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Centering Noncitizens' Free Speech

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CENTERING NONCITIZENS' FREE SPEECH

Gregory P. Magarian[*]

First Amendment law pays little attention to noncitizens' free speech interests. Perhaps noncitizens simply enjoy the same First Amendment rights as citizens. However, ambivalent and sometimes hostile Supreme Court precedents create serious cause for concern. This Essay advocates moving noncitizens' free speech from the far periphery to the center of First Amendment law. Professor Magarian posits that noncitizens epitomize a condition of speech inequality*, in which social conditions and legal doctrines combine to create distinctive, unwarranted barriers to full participation in public discourse. First Amendment law can ameliorate speech inequality by promoting an ethos of* free speech obligation*, amplifying the voices of politically and socially disadvantaged speakers while encouraging more mainstream, advantaged audiences to hear those voices out. Centering noncitizens' free speech would establish a paradigm of free speech obligation. That paradigm would directly ensure noncitizens' First Amendment rights while also, by extension, strengthening speech protections for other groups afflicted by speech inequality—identity minorities, political dissidents, and social outcasts. As to immediate, particular outcomes, centering noncitizens' free speech would necessarily bar the government from deporting noncitizens in retaliation for their political speech and from imposing special constraints on individual noncitizens' spending to support candidates for public offices.*

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I. INTRODUCTION

Noncitizens in the United States get the First Amendment's table scraps. Nearly all case law about First Amendment speech protections[1] deals with citizens. The Supreme Court has said little about noncitizens' expressive freedom.[2] Law reviews publish few articles that thoroughly address the subject.[3] An optimistic way of viewing this state of affairs is that noncitizens' expressive freedom requires little or no elaboration because noncitizens clearly have the same First Amendment rights as citizens. Unfortunately, the Supreme Court has expressed enough ambivalence about noncitizens' First Amendment rights to cause worries that those rights are tenuous or incomplete.[4]

The great irony of this situation is that noncitizens played an outsized role in the birth of First Amendment law. The earliest First Amendment cases to reach the Supreme Court, just over a century ago, involved prosecutions of agitators against the United States' entry into World War I.[5] Those defendants emerged from a left-wing political milieu heavily influenced by recent European immigrants. Indeed, when Justice Holmes made his famous pragmatic appeal to

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[1] This essay deals with the "expression" side of the First Amendment—the rights of speech, press, petition, and assembly—not the Religion Clauses. *See* U.S. CONST. amend. I. I use phrases like "speech protections" and "expressive freedom" to describe those four expression rights collectively, distinguishing them as needed.

[2] I use the term "noncitizens" to include all persons physically present in the United States who are not U.S. citizens, including immigrants, refugees, people with temporary visas, and people without legal documentation, distinguishing those subgroups as needed.

[3] Exceptions include Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. SCH. L. REV. 225 (2020); Katherine Griffin, *Speech as a Pretext for Deportation: When the Only Choice Is Silence*, 29 WILLAMETTE J. INT'L L. & DISP. RESOL. 187 (2022); Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (2016); Maryam Kamali Miyamoto, *The First Amendment After* Reno v. Arab-American Anti-Discrimination Committee: *A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183 (2000).

[4] *See infra* notes 44–58 and accompanying text.

[5] *See* Schenck v. United States, 249 U.S. 47 (1919) (rejecting a socialist leafletter's First Amendment defense against a federal conviction for interfering with military recruitment); Frohwerk v. United States, 249 U.S. 204 (1919) (rejecting a left-wing newspaper publisher's First Amendment defense against a federal conviction for interfering with military recruitment); Debs v. United States, 249 U.S. 211 (1919) (rejecting a socialist speaker's First Amendment defense against a federal conviction for interfering with military recruitment); Abrams v. United States, 250 U.S. 616 (1919) (rejecting left-wing leafletters' First Amendment defense against a federal conviction for interfering with military production).

let ideas compete freely in pursuit of truth,[6] he was arguing—unsuccessfully—to overturn convictions of five Russian-born noncitizens.[7] First Amendment law emerged when it did for many reasons, but one viable reason is the social upheaval and the heterogeneity of experiences and ideologies caused by massive immigration around the turn of the last century.[8] Contrast that origin with the present state of First Amendment doctrine. The Supreme Court pays no mind to noncitizens' distinctive interests in free expression and assembly or to the distinctive burdens noncitizens face in pursuing those interests.

This Essay proposes a corrective. Instead of ignoring noncitizens' distinctive speech interests or paying noncitizens merely tangential attention, what if we placed noncitizens' free speech at the very heart of First Amendment concern? Though I have no hope that the present Supreme Court would ever take this notion seriously, I advance it earnestly. The best part of our First Amendment tradition, which the Supreme Court built during roughly the first half century of First Amendment law, emphasizes speech with two qualities: value for promoting political and social change, and vulnerability to government suppression. Noncitizens' speech exemplifies those qualities. If we want constitutional speech protection to mean something honorable and to accomplish something worthwhile, courts and free speech advocates should move noncitizens from the fringes to the center of First Amendment thinking.

Part II of this Essay critiques present First Amendment doctrine's indulgence and exacerbation of a pathology that I call speech inequality. I describe speech inequality generally and then explain how it particularly disadvantages noncitizens. Part III contends that our public discourse and constitutional doctrine should resist speech equality by reorienting expressive freedom around a collective obligation to hear and consider unfamiliar, challenging ideas. I explain how that obligation should cause First Amendment law to prioritize protection for socially marginal

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[6] *See Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting).

[7] *See id.* at 617 (discussing the defendants' nationality).

[8] *See generally* Julia Rose Kraut, *Global Anti-Anarchism: The Origins of Ideological Deportation and the Suppression of Expression*, 19 IND. J. GLOB. LEG. STUD. 169 (2012) (linking immigration, anarchism, and free speech controversies in the early twentieth century).

speakers, with noncitizens as the paradigm. Part IV suggests how focusing First Amendment protection on noncitizens' speech should change outcomes in two prominent areas of legal controversy: retaliation for protest against government policies, and financial support for political candidates.

II. SPEECH INEQUALITY AND NONCITIZENS' SPEECH

A. SPEECH INEQUALITY'S SOCIAL AND LEGAL DIMENSIONS

Social conditions create disparities in speakers' opportunities to reach and persuade audiences. Present First Amendment doctrine reinforces those social disparities by favoring the speech interests of majorities and empowered groups. We can call this two-layered phenomenon *speech inequality*. My diagnosis of speech inequality is hardly novel. Commentators for decades have argued that First Amendment law should promote distributive justice values and have criticized First Amendment law for failing to do so.[9] Speech inequality matters now more than ever because it has been accelerating for decades.

The unequal distribution of resources in our society is one important social cause of speech inequality. Income and wealth disparities in the United States continue to get worse.[10] These disparities substantially dictate opportunities to participate effectively in public discourse. You can influence an audience only if you have the means to reach that audience. New communications technologies have restructured this opportunity gap, letting more people reach large audiences but also perpetuating resource inequalities and creating new structures of concentrated control.[11]

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[9] *See generally* Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

[10] *See* Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/.

[11] I discuss these new media problems at greater length in Gregory P. Magarian, *How Cheap Speech Underserves and Overheats Democracy*, 54 U.C. DAVIS L. REV. 2455 (2021) [hereinafter Magarian, *Cheap Speech*] and Gregory P. Magarian, *Forward into the Past: Speech Intermediaries in the Television and Internet Ages*, 71 OKLA. L. REV. 237 (2018).

A second major social cause of speech inequality is identity difference. Just as election law recognizes minority populations' vulnerability to polarized voting,[12] minority and marginalized communities face what I have called *identity-polarized discourse.*[13] Members of politically and culturally distinct identity groups tend to speak and argue politically in ways that reflect group members' common interests, experiences, and values. Group polarization promotes speech inequality because, to the extent that identity-driven modes of argument generate opposing viewpoints, conflicts between those viewpoints in public political debate will advantage larger and more empowered groups while disadvantaging smaller and less empowered groups. That skew worsens when majority and empowered communities deliberately press their advantages to silence or drown out voices from minority and marginalized communities. The Internet and social media, for all their value in facilitating communication and propagating information, have exacerbated identity-polarized discourse, for example by enabling concerted trolling against women and people of color.[14]

Courts have been developing First Amendment law for just over a century.[15] Across its first fifty years, from 1919 until about 1970, First Amendment doctrine gathered increasing momentum to ameliorate speech inequality. Political and social outsider groups—notably left-wing dissidents,[16] Jehovah's Witnesses,[17] and African

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[12] *See* Thornburg v. Gingles, 478 U.S. 30, 52–74 (1986) (extensively discussing and documenting racially polarized voting).

[13] *See* Magarian, *Cheap Speech*, *supra* note 11, at 2483–84 (theorizing identity-polarized public discourse).

[14] *See, e.g.*, Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 68–84 (2009) (detailing identity-based aggression by online mobs).

[15] My account here of First Amendment doctrine's development draws on the discussion in Gregory P. Magarian, *Kent State and the Failure of First Amendment Law*, 65 WASH. U. J.L. & POL'Y 41 (2021).

[16] *See* cases cited *supra* note 5; *see also* Whitney v. California, 274 U.S. 357, 371 (1927) (rejecting a socialist's First Amendment challenge to a state "criminal syndicalism" statute); Gitlow v. New York, 268 U.S. 652, 666–68 (1925) (same).

[17] *See* Marsh v. Alabama, 326 U.S. 501, 509–10 (1946) (recognizing a Jehovah's Witness's First Amendment right to distribute literature in a "company town"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943) (sustaining the First Amendment claim of Jehovah's Witness parents for their children not to participate in a public school's mandatory Pledge of Allegiance and flag salute); Cantwell v. Connecticut, 310 U.S. 296, 310–11 (1940) (recognizing Jehovah's Witnesses' First Amendment right to engage in provocative public speech).

American civil rights activists[18]—brought a succession of forceful First Amendment claims. Their efforts prompted the Supreme Court to develop a free speech doctrine, cresting during the Warren Court's rights revolution of the 1960s, that conceived of free speech as an engine for social and political change. This foundational free speech doctrine placed the expressive rights of minority and marginal communities at the center of First Amendment concern.

Around 1970, as the Warren Court gave way to the Burger Court, First Amendment law began a decisive shift. The Court increasingly disregarded the expressive rights of political and social outsiders. Wealthy and powerful speakers and institutions became the new First Amendment paladins. The Court asserted the primacy of property rights over speech rights.[19] It conflated wealth with speech by extending First Amendment protection to commercial advertising[20] and election spending.[21] It de-emphasized special protections for the democratic functions of the news media.[22] The new First Amendment doctrine abandoned the prior era's foundational concerns with ameliorating power disparities and facilitating social and political change. Instead, the new doctrine recast the First Amendment as a protection for established allocations of resources and, accordingly, as a powerful device for maintaining the social and political status quo.

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[18] *See* Brown v. Louisiana, 383 U.S. 131, 141–43 (1966) (finding a First Amendment right for civil rights activists to stage a sit-in at a segregated public library); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284–87 (1964) (finding First Amendment protection from defamation liability for civil rights leaders' advertisement about police abuses); NAACP v. Alabama, 357 U.S. 449, 462–63 (1958) (finding First Amendment protection for a civil rights group from the state's demand for the group's membership list).

[19] *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 521–23 (1976) (denying union members' First Amendment claim of a right to picket in a privately owned shopping center); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 129–31 (1973) (denying political groups' First Amendment claim of a right to purchase advertising time on a national broadcast network).

[20] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770–773 (1976) (finding First Amendment protection for commercial advertisements).

[21] *See* Buckley v. Valeo, 424 U.S. 1, 143–44 (1976) (per curiam) (holding that various campaign finance regulations violated the First Amendment).

[22] *See* Cohen v. Cowles Media Co., 501 U.S. 663, 665, 672 (1991) (rejecting a newspaper's First Amendment defense against a promissory estoppel suit for revealing the name of a confidential source); Time, Inc. v. Firestone, 424 U.S. 448, 455, 461 (1976) (limiting the class of "public figure[s]" who must prove actual malice to recover for defamation); Branzburg v. Hayes, 408 U.S. 665, 708 (1972) (denying a journalist's First Amendment claim to maintain a source's confidentiality).

The present Supreme Court under Chief Justice John Roberts has bored to new depths of speech inequality.[23] On one hand, the Court has extravagantly expanded First Amendment protection for the wealthiest election spenders,[24] commercial enterprises,[25] and opponents of workers' interests.[26] On the other hand, the Court has disdained First Amendment claims of equality activists,[27] electoral challengers,[28] small-scale artists and publishers,[29] and religious minorities.[30] The Court has also diminished the rights of speakers in government preserves, including public school students,[31]

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[23] *See generally* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT (2017) (analyzing and critiquing the Roberts Court's free speech decisions).

[24] *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 227 (2014) (striking down federal aggregate limits for campaign contributors); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754–755 (2011) (striking down a state's matching fund system for publicly funded candidates); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 368 (2010) (striking down federal restrictions on election spending by corporations and unions), Davis v. Fed. Election Comm'n, 554 U.S. 724, 740 (2008) (striking down federal variable contribution limits for opponents of self-financed candidates).

[25] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (striking down the Lanham Act's bar on registration of "immoral or scandalous" trademarks); Expressions Hair Design, Inc. v. Schneiderman, 137 S. Ct. 1144, 1150–51 (2017) (striking down a state's bar on imposing surcharges for credit card purchases); Sorrell v. IMS Health, Inc., 564 U.S. 552, 580 (2011) (striking down a state's restriction on drug companies' use of physicians' prescribing data for pharmaceutical sales).

[26] *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018) (finding a First Amendment right for non-union members to refuse paying the union for collective bargaining expenses).

[27] *See* Rumsfeld v. F. for Acad. and Institutional Rts., Inc., 547 U.S. 47, 70 (2006) (rejecting a coalition of law schools' First Amendment challenge to a federal mandate that let the military services interview students on campus despite the services' anti-LGBTQ+ policies).

[28] *See* N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (rejecting an electoral challenger's First Amendment claim against a state's party convention system for choosing general election candidates).

[29] *See* Golan v. Holder, 565 U.S. 302, 334 (2012) (rejecting a First Amendment challenge to the statutory removal of certain intellectual property from the public domain).

[30] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (denying a small religious sect's First Amendment claim for equal treatment with other religions as to the placement of public monuments).

[31] *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) (rejecting a high school student's First Amendment defense against discipline for displaying a nonsensical sign off school premises). *But see* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2048 (2021) (holding that the First Amendment places some constraints on school administrators' power to discipline students for speech away from school).

government employees,[32] and incarcerated people.[33] The Roberts Court has completely ignored the Press Clause.

Speech inequality delegitimizes First Amendment law by severing the reasons for constitutional speech protection from social reality. Justice Holmes wrote: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[34] What if most of your market competitors start out with greater resources, or your prospective audience distrusts your identity? Justice Brandeis wrote: "Only an emergency can justify repression" of speech.[35] What if speech harms you before most people perceive any emergency? Justice Jackson wrote: "[N]o official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion."[36] What if *unofficial*, socially ingrained orthodoxies place you at a persistent disadvantage? Justice Brennan wrote: "[D]ebate on public issues should be uninhibited, robust, and wide open."[37] What if open debate inexorably crowds out your perspective and experience? Justice Harlan wrote that objectors to assaultive public speech can "effectively avoid further bombardment of their sensibilities simply by averting their eyes."[38] What if you see the same hostile message whichever way you turn?

These concerns recede in urgency when First Amendment law protects outsiders and dissenters, as all five of those esteemed jurists sought to do when they wrote their revered formulations of free speech. The concerns metastasize when, as over the past half century, First Amendment law changes sides to become a tool for perpetuating hierarchies of social and political power.

B. NONCITIZENS AS EXEMPLARS OF SPEECH INEQUALITY

Many people in the United States struggle under speech inequality. Poor people suffer from resource disparities.

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[32] *See* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (refusing to consider a government employee's First Amendment challenge to his employer's retaliation against his speech on the ground that he made the speech pursuant to his job duties).

[33] *See* Beard v. Banks, 548 U.S. 521, 535 (2006) (rejecting a prisoner's First Amendment claim for access to newspapers, magazines, and photographs).

[34] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[35] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[36] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[37] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[38] Cohen v. California, 403 U.S. 15, 21 (1971).

Disadvantaged identity groups, including women, people of color, and members of the LGBTQ+ community, stand on the fault lines of identity-polarized discourse. Schoolchildren and incarcerated people face aggressive speech restrictions with minimal free speech protections. All of these groups suffer from First Amendment doctrine's increasing neglect and disdain.

Perhaps no group faces stiffer challenges from speech inequality than noncitizens. The umbrella term "noncitizens" encompasses multiple, diverse groups, from permanent residents at one pole of legal security to undocumented migrants at the opposite pole. Even so, all noncitizens share characteristics that expose them collectively to speech inequality. As a starting point, they incorporate the problems of other groups who get the short end of free speech. Noncitizens are economically disadvantaged in comparison to citizens.[39] Most noncitizens are people of color.[40] Noncitizens live under special government control—or, in the case of undocumented noncitizens, constant fear of control. In other ways, noncitizens face even more intense speech inequality than other disadvantaged groups. Poor people and identity minorities who are citizens face structural disadvantages in using the political process, but at least those groups have nominal access to voting. Noncitizens have none. All noncitizens face a distinctive, virulent layer of identity-polarized discourse, beyond whatever polarization their other identities produce, because of their noncitizen status itself.[41] They also face distinctive linguistic and cultural barriers to participation in public discourse.

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[39] *See, e.g.*, WILLIAM A. KANDEL, CONG. RSCH. SERV., R41592, THE U.S. FOREIGN-BORN POPULATION: TRENDS AND SELECTED CHARACTERISTICS 24–28 (2012), https://crsreports.congress.gov/product/pdf/R/R41592/5 (showing noncitizens' substantially lower median incomes and substantially higher poverty rates).

[40] Only 13 percent of all immigrants in the United States, including both noncitizens and naturalized citizens, came from Europe and Canada, with the vast majority coming from Latin America, the Caribbean, Asia, and Africa. *See* Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/.

[41] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 161–62 (1980) (citing hostility and political disdain toward immigrants as grounds for strong judicial protection of their constitutional rights); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 376 (2003) (noting "the ignoble history of anti-immigrant sentiment among the voting citizenry, often laced with racial animus"); Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism,* 65 EMORY L.J. 303, 354–58 (2015) (arguing that the First

One sensible way to order constitutional speech protection, familiar from First Amendment jurisprudence between 1919 and 1970, is to focus on the relative value and vulnerability of different kinds of speech. Value is a difficult concept that First Amendment law usually claims to abjure,[42] but we can recognize the distinctive value of speech that contributes to important discussions about political and social change. Vulnerability means the likelihood that government can successfully repress speech. Noncitizens' speech is exceptionally valuable and vulnerable. Like other groups who face speech inequality, noncitizens contribute value to public discourse by sharing perspectives and ideas that many people will find stimulating or provocative, particularly (but not only) as to noncitizens' acute concerns about immigration and sociopolitical inclusion. Noncitizens' speech bears distinctive vulnerability to the power that government can exercise against anyone who lacks the protections of citizenship.[43]

First Amendment doctrine largely ignores the distinctive value and vulnerability of noncitizens' expression. The Supreme Court has sent only limited and qualified signals about noncitizens' First Amendment rights. The Court has declared that "[f]reedom of speech and of press is accorded aliens residing in this country."[44] The Court has further pronounced that none of the "rights . . . protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment . . . acknowledges any distinction between citizens or resident aliens."[45] However, the first of those statements was dicta in a case whose outcome turned on statutory interpretation,[46] while the second comes from a footnote in a non-speech decision that merely quotes the concurring opinion from the earlier statutory interpretation case.

Amendment enabled and encouraged antipathy toward Latin American immigrants in southern states during the 1990s).

[42] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 469–72 (2010) (rejecting the government's argument that the First Amendment should not protect certain depictions of violence because of their relatively low value).

[43] For a detailed examination of how checks against that power have eroded, greatly exacerbating noncitizens' vulnerability, see Das, *supra* note 3, at 245–54.

[44] Bridges v. Wixon, 326 U.S. 135, 148 (1945) (citation omitted).

[45] Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (citing *Bridges,* 326 U.S. at 161 (Murphy, J., concurring)).

[46] *See Bridges*, 326 U.S. at 141–49 (interpreting the meaning of "affiliation" under 8 U.S.C. § 137(f)).

More recently, the Court has asserted that First Amendment and other constitutional rights belong to "the people," defined as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[47] That class might arguably include lawful permanent residents, but the government in litigation has characterized it as excluding undocumented noncitizens.[48] The Court has let the government deport noncitizens based on their present[49] or even past[50] political beliefs and associations. The Court has also let the government deny entry to the United States based on the applicant's political views.[51] Most recently and troublingly, the Court has denied undocumented noncitizens any opportunity to challenge government retaliation against their political speech.[52]

The Court's long-standing ambivalence about noncitizens' First Amendment rights reflects the continuing force of the Plenary Power Doctrine, under which courts defer broadly to the Executive and Legislative Branches on matters related to immigration and citizenship.[53] More recently than any of its speech-specific

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[47] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[48] *See* Kagan, *supra* note 3, at 1244–46 (discussing arguments the government has made against extending constitutional rights to undocumented noncitizens).

[49] *See* United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904) (finding no First Amendment issue with basing a noncitizen's deportation on his anarchist politics).

[50] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (rejecting a First Amendment challenge to basing deportations on the deportees' former membership in the Communist Party). David Cole has argued that *Harisiades* simply extended to citizens the Court's contemporaneous disregard for citizen Communists' First Amendment rights in *Dennis v. United States*, 341 U.S. 494 (1951) (plurality opinion). *See* Cole, *supra* note 41, at 385 & n.69. The *Dennis* plurality, however, had found that leaders of the U.S. Communist Party posed a "clear and present danger" to national security based on their immediate advocacy of communist doctrines. *See Dennis*, 341 U.S. at 508–11. The *Harisiades* Court required no similar showing.

[51] *See* Kleindienst v. Mandel, 408 U.S. 753, 767–69 (1972) (rejecting a First Amendment challenge to the Attorney General's denial of entry to a foreign Marxist journalist).

[52] *See* Reno v. Arab-American Anti-Discrimination Comm., 525 U.S. 471, 492 (1999) (holding that "8 U.S.C. § 1252(g) deprives the federal courts of jurisdiction over respondents' claims").

[53] For example, when Donald Trump fulfilled a series of Islamophobic campaign statements by banning a list of mostly Muslim-majority countries' citizens from entering the United States, a pliant Supreme Court recited: "For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."

pronouncements, the Court has brusquely reiterated: "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[54] Consistent with that premise, the Court recently denied due process protection to a refugee who entered the country without documentation and sought habeas corpus review of his asylum petition.[55] Based on that decision, the Court vacated a Second Circuit decision that had found habeas jurisdiction over a lawful permanent resident's First Amendment claim of retaliatory deportation.[56] Relatedly, the Court has diminished the First Amendment's transnational scope by denying First Amendment protection to political communications with foreign nationals[57] and by holding that foreign affiliates of U.S. social service nonprofits have no First Amendment rights.[58]

Noncitizens have ample reason to fear speech inequality both as a matter of social reality and as a matter of legal doctrine.

III. TRANSCENDING SPEECH INEQUALITY

A better, more humane First Amendment doctrine would recapture the essential mid-twentieth century focus on protecting the rights of disadvantaged groups, political dissenters, and other speakers at society's margins. At the same time, such a

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Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (internal quotation marks and citation omitted). For nuanced recent analysis of the plenary power doctrine, see Michael Kagan, *Shrinking the Post-Plenary Power Problem*, 68 FLA. L. REV. F. 59 (2016) and Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015).

[54] Demore v. Kim, 538 U.S. 510, 521 (2003) (internal quotation marks and citation omitted).

[55] *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1961 (2020) (holding that the relevant statutory scheme only provided for a determination whether the applicant had "a significant possibility" of "establish[ing] eligibility for asylum").

[56] *See* Ragbir v. Homan, 923 F.3d 53 (2d Cir. 2019), *vacated mem. sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020).

[57] *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 40 (2010) (rejecting a First Amendment challenge to a federal bar on peace advocacy groups' counseling foreign terrorist organizations about nonviolent conflict resolution).

[58] *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 140 S. Ct. 2082, 2089 (2020) (holding that foreign affiliates of social service nonprofits, unlike their U.S.-based parents, lacked a First Amendment right to forego government-compelled speech). For a wide-ranging analysis of First Amendment doctrine's insular disregard for communication that transcends our national borders, see TIMOTHY ZICK, THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES (2014).

reorientation of First Amendment law would need to confront both the social and legal dimensions of present speech inequality. Our legal system could advance those goals by centering the expressive freedom of speech inequality's archetypal underdogs: noncitizens. Just as political radicals, religious outsiders, and campaigners for racial inequality formed the paradigms for First Amendment doctrine's foundational decades, noncitizens can form the paradigm for its future.

A. MEIKLEJOHN'S FIRST STEPS

During the early Cold War years, in the shadow of resurgent paranoia about foreign influence on U.S. politics and society, Alexander Meiklejohn formulated a defense of First Amendment speech rights that placed unprecedented emphasis on democratic processes.[59] Meiklejohn argued that the First Amendment should protect only speech related to democratic self-governance, broadly conceived. His central idea was that free speech matters most as a medium for informing voters about the political issues at stake in their voting decisions.[60] He famously declared: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[61]

Given the near-universal limitation of voting rights to U.S. citizens, one might expect Meiklejohn's First Amendment theory to view noncitizens' speech interests indifferently or negatively. Meiklejohn, however, stood apart from other early First Amendment theorists in forcefully asserting noncitizens' full entitlement to free speech rights. Because he prioritized the availability of political ideas, he sought to maximize the sources of those ideas. He pointedly affirmed noncitizens' value as contributors of political information. "[U]nhindered expression," Meiklejohn wrote, "must be open to non-citizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of this nation."[62]

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[59] *See generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

[60] *See id.* at 25–27.

[61] *Id.* at 26.

[62] *Id.* at 119.

Meiklejohn's First Amendment theory provides an important starting point for combating speech inequality. His focus on political speech points First Amendment law toward the field of public discourse most important for challenging hierarchies of power. He cared deeply about the democratic polity's capacity to bring about change. His primary concerns for audiences rather than speakers and, more broadly, for the political community rather than atomistic individuals undercut the tendency of liberal rights to reify the prerogatives of privileged actors. Most important for the present discussion, he singularly placed noncitizens' speech rights on equal constitutional footing with citizens' speech rights. Beyond the facial importance of that egalitarian move, Meiklejohn was implicitly calling on the policymakers and institutions of his fraught era to reject nativist paranoia and national chauvinism.

Despite all those virtues, Meiklejohn's theory also betrays several weaknesses as a tonic for speech inequality. First, his disregard for speakers' (as distinct from audiences') interests, while helpfully underemphasizing powerful speakers, also discourages the validation of marginalized speakers. He failed to grasp identity politics. He likewise seems not to have recognized the value that speakers derive from actively engaging in public discourse, an experience that can foster socially marginal speakers' crucial participation in self-government. Second, Meiklejohn's relentless proceduralism diverted attention from the differential substantive influences that various speakers and ideas can exert on public political debate. He recognized elections' capacity to bring about political change, but he had nothing to say about the distorting electoral effects of big money or prejudice against minority groups. He posited "the procedure of the traditional American town meeting"[63] as a paradigm of democratic discourse, never considering that town meetings can be very homogeneous affairs or that—in the rough and tumble of real public debate—no benign moderator presides to ensure constructive, inclusive discussion.

Meiklejohn's vindication of noncitizens' speech rights, while in one sense egalitarian and generous, was also reductive and instrumental. Meiklejohn granted noncitizens First Amendment stature not for their own sake but because of the value their intellectual labor could confer on citizens. He showed no real

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[63] *See id.* at 24.

consciousness of noncitizens' own identities and interests. Much as the Supreme Court's "attainment of a diverse student body" rationale for affirmative action in higher education helps students of color solely in order to enhance white students' educational experience,[64] Meiklejohn's First Amendment theory helps noncitizens solely in order to enhance citizens' effective self-governance. As the Supreme Court is poised to demonstrate in the affirmative action context, this sort of instrumental largesse is a lot better than nothing.[65] Even so, framing disadvantaged people's constitutional rights without any regard for their own needs or interests exacerbates their social and political marginalization.

B. FREE SPEECH OBLIGATION

Meiklejohn's First Amendment theory presumes a collective obligation to participate in self-government. We can modify that theory and overcome some of its deficits by elaborating on the theme of obligation. Free speech is dynamic and interactive. Meiklejohn was right to emphasize the importance of diverse ideas in public discourse, but he was wrong to disregard the diversity of identities that express and receive those ideas. The communicative interplay between speech and audience suggests a corresponding principle for free speech: The right to speak entails a duty to listen. I will call this the ethos of *free speech obligation*.

Defenses of free speech often posit a version of free speech obligation. However, in the manner of prevailing First Amendment doctrine, libertarian homilies about free speech tend to frame the obligation to listen as validating, rather than resisting, speech inequality. First Amendment tub-thumpers admonish socially marginal audiences to sustain free speech values by grinning and bearing identity-polarized attacks. Thus, the leading parable of free speech orthodoxy in the contemporary United States proclaims not just the unfortunate necessity but also the positive nobility of ensuring Nazis' right to rally near the homes of Holocaust

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[64] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–20 (1978) (opinion of Powell, J.).

[65] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020) (upholding a race-conscious college admissions policy), *cert. granted*, 142 S. Ct. 895 (Jan. 24, 2022) (No. 20-1199).

survivors.[66] In a notorious recent example, the Dean of Students of the University of Chicago sent students in the entering class a letter that dramatized the University's commitment to academic freedom by condemning "trigger warnings," disinvitations of potentially controversial campus speakers, and "safe spaces," all measures associated with protecting minority and disadvantaged communities from harmful speech.[67] This libertarian version of free speech subjects disadvantaged groups to a game of "heads I win, tails you lose." Even as they face obstacles to their own effective expression, free speech orthodoxy commands them to indulge assaultive ideas, as if those ideas were not painfully familiar.

If we really believe that free speech entails an obligation to open ourselves to unfamiliar, potentially unsettling ideas, then that obligation in practice should be a lot easier for minority and marginal members of our national community to fulfill and a lot harder for majority and dominant members to fulfill. Social realities already compel members of minority and marginal groups, but not members of majority and dominant groups, to confront their antagonists' identity-polarized perspectives and accordingly to question their own perspectives. Jews don't need a Nazi rally to understand anti-Semitism. Black people don't need racist invective to grasp white supremacism. Women don't need misogynists to show them how patriarchy works. Systems of social subordination flood society with their dominant norms.[68] Coasting atop the flood, members of dominant groups can glide easily about their lives without having to confront marginalized groups' narratives, grievances, or aspirations.

An ethos of free speech obligation should call most insistently on the powerful and comfortable to hear out the powerless and vulnerable. You have an obligation to listen attentively to

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[66] *See* Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir.) (finding a First Amendment right for a Nazi group to hold a rally in Skokie, Illinois), *cert. denied*, 439 U.S. 916 (1978); *see also, e.g.*, Edward L. Rubin, *Nazis, Skokie, and the First Amendment as Virtue*, 74 CALIF. L. REV. 233, 239–240 (1986) (praising First Amendment protection for the Nazis' right to rally in Skokie as epitomizing a deontological dedication to the freedom of speech).

[67] *See* Letter from John (Jay) Ellison, Dean of Students, The Coll., Univ. of Chi., to Members of the Class of 2020 (undated), https://news.uchicago.edu/sites/default/files/attachments/Dear_Class_of_2020_Students.pdf (asserting free speech precepts).

[68] *See* JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 104 (1999) (positing legitimizing myths as vehicles of social domination).

unfamiliar viewpoints. You have an obligation to seek out those viewpoints when they aren't readily apparent. You have an obligation to question and challenge your own ingrained viewpoints. You have an obligation to promote and contribute to a public discourse that welcomes diverse participants and ideas. Every one of those obligations makes greater demands on the majority and the powerful than on the minority and the powerless. Isn't that how democratic public discourse should work? As we calibrate free speech—our best tool for making our society better, for imagining and discussing change—shouldn't people who live easier also work harder?

Embracing free speech obligation should prompt changes in First Amendment doctrine to make unfamiliar, provocative ideas easier for speakers to propagate and harder for audiences to avoid. Our law and norms should recuperate the essential values of First Amendment doctrine's foundational era, with attention to speech inequality's contemporary forms. We should reorient First Amendment doctrine toward protecting dissent and difference. Those changes would follow directly from placing noncitizens' speech at the center of First Amendment concern. Noncitizens have distinctive, difficult experiences. Most citizens have little understanding of noncitizens' lives, problems, and aspirations. An ethos of free speech obligation would compel citizens to transcend our ignorance, and that transcendence would require amplifying noncitizens' voices.

IV. LISTENING TO NONCITIZENS

Retaliation against noncitizens' political advocacy and restriction of their financial support for political candidates have drawn recent attention from courts and scholars. Both issues concern core political speech, which matters with special urgency for noncitizens because they can't influence government by voting.[69] Placing

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[69] *See* ELY, *supra* note 41, at 161 ("Aliens cannot vote in any state, which means that any [political] representation they receive will be exclusively 'virtual.'"); Cole, *supra* note 41, at 377–78 ("[T]he very fact that noncitizens cannot vote but nonetheless are affected by the political decisions of the community in which they reside only underscores the importance of protecting their speech and associational rights."); Das, *supra* note 3, at 230 ("Without the right to vote, immigrant activists have instead relied on their voices to influence political leaders and to organize voting family members and neighbors to defeat anti-immigrant

noncitizens' expressive freedom at the center of First Amendment theory would compel strong protection for their political expression. If, as I have contended, citizens have an obligation to listen to noncitizens, then noncitizens must be able to express themselves with minimal fear and constraint. Accordingly, the First Amendment should bar the government from imposing adverse consequences on noncitizens, including those without legal documentation, when they express their political views. Likewise, noncitizens should have the same right as citizens to financially support political candidates.

A. POLITICAL DISSENT AND PROTEST AGAINST GOVERNMENT POLICIES

The right to political dissent and protest is the First Amendment's most important contribution to liberal democracy. When large groups take to the streets, as in the Civil Rights movement of the 1960s and the Black Lives Matter movement over the past several years, their voices can dramatically change public political debates.[70] Law enforcement often cracks down brutally on political dissent. In 2017, for example, police in St. Louis, Missouri savagely beat protesters and bystanders who dared to condemn a police officer's wrongful acquittal for murdering an unarmed Black motorist.[71] To make matters worse, state governments are concocting increasingly authoritarian strategies for silencing or punishing dissenters.[72] This combination of street violence and

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politicians in local elections."). Whether and in what circumstances jurisdictions *should* give noncitizens opportunities to vote is an important question beyond the scope of this essay.

[70] *See generally* Zackary Okun Dunivin, Harry Yaojun Yan, Jelani Ince & Fabio Rojas, *Black Lives Matter Protests Shift Public Discourse*, PROCS. NAT'L ACAD. SCI. (March 3, 2022), https://www.pnas.org/doi/10.1073/pnas.2117320119 (analyzing social media and news reports to show how the Black Lives Matter movement caused lasting changes to public debates about racial justice and policing).

[71] *See* Susan Hogan, *Federal Judge Rebukes St. Louis Police for Tactics Used on Protesters After Ex-Officer's Acquittal*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/11/17/federal-judge-rebukes-st-louis-police-for-tactics-used-on-protesters-after-ex-officers-acquittal/.

[72] *See U.S. Protest Law Tracker*, INT'L CTR FOR NOT-FOR-PROFIT L., https://www.icnl.org/usprotestlawtracker/ (last visited Aug. 31, 2022) (continually updated compilation of enacted, pending, and proposed state anti-protest legislation).

legislative repression reflects an aggressive government effort to chill political dissent, in flagrant violation of the First Amendment.

Present First Amendment doctrine, however, shows almost no interest in protecting dissenters' rights to free speech and assembly. The Roberts Court in 2010 let the federal government bar advocates of peaceful political change from counseling foreign groups, which the government had labeled as terroristic, about nonviolent conflict resolution.[73] Chief Justice Roberts, writing for the majority, could barely restrain his contempt for any challenge to the government's assessment of how much (or little) free speech our national security apparatus saw fit to tolerate.[74] Meanwhile, the only street protesters to win a First Amendment claim at the Roberts Court have been anti-abortion activists who swarm around medical facilities to intimidate and harass pregnant people who seek health services.[75] In sustaining an anti-abortion group's First Amendment claim, Chief Justice Roberts refused to acknowledge any speech rights of "protesters," insisting instead that the anti-abortion defendants merely offered helpful counseling.[76]

First Amendment law's disregard for political dissent and protest has distinctively harmed noncitizens, especially those without legal documentation. The federal government has a shameful history of using deportation and exclusion as weapons against political dissent.[77] In recent years, the government has increasingly used selective deportation to silence activists, protesters, artists, organizers, and litigants who publicly agitate for noncitizens' interests.[78] Prominent targets have included Claudio Rojas, whom the government deported only after he appeared in a documentary

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[73] *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 40 (2010) (upholding the federal government's bar on giving advice to designated terrorist groups).

[74] *See id.* at 30–33 (expounding on the government's broad discretion to suppress speech in the name of national security).

[75] *See* McCullen v. Coakley, 573 U.S. 464, 490–96 (2014) (finding a state's restriction on certain speech near facilities that provide abortion care insufficiently narrowly tailored to survive First Amendment review).

[76] *See id.* at 489 ("Petitioners are not protestors. They seek . . . to inform women of various alternatives and to provide help in pursuing them.").

[77] *See* ZICK, *supra* note 58, at 120–22 (discussing the history of ideologically based deportations and exclusions); Kraut, *supra* note 8, at 180–82 (discussing the Alien Immigration Act of 1903).

[78] *See* Das, *supra* note 3, at 231–37 (documenting and describing instances of government retaliation against noncitizens' speech).

film that exposed abuses of ICE detainees,[79] and Ravi Ragbir, whom the government targeted for deportation only after he became a highly visible activist and organizer for immigrants' rights.[80] The Supreme Court has denied federal courts' jurisdiction even to consider First Amendment challenges to such cases of selective enforcement.[81] The Court has held that "[a]n alien unlawfully in this country has no constitutional right" to contest deportation as retaliation against the "alien's" political advocacy.[82] This callous indulgence of punishing noncitizens for expressing their political views contrasts starkly with First Amendment law's remarkable bar on viewpoint-based punishments even of speech that ordinarily gets no First Amendment protection at all.[83]

Advocates for noncitizens' expressive freedom have rightly condemned deportations that punish political participation.[84] Some scholars have invoked such abuses to broaden the scope of what should count as protected political speech. Jason Cade contends that government efforts to stop activists from providing water for undocumented border crossers violate the First Amendment.[85] Daniel Morales, pointing to prospective migrants' lack of a voice in setting immigration policies that determine their fates, contends

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[79] *See id.* at 234–35.

[80] *See id.* at 226–27.

[81] *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491–92 (1999).

[82] *Id.* at 488.

[83] *See* R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992) (striking down a viewpoint-based speech restriction that the Court presumed to apply only to categorically unprotected "fighting words").

[84] *See* ZICK, *supra* note 58, at 124 ("The notion that an alien's ability to enter or remain in the United States implicates a mere privilege, which may be denied based on constitutionally protected expressive activities, rests on provincial principles."); Cole, *supra* note 41, at 377 ("If a foreign national has no First Amendment rights in the deportation setting, he has no First Amendment rights anywhere; the fear of deportation will always and everywhere restrict what he says."); Das, *supra* note 3, at 239–41 (describing harms from retaliatory deportation); Griffin, *supra* note 3, at 202–21 (surveying First Amendment arguments against retaliatory deportation); Kagan, *supra* note 3, at 1270–78 (arguing that retaliatory deportation amounts to impermissible discrimination against a particular class of speakers); *see also* Michael J.Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 673–79 (2003) (criticizing the use of immigration enforcement to discourage noncitizens from seeking law enforcement assistance).

[85] *See* Jason A. Cade, *"Water Is Life!" (and Speech!): Death, Dissent, and Democracy in the Borderlands*, 96 IND. L.J. 261, 281 (2020) (contending that a unique combination of public concern, location, historic symbolism, and audience warrants First Amendment protection for giving water to border crossers).

that "illegal" migration itself is a form of political speech that warrants First Amendment protection.[86] These arguments, innovative even by the standards of Warren Court First Amendment doctrine, vividly highlight the distance between current doctrine and noncitizens' expressive interests.

Placing noncitizens' interests at the heart of First Amendment law would necessarily foreclose any use of immigration enforcement to discourage or silence political dissent. Noncitizens have a pressing interest in speaking out about questions of immigration policy and about other political matters that affect their lives. First Amendment law axiomatically sets speech apart as a sphere of greater freedom than conduct.[87] Undocumented noncitizens epitomize why that speech–conduct distinction matters in practice. The federal government has power to punish undocumented noncitizens' presence in the United States.[88] It should not also have power to stop them from contesting in public discourse the terms of their exclusion from legal admission. From the standpoint of citizens (and that of documented noncitizens), undocumented noncitizens have distinctive perspectives about immigration politics to which an ethos of free speech obligation compels careful attention. Given that retaliatory motives for deportations may often be impossible to prove, an effective First Amendment bar on retaliatory deportation would have to effectively immunize politically vocal noncitizens from deportation except in cases where the government could present unusually strong alternative justifications.[89]

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[86] *See* Daniel I. Morales, *"Illegal" Migration Is Speech*, 92 IND. L.J. 735, 756–57 (2017) (contending that migrating "outside the law" expresses a claim of rightful membership in the political community). For a variation that parallels First Amendment rhetoric by invoking our country's revolutionary origins, see Daniel I. Morales, *Undocumented Migrants as New (and Peaceful) American Revolutionaries*, 12 DUKE J. CON. L. & PUB. POL'Y 135, 136 (2016) ("[U]ndocumented people are modern, non-violent, American revolutionaries, helping to test concepts of legitimate state authority and global social justice.").

[87] *See generally* Arnold H. Loewy, *Distinguishing Speech from Conduct*, 45 MERCER L. REV. 621 (1994); Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427 (2015).

[88] *See, e.g.*, 8 U.S.C. § 1227 (authorizing deportation of undocumented noncitizens).

[89] Courts presently take the opposite approach, presuming nondiscriminatory motives for deportations. *See* Rueda Vidal v. U.S. Dep't of Homeland Sec., 536 F. Supp. 3d 604, 622 (C.D. Cal. 2021) ("Circumstantial evidence may create a genuine dispute of material fact as to retaliatory motive when, in addition to the defendants' knowledge, the plaintiff provides evidence of at least one of the following: (1) proximity in time between the protected action

Throughout this Essay, I have treated the class of "noncitizens" whose free speech rights I am promoting as limited to people physically present in the United States. In general, people who are neither U.S. citizens nor physically present in this country lack any basis for claiming the Constitution's protections.[90] Centering noncitizens' free speech, however, requires relaxing that premise in one important way. The federal government sometimes uses noncitizens' speech as a basis for denying their entry to the country, for example, through visa denials[91] or warrantless searches of electronic devices at a border crossing.[92] Such tactics, on a noncitizen-centered account of the First Amendment, implicate not merely domestic audiences' interests in hearing the excluded noncitizens' speech[93] but more fundamentally the excluded noncitizens' interests in speaking to the domestic audiences. The distinction between using a person's political speech to kick them out of the country and to keep them out of the country makes no normative difference. Accordingly, the First Amendment should bar not just retaliatory deportations of noncitizens who want to stay in

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and the allegedly retaliatory adverse action; (2) additional evidence that the defendant expressed opposition to his speech; or (3) additional evidence that the defendant's proffered explanations for the adverse action were false and pretextual.").

[90] *See, e.g.*, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) (rejecting foreign nonprofit organizations' First Amendment challenge to a government compulsion of speech because "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution"). One important caveat is the right of people under the federal government's control on foreign soil to at least some constitutionally guaranteed procedural protections. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 484 (2004) (finding federal court jurisdiction over habeas corpus petitions of noncitizen military combatants imprisoned at Guantanamo Bay).

[91] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (affirming the government's power to deny a visa based on the applicant's political speech). *See generally* Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 1988 IMMIGR. & NAT'Y L. REV. 217 (1987) (detailing the government's sweeping authority to deny entry based on applicants' political ideology).

[92] *See* Faiza Patel, Rachel Levinson-Waldman, Raya Koreh & Sophia DenUly, *Report: Social Media Monitoring,* BRENNAN CTR. FOR JUST. (Mar. 11, 2020), https://www.brennancenter.org/our-work/research-reports/social-media-monitoring (documenting and criticizing government monitoring of social media content, including border searches).

[93] *See Mandel*, 408 U.S. at 754 (identifying the constitutional issue as whether ideological exclusions of noncitizens "deprive *American citizens* of freedom of speech guaranteed by the First Amendment" (emphasis added)); *see also* ZICK, *supra* note 58, at 126–29 (elaborating on U.S. citizens' benefits from hearing the speech of "alien visitors").

the United States but also ideological exclusions of noncitizens who want to enter.

Recognizing noncitizens' paradigmatic right to First Amendment protection from legal retaliation against their political speech would have crucial resonance for other political dissenters and protesters. Immunizing dissent and protest even from the federal government's ordinarily potent authority to regulate entry and presence in the country would leave no doubt about citizen dissenters' constitutional security. The Supreme Court could no longer justify treating political dissidents as irritating deviants from a respectable social order. Instead, First Amendment doctrine would have to recuperate and contemporize its long-lost commitment to protecting political speakers who "differ as to things that touch the heart of the existing order."[94]

B. SPENDING IN ELECTION CAMPAIGNS

The Roberts Court has lavished more First Amendment attention by far on the right to spend money in elections than on any other form of expressive freedom.[95] One of this Court's most important electoral speech decisions, and certainly its most notorious, is *Citizens United v. FEC*.[96] The majority in that case struck down a long-standing federal bar on independent expenditures in federal elections by campaigns and unions.[97] The *Citizens United* Court strongly condemned laws that discriminate between or among different kinds of speakers, as distinct from the more familiar presumption against laws that discriminate between or among different ideas.[98] Commentators who care about inclusive political debate and broadly responsive government have condemned *Citizens United*, and the Roberts Court's campaign finance jurisprudence generally, for privileging wealthy and powerful speakers' efforts to influence politics and society.[99]

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[94] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[95] *See supra* note 24 and accompanying text.

[96] 558 U.S. 310 (2010).

[97] *See id.* at 365.

[98] *See id.* at 340–41 (discussing discrimination among speakers); *cf.* Reed v. Town of Gilbert, 576 U.S. 155, 163–68 (2014) (striking down a municipal sign ordinance because it impermissibly distinguished among signs based on their contents).

[99] *See generally* TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION (2014); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY

Some champions of noncitizens' First Amendment rights, however, have seen strategic opportunity in *Citizens United*. Even prior to the Roberts Court's string of electoral speech decisions, advocates for noncitizens' rights invoked earlier First Amendment cases that protected audiences' supposed interest in hearing what corporate speakers have to say.[100] *Citizens United*, by emphasizing the "speaker discrimination" principle, seemed to strengthen the parallel. If the First Amendment bars government from discriminating categorically against corporate speakers, then it must also bar government from discriminating categorically against noncitizen speakers.[101] In particular, *Citizens United* appeared to implicate the long-standing federal prohibition on electoral campaign contributions and expenditures by noncitizens other than lawful permanent residents.[102] The decision's logic seemed to mandate letting noncitizens, just like corporations, spend as they wished to promote their views and interests in election campaigns.

However, invoking *Citizens United* to support protection for noncitizens' speech runs into two difficulties. First, the Roberts Court has shown no interest in applying First Amendment principles consistently to protect the powerful and powerless alike. Rather, the present Court in any given case simply invokes whatever principle serves to justify protecting the powerful. The federal spending bar struck down in *Citizens United* applied to unions as well as corporations. Labor advocates duly argued that the decision should portend heightened protection for unions' expressive freedom.[103] The Roberts Court, however, soon turned its attention to a well-settled doctrine that used the First Amendment to limit unions' speech[104]—which the Court condemned as

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CORRUPTS CONGRESS – AND A PLAN TO STOP IT (2011); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* (2014).

[100] *See* Cole, *supra* note 41, at 376–77 ("If protecting corporate speech is essential to preserving a robust public debate, so too is protecting noncitizens' speech.").

[101] *See* Kagan, *supra* note 3, at 1270–78 (arguing that the *Citizens United* rule against speaker discrimination should extend from corporations and unions to noncitizens).

[102] 52 U.S.C. § 30121(a) (prohibiting foreign nationals from contributing or spending in connection with federal, state, and local elections).

[103] *See generally* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800 (2012); Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011).

[104] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977) (imposing First Amendment limits on public sector unions' use of agency fees paid by nonunion workers).

intolerably *favorable* to unions.[105] In a similar fashion, the Court reflexively crushed any optimism about noncitizens' right to spend in elections by summarily affirming a lower court decision that the federal ban on noncitizens' electoral spending survived *Citizens United*.[106]

The second problem with relying on *Citizens United* to support noncitizens' expressive freedom runs deeper. *Citizens United*, in my view, clashes fundamentally with any concern for the First Amendment rights of noncitizens and other socially and politically marginal speakers. The *Citizens United* majority showed its true colors when it stressed the importance of protecting corporations as "the voices that best represent the most significant segments of the economy."[107] *Citizens United* prioritizes the speech rights of wealthy speakers because they're wealthy, of powerful speakers because they're powerful, and of mainstream speakers because they're mainstream. One could hardly imagine a First Amendment doctrine that more thoroughly undercut the idea, central to First Amendment law before 1970, that marginal, underfunded speakers deserve paramount protection. *Citizens United*, in short, embodies priorities and values antithetical to strong free speech rights for noncitizens.

In a reformulated First Amendment regime that made noncitizens' expressive freedom central rather than tangential, one that claimed for noncitizens the First Amendment's bounty rather than its table scraps, *Citizens United* would be one of the first cases tossed into the legal dumpster.[108] The precedent that *Citizens*

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[105] *See* Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (overruling *Abood* and holding that the First Amendment wholly bars public sector unions from collecting agency fees from nonmembers).

[106] *See* Bluman v. Fed. Election Comm'n, 800 Fed. Supp. 2d 281, 289 (D.D.C. 2011) ("[I]n our view, the majority opinion in *Citizens United* is entirely consistent with a ban on foreign contributions and expenditures."), *aff'd mem.*, 565 U.S. 1104 (2012). Professor Kagan, in suggesting the utility of *Citizens United* for noncitizens' First Amendment rights, acknowledges *Bluman* as an obstacle and calls for the Court to overrule it. *See* Kagan, *supra* note 3, at 1277–78.

[107] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 257–58 (2003) (opinion of Scalia, J.)).

[108] The nominal outcome in *Citizens United*, upholding a nonprofit political advocacy group's right to spend money to express its views, seems to me fully consistent with a First Amendment doctrine that treats noncitizens as paradigmatic speakers. *See id.* at 319–20 (describing the Citizens United organization and its political activities). The problem lies with the decision's reasoning and broader holding.

United most aggressively overruled had let governments check the disproportionate electoral influence of concentrated capital.[109] Noncitizens—disproportionately poor, afflicted by identity-polarized discourse, and denied the vote—benefit from such a check. Noncitizens bear little resemblance to business corporations. They are natural persons, distinguished by their physical presence in the United States, and motivated by human needs and aspirations rather than profit motives. The First Amendment should not help wealthy, powerful speakers drown out and politically subjugate the sorts of marginalized speakers that noncitizens exemplify.

Centering noncitizens' free speech rights would require letting noncitizens spend money in elections on equal terms with citizens. A noncitizen-centered First Amendment would recognize the government's authority to impose reasonable restraints on electoral money, subject to something like intermediate constitutional scrutiny, as long as those restraints applied without regard to citizenship status. First Amendment doctrine should amplify noncitizens' expressions of their aspirations and challenges as outsiders looking in at the U.S. political process and should help fulfill citizens' obligation to hear noncitizens' voices. The government would remain free to restrict electoral influence by such foreign entities as governments and corporations without similarly restricting comparable domestic entities. Our 2016 election, among its other harsh lessons, showed the harm that foreign governments and institutions can cause to our politics.[110] Noncitizens embody an opposite, valid form of "foreign influence." People who live, work, and learn alongside U.S. citizens, whose stake in our nation's success grows with every day they spend inside our borders, and who don't get to vote should get to use their resources to advance their political interests.

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[109] *See* Austin v. Mich. Chamber of Com., 494 U.S. 652, 658–59 (1990) (recognizing a compelling government interest in preventing abuse of the corporate form to influence elections).

[110] *See generally* ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019), https://www.justice.gov/archives/sco/file/1373816/download. The First Amendment regime I propose here does not resolve the difficult question whether, and to what extent, the government should restrict financial participation in elections by all nonresident foreign nationals. *See* ZICK, *supra* note 58, at 155–56 (positing the political benefits of "cross-border conversation" and urging rigorous judicial scrutiny of legal constraints on electoral participation by foreign nationals).

V. CONCLUSION

Present First Amendment doctrine fails to protect the speech that most needs protecting. Courts and our broader societal conversation get free speech priorities backwards. We grant boundless solicitude to the speech interests of commercial advertisers, wealthy election spenders, and mainstream advocates for popular causes. Then, every once in a while, we spare a passing thought for the speech interests of identity minorities, political dissenters, and social outcasts. As for noncitizens, we can't be bothered even to settle the extent to which they get First Amendment protection at all. That needs to change. Noncitizens should get as much First Amendment protection as anyone else, most obviously because their speech interests matter as much as anyone else's but also because centering noncitizens' free speech would do wonders for First Amendment law's overall good sense. We can realize the First Amendment's promise as a vehicle for collective engagement and political change only if, first, free speech law recommits to the venerable goal of giving voice to the voiceless and, second, the rest of us actually listen to what those voices say. Centering noncitizens' free speech would provide a sure compass for setting that positive course.