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NOTES

SITTING ON ELLIS ISLAND: THE FATE OF DISPARATE IMMIGRATION POLICIES IN THE WAKE OF THE GUANTANAMO BAY CASES

ANDREA BARTON*

INTRODUCTION

In the early morning hours of December 5, 2007, a light snow fell just before sun break on the steps of Supreme Court plaza in Washington, D.C. and on seventy-three sleeping spectators camped out waiting in the hope of securing one of the few public seats for oral arguments the next day in what was assured to be an historic day in the Court. The question before the Court that day in the case of Boumediene v. Bush was whether six Guantanamo Bay detainees, specifically those classified as enemy combatants, have the right to use United States courts to challenge their detention by way of the constitutionally guaranteed writ of habeas corpus. However, the ramifications of this decision and others like it would sweep beyond the shores of the naval base all the way to the shores of southern Florida. Haitian immigrants are waiting too, sometimes in rafts off the warm shore of Miami, and sometimes even at Guantanamo, to secure one of the few coveted spots available to them if they qualify as refugees. Cubans who reach the shore don't have to wait for their status to be determined—once their feet are planted in the sand they are on the path to adjustment under the Cuban Adjustment Act of 1966.

The spectators chose a supremely historic day; on June 12, 2008, the Court issued a landmark opinion in the Boumediene case, holding

1. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 209 (1953) ("In short, respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in.").

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2. All Things Considered (NPR radio broadcast Dec. 5, 2007).


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that "Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay." Specifically, it held that the six Algerian former residents of Bosnia who have been held at Guantanamo Bay since 2002 do have the constitutional privilege of habeas corpus and are not barred from seeking the writ or invoking the Suspension Clause’s protections because they have been designated as enemy combatants or because of their presence at Guantanamo.

In the first sentences of the majority opinion, Justice Kennedy acknowledged the weight and novelty of this decision as petitioners presented "a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo." The magnitude of the decision was palpable to the Justices, who noted that until that day, "the Court has never held that noncitizens detained by [the United States] Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution." To reach its decision, the Court engaged in an historical analysis of the writ in recognition that the "Framers foresaw that the United States would expand and acquire new territories." The Justices were careful to rein in the decision to implicate only the specific fact situation before them—they held "only that the petitioners before [them] are entitled to seek the writ." Despite this qualification, this decision undoubtedly will spur similar assertions of constitutional rights by noncitizens.

The effects of the decision are already materializing. The Justices’ ruling opened the door for over 200 habeas corpus claims. Judge Richard J. Leon of the Federal District Court in Washington, in handling the Boumediene remand, was the first federal judge to hold a full habeas hearing on a Guantanamo case since the Supreme Court ruling in June. On November 20, 2008, he ruled that five of the six men were being held unlawfully at Guantanamo Bay and ordered their release. The Bush administration subsequently released three of the men to Bosnia. Despite the High Court’s pronouncement, confusion and haziness still reign over noncitizen rights. Judge Leon’s disapproval of Boumediene was evident as he announced his opinion, saying its effect was "to superim-

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5. 128 S.Ct. at 2262.
6. Id. at 2243–62.
7. Id. at 2240.
8. Id. at 2262.
9. Id. at 2253.
10. Id. at 2275.
12. Id.
pose the habeas corpus process into the world of intelligence gathering.\textsuperscript{15}

Discussions of Boumediene and the other Guantanamo cases have captured newspaper headlines and emblazoned television screens, invigorating an intense debate over the citizenship and territoriality of not only the detainees but also immigrants in general.\textsuperscript{16} Hazy categories of citizens, noncitizens, and "enemy combatants" have emerged with equally hazy conceptions of their level of access to constitutional rights. The Supreme Court's decision was an attempt to bring clarity to the discussion, but it is only clear that confusion and haziness still cloud the conversation. The Justice Department acknowledged the confusion and saw Judge Leon's decision as "perhaps an understandable consequence of the fact that neither the Supreme Court nor Congress has provided rules on how these habeas corpus cases should proceed in this unprecedented context."\textsuperscript{17} The Boumediene decision addressing the due process rights of these noncitizen detainees will likely have a significant impact on immigration law and the constitutional rights of immigrants stopped at the border or detained in Cuba. The stringent categories of citizen and noncitizen that immigration law used to converse in have given way to terminology that attempts to make room for national security. This Note will extend the discussion beyond due process rights to the viability of an equal protection claim against disparate immigration policies, particularly in the context of Caribbean immigrants and the special Cuban "Wet Foot/Dry Foot" policy. If an equal protection claim by the immigrants themselves is found to not be viable, the disparate immigration laws may endure a challenge brought by family members or under international law. In light of this, the United States should proactively adopt a more national origin-neutral policy towards refugees that is both loyal to its national security concerns and fair in its treatment of those desperately seeking refuge.

In Part I, I will discuss the history of disparate immigration policies in the United States. In Part II, I will contrast the immigration policies the United States has towards Cuba and Haiti. In Part III, I will discuss the viability of a constitutional claim challenging these policies brought by Haitian immigrants in light of the Guantanamo Bay cases. Finally, in


\textsuperscript{17} Glaberson, Judge Declares Five Detainees Held Illegally, supra note 13.
Part IV, I will discuss alternative challenges to an equal protection claim by Haitian immigrants.

I. IMMIGRATION POLICY IN THE UNITED STATES

A. The Intersection of National Security and Immigration Law

It is precisely the persistent ambiguities in the constitutional rights of immigrants that make immigration law so tempting for the government to employ to combat terrorism, most recently in the context of the detention of terrorism suspects in places like Guantanamo Bay. Immigration law is inextricably tied to national security concerns, and the Supreme Court has repeatedly recognized that immigration law can be a powerful tool in foreign policy. The tragedy of September 11, 2001 launched the War on Terror and institutionalized immigration as a national security affair with the creation of the Department of Homeland Security. The Department of Homeland Security Reorganization Plan was introduced on November 25, 2002, and it transferred a majority of the immigration functions that had previously been performed by the Immigration and Naturalization Service to this newly created national security department.

The Court’s June 29, 2007 decision to hear the Boumediene case marked its first cert reversal in sixty years and the third case dealing with Guantanamo Bay detainee rights to come before the Court. In recognition of the magnitude of this decision, it authorized the same-day release of the audio argument. Boumediene is the most recent development in a series of power-plays between the Bush administration and advocates of detainee rights. It is an unexpected plot twist and the latest chapter in a convoluted storyline of Supreme Court decisions that have shaped immigration policy in the United States. President Barack

18. See Brian G. Slocum, The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law, 84 DENV. U. L. REV. 1017, 1022 (2007) (noting that courts have struggled with “which, if any, constitutional rights should be afforded aliens”).
20. See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) (“The Executive should not have to disclose its ‘real’ reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals.”); Mathews v. Diaz, 426 U.S. 67, 81 (1976) (calling for judiciary caution since immigration law decisions “may implicate our relations with foreign powers”).
Obama’s campaign promise to close Guantanamo has made its detainees the latest protagonists. The initial decision to hold detainees off U.S. soil at Guantanamo was made under the impression that they would not have access to the courts. Instead of merely reacting to the erratic tilt-a-whirl ride of Supreme Court decisions, the United States should develop immigration policies that are less susceptible to challenge.

B. A History of National Origins-Based Immigration Legislation

As a self-defined nation of immigrants, the history of immigration policy in the United States is extensive and marked by periods of unbridled welcome tempered with periods of blatant discrimination. The approximately four million annual tourists, fourth grade field trip students, and history enthusiasts that visit the Statue of Liberty each year read Emma Lazarus’ plea emblazoned on the granite-faced base of the “Mother of Exiles”: “Give me your tired, your poor,/Your huddled masses yearning to breathe free,/The wretched refuse of your teeming shore./Send these, the homeless, tempest-tost to me,/I lift my lamp beside the golden door!” In 1986, America commemorated one hundred years of copper and steel-encapsulated liberty with a birthday celebration at which President Ronald Reagan reinvigorated Lazarus’ message, charging, “We are the keepers of the flame of liberty. We hold it high . . . for the world to see.” The United States is not equipped to offer refuge to all. However, Lazarus’ oft-quoted appeal has been at times tarnished by a United States immigration policy that has picked and chosen which “huddled masses” to accept through national origins quota systems and legislation that rewards those groups with contemporary political clout.

In this Note, I assert that despite attempts to eradicate national origins-based policy, it has infiltrated U.S. immigration law post-1965 and continues today, typically rewarding the group with the most political clout in Congress at the time. The United States has every reason to limit immigration and secure its borders, but immigration is inevitable and integral to the country’s vibrancy. History and modern day policies

24. See William Glaberson & Helene Cooper, Obama’s Closing of Guantanamo May Take a Year, N.Y. TIMES, Jan. 13, 2009, at A1 (stating that Obama plans to issue an executive order on his first day in office to close the detention camp).
reveal that the country has yet to adopt a national origins-neutral immigration policy that looks to the needs of the United States as a country and immigrants as human beings, which may leave it susceptible to an equal protection challenge.

Emma Lazarus’ words rang almost too true in the first hundred years of the nation’s existence. Immigration was unrestricted and even encouraged as essential to the prosperity of the newborn nation. However, around the mid-1800s the composition of the immigrant flow changed from a majority of British, Irish, and German to include an increasing number of unskilled laborers from Southern and Eastern Europe, China, and South America. The juxtaposition of the California Gold Rush and the Taiping Rebellion in China resulted in an influx of Chinese immigrants who satisfied the need for inexpensive labor. When the need for labor waned, so too did the tolerance for immigrants, who were accused of driving wages down and taking away jobs. Anti-Chinese riots erupted in western cities, and Congress responded by enacting the Chinese Exclusion Act, the first national immigration law that discriminated against future immigrants on the basis of their national origin. The Act was passed in 1882; it suspended the immigration of Chinese laborers for ten years, allowed for the deportation of any Chinese in the country illegally, and prohibited Chinese immigrants from obtaining United States citizenship. The Supreme Court upheld the federal government’s power to regulate immigration in 1889 in Chae Chan Ping v. United States (“The Chinese Exclusion Case”). The Court held that the federal power to exclude noncitizens was inherent in the very notion of a sovereign State:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.

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32. Dimas, supra note 29, at 8.
33. NumbersUSA, supra note 30, at 4.
34. Id. at 5.
35. 130 U.S. 581 (1889).
36. Id. at 606.
As is frequently the case with immigration laws, the decision was mostly motivated by the political pressures of the time.

Four years after the *Chinese Exclusion Case*, the Supreme Court expanded the right to exclude entry into an absolute power to demand an individual’s departure when it held that the right to deport foreigners was "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."\(^{37}\) This right was readily exercised in post-war times. Mobilization for the war efforts created both a desperate labor shortage and a short-lived tolerance for immigrants occupying jobs once the need was fulfilled.

Mexican immigrants, for instance, came to the United States in significant numbers for the first time around 1909.\(^{38}\) Political and economic upheaval impelled a further wave of immigrants who were well received as a solution to the labor shortage caused by the First World War.\(^{39}\) But federal immigration officials responded to the economic tumult of the Depression by expelling 500,000 persons of Mexican descent, and over half of them were United States citizens.\(^{40}\) The same shift occurred following World War II, when over 1,000,000 persons of Mexican descent were expelled from this country during another expulsion, termed "Operation Wetback."\(^{41}\) Many of those expelled were, once again, American citizens born in the United States.\(^{42}\)

8.8 million immigrants entered the United States during the first decade of the twentieth century alone.\(^{43}\) Restrictive immigration policies enacted between 1917 and 1924 reflected a swelling tide of unease towards the millions of new arrivals.\(^{44}\) At the end of World War I, ruminating fear of an inundation of immigrants from war-torn countries led to passage of the Quota Law of 1921, which for the first time set numerical limitations on immigration.\(^{45}\) Intended to be temporary, it capped immigration of each nationality at three percent of the United States residents of that nationality living in the country in 1910.\(^{46}\) With the first numerical restriction also came the first of many unequal numerical applications. Natives of Western Hemisphere countries were exempt from the quota and could enter free of restriction.\(^{47}\)

\(^{37}\) *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

\(^{38}\) *DIMAS*, *supra* note 29, at 10.

\(^{39}\) *Id.*

\(^{40}\) *Id.*

\(^{41}\) *Id.* at 11.

\(^{42}\) *DIMAS*, *supra* note 29, at 11.


\(^{44}\) *LEGOMSKY*, *supra* note 31, at 125–26.

\(^{45}\) *Id.* at 126.

\(^{46}\) *DIMAS*, *supra* note 29, at 9.

\(^{47}\) *LEGOMSKY*, *supra* note 31, at 126.
Congress implemented a more permanent national origins quota system when it enacted the 1924 National Origins Act, which set a ceiling of 150,000 immigrants per year and adopted a quota for each nationality group of two percent of the members of that group in the United States in 1890. The 1924 legislation also contained a provision prohibiting the immigration of aliens ineligible for citizenship. The ratification of the Fourteenth Amendment extended eligibility for naturalization to African-Americans, but Asians remained ineligible under naturalization laws since they were considered “non-white.”

Congress codified the immigration laws under a single statute when it passed the Immigration and Nationality Act (INA) in 1952. Congress made its intent to eradicate national origins discrimination explicit in the Act’s language. The introduction to section 202(a) of the INA unequivocally declares: “[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” The language of the statute should preclude the use of discriminatory immigration policies. Although it eliminated race as a bar to naturalization and immigration, it retained the national origins quota systems as a means to “best preserve the sociological and cultural balance” in the United States.

In 1965 in the wake of the Civil Rights Act, Congress amended the INA and abolished the national origins quota system, replacing it with a seven-category preference system that favored immigrants with relatives in the United States, immigrants with needed labor skills, and refugees. In 1976, the categorical preference system, which had previously only

49. NumbersUSA, supra note 30, at 8. The 1924 law used the 1890 census to determine percentages instead of the 1910 census, which the temporary quota law of 1921 used. Immigrants from Northern and Western Europe directly benefited from this decision since their predecessors represented a greater segment of the pre-Great Wave U.S. population. Id. at 9.
50. Id.
51. Id. at 10. See, e.g., Ozawa v. United States, 260 U.S. 178 (1922) (holding that a Japanese immigrant could not be naturalized because he was non-white).
52. NumbersUSA, supra note 30, at 11.
53. Id. at 13.
55. S. REP. No. 81-1515, at 455 (1950).
56. NumbersUSA, supra note 30, at 13. Numerical restrictions on immigration remained a central feature of the amendments, which capped total immigration from the Eastern Hemisphere at 170,000 annually, with a per-country limit of 20,000, and capped
applied to Eastern Hemisphere immigrants, was extended to applicants from the Western Hemisphere.\textsuperscript{57} Two years later, the numerical restrictions for immigrants from both hemispheres were combined into a single worldwide cap of 290,000 per year.\textsuperscript{58} The cap was increased to 675,000 by the Immigration Act of 1990, which simultaneously added a category of admission based on diversity.\textsuperscript{59}

Since 1965, the United States has experimented with legislation to deal with illegal immigration, sometimes more successfully than others. The United States has a history of participating in resettlement efforts of refugees since the end of World War II, and the Refugee Act of 1980 enacted a comprehensive refugee policy that gave the President and Congress collaborative power to determine the number of refugees admitted on a yearly basis.\textsuperscript{60} Haitian immigrants hope to fall within the ambit of this act. The Immigration Reform and Control Act of 1986 addressed the burgeoning issue of illegal immigration by imposing sanctions on employers who knowingly employed unauthorized immigrants and created two amnesty programs for those in the United States illegally.\textsuperscript{61} Unauthorized immigration received further attention in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which addressed border enforcement and the use of social services by immigrants.\textsuperscript{62}

II. IMMIGRATION FROM THE CARIBBEAN

Although national origins quotas were supposedly eradicated in 1965, national origins based legislation still seems to characterize immigration policy. The imagery of a crowded, dilapidated boat arriving on a United States sandy beach has become synonymous with illegal immigration. In the early 1990s, the United States quickly became the desired destination of three primary groups of undocumented immigrants traveling by boat: Haitians, Cubans, and Chinese.\textsuperscript{63} And although all arrive here equally thirsty, both for water and American citizenship, and equally desirous of the opportunity to live in America, the national origin of that boat and its occupants has a direct impact on whether or not their thirsts

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 2.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
will be quenched, which reflects an immigration policy that is still rooted in national origins. Illegal immigration should never be encouraged, and the United States cannot take in the world. However, it does make room in its immigration policy for refugees, but it does not adopt a consistent response to these efforts by sea.

A. Cuban Immigration

On December 28, 1892, the U.S. Senate Committee on Immigration held a hearing on the topic of migration from Cuba to the United States. The very first witness, U.S. Consul-General Ramon O. Williams, described the state of emigration from Cuba to the United States:

I should say that there is no emigration from the island of Cuba, in the European sense of the word . . . between Key West and Havana people go as between Albany and New York; or as between New York and Boston on the Sound . . . [Cubans] say, "I want to go to the Key" just as in Baltimore they would say, "I am going over to Washington."  

Until August 1994, Cubans who wished to enter the United States were free to do so with no real restriction. Congress passed the Cuban Adjustment Act in 1966 in response to the deluge of Cubans to the United States after the fall of the Batista government in 1959 and the assumption of power by Fidel Castro. The law was enacted to show United States opposition to Castro's oppressive communist regime and gave Cubans specialized treatment in the naturalization process. Cuban nationals who had been admitted to the United States or who had come illegally could apply for an immigrant visa after one year of residency in the country. Further, these Cubans would be given permanent residence retroactively to the date of their arrival, so even time spent here illegally would count towards the five years of residency necessary for naturalization. Cuba was the tenth largest source of immigrants to this country from 1981 to 1989, and over 192,000 Cubans were granted permanent resident status in the United States between 1981 and 1994. In 1994, Fidel Castro lifted restrictions on emigration, crowding a sea of Cuban immigrants on rafts setting out for American shores.

65. Id.
66. NUMBERSUSA, supra note 30, at 15.
67. Id.
68. Id.
69. Id. at 16.
70. Id.
On August 19, 1994, President Clinton modified the long-standing open door policy and outlined a new detention policy—immigrants arriving illegally from Cuba would not be allowed to enter the country and would instead be detained at the Guantanamo Naval Base. Clinton emphasized that the policy stemmed from dual considerations of the safety of the rafters and the need to prevent another exodus like the Mariel Boatlift, but was most likely a response to the growing disidence in the U.S. electorate to preferential treatment for Cubans, especially when they appeared to be migrating for the same reasons as every other immigrant—to escape poverty and improve their lives. Since this new policy did mark a significant reversal, Clinton was asked at the press conference whether people fleeing Cuba would still receive automatic entry into the United States as political refugees, and he responded:

No, . . . the people leaving Cuba will not be permitted to come to the United States; they will be sent to safe havens. The people who reach here will be apprehended and will be treated like others. . . . Their cases will be reviewed, those who qualify can stay, and those who don't will not be permitted to. They will now be treated like others who come here.

Despite the new policy, the exodus continued, and the Coast Guard was rescuing record numbers of rafters each day. In response, the United States reopened talks with Cuba on immigration issues on September 1, 1994. Eight days later, in exchange for exit controls on Cubans leaving the island, the United States for the first time placed a floor on immigration from any country when it guaranteed Cuba a mini-

71. Lisandro Pérez, supra note 64, at 204.
72. In an attempt to burden the United States, Fidel Castro opened the Cuban port of El Mariel and allowed over 125,000 Cuban nationals, including prisoners, to flood the shores of the United States. The Carter administration responded to the deluge with its “open hearts and open arms” policy and allowed immigrants to seek asylum from political persecution in the United States. Alberto J. Perez, Note, Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy, 28 Nova L. Rev. 437, 445 (2004).
73. Lisandro Pérez, supra note 64, at 204.
74. Id. at 203–04 (emphasis added).
75. Id. at 205.
76. Id. at 205–06. The New York Times ran a story discussing Castro's ability to manipulate U.S. foreign policy:

His country may be crumbling around him, its economy reduced to ruins and its people so disgusted with their situation that some have marched in the streets of Havana this month, openly demanding his ouster. But for all his problems at home, Fidel Castro still retains a remarkable ability to bedevil the United States and to transfer the burden of his own domestic failings to his adversary he has fought with such gusto and relish for more than 35 years.

mum of 20,000 visas available to Cubans each year. In 1995, the Wet Foot/Dry Foot policy was implemented, which orders the repatriation of Cuban emigrants traveling by boat to the United States who are intercepted at sea but, more importantly, makes those lucky enough to make it to the shore eligible for citizenship under the Cuban Adjustment Act.

Cuban rafters intercepted by the U.S. Coast Guard would be returned to Cuba. No such policy exists for other Caribbean refugees.

B. Haitian Immigration

1. History

Although not in the grip of communism, in the two centuries since independence, Haiti has withstood an unremitting chain of dictatorships, military coups, and political assassinations that have plagued any attempt to institute a democratic government. In the 1960s, Haiti suffered under the repressive rule of François Duvalier, or "Papa Doc," who engaged in continuous human rights violations. His rule was followed by his son Jean-Claude Duvalier, or "Baby Doc," whose reign mimicked his father's in its oppression and subjugation of basic human rights. Because of the magnitude of his violations, the U.S. joined several other countries in demanding his departure. His tumultuous reign was followed by further instability as Haiti cycled through five different presidents in four years. In October 1991, a violent military coup ousted Haiti's first democratically elected president, Jean-Bertrand Aristide, leading to massive repression by security forces, "disappearances," extrajudicial executions, torture, threats, and intimidation of those who had supported the President, and compelling 42,000 to brave the sea in hopes of reaching the United States.

The political instability created by this quick succession of leaders has accelerated the deterioration of civil liberties in Haiti. Although the 1987 Constitution protects the right to assemble and unionize, citizens are repeatedly arrested and beaten for public gatherings and workers are detained or killed for attempts to engage in collective bargaining.

77. Lisandro Pérez, supra note 64, at 206.
78. Alberto J. Perez, supra note 72, at 455.
79. Lisandro Pérez, supra note 64, at 207.
80. Alberto J. Perez, supra note 72, at 456.
81. Id. at 446.
82. Id.
83. Amnesty Int'l, United States: Failure to Protect Haitian Refugees 1, AMR 51/31/93 (Apr. 1993).
85. Id. at 11. For example, on October 19, 1989, the section chief of Mapou prohibited residents from holding public meetings, including religious ceremonies. His
American notions of due process are a fairy tale. Once incarcerated, almost none of the prisoners in Haitian jails will ever see a lawyer. Haiti remains the poorest country in the Western hemisphere with an ever-declining standard of living. Approximately 80% of the population lives in poverty and, of the few employed, two-thirds of the labor force work in non-formal jobs. When Haiti fell from 146th to 150th place on the United Nations Development Programme ranking in 2003, with a drop in life expectancy to an abysmal 49.1 years, representatives of several international aid organizations issued a statement of concern:

We are greatly alarmed by the accelerated degradation of the socioeconomic conditions, by the lost economic opportunities at the national, regional and global level, and by the systematic deterioration of the environment. . . . The nutritional situation is in the process of collapsing towards critical levels: 23% of children under the age of five suffer from chronic malnutrition, and the reports of local organisations mention a 30% increase in the cases of severe malnutrition.

Although Haitian life expectancy has appreciably improved since then, to an estimated 58.1 years, it still falls well below Cuba's 77.2. But the tumult and poverty that has characterized the last two hundred years in Haiti still pushes their people into the sea, alongside Cubans, towards American shores.

2. Haitian Immigration Policies

On July 7, 1991, a Haitian fishing boat named Conail was intercepted by Coast Guard officials on border patrol thirty miles off the coast of Miami. Of the 163 men, women, and children on board, 161 were Haitians fleeing impoverishment in their homeland, and the other two were Cubans who had been saved by the Haitians from their flimsy raft in a "gesture of brotherhood." However, the "brothers" were soon separated, as the two Cubans were allowed to stay in the United States and assistant burned down the homes of three peasant families to demonstrate his authority over the community. Id. at 76.

87. Id.
90. Id. at 261 tbl.10.
92. Id.
all but nine of the Haitians were sent back.\textsuperscript{93} Haitians living in the United States were infuriated by the seemingly stark double standard in immigration policy.\textsuperscript{94}

The primary features of the modern day immigration policy towards Haitians include "interdiction on the high seas and mandatory detentions of undocumented, interdicted Haitians."\textsuperscript{95} Congressional debate over the years has focused on the seemingly disparate classification of Haitians as economic migrants, which results in different treatment from other immigrants seeking asylum.\textsuperscript{96} Even though many Haitians claimed to be fleeing political repression and many Cubans admitted to be escaping harsh economic conditions, the U.S. government has defined Cubans as political refugees to be granted legal status and classified Haitian immigrants as economic migrants detained indefinitely or processed for deportation.\textsuperscript{97} The dissimilar treatment of Haitian immigrants became obvious during the massive migration of Cubans in 1980 during the Mariel boatlift.\textsuperscript{98}

The interdiction program first started on September 23, 1981, when the United States and Haiti authorized the Coast Guard to intercept vessels with undocumented immigrants.\textsuperscript{99} As part of the agreement, the Haitian government said it would not punish those who were repatriated, and those who qualified as refugees would not be returned to Haiti.\textsuperscript{100} In the decade that followed, the Coast Guard intercepted 25,000 Haitian immigrants.\textsuperscript{101} Interviews were conducted aboard Coast Guard cutters, and immigrants identified as economic migrants were screened out and repatriated while those who made a credible showing of refugee status were screened in and transferred to the United States to file formal applications for asylum.\textsuperscript{102}

The military coup that ousted the first democratically elected president in September 1991 resulted in "hundreds of Haitians [being] killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs,"\textsuperscript{103} and

\begin{thebibliography}{99}
\bibitem{93} Id.
\bibitem{94} Id.
\bibitem{96} Id.
\bibitem{97} Ramón Grosfoguel, \textit{Migration and Geopolitics in the Caribbean: The Cases of Puerto Rico, Cuba, the Dominican Republic, Haiti, and Jamaica}, in \textit{Free Markets}, supra note 64, at 225, 235.
\bibitem{98} Id. at 234.
\bibitem{99} Alberto J. Perez, supra note 72, at 451.
\bibitem{100} Id.
\bibitem{102} Id. at 161–62.
\bibitem{103} Id. at 162.
\end{thebibliography}
spurred 34,000 Haitians into the sea towards the United States. Because
of the massive numbers, the Department of Defense established tempo-
rary facilities at the United States Naval Base in Guantanamo, Cuba to
conduct screening for refugee status.104 The naval base soon was filled
to capacity, and President Bush had to choose between allowing Haitians
into the United States for the screening process or repatriating them
without an opportunity to qualify as refugees.105

On May 23, 1992, Bush chose the second option, and issued Exec-
utive Order No. 12,807.106 Bush believed it was the best way to assist in
the restoration of democracy in Haiti while discouraging Haitians from
risking their lives on the treacherous voyage to freedom.107 In Sale v.
Haitian Centers Council, several organizations and Haitian aliens
mounted a legal challenge to the interdiction program.108 Haitian immi-
grants who were either residing illegally in the United States or who
arrived on shore were subject to deportation or exclusion hearings at
which they could request asylum; however these avenues were only avail-
able to those who reach the border and thus "the interdiction program
challenged here has prevented Haitians such as respondents from reach-
ing our shores and invoking those protections."109 The respondents
asserted that the forced repatriation violated § 243(h)(1) of the INA, but
the Court disagreed.110 The Court did not decide the constitutionality
of the policy, as it was not asserted as a claim.

Some members of Congress began to take umbrage at the pattern of
blatant exclusion of Haitians, which once again emerged when Congress
enacted the Nicaraguan Adjustment and Central American Relief Act
(NACARA) in 1997.111 The result of the NACARA was a highly prefer-
ential law which grants practically absolute amnesty to Cubans and
Nicaraguans, but offers less protection to Guatemalans and El Salvadori-
ans and only marginal protection to Eastern Europeans.112 All nationali-

104. Id. at 163.
105. Id. at 163–65.
107. Alberto J. Perez, supra note 72, at 453.
108. Sale, 509 U.S. at 166.
109. Id. at 160.
110. Id. at 170–71.
112. NumbersUSA, supra note 30, at 45. The special legislation surrounding Cuban immigration is perhaps the most famous national origins-based immigration pol-
icy, but many statutes that appear facially neutral are often discriminatory in their effect.
Hon. Paul Brickner & Meghan Hanson, The American Dreamers: Racial Prejudices and
Discrimination as Seen Through the History of American Immigration Law, 26 T. JEFFER-
SON L. REV. 203, 229–31 (2004). NACARA highlights the problems implicit with
nationality specific and national-origins based immigration legislation. There are count-
less poverty-stricken and war-torn countries teeming with people trying to gain access to
ties not mentioned in the Act, including Haitians, were left unprotected.\textsuperscript{113} After NACARA's passage, some members of Congress argued that the exclusion of Haitians from the bill could only stem from racial prejudice, as Haitians are similarly situated to groups which received protection under NACARA.\textsuperscript{114} In response, bills were introduced in both the House and Senate to add Haitians to the Nicaraguan/Cuban amnesty provisions of NACARA, but they were met with resistance.\textsuperscript{115} When Immigration Subcommittees evidenced their reluctance to move the bills, the Senate version had to be proposed as an amendment to an omnibus appropriations bill.\textsuperscript{116} The Haitian Refugee Immigration Fairness Act (HRIFA) adds Haitians who were living in the United States and had applied for asylum or who were paroled into the United States by December 31, 1995, and their spouses and children, to the Nicaraguan/Cuban amnesty provisions.\textsuperscript{117}

Despite this gain, significant disparities remain. While the finish line is drawn on the sand for Cubans, when over two hundred Haitian immigrants successfully reached the Miami shoreline on October 29, 2002, they kept running. They desperately darted through rush hour traffic on the Rickenbacker Causeway to evade authorities, creating a danger for both drivers and themselves.\textsuperscript{118} President George W. Bush responded to this incident and swelling tension by reiterating the policy that "all illegal immigrants who arrive by sea, except those who fall under the 1966 Cuban Adjustment Act, would be detained."\textsuperscript{119} After hearing Bush's announcement, Harold Vieux, President of the Conference of Haitian Pastors United in Christ expressed a common complaint: "If they have one exception then it doesn't apply to everyone . . . I'm not saying that the policy should be lenient, but I'm saying that it should be fair."\textsuperscript{120}

\textsuperscript{113} NumbersUSA, supra note 30, at 46–47.
\textsuperscript{114} Id.
\textsuperscript{118} Alberto J. Perez, supra note 72, at 455–56.
\textsuperscript{119} Georgia East & Thomas Monnay, Haitian Activists Plan National Protest, S. FLA. SUN-SENTINEL, Nov. 10, 2002, at 2B.
\textsuperscript{120} Alberto J. Perez, supra note 72, at 456.
As in the Guantanamo Bay cases, national security concerns directly contoured Haitian immigration policy on November 13, 2002, when the INS published a notice explicating that certain immigrants arriving by sea who are not to be admitted or paroled should be placed in expedited removal proceedings and detained. For example, in April 2003, then-Attorney General John Ashcroft issued a ruling that allowed for the indefinite detention of illegal Haitian immigrants in response to burgeoning national security concerns. Haitians who are detained under this policy, in addition to those actually stopped on the shores of the United States, may be able to proffer an argument that by virtue of their detention they meet the territoriality prong of a constitutional claim.

Undoubtedly the United States has a real interest in making an example out of Cuba and eradicating the disease of communism. But Cuba is not the only communist country in the world; yet its emigrants are the only ones who receive this disparate treatment. Although Haiti is not a communist country, its government has been plagued by political unrest that has left its citizens poverty-stricken.

III. IMMIGRANTS AND THE CONSTITUTION

To begin his argument, the counsel for the city in Mayor of New York v. Minh responded to the foreign shipmaster with irritation that, "although a stranger among us, he has undertaken to teach us constitutional law." He expressed a common resistance to the idea that an immigrant would be able to make a claim under the Constitution of the United States. However, unlike the French, who explicitly produced a Declaration of the Rights of Man and of the Citizen, the drafters of the Bill of Rights did not distinguish between the respective rights of citizens and other persons. In failing to do so they catalyzed years of litigation and questions that are still unresolved today as to whether immigrants may seek any refuge under the Constitution. The majority of attempted constitutional claims brought by immigrants implicate the due process, or lack thereof, in immigration practices in entry or deportation procedures. The series of Guantanamo Bay cases are due process claims in which the detainees assert that they are deprived of the opportunity to present evidence or appeal the decision.

121. Wasem, supra note 111, at 4.
122. Taft-Morales & Ribando, supra note 95, at 31.
123. NumbersUSA, supra note 30, at 17.
124. 36 U.S. (11 Pet.) 102, 121 (1837).
A. Constitutional Rights of Immigrants

Since the Court decided the Boumediene case in a way that may afford detainees some due process rights, equal protection rights are next in line to be challenged, as the two clauses both refer to "any person" as their subjects.

The Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.127

By its terms, the clause restrains only state governments. However, the Fifth Amendment's due process guarantee has been read as imposing the same restrictions on the federal government.128 The ratification of the Fourteenth Amendment in 1868 brought with it a new suggestion that all persons, citizens or not, would enjoy the protections of the Due Process and Equal Protection clauses.129 Shortly after the enactment of the Fourteenth Amendment, the Court confirmed this suggestion when it decided a case that became the foundation of the alien rights tradition. In Yick Wo v. Hopkins, it held that the Fourteenth

is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.130

The Equal Protection clause directs that "all persons similarly circumstanced shall be treated alike."131 In 1982, the Court identified the purpose of the clause as to "work nothing less than the abolition of all caste-based and invidious class-based legislation."132 To that end, the Court held that illegal immigrant children were "persons within the jurisdiction" of the state of Texas,133 and thus protected under the Equal

127. U.S. Const. amend. XIV, § 1 (emphasis added).
128. See Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").
130. 118 U.S. 356, 369 (1886).
133. Id. at 210.
Protection clause from a Texas statute which withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States. In Cuban American Bar Association, Inc. v. Christopher, the Eleventh Circuit held that "aliens who are outside the United States cannot claim rights to enter or be paroled into the United States based on the Constitution."  

The Supreme Court has repeatedly recognized aliens within the United States—at least those documented—as members of a suspect class, and equal protection guarantees apply to aliens as well as naturalized citizens. In Graham v. Richardson, the Court evaluated an equal protection claim against state welfare laws that imposed citizenship and durational residency requirements on beneficiaries. In holding that the laws were violative of equal protection, the Court classified aliens as a prime example of a "discrete and insular minority" and further required that classifications based on alienage, like those based on nationality or race, be subject to close scrutiny as they are inherently suspect. However, a litany of court decisions affirms that Congress must only have a rational basis in its formulation and adoption of regulations pertaining to aliens, even those that discriminate among classes of aliens. In Mathews v. Diaz, the Court decided the constitutionality of Congress enacting legislation that discriminates in favor of citizens over aliens and held that Congress has the power in the realm of naturalization and immigration to make "rules that would be unacceptable if applied to citizens." Despite these ephemeral pronouncements of the courts, the constitutional rights of immigrants in the more complicated fact patterns of real life is still an open question.

B. Can These Haitians Bring a Claim?

Considerations of both status and territoriality have historically been crucial in immigration law in determining the scope of constitutional rights. This is true particularly since individuals are by definition in a limbo-like transit. In the 2004 movie The Terminal, Tom Hanks' character Viktor is a traveler from the fictional country of Krakozhia who finds himself stranded and forced to live in the terminal of JFK Airport when he is denied entry to the United States but simultaneously cannot
return to his homeland because of a political revolution. He befriends a flight attendant, Amelia, played by Catherine Zeta-Jones, who asks him, "Are you coming or going?" Viktor responds, "I don't know. Both."142

The degree to which geography plays a role in constitutional rights is a vibrant source of debate, as evidenced by the Boumediene case. The United States seized Guantanamo Bay during the Spanish American War in 1898.143 After Spain's defeat, Cuba gave the United States control of the base, and it was later leased in perpetuity to the United States, an arrangement that can only be broken if both countries agree.144 During Boumediene's oral arguments on December 5, 2007, Scalia's questions evinced concerns of territoriality that enter into any discussion of immigrants' constitutional rights: "Do you have a single case in the 220 years of our country, or, for that matter, in the five centuries of the English empire in which habeas was granted to an alien in a territory that was not under the sovereign control of either the United States or England?"145

Two categories of Haitian plaintiffs may satisfy the territoriality prong: those who reach the shore and are turned away and those who are detained under the Attorney General's declaration. Under the standard account, constitutional rights are rooted in a territorial distinction.146 The phrase "within its jurisdiction" within the Equal Protection clause reflects this focus. This might be problematic for potential immigrant plaintiffs, as the persons they claim the law is disparately affecting are those who have not yet entered the country. In Leng May Ma v. Barber, the Court emphasized the territoriality distinction: "It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality."147 A more infamous application of the territorial distinction and entry fiction came in the Shaughnessy case. After a series of events that mimics the modern day cinematic drama The Terminal, Ignatz Mezei "sat on Ellis Island because this country shut him out and others were unwilling to take him in."148

Respondent seemingly was born in Gibraltar of Hungarian or Rumanian parents and lived in the United States from 1923 to 1948. In May of that year he sailed for Europe, apparently to visit his dying mother in Rumania. Denied entry there, he remained

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142. The Terminal (Dreamworks SKG etc. 2004).
144. Id.
146. Slocum, supra note 18, at 1022.
in Hungary for some nineteen months . . . . Upon arrival [in the United States] on February 9, 1950, he was temporarily excluded from the United States . . . . Twice he shipped out to return whence he came; France and Great Britain refused him permission to land . . . . Respondent personally applied for entry to about a dozen Latin-American countries but all turned him down. So in June 1951 respondent advised the Immigration and Naturalization Service that he would exert no further efforts to depart.\textsuperscript{149}

Despite the indefinite nature of his detention on U.S. soil and exclusion without a hearing, the Court held that Mezei had no rights because he was to be treated as if he were "stopped at the border."\textsuperscript{150}

The Guantanamo Bay cases have also created new categories of status and muddled previously clear-cut notions of citizens and noncitizens in favor of national security concerns. Immediately following the terrorist attacks of September 11, 2001, Congress enacted a joint resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided [those attacks] . . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."\textsuperscript{151} Following this order, the United States and allied forces captured hundreds of "unlawful enemy combatants" and transferred them to Guantanamo Bay for detention, triggering a deluge of litigation and the evolution of the "enemy combatant," this third category of individuals.\textsuperscript{152}

In \textit{Hamdi v. Rumsfeld}, the Court held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."\textsuperscript{153} Justice O'Connor in her plurality opinion took issue with Scalia's over-attention to territoriality concerns: "Justice Scalia presumably would come to a different result if Hamdi had been kept in Afghanistan or even Guantanamo Bay. This creates a perverse incen-

\textsuperscript{149} Id. at 208-09.
\textsuperscript{150} Id. at 215. In \textit{Gisbert v. U.S. Att'y Gen.}, the Fifth Circuit held that Cuban detainees following the Mariel boatlift had no constitutional right to be free from indefinite detention. 988 F.2d 1437 (1993). The Supreme Court’s decision in \textit{Landon v. Plasencia} to afford due process in an exclusion hearing of a permanent resident alien might indicate a slight shift in the Court’s thinking from \textit{Shaughnessy} or evidence the Court’s own confusion on the issue of immigrant constitutional rights. 459 U.S. 21 (1982). In \textit{Zadvydas v. Davis}, the Supreme Court held that the indefinite detention of deportable aliens would bring up constitutional issues. 533 U.S. 678 (2001).


\textsuperscript{153} 542 U.S. 507, 533 (2004).
tive. . . . It is not at all clear why that should make a determinative constitutional difference.”

The same day, the Court also held in Rasul v. Bush that district courts had jurisdiction under the federal habeas statute to hear habeas applications by detainees challenging the legality of their detentions. Footnote 15 of the Court's opinion has given many legal scholars fodder for the argument that the Court was implying that aliens possess constitutional rights. The Court stated:

[Being] held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing unquestionably describe[s] "custody in violation of the Constitution or laws or treaties of the United States,”

which, as Slocum noted, “is all that the habeas statute requires.”

The definition of “enemy combatant” has evolved with simultaneously evolving national security needs. In response to these decisions granting broader constitutional rights to individuals whom the government has determined to be threats to the state, the Department of Defense established a system of Combatant Status Review Tribunals (CSRT) to determine whether detainees should be classified as enemy combatants. The order establishing these tribunals adopted a broader definition of “enemy combatant” than the court had conceived of in Hamdi, defining it as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” including “any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”

In 2006, the Supreme Court held that the Detainee Treatment Act, which was meant to strip federal courts of jurisdiction over habeas corpus petitions, did not eliminate federal court jurisdiction over pending habeas claims by Guantanamo detainees. Congress responded again by enacting the Military Commissions Act, which pro-

154. Id. at 524 (internal citations omitted).
157. Slocum, supra note 18, at 1030.
vides the first congressional definition of an “unlawful enemy combatant”:

A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.¹⁶²

If the Court is willing to endow “enemy combatants” with constitutional rights, who by definition are a threat to the nation, the argument might readily extend that immigrants who reach the border may be able to bring constitutional claims of equal protection. Attempting to find refuge in both the borders of the United States and in the actual text of the Equal Protection clause, potential plaintiffs might find haven in the term “person” in both the Due Process and Equal Protection clauses, which stands in stark contrast to the use of the term “citizen” in the preceding Privileges or Immunities clause. The Court in PLYLER v. DOE recognized that, “[w]hatever his status under the immigration laws, an alien is surely a ‘person.’”¹⁶³ Some legally operative definitions of “person” go beyond the scope of establishing rights and obligations for individual human beings. For example, in many jurisdictions, any artificial legal entity (like a school, business, or non-profit organization) is treated as a juristic person.

The United States Constitution has historically utilized different definitions of “person” when allotting seats in the House of Representatives. The Wet Foot/Dry Foot policy may be particularly susceptible to equal protection challenge because Haitians who arrive in Florida and touch U.S. land are sent to Guantanamo Bay pending an asylum hearing. Haitians sent to Guantanamo Bay are therefore detainees. Additionally, they are distinguishable from the prototypical illegal immigrant because they have touched U.S. land but were taken away by the U.S. government. The obstacle of rational basis review might nullify this entire discussion, however, because the United States does have a legitimate government purpose in offering political asylum to refugees of a communist regime.

IV. Alternatives to Haitians Themselves Bringing Claims

If the Boumediene decision will not offer constitutional haven, Haitian immigrants and their advocates might explore other avenues.

A. Family Members as Plaintiffs

If an equal protection claim by a Haitian immigrant herself is not viable, Haitians already within the United States may meet the requirements to bring suit. Assuming these individuals are citizens, they certainly possess the requisite constitutional right to equal protection of the laws, with the complication that the injury is the denial of entry to other individuals, not themselves. In order to determine whether a person may bring a cause of action, the person must first establish standing. The “standing doctrine” encompasses two elements: “the minimum constitutional requirements of Article III and the prudential considerations of judicial self-government.” To satisfy the Article III requirements, the plaintiff must establish the following factors: “(1) that he has suffered an actual or threatened injury, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable ruling.”

Applying the three requirements of Article III, they first must allege an actual injury. Family members of repatriated Haitian refugees who made it to shore and were then deported may be able to assert the injury of the loss of companionship and family. The Court has intervened to keep families together when it invalidated a zoning ordinance that made it impossible for a grandmother and two of her grandchildren to live together in the city on substantive due process grounds. In Kleindienst v. Mandel, although the Supreme Court heralded the right of the Attorney General to refuse entry to the United States under Section 212 of the Immigration and Nationality Act, the trial court and dissent attempted to distinguish the case from past First Amendment immigration cases that did not implicate the rights of current American citizens.

Despite contentions that a “palpable” or “concrete” injury is necessary, the Supreme Court has stretched its own rulings to find factual injury where the plaintiff has not been injured in any traditional sense. In Regents of the University of California v. Bakke, the plaintiff challenged
the school’s use of affirmative action in admissions to the medical school as violative of his equal protection rights.169 The Court found standing even though he never established that he would have been admitted had race not been a factor, holding that “the University’s decision not to permit Bakke to compete for all 100 places in the class, simply because of his race,” was sufficient to satisfy the Article III requirement.170 The Court similarly held that non-minority contractors had standing to challenge government programs that allotted contracts for, or otherwise showed preference to, minority businesses.171 The Court applied strict scrutiny and remanded.172 If the Court is willing to recognize a denied opportunity in government contract work, then the denial of the opportunity to become a citizen of the United States and enjoy the privileges or immunities as such should qualify as an injury-in-fact.

The United States government operates with the foundation that people are sovereign, not the government, and the Constitution embodies limits the people have placed on the government.173 Meanwhile, the Supreme Court has held that the nation’s existence as a sovereign state gives the government “plenary power” over immigration, which consequently gives immigrants fewer constitutional rights when immigration powers are involved.174 Some commentators have responded by saying that the argument of a right rooted in national sovereignty assumes complete national solidarity and overlooks the rights of individual citizens. It further adheres to the “guest theory” of immigration, which renders government admission of an immigrant more like a retractable privilege, akin to a private landowner’s invitation, instead of characterizing the exclusion of the alien as an interference with the personal liberty of the alien or the relatives, friends, or business associates whom the alien has really come to visit. It pits a government’s power to exclude or expel against a host’s freedom of association. Undoubtedly, sovereignty encompasses the right to exclude entry to prevent harm or protect national security, but the Constitution does not appear to protect an absolute right to select and exclude for reasons less pressing than that.

B. International Law

The argument of a right to absolute control of the entry of immigrants rooted in national sovereignty is tempered by the United States’

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170. Id. at 281 n.14.
172. Id. at 211 (quoting Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656 (1993)).
173. Neuman, supra note 126, at 121.
174. See Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (characterizing the deportation power as “an inherent and inalienable right of every sovereign and independent nation”).
participation in international law and treaties. Post-World War II, international human rights norms may impose limits on a nation's ability to expel or exclude immigrants and exert absolute control over the movement of persons.\textsuperscript{175}

There are two sources of international law: treaty and customary international law.\textsuperscript{176} The Supremacy Clause of the United States Constitution provides that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\textsuperscript{177} Customary international law, however, is not mentioned in the Constitution. But in The Paquete Habana, the Supreme Court ruled that it is "part of our law," and "ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented."\textsuperscript{178}

The Universal Declaration of Human Rights was adopted by the United Nations on December 10, 1948. Article 1 of the Declaration reads: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."\textsuperscript{179} The United States has only ratified three of the international human rights treaties to which it is a signatory.\textsuperscript{180} Two of these utilize language that may provide refuge for Haitian immigrants.

The preamble to the Convention on the Elimination of All Forms of Racial Discrimination (CERD) includes the following two provisions:

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and free-

\begin{itemize}
  \item \textsuperscript{175} Neuman, \textit{supra} note 126, at 121.
  \item \textsuperscript{176} 3 Immigr. Law Serv. 2d § 16:3 (2008).
  \item \textsuperscript{177} U.S. Const. art. VI, cl. 2.
  \item \textsuperscript{178} 175 U.S. 677, 700 (1900). The principal sources of customary international law are:
    \begin{itemize}
      \item (1) the customs and practices that nations actually observe, to the extent that these practices flow from a sense of international legal obligation;
      \item (2) general principles widely recognized as law by civilized nations, even if these principles are not always observed in practice;
      \item (3) decisions of national and international courts addressing international legal issues; and
      \item (4) the writings of scholars and other highly qualified publicists.
    \end{itemize}
  \item \textsuperscript{180} 3 Immigr. Law Serv. 2d § 16:3. These are the International Covenant on Civil and Political Rights (CCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). \textit{Id.}
doms set out therein, without distinction of any kind, in particular as to race, colour or national origin.

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Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.\(^{181}\)

The United States also ratified the International Covenant on Civil and Political Rights (CCPR), whose preamble includes a similar recognition of persons and the "equal and inalienable rights of all members of the human family" as the "foundation of freedom, justice, and peace in the world."\(^{182}\) It also adopts a similar equal protection clause which makes specific mention of national origins protection:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\(^{183}\)

However, the United States ratified the treaty with so many reservations it has rendered it ultimately ineffective. In particular, the United States wanted to prevent plaintiffs from raising a private cause of action under the treaty, so the Senate issued a declaration that "the provisions of Articles 1 through 27 of the Covenant are not self-executing."\(^{184}\)

The juxtaposition of international law with U.S. law is increasingly common in situations of detention. The limbo-like status of detainees has created an opportunity for international law to influence modern interpretations of not only the Due Process but also the Equal Protection clauses of the Fifth and Fourteenth Amendments. In *Fernandez v. Wilkinson*, Judge Rogers asserted, "No country in the world has been more vocal in favor of human rights [than the United States]. It would not befit our history as a guarantor of human rights for our own citizens[ ] to decline to protect unadmitted aliens against arbitrary governmental infringement of their fundamental human rights."\(^{185}\) Despite this admonition, international law does not always find a welcome reception in American courts, as is evidenced by the numerous reservations the United States adopts when signing on to treaties.

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183. *Id.* art. 26.
Yet some lower courts are experimenting with applying international law. In *Fernandez-Roque v. Smith*, the Northern District of Georgia recognized that "[e]ven the government admits that customary international law of human rights contains at least a general principle prohibiting prolonged arbitrary detention," but this was tempered by the President's "authority to ignore our country's obligations arising under customary international law." Although international law was not ultimately controlling, *Fernandez-Roque* marks a partly successful attempt to use standards of international law to "throw light on the need for more modern interpretation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution." Still, an attempt to use the conceptions of person and equal protection adopted in these covenants may meet similar resistance as it did here.

**Conclusion**

The seventy-three snow-covered spectators chose the perfect day to sit in on Supreme Court arguments. Although the decision centered on Guantanamo Bay, its wake will be felt miles away. Even though the case before it "lack[ed] any precise historical parallel," the Court's decision evinces a willingness to stretch constitutional rights beyond their traditional ambit because the "lack of precedent on point is no barrier to [the] holding." By opening up the categories of status, the Court may simultaneously open ports of entry, border crossings, and beaches of the United States.

This is a moment of opportunity. The United States should shape its own immigration policy rather than leave itself susceptible to the onslaught of challenging litigation and the potential for immigration policy to be shaped by the Court. Rather than change with the changing political tides in Congress at the time, Congress should adopt a more national origins-neutral immigration policy that views the United States as a united country that both protects its borders and recognizes immigrants as human beings and citizens of a wider world community, rather than just the country from which their lifeboat pushed off.

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