



2019

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Recommended Citation

Vanessa Canuto, *Immigrants are "People" Too: Constitutionalizing Free Speech Protections for Undocumented Immigrants*, 17 FIRST AMEND. L. REV. 403 (2022).

Available at: <https://scholarship.law.unc.edu/falr/vol17/iss3/3>

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IMMIGRANTS ARE “PEOPLE” TOO: CONSTITUTIONALIZING FREE SPEECH PROTECTIONS FOR UNDOCUMENTED IMMIGRANTS

Vanessa Canuto*

INTRODUCTION

Imagine being a child trapped in a warehouse without your parents, no one to comfort you, and no knowledge of where your family is.¹ Some children are forced to endure this at a young age, but most people cannot fathom the thought. This unfortunate reality is what the U.S. Border Patrol has been ordered to do to hundreds of children who are undocumented or have undocumented parents.² These children are put inside a cage with about twenty other children and are given scattered bottles of water, bags of chips, and foil sheets to use as blankets.³ Further, these children are forced to look out for each other because the Border Patrol officials do not take care of them, not even the youngest children who cannot fend for themselves.⁴ A sixteen-year-old girl described taking care of a younger two-year-old girl for three days, even changing her diaper, despite not being related to her.⁵ As a result of U.S. Border Patrol actions, children are suffering from extreme trauma because they are being torn apart from their parents with no idea if or when they will ever be reconnected.⁶ Although the Obama Administration also deported undocumented immigrants, the separation of these children from their families is a direct result of the “zero

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¹ See Associated Press, *Separation at the Border: Children Wait in Cages at South Texas Warehouse*, GUARDIAN (June 17, 2018, 5:22 PM), <https://www.theguardian.com/us-news/2018/jun/17/separation-border-children-cages-south-texas-warehouse-holding-facility> (describing the caging of children of undocumented parents with pictures showing children and adults trapped in separate cages inside a warehouse).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

tolerance” policy put in place by the Trump Administration.⁷ Now who will speak for these children?

The media has had marginal success speaking for these children. After the massive news media coverage and backlash to these children’s circumstances,⁸ President Donald Trump signed an executive order reversing the Administration’s policy of separating families.⁹ Under Trump’s new policy, families are detained together, meaning that children and parents are kept in the same cage.¹⁰ This new policy does not limit how long these minors are being detained, which completely disregards the legal limits on the detention of minors.¹¹ Furthermore, the children that were already separated from their families under the earlier policy are not guaranteed to be reunited with their parents, and those who will be reunited will undergo an estimated two-month long process.¹² Also, children are not safe while they remain detained. Two children, as of January 14, 2019, have died while in the custody of the U.S. Border Patrol, due to extensive

⁷ Memorandum for Federal Prosecutors Along the Southwest Border, Office of the Attorney General (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> (informing all U.S. Attorney offices in the Southwest Border of the United States of the new mandated “zero-tolerance policy”); Press Release, Dep’t of Justice, Office of Pub. Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> (“To those who wish to challenge the Trump Administration’s commitment to public safety, national security, and the rule of law, I warn you: illegally entering this country will not be rewarded, but will instead be met with the full prosecutorial powers of the Department of Justice.”); see Associated Press, *supra* note 1. See also Brian Naylor, *Fact Check: Trump Wrongly States Obama Administration Had Child Separation Policy*, NAT’L PUB. RADIO (Apr. 9, 2019, 2:46 PM), <https://www.npr.org/2019/04/09/711446917/fact-check-trump-wrongly-states-obama-administration-had-child-separation-policy>.

⁸ See David A. Graham, *Are Children Being Kept in ‘Cages’ at the Border?*, ATLANTIC (June 18, 2018), <https://www.theatlantic.com/politics/archive/2018/06/ceci-nest-pas-une-cage/563072/>; Jacob Soboroff, *Kids in Cages and Other Scenes from Trump’s ‘Zero-Tolerance’ Border*, VANITY FAIR (June 22, 2018, 3:01 PM), <https://www.vanityfair.com/news/2018/06/scenes-from-trumps-zero-tolerance-border>; Associated Press, *As Outrage Over Caged Children Rises, Trump Blames Dems, Hopes to Force Funding for Wall*, NOLA (June 18, 2018), https://www.nola.com/national_politics/2018/06/as_outrage_over_caged_children.html; Emily Stewart, *The Past 72 Hours in Outrage over Trump’s Immigrant Family Separation Policy, Explained*, VOX (June 18, 2018, 2:30 PM), <https://www.vox.com/2018/6/18/17475292/family-separation-border-immigration-policy-trump>.

⁹ Proclamation No. 13841, 83 Fed. Reg. 29435 (June 20, 2018); see Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and ‘Zero Tolerance’ at the Border*, NAT’L PUB. RADIO (June 19, 2018, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> (discussing the negative effects of the Trump Administration’s strict immigration policy on thousands of families who cross the border).

¹⁰ Domonoske & Gonzales, *supra* note 9.

¹¹ *Id.*

¹² *Id.*

dehydration, shock, and sickness from nausea, vomiting, and fever.¹³

Meanwhile, the powerful voice of the undocumented immigrant community fears speaking out, out of fear of retaliation. The millions of undocumented immigrants watching these policies unfold have received the message that they should fear detention by Immigration and Customs Enforcement (ICE), and that their own children may suffer these traumatic situations. Undocumented immigrant advocates who want to speak up to stop the caging of children, must weigh their risk of potential deportation. These advocates are prevented from speaking due to their immigration status and fearing Trump’s retaliatory deportations.¹⁴ As a consequence, potential speakers who want to use their voices in protest are chilled from doing so.¹⁵ The public misses out on undocumented immigrants’ unique and valuable viewpoints, which is unconscionable because the First Amendment protects not only a speaker’s rights, but the public’s right to hear speech.¹⁶

Thus, retaliatory deportations must be barred. Undocumented immigrant speakers must be guaranteed First Amendment protections. Otherwise, the United States will chill undocumented immigrants into silence and hiding in the Land of Opportunity.¹⁷

This Note will implore the Supreme Court to establish a clear precedent that undocumented immigrants are included within the meaning of “the people” under the First Amendment and guaranteed Free Speech protections. Part I highlights the history of various administrations using deportation to target immigrant communities and chill them into silence. Part II emphasizes that the Trump Administration’s retaliatory deportations targeting undocumented immigrant speakers are far harsher than any administration in history, which results in a silencing effect on undocumented immigrants. Part III

¹³ See Mona Chalabi, *How Many Migrant Children Are Detained in U.S. Custody?*, GUARDIAN (Dec. 22, 2018, 1:00 AM), <https://www.theguardian.com/news/datablog/2018/dec/22/migrant-children-us-custody>; Samantha Putterman, *No, 18 Children Didn’t Die in U.S. Border Protection Custody Under Obama*, POLITIFACT (Jan. 2, 2019, 3:33 PM), <https://www.politifact.com/facebook-fact-checks/statements/2019/jan/02/blog-posting/no-18-children-didnt-die-us-border-protection-cust>.

¹⁴ See John Burnett, *Immigration Advocates Warn ICE Is Retaliating for Activism*, NAT’L PUB. RADIO (Mar. 16, 2018, 10:29 AM), <https://www.npr.org/2018/03/16/593884181/immigration-advocates-warn-ice-is-retaliating-for-activism>.

¹⁵ *Id.*

¹⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); Rebecca Heilweil, *The First Amendment: A Right to Listen*, PENN. UNDERGRADUATE L.J. (Oct. 18, 2014), <https://www.pulj.org/the-roundtable/the-first-amendment-a-right-to-listen>.

¹⁷ See Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 29 (2013).

summarizes existing First Amendment speech protections. Part IV reveals that various constitutional amendments already protect undocumented immigrants within the meaning of “the people.” Part V argues that, in light of existing protections under other Amendments and the urgent need for undocumented immigrant advocates, the Court needs to extend Free Speech protections to undocumented immigrants.

I. RETALIATORY DEPORTATIONS DID NOT ORIGINATE WITH PRESIDENT TRUMP

Various administrations have placed limitations upon undocumented immigrants through threats of deportation. Throughout history, retaliatory deportations have been used as a mechanism to silence undocumented immigrants.¹⁸ Predominantly, deportations are used to prevent undocumented immigrants from exercising their First Amendment rights. Deportation is purposefully used to prevent certain ideas from infiltrating the minds of Americans to encourage political change.¹⁹ Limiting undocumented immigrants’ First Amendment rights originated from the fear that imported ideas, such as communist ideologies, would corrupt the United States government.²⁰ As the United States continued to grow in 1861 and reach international trade markets, there was a corresponding rise in migrant workers entering the country.²¹ The government felt a need to regulate the ideas that were entering the country and regulate the border with increased vigilance.²²

Since the Civil War, the United States increased its economy by trading with various regions around the world such as Europe, Mexico, and Asia.²³ The trade relationships with these regions in turn benefitted the sustainability and growth of the industrial, agricultural, and geographic sectors.²⁴ However, along with the constant trade between these regions came the increased potential of importing the social movements and

¹⁸ DEIRDRE M. MOLONEY, NATIONAL INSECURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882 165 (2012) (“The federal deportation mechanism became an effective strategy for curtailing the importation of ideas and activists who worked on behalf of the grass-roots social or political change.”). *See generally* Marc Edward Jácome, *Deportation in the United States: A Historical Analysis and Recommendations*, 12 MICH. J. PUB. AFF. 22 (2015).

¹⁹ MOLONEY, *supra* note 18, at 165.

²⁰ *Id.* at 163.

²¹ *Id.* at 163–65.

²² *Id.* at 165.

²³ *Id.*

²⁴ *Id.*

ideologies from these areas.²⁵ In an effort to prevent political, religious, labor or economic ideologies from other countries around the world from taking hold in the United States, the deportation of immigrant activists became the government’s solution.²⁶

As a result, during the post-World War I Red Scare, the United States government vigorously attacked ideas that appealed to any form of communism, socialism, and labor radicalism with immediate deportation.²⁷ However, these radical ideologies that the federal government perceived as threatening to the democratic ideals of the United States were not the sole reason for the deportation of immigrant activists.²⁸ Immigrant activists who advocated for economic and racial justice were also viewed as undermining and threatening the ideals of American society.²⁹ Further, the federal government utilized deportations as a tool to prevent the promotion of a variety of ideals within the United States, including ideals that benefitted the equality of many Americans.³⁰

Moreover, ideological beliefs were not the only type of threat that past presidents used to justify enforcing retaliatory deportations. President Herbert Hoover used the rhetoric of “American jobs for real Americans” to deport one million Mexican immigrants and Mexican-Americans.³¹ President Hoover emphasized that Mexicans were not “real Americans” based on their nationality and used this rhetoric to enforce their exclusion, with the added component that they were taking jobs away from American citizens.³² He secured support for these massive deportations because he instilled in the American public the idea that Americans were competing for jobs with people who did not deserve them, were illegally in the country, and were not even American.³³ Mexican immigrants were deported in

²⁵ *Id.*

²⁶ *Id.* (“Deporting immigrant activists became an important capability of the bureaucratic infrastructure to monitor and control immigration.”).

²⁷ *Id.* at 196; see History.com Editors, *Palmer Raids*, HISTORY, <https://www.history.com/topics/red-scare/palmer-raids> (last updated Aug. 21, 2018).

²⁸ MOLONEY, *supra* note 18, at 196.

²⁹ *Id.*

³⁰ *Id.* at 165. See generally Jácome, *supra* note 18.

³¹ Diane Bernard, *The Time a President Deported 1 Million Mexican Americans for Supposedly Stealing U.S. Jobs*, WASH. POST (Aug. 13, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/08/13/the-time-a-president-deported-1-million-mexican-americans-for-stealing-u-s-jobs/?noredirect=on&utm_term=.67ed085adb8a; S.B. 670, 109th Gen. Assemb., Reg. Sess. (Cal. 2005), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200520060SB670 (enacting the “Apology Act for the 1930s Mexican Repatriation Program”).

³² Bernard, *supra* note 31.

³³ *Id.*

inhumane ways resembling Holocaust transportation methods.³⁴ These actions were reinforced by the federal government, which prevented local communities from stopping these deportations.³⁵ The government decided the individuals most effected by the Great Depression were not going to be Americans, but rather the easiest and most vulnerable targets, Mexican immigrants.³⁶ Retaliatory deportations of Mexican individuals was deemed a plausible solution enacted by the federal government during the Great Depression.³⁷

Deportations created a fear among the immigrant community and showed the power of the federal government to eliminate any type of dissent or backlash against the government.³⁸ Also, deportations were used to eradicate and remove, in massive numbers, immigrants the government viewed as interfering with the economic success of the American people.³⁹ The reasoning behind the exile of these immigrant groups and activists varied such that it could be due to simply their presence in the United States or based on sharing their beliefs for political change.⁴⁰ Deporting immigrant activists displayed a clear denial of any First Amendment protections because their ability to exercise their free speech was impaired and chilled by the retaliation exercised against them.⁴¹

Free speech is meant to protect both unpopular speech and speech that is critical of the government without repercussions.⁴² While the retaliations and unconstitutional treatment of these immigrant activists was recognized by legal activists such as Louis Post and Carol Weiss King, no effective change resulted because of the established power that Edgar

³⁴ *Id.* (“[L]ocal law enforcement rounded up people in parks, hospitals, markets and social clubs, crammed them onto chartered trains and deposited them across the border.”).

³⁵ *Id.*

³⁶ *Id.* (“‘Around the country, Mexicans were scapegoated for the bad economy and became victims of cruel dilemmas,’ said Francisco Balderrama, professor emeritus of history and Chicano studies at California State University at Los Angeles.”).

³⁷ *Id.*; see also Yuning Wu, *Chinese Exclusion Act*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Chinese-Exclusion-Act> (last updated May 12, 2017) (highlighting that Mexicans have not been the only nationality to suffer from racialized immigration and detention, and pointing out that “[t]he passage of the [Chinese Exclusion Act of 1882] represented the outcome of years of racial hostility and anti-immigrant agitation . . . [and] set the precedent for later restrictions against immigration of other nationalities, and started a new era in which the United States changed from a country that welcomed almost all immigrants to a gatekeeping one.”).

³⁸ MOLONEY, *supra* note 18.

³⁹ Bernard, *supra* note 31.

⁴⁰ See MOLONEY, *supra* note 18; see also Bernard *supra* note 31.

⁴¹ MOLONEY, *supra* note 18, at 197.

⁴² See *Know Your Rights*, *infra* note 63.

Hoover set of the federal government.⁴³ Past presidential actions are an indicator that deportations against undocumented immigrants for their activist efforts has been a trend used to prevent their voices from being heard.⁴⁴ The threat to undocumented immigrants’ constitutional rights, specifically their First Amendment rights, did not originate from Trump’s retaliatory deportations.⁴⁵ However, Trump is using a similar rhetoric that previous presidents have used when immigrants criticize the government to justify their deportation, but to a more severe scale than before. He has tactfully distinguished the undocumented immigrant population as dangerous criminals that must be deported because they threaten the safety of the American people.⁴⁶ This section has demonstrated that the use of the threat of deportation against undocumented immigrants throughout American history is consistent with the current rhetoric used to enforce retaliatory deportations under the Trump Administration. Furthermore, this indicates how deportations serve as a tool for limiting undocumented immigrants’ free speech protections because of the repercussions they can potentially face for criticizing the government.

II. CURRENT EVENTS: A DISTURBING PATTERN OF RETALIATORY DEPORTATIONS

Current events highlight the threat of deportation to undocumented immigrant activists. Since 2016, the beginning of the Trump Administration, undocumented immigrants—even those with no criminal background—have been targeted and deported by ICE at incredibly high levels.⁴⁷ The rise in

⁴³ MOLONEY, *supra* note 18, at 197 (“Edgar Hoover’s determination to eradicate political radicalism, combined with his unchecked use of intimidation and success in increasing the scope and power of the FBI, limited the efficacy [of those who argued against denying the constitutional rights of undocumented immigrants].”).

⁴⁴ See MOLONEY, *supra* note 18.

⁴⁵ Bernard, *supra* note 31.

⁴⁶ Philip Bump, *That Anti-Immigrant Ad Is the Essence of the Donald Trump Presidency* (Nov. 1, 2018), https://www.washingtonpost.com/politics/2018/11/01/that-anti-immigrant-ad-is-essence-donald-trump-presidency/?noredirect=on&utm_term=.29d5e0317a63.

⁴⁷ See Tal Kopan, *How Trump Changed the Rules to Arrest More Non-Criminal Immigrants*, CNN (Mar. 2, 2018, 9:20 AM), <https://www.cnn.com/2018/03/02/politics/ice-immigration-deportations/index.html> (explaining that the Trump Administration’s strict immigration policy is responsible for deporting individuals who have been living in the United States for more than a decade, who have reported to immigration officials regularly, and are of no threat to their community); see also Kristen Bialik, *Most Immigrants Arrested by ICE Have Prior Criminal Convictions, A Big Change from 2009*, PEW RES. CTR. (Feb. 15, 2018), <http://www.pewresearch.org/fact-tank/2018/02/15/most-immigrants-arrested-by-ice-have-prior-criminal-convictions-a-big-change-from-2009/> (“While ICE arrests overall rose from 2016 to 2017, arrests for those without prior convictions drove the increase. The number of arrestees

deportations is a direct result of the tougher and broader enforcement of immigration laws against non-criminal immigrants.⁴⁸ Prior administrations prioritized deporting undocumented immigrants who commit crimes, but the Trump Administration now allows ICE officials to remove any undocumented immigrant.⁴⁹ “In Trump’s first year as president, U.S. Immigration and Customs Enforcement arrested 109,000 criminals and 46,000 people without criminal records—a 171% increase in the number of non-criminal individuals arrested over 2016.”⁵⁰ Hence, with the rise of non-criminal deportations, the Trump Administration has made it clear that every undocumented person in the country is not safe or exempt from deportation enforcement.⁵¹

As a result of the rise of massive deportations of undocumented immigrants, arrests and threats of deportation to immigrant activists specifically for their activist efforts have escalated.⁵² According to the American Civil Liberties Union, over two dozen cases have been reported regarding immigrant activists and volunteers being arrested and fined or threatened with deportation for their activist efforts.⁵³ The leaders of Migrant Justice, a non-profit organization that advocates for dairy workers in Vermont, reported that six of their primary undocumented immigrant activists were arrested and faced deportation despite not having any criminal records.⁵⁴ The pattern of retaliatory deportations under the Trump Administration as a consequence for undocumented immigrants

without known convictions increased 146% . . . compared with a 12% rise among those with past criminal convictions.”).

⁴⁸ Kopan, *supra* note 47.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Burnett, *supra* note 14.

⁵³ *Id.*

⁵⁴ *Id.* See also Muzzaffar Chishti & Michelle Mittlestady, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?*, MIGRATION POL’Y INST. (Nov. 2016), <https://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal> (undocumented immigrants with criminal records are typically the priority for removal by the Department of Homeland Security but that is dependent upon which crimes are the priority of the President); Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (memorandum informing government officials under the Obama Administration of the three different levels of priority for immigration enforcement practices, prioritizing those with felony convictions. The undocumented immigrants who were regarded as the “highest priority to which enforcement resources should be directed,” specifically included those “engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security; convicted of an offense for which an element was active participation in a criminal street gang . . . convicted of an offense classified as a felony . . .”).

speaking out against harsh government immigration policies has even resulted in international backlash.⁵⁵ The United Nations’ Office of Human Rights has called attention to the United States government to prevent them from continuing to attack undocumented immigrants through retaliatory deportations.⁵⁶

Maria Mora-Villalpando, an undocumented immigrant activist, is a prime example of an activist being targeted and threatened with retaliatory deportation.⁵⁷ Despite living in the United States for twenty-two years and meeting with federal officials under the Obama Administration, she was still threatened with deportation by ICE officials.⁵⁸ Throughout her time in the United States she has helped organize various protests and publicize detainees’ hunger strikes across Washington state.⁵⁹ Individuals facing deportation at the Northwest Detention Center protested the need for expedited court hearings and access to mental and physical healthcare while being detained in a well-publicized hunger strike organized by Mora-Villalpando.⁶⁰ Mora-Villalpando explains that the threat of her deportation was a way for ICE to intimidate her into stopping her advocacy work.⁶¹ Furthermore, Mora-Villalpando has no criminal record to sustain her being threatened with deportation.⁶²

The United States, as a democratic society, guarantees free speech protection in the First Amendment as a check on the government’s power to silence unpopular speech.⁶³ In an attempt

⁵⁵ See Burnett, *supra* note 14 (stating that the deportation threats of highly recognized undocumented immigrant activists have resulted in international attention, including the United Nations Office of Human Rights, whose experts are concerned with the continuation of retaliatory deportations).

⁵⁶ *Id.*

⁵⁷ See David Weigel & Maria Sacchetti, *ICE Has Detained or Deported Prominent Immigration Activists*, WASH. POST (Jan. 19, 2018), https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87_story.html?noredirect=on&utm_term=.71ff1f05af62.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Mike Carter, *Hunger Strike at Tacoma Immigration Detention Center Grows to 750, Activist Says*, SEATTLE TIMES (Apr. 13, 2017, 8:26 PM), <https://www.seattletimes.com/seattle-news/hunger-strike-at-tacoma-immigration-detention-center-growing-activist-says/>; Sydney Brownstone, *Immigrant Advocates Will Take Up Hunger Strike To Protest Treatment Inside the Northwest Detention Center*, THE STRANGER (June 19, 2017, 12:28 PM), <https://www.thestranger.com/slog/2017/06/19/25225363/immigrant-advocates-will-take-up-hunger-strike-to-protest-treatment-inside-northwest-detention-center>.

⁶¹ Burnett, *supra* note 14.

⁶² *Id.*

⁶³ See *Know Your Rights: Free Speech, Protests & Demonstrations*, ACLU, <https://www.aclunc.org/our-work/know-your-rights/free-speech-protests-demonstrations> (last visited May 7, 2019) (“The First Amendment protects your right to express your opinion, even if it’s unpopular. You may criticize the President, the

to bring to the forefront the issue of her retaliatory deportation threat by ICE officials, Mora-Villalpando filed a civil suit against ICE with the help of the National Immigration Project of the National Lawyers Guild.⁶⁴ To limit the reach of Mora-Villalpando's suit, ICE filed a motion to strike several paragraphs from the complaint.⁶⁵ These paragraphs included information on ICE's past detention of immigrant activists, the public's mistrust of ICE, and the government punishing individuals for practicing free speech.⁶⁶ Also, Mora-Villalpando's Notice to Appear in immigration court specifically stated that the basis of her removability was a direct result of "extensive involvement with anti-ICE protest and Latino advocacy programs."⁶⁷ Ultimately, the United States District Court for the Western District of Washington denied ICE's attempts to strike the paragraphs from the complaint.⁶⁸ The court found the paragraphs crucial to the "public interest in disclosing alleged government impropriety."⁶⁹

The policy moving forward, based on the patterns of arrest under the Trump Administration, is that if an undocumented immigrant chooses to speak out against the current government they will be arrested and threatened with deportation.⁷⁰ This leaves undocumented immigrant activists who want to remain in the United States with two options. The first option is protest abusive practices of the government, which risks deportation.⁷¹ The second option is to silently witness the mistreatment of undocumented immigrants across the country as a result of the fear of deportation and detention of their children.⁷² This situation shows an urgent need for the Supreme Court to create a clear judicial precedent protecting the free speech rights of undocumented immigrants. Without this constitutional protection, the only two choices that undocumented immigrants have severely deprives them of the opportunity to speak out and demand the government's attention

Congress, or the chief of police without fear of retaliation."); ACLU, *Free Speech*, <https://www.aclu.org/issues/free-speech> (last visited May 7, 2019).

⁶⁴ See *Mora-Villalpando v. United States Immigration & Customs Enf't*, No. C18-0655JLR, 2018 WL 353674, at 3 (W.D. Wash. July 23, 2018) (explaining the denial of ICE's motion to strike the information from Mora-Villalpando's complaint).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 5 ("Because the challenged paragraphs . . . 'might bear on an issue in the litigation'—specifically the applicability of FOIA exemptions . . . the court denies the Defendants' motion.").

⁶⁹ *Id.*

⁷⁰ See Burnett, *supra* note 14.

⁷¹ Weigel & Sacchetti, *supra* note 57.

⁷² *Id.*

to protect their human rights.⁷³ The current rise in threats of deportation to undocumented immigrants under the Trump Administration have left them more susceptible to human rights violations.⁷⁴

III. EXISTING FREE SPEECH PROTECTIONS

The First Amendment mandates that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”⁷⁵ The power of the First Amendment is unmatched and carries unprecedented power as the amendment that allows for the marketplace of ideas.⁷⁶ A democracy stems from the need to be able to express and vocalize important matters to those one seeks attention from, primarily the government.⁷⁷ The First Amendment empowers all those within the United States boundaries to express themselves as long as the expression is done in a peaceful manner, even when that speech is in disagreement with the government.⁷⁸

The marketplace of ideas that Justice Holmes espoused is a foundational concept of First Amendment philosophy in the

⁷³ *Human Rights and Immigration*, ACLU, <https://www.aclu.org/issues/human-rights/human-rights-and-immigration> (last visited May 7, 2019).

⁷⁴ See e.g., Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html>; ACLU, FREEZING OUT JUSTICE: HOW IMMIGRATION ARRESTS AT COURTHOUSES ARE UNDERMINING THE JUSTICE SYSTEM 1 (2018), <https://www.aclu.org/report/freezing-out-justice> (“The presence of these officers and increased immigration arrests have created deep insecurity and fear among immigrant communities, stopping many from coming to court or even calling police in the first place.”).

⁷⁵ U.S. CONST. amend. I.

⁷⁶ See generally Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 46.

⁷⁷ Stewart Jay, *The First Amendment: The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WILLIAM MITCHELL L. REV. 773, 776 (2008) (explaining that freedom of speech and expression are “the wheels of democracy by providing citizens the knowledge with which to govern themselves; free expression thus checks against government abuse” and “free speech serves the indispensable end of developing self-restraint in society”); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263 (“[T]he people need free speech because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others.”).

⁷⁸ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992) (“Government may not regulate [speech] based on hostility, or favoritism, towards a nonproscribable message they contain.”); *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (holding that the California statute that prohibited the display of a red flag as a sign in opposition of the government was unconstitutional because it was too vague and included in it peaceful and legal speech protected by the First Amendment).

United States.⁷⁹ It allows people from diverse perspectives, or on opposite sides of the political spectrum, to express their ideas.⁸⁰ All ideas, even those criticizing the government, are permitted to be heard unless the ideas pose an imminent threat that in order to “save the country” they are absolutely necessary to interfere with.⁸¹ Justice Holmes expressed that the Constitution was built upon the notion that the ability to express all ideas should not be limited unless under extreme circumstances.⁸² Thus, undocumented immigrants peacefully protesting the government to demand better human rights and immigration policies should be able to do so without facing the threat of deportation. This threat chills immigrants’ ability to speak and as a result, immigrants need the protection of the First Amendment.

Further, the Fourteenth Amendment protects undocumented immigrants’ right to a free public education simply by being within the territorial boundaries of the United States, regardless of their legal status, and affords them the equal protection of the laws of the State.⁸³ Since the First Amendment is incorporated to the States under the Fourteenth Amendment, undocumented immigrants should also be protected under the First Amendment to prevent chilling their speech.⁸⁴

If undocumented immigrants continue to be punished for publicly speaking their truth and demanding to be treated humanely, and not caged like animals, then it goes against the fundamental idea behind the First Amendment that Justice Holmes expressed as the importance of the marketplace of ideas. Retaliatory deportations prevent undocumented immigrants from contributing to the marketplace of ideas and suppress their speech, including speech that would address the injustice of their deportations. Undocumented immigrants will be less likely to speak up and demand that their ideas be heard because of the fear of not only jeopardizing themselves, but also their families.⁸⁵

⁷⁹ Blasi, *supra* note 76, at 46.

⁸⁰ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

⁸⁴ See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Jones v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006) (“The Supreme Court has declared that the First Amendment protects political demonstrations and protests—activities at the heart of what the Bill of Rights was designed to safeguard.”); Katie Egan, *Federal Crackdown on Immigration Activists Threatens to Chill Free Speech*, ACLU (Jan. 30, 2018, 2:00 PM), <https://www.aclu.org/blog/free-speech/rights-protectors/federal-crackdown-immigration-activists-threatens-chill-free> (discussing the negative effect of Trump’s policies on immigrant activists right to free speech).

⁸⁵ See e.g., Vivian Yee, *Immigrants Hide, Fearing Capture on ‘Any Corner’*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html> (describing the massive amount of fear undocumented immigrants have as a result of the Trump Administration’s immigration policies).

Exclusion from First Amendment protection creates an underclass of people not represented within the United States. As a consequence, undocumented immigrants threatened with deportation chills immigrants’ speech because of their legal status. If undocumented immigrants are excluded from constitutional protections then the exclusion condones the abusive mistreatment of millions of people within the territorial boundaries of the United States.⁸⁶ By virtue of being within the United States, they deserve protection, especially since criminal punishments do not distinguish individuals based on their legal status.⁸⁷ Undocumented immigrants will continue to be exploited if they are not guaranteed the ability to express their ideas with protection from retaliation. Justice Holmes’ dissent in *Abrams* highlights this idea and pushes forward how important it is for all people to have the opportunity to express their ideas, not just the ideas that the government deems favorable.⁸⁸ It is important to prevent the suppression of the voices of undocumented immigrants who bring criticisms to the forefront and request change from the federal government.

Since there is no consistent interpretation of the meaning of “the people,”⁸⁹ it should be resolved in including undocumented immigrants under the First Amendment because of this amendment’s democratic importance.⁹⁰ The political climate created by the Trump Administration has made protection of undocumented immigrant speech especially critical.⁹¹ The following section will analyze the importance of the various aspects of the First Amendment that are crucial to undocumented immigrants. It will also discuss the importance of creating a clear precedent for the inclusion of undocumented

forcing immigrants to remain hidden and silent, as well as having a “real fear that their kids will get put into the foster care system”).

⁸⁶ See April Dirks, *Immigration and Sexual Abuse—Protecting Undocumented Children*, 14 SOC. WORK TODAY, Mar./Apr. 2014, at 22,

<https://www.socialworktoday.com/archive/031714p22.shtml>; THE TEXAS ADVISORY COMM’N TO THE U.S. COMM’N ON CIVIL RIGHTS, SIN PAPELES: THE UNDOCUMENTED IN TEXAS 25–33 (U.S. Gov’t Printing Off. 1980) (explaining that undocumented immigrants who suffer from abuse choose to stay silent because of the fear of deportation).

⁸⁷ *Plyler*, 457 U.S. at 215.

⁸⁸ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (“Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . .”).

⁸⁹ See *D.C. v. Heller*, 554 U.S. 570, 635 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Plyler v. Doe*, 457 U.S. 202, 211 (1982); *Matthews v. Diaz*, 426 U.S. 67, 76 (1976); *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904); Jay, *supra* note 77.

⁹⁰ See Jay, *supra* note 77.

⁹¹ Burnett, *supra* note 14.

immigrants under this protection in order to avoid an inconsistent application of First Amendment rights due to changes in presidential administrations.

A. Freedom of Speech for Everyone

The Supreme Court, although it has never explicitly ruled on whether undocumented immigrants are protected under the First Amendment, has held that the government cannot restrict speech based on the speaker's identity.⁹² As a result, the government is expressly prohibited from interfering with an individual's freedom of speech based on who he or she is.⁹³ This creates a pathway for undocumented individuals' speech to be protected based on their identity as being undocumented in the United States.⁹⁴ Identity can be inferred to encompass one's legal status and therefore cannot be used to limit what undocumented immigrants say. An individual's legal status in the United States is part of their identity, as one has to make it clear on various forms whether one is a citizen of the United States, a resident of the United States,⁹⁵ or undocumented. Because one's legal status is an identifying characteristic that is used for a variety of purposes, such as employment and college admissions, legal status is an identity that the government cannot use to interfere with individuals' freedom of speech.

In *Citizens United v. FEC*,⁹⁶ Justice Kennedy explained that it is crucial to protect corporation's free speech and that it is a clear violation of the First Amendment to restrict speech based on the identity of the speaker.⁹⁷ The importance of allowing free speech is that it is an "essential mechanism of democracy, for it is the means to hold officials accountable to the people."⁹⁸ The ability to hold the government accountable and to provide checks on government officials when the people disagree with, or are hurt by, their practices makes it even more critical for

⁹² *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 394 (2010) (Stevens, J., concurring) ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity . . .").

⁹³ See Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1240 (2016) [hereinafter Kagan, *When Immigrants Speak*].

⁹⁴ *Id.* (explaining the *Citizens United v. FEC* case in upholding the speech of individuals of differing identities and the government's inability to silence those individuals based on who they are).

⁹⁵ *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (explaining that "the people" as used in the First, Fifth, and Fourteenth Amendments extends to protect the rights of citizens and resident aliens alike).

⁹⁶ 558 U.S. 310, 394 (2010).

⁹⁷ *Id.* at 365.

⁹⁸ *Id.* at 339.

undocumented individuals’ speech to be protected.⁹⁹ Suffering from retaliatory deportations specifically has consequences to undocumented individuals based on their legal status, a part of their identity. This is a clear violation of the “essential mechanisms of democracy” that Justice Kennedy referred to.¹⁰⁰ It is a violation of the ideals of a democracy to not protect undocumented individuals.¹⁰¹ Lack of protection leaves an entire group of people unable to express their concerns relating to government action or inaction for the protection of their basic human rights.

While various immigration policies have been the subject of much debate, the surrounding dialogue of whether undocumented immigrants are protected under the First Amendment needs to consider the democratic consequence of chilling their right to freedom of speech.¹⁰² Crucially, the analysis of this issue must answer whether undocumented individuals—the group most affected by immigration policy—deserve to have their voices heard and protected when speaking on this matter, regardless of who the president is.¹⁰³ As a democratic country, “it is essential that the general public hear directly from those affected by a public policy” in order to make their most informed decision, and keep in mind the consequences that undocumented immigrants will face.¹⁰⁴ It is a constitutional wrong to punish undocumented immigrants for speaking up and using their voices in regard to policy that directly affects their lives in the United States.

⁹⁹ Kagan, *When Immigrants Speak*, *supra* note 93, at 1252 (“[T]he essence of constitutional rights is about limiting the power of government, not about determining the degree of protection owed to different people. This reframing is important because constitutional protection is typically most important for those marginalized from the national community, not those whose membership is most secure.”).

¹⁰⁰ *Id.*

¹⁰¹ See *Know Your Rights*, *supra* note 63 (advocating that free speech rights are for everyone not just U.S. citizens); Jay, *supra* note 77 (explaining how the First Amendment is crucial to the upholding of a democracy).

¹⁰² Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CALIF. L. REV. CIR. 84, 95 (2015) (discussing the impact of the broad Supreme Court rulings regarding the speaker discrimination doctrine and the policy rationale for allowing the freedom of speech protection to extend to all people in the United States).

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (“Precisely because of their location, such signs provide information about the identity of the ‘speaker’ . . . the identity of the speaker is an important component of many attempts to persuade. A sign advocating ‘Peace in the Gulf’ in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child’s bedroom window or the same message on a bumper sticker of a passing automobile.”); *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) (“Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements.”); *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 296 (1941).

Moreover, the speaker discrimination doctrine that Justice Kennedy established in *Citizens United* states that the government commits “a constitutional wrong when by law it identifies certain preferred speakers” and that if the government does, the law must pass a strict scrutiny analysis.¹⁰⁵ This doctrine is designed to protect both free speech and the speaker from discrimination based on the speaker’s identity.¹⁰⁶ The speaker discrimination doctrine is favorable to undocumented immigrants and should be embraced to uphold their ability to speak their truth and criticize the government.¹⁰⁷ Despite the fact that *Citizens United* specifically applied to corporations involved in political campaigns, the anti-discrimination doctrine should be extended to apply to undocumented immigrants.¹⁰⁸ As a result, undocumented immigrants will be protected when using free speech that will not threaten the government.¹⁰⁹ They will also bring attention peacefully to their lack of rights by preventing ICE from threatening deportation against immigrants involved in First Amendment protected activity.¹¹⁰ It is crucial right now for the applicability of this case to be expanded, but this will only occur if the Court takes a case that will directly address this issue. Unfortunately, as the Court is currently composed, it may not be likely that these protections will be extended to undocumented immigrants right now.¹¹¹

Despite the Court in *District of Columbia v. Heller*¹¹² asserting that “the people” in the Second Amendment is referring only to individuals in the political community,¹¹³ it is unrealistic and unfathomable that the First Amendment is also limited to only individuals that can vote.¹¹⁴ The idea that the meaning of “the people” is consistent throughout the Constitution has been widely debated.¹¹⁵ Rather, the meaning varies with the protection

¹⁰⁵ 558 U.S. at 340 (2010).

¹⁰⁶ *Id.* at 341.

¹⁰⁷ Kagan, *When Immigrants Speak*, *supra* note 93, at 1241.

¹⁰⁸ *Citizens United*, 558 U.S. at 394.

¹⁰⁹ Kagan, *When Immigrants Speak*, *supra* note 93, at 1239–41.

¹¹⁰ *Id.*

¹¹¹ Richard Wolf, *Supreme Court's Actions on Transgender Troops, Gun Rights, Public Prayer Signal Conservative Trend*, USA TODAY (Jan. 23, 2019), <https://www.usatoday.com/story/news/politics/2019/01/23/supreme-court-signals-conservative-trend-series-actions/2647122002/>. See also Robert Barnes, *Supreme Court Maintains Its Low-Key Term, While Signaling an Appetite For Future Controversies*, WASH. POST (Jan. 22, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-maintains-its-low-key-term-while-signaling-an-appetite-for-future-controversies/2019/01/22/35f82aea-1e6d-11e9-8e21-59a09ff1e2a1_story.html?utm_term=.2dbce7b84a4e.

¹¹² 554 U.S. 570 (2008).

¹¹³ *Id.* at 580.

¹¹⁴ Kagan, *When Immigrants Speak*, *supra* note 93, at 1247.

¹¹⁵ *Id.* See also *infra* Part IV.

that is afforded within each amendment that limits whom it was meant to include.¹¹⁶ Specifically, the First Amendment is distinct from the Second Amendment because it has a “mix of individualist rights with a reference to the collective ‘people.’”¹¹⁷ The First Amendment is more similar to the Fourth Amendment in that it has a mix of rights.¹¹⁸ It would be “impractical, to suggest that only those people registered or eligible to vote for the House of Representatives have a right to security of their persons or freedom from unreasonable searches.”¹¹⁹

Also, the anti-discrimination aspect of the speaker discrimination doctrine is crucial to both citizens and noncitizens because it prohibits the majority from controlling the “ideological hierarchy” that would otherwise allow them to discriminate and create laws that limit the voices of the minority.¹²⁰ The right to freedom of speech has been crucial to protect the “dissent from political suppression [that] offsets the effects of this hierarchy.”¹²¹ This dire need to protect the minority voice from majority suppression is directly applicable to undocumented immigrants in this moment in history, because they are constantly facing the fear of retaliation if they speak up.¹²² If they choose to speak up, they will be punished for using their minority voice. This is why it is essential to protect their voice and uphold an upright democracy, and the courts must step in to protect this freedom of speech.

While including undocumented immigrants under the meaning of “the people” is preferred, even if they were not to be included in its original meaning, their right to freedom of speech is still likely protected.¹²³ The First Amendment does not limit an individual’s right to freedom of speech based on the inclusion of “the people.”¹²⁴ Freedom of speech is referenced in abstract terms and is not directly tied to “the people” because that language specifically applies to the right to petition the government or to freely assemble.¹²⁵ Therefore, undocumented immigrants should be able to exercise their free speech without government retaliation.

¹¹⁶ Kagan, *When Immigrants Speak*, *supra* note 93, at 1242–53.

¹¹⁷ *Id.* at 1247.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 148–49 (2010) (stating that the freedom speech doctrine is composed of both an equality and liberty right and discussing the consequences of the *Citizens v. FEC* case).

¹²¹ *Id.*; see also *Edwards v. South Carolina*, 372 U.S. 229 (1963).

¹²² Burnett, *supra* note 14.

¹²³ Kagan, *When Immigrants Speak*, *supra* note 93, at 1242–53.

¹²⁴ *Id.* at 1248.

¹²⁵ *Id.*

B. Freedom to Protest and Petition the Government

Another component of the First Amendment is “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹²⁶ Courts have upheld the importance of the ability to assemble and petition the government when individuals feel the need to demand the attention of the government to initiate change.¹²⁷ This is an important and crucial aspect of upholding the democratic ideals upon which the United States was built, furthered by the Supreme Court’s language in its decisions.¹²⁸ The Court stated in *Edwards v. South Carolina*:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.¹²⁹

The Court recognized the importance of the right to protest in order to uphold a democratic system, similar to the importance of freedom of speech.¹³⁰ Protesting the government in a non-threatening manner allows the government to take a second look at the decisions it makes. If individuals such as those in the undocumented community are not able to do so, then the government will not be forced to recognize the rights or actions it has taken that infringe upon undocumented individuals’ ability to live in the United States without constant fear of being separated from their families.¹³¹

In *Guarnieri*, the Court stressed the importance of the government allowing for free speech and petitioning the

¹²⁶ U.S. CONST. amend. I.

¹²⁷ See *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (holding that the petitioners’ constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances were infringed upon when they were prosecuted for protesting South Carolina laws in a peaceful manner).

¹²⁸ See *Guarnieri*, U.S. 379 at 388; *Edwards*, 372 U.S. at 229.

¹²⁹ *Edwards*, 372 U.S. at 238 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

¹³⁰ *Edwards*, 372 U.S. at 238.

¹³¹ See *Associated Press*, *supra* note 1.

government because those elements are essential factors that allow for a successful democratic process.¹³² The Court declared:

The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.¹³³

The basis of the right to petition the government has been vital for minority groups to gain traction and attention of the government to force them to make changes and guarantee them adequate protections such as: the Civil Rights movement or the DACA movement under the Obama Administration.¹³⁴ Although the Court has never explicitly declared that undocumented immigrants are protected under the First Amendment, it is clear that the lack of protection has resulted in this community being subject to government silencing strategies, such as retaliatory deportations for activist efforts.¹³⁵

IV. EXTENDING “THE PEOPLE” TO UNDOCUMENTED IMMIGRANTS

Although the Supreme Court has issued inconsistent decisions, on balance, it has leaned towards providing protection to undocumented immigrants under the Constitution’s protective umbrella. Various amendments include the language “the people” and “any person” to specify to whom federal governmental protections are guaranteed.¹³⁶ However, the meaning as to whom these two phrases apply has not always been clear, and rather is the subject of much debate throughout the judicial system.¹³⁷ The meaning behind “the people” and “any person” has varied based on the United States Supreme Court’s decisions establishing who is protected under each

¹³² *Guarnieri*, 564 U.S. at 388.

¹³³ *Id.*

¹³⁴ Villazor, *supra* note 17, at 62.

¹³⁵ Burnett, *supra* note 14.

¹³⁶ U.S. CONST. amends. I, II, IV, V, XIV.

¹³⁷ Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078 (2013) [hereinafter *Meaning(s) of “The People”*] (discussing the two definitions of “the people” provided by Justice Rehnquist and Justice Brennan, which both could include undocumented immigrants).

amendment.¹³⁸ While some of the Court's decisions are expansive enough to extend constitutional protection to undocumented immigrants, not all of them are.¹³⁹

Due to this inconsistency and lack of clarity under the First Amendment, the Court must establish that undocumented immigrants are protected in order to prevent chilling their speech through deportation threats when they speak. If the Court does not step in, then this extremely marginalized group's ability to speak without fear of retaliatory deportations will be based on any president's personal preferences.¹⁴⁰ Such inconsistent protection of First Amendment rights is un-American, as is undocumented immigrants' fear that changing leadership can also change their human rights.

A. An Early, Outdated Interpretation

Previous Supreme Court decisions have either extended or denied protection to undocumented immigrants under specific amendments. A common inquiry is whether undocumented immigrants are within the meaning of "the people" consistently throughout the Constitution. In 1904, in *U.S. ex rel. Turner v. Williams*,¹⁴¹ the Supreme Court allowed the federal government to deport an immigrant anarchist and held that the Constitution, as the "supreme law" of the land, had the power to exclude those who did not deserve governmental protections.¹⁴² The Court held that the Constitution only afforded protections specifically to the citizens of the United States.¹⁴³ But, this case focused on the federal immigration policies that allowed the appellee, John Turner, to be deported based on his anarchist beliefs.¹⁴⁴ Indeed,

¹³⁸ *Id.*; see also *D.C. v. Heller*, 554 U.S. 570, 580 (2008) ("What is more, in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community . . ."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 259–60 (1990) ("This suggests that 'the people' refers to 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."); *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("The words 'people of the United States' and 'citizens' are synonymous terms and mean the same thing.").

¹³⁹ See *D.C. v. Heller*, 554 U.S. 570, 580 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 259–60 (1990); *Dred Scott*, 60 U.S. at 404. See also *Meaning(s) of "The People"*, *supra* note 137.

¹⁴⁰ Kagan, *When Immigrants Speak*, *supra* note 93, at 1240.

¹⁴¹ 194 U.S. 279, 292 (1904).

¹⁴² *Id.* ("To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.").

¹⁴³ *Id.*

¹⁴⁴ See *Turner*, 194 U.S. at 292 (upholding the deportation of anarchist John Turner under the Immigration Act of 1903, which stated "[t]hat the following classes of aliens shall be excluded from admission into the United States: All idiots, insane

the Court explained that the exclusionary power the federal government exercised in Turner’s deportation was based upon the fundamental principle “that every sovereign nation has the power as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions.”¹⁴⁵ The primary rationale was security, not speech. In its reasoning, the *Turner* Court did not seriously address the free speech implications of the case,¹⁴⁶ especially compared to post-incorporation First Amendment cases. Rather, the Court focused on the definition of an anarchist, which posed a security threat to the United States government.¹⁴⁷ As the Court upheld his deportation they did not find the First Amendment to be implicated at all.¹⁴⁸ This is not surprising since it was not until 1930 that the Court began to give meaningful First Amendment protection to activists.¹⁴⁹

Still, even if the First Amendment was not implicated in *Turner*,¹⁵⁰ it could have an impact moving forward for undocumented immigrants because the decision placed improper limitations on their rights.¹⁵¹ The *Turner* Court reasoned that when a prohibited immigrant enters the country, they are inherently excluded from the protections of the Constitution.¹⁵² The justices went so far as to state that an immigrant that is prohibited to enter the country is not part of the definition of “the people” by virtue of entering the country illegally.¹⁵³

Yet, despite the early effect that *Turner* had on immigration control, this decision did not consider free speech protections for undocumented immigrants, and decisions after

persons, epileptics, and persons who have been insane within five years previous; . . . anarchists,” and “[t]hat no person who disbelieves in, or who is opposed to, all organized government, or who is a member of, or affiliated with, any organization entertaining and teaching such disbelief . . . shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof”). See also BEN HARRINGTON, OVERVIEW OF THE FEDERAL GOVERNMENT’S POWER TO EXCLUDE ALIENS 3 (Cong. Res. Serv., 2017) (noting that *U.S. ex rel. Turner v. Williams* did not discuss the implications of the First Amendment despite an immigrant being deported for solely for his political beliefs); John Vile, *U.S. ex rel. Turner v. Williams (1904)*, FIRST AMEND. ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/453/united-states-ex-rel-turner-v-williams> (last visited May 7, 2019).

¹⁴⁵ *Turner*, 194 U.S. at 290.

¹⁴⁶ *Id.* at 294 (“We are not to be understood as depreciating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty, in itself unconquerable, but this case does not involve those considerations.”).

¹⁴⁷ *Id.* at 293–95.

¹⁴⁸ Kagan, *When Immigrants Speak*, *supra* note 93, at 1265.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1239–65.

¹⁵² *Turner*, 194 U.S. at 292.

¹⁵³ *Id.*

Turner have better favored immigrants.¹⁵⁴ As the Court evolved its understanding, it began to decipher whether each separate amendment protected undocumented immigrants under the meaning of “the people.”¹⁵⁵ The Court has notably distinguished the meaning of “the people” based on which amendment it is in. Without a definition of “the people” in the First Amendment, these varying definitions impact who the First Amendment free speech doctrine is likely to include and exclude from its protections.

Moreover, in *Dred Scott v. Sandford*¹⁵⁶ the Court held that Blacks were not citizens because they were “regarded as beings of an inferior order” with “no rights which the white man was bound to respect.”¹⁵⁷ However, this decision was overruled by the Fourteenth Amendment. Similarly, *Turner* at the time did not regard immigrant’s free speech rights as threatened by the deportation of an anarchist,¹⁵⁸ but this decision cannot mean that like *Dred Scott*, immigrants are “beings of an inferior order.”¹⁵⁹ Instead, immigrants should receive free speech rights.

B. First Amendment Incorporation Post-U.S. ex rel. Turner v. Williams

In *Turner*, the Court upheld the exclusion of anarchist speech.¹⁶⁰ However, *Turner* was decided prior to the First Amendment being incorporated into the States.¹⁶¹ In 1925, the First Amendment’s guarantee of freedom of speech was incorporated by the Court:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the

¹⁵⁴ LINDA BOSNIAK, THE CITIZEN AND THE ALIEN, DILEMMAS OF CONTEMPORARY MEMBERSHIP 77–101 (2006) (discussing that undocumented immigrants have been afforded a wide range of constitutional rights due to being entitled to basic protections under the law); see also Kagan, *When Immigrants Speak*, *supra* note 93, at 1263–65.

¹⁵⁵ Kagan, *When Immigrants Speak*, *supra* note 93, at 1263–65.

¹⁵⁶ 60 U.S. 393 (1857).

¹⁵⁷ *Id.* at 407.

¹⁵⁸ *Turner*, 194 U.S. at 294.

¹⁵⁹ *Dred Scott*, 60 U.S. at 407.

¹⁶⁰ *Turner*, 194 U.S. at 292.

¹⁶¹ See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Turner*, 194 U.S. at 292.

Fourteenth Amendment from
impairment by the States.¹⁶²

Following *Gitlow*, the incorporation of the First Amendment to the States continued. The right to freedom of the press was incorporated in 1931¹⁶³ and the freedom of assembly in 1937.¹⁶⁴ Then the protection to the free exercise of religion was incorporated in 1940,¹⁶⁵ and the protection against the establishment of religion was incorporated in 1947.¹⁶⁶ Lastly, in 1984 the right to freedom of expression was incorporated to the States.¹⁶⁷ Thus, while *Turner* upheld the deportation of an immigrant with anarchist beliefs,¹⁶⁸ the impact of this decision needs to be reconsidered, because free speech concerns were not properly assessed by the Court.¹⁶⁹ Now that the First Amendment has been entirely incorporated into the States, the next step is to define who “the people” in the First Amendment is meant to protect, particularly that it applies to both citizens and undocumented immigrants. As will be addressed below, the Second, Fourth, Fifth, and Fourteenth Amendments reveal that undocumented immigrants can be protected by the Constitution.

C. “The People” Under the Second Amendment

The Courts, States, and Congress have differently interpreted the Second Amendment to exclude or include undocumented immigrants. The Second Amendment specifically includes the phrase “the right of the people to keep

¹⁶² *Gitlow*, 268 U.S. at 666.

¹⁶³ See *Near v. Minnesota*, 283 U.S. 697, 723–24 (1931) (holding that a statute suppressing newspapers that published “malicious” material was an “infringement of the liberty of the press guaranteed by the Fourteenth Amendment” through the First Amendment’s Freedom of the Press clause).

¹⁶⁴ See *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental . . . For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.”).

¹⁶⁵ See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the statute “deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment”).

¹⁶⁶ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (applying the First Amendment Establishment Clause in upholding a New Jersey state statute).

¹⁶⁷ See *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (holding that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends”).

¹⁶⁸ 194 U.S. at 292.

¹⁶⁹ *Kagan, When Immigrants Speak*, *supra* note 93, at 1262–65.

and bear Arms, shall not be infringed,” which protects the individual right to own firearms.¹⁷⁰

The Court in *Heller*¹⁷¹ held that the Firearm Control Regulation Act that prevented individuals from possessing a handgun in their homes, and required that any lawful gun in the home must be kept in a trigger lock, was unconstitutional.¹⁷² Regulations preventing individuals from owning a handgun in their home was a violation of their Second Amendment right because the amendment specifically grants individuals the right to bear arms, even if they are not in the militia.¹⁷³ In reaching this decision the Court analyzed the meaning of “the people” as it is mentioned seven times in the Constitution, including the Second Amendment.¹⁷⁴

The Court made clear that the right to bear arms is an individual right based on how the phrase “the people” is used specifically in the Second Amendment.¹⁷⁵ In specifying the subset of individuals to whom the Second Amendment applies, the Court stated that “in all six other provisions of the Constitution that mention ‘the people’ the term unambiguously refers to all members of the political community, not an unspecified subset.”¹⁷⁶ However, the Court did not define the meaning of the “political community” to which the right to own guns would include.¹⁷⁷ Thus, it left courts with the ability to interpret it broadly to possibly include various people such as: all citizens,¹⁷⁸ registered voters, eligible voters, or to individuals who are able to lawfully contribute to political campaigns.¹⁷⁹ Due to the lack of a clear definition of who is encompassed in the “political community,” there is a possibility that courts will use this language to exclude certain communities within the United States.¹⁸⁰ Individuals who could potentially be excluded from the

¹⁷⁰ U.S. CONST. amend. II.

¹⁷¹ 554 U.S. 570 (2008).

¹⁷² *Id.* at 635 (holding that the District’s ban on the possession of handguns in one’s home violated individuals Second Amendment rights because the purpose of the Second Amendment was to allow individuals the opportunity to self-defense and to own guns).

¹⁷³ *Id.* at 621.

¹⁷⁴ *Meaning(s) of “The People”, supra* note 137, at 1082.

¹⁷⁵ *Heller*, 554 U.S. at 579–80 (“Three provisions of the Constitution refer to ‘the people’ in a context other than ‘rights’—the famous preamble . . . § 2 of Article I . . . and the Tenth Amendment . . . Those provisions arguably refer to ‘the people’ acting collectively . . . Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”).

¹⁷⁶ *Id.* at 580.

¹⁷⁷ *Meaning(s) of “The People”, supra* note 137, at 1087.

¹⁷⁸ *See United States v. Portillo-Munoz*, 643 F.3d 439, 440 (2011) (explaining that based on the *Heller* Court the Second Amendment extends to “All Americans,” specifically “law-abiding, responsible citizens”).

¹⁷⁹ *Meaning(s) of “The People”, supra* note 137, at 1087.

¹⁸⁰ *Id.*

“political community” are minors, previously convicted felons,¹⁸¹ or those who are not American citizens.¹⁸²

Furthermore, the meaning of “the people” defined in *Heller* was not exclusive to the Second Amendment.¹⁸³ The Court specifically stated that its definition of “the people” was consistent with how the phrase was used in other provisions of the Constitution.¹⁸⁴ The limitations of who the “political community” includes is crucial because it can define who other amendments’ protections are guaranteed to.¹⁸⁵ Therefore, by not defining the meaning of “political community,” the Court provided no clarity as to who was included by the phrase “the people” throughout the Constitution.¹⁸⁶

After *Heller*, courts in thirty-five states have interpreted “the people” to allow only citizens the right to bear arms in contrast with nine states who allow all persons the right to own guns.¹⁸⁷ Also, 18 U.S.C. § 922 (g)(5) prohibits unlawful aliens from owning firearms, as well as those who have renounced their citizenship.¹⁸⁸ Thus, the federal government and the majority of states have not granted every single individual within their borders the right to lawfully own a handgun.¹⁸⁹ Rather, state and federal laws have used “the people” to exclude undocumented immigrants from the individual right declared in the Second Amendment.¹⁹⁰ This exclusion could have a profound impact on undocumented immigrants attaining other protections and rights in the Constitution if courts determine that “the people” has the same definition and thus refers to the same subset of people in every part of the Constitution.

However, in *United States v. Meza-Rodriguez*,¹⁹¹ a citizen of Mexico was arrested carrying a .22 caliber handgun.¹⁹² The Seventh Circuit court distinguished *Heller* because the Supreme Court did not explicitly address whether undocumented immigrants are among “the people” to who the Second

¹⁸¹ *Medina v. Sessions*, 279 F. Supp. 3d 281, 289–90 (D.D.C. 2017) (explaining that the Second Amendment protections do not apply to convicted criminals, specifically felons because they are not considered part of the “political community” as they are not “law-abiding citizens”).

¹⁸² *Id.* See also *Portillo-Munoz*, 643 F.3d at 440 (“Illegal aliens are not ‘law-abiding, responsible citizens’ or ‘members of the political community,’ and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.”).

¹⁸³ *Heller*, 554 U.S. at 580.

¹⁸⁴ *Id.*

¹⁸⁵ *Meaning(s) of “The People”*, *supra* note 137, at 1087.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1094.

¹⁸⁸ *Id.*; see 18 U.S.C. § 922(g)(5).

¹⁸⁹ *Meaning(s) of “The People”*, *supra* note 137, at 1087.

¹⁹⁰ See 18 U.S.C. § 922(g)(5).

¹⁹¹ 798 F.3d 664 (7th Cir. 2015).

¹⁹² *Id.* at 666.

Amendment applies.¹⁹³ Specifically, the court explained that Meza-Rodriguez was both in the United States voluntarily and had extensive ties to the country as he had lived in the United States for over twenty years.¹⁹⁴ In the past, Meza-Rodriguez had attended public schools and worked at various places, which was sufficient to constitute having “substantial connections” with the United States in order to be protected under the Second Amendment’s meaning of “the people.”¹⁹⁵ The court emphasized that “we see no principled way to carve out the Second Amendment to say that unauthorized (or maybe all noncitizens) are excluded. No language in the Amendment supports such a conclusion.”¹⁹⁶ This decision gives hope that undocumented immigrants can receive Second Amendment rights.

D. “The People” Under the Fourth Amendment

There is a lack of clarity in the Court’s determination of who is included within the protections of the Fourth Amendment. The Fourth Amendment protects “the people . . . against unreasonable searches and seizures,” which also includes the protection for individuals’ privacy.¹⁹⁷ Prior to the *Heller* decision, potentially limiting the scope of the meaning of “the people” regarding the Second Amendment, the Court had already defined “the people” in reference to Fourth Amendment search and seizure.¹⁹⁸ In *United States v. Verdugo-Urquidez*, the defendant, a Mexican citizen, was arrested by United States agents in Mexico due to the suspicions of the United States Drug Enforcement Agency (DEA) that he was one of the leaders of a dangerous narcotics organization.¹⁹⁹ After the defendant was transported to the United States, a DEA agent arranged for the search of the defendant’s homes in Mexico.²⁰⁰ The search was conducted because of the belief that it would lead to evidence that the defendant was involved in narcotics trafficking.²⁰¹ Nevertheless, no search warrants were issued prior to the searches in which a tally sheet was found.²⁰² The lack of search warrants resulted in the District Court for the District of California and the Ninth Circuit Court of Appeals holding that

¹⁹³ *Id.* at 669–71.

¹⁹⁴ *Id.* at 671.

¹⁹⁵ *Id.* at 672.

¹⁹⁶ *Id.*

¹⁹⁷ U.S. CONST. amend. IV; see also *The Fourth Amendment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fourth_amendment (last visited May 7, 2019).

¹⁹⁸ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

¹⁹⁹ *Id.* at 262.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

the evidence found during the unwarranted searches of the defendants’ homes must be suppressed.²⁰³

However, the Supreme Court reversed the Ninth Circuit Court of Appeal’s decision because it held that Fourth Amendment protections against unlawful searches and seizures did not apply in this particular situation.²⁰⁴ In reaching this decision, the Court analyzed in-depth the meaning of the Fourth Amendment and who the Framers intended it to protect.²⁰⁵ The court declared that

‘The people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to 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.²⁰⁶

Also, the Court specified that the Fourth Amendment was intended to only provide protection in domestic matters, not searches conducted abroad.²⁰⁷ However, the most crucial and yet unclear portion of the decision was the Court’s test for what constituted as having a “sufficient connection” with the United States to be guaranteed constitutional protections.²⁰⁸ The Court stated, “This suggests that ‘the people’ refers to 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.”²⁰⁹

²⁰³ *Id.* at 263.

²⁰⁴ *Id.* at 274–75 (“At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.”).

²⁰⁵ *Id.* at 265.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 259–60 (“The Fourth Amendment phrase ‘the people’ seems to be a term of art used in select parts of the Constitution and contrasts with the words ‘person’ and ‘accused’ used in Articles of the Fifth and Sixth Amendments regulating criminal procedures.”). *See also Meaning(s) of “The People”, supra* note 137, at 1081 (stating that various legal scholars and courts have refused to apply the test in *United States v. Verdugo-Urquidez* because of the inconsistent standard and lack of explanation of the Court on how it is to be applied in various legal contexts).

²⁰⁹ *Verdugo-Urquidez*, 494 U.S. at 260.

Potentially this test could pose a threat to the ability of the First Amendment to extend to undocumented immigrants.²¹⁰ This decision resulted in courts needing to interpret if undocumented immigrants could establish “substantial connections” with the United States to be protected.²¹¹ Justice Brennan in his dissent instilled hope that the protections of the Fourth Amendment—and therefore potentially the First Amendment—should be extended to undocumented immigrants.²¹² This conclusion was based upon the mutuality basis that the Constitution was built upon.²¹³ If the criminal laws of the United States are extended to undocumented immigrants, then so too should its protections.²¹⁴ Otherwise, undocumented immigrants are susceptible to oppressive government practices.²¹⁵

E. “The People” Under the Fifth Amendment

One Supreme Court decision explicitly includes undocumented immigrants within the protection of the Fifth Amendment. The Fifth Amendment guarantees the right to a grand jury, protects against self-incrimination, and double jeopardy.²¹⁶ It also provides the protection that a person cannot be deprived of “life, liberty or property” without “due process of the law.”²¹⁷ In contrast to the more restrictive interpretations of the Second and Fourth Amendments, the Court has not interpreted the Fifth Amendment to be so limited in its extension to undocumented immigrants. The Supreme Court’s impactful

²¹⁰ *Id.*

²¹¹ Victor C. Romero, *Whatever Happened to the Fourth Amendment: Undocumented Immigrants’ Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1004–015 (1992) (discussing the need to include undocumented immigrants under the protections of the Fourth Amendment for human rights protections and because of the downfall of the Supreme Court decisions in regard to Fourth Amendment protections).

²¹² *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting) (“Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose ‘societal obligations,’ such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”).

²¹³ *Id.* at 284–85 (“Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights. Foreign nationals investigated and prosecuted for alleged violations of United States criminal laws are just as vulnerable to oppressive Government behavior as are United States citizens investigated and prosecuted for the same alleged violations.”).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ U.S. CONST. amend. V.

²¹⁷ *Id.* See also Cornell Law School, *The Fifth Amendment*, https://www.law.cornell.edu/constitution/fifth_amendment (last visited May 7, 2019).

decision in *Matthew v. Diaz*²¹⁸ established Fifth Amendment protections for undocumented immigrants.²¹⁹ The Court stated that “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [of due process].”²²⁰ This statement has had a positive impact in defining the protections undocumented immigrants may obtain through their presence in the United States and providing undocumented immigrants with the right to challenge the United States government in Court.²²¹ Despite the Court’s distinction between “aliens and citizens” based on Congress’ power over immigration policies, the Court did not detract from the fact that undocumented immigrants are entitled to claim Constitutional protections.²²² This decision was monumental because it established that undocumented immigrants are protected, to some extent, under the Constitution.²²³ The Court purposefully specified the Fifth and Fourteenth Amendments as protecting all people within the borders of the United States.²²⁴ Nonetheless, this decision neither includes nor excludes undocumented immigrants from the constitutional protections of the First Amendment.

F. “The People” Under the Fourteenth Amendment

The Supreme Court has established that undocumented immigrants are protected by the Fourteenth Amendment. The Fourteenth Amendment specifically prohibits any state action from the ability to “deny to any person within its jurisdiction the equal protection of the laws.”²²⁵ It is possible for the language of the Fourteenth Amendment to extend to all people residing in and within the jurisdictional boundaries of the United States despite their legal status. There is no explicit exclusion of undocumented immigrants because the amendment does not specifically state who classifies as “any person.”²²⁶ The notion that undocumented immigrants are protected was furthered by *Plyler v. Doe*.²²⁷

²¹⁸ 426 U.S. 67 (1976)

²¹⁹ *Id.* at 77 (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.”).

²²⁰ *Id.*

²²¹ *Id.*

²²² *See id.* at 76–77.

²²³ *See id.*

²²⁴ *Id.* at 76.

²²⁵ U.S. CONST. amend. XIV, § 1.

²²⁶ *See id.*

²²⁷ 457 U.S. 202, 211 (1982).

In *Plyler v. Doe*, at issue was a Texas education law declaring that the government would withhold state funding for the education of undocumented immigrants.²²⁸ This statute also granted school district officials the authority to refuse academic enrollment to any undocumented child.²²⁹ As a result of this law, if an undocumented child wanted to attend a public school they were required to pay tuition.²³⁰ A class action lawsuit was filed by these students, arguing that denying a free public education to undocumented immigrants was unconstitutional under the Fourteenth Amendment.²³¹ The Supreme Court agreed, and held that undocumented children are entitled to receive a free public education even if they are not in the United States legally.²³² The Court reasoned:

This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.²³³

This statement by the Court explicitly recognizes the possibility that undocumented immigrants may be subject to exploitation.²³⁴ By expressly acknowledging the risk of potential abuse in the United States, the Court brought to the forefront the need to protect these individuals, and to give them the ability to exercise their rights.²³⁵ In *Plyler*, the Court guaranteed undocumented immigrant children the right to a free public education.²³⁶ This powerful holding shows that despite being undocumented, these individuals can be granted protection under the Constitution.²³⁷

²²⁸ *Id.* at 202.

²²⁹ *Id.*

²³⁰ *Id.* at 203.

²³¹ *See id.* at 202.

²³² *See id.* at 203.

²³³ *Id.* at 218–19.

²³⁴ *See id.*

²³⁵ *See id.*

²³⁶ *Id.* at 230.

²³⁷ *Id.* at 212 (“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,

Furthermore, this decision has resulted in the recognition that undocumented immigrants are no longer just people in the United States with no legal protection.²³⁸ Rather, the Court made it clear that some constitutional protections are guaranteed to them by virtue of being in the United States.²³⁹ In turn, state governments cannot deny constitutional protections to undocumented immigrants simply because of their legal status.²⁴⁰ Undocumented immigrants being within the jurisdiction of the state entitles them to Fourteenth Amendment protections.²⁴¹ Being undocumented in this country does not get rid of the basic and fundamental rights guaranteed to “persons” under the Constitution as the Supreme Court has established.²⁴² An expansive meaning of “person” that includes undocumented immigrants is crucial to moving forward to protect undocumented immigrants’ rights, and to further their inclusion in more constitutional amendments. It is imperative to include undocumented immigrants under the protections of the First Amendment to prevent chilling their speech based on their legal status and allow them to bring to the forefront their criticisms of the government without fearing deportation. Undocumented immigrants can better defend their protection under other constitutional amendments if they have the protection of the First Amendment.²⁴³

Overall, the Court has mostly granted protection to immigrants by including them as part of “the people.” Therefore, the Court ought to firmly extend “the people” in the First

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 differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.*”).

²³⁸ Villazor, *supra* note 17, at 56.

²³⁹ *Id.* (“The State argued that the Equal Protection Clause did not apply to the children because they were undocumented aliens and thus, not ‘persons’ within the state’s jurisdiction. The Court, however, rejected that argument and held that the Equal Protection Clause applies to ‘persons’ and that ‘[a]liens, even whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”).

²⁴⁰ *Id.*

²⁴¹ *Plyler*, 457 U.S. at 215 (“Use of the phrase ‘within its jurisdiction’ thus does not detract from, but rather confirms, the understanding that the 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.”).

²⁴² *Id.*

²⁴³ See *Palko v. State of Connecticut*, 302 U.S. 319, 326–27 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969) (“This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.”); see also Villazor, *supra* note 17, at 59–65 (showing how the ability to use free speech strengthened the impact of the DACA movement). See generally *Freedom of Expression*, ACLU, <https://www.aclu.org/other/freedom-expression> (last visited May 7, 2019).

Amendment to include undocumented immigrants. This would not overrule *Turner* but distinguish that case as being decided on federal power grounds, not First Amendment grounds.

**V. THE NEED FOR CLARITY: MOVING FORWARD WITH
UNDOCUMENTED IMMIGRANTS BEING PROTECTED UNDER
THE FIRST AMENDMENT**

Because of conflicting case law, it is necessary for the Court to create a precedent that specifically includes undocumented immigrants within the scope of First Amendment protection. By creating clear case law of undocumented immigrant's protections under the First Amendment, the ability for any president to threaten deportation against this vulnerable community for their activist efforts will be limited as it will erode political discretion. This will prevent the deportation threats to immigrants not violating criminal laws who choose to speak. How undocumented immigrant activists are treated should not be subjected to the complete control of the president such that these rights are never permanently secured.²⁴⁴ Politics should not be the controlling factor of the rights of undocumented immigrants. Rather, undocumented immigrants should receive constant and consistent protections by courts, especially the Supreme Court, to prevent violations of their human rights.

An undocumented immigrant's ability to engage in speech, peacefully protest, and petition the government has been predominately based upon who the president is.²⁴⁵ The Court has not clearly stepped in to protect undocumented immigrants' rights in accordance with the First Amendment.²⁴⁶ Rather, the Court left it up to dangerous and inconsistent political discretion.²⁴⁷ The uncertainty that undocumented immigrants face threatens their daily lives and the ability to protect their human rights lies in the ability to speak up against the exploitative treatment they are forced to face. The ability to speak up being limited based on one individual who can change every four or eight years is incredibly daunting to undocumented immigrant communities.²⁴⁸

²⁴⁴ See Kagan, *When Immigrants Speak*, *supra* note 93, at 1237–38.

²⁴⁵ See *id.*

²⁴⁶ *Id.* at 1284–85; see also Kagan, *supra* note 102, at 96.

²⁴⁷ Kagan, *When Immigrants Speak*, *supra* note 93, at 1237 (arguing that the ability for “unauthorized” immigrants to speak out for immigration reform is based primarily upon political discretion rather than on constitutional protections).

²⁴⁸ *Id.* at 1237–38 (“If the White House were to be occupied by a president who is hostile to immigrants and intolerant of dissent, immigrant activists could not be confident that the courts would protect their expressive liberty.”).

A direct comparison of the Trump and Obama Administrations shows the inconsistent treatment undocumented immigrants have in being granted First Amendment rights.²⁴⁹ Under the Obama Administration, undocumented immigrant activism increased as a result of Obama’s policy regarding which undocumented immigrants would be subject to deportation, specifically focusing on those with criminal records.²⁵⁰ Under the Obama Administration, an undocumented immigrant activist was not likely to be targeted or subject to deportation based on their activist efforts, which encouraged activism among this community.²⁵¹ As a result of not being in fear of facing deportation for speaking up, the undocumented immigrant community was able to petition the government successfully.²⁵² The Obama Administration encouraged and aided in the protesting of immigration reform because unless the undocumented immigrants were “national security threats, gang members, convicted felons” they were protected from deportation.²⁵³

Additionally, under the Obama Administration undocumented immigrants, specifically children, who had been brought to the United States at a young age, protested and brought to the forefront the need to be protected.²⁵⁴ They became known as DREAMers.²⁵⁵ President Obama was sympathetic to their cause as children who were raised in the United States but lacked legal status.²⁵⁶ He stated “[t]hey are Americans in their heart, in their minds, in every single way but one: on paper.”²⁵⁷ This sympathetic rhetoric during his Administration allowed DREAMers to increase their activist efforts and step out of hiding to “push for legal recognition of their identity.”²⁵⁸

A. Other Amendments Provide Support that Undocumented Immigrants are Protected by the Meaning of the “the people”

While the First Amendment has never been expressly guaranteed to undocumented immigrants, other Amendments

²⁴⁹ See *id.*; Burnett, *supra* note 14; Kopan, *supra* note 47.

²⁵⁰ Kagan, *supra* note 102, at 1279.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Julia Preston, *Most Undocumented Immigrants Will Stay Under Obama’s New Policies, Report Says*, N.Y. TIMES (July 23, 2015), <http://www.nytimes.com/2015/07/23/us/politics/most-undocumented-immigrants-will-stay-under-obamas-new-policies-report-says.html>.

²⁵⁴ Villazor, *supra* note 17, at 62.

²⁵⁵ *Id.* (discussing the impact of the DACA movement under the Obama Administration and the ability immigrant activists had to be vocal under that Administration, which resulted in the passage of DACA itself).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

have, such as the Fourteenth Amendment.²⁵⁹ This is in contrast to the Second Amendment, which has interpreted by some courts to not include undocumented immigrants.²⁶⁰ The inconsistency in the Constitution's application to undocumented immigrants demonstrates that undocumented immigrants can still be protected under the First Amendment.²⁶¹ The Supreme Court's decision to extend the protection of the Fourteenth Amendment to undocumented immigrants by allowing them to attend primary and secondary schools and prevent states from imposing tuition on public education, demonstrates that legal status is not an impediment to equal protection of undocumented immigrants.²⁶² Instead, these protections show the Court taking necessary measures to prevent the continued exploitation of an underclass in the United States.²⁶³ It should then follow that these protections should be expanded to also include First Amendment rights to undocumented immigrants. This will allow the undocumented immigrant community to freely demand their human rights be upheld because of the fundamental democratic ideals built into the free speech and equal protection clauses.²⁶⁴

B. Importance of the Visibility that Free Speech, Ability to Protest, and Petition the Government Allows for Undocumented Immigrants

The visibility of undocumented immigrants and their ability to exercise their free speech rights without fearing deportation is essential for them to initiate change in matters important to their daily lives. Until undocumented immigrants are seen and have the ability to demand the government's attention, the government will not change or reform immigration laws.²⁶⁵ Through the tactical use of speech, protest, and

²⁵⁹ Plyler v. Doe, 457 U.S. 202, 215 (1982).

²⁶⁰ See D.C. v. Heller, 554 U.S. 570, 580–81 (2008).

²⁶¹ Kagan, *supra* note 102, at 96–97; see also Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS NEWS HOUR (June 25, 2018), <https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have> (“[M]any of the basic rights, such as the freedom of religion and speech, the right to due process and equal protection under the law apply to citizens and noncitizens.”); Raoul Lowery Conteras, *Yes, Illegal Aliens Have Constitutional Rights*, THE HILL (Sept. 29, 2015), <https://thehill.com/blogs/pundits-blog/immigration/255281-yes-illegal-aliens-have-constitutional-rights> (“‘Aliens,’ legal and illegal, have the full panoply of constitutional protections American citizens have with three exceptions: voting, some government jobs and gun ownership (and that is now in doubt) . . .”).

²⁶² Villazor, *supra* note 17, at 56–67.

²⁶³ *Id.* at 30.

²⁶⁴ See Jay, *supra* note 77 (explaining how the First Amendment is crucial to upholding a democracy); *Know Your Rights*, *supra* note 63 (stating that without First Amendment protections all other fundamental rights would “wither away”).

²⁶⁵ Villazor, *supra* note 17, at 6 (“[T]he undocumented closet facilitates a deeper appreciation of the relationships between law, visibility, political mobilization, and

petitioning the government, minority and marginalized groups have been able to put pressure on the government to demand protection and equal protection of their rights.²⁶⁶ The strategic use of speech and demanding protections is possible through the protections granted by the First Amendment.

However, retaliatory deportations are forcing undocumented immigrants to remain silent and not demand change, forcing them to remain hidden.²⁶⁷ Retaliatory deportations under the Trump Administration result in the continued forced silence of undocumented immigrants and cause this community “to be invisible, which makes them vulnerable to legal and social subordination in various forms.”²⁶⁸ Leaving such a large number of people in the United States subject to abuse without the ability to demand protection directly undermines the democratic foundation of this country by allowing the government to silence the most vulnerable group.²⁶⁹ Cases not being brought before the Court presents the issue of undocumented immigrants not being included under the First Amendment’s protection. The Trump Administration, and possibly any future administrations, will continue to enforce retaliatory deportations. Until there is a clear precedent established by the Court that undocumented immigrants are encompassed by the First Amendment, there is no legal incentive for the Trump Administration or any subsequent Administration to respect their activists’ efforts.

The threat of deportation has been firmly established in the undocumented immigrant community, which has continuously prevented them from speaking out against the

legal change.”); Nathaniel Persily, *The Meaning of Equal Protection: Then, Now, and Tomorrow*, A.B.A. (June 29, 2017),

https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2014/november_december/the_meaning_equal_protection_then_now_and_tomorrow/.

²⁶⁶ Villazor, *supra* note 17, at 6–9 (explaining how DREAMers assert their right to belong in the United States despite being undocumented, challenging “conventional notions of membership and belonging,” and how their visibility through protests has resulted in success through the creation of the DACA program that provides protection against deportation).

²⁶⁷ Kopan, *supra* note 47.

²⁶⁸ Villazor, *supra* note 17, at 6.

²⁶⁹ *Id.* at 6–7 (“The symbol of the undocumented closet therefore appropriately sheds light on the vulnerability and subordination of nearly eleven million people and their families, revealing law’s part in the creation of a significant democratic deficit in today’s society.”); *see also* Jay, *supra* note 77, at 1017–19 (“Not just libertarian in preventing the government from suppressing most expression, but more importantly in its premise that liberty of speech is the normal or baseline condition of American society.”); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 24–27 (1975) (“The boisterous assertiveness of much of the civil rights movement, for example, is traceable not only to a need to use the streets and parks as a ‘public forum,’ but more fundamentally to a need for self-assertion simply as a way of staking a claim to equal citizenship. Equality of expression is indispensable to a society committed to the dignity of the individual.”).

injustice and abuse they constantly face.²⁷⁰ This fear has left them without a consistent right to criticize and demand change in the government.²⁷¹ The ability for the undocumented immigrant community to be visible is essential as it is “about political empowerment.”²⁷² “Critically, visibility functions as an important tool for getting those in power to *see* them and create legal change.”²⁷³ However, the fear of facing a retaliatory deportation under the Trump Administration will inevitably result in limiting the ability of undocumented immigrants to be visible in the United States. The constant fear of ICE identifying undocumented immigrants during protest and activist efforts will limit the attention brought to immigration issues.²⁷⁴ Further, it will deter the United States from truly functioning as a democratic society if the Court does not create a clear precedent that states that undocumented immigrants have First Amendment constitutional protection.²⁷⁵

Due to an unclear precedent and threats to undocumented immigrants throughout history as to whether they are protected under the First Amendment, it is now crucial for the Court to establish that they are. Right now, undocumented immigrants are being targeted for speaking up and fighting for better treatment in the United States under the Trump Administration, which is vastly different from how they were treated under the Obama Administration.²⁷⁶ The inconsistency in how undocumented immigrants have been treated throughout history creates a constant back and forth,

²⁷⁰ Villazor, *supra* note 17, at 6 (“In particular, federal, state, and local laws have created a state of fear among undocumented immigrants that they could be deported from the United States at any time . . .”). See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html>; Dirks, *supra* note 86; Paul Harris, *Undocumented Workers’ Grim Reality: Speak Out on Abuse and Risk Deportation*, GUARDIAN (Mar. 28, 2013), <https://www.theguardian.com/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation>; THE TEXAS ADVISORY COMM’N TO THE U.S. COMM’N ON CIVIL RIGHTS, *supra* note 86.

²⁷¹ See generally Villazor, *supra* note 17; Egan, *supra* note 84 (“Over the past year, many immigrants have decided to steer clear of courthouses, hospitals, and other public spaces for fear of arrest and deportation . . . Targeting immigrant leaders endangers the rights of those directly impacted, but it also threatens to chill the free speech of other would-be activists.”).

²⁷² Villazor, *supra* note 17, at 62.

²⁷³ *Id.*

²⁷⁴ R. George Wright, *Undocumented Speakers and Freedom of Speech: A Relatively Uncontroversial Approach*, 45 GONZ. L. REV. 499, 505–06 (2009).

²⁷⁵ *Id.* (“Certainly, the fear of deportation may, realistically, suffice to inhibit speech undocumented persons, whether the practical sanction of deportation would reflect official disagreement with the content of the undocumented person’s speech or not . . . Perhaps most obviously, freedom of speech can distinctively contribute to the optimal functioning of a fully democratic, open, responsive, participatory government and administration, at all levels.”).

²⁷⁶ Villazor, *supra* note 17, at 62.

with immigrants unsure of when First Amendment rights are applicable to them.²⁷⁷ The Court making it clear that undocumented immigrants are protected under the First Amendment will remove the ambiguity that currently exists.²⁷⁸ By specifically granting undocumented immigrants First Amendment rights, the Court would remove the silencing effect currently being created by the Trump Administration.²⁷⁹ First Amendment rights must be guaranteed in order to protect the human rights of a growing undocumented immigrant population in the United States. This will allow undocumented immigrants, who are the most affected by immigration laws in the United States, to have the ability to speak up and demand the attention of the government.²⁸⁰

CONCLUSION

History has demonstrated a trend that undocumented immigrants are threatened based on those in power and no consistent law exists to uphold their First Amendment rights. Currently under the Trump Administration, undocumented immigrants’ First Amendment rights are being threatened by retaliatory deportations.²⁸¹ This has now resulted in prominent immigrant activists being forced into silence or facing deportation.²⁸² However, this is not the first time in history that undocumented immigrant activists have been threatened for speaking out for their rights and beliefs.²⁸³

First Amendment rights have never been explicitly denied or granted to undocumented immigrants, where other amendments in the Constitution have been determined to include or not include undocumented immigrants.²⁸⁴ It is possible for undocumented immigrants to be included within the protections of the First Amendment, because the Court has held that in reference to other amendments they are protected, such as in *Matthew v. Diaz*.²⁸⁵ The Court stated, “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”²⁸⁶ This statement laid

²⁷⁷ *Id.* at 29.

²⁷⁸ See MOLONEY, *supra* note 18, at 198.

²⁷⁹ Burnett, *supra* note 14.

²⁸⁰ See Villazor, *supra* note 17, at 62.

²⁸¹ See *Mora-Villalpando v. U.S. Immigration & Customs Enf’t*, No. C18-0655JLR, 2018 WL 353675, at 3 (W.D. Wash. July 23, 2018); Burnett, *supra* note 14.

²⁸² Domonoske & Gonzales, *supra* note 9.

²⁸³ MOLONEY, *supra* note 18.

²⁸⁴ See *D.C. v. Heller*, 554 U.S. 570, 635 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Plyler v. Doe*, 457 U.S. 202, 211 (1982); *Matthews v. Diaz*, 426 U.S. 67, 76 (1976); *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904).

²⁸⁵ *Matthews*, 426 U.S. at 76.

²⁸⁶ *Id.* at 77.

the foundation for the importance of ensuring Constitutional protections for undocumented immigrants.

Due to undocumented immigrants' human rights being constantly threatened, it is necessary for them to be encompassed in the definition of "the people" to be protected under the First Amendment. This needs to be achieved by the Supreme Court specifically granting this right through a case of an undocumented immigrant activist facing deportation on the basis of their activism. It may not be plausible that the Court would create this precedent right now due to the current makeup of the Court. However, it is at least possible to make this assertion in the Federal District Courts and Federal Circuit Courts and to push the Supreme Court to decide that undocumented immigrants should be protected by the First Amendment.

Without the ability to speak up against the injustices happening to undocumented immigrants every day, undocumented immigrants are forced into the shadows of America, where the violation of their human rights persist, which changes with each president. Allowing undocumented immigrants to be vocal about the change they seek as part of their everyday existence in the United States is crucial and necessary to uphold the democratic ideals of this country.