THE RIGHTS OF OTHERS: LEGAL CLAIMS AND IMMIGRATION OUTSIDE THE LAW

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ABSTRACT

This Article analyzes the rights of unauthorized migrants and elucidates how these noncitizens are incompletely but importantly integrated into the U.S. legal system. I examine four topics: (1) state and local laws targeting unauthorized migrants, (2) workplace rights and remedies, (3) suppression of evidence from an unlawful search or seizure, and (4) the right to effective counsel in immigration court.

These four inquiries show how unauthorized migrants—though unable to assert individual rights as directly as U.S. citizens in the same circumstances—can nevertheless assert rights indirectly and obliquely by making transsubstantive arguments that fall into five general patterns. The first is an institutional competence argument that

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† Susan Westerberg Prager Professor of Law, School of Law, University of California, Los Angeles. My title is inspired (loosely) by the film, *Das Leben der Anderen*, directed by Florian Henckel von Donnersmarck, translated as *The Lives of Others*. The title also echoes and acknowledges SELYA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2004). This Article is part of a book project based on the conceptual framework in Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008). Please send comments by e-mail to motomura@law.ucla.edu.

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the wrong decisionmaker acted. The second is an argument that an unauthorized migrant was wronged by a comparatively culpable person. The third is a citizen proxy argument that sustaining an unauthorized migrant's claim will protect a U.S. citizen or lawful permanent resident. The fourth is that an unauthorized migrant may be unable to challenge the substance of a decision, yet may mount a successful procedural surrogate challenge to the way that decision was reached. The fifth is a phantom norm argument that, even if a government action withstands constitutional challenge, it violates a statute or regulation.

These patterns illustrate how typical doctrinal relationships and litigation strategies—for example, choosing between equal protection and preemption arguments, or between seeking redress for harms to individuals and harms to groups—shift significantly for unauthorized migrants. These patterns of oblique rights reflect a pervasive national ambivalence about immigration outside the law.

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INTRODUCTION

Does an unauthorized migrant have rights? What are they? The answers to these questions have great practical meaning in the lives of over eleven million men, women, and children who live in the United States in violation of federal immigration laws.[1] The answers also say much about how these noncitizens, though their presence in the United States is outside the law, are part of U.S. society in important and telling ways, particularly as actors in a legal system of rights and responsibilities.

This Article begins, however, by acknowledging that these questions may seem odd. A reader trained in the law might even think that only an unschooled commentator would pose them, for surely the answers begin with the phrase, "it depends." A few years back, a television network asked me to videotape a brief segment. A voiceover and graphic would pose a question from a viewer: Do immigrants have rights? For exactly sixty seconds, I was on camera to give an answer that would fit neatly between shows. There would be no editing, so needless to say the shoot required multiple takes. All the while, I thought to myself: Who are the immigrants that viewers have in mind? What kind of rights are they envisioning?

So I admit that skepticism about my opening questions is reasonable. But I also believe that this inquiry, though nearly boundless, is worthwhile. It is axiomatic that unauthorized migrants—or "undocumented immigrants" or "illegal aliens," as opposing sides of the debate would call them—are here outside the law.[2] But by

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1. *See* MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 1 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf (estimating the unauthorized immigrant population living in the United States at 11.6 million in January 2008); JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES app. B at 29 tbl.B1 (2009), *available at* http://pewhispanic.org/files/reports/107.pdf (showing a total unauthorized immigrant population of 11.9 million in 2008 and providing figures for individual states).

2. I use this phrase deliberately as an attempt to be more literally accurate and more neutral than "illegal" or "undocumented" immigration. I do not use the phrase to suggest that unlawfully present individuals are in a domain in which law is nonexistent or irrelevant. It is a construct of the law itself that places them outside the law. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2047–55 (2008) (discussing the meaning of "unlawful presence"); *see also* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1291 (6th ed. 2008) (discussing usage of the terms "illegal aliens," "undocumented aliens," and "unauthorized migrants"); Kevin R. Johnson, *"Aliens" and the U.S. Immigration*

living and working in the United States, unauthorized migrants are part of American society in significant ways, and it turns out that they enjoy substantial integration into the overall U.S. legal system. At the same time, this integration is incomplete. This Article analyzes how and why this is so.

The core argument of this Article is that the rights of unauthorized migrants have evolved in certain patterns that reflect various aspects of a pervasive national ambivalence about immigration outside the law.[3] Because the presence of these noncitizens in the United States is literally outside the law, it would be dissonant—and arguably inconsistent with some ideas that underlie the rule of law—to allow unauthorized migrants to assert legal claims as if their presence were lawful. Yet these migrants live as part of U.S. society in ways that are not just economically and socially important, but also deeply rooted in American history, especially in the complex relationship between the United States and Latin America. To allow their status as unlawful residents to relegate these migrants to legal oblivion would offend other, more fundamental ideas that underlie the rule of law.[4] And so an uneasy ambivalence about immigration outside the law produces ways for unauthorized

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Laws: The Social and Legal Construction of Nonpersons, 18 IMMIGR. & NAT'LITY L. REV. 3, 13 (1997) (discussing how the term "alien" is used to depersonalize unauthorized migrants); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1440–42 (1995) (analyzing the meaning of the term "illegal alien").

3. Soon after the enactment of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.), Professor Linda Bosniak wrote: "Undocumented immigrants live at the boundary of the national membership community. They have long occupied a unique, deeply ambivalent place in the United States." Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956. The ambivalence analyzed in Professor Bosniak's foundational piece has evolved into intertwined patterns of oblique rights that I examine in this Article.

4. *See Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. 42 (2007) (statement of Hiroshi Motomura, Kenan Distinguished Professor of Law, University of North Carolina at Chapel Hill) (explaining how "rule of law" includes not only enforcement, but also discretion subject to legal standards, decisionmaking that is based on expertise but subject to checks and balances, and due process); Motomura, *supra* note 2, at 2085–92 (explaining that "rule of law" is a malleable concept that can include not just enforcement of the letter of the law, but also recognition of claims to equality or membership based on historical relationships and obligations); Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT'L L. 139, 144–51 (2008) (explaining that "immigration law is not self-executing but requires due process and the exercise of discretion").

migrants to assert—and for courts and agency decisionmakers to sustain—their rights indirectly and obliquely, even when unauthorized migrants cannot make claims on the same footing as U.S. citizens or lawful permanent residents.

To pursue this analysis, this Article examines four topics: (1) state and local laws targeting unauthorized migrants, (2) workplace rights and remedies, (3) the suppression of evidence from an unlawful search or seizure, and (4) the right to effective counsel in immigration court. Though these topics range broadly, the selection is not random. At least the first three have been arenas for sustained, often vehement debate, not just in the courts, legislatures, and agencies, but also in the media, communities, streets, and wherever public debate about immigration outside the law has surfaced. But beyond these topics' practical significance, they share two features that make joint analysis worthwhile. First, the ability of unauthorized migrants to assert legal claims is deeply contested in these areas of law, unlike general acceptance of fire protection for unauthorized migrants, for example. Second, intense political and judicial activity has turned these areas into laboratories for emerging patterns of argument and decisionmaking.

Part I discusses the recent efforts of numerous states and cities to address the arrival of unauthorized migrants by enacting laws intended to drive them out. Immigrants' rights advocates have brought lawsuits challenging these state and local laws, which this Article sometimes refers to as subfederal laws.[5] Part II examines legal issues that emerge from the essential role of unauthorized workers in many U.S. industries and occupations. The question has naturally arisen whether these workers are protected by the laws that address labor organizing, safety and health, discrimination, wages, and other aspects of the workplace. Part III analyzes the ability of unauthorized migrants to invoke Fourth Amendment protections against unlawful searches and seizures. These issues have arisen from the raids on worksites, homes, and other venues that have become a significant part of immigration law enforcement. Part IV looks at the right to effective counsel in immigration court. Though much less visible in

5. I use the term "subfederal" to include states, counties, cities, school districts, special districts, and all other government entities below the federal level. When this Article refers to "states and localities," "states and cities," and "state and local," I intend these phrases to refer to the same government entities as the term "subfederal."

public politics, this issue has been the focus of heated controversy between the federal government and advocacy groups.

I do not claim that these four inquiries combine to be exhaustive. But, taken together, they illustrate key facets of the incomplete integration of unauthorized migrants into the U.S. legal system in ways that are more revealing than analysis of any one of these areas alone. Unauthorized migrants can assert their rights in practical effect—albeit indirectly and incompletely—by adopting at least five general patterns that cut across these four substantive areas. All five patterns allow unauthorized migrants to assert oblique versions of rights that U.S. citizens or lawful permanent residents can exercise in the same settings.

First, unauthorized migrants may successfully challenge a government decision because the wrong agency or official makes it, even if they cannot challenge the decision's substance. For example, even when it is extremely difficult to attack a state or local law on equal protection grounds, the possibility of race or ethnic discrimination may help convince a court that a state or local law is preempted because state and local governments are institutionally more susceptible to improper bias. This is what I call an *institutional competence* argument.

Second, an unauthorized migrant might successfully assert a right against a wrongdoer, but only as to conduct that is more culpable than the unauthorized migrant's. For example, unauthorized workers who have been injured on the job may enhance the likely success of lost future wage claims against their employers by arguing that the employer's culpability in allowing the employees to work outweighed the employee's own culpability in working without authorization. I call this a *comparative culpability* argument.

Third, an unauthorized migrant may successfully assert rights if recognizing those rights would protect a U.S. citizen or lawfully present noncitizen who serves as a citizen proxy. For example, courts adjudicating a noncitizen's removal from the United States may suppress evidence from a search that violates the Fourth Amendment in a way—such as by improperly relying on ethnic appearance—that may harm U.S. citizens if the same practice were applied to them. This is what I term a *citizen proxy* argument.

Fourth, even if a direct challenge to the substance of an immigration rule fails, a court might invalidate the process of reaching or applying that decision. For example, a court that balks at an explicit grant of workplace rights to an unauthorized worker might

reach the same result by adopting a traditional procedural rule that puts immigration law status beyond the scope of civil discovery. The result is to treat unauthorized migrants as if they were lawfully present. I refer to this as a *procedural surrogate* argument.

Fifth, a government action may withstand constitutional challenge, but a court might find that it violates a statute or regulation. For example, an immigration judge may hesitate to find as a constitutional matter that evidence should be suppressed under the limited exclusionary rule that applies in removal proceedings for Fourth Amendment violations. The same judge may nonetheless order suppression because the search violated the federal government's own regulations. This is a *phantom norm* argument.

This Article discusses these and further examples of the five patterns. Together, these patterns—which emerge from and cut across the four topics discussed in this Article—show how unauthorized migrants remain at the law's margins with rights that are indirect and oblique.

I. STATE AND LOCAL LAWS

For the American republic's first century, state and local immigration laws were almost the only source of immigration regulation.[6] There were many reasons for this, some of which might not immediately appear relevant today. Of these reasons, perhaps the most arresting was slavery.[7] While it existed, the federal government could not regulate migration without addressing intractable questions about the movement of slaves and free blacks. Only after the Civil War did today's prevailing view of immigration federalism—that federal immigration regulation displaces any state laws on the admission and expulsion of noncitizens—begin to emerge.[8]

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6. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1835–84 (1993) (exploring pre-1875 state and local immigration laws); *see also* ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 74–76 (2006) (discussing state regulatory efforts).

7. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 24–25 (2006) (discussing factors that influenced the shift to federal immigration laws).

8. *See* Henderson v. Mayor of N.Y., 92 U.S. 259, 270–75 (1876) (holding unconstitutional New York and Louisiana statutes that regulated the admission of immigrants through the port of New York, on the ground that they infringed upon the federal power to regulate commerce with foreign nations); Chy Lung v. Freeman, 92 U.S. 275, 279–81 (1876) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to

Constrained by federal preemption of any state and local laws that directly regulate immigration, states and localities have addressed immigration outside the law in two other ways. One is state and local involvement in federal immigration enforcement—for example, agreements authorizing states and localities to carry out some federal enforcement functions.[9] The other, which is the focus of this Part, consists of numerous state and local laws limiting access to education, employment, housing, health care, or welfare, or otherwise making life harder for the unauthorized[10] to persuade or force them to leave.[11]

These state and local laws merit analysis because they illustrate the key role that institutional competence arguments can play in allowing unauthorized migrants to assert rights obliquely and incompletely. This Part focuses principally on the connections between (a) individual rights arguments grounded in the Equal Protection Clause of the Fourteenth Amendment and (b) institutional competence arguments grounded in federal preemption. Section A explains how equal protection arguments against unfavorable treatment of unauthorized migrants are extremely difficult to make.[12] And yet, as Section B discusses, the same evidence that weakly supports an equal protection challenge may be crucial to the success of a preemption challenge. In this way, as Section C addresses, a preemption-based institutional competence argument allows unauthorized migrants to assert their individual rights obliquely, though sometimes with unintended consequences.

Congress, and not to the States."). *See generally* MOTOMURA, *supra* note 7, at 21–25 (discussing the shift from state to federal immigration regulation).

9. *See* Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g) (2006) (authorizing agreements that allow state and local officers to investigate, apprehend, and detain aliens to enforce federal immigration laws).

10. *See* CRISTINA RODRÍGUEZ, MUZAFFAR CHISHTI & KIMBERLY NORTMAN, TESTING THE LIMITS: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES 8–9, 23–24, 32–43, 47–51 (2007) (summarizing recent state and local measures).

11. *See* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 160 (2008) ("If a strategy of attrition through enforcement were implemented nationwide, it would gradually, but inexorably, reduce the number of illegal aliens in the United States."); Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, BACKGROUNDER (Center for Immigration Studies, Wash., D.C.), May 2005, at 1, 1–6, *available at* http://www.cis.org/articles/2005/back605.pdf (arguing that consistent enforcement of immigration laws would steadily reduce the population of unauthorized migrants).

12. *See infra* note 42 and accompanying text.

A. Individual Rights: Equal Protection

A 1975 Texas statute allowing local school districts to deny enrollment to any child not "legally admitted" to the United States ushered in the modern era for state and local laws addressing unauthorized migration.[13] The ensuing litigation led to the 1982 U.S. Supreme Court decision in *Plyler v. Doe*,[14] which upheld, as a matter of constitutional law, the access of schoolchildren living in Texas to public elementary and secondary schools regardless of the child's immigration law status.[15]

Plyler is foundational for understanding immigration outside the law. The decision is especially valuable for understanding the connections between individual rights and institutional competence arguments because the plaintiff schoolchildren challenged the Texas statute on both equal protection and preemption grounds.[16] Early in its decision, the U.S. Supreme Court made clear its view that it did not need to address the preemption challenge.[17] Turning almost immediately to the equal protection issue, the Court started with the proposition that the Constitution—in particular, the Due Process and Equal Protection Clauses of the Fourteenth Amendment—applies to all persons in the United States, regardless of lawful or unlawful presence.[18] The dissent agreed with this proposition.[19]

But what matters is not *whether* but *how* the Constitution applies to unauthorized migrants. As a decision on constitutional claims by unauthorized migrants, *Plyler*'s holding has been confined to the context in which it arose.[20] The Court's equal protection rationale—especially its application of intermediate judicial scrutiny[21]—relied so

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13. *See* TEX. EDUC. CODE ANN. § 21.031 (Vernon 1981), *invalidated by* Plyler v. Doe, 457 U.S. 202 (1982).

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

15. *Id.* at 216–30.

16. *See id.* at 206–10 (discussing the lower courts' decisions, including rulings on preemption).

17. *See id.* at 210 n.8 ("Appellees . . . continue to press the argument that § 21.031 is preempted by federal law and policy. In light of our disposition of the Fourteenth Amendment issue, we have no occasion to reach this claim.").

18. *Id.* at 210–16.

19. *Id.* at 243 (Burger, C.J., dissenting) ("I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment *applies* to aliens who, after their illegal entry into this country, are indeed physically 'within the jurisdiction' of a state.").

20. *See* Motomura, *supra* note 2, at 2043 (exploring why *Plyler* has not been extended beyond the context of public primary and secondary education).

21. *Plyler*, 457 U.S. at 228–30.

heavily on the involvement of children and education[22] that no court has ever used it to overturn a statute disadvantaging unauthorized migrants outside the context of K–12 public education.[23]

That *Plyler* only weakly supports equal protection challenges to statutes that disadvantage unauthorized migrants is consistent with the case law on equal protection challenges by noncitizens who are in the United States. These decisions have sometimes sustained equal protection challenges, but only by noncitizens who are lawfully present. The U.S. Supreme Court's 1971 decision in *Graham v. Richardson*,[24] which held that Arizona and Pennsylvania ran afoul of both equal protection and preemption because their state welfare benefits rules barred lawful permanent residents, is a landmark.[25] To be sure, *Graham* did not distinguish between lawfully and unlawfully present noncitizens. The Court observed generally that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[26] Citing the famous footnote four in *United States v. Carolene Products Co.*,[27] the next sentence in *Graham* declared, "Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[28] Here, too, the Court seemed to address all noncitizens together.

But later cases have established that strict scrutiny does not apply to all statutes that treat unauthorized migrants and U.S. citizens differently. The 1976 U.S. Supreme Court decision in *Mathews v. Diaz*[29] concerned lawfully present noncitizens but is relevant to unauthorized migrants because the Court defined constitutional limits on federal laws that affect noncitizens. *Diaz* upheld federal rules that denied Medicare eligibility to some lawfully present noncitizens, including some who had been permanent residents for less than five

22. *See id.* at 218–30 (discussing the importance of education, and the great societal and individual harms that occur when it is denied to children).

23. *See* Motomura, *supra* note 2, at 2075–76 (discussing *Plyler*'s narrow doctrinal scope). In this regard, *Plyler* stands in sharp contrast to *Brown v. Board of Education*, 347 U.S. 483 (1954), which also arose in the context of K–12 public education but acquired a broader significance as the starting point for the invalidation of segregation in many other American institutions.

24. Graham v. Richardson, 403 U.S. 365 (1971).

25. *Id.* at 371–80.

26. *Id.* at 372 (footnotes omitted).

27. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

28. *Graham*, 403 U.S. at 372 (citation omitted).

29. Mathews v. Diaz, 426 U.S. 67 (1976).

years.[30] In contrast to *Graham*, the Court held in *Diaz* that strict scrutiny does not apply to a federal enactment that disadvantages lawful permanent residents.[31]

Though *Diaz* said that the federal government may disadvantage permanent residents when states cannot, the Court did not simply apply preemption analysis.[32] Instead, it explained that "equal protection analysis . . . involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government."[33] Together, *Graham* and *Diaz* establish that equal protection doctrine limits both federal and subfederal governments, but the federal government has greater power than the states to classify by immigration and citizenship status.[34]

Six years after *Diaz*, the Court reasoned in *Plyler* that strict scrutiny does not apply to a law that disadvantages unauthorized

30. *Id.* at 77–87.

31. *See id.* at 81–84 (asserting that the need for flexibility in policy choices in the face of changing world conditions requires "a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization"); *see also id.* at 80 ("Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.").

32. *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 283–93 (exploring possible justifications for the Court's restrained review of the statute at issue); *cf.* Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 98–102 (1985) (exploring the substantive norms inside Justice Blackmun's equal protection framework as it applies to aliens); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 205–06 (1994) (explaining that an equal protection model can justify certain alienage classifications on a federal level where those same classifications would be unacceptable on a state level); Neuman, *supra* note 2, at 1430–40 (arguing for the validity and necessity of an equal protection approach to discrimination against aliens). *But see* David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1085–86, 1088 (1979) (asserting that *Diaz* is better understood as a preemption decision than as an equal protection one); *cf.* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060–65 (1979) (arguing that the Court's doctrine concerning alienage-based classifications is justifiable not as a matter of equal protection, but rather of federalism).

33. *Diaz*, 426 U.S. at 84–85.

34. *See* Bernal v. Fainter, 467 U.S. 216, 219 (1984) ("As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny.").

migrants because they are not a "suspect class."[35] Beyond the context of access to K–12 public education, subfederal laws that disadvantage unauthorized migrants require only a rational basis.[36] So far, history has shown *Plyler* to be a high-water mark, and not a decision that prompted a new era in equal protection for unauthorized migrants generally.

In contrast to equal protection challenges that characterize laws disadvantaging unauthorized migrants as based on immigration status, is there any room to argue that these laws are based on race and/or ethnicity, and thus violate equal protection for that reason? The plaintiffs made this argument in *Lozano v. City of Hazleton*,[37] which challenged ordinances adopted in 2006 and 2007 by the city of Hazleton, Pennsylvania.[38] One ordinance barred the employment and harboring of unauthorized migrants.[39] Another required renters to have occupancy permits, which city officials would issue only upon proof of lawful residence or U.S. citizenship.[40] The plaintiffs argued, among other things, that the city violated equal protection by discriminating unlawfully by race, ethnicity, and national origin.[41] They presented evidence that the ordinances would disproportionately affect Latinos, but District Judge James Munley,

35. *See* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) ("Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime.").

36. *Cf.* LeClerc v. Webb, 419 F.3d 405, 415–19 (5th Cir. 2005) (holding that laws affecting nonimmigrant aliens require only a rational basis). Commentators have criticized this aspect of prevailing doctrine as providing insufficient protection to unauthorized migrants. *See, e.g.*, Jason H. Lee, *Unlawful Status as a "Constitutional Irrelevancy"?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 19–40 (2008) (arguing that a lesser standard of review for classifications involving illegal immigrants is inconsistent with the principles of individual dignity and humanity that underlie the Equal Protection Clause); Neuman, *supra* note 2, at 1440–52 (arguing that rational basis review would allow the state to deny unauthorized migrants even the minimum standards that it owes under the Constitution to every human being). In *Toll v. Moreno*, 458 U.S. 1 (1982), the U.S. Supreme Court expressly declined to reach the nonimmigrants' equal protection claims. *Id.* at 9–10.

37. Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *argued*, No. 07-3531 (3d Cir. Oct. 30, 2008).

38. *Id.* at 484–85.

39. *Id.* at 484.

40. *Id.* By discussing a local law directed at unauthorized migrants, I do not mean to ignore the many subfederal laws and policies that attempt to integrate unauthorized migrants, or even to offer protection from enforcement of federal immigration laws. *See generally* Motomura, *supra* note 2, at 2075–83 (discussing the role of states and localities in the integration of unauthorized migrants).

41. *City of Hazleton*, 496 F. Supp. 2d at 538–42.

noting the ordinances' facial neutrality, found insufficient evidence of discriminatory intent, which an equal protection challenge requires.[42]

As long as the touchstone in prevailing constitutional doctrine is intent rather than effect, race or ethnic discrimination is an unpromising way to argue that subfederal laws violate equal protection by targeting unauthorized migrants. And as long as courts demand only a rational basis for statutes that disadvantage noncitizens because they are in the United States unlawfully, equal protection challenges based on immigration status alone will fail.

A telling sign that attorneys for unauthorized migrants recognize these severe limitations is the plaintiffs' strategy in *Equal Access Education v. Merten*.[43] That litigation responded to a 2002 opinion by the Virginia Attorney General that "illegal or undocumented aliens should not be enrolled in Virginia public institutions of higher education."[44] The plaintiffs did not argue that such a state bar to admission violated equal protection. Rather, their constitutional challenge relied principally on federal preemption.[45]

In *Equal Access Education*, the plaintiffs gave up on the equal protection argument that carried the day in *Plyler*, instead relying only on the preemption argument *Plyler* had expressly declined to

42. *Id.* at 540–42 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)). The same dilemma exists as to other state and local laws targeting unauthorized migrants. It is not enough to win an unlawful race or ethnic discrimination claim. This is true even if challengers can show some racial or ethnic animus. *See* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 651 (1995) ("[I]t is difficult to refute the claim that the ethnicity of the stereotypical undocumented immigrant played at least *some* role in the passage of Proposition 187." (footnote omitted)); Neuman, *supra* note 2, at 1451–52 (discussing "strong indications that Proposition 187 owed some of its attractiveness to animosity toward Latino immigration"). Interestingly, though Judge Munley rejected the plaintiffs' equal protection claim in *City of Hazleton*, he sustained their argument that the ordinance, by restricting access to rental housing, violated the rights of unauthorized migrants under 42 U.S.C. § 1981, which "provides that 'all persons' shall . . . have the same right to make and enforce contracts and have the full and equal benefit of all laws to the same extent enjoyed by 'white citizens.'" *City of Hazleton*, 496 F. Supp. 2d at 546–48.

43. Equal Access Educ. v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004).

44. Memorandum from Alison P. Landry, Assistant Attorney Gen. of Va., to Presidents, Chancellor, Rectors, Registrars, Admissions Dirs., Domicile Officers, and Foreign Student Advisors, and the Executive Dir., State Council for Higher Educ. in Va. (Sept. 5, 2002), *available at* http://www.schev.edu/AdminFaculty/ImmigrationMemo9-5-02APL.pdf. For a discussion of this Memorandum, see *Equal Access Educ.*, 305 F. Supp. 2d at 591.

45. *Equal Access Educ.*, 305 F. Supp. 2d at 601–08.

address.[46] This emphasis on preemption has been a sound strategy, according to the track record for preemption challenges to subfederal laws targeting unauthorized migrants. With the prominent exception of *Plyler*, the courts that have invalidated state and local laws have generally relied on preemption.[47] In doing so, they have applied the framework from the U.S. Supreme Court's 1976 decision in *De Canas v. Bica*[48] to decide if a state or local immigration-related law conflicts with federal law.[49] Given the obstacles to equal protection claims by unauthorized migrants, preemption has become the challenge of choice, and thus the focus of judicial opinions.

B. Institutional Competence Arguments: Preemption

What is the significance of the trend away from equal protection challenges to subfederal laws toward preemption arguments? The challengers' reliance on preemption taps into a long tradition of institutional competence claims in immigration and alienage law. Government action, even if not susceptible to equal protection or any other individual rights challenge, may be invalid if the government actor is not institutionally competent to make the decision. Thus, preemption can nullify a state or local law, even assuming that a substantively identical federal law would be valid.

To understand the relationship between preemption as an institutional competence argument and equal protection as its individual rights counterpart, it is important first to see that preemption is not the only type of institutional competence argument with purchase in immigration and alienage law. Consider the 1976 U.S. Supreme Court decision in *Hampton v. Mow Sun Wong*,[50] which

46. Plyler v. Doe, 457 U.S. 202, 210 n.8 (1982); *see also supra* note 17 and accompanying text.

47. *E.g.*, Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 764–72 (N.D. Tex. 2007); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1054–57 (S.D. Cal. 2006).

48. De Canas v. Bica, 424 U.S. 351 (1976). A state or local law relating to immigration or immigrants is preempted if it meets any of the three tests set out in *De Canas*. First, federal law preempts any state attempt to regulate immigration. *Id.* at 354. Second, state law is preempted if Congress intended to "occupy the field" in that it was the "clear and manifest purpose of Congress" to effect a "complete ouster of state power—including state power to promulgate laws not in conflict with federal laws." *Id.* at 357 & n.5 (citation omitted). Third, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* at 363 (citations omitted), or conflicts with federal law so as to make compliance with both state and federal law impossible.

49. *See id.* at 354–63 (establishing a preemption framework).

50. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

concerned a Civil Service Commission requirement that federal employees be U.S. citizens or nationals.[51] The Court invalidated the rule because the wrong federal agency had adopted it.[52] The Court reasoned that the Civil Service Commission could not act pursuant to the federal immigration and naturalization power, and thus lacked institutional competence to make decisions on immigration or immigrants.[53] But the Court suggested that either Congress or the president could adopt the same requirement, and lower courts later upheld an Executive Order from President Gerald Ford that generally barred noncitizens from federal jobs.[54]

Similar reasoning is evident in *Aliessa v. Novello*,[55] a prominent New York Court of Appeals decision that invalidated a New York state restriction on state Medicaid benefits for lawfully present noncitizens.[56] The plaintiffs argued that *Graham v. Richardson* controlled, with its apparent prohibition on state laws disadvantaging lawfully present noncitizens.[57] The state responded that *Mathews v. Diaz* had recognized federal authority to adopt different eligibility rules for citizens and lawfully present noncitizens,[58] and that Congress had expressly delegated that authority to the states. In *Aliessa*, the New York Court of Appeals rejected the state's argument.[59] Citing *Mow Sun Wong*, the court held that the federal government cannot authorize the states to adopt their own rules.[60] The outcomes, the court explained, would vary from state to state, violating the

51. *Id.* at 90 n.6 (discussing the requirement in the Civil Service Commission regulations, 5 C.F.R. § 338.101 (1976), that only U.S. citizens or people owing "permanent allegiance" to the United States may sit for competitive civil service examinations).

52. *Id.* at 114–17 ("Since these residents were admitted as a result of decisions made by Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States, due process requires that the decision . . . be made at either a comparable level of government or . . . be justified by reasons which are properly the concern of [the Civil Service Commission].").

53. *Id.* at 101–03, 105, 114–16.

54. *See* Mow Sun Wong v. Campbell, 626 F.2d 739, 744–45 (9th Cir. 1980), *cert. denied sub nom.* Lum v. Campbell, 450 U.S. 959 (1981) (affirming both the president's power to issue and the constitutionality of 5 C.F.R. §§ 7.4 and 338.101).

55. Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001).

56. *Id.* at 1098.

57. *Id.* at 1095 (citing Graham v. Richardson, 403 U.S. 365 (1971)).

58. *Id.* at 1096 (citing Mathews v. Diaz, 426 U.S. 67, 80 (1976)).

59. *Id.* at 1094–99.

60. *Id.* at 1097–98.

constitutional requirement of uniform citizenship rules.[61] This, again, was an institutional competence argument.

Of course, institutional competence arguments are not unique to the law governing unauthorized migration, or to immigration and alienage law. But they make a difference in the outcome of cases when individual rights claims by noncitizens are difficult to sustain. In *Mow Sun Wong*, the obstacle was not unlawful immigration status because the plaintiffs were lawful permanent residents of the United States.[62] But even for lawful permanent residents, an alienage-based equal protection challenge to a properly adopted federal requirement of citizenship was impossible to win, according to *Diaz*.[63] *Graham* did not help plaintiffs because it addressed only state laws.[64] With bleak prospects for any individual rights claim, the institutional competence argument was the *Mow Sun Wong* plaintiffs' only winning constitutional challenge.

An analogous situation prevails in the context of state and local laws that target unauthorized migrants. Just as the federal government can treat lawful permanent residents and U.S. citizens differently, state and local governments can disadvantage unauthorized migrants as long as the case involves neither access to public K–12 education nor proof of racial or ethnic discrimination.[65] Because it is extremely difficult to succeed with equal protection claims based on immigration law status, race, or ethnicity,[66] institutional competence claims have special significance for unauthorized migrants. A preemption-based institutional competence argument, not an equal protection–based individual rights argument, is typically the challengers' only hope of prevailing and the statute's only risk of invalidation.

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61. *Id. But see* Soskin v. Reinertson, 353 F.3d 1242, 1255–57 (10th Cir. 2004) (disagreeing with *Aliessa* and upholding a similar Colorado statute).

62. Hampton v. Mow Sun Wong, 426 U.S. 88, 90 (1976).

63. *Diaz*, 426 U.S. at 84.

64. Graham v. Richardson, 403 U.S. 365, 376 (1971).

65. *Compare* Plyler v. Doe, 457 U.S. 202, 230 (1982) (addressing the K–12 education context), *with* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 540–41 (M.D. Pa. 2007), *argued*, No. 07-3531 (3d Cir. Oct. 30, 2008) (rejecting the plaintiffs' equal protection challenges to city ordinances restricting the access of undocumented aliens to employment and rental housing, because the plaintiffs failed to show that the ordinances were motivated by discriminatory intent).

66. *See supra* notes 24–36 and accompanying text.

C. The Implications of Institutional Competence Arguments

What are the implications of pursuing institutional competence claims like preemption instead of individual rights claims like equal protection? Professor Harold Koh once observed that preemption is much weaker than equal protection as a vehicle for redressing harms that befall noncitizens.[67] Analyzing why permanent residents could challenge state laws in *Graham* but not the federal law in *Diaz*, he argued that preemption did not explain the different outcomes. Professor Koh wrote: "A pure preemption theory, based solely on a structural norm, lacks substantive content. For that reason, it cannot serve as a theory of individual 'rights' at all."[68]

Professor Koh's reasoning seems persuasive as applied to lawful permanent residents, to whom *Graham* gives robust equal protection–based constitutional status.[69] For unauthorized migrants, however, equal protection offers very little.[70] What matters for them is how institutional competence arguments may sometimes substitute for the inability to assert individual rights directly. And when one examines courts' decisions on preemption challenges to subfederal laws that target unauthorized migrants, three patterns emerge that jointly show how preemption-based institutional competence arguments obliquely substitute for individual rights arguments based on equal protection. A judge concerned that racial or ethnic animus is the impetus for a law that targets unauthorized migrants can channel those concerns into the preemption analysis. This channeling allows preemption to operate obliquely as equal protection for unauthorized migrants.

First, and unsurprisingly, courts have insisted that state and local laws rely on federal immigration law status rather than draw their own lines. According to the district court in *Equal Access Education*, any Virginia rule barring unauthorized migrants from state colleges and universities would be preempted if it applies "standards different

67. *See* Koh, *supra* note 32, at 99–100 ("I prefer an equal protection approach because it answers, in a way that preemption reasoning does not, the moral and philosophical claims that resident aliens make against their state governments.").

68. *Id.* at 98; *see also* Neuman, *supra* note 2, at 1436–40.

69. *See supra* notes 24–28 and accompanying text.

70. *See supra* notes 24–36 and accompanying text.

from those established under federal law to determine an applicant's immigration status."[71]

Even when state and local laws rely on federal immigration law standards, some federal courts remain skeptical. The apparent concern is that these state and local laws will affect some unauthorized migrants whom federal immigration enforcement might not target. One court expressed concern that state and local laws would undermine federal enforcement,[72] while another court expressed the opposite concern—that state and local laws would overenforce federal immigration law.[73] These decisions elucidate how preemption can give oblique expression to equal protection arguments.

In the second pattern, the concern that a local ordinance would undermine federal enforcement was the basis for District Court Judge John Houston's reasoning in *Garrett v. City of Escondido*,[74] which involved a challenge to a local ordinance in Escondido, California.[75] The ordinance penalized housing owners for "harbor[ing] an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law."[76] City officials had to check an occupant's immigration status with the federal government.[77]

Responding to a preemption challenge, Judge Houston blocked enforcement with a temporary restraining order, reasoning that the

71. Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 608 (E.D. Va. 2004). The district court allowed the claim to proceed subject to factfinding on whether Virginia relied on federal standards, but it never decided that issue because it dismissed the plaintiffs' preemption claim for lack of standing. Equal Access Educ. v. Merten, 325 F. Supp. 2d 655, 663–72 (E.D. Va. 2004); *see also* Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47, 53 (2008). For a similar insistence that subfederal laws rely on federal immigration status, see Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 861–62, 866–67, 869–71 (N.D. Tex. 2008) (granting a permanent injunction against the enforcement of the ordinance); Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 762, 766–69 (N.D. Tex. 2007) (granting a preliminary injunction against the enforcement of an ordinance mandating certification of citizenship or immigration status to rent apartment property).

72. Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006).

73. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 527–28 (M.D. Pa. 2007), *argued*, No. 07-3531 (3d Cir. Oct. 30, 2008).

74. Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

75. *Id.* at 1047–48.

76. *Id.*

77. *Id.* at 1048.

ordinance "could stand as a burden or obstacle to federal law."[78] Unlike Judge T.S. Ellis in *Equal Access Education*—who would have struck down the Virginia policy had it not relied on federal immigration law categories[79]—Judge Houston was concerned that Escondido would use a federal database to check unlawful presence.[80] Considering how enforcement operates in practice, he explained, "That the Ordinance uses the Immigration and Nationality Act to define 'illegal alien' implies that it will likely place burdens on the Departments of Justice and Homeland Security that will impede the functions of those federal agencies."[81]

In a third pattern, *overenforcing* federal immigration law was Judge Munley's concern in *Lozano v. City of Hazleton*. Though he rejected the plaintiffs' equal protection argument,[82] Judge Munley sustained the preemption challenge—even though the ordinances relied on federal immigration status—because federal law struck a different "balance between finding and removing undocumented immigrants without accidentally removing immigrants and legal citizens, all without imposing too much of a burden on employers and workers."[83] It is wrong to assume, he explained, that "the federal government seeks the removal of all aliens who lack legal status."[84]

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78. *Id.* at 1057 ("The Court . . . has serious concerns regarding the burden this Ordinance will place on federal regulations and resources.").

79. Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 602–08 (E.D. Va. 2004) (noting that the outcome of the case turned on "whether defendants' admissions policies simply adopted federal standards, in which case they are not invalid under the Supremacy Clause, or instead create and apply state standards to assess the immigration status of applicants, in which case the policies may run afoul of the Supremacy Clause").

80. *City of Escondido*, 465 F. Supp. 2d at 1057. Several weeks later, the city consented to a permanent injunction barring enforcement of the ordinance, and to paying $90,000 in plaintiffs' attorney fees. Garrett v. City of Escondido, No. 06CV2434JAH (NLS) (S.D. Cal. Dec. 15, 2006) (order granting stipulated final judgment and permanent injunction). The state of California responded with a statute that barred cities and counties from requiring landlords to inquire into a prospective occupant's immigration or citizenship status. *See* CAL. CIV. CODE § 1940.3 (West Supp. 2009). *See generally* California Legislative News, 84 INTERPRETER RELEASES 2495 (2007).

81. *City of Escondido*, 465 F. Supp. 2d at 1057.

82. *See supra* text accompanying notes 38–42.

83. *City of Hazleton*, 496 F. Supp. 2d at 527–33. *Compare* Cortez, *supra* note 71, at 64 (expressing approval of this aspect of *City of Hazleton*), *with* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 620–28 (2008) (criticizing this aspect of *City of Hazleton*).

84. *City of Hazleton*, 496 F. Supp. 2d at 530.

Rather, "it is completely within the discretion of the federal officials to remove persons from the country who are removable."[85]

I should acknowledge that unlike *City of Escondido* and *City of Hazleton*, other cases have rejected preemption challenges to state and local laws.[86] But my purpose in discussing these decisions is not to restate the prevailing doctrine on preemption. My purpose throughout this Article is to analyze and connect emerging patterns of argument and decisionmaking that may or may not become routine or prevalent. In the context of state and local laws, I want to explain why it matters that a court sustains a preemption challenge when an individual rights challenge based on equal protection fails or is never brought. These reasoning patterns show how preemption may substitute partially for equal protection by striking down state and local laws when equal protection challenges might not succeed in doing so.

The explanation begins by noting that the meaning of unlawful presence is heavily contested. Some observers view determinations of federal immigration status as largely ministerial, and they urge state and local officials to act on these straightforward findings of illegality by impeding access to work and housing, and even by arresting unauthorized migrants.[87] But according to the view of unlawful presence in *City of Escondido* and *City of Hazleton*, a noncitizen's actual removal from the United States and other facets of immigration law enforcement reflect complex, highly discretionary choices. It matters who allocates resources and picks enforcement

85. *Id.* at 530–31. Relatedly, the court noted that only federal immigration judges can determine immigration law status. *Id.* at 533.

86. Some of these decisions rely on a provision of federal immigration law that may expressly authorize some state employer sanctions laws. *See* INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006). Courts are divided on whether this savings clause allows state laws that penalize employers through business licensing schemes. *Compare City of Hazleton*, 496 F. Supp. 2d at 519–20 (finding preemption notwithstanding this provision), *with* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 864–66 (9th Cir. 2008), *petition for cert. filed sub nom.* U.S. Chamber of Commerce v. Candelaria, 78 U.S.L.W. 3251 (U.S. July 24, 2009) (No. 90-115) (finding that this provision authorizes state licensing-based employer sanctions), *and* Gray v. City of Valley Park, No. 4:07CV0081ERW, 2008 WL 294294, at *9–12 (E.D. Mo. Jan. 31, 2008) (same). State laws might be invalidated if the savings clause is construed to give preemptive effect to IRCA. *Cf.* Chamber of Commerce v. Edmondson, 594 F.3d 742, 765–71 (10th Cir. 2010) (granting a preliminary injunction against the enforcement of various Oklahoma state laws based on a likelihood of success in challenging some provisions on preemption grounds).

87. *See, e.g.*, Kobach, *supra* note 11. For a discussion of the range of views of the meaning of unlawful presence and how this range explains some of the deep disagreements about immigration outside the law, see Motomura, *supra* note 2, at 2044, 2047–55.

targets and who balances enforcement goals against competing concerns.[88]

What are these competing concerns? If some judges are troubled when state or local initiatives vary from federal enforcement, what exactly troubles them? One concern, cited in *City of Hazleton*, is that cumbersome enforcement of employer sanctions may hamper business efficiency.[89] Although this is true enough, the most forceful and often repeated criticism of state and local involvement in immigration enforcement is improper reliance on race and ethnicity. This criticism does not necessarily object to the enforcement of immigration laws or argue that immigration laws have not been broken. Rather, the concern is that not only unauthorized migrants, but also lawfully present U.S. citizens and noncitizens, will suffer targeting and discrimination by race and ethnicity.[90]

In this setting, preemption-based skepticism of state and local enforcement can give expression to concerns about discrimination. An equal protection challenge would require proof of discriminatory intent, but a preemption challenge can persuade some judges based on reasonable possibility of discriminatory intent. One wonders if the court in *City of Hazleton* would have found preemption if the plaintiffs had not introduced so much evidence on race and ethnicity. Though that evidence was insufficient to sustain an equal protection claim, it is hard to read Judge Munley's discussion of local variance from federal enforcement in his preemption analysis without also considering his discussions of demographic shifts in Hazleton, his analysis of the atmosphere of intimidation of local Latino residents, and his appendix on U.S. immigration history, which emphasized the historical role of racial exclusion.[91]

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88. For a discussion of the meaning of unlawful presence, the role of states and cities, and how these issues are linked, see Motomura, *supra* note 2, at 2047–65.

89. *City of Hazleton*, 496 F. Supp. 2d at 525–29.

90. *See, e.g.*, Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 318–20 (2009) (describing racial profiling in immigration raids); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 982–83 (2004); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1104 (2004); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119 (2007).

91. *City of Hazleton*, 496 F. Supp. 2d at 484 (mentioning demographic shifts); *id.* at 508–10 (discussing reasons to allow some plaintiffs to proceed anonymously); *id.* at 556–63 (outlining the history of U.S immigration law and policy).

Put differently, preemption and equal protection can function roughly as alternative vehicles for expressing concern about racial and ethnic discrimination. Plaintiffs will likely lose an equal protection argument because of the law's requirement of discriminatory intent and its presumption against finding it. A preemption argument can manage doubt differently by shifting the risk of uncertain knowledge from the plaintiff to state and local governments. Courts may sustain preemption challenges out of concern that state and local laws addressing unauthorized migration give state and local actors a zone of discretion that is too broad because it enables improper reliance on race and ethnicity.[92]

Because not all judges will view preemption like the court in *City of Hazleton*, the future success of any such preemption-based institutional competence argument is uncertain. But, as an approach to argument and analysis, preemption offers a middle ground in constitutional challenges to subfederal laws. It leaves intact the likely rejection of equal protection claims, which under prevailing doctrine would require either extending the antidiscrimination norm in *Graham* from lawful permanent residents to unauthorized migrants, or relaxing the requirements for proving unlawful discrimination on the basis of race or ethnicity. At the same time, preemption avoids relegating unauthorized migrants to a zone without constitutional protections. This might be the result if courts reject not only equal protection challenges based on discrimination by race, ethnicity, and unlawful immigration status, but also preemption challenges.

What explains this middle ground? This is really two questions. One asks how preemption, as an institutional competence argument, serves as a compromise. Part of the answer is that preemption of state and local laws affecting immigrants reflects a reliance on the political process, especially on transparency and deliberation in a larger federal policy arena with a more complex array of counterweights than would shape state or local decisionmaking.[93] With regard to unauthorized migrants, if laws and policies must be enacted nationally, then many that raise constitutional concerns—such as

92. This pattern bears some resemblance to the concerns expressed by the New York Court of Appeals in *Aliessa v. Novello*. *See supra* text accompanying notes 55–61.

93. For an illuminating discussion of the analogous value of transparency and deliberation in national security cases, see Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661 (2009). Muscular procedure, by emphasizing "transparency and deliberation," is closer to institutional competence arguments than to the procedural surrogates discussed in Part II.

racial or ethnic discrimination—might never be adopted.[94] Practically, this is a form of constitutional avoidance. Preemption doctrine avoids serious constitutional questions about the efficacy of arguments based on an individual right like equal protection by enabling an institutional competence argument, which in turn forces government decisionmaking into a federal forum that makes a constitutionally doubtful statute less likely.

At the same time, preemption arguments that allow the oblique assertion of equal protection rights can have other, unintended consequences because preemption is a double-edged sword. For example, limits on state and local laws targeting unauthorized migrants may also restrict the ability of state and local authorities to adopt policies that support or protect unauthorized migrants. In this way, these oblique rights generate dilemmas for advocates on all sides. Those who oppose in-state tuition for unauthorized students may argue that state authority is preempted,[95] yet argue against the preemption of state and local laws that seek to reduce unauthorized population by attrition.[96]

The second question is more fundamental: why does preemption as a middle ground have such appeal? The answer goes back to the idea of discretion in immigration law enforcement, and why this discretion is unusually broad. Here, as is often true when the topic is immigration outside the law, it is useful to return to *Plyler*. In that case, Justice Brennan acknowledged that because of a tolerance of a "'shadow population' of illegal migrants," even noncitizens who lack any avenues of relief and whose presence in the United States is clearly unlawful are unlikely to be apprehended, let alone adjudicated

94. *See* Neuman, *supra* note 2, at 1436–37 (explaining why "[l]ocal anti-foreign movements may have difficulty enlisting the national government in their crusades"). *But cf*. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635 (1997) ("[A] state disempowered from acting in its own jurisdiction will get its way at the national level in the absence of strong countervailing interests on the part of other states . . . ."). For a discussion of this phenomenon in the context of subfederal restrictions on speech, see Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 160–63 (2009) (citing THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961)). Professor Winkler's study does not include First Amendment challenges to local laws that restrict the activities of day laborers, but it would be illuminating to see if judicial responses to such challenges revealed patterns similar to what I discuss here.

95. *See, e.g.*, Martinez v. Regents of the Univ. of Cal., 83 Cal. Rptr. 3d 518, 524–25 (Ct. App. 2008), *review granted*, 198 P.3d 1 (Cal. 2008).

96. *See, e.g.*, *City of Hazleton*, 496 F. Supp. 2d at 519.

as violators and deported.[97] Similarly, Justice Powell commented in his concurrence on the long history of labor migration to the United States, particularly from Mexico.[98]

A generation after *Plyler*, Justice Brennan's observations remain accurate. Even if enforcement has often been visible and severe, chronic and intentional underenforcement of immigration law has been the de facto U.S. federal policy for over a century.[99] Today, even more than a generation ago, enforcement resources are a mere fraction of what would be needed for a significant reduction in immigration outside the law. The reasons for this defy easy summary, but they include the needs and political clout of U.S. employers, as well as broad reluctance to erect border barriers that may not be cost-effective and adopt databases and detection methods that may be error-prone and intrusive.[100] Moreover, tolerating a substantial unauthorized population and then periodically conferring lawful status through discretionary relief or legalization may better meet the U.S. economy's needs than trying to identify worthy immigrants in advance.[101]

Against this national policy backdrop, an unsurprising middle ground recognizes the individual rights of unauthorized migrants, albeit indirectly and incompletely, through institutional competence arguments, especially preemption. Similar patterns of oblique rights appear in other substantive areas in which unauthorized migrants seek legal remedies. Parts II, III, and IV show that these oblique rights have emerged in several patterns that go beyond—yet are closely related to— institutional competence arguments.

II. WORKPLACE PROTECTIONS

Typical workplace laws give employees some protection with regard to wages and hours, labor organizing, health and safety, and

97. Plyler v. Doe, 457 U.S. 202, 218–19 (1982).

98. *Id.* at 237–38 (Powell, J., concurring).

99. For more information on this de facto policy and its history, see MOTOMURA, *supra* note 7, at 129–35; Gerald P. López, *Undocumented Mexican Migration*, 28 UCLA L. REV. 615, 641–72 (1981); Motomura, *supra* note 2, at 2047–55.

100. *See* David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 544–45 (2007) (noting that interest groups have slowed legislative efforts to reduce unauthorized migration).

101. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 844–49 (2007) (arguing that the current enforcement system screens ex post and explaining why this may be preferable to screening ex ante).

employment discrimination, among other concerns. At the same time, immigration law forbids not only unlawful presence but also the employment of unauthorized workers. The latter is the target of the employer sanctions in the Immigration Reform and Control Act (IRCA) of 1986.[102] What happens when an employee seeks work law protection, but is barred by immigration law from working?[103]

The modern answer starts with a case that began in May 1988, when someone going by the name of Jose Castro applied for a job at the Hoffman Plastic Compounds factory in Panorama, California.[104] He had a birth certificate showing that he was born in El Paso, plus a Social Security card and a California state identification card.[105] Around Christmas 1988, the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, started to organize the plant with the help of some workers, including Castro.[106] In January 1989, management heard about the drive and laid off nine employees, including Jose Castro.[107]

The National Labor Relations Board (NLRB) found that Hoffman Plastic had violated federal labor law by laying off employees because of their union activity.[108] The proceedings also revealed that Castro was using a borrowed birth certificate, and that he was not in the United States legally, nor authorized to work.[109] Could the Board still award him the normal remedy—backpay for what he would have worked had he not been discharged illegally? The Board did so,[110] but in 2002 the U.S. Supreme Court reversed by a 5–4 vote in *Hoffman Plastic Compounds, Inc. v. NLRB*,[111] holding that an employee who violates federal immigration law by working

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102. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); *see also* INA § 274A, 8 U.S.C. § 1324a (2006) (prohibiting the employment of unauthorized aliens).

103. *See* Bosniak, *supra* note 3, at 1041 ("With the passage of IRCA, the border law has become a labor law as well.").

104. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).

105. For a fuller account of the case, see Catherine L. Fisk & Michael J. Wishnie, *The Story of* Hoffman Plastic Compounds, Inc. v. NLRB*: Labor Rights Without Remedies for Undocumented Immigrants*, *in* IMMIGRATION STORIES 311, 351 (David A. Martin & Peter H. Schuck eds., 2005).

106. *Hoffman*, 535 U.S. at 140.

107. *Id.*

108. *Id.* at 140–41.

109. *Id.* at 141.

110. *Id.* at 141–42.

111. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

cannot receive backpay from an employer who unlawfully discharges him.[112]

Several court decisions since *Hoffman* have tried to define the limits that the Supreme Court put on remedies for unauthorized workers when employers violate work law. Some post-*Hoffman* cases involve federal law, including other aspects of the National Labor Relations Act (NLRA),[113] Title VII of the Civil Rights Act of 1964,[114] and the Fair Labor Standards Act (FLSA).[115] Other cases have arisen under various state laws relating to work, such as state worker compensation laws and state-law analogues to federal laws.

This Part's inquiry into workplace rights broadens Part I's analysis of individual rights and institutional competence arguments in challenges to state and local laws addressing unauthorized migration. First, these workplace rights are not constitutional rights. Though they have some constitutional aspects, these rights originate in statutes that govern the workplace or in the common law of contracts and torts.

Second, unauthorized migrants can assert workplace rights by making several types of arguments in addition to the institutional competence arguments discussed in Part I. Unauthorized migrants can sometimes assert their workplace rights by showing that their employer has engaged in comparatively more serious wrongdoing, an approach that I call comparative culpability. Another argument is that U.S. citizens and lawful permanent residents may suffer if unauthorized workers are denied remedies. I call this a citizen proxy argument. A third argument challenges the procedures for reaching or applying a decision rather than the substance of the decision itself. This is a procedural surrogate argument. This Part concludes by explaining how any of these four arguments can be effective when they raise pragmatic concerns grounded in the integration of unauthorized workers into the U.S. economy. The combined result is that unauthorized migrants are able to assert their rights obliquely in

112. *Id.* at 151–52. The employer, Hoffman Plastic Compounds, had discharged Castro without knowing that he was not authorized to work.

113. NLRA, 29 U.S.C. §§ 150–69 (2006).

114. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2006). For examples, see Rivera v. NIBCO, Inc., 364 F.3d 1057, 1061 (9th Cir. 2004); Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896 (S.D. Tex. 2003).

115. FLSA, 29 U.S.C. §§ 201–19 (2006). For examples, see Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 323 (D.N.J. 2005); Singh v. Jutla, 214 F. Supp. 2d 1056, 1056 (N.D. Cal. 2002).

ways that mirror societal ambivalence about their presence—here, in the context of the workplace.

A. Comparative Culpability

Judges may weigh a worker's violation of immigration law either against a violation by that individual worker's employer, or against violations by employers of unauthorized workers generally. As a result, courts may obliquely recognize the rights of an unauthorized worker even when such recognition might seem foreclosed. The *Hoffman* majority suggested the relevance of such a comparison when it reasoned that Jose Castro's wrongdoing was not just working without authorization; he admittedly used false documents to obtain employment. The majority concluded that this violation of immigration made Castro ineligible for backpay.[116] Justice Breyer's dissenting opinion in *Hoffman* also addressed Jose Castro's wrongdoing but tempered its consequences in two ways. One is the focus on comparative culpability discussed here. The second is the citizen proxy argument discussed in the next Section.

With regard to comparative culpability, Justice Breyer emphasized in *Hoffman* that Castro's employer fired him—"a crude and obvious violation of the labor laws."[117] To deny backpay would give employers incentives to hire unauthorized workers, thereby undercutting immigration law enforcement.[118] This focus on an employer's comparative culpability is more explicit in a trilogy of cases from the state of New York addressing unauthorized workers' ability to recover lost future wages as a remedy for workplace injuries. In all three cases, the injuries were attributable to an employer's violation of occupational safety requirements under New York state statutes. All three injured employees were federal immigration law violators. All three sued for future lost wages because the injuries left them unable to return to work. And all three employers argued that the injured workers could not claim lost wages because they were not authorized to work.

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116. *Hoffman*, 535 U.S. at 148–50; *see also* Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1393–95 (2009) (discussing employer and employee wrongdoing in *Hoffman* and characterizing *Hoffman* as a "guilty-worker/innocent-employer scenario").

117. *Hoffman*, 535 U.S. at 153 (Breyer, J., dissenting).

118. *Id.* at 155–56.

In the first case, *Balbuena v. IDR Realty LLC*,[119] the New York Court of Appeals found that *Hoffman* does not bar unauthorized workers from claiming lost wages.[120] Distinguishing *Hoffman* as a case involving a worker who "criminally provided his employer with fraudulent papers," the Court of Appeals reasoned that the employers in *Balbuena* were blameworthy.[121] The court noted the lack of evidence that "plaintiffs produced false work documents in violation of IRCA or were even asked by the employers to present the work authorization documents as required by IRCA."[122]

Similar reliance on comparative culpability led the Second Circuit to reach the same result in *Madeira v. Affordable Housing Foundation, Inc.*[123] "Nothing in the trial record indicates that Madeira himself used any false identification to obtain work in the United States; such action was apparently unnecessary given his brother's willingness to hire him despite knowing Madeira's undocumented status."[124] Focusing on the specific document-related prohibitions in IRCA—as opposed to a more general sense of culpability that might be associated with unauthorized work itself—the Second Circuit summed up: "it was the employer and not the worker who violated IRCA by arranging for employment."[125]

The same emphasis on comparative culpability led to the opposite outcome in *Ambrosi v. 1085 Park Avenue LLC*.[126] District Judge Barbara Jones denied lost future wages to a worker who affirmatively presented false documents,[127] distinguishing *Balbuena* and *Madeira* as cases in which the employers failed to ask for identification and work authorization documents.[128] Noting this difference, Judge Jones explained: "Plaintiff's claim for lost wages must be dismissed because Plaintiff is an undocumented alien who

119. Balbuena v. IDR Realty LLC, 845 N.E. 2d 1246 (N.Y. 2006).

120. *Id.* at 1258–61.

121. *Id.* at 1258.

122. *Id.* ("[I]n the context of defendants' motions for partial summary judgment, we must presume that it was the employers who violated IRCA by failing to inquire into plaintiffs' immigration status or employment eligibility.").

123. Madeira v. Affordable Hous. Found. Inc., 469 F.3d 219 (2d Cir. 2006).

124. *Id.* at 223–24.

125. *Id.* at 228.

126. Ambrosi v. 1085 Park Ave. LLC, No. 06-CV-8163(BSJ), 2008 WL 4386751 (S.D.N.Y. Sept. 25, 2008).

127. *Id.* at *13.

128. *Id.* at *12–13.

knowingly used fraudulent documentation to obtain employment . . . in violation of IRCA."[129]

So far I have discussed cases in which comparative culpability is a matter of immigration law violations. In cases like *Balbuena*, *Madeira*, and *Ambrosi*, any express or implied comparison involves the degree to which an employer or employee violated IRCA's scheme to regulate unauthorized work. A more complete picture of comparative culpability arguments by unauthorized workers requires analysis of cases in which employee or employer wrongdoing reaches beyond IRCA's employer sanctions. Consider, for example, an unauthorized worker's claim that an employer has failed to pay wages as required by the Fair Labor Standards Act for work performed. The prevailing view is that working without authorization does not bar recovery of such wages.[130] Though these courts generally do not engage in the explicit comparison apparent in *Balbuena*, *Madeira*, and *Ambrosi*, the reasons articulated for including unauthorized employees within the FLSA's coverage rely on treating nonpayment of wages for past work performed as more culpable than unauthorized work.[131]

B. Citizen Proxies

In addition to comparative culpability, Justice Breyer's dissent in *Hoffman* suggested a second way of tempering the consequences of Jose Castro's wrongdoing: making citizen proxy arguments for unauthorized workers' rights. As with institutional competence arguments and comparative culpability arguments, these citizen proxy arguments allow unauthorized migrants to assert their rights

129. *Id.* at *13. This reliance on comparative culpability in workplace cases is consistent with a basic theme in the treatment of unauthorized migrants in immigration law generally, which opens up access to lawful immigration status when they have become victims, for example, of domestic violence, trafficking, or other crimes. *See* Motomura, *supra* note 2, at 2086 (discussing how immigration law treats victims of domestic violence, trafficking, or other criminal activity as distinct from unauthorized migrants).

130. Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1276–77 (N.D. Okla. 2006) (recognizing unauthorized workers as employees under the FLSA); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 322–25 (D.N.J. 2005) (same); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501–03 (W.D. Mich. 2005) (same); Flores v. Amigon, 233 F. Supp. 2d 462, 463–64 (E.D.N.Y. 2002) (same); Singh v. Jutla, 214 F. Supp. 2d 1056, 1058–59 (N.D. Cal. 2002) (same). *See generally* Cunningham-Parmeter, *supra* note 116, at 1370 & n.55 (discussing and citing cases arising under the FLSA).

131. *See, e.g.*, *Chellen*, 446 F. Supp. 2d at 1279–81 (discussing the nature of employer-defendants' violations of the FLSA); *Flores*, 233 F. Supp. 2d. at 464 (noting the need to include undocumented aliens within the protections of the FLSA to prevent "abusive exploitation" of workers).

obliquely—even when they may not be able to do so directly. When Breyer analyzed the employer's wrongdoing, he addressed not only its comparative culpability but also what the systemic consequences in the U.S. labor market would be if unauthorized workers were denied remedies.[132]

Though the *Hoffman* dissent considered the systemic effects on labor union organizing, it did not describe or identify the types of workers who would be protected by allowing the full range of NLRA remedies for unauthorized workers. In contrast, *Agri Processor Co. v. NLRB*,[133] issued in 2008 by a District of Columbia Circuit panel, did so. In *Agri Processor*, employees had voted to join the United Food and Commercial Workers Union, but the company refused recognition on the ground that most of those who voted were not authorized to work.[134] The issue was whether unauthorized workers are "employees" under the NLRA for purposes of establishing an employer's duty to bargain.[135] Judge David Tatel, the author of the court of appeals decision in *Hoffman* that the U.S. Supreme Court later overturned, wrote for the *Agri Processor* majority. Rejecting the employer's two main arguments, the majority held that unauthorized workers must be included in the NLRA and that the same bargaining unit may include both authorized and unauthorized workers.[136]

The reasoning in *Agri Processor* reached back in time before *Hoffman* to the 1984 U.S. Supreme Court decision in *Sure-Tan, Inc. v. NLRB*,[137] which had held—two years before IRCA introduced federal employer sanctions—that unauthorized workers are employees under the NLRA.[138] Did IRCA and *Hoffman* change the NLRA's definition of employee as interpreted by *Sure-Tan*? *Agri Processor* reasoned that IRCA had not addressed the NLRA definition expressly or impliedly. The court also distinguished *Hoffman* on the ground that it

132. *Hoffman*, 535 U.S. at 153–56 (Breyer, J., dissenting). In contrast, the majority was concerned with a different systemic effect, namely, incentives for future unauthorized workers to come to the United States. Thus, the majority observed that allowing backpay for Castro "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." *Id.* at 151 (majority opinion).

133. Agri Processor Co. v. NLRB, 514 F.3d 1 (D.C. Cir. 2008).

134. *Id.* at 2.

135. *Id.* at 2–8.

136. *Id.* at 8–9.

137. Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

138. *Id.* at 891–92.

addressed only remedies, and not the coverage of NLRA generally.[139] This formal distinction, however, mattered much less than a basic difference between *Agri Processor* and the *Hoffman* majority in understanding the relationship between immigration law and labor law.

Addressing the rights of unauthorized workers, Judge Tatel discussed the interests of workers, authorized and unauthorized alike. He found that immigration law status is not relevant to determining whether workers in the same workplace share a "community of interest," which is the NLRB's test for defining bargaining units.[140] Tatel reasoned that, with respect to "wages, benefits, skills, duties, working conditions, and supervision of the employee, . . . undocumented workers and legal workers in a bargaining unit are identical."[141] He continued, "While undocumented aliens may face penalties for violating immigration laws, they receive the same wages and benefits as legal workers, face the same working conditions, answer to the same supervisors, and possess the same skills and duties."[142]

Agri Processor and the *Hoffman* dissent—which both stand in sharp contrast to the approach of the *Hoffman* majority—articulated a relationship between immigration law and workplace law that emphasizes the practical ties between unauthorized migrants and other persons whose welfare depends on how the law treats the unauthorized. *Agri Processor* reasoned that excluding unauthorized workers from labor organizing under the NRLA can harm coworkers who are U.S. citizens, lawful permanent residents, or otherwise working lawfully.[143] The *Hoffman* dissent reasoned that failure to fully enforce the NRLA would incentivize employers to hire unauthorized workers, thus undermining the workplace welfare (or the jobs) of citizens and lawful noncitizens.[144] According to this view, the interests of all workers in the workplace community of interest may depend on how unauthorized workers are treated.

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139. *Agri Processor*, 514 F.3d at 3–8.

140. *Id.* at 8–9.

141. *Id.* at 9.

142. *Id.*

143. *Id.* at 7–8.

144. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 153–56 (2002) (Breyer, J., dissenting).

To generalize, these citizen and lawful noncitizen workers act as interest surrogates, or as citizen proxies for unauthorized workers.[145] The existence of these citizen proxy workers—even if based on the U.S. labor market generally—is essential to the rationale for workplace protections and remedies for noncitizens who work in violation of immigration law. Citizen proxy arguments, like institutional competence arguments, allow unauthorized migrants to assert rights indirectly and obliquely.[146]

Citizen proxies are also invoked elsewhere in the law governing immigration and immigrants. In federal immigration law, for example, the interests of any U.S.-citizen children may influence the decision whether to remove noncitizen parents from the United States.[147] Evidence of sufficient hardship to children, and sometimes to parents and siblings who are U.S. citizens or lawful permanent residents, may be a factor that blocks deportation. Though it is not easy to meet the threshold eligibility requirements for these forms of relief, or to persuade the decisionmaker to exercise discretion favorably, a significant number of unauthorized migrants can seek relief through a child as a citizen proxy.[148] The statutory vehicles are Immigration and Nationality Act (INA) provisions that give executive branch officials the discretionary authority to allow a parent to stay.[149] These federal immigration law provisions, like the *Agri Processor* interpretation of federal labor law, allow citizen proxies to give expression to the rights of unauthorized migrants.

Consistent with the purpose of this Article as an analysis of emerging patterns, I am not suggesting that citizen proxy arguments on behalf of unauthorized migrants are successful consistently or even

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145. *See* Cunningham-Parmeter, *supra* note 116, at 1389 (explaining how excluding unauthorized workers would undermine the purpose of the FLSA).

146. Comparative culpability arguments work together with citizen proxy arguments when concerns about harms to citizens are heightened because certain employers are identified as especially culpable.

147. The statutory term for deportation is "removal." *See* INA § 240, 8 U.S.C. § 1229a (2006) (setting out rules for conduct of removal proceedings).

148. One study found that in 2008, about four million U.S.-born children were living in families with at least one parent who was an unauthorized migrant, a significant increase over the 2.3 million in 2003. PASSEL & COHN, *supra* note 1, at 8.

149. *See, e.g.*, INA § 240A(b), 8 U.S.C. § 1229b(b) (providing for cancellation of removal for certain nonpermanent residents). Inadmissibility and deportability waivers require and assess hardship to a close relative who is a U.S. citizen or lawful permanent resident. *See, e.g.*, INA § 212(h), 8 U.S.C. § 1182(h) (waiver of inadmissibility for certain crimes); *id.* § 212(i), 8 U.S.C. § 1182(i) (waiver of inadmissibility for fraud or willful misrepresentation); *id.* § 237, 8 U.S.C. § 1227(a)(1)(H) (waiver of deportability for certain misrepresentations).

frequently. The government rejects many applications for discretionary relief because they fail to show sufficient hardship to close relatives who are U.S. citizens.[150] Many noncitizens who would benefit from such relief are not eligible to apply.[151] Moreover, the mere fact that citizen children will be taken out of the country by their deported parents—or separated from their parents—is insufficient to block removal.[152] This aspect of prevailing doctrine may reflect unease that any other rule would impede too many removals of noncitizens who are otherwise deportable, given that the Fourteenth Amendment confers citizenship on virtually all children born on U.S. soil regardless of their parents' immigration law status.[153] Furthermore, courts have been reluctant to consider the constitutional claims of U.S. citizens adversely affected by government decisions on admission and expulsion.[154] Notwithstanding

150. *See, e.g.*, *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 322 (B.I.A. 2002) (holding that a noncitizen did not establish eligibility for cancellation of removal because she failed to demonstrate that her children would suffer exceptional and extremely unusual hardship from her deportation); *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56, 65 (B.I.A. 2001) (finding the respondent not eligible for cancellation of removal because he did not establish that his children or parents would suffer exceptional and extremely unusual hardship if he was deported).

151. *See, e.g.*, INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (requiring ten years of continuous physical presence for eligibility to apply for cancellation of removal).

152. Acosta v. Gaffney, 558 F.2d 1153, 1157–58 (3d Cir. 1977). The federal government removed over 108,000 parents of U.S.-citizen children between 1997 and 2008. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., NO. OIG-09-15, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 5–6 (2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-15_Jan09.pdf.

153. *See* Gerald L. Neuman, *Back to* Dred Scott*?*, 24 SAN DIEGO L. REV. 485, 489 (1987) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, CITIZENS WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985)). There is a narrow exception for parents who are diplomats representing foreign governments in the United States. *See* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 2, at 15–44. For a contrary reading of the Fourteenth Amendment, see generally SCHUCK & SMITH, *supra* (presenting arguments that the Fourteenth Amendment denies *jus soli* citizenship to U.S.-born children of unauthorized migrants).

154. *Kleindienst v. Mandel*, 408 U.S. 753 (1972), tested the denial of a visa to the Belgian Marxist scholar Ernst Mandel. *Id.* at 759. He sued, joined by several professors who had invited him to speak at universities in the United States. *Id.* at 759–60. The plaintiffs claimed that excluding Mandel due to ideology violated their First Amendment freedoms of speech and association. *Id.* at 760. In *Fiallo v. Bell*, 430 U.S. 787 (1977), several families sued to challenge a federal immigration statute that defined "child" to include the children of unwed mothers, but not unwed fathers. *Id.* at 788–91. Some plaintiffs were citizens and lawful permanent residents who sought to be reunited with their families. *Id.* at 790. The Supreme Court rejected both constitutional challenges, declining to take seriously the argument that denying admission to noncitizens can hurt citizens. *Id.* at 794–95; *Mandel*, 408 U.S. at 768–70. Several scholars have discussed the relevance of effects on citizens to constitutional challenges to government immigration decisions. *See* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 374 (2004) (arguing that an alien-centered approach to constitutional immigration

these counterexamples in immigration law, however, this inquiry into workplace protections shows that, even if unauthorized migrants cannot directly assert their rights as fully as they could if they were U.S. citizens, a decision like *Agri Processor* opens the door for indirect recognition of their rights through citizen proxy arguments.

C. Procedural Surrogates

Another pattern is distinct but closely related to institutional competence, comparative culpability, and citizen proxy arguments. This fourth pattern consists of what I call procedural surrogate arguments. I use this term to refer to judicial reliance on the rhetoric of procedure and a traditional procedural rule to recognize the rights of an unauthorized worker, even when principles of labor law or some other substantive body of law might suggest that the worker's claims would be rejected.[155] Procedural surrogates can operate closely in conjunction with some of the other patterns that I have examined, including institutional competence arguments and citizen proxy arguments.

An instructive example is *Reyes v. Van Elk, Ltd.*,[156] decided in 2007 by the California Court of Appeals. At stake was a California statute, adopted in response to *Hoffman*, that made immigration law status irrelevant to the enforcement of state labor and employment laws.[157] *Reyes* arose when an employee claimed unpaid wages, and the employer sought discovery on the employee's immigration law status.[158] The employee then invoked this statute limiting evidence

law ignores the possibility that immigration law may injure citizens); Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, Review Essay, 97 COLUM. L. REV. 1567, 1584–86, 1601–02 (1997) (arguing for a focus on both aliens' rights and citizens' rights in deciding questions of constitutional immigration law); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1946–52 (1996) (book review) (arguing for a national self-definition model of constitutional immigration law that focuses on the rights of U.S. citizens and permanent residents).

155. For a discussion of analogous procedural surrogates in the constitutional aspects of immigration law, see generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

156. Reyes v. Van Elk, Ltd., 148 Cal. App. 4th 604 (Ct. App. 2007).

157. That statute was section 1171.5 of the California Labor Code, which provides:

> For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.

158. *Reyes*, 148 Cal. App. 4th at 608–09.

and civil discovery. The employer argued in turn that *Hoffman*, by making remedies for work law violations depend on immigration law status, preempted the statute.[159] In *Reyes*, the California Court of Appeals rejected this argument and upheld the state statute.[160] In doing so, the decision indirectly recognized the rights of unauthorized migrants in several ways that operated together.

Reyes interwove elements of arguments based on citizen proxies, institutional competence, and procedural surrogates. First, it included the same sort of citizen proxy argument that appears in the *Hoffman* dissent and in *Agri Processor*. In *Reyes*, the court expressed concern about the systemic effects on the workplace of allowing employers to pay employees substandard wages.[161]

Second, by affording unauthorized workers protection in a rule of relevance, *Reyes* articulated workplace protections using a vehicle of traditional procedure. This indirect recognition of rights came in the form of a procedural surrogate for substantive protection under the California prevailing wage statute. Perhaps anticipating the objection that state law workplace remedies for unauthorized workers run afoul of federal immigration law as applied to the workplace by *Hoffman*, the California Labor Code safeguards wages through a procedural rule, not a stronger articulation of the substantive right to the prevailing wage.[162]

Closely tied to the use of a procedural surrogate in *Reyes* is a third noteworthy analytical element: an institutional competence argument. In essence, *Reyes* decided that state law should govern an employer-employee dispute, federal immigration law should not curtail state law remedies, and a state rule of evidence could drive this analysis.[163] This reasoning reflects reliance not only on a procedural surrogate but also on an institutional competence argument—though not the same type of institutional competence argument that has

159. *Id.* at 617. Of course, preemption was not an issue in *Hoffman*, which addressed the relationship between two federal statutes. *See supra* text accompanying notes 104–12.

160. *Reyes*, 148 Cal. App. 4th at 615–18.

161. *Id.* at 617–18.

162. For robust use of discovery as a procedural surrogate that is similar but less explicit, see Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004), which denied discovery of employees' immigration status in a Title VII suit against their employer, *id.* at 1074. On privacy as a barrier to formal discovery of immigration and citizenship status, see Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1185–88 (2008).

163. *Reyes*, 148 Cal. App. 4th at 608–19.

invalidated state and local laws targeting unauthorized migrants. Recall that the institutional competence argument in *City of Hazleton* was a preemption argument against state and local authority.[164] In *Reyes*, institutional competence argued *against* preemption and in favor of state law.[165] States have institutional competence not only to govern procedure in their own courts, but also to regulate employment. Making the latter point, the *Reyes* court said that "[b]ecause legislation providing for the payment of prevailing wages comes under the historic police powers of the state, the presumption is that legislation is not superseded by the IRCA."[166] This statement is consistent with U.S. Supreme Court decisions characterizing employment as an area of traditional state regulation.

D. The Effectiveness of Oblique Rights in the Workplace

Why should arguments based on comparative culpability, citizen proxies, procedural surrogates, and institutional competence sometimes allow unauthorized migrants to assert their workplace rights obliquely? The answer to this question starts by identifying a spectrum of ways to understand and argue for the rights of unauthorized migrants.

At one end of the spectrum are pragmatic arguments that implicitly concede that unauthorized migrants' claims of right are weak, but emphasize that any refusal to sustain their claims will adversely affect persons with stronger claims. Consider the arguments that were typically made by opponents of California's Proposition 187. Had a federal court not found federal preemption, Proposition 187 would have barred access by unauthorized migrants to most state public services, including nonemergency health care and public education.[167]

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164. *See supra* text accompanying notes 37–42.

165. *See supra* text accompanying notes 156–60.

166. *Reyes*, 148 Cal. App. 4th at 616.

167. Illegal Aliens. Ineligibility for Public Services. Verification and Reporting., Proposition 187, 1994 Cal. Stat. A-317 (codified in scattered sections of CAL. EDUC. CODE, CAL. GOV'T CODE, CAL. HEALTH & SAFETY CODE, CAL. PENAL CODE and CAL. WELF. & INST. CODE). It also would have required certain state and local government employees to verify the immigration status of persons whom they encountered in their duties, and to report all suspected unauthorized migrants to federal immigration officials. In addition, Proposition 187 introduced substantial new criminal penalties for manufacturing, selling, and using false documents. A federal court found that all but the criminal penalties were preempted. *See* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995). The

As Professor Linda Bosniak has analyzed, the arguments against Proposition 187 "emphasiz[ed] the initiative's negative consequences for Americans' own self-interest"[168]—for example, that denying health care to the unauthorized population would jeopardize the public health of all Californians, including U.S. citizens.[169] These were pragmatic arguments. In contrast, moral arguments on behalf of the unauthorized migrants were rarely heard in the debate.[170]

Like pragmatic public health arguments against Proposition 187, the arguments based on comparative culpability and citizen proxies are pragmatic—though pragmatic in the context of judicial decisionmaking rather than the political arena that Bosniak analyzed. These pragmatic arguments appeal in the workplace setting to concerns about the broader consequences if judges decline to recognize certain rights of unauthorized migrants. In the *Hoffman* dissent, the citizen proxies were lawful workers in general, who might have been adversely affected if employers had incentives to hire unauthorized workers instead.[171] Comparative culpability arguments appeal to the same concerns about the potential adverse effects on lawful workers of letting egregious employer behavior go unchecked.

But these arguments for workplace rights can be more focused than the pragmatic arguments against Proposition 187, or those in the *Hoffman* dissent. The citizen proxies in *Agri Processor* were in the same workplace,[172] and thus more specifically identifiable as directly affected if the NLRA scheme for organizing and collective bargaining excluded unauthorized workers in the same plant. And in the immigration law settings that I have described, citizen proxies are individually identifiable as directly affected because they lay the foundation for discretionary relief from removal.

These pragmatic arguments allow unauthorized migrants' workplace rights to be recognized indirectly in ways that function like institutional competence arguments in the context of challenging state

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case settled while on appeal. *See* Patrick J. McDonnell, *Prop. 187 Talks Offered Davis Few Choices*, L.A. TIMES, July 30, 1999, at A3.

168. Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 558 (1996).

169. *Id.* at 563.

170. *See id.* at 563, 566.

171. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 153–56 (2002) (Breyer, J., dissenting); *see also supra* text accompanying note 144.

172. Agri Processor Co., Inc. v. NLRB, 514 F.3d 1, 8–9 (D.C. Cir. 2008); *see also supra* text accompanying notes 133–43.

and local laws targeting unauthorized migrants. Relevant again is pervasive ambivalence about immigration law enforcement, this time in the workplace. The impulse in recent years to ramp up enforcement efforts is in tension with the enduring reality that migrant labor represents a crucial component of economic growth. Federal law did not prohibit hiring unauthorized workers until 1986,[173] when IRCA introduced employer sanctions,[174] which have been ineffective. Fake green cards and other false documents are readily available,[175] and employers only need to check if an identity or work authorization document "reasonably appears on its face to be genuine."[176] As long as employers check documents and do the paperwork, their risk of liability under the statute is minimal.[177] Further probing only opens them to discrimination claims.[178]

Worksite enforcement is evolving rapidly. A few years ago, unauthorized work was virtually never detected because enforcement relied on workplace raids, which rarely took place.[179] This changed in

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173. In 1952, Congress made it a felony to harbor an alien unlawfully in the United States and expanded the Border Patrol's enforcement authority. At the insistence of southwestern growers and other agricultural interests, Congress added the so-called Texas Proviso, which excluded the employment of an unauthorized worker from the definition of harboring. Act of June 27, 1952, Pub. L. No. 82-414, § 274, 66 Stat. 163, 228–29; *see also* ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882, at 121 (2004) (discussing the background of the Texas Proviso); MOTOMURA, *supra* note 7, at 177 (same); DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 194 (2002) (same). When IRCA became law in 1986, at least twelve states had some kind of employer sanctions law. SELECT COMM'N ON IMMIGRATION & REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 565 (1981).

174. *See* INA § 274A, 8 U.S.C. § 1324a (2006) (prohibiting employment of unauthorized aliens).

175. *See* Wayne A. Cornelius, *The U.S. Demand for Mexican Labor*, *in* MEXICAN MIGRATION TO THE UNITED STATES: ORIGINS, CONSEQUENCES, AND POLICY OPTIONS 25, 43–44 (Wayne A. Cornelius & Jorge A. Bustamante eds., 1989) (surveying California employers who describe the ease with which undocumented workers attain false identification).

176. INA § 274A(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(A); *see also* Collins Foods Int'l, Inc. v. INS, 948 F.2d 549, 553–54 (9th Cir. 1991) (holding that the employer did not violate § 1324a(b)(1)(A) by failing to closely inspect the employee's social security card or compare it to an example in the INS handbook, and observing that "Congress intended to minimize the burden and the risk placed on the employer in the verification process").

177. *See* Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1046–55, 1057, 1060 (1990) (describing employer reactions to IRCA sanctions and illustrating the degree to which employers are, paradoxically, protected by IRCA despite their employment of undocumented workers).

178. INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6). This requires discriminatory intent. *Id.*

179. *See Lack of Worksite Enforcement and Employer Sanctions: Hearing Before the Subcomm. on Immigration, Border Security and Claims of the H. Comm. on the Judiciary*, 109th

the winter of 2006–2007, when worksite enforcement surged upward.[180] In one highly publicized case in the last year of President George W. Bush's administration, the federal government brought criminal charges against unauthorized workers arrested at a meat packing plant in Postville, Iowa.[181] The Obama administration has shifted policy priorities away from workplace raids to aggressive checks for unauthorized workers using electronic databases.[182]

The recent upsurge in worksite enforcement has not changed the U.S. economy's overall reliance on over seven million unauthorized workers, an estimated 5 percent of the total U.S. workforce. The percentage is much higher in certain occupations and industries.[183] As long as the lawful admission scheme remains unable to provide a steady supply of workers, employers in the U.S. economy will depend heavily on the availability of an unauthorized workforce,[184] and employers will push back if government enforcement becomes too strict.[185]

Cong. 7 (2005) (testimony of Richard M. Stana, Director, Homeland Security and Justice, U.S. Government Accountability Office) (describing how worksite enforcement was and continues to be a low priority for federal government agencies); JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY 136 (2002) (discussing the low number of workplace inspectors and enforcement actions in the late 1990s).

180. *See* U.S. Immigration & Customs Enforcement, Worksite Enforcement Fact Sheet, http://www.ice.gov/pi/news/factsheets/worksite.htm (last visited Mar. 22, 2010) (showing the total worksite enforcement arrests increasing from 1,292 in 2005 to 4,383 in 2006, 4,940 in 2007, and 6,287 in 2008).

181. For a discussion of the Postville raid and an analysis of the trend toward criminal prosecution of unauthorized migrants, see Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. (forthcoming 2010) (manuscript at 21–56, on file with the *Duke Law Journal*).

182. *See* Neil A. Lewis, *In Search for Illegal Workers, Immigration Officials Will Audit More Companies*, N.Y. TIMES, Nov. 20, 2009, at A14 (describing the Obama administration's use of electronic databases to check for unauthorized workers); Julia Preston, *Immigrant Crackdown Leads to 1,800 Pink Slips*, N.Y. TIMES, Sept. 30, 2009, at A1 (describing the Obama administration's emphasis on forcing employers to dismiss employees instead of raiding workplaces).

183. *See* PASSEL & COHN, *supra* note 1, at 14–17 (presenting data showing that unauthorized immigrant workers remain overrepresented in low wage and low education occupations).

184. *See, e.g.*, Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 223 (noting the U.S. economy's dependence on immigrants from Mexico and Latin America).

185. *See* Julia Preston, *Employers Fight Tough Measures on Immigration*, N.Y. TIMES, July 6, 2008, at A1 ("Under pressure from the toughest crackdown on illegal immigration in two decades, employers across the country are fighting back in state legislatures, the federal courts and city halls.").

As long as fundamental ambivalence about enforcement continues to prevail, it is an unsurprising middle ground for the rights of unauthorized workers to be incomplete but recognized. And to the extent that these citizen proxy arguments and comparative culpability arguments reflect pragmatic concerns, they can join forces with institutional competence and procedural surrogate arguments, both of which allow judges to give expression to those concerns. This is not only a way to protect the interests of citizens and lawfully present noncitizens in the same workplace but also—as with unauthorized migrants who are targeted by state and local laws—a way to recognize their inevitable membership in those work-based communities despite their status outside the law.

III. SEARCH AND SEIZURE

Raids on homes, worksites, and other venues have always been an immigration enforcement tool, but they have become more frequent since about 2006.[186] Though the Obama administration has shifted away from workplace raids, a political imperative remains to show a strong enforcement face to help lay the foundation for comprehensive immigration reform. Many arrests and searches have been found to violate the Fourth Amendment, and yet they uncover evidence that is probative as to an arrested individual's immigration law status and thus as to whether she is potentially subject to removal from the United States.[187]

The government will seek to introduce this evidence in immigration court, where an immigration judge will decide removability and rule on any relief that may be available. The noncitizen's attorney (if the noncitizen has one) may file a motion to suppress. May the government introduce evidence obtained through a search and seizure that violated the Fourth Amendment? Though this question affects a full range of noncitizens, including lawful permanent residents and lawfully present nonimmigrants, my focus here, as throughout this Article, is unauthorized migrants.

This inquiry into remedies for unlawful searches and seizures fills in the picture drawn in Parts I and II of the patterns of oblique rights

186. In fiscal year 2002, the federal government arrested 510 unauthorized workers and employers in workplace raids. Worksite arrests rose to 1,292 in fiscal year 2005 and then leapt to 4,940 in 2007. U.S. Immigration & Customs Enforcement, *supra* note 180.

187. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not apply in civil deportation hearings held by the INS).

asserted by unauthorized migrants. Courts have granted remedies in this context to unauthorized migrants, sometimes by sustaining arguments whose success is traceable to comparative culpability arguments, citizen proxy arguments, and institutional competence arguments. Part III also uncovers one new pattern: reliance on subconstitutional reasoning to reach—even if less boldly—practically the same results as if unauthorized migrants were the constitutional equals of U.S. citizens. By "subconstitutional," I mean an argument based on statutes, regulations, or other sources of law less fixed than the U.S. Constitution.

As was true of the patterns that emerged in the topics in Parts I and II, all of these patterns of oblique rights involving search and seizure are related in terms of their practical effect. And as with successful arguments for unauthorized migrants' workplace rights, the persuasiveness of these arguments depends on pragmatic, rather than moral, reasoning. These arguments rely on the consequences of Fourth Amendment violations—and unlawful law enforcement practices generally—on U.S. citizens and lawful permanent residents either because they will be arrested or searched, or because they have close connections to noncitizens who will be arrested or searched. Again, the integration of unauthorized migrants into U.S. society lays the foundation for oblique rights.

A. Egregious Violations, Comparative Culpability, and Citizen Proxies

The baseline rule for remedies in immigration proceedings for a Fourth Amendment violation comes from the 1984 U.S. Supreme Court decision in *INS v. Lopez-Mendoza*,[188] in which the Court held that the exclusionary rule generally does not apply in deportation proceedings.[189] Justice O'Connor's reasoning on behalf of a bare majority of five Justices relied on weighing "the likely social benefits of excluding unlawfully seized evidence against the likely costs."[190] A major element of her reasoning was skepticism about the benefits of excluding evidence. O'Connor observed that deportation would still be possible in many cases without evidence from the arrest, few enforcement officers would expect challenges to the circumstances of the arrest, the government has its own scheme to deter Fourth

188. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

189. *Id.* at 1050.

190. *Id.* at 1041.

Amendment violations, and alternative private remedies are available.[191] She then noted the ''unusual and significant'' costs of an exclusionary rule, among them the cost of ''requir[ing] the courts to close their eyes to ongoing violations of the law,'' thus complicating the system of deportation proceedings.[192]

Justice O'Connor also wrote that the Court's "conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."[193] And she noted, "we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[194] Three other Justices joined this part of her opinion mentioning egregious violations. Presumably, the four dissenters would agree, given that they would have applied the exclusionary rule to all Fourth Amendment violations.[195]

Subsequent federal appeals courts have granted motions to suppress evidence obtained through egregious violations of the Fourth Amendment. These decisions vary in reasoning and result, but several consistent elements have emerged. Most significantly, the federal courts of appeals have almost uniformly found that it constitutes an egregious violation to rely improperly on race or ethnicity in conducting a search or seizure.

The foundational case addressing reliance on race and ethnicity in conducting a search or seizure is the 1975 U.S. Supreme Court decision in *United States v. Brignoni-Ponce*.[196] That case held that immigration agents may not effect an investigative seizure of suspected unauthorized migrants solely because of their "apparent Mexican ancestry."[197] More generally, the Ninth Circuit considers a Fourth Amendment violation egregious if committed "deliberately or by conduct a reasonable officer should have known would violate the Constitution."[198] Applying this standard in light of *Brignoni-Ponce*

191. *Id.* at 1043–45.
192. *Id.* at 1046, 1048–50.
193. *Id.* at 1050.
194. *Id.* at 1050–51.
195. *See* Orhorhaghe v. INS, 38 F.3d 488, 493 n.2 (9th Cir. 1994).
196. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).
197. *Id.* at 885–86.
198. *Orhorhaghe*, 38 F.3d at 493.

and similar decisions, a violation is egregious if an enforcement decision is based on race, ethnicity, or nationality.[199] Thus, the Ninth Circuit has excluded, based on egregious violations of the Fourth Amendment, evidence gathered when a vehicle was stopped solely based on the passengers' Hispanic appearance[200] and when a noncitizen's apartment was entered and searched, without consent or a warrant, solely because he had a "Nigerian-sounding name."[201] The Second Circuit has been disinclined to consider egregious a stop that is not prolonged or accompanied by a show or use of force.[202] But the Second Circuit has ruled that, even if government conduct is not severe, Fourth Amendment violations can be so improper as to call for suppression. In one case, the court observed, "were there evidence that the stop was based on race, the violation would be egregious, and the exclusionary rule would apply."[203]

Examining search and seizure cases uncovers some of the same patterns of indirect recognition of unauthorized migrants' rights revealed in Parts I and II. First, these search and seizure decisions have much in common with the workplace cases in Part II. Asking if a Fourth Amendment violation is egregious is a question about comparative culpability, much like examining the degree of employer wrongdoing in a lost wages decision like *Balbuena*, *Madeira*, or *Ambrosi*.[204] When police officers know or should know that they are violating the Fourth Amendment—for example, by relying on race or ethnicity to choose a search target—the stronger response of a suppression order is appropriate. To be sure, the probative nature of the suppressed evidence suggests a degree of noncitizen culpability based on unlawful presence. But by offsetting the presumption that

199. *See, e.g.*, Ill. Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977) (mem.) (holding that the Immigration and Naturalization Service could not lawfully stop and question individuals solely on the basis of Hispanic appearance). My concern in this Article is how decisionmakers and litigants work within prevailing doctrine to decide on remedies once a violation is established. For a thorough critique of doctrine defining a Fourth Amendment violation—especially of what constitutes a search or seizure, and consent to a search or seizure—see generally Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

200. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450–51 (9th Cir. 1994).

201. *Orhorhaghe*, 38 F.3d at 503.

202. *See* Almeida-Amaral v. Gonzales, 461 F.3d 231, 236 (2d Cir. 2006) ("[E]xclusion may well be proper where the seizure itself is gross or unreasonable in addition to being without a plausible legal ground, *e.g.*, when the initial illegal stop is particularly lengthy, there is a show or use of force, etc.").

203. *Id.* at 237.

204. *See supra* text accompanying notes 119–29.

the illegality of a search does not lead to suppression of evidence, the egregious violation rule allows Fourth Amendment remedies when unauthorized migrants can show that law enforcement behavior tips the comparative culpability analysis to the opposite result.

Second, suppression arguments that cite egregious Fourth Amendment violations operate like citizen proxy arguments. Recall the tension in *Hoffman* and in *Agri Processor* between an unauthorized worker's individual wrongdoing and systemic consequences, which include effects on employer behavior as well as coworkers who are citizens, lawful permanent residents, or otherwise authorized to work.[205] The need to deter unlawful conduct by law enforcement officers, even assuming that the individual who is the object of enforcement is culpable, provides much of the rationale behind the suppression remedy. A major part of the Court's reasoning in *Lopez-Mendoza* was that excluding evidence would have insufficient deterrent value, given the availability of other measures to deter and correct Fourth Amendment violations.[206] Like in the *Hoffman* dissent and the *Agri Processor* decision in the workplace context, courts apply the exclusionary rule to protect citizen proxies. The egregious violation decisions identify police misbehavior patterns that may harm citizens and lawfully present noncitizens directly or indirectly because of police officers' use of excessive force or disregard of warrant requirements, or because of their improper use of race and ethnicity.[207]

These observations about the search and seizure cases should recall the contrast between moral and pragmatic arguments raised in Part II's discussion of citizen proxies and comparative culpability. An argument for suppression can become a strong moral argument based on an unauthorized migrant's Fourth Amendment–based individual rights claim, but only when the circumstances of an illegal search or seizure suggest that the enforcing officer was comparatively culpable. More reliably, a pragmatic rationale like the need to deter unlawful law enforcement activity—especially racial or ethnic discrimination—makes an argument for suppression much more persuasive.

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205. *See supra* text accompanying notes 133–46.

206. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1043–50 (1983).

207. *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 693–711 (2000) (discussing racial profiling by immigration officers even in the wake of the egregious violation decisions).

This pragmatic approach to remedies is consistent with Justice O'Connor's observation in *Lopez-Mendoza* that it might be appropriate to revisit remedies for Fourth Amendment violations if evidence emerges that the government is not adequately controlling and supervising immigration enforcement and constitutional violations become widespread.[208] Any such pragmatic approach to suppression would invoke citizen proxies, namely, citizens who may be harmed directly or indirectly by the same unlawful enforcement practices.

B. Phantom Norm Arguments

This inquiry into remedies for unlawful searches and seizures goes further than Parts I and II by revealing a fifth pattern of oblique rights that unauthorized migrants can assert. An unauthorized migrant seeking to exclude evidence from removal proceedings can not only invoke the egregious violation exception to *Lopez-Mendoza* but can also make a subconstitutional argument based on the government's own regulations.

An example of such subconstitutional reasoning is the February 2009 decision by Immigration Judge Ashley Tabaddor in *Matter of Perez-Cruz*,[209] which excluded evidence because ICE agents violated federal regulations governing arrest and interrogation during workplace raids.[210] This use of a regulatory violation seems unusual but merits examination in this analysis of emerging patterns. Deciding suppression on subconstitutional grounds is not only logical but is also consistent with other patterns in immigration law in which constitutional reasoning has taken subconstitutional form.

Under one of the regulations involved in *Perez-Cruz*, even briefly detaining an individual requires reasonable or individualized

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208. For a detailed argument that developments since *Lopez-Mendoza* support application of the exclusionary rule in removal proceedings, see generally Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109.

209. *In re* Perez-Cruz, No. A95 748 837 (Immigration Ct. L.A., Cal. Feb. 9, 2009), *appeal filed*.

210. *Id.*, slip op. at 9–18; *see also In re* Herrera-Priego, No. [redacted], slip op. at 20–25 (Immigration Ct. N.Y., N.Y. July 10, 2003), *available at* http://www.lexisnexis.com/practiceareas/immigration/pdfs/web428.pdf (suppressing evidence and terminating removal proceedings because the enforcement action violated the government agency's own Operation Instructions on enforcement at worksites involved in a labor dispute); Michael J. Wishnie, *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 389–93 (2004) (discussing *Herrera-Priego*).

suspicion that the individual is unlawfully present in the United States.[211] Judge Tabaddor found no reasonable or individualized suspicion that any of the workers were unlawfully present.[212] The raided plant was an electronic assembly facility owned and operated by Micro Solutions Enterprise in Van Nuys, California. The issue in the case was whether the workers were detained or instead free to walk away when about one hundred Immigration and Customs Enforcement agents entered the plant.[213] The judge found that the workers were detained and therefore seized when the armed and uniformed agents ordered all workers to stop working and gather in a large hallway.[214]

To find a violation of law that made suppression appropriate, Judge Tabaddor relied on the Board of Immigration Appeals decision in *Matter of Garcia-Flores*,[215] which held that removal proceedings may be terminated when the government violates its own regulations and infringes on the respondent's rights.[216] Under *Garcia-Flores*, a regulatory violation justifies termination of removal proceedings only if the violated regulation serves to benefit the noncitizen and the violation "prejudiced interests of the alien which were protected by the regulation."[217] Judge Tabaddor found that the *Garcia-Flores* requirements were met in *Perez-Cruz*.[218] She thus ordered suppression and terminated the removal proceeding with prejudice.[219]

An immigration judge's authority to rule on issues of constitutional law is limited. An immigration judge may, however, make procedural rulings in removal proceedings as required by the Due Process Clause of the Fifth Amendment. Similarly, some immigration judges have granted suppression motions based on the egregious violation exception to *Lopez-Mendoza*.[220] In contrast,

211. 8 C.F.R. § 287.8(b)–(c) (2009).

212. *Perez-Cruz*, slip op. at 14.

213. *Id.* at 11–14.

214. *Id.* at 11–13.

215. *In re* Garcia-Flores, 17 I. & N. Dec. 325 (B.I.A. 1980).

216. *Id.* at 328–29.

217. *Id.* at 328 (quoting United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979)).

218. *Perez-Cruz*, slip op. at 16–18.

219. *Id.* at 18.

220. *E.g.*, *In re* Reyes-Basurto, No. [redacted], slip op. at 7–9 (Immigration Ct. N.Y., N.Y. May 28, 2009), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/NY-5-28-09.pdf. For a list of additional decisions, see Legal Action Ctr., Am. Immigration Council,

Perez-Cruz relied on a regulatory violation, adopting a subconstitutional rationale, which yielded the same practical result as the egregious violation exception.[221]

Reliance on subconstitutional analogues to constitutional rules bears some resemblance to other, more established uses of phantom constitutional norms. As I have analyzed in detail in a previous article, this is the practice of interpreting statutes and regulations to avoid constitutional doubt even when the plenary power doctrine—which ordinarily stifles constitutional judicial review—suggests that the court would reject a noncitizen's constitutional challenge to a government decision pertaining to admission or expulsion.[222] Over the past twenty years, arguing for a phantom norm decision has gradually become a standard strategy in litigation challenging government immigration decisions. The success of this strategy no doubt prompts plaintiffs in such cases to press such arguments when they can.

Several U.S. Supreme Court cases have invalidated government decisions not on constitutional grounds, but by interpreting statutes to avoid serious constitutional questions. Prominent among them are the Court's 2001 decisions in *Zadvydas v. Davis*[223] and *INS v. St. Cyr*.[224] *Zadvydas* involved the indefinite detention of former permanent resident noncitizens who had been ordered removed from the United States but who could not be sent anywhere because no country would accept them, not even their own country of citizenship.[225] The Supreme Court held that the INA did not authorize the government to detain a noncitizen indefinitely, thus avoiding a decision on the constitutionality of the indefinite detention of these noncitizens.[226] In *St. Cyr*, the Supreme Court held that the INA did not eliminate the

Enforcement, Motions to Suppress, http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-motions-suppress (last visited Feb. 19, 2010).

221. *Perez-Cruz*, slip op. at 17.

222. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). Examples of phantom norm decisionmaking include interpretation of both statutes and regulations. *See, e.g.*, *id.* at 570–71, 590–92 (discussing the interpretation of regulations in *Jean v. Nelson*, 472 U.S. 846 (1985), and *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953)).

223. Zadvydas v. Davis, 533 U.S. 678 (2001). I should disclose that I served as a volunteer consultant for the attorneys representing Kim Ho Ma, one of the petitioners in *Zadvydas*.

224. INS v. St. Cyr, 533 U.S. 289 (2001). I should disclose that I co-authored an *amicus curiae* brief in *In re Soriano*, 21 I. & N. Dec. 516 (B.I.A. 1996), which first posed some of the issues that *St. Cyr* later decided.

225. *Zadvydas*, 533 U.S. at 684–86.

226. *Id.* at 696–99.

jurisdiction of federal courts sitting in habeas corpus to review removal orders, thus avoiding the question whether the abrogation of habeas jurisdiction would violate the Suspension Clause of the U.S. Constitution.[227]

Perez-Cruz is an example of phantom norm decisionmaking. The prevailing view is that the Fourth Amendment applies to interior enforcement of the immigration laws against noncitizens who are in the United States unlawfully.[228] But *Lopez-Mendoza* curtailed the practical protections of the Fourth Amendment by limiting the remedies available in a certain type of proceeding in a certain type of forum—removal proceedings in immigration court—that uniquely involves noncitizens and especially affects unauthorized migrants.[229] Put more generally, constitutional doctrine evolved to create a significant gap between the Fourth Amendment rights of unauthorized migrants and those of U.S. citizens. In *Perez-Cruz*, as in other applications of phantom norms, an unauthorized migrant who could not directly demand a constitutional remedy could do so indirectly by securing a subconstitutional remedy, based here on a regulatory violation.[230]

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227. *St. Cyr*, 533 U.S. at 308.

228. The U.S. Supreme Court decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), might be read to suggest that unauthorized migrants lack constitutional protections without some showing of connections to the United States. *See id.* at 271 ("These cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."). A few decisions have taken this suggestion seriously, but they seem to be outliers. *See* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1273 (D. Utah 2003) (holding that "Ezparza-Mendoza—as a previously deported felon—lacks sufficient connection to this country to assert a Fourth Amendment suppression claim"); United States v. Guitterez, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446, at *16–18 (N.D. Cal. Oct. 14, 1997) ("The salient issue . . . is whether defendant Guitterez has developed substantial connections with this country . . . ."); Torres v. State, 818 S.W.2d 141, 143 n.1 (Tex. App. 1991) ("We do not believe that the protections of the Fourth Amendment . . . apply to such illegal aliens, unless they have developed sufficient connection with this country to be considered a part of the community.").

229. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984).

230. *Perez-Cruz* contrasts superficially with *Zadvydas*, where the threshold application of the arguably relevant constitutional provision was in doubt. *Zadvydas*, 533 U.S. at 696–97. The issue in *Perez-Cruz* was not the application of the Fourth Amendment, but rather the remedy for violations. *In re* Perez-Cruz, No. A95 748 837, slip op. at 16–18 (Immigration Ct. L.A., Cal. Feb. 9, 2009), *appeal filed*. In both cases, however, a subconstitutional decision reached a result that was more favorable for the noncitizen than a constitutional holding would have provided.

C. *Phantom Norms, Institutional Competence, and Citizen Proxies*

Phantom norm arguments are closely related to institutional competence arguments. The suppression cases that rely on phantom norms to remedy Fourth Amendment violations reflect some of the same values that underlie institutional competence arguments, such as preemption in the decisions on state and local laws. Teasing out the connection requires comparing the subconstitutional version of the exclusionary rule in *Perez-Cruz* with the constitutional remedy available if a court applied the egregious conduct exception, or if the Supreme Court abrogated the general rule in *Lopez-Mendoza*.

Regulations appear to be a less robust form of law than statutes, let alone constitutional provisions, because administrative agencies can reverse regulations without congressional involvement. In practical terms, however, regulations are more robust than they first appear in setting standards for government conduct, and thus in establishing the rights of unauthorized migrants. The key here is the value of transparency and deliberation in setting the regulatory standard, and then in preserving that standard against erosion or repeal. This is similar to a clear statement requirement, which provides that Congress may enact retroactive deportability grounds, but must do so clearly.[231] This requirement facilitates public awareness about the legislative threat and allows those concerned about retroactivity to make their objections heard. This shift from litigation to politics need not diminish—and may even enhance—the rights of unauthorized migrants in practical effect. In this regard, phantom constitutional norms are closely related to institutional competence arguments. Both types of inchoate rights rely on transparency, deliberation, and structural requirements such as notice-and-comment procedures to offer some degree of protection to unauthorized migrants.

The search and seizure cases also resume a thread on race and ethnicity from Part I's inquiry into state and local laws by showing how unauthorized migrants can use various arguments to suppress evidence from an unlawful search or seizure that may be discriminatory. Recall that equal protection challenges to laws that disadvantage noncitizens based on their unlawful immigration status

231. *See St. Cyr*, 533 U.S. at 315–17 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (quoting Landgraf v. USI Film Prod., 511 U.S. 244, 272–73 (1994))).

have little or no traction outside of access to public K–12 education. And it is very hard to sustain an equal protection challenge to such laws based on race or ethnic discrimination, because courts require proof of intent to discriminate by race or ethnicity. Some courts have instead struck down state and local laws on institutional competence grounds—especially that of federal preemption.[232]

In some situations, courts may recognize the rights of unauthorized migrants under the Fourth Amendment as an alternative to both equal protection and preemption. Like preemption, a Fourth Amendment challenge channels concerns about discrimination away from the unreceptive form of a broad challenge to a state or local policy—for example, the equal protection argument that failed in *City of Hazleton*.[233] But the law of Fourth Amendment remedies—whether based on egregious violations or regulatory violations—can recognize the improper use of race or ethnicity in ways that differ from preemption. Most significantly, Fourth Amendment remedies can rely on evidence pertaining to a single incident, not needing the broader allegations that defeating a state or local law might require.

The availability of Fourth Amendment remedies can make a difference partly because not all courts find state or local decisions preempted, but also because preemption does not apply to federal immigration enforcement at all. Those who challenge state and local laws and practices that target unauthorized migrants may try equal protection and preemption challenges that are harder to win but broader in systemic effect if successful. Or they may try a Fourth Amendment argument that may be easier to prove but narrower in its direct effect, literally limited to an individual case.

More generally, this Part's inquiry into search and seizure—like the inquiries into state and local laws and workplace rights—shows how unauthorized migrants have oblique rights that indirectly and incompletely correspond to the rights that U.S. citizens or lawful permanent residents may assert in the same circumstances. And once again, these patterns of argument reflect a degree of integration of these unauthorized migrants into U.S. society despite their formal position outside the law. But in contrast to the workplace integration that was key to the patterns discussed in Part II, the integration that matters for similar patterns in search and seizure is integration more

232. *See supra* text accompanying notes 50–61.

233. *See supra* text accompanying notes 37–42.

broadly into communities that consist of citizens and noncitizens, some of whom are in the United States lawfully, and some of whom are not.

IV. THE RIGHT TO EFFECTIVE COUNSEL

The Sixth Amendment to the U.S. Constitution does not support a right to counsel in immigration proceedings, according to long-standing precedent. The doctrinal reason is that the U.S. Supreme Court has consistently found that deportation is not criminal punishment.[234] Were the law otherwise, indigent noncitizens in removal proceedings would be appointed counsel at no cost, the same way that indigent criminal defendants are appointed public defenders.

Absent Sixth Amendment protection, any right to counsel in immigration proceedings must be based on the Fifth Amendment's guarantee of due process of law. The U.S. Supreme Court has declared as a general proposition that the Fifth Amendment applies to all persons on U.S. territory.[235] But no judicial decision has interpreted the U.S. Constitution to require as a general rule that noncitizens in removal proceedings be appointed counsel. The closest that any court has come to requiring this is the Sixth Circuit's 1975 decision in *Aguilera-Enriquez v. INS*,[236] which held that the Constitution requires the appointment of counsel if necessary for "fundamental fairness."[237] But research reveals no reported decision that has invoked this or any similar test to decide that counsel should be appointed. Reflecting the prevailing interpretations of the Fifth and Sixth Amendments, the INA and its accompanying regulations

234. *See Lopez-Mendoza*, 468 U.S. at 1038 ("A deportation proceeding is a purely civil action . . . ."); Abel v. United States, 362 U.S. 217, 237 (1960) ("[D]eportation proceedings are not subject to the constitutional safeguards for criminal prosecutions."); Galvan v. Press, 347 U.S. 522, 530–31 (1954) ("Deportation . . . has been consistently classified as a civil rather than a criminal procedure."); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) ("'Deportation' is the removal of an alien out of the country . . . without any punishment . . . .").

235. *See* Plyler v. Doe, 457 U.S. 202, 210–16 (1982) ("[T]he Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [Fifth Amendment] protection.").

236. Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

237. *Id.* at 569.

provide that noncitizens in removal proceedings have a right to counsel, but not at the government's expense.[238]

Constitutional doctrine on the right to appointed counsel seems settled, notwithstanding cogent objections voiced by many.[239] Given this clarity, the most contentious questions in recent years have involved not the presence or absence of appointed counsel but what happens when counsel is ineffective. This topic is the fourth and final inquiry of this Article: Is there a right to effective counsel in removal proceedings in immigration court? This Part shows how unauthorized migrants, whose right to counsel does not stand on equal footing with that of citizens or lawfully present noncitizens, may nevertheless assert their rights indirectly and obliquely.

One might ask how much this inquiry concerns unauthorized migrants at all, just as one might ask if examining the exclusionary rule in immigration proceedings addresses the rights of unauthorized migrants. To be sure, noncitizens who face potential removal from the United States in immigration proceedings include lawful permanent residents who may have become deportable for a variety of reasons, such as being convicted of a crime.[240] But many noncitizens in immigration court proceedings who appear to lack lawful status in the United States may nevertheless be eligible for discretionary relief resulting in lawful immigration status, including permanent residence.[241] For these unauthorized migrants, the contours of any right to effective counsel can make a big difference.

Although the right to effective counsel has great practical significance for unauthorized migrants, this inquiry differs from inquiries into state and local laws, workplace protections, and search and seizure. The difference arises in that the right to effective counsel depends more directly on the meaning of unlawful presence as a threshold issue. Part I noted that, in deciding whether subfederal laws are preempted, courts might consider that even those who clearly lack lawful immigration status may never be removed from the United

238. INA § 240(b)(4)A), 8 U.S.C. § 1229a(b)(4)(A) (2006).

239. *See, e.g.*, DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 4 (2007) (explaining problems associated with the fact that a noncitizen "will never have the right to appointed counsel"); LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 150–68 (2009) (discussing problems attributable to the absence of appointed counsel in immigration proceedings).

240. *See, e.g.*, INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

241. *See, e.g.*, INA § 240A(b), 8 U.S.C. § 1229b(b).

States. This was a key element in the reasoning in both *City of Hazleton*[242] and *Plyler*.[243] But Part I assumed generally that the noncitizens affected by the state and local laws under discussion are unauthorized migrants. Similarly, Part II assumed that the noncitizens seeking the contested workplace protections are unauthorized migrants.

The search and seizure cases in Part III are slightly different, because the core issue of suppression of evidence obtained in violation of the Fourth Amendment arises in the context of removal proceedings. In this context, unlike in the context of state and local law enforcement and workplace protections, the issue of unlawful immigration status is contested—for that is the very purpose of a removal proceeding. Part III, however, assumed that the evidence sought to be suppressed in removal proceedings is probative of alienage or immigration law status, often by tending to prove unlawful presence. This assumption frames the question as whether probative evidence should nonetheless be suppressed because the government obtained it illegally. In this sense, Part III focused on unauthorized migrants.

This Part differs from the preceding three Parts in that it is not clear that noncitizens who assert a right to effective counsel are unauthorized migrants. For this reason, the right to effective counsel is not just a right of an unauthorized migrant, but is also a right to contest that characterization. But the remedies afforded to unauthorized migrants for ineffective assistance of counsel reflect patterns of argument closely related to those discussed in Parts I, II, and III. As a result, examining the right to effective counsel leads to a more textured understanding of institutional competence and citizen proxy arguments. Examining the right to counsel thus further elucidates how the legal system conceptualizes the rights of unauthorized migrants generally.

A. Defining the Right

In 2009, questions about a right to effective counsel in removal proceedings came to a head in the case of *Matter of Compean*,[244]

242. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 531–32 (M.D. Pa. 2007), *argued*, No. 07-3531 (3d Cir. Oct. 30, 2008); *see also supra* Part I.

243. Plyler v. Doe, 457 U.S. 202, 218–19 (1982); *see also supra* Part I.

244. *In re* Compean (*Compean I*), 24 I. & N. Dec. 710 (Att'y Gen. 2009).

which prompted the rare intervention of two attorneys general of the United States, one of whom reversed his predecessor.[245] The case grew out of three separate removal proceedings in immigration court.[246] One respondent, Enrique Salas Compean, entered the United States unlawfully in 1989.[247] Fifteen years later, Compean was placed in a removal proceeding in which he sought cancellation of removal—a form of case-by-case discretionary relief that can confer lawful permanent resident status on a noncitizen present in the United States unlawfully.[248] The second respondent, Sylla Bangaly, had been lawfully admitted to the United States as a nonimmigrant but was placed in removal proceedings when he overstayed his admission.[249] The third respondent was an asylum applicant, known as J-E-C-, who was admitted to the United States for a six-month period but then applied for asylum, withholding of removal, and protection based on the Convention Against Torture.[250]

All three respondents were present in the United States unlawfully, but each claimed some form of relief that could cure the apparent lack of lawful immigration status and eventually lead to permanent residence. After receiving an adverse ruling from the immigration judge in his removal proceeding, each respondent filed a motion to reopen his case, arguing that his attorney had rendered ineffective assistance of counsel by failing to present highly relevant evidence or failing to file an appellate brief.[251] The three immigration judges denied these motions, and the Board of Immigration Appeals (BIA) affirmed all three.[252]

The immigration judges and the BIA all applied the prevailing law governing ineffective assistance claims. The regulations on motions to reopen require the respondent to offer evidence that "is material and was not available and could not have been discovered or presented at the former hearing."[253] Ineffective assistance claims can

245. *See In re* Compean (*Compean II*), 25 I. & N. Dec. 1, 2–3 (Att'y Gen. 2009) (reversing Attorney General Mukasey's order in *Compean I*).

246. *Compean I*, 24 I. & N. Dec. at 714–16.

247. *Id.* at 714–15.

248. *Id.*

249. *Id.* at 715.

250. *Id.* at 715–16.

251. *Id.*

252. *Id.*

253. 8 C.F.R. § 1003.23(b)(3) (2009).

satisfy this requirement[254] if they fulfill the procedural requirements set forth in *Matter of Lozada*,[255] a 1988 decision by the BIA. *Lozada* requires any motion to reopen for ineffective assistance of counsel to be supported by documents describing what the prior attorney agreed to do, how the noncitizen notified the prior attorney of the allegations, and whether the noncitizen filed a complaint with bar disciplinary authorities (or why not).[256]

Courts vary in their insistence on literal compliance with the procedural requirements established by *Lozada*.[257] And immigration judges' decisions to grant or deny motions to reopen for ineffective assistance of counsel are heavily fact dependent. But it has become broadly accepted that ineffective assistance is a valid basis for a motion to reopen, and the right to effective counsel is a matter not only of statute and regulation, but also of constitutional due process.[258] Due process is violated, in the phrasing of an oft-quoted decision, when assistance is "so ineffective as to have impinged upon the fundamental fairness of the hearing."[259]

This last point about a constitutional basis for a right to effective counsel might raise eyebrows, given the absence of a constitutional right to *any* counsel. *Coleman v. Thompson*,[260] a 1991 U.S. Supreme Court decision, held that if there is no constitutional right to appointed counsel in a criminal proceeding, then there is no constitutional basis for a claim of ineffective assistance of counsel.[261] Did *Coleman* eliminate any constitutional basis for a claim of ineffective assistance of counsel in an immigration proceeding? The

254. *See, e.g.*, Iavorski v. INS, 232 F.3d 124, 129 (2d Cir. 2000) ("Claims of ineffective assistance of counsel satisfy the [regulations'] general requirement[s] . . . .").

255. *In re* Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988).

256. *Id.* at 637; *see also* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 2, at 1064–77.

257. *Compare* Castillo-Perez v. INS, 212 F.3d 518, 526 (9th Cir. 2000) ("While the requirements of *Lozada* are generally reasonable, they need not be rigidly enforced where their purpose is fully served by other means."), *and* Yang v. Gonzales, 478 F.3d 133, 143 (2d Cir. 2007) (holding that "only . . . substantial compliance is necessary"), *with* Stroe v. INS, 256 F.3d 498, 501–04 (7th Cir. 2001) (upholding the BIA's denial of an alien's motion to reopen on account of his failure to comply with *Lozada*).

258. *See, e.g.*, Saakian v. INS, 252 F.3d 21, 26 (1st Cir. 2001) (holding that the immigration judge and the BIA had violated an alien's due process rights by denying his motion to reopen his asylum proceeding to raise an ineffective assistance of counsel claim).

259. Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986); *see also* Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273–74 (11th Cir. 2005) (employing functionally identical language).

260. Coleman v. Thompson, 501 U.S. 722 (1991).

261. *Id.* at 752–54.

government raised this argument unsuccessfully in the case of *Matter of Assaad*.[262] In that case, the BIA reasoned that the Fifth Amendment's Due Process Clause supported a different analysis of ineffective assistance claims than the Sixth Amendment suggested for criminal proceedings.[263] *Assaad* focused on the federal courts of appeals' consistent recognition that noncitizens have "a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents the respondent from meaningfully presenting his or her case."[264]

Those were the general contours of the doctrine when, in the last months of the George W. Bush presidency, Attorney General Michael Mukasey certified the cases involving Compean, Bangaly, and J-E-C- to himself for consolidated review.[265] The BIA found for the government in all three cases, but Mukasey chose this occasion to, as he put it, "review the Board's position on both the constitutional question and the question of how best to resolve an alien's claim that his removal proceeding was prejudiced by his lawyer's errors."[266] The result was his decision in *Compean I*, issued shortly before President Bush left office.[267]

Compean I held that "the Constitution does not confer a constitutional right to effective assistance of counsel in removal proceedings."[268] Noting that several federal appeals courts in the six years since *Assaad* had found no constitutional right to effective assistance of counsel in removal proceedings,[269] *Compean I* overruled

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262. *In re* Assaad, 23 I. & N. Dec. 553 (B.I.A. 2003).

263. *Id.* at 560 (declining to overrule *Lozada* in light of the Supreme Court's holding in *Coleman*).

264. *Id.* at 558.

265. Under the regulations governing the BIA within the Department of Justice, the Attorney General may choose to review a BIA decision. *See* 8 C.F.R. § 1003.1(h)(1)(i) (2008).

266. *In re* Compean (*Compean I*), 24 I. & N. Dec. 710, 714 (Att'y Gen. 2009) (citing Att'y Gen. Order Nos. 2990-2008, 2991-2008 & 2992-2008 (Aug. 7, 2008); 8 C.F.R. § 1003.1(h)(1)(i) (2008)).

267. Attorney General Mukasey handed down his decision on January 7, 2009, less than two weeks before Barack Obama acceded to the presidency.

268. *Id.* at 714.

269. *Id.* at 713. At the time of the *Compean I* decision, federal appellate courts had reached divergent outcomes on the matter. *Compare* Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) (holding that no such constitutional right exists), Afanwi v. Mukasey, 526 F.3d 788, 798–99 (4th Cir. 2008) (same), *and* Magala v. Gonzales, 434 F.3d 523, 525 (7th Cir. 2005) (same), *with* Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008) (holding that such claims are constitutionally cognizable), Aris v. Mukasey, 517 F.3d 595, 600–01 (2d Cir. 2008) (same), Zeru v. Gonzales, 503 F.3d 59, 72 (1st Cir. 2007) (same), Fadiga v. U.S. Att'y Gen., 488 F.3d 142, 155

Lozada and *Assaad*.[270] But *Compean I* continued: "In extraordinary cases, where a lawyer's deficient performance likely changed the outcome of an alien's removal proceedings, the Board may reopen those proceedings notwithstanding the absence of a constitutional right to such relief."[271] To reach this result, Mukasey's reasoning went through three main steps. First, deportation is civil, not criminal, so the Fifth Amendment's Due Process Clause is the source of any constitutional right to counsel.[272] Second, the performance of private counsel does not constitute "state action," which is normally required for a due process violation.[273] Third, and most directly addressing the central issue in the case, the Constitution does not guarantee counsel at all, so there is no constitutional right to effective assistance of counsel.[274]

In the fifth month of the Obama administration, Attorney General Eric Holder vacated his predecessor's decision.[275] Referring to the approach in *Lozada* and *Assaad*, Holder reasoned that *Compean I* had not "resulted in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice that had been reaffirmed by the Board in 2003 after careful consideration."[276] Holder then ordered the initiation of rulemaking procedures "to evaluate the *Lozada* framework and to determine what modifications should be proposed for public consideration."[277]

Though it is too early to predict the outcome of rulemaking, it is significant that Attorney General Holder addressed the substance of the issue by repudiating the statement in *Compean I* that "there is no constitutional right to effective assistance of counsel in removal

(3d Cir. 2007) (same), Sene v. Gonzales, 453 F.3d 383, 386 (6th Cir. 2006) (same), Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1274 (11th Cir. 2005) (same), Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003) (same), *and* Nelson v. Boeing Co., 446 F.3d 1118, 1120 (10th Cir. 2006) (same).

270. *Compean I*, 24 I. & N. Dec. at 712, 727.

271. *Id.* at 714.

272. *Id.* at 716–17.

273. *Id.* at 717–18.

274. *See id.* at 726 ("[T]here is no valid basis for recognizing a constitutional right to counsel in removal proceedings, and thus no valid basis for recognizing a constitutional right to effective assistance of privately retained lawyers in such proceedings.").

275. *In re* Compean (*Compean II*), 25 I. & N. Dec. 1, 2 (Att'y Gen. 2009).

276. *Id.*

277. *Id.*

proceedings."[278] This statement, Holder emphasized, was "not necessary either to decide the[] case under [existing law,] or to initiate a rulemaking process."[279] More fundamentally, Part IV's inquiry into the right to effective assistance of counsel does not depend on the specifics of any rules that may be adopted. My more basic purpose is to see how the approach adopted by the BIA and the majority of the federal courts of appeals that have addressed the topic sheds light on the rights of unauthorized migrants, especially in ways that add to the lessons of this Article's first three Parts.

B. Assumptions, Institutional Competence, and Citizen Proxies

The contrast between the two decisions in *Compean I* and *Compean II* is instructive because Attorney General Mukasey's abrogation of the established law governing ineffective assistance of counsel in immigration proceedings—and Attorney General Holder's repudiation of that view and his tentative deference to that set of precedents—exposes some key assumptions that underlie the law's response to ineffective assistance of counsel claims. These assumptions reflect varying views of the meaning of unlawful presence in the United States.

If many noncitizens without lawful status are allowed to stay in the United States through cancellation of removal, waivers of inadmissibility and deportability, and other forms of case-by-case discretionary relief, then a noncitizen's lack of lawful status is just the beginning of the analysis, not its end. Moreover, the grant or denial of such discretionary relief is governed by standards, factors, and other markers suggesting that this has become a question of law, at least in the sense that deviations from decisions in similar prior cases can fairly be called erroneous. If, in turn, unauthorized migrants can acquire lawful immigration status through determinations governed by legal standards, then the right to effective counsel seems essential to outcomes that are fair and just. This is true even if the decision in any given case eventually goes against the unauthorized migrant who seeks discretionary relief.

This interpretation of unlawful presence is also the basis for questioning the threshold characterization of deportation as civil, not criminal. For if there are discernable, enforceable standards that

278. *Id.*

279. *Id.*

govern the discretionary relief that can effectively legalize unauthorized migrants on a case-by-case basis, removing them from their homes in the United States seems that much closer to punishment. As James Madison once put it, "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."[280] This view of removal is bolstered by the growing practice of detaining noncitizens placed in removal proceedings, and by court decisions recognizing that detention gives rise to rights beyond those that attach in removal proceedings.[281]

What happens if the opposite assumptions prevail? What if unlawful presence is clear and dispositive, in that it dictates the ultimate result of the removal proceeding by inevitably forcing the noncitizen to leave the United States? And even if ultimate removal is not inevitable, what if discretionary relief is an act of grace that is not susceptible to correction after comparing the facts, reasoning, and outcome with prior cases? If either assumption is correct, then any right to effective assistance of counsel is not only less urgent but also less grounded in constitutional due process. Moreover, an attorney's persistence seems dilatory rather than a worthy claim of right.

Contrasting these sets of assumptions reveals some connections between the indirect assertion of rights by unauthorized migrants and the direct assertion of the right to effective counsel in immigration proceedings—at least as it appears in *Lozada*, *Assaad*, *Compean II*, and a number of federal appeals court decisions. Importantly, this comparison demonstrates that the right to effective assistance of counsel can be understood as an institutional competence argument.

If motions to reopen for ineffective assistance of counsel are rarely or never granted, then the initial decisions to arrest unauthorized migrants and put them into removal proceedings are likely to be the only decisions that matter after Congress sets up the basic categories for admission and removal. If, however, immigration judges are required to be receptive to ineffective assistance claims so that attorneys can bring supportable arguments for discretionary relief in spite of their apparently unlawful status, then ultimate

280. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Jonathan Elliot ed., 2d ed. 1836).

281. *See* Zadvydas v. Davis, 533 U.S. 678, 692 (2001) (highlighting the "serious constitutional problem arising out of a statute that . . . permits an indefinite, perhaps permanent, deprivation of human liberty").

decisionmaking power will shift away from front-line enforcement officers. Put differently, recognizing a right to effective counsel makes more meaningful the possibility that initial enforcement decisions will be tempered by what happens in immigration court.

This is a choice between two views of what constitutes institutional competence not only in deciding who must leave the United States, but even more fundamentally, in deciding what unlawful presence means. So viewed, this resembles the contrasting approaches to preemption seen in the cases challenging state and local laws. *City of Hazleton*[282] is deeply skeptical of enforcement decisions by state and local officials in ways that parallel the deep skepticism of initial determinations of unlawful presence in the right to effective counsel cases.[283]

The right to effective counsel can also be understood as a citizen proxy argument. Ineffective counsel jeopardizes the interests of the U.S. citizens and permanent residents who are close family members of the unauthorized migrants whom the government has put into removal proceedings. These close relatives are typically the individuals whose hardship must be taken into account as part of the decision on discretionary relief. For potentially viable claims of unauthorized migrants to be cut off without being presented with the assistance of competent counsel is to harm these citizens and permanent residents. This is the same indirect assertion of unauthorized migrants' rights shown to be effective in the workplace protection and search and seizure contexts.

CONCLUSION: TWILIGHT AMERICANS?

What emerges from these inquiries into four areas in which the rights of unauthorized migrants are contested? Why does any of this matter? To answer these questions, I start by drawing one obvious conclusion from this Article's four inquiries. In spite of their position outside the law, unauthorized migrants do have rights in some significant respects. They can claim partial or indirect rights in four important areas in which the ability to claim rights can matter a great deal. Unauthorized migrants are integrated into the U.S. legal system, but often their rights can be asserted only obliquely or indirectly.

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282. Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *argued*, No. 07-3531 (3d Cir. Oct. 30, 2008); *see also supra* Part I.

283. *See supra* text accompanying notes 87–92.

The four topics reveal five recurring and intertwined patterns. Some rights can be vindicated only if unauthorized migrants can either (1) question a government decisionmaker's institutional competence, (2) identify wrongdoers who are more culpable than the unauthorized migrants, (3) identify citizen proxies, (4) invoke procedural surrogates, or (5) invoke phantom norms. These five patterns are not necessarily widespread, but they have emerged enough to suggest reasoning and modes of argument that may persuade many judges in many cases, especially if pressed by advocates on facts that a particular judge finds sympathetic.

Second, these patterns of indirect or oblique rights are consistent with a national ambivalence toward immigration outside the law. Much of Justice Brennan's reasoning in *Plyler* was directed toward complicating the meaning of unlawful presence. According to his view, illegality is difficult to establish, and even noncitizens lacking an avenue to lawful status might never be removed from the United States. By definition, unauthorized migrants are in the United States in violation of the law, and yet immigration law enforcement in the United States—as it was when Brennan wrote one generation ago—still reflects widespread tolerance of immigration outside the law. This is the knowing and perhaps intentional consequence of government policy. In this setting, the U.S. legal system recognizes that unauthorized migrants cannot be relegated to true oblivion.

During oral argument in *Plyler*, Justice Thurgood Marshall asked the attorney for the state of Texas, John Hardy, whether Texas could deny fire protection to illegal aliens.[284] Apparently nonplussed, Hardy bought a little time: "Deny them fire protection?" Marshall persisted: "Yes, sir. F-I-R-E. . . . Could Texas pass a law and say they cannot be protected?" When Hardy said that he didn't think it could, Marshall pressed on: "Why not? . . . Somebody's house is more important than his child?"[285]

National ambivalence toward immigration outside the law poses some hard choices about legal protections for unauthorized migrants. What is like fire protection and what is not? Just as national policy

284. *See* Barbara Belejack, *A Lesson in Equal Protection: The Texas Cases that Opened the Schoolhouse Door to Undocumented Immigrant Children*, TEX. OBSERVER, July 12, 2007, http://www.texasobserver.org/article.php?aid=2548; *see also* Transcript of Oral Argument, Plyler v. Doe, 457 U.S. 202 (1982) (No. 80-1538), *available at* http://www.oyez.org/cases/1980-1989/1981/1981_80_1538/argument.

285. Transcript of Oral Argument, *supra* note 284.

allows unauthorized migrants to live and work in the United States, the legal system sometimes affords them remedies for maltreatment by state and local governments, for employer wrongdoing, for illegal law enforcement activity, and for ineffective representation in immigration court. And yet, in the same way that unauthorized migrants live under the threat of discretionary government decisions that could lead to their deportation, the legal system circumscribes and channels their legal rights claims. Does de facto national policy on immigration outside the law cause these patterns of oblique or conditional rights? It is hard to build a convincing case for causation. But it is safe to say that these patterns are generally consistent with U.S. immigration policy.

Third, these patterns of oblique rights are related to each other. A major purpose of this Article has been to map these connections for the first time. For example, the trend toward institutional competence and away from individual rights claims is consistent with the emergence of interest surrogates in the form of citizen proxy arguments in the workplace law context. Both citizen proxy arguments and institutional competence arguments reflect greater reliance on process, especially on transparency and on the dialogue that transparency may enable or foster. This may mean a shift of advocacy and responsibility from court litigation to the political branches. It may also initiate a shift in the debate from state and local governments to the federal government.

Fourth, these patterns suggest relationships—both doctrinal and strategic—between various types of arguments to challenge government decisionmaking. The relationships suggested by these patterns shift significantly away from the relationships that prevail when citizens challenge the government. Unauthorized migrants are vulnerable to racial or ethnic discrimination masked by laws that are facially neutral as to race or ethnicity, yet may have been enacted by a city council that was quite aware that to target noncitizens based on immigration law status—which the U.S. Constitution allows outside of public K–12 education—would be to target a population that is racially or ethnically different. The challenge that is most likely to invalidate such a local decision is not equal protection, but preemption.

In addition to shifts in doctrinal relationships that concern race and ethnicity, the patterns discussed in this Article suggest that similar shifts in other aspects of doctrine are putting advocates and decisionmakers to complex choices. In the workplace context, for

example, the key to litigation success is identifying wrongdoers who are more culpable than the unauthorized worker or U.S. citizens who will be harmed if the unauthorized worker wins an inadequate remedy. But this shift diverts attention away from the factors that might help decide whether unauthorized migrants deserve more direct recognition of their individual rights, without the workarounds that have become part of judicial decisions and litigation strategies. These patterns of oblique rights shift debate away from the moral argument for and against recognition of unauthorized migrants as individuals and as a group of unauthorized migrants. Instead, debate shifts toward viewing the unauthorized simply through the pragmatic prism of asking: How will what happens to "them" affect "us"? But it should not be surprising that this is precisely how the role of unauthorized migrants in U.S. society—though the formal law would deny their presence—reemerges as legal argument.

A final thought comes back to this Article's central thesis—that the rights of unauthorized migrants have evolved in certain patterns that reflect various aspects of a pervasive national ambivalence about immigration outside the law. The current impasse—not only with regard to what to do about immigration outside the law, but also with regard to how to even think about it—has many costs. Chief among these costs are serious impediments to addressing major challenges and opportunities that come with being a nation of immigrants. These challenges and opportunities include three foundational questions that I have addressed elsewhere.[286] I mention them here as a frame for learning from this Article's inquiry into the rights of these others.

One question is how to define immigration enforcement to reflect the sensitive exercise of discretion and to recognize that the line between legal and illegal immigration is not—and has never been—clear and impermeable. The second question is how to foster the growth of communities that can meaningfully integrate both citizens and noncitizens, including some unauthorized migrants. The third question is how to honor any obligations and expectations that emerge from the complex historical origins of immigration outside the law, and yet to also move forward in the national interest.

Answering these questions is essential if national policy is to achieve a measure of justice in immigration, where this aspiration is especially elusive because the very idea of citizenship presupposes

286. *See* Motomura, *supra* note 2.

some inequality between citizens and noncitizens. There are many obstacles that stand between the status quo and a just immigration policy. One major obstacle is the reality that unauthorized migrants are twilight Americans, with the indirect and oblique rights that this Article has analyzed. At the same time, as long as impasse persists in public debate about immigration outside the law, these patterns of oblique rights may be the inevitable consequence.