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Expanding the Circle of Membership by Reconstructing the "Alien": Lessons From Social Psychology and the "Promise Enforcement" Cases

Victor C. Romero
Pennsylvania State University, Dickinson School of Law

EXPANDING THE CIRCLE OF MEMBERSHIP BY RECONSTRUCTING THE "ALIEN"†: LESSONS FROM SOCIAL PSYCHOLOGY AND THE "PROMISE ENFORCEMENT" CASES

Victor C. Romero*

Recent legal scholarship suggests that the Supreme Court's decisions on immigrants' rights favor conceptions of membership over personhood. Federal courts are often reluctant to recognize the personal rights claims of noncitizens because they are not members of the United States. Professor Michael Scaperlanda argues that because the courts have left the protection of noncitizens' rights in the hands of Congress and, therefore, its constituents, U.S. citizens must engage in a serious dialogue regarding membership in this polity while considering the importance of constitutional principles of personhood. This Article takes up Scaperlanda's challenge. Borrowing from recent research in social psychology, this Article contends that "We the People" can better inform our ideas of polity membership by resisting existing invidious stereotypes of the noncitizen as the "alien" and by embracing instead the notion of equal personhood. This Article also urges citizens to demand the repeal of the "court-stripping" provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. These provisions encourage the federal government to renege on promises not to deport noncitizen defendants in exchange for assistance in criminal prosecutions. Without fear of judicial review, the government is free to enter into cooperation agreements with noncitizen defendants and then breach those agreements with impunity so as to achieve its dual goals of criminal prosecution and deportation. The federal government should not be allowed to break its promises, especially when the goal of the agreement with the noncitizen is to facilitate a criminal prosecution, not to impact immigration law.

† Except to make a statement in this title, I prefer the terms "noncitizen" to "alien" and "undocumented immigrant" to "illegal alien" because there are pejorative connotations attached to the word "alien." However, I favor the term "alienage jurisprudence" rather than "citizenship jurisprudence" because the former captures the dehumanizing nature of such categorizations. *See* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425, 426 n.4 (1997) [hereinafter Romero, *Congruence*]; Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 573 n.4 (1997) [hereinafter Romero, *Equal Protection*]; *see also* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Law: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1996–97) (discussing "how the term alien masks the privilege of citizenship and helps to justify the legal status quo").

* Associate Professor of Law, Pennsylvania State University, Dickinson School of Law. B.A., 1987, Swarthmore College; J.D., 1992, University of Southern California Law Center; e-mail: vcr1@psu.edu.

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INTRODUCTION

Estrella Santiago, a Mexican citizen, is arrested for her involvement as a drug courier in an international cocaine-smuggling conspiracy. She is tried in federal court for her drug offense, and if convicted, she will likely be haled into immigration court as a deportable[1] person for her involvement in drug trafficking.[2] The Assistant United States Attorney (AUSA) prosecuting her criminal case agrees to recommend a reduced sentence and promises that Ms. Santiago will not be deported if she testifies against her coconspirators and waives any objections to deportation. Ms. Santiago, after consulting with her attorney, agrees to the deal. After pleading guilty and waiving objections to her deportability, Ms. Santiago receives a deportation order from a U.S. immigration judge requiring her to surrender to the Immigration and Naturalization Service (INS) authorities. When Ms. Santiago complains to the INS that the federal prosecutor offered her immunity from deportation, the INS replies that the AUSA had no authority to promise immunity and that the INS is therefore not bound by the federal prosecutor's promise. Terrified at the idea of being sent back to Mexico only to be killed by henchmen of angry coconspirators convicted by her testimony, Ms. Santiago decides to seek to enforce the AUSA's promise in federal court. However, upon the government's motion, the district court judge dismisses Ms. Santiago's "promise enforcement" suit for lack of jurisdiction, citing Congress's recent enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[3] which limits the jurisdiction of federal courts over challenges to immigration deportation orders.[4]

This fictional scenario, based in reality,[5] captures the crucial difference between the citizen and noncitizen in the United States:[6] A

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1. While the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) uses the term "removal" rather than "deportation," *see* IIRIRA, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-587 (1996) (codified as amended in scattered sections of 8 U.S.C.), "deportation" is a term more commonly used in immigration literature, *see, e.g.*, 8 U.S.C. § 1101(a)(47)(A) (Supp. II 1996) (defining "order of deportation"), and therefore, I use it here.

2. *See* Immigration and Nationality Act (INA) § 241(a)(2)(B)(I), 8 U.S.C. § 1227(a)(2)(B)(I) (Supp. II 1996) (originally codified at 8 U.S.C. § 1251 (1994)) (requiring a noncitizen convicted of a crime to be deported under some circumstances).

3. 110 Stat. 3009-546.

4. *See* 8 U.S.C. § 1252 (Supp. II 1996).

5. *See infra* Part II.B.

6. For more information on the trials of noncitizens, see generally Kevin R. Johnson, Los Olvidados*: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and*

citizen would never be subject to deportation and would never be faced with Ms. Santiago's dilemma. Moreover, generally, a citizen would be able to avail herself of an effective remedy in the face of intentional or negligent government deception because she would be entitled to have her conviction vacated, and she would be allowed to enter a new plea.[7] In contrast, a noncitizen lacks such a remedy because Congress's recent enactment of the IIRIRA effectively deprives any court of jurisdiction over deportation orders.[8] Our hypothetical Ms. Santiago potentially represents many others who will never get their day in court as Congress "clear[s] the decks"[9] of pending cases covered by the new statute. Like Ms. Santiago, many of these former government witnesses may be exposed to grave bodily harm after being deported to their home countries when the U.S. government fails to live up to its promises. If there is one principle for which the Bill of Rights stands, it is limiting government action against persons, especially when the government fails to follow rules of fair play in the enforcement of its laws.[10] Yet this foundational principle of fair play does not protect Ms. Santiago.

Enforcement, 1993 BYU L. REV. 1139, 1146 [hereinafter Johnson, Los Olvidados] (discussing the difficulties faced by immigrants in both the political and judicial spheres); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990) (comparing the immigration histories of Native Americans, Chinese, and Mexicans in America); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995) (describing the treatment of immigrants held in U.S. detention centers); Patricia Zavella, *The Tables Are Turned: Immigration, Poverty, and Social Conflict in California Communities*, *in* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 136 (Juan F. Perea ed., 1997) [hereinafter IMMIGRANTS OUT!] (describing the rise of social conflict in California in the face of increased immigration and a changing economy).

7. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262–63 (1971) (holding that the government's failure to abide by a promise that induces a guilty plea requires that the conviction be vacated and the case remanded to the lower court).

8. *See* IIRIRA § 306(a), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-612 (codified as amended at 8 U.S.C. § 1252(g) (Supp. II 1996)). Section 1252 now reads, in pertinent part, as follows:

> EXCLUSIVE JURISDICTION.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against alien under [the INA].

Id. § 1252(g) (Supp. II 1996).

9. Ramallo v. Reno, 114 F.3d 1210, 1213 (D.C. Cir. 1997) (*Ramallo III*).

10. *See, e.g.*, U.S. CONST. amends. IV (right to be free from unreasonable searches and seizures), V (right to due process), VI (right to counsel), VII (right to a jury trial), VIII (right to be free from cruel and unusual punishments), XIV, § 1 (right to equal protection of the laws).

This horrible result arises from the distinctions our country draws between the citizen and noncitizen. At first blush, differentiating between citizen and foreigner appears reasonable. Indeed, any sovereign nation should have the power to determine who qualifies to join its polity. In fact, the power to distinguish between citizen and noncitizen rests in the U.S. Constitution's charge that Congress create a "uniform Rule of Naturalization."[11] The framers, however, surely did not intend or foresee the disastrous consequences of the citizen/noncitizen distinction for foreigners such as Ms. Santiago, especially in the context of promise enforcement cases. Although immigration consequences flow from the government's breach of its promise, the essential purpose of the cooperation agreement is to facilitate law enforcement, not to regulate immigration.[12] It would be easy to attribute Ms. Santiago's fateful plight to the doctrine of unintended consequences,[13] but the consequences may be particularly grave in this instance. A conscientious America must ensure that such consequences do not materialize.

How did we get here? Why does current immigration and due process law allow for such an unjust outcome? More importantly, how can we work to avoid such undesirable results? This Article seeks to answer these important questions by examining current immigrants' rights theory, reviewing recent due process case law on promise enforcement suits, and borrowing from Professor Jody Armour's theories on enhancing legal decision-making and recent psychological research on people's attitudes toward new immigrant groups. By recognizing that, like racial stereotypes, immigrant group stereotypes have been used to create a permanent out-group of noncitizens, American society can begin to retreat from its current xenophobic stance and adopt policies that value the inherent humanity of all. Citizens might start this process by demanding Congress repeal the "court-stripping" provisions of the IIRIRA, thus providing a check on the government's reneging on cooperation agreements made with noncitizens like Ms. Santiago.

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11. U.S. CONST. art. I, § 8, cl. 4.

12. *See, e.g.*, Thomas v. INS, 35 F.2d 1332, 1337 (9th Cir. 1994) (analogizing the cooperation agreement to a traditional plea agreement).

13. *See generally* Thomas O. Depperschmidt, *Unintended Consequences and Perverse Effects in Forensic Economic Award Calculations*, J. LEGAL ECON., Summer 1994, at 65, 65 ("[U]nintended consequences contain actions yielding a variety of unplanned results, often somewhat serendipitously."); *cf. generally* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994) (describing the unintended consequences that result from well-meaning campaign finance regulations). Of course, my use of the term here is not so benign.

Part I examines the history of several immigrant groups in the United States and the current legal theories that explain how and why American law draws distinctions between the citizen and noncitizen. American history reveals, and contemporary scholars assert, that there are two competing views of noncitizens' rights in U.S. law: one views the noncitizen as someone not entitled to constitutional protection (the "membership" paradigm), and the other values the personhood of the noncitizen and the citizen equally and thus entitles the noncitizen to constitutional protection (the "personhood" paradigm). Professor Michael Scaperlanda argues that courts view membership claims as superior to personhood claims. He advocates that citizens seek strategies to ensure that constitutional notions of personhood are not forgotten in our discussions of polity membership. Part II looks at three recent promise enforcement suits like Ms. Santiago's and illustrates how current theories of membership and personhood may be used to explain the results in those cases. Drawing from contemporary critical race theory and social psychology research about invidious immigrant group stereotypes, Part III begins the membership dialogue Scaperlanda suggests in an effort to move away from ideas of segregation, alienation, and subordination to those of integration, acceptance, and equality. Specifically, this Part contends that by acknowledging the existence of anti-immigrant stereotypes in contemporary society, citizens might reconstruct their image of the noncitizen deportee by calling for the repeal of the IIRIRA's court-stripping provisions and by insisting that the federal government abide by its promises and respect the noncitizen's equal personhood.

I. HISTORICAL AND LEGAL PERSPECTIVES ON IMMIGRANTS' RIGHTS

Despite the rapid globalization of the world economy, the countries of *terra firma* are unlikely to abandon the concept of individual, sovereign nations in favor of a world of free borders and unrestricted migration.[14] Thus, every sovereign nation will

14. Note, however, that some scholars have argued for open border immigration policies for the United States and elsewhere. *See, e.g.*, Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251, 252 (1987) (finding support for open borders from the assumption that individuals are of equal moral worth); R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265, 1265 (1994) ("[A]

continue to struggle with immigration and naturalization policy in an effort to decide who should join the polity and enjoy all the rights and privileges of citizenship and who should be excluded.[15]

For the United States, the immigration issue is particularly difficult because two competing values lie at the core of American legal history and culture: the conception of the United States as an immigrant nation and the notion of limiting resources and rights to U.S. citizens only. Images of the former include the Statue of Liberty, Ellis Island,[16] the poetry of Emma Lazarus,[17] multiculturalism,[18] and the melting pot concept.[19] In contrast, the latter notion conjures up visions of the Chinese Exclusion Act,[20] World War II internment camps,[21] current anti-

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carefully crafted version of an open entry policy need not involve costs to current citizens so substantial as to practically disqualify such a policy.").

15. The European Community might be the exception to this statement. Under the Treaty on European Union, the community has begun to experiment with a single immigration policy governing movement of union nationals within the member states. *See* Treaty on European Union, Feb. 7, 1992, art. 8a, § 1, 31 I.L.M. 247, 259; Giovanna I. Wolf, Note, *Efforts Toward "An Ever Closer" European Union Confront Immigration Barriers*, 4 IND. J. GLOBAL LEGAL STUD. 223, 223 (1996).

16. *See* New Jersey v. New York, 118 S. Ct. 1726, 1733 (1998) (discussing Ellis Island's role in U.S. immigration from 1892 until 1954).

17. Emma Lazarus's words adorn the pedestal of Lady Liberty: "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!" Emma Lazarus, *The New Colossus*, *in* THE POEMS OF EMMA LAZARUS 203 (1888).

18. *See generally* THOMAS J. LA BELLE & CHRISTOPHER R. WARD, MULTICULTURALISM AND EDUCATION: DIVERSITY AND ITS IMPACT ON SCHOOLS AND SOCIETY (1994) (evaluating the desirability of multicultural education through an analysis of history, immigration, and culture). La Belle and Ward believe that "multiethnic and multiracial societies should make efforts to ensure equity and justice for individuals whose minority background, physical features, economic status, and goals differ from dominant groups." *Id.* at 1. They also believe that societies need to use "differences in lifestyles, values, and beliefs as a means to enrich all individuals and groups by studying other cultures, learning other languages, establishing fair and equitable methods of treatment, and generally making an effort to understand the behavior and thought of others through their eyes and value systems." *Id.* This Article attempts to provide one method by which citizens can learn to value noncitizens' personhood by examining recent social psychology research on perceptions of outgroups. *See* discussion *infra* Part III.

19. *See* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 311–13 (1986) (discussing the origins of the melting pot concept in U.S. history).

20. Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

21. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding order excluding persons of Japanese ancestry from areas on the West Coast during World War II); Hirabayashi v. United States, 320 U.S. 81, 100–02 (1943) (determining that World War II curfew order directed at persons of Japanese ancestry did not unconstitutionally discriminate against U.S. citizens of Japanese ancestry); Yasui v. United States, 320 U.S. 115, 117 (1943) (upholding conviction of American-born person of Japanese descent for violating

Asian violence,[22] Proposition 187,[23] and welfare reform.[24] Not surprisingly, the U.S. Supreme Court's jurisprudence in the area of

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curfew order in light of *Hirabayashi*); *see also* PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (1989) (collecting materials discussing *Korematsu*, *Hirabayashi*, and *Yasui*). The irony of the internment camps is that most of those interned were American citizens who were perceived to be foreigners. *See* MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS 29 (1976) ("[O]f those interned some 73 percent were American citizens, born in this country and entitled to the full protection of our laws. These citizens were imprisoned for no reason other than their race."); *see also infra* note 44.

22. While anti-Asian violence has long been a sad part of America's history, one recent incident galvanized the Asian-American community: the 1982 killing of Vincent Chin. Chin was a young Chinese-American engineer who "was brutally beaten to death with a baseball bat by two white auto workers who thought he was Japanese and blamed him for the recession of the American auto industry." NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, 1995 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS: THE CONSEQUENCES OF INTOLERANCE IN AMERICA 6 (1996). Chin's killers served no jail time. *See id.*

23. Proposition 187 is a California initiative that restricts undocumented immigrants' access to various state benefits. *See* Lolita K. Buckner Inniss, *California's Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577, 617–22 (1996) (describing provisions of Proposition 187). California voters passed the proposition in 1994 with a fifty-nine percent to forty-one percent vote. *See id.* at 578. Racially-tinged appeals to American patriotism were typical of the campaign to pass the initiative. *See, e.g.*, Letter to the Editor, *Illegal Students Given Preferential Coverage*, L.A. TIMES, Oct. 30, 1994, at B16, *available in* 1994 WL 2360440 ("[T]he state of California is not a province of Mexico. The victory of Proposition 187 will be proof that the state of California belongs to the United States of America."). Through correspondence with the Author, Professor Kevin Johnson has suggested that "Proposition 187, which limited benefits to *undocumented* immigrants, was simply a precursor to the limitation of benefits to legal immigrants as well," as evidenced by the 1996 welfare reform bill. Letter from Kevin R. Johnson, Professor, University of California, Davis, to Victor C. Romero, Associate Professor, Dickinson School Law 2 (Sept. 8, 1997) (emphasis added) (on file with the *University of Michigan Journal of Law Reform*). Thus, the anti-immigrant sentiment behind Proposition 187 was not limited to "illegal aliens." *See* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 651 (1995) ("It also is possible that the passage of Proposition 187 resulted from sheer frustration with immigration.").

24. Last year's welfare reform bill included a provision that would deny "aliens" certain welfare benefits. *See* Restricting Welfare and Public Benefits for Aliens, Pub. L. No. 105-33, tit. V, subtit. D, 111 Stat. 251, 597-603 (1998). The INS has seen a surge in the number of citizen applications as a result of this and other anti-immigrant measures. *See* William Booth, *In a Rush, New Citizens Register Their Political Interest*, WASH. POST, Sept. 26, 1996, at A1 ("[T]he anti-immigrant mood of the country is pushing many to become citizens."); Matt McKinney, *Welfare Reform Spurs Citizenship "Panic,"* PROVIDENCE J. BULL., Sept. 24, 1996, at C1, *available in* 1996 WL 12465785 ("Applications nationwide have climbed sharply. Immigration officials received more than 1 million applications for citizenship between Oct. 1, 1994, and Sept. 30, 1995, the fiscal year for the INS. That was a 300 percent increase over 1994.").

This year, recent efforts by the Clinton administration to repeal some of the anti-immigrant welfare measures have relieved some of the panic among immigrants rushing to become citizens. *See* Annie Nakao, *Rush to Become Citizens Slowing, Aid Groups Say Many Immigrants Believe Threatened Benefits Won't Be Taken Away After All*, S.F. EXAMINER, July 30, 1997, at A5. Immigrants' rights groups, however, are continuing to urge noncitizens to naturalize, in case Congress decides to pass other anti-immigrant legislation. *See id.* In the meantime, a federal district judge in New York recently upheld, against an equal protection challenge,

noncitizens' rights illustrates this dichotomy between the celebration of immigrants' personhood and the denial of equal status for noncitizens.

In an effort to better understand the challenges U.S. citizens face in balancing the need to restrict membership in this country against the interest in protecting the rights of all people who enter, Part A briefly examines the history of three immigrant groups in America and the competing theories underlying the Supreme Court's jurisprudence.

A. A Historical Perspective: Non-English Whites, Chinese, and Mexican Immigrants

Throughout American history, immigration and alienage law has reflected a tension between welcoming the immigrant as a person entitled to the same legal protections and benefits as citizens and denigrating the immigrant as one outside the circle of national membership. To illustrate this tension, this section will briefly discuss how three groups in the United States' history—the non-English whites, the Chinese, and the Mexicans—have been treated alternately as insiders and outsiders by the United States' citizenry. In reviewing this history, two patterns emerge. Where the out-group can be characterized by the majority as possessing attributes similar to the majority's or as helping to further the majority's interests, then discrimination abates. Where the out-group is viewed as different and threatening, however, discrimination escalates.

1. Non-English European Immigration—In early America, there was no federal immigration law as it currently exists today. Rather, America was "the New World," free to be populated by those fleeing religious persecution in Europe.[25] In the 1700s, many of the

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the Welfare Reform Act's provisions disqualifying many lawful permanent residents from receiving supplemental security income benefits and food stamps. *See* Abreu v. Callahan, 971 F. Supp. 799, 821 (S.D.N.Y. 1997). For a more detailed analysis of the welfare reform legislation, see generally Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997) (explaining the effect of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 on resident aliens); Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245 (1996) (arguing that the language of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 remains open to interpretation but will likely have the greatest negative impact on resident alien children and the elderly and states with large resident alien populations).

25. Although he acknowledges that there was neither a quantitative restriction on immigration nor a federal mandate against it, Professor Gerald Neuman contends that

immigrants were of English or Scottish descent, often members of dissenting Protestant sects.[26] Tied by a bond of common culture and purpose, many of these new settlers came to prefer things English[27] and likely felt no need to discourage immigration of others like themselves. With the influx of other Europeans, however—the non-English, the poor, the Catholics, the Jews—the first wave of immigrants began to resent the newcomers' intrusion and made them feel unwelcome.[28] Interestingly, early "immigration law" restricted entry into the various states rather than into America itself. These state-imposed rules differed from modern federal immigration law in that the former applied to other states' citizens as well as to foreigners and were often ostensibly concerned with regulating the spread of disease or with crime rather than with excluding undesirable non-English Europeans.[29] Similarly, the first federal immigration laws enacted in the late 1800s appeared to be racially and ethnically neutral,[30] although anti-Catholic sentiment was rampant.[31]

Over time, however, the English settlers began to accept the non-English.[32] Despite the initial classification of the non-English as "the other," ultimately the Europeans' shared "whiteness" constituted a sufficient basis for constructing a unified community with a new "other," the non-Whites. Congress might have foreshadowed this eventual merger of the English and non-English whites in 1790 when it restricted naturalization to "white persons,"

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qualitative restrictions on transborder movement existed, primarily at the state level and supplemented by federal legislation. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 19 (1996).

26. *See* Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, *in* IMMIGRANTS OUT!, *supra* note 6, at 15.

27. *See id.* at 15–16.

28. *See id.* at 17.

29. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 1 (3d ed. 1995) (noting that early immigration law restricted entry by other states' citizens and foreigners and also regulated specific concerns such as public health); *see also* NEUMAN, *supra* note 25, at 21–34 (describing restrictionist policies by various colonies, including the control of disease and the entry of convicts).

30. *See* Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974); Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1883); *see also* ALEINIKOFF ET AL., *supra* note 29, at 2 ("The first federal statutes limiting immigration, enacted in 1875 and 1882, prohibited the entry of criminals, prostitutes, idiots, lunatics, and persons likely to become a public charge.").

31. *See* Feagin, *supra* note 26, at 19, 21–22, 25.

32. *See id.* at 25 ("The Irish, however, did share certain cultural mores with the English and most did assimilate relatively easily to many aspects of the dominant culture."). On the concept of "whiteness" as a social construct, see generally IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

thus formally recognizing the common bond between the two groups.[33]

2. Chinese Immigration—Like the non-English whites, the Chinese in America have also experienced membership in the in-group and out-group. Initially brought to California to work on the railways, Chinese laborers outlived their usefulness in the eyes of the European-Americans once the transcontinental railroad was completed.[34] In the ensuing Panic of 1873, a drought and the depression of 1877, the Chinese became easy targets of anti-immigrant sentiment.[35] In the 1880s, Congress passed the so-called "Chinese Exclusion Laws,"[36] which were designed to prohibit Chinese immigration.[37] Further, in *Chae Chan Ping v. United States*,[38] the U.S. Supreme Court held that Congress possessed plenary constitutional power over immigration and therefore could exclude noncitizens on the basis of race.[39] The plenary power doctrine was born with this decision, and it has remained a resilient,

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33. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (1845) (repealed 1795). Feagin correctly notes, however, that white-on-white ethnic conflict has not completely disappeared from American society, citing 1984 vice-presidential candidate Geraldine Ferraro's and former New York Governor Mario Cuomo's need to defend themselves against allegations that their Italian heritage suggested Mafia links. *See* Feagin, *supra* note 26, at 27. Unfortunately, the often white-on-white prejudice of anti-Semitism still also occurs. *See id.* at 27–28.

34. *See* ALEINIKOFF ET AL., *supra* note 29, at 2.

35. *See id.* Authors disagree as to whether the Chinese were consigned to the margins of society from the outset or whether they were gradually resented as their numbers grew. *Compare id.* at 2–3 ("The Chinese had been victims of discriminatory legislation in California since the 1850's. They were subjected to entry, license and occupation taxes, originally to raise money for the California treasury and later as a means to deter immigration."), *and* HYUNG-CHAN KIM, A LEGAL HISTORY OF ASIAN AMERICANS, 1790–1990 47 (1994) ("[T]he Chinese became immediate targets of both legal and extralegal actions taken by white miners against them to discourage their presence in California."), *with* MARY ROBERTS COOLIDGE, CHINESE IMMIGRATION 21 (1909) (describing Chinese as having been "welcomed, praised and considered almost indispensable"). For more on the early history of the Chinese in America, see generally LUCY E. SALYER, LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995); Charles McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CAL. L. REV. 529 (1984).

36. *See* Act of Nov. 3., 1893, ch. 14, 28 Stat. 7 (repealed 1943); Act of May 5, 1892, ch. 60, 27 Stat. 25 (repealed 1943); Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943); Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476 (repealed 1943); Act of July 5, 1884, ch. 220, 23 Stat. 115 (repealed 1943); Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

37. *See* ALEINIKOFF ET AL., *supra* note 29, at 2 (discussing the history of Chinese immigration); *see also* KIM, *supra* note 35, at 70–91 (discussing the statutes and court cases regarding Chinese exclusion); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12–16 (1998) (discussing the plenary power doctrine arising out of the Chinese exclusion cases).

38. 130 U.S. 581 (1889).

39. *See id.* at 601–11.

important organizing principle of immigration law.[40] Justice Field chillingly captured the nativists' view of the Chinese as the "outsider" during that time:

> The differences of race added greatly to the difficulties of the situation. . . . [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them . . . .[41]

After classifying the Chinese as the "outsider," Justice Field found it easy to justify their harsh treatment at the hands of the government:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.[42]

Like the non-English whites before them, the Chinese were viewed as outsiders who chose not to assimilate into the American culture and who therefore posed a threat to the security of the majority. According to the Court's analysis, there were only two ways by which the perceived threat of "invasion" could be abated:

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40. *See* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 925–26 (1995) [hereinafter Legomsky, *Ten More Years*]; *see also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 3 (1984) ("Classical immigration law proved to be remarkably durable.").

Many scholars have called for the dismantling of the plenary power doctrine and have been disappointed by its continued acceptance. *See* Legomsky, *Ten More Years*, *supra*, at 936–37 (predicting future erosion and emasculation of the plenary power doctrine); *see also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 303, 305 [hereinafter Legomsky, *Immigration Law*] (predicting that the plenary power doctrine will eventually be frankly disavowed); Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV., Summer 1996, at 35, 35 (calling for elimination of the plenary power doctrine).

41. *Ping*, 130 U.S. at 595.

42. *Id.* at 606.

through assimilation (the route traversed by the non-English whites) or through exclusion. Viewing the Chinese as incapable of assimilating to the white culture, the dominant majority chose exclusion.[43] Just as the English settlers used facially objective laws to keep social "undesirables" out of the colonies, the white majority utilized the fiction of sovereign power to justify its overtly racist policies.[44]

Despite the continued prejudice and violence against Chinese-Americans today,[45] the dominant society has come to view the Chinese as having assimilated in some areas of American life. For example, Chinese and other East Asians often do very well on college entrance examinations and are viewed as "model minority" groups that succeed by virtue of traditional "American" values like industry and loyalty.[46] Thus, just as the non-English whites have

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43. Anti-Asian sentiment in America historically has affected groups other than the Chinese. Americans of Japanese heritage also suffered the indignity of exclusion and isolation by being interned in camps during World War II, while Americans of German and Italian descent remained free. *See* Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1098 (Hyung-chan Kim ed., 1992) ("The evacuated Japanese Americans, including U.S. citizens, were presumed to be sufficiently foreign for an inference by the military that such racial-foreigners might be disloyal. . . . With the presence of racial foreignness, a presumption of disloyalty was reasonable and natural."); *see also* Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of* JUSTICE AT WAR, 85 COLUM. L. REV. 1186, 1190–92 (1985) (book review) (discussing *Korematsu* and other wartime "concentration camp cases").

44. *See* Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 83 (1989) ("There is also a sinister ideological purpose served by the fiction of sovereignty. The Court was undoubtedly caught up in the nativist xenophobia of the era. . . . The fiction of sovereignty masked the Court's underlying bigotry by providing the decision with a seemingly objective disinfectant.") (footnote omitted). By drawing analogies between the experiences of the non-English whites and the Chinese, I do not mean to ignore the role racism played in the subordination of the Chinese. I compare these two groups, however, not to determine which has suffered more, but to emphasize the injustices that both sets of newcomers endured at the hands of the earlier arrivals, themselves European immigrants.

45. *See supra* note 22 (discussing the murder of Vincent Chin).

46. In an interesting twist in group dynamics, some universities have placed ceilings on Asian-American admissions to increase admissions of members of other racial groups. *See generally* Pat K. Chew, *Asian Americans: The "Reticent" Majority and Their Paradoxes*, 36 WM. & MARY L. REV. 1 (1994) (discussing treatment of Asian Americans in university admission policies and the distortions in societal perceptions that lead to this treatment); Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659 (1989) (discussing admission ceilings on Asian-Americans at some universities). Such admission ceilings have led some Asian-Americans to question affirmative action policies as anti-Asian, generating much scholarly commentary. *See, e.g.*, Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995) (arguing that Asian-Americans have become pawns in the affirmative action debate because of their success in the American education system); Selena Dong, Note, *"Too Many Asians": The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995) (proposing constitutional arguments for Chinese-

assimilated into the dominant culture, the Chinese have been accepted where they have reflected values held by American society.

3. Mexican Immigration—Mexican laborers, like the Chinese coolies before them, have been welcomed and shunned at different times based upon their perceived usefulness by the larger American majority. While the Chinese were imported to build railroads, the Mexicans concentrated on agricultural work, mostly in the southwestern United States.[47] Based on economic demand for their services, the Mexicans alternately were recruited through formal and informal immigration arrangements[48] and rejected by American agricultural businesses.

U.S. immigration policy frequently has reflected business demand for Mexican labor. For example, World War II created an increased need for agricultural workers. Accordingly, the United States negotiated a treaty with Mexico, popularly known as the "*Bracero* Program," under which Mexican citizens were temporarily allowed entry into the United States to work on agricultural lands.[49] Once the United States government realized that it could not control its businesses' continued recruitment of cheaper, undocumented non-*Bracero* labor, however, the INS initiated "Operation Wetback" in 1954 to expel over 1,000,000 undocumented Mexican workers.[50] Rather than designing a coherent immigration policy that also punished American businesses for hiring undocumented immigrants, the federal government forced the workers to bear the ignominy of deportation.[51] In 1986, some

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American students who must meet higher admission standards at a San Francisco high school because enrollment exceeded desegregation quotas).

47. *See* Olivas, *supra* note 6, at 432–41 (comparing the immigration histories of the Chinese and Mexicans in America).

48. Professor Gerald López asserts that while the evidence is incomplete, early commentaries support his conclusion that "the majority of Mexicans recruited after the 1880s were undocumented." Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 668 & n.302 (1981).

49. *See* Agreement Respecting the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, U.S.-Mex., 56 Stat. 1759, 1766 [hereinafter *Bracero* Program]; *see also* López, *supra* note 48, at 664–67 (discussing the *Bracero* Program).

50. *See* López, *supra* note 48, at 670; *see also* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 84–85 (1985) (describing Operation Wetback); Olivas, *supra* note 6, at 438–39 (same).

51. *See* López, *supra* note 48, at 707–08. López states:

> If we were really serious about making . . . a [sic] effective deterrent to undocumented entry, we might be able to do something about it. . . . [T]here is no reason to suppose that sanctioning those employing undocumented Mexicans would be ineffective. . . . [but] sanctions would harm the economic interests of employers and the documented population.

Id.

thirty years after Operation Wetback, Congress decided to amend the INA to include employer sanctions for hiring undocumented persons.[52] Rather than value and respect the industry of Mexican workers, many of whom have toiled in agricultural jobs not taken by citizens,[53] the United States has often affirmed the primacy of one's legal immigration status over one's desire to put in an honest day's work.[54]

Even the most cursory review of the immigration histories of the non-English whites, the Chinese, and the Mexicans in the United States reveals that their acceptance by the dominant culture, both inside and outside the law, depended greatly on their perceived similarity or usefulness to the larger society. The non-English whites shared their skin color and some cultural mores with the original English settlers; the Chinese were able to excel scholastically; the Mexicans provided vital, inexpensive agricultural labor. Just as each immigrant group has achieved varying degrees of acceptance,[55] the United States' immigration policies toward group members have vacillated depending on the citizenry's ability to

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52. *See* Immigration Control and Reform Act of 1986, Pub. L. No. 99-603, tit. I, § 10, INA § 274A, 100 Stat. 3360–74 (codified as amended at 8 U.S.C. § 1324a (1994)). Section 1324a makes it "unlawful for a person or other entity [] to hire, or to recruit or refer for a fee, for employment in the United States [a noncitizen] knowing the [noncitizen] is an unauthorized [noncitizen] . . . with respect to such employment . . . ." *Id.* § 1324a(a)(1)(A).

53. Professor Kevin Johnson describes this attitude toward Mexican workers as "schizophrenic": "On the one hand, Mexicans often are characterized as hardworking and performing labor that many 'Americans' will not. On the other hand, they serve as convenient scapegoats when the U.S. economy turns for the worse." Kevin Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue, in* IMMIGRANTS OUT!, *supra* note 6, at 165, 171 (endnotes omitted).

54. As one subway commuter acknowledged in a recent *New York Times* article about undocumented immigrant workers: "These guys work very hard, even if they are here illegally." Clyde Haberman, *Immigrants: In Plain Sight, but Not Seen*, N.Y. TIMES, July 22, 1997, at B1; *see also* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (discussing the identity of undocumented workers in the United States).

55. Indeed, some commentators contend that the recent nativism directed at noncitizens of color may be more resilient than that directed at their white counterparts:

> Many of today's "legal" and "illegal" immigrants are people of color, especially from Mexico. As has been the case with past immigrant generations, they have been subject to discrimination. Unlike their European predecessors, however, the animus directed at the new immigrants may enjoy greater resilience. The color of their skin indefinitely ensures their weakness in the political process, even for those "illegals" who navigate the arduous process to become "legal."

Johnson, Los Olvidados, *supra* note 6, at 1145 (citations omitted); *see also* Robert S. Chang, *A Meditation on Borders, in* IMMIGRANTS OUT!, *supra* note 6, at 244, 245 (discussing the concept of nativistic racism as it applies to discrimination against Asian-Americans).

recognize in the noncitizens values held by the dominant American culture.

This section has examined the historical tension between the acceptance and rejection of the foreigner by the citizen. The next section will examine how the Supreme Court's alienage jurisprudence reflects this tension. Specifically, the next section describes two competing paradigms in Supreme Court precedent to explain the Court's opinions about noncitizens: the membership and personhood paradigms.

B. A Legal Perspective: Membership Versus Personhood

Two important law review articles succinctly summarize the Supreme Court's jurisprudence regarding the membership and personhood status of immigrants in American society.

In *Membership, Equality, and the Difference that Alienage Makes,*[56] Professor Linda Bosniak contends that the Court's alienage decisions may best be understood through the prisms of "separation" and "convergence."[57] Drawing from the work of political scientist Michael Walzer,[58] Bosniak describes the separation model[59] as one that assumes that the government's plenary power[60] over immigration—the admission and exclusion of noncitizens—exists separate from its limited power over immigrants' personal rights.[61] Therefore, a government that has the power to deny a noncitizen admission to this country does not have the power to beat a confession out of an immigrant accused of committing a crime.[62] The convergence model asserts the converse: the government's power over immigration converges with its power over immigrants'

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56. Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

57. *Id.* at 1059.

58. *See id.* at 1057 (discussing MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983)).

59. *See id.* at 1138.

60. *See id.* at 1059–65.

61. *See id.* at 1094–95.

62. *See* Franco de Jerez v. Burgos, 876 F.2d 1038, 1042 (1st Cir. 1989) (noting that the Constitution guarantees noncitizens the same constitutional rights possessed by citizens charged with crimes); Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987) (holding that noncitizens have the right to be free from gross physical abuse at the hands of state or federal agents).

rights.[63] For example, the government may fairly restrict the right to vote to citizens only, but deny the franchise to foreigners.[64]

Despite these distinctions, Bosniak acknowledges that the boundary between these two models is not, at the margin, clearly delineated: "The defining question in the current politics of [noncitizen] status is just how far the government's power to regulate immigration legitimately extends."[65] In other words, does the government's power to deny a foreigner entry into the United States also include the power to deny the noncitizen access to public benefits once in the United States? In the case of our fictional Ms. Santiago, does the government's immigration power extend so completely over noncitizens that the government can deny Ms. Santiago the right to enforce a plea agreement? Ultimately, Bosniak chooses not to predict how courts will respond to the ever-increasing number of rights claims by noncitizens in the current anti-immigrant climate, but she is satisfied that, for now, her two models provide a useful framework from which to evaluate these claims.[66]

In *Partial Membership: Aliens and the Constitutional Community*,[67] Professor Michael Scaperlanda picks up where Bosniak leaves off. Using the term "personhood" in place of "separation" and "membership" in lieu of "convergence," Scaperlanda contends that the Supreme Court favors membership over personhood.[68] In reviewing a noncitizen's rights claim, the Court will first determine whether membership issues are present.[69] If so, then the noncitizen's claim will be summarily denied, and the Court will defer to the political arm which has chosen to differentiate between citizen and foreigner.[70] For instance, in *Mathews v. Diaz*,[71] the Court held that Congress's plenary power over immigration extended into the realm of the distribution of Medicare benefits.[72] Accordingly, the Court upheld the statutory scheme that made a noncitizen's length of continued residence in the United States a condition for par-

63. *See* Bosniak, *supra* note 56, at 1138.

64. *See infra* note 138 and accompanying text (discussing limits on the voting rights of noncitizens); *cf.* Bosniak, *supra* note 56, at 1064 (noting that alienage is often a legitimate basis for denying certain rights to noncitizens).

65. Bosniak, *supra* note 56, at 1143.

66. *See id.* at 1148–49.

67. Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

68. *See id.* at 716, 752.

69. *See id.*

70. *See id.* at 716.

71. 426 U.S. 67 (1976).

72. *See id.* at 80 (applying rational basis review to the federal alienage classification).

ticipation in a federal medical insurance program.[73] Diaz was not a citizen, so Congress could legitimately exercise its plenary immigration power over him to deny him certain federal benefits.[74] His claim of personhood did not trump his status as a foreigner.

If membership is not an issue, however, then the Court closely scrutinizes the discriminatory governmental conduct, often validating the noncitizen's claim to equal personhood.[75] In another benefits case, *Graham v. Richardson*,[76] the Court invalidated an Arizona statute that deprived noncitizens of certain welfare benefits, stating that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[77] In *Graham*, national membership was not an issue; therefore, Arizona, which, unlike Congress, possesses no plenary power over immigration, could not deny noncitizens their rights to equal personhood absent a compelling reason.[78] Equal personhood trumps governmental claims where national membership is a non-issue.[79]

Given the Court's preference for the membership model, Scaperlanda argues for a redefinition of the debate over membership from one that pits the plenary power of the legislature against the noncitizen's claim to equal rights, to a debate that weighs the rights of the citizenry "to create a constitutional community"[80] against the rights of the noncitizen to equal personhood. Scaperlanda cites the Court's "political function" cases to illustrate his theory.[81] In these cases, the Court found that a state's right to define who is part of its community overrides any personhood claims the noncitizen might have.[82] For example, in *Cabell v. Chavez-Salido*,[83] the Court sustained a California requirement that all peace officers be citizens.[84] The Court stated the following:

> [The] exclusion of [noncitizens] from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political

73. *See id.* at 83–84.
74. *See id.* at 84.
75. *See* Scaperlanda, *supra* note 67, at 716, 752.
76. 403 U.S. 365 (1971).
77. *Id.* at 372 (citations omitted).
78. *See* Scaperlanda, *supra* note 67, at 731 & n.126.
79. *See id.* at 716.
80. *Id.* at 769.
81. *See id.* at 767–71.
82. *See id.* at 769–70.
83. 454 U.S. 432 (1984).
84. *See id.* at 447.

> self-definition. Self-government . . . begins by defining the scope of the community of the governed and thus of the governors as well: [noncitizens] are by definition those outside of this community.[85]

Scaperlanda specifically cites this passage in *Cabell* to emphasize that the Court should justify its preference for membership over personhood only when membership involves the citizenry's attempt at self-definition in accordance with constitutional mandates.[86] Thus, Scaperlanda maintains, the current plenary power or the "inherent sovereign power" paradigm is essentially unbounded.[87] His alternative—a model that requires that communal formation be tempered by the Constitution and then weighed against the noncitizen's personhood claim—forces the government to recognize that it has limited power. The primacy of the Constitution prevents the government from playing the membership card to trump personhood.[88]

Scaperlanda concludes by calling for a constitutional dialogue among "We the People."[89] While he questions whether the political branch will act to protect the rights of noncitizens,[90] he hopes that the process of engaging in a frank discussion about citizenship and personal rights will help shape "the place of noncitizens in our society . . . ."[91]

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85. *Id.* at 439–40.

86. *See* Scaperlanda, *supra* note 67, at 769–71.

87. *See id.* at 754 ("[T]he membership's core is broad and the political branches receive wide latitude in formulating its policy.").

88. Arguably, Scaperlanda's reliance on the political function cases begs the issue. If Scaperlanda seeks to bound both the federal and state governments by the Constitution, current equal protection law arguably does just that. Even in cases where membership is an issue, the Court has employed, for the most part, a rational basis test to scrutinize the government action. *See* Scaperlanda, *supra* note 67, at 731–34. While this may not seem like much scrutiny, it remains constitutional scrutiny nonetheless. *See* Mathews v. Diaz, 426 U.S. 67, 81–82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.") (citations omitted). In correspondence I have received from him, Scaperlanda responds that he is concerned that the current rational basis review undervalues the personhood interests of the noncitizen. *See* Electronic Mail from Michael Scaperlanda, Professor, University of Oklahoma Law Center, to Victor C. Romero, Associate Professor, Dickinson School of Law (Dec. 12, 1997) (on file with *University of Michigan Journal of Law Reform*). I agree with that assessment and, in fact, argue for greater judicial scrutiny of alienage classifications within the immigration law context. *See* Romero, *Congruence*, *supra* note †, at 441–54.

89. *See* Scaperlanda, *supra* note 67, at 771.

90. Kevin Johnson has expressed a similar fear that the U.S. citizenry will be unsympathetic to noncitizen concerns. *See* Johnson, Los Olvidados, *supra* note 6, at 1147.

91. Scaperlanda, *supra* note 67, at 771 n.352. Certainly, the public could decide to amend the Constitution to eliminate the distinction between citizen and noncitizen. So long as the United States and other nations favor territorial boundaries over borderless

Part II, through its discussion of the recent promise enforcement cases, provides one recent example of how membership preempts personhood and how Scaperlanda's fears of an unsympathetic Congress have been realized. After acknowledging the problem that the primacy of membership poses, Part III proposes a way to engage in the constitutional dialogue Scaperlanda suggests by examining recent research in critical race theory and social psychology.

II. PERSONHOOD VERSUS MEMBERSHIP: THE "PROMISE ENFORCEMENT" CASES

A. The Due Process Rights of Noncitizens

The Due Process Clauses of the Fifth and Fourteenth Amendments preclude the federal government and the states, respectively, from denying life, liberty, or property to any person without due process.[92] Although the Supreme Court decided long ago that the term "person" in both amendments applies to certain groups of noncitizens[93] and that noncitizens enjoy a right to trial in criminal proceedings,[94] within the context of immigration law, the Court has been reluctant to ascribe constitutional significance to any procedural protections granted immigrants in civil deportation proceedings.

Professor Hiroshi Motomura contends that the Court has not held that the Constitution requires procedural due process protection for noncitizens in deportation hearings. Instead, the Court has relied on subconstitutional statutory interpretations of the INA[95] that favor the noncitizen.[96] For example, Motomura asserts

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jurisdictions, however, the distinction between citizen and noncitizen will remain. *See supra* text accompanying notes 14–15. My goal is less ambitious: using the promise enforcement cases as examples, I seek to convince citizens to value fundamental rights concomitant with the idea of personhood rather than to assert the primacy of their polity membership.

92. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* amend. XIV, § 1.

93. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (holding that permanent residents are "persons" within the context of the Fifth Amendment's Due Process Clause); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that permanent residents are "persons" protected by the Fourteenth Amendment).

94. *See* Wong Wing v. United States, 163 U.S. 228, 237 (1896).

95. 8 U.S.C. §§ 1101–1557 (1994).

96. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1645 (1992) [hereinafter Motomura, *Evolution*] ("The few judicial decisions [of the 1950s and 1960s] that fostered

that in *Woodby v. INS*,[97] the Court's decision that the applicable INA statute required the showing of clear and convincing evidence of deportability, rather than a simple preponderance, incorporated constitutional due process reasoning, despite the Court's insistence that it was merely engaging in statutory interpretation.[98]

The Court has been reluctant to apply constitutional law due to the primacy of the membership paradigm, as embodied in Congress's plenary power over immigration. The use of this paradigm restricts the Court and renders it reluctant to encroach upon Congressional conceptions of citizenship by erecting constitutional requirements and barriers. The only way the Court is willing to subvert Congressional power is through the occasional use of clandestine subconstitutional due process norms masquerading as neutral statutory interpretation.

Arguably, the use of what Motomura describes as "phantom" or "surrogate" procedural rules[99] to achieve what constitutional norms of personhood readily accomplish, reinforces the concept of the noncitizen as the "other" by underenforcing our traditional constitutional norms. Every court decision that favors the membership paradigm over the personhood theory further alienates the noncitizen.

The next section describes how the primacy of membership over personhood can lead a federal court to completely abdicate its role as protector of the marginalized in deference to legislative conceptions of citizenship.

B. Membership Trumps Personhood: The "Promise Enforcement" Cases

Each of the three cases described below highlights the tensions between the membership and personhood paradigms in a judicial milieu that generally favors membership concerns.

1. The Personhood Paradigm Applied: Thomas v. INS—Clive Charles Thomas arrived in the United States in 1954 and was admitted

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the expansion of procedural due process review did so primarily through statutory interpretation, not constitutional law."); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–75 (1990) [hereinafter Motomura, *Century*] (arguing that the plenary power doctrine has constrained courts from applying constitutional law in immigration cases).

97. 385 U.S. 276 (1966).

98. *See* Motomura, *Evolution*, *supra* note 96, at 1645 & n.106 (citing *Woodby*, 385 U.S. at 284–85).

99. *See id.* at 1645 n.100.

as a lawful permanent resident.[100] In 1983, Thomas, still a noncitizen, pled guilty to conspiracy to possess cocaine for sale and was sentenced to seven years' imprisonment.[101] Because Thomas cooperated with the U.S. Attorney's Office in a major narcotics investigation, he was released after serving only two years of his sentence.[102]

As part of his deal with the government, Thomas entered into a written cooperation agreement in which he agreed to turn over a sworn statement about his drug trafficking and to serve as a prosecution witness for two years.[103] In exchange, the government promised to advise Thomas's parole board of his cooperation and agreed not to oppose motions made by Thomas's attorney for reduction of sentence and relief from deportation.[104]

After his conviction, the INS issued an order for Thomas to show cause why he should not be deported.[105] Thomas's attorney moved for discretionary relief under section 212(c) of the Immigration and Nationality Act (INA).[106] Notwithstanding the government's express promise not to do so, the INS opposed the request for relief, calling two witnesses at the immigration court hearing who testified to Thomas's criminal activities.[107] Despite Thomas's testimony about his reformed behavior and his cooperation with the government, the immigration judge denied Thomas's request. Thomas also lost his appeal before the Board of Immigration Appeals (BIA).[108]

Thomas then brought his case before the Ninth Circuit, claiming that the government had violated his due process rights by reneging on its promise not to contest his motion for relief from deportation.[109] In a 2-1 decision, the Ninth Circuit panel agreed with Thomas and remanded the case to the immigration judge for

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100. *See* Thomas v. INS, 35 F.3d 1332, 1335 (9th Cir. 1994).

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.* Under the agreement, if the U.S. Attorney determined that Thomas had lied, the government could terminate the agreement. The government, however, was required to give Thomas an opportunity to confront his accusers prior to the agreement's termination. *See id.*

105. *See id.* at 1336.

106. *See id.* INA section 212(c) provides that "[noncitizens] lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . ." 8 U.S.C. § 1182(c) (1994).

107. *See Thomas*, 35 F.3d at 1336.

108. *See id.*

109. *See id.* at 1336–37.

a new section 212(c) proceeding for discretionary relief from deportation.[110]

Citing well-known and long-standing Supreme Court precedent, the Ninth Circuit began the heart of its opinion strongly in Thomas's favor: "It has long been the law that the government's failure to keep a commitment which induces a guilty plea requires that judgment be vacated and the case remanded."[111] Noting that a cooperation agreement is analogous to a plea agreement,[112] the court stated that the government would be held to the literal terms of the agreement and would ordinarily bear responsibility for any lack of clarity.[113] For the agreement to be enforceable, however, the promisee must rely detrimentally on the promise, and the promisor must be authorized to make the agreement.[114]

The INS offered two arguments in opposition to Thomas's appeal. First, it contended that the INS was neither a party to the agreement, nor bound by it, nor did the agreement specify that the government would not oppose Thomas's request.[115] Second, it "argue[d] that the United States Attorney lacked authority to enter into an agreement on [behalf of the INS]."[116]

The court rejected outright the first argument regarding the INS's alleged non-participation in the agreement negotiations.[117] Although acknowledging the reasonableness of the INS's wish not to be bound by an agreement crafted without its consultation, the court nonetheless focused on the harm to Thomas caused by the U.S. Attorney's gaffe: "Thomas was entitled to performance by the government of its promise."[118] Moreover, the court stated the following:

> The agreement plainly and unambiguously spoke to the issue of deportation and expressly bound the INS. In the first paragraph, the agreement says that "Government," designated as the promisor, "includes its departments, officers, agents, and agencies." . . . The eighth paragraph bound "[t]he Government," so defined, not to oppose motions for "relief from deportation to the . . . U.S. Immigration Service." . . . Motions for relief from deportation are made and heard before the

110. *See id.* at 1337.
111. *Id.* (citing Santobello v. New York, 404 U.S. 257, 262 (1971)).
112. *See id.* (citing United States v. Carrillo, 709 F.2d 35, 36 (9th Cir. 1983)).
113. *See id.* (citing United States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992)).
114. *See id.* (citing Johnson v. Lumpkin, 769 F.2d 630, 633 (9th Cir. 1985)).
115. *See id.*
116. *Id.*
117. *See id.*
118. *Id.*

> INS, and opposed by INS lawyers, so this particular promise, to mean anything, had to mean that the INS would not oppose such a motion.[119]

The court spent considerably more time analyzing the INS's second argument, that the U.S. Attorney lacked authority to bind the INS.[120] Applying common law agency principles, the court stated that an agent may bind the principal only if it has actual authority—express or implied—to do so:

> Therefore, the United States Attorney's promise that the government would not oppose Thomas's § 212(c) application is binding on the INS if the United States Attorney had either an express grant of authority to make such a promise, or his authority for making the promise is incidental to some other express grant of authority.[121]

Examining the duties of the U.S. Attorneys, the court noted that Congress expressly conferred upon them the power to "prosecute for all offenses against the United States."[122] Congress, however, specifically delegated to the Attorney General the power to administer and enforce the INA.[123] In turn, the Attorney General has delegated much of this power to officials of the INS, leading the court to conclude that "[s]o far as we have found in the Code of Federal Regulations, no delegation of that authority has been made to United States Attorneys."[124]

After finding no *express* delegation, the court next considered whether the U.S. Attorney's Congressionally-sanctioned power to prosecute gives her *implied* authority to prevent the government, including the INS, from opposing motions for relief from deportation.[125] The court ruled that the U.S. Attorney has such implied authority.[126] Again citing common law agency principles, the court held that the power to enter a cooperation agreement and consequently bind the government is an incident of the same prosecutorial power that gives U.S. Attorneys the implied authority

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119. *Id.* at 1337–38 (citations omitted).
120. *See id.* at 1338–42.
121. *Id.* at 1338.
122. *Id.* at 1339 (citing 28 U.S.C. § 547(1) (1988)).
123. *See id.* at 1338 (citing 8 U.S.C. § 1103(a) (1994)).
124. *Id.*
125. *See id.* at 1339.
126. *See id.* at 1339–40.

to negotiate plea bargains.[127] The court specified three reasons for its holding:

> First, deportation commonly arises from the context of criminal prosecution. It is likely to be a central issue in many criminal cases involving [noncitizens]. Second, the terms of a plea or cooperation agreement will commonly affect deportation. The attorneys will negotiate the offenses of conviction and sentences partly by considering the effects of these determinations on deportation. Third, there is no reason why, in the absence of regulations or orders to the contrary, we should doubt that Congress implied this grant of authority.[128]

This holding does not mean that the INS is without a remedy. The court noted that the Attorney General, if she wished, could limit the authority of the U.S. Attorneys through an appropriate section in the Code of Federal Regulations, but she has chosen not to do so.[129]

This case is a marvelous example of the personhood theory of noncitizens' rights. Specifically, this case demonstrates three characteristics of the personhood paradigm: (1) the focus is on constraining government power rather than determining the extent to which the noncitizen may enjoy the rights of a citizen; (2) the government is seen as a unified entity rather than separate branches in instances where it seeks to limit a noncitizen's rights; and (3) the paradigm recognizes the reality that noncitizens should be accorded more protection in some instances, especially since the threat of deportation is a constant in noncitizens' lives. Let us examine these lessons in turn.

First, the court did not begin by looking at Thomas's noncitizenship in order to determine what process was due. Instead, it focused on Thomas's claim that the government failed to satisfy its end of the bargain, which caused a direct harm to Thomas.[130] While it sympathized with the INS's plight owing to the agency's non-participation in the cooperation agreement talks, the court stressed that, ultimately, it was Thomas who was "entitled to performance by the government"[131]—whether that obligation was fulfilled by the U.S. Attorney or the INS. Thomas's personhood, and therefore, his claim against the government, was not dimin-

127. *See id.*
128. *Id.* at 1340.
129. *See id.* at 1341.
130. *See id.* at 1337.
131. *Id.*

ished by his noncitizenship. In the court's eyes, he was entitled to the same due process as citizens subject to prosecution by the government and its entities.[132]

The personhood paradigm is especially applicable here because membership issues are of secondary concern in the promise enforcement scenario. The primary object of the cooperation agreement between the government and the noncitizen is to facilitate the prosecution of a criminal case, not to affect immigration law.[133] Put another way, in cooperation agreements, the government's main concern is the defendant's cooperation, not the defendant's citizenship. The *Thomas* court properly kept its focus on the government's obligation to keep its promises rather than be distracted by the defendant's irrelevant citizenship status.

Second, this case is instructive because the court correctly understood that, in the noncitizen's eyes, the government is monolithic. When the government purports to negotiate with any person, noncitizens included, it should not be allowed to feign ignorance when one of its branches fails to communicate with another branch. Thus, drawing an artificial boundary between the government's immigration arm and its criminal prosecutorial arm means little to the noncitizen who negotiates in good faith. Viewing the government as monolithic makes sense, especially when the government's negotiating arm seeks to acquire from the noncitizen cooperation that benefits the general public. If the government wants to reap the benefits of its negotiated deal, it must also be willing to accept the accompanying burdens.

At one level, "distaste" for the monolithic government also mirrors the general sentiment held by some scholars that there should be little difference between state and federal discrimination against noncitizens. Commentators have long recognized that plenary power over immigration effectively immunizes the federal government from equal protection scrutiny when it treats noncitizens worse than citizens, while state governments engaging in the same discriminatory conduct are generally subject to heightened scrutiny.[134] This federal/state dichotomy in alienage jurisprudence has led some to urge that the plenary power doctrine be

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132. *See id.* (accepting Thomas's due process claim); *see also* Santobello v. New York, 404 U.S. 257, 262 (1971) (discussing the importance for due process considerations that the government abide by its promises in the plea agreement context).

133. *See Thomas*, 35 F.3d at 1337 (analogizing cooperation agreements to plea bargains).

134. *See* Legomsky, *Immigration Law*, *supra* note 40, at 256, 305 n.254; Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 275–77.

rejected,[135] while others have suggested that, at the very least, some congruence be sought between the levels of scrutiny currently used to examine federal versus state action.[136] From the noncitizen's perspective, the view of the government is the same in the *Thomas* case as in the plenary power debate: all the noncitizen knows is that she is being confronted by an American government seeking somehow to restrict her liberty.

Finally, the court correctly observed that, as a practical matter, cooperation agreements in criminal law proceedings affect noncitizens more than citizens because of the "everpresent threat of deportation."[137] Perhaps second only to the inability to vote,[138] the constant threat of deportation divides the noncitizen from the citizen. Because noncitizens cannot exercise the franchise, they are unable to vote for procedural safeguards to temper prosecutorial zeal in deportation hearings.[139] Therefore, courts must pay atten-

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135. *See supra* note 40.

136. *See* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 870 (1989) (suggesting that rather than invoking Congress's plenary power, "courts ought to examine the justifications offered on behalf of federal regulations based on alienage to see if they meet traditional constitutional standards of permissibility" and recommending courts review strictly regulations burdening fundamental constitutional rights); Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 603 n.52 (1994) (arguing that the Court has failed to articulate a viable reason for why state and federal laws would be subject to different levels of scrutiny); Romero, *Congruence*, *supra* note †, at 428–29 (arguing that Justice O'Connor's "congruence principle" in the *Adarand* case may serve as the starting point for requiring generally stricter scrutiny of some federal alienage classifications); Rosberg, *supra* note 134, 316–36 (arguing that constitutional limits on classification by alienage should apply to federal as well as state government). *But see* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060–65 (1979) (arguing that conceptualizing the distinction between levels of scrutiny using the Supremacy Clause, not equal protection, explains the Court's general deference to federal actions).

137. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 58 (1983). Ironically, even though deportation is viewed as the enforcement activity most closely associated with the INS, many noncitizens that the INS expels are undocumented immigrants caught and repelled at the border. *See* Patrick J. McDonnell, *Formal Departure Is Much Less Common than Expulsion*, L.A. TIMES, June 23, 1997, at A14.

138. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976) (noting that noncitizens are denied the right to vote); JOHN HART ELY, DEMOCRACY AND DISTRUST 161 (1980) (same); *see also* U.S. CONST. amend. XV, § 1 (protecting the right to vote of citizens only). Professor Gerald Rosberg has argued that noncitizens with permanent resident status should be allowed to vote. *See* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1110–15 (1977); *see also* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1441–60 (1993) (arguing that no logical distinction exists between citizens and resident aliens for purposes of the voting franchise).

139. While Thomas arguably could have naturalized so he could enjoy the full panoply of citizens' rights, naturalization is not an option for the vast majority of permanent residents who are either waiting to apply or are in the process of applying for U.S. citizenship. *See* INA § 316(a), 8 U.S.C.A. § 1427 (West 1998) (noting that legal permanent residents

tion to the double threat facing a noncitizen charged with a crime: criminal prosecution and deportation. The *Thomas* court did just that. It acknowledged that, when a noncitizen is a criminal defendant, deportation must be considered because any plea or cooperation agreement could very well involve deportation considerations.[140]

In sum, the *Thomas* decision captures the essence of the personhood paradigm: the belief that due process rights require the government to act fairly in its dealings with both citizens and noncitizens.[141]

2. The Membership Paradigm Applied: San Pedro v. United States—This next subsection examines a case whose facts, though similar to the facts in *Thomas*, led the court to deny the noncitizen protection and implicitly, though likely unintentionally, to assert the primacy of the membership theory of noncitizens' rights.

Alberto San Pedro is a Cuban citizen, but he has been a lawful permanent resident of the United States for over forty years.[142] He was indicted for bribing, and for conspiracy to bribe, a federal public official.[143] After entering into a plea agreement with the U.S. Attorney's Office, San Pedro pled guilty to the conspiracy charge in exchange for transactional immunity.[144] The government promised not to prosecute San Pedro for any other offenses based upon evidence revealed during the investigation leading to the bribery charges.[145]

It is at this point that San Pedro's and Thomas's stories converge. As in *Thomas*, the INS issued an order for San Pedro to show

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must have lived in the United States for five years before they are eligible to apply for naturalization).

140. *See Thomas*, 35 F.3d at 1340.

141. In a case involving similar facts, the Eighth Circuit followed the same reasoning as the *Thomas* court in holding that an AUSA could bind the INS to a plea agreement. *See* Margalli-Olvera v. INS, 43 F.3d 345, 353 (8th Cir. 1994). The Eighth Circuit panel stated the following:

> [A]n Assistant United States Attorney enters into a plea agreement on behalf of the United States government as a whole. Accordingly, promises made by an Assistant United States Attorney bind all agents of the United States government. Therefore, we hold that unless a plea agreement uses specific language that limits the agents bound by the promise, ambiguities regarding the agencies bound by the agreement are to be interpreted to bind the agency at issue.

Id.

142. *See* San Pedro v. United States, 79 F.3d 1065, 1067 (11th Cir. 1996), *cert denied*, 519 U.S. 980 (1996).

143. *See id.*

144. *See id.*

145. *See id.* at 1067 & n.1.

cause why he should not be deported because of his conviction.[146] San Pedro responded by filing a petition for writ of mandamus in federal district court, contending, as did Thomas, that the government's promise in the plea agreement prevented the INS from deporting him.[147] The government filed a motion to dismiss, arguing, as did the government in *Thomas*, that it never promised San Pedro non-deportation, and even if it did, that the promise did not bind the INS because the U.S. Attorney did not have the authority to make such a promise.[148]

Converting the motion to dismiss into one for summary judgment,[149] the court ruled that although there was a factual issue as to whether the government made the non-deportation promise, the crucial legal issue was whether the U.S. Attorney "had the authority to promise not to deport a criminal defendant as a condition of a plea bargain."[150] The court held that neither the U.S. Attorney's manual nor the INA vested the U.S. Attorney with the power to bind the INS through a non-deportation clause; accordingly, the court granted summary judgment in the government's favor.[151]

On appeal, the Eleventh Circuit grappled with the same issues as the *Thomas* court, and indeed, cited *Thomas* as prior authority.[152] While it agreed with the *Thomas* court that Congress did not expressly grant the U.S. Attorney power to bind the INS or any other governmental agency,[153] the Eleventh Circuit disagreed with the *Thomas* court's interpretation of the controlling law:

> We believe *Thomas* incorrectly harmonized the statutes that empower the United States attorneys and the attorney general, and failed to consider that *the express authority to enforce immigration law is concentrated solely in the attorney general.* It is unclear to this court, as it was to the district court, why Congress would have granted United States attorneys the authority to enter into agreements with criminal defendants that bind the INS while simultaneously granting the authority

146. *See id.* at 1067.

147. *See id.*

148. *See id.*

149. *See id.*

150. *Id.* at 1068.

151. *See id.*; *see also* United States v. Igbonwa, 120 F.3d 437, 444 (3d Cir. 1997) ("We hold that the United States Attorney's Office lacks the authority to make a promise pertaining to deportation in the prosecution of a criminal matter that will bind INS without its express authorization.").

152. *See* San Pedro v. United States, 79 F.3d 1065, 1069 (11th Cir. 1996). The panel also noted that the Eighth Circuit had followed the *Thomas* court's reasoning in a 1994 decision. *See id.* (citing Margalli-Olvera v. INS, 43 F.3d 345, 353 (8th Cir. 1994)).

153. *See id.*

> to enforce the specific provisions of the immigration laws to the attorney general in the INA. We therefore follow the principle, upheld by the Supreme Court on numerous occasions, that a specific statute takes precedence over a more general one.[154]

Unlike the Ninth Circuit's affirmation of Thomas's personhood, the Eleventh Circuit implicitly upheld the theory of membership by emphasizing the separate, unique status of immigration law enforcement. By extension, the *San Pedro* court also highlighted the practical disadvantage separate immigration enforcement creates for noncitizens like San Pedro who cannot rely on a monolithic government to abide by its promises but instead must specifically adhere to the INS's rules and requirements, regardless of what other government agencies might guarantee.

The *San Pedro* decision emphasizes two other important points that appear in the Supreme Court's alienage jurisprudence about membership. First, the court was quick to rely on a seemingly neutral rule of interpretation—that specific statutes take precedence over more general ones—without examining the adverse consequences to San Pedro. Similarly, the Supreme Court in *Mathews v. Diaz* invoked another neutral rule—the plenary power doctrine—to deny Medicare benefits to certain noncitizens.[155] Arguably, the distribution of public benefits has little to do with the admission or expulsion of people,[156] which is the basic province of immigration

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154. *Id.* (citing Simpson v. United States, 435 U.S. 6, 15 (1978); Brown v. General Servs. Admin., 425 U.S. 820, 834 (1976)) (emphasis added).

155. *See* Mathews v. Diaz, 426 U.S. 67, 81–84 (1976).

156. Some may argue, as I am sure the proponents of Proposition 187 did, that a legitimate way to deter immigration is to create disincentives to immigrate. Thus, the proponents of California's Proposition 187 would contend that one purpose of denying Mexican undocumented immigrants medical care is to deter them from crossing the border illegally. Recent research, however, has affirmed prior studies that most Mexican immigrants come to the United States to work and not to avail themselves of government benefits. *See* WAYNE A. CORNELIUS ET AL., CENTER FOR U.S.-MEXICAN STUDIES, MEXICAN IMMIGRANTS IN THE SAN FRANCISCO BAY AREA: A SUMMARY OF CURRENT KNOWLEDGE 43–56 (1982) (noting that although undocumented Mexican immigrants in the Bay Area are commonly thought to be heavy social services users, the available evidence does not support this characterization); WAYNE A. CORNELIUS ET AL., CENTER FOR U.S.-MEXICAN STUDIES, MEXICAN IMMIGRANTS AND SOUTHERN CALIFORNIA: A SUMMARY OF CURRENT KNOWLEDGE 52–56, 57 (1982) (noting that first generation undocumented Mexican immigrants tend to come to the United States to accumulate capital to return to Mexico and discussing the health care costs associated with undocumented immigrants); Patrick J. McDonnell, *Immigrants Not Lured by Aid, Study Says*, L.A. TIMES, Jan. 29, 1997, at A3 (citing a report by the Public Policy Institute of California which found that half of all documented Mexican immigrants return home within two years, and less than one-third stay as long as ten years, while undocumented immigrants return home even sooner); *see also* T. Alexander Aleinikoff, *The Tightening Circle of Membership*, *in* IMMIGRANTS OUT!, *supra* note 6, at 324–26

law. Invoking the plenary power doctrine became even more frustrating when the Supreme Court held that alienage is a suspect classification like race and that states may not discriminate against noncitizens in the distribution of state-sponsored public benefits.[157] The plenary power doctrine, like the specific statute rule used in *San Pedro*,[158] provides the court with an apparently legitimate and neutral way to discriminate against noncitizens but simultaneously ignores the real hardship such a rule inflicts.[159]

Second, the *San Pedro* court characterized the government as being multidimensional rather than monolithic by emphasizing the differences between the immigration and prosecutorial powers of the federal government: The immigration power focuses on the admission and expulsion issue, while the prosecutorial power examines the criminal liability of those subject to U.S. law.[160] Yet, in contrast, the *Mathews* court chose not to separate the immigration question (should a noncitizen be admitted or expelled) from the immigrants' rights question (should a noncitizen be entitled to public benefits) and instead invoked the plenary power doctrine to assert a united government's power over immigrants as long as they are in the United States.[161] *Mathews* illustrates how courts can manipulate their characterization of the government from a singular entity to a fragmented structure to avoid government responsibility for noncitizens' welfare. The end result is the same, whether intended or not: the failure to focus on the personhood of the noncitizen tightens the circle of membership, excluding those who are not full citizens.

3. Membership Trumps Personhood: Ramallo v. Reno—As a final illustration of the workings of the personhood/membership dichotomy in recent lower court decisions, this section examines the curious case of *Ramallo v. Reno*[162] in which Congress intervened

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(arguing that denials of public benefits to permanent residents send the message that the circle of citizenship is growing ever smaller).

157. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

158. *See San Pedro*, 79 F.3d at 1069.

159. Moreover, the *San Pedro* court could have invoked some of Motomura's phantom norms of statutory interpretation to achieve justice, but it chose not to do so. *See supra* text accompanying notes 96–99.

160. *See San Pedro*, 79 F.3d at 1069–70 & n.3; *see also* Thomas v. INS, 35 F.3d 1332, 1346 n.5 (9th Cir. 1994) (Kozinski, J., dissenting) (noting that Congress chose to give both the Attorney General and U.S. Attorneys prosecutorial power, but authority over immigration matters rests with the Attorney General alone).

161. *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

162. 931 F. Supp. 884 (D.D.C. 1996) (*Ramallo I*), *order entered by* 934 F. Supp. 1 (D.D.C. 1996) (*Ramallo II*), *vacated by* 114 F.3d 1210 (D.C. Cir. 1997) (*Ramallo III*).

to reestablish the primacy of the membership theory after the lower court had implicitly endorsed the idea of personhood.

Marlena Ramallo is a Bolivian citizen who entered the United States in 1972.[163] She became a permanent resident in 1978.[164] In August 1986, she pled guilty to the charge of conspiracy to import cocaine.[165] Three months after Ramallo's conviction, the INS initiated deportation proceedings against her.[166] During the course of the deportation proceedings, the government entered into an agreement with Ramallo in which she promised to assist in prosecuting other drug traffickers.[167] In return, the government, with approval of the AUSA, the Drug Enforcement Agency, and the INS District Director, agreed not to deport Ramallo.[168] Pursuant to her understanding of the agreement, Ramallo withdrew her objection to deportability in the INS proceedings.[169] In apparent violation of the agreement, an INS judge subsequently issued a deportation order.[170] When the government later attempted to enforce the order, Ramallo filed suit in federal district court, claiming violation of her due process rights[171] and seeking to enforce the cooperation agreement to restore her to permanent resident status.[172]

After several rounds of briefing, the parties filed cross-motions for summary judgment.[173] Ramallo claimed that the government had violated her constitutional rights by breaching its agreement and, therefore, it was promissorily and equitably estopped from deporting her.[174] In response, the government argued that, among other things, the government representatives who dealt with Ramallo did not have the authority to bind the government[175]—the

163. *See Ramallo III*, 114 F.3d at 1211.

164. *See id.*

165. *See id.*

166. *See id.*

167. *See Ramallo I*, 931 F. Supp. at 898–99.

168. *See Ramallo II*, 934 F. Supp. at 2. In *Ramallo I*, the court noted that Ramallo also contended that the government agreed to restore her status as a lawful permanent resident. *See Ramallo I*, 931 F. Supp. at 889.

169. *See Ramallo III*, 114 F.3d at 1211.

170. *See id.*

171. *See id.*

172. *See id.*

173. *See Ramallo I*, 931 F. Supp. at 888.

174. *See id.*

175. *See id.* Although it did not dispute that a cooperation agreement was reached, the government also claimed that it promised Ramallo only a temporary stay of deportation. *See id.* Alternatively, the government asserted that Ramallo had modified the original agreement and therefore was barred from receiving equitable relief under the doctrine of "unclean hands." *See id.*

same argument the government raised before the *Thomas* and *San Pedro* courts.

On the issue of agency, the court cited its approval of *Thomas*[176] and its rejection of *San Pedro*.[177] Ultimately, however, the court decided that it did not need to choose definitively between these conflicting precedents because an INS agent was directly involved in the negotiations along with the U.S. Attorney.[178] If anyone has authority to bind the INS, "an INS attorney, whose job is to represent the INS . . . in matters of deportation proceedings," [179] must have that power. Soon thereafter,[180] the court granted judgment in Ramallo's favor, ruling that fundamental due process concerns required the government to restore Ramallo's status as a lawful permanent resident.[181]

At first blush, *Ramallo* appears to be a much easier case than either *Thomas* or *San Pedro*. The *Ramallo* district court did not have to choose between the conflicting theories of *Thomas*'s personhood paradigm and monolithic government on the one hand and *San Pedro*'s membership paradigm and multidimensional government on the other. The D.C. District Court simply applied general principles of agency law to hold that an INS agent who promises a noncitizen that she will not be deported binds the INS by that promise[182]—a rather uncontroversial statement.

This obvious truth, however, would not hold sway for long. The government appealed this case to the District of Columbia Circuit, claiming that the lower court lacked jurisdiction when it found for the plaintiff.[183] Although the appellate court did not reach the jurisdictional issue, it vacated the decision of the lower court.[184] After the district court heard the case, Congress enacted the IIRIRA,[185] which amended the INA to deprive federal courts of jurisdiction to

176. *See id.* at 893–94 (citing Thomas v. INS, 35 F.3d 1332, 1339, 1345 (9th Cir. 1994)). The court also cited *Margalli-Olvera* with approval. *See id.* (citing Margalli-Olvera v. INS, 43 F.3d 345 (8th Cir. 1994)). In *Margalli-Olvera*, the Eighth Circuit held that the U.S. Attorney's Office had authority to bind the INS to a plea agreement. *See Margalli-Olvera*, 43 F.3d at 355.

177. *See Ramallo I*, 931 F. Supp. at 894 (citing San Pedro v. United States, 79 F.3d 1065 (11th Cir. 1996)).

178. *See id.*

179. *Id.*

180. The court denied both sides' motions for summary judgment on the narrow factual issue of whether the government promised Ramallo that she would not be deported. *See id.* at 892. At the ensuing hearing, the court resolved this factual issue in Ramallo's favor and granted judgment for the plaintiff. *See Ramallo II*, 934 F. Supp. at 2.

181. *See id.*

182. *See Ramallo I*, 931 F. Supp. at 894.

183. *See Ramallo III*, 114 F.3d at 1211.

184. *See id.* at 1213–14.

185. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).

decide cases like *Ramallo*. Section 306(a) of the IIRIRA amends section 242 of the INA[186] by depriving federal courts of jurisdiction over noncitizens' claims that arise out of proceedings brought against the noncitizens by the Attorney General.[187] Because Ramallo's case was a claim arising out of the INS's efforts to deport her, the IIRIRA barred the federal courts from entertaining her claim.[188]

What started out as a decision closely tracking the personhood paradigm was transformed into a membership case by Congressional fiat! Indeed, *Ramallo* did not begin as a controversial case. Just as a citizen should be able to insist that a prosecutor's promise bind the prosecuting office, so should a noncitizen be able to surmise that an INS agent's word will obligate the INS. Unfortunately, Congress, with its plenary power over immigration, invoked the membership paradigm to quash any claims of equal personhood Ramallo could have made.[189]

Ramallo is the most recent example of the American government using its power over immigration and naturalization to deny even the most basic due process rights to noncitizens. So long as the government continues to value the membership paradigm (and its enforcer—the plenary power doctrine) over equal personhood for noncitizens, the circle of membership will continue to

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186. Section 242 of the INA deals with the apprehension and deportation of noncitizens. *See* INA § 242, 8 U.S.C. § 1252 (1994 & Supp. II 1996).

187. *See* 8 U.S.C. § 1252(g) (Supp. II 1996). Section 1252 now reads in pertinent part:

> EXCLUSIVE JURISDICTION.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against alien under [the INA].

Id. § 1252(g) (Supp. II 1996). Because this Article focuses on fostering constitutional dialogue through the use of social psychology techniques, the constitutionality of the IIRIRA's court-stripping provision is beyond the scope of this discussion. For an analysis of this latter point, see generally Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997) (discussing possible judicial reaction to the jurisdiction stripping provision of the IIRIRA).

188. *See Ramallo III*, 114 F.3d at 1213.

189. In *Ramallo III*, the circuit court noted that Ramallo was not entirely without a remedy; she could file a habeas claim. *See id.* at 1214. But this statement rings hollow. Aside from the difficulty of winning habeas claims, the very fact that this case could turn from an easy, obvious, and just win for the noncitizen into a denial of jurisdiction for what are important constitutional claims sends a very strong message that the government has unbridled discretion as to noncitizens. On the difficulty of pursuing habeas relief, see generally Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 4 (1997).

tighten. What does that mean for people like Marlena Ramallo and Alberto San Pedro? If they fulfill their promises to the U.S. government and bring their co-conspirators to justice, not only will they be denied the right to remain in the United States, they also face almost certain retaliation upon return to their home countries.[190]

III. REASSERTING THE IMPORTANCE OF PERSONHOOD

The previous two parts of this Article demonstrate the prominence of the membership paradigm in both Supreme Court jurisprudence and in recent promise enforcement cases brought before the lower federal courts. Professor Scaperlanda's challenge still must be met as the paramount question remains: What can be done to redefine and expand the circle of membership? The work of Professor Jody Armour and recent social psychology research on attitudes about immigrants may help effect a paradigm shift: If we can all acknowledge the stereotypes we have about others—immigrants included—we may begin to dismantle those stereotypes, debunk those myths, and, ultimately, welcome and value the equal personhood of those who are different.

A. Armour on Stereotype Reduction in Judicial Decision-making

Critical race theorist Professor Armour's work on effective legal decision-making provides us with a framework for understanding society's views about the "other." Armour has challenged the approach adopted by most courts, and advocated by many commentators, that leaves descriptions of race, gender, and sexual orientation out of the courtroom because doing so appeals to the prejudices of the jury.[191] Indeed, defense lawyer Johnnie Cochran often was criticized in the press for "playing the race card" during

190. Despite the potentially greater harm to noncitizens from deportation than from incarceration, the Supreme Court has held that deportation is a "purely civil action," and therefore, noncitizens at deportation hearings are not given the same constitutional and procedural safeguards as in criminal trials. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984); *see also* U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 97–101 (1980) (discussing the characterization of deportation hearings as civil in nature).

191. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 736–38 (1995).

the O.J. Simpson trial.[192] When Cochran sought to paint Mark Fuhrman as racist, critics viewed the accusation as irrelevant to whether Simpson was guilty of double murder and asserted that it would make the black jurors empathize with Simpson. Rather than seeing the acquittal as a reflection of reasonable doubt in the jurors' minds, some commentators thought the Simpson verdict was the product of black people acting prejudicially in favor of a fellow black, ignoring what in critics' minds was overwhelming evidence of Simpson's guilt.[193]

To enhance the legal decision-making process, Armour challenges conventional wisdom by drawing distinctions between constructive and destructive uses of stereotypes about social outgroups.[194] Borrowing from recent social psychology theory, Armour distinguishes between prejudice and stereotype: "Stereotypes consist of well-learned sets of associations among groups and traits established in children's memories at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes."[195] For example, a three-year-old child, upon seeing a black infant, might describe the infant as a "baby maid," demonstrating a recognition of the social stereotype

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192. *See* Rob Morse, *The Gospel According to Cochran*, S.F. EXAMINER, Sept. 28, 1995, at A1 ("Cochran didn't just play the race card before the jury of nine African Americans, two whites and one Latino. He played the whole race deck."). Indeed, one of Cochran's own "critics was co-counsel Robert Shapiro who has berated Cochran for playing the race card 'from the bottom of the deck.'" Lynda Gorov, *Cochran Becomes Celebrity, Draws Criticism*, BOSTON GLOBE, Oct. 5, 1995, at 31 (quoting Robert Shapiro). Even Senator Arlen Specter considered probing Cochran's "playing the race card" during closing arguments. *See White House '96—Specter: Considers Probe of Cochran's Conduct in O.J. Trial* (visited Oct. 28, 1998) <http.www.cloakroom.com/pubs/hotline/db2/1995/10/h951011.18 .html>.

193. *See, e.g.*, Martin Gottlieb, *Racial Split at End as at Start*, N.Y. TIMES, Oct. 4, 1995, at A1 ("'The case turned when the black jurors pivoted from looking at the murder to looking at the police .... O.J. should have burned and the cops should have lost their jobs ....'"); Elsa McDowell, *O.J. Trials Say More About Us than Judiciary*, POST & COURIER (Charleston, SC), Feb. 6, 1997, at B1, *available in* LEXIS, News Library, PSTCUR File ("People who decry the criminal acquittal as racially motivated may not be altogether wrong."); Roger Rosenblatt, *The Simpson Verdict*, TIME, Oct. 16, 1995, at 40, 43 ("'Think of it,' a young man said bitterly. 'O.J.'s lawyer tried to separate the races, and it worked.' He shook his head. 'It's a payback for Rodney King; that's all it is. Everybody was so stunned to see that police beating on tape.'"); Jim Steinberg, *Fresno Reaction Takes on Racial Overtone*, FRESNO BEE, Oct. 4, 1995, at A1 ("White workers by a curb along California Avenue dismissed the trial and verdict with a word denoting bulls' excrement.... 'It was a done deal,' [said one man], who [was] white.").

194. *See* Armour, *supra* note 191, at 768–69.

195. *Id.* at 741 (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989)). Armour has incorporated many of these arguments in his recent book. *See* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 115–53 (1997). On the nature of prejudice generally, Professor Gordon Allport's treatise on the subject is a classic. *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954).

without having the cognitive wherewithal to approve or disapprove of the ascription.[196] "In contrast, prejudice consists of derogatory *personal beliefs*," those "that people endorse and accept as being true."[197] Thus, the three-year-old in our hypothetical who grows up to reject the stereotype of the black maid is not "prejudiced" under this definition.[198]

Aside from highlighting the distinction between "stereotype" and "prejudice," Armour notes that social psychologists also differentiate between "low prejudiced" individuals (those who have personally rejected cultural stereotypes as inappropriate) and "high prejudiced" individuals (those who know and endorse cultural stereotypes).[199] He argues that people commonly err by labeling "low prejudiced" individuals who exhibit stereotype-congruent responses as "racist" when, as social psychologists point out, "nonprejudiced beliefs and stereotype-congruent thoughts and feelings may coexist within the same individual."[200] For example, some Southerners, despite rejecting prejudice against blacks, have expressed feeling squeamish when shaking African Americans' hands—a product of residual feelings from their childhood, social scientists say.[201]

Armour next points to empirical evidence that suggests that unless they monitor their behavior, low prejudiced people may fall easily into stereotype-congruent responses and habits because negative cultural stereotypes are environmentally well-established and reinforced by the mass media.[202] Thus, prejudice-like responses

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196. *See* Armour, *supra* note 191, at 741 (citing Phyllis A. Katz, *The Acquisition of Racial Attitudes in Children*, *in* TOWARDS THE ELIMINATION OF RACISM 125, 147 (Phyllis A. Katz ed., 1976)).

197. *Id.* at 742 (citing Anthony R. Pratkanis, *The Cognitive Representation of Attitudes*, *in* ATTITUDE STRUCTURE AND FUNCTION 71, 91 (Anthony R. Pratkanis et al. eds., 1989)). Similarly, Professor Allport opines that an adequate definition of prejudice must contain an "*attitude* of favor or disfavor" that "must be related to an overgeneralized (and therefore erroneous) *belief*." ALLPORT, *supra* note 195, at 13.

198. *See* Armour, *supra* note 191, at 742.

199. *See id.* (citing Patricia G. Devine et al., *Prejudice with and Without Compunction*, 60 J. PERSONALITY & SOC. PSYCHOL. 817, 817–19 (1991)).

200. *Id.* at 743 (citing Devine, *supra* note 199, at 817)). This distinction between low- and high-prejudiced individuals might help reduce feelings of defensiveness among those in the white majority who, sometimes justifiably, feel like scapegoats every time the question of white racism is raised. On the issue of affirmative action, for example, some white males see the issue as one of class rather than race. *See, e.g.*, David Thomas, *Initiative Will Level Playing Field*, L.A. TIMES, Mar. 10, 1996, at B4, *available in* 1996 WL 5249221 ("I'm sick and tired of the bashing from all the groups who are still crying about lack of opportunities in education and business, and who characterize all white males as racist, sexist animals whose only job on Earth is to deny others their due.").

201. *See* Armour, *supra* note 191, at 743 (citing Daniel [G]oleman, *"Useful" Modes of Thinking Contribute to the Power of Prejudice*, N.Y. TIMES, May 12, 1987, at C1).

202. *See id.* at 755–57.

that are sometimes labeled "racist" may simply be the product of a bad habit rather than a personal belief in the inferiority of a given race.[203]

Armour uses this research to argue against the tendency of many courts to disallow arguments to the jury relating to race, gender, sexual orientation, or other group characteristics on the ground that such evidence engenders prejudice.[204] He contends that legal decisionmakers should be reminded of their non-prejudiced personal beliefs so that they may guard against unconscious discrimination.[205] Armour cites the example of a 1920s case in which Clarence Darrow effectively utilized this strategy in his defense of a black doctor, the doctor's relatives, and friends accused of murdering a white man.[206] Two days after Dr. Ossian Sweet and his family moved into a white Detroit neighborhood in 1925, an angry white mob gathered outside their home, shouting racial epithets and throwing rocks.[207] As the mayhem intensified, the police officers who were dispatched to keep the peace did nothing.[208] After seeing a big rock crash through an upstairs window and the crowd make a sudden movement, Dr. Sweet and his brother fired a warning shot above the mob; one of the crowd's members was killed, and all eleven household members were charged with murder.[209]

In his summation before an all-white jury, Darrow challenged them to resist giving in to their racial prejudices:

> I haven't any doubt but that every one of you is prejudiced against colored people. I want you to guard against it. I want you to do all you can to be fair in this case, and I believe you will. . . .
>
> . . . Here were eleven colored men, penned up in the house. Put yourselves in their place. Make yourselves colored for a

203. *See id.* at 756–59. Armour explains: "[T]he research demonstrating disassociation of stereotypes and personal beliefs in low-prejudiced people argues against the conclusion that 'we are all racists.' Instead, I suggest that it is more accurate and useful to say that 'we are all creatures of habit.'" *Id.* at 759.

204. *See id.* at 759–60.

205. *See id.*

206. *See id.* at 762 (citing Arthur Weinberg, *You Can't Live There!*, *in* ATTORNEY FOR THE DAMNED 229, 229 (Arthur Weinberg ed., 1957) (compiling excerpts of Clarance Darrow's closing arguments and supplying editorial commentary)).

207. *See id.* (internal citation omitted).

208. *See id.* (internal citation omitted).

209. *See id.* (internal citation omitted).

> little while. It won't hurt, you can wash it off. They can't, but you can; just make yourself black for a little while; long enough, gentlemen, to judge them, and before any of you would want to be judged, you would want your juror to put himself in your place. That is all I ask in this case, gentlemen. . . .[210]

The jury acquitted Dr. Sweet, and the prosecution dropped the charges against the remaining defendants.[211]

Darrow's triumph provides an inspiring narrative of the power of social psychology. As Armour's theory suggests, Darrow's reminder to the jury members—all white males—of their unconscious proclivity for prejudice forced them to suppress this irrational emotion in favor of a just verdict.

More importantly, Armour's research serves as a useful starting point for engaging in a more informed dialogue about citizenship and membership in the U.S. polity along the lines envisioned by Scaperlanda: If social psychologists are correct, American citizens can train themselves to guard against any lingering stereotypes they may have against immigrant groups—such as those maintained against non-English whites, Chinese, and Mexicans[212]—and reject the primacy of membership in cases where personhood should prevail, as in the promise enforcement cases discussed above. Thus, when the government makes a promise in a criminal proceeding and the promisee upholds her side of the bargain, it should not matter whether the promisee is a citizen or a foreigner. Because the IIRIRA currently permits differential treatment on the basis of citizenship, citizens should act to ensure that noncitizens receive the same bargain from the government by calling for the repeal of the Act's court-stripping provisions.

The next section examines recent social psychology scholarship that explores a citizenry's reactions to new immigrant groups with an eye toward learning how to reassert the importance of personhood in our own constitutional dialogue.

B. Maio et al.'s Research on Attitudes Toward New Immigrant Groups

Strong parallels may be drawn between Armour's references to race prejudice and the anti-immigrant sentiment in the United

210. *Id.* at 762–63 (internal citation omitted).
211. *See id.* at 763 (internal citation omitted).
212. *See supra* Part I.A.

States today. First, just as deep-seated historical biases and the media have contributed to the stereotype of the black male as hostile or prone to violence,[213] the media have also perpetuated the stereotype of the "illegal alien" as a young, unskilled Mexican male, although Mexicans comprised only thirty-nine percent of all undocumented immigrants in 1992.[214] Further, despite the persistence of these racial and immigrant stereotypes, most people are low-prejudiced individuals. A recent poll of 1,314 whites, blacks, and Hispanics, all citizens or residents of the United States since 1980, revealed that while the respondents were divided on the issue of whether immigrants benefit or burden the nation overall, only one in three respondents offered negative views toward individual immigrant groups.[215] In an interesting commentary on how alienage serves as a proxy for race, the respondents viewed European immigrants in the most favorable light, while Cubans, Mexicans, Middle Easterners, and people from the Carribean were perceived most unfavorably.[216] Finally, given this intersection of race and alienage,[217] Armour's research may prove useful in identifying and confronting racial prejudice masquerading as politically more palatable anti-immigrant sentiment.[218] Armour's work may

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213. *See* Armour, *supra* note 191, at 752–53 (discussing various studies regarding group trait stereotypes).

214. *See, e.g.*, Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1545–46 (1995) [hereinafter Johnson, *Public Benefits*]. Professor Johnson states the following:

> The stereotypical 'illegal alien,' the term that replaced 'wetback,' is a Mexican who has snuck [sic] into the United States in the dark of night. The image in the minds of many is that of a poor, brown, unskilled, young male. . . . Despite the stereotype, only about thirty-nine percent (1.3 million) of the total [number of undocumented immigrants in 1992] were from Mexico.

See id. (footnotes omitted).

215. *See Poll Shows Americans Softening on Immigration*, Assoc. Press, June 15, 1997, *available in* Westlaw, ASSOCPR Database [hereinafter *Poll*]; *see also New Immigrants Winning Much Wider Acceptance—More Americans Meeting, Learning About Newcomers*, ORLANDO SENTINEL, June 15, 1997, at A12, *available in* 1997 WL 2785222 (explaining how people's encounters with immigrants, as well as their personal circumstances, shape their attitudes toward newcomers).

216. *See Poll*, *supra* note 215. Japanese were viewed as the next most favorable group, followed by Chinese and Africans. *See id.*

217. I explore the race-alienage dynamic in other articles on equal protection and immigrants' rights. *See* Romero, *Congruence*, *supra* note †, at 445–49; Romero, *Equal Protection*, *supra* note †, at 601–02.

218. Karen K. Narasaki, Executive Director of the National Asian Pacific American Legal Consortium, noted the following in an immigration law symposium at Georgetown University: "My feeling has been that talking about immigrants is really sort of the last acceptable way to talk about race without actually talking about race." Symposium, *Reforming*

enrich Scaperlanda's constitutional dialogue about membership by forcing U.S. citizens to confront their stereotypes regarding immigrant groups, knowing that the root of some stereotypes may be in racial bias.

Armour's work is just the beginning. Two recent social psychology articles specifically address the issue of people's attitudes toward new immigrant groups and may help advance Scaperlanda's proposed constitutional dialogue. The first is a study conducted by Gregory R. Maio et al. to examine how indirect information regarding a new immigrant group affects people's attitudes toward that group.[219] This experiment started with the premise that many people first receive information about a new group indirectly—e.g., through the media—rather than through direct interpersonal contact.[220] In the study, over two hundred residents of Ontario, Canada were asked their views regarding the impending arrival of a fictitious group of new immigrants, the "Camarians," who were fleeing to various countries because of natural disasters in their nation.[221] The subjects were told that the Canadian Statistics on Immigration Agency expected 7,000 Camarians to arrive in Canada within seven months.[222] To examine the extent to which the subjects' views might be influenced by the perceived impact the impending immigration might have on their lives, some subjects were told the Camarians would immigrate to Ontario (high personal relevance), while others were told the immigrants would settle in British Columbia (low personal relevance).[223] The subjects were also told that their views were of interest because the Camarians might cause a shift in provincial employment and economic conditions.[224] Finally, the subjects received tables that contained fictitious information regarding the emotions Camarians elicit from others, their personality traits, and their values.[225] The respondents were told that these tables were

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the Administrative Naturalization Process: Reducing Delays While Increasing Fairness—March 6, 1996 Transcript, 10 GEO. IMMIGR. L.J. 5, 27 (1996).

219. *See* Gregory R. Maio et al., *The Formation of Attitudes Toward New Immigrant Groups*, 24 J. APPLIED SOC. PSYCHOL. 1762 (1994).

220. *See id.* at 1762–63.

221. *See id.* at 1767.

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.* The six emotions listed were "comfortable," "curious," "happy," "proud," "relaxed," and "respect." *Id.* at 1768. "Friendly," "hardworking," "honest," "intelligent," "loyal," and "polite" were the six personality traits used. *Id.* The six values included "economic development," "education," "equality," "family," "freedom," and "law and order." *Id.* The fictitious survey reflected the extent to which the Camarians elicited the emotion, possessed the personality trait, or promoted the value listed. *See id.*

taken from a survey of perceptions about Camarians in England and the Southwestern United States.[226] Each subject was randomly given either uniformly positive information, uniformly negative information, or a mixture of both positive and negative information regarding these three characteristics.[227] After reviewing the fictitious survey information, the subjects were asked to indicate their attitudes toward Camarians using an attitude thermometer with a scale from zero degrees (extremely unfavorable) to 100 degrees (extremely favorable).[228]

The study revealed that people formed more favorable attitudes toward the new immigrant group when they were provided uniformly positive information about the emotions elicited by the group's members, their personality traits, and their values.[229] Thus, those who received uniformly positive information about the Camarians were most receptive to their immigration.[230] People who believed that they would be most affected by the Camarians' immigration acted less favorably—but still positively—to the uniformly positive information than those for whom the immigration was less relevant.[231] For example, the Ontarian subjects who were told that the Camarians would settle in Ontario favored the immigration, but did so at a lower attitude reading than those who believed the Camarians would settle in British Columbia, even though both groups received uniformly positive information regarding the Camarians.[232] Despite its moderating effect on the perception of uniformly positive information, personal relevance had no noticeable effect on subjects' views toward the Camarians based on the immigrants' fictitious values.[233] Maio et al. hypothesize that the subjects may have perceived the emotions elicited by Camarians and their personality traits as having a more immediate,

226. *See id.* at 1767–68.

227. *See id.* at 1768.

228. *See id.*

229. *See id.* at 1772.

230. *See id.* at 1770 fig. 1. Although those participants who received uniformly positive information were more receptive in absolute numbers, while the effect was statistically significant for those subjects in the "low relevance" category, *see id.* at 1769, for those in the "high relevance" category, the difference between those who received uniformly positive information and those who received mixed information was not statistically significant. *See id.* at 1771.

231. *See id.* at 1772. Interestingly enough, where mixed positive and negative information was received, the respondents actually responded more favorably to immigration when they perceived it to be more relevant to their lives, although not as favorable as their response to uniformly positive information. *See id.* at 1772–73.

232. *See id.* at 1772.

233. *See id.* at 1773.

personal effect on the respondents' lives than the more abstract notion of values.[234]

In constructing our dialogue about membership, we should consider Maio et al.'s findings. Their study teaches us that while imparting positive consensus information is important in fostering favorable attitudes toward new immigrants, it is even more important to recognize that personal relevance bias plays a significant role. To convince citizens of the value of the personhood of immigrants, one must find a way to convey positive images of "the immigrant as person" that will resonate with the citizens so that the natives becomes personally vested in the immigrant's plight. This "connection" between in-group and out-group members is what Darrow successfully accomplished in obtaining Dr. Sweet's acquittal, and this is the challenge faced by those seeking to restore personhood's importance in the debate over immigrants' rights.

How do we achieve this "connection" in our constitutional dialogue? The second study by Maio et al. provides support for Armour's position that informing decision-makers of their inherent biases may enhance their evaluative processes.[235] Psychological research has shown that while most people do not subscribe to racial discrimination, they unconsciously retain certain negative stereotypes about many out-groups.[236] Other research has shown that people may hold both positive and negative views of an out-group. For example, while some white Americans hold negative views toward blacks, they may simultaneously sympathize with their plight.[237] As a follow-up to the above-mentioned study, Maio et al. decided to test the effect this kind of ambivalence might have on the way people process persuasive messages about certain minority groups.[238] Like many of the studies Armour cites, Maio et al.'s experiment addressed the issue of how people with conflicting attitudes process information.[239]

This study was conducted in two parts: First, over 113 psychology undergraduates were evaluated on the ambivalence of their attitudes toward "Oriental" people, defined by the researchers as

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234. *See id.*

235. *See* Gregory R. Maio et al., *Ambivalence and Persuasion: The Processing of Messages About Immigrant Groups*, 32 J. EXPERIMENTAL & SOC. PSYCHOL. 513, 532–33 (1996).

236. *See supra* Part III.A.

237. *See* Maio et al., *supra* note 235, at 514 (citing Irwin Katz & R. Glen Hass, *Racial Ambivalence and American Value Conflict: Correlational and Priming Studies of Dual Cognitive Structures*, 55 J. PERSONALITY & SOC. PSYCHOL. 893 (1988)).

238. *See id.* at 514. Although describing the research in terms of "minority" groups, the study provided subjects with information about immigrant minority groups. *See id.* at 516.

239. *See id.* at 514.

persons from China, Japan, and Hong Kong.[240] Next, each subject was given either a "strong" or "weak" persuasive message in favor of immigration from Hong Kong: The strong message described a strong tendency for Hong Kong residents to elicit positive emotions from people, possess positive personality traits, and favor positive values; the weak message described a weak, but still positive, tendency.[241] The researchers then examined the effect of these messages on the subjects' agreement with immigration from Hong Kong, favorability toward Hong Kong residents, and the immigration-related thoughts the subjects listed in response to the messages.[242]

The study demonstrated that those people who possessed "ambivalent attitudes toward [the immigrants were] more likely to systematically process persuasive messages about the group than [those] people who [held] unambivalent attitudes toward the group."[243] Thus, the ambivalent participants given the strong positive message about immigration from Hong Kong favored this immigration more than those who received the weak positive message, while unambivalent respondents were not affected differentially by the strong and weak messages.[244] Maio et al. posited that because they had conflicting views of the out-group, ambivalent persons would not only be more motivated to pay attention to new information about that group but also be better able to process such new information.[245]

It is at this point that Armour's and Maio et al.'s theories complement each other. If both theories are correct in assuming that most people are, in varying degrees, ambivalent about out-group members, and that ambivalent people are more effective than unambivalent people in processing information about the out-group, then it behooves us all to develop strategies to communicate positive messages about personhood to citizens acting to define membership in this polity.

For example, throughout history, many U.S. businesses have been ambivalent about employing undocumented Mexican immigrants.[246] On the one hand, the industries enjoy the fruits of cheap

240. *See id.* at 516.
241. *See id.* at 517.
242. *See id.*
243. *Id.* at 528.
244. *See id.*
245. *See id.* at 530.
246. *See* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956; López, *supra* note 48, at 657. The ambivalence exists to this day in California, which has recently been in need of farm workers. Indeed, John Ledbetter, an officer of Vino Farms, Inc., in Lodi, California, stated that

labor; on the other, the businesses do not want to encourage undocumented immigration.[247] So when an undocumented worker is sexually harassed by her employer and reports the abuse to the authorities, should she be subject to deportation because of her status? Should the immigrant's lack of membership in the polity preempt her personal claim to protection from abuse? What is more important: discouraging "illegal" immigration or preventing employer abuse? The average citizen holds little sympathy for the stereotype of the "illegal alien" as the unskilled, dark-skinned Mexican laborer sneaking into the United States,[248] but the citizen decision-maker must fight against that stereotype by considering three additional points. First, regardless of how one feels about undocumented immigration, the immigrant in this case is a person who suffered sexual harassment. Second, by deporting the immigrant, the United States sends the message that it discourages the reporting of similar incidents of sexual abuse. Third, and perhaps most importantly, the definition of whether one is a "legal" or "illegal alien" may depend upon the country from which one hails. For instance, a Mexican citizen who enters the United States without a valid visa is automatically an "illegal alien," while many Western European citizens may remain in the United States for up to ninety days without one.[249]

With this new information, the ambivalent citizen, aware that she is influenced by the media-driven image of the "illegal alien" stereotype, might be able to process this positive data effectively to reach a decision valuing personhood over membership. One good example of a citizen who decided to reassert the importance of personhood is Rudolph Giuliani, the Republican mayor of New York City. Giuliani, who is sometimes criticized for being unsympa-

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the federal government might want to consider "[s]ome type of a program that allows people to legally come to this country to work on a temporary basis . . . ." Lynn Graebner, *Farmers Face Shortage of Laborers*, BUS. J.-SACRAMENTO, Oct. 31, 1997, at 3, *available in* 1997 WL 15017468.

247. Michael Posner, Executive Director of the Lawyers Committee for Human Rights, recently stated the following: "We're schizophrenic about immigration . . . . On the one hand, we want control of our borders, and I think that's right. On the other hand, we want cheap immigrant labor. That's what keeps whole industries alive. That is the bargain, and we should be honest about it." Haberman, *supra* note 54, at B1.

248. *See supra* note 214 and accompanying text.

249. *See* Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Rights Strategy*, *in* IMMIGRANTS OUT!, *supra* note 6, at 254, 255. Professor Kevin Johnson notes that one-half of all undocumented immigrants were visa overstays; thus, the failure to address this issue, while simultaneously beefing up the U.S.-Mexico border, signifies a desire to reduce only undocumented Mexican immigration, not all undocumented immigration. *See* Johnson, *Public Benefits*, *supra* note 214, at 1547.

thetic to minority concerns,[250] believes that it is more important to encourage the reporting of abuse suffered by immigrants than to worry about the "illegal" presence of undocumented persons.[251] Indeed, he recently vowed to appeal a lower federal court decision invalidating an executive order that prohibited city employees from turning in undocumented immigrants who sought basic services such as police protection.[252] By adopting the strategies outlined by Armour and Maio et al., "We the People" might be in a better position to reach decisions on immigrants' rights matters unfettered by the stereotypes that might cause us to discount the value of equal personhood. In turn, this should lead to legislative action consistent with these ideals.

The final section applies the social psychology research outlined here to articulate a model for re-injecting personhood into the discussion of the promise enforcement cases discussed above.

C. Application of Social Psychology Research to the "Promise Enforcement" Cases

Like the issue of undocumented immigrant employment, the promise enforcement cases raise the issue of balancing membership and personhood concerns. In the promise enforcement cases, the question is whether a noncitizen should be precluded from receiving the benefit of her bargain with the government simply because of her foreign status. Put another way, does her foreign, nonmembership status preempt her personal right to enforce her claim that the government promised not to deport her in exchange for her cooperation?

Assuming that the federal courts have abdicated the membership decision to the citizenry, as Scaperlanda suggests, how does the social psychology research cited here help "We the People" value personhood in the midst of a discussion about membership? First, citizens must, as Armour's research indicates, acknowledge their deep-rooted, media-influenced biases, which include anti-immigrant sentiment, as well as the United States' long and sordid

250. In one infamous incident, Giuliani went head-to-head with the flamboyant Reverend Al Sharpton and his followers over the use of the Brooklyn Bridge for a march to celebrate Reverend Dr. Martin Luther King, Jr.'s birthday. *See* Kirk Johnson, *Words of Peace and Protest on King Holiday*, N.Y. TIMES, Jan. 16, 1996, at B1. Giuliani prohibited the marchers from using the entire bridge because they would impede the flow of traffic. *See id.* Sharpton compared Giuliani to a southern segregationist. *See id.*

251. *See id.*

252. *See* Haberman, *supra* note 54, at B1.

history of alienating newcomers.[253] Related to this first point, citizens must reflect upon whether any anti-immigrant stereotypes they harbor have roots in racial bias. Second, citizens must, as Darrow suggested in his defense of Dr. Sweet, put themselves in the shoes of the noncitizen. After all, many of their ancestors were once noncitizens. Do not citizens expect that a government will abide by its promises to them? Third, citizens must ask themselves whether the primary purpose of due process as it relates to promise enforcement cases is to restrain government action against citizen and noncitizen alike or to ensure the primacy of a citizen's rights over those of a noncitizen. Because Maio et al.'s work reveals that ambivalent people are better at processing new information than unambivalent people, and current data suggest that most Americans are ambivalent about immigration and immigrants, adopting the social psychology techniques outlined here may lead to a more self-aware citizenry better able to engage in a dialogue about membership without forgetting the importance of personhood.[254] Unlike Armour's application of such research to judicial decision-makers, this Article advocates that U.S. citizens use these techniques to help construct fair alienage policies that value equal personhood. Hopefully, a reflective and thoughtful citizenry will call for the repeal of the court-stripping provisions of the IIRIRA and will ensure that, at a minimum, the U.S. government abides by its promises to all, citizen and noncitizen alike.

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253. *See supra* Part I.A.

254. I am aware that some may not share my view that citizens should show empathy toward criminal noncitizens. *See* Anthony Lewis, *Accent the Positive*, N.Y. TIMES, Oct. 10, 1997, at A29. The article discusses Senator Spencer Abraham's view that to make the case for legal immigration, one must also "make clear that you're going to address the negatives, especially criminal [noncitizens]. There is a public feeling against those who come here and commit crimes." *Id.* As mentioned earlier, however, the wrongdoing in the promise enforcement context is committed by the government, not the noncitizen. It is the government that reneges on its promises in these cases, benefits from the noncitizen's performance, and then acts to deport the noncitizen simply because it can do so under the law. I contend that the government should be constrained in promise enforcement cases in a manner similar to the limitations on government activity in other criminal contexts. For example, government agents may not beat confessions out of defendants under the Fourteenth Amendment, *see* Brown v. Mississippi, 297 U.S. 278, 285–86 (1936), and they may not illegally search a person's property under the Fourth Amendment. *See* Weeks v. United States, 232 U.S. 383, 391–93, 398 (1914). Society as a whole benefits from such restraints on government activity. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

CONCLUSION

The tension between membership and personhood in the realm of immigrants' rights law has been, and will continue to be, of paramount concern to U.S. citizens. Because this issue is so important, we, the citizens of this country, must tread cautiously as we try to define what it means to be an American. Although membership will probably always be the starting point for determining questions of citizenship, it need not be the endpoint. We live in a society steeped in a culture of xenophobia and invidious anti-immigrant stereotypes, some of which are rooted in racial bias. It behooves us all to acknowledge and then transcend these prejudices if we are to ensure that the value of equal personhood retains true constitutional significance in our society. Otherwise, someone we know and hold dear might be the next Ms. Santiago—an "alien" whose personhood is sacrificed at the altar of non-membership.