Citizen Standing and Immigration Reform: Commentary and Criticisms

By Stephen Lee†

INTRODUCTION

Mary Douglas explains that dirt is simply “matter out of place.”¹ This relative concept orders and classifies by “rejecting inappropriate elements”: strands of hair are not inherently dirty, but when left surreptitiously on the dining room table, they normatively transform into something threatening.² The knee-jerk reaction is to purify the sullied space through what Douglas calls “pollution behavior.”³ “[P]ulverizing, dissolving and rotting” the threatening elements, the pollution behaviorist leaves behind only a “mass of common rubbish.”⁴ Strands of hair, crumbs of food, and discarded wrappings are amassed with other offending objects and collectively swept into the trash. The dirt-turned-rubbish consoles because pollutants are returned to their appropriate place and order is restored.

Douglas’ model provides a powerful analogy for understanding the United States’ federal immigration regime, where Congress engages in the weighty business of line drawing. As a formal matter, immigration policies merely demarcate the boundaries of our national political community. But with the authority to juridically classify entrants and visitors,⁵ they also perform an identity-imparting function. As Lisa Lowe explains, “‘Legal’

---

² Id.
³ See id. at 36-37.
⁴ Id. at 161.
and 'illegal,' 'citizen' and 'noncitizen,' and 'U.S.-born' and 'permanent resident' are contemporary modes through which the liberal state discriminates, surveys, and produces immigrant identities.  

But the line separating "immigrants" and "dirt" is a flimsy one. As a majoritarian institution, Congress's treatment of immigrants fluctuates from warm acceptance to punishing expulsion; citizens and voters casually accept the linkages between immigrants and dirt and use them as common sense points of reference. All sides of the immigration debate share common ground on at least one point: immigrants take on the "dirty and dangerous jobs" that citizens will not. Paradoxically, despite this strain of divisiveness, "dirty" immigrants also have the effect of unifying the American citizenry. America's self-image clings to a success-story heritage, in which "dirt-poor immigrants" have traditionally overcome difficult odds to forge new lives. Immigrants, like dirt, carry shifting meanings. Today, during this moment of prolonged national crisis, the ground has once again shifted; the federal immigration regime has identified the "pollutants" among us as "matter out of place." During the last several years, in response to 9/11, the government has ordered more than thirteen thousand noncitizens into deportation

6. Id.  
7. See Dreaming of the Other Side of the Wire - American Immigration, ECONOMIST, Mar. 12, 2005, at 27, available at 2005 WLNR 3817325 (noting that immigrants' rights activists often defend undocumented workers by arguing that "immigrants take the nation's dirty and dangerous jobs because Americans will not") (emphasis added).  
9. See Stuart Dye, Challenged Spitters Say Practice May Be Unpleasant But It's Not Offensive, N.Z. HERALD, Feb. 23, 2004, at A02, 2004 WLNR 12437026 (explaining that in response to the alleged habit of immigrants to spit on the street, "Auckland Mayor John Banks wants people to tell immigrants that the 'filthy habit' is not welcome here"); Anushka Asthana, My Life as an Immigrant, OBSERVER (Europe), Mar. 20, 2005, 2005 WLNR 4367556 ("I think there is a perception that is being propagated making the word immigrant sound dirty and evil and disease-carrying, and it does upset me. I am proud to be an immigrant.").  
10. Peter Bronson, At St. Joseph, Orphans Find Home, Haven, CINCINNATI ENQUIRER (OH), Dec. 16, 2004, at 2C, 2004 WLNR 14266095 ("A hundred years ago, dirt-poor immigrants had nobody to adopt and raise their children when disaster or death struck.") (emphasis added); see also John Freeman, Satchmo Arrives to Steal the Show, ALBANY TIMES UNION (NY), Nov. 7, 2004, at J4, 2004 WLNR 6643036 (describing New York City in the 1920s as "a dangerous, mean, dirty place; immigrants who lived there had to scrap and crawl over one another to get to the top").  
11. See DOUGLAS, supra note 1.  
12. Although much of the literature and jurisprudence use the term "alien," I reject this term because of its dehumanizing implications and instead embrace the terms "immigrant" or "noncitizen." The terms "immigrant" and "noncitizen" are not entirely coterminous, however. A "noncitizen" refers to anyone who is not legally a "citizen" whereas an "immigrant" refers to anyone who at one point came from elsewhere. Moreover, as I use them, "noncitizen" is a strictly legal term whereas "immigrant" also embodies a social identity; an "immigrant" may continue to identify as such even if or when she naturalizes.
proceedings, often for petty immigration violations such as overstaying visas.\(^{13}\) Prior to 9/11, deportation procedures simply would not have been commenced against these individuals eligible for deportation.\(^{14}\) It raises eyebrows that despite the jingoistic anti-Muslim violence and harassment committed by private actors in the wake of 9/11, the largest number of complaints filed by the Muslim community nationally has centered on government antiterrorism policies.\(^{15}\) By detaining noncitizens for petty immigration violations, rather than on criminal charges that afford greater constitutional protections, the federal government is able to exploit this due process deficit to the detriment of these communities of color.\(^{16}\) Where should immigrants turn? Traditionally, noncitizens have sought refuge in federal courts.\(^{17}\) The Constitution, after all, presumes noncitizens to be members of the constitutional community.\(^{18}\)

\(^{13}\) See Teresa Watanabe, Anti-Muslim Incidents Rise, Study Finds; Group Says Hate Crimes and Harassment in California Tripled in 2003 from Previous Year, L.A. TIMES, May 3, 2004, at B1; see also Michael J. Kelly, Executive Excess v. Judicial Process: American Judicial Responses to the Government’s War on Terror, 13 IND. INT’L & COMP. L. REV. 787, 788 (2003) (“Immigrants, by virtue of their status as non-citizens, are treated worse. Hundreds of Middle Eastern and South Asian men were rounded up in a huge dragnet, held in secret for months, interrogated, subjected to closed immigration hearings, and then summarily deported.”).

\(^{14}\) Amantha Perera, Rights-U.S.: U.S. Muslims Fear Second Term for Patriot Act, IPS-INTER PRESS SERVICE, May 6, 2004 (“The report says deportation procedures were started against 13,799 people, 2,870 were jailed at deportation centres and 143 were charged as criminals. ‘Numbers who were charged with terrorism, although officials say a few have terrorism connections: 0,’ it adds.”).

\(^{15}\) Teresa Watanabe, Anti-Muslim Hate Crimes Triple in ’03, CONTRA COSTA TIMES (Walnut Creek, CA), May 3, 2004, at 4, 2004 WL 77488512.


[[T]he government is able to take advantage of the administrative and civil nature of immigration proceedings to aggressively prosecute its claims without providing as much due process protection to the individuals charged. For example, because attorneys are not automatically provided to noncitizens in deportation proceedings, the government is at a distinct advantage in investigating possible terrorist links in the context of deportation than if it had to proceed in a criminal court.]

\(^{17}\) The Court has affirmed that access to courts, as guaranteed by the writ of habeas corpus, is a cherished right in the context of noncitizen detention:

[[T]o conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of Executive detention . . . . Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court.

INS v. St. Cyr, 533 U.S. 289, 305-06 (2001). Although courts have provided less than consistent protection to noncitizens in practice, courts have nevertheless proven to be greater allies to noncitizens than either of the political branches, particularly during moments of national emergency. See David Cole, The Priority of Morality: The Emergency Constitution’s Blind Spot, 113 YALE L.J. 1753, 1764 (2004).

But, courts have not always provided consistent protection for immigrants. Though the Constitution confers substantive rights upon noncitizens, courts have not given these rights steadfast expression but instead have shown considerable deference to Congress’s plenary power over immigration affairs. Based on this expansive power, the political branches have regulated immigrants with impunity, through channels and means which would be unacceptable if applied to citizens.\(^{19}\)

Very recently, a handful of commentators have begun floating a new tactic for mitigating overzealous federal immigration policies through what I call a “citizens’ rights” approach.\(^{20}\) Whereas challenges to immigration policies have largely considered only the noncitizen perspective, and the curtailment of immigrants’ rights has been popularly understood as affecting only immigrants, these new voices are staking claims to the contrary.

Leading this charge is Adam Cox. In *Citizenship, Standing, and Immigration Law*,\(^{22}\) Cox argues that, more than just the source of the federal immigration power, plenary power also operates as a standing doctrine. Per this reading, congressional action is not upheld because of some inherent federal power. Rather, noncitizens, by virtue of their constitutional “outsider” status, are legally disabled from challenging immigration policies. By contrast, courts have been willing to recognize citizen standing in certain circumstances where immigration policies have harmed citizens’

---

19. For purposes of this paper, I rely on the following definition of the plenary power doctrine: “Plenary’ simply means full or complete. The Supreme Court has used this doctrine to say that in certain substantive areas such as immigration law the courts will not intervene because Congress and the executive—the ‘political branches’ of government—have complete power.” Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 *Asian L.J.* 13, 14 (2003).

20. See Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

21. Commentators have recently begun examining rights of citizens within the immigration or national security context. I dub these “citizens’ rights” approaches because they all, in some form, emphasize the constitutional rights of citizens in making their case for national reform. In this comment, I focus on Cox in part because his proposed model of citizen standing offers perhaps the most readily employable tactic in a robust litigation-centered strategy for immigration reform. See Cox, infra note 22. To raise public consciousness and help mobilize support for a larger immigrants’ rights movement, others, like David Cole, highlight ways in which immigration policies have impacted the rights of citizens. See David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 7 (2003). Still others criticize the Court’s treatment of enemy combatants, which has carved out an unspoken category of “pseudo-citizenship” wherein plenary power ideals are applied with impunity despite formal protections of citizenship. See Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. *Davis L. Rev.* 79, 86-87 (2004). Finally, the work of critical race theorists and other critical legal scholars can fairly be characterized as attempts to achieve immigration reform through the critical examination of how citizens from racial minority groups are denied the various rights of citizenship. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1594 (2002); see also Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 *Ohio St. L.J.* 1285, 1292-93 (2002).

interests. Cox argues that this impulse should be embraced and the circumstances in which citizens have standing to sue should be expanded. By so construing plenary power, according to Cox, citizens can bring legal challenges to constitutionally repugnant immigration policies that noncitizens, by virtue of their status, cannot. In short, Cox offers a clever, thought-provoking solution to a problem with which immigrants' rights activists have long grappled: namely, overcoming the plenary power doctrine.

Cox's citizen standing model represents an important contribution to a spirited and high stakes debate on immigration reform. Most crucially, his thesis illuminates the broad reach of federal immigration policies and highlights the commonly misunderstood fact that these policies affect citizens and noncitizens alike. Nevertheless, in this Comment I argue that Cox's model must overcome some hurdles if it is to be effectively deployed as a strategy for immigration reform. I contend that a citizen standing strategy, as Cox presents it, suffers for both descriptive and normative reasons.

In Part I, I briefly summarize Cox's citizen standing argument. In particular, I focus on his assessment of the plenary power doctrine and describe Cox's rationales for expanding the circumstances under which courts should recognize citizen standing. In Part II, I lay out my descriptive critique. Despite its initial appeal as an end-run around plenary power, a citizens' rights approach may be unnecessary to a strategy for immigration reform. Those instances that Cox cites where courts preclude noncitizens from challenging immigration policies are becoming fewer and less representative of the bulk of immigration challenges. Rather, the Supreme Court has recently signaled a willingness, and in some cases articulated a duty, to hear challenges brought by immigrants. This Part analyzes how the Court has rigorously applied the canons of construction, tamed the plenary power


24. As Cox explains, "The justification that aliens lack the right to seek judicial review of the constitutionality of immigration laws—a principal justification underlying plenary power doctrine—is absent when citizens' rights are stake [sic]." Cox, supra note 22, at 422.

25. Cox's citizen standing model, as a platform for immigration reform, relies on two key insights: first, that plenary power has been construed as a standing doctrine precluding noncitizen challenges to the constitutionality of immigration policies, see Cox supra note 22, at 387, and second, that immigration law plays a central role in national self-definition, which may injure citizens when policies express constitutionally impermissible notions of national political identity. See id. at 390. These two insights lead to the conclusion that "[c]itizens with standing should be able to test the constitutionality of . . . allegedly discriminatory immigration policies," id. at 414, thereby raising issues that courts would not otherwise have the opportunity to adjudicate.

26. See Clark v. Martinez, 125 S. Ct. 716, 727 (2005) (holding that inadmissible noncitizens may not be held indefinitely); Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (holding that removable noncitizens may not be held indefinitely); INS v. St. Cyr, 533 U.S. 289, 326 (2001) (holding that removable noncitizens were entitled to bring habeas claims in federal court). See infra Part II.C.
doctrine, and delivered a series of decisions animated by individual rights. In making this point, I offer my own reading of the plenary power doctrine and the Court’s historical treatment of immigration policies as they implicate noncitizens’ rights.

In Part III, I turn to a normative critique of citizen standing and explore whether it is even desirable to embrace a citizen-centered approach to immigration reform. Here, I suggest that Cox’s strategy for immigration reform, within the context of a larger social justice agenda, may be unwise. It may be imprudent to bring citizen suits against immigration policies when the Court has begun to acknowledge its role in addressing immigration challenges. To embark on a road toward citizen challenges to immigration policies would distract judges from developing a robust theory of immigrants’ rights.

Moreover, if implemented in an unreflective manner, a citizen standing strategy will likely hurt more than help those immigrants most affected by federal pollution behavior, namely racial minorities. Cox points out that there is “mounting evidence” that the federal government is relying on race in formulating immigration policies. But, as Critical Race Theory and Latino Critical Theory (LatCrit) commentators point out, the evidence is monumental and longstanding. Immigration, like education, is an area of American life where notions of citizenship constitute and are constituted by practices of racism, and where racial minorities, citizens and noncitizens alike, lose out. Therefore, citizen standing by itself is an inadequate solution to the problem of federal policies that harm communities both for their noncitizen and racial status.

I

Immigration Reform: A Citizen’s View

Cox’s citizen standing model strikes a unique balance by appeasing two extreme positions. On one hand, it placates a strictly “us vs. them” nationalist perspective that envisions the Constitution protecting citizens and only citizens. On the other hand, Cox’s model appears to provide

---

27. Cox, supra note 22, at 378. According to Cox, evidence also suggests that the federal government has been relying on religion and ideology in formulating immigration policies.

28. See Robert S. Chang & Keith Aoki, Centering the Immigrant in the Inter/National Imagination, 85 Cal. L. Rev. 1395, 1398 (1997); see also Volpp, supra note 21, at 1586 (footnote omitted).

29. One commentator explains:

First time readers of Brown v. Board of Education might well be surprised that the case is neither a paean to constitutional color blindness (Chief Justice Warren’s opinion does not cite Harlan’s dissent in Plessy v. Ferguson) nor a wholesale condemnation of state-imposed segregation. The case is about education and, more broadly, citizenship .... Education, says the Court, is ‘the very foundation of good citizenship.’

immigrants' rights activists with a much-needed additional arrow in their quiver: sympathetic citizens can bring challenges where noncitizens cannot. In order to demonstrate how Cox achieves this balance, in the following section I focus on two key aspects of his thesis. First, Congress's plenary power has operated in some instances as a standing doctrine, preventing noncitizens from bringing legal challenges based on their constitutional "outsider" status. Second, citizens have standing to challenge immigration policies based in part on their constitutional "insider" status.

A. Plenary Power as Standing Doctrine

The first half of Cox's argument presses on the common knowledge justifications for plenary power. Plenary power largely immunizes federal immigration policies from constitutional attack and is justified on several different and sometimes conflicting grounds. According to Cox, commentators typically situate the doctrine in one of two positions. One is in a "judicial deference" model, in which courts provide minimal review of immigration policies for compliance with constitutional norms. The courts largely defer to Congress's judgment regarding the constitutional validity of these laws. Alternatively, plenary power may be examined within an "unlimited congressional power" model. This represents a far more extreme position that completely dispenses with review and instead embraces the principle that the plenary power doctrine, whether for constitutional or extraconstitutional reasons, provides Congress with the unlimited power to regulate immigration.

To these two positions, Cox adds a third reading of plenary power. Cox insists that courts have also employed plenary power as a standing doctrine, though this is "generally unrecognized." In so doing, "courts largely insulate immigration laws from constitutional attack by aliens on the ground that they do not have the right to seek judicial review of those

30. Cox, supra note 22, at 387.
31. Id. at 382.
32. Cox explains that case law suggests at least two different sources of unlimited power. Some courts have recognized Congress's unlimited plenary power as stemming from its status as a sovereign; Cox explains that courts accepting this position justify such a reading on principles that "sovereignty inherently entails unlimited power over immigration" or in any event, "international law grants such power to all sovereign nations." Id. at 384-85. Similarly, courts have also based "unlimited congressional power" readings of the plenary power on the Constitution itself, "either through the provisions related to foreign affairs or through some other constitutional source." Id. at 385.
33. Id. at 384-86.
34. Under standing doctrine, a plaintiff must satisfy the Article III "case or controversy" requirement in order to obtain relief from a federal court. As William Fletcher explains, "To satisfy Article III, a plaintiff must show that he has suffered 'injury in fact' or 'distinct and palpable' injury, that his injury has been caused by the conduct complained of, and that his injury is fairly redressable by the remedy sought." William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 222 (1988) (footnotes omitted).
laws." Cox acknowledges that lack of standing does not translate into lack of injury; of course, exclusion, deportation, and governmental regulation generally injure and take their toll on noncitizens. Still, "the injuries aliens suffer are not judicially cognizable," Cox explains, and therefore, plenary power reflects "a legal disability on the part of aliens."

B. Recognizing Citizen Standing

Having demonstrated that plenary power operates at least some of the time as a standing doctrine that renders noncitizens legally disabled, Cox then makes his case for citizen standing. According to conventional wisdom, Cox observes that "it is precisely citizens’ full [political and constitutional] membership that is thought to deprive them of standing to challenge immigration laws." Because citizens already "enjoy the entitlement of residence and the benefits of citizenship," the tendency of courts and commentators is to overlook legally cognizable ways in which immigration policies injure citizens.

Though examples are scarce, Cox insists that courts have recognized ways in which immigration policies can diminish citizens’ interests. Specifically, Cox observes that courts have occasionally recognized citizens’ associational interests. For example, the High Court has twice granted standing to citizens facing potential long-term separation from family members on account of exclusionary immigration policies. Further, in Kleindienst v. Mandel, the Court recognized citizen standing to challenge the Attorney General’s denial of a temporary visa to a foreign

35. Cox, supra note 22, at 386-87.
36. Id. at 387.
37. Id. at 388.
38. Id. at 389.
39. Id. at 390.
40. Id.
41. Id. at 391. Cox cites Fiallo v. Bell, 430 U.S. 787, 790 (1977) (granting standing to citizen and permanent resident fathers who challenged an immigration statute that allowed mothers but not fathers to sponsor their illegitimate children), and Nguyen v. INS, 533 U.S. 53, 58 (2001) (recognizing that a citizen father had standing to challenge an immigration policy that made it more difficult for his children to remain in the United States), as cases in which the Court has recognized how immigration policies that separate family members can exact associational injuries upon citizens. Cox also cites several lower court decisions recognizing the economic injuries citizens incur as a result of immigration policies. Id. 392-94 (citing Pesikoff v. Sec’y of Labor, 501 F.2d 757, 760-61 (D.C. Cir. 1974); Sec’y of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973); Am. Immigration Reform, Inc. v. Reno, 93 F.3d 897, 900 (D.C. Cir. 1996)).
42. Id. at 398 n.112.
43. 408 U.S. 753 (1972).
speaker.\textsuperscript{44} Elsewhere, lower courts have granted standing based on theories of economic injury. Citizen employers can challenge the denial of labor certifications for their immigrant-employees, and at least one court has granted standing to citizen workers claiming harm from the aggregate economic effects of a guest worker program.\textsuperscript{45}

Based on these examples, Cox posits that citizen standing is not a radical idea and pushes for an explicit expansion of the circumstances under which citizens may challenge immigration policies. Cox justifies this doctrinal expansion by turning to the Court's treatment of expressive harms in the voting rights context. Drawing on the Court's treatment of voting rights law in the \textit{Shaw v. Reno} line of cases,\textsuperscript{46} Cox explains that just as voters, as members of a local political community, can challenge constitutionally suspect redistricting schemes, so ought citizens, as members of the national political community, be able to challenge immigration policies.\textsuperscript{47} "[B]y paying inappropriate attention to race," Cox explains that the \textit{Shaw} Court recognized that "the redistricting process expressed a constitutionally impermissible notion of what membership in the political community meant."\textsuperscript{48} Such an unconstitutional use of race, therefore, amounted to an expressive harm.

By analogy, just as local redistricting processes regulate the boundaries of political membership, under Cox's proposed citizen standing regime, citizens would be able to challenge immigration policies that shape our national political community in impermissible and unconstitutional ways. Specifically, Cox proffers the example of current, post-9/11 "allegedly discriminatory immigration policies" whereby citizen standing would create the opportunity to test the constitutionality of such practices.\textsuperscript{49} In his hypothetical, Cox suggests that any citizen ought to be able to challenge an immigration regime that treats Muslims and Middle Eastern immigrants as suspects first\textsuperscript{50} and constitutionally protected "persons" second.\textsuperscript{51}

\begin{itemize}
  \item \textsuperscript{44} Cox, \textit{supra} note 22, at 391-92.
  \item \textsuperscript{45} \textit{Id.} at 393. See \textit{Nw. Forest Workers Ass'n v. Lyng}, 688 F. Supp. 1, 3-4 & n.2 (D.D.C. 1988).
  \item \textsuperscript{47} Cox, \textit{supra} note 22, at 396-98.
  \item \textsuperscript{48} Cox admits that the \textit{Shaw} Court did not explicitly use the language of expressive harms, though it has subsequently suggested that the injury \textit{Shaw} recognized was indeed of an expressive nature. \textit{See id.} at 400.
  \item \textsuperscript{49} \textit{Id.} at 414.
  \item \textsuperscript{50} \textit{See Tumlin, supra} note 18.
  \item \textsuperscript{51} Cox, \textit{supra} note 22, at 413-14.
\end{itemize}
CITIZEN STANDING: A DESCRIPTIVE CRITIQUE

Cox correctly notes that both the Supreme Court and lower courts have in some significant instances construed the plenary power as a standing doctrine that precludes noncitizens from bringing challenges to immigration policies. But as a descriptive matter, such a reading of plenary power has not gained much traction within the judiciary, and in fact the trend seems to be just the opposite. To the extent that plenary power has been interpreted as precluding noncitizen challenges, the current Supreme Court seems to be ignoring this interpretation. Cox seems to undervalue the current Court's treatment of the plenary power, where it has demonstrated an increasing willingness to weigh in on immigration questions as they implicate individual rights. While never formally questioning Congress's ultimate decision-making power in the realm of immigration, the Court has nevertheless applied canons of construction—in particular the clear statement rule—with rigor, resolving statutory ambiguities in favor of immigrants to reach results that preserve individual rights against governmental intrusion. Cox seems to undervalue the current Court's treatment of the plenary power, where it has demonstrated an increasing willingness to weigh in on immigration questions as they implicate individual rights. While never formally questioning Congress's ultimate decision-making power in the realm of immigration, the Court has nevertheless applied canons of construction—in particular the clear statement rule—with rigor, resolving statutory ambiguities in favor of immigrants to reach results that preserve individual rights against governmental intrusion. Cox seems to undervalue the current Court's treatment of the plenary power, where it has demonstrated an increasing willingness to weigh in on immigration questions as they implicate individual rights. While never formally questioning Congress's ultimate decision-making power in the realm of immigration, the Court has nevertheless applied canons of construction—in particular the clear statement rule—with rigor, resolving statutory ambiguities in favor of immigrants to reach results that preserve individual rights against governmental intrusion.

A survey of recent decisions reveals that the Court is engaging in something more than what Cox suggests is "minimal review of immigration laws for compliance with constitutional norms." Far from institutionally impotent in the realm of immigration affairs, the current Court shows no signs of hesitation in hearing noncitizen challenges. Appreciating the current Court's approach to plenary power questions requires an exploration of the competing concerns the Court has historically attempted to balance. The following sections review case law that has undergirded two approaches the Court has taken to plenary power questions. One involves issues of sovereignty, and is animated by concerns of structural and national integrity. The other, which is animated by a commitment to individual rights, involves issues of liberty.

A. Sovereignty and Plenary Power Jurisprudence: The Chinese Exclusion and Cold War Cases

One approach the Supreme Court has taken to plenary power questions begins with the principle of sovereignty—that indivisible, final, and unlimited power necessary for every political society. More than a century ago, the Court forged Congress's general immigration powers, in a

52. The current Court's approach to plenary power questions seems to most closely approximate what Cox refers to as the "judicial deference" model. See id. at 382. However, the Court's approach is substantially different because it has teeth, demonstrating a keen willingness on the Court's part to find creative ways to reach outcomes preservative of individual rights.
53. See infra, Part II.C.
54. Cox, supra note 22, at 382.
series of Chinese Exclusion Cases relying not on constitutional text, but on the principle of sovereignty. At issue in *Chae Chan Ping v. United States* was whether Congress could, within its legislative powers, employ a race-conscious statute that excluded Chinese immigrants. During the zenith of anti-Asian sentiment, a unanimous Court unflinchingly upheld Congress’s power of exclusion. Explaining that the exclusionary power was “an incident of sovereignty belonging to the government of the United States,” the Court held that the federal government maintains this power in “all those general subjects of legislation and sovereignty which affect the interest of the whole people equally and alike.”

Under this abstract justification, Congress’s powers over immigration are highest—and immigrants’ rights are therefore lowest—where legislative action implicates “powers which are to be exercised for protection and security.” Regardless of the form of “aggression and encroachment” Congress’s power is plenary when confronting “the foreign nation acting in its national character or... vast hordes of its people crowding in upon us.” Under this approach, the question of whether a noncitizen’s rights have been trampled upon is secondary to the more forgiving question of whether Congress has acted within its capacity as a sovereign entity. This is a jurisprudence of sovereignty that accepts without reservation that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”

In *Fong Yue Ting v. United States*, the Court expanded this principle to include the deportation power, which in its estimation was one of “the essential attributes of sovereignty.” *Fong Yue Ting* involved Chinese immigrant plaintiffs who challenged a federal deportation statute that required Chinese residents to be deported if they failed to provide either a certificate of identity or prove “by at least one credible white witness” that they were residents of the United States. In rejecting the plaintiffs’ claims, the Court reaffirmed principles of sovereignty first articulated a few years earlier in *Chae Chan Ping*, holding that “[t]he right of a nation to expel or deport foreigners” is “absolute and unqualified” and rests on the same grounds as the right to “prohibit and prevent” entrance into the country.

---

56. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).
57. *Id.* at 609.
58. *Id.* at 605.
59. *Id.* at 606.
61. 149 U.S. 698 (1893).
62. *Id.* at 707.
63. *Id.* at 729.
64. *Id.* at 707.
The Court concretized the Chinese Exclusion legacy in the 1950s at the height of the Cold War, when it recommitted itself to a jurisprudence of sovereignty. As threats of espionage and nuclear war set the country's teeth on edge, David Cole explains, "the federal government . . . adopted a sweeping preventive strategy and again relied on administrative mechanisms to bypass the rights associated with the criminal process." During this moment of Cold War-induced pollution behavior, the Court roundly reaffirmed Congress's power to deport and exclude noncitizens almost at will.

Congress passed measures that greatly expanded grounds for deportation. Requiring "Communist-action organizations" to register with the Attorney General, and making deportation a consequence of failing to do so, these laws expressly authorized the executive to bar entry of foreign nationals on the basis of secret evidence, to which neither the immigrant nor his lawyer had access. One commentator has dubbed this period a "constitutional revolution" that shifted the war power from the Congress to the executive, allowing the President to conduct wars on his own under the banners of national security and national self-preservation.

In Carlson v. Landon, for example, the Court upheld a statute that granted the Attorney General the power to detain deportable immigrants on grounds of membership in the Communist Party. The opinion devoted little discussion to immigrants' Fifth Amendment rights and was comparatively replete with sovereignty references.

Congress's deportation power stood on firm constitutional ground and the Court thought neither to question nor reexamine such a proposition. Concluding that "[c]hanges in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation," the Court, just as it had done in the late nineteenth century, privileged pragmatic concerns over inconveniences.

67. Cole, supra note 21, at 129.
68. Id. at 131-32.
70. 342 U.S. 524 (1952).
71. Id. at 528-29.
72. See id.
73. Id.
of constitutional silence: “Mankind is not vouchsafed sufficient foresight to justify requiring a country to permit its continuous occupation in peace or war by legally admitted aliens”\(^7\) and “[t]he lack of a clause in the Constitution specifically empowering such action has never been held to render Congress impotent to deal as a sovereign with resident aliens.”\(^5\)

Similarly, the Court reaffirmed the right to exclude noncitizens. In *Shaughnessy v. United States ex rel. Mezei*,\(^6\) the Court held that the Attorney General could detain a returning resident noncitizen upon reentry and order him excluded without a hearing on the “basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.”\(^7\) Although Mezei was a lawful permanent resident of the United States, the Court gave short shrift to this fact. “The times being what they [were],”\(^8\) the Court chose instead to focus on the facts that Mezei was gone nineteen months, and that he spent that time in Hungary “behind the Iron Curtain.”\(^9\) The Court came to the harsh conclusion that Mezei was to be treated as a first time entrant.\(^0\) Significantly, the Attorney General maintained discretionary authority to release immigrants as necessary.\(^1\)

Both the Chinese Exclusion and the Cold War cases demonstrate that sovereignty principles form the basis of plenary power. Moreover, they serve to highlight the Court’s historical deference to Congress’s judgment, expressed in terms of powers incidental to sovereignty and powers necessary to confront a volatile global landscape. In the following section, I discuss a contrary line of cases where the Court has intervened on behalf of immigrants.

**B. Jurisprudence of Common Liberty and the Individual Rights of Noncitizens**

A second approach the Court has embraced centers on an immigrant’s liberty interest and her right to be free from oppression and arbitrary governmental regulation, a right immigrants share with citizens. In the context of state or local action, rather than begin with the question of sovereignty,
the Court's approach has been to invert the inquiry, assessing which individual rights the noncitizen maintains and whether those rights have been trampled upon. This immigrant-centered inquiry presupposes that immigrants, like other oppressed groups, deserve special judicial protections as discrete and insular minorities.  

For example, in *Yick Wo v. Hopkins*, a city ordinance was racially neutral on its face, but was used to deny Chinese laundromat owners operating permits to conduct their businesses. In the face of overt anti-Chinese racism, the *Yick Wo* Court resisted the popular zeal of pollution behavior and explained that the Equal Protection Clause and the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."  

*Yick Wo* marked the beginning of the Court's jurisprudence of common liberty, where noncitizens and citizens alike share in the right to be free from the forces of arbitrary power and tyranny. As the Court put it, "the very idea that one man may be compelled to hold his life... at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Protections and rights that lie at the heart of a democratic society inhere in the immigrant. "[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence," the Court explained nearly a century later, "his constitutional status changes accordingly."  

---

82. This, of course, alludes to the famous footnote explaining that under some circumstances "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); see also Frickey, *supra* note 37, at 47 (observing that "[t]hose victimized by immigration law often seem to have discrete and insular minority status, and their legal complaint is that, although they are similarly situated to citizens in all relevant respects, they are being harshly and dissimilarly treated").  

83. 118 U.S. 356 (1886).  

84. See generally CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1994).  

85. *Yick Wo*, 118 U.S. at 369 (cf. "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.") *id.* at 370.).  

86. *Id.*  

87. Cleveland, *supra* note 65, at 119 ("Yick Wo stands as one of the late-nineteenth-century Court's most powerful affirmations of the liberal, egalitarian vision of the Constitution."). But cf. Thomas Wuil Joo, New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence, 29 U.S.F. L. REV. 353, 355-56 (1995) (arguing that the *Yick Wo* Court was driven, not by sincere concern for civil rights of Chinese litigants, but rather by a desire to extend the Fourteenth Amendment to protect economic interests from state interference).  

Within the realm of federal action, although the Court largely defers to Congress's judgment, it has nevertheless articulated two important limitations to federal power. Three years after *Fong Yue Ting*, the Court established the first important limitation: however broad Congress's immigration power, it cannot use its sovereignty powers for purely punitive purposes. That is, plenary power is not so all-inclusive that it can subject noncitizens to detention beyond that necessary to effectuate deportation. In *Wong Wing v. United States*, the Court considered a deportation scheme that placed deportable immigrants in a year of hard labor prior to being deported, for no purpose other than deterring present and future noncitizens from attempting illegal entries. Though the Court reaffirmed principles of sovereignty and Congress's general deportation power, it nevertheless held that Congress could not find complete constitutional refuge within such powers. Reasoning that imprisonment, not for deportation purposes, but for imprisonment's sake amounted to the deprivation of "life, liberty, or property," the Court held that application of the Fifth and Sixth Amendments does not turn on citizenship status, and therefore appellants in *Wong Wing* were entitled to due process of law.

Less than a decade later, the Court established a second important limitation on federal power, announcing the noncitizen's right to procedural due process: for immigrants and citizens alike, "no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends." In *Yamataya v. Fisher*, an immigration officer challenged a Japanese resident's entry into the United States as unlawful, concluding that Yamataya was a "pauper...likely to become a public charge" and therefore excludable. She was subsequently taken into custody and ordered returned to Japan. The Court held that it was unconstitutional for an executive officer to detain and deport a noncitizen without providing "all opportunity to be heard upon the questions involving his right to be and remain in the United States." The Court further explained that any immigrant who has effectuated an entry into the United States, illegal or otherwise, has necessarily entered into the constitutional community and was

89. 163 U.S. 228, 237 (1896).
90. Id. at 237.
91. Id. at 231 ("But this court held, in the case of *Fong Yue Ting*...that the right to exclude or to expel aliens...is an inherent and inalienable right of every sovereign and independent nation...") (citation omitted).
92. See Cleveland, supra note 65, at 154 ("[In *Wong Wing*] the Court broadly deferred to Congress's decisions regarding aliens' membership in the American polity, while holding that the Constitution otherwise applied to aliens in the United States.").
95. Id. at 87.
96. Id. at 101.
therefore entitled to due process rights. Crucially, the Court based its decisions on "fundamental principles that inhere in 'due process of law.'"97

_Yick Wo, Wong Wing_, and _Yamataya_ represent key common liberty cases from the first few decades of the Court's immigration jurisprudence. During that period, the Court both followed a trajectory of openness away from the rigidly oppressive ideals of sovereignty, and created a second immigration inquiry that begins, not with sovereignty powers, but rather with the immigrant's individual rights. What began in _Fong Yue Ting_ as a question of the powers "incident to the sovereign" was resolved in _Yamataya_, when the Court framed the constitutional question in terms of whether executive officers had "disregard[ed] the fundamental principles that inhere in 'due process of law.'"98 As the Court entered the twentieth century, it rooted the noncitizen squarely within the Fifth Amendment and inaugurated an era of noncitizen constitutional rights.

C. Contemporary Jurisprudence: Preserving Individual Rights Through the Clear Statement Rule

As the foregoing cases demonstrate, the Court has historically attempted to maintain respect for its political co-branches while not unduly trampling upon individual rights of noncitizens. Still, when noncitizens go up against Congress in its sovereign capacity, they tend to lose. Only once, in _Wong Wing_, has the Court held an immigration law to be constitutionally beyond the realm of Congress's sovereign powers, and even then, the Court failed to define those outer boundaries with precision. In this regard, the current Court has retained the Chinese Exclusion legacy by deferring to the proposition that Congress retains ultimate authority over immigration affairs.

But the Court has nevertheless approached immigration questions in a manner distinct from past courts. While never formally questioning Congress's ultimate authority, this Court has nevertheless managed to secure some significant individual rights for immigrants. Over the last several years the Court has curtailed expansion of the plenary power doctrine

97. _Id._ at 100 (quoting U.S. CONST. amend. XIV, § 1). It is worth noting that the narrow holding of _Yamataya_ is that noncitizens are entitled to _some_ form of procedural due process, and not necessarily the same level of process associated with federal courts, and therefore, in the context of due process rights, citizenship in some sense still matters. But as historian Lucy Salyer notes, a "fundamental principles" approach demarcates an important step toward "rais[ing] the standards in immigration procedure because it suggest[s] that there exist[s] a 'higher law' to which congressional statutes . . . must conform." _Lucy E. Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law_ 173 (1995). Moreover, another commentator has pointed out that we cherish procedural rights because they implicate substantive ideals within law and society.

98. _Yamataya_, 189 U.S. at 100 (quoting U.S. CONST. amend. XIV, § 1).
by rigorously applying a clear statement rule to statutes aimed at preserving immigrants’ rights and resolving ambiguities in favor of immigrants.99

Just as the specter of the “communist alien” shaped the contours of immigration law during the 1950s, today, the “criminal alien” has been the most persistent protagonist in the Court’s modern jurisprudence. Since the late 1990s, federal courts have heard several challenges to the Antiterrorism and Effective Death Penalty Act100 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act101 (IIRIRA), statutes that Congress passed out of concern over criminal immigrants. One commentator notes that these statutes are “the toughest immigration legislation adopted in half a century,”102 while another notes that they created “the alarming precedent of making it the exclusive province of the executive branch to say what the law is in a matter affecting personal liberty.”103

The Court first examined the statutes as they applied to noncitizens in a 2001 case, INS v. St. Cyr,104 where it held that Congress could neither revoke federal jurisdiction to hear habeas corpus claims brought by a criminal noncitizen, nor pass a retroactive deportation statute without raising serious constitutional concerns. In St. Cyr, a noncitizen pleaded guilty to a charge of selling a controlled substance. He was eligible for a waiver

99. This approach is an apparent resuscitation of an approach the Court once employed in Federal Indian Law cases. See Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 417 (1993). Frickey notes:

[It] is not surprising that the Supreme Court has long applied a clear-statement requirement to congressional acts that appear to invade tribal sovereignty. The clearest example is the principle that, absent compelling evidence, a court should not hold that a federal statute has abrogated an Indian treaty. Unilateral federal treaty abrogation, one of the starkest acts of colonization, is within the discretion of Congress, the Court has held, and thus injunctive relief is unavailable to prevent abrogation... Just as contemporary decisions protect against all but express repeals of values rooted in the Constitution, the Indian treaty abrogation doctrine protects against all but clear repeals of values rooted in the spirit of Indian treaties.

Id. (footnotes omitted). Legal scholar Hiroshi Motomura makes a similar argument regarding the Court’s application of the canons in the context of immigration law. He argues that the Court sustains a pattern of “phantom norm decisionmaking” where it uses “phantom norm constitutional reasoning to reach subconstitutional outcomes favorable to aliens.” Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 567 (1990). Specifically, Motomura argues that in the paradigmatic example of phantom norm decisionmaking, the Court is “careful to disclaim reaching the constitutional issue” while nevertheless relying on an “underlying reasoning [that is] unmistakably constitutional.” Id. at 571. In one sense, my thesis is an extension of Motomura’s where I examine the current Court’s application of the clear statement rule.

of deportation at the Attorney General’s discretion at the time of his plea bargain. Relying upon his waiver eligibility, he struck his deal early in 1996 and his conviction was entered one month before AEDPA went into effect. But he was released after AEDPA had gone into effect and the government, disregarding St. Cyr’s reliance interest in the waiver, immediately initiated deportation proceedings against him. The Court explained that because the statute deeply implicated his habeas rights, Congress’s structural limitations, and the unique nature of immigration affairs, it was required to apply the clear statement rule rigorously. In the Court’s words, deportation of a noncitizen without the benefit of judicial oversight “would raise serious constitutional problems.”

That same term, in *Zadvydas v. Davis*, the Court heard a challenge to post-deportation detention. There, two criminal noncitizens, who had been adjudicated “removable,” were detained indefinitely, primarily because the Immigration and Naturalization Service (“INS”) could not find a country that would receive them. The INS argued that the continued detention was justified on grounds that the noncitizens had been deemed removable, they retained no right to reside within U.S. borders, and therefore had forfeited any Fifth Amendment liberty interests.

Unpersuaded, the Court held that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment] protects.” Recognizing that the statute affected a broad cross-section of immigrants—“not only...terrorists and criminals, but also...ordinary visa violators”—the Court rejected the government’s expansive reading of the statute. Because indefinite detention strikes at the heart of the liberty interest guaranteed by the Fifth Amendment, the Court read into the statute a presumptively reasonable maximum time period of ninety days before proceedings are commenced.

105. *Id.* at 298 (“For the INS to prevail it must overcome...the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.”).

106. *Id.* at 304. The Court explained:

St. Cyr’s constitutional position also finds some support in our prior immigration cases. In *Heikkila v. Barber*, the Court observed that the then-existing statutory scheme ‘had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution...’. Therefore, while the INS’ historical arguments are not insubstantial, the ambiguities in the scope of the exercise of the writ at common law identified by St. Cyr, and the suggestions in this Court’s prior decisions as to the extent to which habeas review could be limited consistent with the Constitution, convince us that the Suspension Clause questions that would be presented by the INS’ reading of the immigration statutes before us are difficult and significant.

*Id.* (emphasis in original) (citation omitted).


109. *Id.* at 690.

110. *Id.* at 697.
St. Cyr and Zadvydas illustrate that the current battle for immigrants’ rights is being waged through statutory interpretation. The Court is affirming Congress’s general immigration powers in form, but reading limitations into the statutes based on unspoken constitutional norms such as liberty. Therefore, from a noncitizen’s perspective, it has made little difference whether the plenary power sounds in judicial deference, sovereignty, or standing principles. Whatever the basis for plenary power, the Court has conceded that Congress unquestionably retains it. What the Court has not conceded, however, is its own role in determining the scope of this power. Unlike the Chinese Exclusion and the Cold War courts, this Court has insisted that it has a role to play in the dialogue over immigration, and in so doing, it has kept the courtroom doors open to noncitizen challenges.

Even Demore v. Kim,111 a 2003 case that both dealt a blow to immigrants’ rights112 and drew criticism for its opaque reasoning,113 nevertheless affirms the Court’s role in policing governmental abuse of immigrants’ rights. The case holds that preventive detention “for the purposes of detention” does not violate a noncitizen’s Fifth Amendment liberty interest, but Justice Kennedy registered the decisive fifth vote with an important qualification. He explained that where “continued detention became unreasonable or unjustified,” the noncitizen’s detention would amount to an arbitrary deprivation of liberty, thus triggering the Fifth Amendment.114 In the instance of “unreasonable delay” on the part of the INS “in pursuing and completing deportation proceedings,” the Fifth Amendment would require the Court to make a pretext inquiry. There, the key question would be whether detention was truly “to facilitate deportation, or to protect against risk of flight” or whether its purpose was “to incarcerate for other reasons,” which would make it unconstitutional.115 Justice Kennedy joined the majority only with the caveat that the Court reserves the right to intervene in removal proceedings at the first sign of abuse. This recent line of cases demonstrates that, for the moment, the Court is intervening on behalf of immigrants to shield them from plenary overreach.

112. The Demore Court held that preventive detention for the purposes of deportation was not a violation of the alien’s Fifth Amendment liberty interest. Id. at 513.
113. Judge Fletcher, who penned the Ninth Circuit decision the High Court overturned, has publicly lamented that the Court ignored the facts of the case to achieve the broader goal of advancing the “war on terror”:

Why did they do this? Because it was easy; because, to use a word they did not use, it was statesmanlike. Because it made it easier to fight the war on terror. ... There is an old Quaker saying, ‘Speak truth to power.’ There is a reciprocal obligation. Power often maintains itself by silence; by half-truths, and by deceptions. Power should speak truth to us.

114. Demore, 538 U.S. at 532 (Kennedy, J., concurring).
115. Id. at 532, 533.
Most recently, in Clark v. Martinez,\footnote{Clark v. Martinez, 125 S. Ct. 716 (2005).} in a 7-2 decision by Justice Scalia, the Court held that inadmissible immigrants may not be held indefinitely.\footnote{Id. at 727.} Justice Thomas’s dissent is noteworthy. He critiques the majority on several grounds, but significantly for present purposes, Thomas cites the Court’s “aggressive application of modern constitutional avoidance doctrine” as “the greater danger.”\footnote{Id. at 14 (Thomas, J., dissenting).} “A disturbing number of this Court’s cases,” he continues, “have applied the canon of constitutional doubt to statutes that were on their face clear.”\footnote{Id.}

Returning to Cox, the appeal of a citizen standing strategy as an end run around the plenary power doctrine loses luster in light of the Court’s recent willingness to hear noncitizen challenges. As St. Cyr, Zadvydas, Clark, and even Demore demonstrate, the Court sees itself as institutionally capable and fully equipped to hear noncitizen challenges. This is not to say that the Court will henceforth champion the individual rights of noncitizens, of course. As Justice Scalia asserts in Clark, Congress may design an oppressive immigration regime by statute if it so desires.\footnote{See id. at 727.} Nevertheless, on the role of citizen standing in immigration reform, it is unclear what Cox’s strategy will actually contribute when the Court seems willing to recognize injuries-in-law and adjudicate the claims of noncitizens.

III

Citizen Standing: A Normative Critique

This part explores whether it is even desirable to embrace a citizens’ rights approach to immigration reform. I contend it is not. In short, those cases that Cox cites do not reflect the most pressing issues in the current movement for immigrants’ rights. Specifically, Cox cites exclusion cases involving noncitizens who are physically outside the United States.\footnote{Cox, supra note 22, at 386 n.56.} Although troubling, in the current context of the “war on terror,” the most egregious violations of immigrants’ rights arguably pertain to detention and deportation, not exclusion.\footnote{See Kelly, supra note 13;Perera, supra note 14; Romero, supra note 16, at 210 (“while the legitimate goal of immigration law enforcement is deportation, Ashcroft’s true objective in targeting noncitizens appears to be criminal prosecution for terrorism and subversion”); Tumin, supra note 18, at 1210 (“Not surprisingly, most legal opposition to the 9/11 investigation has come in the form of challenges to the detention of nearly 1,200 individuals held during the government’s preventive detention campaign”); Cole, supra note 17, at 1754.} Therefore, although Cox’s reading of plenary power is correct as a matter of doctrine, it misses the mark as a
workable theory for undermining the power as it currently oppresses immigrant communities.\footnote{Indeed, the most recent case Cox cites is more than a decade old. See Cox, \textit{supra} note 22, at 386 n.56 (citing Romero v. Consulate of U.S., Barranquilla, Colom., 860 F. Supp. 319, 323 n.7 (E.D. Va. 1994)).}

Practically speaking, immigration reform should continue by pushing the Court to constitutionalize immigrants' rights. The confidence of the current Court in this arena must not be squandered. Over the last century, the Court has been slowly developing the doctrinal tools—in this case, due process principles and the clear statement rule—into a mature institution, proficient in resolving immigration challenges. However tempting Cox's citizen standing model may appear, immigrants' rights activists should press on with immigrant-centered challenges. Only in this way can we hope for a Constitution that takes explicit account of both substantive and procedural promises locked within the fundamental principles of due process.

Moreover, a citizen standing regime sends the wrong message. It suggests that the impermissible use of race in the immigration context only matters when the rights of citizens are affected. Accordingly, bringing citizen challenges to immigration policies will continue to perpetuate the citizen-immigrant construct that has captured the Court's imagination for more than a century. This binary must be broken, and immigrants ought to be brought wholly within the constitutional community as the text of the Constitution itself promises. Finally, to the extent citizen standing does retain purchase as a reform strategy, pursuing it in an unreflective, unspecific manner runs the serious risk of harming racial minorities within immigrant communities. In the following sections, I elaborate on the normative reasons that a citizens' rights approach will impede effective immigration reform.

\textit{A. A New Constitutional Moment?}

Focusing on citizen challenges would squander a potentially valuable constitutional moment for immigrants' rights activists. As explained previously, the Court has been able to preserve individual rights of immigrants, albeit through hyper-actualized applications of the canons of interpretation. But canons are fairly insubstantial. The Constitution offers the only firm ground upon which to base lasting reform. It has been more than a century since the first and last time the Court overruled an act of Congress related to immigration. Yet, the moment may be ripe to make the same push for noncitizen rights in the context of detention and deportation.

Perhaps the most accurate way to view the Court's recent plenary power cases is through the lens of judicial confidence. In contrast to the deferential language that the Court embraced during the nineteenth-century
plenary power cases—in which Congress’s decisions were “conclusive upon the judiciary”—the *St. Cyr* and *Zadvydas* Courts deliberated with far greater confidence. For example, the *Zadvydas* Court recognized the plenary authority and “the Nation’s need to ‘speak with one voice’ in immigration matters,” but nevertheless insisted on its role in the national dialogue. As an institution, the Court felt fully capable of considering competing political and foreign affairs interests “without abdicating [its] legal responsibility to review the lawfulness of an alien’s continued detention.” In truth, there is little reason for the Court not to take such a stringent approach to immigration questions. As some commentators have observed, “When the [immigration] challenges are based on Due Process and Equal Protection Clauses (as most are), there is no basis for finding a lack of judicially discoverable or manageable standards; these are mainstays of modern constitutional law.”

Moreover, *St. Cyr* and *Zadvydas* suggest that judicial intervention is not only an issue of institutional capacity but also of necessity. Judicial review is necessary to mitigate effects of Congressional “pollution behavior.” The *St. Cyr* Court was reluctant to abdicate its power of judicial review and devoted a considerable portion of its opinion unpacking the historical role of the writ of habeas corpus. “At its historical core,” the Court explained, “the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.” In order for the INS to prevail, the Court opined, it had to overcome “the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.” In the context of detention and deportation, it is precisely because Congress’s “unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration” that the Court must be vigilant in mitigating the political temptation “to use retroactive legislation as a means of retribution against unpopular groups of individuals.” The Court’s ruling rested upon concerns with the overzealous political

125. *Id.*
127. *St. Cyr*, 533 U.S. at 300 (“judicial intervention in deportation cases is unquestionably ‘required by the Constitution,’” Heikkila v. Barber, 345 U.S. 229, 235 (1953)).
128. *Id.* at 301.
129. *Id.* at 298 (emphasis added).
130. *Id.* at 315 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)).
response, one that ostracized immigrants and moved to define them collectively as a “mass of common rubbish.”^131

The Court expressed similar concerns in *Hamdi v. Rumsfeld*.^132 Rejecting the government’s separation of powers argument to justify the indefinite detention of Hamdi,^133 the Court explained that “a state of war is not a blank check” and despite the power the executive may retain, “[the Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake.”^134

With all the Court’s talk of institutional capacity, immigrants’ rights activists today find themselves engaging in a different level of discourse with the Court than did advocates more than a century ago. The Court no longer needs to be convinced that it has a role to play within immigration affairs; it has proclaimed that it does. With this role firmly established, immigration reform can now make the case for full personhood within the meaning of the Constitution. This institutional shift is partly why citizen standing will not significantly impact immigration reform strategies under the current Court.

Moreover, a citizen standing strategy sends the wrong message. It tells courts that they should examine plenary power questions with greater scrutiny and demand greater compliance with constitutional norms only when the rights of citizens are on the line. Cox unsettles the notion that immigration policies exact injuries only upon immigrants, but there is a danger in taking this observation too far. Starting down the road towards recognizing the ways in which immigration policies harm citizens may lead courts to fixate on these harms, to the detriment of recognizing ways in which these policies harm immigrants.

**B. The Citizen-Immigrant Construct**

Another normative implication of a citizen standing strategy is that it risks harming racial minorities within immigrant communities. Cox’s citizen standing thesis relies on two implicit assumptions. First, he assumes that the rights of citizens are largely unrelated to the rights of immigrants.^135 Cox’s citizen standing model turns on a series of binary constructs: immigrants are legally disabled, citizens are not; immigrants are constitutional outsiders, citizens are not. Therefore, in Cox’s estimation, by

---

131. DOUGLAS, supra note 1, at 161. More tangibly, the history of deportation largely confirms the Court’s observation. See COLE supra note 21; see also Hafetz, supra note 103.


133. Admittedly, *Hamdi* involved the detention of a citizen and not an immigrant. Nevertheless, because the case was decided by the same Court as *Zadvydas* and *St. Cyr*, it goes towards showing the Court’s newfound confidence, whether it be in immigration affairs or national security policies. In any event, the two fields of law are apparently merging. See Tumlin, supra note 18; Stumpf, supra note 21.

134. 124 S. Ct. at 2650 (emphasis added).

challenging harmful immigration policies, citizens are simply filling in for immigrants who are injured-in-fact but not injured-in-law, thereby raising legal issues that would not otherwise get play before a court.\footnote{Id. at 390.}

As a strictly formalistic matter, this is not wrongheaded. After all, as Cox points out, questions of standing are not trans-substantive in nature, but instead require an examination of the specific legal claims at stake.\footnote{See Cox, supra note 22, at 395.} If immigration policies exact particularized expressive harms upon citizens as citizens, then it follows that citizens, as members of an injured class, ought to have standing on its own terms. Therefore, according to such an approach, whatever harms citizens incur stand separate and apart from those that harm immigrants.

But citizenship is not a strictly formalistic matter. Far from being distinct, citizens’ rights are tightly intertwined with immigrants’ rights. The history of immigration policy is replete with examples of citizens seeking to preserve “citizenship” by denying access to immigrants and other foreigners.\footnote{See generally Salyer, supra note 97.} Moreover, denial of citizenship has often operated along racial lines,\footnote{Cox is correct that permanent and long-term residence, not citizenship, now operate as important gatekeeping mechanisms. See Cox, supra note 22, at 404. Nevertheless, because removal statutes apply with equal force to Lawful Permanent Residents as well as to “illegal” immigrants, the argument that citizenship has operated as a mechanism of exclusion can easily be extended to apply so as to construe removal as operating as a mechanism of expulsion. The relevant removal and detention statute provides that “[t]he Attorney General shall take into custody any alien who” commits any number of deportable crimes. 8 U.S.C. § 1226(c) (2000).} such that preservation of citizenship has operated as a proxy for preserving the status of whiteness.\footnote{See generally Ian F. Hanevy Lopez, White by Law: The Legal Construction of Race (1996).} This raises Cox’s second implicit assumption: race no longer animates the citizen-immigrant construct. Even assuming that a citizen standing strategy gained traction and became an acceptable means by which citizens could challenge the use of race in the immigration context, it is not clear that citizens would pursue the challenges that would benefit minority immigrants. That is to say, if citizenship has historically operated to preserve whiteness, citizen standing proffers only the means, not the incentive, to achieve racial justice in the immigration context.

For most of this country’s history, “whiteness” has been a prerequisite to “citizenship.” For example, under the terms of the Treaty of Guadalupe Hidalgo, the U.S. government recognized Mexicans in the Southwest as being white during the mid-nineteenth century.\footnote{Evelyn Nakano Glenn, Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor 158 (2002).} Still, despite the legal conferral of whiteness—and hence eligibility for citizenship—upon...
Mexicans, they were nevertheless denied the enjoyment of these rights because of their race. Local officials and communities discriminated against Mexicans with impunity. During the early part of the twentieth century, Mexicans in the Southwest were treated to a regular diet of disenfranchisement and segregation; combined forces of racialization and denial of rights disincentivized Mexican immigrants to naturalize. Here, despite the availability of the legal means to access whiteness and citizenship, social forces and incentives rendered these means insignificant.

To be clear, I do not contend that Cox refutes this history; he clearly accepts it. Rather, I argue that Cox disregards ways in which this history still animates contemporary legal and social conceptions of the immigrant, and how rights of the citizen still implicate rights of the immigrant along a racial axis. It is irresponsible to run headlong into a battle against the plenary power armed only with citizen standing and without giving thoughtful consideration to ways in which such a strategy might do greater harm than good for minority immigrant communities.

What this history suggests, and what Cox’s thesis fails to acknowledge, is that citizenship exists and operates on several levels. As Leti Volpp observes, “There is a danger to try to define citizenship in isolation from identity, since particularities will determine how successfully such citizenship can be accessed and enjoyed.” Volpp explains:

While many scholars approach citizenship as identity as if it were derivative of citizenship’s other dimensions, it seems as if the guarantees of citizenship as status, rights, and politics are insufficient to produce citizenship as identity. Thus, one may formally be a U.S. citizen and formally entitled to various legal guarantees, but one will stand outside of the membership of kinship/solidarity that structures the U.S. nation. And clearly, falling outside of the identity of the “citizen” can reduce the ability to exercise citizenship as a political or legal matter. Thus, the general failure to identify people who appear “Middle Eastern, Arab, or Muslim” as constituting American national identity

142. Id. at 161-63.
143. Id. at 173. As one Mexican resident lamented, “I’m not interested in being a citizen because . . . I would be a citizen in name only—with no privileges or considerations. I would still be a ‘dirty Mexican.’” Id.
144. As Cox explains:
Since the 1880s, immigration law has frequently been used to protect the interests of insiders by excluding those whose presence has been thought to corrupt the national community in some way. The Chinese Exclusion Acts, the national origins quota, and the pre-1952 naturalization laws were all designed to protect and foster an ethnic national identity by keeping the American national community White.

Cox, supra note 22, at 397 (footnotes omitted).
reappears to haunt their ability to enjoy citizenship as a matter of rights, in the form of being free from violent attack.\(^{146}\)

Accordingly, a Delaware-born woman who appears ‘Middle Eastern,’ ‘Arab,’ or ‘Muslim’ may enjoy the legal rights of citizenship, but when she is denied a credit card application because of a cashier’s unprincipled, ad hoc enforcement of the Patriot Act,\(^{147}\) that Middle Eastern citizen experiences a diminished array of civil rights. Rights that normally attach to legal citizenship disappear as the State and private actors respond instead to her Middle Eastern, Arab or Muslim identity, thus effectively treating her as they might treat a noncitizen.\(^{148}\) Although a theory of expressive harms does capture one dimension of the injuries citizens experience at the hands of immigration policies, the greater harm that citizens experience is being denied the right to access the full rights attendant to citizenship, including identity, membership, and political solidarity. Moreover, unlike expressive injuries, which are theoretically widespread, these injuries are specific and racialized.

Thus, when Cox argues that citizens should have standing to challenge post-9/11 discriminatory immigration policies,\(^{149}\) it seems unlikely that courts would recognize the sort of racialized injury described above. The examples Cox provides are consistent with this observation. Where courts have been willing to recognize citizen standing, other conventional norms were at play, none of which could provide any real grounding for the sort of race-based injuries citizens experience today within the context of post-9/11 immigration policies. For example, in the associational injury cases—\textit{Fiallo, Nguyen,} and \textit{Kleindienst}—the Court grappled primarily with a citizen’s interest in maintaining a heteroreproductive family or free speech rights rather than addressing immigration issues. Worse still, economic injury examples Cox cites seem to suggest that courts have been willing to grant citizen standing in ways that are detrimental to the interests of immigrants and communities of color. A court’s recognition of ways in

\(^{146}\) Volpp, \textit{supra} note 21, at 1594-95 (footnote omitted).


\(^{148}\) Watanabe, \textit{supra} note 13 (“One Delaware woman, a U.S.-born citizen, reported that her credit card application was rejected after she heard the cashier mention the Patriot Act in her conversation with the bank processing her request. The woman’s name was not listed on the Treasury Department’s list of suspicious people.”). Moreover, not all immigrants are socially or legally disabled in the same manner. As Robert Chang and Keith Aoki explain: “Fear of immigration . . . is colored so that only certain immigrant bodies excite fear.” Chang & Aoki, \textit{supra} note 28, at 1400. While the public clamored for increased restrictions to immigration in the early 1990s, the Immigration Act included legislation to encourage immigration from northwestern Europe. \textit{See id.} This selective invitation is consistent with the larger history of racially discriminatory immigration policies. As Bill Hing aptly observes, throughout history, “[a]s long as they were the right kind of immigrations, the new nation wanted them.” \textit{Bill Ong Hing, Defining America Through Immigration Policy} 20 (2004).

\(^{149}\) Cox, \textit{supra} note 22 at 413.
which a “guest worker program” injures citizens seems to legitimate the sort of racialized, anti-immigrant sentiment that infects that perpetuates the very immigration policies being challenged.

C. Citizen Standing Applied

My criticisms of Cox’s arguments should not be taken to mean that citizens bringing challenges to immigration policies can never be effective. They can be, but not in doctrinal terms and not without taking specific account of race. Cox’s citizen standing model might play out with some success under two circumstances. One possibility would be the political lawsuit; that is, a suit in which the citizen-plaintiff specifically seeks to unsettle presumptions surrounding citizenship and immigrant identities. Therefore, if the Delaware-born, Middle Eastern (instead of the presumptively white citizen) woman challenged removal policies that currently threaten Muslim, Arab, and South Asian immigrants, her presence in the courtroom as both a citizen (i.e., loyal American and constitutional insider) and a Middle Eastern woman (i.e., feared potential terrorist and presumed constitutional outsider) would animate the courtroom and media dynamics in such a way as to illuminate racist tendencies of the law and the public. This approach relies not on doctrinal underpinnings of citizen standing, but instead on political capital generated by a high-profile lawsuit aimed at effectuating a larger political agenda.

Another possibility would be to bring citizen suits as companion cases to noncitizen suits. In challenging the current detention of noncitizens within the “war on terror,” citizens and noncitizens could bring parallel suits to illuminate ways in which immigration policies harm members of our society, citizens and noncitizens alike. The purpose of such a strategy would be to educate courts as to the full extent, and the real human price that is paid, in allowing oppressive immigration policies to go unchecked. Here, courts would be squarely confronted with having to choose between a regime of double standards or one of rule of law. Cox aptly observes that the Court has treated some noncitizens as “meaningful members of the national political community,” and thereby created the notion that there

---

150. See Eric K. Yamamoto et al., Courts and the Cultural Performance: Native Hawaiians’ Uncertain Federal and State Law Rights to Sue, 16 U. HAW. L. REV. 1, 5-6 (1994). Yamamoto argues that in the Native Hawaiian context:

[A]ccess to court process for indigenous peoples may have potential social-political value on multiple levels. The right to sue—to gain system entry and develop, define and present claims—may have value even in the absence of favorable court declarations of rights. It may have value even though favorable court declarations of rights rarely lead directly or immediately to fundamental structural and attitudinal changes.

Id. (footnote omitted). A similar argument may be made to cover the hypothetical I pose.

151. COLE, supra note 21, at 7.
152. Cox, supra note 22, at 407.
are "degrees of belonging." But a companion case strategy seeks to exploit and dismantle the connection between "injury" and "belonging." For example, the lower courts in both *Zadvydas* and *Demore*, as well as the *Demore* dissent, all argued against detention, based in part on the notion that those noncitizens resembled citizens in significant ways, thereby alluding to a notion of belonging. Rather than highlight all the ways in which noncitizens resemble citizens vis-à-vis immigration policies, a companion case strategy would seek to highlight how noncitizens and citizens alike are injured as persons.

Deploying citizen standing would have the additional benefit of sharpening theories of immigrants' rights within the academy. If notions of political belonging have captivated courts, as legal scholar Kunal Parker suggests, notions of physical belonging have tended to characterize historical understandings of immigration law. Parker explains that many commentators have operated under the assumption that immigration is about the "spatial movement of individuals from 'there' to 'here'". He persuasively argues that immigration policy is really about "managing immigrants' legal visibility on the landscape of claims," which allows the state to "render[] immigrants legally invisible as subjects of claims." Parker's insights regarding spatial assumptions of immigration theories feed into ways in which courts rely on notions of belonging: citizens are from "here" while noncitizens are from "there," and rights the noncitizen will receive depend on where, in the court's estimation, along that spectrum she falls. But if immigration activists can help dislodge judicial understandings of rights from notions of belonging, and commentators can unsettle notions of spatial movement within immigration theory, then both roads may eventually lead to the expression of rights free from qualification.

To reiterate, citizens' rights and immigrants' rights are not separate entities, but rather intrinsically linked and moreover, they implicate...
historical and modern racism. This is perhaps what is most troubling and ironic about Cox’s reliance on *Shaw* and the Court’s voting rights jurisprudence to justify judicial intervention on behalf of citizens. Under his reading of *Shaw*, the Court invalidated any governmental attempt to regulate political communities “in an overly racialized way” because to do so would exact an “expressive injury on the insiders—the existing members of the political community—that is cognizable under the Equal Protection Clause.” Cox therefore argues that just as voters, as members of a local political community, have standing to challenge constitutionally impermissible uses of race in local redistricting schemes, so too should citizens, as members of a national political community, have standing to challenge the use of race in federal immigration policies.

Cox correctly summarizes the Court’s voting rights jurisprudence as a formalistic matter, but ignores basic social implications of that jurisprudence. *Shaw* is not about the Court recognizing voters’ right to challenge an impermissible use of race by state legislatures, but rather about the Court recognizing white voters’ right to challenge a legislative scheme that was intended to benefit black voters. *Shaw* typifies the judicial move towards colorblindness; the plaintiffs were white voters challenging a Voting Rights Act redistricting scheme that privileged black voters. It is deeply ironic that a seminal civil rights statute, created specifically with the protection of black interests in mind, would be undermined decades later by a case in which white plaintiffs challenged a redistricting scheme that protected black interests pursuant to the same Act.

Thus, given the ways in which *Shaw* undermines black voting rights and prevents the historically meaningful achievement of racial justice, it seems odd for Cox to rely so heavily on this case in making his case for citizen standing—a strategy he contends will enforce racial justice in the immigration context. Racial injuries, no less than other legal injuries, require examining the specific claims at stake and the surrounding circumstances. Whether the goal is to make the franchise meaningful for blacks, or to protect minority noncitizens from selective enforcement of immigration laws, strategies of reform must be specific to context and sensitive to history.

160. See *Shaw* v. Reno, 509 U.S. 630, 657 (1993) (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . . .”).
CONCLUSION

Cox casts an important first stone in the debate on what role, if any, citizens ought to play in immigration reform. He brings into sharp relief the fact that immigration policies not only harm immigrants, but citizens in legally cognizable ways as well. Still, as a platform for immigration reform, his model presents descriptive and normative problems.

We are in the midst of a unique constitutional moment in the Court’s immigration jurisprudence. After a century of oscillating between solemnly respecting the sovereign’s plenary power and shielding immigrants through procedural protections excavated from a faint recognition of personhood, the Court has settled on a compromise founded upon canons of construction and a clear statement rule. The effect: affirming Congress’s ultimate powers in the field of immigration while resolving all statutory ambiguities in favor of individual rights. The noncitizen’s right to a neutral decision maker, and her right to be free from arbitrary detention are for the moment secure. Yet, promoting a citizens’ rights strategy for immigration reform sends the wrong message and distracts courts from where judicial energy ought to be devoted: namely, constitutionalizing immigrants’ rights.

However immigrants’ rights activists incorporate citizen standing into their reform portfolio, they—we—must not forget Douglas’s lessons on dirt, namely, that current immigration policies, as forms of pollution behavior, reveal a deeply flawed and tangled system of social values. Through systematizing and ordering, delineating boundaries of belonging and exclusion, constructing the world as “here” and “there,” and of course, affirming the importance of race, our nation’s immigration laws and policies conspire to disregard immigrants as “matter out of place.” The only hope for preventing such pollution behavior is to root out our majoritarian anxieties.

---

161. See St. Cyr, 533 U.S. at 326.
163. DOUGLAS, supra note 1.