INDEPENDENCE AND IMMIGRATION

AMANDA FROST*

The Declaration of Independence articulates principles about the colonists' decision to leave one polity and join another—that is, the very act that lies at the heart of immigration itself. It is not surprising, then, to find that the Declaration has influenced the constitutional foundations of immigration law.[1] Perhaps most important, the Declaration's claim that certain rights are universal, including the right to make a new life in a new nation, has led courts to find that the Constitution protects even undocumented noncitizens living in the United States. And yet the Declaration's influence has been limited, for its universalist philosophy has never been extended to the rules governing the entry and removal of noncitizens—rules that the Supreme Court has long held fall under the "plenary power" of Congress and thus which are almost wholly unconstrained by the Constitution. This Article explores the Declaration's role in creating the strange dichotomy between the laws that regulate noncitizens, which are subject to constitutional constraints, and the laws that select them for admission and removal, which are not.

Part I of this Article observes that, surprisingly, the Constitution provides little guidance on many of the basic issues in immigration law, such as which governmental institutions have the authority to create the rules regarding who may come to the United States, the limits on

* Professor of Law, American University Washington College of Law; B.A. 1993, Harvard College; J.D. 1997, Harvard Law School. The author thanks the participants in the symposium on the Declaration of Independence at the National Constitution Center for their helpful comments and suggestions. In particular, the author thanks Alexander Tsesis for organizing the symposium and for providing helpful feedback on this Article.

1. For the purposes of this Article, the term "immigration law" is used not only to refer to the body of law governing the admission and expulsion of noncitizens, but also laws regulating noncitizens living in the United States. As will be explained in Part II of this Article, although these two bodies of law are often treated as independent of one another and are governed by very different constitutional standards, in practice, they are closely intertwined. *See infra* Part II.D. *See also* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 366–67 (2008) (making this observation).

governmental power to exclude or remove noncitizens (if any), and the degree to which noncitizens within the United States are protected by the U.S. Constitution (if at all). Part I then describes how the Declaration of Independence explicitly and implicitly addresses some of these questions.

Part II explains how the Declaration's espousal of universal rights, as well as its special solicitude for immigrants, has led the Supreme Court to conclude that the Constitution protects noncitizens from laws seeking to regulate their conduct. Part II focuses on the Supreme Court's groundbreaking decision in *Yick Wo v. Hopkins*, in which the Court held for the first time that the Constitution applies to noncitizens living in the United States—a decision based, in part, on the universalist philosophy of the Declaration of Independence. A few years later, the Court extended *Yick Wo*'s rationale to provide constitutional protection even to those noncitizens found illegally in the United States. Yet during the same time period, the Court declined to adopt this expansive view of the Constitution when it came to determining noncitizens' rights to enter and remain in the United States.

Part III argues that granting noncitizens constitutional protection from laws regulating their conduct is of little practical value when they have no such protection from laws restricting their ability to enter or remain in the United States. To give just one example, granting noncitizens the constitutional right of free speech means little when noncitizens may be deported for that same speech. Furthermore, as a matter of constitutional theory, it is hard to reconcile the universalist view of the Constitution's scope with a membership approach that excludes noncitizens from that protection when it comes to laws selecting them for admission. If the Declaration's universalist philosophy is to be taken seriously, the government's selection process must be cabined by the same constitutional restraints that apply to laws that regulate the lives of citizens and noncitizens alike.[2]

The Article concludes by noting how the plenary power doctrine is slowly eroding, albeit without ever being explicitly disavowed by the Court or the executive branch. Professor Hiroshi Motomura has observed that courts often strive to avoid interpreting federal immigration laws in ways that conflict with the Constitution, even though Congress is mostly free from constitutional constraints when legislating rules of admission.[3] He

2. *See* Cox, *supra* note 1, at 366–70 (discussing the relationship between rules governing the selection of noncitizens and those regulating noncitizens' behavior).

3. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom*

labels these constitutional influences "phantom norms." This Article argues that the Declaration's universalism and its inherent embrace of the right to immigrate are phantom norms that also appear to be influencing the development of immigration law.

I. THE U.S. CONSTITUTION, THE DECLARATION OF INDEPENDENCE, AND THE RIGHTS OF NONCITIZENS

A. CONTROL OF IMMIGRATION LAW

1. The U.S. Constitution

The U.S. Constitution has almost nothing to say about the rights of noncitizens or the regulation of their admission into the United States, which is remarkable given that lack of clear control over immigration into the United States was an impetus for declaring independence from Britain[4] and contributed to the failure of the Articles of Confederation.[5] Article I, Section 8 of the Constitution enumerates the specific subject areas on which Congress has constitutional authority to legislate, yet it says nothing explicit about Congress's power to regulate immigration. Nor does the Constitution explicitly grant the executive branch authority over immigration. Accordingly, although it has long been accepted that Congress has the power to enact laws determining which noncitizens may enter the United States and the President has authority to implement these laws (and exercise great discretion while doing so), there is no consensus over the source of that power.[6]

Some scholars have argued that Congress's authority over immigration is included in its power to "establish an uniform Rule of Naturalization."[7] Yet the power to decide who can become a U.S. citizen would seem to be a separate question from who may enter the United States

Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 564 (1990).

4. THE DECLARATION OF INDEPENDENCE paras. 2, 9 (U.S. 1776) (listing as one of the King's "injuries" and "usurpations" his "obstructi[on]" of laws intended to encourage migration to the states).

5. *See, e.g.*, THE FEDERALIST NO. 42 (James Madison) (describing how the Constitution granted Congress the power to establish a uniform rule of naturalization, which cured the "defect" in the Articles of Confederation granting each state control over naturalization); Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective*, 15 TEX. REV. L. & POL. 61, 94 (2010) ("[T]he consensus among Early American historians is that the Constitution was adopted to correct the problems that the Articles of Confederation posed in relation to foreign policy and immigration.").

6. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 99 (6th ed. 2015) ("[N]owhere does the Constitution expressly authorize the federal government to regulate immigration.").

7. U.S. CONST. art. I, § 8, cl. 4.

in the first instance. Others claim that it can be found in the Slave Trade Clause, which bars Congress from "prohibit[ing]" the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit" until the year 1808,[8] and thus, by negative implication, suggests that Congress otherwise has such power.[9] But that is a strangely backhanded way for the Framers to assign authority over immigration to Congress. Alternatively, some argue that immigration is subsumed within Congress's power to "regulate Commerce with foreign Nations,"[10] and yet the term "commerce" would not appear to encompass the ingress and egress of *people*, who are not normally considered commodities.[11]

The courts have not arrived at a satisfactory answer to this question. Although early case law seemed to rely on the Commerce Clause as the source of Congress's power,[12] since 1889 the Supreme Court has instead claimed that Congress's power over immigration is inherent to national sovereignty, and thus need not be derived from any particular provision of the Constitution.[13] In *Chae Chan Ping v. United States* (often referred to as the *Chinese Exclusion Case*)[14] the Court declared that the power to exclude "is an incident of every independent nation. . . . If it could not exclude aliens it would be to that extent subject to the control of another power."[15] Four years later, in *Fong Yue Ting v. United States*,[16] the Court likewise granted Congress nearly unfettered power to deport noncitizens, declaring that the power to deport "is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."[17] In other words, despite the fact that the federal government's role is supposedly limited by the powers enumerated in the Constitution, the Supreme Court has declared that Congress's authority over immigration is independent of the Constitution itself.[18]

8. U.S. CONST. art. I, § 9, cl. 1.

9. LEGOMSKY & RODRIGUEZ, *supra* note 6, at 102.

10. U.S. CONST. art. I, § 8, cl. 3.

11. *See* LEGOMSKY & RODRIGUEZ, *supra* note 6, at 100.

12. *See, e.g.*, Head Money Cases, 112 U.S. 580, 595–96 (1884).

13. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889). *See also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 122 (1996) ("Although earlier cases of the 1870s and 1880s categorized immigration control as a regulation of foreign commerce within the enumerated powers of Congress, the *Chinese Exclusion Case* has come to stand for the idea of immigration control as an unenumerated, or even extraconstitutional, power inherent in nationhood.") (footnote omitted).

14. *The Chinese Exclusion Case*, 130 U.S. 581.

15. *Id.* at 603–04.

16. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

17. *Id*. at 711.

18. *See, e.g.*, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM.

A collateral consequence of finding immigration to be extra-constitutional has been the assumption that the federal government's control over immigration is not subject to the usual constitutional constraints.[19] That has been the consistent position taken by Congress and the executive branch and, at least until recently, the courts have approved. Under the "plenary power" doctrine, the federal courts have held that the Constitution places few, if any, restrictions on the federal government in the area of immigration policy, either because it places no limit on the federal government, or alternatively because courts have no authority to police those limits.[20] In short, as Professor Gerald Neuman has observed, "[i]mmigration law has become an isolated specialty within American law, where normal constitutional reasoning does not necessarily apply."[21] As argued below, however, this textual vacuum creates space for another extra-constitutional source—the Declaration of Independence—to play an unusually important role in determining the scope of the federal government's role in immigration.

2. The Declaration of Independence

The Declaration of Independence provides important context for the founding generation's original understanding of the role of government in setting immigration policy, particularly in light of the Constitution's silence on that subject.

The Declaration has particular significance for immigration law. Indeed, the Declaration of Independence could be described as the nation's *first* immigration law. By its very existence, the document purported to sever one set of national allegiances and create new ones, transforming British subjects into citizens of thirteen colonies. One scholar has referred

J. INT'L L. 862, 863 (1989) ("In analyzing the constitutional issues in these [immigration] cases, the Court did not start with the text or structure of the Constitution and ask how a power to regulate immigration might be inferred. Rather, it approached the question of congressional power from the perspective of the conduct of foreign affairs."); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 12 (1985) (asserting that the "Constitution provides virtually no guidance" on immigration law, and that "[a]s regards immigration, the courts admittedly have built a constitutional jurisprudence wholly on extra-constitutional foundations").

19. Aleinikoff, *supra* note 18, at 863.

20. *Id.* at 864 ("[S]eeing the immigration power as an aspect of international relations suggested a very limited—or nonexistent—role for the courts."). *See also* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 926 (1995) (describing Supreme Court decisions holding that Congress has "plenary" power over immigration, with minimal judicial oversight, though noting that the doctrine has eroded slightly in recent years).

21. NEUMAN, *supra* note 13, at 13.

to the Declaration of Independence as "our national birth certificate,"[22] but it could just as easily be considered America's immigration papers. After all, although Europeans populated the so-called "new world" before the Declaration of Independence, it was the Declaration that dissolved their ties to one country and endowed them with new citizenship.[23]

Furthermore, the King's anti-immigration measures were explicitly listed in the Declaration as one of the triggers for the colonists' decision to break free from Great Britain and form a new country. The seventh item in the Declaration's list of "injuries" and "usurpations" against the King states, "He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands."[24]

As this statement made clear, the colonists objected to the King's "usurpation[]" of their desire to encourage immigration to the new world—a subject which the colonists believed they had a right to control for themselves. In other words, the colonists declared their independence in part to take control over immigration specifically. (Though, of course, self-governance generally was the broader and more important goal.)

Moreover, the Declaration did not just state an intent to control immigration law and policy, it accomplished that goal. For that reason, courts date the termination of British citizenship as occurring on July 4, 1776, the day on which the Second Continental Congress officially adopted the Declaration, rather than nine years later when the British capitulated—thereby giving the Declaration the legal authority to terminate the colonists' status as subjects of Great Britain.[25] Furthermore, the Declaration's rhetoric that "all men are created equal" and have

22. Henkin, *supra* note 18, at 30.

23. *See, e.g.*, Inglis v. Trs. of the Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 121 (1830) (holding that "the American *ante nati* ceased to be British subjects" upon the signing of the Declaration of Independence on July 4, 1776).

24. THE DECLARATION OF INDEPENDENCE paras. 2, 9 (U.S. 1776). Indeed, Jefferson felt strongly enough on this subject to have quarreled with the King's anti-immigration policies in his preamble to the Virginia Constitution, a draft of which he relied upon when drafting the Declaration. *See* VA. CONST. pmbl. Admittedly, however, contemporaneous critics of the Declaration were bewildered by the Declaration's inclusion of complaints about the King's immigration policies, and this particular grievance was not viewed by anyone as among the most weighty. *See* PAULINE MAIER, AMERICAN SCRIPTURE 115 (1997).

25. *See Inglis*, 28 U.S. at 121 ("The rule as to the point of time at which the American *ante nati* ceased to be British subjects, differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783. Our rule is to take the date of the declaration of independence.").

"unalienable Rights [to] Life, Liberty and the pursuit of Happiness"[26] should inform the colonists' exercise of power over immigration law, as they do any other subject.

Admittedly, however, the Declaration was less clear about *who* would control immigration policy once the colonies established their independence. As stated in the Declaration, the government can only "deriv[e]" its "powers from the consent of the governed,"[27] and thus any claim of authority over immigration policy had to come from representatives of the people. But *which* people? Would a centralized government create immigration policy for all thirteen colonies? Would each colony decide for itself whether to encourage or bar migration? Or would that power be shared between the colonies and the Continental Congress (or whichever centralized authority took its place)? The Declaration provides no answers to these questions, other than to suggest that immigration policy is an important subject over which the founders of the new nation assumed they would need to legislate.

B. THE CONSTITUTIONAL RIGHTS OF NONCITIZENS

1. The U.S. Constitution

Another longstanding and important constitutional question in immigration law is the extent to which the U.S. Constitution applies to noncitizens. The question comes up in at least two contexts: First, the scope of noncitizens' constitutional rights in the course of seeking to enter or remain in the United States; and second, the degree to which noncitizens are protected by the Constitution while in the territorial United States.[28]

Again, the Constitution's text does not answer these questions clearly.[29] The Constitution frequently describes the rights of "persons" and not merely "citizens"—language of particular significance in the Bill of Rights. For example, the Fourth Amendment refers to "[t]he right of the *people* to be secure in their persons, houses, papers, and effects, against

26. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

27. *Id.*

28. As discussed *supra* note 1, although the body of law regulating selection of noncitizens for admission is often viewed as distinct from that regulating noncitizens' conduct in the United States, in fact, they are closely related. Important constitutional questions are also raised by the treatment of noncitizens outside of the United States outside of the context of entry or admission, *see, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 269–71 (1990), but those are beyond the scope of this Article.

29. NEUMAN, *supra* note 13, at 5 ("From its inception the very text of the Constitution has suggested inconsistent readings of its intended scope.").

unreasonable searches and seizures,"[30] and the Fifth Amendment states that "[n]o *person* shall be . . . deprived of life, liberty, or property, without due process of law."[31] This broad language suggests that the Constitution's protection is not limited to citizens. As Professor Louis Henkin declared, "The choice in the Bill of Rights of the word 'person' rather than 'citizen' was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings."[32] This universalist reading of the Constitution would mean that most of its provisions apply to everyone, citizen or noncitizen, whether within the territorial United States or outside of it.

However, the language of the Constitution's Preamble suggests that it was not intended to apply so broadly. In relevant part, the Preamble states, "*We the People of the United States*, in Order to . . . secure the Blessings of Liberty to *ourselves and our Posterity*, do ordain and establish this Constitution *for the United States of America*."[33] As Professor Neuman has explained, this language has been read by some as creating a social contract, with the text of all that follows limited in application only to those who are considered parties to that contract.[34] Under this reading, noncitizens could claim no recourse to constitutional rights or protections.

In short, "[f]rom its inception the very text of the Constitution has suggested inconsistent readings of its intended scope."[35] Not surprisingly, debates over who was to be included within the Constitution's protection began almost immediately with the passage of the Alien and Sedition Acts in 1798[36] and continued over the next century. The Constitution's ambiguity on this important question left room for the influence of extra-constitutional sources, including the Declaration of Independence.

30. U.S. CONST. amend. IV (emphasis added).

31. U.S. CONST. amend. V (emphasis added).

32. Henkin, *supra* note 18, at 32. *See also* ALEXANDER M. BICKEL, *Citizen or Person? What is Not Granted Cannot Be Taken Away*, *in* THE MORALITY OF CONSENT 33, 33 (1975) ("Remarkably enough—and as I will suggest, happily—the concept of citizenship plays only the most minimal role in the American constitutional scheme."). *But see Verdugo-Urquidez*, 494 U.S. at 269–71 (concluding that a noncitizen located outside the United States was not one of "the people" protected by the Fourth Amendment).

33. U.S. CONST. pmbl. (emphasis added).

34. NEUMAN, *supra* note 13, at 5.

35. *Id.*

36. *See* sources cited *infra* note 47.

2. The Declaration of Independence

In contrast to the Constitution's ambivalence about its application to noncitizens, the Declaration is avowedly universalist.[37] The Declaration states that "all men are created equal" and are "endowed by their Creator with certain unalienable Rights" to "Life, Liberty and the Pursuit of Happiness," and that "to secure these rights," Government can only derive its "just powers from the consent of the governed."[38] The Declaration did not limit this rhetoric in favor of equality and self-government to people with the legal status of citizens, and for good reason. It was adopted when there was no such thing as a "United States citizen." The context in which the Declaration was drafted required its authors and signers to pronounce universal principles that transcended membership in a single political community.[39]

Although tension between the Declaration's sweeping rhetoric and the Constitution's more restrained text exists in other constitutional debates, it is particularly striking in the immigration context, in part because immigrants are similarly situated to the nation's founders. Like the signers of the Declaration, immigrants who arrive in the United States are seeking to make a better life for themselves by escaping from one nation and government—often a tyrannical one—and seeking to establish a new home in a representative democracy in which they can play an active role.

Thomas Jefferson presaged this aspect of the Declaration when he wrote in 1774 that the colonists "possessed a right which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies."[40] His Declaration of Independence, followed by the colonists' subsequent military success, made this rhetoric a reality. And his articulation of a "right" to seek a new homeland resonates for who seek to immigrate to the United States, often for reasons similar to those that inspired the founding fathers to seek independence from Britain.[41]

37. *See, e.g.*, Mark Tushnet, *United States Citizenship Policy and Liberal Universalism*, 12 GEO. IMMIGR. L.J. 311, 312 (1998).

38. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

39. Henkin, *supra* note 18, at 34 ("The rights our ancestors recognized as inherent and unalienable knew neither bounds nor state boundaries.").

40. THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 5 (Williamsburg, Clementina Rind 1774).

41. Similarly, in 1870, Senator Charles Sumner sought to allow non-whites to naturalize, citing the sweeping rhetoric of the Declaration of Independence to support a color-blind naturalization policy. *See* ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 228 (2012) (describing how the Declaration of Independence was cited as a basis for

II. THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTIONAL FOUNDATIONS OF IMMIGRATION LAW

As explained above, the Constitution is remarkably silent on the major questions in immigration law, such as which branch (and what level) of government controls immigration policy, the constitutional limits (if any) on decisions about whether noncitizens can enter and remain in the United States, and the degree to which noncitizens are protected by the Constitution (if at all) while living in the United States. In contrast, the text of the Declaration of Independence has a lot to say about immigration—both explicitly, by listing the colonists' lack of control over immigration and naturalization policy as an impetus behind the decision to break with Britain, and implicitly, in its message that certain rights are universal in application and thus not limited by citizenship. Accordingly, it should not be surprising to find that the Declaration's principles have influenced the development of immigration law in the United States.

A. THE CONSTITUTION'S SCOPE: COMPETING THEORIES

As Professor Neuman explained in his seminal book *Strangers to the Constitution*, the Constitution's scope has long been debated.[42] Some have claimed the Constitution's rights have universal application, applying to everyone. In contrast, others read the Constitution under a membership approach, under which only the parties (i.e., citizens) to this agreement benefit from the Constitution's rights and protections, while outsiders (i.e., noncitizens) do not.[43]

As discussed above, the text of the Constitution is ambiguous as to its intended scope. In contrast, the Declaration adopts the universalist message that "all men are created equal" and have the "unalienable Right[]" to "Life, Liberty and the pursuit of Happiness."[44] Some scholars have observed a connection between the political philosophy of the Declaration and the conclusion that the government established under the Constitution

more inclusionary, "color-blind" immigration laws).

42. NEUMAN, *supra* note 13, at 5.

43. Tushnet, *supra* note 37, at 313 (explaining that under the membership theory, "[t]he Constitution limits what members can do *among themselves*, but it has nothing to say about what members can do with respect to the admission of new members"). *See also* NEUMAN, *supra* note 13, at 5. Professor Neuman also discussed two other approaches to determining the scope of the Constitution: the *mutuality of legal obligation* approach, under which the Constitution restricts the government wherever it exercises legal control (whether inside or outside of the United States), and the *balancing* approach, which recognizes that all persons have rights (as the universalist model does) but allows that those rights may at times be outweighed by countervailing government interests. *Id.* at 7–10.

44. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

must protect the rights of all who fall under its control, regardless of their immigration status.[45] This Article builds on that insight by describing how the Declaration's universalist principles have prevailed when it comes to laws seeking to regulate the conduct of noncitizens living in the United States.

But the Declaration's universalist principles have not entirely won the day. Under the plenary power doctrine, the rules regarding the selection of noncitizens operate outside of any constitutional restraints. In this realm, courts have construed the Constitution under a membership theory, concluding that it does not apply to noncitizens who seek to enter or remain in the United States.

B. IN THE BEGINNING: THE CONSTITUTION'S UNCERTAIN SCOPE

The issue of whether the Constitution applied to noncitizens living in the United States was not resolved at the time of the Constitution's ratification, and it was the subject of ongoing debate for almost one-hundred years before the Court addressed the question in *Yick Wo v. Hopkins* in 1886.[46] The issue first came to a head in the controversy created by the Alien and Sedition Acts of 1798.[47] Whether aliens had constitutional rights was raised directly by the Alien Act, which permitted the President to unilaterally expel any alien that "he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof."[48]

The public reaction to the Alien Act revealed the founding generation's divergent views about the scope of the Constitution's protections. In defending those laws, some Federalists argued that aliens had no rights or protections under the U.S. Constitution, while Jeffersonian

45. *See e.g.*, Henkin, *supra* note 18, at 30–31. Professor Henkin goes further, arguing that the Constitution, as interpreted in light of the political philosophy enunciated in the Declaration of Independence, "require[s] the United States government to respect these human rights, with which all men and women are endowed equally." *Id.* at 32. But Professor Henkin also makes clear that "[w]hether an alien abroad has access to the courts of the United States is a different question." *Id.* at 32 n.127. The scope of the Constitution's extra-territorial application is beyond the scope of this Article.

46. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See also* NEUMAN, *supra* note 13, at 52 (The "ambiguities . . . regarding aliens' rights were not resolved in the drafting of the United States Constitution.").

47. Four statutes were the focus of debate: (1) The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); (2) The Naturalization Act, ch. 54, 1 Stat. 566 (1798) (extending the period of residence required before naturalization from five to fourteen years); (3) The Sedition Act, ch. 74, 1 Stat. 596 (1798); and (4) The Alien Act (or Alien Friends Act), ch. 58, 1 Stat. 570 (1798) (authorizing the President to expel aliens).

48. Alien Act (or Alien Friends Act), 1 Stat. at 571.

Republicans disagreed.[49] As Professor Neuman explained, "in systematically attacking or defending all portions of the Alien-and-Sedition package, this contentious generation laid the foundation for future thought on the place of aliens in American constitutionalism."[50]

Federalist proponents of the Alien and Sedition Acts argued that, as a textual matter, the Constitution is limited to those who are members of the social contract that created it—that is, to citizens of the United States.[51] They cited the Constitution's Preamble, which declares that it was created by "We the People of the United States" and had among its goals "to secure the blessings of liberty to ourselves and our posterity."[52] Accordingly, they asserted that "aliens are not parties to [the Constitution], and therefore can claim no benefit under it."[53] In part, they relied on the rights/privileges distinction: Because aliens had no right to remain in the United States, they could claim no constitutional protection against an order of expulsion. Accordingly, even lawful permanent resident aliens who had lived in the United States for many years had no rights under the U.S. Constitution, but instead were protected only by the law of nations and other common law principles. Summing up this view, a report of a House select committee declared:

> [T]he Constitution was made for citizens, not for aliens, who of consequence have no rights under it, but remain in the country and enjoy the benefit of the laws, not as matter of right, but merely as matter of favor and permission, which favor and permission may be withdrawn whenever the Government charged with the general welfare shall judge their further continuance dangerous.[54]

In response, Republicans such as James Madison argued that regardless of whether aliens are parties to the constitutional compact, they have a right to its protection. Here, Republicans drew on the political philosophy espoused in the Declaration by arguing that aliens, like all people, are entitled to certain natural rights that are protected against

49. *See* NEUMAN, *supra* note 13, at 52–53; David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 371 n.18 (2003) ("The debate that accompanied the enactment and ultimate demise of the Alien and Sedition Acts suggests that there was in fact substantial disagreement about the status of foreign nationals' rights in the early years of the republic, at least in a time of crisis.").

50. NEUMAN, *supra* note 13, at 53.

51. *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L. J. 909, 929 (1991).

52. US. CONST. pmbl.; Neuman, *supra* note 51, at 929.

53. Neuman, *supra* note 51 at 931–32 (quoting *Charges to Grand Juries of the Counties of the Fifth Circuit in the State of Pennsylvania*, *No. 26*, *in* 1 ADDISON'S REPORTS 590, 597 (A. Addison 2d ed. 1883)).

54. 9 ANNALS OF CONG. 2987 (1799).

governmental intrusion by the Constitution.[55] In his Report to the Virginia Legislature in 1800 arguing against the Alien and Sedition Act, Madison asserted that noncitizens' right to remain in the United States was essential to both their "happiness" and their "liberty"[56]—language reminiscent of the Declaration's description of these "unalienable rights." Madison rejected the Federalists' "social contract" reading of the Constitution's scope, explaining that "it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that . . . they have no right to its protections."[57] Although Madison did not cite the Declaration of Independence when making these assertions, his view of the Constitution as fundamental law protecting the natural rights of *all* men, not only citizens, is in accord with the Declaration's rhetoric that "all men" have "unalienable Rights" to "Life, Liberty and the Pursuit of Happiness."[58]

Although significant portions of the Alien and Sedition Acts were repealed shortly after Thomas Jefferson took office, these debates did not put to rest the question of the Constitution's scope, which remained unresolved until the Supreme Court finally addressed that issue in *Yick Wo v. Hopkins* nearly a century later.

C. *YICK WO V. HOPKINS*: THE DECLARATION'S UNIVERSALISM IN PRACTICE

In *Yick Wo v. Hopkins*, decided in 1886, a Chinese national and legal resident of the United States challenged a San Francisco ordinance that discriminated against persons of Chinese descent on the ground that it violated the Fourteenth Amendment's Equal Protection Clause.[59] The question whether the Constitution protects noncitizens had never before been addressed by the Supreme Court.

Despite the ambiguities in the Constitution's text, as well as evidence that the founding generation was divided on the issue, the Court held that the Fourteenth Amendment's Equal Protection Clause applied to noncitizens as well as citizens. The decision was made easier by the fact that the Reconstruction Amendments repudiated the Supreme Court's

55. NEUMAN, *supra* note 13, at 53.

56. Madison's Report on the Virginia Resolutions (1799–1800), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 555 (Jonathan Elliot ed., New York, Burt Franklin 1888).

57. *Id.* at 556.

58. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

59. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Although the ordinance was "fair on its face," the Court found that it was "applied and administered by public authority with an evil eye and an unequal hand" against those of Chinese descent. *Id.* at 373–74.

decision in *Dred Scott v. Sandford*, declaring that African Americans were not citizens and thus were excluded from the Constitution's protection.[60] Yet the Court's reasoning in *Yick Wo* went beyond simply rejecting *Dred Scott*. In holding that the ordinance was invalid, the Court declared that the Fourteenth Amendment protects *all* persons within the United States, and not only citizens:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality . . . . The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.[61]

The Court's holding was at least partially influenced by the universalist principles of the Declaration of Independence, which the Court both referenced indirectly and quoted directly (though without citation). For example, the majority observed that "in our system . . . sovereignty itself remains with the people, by whom and for whom all government exists and acts"[62]—alluding to the Declaration's statement that "Governments . . . deriv[e] their just powers from the consent of the governed."[63] The decision then borrowed the Declaration's universalist rhetoric to justify its invalidation of the racially discriminatory ordinance, explaining that the ordinance prevented those of Chinese descent from exercising their "fundamental rights to life, liberty, and the pursuit of happiness" by denying them "the means of living."[64]

Nor was *Yick Wo*'s holding limited to the Fourteenth Amendment's Equal Protection Clause, which itself harkens back to the Declaration of Independence and thus might be viewed as meriting especially broad

60. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857).

61. *Yick Wo*, 118 U.S. at 369.

62. *Id.* at 370.

63. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

64. *Yick Wo*, 118 U.S. at 370 ("[T]he fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws . . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."). *See also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

application. In subsequent cases, the Court cited *Yick Wo* in holding that noncitizens are also protected by the Due Process Clause of both the Fifth and Fourteenth Amendments,[65] as well as the First Amendment's right to free speech,[66] and the Fourth Amendment's guarantee against unreasonable searches and seizures.[67] In short, *Yick Wo*—and by extension, the Declaration of Independence—is the intellectual source of the many subsequent cases granting noncitizens most of the same constitutional protections enjoyed by citizens.

Finally, and perhaps most surprisingly, the *Yick Wo* decision was extended to noncitizens who are not legally present in the United States. In *Wong Wing v. United States*, the government had sentenced noncitizens found to be illegally in the United States to two months hard labor without providing them with the procedural protections guaranteed by the Fifth and Sixth Amendments.[68] Although the government's brief acknowledged that *Yick Wo* and its progeny established that the Constitution applied to legally present noncitizens, it argued that "[n]one of these cases decided that an alien could sneak or force his way into the United States against their will, and stand under the protection of the Constitution."[69] According to the government, the Constitution "was not made nor intended for all humanity . . . but was ordained and established by the people of the United States for their own benefit and the benefit of those lawfully within their Territory."[70]

The Court disagreed, citing *Yick Wo* to support its conclusion that "all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments]."[71] As Professor Neuman has written:

> The landmark significance of *Wong Wing* arises from a series of firsts: it was the first Supreme Court decision invalidating a federal immigration statute, the first Supreme Court holding that the Bill of Rights protects aliens against the federal government, and the first Supreme Court confirmation of the constitutional rights of illegal aliens.[72]

65. Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments . . . .").

66. Bridges v. Wixon, 326 U.S. 135, 148 (1945).

67. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 273–75 (1973).

68. *Wong Wing*, 163 U.S. at 233–34.

69. Brief for Respondent at 9, *Wong Wing*, 163 U.S. 228 (No. 204).

70. *Id.* at 19.

71. *Wong Wing*, 163 U.S. at 238.

72. Gerald L. Neuman, Wong Wing v. United States*: The Bill of Rights Protects Illegal Aliens*, *in* IMMIGRATION STORIES 31, 41 (David A. Martin & Peter H. Schuck eds., 2005).

The question was raised one last time in *Plyler v. Doe*, in which a class of undocumented school-age children challenged a Texas law that barred them from obtaining the free public education that was available to U.S. citizens and lawful permanent residents, arguing that it violated their right to equal protection under the Fourteenth Amendment.[73] Despite the century of precedent establishing that *all* noncitizens, including noncitizens not legally present in the United States, were protected by the Constitution, Texas argued that the Fourteenth Amendment did not apply to undocumented children. The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws," and Texas claimed that undocumented immigrants were not "persons within the jurisdiction" of the state of Texas due to their lack of immigration status.[74]

This time, all nine members of the Court—including the four justices in dissent—rejected Texas's position and agreed that the Fourteenth Amendment applies to undocumented immigrants.[75] Justice Brennan declared that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term," and therefore was entitled to the Constitution's protection.[76] As Professor Linda Bosniak described it, *Plyler* affirmed that "even though an undocumented alien is subject to the government's immigration authority—pursuant to which she might well be deportable—the fact of being so subject does not define her entire relationship with government power."[77]

D. THE LIMITS OF *YICK WO*

If *Yick Wo* and its progeny were read in isolation, it would appear that the Declaration's universalist philosophy had won the day. But the story is not so simple. As some immigration scholars have noted, the constitutional treatment of noncitizens is cleaved into two conflicting lines of cases. Although noncitizens residing in the United States—whether legally present or not—are protected by the Constitution, noncitizens have almost

73. Plyler v. Doe, 457 U.S. 202, 205–06 (1982).

74. *Id.* at 210 (quoting U.S. CONST. amend. XIV).

75. *Id.* (rejecting Texas's argument that undocumented immigrants are not protected by the Fourteenth Amendment); *id.* at 243 (Burger, J., dissenting) (agreeing with the majority that the Fourteenth Amendment applies to undocumented immigrants).

76. *Id.* at 210. *See also id.* at 215 ("[T]he protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory.").

77. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 55 (2006).

no constitutional rights when they seek to enter or reenter the United States, and they have very few such rights when they seek to avoid deportation from the United States.[78] In other words, the Constitution is read through a universalist lens when it comes to rules *regulating* noncitizens' conduct, but not when it comes to rules *selecting* them for entry into the United States.[79]

Curiously, the Supreme Court's decisions affirming Congress's plenary power over the selection of noncitizens were issued almost simultaneously with its rulings that noncitizens living in the United States were protected by the Constitution from laws regulating their daily lives. Only three years after *Yick Wo*, the Court held in *Chae Chan Ping v. United States* that Congress could bar a longtime legal resident from returning to the United States after a trip abroad, concluding that the federal government had inherent authority to create immigration policy with few, if any, constitutional constraints.[80] Only a few years later, in *Fong Yue Ting v. United States*, the Court extended that reasoning, rejecting a constitutional challenge by three noncitizens residing in the United States to the process leading to their removal from the country.[81]

Although the Court never acknowledged this dichotomy, it also never abandoned it. To the contrary, the Court made clear that the federal government could do anything it wanted with respect to noncitizens when deciding whether they could enter the United States. In 1950, the Court allowed the government to bar, without explanation, the German wife of a U.S. citizen from entering the country, stating that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[82] Three years later, in *Shaughnessy v. United States ex rel. Mezei*, the Court found that a noncitizen who had lived for many years in the United States could not only be barred from reentering, but could also be detained indefinitely on Ellis Island because no other country would accept him.[83] As recently as 1977, the Court declared:

78. *See, e.g.*, Aleinikoff, *supra* note 18, at 865 (noting this dichotomy in immigration law); Cox, *supra* note 1, at 345 (same).

79. *See* Cox, *supra* note 1, at 366–70 (discussing this dichotomy and arguing that it is indefensible).

80. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889). *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 124–25, 131–33 (2002).

81. Fong Yue Ting v. United States, 149 U.S. 698, 704–07, 731–32 (1893).

82. United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

83. Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 213 (1953).

"[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. . . . Our cases have long recognized the power to expel or exclude aliens as . . . largely immune from judicial control."[84] In recent years, the Court has begun to step back from such sweeping statements, in particular when it comes to noncitizens already within the United States. Nonetheless, it is fair to say that noncitizens have been almost entirely excluded from constitutional protection when it comes to these "selection" rules, rendering such rules "an isolated specialty within American law, where normal constitutional reasoning does not necessarily apply."[85]

At first glance, placing constitutional limits on the laws that regulate noncitizens in the United States, but not on the laws enabling them to enter and remain, might appear to make sense. Absent a policy of completely open borders, there must be some rules about who is admitted to the United States. Unless the Constitution applies to everyone around the world, there must be limits on who is permitted to benefit from its protection. Thus, the Constitution should protect all noncitizens within the United States from laws regulating their conduct, but not from laws regulating their ability to enter and remain in the country.

Upon closer inspection, however, it becomes clear that this distinction is hard to maintain because rules selecting noncitizens cannot be clearly distinguished from those regulating their conduct. As Professor Adam Cox has explained, "Every putative selection rule creates regulatory pressure (that is, pressure to live one's life in a particular way), and every putative regulatory rule creates selection pressure (that is, pressure to live in a particular place)."[86] So, for example, the fact that a noncitizen can be deported for committing an "aggravated felony"[87] can be viewed as a selection rule (because it is grounds for removal), but also as a rule regulating that noncitizen's day-to-day conduct (because it affects the choices that person will make). Thus, even laws that are viewed as being primarily about selection are also rules that operate as a method of social control, changing the ways in which noncitizens choose to live in the United States.[88]

84. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citations and internal quotation marks omitted).

85. NEUMAN, *supra* note 13, at 13.

86. Cox, *supra* note 1, at 360.

87. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

88. DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 4–5 (2012) ("For many millions of noncitizens, the threat of deportation now looms at least as large as the promise of permanent residence and citizenship.").

Relatedly, if the government has unfettered discretion to decide who can come into the United States and who can stay, then noncitizens living in the United States have little ability to protect their rights (constitutional or otherwise). In other words, even if undocumented immigrants have the constitutional right to attend elementary school, engage in free speech, and be provided with procedural protections in criminal proceedings, these rights are weakened by the fact that at any moment the federal government is free to deport them for almost any reason, including for exercising any of those rights.[89] For example, although a long line of cases establish that noncitizens cannot be criminally sanctioned for their speech, other decisions allow the government to deport noncitizens for engaging in disfavored speech.[90] In short, the constitutionally unfettered selection rule will prevent noncitizens from exercising their constitutional rights.[91]

The dichotomy has become even more difficult to justify as Congress has expanded the grounds on which even longtime lawful permanent residents can be deported. Today, even longtime lawful permanent residents can be deported for fairly minor criminal offenses, which means that hundreds of thousands of legal permanent residents live under the threat that they might be removed for their past conduct (even if that conduct was not a deportable offense at the time they committed it).[92] Furthermore, the undocumented population of the United States is now at an all-time high, placing these approximately 11.4 million people in a uniquely vulnerable position.[93] In short, although the Declaration of Independence prompted the Court to adopt a universalist reading of the

89. *See, e.g.*, BOSNIAK, *supra* note 77, at 70 ("[T]he rights undocumented immigrants formally enjoy in the sphere of territorial personhood are often rendered irrelevant, as a practical matter, by operation of the nation's border-regulatory authority."); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 19 (1990) ("[W]hy does the first amendment prohibit the imprisonment of resident aliens for protected speech but not prevent their deportation for such speech?").

90. *Compare* Bridges v. Wixon, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded to aliens residing in this country."), *with* Dennis v. United States, 341 U.S. 494, 551 n.15 (1951) (Frankfurter, J., concurring) (acknowledging that immigration laws require deporting noncitizens for speech advocating the overthrow of government by force). *See also* Cox, *supra* note 1, at 349 (noting this problem).

91. *See, e.g.*, *Bridges*, 326 U.S. at 160–62 (Murphy, J., concurring) (noting that the constitutional distinction between selection and regulatory rules is impossible to maintain for this reason).

92. *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (discussing this issue within the context of two federal laws passed in 1996 requiring mandatory deportations after certain criminal convictions).

93. BRYAN BAKER & NANCY RYTINA, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 1 (2013), https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

Constitution in *Yick Wo* and its progeny, the value of those constitutional protections is limited because noncitizens have little constitutional protection from removal from the United States.

III. THE DECLARATION'S INFLUENCE LOOKING FORWARD

Part II explained that immigration law is cleaved by inconsistent theories regarding the Constitution's scope. The Court has long held that the Constitution protects noncitizens from laws regulating their daily lives within the United States—a universalist view consistent with the Declaration of Independence. Yet at the same time, the Court has adopted an exclusive, membership approach to the Constitution's scope when it comes to rules regarding the selection of noncitizens. The difficulty of trying to maintain these conflicting views of the Constitution's scope may ultimately force the Court to abandon the plenary power doctrine, which is already showing some cracks in its foundation.[94]

For example, in *Landon v. Plasencia*, the Court held that a lawful permanent resident who had left the United States for only forty-eight hours was not to be treated as an arriving alien with no constitutional rights, and thus due process entitled her to procedural protections before she could be permanently prevented from returning to the United States.[95] This decision granting a noncitizen outside the United States constitutional protection from exclusion was an important restriction on the plenary power doctrine, and one that better accords with the universalist view of rights contained in the Declaration. Similarly, in *Zadvydas v. Davis*, the Court read into the Immigration and Nationality Act a six-month time limit on the detention of a deportable noncitizen to avoid the constitutional question that would arise were the statute interpreted to permit indefinite detention, thereby implicitly acknowledging that deportable noncitizens are protected by the Constitution.[96] More recently, in *Padilla v. Kentucky*, the Court held that the Sixth Amendment requires that defense counsel advise noncitizens about the immigration consequences of their decisions to plead guilty to criminal offenses.[97] These decisions, among others, suggest that the scope of the Constitution's protection is expanding to cover rules regarding the selection of noncitizens.[98]

94. *See, e.g.*, Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 67 OKLA. L. REV. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480570.

95. Landon v. Plasencia, 459 U.S. 21, 23, 32 (1982).

96. Zadvydas v. Davis, 533 U.S. 678, 700–01 (2001).

97. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

98. *See, e.g.*, Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339,

The universalist principles of the Declaration of Independence may have assisted in bringing immigration law back into the constitutional fold. As many reformers have argued, it is hard to reconcile the plenary power doctrine with a country founded on the "unalienable Rights" to "Life, Liberty and the pursuit of Happiness"—rights that these founders believed could only be realized by "dissolv[ing] the political bands" they had to one country and starting over in another.[99] Conflicts between the aspirations of the Declaration and the realities of the society established by the Constitution's framers abound, but they are particularly poignant when it comes to noncitizens seeking to immigrate. Immigrants are in a similar position to the Framers themselves, for they hold the shared belief, as articulated by Thomas Jefferson, that they "possess[] a right which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies."[100] A country that prides itself as a nation of immigrants is thus uneasy with a constitutional order that permits its federal government to exclude and remove those immigrants without constitutional restraint.

To be sure, the principles in the Declaration are usually not explicitly cited as a reason to give protection to those noncitizens seeking to enter or remain in the United States. But they may serve as what Professor Motomura calls "phantom norms"—that is, norms that inform the interpretation of immigration law without ever being acknowledged as an express limit on the federal government's power over immigration.[101] Under the plenary power doctrine, the Constitution imposes almost no limits on the federal government when it comes to selection rules. Yet Professor Motomura observed that constitutional norms *indirectly* constrain courts when interpreting such selection rules, leading courts to adopt interpretations to comply with norms that do not formally apply to these rules.[102] Likewise, the Declaration's universalist principles and embrace of

339 (2002) (declaring that *Zadvydas* "point[s] the way to the abandonment of plenary power").

99. THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776). *See* TSESIS, *supra* note 41, at 228 (describing how Senator Charles Sumner, among others, argued that racial restrictions on naturalization were at odds with the principles of the Declaration of Independence).

100. JEFFERSON, *supra* note 40, at 5. As one scholar has noted, Jefferson's *A Summary View of the Rights of British America* "furnished a great deal of material for the Declaration of Independence." Eric Nelson, *A Response to Professor Helfman*, 128 HARV. L. REV. F. 354, 355 (2015).

101. Motomura, *supra* note 3, at 564.

102. Professor Motomura explains that in immigration law, constitutional norms tend to "operate indirectly, by serving as the unstated background context that informs our interpretation of statutes and other subconstitutional texts." *Id.* at 561.

immigration appear to be another set of "phantom norms" influencing the development of immigration law.

Like the U.S. Constitution, the Declaration does not explicitly bind the federal government when enacting and implementing immigration law. And yet its broadly worded, universalist principles—adopted by a people who wished to break free from one country and become citizens of another—articulate norms that implicitly constrain the government's immigration decisions. These norms were expressly cited by the Supreme Court in *Yick Wo v. Hopkins*, and they have led to the line of cases providing noncitizens with a nearly full panoply of constitutional rights regulating their conduct. And it appears that they are now creeping into the Court's interpretation of laws regulating the selection of noncitizens, ensuring that the Constitution provides some protection to noncitizens seeking to enter, or hoping to remain within, the United States.

Nonetheless, the Declaration's universalism has yet to fully inform the government's approach to the selection of noncitizens. In 2015, the Supreme Court decided *Kerry v. Din*, which challenged the executive's longstanding claim that its consular officials had nearly unreviewable discretion to grant and deny noncitizen's applications for visas.[103] In its brief, the government continued to assert that it had "plenary control" over immigration, asserting that "there is no basis for claiming constitutional protection for any asserted right to obtain a visa or seek admission for an alien spouse."[104] Significantly, a majority of the Supreme Court did not endorse that view. In his concurrence, Justice Kennedy carefully did not join in the plurality's view that consular officials had unreviewable discretion to deny visas.[105] Still, the Court reversed the Ninth Circuit and affirmed the executive's decision to deny a visa to the spouse of a U.S. citizen.[106] The plenary power doctrine may be eroding under the weight of the "phantom norms" described by Professor Motomura—including the Declaration's norms—but as of yet, no branch of the federal government has been willing to apply the Declaration's universalism, or its pro-immigration sentiments, to its understanding of the federal government's power over the selection (as opposed to the regulation) of noncitizens.

103. Kerry v. Din, 135 S. Ct. 2128, 2131 (2015).
104. Brief for Petitioner at 14, *Kerry*, 135 S. Ct. 2128 (No. 13-1402), 2014 WL 6706838, at *14.
105. *Kerry*, 135 S. Ct. at 2139 (Kennedy, J., concurring).
106. *Id.* at 2138.

CONCLUSION

As explained in this Article, the Declaration is inherently a pro-immigration document—not only because it protests the King's "usurpation" of laws promoting immigration, but also because it states in universalist terms the right to break free from one country and create allegiance to another. The Declaration's assertion that "all men" have a right to "Life, Liberty and the pursuit of Happiness" was quoted by the Supreme Court to support its conclusion in *Yick Wo v. Hopkins* that the Constitution applies to citizens and noncitizens alike, and the Declaration's special solicitude to immigrants had been a subtle influence on the Court's holding that immigrants are protected by the Constitution.

Under the plenary power doctrine, however, courts have long treated the laws regulating the right to enter and remain in the United States as being almost entirely outside constitutional constraints. The dichotomy between the laws that regulate noncitizens and those that select them for admission and removal is troubling, since it is impossible to fully separate the effects of rules regarding selection from those regulating conduct. Perhaps for that reason, the plenary power doctrine is eroding, leading many scholars to declare that it is coming to an end. The Declaration has not been explicitly cited in this debate, and yet the Declaration's inclusionary, universalist themes, coupled with its recognition that the United States is a nation founded by immigrants, appear to be "phantom norms" that are contributing to the plenary power doctrine's downfall.