



FIRST NAME

MIDDLE NAME

LAST NAME

DATE OF BIRTH

The Fractured Membership
Rights of the Undocumented Worker

STATUS

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STILL

ON

THE

BORDER

By Carolina Núñez¹

THE

United States workforce includes over eight million undocumented immigrants.² They work in the shadows to evade deportation, and they accept jobs and working conditions that their documented counterparts will not accept. As invisible as their day-to-day work may be, undocumented workers are an integral, though unsanctioned, part of the U.S. economy. They build our houses, tend our crops, and slaughter our livestock. They help satiate the American craving for affordable abundance. At the same time, unauthorized immigrants are not supposed to be here, and their mere presence undermines our understanding of community and membership. Relied upon but unwelcome, among us but uninvited, undocumented workers labor on the border of inclusion and exclusion and are the subjects of a series of challenging questions: Should undocumented workers enjoy the same workplace protections that authorized workers enjoy? When and how much should immigration status matter? Does being here count for anything? Who belongs?

Who is a member?

Unfortunately, the answers to these questions are less than clear. For much of U.S. history, undocumented workers have enjoyed many of the same rights that U.S. citizens have enjoyed by virtue of mere presence within U.S. territory. Recently, however, some undocumented workers have found that they cannot effectively enforce many of their statutorily protected employment rights, including the right to participate in union organizing activities, work in a discrimination-free environment, and be compensated for work-related injuries. Undocumented workers, it seems, are not considered full “members” of the employment protection franchise. Although this trend is not surprising given rising concern and anger over the large number of undocumented immigrants filling U.S. jobs, the denial of membership rights to individuals based solely on unauthorized status is actually a significant deviation from the theory of membership developing in broader U.S. law. Outside of the employment sphere, courts are not looking to status to determine membership. Rather, they are increasingly affording rights to individuals based on more fundamental indicators of membership including an individual’s ties to the surrounding community and subjection to U.S.-imposed obligations. Here, I argue that the distribution of employment-related rights should conform to this emerging, more nuanced approach, not merely for the sake of a consistently applicable membership theory but to avoid the draconian incentives produced by effectively denying undocumented immigrants work-related rights.

I. The Concept of Membership

The distribution of rights, regardless of type, boils down to a single question: Who belongs? This question follows naturally from the assumption that members—those who belong—deserve a certain type of treatment, and those who are not members deserve another. In that sense, the distribution of membership rights is as much about determining who *does not* belong as it is about determining who *does* belong.

Two competing mechanisms or theories for sorting members from nonmembers have historically coexisted in the United States: the territorial approach and the status-based

approach. Broadly speaking, the status-based approach distributes membership rights based on an individual’s legal status. Under such a conception of membership, undocumented immigrants have no formal, consensual relationship with the state and therefore are not members, while citizens enjoy the full suite of rights available. In contrast, territoriality distributes membership rights and benefits according to geographic boundaries without regard to legal status. Under a territorial approach, individuals within the state boundaries are members entitled to all rights offered by the state, while individuals outside the state boundaries have no guaranteed rights.

Territoriality enjoys wide support in the academic community, no doubt because of its broad inclusiveness. However, skeptics have challenged territoriality’s theoretical underpinnings, and the challenge is not an easy one to meet. What is it about territorial presence that requires the distribution of full membership rights? Why reward territorial presence at all? Territoriality’s supporters offer three potential responses to these questions.

COMMUNITY PRESERVATION

One potential rationale for territoriality is the community preservation rationale. Under this rationale, equality of membership is important, not because all individuals deserve membership rights equally, but because equality of membership preserves the nature of the community. This argument is not about fairness to strangers, but it is about preservation of a system, i.e., egalitarianism is worth preserving, not because newcomers to the territory deserve to be treated as equals, but because those who were already here desire to live in an egalitarian community and do not want to risk becoming a part of a future subclass of residents. Under this rationale, even an individual’s consent to substandard treatment could not justify unequal treatment because the effect would be the same—the perpetuation of a second-class caste.

Community preservation explains various scholars’ and courts’ espousal of territoriality. Owen Fiss, for example, has argued that the principle of self-preservation is implicit in the Fourteenth Amendment as “a statement about how society wishes to organize itself, and prohibits subjugation, even voluntary subjugation, because such a practice would

disfigure society.”³ Indeed, “[w]e ought not to subjugate immigrants, not because we owe them anything, but to preserve our society as a community of equals.”⁴

MUTUALITY OF OBLIGATION

A second possible rationale for territoriality is the mutuality of obligation rationale: the state owes individuals within the territory membership rights because those individuals are subject to the obligations imposed by the state. Under this rationale, territorial presence evidences the individual’s acceptance of the state’s jurisdiction over her. This concept flows from Westphalian notions of territorial sovereignty under which the nation-state is a unitary, self-contained actor with complete and exclusive jurisdiction over the people within its territory. Under such a system, no state may act within the boundaries of another sovereign nation-state. Thus, a nation-state may only impose obligations on and protect the population within its territorial borders. If a nation-state can only apply its rules within its territorial boundaries, then *where* an individual resides, rather than *who* the individual is, determines *which rules* apply. That is, presence within the nation-state’s territory determines an individual’s obligations. The nation-state, in turn, affords those individuals whatever membership rights and benefits it has undertaken to provide residents.

The mutuality of obligation rationale for territoriality makes perfect sense in a purely Westphalian system. The reality, however, is that states often do impose obligations outside their borders and selectively suspend obligations within their own territory. Embassies, for example, function as islands of immunity from the obligations imposed by the host state within its territory even though embassies operate within the host state’s territory. States also routinely pass laws to govern the acts of their nationals abroad. This incongruous relationship between modern notions of jurisdiction have led some to call for the rejection of territoriality and the adoption of a model based entirely on mutuality of obligation.

COMMUNITY TIES

Many have defended territoriality based on a community ties rationale. Under this view

of territoriality, territorial presence serves as an indicator of an individual's ties to other individuals and entities within the territorial boundaries of the state. This view of territoriality is attractive in its recognition of real human relationships as a basic social fabric, but the question remains: What is it about the existence of human relationships that requires the bestowal of membership rights?

One answer is that an individual's ties to the surrounding community foster commitment and loyalty to the surrounding community. As an individual becomes dependent on her surrounding community, her personal interests align with those of the community. The individual is therefore more likely to make valuable contributions to the community and refrain from harming it in order to augment her own existence within the community. Affording membership rights to such an individual rewards her contribution.

Another answer is that as strangers develop ties to the surrounding community, they begin to help define the character of the community. In other words, not only do the individual's ties to the community merit the individual's inclusion as a member, but the *community's ties to the individual* require inclusion of that individual. By including such an individual, the state preserves the community's character, which is a function of its members' social affiliations. This argument is merely a restatement of what I have termed the community preservation rationale. That is, those who are members owe individuals who have formed ties to the community nothing. Rather, they owe it to the community—to themselves—to preserve those ties and the community built on those ties.

Despite the appeal of the community ties rationale, it does not hold up well in practice. First, in today's world, ties to other individuals and entities do not necessarily depend on physical proximity. In fact, as the popularity of Internet-based social networking sites suggests, individuals may easily maintain affiliations with individuals in other countries. It is also entirely possible for an individual to have very few affiliations with those inside the country in which she resides. Moreover, even where an individual does have ties to others within the same nation-state, these affiliations may



stem from a shared interest, familial ties, or professional obligations, rather than from physical proximity.

Second, territoriality's binary conception of members and nonmembers—in which those within the territory are full members and those outside the territory receive nothing—does not coincide with this affiliations-focused rationale. The types, depth, and number of community ties vary by individual. Community ties distribute across a spectrum, not on a binary toggle. Is there a threshold number and type of connections required of a "member"? If community ties underlie territoriality, shouldn't an individual with more connection to the surrounding community have a greater claim on membership rights than one whose only connection to the surrounding community is mere presence in it?

II. Territoriality's Metamorphosis

Courts have begun to recognize territoriality's failure to always produce results consistent with its underlying rationales. Territorial presence, it turns out, is an inadequate proxy for the more fundamental indicators of membership encompassed by territoriality's underlying rationales. While a century ago U.S. courts held territorial presence to be an inviolable guarantee of many membership rights, strict territoriality has recently begun to wane. Instead of distributing rights based exclusively on an individual's territorial presence, modern courts have begun to distribute rights to individuals only where consistent with the rationales of territoriality. Thus, territoriality is undergoing a transformation; in this new conception of membership, which I call the "postterritorial" approach; courts are

shedding their preoccupation with geography and focusing on mutuality of obligation, community preservation, and community ties as the driving forces behind the distribution of membership rights.

Territoriality's metamorphosis has gained momentum only in the last several decades. In early U.S. history, being present in the United States categorically secured a great deal of membership rights for aliens within the United States, although the rationale for a territorial distribution of rights remained undeveloped for many years. In *Yick Wo v. Hopkins*,⁵ for example, the Supreme Court emphatically proclaimed, without explanation, that the Fourteenth Amendment's guarantees "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."⁶ In the years following *Yick Wo*, the Court routinely held that immigrants, even those that were not lawfully within U.S. territory, were entitled to membership rights by virtue of their presence within U.S. borders.⁷ However, the rationale for such a territorial conception of membership remained vague.

It was not until a century later, and perhaps due to increasing concerns about the wisdom of offering constitutional rights to undocumented immigrants, that the Court offered a detailed defense of territoriality's guarantee of membership rights to all within the national territory. In *Plyler v. Doe*,⁸ the Court invalidated a Texas statute that allowed local public schools to deny enrollment to undocumented children. Those children, the Court reasoned, were within the United States and therefore entitled to the equal protection of Texas law. In arriving at that conclusion, the Court offered a mutuality of obligation rationale for territoriality. The Court reasoned that Texas was under an obligation to protect all those upon whom it could impose obligations—all individuals within Texas borders. As a second rationale for territoriality, the Court emphasized the need to preserve the national community's character. The Court reasoned that education "has a fundamental role in maintaining the fabric of our society."⁹ According to the Court, we must afford unauthorized immigrants a public education in order to preserve "a democratic system of government,"¹⁰ ensure that individuals will be able to "lead

economically productive lives to the benefit of us all,"¹¹ and "sustain[] our political and cultural heritage. . . ."¹²

Some of the first hints that territorial presence would no longer categorically guarantee rights to aliens within U.S. territory appeared just a few years after *Plyler* in *Verdugo-Urquidez*.¹³ There, the Supreme Court, in a plurality opinion, suggested that territorial presence may not be enough for some membership rights to attach. The Court's opinion boldly recharacterized *Yick Wo* and its progeny: "These cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."¹⁴ The defendant in *Verdugo*, a Mexican national who had been brought to the United States against his will while U.S. law enforcement agents searched his house in Mexico without a warrant, had not established such connections: "[T]his sort of presence—lawful but involuntary—is not of the sort to indicate any substantial connection with our country."¹⁵ The Court stopped short of requiring an individual to have significant community ties in the U.S. as a prerequisite to the enjoyment of membership rights, but its language certainly suggested that affiliations might be indicative of membership within the U.S.

Territoriality's transformation is perhaps most obvious in Supreme Court precedent determining the rights of individuals outside U.S. borders. While strict territoriality would categorically exclude such individuals from the distribution of membership rights, the Supreme Court has recently rejected strict territoriality in favor of a more functional, postterritorial approach. This is a significant departure from early precedent. In *Ross*,¹⁶ a seminal case that governed U.S. law for several decades, the Court denied that a sailor on a U.S. merchant ship had a Sixth Amendment right to a jury trial, even though he had been tried by a U.S. consular court in Japan: "[t]he Constitution can have no operation in another country."¹⁷ Notably, the Court defended the territorially based denial of constitutional rights based on the absence of mutual obligations between the petitioner and the U.S. government. The Court suggested that a government has no obligation to an individual outside its own territory because the state

cannot impose any obligations upon individuals abroad. Rather, the U.S.'s only obligation was to Japan to conduct its consular affairs on mutually agreed terms.

Reid v. Covert,¹⁸ decided more than 70 years later, signaled a shift in the Supreme Court's approach. There, the Court held that two U.S. citizens living abroad and convicted by a U.S. military court for the murder of their husbands enjoyed the right to a trial by jury and indictment by a grand jury. Backtracking on its reasoning in *Ross*, the Court suggested that mutuality of obligation *did* require the U.S. to offer the defendants the requested membership rights. The Court reasoned that when the U.S. enforces obligations on citizens abroad, it must also offer corresponding protections: "[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. . . . When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."¹⁹

Reid rejected strict territoriality in favor of an approach based on mutuality of obligation. While much of the *Reid* opinion focused on the defendants' U.S. citizenship as the cornerstone of mutual obligation (and therefore suggested that a status-based approach to membership would govern), the Court's recent opinion in *Boumediene v. Bush*²⁰ indicated that aliens, too, may enjoy some Constitutional protection outside of U.S. borders. In *Boumediene*, the Court squarely faced a question of membership—of which membership model to apply to determine whether enemy combatant detainees held at Guantanamo Bay were members for purposes of enjoying a right to the writ of habeas and the protections of the Suspension Clause. In its lengthy opinion, the Court struggled to define the contours of membership, acknowledging that formal status and territorial presence within the U.S. were traditional indicators of membership.

However, despite the detainees' lack of status and territorial presence, the Court held that Congress could not deny them the privilege of habeas corpus without complying with the Suspension Clause. In rejecting a strictly territorial approach, the Court

observed that the U.S. was the sole entity imposing its laws at the naval station. No other government had effective jurisdiction over Guantanamo Bay. Thus, there was no reason the United States could not, in practice, afford constitutional protections to the detainees. In effect, the Court highlighted territoriality's failure to preserve the notion of mutual obligations. The Court's argument can, in part, be read as a critique of Westphalian notions of territoriality: since governments can and do impose obligations abroad, they also can and ought to afford corresponding protections: "Even when the United States acts outside its borders, its powers are . . . subject 'to such restrictions as are expressed in the Constitution.'"²¹

A bird's-eye view of territoriality's role in U.S. law suggests that strict territoriality may not survive into the next century. This is not to say that territory no longer matters; it does. But territory no longer defines relationships in the way it once did, nor does territory pose the impenetrable barrier of sovereignty and exclusive jurisdiction idealized by Westphalian territorial preeminence. Territorial presence is thus no longer a consistently adequate proxy for fundamental indicators of membership. In territoriality's stead, a more flexible post-territorial membership approach is emerging in which membership is not based on the fiction that territorial presence signifies membership in a society but on actual indicators of membership—community ties and mutuality of obligation—as well as an effort to preserve the character of the national community. Courts are looking to the rationales that historically justified territoriality and evaluating membership with direct reference to those rationales. In that sense, territoriality is not dying; it is making a transformation to keep up with the realities of modernity. Thus, courts are now asking and will likely increasingly be asking whether an individual (or class of individuals) (1) has significant and substantial ties to the surrounding community and (2) is subject to U.S. law in a way that triggers the U.S. government's reciprocal obligations. However, even where an individual does not seem to evidence these two aspects of membership, courts will need to evaluate whether denying rights will threaten the character of U.S. society.

III. Territoriality's Demise in the Employment Sphere: Where Work and Borders Collide

Given strict territoriality's decline in U.S. law, it should come as no surprise that with respect to employment-related rights, immigrants can no longer solely rely on their territorial presence to secure protections. However, territoriality's decline in the employment sphere has not followed the same trajectory that territoriality has followed outside the employment sphere. In employment-related cases, courts are not focusing on the rationales underlying territoriality to distribute membership rights. Rather, in this realm, territoriality is giving way to the status-based membership model rather than to the developing postterritorial model discussed above. For documented workers, this poses no obstacle to the enjoyment of employment rights, as authorized status secures membership rights under the status-based model. Undocumented workers, however, having no legal status under the law, have increasingly found themselves excluded from the effective enjoyment of many employment-related rights.

It was the Supreme Court's 2002 decision in *Hoffman Plastics*²² that solidified the status-based model's encroachment into the employment sphere. There, the petitioner, Castro, had been unlawfully fired from his job because he was engaging in union organizing efforts, an activity protected under the National Labor Relations Act. Castro brought a claim for back pay (payment for work that would have been done if not for the unlawful termination of employment). However, during the resolution of his claim, Castro admitted he had no authorization to work in the United States and that he had secured employment at Hoffman with a fraudulent Social Security card. The Supreme Court acknowledged that Castro was protected under the National Labor Relations Act by virtue of his presence in the United States, but it refused to award Castro back pay. The Court reasoned that awarding back pay would run counter to the Immigration Reform and Control Act's underlying policy of preventing the employment of undocumented immigrants. (Passed in 1986, IRCA imposes civil and criminal penalties on

employers who knowingly hire or continue to employ unauthorized workers.) Castro's only remedy—and Hoffman's only sanction—was an order to cease and desist from engaging in violations of the NLRA and to post a notice of that order at Castro's former work site.

The *Hoffman* majority opinion highlights the duality of the undocumented worker's position in the workplace. Undocumented workers labor on the border of the territorial and status-based models. By recognizing that undocumented workers present in the United States are "employees" covered under the NLRA, the Supreme Court offered a measure of inclusion and membership to Castro and all undocumented workers. However, Castro's membership ended there. Castro's status as an undocumented immigrant foreclosed back pay because, under IRCA, Castro could not legally have worked at Hoffman during the period for which back pay was awarded.

Hoffman has added a new dimension to both federal and state employment law litigation. Immigration status has now become a relevant factor in the distribution of various employment rights in many jurisdictions. In *Escobar v. Spartan Security Service*,²³ for example, the court held that back pay was not available to a claimant who had been undocumented at the time of his employer's alleged sexual harassment, sexual discrimination, and retaliation even though the claimant had since gained authorization to work legally in the U.S. Similarly, a federal district court in Florida held that the estate of an undocumented employee injured in a forklift accident could not recover lost U.S. wages in its claim against the forklift manufacturer.²⁴ Citing *Hoffman*, the court reasoned that lost wage compensation was sufficiently like the back pay denied in *Hoffman* for the court to find that immigration status precluded its award to an undocumented worker: "Awarding lost wages is akin to compensating an employee for work to be performed. This Court cannot sanction such a result."²⁵ In what is likely the most expansive view of *Hoffman*, a Virginia court ordered a worker's compensation claimant to respond to the employer's discovery request regarding immigration status.²⁶ Citing *Hoffman*, the court held that the claimant's immigration status was relevant, not merely to the remedies available, but to



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the claimant's qualification to bring suit at all: "Essentially, Plaintiff's argument that he is entitled to make a workers' compensation claim, even if he is an illegal alien, is 'foreclosed by federal immigration policy. . . .'"²⁷

The fractured view of membership widely applied to the distribution of employment rights and benefits creates significant concerns on many levels. Perhaps most disturbing, the *Hoffman* approach to undocumented workers undermines federal immigration policy, the very issue with which the majority claimed to be concerned. As many have argued, the exclusion of unauthorized immigrants from labor protections is likely to create incentives for employers to continue hiring unauthorized workers. First, removing back pay as an available remedy for the violation of any employee's employment rights severely diminishes an employer's incentive to

fulfill its employment obligations. The remedies approved by the majority in *Hoffman*, an order that the employer cease and desist its illegal conduct and post a notice to employees of the NLRA violation, are a small price to pay for improper termination of an employee. With no remedy to enforce an ostensibly legally ensured right, employees will have little incentive to report their employers' labor law violations, especially where employers threaten to expose an undocumented worker's legal status during litigation. As a result, undocumented workers will have little option but to continue working under substandard conditions.

This, in turn, encourages the hiring of undocumented workers, a practice specifically prohibited by IRCA and ostensibly the very focus of IRCA. As the *Hoffman* dissenters recognized, the denial of back pay "lowers the cost to the employer of an initial labor law violation. . . . It thereby increases the employer's incentive to find and to hire illegal-alien employees" or at least encourages employers to hire "with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations."²⁸

In addition, the reverse incentives created by the failure to afford equal remedies to undocumented immigrants erode workplace standards for all employees, especially where undocumented workers compose a high percentage of the workforce. Where undocumented workers are readily available and easily coerced into remaining quiet about labor law violations, documented workers, too, will be reluctant to report those violations out of a fear of being replaced by an undocumented worker or as a result of pressure from undocumented coworkers who do not want to risk exposure of immigration status. Statistics suggest this dynamic may indeed be present: industries in which undocumented workers compose a high percentage of employees (which are often the most dangerous and lowest paying industries) exhibit a high incidence of wage and hour law violations.

In addition to the troubling incentives created by the use of a status-based approach to deny employment-related rights and benefits to undocumented workers, the status-based approach is inconsistent with the emerging postterritorial approach to membership

emerging outside of the employment sphere. Territoriality's trajectory in the employment sphere represents a stray branch in the overall trajectory of membership theory within U.S. law. While outside the employment sphere territoriality is undergoing a transformation into a more principled, nuanced membership approach, territoriality as it has historically applied in the employment sphere is giving way to an even more formalistic approach. To avoid the undesirable incentives created by the use of a status-based model in the employment sphere and to bring the distribution of membership rights within the employment sphere in line with territoriality's broader transformation, courts must begin to employ the emerging postterritorial approach to distribute employment-related rights.

Under the developing postterritorial approach to membership, undocumented workers, as a category, are members of the employment sphere entitled to the full distribution of membership rights available in that sphere. First, undocumented workers have significant affiliations with their surrounding community. Their employment, alone, ensures the existence of these ties. Undocumented workers contribute to a collective effort and add value to an enterprise. Their employers and the broader economy rely on undocumented workers to perform what are often undesirable and dangerous tasks that few authorized workers care to perform.

Second, the principle of mutuality of obligation further suggests that undocumented workers, despite their lack of work authorization, are members entitled to full membership rights. On one level, and as articulated in *Boumediene*, the only law that applies to undocumented workers in the United States is U.S. law, and the government must not impose obligations upon undocumented immigrants without also affording corresponding protections. But on a more specific level, the relationship between employee and employer is one of reciprocal obligations. An employee subjects herself to the requirements and instructions of an employer on the express assumption that the employee will abide by legally imposed standards. To allow an employer to circumvent these standards by denying undocumented immigrants certain remedies is to approve of the employer's refusal to fulfill its reciprocal obligations to

an employee—it allows employers to govern employees without legal constraint.

Third, and perhaps most important, the failure to enforce the rights of the undocumented worker is likely to create a subcaste of workers without enforceable rights. Aside from leaving a group of residents without full legal recourse for blatant violations of employment rights, this threatens our societal norms of equal rights in the workplace and ultimately endangers the rights of authorized workers and citizens. Absent full protection for undocumented workers, employment standards could be weighed down by the sheer number of undocumented immigrants working under subpar conditions. A bifurcated system of employment protections in which one group enjoys more remedies than the other cannot be sustained for long; such a system brings to mind Thomas Jefferson's warning against the passage of the Alien and Sedition Acts: "The friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow. . . ."²⁹

IV. Conclusion

The increasing presence of undocumented workers in the U.S. labor force poses challenging questions for courts and elected officials about the meaning of immigration status, presence in the United States, and, as I have argued here, the broader concept of membership. I do not claim to have all the answers to these questions. Rather, my hope is that I have given a larger context to questions surrounding undocumented workers, and more broadly, undocumented immigrants. Membership rights can be distributed many different ways. It is important that the U.S. choice of a membership approach be a deliberate, conscientious choice that furthers our overall policies and goals rather than the result of a hasty reaction to surging unauthorized immigration. In the employment sphere, I believe U.S. law has diverged from a broader U.S. commitment to and trend toward a more principled approach to membership. But it is not too late to correct the course of employment rights distribution. Indeed, commentators from both ends of the political spectrum are calling for an overhaul of our immigration policy. My hope is that analyzing the undocumented worker through the lens of member-

ship may help illuminate the difficult path that lies ahead as the United States engages in immigration reform and makes difficult decisions about who belongs and what belonging here means.

NOTES

- 1 D. Carolina Núñez is a visiting assistant professor of law at J. Reuben Clark Law School. She graduated from the Law School in 2004.
- 2 Jeffrey Passel & D'Vera Cohn, *Pew Hispanic Center, A Portrait of Unauthorized Immigrants in the United States* 12 (2009).
- 3 Owen Fiss, *The Immigrant as Pariah*, 23 *Boston Rev.* 5 (Oct./Nov. 1998).
- 4 *Id.*
- 5 *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
- 6 *Id.* at 369.
- 7 *See, e.g., Wong Wing*, 163 U.S. 228 (1896).
- 8 *Phyller v. Doe*, 457 U.S. 202, 226 (1982).
- 9 *Id.* at 221.
- 10 *Id.* at 221.
- 11 *Id.* at 221.
- 12 *Id.* at 203.
- 13 *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
- 14 *Id.* at 271 (1990) (emphasis added).
- 15 *Id.*
- 16 *In re Ross*, 140 U.S. 453 (1891).
- 17 *Id.* at 464.
- 18 354 U.S. 1 (1957).
- 19 *Id.* at 6.
- 20 128 S. Ct. 2229 (2008).
- 21 *Id.* at 2258 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).
- 22 *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board*, 535 U.S. 137 (2002).
- 23 *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895 (S.D. Tex. 2003).
- 24 *Veliz v. Rental Service Corp. USA, Inc.*, 313 F. Supp. 2d 1317 (M.D. Fla. 2003).
- 25 *Id.* at 1336.
- 26 *Xinic v. Quick*, 69 Va. Cir. 295, 2005 WL 3789231 (Va. Cir. Ct. 2005).
- 27 The court was unhindered by the relevant workers' compensation statute, which defined an "employee" as "every person, including aliens and minors, in the service of another under any contract of hire . . . whether lawfully or unlawfully employed. . . ." Va. Code Ann. § 65.2-101 (emphasis added).
- 28 *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board*, 535 U.S. 137, 156 (2002).
- 29 Thomas Jefferson, "Drafts of the Kentucky Resolutions of 1798," in 7 *The Writings of Thomas Jefferson, 1795-1801*, (Paul Leicester Ford, ed. 1896).