MOBILIZING UNDER "ILLEGALITY": THE ARIZONA IMMIGRANT RIGHTS MOVEMENT'S ENGAGEMENT WITH THE LAW

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ABSTRACT

Arizona has been in the news for the past few years not only for its vituperative, anti-immigrant polices, but also for the impressive immigrant rights movement that continues to spawn new coalitions and new activisms. The large numbers of cases that were and continue to be litigated and the innovative use of law to mobilize present a paradox since it is the law that constructs the "illegality" of undocumented immigrants, providing them very limited recourse to rights claims.

This paper analyzes the opportunities in existing legal doctrine for claiming rights for the undocumented. I argue that in the almost categorical acceptance of the plenary power of the Congress in immigration and the absence of a clear-cut articulation of rights for undocumented immigrants, immigrant rights advocates are faced with procedural and substantive obstacles to make legal claims. The legal opportunities that exist currently offer partial and ineffective solutions at best. I then explore what compelled legal mobilization strategies despite the lack of entitlements under immigration law and how the costs of legal strategies are mitigated by other advantages that legal mobilization provides. I suggest that activists invoked the law in various ways, not necessarily enamored by rights discourses or by an unbridled expectation in law as a means to achieve justice. The law, even with its limitations and biases, still provided avenues to curb state power and it also functioned as a symbolic, discursive, and mobilizing resource. I show that undocumented immigrants rely on legal action and rights discourse not only because of the expected diffusional effects of movements such as the civil rights and gay rights movement but also as acts of resistance and as assertions of quasi-citizenship.

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Introduction

> "The state [of Arizona is both a laboratory for the far-right as well as an incubator of this generation's vibrant human rights movement . . . hundreds of campaigns have been born challenging Arizonification and turning the tide from hate to human rights."[1]

Arizona has been in the news for the past decade not only for its vituperative, anti-immigrant polices, but also for the massive immigrant rights movement that was unleashed within its borders. In addition to political action, actors in the movement used legal action in various ways. Some of the successful legal mobilizations include overturning several of the state immigration laws passed between 2005 and 2010 in the federal courts. For example, in September 2012 in *Arizona v. United States* the U.S. Supreme Court upheld injunctions against three parts of the 2010 omnibus Arizona immigration law Senate Bill 1070 (SB 1070).[2] This included provisions that made it a state crime for immigrants to be undocumented or to solicit for work, and the draconian law that allowed for warrantless arrest if an officer *thinks* there is probable cause that a noncitizen committed a public offense (which would in turn trigger removability proceedings) ("*Arizona v. United States")*.[3]

The Supreme Court, however, upheld the section of the statute allowing police officers to check immigration status during any investigation of possible crimes (the "Show Me Your Papers" provision). This section is now being litigated as numerous cases of racial profiling and illegal detention by

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[1] Jeff Briggers, *At Supreme Court, Arizona Leaves Affected Voices at Home: Q & A With Carlos Garcia, Puente Human Rights Advocate*, *available at* Huffington Post, April 24, 2012, *available at* http://www.huffingtonpost.com/jeff-biggers/arizona-immigration-law_b_1450818.html, *archived at* https://perma.cc/HUD9-N3VR.

[2] Arizona v. United States, 132 S. Ct. 2492 (2012)

[3] S.B.1070 2010 Leg., 49th Sess. (Ariz. 2010).

law enforcement officials throughout the state have been documented.[4] Several other litigations have been initiated and won, such as human smuggling laws targeting undocumented immigrants, traffic laws preventing day laborers from soliciting for work, criminal laws that denied bond to undocumented immigrants and that made working under a false social security number a crime, and laws that discriminated against Deferred Action for Childhood Arrivals (DACA) recipients.[5]

Organizations also used legal action to resist deportations by the U.S. Immigration and Customs Enforcement (ICE). Using legal frames, activists highlighted how ICE undermined the functioning of the criminal justice system, engaged in retaliation, failed to apply prosecutorial discretion, and took actions marked by lack of oversight, supervision, accountability and procedural safeguards, all of which are essential elements of rule of law.[6] The radical group National Immigrant Youth Alliance (NIYA) tactfully used asylum law in their "Bring Them Home" campaign. They organized DREAMers to cross into Mexico and make asylum claims as they reentered the US alongside others who has been deported earlier.[7]

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[4] *See* Cortes v. Lakosky, No. CV-14-02132-PHX-JJT (D. Ariz. Dec 17, 2014) (holding in favor of Maria Cortes). This was the first federal lawsuit litigating the "Show me your papers" provision. Maria Cortes made a Fourth Amendment claim against the police deputies for prolonging her detention for 5 days after a traffic stop solely based on a suspicion that she was an undocumented immigrant. At the time of her detention, Ms. Cortes had a pending U-visa application stemming from her status as a victim of domestic violence.

[5] *See e.g.*, Valle Del Sol Inc. v. Whiting, 732 F.3d 1006, 1025–26 (9th Cir. 2013) (holding that a part of S.B. 1070, which prohibited day laborers from soliciting for work because it impeded traffic, violated the workers' First Amendment free speech right to solicit for work); We Are America/Somos America Coalition of Arizona v. Maricopa Co. Bd. of Supervisors, No. Civ 06-2816 PHX RCB (D. Ariz. Sept. 27, 2013) (holding that the federal Immigration and Naturalization Act preempted the practice of charging undocumented immigrants as conspirators under a 2005 human smuggling law); Melendres v. Arpaio, No. CV-07-02513-PHX-GMS (D. Ariz. Oct. 2, 2013)(upholding an injunction on an SB 1070 statute that made it illegal to harbor or transport undocumented immigrants on the basis that the statute violated the Fourth and Fourteenth amendment rights of Latino citizens as it constituted racial profiling); Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 777 (9th Cir. 2014) (en banc) (holding state law provision precluding bail for immigrants unlawfully present violates substantive due process); United States of America v. State of Arizona, No. CV10-1413-PHX-SRB (D. Ariz. Nov 7, 2014) (holding that a 2005 Arizona criminal statute against human smuggling infringed on the U.S. government's power to enforce immigration law); Puente v. Arpaio, No. 2:14-cv-01356-DGC (D. Ariz. Jan 5, 2015)(prohibiting the enforcement of two identity theft statutes that criminalized working under a false Social Security number, on the basis that the statutes are likely preempted under the doctrines of field and conflict preemption because IRCA already made it a civil offence to engage in such identity theft and there were other federal criminal statutes that criminalized the activity); Arizona Dream Act Coalition, et al. v. Brewer, et al. No. CV12-02546 PHX DGC (D. Ariz Jan 22, 2015) (overturning a law that denied licenses to DACA recipients).

[6] *See* Tania Unzueta Carrasco & B. Loewe, *Destructive Delay: A Qualitative Report on the State of Interior Immigration Enforcement and the Human Cost of Postponing Reforms*, National Day Laborer Organizing Network, Oct. 2014, *available at* http://transgenderlawcenter.org/wp-content/uploads/2014/10/2014-10-08-report-update.pdf, *archived at* https://perma.cc/A758-DZPY.

[7] *See* Griselda Nevarez, *150 Undocumented Immigrants To Enter U.S. In Border-Crossing Demonstration,* Huffington Post, Oct. 3, 2014, *available at* http://www.huffingtonpost.com/

The Arizona legal mobilization raises a paradox. Current constitutional law doctrine provides no clear articulation of rights for undocumented persons in the United States. Existing doctrines, such as the preemption doctrine, provide only indirect entitlements for the undocumented. When rights-based litigation does not provide much substantive assistance to undocumented immigrants, what motivates the undocumented movement actors to use the law, especially when they deem the law to be a source for their continued "illegal" status? Legal action is also costly in terms of resources and time, neither of which the undocumented population possesses. Studies show that litigation strategies have several other drawbacks such as risk of co-optation by elite lawyers, dilution and de-radicalization of the claims to fit into the legal framework, and legal victories that do not produce any lasting change.[8]

Furthermore, the predominant focus of legal mobilization has been on rights-based litigation by *citizens* who are deemed to have the "*right to have rights"*—that is, the right to claim constitutional protections from the state by virtue of their membership in the polity and their enjoyment of constitutional protections against state power.[9] The scholarship on this subject has ranged from showing the perils of relying on a "myth of rights" ideology while pushing for social and political change through the law,[10] to celebrating the myriad of ways in which legal action and rights discourse can provide resources to activists.[11]

In general, the scholarship assumes implicitly or explicitly that rights mobilization is an essential aspect of state-building and democracy, which are the prerogatives of citizens. According to legal and political theory, citizens have a claim to not be subordinated by the state and to equal protection and entitlements from the law. When these claims and legal discourses are unavailable to noncitizens, especially undocumented immigrants, it raises

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2014/03/11/bring-them-home-campaign-_n_4940897.html, *archived at* https://perma.cc/8LEC-LAPM.

[8] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 420–29 (1991) (arguing that litigation cannot bring about social change and that courts merely act as "flypaper" for social reformers who succumb to the "lure of litigation).

[9] *See, e.g.,* Reva Siegel, *The Jurisgenerative Role of Social Movements in United States Constitutional Law*, SEMINARIO EN LATINO AMÉRICA DE TEORIA CONSTITUCIONAL Y POLITICA (SELA) (Jun. 2004), *available at* https://www.law.yale.edu/system/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf, *archived at* https://perma.cc/N3BH-Q8YW.

[10] *See generally* Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61–77, 62–63 (2011) (dividing the literature on law and its capacity for social change into these two camps, the pessimistic "myth of rights" side and the optimistic strategic/symbolic side); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993).

[11] *See e.g.*, STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2nd ed. 2004); ROSENBERG, *supra* note 8 at 61–77; MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); Alan Hunt, *Rights and social movements: Counter-hegemonic strategies*, J. L. SOC'Y 325-326 (1990).

the fascinating question over why and how immigrant rights movement actors use the law.

The mobilization of legal rights by undocumented immigrants would seem to be predicted neither by extant doctrine (which defines the constitutional rights of undocumented immigrants narrowly), nor by theories of rights mobilization by social movements (which have focused on citizens). Why then, despite these factors and despite the costs of a legal strategy, have undocumented activists headed, often successfully, to the courts or undertaken other legal actions? Using the Arizona context, I show that undocumented immigrants rely on legal action and rights discourse not only because of the expected diffusional effects of movements such as the civil rights and gay rights movement, but also as acts of resistance and as assertions of quasi-citizenship.

In the next section (Part II), the paper analyzes the opportunities that extant legal doctrine provides. I argue that despite the promise of personhood-based rights in the constitution, undocumented status remains a bar to claiming inalienable rights. Successful claims have been achieved indirectly through proxy doctrines and not through an assertion of rights. Yet the immigrant rights activists have mobilized the law in novel and unique ways and have recently enjoyed success by capitalizing on the indeterminacy in legal doctrine. In Section III, I explore what compelled legal mobilization strategies despite the lack of entitlements under immigration law and how the costs of legal strategies are mitigated by immigrant rights advocates. I rely on a non-exhaustive analysis of news articles, organizational websites, news releases and public statements by the prominent organizations based in Arizona, such as *Puente Arizona, LUCHA, Arizona Dream Act Coalition (ADAC),* and publicly available statements by activists. I suggest that historical legacies and an environment that encourages litigation strategies for social movements compel the legal mobilization to an extent. Legal mobilization also provides other benefits such as media coverage, engendering a collective rights consciousness, and legitimizing the movement. Legal mobilization is also compelled by the urgency to overturn anti-immigrant laws when faced by a virulently anti-immigrant political environment. While there are costs to the legal mobilization such as resource depletion, creating false hopes of rights recognition, and sidelining radical ideas that challenge the sovereign authority of the state to decide on citizenship and deportation, legal mobilization is a necessary, but not sufficient, tactic for the undocumented when their illegality and lived reality is determined by the law. In addition, their "illegal" status can be used to wield the law as a tool of resistance.

I. Law and the Undocumented Immigrant

A. The Regime of "Oblique" Rights

Professor Hiroshi Motomura has classified legal arguments for undocumented residents to claim rights from the state or challenge anti-immigrant legislation into the following categories, all of which, he asserts are "oblique" ways of asserting rights in the legal system: a) *institutional competence* arguments that the wrong institution has passed the anti-immigrant law (the preemption doctrine); b) *comparative culpability* arguments where a citizen "wrong-doer" (such as an exploitative employer) is deemed to have committed a worse wrong-doing than the undocumented immigrants' act of being illegally present c) *citizen proxy* arguments where the rights of a US citizen are implicated by the action against undocumented immigrants d) *procedural surrogate* arguments where procedural rules are violated when adjudicating over the undocumented.[12]

To these four, he also adds a *phantom norm* argument, where courts avoid constitutional interpretation (which would make them beholden to the plenary power doctrine) and use statutory interpretation and canonical methods to provide constitutional-like protections.[13] However, the *phantom norm* argument may be subsumed under the rubric of procedural surrogate and fairness arguments because "phantom norms" are essentially inviolable principles of rule of law such as due process and fairness.[14] The paper categorizes the cases within this framework.

All the cases listed above fall easily into one of these four categories. The SB 1070 Supreme Court case, *We Are America/Somos America Coalition of Arizona v. Maricopa Co. Bd. of Supervisors, United States of America v. State of Arizona, et al,* and *Puente v. Arpaio* used the preemption doctrine to overturn state laws. *Valle Del Sol Inc. v. Whiting*, *Melendres v. Arpaio, Cortes v. Lakosky* and *ADAC v. Brewer* fall under the category of "citizen proxies" as the state laws implicated rights of citizens or legally resident aliens, such as DACA recipients. *Angel Lopez-Valenzuela v. Joe Arpaio* and detention and deportation cases were ruled on the basis of "procedural surrogate and rule of law" arguments. Despite the successes, none of these cases cemented inalienable rights for undocumented immigrants. The preemption doctrine, for example, merely asserts the plenary power of the

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[12] *See generally* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration outside the Law*, 59 Duke L. J. 1723, 1729–1761 (2009).

[13] *See* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 Fla. St. U. L. Rev. 363, 371–372 (2006) (implying Motomura's "phantom norms" are better substituted by legal canons).

[14] *See* Anna O. Law, The Immigration Battle in American Courts 219–221 (2010) (arguing that phantom norm as well as procedural surrogate explanations are motivated by "deeply ingrained commitment" to due process and procedural fairness rooted in *raison d'etre* of courts and law such thatjudges are not resorting to creative phantom norms merely to come to a pro-alien decision).

Congress to decide on the rights of undocumented immigrants. The other decisions, as I elaborate below, relied on surrogate arguments.

a. Preemption and Institutional Competence

The *Somos America* case involved the application of conspiracy statutes to the so-called "Coyote Law" that criminalized human smuggling.[15] The then-Maricopa County Attorney Andrew Thomas decided that he would charge immigrants with conspiracy to commit human smuggling for paying a smuggler, or coyote, to bring them into the country. The law became, "in effect, a deportation machine."[16] We Are America/Somos America filed a lawsuit in 2006, but the suit was ultimately thrown out on the basis that the case interfered with ongoing criminal prosecutions. After the 9th U.S. Circuit Court of Appeals reinstated it, the legal team, which included the Center for Human Rights and Constitutional Law in Los Angeles, refocused the complaint to concentrate on preemption by federal law.[17] It was successful and the court enjoined the Maricopa County Offices from further implementing policy.

Several such cases on behalf of undocumented immigrants have been won on preemption grounds.[18] These cases present a grave irony. In each of the cases, the Court relies not on notions or appeals to justice or rights but on the view that the Congress is the appropriate governmental institution to decide on the rights of the undocumented immigrant. The legal argument is not whether the undocumented have any rights to not be discriminated against, deported, or have their rights violated, but rather *which governmental institution* is constitutionally permitted to do so. The argument lacks substantive and normative bases and offers very little in the form of a rights discourse that social movements actors can latch on to. Instead it is an arid jurisdictional approach to significant human rights violations.

Nevertheless, this approach resonates well in courts. That the federal government has plenary power over immigration is a well-established legal doctrine[19] with a long historical pedigree starting from the Chinese Exclu-

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[15] We Are America/Somos America Coalition of Arizona, No. Civ 06-2816 PHX RCB (D. Ariz. Sept. 27, 2013).

[16] Michael Kiefer & Daniel Gonzalez, *Judge Bars Human Smuggling Conspiracy Charge*, The Arizona Republic, Sep 30, 2013, *available at* http://www.azcentral.com/news/arizona/free/20130930arizona-joe-arpaio-smuggling-tactic-ruling.html, *archived at* https://perma.cc/EMY4-8C5V.

[17] *See id.*

[18] *See* Kerry Abrams, *Plenary Power Preemption*, 99 Va. L. Rev. 601 (2013) (providing detailed account of the preemption and plenary doctrines in immigration). *See also* Motomura, *supra* note 12 at 1729–1745; Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N. Y. U. L. Rev. 1047 (1994); Kevin R. Johnson, *Why Alienage Jurisdiction-Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 Yale J. Int'l. L. 1 (1996); Hiroshi Motomura, Americans in waiting: the lost story of immigration and citizenship in the United States 113–144 (2006).

[19] *See* Victor C. Romero, Alienated: immigrant rights, the constitution, and equality in America 10–16 (2005); Hiroshi Motomura, *Immigration Law after a Century of*

sion cases of the late 1800s and the infamous case of *Chae Chan Ping v. United States*.[20] It is a doctrine that accords the utmost deference to state sovereignty and Congressional power and does not raise the counter-majoritarian concerns that make courts anxious. Nevertheless, at the very least, the doctrine curbs anti-immigrant policies by states by offering an opportunity, albeit limited, to challenge such laws. Immigrant rights legal advocates have extensively used the preemption doctrine to overturn state laws that target noncitizens.

Some authors suggest that the preemption doctrine extends *positive* rights to noncitizens and that there is an "immigrant equality" component in preemption doctrine.[21] The Civil Rights Act of 1870, which shepherded the doctrine into common law, was drafted to prevent states from passing discriminatory laws. Sections 16 and 17, the "alienage" provisions, prohibit states from passing laws that discriminate against noncitizens in the realm of civil and economic rights.[22] Guttentag posits that the alienage provision of the act goes beyond the language that one might expect from a separation of powers or institutional supremacy section.[23] The provision explicitly states that "*all* persons within the jurisdiction of the United States shall *have the same right*" to make contracts and get the "*full* and *equal* benefit" of all laws and proceedings for "the security of person and property *as is enjoyed by white citizens.*" There is no provision to state that Congress has the sovereign authority to *deny* existing rights. The alienage provisions were specifically drafted to protect the Chinese and other immigrants against discrimination thus establishing a proto-equality claim.[24] In 1941, *Hines v. Davidowitz* solidified the preemption doctrine in immigration cases but its use of *Yick Wo v. Hopkins,* which explicitly extended equal protection "to *all persons* within the territorial jurisdiction,*"* suggests that, even in 1941, there was an acceptance of an underlying equality claim in the doctrine.[25]

Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L. J. 545 (1990); Patrick J. Charles, *Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective, The*, 15 TEX. REV. L. POL. 61 (2010); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L. Q. 925 (1994); Clare Huntington, *The Constitutional Dimension of Immigration Federalism,* 61 VANDERBILT L. REV. 787 (2008); Abrams, *supra* note 18.

[20] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)

[21] *See* Motomura, *supra* note 12 at 1736–1745; Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870,* 8 DUKE J. CONST. L. PUB. POL'Y 1 (2012).

[22] Civil Rights Act of 1870, § 16–17,16 Stat. 140 (1870).

[23] *Id.* at § 16 (emphasis added) ("[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.")

[24] Guttentag, *supra* note 21, at 10–16.

[25] Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (holding that Pennsylvania's law requiring alien registration was preempted by federal law as it posed an obstacle to achieving Congress'

Motomura argues that the preemption doctrine is in fact a decent substitute, albeit oblique, for individual rights arguments based on equal protection. He justifies its application on two grounds. First, he argues that equal protection arguments are difficult to win in general because of the need to show discriminatory intent. Preemption arguments, which lack such a requirement, have fared better in courts. Second, he argues, preemption doctrine reflects a "reliance on the political process" where the courts assume that one would expect greater "transparency and deliberation in a larger federal policy arena with a more complex array of counterweights" than in state or local decision-making.

But for immigrant rights advocates, it is the federal political process and both Congressional action and inaction are the source of the problem. Indeed, the federal government has not been a reliable proponent of implicit or explicit equality norms regarding undocumented immigrants. The lack of a rights-conscious federal immigration system has welcomed undocumented immigrants as a source of cheap exploitable labor where the workers can be deported readily when political or policy exigencies demand it.[26] This has consistently allowed undocumented labor migration to appease business interests, especially those of the strong agricultural industry.[27] Congress passed the 1986 Immigration Reform and Control Act (IRCA) to resort to guest workers programs, while making undocumented labor "illegal." The move created more precarious temporary immigration statuses, reduced the mobility of undocumented workers, and further encouraged the production of a low-wage, exploitable underclass of workers.[28] Federal-level trade agreements increased the undocumented population; scholars have argued that they have uprooted livelihoods in other countries (specifically, Mexico), and made it more difficult for Central Americans to cross borders.[29] Policies which create stratified immigrant groups—by privileging certain undocu-

goals); *See also* United States v. Arizona, 132 S. Ct. 2492, 2501–02 (citing *Hines v. Davidowitz* in holding); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[26] *See generally* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 91–166 (2004); CINDY HAHAMOVITCH, NO MAN'S LAND: JAMAICAN GUESTWORKERS IN AMERICA AND THE GLOBAL HISTORY OF DEPORTABLE LABOR 237–239 (2011).

[27] Gerald P. Lopez, *Don't We Like Them Illegal*, 45 UC DAVIS L. REV. 1711 (2011).

[28] *See* Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 UNIV. MICH. J. L. REFORM 737 (2002); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud,* 18 IMMIGR. NAT'LITY. L. REV. 643, 689–690 (1997).

[29] *See* Patricia Fernández-Kelly & Douglas S. Massey, *Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 98–100 (2007) ("The privatization of Mexico's collective farms under neoliberalism and the elimination of agricultural subsidies under NAFTA also increased the number of displaced peasants seeking economic opportunities elsewhere. The combination of continued pressures for emigration and increasingly restrictive border policies had a profound effect on patterns and processes of Mexico-U.S. migration. Although migrants continued to arrive at the border and cross into the United States, they did not return to Mexico in the same numbers as before. Instead, unauthorized migrants reduced cyclical movements to spare themselves the greater costs and risks of reentry after 1986. The reduction in return migration led, in turn, to unprecedented accretions to the Mexican population living north of the border.").

mented residents over others based on their economic viability, willingness to join the military, and conformity to conventional, assimilationist 'good immigrant' archetypes—remains dominant.[30] Congress has been unable to pass Comprehensive Immigration Reform and pending legislation continues to perpetuate stratified immigration policies.[31] S.744, the U.S. Senate's endorsed solution to fix the broken federal immigration system, planned to only further institutionalize temporary statuses with its "Registered Provisional Immigrant" (RPI) status and massively increased funding for border security.[32] Thus, the fact that the Court accedes to Congress's judgment through the preemption doctrine is of little solace to undocumented immigrants and those eager to see reforms.

Additionally, the plenary power doctrine may prevent immigrant law devolution to states that may provide more expansive rights to noncitizens. Examples of such constructive devolutions include the creation of "sanctuary" areas that would provide the same services to all residents (irrespective of citizenship status), and the resistance by several cities and mayoral administrations to local police collusion with federal enforcement of deportation laws or the Patriot Act.[33] Relying on a separation of power doctrine instead of a rights framework prevents the formulation of such distinctions between state laws.

The Supreme Court in the past has been careful to retain a residual jurisdiction to limit the Congress' plenary power in immigration.[34] After all, the U.S. Constitution does not expressly grant Congress the power to regulate immigration (it only grants the power to decide on naturalization).[35] The limits vary depending on both the rights involved (procedural rights are given less deference than substantive rights) and the class of noncitizens involved (documented immigrants versus the undocumented; noncitizens within the country versus those at the border).[36] However, any purported limits have not been clearly articulated and the doctrine has generated a

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[30] As exemplified in various immigration law bills proposed over the years, including the DREAM Act. *See* Development, Relief, and Education for Alien Minors ("DREAM") Act, H.R. 6497, 111th Cong. (2010); S. 3992, 111th Cong. (2010). *See also* LINA NEWTON, ILLEGAL, ALIEN, OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM 89–103 (2008); NGAI, *supra* note 26, at 57;KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (reviewing the history of exclusion and removal of the poor, political and racial minorities, the disabled, gays, and others).

[31] E.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

[32] *Id.* at § 2011–2103.

[33] *See* ROMERO, *supra* note 19, at 192–197.

[34] *See, e.g.,* Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (holding the Congress' plenary power is subject to "important constitutional limitations"); INS v. Chadha, 462 U.S. 919, 940–41 (1983) (holding implementation of the Congress' plenary power is limited to "constitutionally permissible means"); Landon v. Plasencia, 459 U.S. 21, 32-35, 37 (1982) (recognizing due process rights of a legal permanent resident returning to the United States).

[35] *See* T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, 192 (6th ed. 2008); U.S. CONST. Art. I, § 8, cl. 4 ("The Congress shall have Power. . . [t]o establish an uniform Rule of Naturalization")

[36] *See* Motomura, *supra* note 12.

plethora of literature trying to identify the sphere of rights that noncitizens have.[37]

Zadvydas, for example, raised the question of the constitutionality of indefinite detention of removable immigrants. The majority conceded that if the Court were to find a *clear congressional intent* to grant the Attorney General the power to indefinitely detain an alien, whose removal has been ordered, the Court would be required to give it effect.[38] The plenary doctrine has generated much scholarship criticizing the Court's refusal to review Congressional immigration policies, thereby creating a state of "immigration exceptionalism," which remains a legacy of the xenophobic Chinese exclusion cases from the late 1800s.[39]

It is therefore difficult to share Motomura's optimism about the preemption clause. It has been a capricious and blunt sword, if indeed a sword at all. Several of the successful preemption cases were made on split-decision, and various levels of the courts have differed in their decisions on whether to find preemption or not.[40]

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[37] *See id.*; Charles, *supra* note 19; Legomsky, *supra* note 19; Slocum, *supra* note 13; Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty,*51 CATH. U. L. REV. 1115 (2001); Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEOR. INQ. LAW 389–410 (2007); Bosniak, *supra* note 18.

[38] *Zadvydas*, 533 U.S. at 696.

[39] *See* Susan Bibler Coutin, Justin Richland & Veronique Fortin, *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous under U.S. Law*, 4 U.C. IRVINE L. REV. 97 (2014); Stephen H. Legomsky, *Fear and loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (1999); Saito, *supra* note 37; Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 19 IMMIGR. NAT'LITY. L. REV. 3 (1998); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965 (1993); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny,* 1988 IMMIGR. NAT'LITY. L. REV. 115 (1988); *see generally* DAN KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007). Some scholars, however, claim that the doctrine is nearing its demise, especially following the few rulings where the Court overturned legislation such as in *Zadvydas* or the recent case of Padilla v. Kentucky, 559 U.S. 356 (2010). *See* Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 67 OKLA. L. REV. (forthcoming 2015); Peter L. Markowitz, *Deportation is Different*, 13 UNIV. PA. J. CONST. L. 1299 (2010); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2001).

[40] *E.g.*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (upholding Arizona's Legal Arizona Workers Act against a preemption claim that revoked business licenses of companies that knowingly hire undocumented workers and mandated employers in the state to use a federal electronic system to check that their workers are authorized to work); *see also* De Canas v. Bica, 424 U.S. 351 (1976) (holding that a California law imposing fines on employers of undocumented immigrants was not preempted); Plyler v. Doe, 457 U.S. 202 (1982) (exemplifying a divided court and multiple rationale); Arizona v. United States, 132 U.S. 2492 (2012); Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008) (upholding the state law that revoked the business license of employers who hire undocumented immigrants and authorized the use of E-Verify). *But see* Lozano v. Hazleton, 496 F. Supp. 2d 477, 540–41 (M.D. Pa. 2007)(holding the City's law prohibiting employment of unauthorized aliens and precluding them from renting housing within the City was preempted).

b. Citizen Proxy

Some cases have been won on the basis that certain laws that discriminates against the undocumented also adversely affect US citizens. Sherrif Joe Arpaio's immigration sweeps and traffic stops of Latinos were aimed at hunting down and deporting undocumented immigrants.[41] In practice, his policies involved the profiling and harassment of the entire community of Spanish speakers in his county. U.S. citizens and legally present Latinos mounted a challenge by successfully arguing that the actions of his police force constituted racial profiling and it violated their 4th and 14th amendment rights. Melendres, one of the plaintiffs, was a retired schoolteacher from Mexico who was arrested while he was in a truck carrying day laborers. He spent nine hours in custody without charge even when he showed his valid US visa. He was therefore an apt class representative to show racial profiling.

In addition to finding that Arpaio's actions violated the rights of US citizens and those who were legally present, the court also made rulings that *directly* protected undocumented immigrants. The court ruled that police deputies do not have authority to enforce Federal civil immigration law, since being undocumented did not constitute a crime. The police had to have had a reasonable suspicion that an *actual* crime had been committed before it could engage in a search and seizure activity. The injunction ordered the police force to include training, monitoring, and recording its searches so that the court could monitor the force. Though *Melendres* was won on the basis of the impact on citizens, the outcome ameliorates the conditions for undocumented residents, and the court, in this case at least, was enthusiastic about riding on the coattails of citizen rights to articulate rights that undocumented immigrants are considered to equally possess.

Citizen proxy reasoning at least has the virtue of acknowledging the pernicious effects of anti-undocumented immigrant laws on entire communities. For example, Kitty Calavita describes the production of an "economics of alterité" by immigration law where the migrant workers' location in the host economy doing unwanted labor reproduces "otherness," racialization, and marginalization that mark their entire community with "the ugly stigma" of poverty and illegality. Many of the sectors that the undocumented workers work in, like agriculture, function under "pre-fordist" models of employment immunized from collective bargaining and government labor regulations associated with industrial employment.[42] These conditions

[41] Joe Arpaio is the elected sheriff of Mariposa County, Arizona, who became notorious for his virulent anti-immigrant stance and enforcement of anti-immigrant laws against the undocumented and Latino population. *See* Rachel Kleinman & Benjamin Landy, *Immigrant-rights Advocates Sue Maricopa County Sheriff Joe Arpaio*, MSNBC (Jun. 2014), *available at* http://www.msnbc.com/msnbc/immigrant-rights-advocates-sue-maricopa-county-sheriff-joe-arpaio, *archived at* https://perma.cc/Q3H9-WBRQ.

[42] *See* Kitty Calavita, *Law, Citizenship, and the Construction of (Some) Immigrant "Others,"* 30 Law Soc'y. Inquiry 401–420, 414–15 (2005).

perpetuate a specific stigmatized image of "third-world migrants" that legitimizes the unequal rights of entire communities with cultural and ethnic ties with the Global South. In California, for example, the "Save Our State" movement created a discourse about the threat to the welfare state from the fertility of undocumented Latina women that led to Proposition 187, which would have denied pre-natal care and other social services to undocumented women.[43] The political rhetoric also served to stigmatize and discriminate against Latina women who were citizens.

The success of citizen proxy claims also resonates with political institutions given the population of Latinos in the country and their increasing influence on electoral outcomes. Citizen-proxy arguments can hence serve as a shield for courts and legislatures to pass transformative laws for noncitizens without producing an anti-immigrant backlash. Undocumented immigrant advocates such as *Puente Arizona,* specifically highlighted the fact that the entire community of Spanish-speakers were affected by Arpaio's action, which arguably spurred the Department of Justice to launch an investigation and a subsequent lawsuit on the basis that Arpaio's activities constituted unlawful conduct under the First, Fourth, and Fourteenth Amendment, as well as Title VI of the Civil Rights Act.[44] Similarly, equal protection claims have had success in cases such as *Lozano v. City of Hazleton,*[45] when the plaintiffs were able to show that citizens were adversely affected by the regulation. Citizen proxy claims thus constitute an important way for undocumented workers to *indirectly* claim equal right protection.

However, there are limitations to using citizen proxy claims, as the citizen groups that are affected are often themselves subject to institutional marginalization. Structural racism has been institutionalized through decades of racialized outcomes of welfare, economic, criminal, and immigration laws that have targeted the ethnic communities from which undocumented workers originate. The strength of equal protection laws have corroded over the years, and a finding of impact discrimination is no easy feat, especially for citizens from racialized and marginalized communities. In the *SB 1070* case, the Supreme Court allowed the section of statute that required police officers to check immigration status during any investigation of possible crimes, because there was no "evidence" of racial profiling, even though it seemed fairly obvious that the impugned section would encourage racial profiling. It has taken several years and extensive resource deployment for organizations to collect documentation on disparate impact even in Arizona, where there are explicit policies that facilitate the racial profiling of Latinos. It was only in December 2014 that Maria Cortes won the first federal lawsuit against the

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[43] Leo R. Chavez, *A Glass Half Empty: Latina Reproduction and Public Discourse*, 63 Hum. Org. 173, 173–174 (2004).

[44] Puente v. Arpaio, No. 2:14-cv-01356-DGC (D. Ariz. Jan 5, 2015).

[45] Lozano v. City of Hazleton, 496 F. Supp.2d 477 (M.D. Pa. 2007) (striking down local law penalizing employers of undocumented immigrants and requiring proof of immigration status to obtain housing).

impugned legislation.[46] Lastly, citizen proxies do not directly address the stratification between citizens and noncitizens that forms the core grievance of immigrant rights groups.

c. Comparative Culpability Cases

Courts often rely on a demonstration of *greater* culpability from flagrant violations of the law on the part of citizens or institutional perpetrators to "minimize" the "culpability" of undocumented immigrants stemming from their illegal status. The implicated actions are deemed to affect the moral fabric of the United States. Arpaio's actions, for example, are considered so egregious that even those with traditionally anti-immigrant sentiments have been unable to support his actions. U-visa applications, for example, have been successfully made on the basis that the undocumented immigrant has been a victim of a crime, which is morally more culpable than the civil wrongdoing of being undocumented.[47]

The precarious, vulnerable status of undocumented workers increases their potential to be subject to coercion and exploitation. It is not surprising that many such exploitation claims are made on their behalf. However, such legal claims are usually individualized and offer limited opportunity for collective action. Nevertheless, for immigrant rights activists, highlighting the inhuman exploitation of undocumented immigrants form an important part of their advocacy work. By showing the systematic nature of the oppression, they are able to "collectivize" the issue, even as the court relies on individualized remedies.

It should be noted that such claims focus on extreme forms of abuse, such as slavery, child labor, and bonded servitude, and can normalize anything but extreme rights violations and can desensitize the public to the everyday, lived realities of undocumented workers. As Jennifer Gordon points out, "most immigrants do not work in conditions of slavery, but . . . many labor 12, 14, even 16 hours a day to make ends meet."[48] Such claims paradoxically can also result in an *increase* in the coercive power of the state to control the lives of undocumented immigrants and to close borders, especially when anti-immigrant groups use cases of exploitation to construct a

[46] Cortes v. Lakosky, No. CV-14-02132-PHX-JJT (D. Ariz. Dec 17, 2014).

[47] *See* Garcia v. Audubon Cmty.'s Mgmt., LLC, No. 08-1291, 2008 WL 1774584, (E.D. La. Apr. 14, 2008) (certifying the plaintiffs as victims of crime for U-Visa purposes since the plaintiffs had made a *prima facie* case showing that they had been victims of involuntary servitude). The court found that the defendants engaged in a "pattern of conduct . . . to force the plaintiff-employees to work by taking advantage of the plaintiff-employees undocumented immigration status." The living conditions the plaintiffs "were forced" to endure, included needing "to find food in the trash" and other humiliations. *See also* Joey Hipolito, *Illegal Aliens or Deserving Victims: The Ambivalent Implementation of the U Visa Program*, 17 Asian Am. L.J. 153 (2010); Jennifer J. Lee, *Outsiders Looking in: Advancing the Immigrant Worker Movement through Strategic Mainstreaming*, 2014 Utah L. Rev. 1063, 1079 (2014).

[48] Jennifer Gordon, Suburban sweatshops: the fight for immigrant rights 15 (2005).

narrative that undocumented workers are willing to work under any conditions at the expense of citizen's wages and employment.[49]

They also produce a particular racialized, victimized image of the undocumented immigrant. Such an image may be counter-productive to mobilization for claims that undocumented immigrants are no different from citizens and are deserving of equal rights of citizenship. The uphill battle faced by immigrant rights groups to counter the stereotype of the undocumented immigrant (as either the exploited worker or the accomplished DREAMER) is emblematic of this dynamic.[50] However, organizations such as *Puente Arizona* are able to maintain the depiction of the will and dignity of the worker, even as they were highlighting his or her exploitation. For example, in describing the impact of Arpaio's raids that resulted in the dehumanization and deportation of several undocumented workers, *Puente* maintained the message of the workers' industriousness, dignity, and concern for their families and communities.[51] The discourse has tremendous potential in organizing; however, in a law setting, the cases are still predicated on both the assumption that the undocumented immigrants are culpable (even if of a lesser crime), and on the construction of racial, and often gendered, stereotypes.

d. Procedural Fairness and Rule of Law Norms

Courts respond more positively to procedural and due process arguments than to substantive rights arguments. Habeas corpus, freedom from indefinite detention, and retroactive laws, for example, are rooted in long-held legal traditions, and the Court has not shied from ruling against the other two federal branches when such interests are implicated, despite the plenary power doctrine.[52]

Courts have considered such claims to be the bastion of the justice system over which they have sole jurisdiction. As Susan Silbey states: "In modern, pluralistic democracies, due process, treating like cases the same, and equality before the law—the foundations of legal liberalism—name the most widely shared and philosophically sustained conceptions of justice."[53] In her analysis of immigrant rights litigation across the globe, Catherine Dauvergne finds that the "rule of law" doctrine has played a significant role in protect-

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[49] *See* Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 Am. J. Int'l. L. 609 (2014); Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 Harv. Latino L. Rev. 129, 172–174 (2012).

[50] *See e.g.*, *A Conversation with DREAMer Julio Salgado,* CultureStr/ke, *available at* http://culturestrike.net/julio-salgado-and-favianna-rodriguez-at-la-pena (last visited Aug. 21, 2015) (describing how the organization Dreamers Adrift sought to "humanize a crisis so often obscured in statistics and stereotypes"), *archived at* https://perma.cc/SJW7-D4X7.

[51] *See infra* Section III.

[52] *See* Brian G. Slocum, *Courts vs. the Political Branches: Immigration Reform and the Battle for the Future of Immigration Law*, 5 Geo. J. L. Pub. Pol'y. 509 (2007); Legomsky, *supra* note 19.

[53] Susan S. Silbey, *After Legal Consciousness*, 1 Ann. Rev. L. Soc. Sci. 323. 325 (2005).

ing and expanding rights for migrants, asylum-seekers, and other noncitizens.[54]

Movement actors have relied on these basic legal principles to highlight the egregious actions of ICE and the violations of basic procedural norms in deportation proceedings.[55] In Angel Lopez-Valenzuela v. Joe Arpaio, using principles long established in law about the constitutional limits on pretrial detention, the 9th Circuit Court of Appeals overturned Proposition 100, which denied bail for undocumented immigrants (or if there was probable cause that they entered or remained illegally) so long as there is a "great" presumption or "evident" proof that a "serious felony" (which includes driving under the influence and all Class 1, 2, and 3 felonies).[56] The 9th Circuit Court of Appeals found that the Proposition impinged on a fundamental right: "[f]reedom from bodily restraint," which "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[57] The Court found that the Propositon's infringement effects were not justifiable as they do not address an acute problem, nor were its provisions narrowly tailored. In a separate opinion, Judge Nguyen even acknowledged that "Proposition 100 was intentionally drafted to punish undocumented immigrants for their 'illegal' status" and then affirmed that "intentionally meting out pretrial punishment for charged but unproven crimes, or the nonexistent crime of being "in this country illegally," is without question, a violation of due process principles."

While this case appears to imply the inviolability of certain legal principles, both the district courts and the 9th Circuit Court of Appeals originally upheld Proposition 100, and it was only the 9th Circuit Court of Appeals sitting en banc that overturned the law in a divided decision. The dissent followed the same reasoning as the Supreme Court in *Demore v. Kim*[58] and the dissent in *Zadvydas* (including Justice Kennedy) by underscoring that the Supreme Court has repeatedly endorsed the proposition that noncitizens may be subject to rules that would be unacceptable if applied to citizens.[59] The dissent in Angel Lopez-Valenzuela (just like the dissent in *Zadvydas*) was quick to find that "illegal aliens" as a group lack community ties and pose a flight risk. It was therefore entirely reasonable for the legislature to deprive aliens of their liberty by denying bail, which would have been accorded to citizens. The scathing dissent, which resembled Justice Kennedy's dissent in Zadvydas, displays a stubborn unwillingness to adopt its rights-protecting role when it comes to noncitizens by conveniently claiming to cede to the "democratic" will of the majority. The dissent notes:

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[54] Catherine Dauvergne, Making People Illegal: What Globalization Means for Migration and Law 175–184 (Reprint ed. 2009).

[55] Carrasco and Loewe, *supra* note 6.

[56] Ariz. R. Crim. P. 7.2(b).

[57] Lopez-Valenzuela v. Joe Arpaio, D.C. No. 2:08-cv-00660-srb at 17 (Oct 15 2014).

[58] 538 U.S. 678 (2001).

[59] *See id.* at 522 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

> It is quite another for an Article III court to tell Arizona, based on this record and considering the majority vote of the Arizona legislature and electorate in favor of Proposition 100, that its perceived problem is not really a problem.[60]

Undoubtedly, the Court's concern to not impinge on the democratic will expressed by legislative acts is not limited to noncitizens' rights cases. Furthermore, procedural fairness and certain rule of law principles are indeed deeply enshrined within the legal system as rights of *all* persons and are not necessarily even dependent on the Constitution. In the cases of noncitizens, however, such basic rights are still refracted through the plenary doctrine and the notion of significantly more stringent constitutional protections for citizens. The willingness to accept the *unacceptable* for noncitizens raises serious concerns about the vulnerability of noncitizens to have even basic legal rights stripped from them.

When the historian E.P. Thompson made his case for how law can be used by social movements to challenge existing power structures, he relied on the presence of basic legal inviolable principles that can be used to curb state power.[61] If these principles stand on shaky ground for noncitizens, then one wonders how even such so-called inviolable claims can offer a robust, principled defense of the basic rights of undocumented people.

Thus, even in the latter two categories (comparative culpability and essential rule of law norms), which ostensibly protect undocumented people and all noncitizens, courts have been ambivalent, in practice, as suggested by the often-equivocal character of their decisions.

B. Equal Amendment: Noncitizens and "We, the People"

At its core, the claim of the undocumented immigrant rights social movement is one of equality with citizens, the "right to have rights."[62] Undocumented immigrants claim that, like citizens, they reside in the country, are part of their community, study, teach, work, and engage in political and economic activities. Except for the absence of "papers" that provide them with legal status, their ties and the historical context of US immigration provide a sufficient basis for citizenship *and* equal protection claims. The Constitution, they argue, reflects this notion as well.

While immigration law seeks to stratify people into citizens and noncitizens, constitutional law is more complex. On the one hand, it is informed by a strong nationalistic sentiment of membership and citizens' rights. On the other, it recognizes that certain significant rights such as due process and

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[60] Lopez-Valenzuela v. Joe Arpaio, D.C. NO. 2:08-cv-00660-srb (Oct. 15, 2014).

[61] E. P. Thompson, *The Rule of Law (From "Whigs and Hunters")*, in THE ESSENTIAL E.P. THOMPSON 432–442 (Dorothy Thompson ed., 2001).

[62] Hannah Arendt, IMPERIALISM: PART TWO OF THE ORIGINS OF TOTALITARIANISM 296–98 (1968).

equal protection are based on personhood, not citizenship status, providing a basis for noncitizens to claim rights.[63]

As early as 1886, the Court in *Yick Wo v. Hopkins* overturned San Francisco's facially neutral laundry ordinances that discriminated against Chinese immigrants on the basis that they violated the Fourteenth Amendment because they were "applied and administered" with "an evil eye and unequal hand."[64] The Court unambiguously stated that "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens" and went further to explicitly state that the "rights of every citizen" must be considered "equally with those of the strangers and aliens" who invoke the jurisdiction of the Court. After *Yick Wo,* equal protection in general went into effective desuetude with the separate-but-equal doctrine and Japanese internment cases such as *Korematsu v. United States*.[65]

In 1971, *Graham v. Richardson* reinvigorated a newer legal opportunity when the US Supreme Court ruled that "aliens" are a prime example of a "discrete and insular" minority for whom "heightened judicial solicitude is appropriate."[66] The case dealt with an Arizona law that circumscribed the federal welfare assistance programs to citizens or those with 15 years of residence.[67] However, *Matthew v. Diaz,* which also dealt with federal assistance for lawfully present aliens, soon closed that door.[68] The case dealt with a *federal* law that provided Medicare only to those aliens who were permanent residents and who had resided in the US for at least five years. The appellants were Cuban refugees. Justice Stevens, speaking for a unanimous Court, in no uncertain terms held there was *no* presumption of universal equality. He writes:

> In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens . . . . [T]he fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."[69]

The Court could not have been more unambiguous about the lack of entitlement to equality when it held aliens could not have any claim to share in the "bounty" that the United States was only extending as a "conscientious sovereign."[70] Certain rights, nonetheless, have been considered to have

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[63] *See* Bosniak, *supra* note 18; *see generally* Thomas Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in FROM MIGRANTS TO CITIZENS?: MEMBERSHIP IN A CHANGING WORLD 151-152 (Thomas Alexander Aleinikoff & Douglas B. Klusmeyer eds., 2000).

[64] *Yick Wo*, 118 U.S. at 373–74.

[65] 323 U.S. 214 (1944). *See also Takahashi v. California Fish & Game Commission,* 334 U.S. 410, 419 (1948) (using the preemption doctrine to validate California's anti-Japanese discriminatory laws).

[66] 403 U.S. 365, 372 (1971).

[67] It should be noted that the appellants were lawfully present aliens.

[68] Matthew v. Diaz 426 U.S. 67, 79–80 (1976)

[69] *Id.*

[70] *Id.*

universal application because they attach to personhood, not citizenship. Because of the broad and inclusive language of the 14th Amendment, it was presumed that Equal Protection is one such right. But it has had only limited application for noncitizens. Indeed, certain classes of aliens have better recourse to equal protection claims, specifically children and legally resident aliens, including DACA recipients.[71]

Employment and labor has traditionally been an arena in liberal states where rights are attached to personhood. However, employment and labor rights are pervaded by the same "citizen proxy" ethos (described above), since the contraction of employment rights of the undocumented population would affect the rights of citizens. A cheap and exploited labor source depresses the wages of citizens and diminishes their employment opportunities and workplace conditions. This externality is epitomized in Justice Robert Jackson's words in *Pollock v. Williams* when he declared "no indebtedness warrants a suspension of the right to be free from compulsory service."[72] He continues:

> When the master can compel and the labourer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, *but every other with whom his labor comes in competition*.[73]

Thus, noncitizens become subject of employment protection only because courts believe that it ultimately benefits *citizens*. However, even employment rights for the undocumented are vulnerable to being extirpated. In *Hoffman Plastic Compounds, Inc. v. NLRB,* the Supreme Court ruled that undocumented workers are not elgible for backpay as they were working "illegally."[74] The Court reneged on a right that all liberal states claim to protect and the US's own obligations under the International Labor Organization's 1998 *Declaration on Fundamental Principles and Rights at Work*.[75] Even if *Hoffman* can be only limited to the rights under the National Labor Relations Act (NLRA), it affects the organizing of undocumented workers.

Alienage classifications and alienage rights are more blurry than the Constitution suggests. Although the notion of alienage rights presupposes a separation between an unbridled state power to decide who can get into the country and a limited state power to decide on the rights of those within the

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[71] *See* Kevin R. Johnson, *Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 Univ. Miami Inter-Am. L. Rev. 263, 274–279 (1996); Aleinikoff, *supra* note 63, at 168; *see also* Arizona Dream Act Coalition (ADAC) v. Brewer, D.C. No. 2:12-cv-02546- DGC, 21-22 (Dec 3, 2013)

[72] Pollock v. Williams, 322 U.S. 4, 25 (1944).

[73] *Id.* Emphasis added.

[74] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).

[75] *See* Garcia, *supra* note 28, at 752–53; *see also* Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 Cornell J.L. & Pub. Pol'y 611 (2011).

country, there is more convergence than separation, and alienage classification serves more to exclude than to include.[76] In effect, the plenary doctrine ensures the sovereign rights of the Congress to limit the rights of even personhood-based rights of noncitizens when the Congress chooses to privilege membership in the form of citizenship or legal status over personhood.[77]

C. Restrained Courts, Ambivalent Laws, and Active Advocates

It appears evident that undocumented residents have no inherent rights in the American legal system except in those cases where a comparative culpability argument can be made or in instances of basic procedural fairness cases. Their rights are derivative either based on procedures and technicalities that are essential principles of the legal institution or from the rights of US citizens, and they often depend on the capricious benevolence of the court. Although there has been a long tradition of alienage rights,[78] they have been framed not as *entitlements* but as derivative *privileges*. Immigrant rights in courts have been won on technicalities of due process or preemption as opposed to on the basis of inviolable rights such as equality or dignity (unlike rights to same-sex marriage, for example). It is the State that determines the conditions under which immigrants can reside in the US; governmental sovereignty is sacrosanct. As Peter Schuck states: "immigration law remains the realm in which government authority is at the zenith and individual entitlement is at its nadir";[79] immigration law has been described as a "constitutional oddity."[80] Throughout history, the "beneficence" of state institutions towards noncitizens has been capricious, based not on substantive aspects but on arbitrarily created categories.[81]

Professor Motomura aptly reflects that it is a "construct of the law itself that places [undocumented US residents] outside the law."[82] Historical legacies and nativist, exclusionary immigration laws have decided who is and who is not "illegally" resident. Thus, immigrant advocates emphasize it is the immigration laws themselves, not the undocumented immigrants, that are "outside the law"; the governmental right to determine the illegality of persons is considered a sovereign right of the *state,* and in its determination, the state is not bound by any higher order principles. This stands in direct contrast to the notion of a liberal, rights-protecting state. As Carlos Garcia, the Executive Director of *Puente Arizona,* profoundly states: "[The narrative of

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[76] Bosniak, *supra* note 18.

[77] Romero, *supra* note 19, at 167–169.

[78] Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership (2008).

[79] Peter H. Schuck, *The Transformation of Immigration Law*, 84 Columbia Law Rev. 1 (1984).

[80] Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, Sup. Ct. Rev. 255, 255 (1984)

[81] *See* Ian Haney-López, White by law: the legal construction of race 56–61 (1996)(describing arguments by appellant in Ozawa v. United States, 260 U.S. 178 (1927)).

[82] Motomura, *supra* note 12, at n.2.

illegality of undocumented persons] ignores the illegality of racial profiling, unconstitutionality of ICE holds, the denial of indigenous sovereignty along the U.S.-Mexico border, and the violations of civil and human rights in the name of enforcement . . . ."[83]

That is not to say that the laws cannot change to acknowledge the realities of migration especially in the US-Mexican border. After all, the 14th Amendment lay moribund until 1938 when Justice Stone's famous footnote 4 in *Carolyn Products* hinted at a broader role for equal protection. He opined that judicial scrutiny should be heightened where prejudice against "discrete & insular" minorities was implicated. And it was only in 1954 that Equal Protection was injected a new life with the seminal case of *Brown v. Board*. But, the *Brown* decision was a product of its times, influenced by the change in attitudes, economy, and political climate post-World War II and during the Cold War.[84] Accordingly, Motomura makes an important point: so long as there is national ambivalence about undocumented migration, the ambivalence will be reflected in the law.[85] As *Hoffman Plastics* shows, undocumented immigrants occupy a precarious space where even their rights under long-established legal traditions could be revoked at any time. Thus, it is more likely that legal action will not provide any better outcomes for immigrant advocates than what they can expect from Congress.

In courts and social change scholarship, two opposing viewpoints characterize courts as either "constrained" institutions bound to the interests of the majoritarian regime and hegemonic elites,[86] or as "dynamic" institutions capable of bringing about substantial expansion of rights for groups marginalized by other branches of government. In the immigration sphere, *prima facie,* courts appear to firmly fall under the first characterization. Courts are reluctant to extend any rights except through oblique means and have been capricious and unpredictable. Courts are comfortable ruling in the realm of separation of powers or established rights for citizens, which do not involve extending or recognizing rights of undocumented noncitizens. In immigration proceedings, the courts see their role, not as meting out justice, but in bringing states in conformity with federal values.[87] Under these circumstances, legal institutions appear to offer little opportunity for the undocumented rights movements to create new norms of citizenship.

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[83] Carlos García, *Not 1 More Means Not One More*, PUENTE MOVEMENT, Nov. 22, 2014, *available at* http://puenteaz.org/blog/not1more-means-not-one-more/, *archived at* https://perma.cc/CR6Y-9QRS.

[84] *See* Michael Klarman, *An Interpretive History of Modern Equal Protection,* 90 MICH. L. REV. 215 (1991); ROSENBERG, *supra* note 8.

[85] *See* Motomura, *supra* note 12, at 1783.

[86] *See* ROSENBERG, *supra* note 8; see generally RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS (2009); Klarman, *supra* note 84; Tushnet, *supra* note 10.

[87] *See generally* Keith E. Whittington, *"Interpose your friendly hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POLIT. SCI. REV. 586–87 (2005); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POLIT. DEV. 37–45 (1993).

However, despite the pessimism in court-based legal reform, legal action can still provide grist for organizing and mobilization as the immigrant rights advocacy has shown. Legal forums can still function as a place to mitigate the worst excesses of the political branches. Moreover, while the indeterminacy and inconsistency can be frustrating as it prevents a clear-cut articulation of rights, the very indeterminacy can also provide a space for *contesting* the meaning of rights. Social movement actors can capitalize on doctrinal indeterminacy and historical inconsistencies of application to argue for progressive meanings of the law.[88] Indeed, the success of the contestation is not as significant as its ability to raise rights consciousness, mobilize people, and produce public debate, which can arguably create more changes in the undocumented communities than what even a legal decision can produce.[89]

The Constitution requires us to ask at all points in history about who constitutes "the People."[90] From time to time, the definition has changed from including certain groups (including undocumented noncitizens) and excluding others, such as racialized citizens.[91] Scholars argue that all noncitizens, even legal immigrants, are considered to be on "probation," and can be removed once they are no longer considered "desirable" in the economy or social community.[92] Other scholars, however, argue that this characterization of non-citizens as being in perpetual probation does not have historical continuity. There have been times in the past, when immigrants were treated as "Americans-in-Waiting," who would have most of the rights of citizenship as they transitioned in their status.[93]

Immigration policies raise moral and legal dilemmas as they produce contradictions between the liberal principles of equality and dignity and the sovereign rights of state, both of which are embodied in the Constitution. These contradictions can support a plurality of understandings of rights and claims for a much larger sphere of rights for all noncitizens. Victor Romero, for example, argues that the constitution should be read using the tenets of "anti-essentialism" and "anti-subordination" to curb government action that privileges dominant groups.[94] Importantly, such contestations do not exist only in the realm of legal scholarship and lawyers' actions. Social movement advocates also engage in the process of articulating alternative narratives of

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[88] *See* Scheingold, *supra* note 11, at xxviii.

[89] For an analysis of positive externalities of legal mobilization *see* McCann, *supra* note 11.

[90] *See generally* Romero, *supra* note 19, at 69–91.

[91] *See* Motomura, *supra* note 18; Ngai, *supra* note 26; Kanstroom, *supra* note 39; Aleinikoff, *supra* note 63; Klarman, *supra* note 84; Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, Am. Hist. Rev. 1442–1445 (1998).

[92] Edward J. W. Park & John S. W. Park, Probationary Americans: contemporary immigration policies and the shaping of Asian American communities 1–5 (2005); *See also* Kanstroom, *supra* note 39.

[93] Motomura, *supra* note 18.

[94] Romero, *supra* note 19; *see also* Bill Ong Hing, Deporting our souls: values, morality, and immigration policy (2006); Motomura, *supra* note 18 (discussing arguments based on various constructions of constitutional and moral political ethos)

rights and membership. The motivation of their activism certainly extends beyond mere legal reform or a mythic belief in the power of rights and laws.

II. Law and the Social Movement: Using the Law to Challenge "Illegality"

While legal mobilization is not without costs, there are compelling reasons why Arizona advocates resort to the law. In the following sub-sections, I suggest certain plausible explanations for the legal mobilization based on an analysis of interviews, websites, and public statements by Arizona immigrant rights advocates.

There are many plausible reasons for use of legal strategies by the immigrant rights movement in Arizona that are supported by legal mobilization theories. The movement had no choice but to use courts defensively to overturn the anti-immigrant laws that were being passed by the Arizona legislature and to resist deportation actions by ICE and the police. In addition, interviews and public statements by immigrant rights groups display the profound influence of the civil rights movement, which, for at least some actors, includes the potential for courts to affirmatively declare rights that the legislature is not yet willing to accept. Legal mobilization can also serve other purposes such as providing a space for subordinated groups to publicly air their grievances and bring them to the notice of public actors by drawing media attention. The language of law and rights also serves as a symbolic resource that was used to generate new meanings of rights for noncitizens, and to "perform" actions that are usually derived from citizenship status such as making constitutional claims and civic engagement. In addition, law was also used strategically even by radical and subversive groups.

A. Path Dependency and the Civil Rights Legacy

According to social movement theory, movements select tactics from a "repertoire of contention" which is socially determined.[95] In this structurally deterministic perspective, protest actions are shaped by a "society's sense of justice" which the tactic can appeal to, their knowledge and prior experience of the tactic, and the "forms of repression they are likely to face."[96] Certain tactics endure because of their success rate and because of the meaning they hold for its public audience. Bloemraad and Provine compared the US and Canada and found that historical legacies of framing rights can shape current rights claims for immigrants and noncitizens. The US has a deeply entrenched tradition of individual civil rights, with political movements and

[95] Sidney G. Tarrow, Power in movement: social movements and contentious politics 30–32 (2nd ed. 1998); Jeff Goodwin & James M. Jasper, *What do Movements do?*, in The social movements reader: cases and concepts 213–219 (Jeff Goodwin & James M. Jasper eds., 3rd ed. 2015).

[96] Goodwin and Jasper, *supra* note 95.

interest groups alliances shaped around civil rights discourse.[97] Courts-based strategies, which were central to this tradition, thus have resonance with the American public.

Additionally, literature on the diffusion of tactics and strategy across social movements identify the following mechanisms through which mobilization diffuses: shared personnel between the movements, shared identity or structural and cultural similarities, political opportunity structure created by a successful legal mobilization, and purposive emulation. For the last mechanism, the "adopters" perceive their issues and identity as similar to the "transmitters" and believe that they will have success with the adoption of the tactic.[98]

Purposive emulation of the civil rights movement is evident in the narratives of the immigrant rights movement actors. DREAMers in Arizona and elsewhere were personally inspired by the civil rights movement tactics and skillfully used civil rights frames to garner legitimacy and mobilize.[99] Legal action, along with civil disobedience, was an important tactic in the repertoire of civil rights movements, and is epitomized in the seminal case of *Brown v. Board of Education*, which has since provided the precedent and legal opportunity for equality claims for several marginalized groups. The Arizona Dreamers selected May 17, 2010, the anniversary of *Brown v. Board of Education*, to stage a sit-in at the office of Senator McCain.[100]

The undocumented rights movement similarly used tactics from the gay rights movement, in their "coming out" actions to transform the narrative of "illegality."[101] The National Immigrant Youth Alliance used public "outings" to condemn the activities of ICE, thus combining political action with mobilizing legal rights. Leti Volpp demonstrates how such coming out demonstrations "disrupt[ ] the regime of enforced invisibility" and constitute an assertion and recognition of their "right to have rights."[102]

Rooted in the civil rights movement, there are several established public interest legal organizations that now provide material support to the immigrant rights movements. Such organizations include the ACLU, MALDEF, National Immigration Law Center (NILC), amongst others.

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[97] *See* Irene Bloemraad & Doris Marie Provine, *Immigrants and Civil Rights in Cross-National Perspective: Lessons from North America*, 1 J. Comp. Migr. Stud. 47–51 (2013).

[98] Sarah A. Soule, *Diffusion Processes within and across Movements*, in The Blackwell Companion to Social Movements 294–310 (David A. Snow, Sarah A. Soule, & Hanspeter Kriesi eds., 2004); David S. Meyer & Steven A. Boutcher, *Signals and Spillover: Brown v. Board of Education and Other Social Movements*, 5 Persp. Polit. 83–84 (2007).

[99] *See* Claudia Anguiano, "Undocumented, Unapologetic, and Unafraid: Discursive Strategies of the Immigrant Youth Dream Social Movement," 180–184 (June 2011) (unpublished Ph.D. dissertation, University of New Mexico) (on file with University Libraries, University of New Mexico).

[100] *Id.*

[101] *See* Cristina Beltrán, *"Undocumented, Unafraid, and Unapologetic" DREAM Activists, Immigrant Politics, and the Queering of Democracy*, in Transforming Citizens: Youth, New Media and Political Participation (Danielle Allen & Jennifer Light eds., 2015).

[102] Leti Volpp, *Civility and the Undocumented Alien*, in Civility, Legality, and Justice in America, 93 (Austin Sarat ed., 2014).

These organizations continue to offer support to the undocumented rights movement in the best way they know how: through the use of litigation as a strategy for mobilizing rights, even when there is no active involvement by actual social movement constituents. Public interest legal organizations like the NAACP and ACLU have stayed true to their mission, and have spearheaded suits on behalf of undocumented immigrants across the country.[103]

Brown v. Board was litigated when the Equal Protection clause had been lying dormant before the Supreme Court for decades. Indeed, *Plessy v. Fergusson* was still good precedent. While misgivings about racial classification were being expressed in the Japanese internment cases, there was still no good precedent for *Brown v. Board*.[104] The NAACP and Thurgood Marshall's use of litigation as a tactic to achieve desegregation shows that there is a historical legacy of appealing to legal institutions even when there is limited legal opportunity. The use of the law by the immigrants' rights movement, to generate a discourse of rights or to litigate existing laws, is therefore expected within this culture, *even when the legal opportunity structure militates against the tactical choice.* McCann and other scholars have shown that it is not the likelihood of success, but the presence of movement organizers desiring to use litigation as a tactic, that determines its usage in social movements.[105] A supportive "political and legal ethos," and the availability of necessary resources, automatically mitigate towards legal strategies irrespective of legal doctrine or law-in-the-books.

B. Using All Means Possible: Legal Mobilization as a Defensive Tactic

Using the principle of "attrition through enforcement," Arizona used a legal regime to create laws to make Arizona so inhospitable for undocumented immigrants that they would voluntarily leave the state. Put differently, law was used as a means to discipline and regulate the population and to consolidate the state's power. It is but natural that advocates would challenge the laws that subordinated them. The Arizona Legislature's actions were arguably so exceptional, that even existing doctrine provides enough leeway for advocates to legally challenge and undermine them.

Being forced to show your papers is a profoundly dehumanizing, humiliating, and disempowering experience. As one undocumented activists states: "It's like being invisible, like being no one . . .. . No one takes you

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[103] Ben Jealous of the NAACP is quoted as likening the "show me your papers" provision of Arizona's law to the time when free blacks had to carry documents when traveling across states or else face the threat of being forced back into slavery. *See* Elise Foley & Sabrina Siddiqui, *Arizona Immigration Law Fight Continues For Civil Rights Groups*, HUFFINGTON POST, July 2, 2012, http://www.huffingtonpost.com/2012/07/02/arizona-immigration-law-civil-rights-fight_n_1641679.html.

[104] Klarman, *supra* note 84.

[105] SCHEINGOLD, *supra* note 11 at xxxi; *See also* MCCANN, *supra* note 11 at 279–80; CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 2–6 (1998).

into account if you don't have documents to back you up."[106] When the lack of papers has immediate repercussions of detention and deportation, it generates an urgent need to attack the laws in all ways possible. *Puente Arizona* decided to file the lawsuit in *Puente v. Arpaio* after families approached the organization seeking help.[107] They were deeply anxious that the felony charges from the workplace raids would render them ineligible for any future relief from immigration reform, including a possible path to citizenship. It was imperative for Puente to look for all possible ways to prevent the felony charges. Puente and other immigrant rights groups had but limited power to influence the Arizona Legislature; challenging the laws in courts was the best strategic option. *Puente v. Arpaio* was then initiated with the help of the ACLU-Arizona Chapter. While immigrant rights advocates won many of the lawsuits arising out of Arizona's conduct it was too late for those apprehended before the legal successes, and the lawsuits were costly and resource-heavy.

C. Legal Mobilization for Building Communities, Story Telling, and For Media Coverage

A cursory search of news media reveals the extent to which the lawsuits against Arpaio and Mariposa County received coverage. From local newspapers to international news outlets such as *The Guardian, Al Jazeera, BBC,* the media has extensively reported on the lawsuits in Arizona.[108] Organizations like *Puente* had an active media campaign, which utilized blogging, YouTube videos, Twitter, radio, and other means to tell the stories of undocumented immigrants.[109] Some of the publicity would arguably have been generated solely with political mobilization, even in the absence of lawsuits

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[106] Valeria Fernandez, *Arizona: A Hotbed of Pro-Immigrant Change*, Al Jazeera, Nov. 20, 2014, *available at* http://www.aljazeera.com/indepth/features/2014/11/arizona-hotbed-pro-immigrant-change-20141119105320424427.html, *archived at* https://perma.cc/UY9W-BJAG.

[107] *See* Kleinman & Landy, *supra* note 41.

[108] *See e.g.*, Associated Press, *Joe Arpaio Racially Profiled Latinos in Arizona, Judge Rules*, The Guardian, May 25, 2013, *available at* http://www.theguardian.com/world/2013/may/25/joe-arpaio-latinos-arizona-judge, *archived at* https://perma.cc/B4EV-ZXF4; Karen McVeigh, *Arizona's sheriff Joe Arpaio Faces Civil Lawsuit Over Rracial Profiling llegations*, The Guardian (Jul. 17, 2012), *available at* http://www.theguardian.com/world/2012/jul/17/arizona-sheriff-joe-arpaio-lawsuit?CMP=twt_fd, *archived at* https://perma.cc/8XFN-HYU6; Lisa De Bode, *Judge Blocks Sheriff Arpaio's Workplace Raids of Undocumented Workers*, Al Jazeera America (Jan. 6, 2015), *available at* http://america.aljazeera.com/articles/2015/1/6/arpaio-blocked-fromraidingundocumentedworkersinarizona.html, *archived at* https://perma.cc/C2XW-36UN; "US Sheriff Joe Arpaio 'discriminated against Hispanics,'" BBC, http://www.bbc.com/news/world-us-canada-16210204 (last visited Sep. 7, 2015).; *see also* Marc Pitzke, *Roadtrip: Sheriff Arpaio steht in Arizona vor Gericht - Südwesten der USA: Recht, Ordnung, Arizona*, Der Spiegel, (Jul. 28, 2012) *available at* http://www.spiegel.de/politik/ausland/road-trip-sheriff-arpaio-steht-in-arizona-vor-gericht-a-846708.html (Translation: "The state in the southwest has the sharpest immigration law of the United States and a sheriff who Latinos chasing and prisoners placed in chains. Too bad: Now he stands himself in court."), *archived at* https://perma.cc/A288-SVSQ.

[109] *See e.g.*, Puente Arizona Channel, Youtube https://www.youtube.com/user/Puenteaz; Puente Movement, Instagram https://instagram.com/PuenteMovement; Puente Arizona,

and legal narratives. But the lawsuits provided an important attraction for media coverage.

In one example, Carlos Garcia, the Executive Director of *Puente*, confronted Maricopa County Attorney, Bill Montgomery, publicly to demonstrate how Arpaio's raids were violating basic rights of workers such as being charged with class four felonies for forgery and identity theft, and held without bail.[110] He described how they were subject to "regular strip-searches, violent conditions, abusive detention officers, and inedible rations," and how the deplorable conditions led the workers to sign plea agreements and plead guilty to class six felonies (which automatically made them removable). He pointed out that these workers will never see their families again; they will also never get to avail of their right to plead in their immigration cases. His arguments forced Montgomery in the video to commiserate with the families who are being ripped apart by his county's laws. In short, Carlos Garcia used a legal rights discourse to legitimate the claims of the undocumented persons against *Arpaio*.

In addition, the lawsuits provided opportunity for several immigrants to narrate their experiences to the media and to legal institutions during the litigation. In *Puente v. Arpaio*, Puente submitted several affidavits, albeit anonymous, of its members who were knowingly transgressing the law as they had used somebody else's Social Security number and green card to obtain employment.[111] Many of the lawsuits served the function of "coming out" for undocumented workers as they told their stories in the form of affidavits and depositions.

The Not1MoreDeportation Campaign also provided another forum for undocumented immigrants to narrate their stories. In the absence of legal aid, *Puente Arizona* trained their members to convincingly tell their stories so that they could appeal successfully to the discretion of the officer in their deportation case.[112] Their training campaign has been very successful as evi-

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TWITTER, https://twitter.com/PuenteAZ; Arizona Dream Act Coalition Channel, YOUTUBE https://www.youtube.com/user/TheADACTube.

[110] Stephens Lemons, *Bill Montgomery's Apartheid Policies Challenged by Puente's Carlos Garcia in Videotaped Confrontation, Phoenix New Times*, PHOENIX NEW TIMES, May 4, 2013, *available at* http://www.phoenixnewtimes.com/blogs/bill-montgomerys-apartheid-policies-challenged-by-puentes-carlos-garcia-in-videotaped-confrontation-6501307, *archived at* https://perma.cc/W9F7-FPFB.

[111] Puente Arizona v. Arpaio, NO. CV-14-01356-PHX-DGC (D. Ariz) (holding that there is credible case of prosecution under the impugned statute that criminalizes identity theft done with the intent to obtain or continue employment on the basis of affidavits from three of Puente's members declaring that "that he or she is living in Arizona, is an active member of Puente, and has used the social security number and green card of another to obtain his or her current job")

[112] *See* Carlos García, Address at Boalt Hall University of California Berkeley (Mar. 10, 2015); *see also Carlos García, Not 1 More Means Not One More*, PUENTE MOVEMENT, Nov. 22, 2014, *available at* http://puenteaz.org/blog/not1more-means-not-one-more/, *archived at* https://perma.cc/PBQ5-7H46. ("We organize to stop deportations through a combination of legal advocacy, political pressure, storytelling, and community organizing. Since January 2013, we have successfully helped families stop nearly 100 deportations. If you or your loved one are in detention or have an active deportation case, call us at . . . .");

denced by the numerous deportations the organization has managed to thwart.[113] Research suggests that using legal forums as a stage to narrate their stories generates a rights consciousness that spurs community mobilizations.[114] The public nature of the legal narratives increases cohesion as actors find solidarity and inspiration in each other's stories.

The examples show how important the language of rights and the law can be for subordinated groups, even as they are being subordinated by the law. Several critical race theorists have clarified how the language of legal entitlements can be a powerful tool even while resisting the law.[115] As Patricia Williams eloquently states, "[The] concept of rights . . . is the marker of our citizenship, our relation to others [and rights] is the magic word of visibility and invisibility, of inclusion and exclusion, of power and no power." The process of articulating legal rights is a powerful mobilizing tool, even if legal forums offer limited recourse for relief.

The *SB 1070* case is also used as a symbol to organize demonstrations and keep the mobilization alive. In April 2015, movement organizers used the anniversary of the case to mobilize demonstrators to gather at the Arizona State Capitol and march towards the jail to fight for the removal of ICE officers from county jails.[116] Although *SB 1070* did not deal with ICE deportations, its symbolic significance provides a mobilizing tool for movement actors to mobilize for other causes that challenge established ideals of nation-state boundaries and border control. Movement organizers thus used the law to "raise the expectations and channel the energies" of those who are aware of their subordinated, unequal status, just like the organizers of the pay equity movement and other movements.[117]

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[113] Valeria Fernandez, *ICE Dismisses Dozens of Deportation Cases in Arizona*, ALTERNET, Jul. 17, 2013, *available at* http://email.alternet.org/immigration/ice-dismisses-dozens-deportation-cases-arizona, *archived at* https://perma.cc/P2ML-X6XF.
("Carlos García, Director of PUENTE, said that engaging the public and putting a human face on these cases has helped close about 40 cases related to Arpaio's immigration sweeps. PUENTE is now working to replicate this strategy in other deportation cases. 'We use the same strategy of telling the story and giving the public something to do so they can help . . . . We show ICE that these are not criminals; we show that they're families like the Figueroas.'")

[114] *See* Francesca Polletta, *Contending Stories: Narrative in Social Movements*, 21 QUAL. SOC. 434–438 (1998) (describing how story-telling sustains movements); Beltrán, *supra* note 101 (describing narratives by DREAMERs and how it influenced their activism); *see generally* Kathryn R. Abrams, *Performative Citizenship in the Civil Rights and Immigrant Rights Movements*, in A NATION OF WIDENING OPPORTUNITY: THE CIVIL RIGHTS ACT 50 (Ellen Katz & Sam Bagenstos eds., forthcoming 2015) (describing the various functions of telling one's stories which included, raising consciousness, finding energy and solidarity, and performing citizenship).

[115] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 164 (1991); *see also* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RIGHTS-CIV. LIB. LAW REV. 323, 333 (1987) ("The dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color.").

[116] *See* Judson Tomaiko, *Protesters March on SB 1070 Signing Anniversary*, AZ CENTRAL, Apr. 23, 2015, *available at* http://puenteaz.org/blog/protesters-march-on-sb-1070-signing-anniversary, *archived at* https://perma.cc/2HLE-VQ6G.

[117] MCCANN, *supra* note 11 at 279–80.

D. Legal Mobilization as a Subversive Tactic?

Use of the law by radical groups like "The National Immigrant Youth Alliance (NIYA)" offers a different lens to understand various ways in which law and rights can be wielded. Their "Bring Them Home" Campaign was intended to highlight the increased deportations by the Obama Administration and to find a way bring back the deported to the US. It started in July 2013 with the "DREAM9" which consisted of nine undocumented activists who had lived in the US for most of their lives.[118] Three of the activists voluntarily crossed into Mexico from the US to join the remaining who had already left the United States for Mexico—one had been deported to Mexico and the rest had returned compelled by economic, political, and family reasons. The nine activists claimed asylum or humanitarian parole as they crossed the border to re-enter the US, while chanting "undocumented, unafraid" and "bring them home."[119] On September 2013, NYIA enacted another similar border-crossing with 30 undocumented members. A third action in March 2014 brought 150 deportees and undocumented families back into the US.[120] Both pro and anti-immigrant groups condemned their actions, with allies criticizing their actions for being counter-productive for legal reform.[121]

Abdullahi, one of the NYIA organizers, has stated that NYIA's objective is to "disorganize the organized," to cause some "chaos" amongst those who cannot see past the status quo, and to bring families together, to stop deportation, and to empower undocumented leaders.[122] Their official mission statement is to "empower, educate, and *escalate*." NYIA rejects the legitimacy of state institutions and their capacity to produce any meaningful change for the undocumented so long as borders and nation-state paradigms exist. Yet, they used the available asylum law as a *means* of resistance and subversion. They performed civil disobedience through protest actions to discredit the status quo and disrupt accepted state-border paradigms, and then they used the law by following existing legal channels to claim asylum.

The use of asylum law by the deported was not hidden. If anything, it was public and confrontational. Many of them expected to face severe retaliation from the government and they did not expect their asylum claims to be successful. Of the 250 participants who had planned to cross the border, 100 people dropped out because of the stress and emotional trauma of knowing

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[118] Volpp, *supra* note 102.

[119] *Id.;* Roque Planas, *Undocumented Youths Stopped Crossing Border Back to U.S. in Immigration Protest* Huffington Post, July 22, 2013, *available at* http://www.huffingtonpost.com/2013/07/22/undocumented-border-protest-nogales_n_3636946.html, *archived at* https://perma.cc/2UQ4-HJKX.

[120] Joaquina Weber-Shirk, *Deviant Citizenship: DREAMer Activism in the United States and Transnational Belonging*, 4 Soc. Sci. 583 (2015).

[121] *Id.*; Volpp, *supra* note 102.

[122] Diana Bryson Barnes, *"Bring Them Home" Undocumented Activism: Week One in Otay*, NACLA (Mar. 15, 2014), *available at* http://nacla.org/news/2014/3/15/bring-them-home-undocumented-activism-week-one-otay, *archived at* https://perma.cc/HLJ6-GZA3.

that they may be detained and jailed for an extended period of time, and then possibly deported back to Mexico.[123] While their stated inspiration is the Student Nonviolent Coordinating Committee (SNCC) from the civil rights movement, their tactic is remarkably innovative. In the earlier examples described in sections IIIA-C, advocates relied on law's *power* and not its *weakness*. Legal institutions provide a forum where their claims can be contested. Advocates relied on law's authority to curb state power. They also used the law as an institutional and cultural resource because of law's power to legitimize certain discourses and its capacity to generate a rights consciousness from claims for legal entitlement. In contrast, NYIA, did not rely on asylum law to provide for rights or to legitimize their claims. The law was merely *a tool* for them to conduct their broader subversive campaign.

The NYIA has engaged in many such acts of insurgency, aimed at shaking the binaries of the "deserving" and "undeserving" immigrants. For example, they sought to get themselves arrested in order to "infiltrate" detention centers and help detainees claim prosecutorial discretion in their deportation claims. Admittedly, all their acts required a baseline of acceptance of such tactics by the public and a baseline of laws that can provide a means of resistance. As shown by their strategies, even a tiny opening in the law can provide a forum for radical protest actions against hegemonic powers.

III. What did Mobilization Achieve?

Law and social change theory present two competing views on the consequence of social movements' use of legal action. Under one view, legal strategies and rights frames reinforce existing hegemonies, de-radicalize the message and identity of social movements, deplete limited resources, and legitimize and reinforce unjust systems. They are ineffectual because courts privilege hegemonic elites and lack institutional capacity to fulfill collective aims.[124] On the other hand, law and rights can be deployed in "counter-hegemonic" ways to "refashion" the elements constituting the "prevailing hegemony" and can aid political mobilization.[125] Legal challenges can be used to question, and even delegitimize, socially normalized but exclusionary practices and generate new understandings of social statuses.[126] Under which rubric does the legal mobilization by immigrants rights groups fall?

Evidently, tangible results were achieved in the successful cases, which were essential to provide relief to undocumented immigrants. In his public

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[123] *See id.*

[124] Albiston, *supra* note 10; Rosenberg, *supra* note 8; Tushnet, *supra* note 10.

[125] Hunt, *supra* note11; McCann, *supra* note 11. For examples of legal mobilization by subordinated groups from other parts of the world, *see* Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in Law and globalization from below: Towards a cosmopolitan legality 1 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005).

[126] Albiston, *supra* note 10.

statement after *Puente v. Arpaio*, Carlos Garcia, the Executive Director of Puente, affirmed that the case had far-reaching consequences:

> This is an enormous victory for our community . . . . Arpaio and Montgomery are being stripped of the tools they use to illegally terrorize immigrant workers and families . . . . We hope that justice will continue to prevail; that not one more worker is arrested for providing for his or her family and that the racist, anti-immigrant machine for which Arizona is known is dismantled completely.[127]

Puente members who were directly affected by the raids expressed similar sentiments. Noemi Romero was arrested in a raid in 2012. For her, the lawsuit was a political action taken *on behalf* of her community so that the community would not suffer any more. It was representative political action and an act of self-governance.

> When I was led away from my job in handcuffs, I never thought I would see the day that we took Arpaio and Montgomery to court instead of the other way around. . . . We lost our fear and made this lawsuit happen, and now others in our community won't have to suffer like we did.[128]

In addition, making claims in the courts would have empowered many undocumented immigrants to confront the law and their fears of asserting rights publicly. Kathryn Abrams illustrates how legal action can be a tool in organizing through its ability to generate "reciprocal" emotions—feelings of connection with others who have the same grievance.[129] The community and rights consciousness generated by the process serves future organizing and mobilization efforts as well.[130]

Some argue that the *United States v. Arizona* Supreme Court decision on SB1070 has served to prevent other states from adopting similar egregious laws. They demonstrate that the strength of the mobilization has served to highlight the deficiencies in the political process and has forced the executive to take action. As Muzaffar Chishti from the Migration Policy Institute speculates: "It made a huge milestone and stopped many states from enacting laws like that and in a way unleashed another track: *more and more pro-immigrant measures*."[131]

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[127] De Bode, *supra* note 108

[128] Rory Carroll, *Judge Blocks Sheriff Joe Arpaio's Raids on Undocumented Workers in Arizona,* The Guardian, Jan. 5, 2015, *available at* http://www.theguardian.com/us-news/2015/jan/06/sheriff-joe-arpaio-blocked-judge-raids-unconstitutional, *archived at* https://perma.cc/39TR-K2MJ.

[129] Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 Harv. C. R.-C. L. L. Rev. 551, 573 (2011).

[130] *See id.* at 566–570, 581, 585. For a description of how the process of narrating one's story and "coming out" influenced political action by DREAMers and other undocumented immigrants, *see* Abrams, *supra* note 114; Volpp, *supra* note 102; Beltrán, *supra* note 101.

[131] Fernandez, *supra* note 106 (emphasis added).

On the other hand, others argue that the Arizona laws changed the threshold of what is acceptable, and it has pushed the political debate on immigration further to the right in spite of the litigations. The "show me your papers" section of SB1070 is still valid; deportations continue to increase even if the focus of ICE has changed; ICE continues to use novel, unscrupulous methods to deport; federal programs such as "Secure Community" continue to be used to detain and deport undocumented immigrants. However, while these examples may attest to the limited impact of legal victories, there is nothing to suggest that legal mobilization had an adverse impact on deportation.

Furthermore, the activists wanted more than merely winning the case: they desired an explicit articulation of their rights and a change in the power structure, which was far from being achieved. For example, Carlos Garcia was emphatic about what the SB 1070 mobilization is about:

> The voices that need to be heard in the SB 1070 debate are those of the people directly placed in the bill's crosshairs. Our community is tired of being a political football that politicians on both sides kick around to score points for their own reelection. [. . .] Immigrants are not valuable simply because we grow the crops in this country. [We need to recognize] immigrants' humanity and our capacity of visionaries who under the hardest of circumstances are rescuing democracy and justice from agents of intolerance in the state.[132]

Instead, many of the cases were won on the basis of jurisdictional competence using the preemption doctrine, where Arizona is merely proscribed from actions that are the purview of the Federal government. While Arizona's laws were being overturned, the Federal government maintained its policies of stratifying immigrants, criminalizing them, and compounding their exploitation and precariousness. As Garcia explains:

> Arizona's human rights crisis could be solved by the president with a stroke of a pen. Instead the administration sues states like Arizona for passing immigration policies, and then replicates the state's model through its own programs like Secure Communities. You cannot legalize immigrants while criminalizing the immigrant community. Until the federal government abandons the failed experiment of enlisting police as "force multipliers" in immigration and begins earnest efforts to provide legalization, the human rights crisis in the state and across the country is bound to deepen.[133]

Also, while the successes were met with general enthusiasm, immigrant advocates recognized that it is too late for thousands of undocumented immi-

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[132] Briggers, *supra* note 1.
[133] *Id.*

grants who had been deported over the past years.[134] Since many were charged with a felony, they may be unable to ever return to the US. For many advocates, justice has not been entirely served. The systemic issues that criminalize and maintain the undocumented immigrant's precarious, "illegal" status remain untouched:

> While today's court ruling is undeniably a victory, real justice will come when the victims of Arpaio see their rights fully vindicated. At a bare minimum, the White House should respond by immediately suspending deportations throughout Maricopa County.[135]

Legal decisions (and government policies) favoring one group of immigrants over the other produces a divisive, exclusionary, and de-radicalizing message that could affect the movement. The National Immigrant Youth Alliance (NIYA) point out that in the name of immigration reform, the government and powerful business lobby groups have successfully "channel[ed] the energy of the 'immigrant rights' movement into a non-threatening 'comprehensive immigration reform' package designed 'from above.'"[136] This sentiment is shared by organizations like *Puente Arizona* as well. Nevertheless, the presence of solidarity between the various organizations in Arizona suggests that the movement can be resilient in the face of divide-and-conquer strategies under some contexts.

Another argument against legal mobilization is that the legal successes may also create an impression of immigrant rights protecting courts when an examination of the legal reasoning belies this hope. The impression may lull social movement actors into a sense of false security, and relying purely on constitutional litigation can de-radicalize the movement goals because only individual, short-term remedies are achieved.[137] However, elite lawyers and national civil rights organizations would be more susceptible to such enduring faith in the legal system; there is no evidence to suggest that all the other social movements actors in Arizona were singularly impressed by the successes of litigation, as the public statements referred to above show. If anything, protest actions intensified and radicalized through the period. Lawyers draw meaning from lawsuits as they consider courts to be the chief authors in determining rights; but movement actors understand that the law's hegemonic force determines their "illegal" status, and rights are articulated "on the ground" by the undocumented persons themselves. Legal action is merely one of several tactics.

In general, there may be a risk of co-optation by national organization and legal groups if their support is top-down and alienated from the organiz-

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[134] *See* Kiefer and Gonzalez, *supra* note 16.

[135] Fernandez, *supra* note 106.

[136] David Feldman, *Whose Immigration Reform?*, 4 Rev. Droits L'homme 10 (2013).

[137] *See* Rosenberg, *supra* note 8; Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 Am. J. Soc. 305–306 (2003).

ing efforts.[138] But such risk of co-optation would arguably occur to a greater degree when lobbying for change or when engaging national level organizations that seek to balance several competing interests. Moreover, at least in a few of the cases, organizations such as *Puente* were deeply involved as they made sure that the interests of undocumented immigrants in Arizona were prioritized.

The Arizona laws created a culture of fear. Despite the victory against the specific laws passed between 2005 and 2010, undocumented immigrants continue to be unwelcome, even as they engage in all acts of citizenship. One organizer states: "[t]he very people who are being told we are not welcome in the US are those who are defending its core values and constitutional rights."[139] News articles provide evidence on how ICE continues to instruct Arizona prosecutors on how to charge the undocumented to ensure their removal.[140] Federal immigration reform that truly advances the interests of the undocumented immigrants appears to be a futile goal, and the courts seem unwilling and unable to challenge existing doctrine.

Nevertheless, I suggest that for all the reasons described earlier—the exigencies of overturning anti-immigrant laws, the use of litigation as an organizing tool, the capacity of legal frames to offer symbolic sources that can inspire movement actors, as well as the capacity of law to transform itself into a shield for subversive, radical action—legal mobilization remains a necessary tactic for immigrants, albeit as part of a broader strategy of political mobilization.

Conclusion

Arizona provides an important palette to critically assess law and social change theories due to both the extreme nature of its efforts to drive out the immigrant community and the backlash its efforts have prompted. Indeed, these efforts inspired a "new attitude of defiance" in immigrant rights movements.[141] It has spawned new coalitions and new organizations and has served as "a wake-up call to immigrants around the country to get engaged in changing the laws."[142] The fervor of the legal mobilization exemplified by the large numbers of closed and pending cases, as well as the innovative use of law to mobilize during deportation hearings and subversive cross-border action, present a paradox: it is the *law* that constructs the "illegality" of

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[138] *See* Betty Hung, *Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. Pub. Int. L.J. 13–19 (2008).

[139] Briggers, *supra* note 1.

[140] *See* Lemons, *supra* note 110.

[141] Naureen Khan, *Five Years Later, Arizona Immigrants Defy SB 1070*, Al Jazeera America, Mar. 23, 2015, *available at* http://america.aljazeera.com/articles/2015/3/23/five-years-after-sb-1070-arizona-immigrants-defy-law.html, *archived at* https://perma.cc/FMP5-QBAR.

[142] *Id.*

undocumented immigrants, while providing them very limited recourse to rights claims.

This paper first showed that the "citizen" continues to be the subject of constitutional rights protection, and the plenary power of the Congress continues to be unchallenged (except under narrow exceptions). Undocumented immigrants have limited rights under "alienage" law and limited inherent rights in constitutional law. The Court has often been quick to use extra-legal justifications such as foreign policy and national security[143] to protect the Congress from having to limit its infringement of rights to liberty, security, and equality of noncitizens. Successful cases, such as the *SB1070* cases, generate optimistic scholarship that immigration exceptionalism is in its last throes; that the Court is finally acknowledging the historical context of the US-Mexico border and the human suffering caused by stratifying society; and that the sovereign power of the state has to bow down to the compelling arguments of universal rights that are applicable irrespective of citizenship status.[144] However, every one of these cases has been narrowly won on indirect grounds. The preemption doctrine or a finding of infringement of citizens' rights has allowed the courts to dodge substantive issues and rule on the basis of procedural and fairness norms.

The law and legal institutions do not challenge the excesses of state sovereignty when it comes to disenfranchised groups with no democratic power. This is even truer in the case of undocumented immigrants. The plenary doctrine continues to demarcate a sphere of state exceptionalism in its treatment of undocumented noncitizens. Positive decisions from the courts that *prima facie* appear to protect the interests of undocumented immigrants are unreliable as precedent or as evidence of legal inclusion of undocumented immigration as they rest on ambiguous, indirect grounds and are inordinately circumspect in scope. Nevertheless, despite the legal narrowing of the issues even in successful judgments, immigrant rights advocates continue to move the law for making their claims and derive other benefits from the legal mobilization. These extra-legal benefits are perhaps the ultimate benefit of the courts' ambivalent strategy.

Law can be thus be seen as an instrument that consolidates state power with the means to discipline and regulate subordinated groups such as the undocumented. But law can also have an "insurgent and emancipatory character" as it provides avenues to curb state power and also a discourse of

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[143] Coutin, Richland, and Fortin, *supra* note 39, at 101–02 ("In the case of plenary power, law 'on-the-books' is 'law-in- action,' a fusion that is enabled by the paradoxical move of granting legal authority to decide according to extralegal criteria such as pleasure, will, grace, judgment, political considerations, foreign policy, or national security.").

[144] For an expression or optimism (albeit cautious) after *Plyler*, *see* Legomsky, *supra* note 80 (predicting that the Court would soon end the doctrine only to change his mind a few years later); Spiro, *supra* note 39; Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 Mich. L. Rev. First Impressions 21 (2015). *But see* Johnson, *supra* note 39; Markowitz, *supra* note 39.

rights.[145] Thus, in spite of low expectations on the judicial administration of law, law in its democratic function can provide a forum to generate alternative understandings of legal rights. Even in its judicial function, the law can remedy extreme precariousness and subordination, and be used as a tool for broader political strategies.

The legacies of the civil rights movement continue to inspire actors in the immigrant rights movement to use a legal rights framework. Litigation in the United States generates extensive media coverage on which the Arizona immigrant rights organizations capitalized. The legal process of providing testimony and narrating one's story has been an important organizing tool even when fighting cases of deportation. Lastly, the innovative use of the law when engaging in radical, subversive action speaks to its capacity to combat the law's own hegemony.

The successful legal outcomes cannot be easily minimized. The cases generated in Arizona evidently emerged as a defensive tactic against the Arizona Legislature's laws. The opportunity to challenge them in the legislative arena was foreclosed by a virulently anti "illegal" immigration Arizona state government. The success of many of the cases rested on the fact that the state of Arizona, and not the U.S. Congress, had authored the laws in question. In some of the cases, the litigants were also able to show that the law impugned the rights of US citizens. *Angel Lopez-Valenzuela v. Joe Arpaio* was narrowly won on a substantive due process claim. The cases required significant resources and took several years to litigate, by which time families were separated, long-term residents were deported, and the Latino Community was acutely impaired. But despite being late in coming, the legal outcomes of the cases offered much needed relief to the immigrants in Arizona. The immigrant rights advocates have used the law to accomplish important goals: an end to Sherrif Arpaio's raids; placement of his operation under an independent monitor; drivers licenses for DACA recipients; bail for undocumented immigrants and other criminal protections. The litigation also served as legitimating spectacle where undocumented immigrants held the highest officials in the state accountable before the courts.

In legal scholarship, constitutional mobilizations *by citizens* are deemed to be "crucial building blocks of self-governance" and an essential aspect of citizenship and democracy.[146] Noncitizens are ignored in this narrative of state building, self-governance, and equal citizenship. However, in Arizona and elsewhere, the undocumented have mobilized the law for equal rights as citizens, engaged in citizenship and democratic processes, and sought self-governance. The undocumented have acted out citizenship in several ways, have made collective demands against the state, and have used the law to assert their claims.[147] They invoked the law in various ways to achieve strate-

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[145] Boaventura de Sousa Santos, Toward a New Legal Common Sense 19 (2 ed. 2003); *see* Thompson, *supra* note 61; Hunt, *supra* note 11.

[146] Siegel, *supra* note 9.

[147] *See* Abrams, *supra* note 114 at 50; Volpp, *supra* note 102.

gic goals, not necessarily enamored by rights discourses or by an unbridled expectation in law as a means to achieve justice.[148]

As this article has shown, the immigrant rights movement in Arizona has successfully appropriated mobilization tactics from earlier *citizenship* movements such as the civil rights and gay rights movements. In effect, they have created their own movement by claiming rights and utilizing traditional mobilization tactics as if they were citizens. But the movement has also gone beyond citizenship movements. By performing, narrating, and claiming legal rights as if they had full participation in the society, they have made claims that extend beyond their own self-interest. By claiming the rights of all persons to migrate to and remain in the US under the Not One More Deportation umbrella, for example, immigration rights activists are challenging state sovereignty and drawing attention to global issues of migration and border control.

The Arizona movement illustrates how a marginalized group used the law to assert fundamental human rights and political claims in innovative, yet effective, ways. As the fight for the rights of undocumented immigrants presses forward, we can expect the law to continue to play a role as an avenue for mobilization.

[148] *See* SCHEINGOLD, *supra* note 11 at xxii; Michael McCann, *How does law matter for social movements?*, in HOW DOES LAW MATTER? 76–108, 89 (Bryant G. Garth & Austin Sarat eds., 1998).