Glaubeck pay of Captain in Army of United States); see also Act of June 4, 1790, ch. 16, 6 Stat. 2 (adjusting and satisfying the claims of Frederick William von Steuben). Steuben was regularly termed a "foreigner," though in fact he had naturalized under the laws of New York by the time he petitioned the First Congress. See *infra* note 204.

<sup>191</sup> H. Journal, 1st Cong., 2d Sess. 232 (1790). John McCord was a native of Northern Ireland who came to Quebec before the Revolution. His petition to the First Congress sought reimbursement for supplies provided to the American army in Canada, 7 Documentary History, *supra* note 104, at 76-78, and resulted in enactment of a private bill settling his account and granting a further sum in satisfaction of his claims "for lands and rations granted by several resolutions of Congress to Canadian sufferers." Act of July 1, 1790, ch. 23, 6 Stat. 2 (satisfying claims of John McCord against United States). William Maclay, a member of the Senate committee examining McCord's petition, initially believed that McCord's "claims [did] not seem over well founded in point of law or any act of Congress"; but Maclay eventually expressed "no difficulty in allowing" McCord the sum, as "[h]e had suffered greatly in Canada." Journal of William Maclay 287, 298 (Edgar S. Maclay ed., N.Y., J.D. Appleton & Co. 1890) [hereinafter Maclay Journal].

<sup>192</sup> See *infra* notes 205-29 and accompanying text.

notion that only members of the national community, or those who have developed sufficiently close ties to the national community, may exercise rights of “the people” is absent.

a. Baron de Glaubeck, 1789

The first private bill enacted by the First Congress was passed in response to a petition from a German who had served in the Revolutionary Army and sought a pension. Peter William Joseph Ludwig, the Baron de Glaubeck, arrived in the United States in 1777, where he became an aide to General Daniel Morgan.<sup>193</sup> For “merit and services” at the Battle of Cowpens in 1781, the Baron received a brevet commission as a captain.<sup>194</sup> Glaubeck incurred substantial debt during his service, however, for which his commanding officer, General Nathaniel Greene, was liable as guarantor.<sup>195</sup>

The Baron sought assistance from the Continental Congress in 1783, with the support of General Greene and John Edgard Howard, Governor of Maryland.<sup>196</sup> The effort was unsuccessful, and Glaubeck left the country soon afterwards.<sup>197</sup> He eventually returned and, in July 1789, petitioned the First Congress.

This time, Glaubeck mustered additional political and media support. President George Washington “authenticated” the previous testimonials offered by Glaubeck’s supporters,<sup>198</sup> and in September 1789, *The New-York Packet* published a laudatory article by an anonymous “Old American Officer.”<sup>199</sup> There is little legislative history of the petition and resulting private bill.<sup>200</sup> In the final days of the First Session of the First Congress, both the House and Senate approved, and President Washington signed, a private bill granting Glaubeck “the

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<sup>193</sup> See James Graham, *The Life of General Daniel Morgan* 311 (N.Y., Derby & Jackson, 1858) (reprinting Letter by General Daniel Morgan to General Greene (Jan. 19, 1781), in which Morgan lauded Glaubeck, who “served with me as a volunteer, and behaved so as to merit your attention”).

<sup>194</sup> 7 Documentary History, *supra* note 104, at 198-201 (internal quotation omitted). A brevet commission provided rank without the corresponding pay. *Id.* at xiii.

<sup>195</sup> *Id.* at 199.

<sup>196</sup> H. Comm. Rep., 1st Cong. (July 31, 1789), reprinted in 7 Documentary History, *supra* note 104, at 200.

<sup>197</sup> 7 Documentary History, *supra* note 104, at 200.

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

<sup>199</sup> *Id.* at 199.

<sup>200</sup> The petition was presented, read, and tabled on May 15, 1789, referred to a select committee in late July, and reported back to the full House three days later. In late September, the House adopted the Report, and within a week the Senate had as well. *Id.* at 199-200.

pay of a captain in the army of the United States” for seventeen months of service in 1781 and 1782.<sup>201</sup>

Subsequent developments were less auspicious. Several days after passage of his bill, Glaubeck sold a “debt certificate” for significantly less money than the value of the pay awarded him and left New York, where Congress had met.<sup>202</sup> Two associates of Alexander Hamilton, acting on behalf of the widow of General Greene, purchased the rights to Glaubeck’s pay, but the transaction was revealed as fraudulent and Hamilton’s political adversaries accused him of unlawful speculation.<sup>203</sup> The Baron himself retired to Savannah, Georgia and died the following year while demonstrating “feats of horsemanship to the inhabitants of the place.”<sup>204</sup>

The account of the very first petition approved by the very First Congress therefore undermines the *Verdugo-Urquidez* conclusion that

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<sup>201</sup> Act of Sept. 29, 1789, ch. 26, 6 Stat. 1 (allowing Baron de Glaubeck pay of Captain in Army of United States).

<sup>202</sup> 7 Documentary History, supra note 104, at 199.

<sup>203</sup> Id.

<sup>204</sup> Id. (internal quotation omitted). The third private bill passed by Congress was also enacted in response to the petition of a German veteran, Baron von Steuben, a colorful aide to George Washington who claimed the title of “Baron” based on a spurious family tree. See Philander Dean Chase, *Baron von Steuben in the War of Independence* 3-5 (1973) (unpublished Ph.D. dissertation, Duke University) (on file with the *New York University Law Review* and available on microfilm from Univ. Microfilms Int’l Dissertation Serv.). Steuben had petitioned the Continental Congress successfully on several occasions, but his extravagant lifestyle and grandiose claims to having foregone extensive income in Europe led him to petition the First Congress as well. 7 Documentary History, supra note 104, at 205-33. The petition caused a furious debate, in which Steuben’s supporters, including Alexander Hamilton, John Adams, and Rufus King, defended the Baron against plausible claims that he had exaggerated his military contributions and his claims of lost income in Europe, as well as rumors of corrupt dealings with Hamilton. See 2 *Annals of Cong.* 1553-57 (1790) (recording House consideration of Steuben petition); Maclay Journal, supra note 191, at 261-62, 271-76 (recounting of Senate debate by Senator William Maclay, chair of Special Committee established to review Steuben petition); id. at 271 (“It is well known that all [the Baron] would get would immediately sink into the hands of Hamilton.”). Eventually Congress approved an award. Act of June 4, 1790, ch. 16, 6 Stat. 2 (adjusting and satisfying the claims of Frederick William von Steuben). Despite having being naturalized under the laws of New York, Steuben was universally regarded as a “foreigner.” See, e.g., 7 Documentary History, supra note 104, at 203 (quoting Letter from George Washington to Thomas Jefferson (Mar. 15, 1784), in which Washington describes Steuben as “Foreigner”); Letter from Rufus King to Elbridge Gerry (Nov. 5, 1786), microformed in *The Papers of General Friedrich Wilhelm von Steuben, 1777-1794*, reel VII:64 (Edith von Zemenszky ed., Kraus Int’l Pubs. 1982) (characterizing Steuben repeatedly as “foreigner”); Alexander Hamilton, Report of the Secretary of the Treasury (1790), reprinted in 7 Documentary History, supra note 104, at 233, 243 (same). See Act of May 4, 1784, 7th Sess. ch. 55, 1 Laws of the State of New York 703 (approving naturalization petition of Steuben on condition he take oath of allegiance); Telephone Interview with Joe Van Nostrand, Senior Management Analyst, New York County Clerk’s Office (June 2002) (citing N.Y. City Mayor’s Court Minute Book 217 (engrossed ed., Oct. 17, 1785–June 26, 1787) (recording that Steuben took oath on July 4, 1786)).

the Founders intended to reserve to citizens, or to those with substantial ties to the national community, the rights of “the people.” Baron de Glaubeck came to this country to serve in the Revolutionary War, departed soon after, and returned to the United States to petition for financial reward. Research reveals no evidence that the strength of Glaubeck’s connection to the nation established a threshold requirement on his right to petition, or that his relatively modest ties to the national community in fact restricted his exercise of that right.

b. The Santo Domingo Refugees, 1794

In 1793, a slave uprising in the French colony of Santo Domingo<sup>205</sup> prompted the Governor of Cap-Français, the colonial capital, to organize a refugee flotilla.<sup>206</sup> Drawn to Maryland’s Catholic population, the first ships arrived in Baltimore Harbor in July 1793. Within two weeks, more than fifty boats had delivered approximately 1500 people.<sup>207</sup> While the arrival of the Santo Domingo refugees had a lasting impact on Baltimore,<sup>208</sup> its immediate effect was to provoke a humanitarian crisis. The refugees benefited initially from private charity,<sup>209</sup> and at the end of 1793, the Maryland legislature appropriated funds for their support.<sup>210</sup> Recognizing the limits of its resources, however, the state soon sought relief from Congress.

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<sup>205</sup> Santo Domingo, or Saint-Domingue, was a colony on the island of Hispaniola, now modern Haiti and the Dominican Republic. On the uprising generally, see C.L.R. James, *The Black Jacobins: Toussaint L’Ouverture and the San Domingo Revolution* (1963); Thomas O. Ott, *The Haitian Revolution, 1789–1804*, at 47–75 (1973).

<sup>206</sup> Ott, *supra* note 205, at 70–71; 2 J. Thomas Scharf, *History of Maryland: From the Earliest Period to the Present Day* 578–79 (facsimile ed., 1967) (1879).

<sup>207</sup> 2 Scharf, *supra* note 206, at 579; Gregory A. Wood, *The French Presence in Maryland, 1524–1800*, at 144 (1978). Thomas Scharf estimates that approximately one thousand of the refugees who arrived in Baltimore were white and approximately five hundred were black or multiracial. 2 Scharf, *supra* note 206, at 579.

<sup>208</sup> The presence of the refugees significantly increased Baltimore’s Catholic population and altered the religious balance of power. See Terry D. Bilhartz, *Urban Religion and the Second Great Awakening: Church and Society in Early National Baltimore* 59, 113 (1986) (discussing how “disconcerting demographic changes” caused by arrival of Santo Domingo refugees led to churches sponsoring schools, and describing arrival of refugees as “time[ ] of social crisis”). It also had a substantial impact on the city’s economy. Wood, *supra* note 207, at 146.

<sup>209</sup> 2 Scharf, *supra* note 206, at 579; Wood, *supra* note 207, at 144. One historian concludes that private citizens in Baltimore pledged a total value of approximately \$11,000, of which about one-third was paid immediately. 1 Annabelle M. Melville, *Louis William DuBourg: Bishop of Louisiana and the Floridas, Bishop of Montauban, and Archbishop of Besançon, 1766–1833*, at 38 (1986).

<sup>210</sup> Wood, *supra* note 207, at 146. Together, public and private contributions in Maryland totaled approximately \$20,000. 1 Melville, *supra* note 209, at 38.

The first effort was a memorial<sup>211</sup> from a committee of Maryland legislators appointed to aid “the French emigrants from the island of St. Domingo,” who declared that “their funds are nearly exhausted” and prayed for relief from Congress.<sup>212</sup> This application provoked an extensive House debate. A committee recommended granting relief,<sup>213</sup> but on the floor, some representatives objected that the Constitution did not empower them to “bestow the money of their constituents” on an “act of charity.”<sup>214</sup> Others insisted that constitutional authorization existed, citing Executive Branch “despatches” approving funds for the refugees,<sup>215</sup> as well as two examples of accepted public expenditures for noncitizens: lodging for Native American ambassadors who came to Washington for various negotiations and support for prisoners of war.<sup>216</sup> James Madison lauded the humanitarian impulses of the committee report but cautioned that he “could not undertake to lay his finger on that article in the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.”<sup>217</sup> Madison carefully rebutted the precedents for congressional aid to noncitizens,<sup>218</sup> though he did offer as a compromise the possibility that Congress might advance the refugees monies then owed by the United States to France.<sup>219</sup>

The issue was deferred, but within weeks another petition arrived in the House “praying that Congress will speedily decide on the memorial of the committee appointed by the Legislature of Maryland . . . for the relief of the French emigrants from the Island of St. Domingo.”<sup>220</sup> This petition came from the refugees themselves, rather than the Maryland Legislature.<sup>221</sup>

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<sup>211</sup> The terms “petition” and “memorial” were “often used interchangeably” in the First Congress. 8 Documentary History, *supra* note 104, at xi.

<sup>212</sup> 2 H. Journal, 3d Cong., 1st Sess. 25 (1794).

<sup>213</sup> 4 Annals of Cong. 169-70 (1794).

<sup>214</sup> *Id.* at 170 (statement of Rep. Nicholas) (“He would be extremely happy to vote for the relief of the fugitives of Cape Francois, if, upon reflection, he found it Constitutional.”); see also *id.* at 173 (statement of Rep. Giles) (expressing concerns about constitutionality of congressional aid).

<sup>215</sup> *Id.* at 170 (statement of Rep. S. Smith).

<sup>216</sup> *Id.* at 172 (statement of Rep. Boudinot). Boudinot also argued that “the law of Nature” and “the law of Nations” compelled assistance to the citizens of the nation’s allies, the French. *Id.*

<sup>217</sup> *Id.* at 170 (statement of Rep. Madison).

<sup>218</sup> Madison distinguished Parliament’s appropriation of £100,000 for the residents of Lisbon following a 1755 earthquake by stating that “this House certainly did not possess an undefined authority corresponding with that of a British Parliament.” *Id.* at 171.

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

<sup>220</sup> *Id.* at 349-50.

<sup>221</sup> *Id.* at 349; 2 H. Journal, 3d Cong., 1st Sess. 50 (1794). The petition was from Peter Gauvain and “Louis Dubourg,” the latter almost certainly being Louis-Joseph Du Bourg,

Some congressmen now complained that the French ambassador had been insufficiently responsive to the needs of the refugees,<sup>222</sup> and one skeptic offered that funds might be secured “[o]ut of the liberal compensation which the members of that House received from the country.”<sup>223</sup> Others responded by stressing the humanitarian needs of the refugees and the overwhelmed citizens of Baltimore.<sup>224</sup> In February 1794, a version of Madison’s compromise was adopted, whereby the House authorized the President to spend certain sums for the use of the refugees and to negotiate with the French government for credit against U.S. accounts.<sup>225</sup> The Senate took up the bill the following day,<sup>226</sup> passed it with an amendment to which the House shortly concurred,<sup>227</sup> and within a week President Washington had signed a relief measure into law.<sup>228</sup> The statute appropriated \$15,000 for refugee assistance “to be paid out of any moneys which may be in the Treasury, arising from foreign loans” and distributed in whatever manner the President chose.<sup>229</sup>

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who supervised coffee operations in Santo Domingo for the Du Bourg family of Bordeaux and who fled to Baltimore in June 1793. 1 Melville, *supra* note 209, at 4, 8, 10.

<sup>222</sup> 4 Annals of Cong. 350 (1794) (statement of Rep. Clark) (objecting that “[t]he French Ambassador had restricted his services to a particular class of people”); *id.* at 350-51 (statement of Rep. Smilie). This floor debate centered less on the constitutionality of the proposed aid than on its propriety. Only Madison and John Nicholas stated that they remained in doubt about the constitutionality of the aid. *Id.* at 352 (statement of Rep. Madison); *id.* at 351 (statement of Rep. Nicholas).

<sup>223</sup> *Id.* at 351 (statement of Rep. Nicholas).

<sup>224</sup> *Id.* at 351-52 (statement of Rep. S. Smith); *id.* at 351 (statement of Rep. Scott); *id.* at 350 (statement of Rep. Boudinot). Some members may have contemplated similar petitions from their own districts. See *id.* at 350 (statement of Rep. Hunter) (noting “remarkable exertion of benevolence respecting persons of this kind” in his home state of South Carolina); see also Walter J. Fraser, Jr., *Charleston! Charleston! The History of a Southern City 182-85* (1989) (chronicling impact of 1791 arrival of French refugees fleeing earlier slave uprisings in Santo Domingo); Ott, *supra* note 205, at 53-54 (noting Southern fears in 1791 that Haitian revolution would inspire slave rebellions in slave-holding states).

<sup>225</sup> 2 H. Journal, 3d Cong., 1st Sess. 50, 54 (1794).

<sup>226</sup> The bill was read for the first time in the Senate the same day it passed the House and was debated the next day. 2 S. Journal, 3d Cong., 1st Sess. 27-28 (1794).

<sup>227</sup> The Senate rejected a motion to recommit the bill to committee for further investigation on February 6, 1794, *id.* at 28, and passed the bill as amended February 7, 1794. *Id.* at 29. The House concurred. See 2 H. Journal, 3d Cong., 1st Sess. 59 (1794); 4 Annals of Cong. 442 (1794). Unfortunately the official records of neither the Senate nor House reveal the substance of the Senate debate or the nature of the Senate’s amendment to the original House bill.

<sup>228</sup> Act of Feb. 12, 1794, ch. 2, 6 Stat. 13 (providing relief to Santo Domingo refugees).

<sup>229</sup> §§ 1-2, 6 Stat. at 13. Congress further directed that the appropriation “be provisionally charged to the debit of the French Republic,” subject to future bilateral arrangements, and provided that if France had not expressly authorized a debit to its accounts within six months of the statute’s enactment, all payments would be discontinued. § 3, 6 Stat. at 13. Eventually, the Executive Branch chose to place five thousand dollars in reserve and dis-

The story of the petition by the Santo Domingo refugees further contradicts the historical account offered by Chief Justice Rehnquist in *Verdugo-Urquidez*. The refugees had even less connection to the United States than Baron de Glaubeck; essentially, the refugees had no ties whatsoever. But their lack of either citizenship status or connection to the national community did not limit the refugees' right to petition: Even those in Congress who opposed granting redress did not question the refugees' petition rights.

c. The de Grasse Daughters, 1795 & 1798

Comte Francois Joseph Paul de Grasse was the fifth son of a Marquis in Provence and an Admiral in the French Navy.<sup>230</sup> While preparing to leave France in 1781 for Santo Domingo, Admiral de Grasse was ordered to send part of his fleet to the "North American coast" to assist French and American forces there following completion of the fleet's service in the Caribbean.<sup>231</sup> Once in Santo Domingo, de Grasse received word that General Rochambeau was in urgent need of his support, and so the Admiral raced north with his entire fleet, arriving off Virginia on August 30, 1781.<sup>232</sup> De Grasse engaged the British fleet in the Chesapeake Bay, preventing them from relieving Cornwallis at Yorktown and contributing mightily to the defeat of the British forces.<sup>233</sup> There is some indication that de Grasse overstayed his orders to aid the Revolutionary Army, risking his military commission and rank but earning the enduring gratitude of George Washington.<sup>234</sup>

The Admiral's success did not continue, however, as he was sent immediately back to the Caribbean, defeated by the British off Santo Domingo in 1782, taken prisoner, and, upon his release, blamed by his countrymen for the Navy's defeat.<sup>235</sup> De Grasse died in Paris in 1788,

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tributed the remaining ten thousand dollars to city and state authorities. 1 Melville, *supra* note 209, at 38.

<sup>230</sup> Charles Lee Lewis, *Admiral De Grasse and American Independence* 4-5 (1945).

<sup>231</sup> *Id.* at 97-98; Stephen Bonsal, *When the French Were Here* 81 (1945).

<sup>232</sup> Lewis, *supra* note 230, at 119-26, 136-42.

<sup>233</sup> *Id.* at 200-02; Bonsal, *supra* note 231, at 137-38, 155-79.

<sup>234</sup> H. Journal, 3d Cong., 2d Sess. 333 (1795) (noting, in House resolution, "the extraordinary services rendered the United States by the late Count de Grasse . . . on the urgent request of the Commander in Chief of the American forces, beyond the term limited for his co-operation with the troops of the United States"); 4 *Annals of Cong.* 1236 (1795) (same).

<sup>235</sup> Lewis, *supra* note 230, at 247, 252, 288-300. George Washington wrote to encourage his friend,

Be assured, my dear Admiral, that my Confidence in Your Bravery & Ability to Conduct so great a Fleet . . . is not the least abated by [your defeat]. It only proves, what many a noble Hero has heretofore experienced, that Fortune is a



his reputation intact in America but only partially rehabilitated in France.<sup>236</sup> The Admiral's many debts burdened his wife and children after his death. His four daughters remained in France, supported for several years by state pensions, until 1794 when they fled the Reign of Terror for Salem, Massachusetts.<sup>237</sup>

Apparently destitute, the de Grasse daughters petitioned the Third Congress for assistance in early 1795.<sup>238</sup> Their memorial sought a loan, their resources from France "being exhausted" and their property in Santo Domingo unavailable "under present circumstances."<sup>239</sup> Their application was referred to a committee that included James Madison,<sup>240</sup> who had expressed constitutional doubts only a year before about the petitions for direct relief for the Domingan refugees in Baltimore.<sup>241</sup> Madison's reservations seem to have diminished, for less than a week later his committee recommended not the requested loan, but rather a payment of one thousand dollars to each of the four de Grasse daughters.<sup>242</sup>

The Annals of Congress record a brief but telling exchange on the floor over the committee's report. Nathaniel Macon objected that, "though the claims of the petitioners were strong," granting "so large a sum at once to foreigners" would be inappropriate.<sup>243</sup> Hinting darkly of a flood of subsequent petitions from foreign veterans and their dependents, Macon continued that "there were likely an hundred [sic] of the officers of de Grasse, or of Rochambeau's army, that were in this country, and in want."<sup>244</sup> Samuel Dexter answered that this petition was a compelling case,<sup>245</sup> and the House seems to have agreed, resolving "by a great majority" that the committee should draft legislation consistent with its report.<sup>246</sup> The subsequent legisla-

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fickle Mistress . . . and that . . . she is often best pleased with giving pain to her most deserving & meritorious Gallants.

Id. at 287.

<sup>236</sup> See id. at 297-302 (recounting defenses of de Grasse prior to his death and his recognition by U.S. Congress).

<sup>237</sup> Id. at 308-09.

<sup>238</sup> H. Journal, 3d Cong., 2d Sess. 324 (1795) (stating that petition of Amelie, Adelaide, Melanie, and Silvie de Grasse was presented to House).

<sup>239</sup> Id. The 1795 de Grasse petition may have been crafted as a request for a loan in recognition of congressional reluctance in 1794 to make a direct appropriation for aid to the Domingan refugees. See *supra* notes 214-19, 222, and accompanying text.

<sup>240</sup> H. Journal, 3d Cong., 2d Sess. 324 (1795).

<sup>241</sup> See *supra* notes 217-19, 222 and accompanying text.

<sup>242</sup> H. Journal, 3d Cong., 2d Sess. 333 (1795) (ordering payment to de Grasse daughters).

<sup>243</sup> 4 Annals of Cong. 1235 (1795) (statement of Rep. Macon).

<sup>244</sup> Id.

<sup>245</sup> Id. at 1235-36 (statement of Rep. Dexter). Dexter was from Massachusetts and may have taken a special interest in the cause of the de Grasse daughters.

<sup>246</sup> Id. at 1236.

tion swept through the House and Senate<sup>247</sup> and was immediately signed into law by the President.<sup>248</sup>

In December 1797, the de Grasse daughters submitted a second petition to Congress, explaining that the 1795 funds were “already exhausted by the payment of debts previously contracted, combined with the subsequent expenses of their maintenance.”<sup>249</sup> A committee reported favorably on the second de Grasse application, prompting a floor debate comparable to the one on the petition for the Domingan refugees. The *Annals of Congress* do not record any suggestion, however, that as noncitizens, the de Grasse daughters lacked the capacity or right to petition Congress for the redress of grievances. Some opposed further assistance on the grounds that the de Grasse daughters had failed to account for the expenditure of the 1795 payments,<sup>250</sup> some objected to the sum recommended or the duration of payments,<sup>251</sup> and others repeated James Madison’s concern that such appropriations were unauthorized by the Constitution.<sup>252</sup> On the other hand, proponents of relief emphasized the exemplary military service of de Grasse and the savings, in American lives and dollars, that resulted from his decision to remain in the Chesapeake “beyond the time allowed him . . . at the risk of everything which is dear to a soldier, his commission and honor.”<sup>253</sup> In contrast to the debate on aid to the Domingan refugees, there was but one mention of the urgent

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<sup>247</sup> See H. Journal, 3d Cong., 2d Sess. at 335 (passing resolution). Perhaps seeking to limit any precedential effect of the de Grasse bill, the Senate amended the House bill to include a “whereas” clause, recording that the de Grasse daughters were now “within the United States” and had “represented that they are destitute of the means of support.” S. Journal, 3d Cong., 2d Sess. 167 (1795). The House promptly concurred. H. Journal, 3d Cong. 2d Sess. 342 (1795).

<sup>248</sup> Act of Feb. 27, 1795, ch. 32, 6 Stat. 19, 19-20 (“An Act authorizing the payment of four thousand dollars for the use of the daughters of the late Count de Grasse”).

<sup>249</sup> H. Journal, 5th Cong., 2d Sess. 113 (1797). The daughters again requested a loan rather than a direct appropriation. *Id.*

<sup>250</sup> 7 *Annals of Cong.* 791 (1798) (statement of Rep. Williams) (“Nobody knew how the money which had been granted had been expended.”).

<sup>251</sup> See, e.g., *id.* (statement of Rep. Nicholas) (objecting to grant of pensions to those requesting temporary relief); *id.* at 792 (statement of Rep. Harper) (proposing amendment to make pensions temporary).

<sup>252</sup> *Id.* at 791 (statement of Rep. Nicholas) (cautioning that Congress was “outstepping the bounds of [its] authority, in thus disposing of the public money”); *id.* at 794 (statement of Rep. Livingston) (noting that “[s]ome gentlemen had objected to the proposition from Constitutional scruples, thinking the Constitution did not authorize them to extend a grant to this case”).

<sup>253</sup> *Id.* at 792 (statement of Rep. Harper); see also *id.* at 793 (statement of Rep. Hartley) (emphasizing “importance of the service rendered by Count de Grasse, in extending his stay beyond his orders”); *id.* at 793 (statement of Rep. Rutledge) (stressing military service of de Grasse and that “the situation of his daughters called for relief”); *id.* at 795 (statement of Rep. Shepard) (“No one officer . . . ever did such important services for the United States as the Count de Grasse . . .”).

circumstances of the de Grasse daughters,<sup>254</sup> and only Edward Livingston made even a brief rejoinder to the constitutional reservations.<sup>255</sup>

As with the debate on the Domingan refugees the most contentious issue was the propriety (not constitutionality) of granting funds to immigrants like the de Grasse daughters. John Williams warned that Congress might soon confront petitions from “daughters of other foreign officers whose estates were gone,” even while “daughters of our own meritorious officers . . . were becom[ing] . . . town charge[s].”<sup>256</sup> Williams continued that Congress “ought not to be too lavish in [its] grants to foreigners,” at least until it had “attended to the wants of our own citizens.”<sup>257</sup> Other opponents cited instances in which the families of American soldiers killed in battle “had been much more hardly dealt with.”<sup>258</sup> The proponents, however, carried the day. The House settled on annuities of four hundred dollars for each daughter, for a period of five years;<sup>259</sup> the Senate agreed, and the daughters had their relief.<sup>260</sup>

The strength of the de Grasse daughters’ ties to the United States must fall somewhere between those of Glaubeck and those of the Santo Domingo refugees. Like the refugees, the de Grasse daughters petitioned more or less upon arrival in this country, though they invoked the connection of their father, who like Glaubeck had been a participant in the Revolutionary War. What is significant is that, in common with the experience of Glaubeck and the Santo Domingo refugees, the right of the de Grasse daughters to petition for redress was unquestioned. Contrary to *Verdugo-Urquidez*, but consistent with English and colonial traditions, the daughters’ petition rights did not depend on an initial determination that they possessed sufficiently strong ties to the nation; rather, they exercised a right universally held.

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<sup>254</sup> See *id.* at 792 (statement of Rep. Harper) (recounting hardships of daughters).

<sup>255</sup> *Id.* at 794 (statement of Rep. Livingston).

<sup>256</sup> *Id.* at 791 (statement of Rep. Williams).

<sup>257</sup> *Id.* Williams also pointed out that in ordering the Comte de Grasse to support the Revolutionary Army, France was “not influenced altogether by our interest; they had an interest of their own; they wished to separate this country from Great Britain.” *Id.*

<sup>258</sup> *Id.* at 808 (statement of Rep. Macon).

<sup>259</sup> *Id.* at 807-09; H. Journal 5th Cong., 2d Sess. 124-26 (1798).

<sup>260</sup> S. Journal, 5th Cong., 2d Sess. 422 (1798); see also Act of Jan. 15, 1798, ch. 3, 6 Stat. 31, (authorizing payment of certain sums of money to daughters of late Count de Grasse). The year after their second petition was granted, two of the daughters died of yellow fever. The other two married and established homes in South Carolina. Lewis, *supra* note 230, at 309.

### 5. *Alien, Sedition, and Naturalization Act Petitions, 1798–1804*

A different sort of noncitizen petitioning was prompted by congressional enactment of anti-immigrant legislation in 1798.<sup>261</sup> The Alien Act empowered the President to deport any noncitizen he judged to be a danger to the public or suspected of conspiring against the government.<sup>262</sup> The Sedition Act criminalized, among other things, “unlawful assembly” and the publication of false or malicious writing against the government.<sup>263</sup> The Alien Enemies Act, which remains in force, authorizes the President during wartime to arrest, imprison, or deport noncitizens deemed dangerous.<sup>264</sup> Finally, the Naturalization Act significantly extended the residency requirements for obtaining citizenship.<sup>265</sup>

One historian of early American petitioning described these enactments as together “creat[ing] the first minor flood of petitions to descend upon Congress,”<sup>266</sup> both for a general repeal and for individual relief. The laws were immediately controversial and not just with the Jeffersonian opponents of the Federalists. The Virginia and Kentucky Resolves famously condemned the Alien and Sedition Acts,<sup>267</sup> the Supreme Court has termed them unconstitutional,<sup>268</sup> and contemporary scholars nearly uniformly view them as such.<sup>269</sup>

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<sup>261</sup> For an account of the debates that produced these statutes, see Neuman, *supra* note 73, at 52-60.

<sup>262</sup> Act of June 25, 1798, ch. 58, 1 Stat. 570, 570-71.

<sup>263</sup> Act of July 14, 1798, ch. 74, 1 Stat. 596, 596-97.

<sup>264</sup> Act of July 6, 1798, ch. 66, 1 Stat. 577 (current version at 50 U.S.C. §§ 21-23 (2000)).

<sup>265</sup> In 1795, Congress had established a five-year residency requirement for the naturalization of a “free white person,” Act of Jan. 29, 1795, ch. 20, 1 Stat. 414, but the Federalists, seeking to maintain political power and concluding that noncitizens were a significant source of antifederalist sentiment, extended the rule to a fourteen-year residency requirement. Act of June 18, 1798, ch. 54, 1 Stat. 566. See Neuman, *supra* note 73, at 52-53 (describing Federalist reaction to “importation of dangerous revolutionary ideas from France”). The Naturalization Act of 1798 was repealed in 1802. Act of Apr. 14, 1802, ch. 28, 2 Stat. 153. The five-year residency requirement was restored and remains the basic rule. See 8 U.S.C. § 1427(a) (2000).

<sup>266</sup> Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretation* 112 (1971) (unpublished dissertation, available at Univ. Microfilms Int’l, 1986).

<sup>267</sup> See Thomas Jefferson, *Virginia Resolutions of 1798*, reprinted in 4 *Debates on the Adoption of the Federal Constitution* 528 (photo. reprint 1941) (Jonathan Elliot ed., 2d ed. Philadelphia, J.B. Lippincott 1888) [hereinafter *Debates on Adoption*]; Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799*, reprinted in *Debates on Adoption*, *supra*, at 540.

<sup>268</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”); see also *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (describing Alien and Sedition Acts as “patently unconstitutional by modern standards”).

<sup>269</sup> See, e.g., *Sullivan*, 376 U.S. at 276 (gathering sources); Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1519 (1994) (describing Alien and Sedition Acts as “about as clear an example of unconstitutional legislation as one could find”).

Most significantly for present purposes, these acts induced petitioning by noncitizens. Many immigrants petitioned Congress for relief from the draconian provisions of the Naturalization Act,<sup>270</sup> and although Congress did not pass any private bills naturalizing the petitioners,<sup>271</sup> in 1802 it repealed the 1798 Naturalization Act and replaced it with relaxed residency requirements.<sup>272</sup> Congress also received numerous petitions against the Alien and Sedition Acts, many of which were no doubt from immigrants,<sup>273</sup> but both statutes expired without further legislation from Congress.<sup>274</sup>

#### *D. Conclusion*

At the Founding, as in modern times, a substantial number of the private bills passed by Congress were enacted in response to petitions by immigrants.<sup>275</sup> There is substantial historical evidence that noncitizens regularly exercised the right to petition colonial, state, and federal authorities, and often were successful in obtaining redress. These noncitizens ranged from indigent Acadian and Domingan refugees to European veterans and their families. The history of immigrant petitioning is not anomalous but rather comports with the experience of other subordinated persons, such as women, Native Americans, and free blacks, who, by petitioning, communicated their views to lawmakers and participated to some extent in the political life of English and early American society. Early congressional rules on petitioning contained no alienage classifications, and indeed the cause of various immigrant petitioners was taken up by leading figures of the

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<sup>270</sup> Smith, *supra* note 266, at 114 (“The main flood of petitions to Congress concerned the Naturalization Law and were primarily from aliens praying for relief.”); see also 12 *Annals of Cong.* 97 (1803) (recording debate regarding allegedly disrespectful petitions from immigrants in Pennsylvania); *id.* at 465 (statement of Rep. Davis) (complaining of “never-ending petitions”); *id.* at 474-80 (showing debate regarding second set of immigrant petitions from Pennsylvania); 13 *Annals of Cong.* 232 (1804) (involving presentation of immigrant petitions from Baltimore).

<sup>271</sup> The first private bill to naturalize a petitioner was not enacted until 1839. See Act of Feb. 13, 1839, ch. 23, 6 Stat. 750 (granting relief to Dr. John Campbell White, of Baltimore, in state of Maryland); Bernadette Maguire, *Immigration: Public Legislation and Private Bills* 3 (1997) (identifying White’s as first naturalization petition granted by Congress).

<sup>272</sup> Act of Apr. 14, 1802, ch. 28, 2 Stat. 153.

<sup>273</sup> 9 *Annals of Cong.* 2934-35 (1799) (statement of Rep. Livingston) (attempting to present “a number of petitions from the State of Vermont, praying for a repeal of the alien and sedition laws”); *id.* at 2957-58 (statement of Rep. Bard) (presenting Pennsylvania petitions against Alien and Sedition Acts); *id.* at 2959 (statement of Rep. Gallatin) (offering additional Pennsylvania petitions against Alien and Sedition Acts).

<sup>274</sup> The Alien Act expired by its own terms in 1800. Act of June 25, 1798, ch. 58, § 6, 1 Stat. 570, 572. The Sedition Act followed, going out of force in 1801. Act of July 14, 1798, ch. 74, § 4, 1 Stat. 596, 597 (1798).

<sup>275</sup> See Hopper & Osuna, *supra* note 180, at 3 (stating that from 1789 to 1997, Congress enacted over 7200 private immigration bills).

Founding generation. The history of colonial and early American immigrant petitioning also corresponds with English traditions, which guaranteed the right to petition to all individuals. The absence of alienage classifications on petitioning is consistent, moreover, with the reality that “citizenship” and membership in a “national community” were ambiguous, inchoate notions at the Founding, notions that were intentionally submerged for fear their discussion would force a confrontation with the sectional disagreements over slavery.<sup>276</sup>

In light of this history, if the Framers truly intended to exclude immigrant petitioners from constitutional protection, one would expect to find at least some evidence to this effect. But the *Verdugo-Urquidez* Court offered none, nor has research uncovered any. History strongly suggests that the use of the word “people” rather than “persons” in the First Amendment was not in any way intended to exclude noncitizens from the rights safeguarded therein. Any argument for the exclusion of immigrants from the Petition Clause must be pitched on grounds other than history.

### III

#### THE PETITION CLAUSE AND IMMIGRANT COMMUNICATIONS TO LAW ENFORCEMENT AGENCIES

If the First Amendment guarantees all persons in the United States, regardless of their citizenship status, the right to petition the government for a redress of grievances, then do barriers to immigrants petitioning law enforcement agencies have constitutional implications? Consider an undocumented immigrant who is the victim of a violent crime, or whose labor rights have been egregiously violated—or both, as in the cases of Gregorio Zarma Goyo and Beatrice Okezie<sup>277</sup>—but who hesitates to seek redress from law enforcement authorities for fear of deportation. It is wildly unsound policy to deter Goyo, Okezie, and tens of thousands of persons like them, from petitioning the government for relief. In the following Part, I consider whether burdens to immigrants petitioning may also violate the Petition Clause.

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<sup>276</sup> See, e.g., Smith, *supra* note 135, at 116 (observing ambiguities in meaning of citizenship at Founding); see also Raskin, *supra* note 134, at 1401 (“To exclude aliens from voting would have given rise to the dangerous inference that U.S. citizenship was the decisive criterion for suffrage at a time when the majority of U.S. citizens, including almost all women and substantial percentages of men without property, were categorically excluded from the franchise.”).

<sup>277</sup> See *supra* notes 1-2 and accompanying text.

### A. *The Right to Petition Under Current Doctrine*

In this Section, I consider the extent to which current doctrine—which treats petitioning as subsumed within speech and entitled to no special First Amendment protection—safeguards the right of immigrants to apply to government officials for a redress of grievances. In the following Section, I argue that history, constitutional text and purpose, and sound principle favor treating petitioning as an extraordinary form of speech, the regulation of which should be subject to close judicial scrutiny.

In particular, I analyze petition rights and law enforcement policies in two discrete circumstances. The first involves an agency that expressly inquires into immigration status and shares with the INS the information it obtains. Some local criminal law enforcement agencies embrace this approach,<sup>278</sup> as did the 1992 Memorandum of Understanding between the DOL and INS.<sup>279</sup> I call this a *collect-and-report* approach.

The second and more common approach involves a law enforcement agency that neither requires nor prohibits the collection or reporting to the INS of immigration status information. Noncitizens therefore cannot be certain whether, upon filing a complaint, they will be asked about their immigration status or, if that information is otherwise learned by the agency, it will be communicated to the INS. Many local police departments<sup>280</sup> and many labor and employment

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<sup>278</sup> Davis et al., *supra* note 26, at 193 (describing police department whose “policy required them to report illegal immigrants” to INS).

<sup>279</sup> Memorandum of Understanding Between INS and Labor Department on Shared Enforcement Responsibilities, reprinted in 113 Daily Lab. Rep. (BNA) D-1 (June 11, 1992) [hereinafter 1992 MOU]. Pursuant to the 1992 MOU, the DOL agreed that whenever it examined employer payroll records in the course of a wage-and-hour investigation, the DOL would (1) review records regarding employee immigration status and (2) refer any suspected discrepancies or omissions to the INS. *Id.*

<sup>280</sup> Before 1996, several cities adopted “anti-snitch” ordinances prohibiting municipal employees from communicating with INS about the immigration status of those they served. See, e.g., City of N.Y. Exec. Order No. 124 (Aug. 7, 1989); City of Chi. Exec. Order No. 89-6 (Apr. 29, 1989). These orders sometimes contained a “criminal activity” exception to the prohibition on reporting. See, e.g., N.Y. Exec. Order No. 124 § 2(a)(3). But see Chi. Exec. Order No. 89-6 (failing to enumerate criminal activity exception). Even these exceptions, however, did not allow local officials to report the status of a crime victim. N.Y. Exec. Order No. 124 § 2(c) (“Enforcement agencies, including the Police Department and the Department of Correction . . . shall not transmit to federal authorities information respecting any alien who is the *victim of a crime*.” (emphasis added)). Because the status of these policies has been uncertain since 1996, see *infra* note 282 and accompanying text, and because many police departments have never adopted uniform policies on collecting and sharing immigration status information, I classify police departments as generally embracing the no-standards approach.

agencies follow this approach,<sup>281</sup> which has likely become more common since 1996, when Congress enacted two statutes that prohibit local ordinances banning municipal employees from communicating with the INS.<sup>282</sup> Where law enforcement officials are neither obligated to inquire into the immigration status of a petitioner, nor precluded from doing so, I call this policy a *no-standards* approach.

### 1. *The First Amendment and Immigrants Generally*

Nearly all judicial decisions addressing the First Amendment and immigrants have arisen in the context of challenges to immigration proceedings, frequently when the government has sought to exclude or deport a person based on ideological grounds.<sup>283</sup> Only a few decisions have analyzed First Amendment claims by immigrants in other contexts,<sup>284</sup> and no research I am aware of has uncovered a case specifically addressing the applicability of the Petition Clause to noncitizens.<sup>285</sup> Nevertheless, several principles of First Amendment

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<sup>281</sup> See, e.g., Gordon, *supra* note 50, at 421 (describing practice of state labor official who "requests proof of authorization to work, even though the Department of Labor's official policy is to accept [unpaid wage] cases from undocumented workers"); *id.* at 422 n.51 (recounting practice of small claims court judges who "have taken it upon themselves to tell an undocumented worker . . . that they will report her to the Immigration and Naturalization Service if she does not settle").

<sup>282</sup> 8 U.S.C. §§ 1373(a)-(b), 1644 (2000). The federal government has not sought to enforce these provisions, but one Court of Appeals has upheld them against a Tenth Amendment challenge. *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999).

<sup>283</sup> See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (rejecting First Amendment challenge to initiation of deportation proceedings because of disfavored speech and associational activities); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (rejecting First Amendment challenge to denial of nonimmigrant visa on ideological grounds); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (rejecting First Amendment challenge to deportation of alleged members of Communist Party); *Bridges v. Wixon*, 326 U.S. 135 (1945) (vacating deportation order based on alleged membership in and affiliation with Communist Party); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (rejecting First Amendment challenge to exclusion of alleged anarchist); see also *Schneiderman v. United States*, 320 U.S. 118, 137-38 (1943) (refusing to denaturalize citizen based on Communist Party membership); *Montero v. INS*, 124 F.3d 381, 385-86 (2d Cir. 1997) (declining to suppress evidence in deportation proceeding based on alleged INS interference with exercise of First Amendment rights in labor organizing campaign); *Price v. INS*, 962 F.2d 836 (9th Cir. 1992) (rejecting First Amendment challenge to requirement that applicant for naturalization disclose all organizations with which he had ever been affiliated).

<sup>284</sup> See, e.g., *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 365 (9th Cir. 1995) (involving defense to defamation action); *Brunnenkant v. Laird*, 360 F. Supp. 1330, 1332 (D.D.C. 1973) (holding withdrawal of immigrant's security clearance based on expression of "distasteful" political, economic, and social views violative of First Amendment).

<sup>285</sup> In *Bridges v. California*, 314 U.S. 252 (1941) (reversing contempt judgment against labor activist), Justice Black noted in passing that by writing the Secretary of Labor, Harry Bridges, a noncitizen, "was exercising the right of petition to a duly accredited representative of the United States government, a right protected by the First Amendment." *Id.* at



jurisprudence are relevant to an inquiry into the petition rights of immigrants.

First, its comments in *Verdugo-Urquidez* notwithstanding, the Supreme Court has said many times that lawful permanent residents are protected by the First Amendment,<sup>286</sup> and one court of appeals has said the same of all other immigrants lawfully in this country.<sup>287</sup> Second, the opinions consistently reflect the view that in the exercise of its plenary immigration power, Congress may to some extent infringe on the rights of noncitizens in ways that would be impermissible if done to citizens.<sup>288</sup> If extended from speech to petitioning, these principles would suggest that, at the least, immigrants lawfully in this country have petition rights (regardless of the strength of the individual's ties to the national community), but that, in the exercise of its immigration power, Congress may to some degree infringe the petition rights of noncitizens.

## 2. *Petitioning Doctrine*

Few litigants have pressed claims under the Petition Clause, and few courts have engaged in significant analysis of the scope or content of the rights it protects.<sup>289</sup> There are a small number of exceptions to this neglect. The Supreme Court has held that the right to petition compels interpreting the antitrust laws to permit lobbying for measures in restraint of trade,<sup>290</sup> provided that the lobbying is not a sham

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277; see also *Bridges v. Wixon*, 326 U.S. 135 (vacating deportation order against same Bridges without analysis of petition rights of noncitizens).

<sup>286</sup> The classic statement occurs in Justice Murphy's separate opinion in *Bridges v. Wixon*, 326 U.S. at 161 (Murphy, J., concurring) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."); see also *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 n.5 (1970) (adopting Murphy concurrence in *Bridges*); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (same).

<sup>287</sup> *Underwager*, 69 F.3d at 365 (holding, in defamation suit, that "the speech protections of the First Amendment at a minimum apply to all persons legally within our borders"); see also *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1063-65 (9th Cir. 1995) (holding undocumented persons in United States protected by First Amendment Speech and Association Clauses), rev'd on other grounds, 525 U.S. 471 (1999).

<sup>288</sup> See cases cited supra note 283. The impact of the plenary power doctrine of immigration law on the petition rights of noncitizens is discussed infra notes 414-28 and accompanying text.

<sup>289</sup> Commentators are fond of remarking that there has been very little legal scholarship on the Petition Clause, even as the scholarship proliferates. See, e.g., Andrews, supra note 89, at 558 n.4 ("Almost every recent article that concerns the Petition Clause begins by noting the dearth of academic or judicial analysis of the right to petition.").

<sup>290</sup> See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (concluding that effort by railroad interests to persuade Governor of Pennsylvania to veto measure benefiting trucking interests did not violate Sherman Act); see also *Mine Workers*

campaign designed to obscure direct business interference.<sup>291</sup> The Court has also concluded that the Petition Clause secures a right to court access,<sup>292</sup> subject to a similar caveat that the Constitution does not protect sham litigation.<sup>293</sup> State and lower federal courts have also invoked the right to petition in assessing “strategic lawsuits against public participation,” or “SLAPP,” suits.<sup>294</sup> And in the field of legal ethics, the right to petition has forced an exception to the usual prohibition on communication with a represented party, so as to allow contacts with some government officials even during litiga-

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v. Pennington, 381 U.S. 657, 670 (1965) (stressing that “*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent”).

<sup>291</sup> See *Noerr*, 365 U.S. at 144 (recognizing that “application of the Sherman Act would be justified” when “a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor”); see also *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (defining sham litigation). Although the *Noerr-Pennington* doctrine, as it came to be known, involves rules of statutory construction, the decisions were plainly driven by constitutional considerations. The Court in *Noerr* argued that interpreting the Sherman Act to prohibit lobbying “would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.” *Noerr*, 365 U.S. at 138; see *Profl Real Estate Investors*, 508 U.S. at 56 (explaining that *Noerr* Court did not “‘impute to Congress an intent to invade’ the First Amendment right to petition” (quoting *Noerr*, 365 U.S. at 138)).

<sup>292</sup> See *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (grounding right to court access in, inter alia, right to petition); *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (“[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.”); *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972) (“The right of access to the courts is indeed but one aspect of the right of petition.”). See generally *Andrews*, supra note 89, at 580-89 (discussing court access cases under Petition Clause).

<sup>293</sup> *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (holding that right to petition protects litigation not “objectively baseless” from liability under federal labor law); *Cal. Motor Transp.*, 404 U.S. at 516 (holding that “allegations come within the ‘sham’ exception in the *Noerr* case, as adapted to the adjudicatory process”).

<sup>294</sup> These suits are typically brought by the targets of environmental, consumer, or labor protests, alleging that the protesters have committed defamation, libel, or tortious interference with contract. The objective of a SLAPP suit is to chill complaints to public officials, whether or not the plaintiff prevails in its tort claims. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding First Amendment rights of speech, association, assembly, and petition protect nonviolent economic boycott activities from state tort liability); *Street Beat Sportswear, Inc. v. Nat’l Mobilization Against Sweatshops*, 698 N.Y.S.2d 820 (Sup. Ct. 1999) (dismissing as SLAPP suit action for tortious interference brought by garment manufacturer against community organizations that engaged in public protest of sweatshop conditions). For further discussion of SLAPP suits, see George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (1996); Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts’ Responses to Frivolous Litigation*, 39 *UCLA L. Rev.* 979 (1992).

tion.<sup>295</sup> Significantly, the Supreme Court has held that statements contained in a petition to the government are not entitled to absolute immunity but rather are subject to ordinary libel standards.<sup>296</sup> Finally, scholarship has explored whether the right to petition may restrict contemporary doctrines of sovereign immunity.<sup>297</sup>

Most recently, in *BE & K Construction Co. v. NLRB*,<sup>298</sup> the Supreme Court held that the National Labor Relations Board (NLRB) could not impose liability on an employer for losing a retaliatory lawsuit absent evidence that the unsuccessful suit was also “objectively baseless.”<sup>299</sup> Building on its legislative petitioning precedent in the antitrust cases, the Court reasoned that the First Amendment protects the right of persons (including corporations) to petition the courts for redress of grievances and, further, that imposing liability without proof that a lawsuit was both objectively and subjectively a “sham” would violate the Petition Clause.<sup>300</sup>

Several aspects of *BE & K Construction Co.* are important to the thesis of this Article. Responding to distinctions made between the antitrust and labor law regimes by four Justices who concurred in the judgment,<sup>301</sup> the *BE & K Construction Co.* majority conceded that “the threat of an antitrust suit may pose a *greater* burden on petitioning than the threat of an NLRA adjudication.”<sup>302</sup> Nevertheless, the

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<sup>295</sup> See, e.g., The Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, Formal Op. 1991-4 (Eugene M. Wypyski ed., 1991) (interpreting no-contact rule in litigation involving government party and explaining “[g]overnment lawyers should not be able to block all access to government officials to the point of interfering with the right to petition for redress”); Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 82-83 (3d ed. 1992) (noting First Amendment limits on no-contact rule).

<sup>296</sup> In a defamation suit, *McDonald v. Smith*, 472 U.S. 479 (1985), the Court declined to afford absolute immunity to a letter opposing a U.S. Attorney appointment, instead applying the “actual malice” standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). But see *Smith*, supra note 84, at 1184-88 (criticizing *McDonald* analysis of right to petition and arguing for absolute immunity for statements of petitioners).

<sup>297</sup> Pfander, supra note 90, at 963-89; see also *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 779-80 (2002) (Breyer, J., dissenting) (disagreeing with majority conclusion that Eleventh Amendment prohibits federal agency from adjudicating private complaint against nonconsenting state and noting that Framers guaranteed right to petition). But see *id.* at 761 n.13 (rejecting, in majority opinion, Justice Breyer’s invocation of Petition Clause and explaining that petition right does not establish right to sue otherwise-immune state “in front of either an Article III court or a federal administrative tribunal”). Other students of the history of petitioning have concluded, perhaps ruefully, that petitioning is but a relic of colonial times with little utility in modern society. See, e.g., Higginson, supra note 103, at 165-66; Mark, supra note 84, at 2229-31.

<sup>298</sup> 536 U.S. 516 (2002).

<sup>299</sup> See *id.* at 528-33.

<sup>300</sup> See *id.*

<sup>301</sup> *Id.* at 538-44 (Breyer, J., with whom Stevens, Souter, and Ginsburg, J.J., join, concurring in part and concurring in judgment).

<sup>302</sup> *Id.* at 529 (emphasis in original).

majority held that even modest burdens on petitioning—attorneys' fees, a requirement to post notices, an injunction against similar suits in the future, and "the threat of reputational harm"—trigger rigorous judicial scrutiny.<sup>303</sup> In addition, the Court looked to First Amendment speech doctrines in developing its narrow definition of sham petitioning, particularly the "breathing space" principles that protect some falsehoods to ensure "the freedoms of speech and press [receive] that breathing space essential to their fruitful exercise."<sup>304</sup>

From this eclectic mix of precedents emerge four principles relevant to the rights of immigrants to petition law enforcement agencies. First, reflecting both historical origins and contemporary political structures, the right to petition encompasses applications for relief addressed to the executive and judicial branches, not merely to the legislature.<sup>305</sup> Second, genuinely sham petitioning may not be constitutionally protected,<sup>306</sup> and defamatory content is likewise not necessarily immune from liability.<sup>307</sup> The threshold, however, for treating a petition as an unprotected sham is reasonably high.<sup>308</sup> Third, though at the Founding the right to petition may well have embraced a right to a governmental response,<sup>309</sup> modern Petition Clause jurisprudence allows the government to refuse to act upon, or otherwise to ignore, particular petitions.<sup>310</sup> Finally, the thrust of the *BE & K Construction Co.* opinion is inescapable: Petitioning is a fundamen-

<sup>303</sup> *Id.* at 530.

<sup>304</sup> *Id.* at 531 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (internal quotation omitted)).

<sup>305</sup> See *McDonald v. Smith*, 472 U.S. 479 (1985); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983); see also *BE & K Constr. Co.*, 536 U.S. at 525 ("[T]he right to petition extends to all departments of the Government . . . ." (quoting *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972))). In the words of one scholar:

Unlike all of its state predecessors, the Petition Clause speaks of the right to petition the "Government," not the legislature, for a redress of grievances. . . . The drafting history of the Petition Clause confirms that, in choosing the word "Government," the drafters consciously rejected the state model of legislative petitioning.

Pfander, *supra* note 90, at 956-57.

<sup>306</sup> See *supra* notes 291, 293; see also *Bill Johnson's Rests.*, 461 U.S. at 743 ("[B]aseless litigation is not immunized by the First Amendment right to petition."); *Cal. Motor Transp. Co.*, 404 U.S. 508 (holding "sham" lawsuit filed merely to harass not protected by right to petition).

<sup>307</sup> *McDonald*, 472 U.S. at 483.

<sup>308</sup> *BE & K Constr. Co.*, 536 U.S. at 531-32 (holding that to be sham, petition must be both objectively baseless and subjectively intended for improper purpose).

<sup>309</sup> See Higginson, *supra* note 103, at 165 (noting "the clear colonial practice that linked petitioning to a corollary duty of legislative response").

<sup>310</sup> See, e.g., *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues.").

tal right that must be protected through close judicial scrutiny of even modest burdens on its exercise.

### 3. *Petitioning as Ordinary Speech*

The modern Supreme Court has generally regarded the right to petition as subsumed within the more familiar rights of speech and association,<sup>311</sup> and the Court's extensive speech jurisprudence thus supplies a useful reference for examining the Petition Clause implications of barriers to immigrant access to law enforcement.<sup>312</sup>

According to classic speech doctrines, content-based restrictions on expression receive strict scrutiny,<sup>313</sup> but content-neutral regulations "are subject to an intermediate level of scrutiny"<sup>314</sup> unless the expression falls within "narrow and well-understood exceptions" for unprotected speech.<sup>315</sup> To distinguish content-based and content-neutral restrictions, a court will examine the purposes underlying the regulation and whether a law "confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed."<sup>316</sup> Speaker-based restrictions on communication are also suspect.<sup>317</sup>

The intermediate scrutiny standard for content-neutral regulations directs a court to ask if the regulation "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is

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<sup>311</sup> See, e.g., *McDonald*, 472 U.S. at 485 ("The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. . . . [T]here is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." (citations omitted)). But see *BE & K Constr. Co.*, 536 U.S. at 531-32 (exploring but rejecting analogy of baseless suit to false speech).

<sup>312</sup> At *infra* notes 342-57 and accompanying text below, I argue that petitioning the government deserves heightened protection as extraordinary speech safeguarded by the First Amendment.

<sup>313</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765, 774-45 (2002) (holding content-based speech restriction subject to strict scrutiny, which requires government to prove restriction "is (1) narrowly tailored, to serve (2) a compelling state interest"); *id.* at 775 (explaining that to show regulation is narrowly tailored, government must "demonstrate that it does not unnecessarily circumscrib[e] protected expression" (internal quotation omitted)).

<sup>314</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

<sup>315</sup> *Id.* at 641; see also *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding incitement to imminent lawless action unprotected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (deeming "fighting words" unprotected speech that can be regulated without violating First Amendment).

<sup>316</sup> *Turner*, 512 U.S. at 643.

<sup>317</sup> *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

essential to the furtherance of that interest.”<sup>318</sup> In practice, application of this standard frequently leads to a balancing of the government interest in the regulation against the amount of speech restricted.<sup>319</sup> In some cases, the Court has demanded a greater justification for neutral regulations that impose disproportionate burdens on unpopular or vulnerable groups.<sup>320</sup> Often the Court has considered relevant the availability of alternative avenues of expression and whether there are less speech-restrictive means of achieving the government’s regulatory purpose,<sup>321</sup> and it has insisted upon a more persuasive justification for regulations limiting expressive activity that operate in a public forum.<sup>322</sup>

These principles suggest that, even assuming petitioning is but ordinary speech, some current law enforcement policies violate the right to petition. First, immigrant reports of unlawful activity do not fit plausibly within any category of unprotected speech. Thus, an outright prohibition on immigrants seeking redress for unlawful activity would constitute a direct, speaker-based regulation of speech that is presumptively invalid and could be justified only upon the demonstration of a compelling state interest.

Second, even taking law enforcement policies on immigrant reporting as content-neutral leads to the application of intermediate scrutiny, which the policies do not pass. A substantial amount of speech is inhibited by law enforcement agency practices that allow im-

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<sup>318</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>319</sup> See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165 (2002) (explaining inquiry as whether there is “an appropriate balance between the affected speech and the governmental interests that the [speech restriction] purports to serve”).

<sup>320</sup> *Id.* at 2088 (observing that Jehovah’s Witnesses are “‘little people’ who face the risk of silencing by [such] regulations”); *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (invalidating ban on door-to-door leafleting and noting its importance “to the poorly financed causes of little people”); see also *Tribe*, *supra* note 83, at 979-80 (emphasizing that facially neutral rules which disproportionately burden unpopular groups should be subject to heightened scrutiny).

<sup>321</sup> See *United States v. Kokinda*, 497 U.S. 720, 738-39 (1990) (Kennedy, J., concurring) (upholding restriction on solicitation on postal sidewalk in part since it still allows those affected “to engage in a broad range of activity to express their views”); *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (upholding municipal noise regulation for musical performances in park and noting availability of “ample alternative channels of communication”).

<sup>322</sup> See, e.g., *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding regulation on speech-related conduct on sidewalks and roads near health care facilities, including abortion clinics, even though sidewalks and roads are public forums); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (finding airports not public forums and upholding prohibition on solicitations in airports); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983) (setting out categories of forums).

migrants who report illegal activity to be reported to INS,<sup>323</sup> but few if any government interests are served by such a regulation.

Begin with the aggressive *collect-and-report* policies. Such policies might be defended as promoting efficiency in law enforcement by facilitating the exchange of information among local, state, and federal officials across civil and criminal law enforcement jurisdictions. On the surface these policies might also seem to promote immigration law enforcement in particular, as law enforcement officials would gather immigration status information and share it, thus generating investigatory leads for INS.<sup>324</sup> One might also posit that the collect-and-report policy serves to concentrate law enforcement resources on the investigation of unlawful activity directed at law-abiding victims, rather than on crimes against those victims, such as undocumented immigrants, who have themselves engaged in unlawful activity.

But these interests are illusory. A collect-and-report policy undermines law enforcement by deterring reports of *any* unlawful activity and will result in few referrals to INS, as leads will be produced only where an immigrant is unaware that the information will be shared, is duped into supplying it, or is so desperate for help—recall Gregorio Zarma Goyo and Beatrice Okezie—that she is willing to risk deportation to obtain it.<sup>325</sup> Nor can one credit a government interest in concentrating enforcement resources on illegal activity involving “innocent” victims, as prosecutors’ longstanding reliance on the cooperation of minor defendants, including snitches and informants, belies

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<sup>323</sup> See *supra* Part I. It is not clear that an affirmative collect-and-report policy inhibits more speech than a no-standards policy, as both fall short of the guarantee of confidentiality of status that many immigrants need before they are willing to petition. For the purposes of weighing the amount of speech inhibited, I will treat both the collect-and-report and no-standards approaches as inhibiting a substantial quantum of speech.

<sup>324</sup> Especially since 1996, Congress has sought to encourage, though not require, greater collaboration between local and state agencies and INS. In IIRIRA, for instance, Congress authorized state and local governments to enter into cooperation agreements with INS, pursuant to which state and local officials would agree to enforce federal immigration laws directly. IIRIRA, Pub. L. No. 104-208, § 133, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1357(g) (2000)); see also § 1103(a)(10) (empowering Attorney General to authorize state and local officials to enforce immigration laws in event of “an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border”). Relatedly, in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) [hereinafter PRA], Congress required states receiving TANF grants to report quarterly to the INS the names and addresses of all persons the state knows to be “unlawfully in the United States.” PRA § 411A (codified at 42 U.S.C. § 611a (2000)). Finally, the PRA bars “anti-snitch” policies. See *supra* note 282 and accompanying text.

<sup>325</sup> In extreme cases, in any event, the INS is likely to stay its hand. See, e.g., Mirta Ojito, U.S. Permits Deaf Mexicans, Forced to Peddle, to Remain, N.Y. Times, June 20, 1998, at A1 (noting INS acknowledgment that deaf Mexican peddlers held in involuntary servitude will not be deported).

the claim.<sup>326</sup> Finally, the absence of a connection between immigrant-status information and nearly all non-INS law enforcement, from civil labor and workplace safety violations to ordinary criminal offenses, undermines any suggestion that affirmative collection of status information serves general law enforcement purposes.<sup>327</sup>

That a collect-and-report policy cannot pass intermediate scrutiny is further confirmed by the presence of other factors that have traditionally led to the invalidation of indirect regulations of speech. This policy creates disproportionate burdens on a vulnerable and unpopular population.<sup>328</sup> In many instances it leaves no alternative avenue available for the immigrant to communicate her message to the government. Nor is a collect-and-report policy the least restrictive means for promoting law enforcement in general or immigration law enforcement in particular.

Finally, while not a classic public forum in the sense of a street or park,<sup>329</sup> law enforcement intake units generally open to the public should be considered at least "limited-purpose" public forums explic-

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<sup>326</sup> See *United States v. Singleton*, 165 F.3d 1297, 1299 (10th Cir. 1999) (en banc) (noting United States's protest that interpreting antibribery statute to bar prosecutors from offering lenient treatment to criminal defendants in exchange for cooperation "would not only be a radical departure from the ingrained legal culture of our criminal justice system but would also result in criminalizing historic practice and established law"); *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (en banc) ("No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.").

<sup>327</sup> See Muzaffar Chishti, *The Role of States in U.S. Immigration Policy*, 58 *Ann. Surv. Am. L.* 371, 372 (2002) ("[Cooperation] between the INS and local law enforcement agencies do[es] irreparable harm to both effective law enforcement and to public safety. Effective law enforcement depends upon the trust that complainants and witnesses place in local police.").

<sup>328</sup> The Supreme Court has characterized permanent residents as a "discrete and insular minority" and has generally treated state discrimination against legal immigrants as presumptively invalid. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (internal quotation omitted) (invalidating state welfare discrimination against legal immigrants under strict scrutiny); see also *Bernal v. Fainter*, 467 U.S. 216 (1984) (applying strict scrutiny and striking down state prohibition on permanent residents becoming notary publics); *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085 (N.Y. 2001) (subjecting state discrimination against legal immigrants to strict scrutiny as permanent residents are discrete and insular minority). The Court has even subjected to heightened scrutiny state and local discrimination against some undocumented immigrants. *Plyler v. Doe*, 457 U.S. 202, 224 (1982) (determining that state denial of free public education to undocumented children was subject to heightened scrutiny, requiring furtherance of "substantial goal").

<sup>329</sup> See, e.g., *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002) (characterizing park as public forum but upholding permit requirements as content-neutral and reasonable time, place, and manner restriction); *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (recognizing public streets as "the archetype of a traditional public forum").



itly dedicated to a particular form of expressive activity<sup>330</sup>—communication of information regarding criminal or other unlawful behavior to the relevant authorities.

The Supreme Court has been reluctant to recognize some specialized physical settings as limited-use public forums—spaces that might appear analogous to a precinct house or local labor department intake unit. But these decisions have generally turned on the presence of two factors, neither of which is present in the context of immigrant complainants to law enforcement agencies. First, in some cases in which the Court has refused to classify government property as a public forum, such as a postal sidewalk,<sup>331</sup> private mailboxes,<sup>332</sup> and union-related meetings at a state community college,<sup>333</sup> the Court has seemed motivated principally by a conviction that obvious and adequate alternative avenues for expression remained open.<sup>334</sup> Second, the Court has sometimes declined to characterize a government space as a public forum because the Court has viewed the government as acting in a proprietary capacity.<sup>335</sup> In the case of immigrants seeking to communicate with law enforcement agencies, however, there are no alternative avenues for expression and the government is not acting in a proprietary capacity.

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<sup>330</sup> A limited-purpose public forum is “public property which the State has opened for use by the public as a place for expressive activity,” *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983), and has been “created for a limited purpose such as use by certain groups.” *Id.* at 46 n.7; see also *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389-93 (1993) (noting that access to public property that is not fully open public forum must be reasonable and viewpoint neutral).

<sup>331</sup> *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding prohibition on solicitations on postal premises).

<sup>332</sup> *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (upholding federal prohibition on placement of unstamped “mailable matter” in mailboxes).

<sup>333</sup> *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984) (holding nonunion faculty member does not have right to participate in “meet and confer” sessions between union and state college).

<sup>334</sup> See *Council of Greenburgh*, 453 U.S. at 119 (discussing other viable methods of distributing “mailable matter”); *id.* at 135-36 (Brennan, J., concurring in judgment) (emphasizing availability of alternative avenues for expression); *Knight*, 465 U.S. at 288 (noting individual instructors’ freedom to speak is not impaired by exclusion from sessions between union and state college). The Court has on occasion raised other special considerations, such as the unique nature of a military base. *United States v. Albertini*, 472 U.S. 675 (1985) (holding “open house” at military base not public forum); *Greer v. Spock*, 424 U.S. 828, 836-38 (1976) (holding that civilian access and presence of roads and sidewalks within U.S. military base do not render base public forum).

<sup>335</sup> See, e.g., *Kokinda*, 497 U.S. at 725-26 (stating that when government acts “in its proprietary capacity,” restriction on First Amendment activities “is valid . . . unless it is unreasonable”); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (emphasizing different First Amendment standard where “the city is engaged in commerce” and upholding ban on political advertisements on municipal transit vehicles).

Accordingly, a collect-and-report policy would appear to be invalid under current First Amendment speech doctrines. The policy inhibits substantial speech while vindicating little or no other valid regulatory interest. In addition, the policy is suspect because it falls disproportionately on a vulnerable and unpopular group; it leaves open no alternative avenues for communication with the government; and the space where it operates is fairly characterized as a limited-purpose public forum.

The analysis of a *no-standards* policy under the First Amendment reaches a similar result. Such a policy inhibits a substantial amount of speech, not because immigrants know that they will be reported to INS, but because they cannot be sure they will not be.<sup>336</sup> On the other side of the balance, the no-standards policy vindicates little or no regulatory interest. It is unlikely to foster efficient law enforcement generally or immigration law enforcement in particular.<sup>337</sup> Since immigration status information is collected only on an ad hoc basis by law enforcement agencies that have no standards, the policy itself cannot be described as germane to the agency's overall mission. And, as with a collect-and-report policy, the no-standards approach disproportionately burdens a vulnerable population, leaves no alternative avenue for communication with the government, and operates in a limited-purpose public forum.

The no-standards policy may raise one additional concern: It may also trigger the First Amendment "void for vagueness" doctrine. This doctrine holds that ambiguous statutes may transgress due process requirements of fair notice<sup>338</sup> and legislative cabining of agency discretion.<sup>339</sup> The Court has shown a special concern for application of the void-for-vagueness doctrine in First Amendment cases, for "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms."<sup>340</sup>

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<sup>336</sup> It may be that a no-standards policy inhibits less speech and so presses less heavily on the First Amendment scale. But existing social science research results are not sufficiently nuanced to detect such an outcome.

<sup>337</sup> See *supra* notes 325-327 and accompanying text.

<sup>338</sup> See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (explaining that criminal statute must give fair warning of conduct it prohibits); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (identifying law as unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning").

<sup>339</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (explaining void-for-vagueness doctrine, which directs that "a legislature establish minimal guidelines to govern law enforcement" (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974))).

<sup>340</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (footnotes and internal citations omitted) (upholding municipal antinoise ordinance); see also *NAACP v. Button*, 371 U.S. 415, 433 (1963) (invalidating law while recognizing that vagueness standards are strict in free expression cases).

A law enforcement agency that embraces a no-standards policy would seem to implicate the void-for-vagueness doctrine on both counts. The policy does not provide notice to the immigrant of the negative consequences of engaging in expressive activity, as immigrants who petition may be questioned and referred to the INS. Nor does the no-standards policy sufficiently guide the discretion of the law enforcement official conducting the intake, impermissibly allowing “police-men . . . to pursue their personal predilections.”<sup>341</sup>

In sum, even treating petitioning as subsumed within speech, current speech doctrine suggests that law enforcement agencies who adopt either a collect-and-report policy or have no policy at all regarding the gathering and sharing of immigration status information may violate the First Amendment.

### *B. Towards a New Theory of the Right to Petition*

Current petitioning doctrine is inconsistent with the history of the right, inadequate to its purpose, and unsatisfactory from the perspectives of individual rights protection, effective law enforcement, and a concern for a well-functioning republican government. The next Section argues for a new theory of petitioning, more faithful to the history and purpose of the right and consistent with several closely related doctrines.

#### *1. Petitioning as Extraordinary Speech*

Petitioning is not ordinary speech.<sup>342</sup> This form of expression has a distinctive history<sup>343</sup> and plays a unique function in facilitating republican government<sup>344</sup> by assuring that both the personal and generalized grievances of all persons are heard by those who govern. This particular history and functionality is reflected in the text of the Petition Clause, which extends beyond the general guarantee of the “freedom of speech” to promise that a particular audience—“the government”—is forever open to hear a specialized kind of expres-

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<sup>341</sup> *Kolender*, 461 U.S. at 358 (quoting *Goguen*, 415 U.S. at 575).

<sup>342</sup> But cf. *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (declining to “elevate the Petition Clause to special First Amendment status” as “there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions”).

<sup>343</sup> See *supra* Part II.

<sup>344</sup> *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (“We . . . have explained that the right [to petition] is implied by ‘[t]he very idea of a government, republican in form . . . .’” (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876))).

sion—a “petition . . . for a redress of grievances.”<sup>345</sup> Accordingly, restrictions on petitioning should receive heightened judicial scrutiny, subject only to the sham petitioning exception already recognized.

As the history of petitioning well demonstrates, the practice serves important purposes for both the governors and the governed.<sup>346</sup> The free flow of petitions supplies an important stream of information about the views and concerns of the people, informing government decisions about individual cases and the need for generalized policymaking.<sup>347</sup> Unobstructed petitioning also creates an opportunity for all people, regardless of their political status, to be heard. The guarantee of the right to petition does not include a guarantee of substantive relief, of course, nor even of a formal response.<sup>348</sup> But the Founding generation understood petitioning as a singular political activity of the highest order, and the decision to memorialize it separately in our First Amendment reflected an appreciation for its unique role in republican government. Vindication of that role compels close judicial scrutiny of any governmental impediments to petitioning.

Today the nation is too populous, and the issues confronting state and national legislatures too numerous, for petitions to Congress to foster the same sort of “unmediated and personal politics”<sup>349</sup> they once did. Nevertheless, communications to national, state, and local legislators continue to serve vital purposes. They inform representatives of the grievances and concerns of the governed and of the operation of laws and agencies on residents of their districts; prompt inquiries by legislative offices to executive branch agencies that eventually yield individual redress; and illuminate broader statutory, regulatory, or budgetary deficiencies.<sup>350</sup>

In addition to the nation’s greater size and population, petitions to legislators today differ from those of the Founding era because Congress and other legislatures have shifted to executive agencies

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<sup>345</sup> U.S. Const. amend. I; see Andrews, *supra* note 89, at 624 (“[T]he right to petition guarantees the right to speak to a particular body of persons . . . [and] preserves a particular type of speech . . .”).

<sup>346</sup> Cf. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 246-47 (2002) (urging “an approach to constitutional interpretation that places considerable weight upon consequences—consequences valued in terms of basic constitutional purposes”).

<sup>347</sup> For one study of the role of individualized petitions in prompting general legislation, see generally Maguire, *supra* note 271 (analyzing impact of private immigrant petitioning on development of public laws concerning naturalization, immigration quotas, and grounds for exclusion).

<sup>348</sup> Cf. Higginson, *supra* note 103, at 165 (observing that historically, legislative petitioner was entitled to response).

<sup>349</sup> Mark, *supra* note 84, at 2154.

<sup>350</sup> See *supra* note 347.

many of the executive and quasi-judicial functions performed by Founding-era legislatures.<sup>351</sup> But executive branch agencies today rely on petitioning in many of the same ways that colonial legislatures once did. Petitions enable the agencies to respond to individual grievances, private and public, in furthering the goals of their statutes.<sup>352</sup> Petitions also create an information stream that enables agencies better to allocate resources, target enforcement, and identify gaps in statutory or regulatory coverage.<sup>353</sup>

Petitions to the government also further important individual interests. Some result in direct redress.<sup>354</sup> Others may further dignitary values by assuring that a complainant's grievance will be heard, if not heeded, and confirming that the petitioner has a voice worthy of attention. Finally, in the case of new immigrants, lowering barriers to law enforcement services may promote civic engagement with public institutions,<sup>355</sup> thereby reducing the need for immigrant communities to develop insular, sometimes undemocratic, governance structures.<sup>356</sup> For these reasons of constitutional text, history, and purpose, as well as for sound policy reasons, petitioning is extraordinary speech, and infringements on the right to petition should be subject to heightened First Amendment scrutiny.

The principle of heightened protection can be achieved doctrinally in any number of ways. My purpose here is not to argue for a precise verbal formulation. Rather, my aim is to make the more fundamental point that petitioning warrants greater judicial protection

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<sup>351</sup> See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) ("The Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state.").

<sup>352</sup> See, e.g., *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) ("[The NLRB] does not initiate its own proceedings; implementation is dependent upon the initiative of individual persons." (internal quotations omitted)); U.S. Gen. Accounting Office, GAO/HEHS-95-29, *Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops* 3 (1994) (stating that in garment industry, U.S. Department of Labor "typically targets workplaces for inspection based on complaints received from workers and other sources"); *id.* at 10 (noting that in garment industry, "OSHA has chosen to rely on an employee complaint or a reported injury").

<sup>353</sup> See *supra* note 347.

<sup>354</sup> Hopper & Osuna, *supra* note 180, at 3 (documenting that "[s]ince the first Congress in 1789, more than 7,200 private [immigration] bills have been enacted into law" in response to petitions from noncitizens).

<sup>355</sup> Cf. Breyer, *supra* note 346, at 246-47 ("[W]hen judges interpret the Constitution, they should place greater emphasis upon . . . the people's right to 'an active and constant participation in collective power.'" (quoting Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), in *Political Writings* 309, 316 (Biancamaria Fontana trans. & ed., 1988))).

<sup>356</sup> See, e.g., Peter Kwong, *The New Chinatown* 81-106 (rev. ed. 1996) (noting role of government neglect in fostering development of business-dominated, antidemocratic governance institutions in New York City's Chinatown).

than current speech doctrine now affords it. Nonetheless, it is not hard to identify familiar judicial tools that could be deployed to protect petitioning as extraordinary speech.<sup>357</sup> One could conclude that content-neutral regulation of petitioning should be permissible only when narrowly tailored to achieve a compelling state interest (ordinarily the standard for content-based regulation of speech). Alternatively, one could conceive of a modified balancing test—which, like other First Amendment doctrines, requires a broad weighing of the amount of petitioning inhibited as against the interests served by the government regulation—but in which the proverbial thumb on the petitioning scale presses with special force on the speech-protective side of the balance. This could be done, for instance, by incorporating a rebuttable presumption of government unlawfulness upon a showing that a challenged policy or practice chills a significant amount of petitioning.

## 2. *Coherence with Related Doctrines*

The argument for a muscular theory of petition rights generally, and petition rights for immigrants in particular, draws strength not only from the text, history, and purpose of the Petition Clause, and from its relationship to speech doctrines, but also from its consistency with related decisions on court access, unconstitutional conditions, and equal protection.

### a. The Court Access Doctrine

The court access cases, which some have argued are best understood as petitioning decisions,<sup>358</sup> hold that the Due Process Clause forbids the government from restricting court access regarding fundamental rights and where the state exercises exclusive control over the

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<sup>357</sup> The following tests would be classified as “suspect-content” rules in Richard Fallon’s taxonomy. See Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 56, 67-73 (1997) (delineating doctrinal tests). Selection of a “suspect-content” test would align petitioning doctrine with other speech and discrimination doctrines. See *id.* at 83 (“Most of the doctrinally prominent tests under the First Amendment and the Equal Protection Clause . . . are suspect-content rather than forbidden-content tests.”).

<sup>358</sup> See *Andrews*, *supra* note 89, at 570 (“[In the court access cases,] the Court did not meaningfully address the Petition Clause. The reason for this oversight is difficult to discern.”); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 *Hastings Const. L.Q.* 15, 44 (1993) (criticizing “the Court’s failure to recognize that the First Amendment Petition Clause should govern these [court access] claims”); see also *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (explaining that “[d]ecisions of this Court have grounded the right of access to courts in . . . the First Amendment Petition Clause,” among other constitutional provisions).

means of redress. In 1971, in *Boddie v. Connecticut*,<sup>359</sup> the Supreme Court established this two-pronged test and applied it to invalidate filing fees for divorce petitions.<sup>360</sup> Almost immediately, the Court retreated from the potentially sweeping implications of *Boddie*, concluding that filing fees for bankruptcy petitions<sup>361</sup> and judicial appeals of adverse welfare determinations<sup>362</sup> were constitutionally permissible. In its subsequent decisions, the Supreme Court displayed a special concern for barriers to court access for claims involving First Amendment concerns.<sup>363</sup> In 1996, in its most recent application of the *Boddie v. Connecticut* standard, the Court struck down a filing fee for appeal of an order terminating parental rights,<sup>364</sup> reaffirming the validity of the test.<sup>365</sup>

At the end of the 2001 Term, the Supreme Court clarified the right of court access in *Christopher v. Harbury*,<sup>366</sup> a decision rejecting the contention of the widow of a murdered Guatemalan citizen that U.S. government officials had concealed information about her husband's circumstances and thereby violated her right of court access.<sup>367</sup> Writing for eight members of the Court,<sup>368</sup> Justice Souter grouped court access claims into two categories: the first being forward-looking "claims that systemic official action frustrates a plaintiff . . . in

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<sup>359</sup> 401 U.S. 371 (1971).

<sup>360</sup> *Id.*; see also *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.").

<sup>361</sup> *United States v. Kras*, 409 U.S. 434, 444-46 (1973) (upholding filing fee for bankruptcy petition because elimination of debt implicates no fundamental right and debtor may engage in private negotiation with creditors).

<sup>362</sup> *Ortwein v. Schwab*, 410 U.S. 656 (1973) (*per curiam*) (upholding filing fee for judicial review of denial of welfare benefits because no fundamental rights are implicated and administrative proceedings could provide meaningful redress).

<sup>363</sup> See *Ortwein*, 410 U.S. at 658 (distinguishing judicial appeal of adverse welfare determination from "the special nature of the marital relationship and its concomitant associational interests" at issue in *Boddie*); *Kras*, 409 U.S. at 446 ("Bankruptcy is hardly akin to free speech or marriage or to those other rights . . . that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated.").

<sup>364</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

<sup>365</sup> In *M.L.B.*, the Court emphasized the "fundamental interests" inquiry—there the deprivation of parental rights—but it did not wholly abandon the separate *Boddie* concern with a system of exclusive state control. 519 U.S. at 113-16; see also *Boddie*, 401 U.S. at 376-77 (explaining that where resort to judicial process is mandatory, right of court access is analogous to due process rights of defendant "called upon to defend his interests in court").

<sup>366</sup> 536 U.S. 403 (2002).

<sup>367</sup> *Id.* at 405-06.

<sup>368</sup> Justice Thomas concurred in the judgment. *Id.* at 422-23 (writing, in single-paragraph concurrence, that right of court access imposes no affirmative obligation on government actors).

preparing and filing suit[ ],” and the second being backward-looking “claims . . . of specific cases that cannot now be tried (or tried with all material evidence).”<sup>369</sup> Common to both categories of court access claims, concluded the Court, was the requirement that a plaintiff possess a nonfrivolous underlying claim for relief, “without which a plaintiff cannot have suffered injury by being shut out of court.”<sup>370</sup>

To put *Harbury* in Petition Clause terms, the right of court access protects a petition regarding a grievance that is capable of redress by the authorities to which the petition is submitted; conversely, interference with frivolous petitioning on matters not susceptible to redress does not contravene the right.<sup>371</sup> From *Harbury*, therefore, comes the guidance that a petition must state a nonfrivolous claim for redress of grievances to a government body empowered to deliver relief on the claim. In addition, court access cases challenging systemic government interference, such as *Boddie* and *M.L.B.*, instruct that even government rules which *indirectly* burden petitioning, such as filing fees, are suspect when the petitioning involves a fundamental right and the state exercises exclusive control of the means of resolution of the dispute. The Court’s other Petition Clause decision this Term, *BE & K Constr. Co. v. NLRB*, confirms the point that even slight burdens on petitioning implicate the right,<sup>372</sup> for like other First Amendment free-

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<sup>369</sup> Id. at 413-14. Examples of “systemic official action” include filing fees as in *M.L.B.* or, in the context of prisoners, an inadequate prison law library. See *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (requiring that court access for prisoners be “adequate, effective, and meaningful”); see also *Lewis v. Casey*, 518 U.S. 343 (1996) (reviewing various challenges to adequacy of prison law library). The most common example of a denial of court access in a specific case is a government cover-up. See *Harbury v. Deutch*, 233 F.3d 596, 607-08 (D.C. Cir. 2000) (gathering cover-up cases).

<sup>370</sup> *Harbury*, 536 U.S. 414-15; see also id. (“[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong.”). The Court explained that it had previously intimated the requirement of a bona fide underlying claim in *Lewis*, 518 U.S. at 353 & n.3 (declaring that prisoner alleging denial of court access must identify “nonfrivolous” or “arguable” underlying claim).

<sup>371</sup> It is now apparent that the requirement of a nonfrivolous underlying claim was foreshadowed in an exchange regarding the Petition Clause earlier in the 2001 Term, in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002). Justice Breyer suggested that the Petition Clause established a right to sue a state before a federal administrative agency, id. at 780 (Breyer, J., dissenting), but the majority indicated that the right to petition was not implicated when there was no underlying cause of action, in this case because the state enjoyed Eleventh Amendment sovereign immunity. Id. at 761 n.13.

<sup>372</sup> *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 529 (2002) (holding right to petition implicated even by relatively modest burden of “threat of an NLRA adjudication”).



doms, courts must safeguard sufficient “breathing space” to permit petition rights to flourish.<sup>373</sup>

Applying the guidance of the court access cases, some matters about which immigrants desire to petition the government are surely fundamental. For instance, an immigrant victim of domestic or other violence who seeks civil and criminal intervention is petitioning about a fundamental right to bodily integrity, and perhaps against slavery.<sup>374</sup> Freedom from invidious discrimination is also undeniably fundamental, and thus immigrants seeking to petition under antidiscrimination laws should meet this standard; so too for petitions alleging violations of the National Labor Relations Act (NLRA) right to organize, which has been described as an aspect of the First Amendment’s right of association<sup>375</sup> and of the Thirteenth Amendment’s freedom from involuntary servitude.<sup>376</sup> Petitions seeking redress for slave-labor conditions or the unlawful denial of life-sustaining support, such as subsistence welfare benefits, should also be regarded as implicating fundamental rights.

Further, as to some of these fundamental matters on which immigrants wish to petition, the government retains exclusive control of the means of dispute resolution, raising a court access notion that echoes the First Amendment inquiry into the availability of alternative avenues of expression.<sup>377</sup> The clearest instance of exclusive government control may be criminal law: A victim who cannot petition the police has nowhere else to turn,<sup>378</sup> and thus special protection for petitioning on criminal matters would cohere strongly with the court access doctrines.

Applying the court access tests to petitions on civil matters addressed to executive branch authorities raises further issues, as these

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<sup>373</sup> *Id.* at 531-32 (applying “breathing space” principles of speech doctrines to right to petition).

<sup>374</sup> This very concern led to the passage of the most sweeping whistleblower protections for immigrants in recent years, the VAWA provisions for battered immigrant women and children. See *supra* note 13.

<sup>375</sup> *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (holding that union organizing implicates speech and assembly rights); *Howard Gault Co. v. Tex. Rural Legal Aid, Inc.*, 848 F.2d 544, 567 (5th Cir. 1988) (same).

<sup>376</sup> James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–57*, 102 *Colum. L. Rev.* 1 (2002) (reviewing Thirteenth Amendment arguments pressed by labor advocates in development of *Norris-LaGuardia* and *Wagner Acts*); see also William E. Forbath, *Law and the Shaping of the American Labor Movement* 136 (1991) (describing “labor jurisprudence” that “drew on the . . . thirteenth amendment[.]”).

<sup>377</sup> *Supra* note 321 and accompanying text.

<sup>378</sup> It was not always so. See, e.g., Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 *Notre Dame L. Rev.* 321, 350-53 (2002) (tracing origin and decline of system of private prosecutions).

matters are at least theoretically amenable to negotiated settlements between private parties, and some civil statutes establish a private right of action in addition to administrative remedies.<sup>379</sup> Nevertheless, for several reasons, barriers to immigrant petitioning on some civil matters are inconsistent with court access principles. First, the formal possibility of a private, negotiated settlement is frequently illusory. Perhaps acknowledging the deficiencies of this analytic structure, the Court in its most recent court access decision deemphasized the “exclusive control” inquiry.<sup>380</sup> Second, some civil regimes of particular importance to undocumented persons, including the NLRA<sup>381</sup> and OSHA,<sup>382</sup> foreclose a private right of action. Only by petitioning the NLRB or OSHA can immigrants redress grievances arising under these statutes. Third, and most importantly, even civil statutes that allow for private enforcement (such as wage-and-hour<sup>383</sup> and antidiscrimination laws<sup>384</sup>) rarely provide a meaningful alternative to petitioning executive branch agencies. Low-wage and indigent immigrants are largely unable to afford legal representation, the Legal Services Corporation (LSC) forbids its grantees from representing many immigrants,<sup>385</sup> and few LSC-funded legal services offices offer representation in workplace matters in any event.<sup>386</sup> Petitions to executive branch agencies are frequently the only realistic possibility of securing redress.

In sum, heightened scrutiny of even indirect or slight regulation of petitioning would be consistent in many regards with the court access cases. These principles are most likely to invalidate barriers to

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<sup>379</sup> See *United States v. Kras*, 409 U.S. 434, 445-46 (1973) (stating that possibility that debtor could negotiate private agreement with creditors, “[h]owever unrealistic the remedy may be in a particular situation,” renders bankruptcy proceedings nonexclusive means of dispute resolution).

<sup>380</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-18 (1996); see also Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 46 (1973) (“[In *Boddie*] the state’s active involvement in the resulting plight of the individuals thus disabled may not be essential to the Court’s conclusion.”).

<sup>381</sup> 29 U.S.C. §§ 151-169 (2000).

<sup>382</sup> §§ 651-678; see also Mark A. Rothstein, *Occupational Safety and Health Law* § 502 (4th ed. 1998) (explaining lack of private right of action to enforce OSHA).

<sup>383</sup> § 216(b) (establishing private right of action to enforce federal minimum wage and overtime statutes).

<sup>384</sup> 42 U.S.C. § 2000a-3 (2000) (creating private right of action to enforce certain antidiscrimination provisions).

<sup>385</sup> See 45 C.F.R. § 1626 (2003) (restricting grantees from providing legal services to many classes of noncitizens).

<sup>386</sup> In 1999, two percent of the cases closed by LSC-funded legal services offices related to employment matters. Legal Servs. Corp., *Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress* 7 (2000), available at <http://www.lsc.gov/pressr/EXSUM.pdf>.

court access involving matters of fundamental rights and where the state exercises exclusive control of the means of dispute resolution, although the Supreme Court has wisely begun to retreat from equal reliance on the latter factor. Incorporating these principles into a theory of petition rights as applied to immigrants should yield close judicial scrutiny of burdens to nonfrivolous petitioning for redress of grievances arising under, at the least, criminal, labor organizing, health and safety, wage-and-hour, antidiscrimination, and subsistence benefits laws.

#### b. Unconstitutional Conditions Doctrine

The doctrine of unconstitutional conditions holds that government may not indirectly burden the exercise of rights that it could not restrict directly.<sup>387</sup> The doctrine rejects the view, famously advanced by Justice Holmes, that the greater power to deny a benefit necessarily includes the lesser power to grant the benefit conditionally.<sup>388</sup> Instead, unconstitutional conditions principles dictate close judicial scrutiny of regulations that coerce the forfeiture or nonexercise of a constitutional right, just as if the regulations were direct restrictions on the constitutional right.<sup>389</sup> The Supreme Court relied on the doctrine initially to protect corporate economic interests from state regulation of the public highways and foreign corporations.<sup>390</sup> Later the Court came to apply the doctrine in defense of some individual liber-

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<sup>387</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1421-22 (1989) ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.").

<sup>388</sup> See, e.g., *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) ("If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."); *McAuliffe v. Mayor and Bd. of Aldermen of New Bedford*, 155 Mass. 216, 220 (1892) (stating that although policeman "may have a constitutional right to talk politics . . . he has no constitutional right to be a policeman"); see also Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. Pa. L. Rev.* 1293, 1304-14 (1984) (reviewing history of greater-includes-the-lesser principle in Supreme Court decisions).

<sup>389</sup> For one of the earliest statements of the principles, see *Frost v. Railroad Commission of California*, 271 U.S. 583 (1926) (invalidating California law imposing restrictive conditions on private transportation companies wishing to do business in state).

<sup>390</sup> See Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 *Colum. L. Rev.* 321 (1935) (reviewing early cases).

ties, including particularly First Amendment rights,<sup>391</sup> and most recently, in zoning and land use cases.<sup>392</sup>

The Court's jurisprudence in this area is widely described by commentators as incoherent and dominated by judicial policy preferences.<sup>393</sup> The difficulty is in identifying when conditions on government largesse, employment, or licenses amount to impermissible suasion subject to heightened judicial scrutiny, and the Court's opinions fail to establish a clear, defensible demarcation between legitimate incentives and illegitimate coercion.

It is not my purpose to analyze the extensive case law and theoretical work on unconstitutional conditions but rather to explain why the theory of petition rights advanced in this Article fits comfortably with principles that animate that jurisprudence. In general, the unconstitutional conditions decisions tend to inquire into the degree of government coercion, the importance of the right affected, and the germaneness of the condition to the benefit.<sup>394</sup> The presence of a government monopoly on the benefit at issue increases the likelihood that courts will closely scrutinize any conditions imposed.<sup>395</sup>

The unconstitutional conditions doctrine does not apply directly to the circumstance of immigrant petitioners unable to communicate with government for fear of deportation because the government is

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<sup>391</sup> See, e.g., *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (invalidating termination of relationship with government contractor based on political affiliation); *Elrod v. Burns*, 427 U.S. 347 (1976) (holding unconstitutional discharge of public employee based on political affiliation); *Perry v. Sindermann*, 408 U.S. 593 (1972) (invalidating nonrenewal of teacher's contract based on criticism of college administration); *Sherbert v. Verner*, 374 U.S. 398 (1963) (striking down attempt to condition unemployment benefits on recipient's willingness to work on religious sabbath); *Speiser v. Randall*, 357 U.S. 513 (1958) (rejecting loyalty oath requirement for certain tax exemption). But see *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding abortion counseling "gag rule" as condition of receipt of certain federal funds); *Lyng v. UAW*, 485 U.S. 360 (1988) (upholding rule that household is ineligible for food stamps if member is on strike); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (affirming tax exemption for nonprofit organizations that do not engage in substantial lobbying activities).

<sup>392</sup> See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (invalidating municipal condition on building permit that portion of land be dedicated to public purposes); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (invalidating exaction of easement as condition of permit to develop oceanfront property). For a critical perspective on the Court's reliance on the doctrine in this area, see Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum. L. Rev.* 473 (1991).

<sup>393</sup> See Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *Harv. L. Rev.* 4, 10-11 (1988) (commenting that doctrine "roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others").

<sup>394</sup> *Sullivan*, *supra* note 387, at 1428 (reviewing coercion as theme in unconstitutional conditions cases); *id.* at 1456-58 (reviewing germaneness as theme in case law).

<sup>395</sup> Epstein, *supra* note 393, at 103-04 (contending that the unconstitutional conditions doctrine functions to counteract harmful effects of government monopoly power).

not pressuring a predicate right (petitioning) by imposing a condition on a public benefit (law enforcement services); here, the right and benefit run together. Rather, the “exchange” at issue—the government price for undocumented immigrants accessing law enforcement services by petition—is possible deportation. But undocumented immigrants possess no constitutional right against deportation,<sup>396</sup> and therefore conditioning communication with law enforcement agencies on an immigrant’s exposing herself to deportation does not pose a direct “unconstitutional conditions” problem.

Nevertheless, underlying norms of the unconstitutional conditions doctrine are consistent with the theory of robust petition rights I urge here. Dean Kathleen Sullivan has argued persuasively that a better understanding of the doctrine lies in evaluating “the systemic effects that conditions on benefits have on the exercise of constitutional rights.”<sup>397</sup> Of particular constitutional concern is a condition that “discriminates de facto between those who do and do not depend on a government benefit.”<sup>398</sup> Sullivan’s distributive argument is grounded in equality norms and discerns within the case law the principle that conditions that entrench a caste hierarchy are constitutionally suspect.<sup>399</sup>

The anticaste strand of the unconstitutional conditions doctrine fits well with this Article’s analysis of immigrant petition rights. In classic unconstitutional conditions terms, the right to petition is a core First Amendment right, and immigration status is not “germane” to the organic mission and routine investigations of many, probably

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<sup>396</sup> This is not to say that deportation threatens no constitutional values. For example, deportation of an undocumented mother whose school-age citizen-child remains in the United States is extraordinarily destructive of family integrity. Cf. *Santosky v. Kramer*, 455 U.S. 745 (1982) (recognizing parental right under Due Process Clause to maintain relationship with child); *Stanley v. Illinois*, 405 U.S. 645 (1972) (same); *Beharry v. Reno*, 183 F. Supp. 2d 584, 588 (E.D.N.Y. 2002) (“Forcible separation of a non-citizen legal resident of this country from his citizen child or spouse implicates this right to familial integrity.”); see also *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (noting that if removed from country, noncitizen “may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual”).

<sup>397</sup> Sullivan, *supra* note 387, at 1490.

<sup>398</sup> *Id.* at 1490. Sullivan identifies two other, related concerns that should also trigger strict scrutiny of government conditions on benefits, where a condition would “alter the balance of power between government and rightholders” or would transgress the entitlement of rightholders to evenhandedness. *Id.*

<sup>399</sup> *Id.* at 1497-99; see also Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 *Cornell L. Rev.* 1185, 1188 (1990) (arguing that in benefits cases, Court has guaranteed “a certain non-wealth-dependent equality of constitutional rights within the constraints of our essentially market economy”).

most, law enforcement agencies.<sup>400</sup> More to the point, if government agencies *not* charged with immigration law enforcement discourage immigrant reporting, such a policy imposes a condition on the exercise of the right to petition that entrenches undocumented immigrants, many of them indigent, in a caste hierarchy.<sup>401</sup> This condition does not weigh as heavily on wealthier members of society, who can more readily pursue private negotiation or litigation. Further, because agency policies that deter immigrant reporting frequently undermine law enforcement not just for the individuals directly affected, but for other victims, co-workers, and community members, such policies are even more likely to raise anticaste concerns.<sup>402</sup>

In short, law enforcement agencies that discourage immigrant petitioning violate the anticaste principles that should, and often appear to, drive the doctrine of unconstitutional conditions, even if such policies do not directly enforce an impermissible exchange of preferred rights for government benefits. Treatment of petitioning as extraordinary speech deserving of heightened judicial protection would thus further cohere with the doctrine of unconstitutional conditions.

### c. Equal Protection Doctrine

Rigorous scrutiny of burdens on the petition rights of immigrants would also be consistent with constitutional equality principles. The Supreme Court's equal protection jurisprudence has long scrutinized alienage classifications,<sup>403</sup> recognizing that they are frequently pretexts for race and national origin discrimination.<sup>404</sup> The Court has

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<sup>400</sup> There are exceptions, but few crimes involving persons or property implicate immigration status, and status is rarely relevant to labor and employment matters on which immigrants would like to petition. See *supra* notes 47-48, 327 and accompanying text.

<sup>401</sup> See Rivera-Batiz, *supra* note 49, at 100 (documenting large wage penalty attributable to undocumented status).

<sup>402</sup> One commentator has urged an unconstitutional conditions doctrine that offers special protection to the exercise of rights that benefit the public as a whole, not just the rightholder herself. Thomas W. Merrill, *Dolan v. City of Tigard*: Constitutional Rights as Public Goods, 72 Denv. U. L. Rev. 859 (1995). Such an approach would extend special protection to the exercise of petition rights, which furthers responsive government in general and effective law enforcement in particular.

<sup>403</sup> See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (invalidating anti-Japanese discrimination in commercial fishing-license scheme as violative of equal protection); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding noncitizens are "persons" guaranteed "the equal protection of the laws" and invalidating San Francisco's denial of permits to Chinese laundry operators).

<sup>404</sup> See, e.g., *Takahashi*, 334 U.S. at 424 (Murphy, J., concurring) (describing anti-Japanese alienage classifications as product of "winds of racial animosity"); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1061 & n.194 (1979) (describing alienage classification in *Takahashi* as "at bottom" race discrimination).

concluded that much state discrimination against legal permanent residents is subject to strict scrutiny and presumptively invalid,<sup>405</sup> even as it has exempted federal discrimination against permanent residents<sup>406</sup> and state regulation of undocumented persons<sup>407</sup> from the baseline of strict scrutiny.

In its single decision involving equality claims by undocumented immigrants, *Plyler v. Doe*,<sup>408</sup> the Court applied heightened scrutiny to invalidate Texas's denial of free public education to undocumented children. Recognizing the presence in the United States of millions of undocumented persons in a huge "shadow population,"<sup>409</sup> the Court warned of the "specter of a permanent caste of undocumented resident aliens."<sup>410</sup> "The existence of such an underclass," wrote the Court, "presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."<sup>411</sup> Rejecting arguments that would result in the creation of such a caste, the Court instead declared that the "Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."<sup>412</sup>

As a matter of strict precedent, *Plyler* may secure for immigrants at least that quantum of petitioning necessary to avoid establishment

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<sup>405</sup> *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) ("[State] classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." (citation omitted)); *Bernal v. Fainter*, 467 U.S. 216 (1984) (applying strict scrutiny and invalidating state rule prohibiting permanent residents from serving as notary publics). The Court has exempted certain state public employment classifications from the rule of strict scrutiny for discrimination against permanent residents. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (upholding under rational basis review state prohibition on permanent residents serving as deputy probation officers). For analysis of the Court's equal protection decisions concerning noncitizens, see Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *Hamline L. Rev.* 51 (1985); Wishnie, *supra* note 140, at 504-09.

<sup>406</sup> See *Mathews v. Diaz*, 426 U.S. 67 (1976) (subjecting federal discrimination against permanent residents in Medicare program to rational basis review and holding it valid).

<sup>407</sup> *De Canas v. Bica*, 424 U.S. 351 (1976) (recognizing degree of leeway for states to regulate undocumented persons).

<sup>408</sup> 457 U.S. 202 (1982).

<sup>409</sup> *Id.* at 218.

<sup>410</sup> *Id.* at 218-19.

<sup>411</sup> *Id.* at 219.

<sup>412</sup> *Id.* at 213. Because children were not responsible for the actions of their undocumented parents and because denial of education would work an enduring, stigmatizing disability on the children, the Court ultimately applied heightened scrutiny and invalidated the state's discrimination against undocumented children. *Id.* at 223-30. In his concurrence, Justice Powell explained that he would apply the same reasoning to invalidate welfare restrictions directed at the children of undocumented persons. *Id.* at 239 n.3 (Powell, J., concurring).

of a “permanent caste” of undocumented persons.<sup>413</sup> This petitioning includes, at a minimum, communications on behalf of the vital interests of children—such as those affecting their education, health, and safety—and regarding other sorts of unlawful activity that threaten to entrench a permanent caste—such as domestic and other gross physical violence and slave-like working conditions. More broadly, the equality principles underscored by the Supreme Court in *Plyler* and its other alienage cases support a robust view of immigrant petition rights. Because equality rights are implicated along with petition rights in immigrant communications to government, immigrant petitioning should be treated as extraordinary speech deserving of special judicial protection.

In sum, petitioning is extraordinary speech warranting heightened judicial protection. Close scrutiny of burdens on petitioning is consistent with the history of the right to petition and its special role in fostering republican government as reflected in the specific codification of the right in the text of the First Amendment. A doctrine that values petitioning as a fundamental right and examines closely even indirect or modest burdens on the right would cohere with related lines of court access, unconstitutional conditions, and equal protection cases. It would also foster informed government and promote effective law enforcement, while avoiding the entrenchment of subordinated groups such as noncitizens in caste hierarchies.

#### IV OBJECTIONS

One might anticipate several counterarguments to a theory of petitioning as extraordinary speech and petitioning by immigrants as deserving of special judicial protection. This Part addresses several objections: that the plenary power doctrine of immigration law allows broad regulation of petitioning by noncitizens; that history contradicts a robust theory of petition rights; and that undocumented immigrants should be considered fugitives not entitled to seek the government’s aid. This Part further addresses an objection from a different direction—that petitioning rights should be absolute and the theory advanced here is not protective enough of the right.

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<sup>413</sup> The Court’s precedent on alienage classifications frequently defers to federal discrimination even against legal immigrants but closely scrutinizes identical state discrimination. See *supra* notes 405-06 and accompanying text. In light of this precedent and the sensitivity to this federalism-based distinction in *Plyler* itself, see 457 U.S. at 219 n.19, it may be more accurate to say that the Equal Protection Clause guarantees the right to petition state and local authorities so as to avoid the creation of a permanent caste.



### A. *The Plenary Power Doctrine of Immigration Law*

Immigration law has been traditionally understood as the regulation of entrance and abode in the national community.<sup>414</sup> In the late nineteenth century, the Supreme Court determined that Congress and the Executive Branch possess an unenumerated but “plenary” power to regulate immigration, and further, that exercises of this immigration power are largely immune from judicial scrutiny.<sup>415</sup> Despite widespread condemnation of the doctrine,<sup>416</sup> for a century the Court has linked immigration law to foreign affairs and national security and insisted on substantial judicial deference to the judgments of the political branches.<sup>417</sup> In light of this jurisprudence, one might object that whatever petition rights immigrants possess, the plenary power doctrine entitles Congress and the President to limit those rights, and the courts must defer to any such restrictions.<sup>418</sup>

There are several reasons, however, to reject a plenary power limitation on the petition rights of immigrants. First, the doctrine is misguided and should be discarded.<sup>419</sup> Perhaps its abandonment is al-

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<sup>414</sup> See, e.g., *Graham v. Richardson*, 403 U.S. 365, 380 (1971) (forbidding state from encroaching on federal immigration power to regulate “entrance and abode”); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (same).

<sup>415</sup> These principles found expression in a notorious trilogy of decisions. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (rejecting challenge to substantive grounds for deportation in statute); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (rejecting procedural due process challenge to exclusion statute because, to noncitizens, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law”); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (refusing to accept challenge to substantive grounds for exclusion in statute).

<sup>416</sup> To mention but a few of the powerful criticisms, see T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* 184 (2002) (“[The doctrine reflects] a vision wholly out of step with modern constitutional law and the reality of our world today. . . . [T]he plenary power cases should be abandoned.”); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998) (attributing plenary power doctrine to *Plessy v. Ferguson*-era principles of racial separatism); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 863 (1987) (“*Chinese Exclusion*—its very name is an embarrassment—must go.”).

<sup>417</sup> See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (“[C]ontrol over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature.”); *Harisiades v. Shauhnessy*, 342 U.S. 580, 588-89 (1952) (observing that immigration law “is vitally and intricately interwoven” with foreign affairs and national security and hence is “largely immune from judicial inquiry or interference”).

<sup>418</sup> Such an objection might draw strength from *Mathews v. Diaz*, 426 U.S. 67 (1976), in which the Supreme Court held that although state welfare discrimination against legal permanent residents is subject to strict scrutiny under the Equal Protection Clause, given the federal immigration power, identical discrimination by the federal government is subject only to rational basis review. *Id.* at 84-87.

<sup>419</sup> See *supra* note 416.

ready underway: In recent years the Court has resolved cases involving immigrants, for or against their rights, without the sort of reflexive invocation of the plenary power doctrine that once seemed to foreclose any further inquiry.<sup>420</sup>

Moreover, even assuming its continued vitality, the plenary power doctrine has no relevance whatsoever to the actions of state and local government agencies. The immigration power is an exclusively federal power, and subfederal entities possess no concurrent authority.<sup>421</sup> Thus, state or local law enforcement agencies that burden the petition rights of immigrants cannot seek refuge in the plenary power doctrine; at most, that doctrine shields the *federal* government from ordinary judicial scrutiny. Nor may state or local authorities defend petitioning restrictions by relying on a generalized congressional determination to expand local law enforcement cooperation with immigration officials,<sup>422</sup> for no statute authorizes local officials to burden immigrant petitioning. In any event, Congress may not authorize the states to violate the Constitution,<sup>423</sup> nor may Congress ratchet down the level of constitutional scrutiny applied to subfederal action by de-

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<sup>420</sup> See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding undocumented worker discharged for union organizing ineligible for back pay under National Labor Relations Act without referring to plenary power doctrine); *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding, without reference to plenary power doctrine, that immigration statutes do not divest federal courts of habeas corpus jurisdiction to review lawfulness of deportation order and construing statutes not to apply retroactively); *Nguyen v. INS*, 533 U.S. 53 (2001) (rejecting gender discrimination challenge to citizenship statute without referring to plenary power doctrine); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (interpreting statutory provisions, without reference to plenary power doctrine and in light of constitutional due process concerns, not to authorize indefinite postremoval order detention of immigrants); see also Daniel Kanstroom, *St. Cyr* or Insincere: The Strange Quality of Supreme Court Victory, 16 *Geo. Immigr. L.J.* 413, 416 (2002) ("Virtually nowhere [in *St. Cyr*] does anything about the government's extraordinary power to control immigration law appear. Not once does the so-called plenary power doctrine rear its hoary head.").

<sup>421</sup> See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("[T]he authority to control immigration is . . . vested solely in the Federal Government, rather than the States . . ."); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

<sup>422</sup> See, e.g., 8 U.S.C. § 1103(a)(10) (2000) (empowering Attorney General to authorize state or local officials to perform duties of immigration officers in event of "actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border"); § 1357(g)(1) (empowering Attorney General to enter into written agreements with state or local agencies authorizing state or local officials to "perform a function of an immigration officer").

<sup>423</sup> See, e.g., *Saenz v. Roe*, 526 U.S. 489, 507 (1999) ("[W]e have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment."); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) ("[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.").

volving the federal immigration power to the states.<sup>424</sup> State and local police, labor, and other law enforcement officials simply may not burden petition rights in the name of the plenary power doctrine of federal immigration law.

Furthermore, even assuming that foreign affairs and national security concerns warrant shielding some exercises of the immigration power from close judicial scrutiny, much federal government action affecting immigrants has nothing to do with immigration and deserves no special judicial deference.<sup>425</sup> Many of the federal agencies immigrants would like to petition, such as the Department of Labor, OSHA, and the EEOC, have little or no immigration enforcement responsibilities. The Supreme Court has been sensitive to such distinctions in institutional roles; for instance, it invalidated a federal civil service citizenship requirement on grounds that the Civil Service Commission was neither designated nor competent to implement foreign policy and immigration law.<sup>426</sup> Relatedly, scholars have argued that there is a distinction between “immigration law”—the regulation of entrance and abode—and “alienage law”—social or economic regulation of noncitizens—and that there is no principled reason the plenary power doctrine should compel judicial deference to “alienage laws” enacted or enforced by the federal government.<sup>427</sup> Reflecting this distinction, when courts have evaluated First Amendment claims by noncitizens in cases *not* arising under the immigration statutes, they have applied First Amendment tests undiluted by the plenary power doctrine.<sup>428</sup>

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<sup>424</sup> Wishnie, *supra* note 140, at 527-58 (examining constitutional and extraconstitutional sources of federal immigration power and concluding Congress may not by statute devolve immigration power to the states).

<sup>425</sup> See, e.g., T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 869 (1989) (“[Not] every federal regulation based on *alienage* is necessarily sustainable as an exercise of the *immigration* power.”).

<sup>426</sup> *Hampton*, 426 U.S. at 88.

<sup>427</sup> See, e.g., Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. Rev. 1047, 1089 (1994) (“The chronic question that drives the doctrine is when and to what degree membership regulation properly subsumes matters of alien status beyond the border . . .”). I have questioned whether this theoretical distinction “can supply a meaningful standard in particular cases,” Wishnie, *supra* note 140, at 524, particularly in areas such as employment and public benefits, which are regulated both as conditions of entrance and abode and through social and economic legislation. *Id.* at 524-26. But petitioning is an easy case, as Congress has not regulated petitioning by immigrants, except in a few instances to encourage it. See *supra* notes 13-17 and accompanying text. One would be hard-pressed to contend that the policies of individual federal agencies discouraging immigrant petitioning are conceivably classed as “immigration law.”

<sup>428</sup> *Bridges v. California*, 314 U.S. 252 (1941) (reversing contempt judgment against noncitizen labor activist for First Amendment activities); *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 365 (9th Cir. 1995) (holding, in defamation suit, that “the speech protections of the First Amendment at a minimum apply to all persons legally within our borders”);

### B. *The House "Gag Order" of 1840*

Arguing from history, one might object that a robust theory of petition rights is inconsistent with the antebellum adoption of congressional rules limiting petitioning in opposition to slavery.<sup>429</sup> Many abolitionist petitioners were women who, in the tradition of outsider petitions, "were thus by this modest action entering into a civic life that was otherwise closed to them."<sup>430</sup> Frustrated by these popular campaigns and frightened that previous congressional debate on slavery had inspired plans for slave revolts,<sup>431</sup> proslavery members of Congress sought to enact rules in each chamber banning abolitionist petitions. Beginning in 1836, the House adopted a series of rules directing that any abolitionist petition received be immediately tabled.<sup>432</sup> This measure alone was insufficient to deter further petitioning, and in 1840, over vigorous opposition led by former President John Quincy Adams, the House adopted a standing gag rule banning all petitions for the abolition of slavery.<sup>433</sup> Moreover, despite a history of having received petitions from free blacks,<sup>434</sup> the slavery forces succeeded in winning adoption of a further resolution declaring that, as property, "slaves do not possess the right of petition secured to the people of the United States by the constitution."<sup>435</sup>

Adams condemned the gag rule as unsound and unconstitutional, and even some Representatives who claimed to oppose the abolition-

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*Brunnenkant v. Laird*, 360 F. Supp. 1330, 1332 (D.D.C. 1973) (holding, in challenge to withdrawal of security clearance by German national, that "an immigrant alien who has not completed his naturalization, has the same rights freely to give voice to his opinions as any American citizen in the same circumstances").

<sup>429</sup> On the development of abolitionist petitioning and the 1836–1844 debate over a House "gag rule" generally, see William Lee Miller, *Arguing About Slavery: The Great Battle in the United States Congress* (1996). Quakers had petitioned to end slavery as early as the First Congress, but abolitionist petitioning did not become a major popular movement until the nineteenth century. William C. diGiacomantonio, "For the Gratification of a Volunteering Society": Antislavery and Pressure Group Politics in the First Federal Congress, 15 *J. Early Republic* 169, 170 (1995) (describing Quaker abolitionist petition to first Congress), cited in Mark, *supra* note 84, at 2216 n.297.

<sup>430</sup> Miller, *supra* note 429, at 48.

<sup>431</sup> *Id.* at 31 (connecting South's fears of slave rebellions to "the awareness that the free black Denmark Vesey had been moved to plan his slave revolt in Charleston by reading the arguments in Congress on the Missouri Question").

<sup>432</sup> Mark, *supra* note 84, at 2217.

<sup>433</sup> Cong. Globe, 26th Cong., 1st Sess. 150 (1840). On the gag rule generally, see Mark, *supra* note 84, at 2214–26; Higginson, *supra* note 103, at 158–65.

<sup>434</sup> Mark, *supra* note 84, at 2221 ("The [pro-gag rule] representatives were forced, despite claims that blacks could not petition, to deal with the fact that some had petitioned . . .").

<sup>435</sup> 13 Abridgment of the Debates of Congress, from 1789 to 1856, at 296 (T.H. Benton ed., 1860), quoted in Mark, *supra* note 84, at 2223.

ist petitions on the merits spoke against it.<sup>436</sup> Joining with Adams, Representative Cushing presented a lengthy history of the right of petition from English origins through adoption of the First Amendment, early federal practice, and the place of petitions in contemporary legal culture.<sup>437</sup> But the gag rule was defended as necessary to protect slaveholders' constitutionally recognized property interest in slavery and indispensable to the constitutional bargain regarding continuation of slavery. A close majority approved it in the House.<sup>438</sup>

Soon after the House first adopted the gag rule, the Massachusetts legislature registered its strong disapproval in a resolution that sounded ancient themes of the right to petition. Massachusetts declared the gag rule "a palpable violation of the Constitution of the United States."<sup>439</sup> The rule, the state legislature contended, is a "bold denial of inalienable rights," for

it is the indisputable right of any portion of the people of this country, however mistaken in their views, or insignificant in number, at any time to petition Congress for a redress of grievances, or what to them may seem such; and that Congress is bound to receive all such petitions, and give them a respectful and deliberate consideration.<sup>440</sup>

Further, the gag rule undermined effective government by denying it useful information ("a most unphilosophical and absurd mode to stop the progress of reform") and denied a peaceful, orderly outlet for expression of popular opinion with uncertain effects ("and must naturally and inevitably increase agitation and excitement in all parts of the Republic").<sup>441</sup>

The gag rule endured, however, and one is left to ask whether this historical episode can be reconciled with a robust theory of petition

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<sup>436</sup> See, e.g., Cong. Globe, 26th Cong., 1st Sess. 150 (1840) (statement of Rep. Vanderpool) (agreeing with pro-slavery members' claim to constitutionally protected property right in slavery but insisting that Congress retain jurisdiction to receive meritless petitions). The proposed gag rule was also criticized as an infringement on the speech rights of the members of Congress, as opposed to the rights of the petitioners. Higginson, *supra* note 103, at 164-65.

<sup>437</sup> See Mark, *supra* note 84, at 22,180-20 (reviewing Cushing's remarks, including statement that in history of Great Britain, "never had either of the Houses of Parliament refused to receive petitions").

<sup>438</sup> Cong. Globe, 26th Cong., 1st Sess. 151 (1840) (recording 115 to 105 vote in favor of House rule).

<sup>439</sup> H. Journal, 26th Cong., 1st Sess. 788 (1840).

<sup>440</sup> *Id.* Notably for the purposes of this Article, the Massachusetts legislature emphasized the universality of the petition right, a right available to "any portion of the people of this country," no matter how few or foolish.

<sup>441</sup> *Id.*

rights.<sup>442</sup> I do not think it can be. Congressional adoption of the antebellum gag rule was an unconstitutional measure, taken in an effort to stave off secession. Adams, his legislative allies, the Massachusetts legislature, and other contemporary critics were correct in 1840: Congress may not by statute proscribe petitioning on any particular matter. In contrast to the view that carried the majority in 1840, the opinion of Adams and the others who opposed the gag rule is not inconsistent with a theory of petitioning as extraordinary speech.

### C. *Fugitive Disentitlement Doctrine*

The fugitive disentitlement doctrine holds generally that a fugitive from justice may not avail herself of the jurisdiction of the courts.<sup>443</sup> In its broad outlines, the doctrine is uncontroversial: A fugitive who absconds may be “disentitled” from invoking judicial process either to prosecute or defend an action. One might argue that because undocumented immigrants are unlawfully present in this country, they are akin to fugitives from justice and therefore can neither seek the aid of the judicial branch nor, by analogy, enjoy any right to seek redress of grievances from the legislative or executive branches.

The analogy would be inapposite, however. One might begin by noting that the drafters of the Petition Clause included no exception for fugitives generally, though the concept was certainly familiar to them.<sup>444</sup> More importantly, the fugitive disentitlement doctrine arose in the context of criminal appeals in which a convicted person had fled and courts were uncertain whether their appellate judgments would be enforceable.<sup>445</sup> There is no comparable “enforceability” concern

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<sup>442</sup> Actually the 1840 gag rule is not the only historical instance of such regulation. Throughout much of the eighteenth century, the House of Commons enforced a rule that “no petitions, apart from any from the City [of London], could be accepted against money bills imposing new taxes.” P.D.G. Thomas, *The House of Commons in the Eighteenth Century* 71 (1971). This rule was adopted amidst political struggles over the desire of the House of Commons to control appropriations and finance, and developed from the practice of disregarding petitions against the many new taxes adopted after 1688. *Id.* at 69-71.

<sup>443</sup> See, e.g., *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993) (“It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal.”); see also *Degen v. United States*, 517 U.S. 820 (1996) (reversing grant of summary judgment to government in civil forfeiture action against criminal fugitive residing outside country and not amenable to extradition as improper application of fugitive disentitlement doctrine).

<sup>444</sup> See Articles of Confederation art. IV (1781) (“[T]he free inhabitants of each of these States, paupers, vagabonds and *fugitives from justice* excepted, shall be entitled to all privileges and immunities of free citizens in the several States . . .” (emphasis added)).

<sup>445</sup> See *Smith v. United States*, 94 U.S. 97, 97 (1876) (“It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render.”); see also *Eisler v. United States*, 338 U.S. 189, 190 (1949) (per curiam) (removing case from docket where

implicated in immigrant petitioning, however. More recently, the Supreme Court has identified other theories justifying “disentitlement,” including waiver or abandonment<sup>446</sup> and furtherance of a “deterrent function and . . . an interest in efficient, dignified appellate practice.”<sup>447</sup> These latter justifications do not support invocation of the doctrine to deny undocumented immigrants the right to petition. Far from desiring to “deter” petitioning by immigrants, the free flow of information to government authorities improves efficient law enforcement.

In addition to there being a disconnect between the purposes of the fugitive disentitlement doctrine and the notion of immigrant petitioning, the fugitive disentitlement doctrine arises in the context of *criminal* prosecutions, whereas unlawful presence in this country is generally only a *civil* immigration violation.<sup>448</sup> Finally, there has been no adjudication of “guilt” for undocumented persons, and though their presence may violate the immigration laws, many undocumented persons are eligible for relief from deportation and will obtain that relief if arrested by INS.<sup>449</sup>

#### D. *Petitioning as Absolute Speech*

From a different direction, one might object that a theory of heightened scrutiny for petitioning is not robust *enough*—that petitioning is not just extraordinary speech, it is an absolute right, and any barrier whatsoever to a person applying to the government for the redress of grievances is inconsistent with the First Amendment.<sup>450</sup> A

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petitioner fled country); *Bonahan v. Nebraska*, 125 U.S. 692, 692 (1877) (removing writ of error from docket where plaintiff escaped during pendency of writ).

<sup>446</sup> *Ortega-Rodriguez*, 507 U.S. at 239-42; *Molinero v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam).

<sup>447</sup> *Ortega-Rodriguez*, 507 U.S. at 242.

<sup>448</sup> A noncitizen who is ordered deported or excluded but willfully fails to depart is subject to criminal liability. 8 U.S.C. § 1253(a) (2000). Most undocumented persons in the country, however, have not willfully failed to depart following entry of a deportation order. Compare *supra* note 7 (citing sources estimating undocumented population of six to eleven million) with Chris Adams, INS to Put in Federal Criminal Databases the Names of People Ordered Deported, *Wall St. J.*, Dec. 6, 2001, at A22 (reporting that INS estimates that approximately 314,000 persons have outstanding orders of deportation).

<sup>449</sup> See, e.g., § 1158 (authorizing grant of political asylum); § 1229b(b) (authorizing “cancellation of removal” for certain undocumented persons); § 1254a (authorizing grant of “temporary protected status” to undocumented persons upon finding by Attorney General of ongoing armed conflict, natural disaster, or other “extraordinary and temporary” conditions in country of origin).

<sup>450</sup> See Smith, *supra* note 84, at 1183 (“An absolute right of petition must be preserved to fulfill adequately the purposes and interests of petitioning.”); cf. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 874 (1960) (“The phrase ‘Congress shall make no law’ is composed of plain words, easily understood. . . . [The language is not] anything less than absolute.”).

colorable threat of deportation, like any other sanction or coercion on the exercise of the right, would violate this absolute right.

An absolute right to petition might appear inflexible and unworkable, not to mention incompatible with a preference for balancing tests in modern constitutional jurisprudence,<sup>451</sup> but one should nevertheless hesitate to reject this view. An absolute right to petition would serve a number of traditional and fundamental public and private interests. But an absolute petition right is not consistent with Supreme Court decisions on the Petition Clause, nor with the Court's speech, association, and court access decisions.<sup>452</sup> The petition cases themselves establish a "sham" exception to the right's protections and chill petitioning by recognizing liability for libel.<sup>453</sup> More importantly, interpreting the petition right as absolute is unnecessary. Treating petitioning as extraordinary speech deserving of heightened judicial protection would foster extensive communications to government, far more than occur today, at least from the millions of noncitizens resident in the nation. In the absence of evidence that even greater protection of the right is necessary to ensure open flows of information between the government and all of the governed, divergence from speech and other doctrines is unwarranted. The petition right need not be deemed "absolute" to ensure achievement of the purposes that underlie its enshrinement in the First Amendment.

#### CONCLUSION

This Article began with the problem that immigrants underreport criminal and other unlawful activity to the detriment of themselves, their families, co-workers, and communities. Public officials themselves recognize that immigrants' fear of deportation undermines the ability of government agencies to enforce laws generally within their jurisdictions, and that the reluctance of any single community to cooperate with law enforcement has negative consequences for public safety and order that extend beyond the borders of any one community. Nevertheless, almost no law enforcement agency in the country affirmatively protects immigration status information or declares a policy that, if obtained, it will keep any such information confidential. Since the terrorist attacks of September 11, 2001, the trend has been in the opposite direction, towards greater information-sharing among

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<sup>451</sup> Cf. Fallon, *supra* note 357, at 77 (questioning descriptive accuracy of criticism "lament[ing] . . . the dominant, even pervasive role of balancing tests in constitutional law").

<sup>452</sup> See, e.g., *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (rejecting "view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes'").

<sup>453</sup> See *supra* notes 291, 293-96 and accompanying text.



agencies and greater involvement of state and local officials in immigration law enforcement.

Policies that deter immigrant communications with government authorities are not only unwise; they have important First Amendment implications as well. Contrary to the Supreme Court's analysis in *Verdugo-Urquidez*, the history of petitioning and its codification in the First Amendment indicates widespread acceptance of noncitizen petitioning by the Founding generation. There is no evidence of an intention on the part of the authors of the First Amendment to depart from historic practice by excluding noncitizens from the constitutional rights guaranteed to "the people." Regarding petitioning as extraordinary speech and developing doctrinal formulations to ensure that all branches of government are open to communication from all persons, regardless of their immigration status, would honor the historic practice of petitioning by disenfranchised outsiders, while also promoting responsive government and effective law enforcement.

Application of some form of heightened scrutiny to law enforcement policies on immigrant petitioning would not entail the affirmative grant of lawful status to those who petition, only a commitment that the *status quo ante* would not be disturbed solely by virtue of an immigrant having petitioned. But such a doctrine might lead to the invalidation of collect-and-report policies, as well as of the common no-standards policies of many civil agencies and local police departments. The likelihood of invalidation would be particularly high where the agency practice chills a significant amount of petitioning, the law enforcement interest in obtaining immigration status information is slight, the petitioning implicates a fundamental right, and the agency possesses, *de facto* or *de jure*, the exclusive means to grant redress or settle a dispute. In nearly all cases involving agency deterrents to petitioning by noncitizens, that deterrence would operate to disadvantage a vulnerable and unpopular group and would threaten to entrench a caste hierarchy.

A different, more welcoming law enforcement policy toward petitioning by noncitizens may well have aided Beatrice Okezie or Gregorio Zarma Goyo to escape their tormentors and assert the civil rights they knew they possessed. Law enforcement policies more sensitive to the strong First Amendment values inherent in communications from all persons to governmental authorities would also diminish the capacity of smugglers, traffickers, and other thugs to dominate those noncitizens they hold in slave-like conditions.

Law enforcement officials, immigrant advocates, and noncitizens themselves have long understood that sound policy considerations

favor assuring noncitizens that reporting unlawful activity will not lead to their own deportation. The Petition Clause of the First Amendment may compel it.