The Modern American

Volume 6 | Issue 2 Article 3

2010

A Fraudulent Sense of Belonging: The Case for Removing the 'False Claim to Citizenship' Bar for Noncitizen Voting

Anne Parsons
American University Washington College of Law, panneliza@gmail.com

A Fraudulent Sense of Belonging: The Case for Removing the 'False Claim to Citizenship' Bar for Noncitizen Voting

Keywords
immigration law, reform, noncitzen, voting, democracy

A FRAUDULENT SENSE OF BELONGING: THE CASE FOR REMOVING THE 'FALSE CLAIM TO CITIZENSHIP'

By: Anne Parsons [1]

I. Introduction

> *I have been a permanent resident for about 10 years. When I decided to apply for US citizenship I realized that I might be ineligible because when applying for my first driver's license I also became registered to vote. At the time, I did not understand that permanent residents are not allowed to vote. The fact that a governmental official asked me to register (even though at that point my greencard was my only official ID) and actual issuance of a registration card made me even more ensured* [sic] *that I am an eligible voter. If I recall correctly, the Election Day was shortly after and I am almost positive that I voted during these elections. However, soon later, when talking with another greencard holder I was informed that I am not eligible to vote. Since that point on, I never voted and whenever asked if I wish to register I make a point to inform those who ask that "as a permanent resident I am not eligible." Other than that, my record is perfectly clean. Do I still have a chance to become naturalized? Is it truly a deportable offense? Is there a way, and should I try to find out whether I actually voted? There must be more people who made the same mistake as I did, is there a way to find out what percentage is denied citizenship on similar grounds?*[2]

A little known fact in U.S. history is that noncitizens[3] once had the right to vote in local, state, and even national elections.[4] Today, not only are noncitizens largely prohibited from voting, except in a few local jurisdictions, noncitizens may lose their chance to become citizens, and face the additional threats of deportation and criminal sanctions for voting or merely registering to vote. While noncitizens have always faced consequences for fraud or willful misrepresentation of a material fact under the Immigration and Nationality Act ("INA"),[5] the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[6] (commonly known as "IIRIRA" or "IIRAIRA") changed the law in several ways, including by adding specific grounds of inadmissibility and removability related to voting in any local, state, or federal election.[7]

This paper criticizes IIRIRA's addition of the "false claim to citizenship" provision to regulate noncitizen voting as inconsistent with the proper role of immigration law in creating and defining the body politic. Part I explores democratic concepts of citizenship in the context of noncitizen voting rights. This view of citizenship as political voice and belonging, however, must inevitably confront the perceived imperative of the modern nation-state to create legal distinctions between citizens and non-citizens. Part I then explores how the U.S. does so by examining theories underlying the naturalization process and looking specifically at how "citizenship" is defined in current U.S. immigration law.

Part II briefly examines the connection between immigration policy and the gradual erosion of noncitizen voting rights as a backdrop to IIRIRA's creation of the "false claim to citizenship" provisions. In Part III, the paper argues that the IIRIRA amendments to the "false claim to citizenship" provisions have several negative consequences. First, the provisions risk unnecessarily excluding or deporting viable candidates for citizenship, including long-time legal permanent residents ("LPRs") like the individual in the epitaph. Second, these provisions validate unfounded concerns about noncitizen voter fraud, thereby further polarizing the immigration debate in unproductive ways. And third, the provisions are inconsistent with the underlying goals of the naturalization process, and jeopardize noncitizens' opportunity for meaningful political participation.

The paper concludes by suggesting various ways the false claim to citizenship provisions could be reformed, arguing that removing the immigration consequences for noncitizens who vote is most in line with democratic ideals. It calls upon immigrants' advocates to reconsider arguments for extending voting rights to noncitizens in light of predicted demographic change and the growing push for Comprehensive Immigration Reform.

II. What Makes a Citizen?

The legal definition of "citizen" is "a person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections."[8] Constitutional democracies are premised on the notion of consent by the governed, with the vote serving as the primary mechanism through which members of the polity realize democratic ideals.[9] All democracies index insiders and outsiders based on existing members' collective notions of who constitutes "the people." If formal citizenship is the marker of membership in the political community, this means that in a democracy, noncitizens are governed by the laws but do not have a formal voice.[10] Why and how is formal citizenship taken into account in defining

the body politic? In its reference to naturalization, the definition of citizenship hints at another fundamental question: how do nations, and the U.S. in particular, determine who becomes a citizen in the first place?

a. Citizenship as Political Voice and Belonging

Today, with a few exceptions,[11] formal citizenship is the primary marker of an individual's inclusion or exclusion in the body politic in the U.S.[12] Despite the fact that certain classes of noncitizens, LPRs in particular, share many characteristics with citizens—they pay taxes, own property, and serve in the armed forces—only citizens can vote. And yet, this has not always been the case.

the effect of immigration law in defining the body politic has become increasingly important

In his socio-historical account of noncitizen voting rights in the U.S., Maryland State Senator and Law Professor Jamin Raskin, notes that the extension of voting rights to noncitizens by states stemmed from a strong federalist paradigm.[13] Depending on the time period, states had different reasons for allowing noncitizens to vote.[14] In the eighteenth century, states extended the right to vote to propertied, white, male noncitizens both because they exhibited those attributes most valued in electors, and because doing so allowed states to justify the exclusion of people without those attributes from the ballot by delinking citizenship from the franchise.[15] Later, in the nineteenth century, states used the franchise primarily to draw noncitizens to settle in their territory.[16]

Raskin derives three interrelated normative arguments for alien suffrage based on state's express or implied rationales for allowing noncitizens to vote. First, doing so logically follows from the democratic ideal of "citizenship as presence," in that extending the right to vote to noncitizens merely recognizes those individuals' participation in the social life of the community.[17] Second, allowing noncitizens to vote serves the practical function of assimilating them to local values, a rationale Raskin terms "citizenship as integration."[18] A third and similar rationale, "citizenship as standing," reconstitutes the vote as a form of public acknowledgement that noncitizens belong in American society.[19] The latter two rationales provide strong justification for extending the vote to individuals who intend to naturalize. Although current U.S. immigration law does not explicitly distinguish between those who intend to become citizens and those who do not, LPR status is the closest proxy even though LPRs are not required to naturalize. Not surprisingly, serious arguments have been made that LPRs should be able to vote at the local level,[20] and a few localities in the U.S. have extended the franchise to this group.[21] Serious consideration of the first rationale, however, has the potential to lead to a more radical conclusion: that all noncitizens with presence and a significant stake in their communities should have a voice in all those communities in which they participate, whether local, state, or national.[22]

Theoretically speaking, however, a democracy is not obligated to extend suffrage to noncitizens.[23] The U.S. Constitution does not deny noncitizens the right to vote,[24] yet arguably neither does it require it.[25] Whether a nation-state chooses to extend the vote to noncitizens might depend on that particular state's constitutional values in relation to noncitizens.[26] The more constitutional protections a state grants to noncitizens, the more important it becomes for citizens to maintain the vote as a distinguishing and exclusive right.[27] Correspondingly, the more courts extend to noncitizens the rights to due process, free speech, and association, the less crucial the vote is for ensuring noncitizens' political voice and sense of belonging.[28] As one scholar points out, this may explain why "[noncitizen] suffrage is, at once, insignificant and central" in the U.S.[29]

b. Citizenship as Membership in a Nation-State

In today's world of increased border restrictions, the effect of immigration law in defining the body politic has become increasingly important.[30] The increasing overlap between immigration, criminal, and national security law has greatly enhanced the gate-keeping function of immigration law in the U.S.[31] As a prime symbol of these conceptual overlaps, IIRIRA's amendments to the Immigration and Nationality Act ("INA") significantly expanded the exclusionary function of immigration law.

Historically, immigration law played a minimal role in regulating noncitizen voting rights, which instead were regulated by state election laws. Generally, laws that govern the lives of noncitizens already living in the U.S. are termed "alienage laws," as distinct from immigration laws which determine who has the right to be present in the first place.[32] In the U.S., both alienage laws that restrict noncitizens' right to vote, and immigration laws that delineate the grounds of inclusion and exclusion, play a role in defining the body politic. In comparison, in countries such as New Zealand that allow noncitizens to vote in national elections, immigration laws alone define the people.[33] In reality, alienage and immigration laws often overlap,[34] but they remain nonetheless analytically distinct.[35] For example, alienage laws often receive strict scrutiny by the courts,[36] while Congress retains plenary power over immigration law.[37] Though both types of laws play a role in defining the electorate, essentially, this paper argues that using immigration law, rather than alienage law,

to regulate noncitizen voting undermines the democratic ideals the immigration system should seek to promote.[38]

A society's immigration statutes reflect its perception of how the process of national self-definition should take place. Conversely, whether and how a society permits noncitizens to vote depends on that society's ideas about how the integration of noncitizens should occur.[39] According to Immigration Scholar and Historian Hiroshi Motomura, U.S. immigration law is a blend of three competing views of immigration: immigration as contract, immigration as affiliation, and immigration as transition.[40] Each view reflects a model of justice based on differing notions of the relative equality between citizens and noncitizens. Under the contract theory, citizens and noncitizens are not equal.[41] Lawful immigrants have the right to remain in the U.S. only so long as they obey the rules.[42] For Motomura, contract theory is inadequate as an exclusive foundation for immigration law because the contract is one-sided—the immigrant must take it or leave it.[43] This violates the requirement of consent underlying modern democratic politics.[44]

the more the law prioritizes a person's ties to the U.S., the less important formal citizenship becomes as a means of gaining rights.

Affiliation is the second conceptual foundation and serves as immigration law's counterpart to Raskin's notion of "citizenship as integration." Viewing immigration as affiliation means that the longer that lawful immigrants remain in the U.S., the more citizen-like rights they gain.[45] Paradoxically, the more the law prioritizes a person's ties to the U.S., the less important formal citizenship becomes as a means of gaining rights.[46]

One form of relief in U.S. immigration law that seems to reflect the affiliation concept is cancellation of removal. Cancellation of removal is a form of relief that allows noncitizens who are otherwise inadmissible or deportable to stay in the U.S. based, in part, on their length of residence in the country and other equities including the presence of family, property, or business ties. [47] In general, Motomura sees current U.S. immigration law as a blend of the contract and affiliation theories.[48] While the rationale for cancellation of removal recognizes the inherent unfairness in severing an individual's ties to the U.S., in reality, the law also contains an element of contract. To be eligible for cancellation of removal, for example, both LPRs and other noncitizens ("non-LPRs") must prove that they have not committed certain types of crimes.[49] It is also worth mentioning, though perhaps not surprising, that the law as applied to non-LPRs includes more stringent "contractual terms" in addition to requiring a longer period of residence to establish eligibility.[50]

In contrast to the first two views, immigration as transition means that all lawful immigrants are treated as potential citizens upon entry and thus benefit from a presumption of equal rights.[51] Only when an immigrant expresses her intention not to naturalize would that person lose her citizen-like rights.[52] While not erasing the distinction between lawful immigrant and citizen completely, the view of immigration as transition would tend to support voting rights for intending citizens. Motomura argues that, historically, the concept of transition played an important role. In particular, he points to declarations of intent to naturalize, a feature of U.S. immigration law from 1795 to 1952, which could be filed by eligible noncitizens several years in advance of a naturalization application, and which elevated the noncitizen to a pre-citizen status.[53] For Motomura, the history of transition and its emphasis on inclusion is an antidote to the logic of the other two concepts, which pervades the U.S.'s increasingly restrictive immigration policies.[54]

c. Citizenship in U.S. Immigration Law

If immigration law plays a role in defining the body politic, citizenship and naturalization are the primary means by which it does so. People gain citizenship by birth in the U.S.,[55] through naturalization,[56] or in limited cases, by blood.[57] The naturalization process in the U.S. has traditionally been characterized as easy or open by international standards, which reflects the importance of naturalization as a governmental objective.[58] In other words, the U.S. government can justify retaining a firm citizen/noncitizen distinction as an incentive for people to naturalize, so long as it compensates by making the transition to citizenship a relatively quick process.[59]

Very generally, to qualify for citizenship, naturalization applicants must have lived in the U.S. for at least five years as an LPR,[60] or three years if they are spouses of U.S. citizens.[61] Applicants must meet a minimum period of physical presence in the U.S.,[62] in addition to demonstrating "good moral character."[63]

In practice, the transition to citizenship is easy for many people, and the denial rate is relatively low.[64] Still, denial rates do not account for those who fail to apply out of fear of being denied. Many potential citizens find the English and civics requirements insurmountable obstacles. Others may not be able to pay the $675 application fee. Still others may not apply out of fear that past crimes or violations of immigration law will lead to a denial, or even deportation. With IIRIRA's dramatic expansion of the grounds for inadmissibility to, and removal from, the U.S., these fears have gained new currency.

III. From Suffrage to "Falsely Claiming Citizenship"

a. Restrictive Immigration and the Erosion of Noncitizen Voting Rights

An undeniable correlation exists between U.S. immigration policy and noncitizen voting rights.[65] Noncitizens voted and held local office throughout the colonies beginning as early as 1692.[66] The extension of voting rights to noncitizens in the U.S. occurred during a period of relatively open immigration. During the early colonial period, the federal government left the regulation of immigration, including alien suffrage, largely to the states.[67] Its first attempt to create uniformity among the states came with the passing of the 1790 Naturalization Act, which regulated who could become a U.S. citizen.[68] The federal government only began to centralize control of immigration in the late nineteenth century.

Not surprisingly, throughout history, "the rise and fall of xenophobic and nationalist tendencies" has greatly impacted both immigration law and immigrant voting rights.[69] During the War of 1812, for example, increasing suspicion of non-English immigrants decreased popular support for noncitizen voting, [70] though voting rights expanded again in the years leading up to the Civil War.[71] At the height of noncitizen voting in 1875, twenty-two states and territories had extended the franchise to noncitizens.[72] Beginning that same year, however, the U.S. government passed a series of exclusion laws due in part to the influx of Chinese immigrants.[73] As anti-immigrant sentiment began to rise around the turn of the century, states one by one terminated voting rights for noncitizens.[74] The final end to noncitizen suffrage roughly coincides with the end of World War I,[75] which also put an end to unlimited immigration and led to the creation of a nation-origins quota system.[76]

Even though the U.S. government eventually centralized control over immigration matters, it did not seek to regulate noncitizen voting. In fact, the government did not create a provision barring entry for misrepresentation, the statutory precursor to IIRIRA's false claims provisions, until after World War II.[77] In 1952, the drafters of the INA supported incorporation of the misrepresentation provision into the permanent statute as an anti-communist measure.[78] Initially, the INA's provisions related to false claims were narrowly drawn: noncitizens were only guilty of making a false claim to citizenship if the claim was made to a U.S. government official for the purpose of securing admission into the U.S.[79] The 1986 Immigration Marriage Fraud Amendments[80] significantly strengthened the fraud provisions, but continued to limit their application to noncitizens who made material representation for the purpose of receiving immigration benefits.[81]

b. IIRIRA: A Fraudulent Sense of Belonging?

These provisions changed again for the worse in 1996 when President Clinton signed IIRIRA into law. IIRIRA closely followed another piece of legislation, the Antiterrorism and Effective Death Penalty Act of 1996[82] ("AEDPA"), which was enacted one year after the Oklahoma City bombing to combat domestic and international terrorism. IIRIRA, on the other hand, focused on illegal immigration reform. According to former INS General Counsel, Paul W. Virtue,

> IIRIRA represented the culmination of immigration-reform efforts that began with the Republican Party assuming majority control of the House and Senate in 1994. Congress was faced with the task of trying to strengthen our national security in the wake of the 1992 terrorist attacks on the World Trade Center, while at the same time, trying to find a way to discourage illegal migration. What had started as separate bills, one designed to reduce the annual number of family and employment-based immigrants to the United States (legal immigration) and the other designed to address border security and deportation issues (illegal immigration), were combined in each house and then split again due to a concerted grass-roots lobbying effort. Separated from the more popular illegal-immigration bills, the legal-immigration measures were defeated in both houses.[83]

Although Congress rejected the proposed bill on restrictions for "legal immigration," many of IIRIRA's provisions, including those related to noncitizen voting, have nonetheless affected authorized immigrants.[84]

Few of IIRIRA's sixty-plus provisions are immigrant-friendly. To achieve its goal of curbing unauthorized immigration, IIRIRA strengthened border security, initiated the border fence project, added three and ten-year bars to re-admission for immigration violators, tightened eligibility for cancellation of removal, streamlined removal proceedings for certain classes of immigrants, and severely restricted judicial review.[85] The legislation also instituted electronic employment verification pilot programs, and removed public benefits for most undocumented immigrants while tightening eligibility restrictions for lawful immigrants.[86]

Similarly, AEDPA and IIRIRA both expanded the criminal and non-criminal grounds of inadmissibility and removal.[87] IIRIRA also broadened the fraud

provisions of the INA and made penalties more stringent to support efforts to curb unauthorized immigration at the border and in the workplace.[88] IIRIRA added a ground of inadmissibility, which effectively extended the applicability of the general misrepresentation ground to false claims of citizenship made to private employers.[89] It also added a comparable ground of removability[90] and made it a crime to make a false claim of citizenship.[91]

Even though the general false claim to citizenship provisions could technically encompass unlawful voting by immigrants, Congress added parallel provisions to deal specifically with that issue. Section 347 of IIRIRA creates new grounds of inadmissibility and removal for noncitizens who vote in violation of "any Federal, State, or local constitutional provisions, statute, ordinance, or regulation."[92] Though section 347 technically only applies to noncitizens who have actually voted, a noncitizen who unlawfully registers to vote may also be inadmissible or removable under the broad "any purpose" language of the general false claim to citizenship provisions.[93] In contrast to the unlawful voting provisions, the false claim provisions do not require a finding that the individual violated underlying election law, only that the person falsely represented herself as a U.S. citizen on or after September 30, 1996 for the purpose of registering to vote or voting.[94] Unlike the general false claims provisions, the provisions that apply specifically to unlawful voting are applicable retroactively.[95]

Interestingly, IIRIRA creates two separate criminal penalties for unlawful voting. Section 216 makes noncitizen voting in federal elections a general intent crime, punishable by fine and/or one year prison sentence.[96] In addition, IIRIRA further provides that knowingly making a false statement or claim to vote or register to vote in any Federal, state, or local election constitutes a felony punishable by fine and/or five years in prison.[97] In 2000, the Child Citizenship Act[98] ("CCA") added an exception to the inadmissibility, removability, criminal prosecution, and finding of lack of good moral character provisions related to false claims to citizenship and unlawful voting, but it is extremely limited in its application.[99]

Given Congress's addition of specific and undeniably harsh provisions to deal with noncitizen voting, this was presumably an issue of major concern. The legislative history, however, is silent on these provisions. On one hand, their addition makes sense given Congress's general intent to curb fraud with the enactment of IIRIRA. On the other hand, the provisions do not even loosely relate to the prevention of unauthorized immigration—the prospect of voting in U.S. elections is not likely a main reason that people cross the border without authorization. Perhaps the provisions were meant to appease those voters who believe that politicians should not pander to noncitizens who cannot vote anyway, though this is merely speculation. Whatever the reason, as discussed below, the impact of the provisions clearly falls hardest on legal immigrants, specifically those applying to adjust status and legal permanent residents.

IV. The Negative Consequences of an Illogical Punishment

a. Immigration Consequences of Falsely Claiming Citizenship

Although noncitizens are prohibited from voting in all federal, and most state and local elections, registering to vote as a noncitizen is fairly easy and many noncitizens may do so inadvertently. The National Voter Registration Act of 1993[100] (also known as the "Motor Voter Act") requires states to provide individuals with the opportunity to register to vote when they apply for or renew their driver's license.[101] Only fifteen states require documentary proof of citizenship at the Department of Motor Vehicles ("DMV").[102] Many states simply require the driver's license applicant or the DMV clerk to check a box to indicate the individual's citizenship status.[103] Other states do not require any proof of citizenship.[104] DMV employees routinely ask driver's license applicants whether they would like to register to vote and do not have to verify that the person is actually eligible to vote.[105] Noncitizens asked by a governmental official may assume they are eligible. Similarly, community-based organizations and voter registration campaigns may also encourage noncitizens to vote. Lastly, in contrast to the first two situations in which the noncitizen registers inadvertently, the possibility exists that some noncitizens knowingly, and without encouragement, register to vote and vote.

Only fifteen states require documentary proof of citizenship at the Department of Motor Vehicles

The above scenarios raise a key question—the issue of intent. The provisions that specifically address unlawful voting do not explicitly require intent. If a noncitizen votes in violation of federal, state, or local election law, that individual may be found inadmissible or removable under these provisions.[106] Intent does come into play, however, in the determination of whether the noncitizen violated election law by voting if the election statute requires a showing of specific intent. Department of Homeland Security ("DHS") policy guidelines clarify that in cases where the underlying election law requires a finding of specific intent, adjudicating officers must assess the circumstances surrounding the voting accordingly.[107] If the officer determines the individual knowingly violated the relevant election law, the individual is removable subject to the officer's exercise

of prosecutorial discretion.[108] If there is no evidence of specific intent and the statute requires such a showing, then presumably the individual cannot be deemed removable.

It is less clear whether an individual can be deemed inadmissible or removable absent a showing of intent under the general provisions, which apply to false claims of citizenship for any purpose or benefit under state or Federal law.[109] The answer may hinge on the meaning of "false" in the context of these provisions, a question which, to date, no courts have addressed. One citizenship expert suggested conflicting interpretations of the provision based on two distinct meanings of "false."[110] A court may construe the provision as embodying an intent requirement based on the common understanding that false implies "intentionally untrue."[111] On the other hand, a court may construe Congress's use of "falsely claiming" as an attempt to distinguish this provision from adjacent ones dealing with fraud and misrepresentation.[112] The former provision would clearly result in fewer immigration consequences for noncitizens who are charged with inadmissibility or removability under the false claims provisions,[113] but for the moment, there is little indication how the immigration agencies are actually implementing them.

The fact that a noncitizen voted or registered to vote may become relevant at four points: application for a nonimmigrant visa, application for relief from removal, adjustment of status, and naturalization. It is unclear if and how the various immigration agencies' policies for handling noncitizen voting issues differ, and whether some agencies go to greater lengths than others to determine whether a noncitizen has unlawfully voted or registered to vote. Still, the following discussion outlines the provisions' potential to negatively impact noncitizens at each stage.

i. Application for Nonimmigrant Visa

The provision may impact "nonimmigrants," a legal term used to designate noncitizens whose presence in the U.S. is authorized on a temporary basis.[114] A nonimmigrant visa applicant who violates the false claims or unlawful voter provisions can apply for a waiver.[115] An otherwise inadmissible applicant may only be granted admission as a temporary nonimmigrant at the discretion of the Attorney General.[116] To qualify for a nonimmigrant visa, however, most applicants must demonstrate that they do not intend to stay in the United States.[117] An individual who has previously voted or registered to vote in the U.S. will likely have a hard time convincing a consular office that she does not have the intention of staying.[118] Thus, in most circumstances the waiver will mean very little.

ii. Adjustment of Status

Under the INA, adjustment of status is treated as an admission to the U.S. [119] Thus, if a noncitizen becomes inadmissible as result of making a false claim to citizenship for the purpose of voting or registering to vote, or voting unlawfully, this will bar her from adjusting her status to permanent residence.[120] While there is a waiver available for immigrants who are inadmissible under the general misrepresentation provision, [121] there are no waivers available for those who are found inadmissible as a result of false claims to citizenship or unlawful voting.[122]

Currently, it is unclear how aggressively DHS checks whether an applicant has registered to vote at the adjustment of status stage. There are no questions pertaining to unlawful voting on the adjustment of status application.[123] Still, some applicants have been denied on these grounds.[124] Regardless, given the increasing integration of government databases, a mere change in policy could make screening of this kind routine procedure. [125]

iii. Relief from Removal

If a noncitizen is found removable as a result of voting-related violations, she can still apply for relief from removal. Unlawful voting or a false claim to citizenship can affect eligibility for relief in several ways. First, if the individual is in exclusion proceedings and the violation constitutes a crime involving moral turpitude, the individual will be statutorily barred from applying for non-LPR cancellation of removal.[126] DHS has determined that a conviction under 18 U.S.C. § 1015(f), the specific intent provision, constitutes a crime involving moral turpitude.[127] There do not appear to be any cases challenging this designation, perhaps because convictions for knowingly making a false statement or claim to vote or register to vote are rare. In the same policy statement, DHS indicates that a conviction under 18 U.S.C. § 611, the general intent provision, likely do not constitute a crime involving moral turpitude.[128] Interestingly, if a noncitizen were found to have been convicted of a crime involving moral turpitude as a result of unlawful voting or false claims to citizenship, theoretically that individual could apply for a discretionary waiver,[129] even though there is no way to directly waive the false claim to citizenship or unlawful voting grounds of inadmissibility. If the individual is in removal proceedings, rather than exclusion proceedings, false claims to citizenship constitute an independent bar to non-LPR cancellation of removal.[130]

Second, even if the conviction does not constitute a crime involving moral turpitude a violation may preclude an individual from establishing good moral character, a statutory requirement for certain forms of relief such as non-LPR

cancellation of removal and voluntary departure.[131] Any two or more convictions, regardless of whether the offenses involve moral turpitude, can preclude a finding of good moral character if the aggregate sentences to confinement were five years or more.[132] Additionally, confinement to a penal institution for 180 days or more bars a finding of good moral character.[133] An individual can only avoid the bar if he or she met the narrow exception established by the CCA.[134]

Lastly, even in the absence of a criminal conviction, a violation negatively factors into the discretionary analysis accompanying many applications for relief including asylum, voluntary departure, and both LPR and non-LPR cancellation of removal. For noncitizens who lack strong equities, voting or registering to vote, could be a deciding factor in a denial of relief, depending on the immigration judge. Further, many types of discretionary decisions are not subject to judicial review.[135]

iv. Naturalization

The provisions' biggest impact is likely to be at the naturalization stage. After IIRIRA, all officers conducting naturalization interviews are required to ask the applicant if she has ever voted or registered to vote in any election in the United States.[136] In addition, the application for naturalization was amended to include questions related to false claims and voting.[137] If the individual violated relevant election law or made a false claim to citizenship when registering to vote or voting, and the applicant does not qualify for one of the CCA exceptions, the adjudicator's decision to initiate removal proceeding is one of prosecutorial discretion.[138]

If the adjudicator decides that the case merits prosecutorial discretion, the adjudicator must still make a good moral character finding.[139] If a noncitizen has actually been convicted under either of the voting related provisions, then the same analysis outlined above applies.[140] In the absence of a conviction or a finding that a conviction constitutes a crime involving moral turpitude, DHS policy guidelines suggest that if the violation occurred in the distant past and the individual can establish good moral character "in spite of making a false claim to U.S. citizenship," the adjudicator may exercise her discretion favorably, though DHS guidelines set the bar fairly high.[141] If the adjudicator denies the application, the noncitizen must apply for administrative review of the decision within thirty days.[142] If she fails on the second review, as a last resort, the applicant can petition a federal district court to conduct a de novo review of her eligibility for naturalization.[143]

It is impossible to tell how often voting-related false claims determine the outcome of an application because DHS does not publish statistics of its denial rate specific to these grounds. It is equally impossible to tell how many LPRs do not file applications for fear that they will be denied. The lack of immigrant waiver and very limited exception means the laws will have the hardest impact on applicants at the adjustment of status and naturalization stages, in other words, the most viable candidates for citizenship.

b. Polarizing the Immigration Debate

Immigration law defines the body politic "by establishing a ladder of accession to permanent residence and then formal U.S. citizenship."[144] The immigration debate focuses on what set of criteria a noncitizen must be required to meet before her inclusion into the body politic.[145] Although lawmakers may have rational reasons for withholding voting rights for noncitizens,[146] it does not follow that it is thus rational or necessary to deny immigration benefits to and potentially deport noncitizens who vote or register to vote in violation of election law.

Congress enacted IIRIRA in response to the growing fears over "illegal immigration."[147] Ironically, since the enactment of IIRIRA, immigration experts have criticized the legislation on the grounds that it has contributed to an increase in the number of unauthorized immigrants in the U.S.[148] It is no coincidence that IIRIRA passed shortly after AEDPA, which Congress enacted primarily to combat the threat of international terrorism. Advocates and academics alike have decried the increasingly frequent discursive linkages made by lawmakers between illegal immigration, crime, and terrorism as a sort of fear-mongering.[149] While the rule of law and national security are undeniably of utmost importance to all members of a society, the negative consequences of this rhetoric are clear: an increasingly polarized, and oftentimes vitriolic, immigration debate.

Immigration law defines the body politic "by establishing a ladder of accession to permanent residence and then formal U.S. citizenship."

The thrust of the debate is the big question of line drawing—who is "in" and who is "out" and, just as important, who has the right to decide. In the context of voting rights, the debate centers on the issue of voter fraud. Anti-immigrant advocacy groups and media personalities frequently allege that noncitizen voting is undermining the integrity of the electoral process and manipulating election outcomes.[150] These voices use fear of widespread voter fraud by noncitizens to gain support for stricter immigration policies.[151] The false claims and unlawful voter provisions validate and legitimize those fears, regardless of the real—de minimis—extent of the problem.

Those seeking to counter claims of widespread voter fraud by noncitizens frequently argue that voter fraud is rare,

largely because the consequences of committing voter fraud are so disproportionate to the individual's gain of a single vote.[152] Though convincing, this argument is not alone sufficient to counter arguments in favor of maintaining the IIRIRA provisions. For one, if noncitizen voter fraud is a myth then the false claims and unlawful voting provisions do no harm. Likewise, one might argue, if noncitizens do commit voter fraud, then the provisions are necessary as a deterrent in the rational actor's cost-benefit analysis. There are several responses, however, that highlight both the irrationality and the destructive effect of IIRIRA's false claims and unlawful voting provisions.

The tension between democratic norms of inclusion and the inherently exclusive function of immigration law may never be fully resolved.

First, even if noncitizens are voting or registering to vote, studies have largely debunked the myth that noncitizen voting has improperly influenced elections.[153] Those individuals who violate election laws likely do so unintentionally. Either they believe they are citizens, or they are not aware that only citizens can vote. Many noncitizens may register to vote, at the DMV for example, but never actually cast a vote, in which case they have no effect on the outcome of elections. There have been a few incidents or allegations of larger-scale voter fraud.[154] In those types of cases, however, individual noncitizens are led to believe they can vote by trusted community-based organizations. These situations are likely to be rare. Even where noncitizens face draconian enforcement measures, like what is currently happening in Arizona,[155] immigrant advocacy groups are unlikely to risk the political and criminal consequences of encouraging noncitizens to vote when alternate methods of advocacy exist. Thus, as long as advocacy groups are aware of the voter restrictions, they are unlikely to use noncitizen voting as a strategic tool.

Second, the IIRIRA provisions are not necessary to deter voter fraud. The laws likely do not factor into the individual's decisional calculus because most noncitizens, and even many immigration attorneys, are not aware of the consequences of making a false claim to citizenship or even what making a false claim entails.[156] Even assuming that noncitizens are aware of the consequences of making a false claim in the context of voting, the threat of deportation or denial of immigration benefits is not necessary to deter noncitizens. Noncitizens who knowingly commit voter fraud can be prosecuted under existing state and federal laws, which impose significant penalties for unlawful voting.[157] Immigration law can then treat these convictions the same way they treat all convictions. From a deterrence perspective, it is simply not necessary to create separate grounds of inadmissibility and removal.

Using deportation to sanction noncitizens for voting or registering to vote is grossly disproportionate to the offense, especially if the noncitizen did so unknowingly.[158] A single fraudulent vote is not likely to undermine the integrity of the electoral process, and yet, the consequences of deportation to an individual are enormous.[159] Neither agency discretion nor the availability of forms of relief mitigates this fact.[160] For one, cancellation of removal and other forms of removal relief are quite limited in their availability.[161] Second, in both cases, the adjudicator—either an immigration judge or an agency official—is choosing between imposing the sanction or not imposing the sanction.[162] Thus, the exercise of discretion does not "inject proportionality" into the immigration system, simply put, because there are no alternative sanctions available.[163]

Lastly, even if noncitizen voting is rare, the IIRIRA false claims and unlawful voting provisions are far from benign. For one, the provisions apply not only to those who vote, but also to those who register to vote.[164] Those noncitizens that are found inadmissible or removable for either violation are *equally* negatively impacted—they may be denied immigration benefits and face possible deportation.[165] In addition, the provisions bolster the rhetoric of anti-immigration advocates. Perhaps most disturbing, however, is their symbolic import. In essence, the IIRIRA provisions use elections, the symbol of the democratic process itself, to enforce immigration law. It is difficult to imagine what could be further from the aspirational view of democracy as "citizenship as presence."[166]

c. An Improper Role for Immigration Law

The tension between democratic norms of inclusion and the inherently exclusive function of immigration law may never be fully resolved. Still, as Motomura suggests in his analysis of three different conceptions of immigration law, society can choose the degree to which it incorporates notions of equality into the immigration system.[167] Regardless of a society's ultimate decision to incorporate noncitizens into the political process, the body politic has a duty to ensure that U.S. immigration law both serves the needs of society and reflects societal ideals.[168] In this respect, IIRIRA's provisions represent a huge step backwards.

Motomura's call to view immigration as transition requires revisiting the idea of extending voting rights to noncitizens.[169] For Motomura, "immigration as transition means treating lawful immigrants as Americans in waiting from their first day in this country."[170] Because immigration as transition presumes full equality for LPRs who intend to naturalize,[171] logically, this leads to the conclusion that LPRs should have some voting rights.[172] Raskin and others have convincingly argued that LPRs should be allowed to

vote in local elections.[173] Motomura echoes these proposals with the qualification that voting rights for LPRs should be temporally limited to the five-year period during which they are not allowed to naturalize.[174] Motomura's proposal to view immigration as transition bears significant resemblance to the history of noncitizen voting in the U.S. as described by Raskin. For Motomura, immigration law could do a better job of recognizing the role of LPRs in modern American society ("citizenship as standing").[175] In addition, extending the franchise to LPRs serves the practical function of "foster[ing] civic education and involvement as aspects of integration and transition to citizenship" ("citizenship as integration").[176]

From an advocacy perspective, these provisions should be a wake-up call.

Prior to the enactment of IIRIRA, noncitizen voting in the U.S. most closely resembled Motomura's second concept of immigration as affiliation. The logic of immigration as affiliation prescribes that lawful immigrants gain rights proportionate to their length of time in the country.[177] In a system that is mostly based on the affiliation concept, the importance of naturalization is deemphasized since LPRs eventually gain most of the rights of citizenship.[178] Motomura points out that in certain European countries that closely fit the immigration as affiliation model of citizenship, resident noncitizens are allowed to vote in local elections.[179] If naturalization is a priority in the U.S., under the affiliation rationale, it makes sense to withhold certain rights, such as the right to vote, in order to provide noncitizens with the incentive to naturalize.[180] The withholding of voting rights, however, is only justified so long as noncitizens actually benefit from other constitutional protections.[181] While it is debatable whether the rights of noncitizens were sufficiently protected prior to the enactment of IIRIRA, when noncitizen voting rights were governed exclusively by election law (with criminal sanctions attached), the balance, though perhaps not ideal, was still justifiable under democratic principles.

The landscape changed with the enactment of IIRIRA, which essentially gave immigration law a role to play in regulating noncitizen voting. This aspect of immigration law now most fully embodies the view of immigration as contract, with the grounds of inadmissibility and removal representing the "terms" of the contract. Before, noncitizens who voted unlawfully had only to suffer the criminal consequences, though still severe, of their actions. Now, the fact that a noncitizen voted or registered to vote is by itself, sufficient grounds for terminating that individual's "contract" to remain in the United States.[182] The contract theory of immigration, as described by Motomura, is premised on the notion that fairness and justice can be achieved through notice, promise, and expectations, rather than through any assumption that noncitizens are entitled to equal rights.[183]

There are numerous problems with this rationale in the case of the false claims and unlawful voting provisions. First, the terms of the contract are unclear—what is a "false claim to citizenship" anyway?[184] Second, at least in the case of the unlawful voting provision, which applies retroactively, noncitizens do not get notice.[185] Third, noncitizens may not reasonably expect to be denied immigration benefits or deported for voting or merely registering to vote. Motomura echoes the concerns, discussed above, about the inadequacy of cancellation of removal and discretion for preserving fairness.[186] Lastly, noncitizens have little choice over the terms.[187] While Motomura highlights the unequal bargaining power of noncitizens vis-à-vis many aspects of the immigration system, nowhere is this more clearly reflected than in the IIRIRA provisions: noncitizens may be deported for participating, even unknowingly, in the process through which their political rights are denied in the first place. In that sense, the IIRIRA provisions are doubly punitive.

While these provisions make up only a small part of the immigration system as a whole, they are nevertheless important because of the values they reflect. The provisions' attempt to validate the concerns of some citizens that the line between citizen and noncitizen has grown blurry risks further marginalizing noncitizens from the political process. Noncitizens have the right to participate politically through grassroots organizing and other informal channels.[188] Even if one accepts the premise that denying noncitizens the right to vote is a legitimate part of self-definition in a democracy, the IIRIRA provisions go one step too far in that they deny noncitizens even the potential to have a voice—formal or informal. In Motomura's words, "In the context of national self-definition, focusing only on promises, notice, and expectations is too narrowly utilitarian and cavalier in its dismissal of equality, even where, as in immigration and citizenship, some inequality is assumed."[189]

V. Time for Radical Reform?: The Meaning of "Citizenship" for Noncitizens

As currently written, the IIRIRA false claims and unlawful voting provisions solidly reject the notion of "citizenship as presence." This paper has argued that these provisions have threatened rather than protected American democratic ideals. There are many easy fixes that could mitigate their effects to some degree. Congress could amend the provisions to explicitly incorporate a specific intent requirement, or make an immigrant waiver available, similar to one that exists for fraud and misrepresentation. In the end, however, these solutions

do not go far enough. If naturalization and integration are main goals of the immigration system, immigration law cannot treat formal citizenship as an impermeable border. At the very least, the provisions must be removed. Even then, more is required to transition to a system that more fully accounts for the true role of noncitizens in society.[190]

From an advocacy perspective, these provisions should be a wake-up call. Certainly, for the time being, immigration attorneys must pay greater attention to the implications of these provisions for their individual clients. But, the provisions raise even greater issues in the context of immigration reform: in whatever form it is likely to take, it is ironic that those most likely to be affected do not have a formal voice in the process. Advocacy groups should push for the removal of these provisions, which both literally and symbolically silence the noncitizen voice. Advocates should also consider pushing for more radical reform, perhaps even going so far as to reinvigorate the noncitizen suffrage movement. Given the growing political influence of recently naturalized citizens,[191] the time may soon be right for such a movement, even if its scope is limited to voting rights at the local level.[192] In the end, if the project of self-definition excludes individuals like the one whose story began this paper, we have to question the validity of the project.

Endnotes

[1] Anne Parsons is a third-year student at American University Washington of Law, and a student attorney in the Immigrant Justice Clinic. She would like to thank Professor Elizabeth Keyes and *The Modern American* for their significant contributions to this article. Any errors are entirely her own.

[2] Wszopa, Posting to *Voter Registration Card & Voting Through a Misunderstanding*, Murthy Forum (July 3, 2005, 7:41 AM), http://murthyforum.atinfopop.com/4/OpenTopic?a=tpc&s=1024039761&f=8144055071&m=936100787.

[3] Throughout this paper, I make an attempt to use terms that are both neutral and precise. In making general references to all categories of immigrants, I use the term "noncitizen" rather than the legally accurate, but more inflammatory, "alien." In addition, rather than "alien suffrage," I use various iterations of "noncitizen voting rights." Lastly, I avoid the use of "undocumented" or "illegal" and instead refer to "unauthorized" migrants or immigration. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 Duke L.J. 1723, 1725-26 (2010) (commenting on language's power to depersonalize noncitizens).

[4] *See generally* Virginia Harper-Ho, *Noncitizen Voting Rights: the History, the Law and Current Prospects for Change*, 18 Law & Ineq. 271, 273-83 (2000) (outlining the scope of noncitizen voting rights through six periods of U.S. history: Colonization, post-War of 1812, pre-Civil War, Reconstruction, the turn of the 20th century, and current developments).

[5] Immigration & Nationality Act (INA) § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i) (2009).

[6] Div. C, Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1997) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

[7] *Id.* § 347 (codified as amended at INA § 212(a)(10)(D), 8 U.S.C. § 1182(a)(10(D) (2009) and INA § 237(a)(6), 8 U.S.C. §1227(a)(6) (2008)).

[8] Black's Law Dictionary 278 (9th ed. 2009).

[9] *See* Cristina M. Rodríguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 Int'l J. Const. L. 30, 30 (2010).

[10] *Cf.* Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982) ("The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.").

[11] Most states also prohibit convicted felons from voting while in prison, on probation, or in parole. A few states impose a lifetime denial of the right to vote on all citizens with a felony record. *See* Brennan Center for Justice, Criminal Disenfranchisement Laws Across the United States (May 3, 2007), http://www.brennancenter.org/page/-/d/download_file_48642.pdf.

[12] *See* Margaret R. Somers, Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights 21 (2008) (conceptualizing citizenship as a set of "rules and practices of distribution and exclusion").

[13] *See* Jamin Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1397-98 (1993) (explaining that states' extension of voting rights to noncitizens reflected the prevalent belief that individual states could define their citizenry independent of the national government).

[14] *See id.* at 1395.

[15] *See id.* at 1401.

[16] *See id.* at 1405 (discussing Illinois's early policy of

encouraging settlement through the vote as also expressing the notion that political inclusion should be based not on formal citizenship, but on habitation, residence, and social membership).

[17] *See id.* at 1398.

[18] *Id.*

[19] *Id.*

[20] *See, e.g., id.* at 1441-67; Harper-Ho, *supra* note 4, at 298-305 (refuting arguments against permanent resident voting).

[21] *See* Harper-Ho, *supra* note 4, at 310-22 (describing several city and state initiatives to enfranchise noncitizens); *see also* Immigrant Voting Project, http://www.immigrantvoting.org/ (last visited Apr. 26, 2010) (providing updates on current efforts to restore voting rights for noncitizens in the U.S.).

[22] *See* Erin E. Stefonick, Note, *The Alienability of Alien Suffrage: Taxation Without Representation in 2009*, 10 Fla. Coastal L. Rev. 691, 696-97 (2009) (arguing that denying taxpaying noncitizens benefits, including the right to vote, is unjust). *But see* Raskin, *supra* note 13, at 1468 (expressing doubt that arguments for noncitizen voting in local elections apply with equal force in state and national elections due to the strong ideological hold of nationalism); Harper-Ho, *supra* note 4, at 294 (echoing Raskin's assertion that extending suffrage to noncitizens at the national level would implicate valid foreign policy concerns).

[23] *See* Rodríguez, *supra* note 9, at 35 (stressing that although a democratic regime must find ways to account for the interests of noncitizens subject to its jurisdiction, it can do so without extending voting rights to noncitizens).

[24] *See* Raskin, *supra* note 13, at 1421-31 (arguing that alien suffrage is consistent with the principles of republicanism, the suffrage amendments, and the Naturalization Clause).

[25] With regards to whether noncitizens have a constitutionally protected right to vote, the Supreme Court has remarked: "This Court has never held that aliens have a constitutional right to vote . . . under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights." Sugarman v. Dougall, 413 U.S. 634, 648-49 (1973).

[26] *See* Rodríguez, *supra* note 9, at 36.

[27] *See id.* at 39.

[28] *Id.*

[29] *Id.* at 40.

[30] *See id.* at 46 (noting that a society's manner of selecting immigrants dictates the character of the polity).

[31] *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 414-15 (2006) (questioning whether members of a democratic society should have the power to exclude individuals).

[32] *See* Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States 46 (2006).

[33] *See* Rodríguez, *supra* note 9, at 45.

[34] *See* Motomura, *supra* note 32, at 47-48 (discussing the overlap between alienage laws that limit noncitizen eligibility for public benefits and the "public charge" exclusion and deportation grounds). Before 1996, noncitizen voting was regulated exclusively by alienage laws. IIRIRA effectively made noncitizen voting the subject of immigration law as well. *See infra* Part III(b).

[35] *See* Motomura, *supra* note 32, at 46.

[36] *See* Korematsu v. United States, 323 U.S. 214 (1944); Graham v. Richardson, 403 U.S. 365 (1971).

[37] *See* Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (establishing Congress's plenary power to exclude noncitizens).

[38] *See infra* Part IV.

[39] *See* Rodríguez, *supra* note 9, at 36.

[40] *See* Motomura, *supra* note 32, at 9-12.

[41] *See id.* at 10 (observing that the contract model holds that providing notice, keeping promises, and protecting expectations are sufficient to secure justice for noncitizens).

[42] *See id.*

[43] *See id.* at 60 (analogizing immigration to an unenforceable "adhesion contract").

[44] *See id.*

[45] *See id.* at 11 (discussing that immigration as affiliation is premised on the notion of "earned equality").

[46] *See id.* at 94-95 (expressing concern that reducing incentives to naturalize will lead to a large population of noncitizens who are less than full participants in society).

[47] *See* INA § 240A, 8 U.S.C. § 1229b (2008); *see also* Matter of C-V-T-, 22 I&N 7, 11 (BIA 1998) (listing relevant discretionary factors).

[48] *See* Motomura, *supra* note 32, at 11.

[49] LPRs must prove that they have not committed any aggravated felonies. INA § 240A(a)(3). Other noncitizens must prove that they have not committed certain crimes involving moral turpitude, aggravated felonies, or certain types of document fraud. INA § 240(A)(b)(1)(c).

[50] Additional requirements include: proof of good moral character, "exceptional or extremely unusual hardship" to a U.S. citizen child, spouse, or parent, and proving ten years of continuous residence instead of the seven years

required of LPRs. INA § 240(A)(b)(1).
[51] *See id.* at 13.
[52] *Id.*
[53] *Id.* at 8.
[54] *Id.* at 9.
[55] *See* INA §§ 301-09, 8 U.S.C. §§ 1401-09 (1994).
[56] *See* INA § 310, 8 U.S.C. § 1421 (1994).
[57] The INA contains special provisions for children of U.S. citizens who are born outside of the U.S. *See* INA § 322, 8 U.S.C. § 1443 (2008).
[58] *See* Motomura, *supra* note 32, at 144.
[59] *Cf.* Rodríguez, *supra* note 9, at 40 (asserting that the U.S.'s generous naturalization regime "balances the objective of giving those who are governed by the law a voice, on the one hand, with the interest in ensuring the acculturation of members of the polity who exercise state authority").
[60] *See* INA § 316(a)(1), 8 U.S.C. § 1427(a)(1) (2006).
[61] *See* INA § 319(a), 8 U.S.C. § 1430(a) (2008).
[62] *See* INA § 316(a)(2), 8 U.S.C. § 1427(a)(2) (2006).
[63] *See* INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) (2006). Several categories of people are precluded from establishing "good moral character," including habitual drunkards, persons convicted of serious criminal offenses, and noncitizens who make false claims of citizenship, or who unlawfully register to vote or vote in a local, state, or federal election. INA § 101(f), 8 U.S.C. § 1101(f) (2009).
[64] *See* Motomura, *supra* note 32, at 143 (noting that average denial rates were once as low as 3 percent but spiked dramatically in the late 1990s to around 35 percent). The United States Citizenship and Immigration Services ("USCIS") posts its approval and denial statistics for naturalization benefits each month. In February 2010, USCIS approved 50,520 and denied 4346 applications for citizenship. In that same month, the number of approvals and denials for FY2009 totaled 741,982 and 109,832 respectively. *See* USCIS, Naturalization Benefits (Feb. 2010), *available at* http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/static_files/n-400-natz-benefits-2010-feb.pdf.
[65] *See* Rodríguez, *supra* note 9, at 44 (concluding that a society's immigration regime reflects its method of balancing democratic accountability and sovereignty). One interesting comparative study of resident alien voting rights in twenty-five democracies found that states that offer birthright citizenship, and hence tend to view the nation as a multicultural community, are more likely to extend voting rights to noncitizens than are states operating on the doctrine of *jus sanguinis*. *See also* David C. Earnest, *Neither Citizen Nor Stranger: Why States Enfranchise Resident Aliens*, 58 World Pol. 242, 263 (2006).
[66] *See* Harper-Ho, *supra* note 4, at 274.
[67] *See* Walter A. Ewing, Immigration Policy Ctr., *Opportunity and Exclusion: A Brief History of U.S. Immigration Policy* (Nov. 25, 2008), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/OpportunityExclusion11-25-08.pdf.
[68] *Id.* (noting that the Naturalization Act limited citizenship to "free white persons" of "good moral character").
[69] *See* Harper-Ho, *supra* note 4, at 273 (including constitutional amendments, changes in voting rights laws, and demographic changes in the immigrant population as other factors contributing to the decline of noncitizen voting rights).
[70] *Id.* at 275-76 (commenting that Michigan's decision to extend the vote to noncitizens when it entered the Union in 1835 sparked controversy among nativist Congressmen).
[71] *Id.* at 276-77 (describing how frontier states used the franchise to draw immigrant settlers during this period).
[72] *Id.* at 281.
[73] *See* Ewing, *supra* note 67, at 3 (discussing the Immigration Act of 1875 that excluded criminals, prostitutes, and Chinese contract laborers; the infamous Chinese Exclusion Act of 1882; and a separate 1882 act that excluded "lunatics" and persons likely to become a "public charge").
[74] *See* Harper-Ho, *supra* note 4, at 282.
[75] *Id.* (noting that four of the last states allowing noncitizens to vote terminated noncitizen suffrage in 1918).
[76] In 1921, Congress passed the first immigration law imposing numerical limits on immigration, which created an annual immigration cap of 350,000 with geographical restrictions favoring immigrants from northwestern Europe. *See* Ewing, *supra* note 67, at 4.
[77] Refugee Relief Act of 1953, Pub. L. No. 83-203, § 11(e), 67 Stat. 400; *see also* Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, 5-63 Immigration Law & P. § 63.07 (201) (explaining that inhibiting the entry of former Nazis, spies, and terrorists was the primary purpose of the Act).
[78] *Id.* § 63.07(3)(a).
[79] *Id.*
[80] Pub. L. No. 99-639, § 6(a), 100 Stat. 3537, 3543-44 (codified as amended at INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2009)).
[81] *Id.* § 212(a)(6)(C)(i) (providing "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission in the United States or other benefit provided under this Act is inadmissible").
[82] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended

in scattered sections of 8 U.S.C.).

[83] *Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 29 (2007) (prepared statement of Paul W. Virtue) [hereinafter *Shortfalls of the 1996 Immigration Reform Legislation*].

[84] *Id.* at 29-30 (referring to the retroactive changes to the "aggravated felony" definition and other new bars to admissibility and their effect on lawful permanent residents).

[85] *See* U.S. Immigration and Naturalization Laws and Issues: A Documentary History 304-10 (Michael LeMay & Elliot Robert Barkan eds., 1999).

[86] *Id.*

[87] *See generally* Kathleen Sullivan, *IIRAIRA: Comparative Charts*, 2 Bender's Immigr. Bull., Feb. 1, 1997, at 90 (comparing the pre- and post-IIRIRA grounds of excludability, inadmissibility, and deportability). As part of these extensive changes, IIRIRA also introduced the concepts of "admission" and "removal" to replace the old concepts of "entry" and "deportation." §§ 301, 304(a).

[88] *See* 142 Cong. Rec. S4577 (daily ed. May 2, 1996) (statement of Sen. Simpson) (agreeing that creating a disincentive for immigrants to make a false claim to citizenship in the form of new grounds of exclusion and deportation will counteract any weaknesses in the electronic employment verification pilot programs).

[89] § 344(a) (creating new INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii) (2009)). The provision bars admission to any noncitizen who falsely claims citizenship "for any purpose or benefit under [the INA] . . . or any other Federal or State law," expressly including benefits under INA § 274A, which deals with the unlawful employment of noncitizens.

[90] § 344(b) (creating new INA § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D) (2009)).

[91] § 215 (creating new 18 U.S.C. § 1015(e) (2009)).

[92] § 347 (creating new INA § 212(a)(10)(D), 8 U.S.C. § 1182(a)(10(D) (2009) (inadmissibility ground)); (creating new INA § 237(a)(6), 8 U.S.C. §1127(a)(6) (2009) (removal ground)).

[93] § 344.

[94] *Id.*

[95] *See id.* (applying to noncitizens who vote unlawfully before, on, or after Sept. 30, 1996).

[96] § 216 (codified as amended at 18 U.S.C. § 611).

[97] § 215 (codified as amended at 18 U.S.C. § 1015(f) (2009)).

[98] Pub. L. 306-395, 114 Stat. 1631 (Oct. 30, 2000) (codified as amended in scattered sections of 8 U.S.C.).

[99] The exception applies if the noncitizen meets three conditions: 1) reasonable belief of citizenship; 2) *both* parents are U.S. citizens; and 3) permanent residence in the U.S. before the age of sixteen.

[100] Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg-gg-10 (2006)).

[101] Id. § 1973gg-2.

[102] Laura Seago, Brennan Ctr. for Justice, Government Lists: How Ready are They for Automatic Registration? 2 (2007).

[103] *Id.* at 3.

[104] *Id.*

[105] *See* Christina Murdoch, Motor Voter Laws: A Potential Trap for Non-citizens, Scott D. Pollock & Associates, P.C. (Dec. 15, 2009, 3:03 PM), http://www.lawfirm1.com/?p=604.

[106] *See* INA §§ 212(a)(10)(D), 237(a)(6).

[107] D. Martin, INS Memorandum, *Legal Consequences of Voting by an Alien Prior to Naturalization* (Feb. 13, 1997), *available at* http://www.uscis.gov (Adjudicator's Field Manual, Appendix 74-9) [hereinafter Martin Memo]. *Accord* McDonald v. Gonzales, 400 F.3d 684 (9th Cir. 2005) (finding the government failed to prove that a naturalization applicant was removable by clear and convincing evidence since she lacked the requisite mens rea necessary to establish a violation of state election law).

[108] *See* W. Yates, DHS Memorandum, *Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote* (May 7, 2002), *published at* 8 Immigration L. Service 2d PSD Selected DHS Document 1530 (2010) [hereinafter Yates Memo].

[109] *See* INA §§ 212(a)(6)(C)(ii), 237(a)(3)(D).

[110] *See* Kathrin S. Mautino, *False Claims to U.S. Citizenship*, 2008 Lexsee Emerging Issues 1748 (2008).

[111] *Id.*

[112] *Id.*

[113] INA §§ 212(a)(6)(C)(ii), 237(a)(3)(D).

[114] *See* INA § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A) (2009).

[115] *See* INA § 212(d), 8 U.S.C. § 1182(d) (2009).

[116] *Id.* § 212(d)(3A).

[117] *See* Mautino, *supra* note 110.

[118] *Id.*

[119] *See* INA § 245(a), 8 U.S.C. § 1255(a) (2006). Under the INA, admission is defined as "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 U.S.C.

§ 1101(13)(A) (2009).

[120] INA §§ 212(a)(6)(C)(ii), 212(a)(10(D); *see also*, Martin Memo, *supra* note 107 (noting that the INS has little discretion when making admissibility determinations).

[121] *See* INA § 212(i), 8 U.S.C. § 1182(i) (2009).

[122] Note, however, that DHS has broad authority to waive these grounds of inadmissibility for U and T visa applicants pursuant to INA § 212(d)(14). The U and T visa are nonimmigrant visas that provide a pathway to adjust status, thus, these visas may provide an indirect waiver for the inadmissibility grounds at INA §§ 212(a)(6)(C)(ii) and 212(a)(10)(D) for U and T visa holders.

[123] *See* USCIS, Form I-485, *available at* http://www.uscis.gov/files/form/i-485.pdf.

[124] *See, e.g.,* USCIS, Administrative Appeals Office, *Application to Register Permanent Resident or Adjust Status under Section 245 of the Immigration and Nationality Act; 8 U.S.C. § 1255* (May 19, 2006), *available at* http://www.uscis.gov/err/L2%20%20Legalization%20Application%20for%20Adjustment%20to%20Permanent%20Resident%20Status/Decisions_Issued_in_2006/May192006_06L2245.pdf (finding an applicant inadmissible and thus ineligible for adjustment of status under INA § 212(a)(10)(D) when applicant voted in a federal election while believing he was a U.S. citizen).

[125] *See generally*, Seago, *supra* note 102. *But see* Hans A. von Spakovsky, Heritage Found., The Threat of Noncitizen Voting 4-5 (2008), *available at* http://www.heritage.org/Research/Reports/2008/07/The-Threat-of-Non-Citizen-Voting (asserting that federal agencies routinely fail to honor election officials' requests to verify citizenship status of registered voters).

[126] INA § 240(A)(b)(1)(C).

[127] *See* Yates Memo, *supra* note 108, at 8.

[128] *See id.* The Board of Immigration Appeals addressed this issue in Matter of K-, 3 I&N 180, 180-2 (BIA 1949) (holding that a noncitizen who voted in a national election because his union required its member to vote was not precluded from establishing good moral character even though he knew he was not eligible, when he retracted his claim in a timely manner). Subsequent decisions finding that offenses that entail "a deliberate deception and impairment of governmental functions" constitute crimes involving moral turpitude cast doubt on the holding in Matter of K-. *See* Matter of Flores, 17 I&N 225, 230 (BIA 1980) (denying voluntary departure based on a finding that a conviction for selling counterfeit documents relating to the registry of aliens constitutes a crime involving moral turpitude); *see also* Martin Memo, *supra* note 108, n. 6 (speculating that the Board may reconsider its holding in Matter of K- based on its holding in Matter of Flores, and noting that actual intent to deceive the government may weigh heavily in the determination of whether a particular voting related offense constitutes a crime involving moral turpitude).

[129] INA § 212(h) (authorizing waiver of certain crimes if the offense occurred more than fifteen years before the date of the noncitizen's application for a visa, admission, or adjustment of status, the admission is not contrary to the national welfare or security of the U.S., and the noncitizen can prove rehabilitation).

[130] *See id.* (referencing INA § 237(a)(3)(D), the false claim to citizenship grounds for removal).

[131] INA §§ 240A(b)(1)(B), 240(B)(b)(1)(B).

[132] INA § 101(f)(3).

[133] INA § 101(f)(7).

[134] INA § 101(f)(9).

[135] INA § 242(a)(2)(B)(i) (barring judicial review of any judgment regarding the granting of relief under the waiver provisions in § 212(h) and § 212(i), cancellation or removal, voluntary departure, and adjustment of status). Note that judicial review is available for asylum, also a discretionary form of relief, but under a highly deferential standard. *See* INA § 242(b)(4)(D).

[136] *See* R. Bratt, INS Memorandum, *Voter Registration and Standardized Date Citizenship Testing* (May 13, 1997), *available at* http://www.uscis.gov (Adjudicator's Field Manual, Appendix 74-10).

[137] *See* USCIS, Form N-400, *available at* http://www.uscis.gov/files/form/n-400.pdf.

[138] *See* Yates Memo, *supra* note 108.

[139] *Id.* (directing adjudicators to consider factors such as family ties and background, criminal history, education, employment history, community involvement and other law-abiding behavior, credibility, and the length of time in the U.S.).

[140] *See supra* notes 131-37 and accompanying text.

[141] *See id.* For example, the guidelines suggest that an officer *might* find good moral character if the applicant registered to vote in a federal election fifteen years ago, but did not actually vote. In addition, the guidelines state the applicant must have been "specifically told by a community organization that he or she was entitled to vote." Further, if the applicant has any other criminal history, the officer is more likely to find lack of good moral character. *Id.*

[142] *See* INA § 336(a) (providing that a naturalization applicant may request a hearing before another immigration officer if her application is denied).

[143] *See* INA § 312(c).

[144] Stumpf, *supra* note 31, at 398.

[145] *Id.*

[146] This paper accepts that denying noncitizens the right to vote may not be inherently at odds with democratic principles, especially in societies where the right to vote constitutes the only meaningful distinction between citizens and noncitizens. *See supra* Part II(a). For a detailed analysis of the arguments for and against extending voting rights to noncitizens, *see* Harper-Ho, *supra* note 4, at 294-305.

[147] *See* Motomura, *supra* note 3, at 1725-26 (noting the use of such charged terms by anti-immigration advocates to stimulate public emotion over immigration issues).

[148] *See Shortfalls of the 1996 Immigration Reform Legislation*, *supra* note 83, at 32 (prepared statement of Paul W. Virtue) (arguing that IIRIRA's expansion of the grounds of admissibility and creation of the three and ten years' bars to re-admission discourage circular migration patterns and force individuals to choose between unauthorized presence and separation from family). *But see id.* at 52 (prepared statement of Mark Krikorian) (asserting that lack of interior enforcement is the root of the unauthorized immigration problem).

[149] *See* Stumpf, *supra* note 31; Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 Harv. C.R.-C.L. L. Rev. 1 (2010); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 Conn. L. Rev. 1827 (2007).

[150] *See*, *e.g.*, Federation for American Immigration Reform, *Illegal Aliens in Elections and the Electoral College* (Oct. 2004), *http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersd70b*; *Lou Dobbs Tonight* (CNN broadcast Jan. 17, 2008), *available at* http://www.youtube.com/watch?v=lATG4KH_5yE.

[151] *See, e.g.,* von Spakovsky, *supra* note 125.

[152] *See* Justin Levitt, Brennan Ctr. for Justice, The Truth About Voter Fraud 7 (2007).

[153] *See id.* at 19 (refuting allegations of voter fraud). *See generally* Mexican American Legal Defense and Education Fund, The Myth of Widespread Non-Citizen Voting: A Response to the Heritage Foundation (2008).

[154] A widely publicized incident in 1997 involved a Latino rights organization in California that distributed voter registration forms to noncitizens whom it was helping through the naturalization process. The charges were dropped after a yearlong investigation failed to substantiate the allegations of widespread voter fraud. *See* Michael G. Wagner & Nancy Cleeland, *D.A. Drops Voter Probes After Indictments Rejected*, L.A. Times, Dec. 20, 1997, at A1. In 2008, national community group Acorn came under scrutiny for fraudulently registering voters in poor neighborhoods, though there were no specific allegations of widespread voting by noncitizens. *See* John Schwartz, *Report Uncovers No Voting Fraud by Acorn*, N.Y. Times, Dec. 23, 2009, at A15.

[155] *See* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. Times, Apr. 23, 2010, at A1 (reporting on the new state law which gives state and local police broad powers to detain any individual suspected of unauthorized presence in the U.S.).

[156] *See* Murdoch, *supra* note 105.

[157] *See* Levitt, *supra* note 152, at 7 (noting the penalty for violating federal election law includes five years in prison and a $10,000 fine).

[158] *See* Juliet Stumpf, *Fitting Punishment*, 66 Wash. & Lee L. Rev. 1683, 1689 (2009) (calling for the use of graduated sanctions in immigration law).

[159] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("We have long recognized that deportation is a particularly severe 'penalty,' . . . but it is not, in a strict sense, a criminal sanction.") (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

[160] *See* Stumpf, *supra* note 158, at 1693-1706.

[161] *Id.* at 1699.

[162] *Id.* at 1705.

[163] *Id.* at 1704.

[164] INA §§ 212(a)(6)(C), 237(3)(D).

[165] *See supra* Part IV(a).

[166] *See* Raskin, *supra* note 13, at 1392 ("But if 'universal suffrage' for all persons living in the governed jurisdiction is not logically required by democratic ideology, through social struggle it has almost always become a political imperative in democratic history."). *See also* David C. Earnest, *Noncitizen Voting Rights: A Survey of Emerging Democratic Norms*, 2003 Annual Meeting of the American Political Science Association, Philadelphia, PA (Aug. 29, 2003), *available at* http://www.odu.edu/~dearnest/pdfs/Earnest_APSA_2003.pdf (creating a typology of "resident-alien" voting rights by surveying the practices of democratic states worldwide).

[167] *See generally* Motomura, *supra* note 32, at 9-14 (articulating the differences between the concepts of immigration as contract, affiliation, and transition).

[168] There are those who argue that the only alternative to "open borders" is a "tightly controlled immigration system." *See, e.g., Shortfalls of the 1996 Immigration Reform Legislation*, *supra* note 83, at 55 (prepared statement of Mark Krikorian). Motomura's approach is not inconsistent

with the rule of law, and in fact, he argues that when our immigration system does not adhere to concepts of due process, checks and balances, and discretion, immigration law itself undermines the rule of law. *See id.* at 42-47 (prepared statement of Hiroshi Motomura).

[169] *See* Motomura, *supra* note 32, at 191.

[170] *Id.* at 155.

[171] *Id.* (admitting that affording LPRs greater rights will likely mean that the distinction between intending citizens and other categories of noncitizens will become more distinct).

[172] *Id.* at 191.

[173] *See* Raskin, *supra* note 13, at 1460-66; *see also* Harper-Ho, *supra* note 4, at 294-98.

[174] *See* Motomura, *supra* note 32, at 193.

[175] *Id.*

[176] *Id.* at 194.

[177] *Id.* at 154 (describing affiliation as a system of "earned equality").

[178] *Id.* at 157.

[179] *Id.*

[180] *Id.* (hypothesizing that the noncitizen suffrage movement has not gained currency in the U.S. because of the relative ease with which long-time LPRs can naturalize).

[181] *Id.*

[182] *See* INA §§ 212(a)(6)(C)(ii), 212(a)(10), 237(a)(3)(D), 237(a)(6).

[183] *See* Motomura, *supra* note 32, at 37.

[184] *See* Mautino, *supra* note 110 (stating that the lack of analysis of these provisions by courts or administrative agencies is "both surprising and troubling" given the extreme consequences attached to a finding of a false claim). *But cf.* United States v. Knight, 490 F.3d 1268, 1271 (11th Cir. 2007), *cert. denied*, 552 U.S. 1016 (2007) (rejecting defendant's arguments that 18 U.S.C. § 611, the statute criminalizing noncitizen voting in federal elections, violated his due process rights on the grounds that the statute is overbroad and impermissibly vague).

[185] *See* INA §§ 212(a)(10), 237(a)(6).

[186] *See* Motomura, *supra* note 32, at 55.

[187] *Id.* at 60.

[188] For a comprehensive discussion of LPR's First Amendment right to donate to U.S. political campaigns and arguments for why nonimmigrants should be afforded the same rights, *see generally*, Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 Yale L. & Pol'y Rev. 503 (1997). It is worth mentioning that, absent a criminal conviction, apparently no immigration consequences attach to a non-LPR's violation of campaign finance laws, an anomaly which further undermines arguments that the IIRIRA provisions are necessary to prevent noncitizens from influencing election outcomes.

[189] *Id.* at 62.

[190] *Id.* at 202 (arguing that "new lawful immigrants [should] be treated just like citizens in a number of key areas, including family reunification, public education, public assistance, voting, and public employment").

[191] *See* Rob Paral & Associates, Immigration Policy Ctr., *The New American Electorate: The Growing Power of Immigrants and Their Children* (2008).

[192] *See* Raskin, *supra* 13, at 1468 (discussing the foreign policy implications of noncitizen voting at the national level).

See Anne Parson's "Inside the Authors' Studio" interview on our website to learn more about her inspiration for the article, and her thoughts about the issues and questions emerging from the article.