

Membership: Reflections on Abortion and Immigration

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THOSE OF US WHO TEACH and write in the area of immigration law tend to agree, almost uniformly, that the Constitution inadequately protects noncitizens. (I stay away from the term “alien” because it conjures up in my mind images of Dr. Spock with his pointed ears and impeccable logic.ⁱ) We also tend to agree that Congress and the Executive often fail in providing appropriate substantive relief and procedural protection to noncitizens within the United States and to those knocking at our doors. In the scholarly literature, immigration law has been referred to as “a constitutional oddity,” a “maverick,” and the “neglected step-child of our public law.”ⁱⁱ Yale law professor, Peter Schuck, suggests that “no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”ⁱⁱⁱ Pro-lifers know that there is another area of our law that is even more radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system but more on that later in the essay.

At both constitutional and subconstitutional levels, immigration law scholars, often with great justification, bemoan the xenophobia and nativism present in American law.^{iv} A brief survey of recent titles in the scholarly literature makes this point: “Aliens as Outlaws,”^v “Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare Reform,”^{vi} “Don’t Give Me Your Tired, Your Poor,”^{vii} and “The First Time as Tragedy, the Second Time Farce: Proposition 187, Section 1981, and the Rights of Aliens.”^{viii}

Immigration law is an interesting and rewarding discipline in and of itself. But when the horizon expands and immigration law is seen as a small part of the legal structure, we discover that immigration law casts unique shadows on the broader legal terrain. For, you see, immigration

law allows us to peer into the soul of the nation. The criteria upon which we judge others as worthy or unworthy of membership in our community and the procedures employed in making the determination tell us much about who we are as a people, about our values, our dreams, and how we live our common life together.

Abortion even more than immigration presents opportunities for a stark assessment of the nation's inner core as reflected outward by its membership regime. In some respects pre-born children and would be immigrants share a similar position in the America of the late 1990's. In *Roe v. Wade*, the Court concluded that "the unborn have never been recognized in the law as persons in the whole sense."^x Justice Stevens, in *Planned Parenthood v. Casey*, draws the parallel between abortion and immigration in a rather startling footnote, suggesting that Haitians "have risked the perils of the sea in a desperate attempt to become 'persons' protected by our laws."^x Both immigrants and the pre-born are knocking at membership's door, with neither guaranteed admission into the American community. These days the pre-born also have the additional burden of clamoring for recognition as members of the larger human family. As we all know far too well, this wasn't always the case. At an earlier time in our history, before *Roe v. Wade* created a constitutional license to terminate a pregnancy, the pre-born did not have to petition for membership in either the human family or the American political family. Entrance into the human family came, well, *naturally*. And, for those children born in the United States, entrance into the American family came by way of the Fourteenth Amendment.^{xi}

Ever since the infamous *Roe* decision, the pre-born have been relegated to the status of "outsider" who must be granted permission to join our community. With a little imagination, immigration law can help us see even more clearly, if that is possible, just how little our culture values the unborn. Normally, when we stare into the looking glass with the eyes of an immigrant, we are struck by the stark contrast between the generous substantive rights and procedural protections afforded members of the community for their protection and the absence of such rights and protections for the noncitizen—the nonmember or the partial member. If we adjust our viewpoint only slightly, the status of the would be

immigrant or potential member of American society looks pretty good. Compared with the pre-born (or to use the Supreme Court's euphemism—"potential life"), the pre-American or "potential member of our political community" is granted a generous array of constitutional and subconstitutional safeguards offering protection and refuge.

In this essay, I contrast the rights granted noncitizens seeking admission to membership in the American community with the lack of protection afforded by any recognition of rights for the unborn child who silently and without counsel makes a similar claim. Although this essay revolves primarily around legal themes, it is not offered as a cogent legal analysis of the type a lawyer would argue in court. Instead, I offer it more as a reflection on our culture. Think of it as another count in the long indictment against a society that allows, as a matter of fundamental constitutional right, the slaughter of millions of innocent and helpless human beings. In short, I hope to spark your imagination as I place the unborn's struggle for life within the context of the types of membership issues that arise in the field of immigration law.

In this brief discussion, I will proceed by exploring three facets of the membership question as it pertains to immigration: (1) the substantive value choices we make in deciding who we will accept for membership; (2) the procedural protections afforded noncitizens seeking membership; and (3) specifically the substance and procedure driving our asylum and refugee law. I conclude by contrasting the constitutional and subconstitutional status of the noncitizen with that of the unborn focusing primarily on the issues of separation of powers and procedural due process.

SUBSTANTIVE VALUE CHOICES

The Constitution, at least as interpreted by the Supreme Court,^{xii} offers no substantive protection for would be immigrants or even aliens who face deportation. With broad deference granted the political branches by the judicial, noncitizens can be excluded or deported from this country on any grounds Congress deems appropriate, even on grounds that would offend our domestic constitutional norms. For instance, the Supreme Court has acquiesced in congressional action providing for exclusion or

deportation on the grounds of race,^{xiii} gender,^{xiv} unpopular speech,^{xv} and membership in unpopular organizations.^{xvi}

Despite the instances when Congress has exercised its plenary immigration power in narrow and nativist ways, Congress and the American people generously allow hundreds of thousands of people to immigrate to the United States annually, including many persons who are considered human refuse by their own countries. Our membership scheme favors four types of aliens: (1) those with family ties in the United States; (2) those who possess skills in areas where the labor market demand outstrips the domestic supply, (3) those who come from countries that have contributed few immigrants over the years; and (4) refugees and asylum seekers who cannot safely remain in their country of origin. Current immigration law allows nearly a half a million people to immigrate to the United States annually for the purpose of family reunification, an additional 140,000 can immigrate annually based on employer petitions, and 55,000 immigrant slots are awarded annually through a lottery weighted heavily in favor of those coming from low sending countries.^{xvii} Additionally, during the 1990's, the United States admitted on average more than 100,000 refugees and asylees annually.^{xviii}

PROCEDURAL SAFEGUARDS

When a noncitizen seeks the partial membership that permanent residence status brings, the noncitizen is provided a wide array of procedural safeguards. These safeguards, which are considered woefully inadequate by immigrant rights advocates, are exceedingly generous when placed in stark contrast to our abominable human rights record with respect to the unborn.

For more than a century, the U.S. Supreme Court has recognized that noncitizens who are within the borders of the U.S., even if they are here illegally, cannot be deported or removed from the U.S., without being given a fair hearing in compliance with the due process clause of the 5th Amendment.^{xix} In part, procedural due process applies to protect these noncitizens because, as Justice Field said in 1893, “nothing can

exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations...there contracted."^{xx}

Similarly, a permanent resident alien (a person we may define as a partial member of our community) who has left the United States for a short time and is returning has a constitutional right to a fair hearing before she can be denied entry.^{xxi} The procedural due process clause, however, does not protect a noncitizen who is (a) in a foreign country seeking a United States visa or (b) seeking entry at the border unless she is a returning permanent resident alien. Theoretically then, no judicially correctable constitutional violation would occur if, without a hearing, we cast potential immigrants into the shark infested waters off the Florida keys to prevent them from infiltrating our sovereign territory.

As you might imagine, even where no process is due under the Court's interpretation of the Constitution, the political branches of our national government through legislation and regulation provide a myriad of procedures to protect the interests of the noncitizen. Most people who desire to live in the United States permanently and become members of our community must successfully navigate a complex web of agencies and subagencies, possibly calling on the judiciary to help them past the most treacherous points on the journey. Within the Department of Justice two agencies, the Immigration and Naturalization Service ("INS") and the Executive Office for Immigration Review ("EOIR") with its immigration judges ("IJ") and Board of Immigration Appeals ("BIA"), play separate but major roles in implementing and policing the immigration regime. Additionally, the State Department's Visa Consular Offices independently review the files of most noncitizens seeking to immigrate. Finally, many applicants seeking employment based immigrant visa's must receive labor certification from the Department of Labor ("DOL"), which typically involves a state employment agency, a DOL certifying officer, and the Board of Alien Labor Certification Appeals ("BALCA"), an appellate body of administrative law judges.

Although we could contrast the substantive rights and procedural protections of any number of types of immigrants with those afforded the unborn, I'll focus, in the next section, on the contrasting legal positions of the asylum seeker and the unborn. The asylum applicant, like the

fetus, knocks at our door begging entry and protection claiming that without our government's sanctuary her life will be imperilled.

ASYLUM

An alien, who presents herself at our border without documents or other evidence of admissibility can claim asylum, alleging that she has "a well founded fear of persecution on account of race, religion, nationality, membership in a particular group or political opinion."^{xxii} Persecution includes "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.*, race, religion, political opinion, etc.), in a manner condemned by civilized governments."^{xxiii} By way of example, a young woman, let's call her Monique, from a particular tribe in Africa who is subject to but opposed to female genital mutilation ("FGM") may be a member of a social group.

And, if the government of her country will either subject her to FGM or stand by while her tribe or family performs FGM, she may have a claim for asylum on the basis that she has a well founded fear of persecution on account of her social group.^{xxiv}

According to United States law, if Monique presents herself at the border seeking asylum, she will be detained, given the opportunity to consult an attorney, and then taken before an asylum officer who will make an initial determination as to whether she has a "credible fear" of persecution.^{xxv} If she establishes credible fear defined as "a significant possibility...that the alien could establish eligibility for asylum," the asylum officer will then refer her for a full determination of her claim before an immigration judge.^{xxvi} If the asylum officer does not find credible fear, the officer must in writing summarize the facts and provide an analysis of why no credible fear was found. Monique can seek review of the asylum officer's decision before an immigration judge and after consulting an attorney. If the immigration judge finds no credible fear, then the alien is subject to removal from the U. S. without the benefit of judicial review of either the asylum officer or the immigration judge's decision.

If Monique is already present in the U.S., her asylum application will be acted upon by an asylum officer in a nonadversarial proceeding.

The asylum applicant has the right to counsel, the right to offer witness affidavits, and the right to offer evidence including live witnesses. If the asylum officer denies her asylum claim, she can renew that claim before an immigration judge as an affirmative ground of relief from deportation in a subsequent removal hearing. During the removal hearing, Monique has a right to be represented by an attorney, to a translator if her native language is not English, to have the immigration judge's decision (findings of fact and conclusions of law) made on the record, to put on her own witnesses, and to cross-examine government witnesses. She also has the right to appeal an adverse decision by the immigration judge to the Board of Immigration Appeals in Washington. If the BIA refuses to grant her the relief sought, she can appeal to the federal appellate court.

Even with these procedures, the risk of error abounds. Lack of money compounded by a lack of knowledge of our culture, the legal system, and the English language may cause Monique to miss the opportunity to effectively apply for asylum. At the border, Monique is subject to expedited removal if she fails to affirmatively ask for asylum. Even if she asks for asylum, she may not have the ability to obtain the services of an attorney who will help her navigate the uncertainties of a credible fear determination and subsequent hearing. And, Congress has denied her access to the courts to appeal an adverse credible fear determination. Although immigration lawyers and advocates detest for good reason the lack of procedural protection and review for would be members of our community, when contrasted with the unborn who make similar claims for membership in our political community and who also seek refuge from life threatening forces, the alien's position is enviable.

THE UNBORN—UNWORTHY OF PROTECTION?

“No society is free where government makes one person's liberty depend upon the arbitrary will of another.”^{xxvii}

As we have seen, the Constitution as interpreted by the Supreme Court mandates certain protections for some immigrants, but in no case does the Constitution prohibit the political branches of the government from granting greater substantive and procedural protection to potential

members. Through its substantive immigration policy the legislative branch has developed an immigration policy favoring family reunification, economic development, and refuge. Congress also specifies certain procedural guidelines for the executive branch to follow in determining whether an alien meets the specified substantive criteria. The executive branch, through the INS, acts in a dual capacity, as a service provider facilitating the entry of qualifying immigrants and as enforcer, attempting to police the border to keep out non-qualifying aliens. The executive branch, through the EOIR, also acts in a quasi-adjudicatory role, supplying immigration judges and the Board of Immigration Appeals to rule on whether the INS overstepped its bounds by denying entry or ordering the removal of noncitizens who are entitled to enter the United States. And, adversely affected noncitizens through the constitutional writ of habeas corpus^{xxviii} and through legislative grants of jurisdiction can, in many cases, seek limited judicial review of the executive's immigration decision in a particular case.

In contrast, when the unborn petition for membership in the American community, our Constitution, as interpreted by the Supreme Court in *Roe v. Wade* and modified by *Planned Parenthood v. Casey*, prohibits the American people from providing all substantive and most procedural protection. As we know all too well, the Court grants the mother the power to deny the child's humanity or to abort her child in spite of the child's humanity. This decision remains her's alone subject to no meaningful oversight. She possesses the absolute authority to determine whether the "distress, for all concerned, associated with an unwanted child"^{xxix} outweighs the child's claim to membership. The mother acts in a legislative capacity as policymaker making the substantive determination with respect to the value of fetal life and the circumstances in which the unborn child will be allowed to enter into membership in our human and political community. During a pregnancy in which abortion is contemplated, the mother also acts in an executive capacity, carrying out her substantive policy as to whether this particular baby ought to be denied membership. Finally, she acts in an adjudicative capacity, reviewing the propriety of her legislative value choices and judging the executive application of that policy. In other words, the

Court requires that she be the sole authoritative lawmaker, executive, and judicial officer in determining the membership status of her offspring. Investing this type of power in one person to determine the fate of an asylum applicant who is presently in the United States would clearly be unconstitutional. And, even for the arriving asylum applicant, Congress grants much more in the way of substantive and procedural protection.

The Court's abortion arrangement, which places with the mother complete sovereignty over this vital membership issue, violates basic constitutional concepts. Quite apart from the substantive question about the unborn child's right to life and whether and in what circumstances abortion might be justified, placing the legislative, executive, and judicial power over this important membership issue in the hands of a single person assaults our core values of separation of powers and due process. To borrow from Justice Cordozo, "this is delegation running riot."^{xxx} Writing as Publius, James Madison stated that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the proposition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, ... may justly be pronounced the very definition of tyranny."^{xxxi} Quoting Montesquieu, Madison explained, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, ... were it joined to the executive, the judge might behave with all the violence of an oppressor."^{xxxii} In the absence of separated powers with checks and balances, the interest and passions of the mother prevail over the interest of the unborn child and the interest of the community in protecting innocent human life.

The due process interests of the petitioning fetus also suffer jurisprudential genocide under the weight of the Court's mandate in *Roe* and *Casey*. Many years ago, Judge Henry Friendly listed eleven attributes of a fair hearing: "an unbiased tribunal," "notice of the proposed action and the grounds asserted for it," an opportunity to present reasons why the proposed action should not be taken," the "right to call witnesses," the right "to know the evidence against one," the right "to have the decision based only on the evidence presented," the right to

counsel, “the making of a record,” a “statement of reasons” for action to be taken, a proceeding open to the public, and judicial review.^{xxxiii} Since *Planned Parenthood v. Casey*, a state can take a limited role in lobbying the women regarding the wisdom of her legislative formulation (providing her with information as to fetal development), it may also provide limited relief to the child during the prosecutorial phase of the membership hearing by requiring a 24 hour continuance before a final judgment is made, but unless the pregnant woman is a minor, she is the ultimate judge as to whether her child will be admitted into membership in our society. In reality, the child receives almost no meaningful procedural protection. The child is entitled to neither a guardian ad litem nor an attorney to represent her interests. No unbiased tribunal waits to decide the fate of this youngest of asylum seekers. Instead, the Court insists that the mother, who as prosecutor has charged the fetus with inadmissibility on grounds of inconvenience, distress, public charge, physical defect, or some similar ground that makes the fetus undesirable, acts as judge without much interference from any outside party, including the state and the child’s father. In fact, each and every element of a fair hearing is denied the child seeking membership in our community.

Professor Kevin Johnson stresses that when we distinguish “between aliens and persons, [we are] able to reconcile the disparate legal and social treatment of the two groups” by institutionalizing and legitimating the alien as “other” or as a nonperson.^{xxxiv} A similar process occurs within the abortion realm. As pro-choice philosopher Naomi Wolff remarked, by “[c]linging to a rhetoric about abortion in which there is no life and no death, we entangle our beliefs in a series of self-delusions, fibs and evasions.”^{xxxv} Instead, she argues, we must confront the fetus “in its full humanity,” admitting that abortion involves real death.^{xxxvi} Pro-choice constitutional law scholar, John Hart Ely would also have us recognize that “[a]bortion ends...the life of a human being other than the one making the choice.”^{xxxvii}

Such honesty is fraught with consequences. If we set aside the legerdemain and correct the judicially sanctioned “fibs and evasions” about abortion and fetal life, tremendous pressure will be brought to bear on the constitutionality of the abortion license. The courts and/or the

legislatures have a duty to protect this most innocent of human life. To articulate it in immigration terms, one could even imagine an unborn child seeking asylum through the assistance of a guardian, claiming that her government will do nothing to protect her from certain death, which will occur as a form of persecution on account of the unborn's social group defined as unborn children who desire to live but who have mothers bent on destroying that possibility. Our asylum policy requires the grant of asylum anytime an innocent noncitizen can prove that she will be put to death on account of her social group, and our abortion law should do no less.

At a minimum, however, recognition of the child's humanity should require the court to allow the legislatures discretion to offer the unborn greater procedural and possibly substantive protections. Ely suggests that "an unwanted child can go a long way toward ruining a woman's life."^{xxxviii} Wolff says that women who seek abortion because of poverty, youth, marital rape, and incest have less moral culpability than those who seek abortion for other reasons."^{xxxix} Even assuming *arguendo* that morally justifiable abortions exist, Ely, in attacking what he calls the "frightening" *Roe* opinion, reminds the reader that "the Court requires of the mother" no showing that her desired abortion falls into an acceptable category.^{xl} As Wolff points out, "[o]f the abortions I know of, these were some of the reasons: to force a boy or man to take a relationship more seriously; and, again and again, to enact a rite of passage for affluent teenage girls. In my high school, the abortion drama was used to test a boyfriend's character."^{xli} In her own case, Wolff says, "there were two columns in my mind—'Me' and 'Baby'—and the first won out" because of "unwelcome intensity in the relationship with the father; the desire to continue to 'develop as a person' before 'real' parenthood; wish to encounter my eventual life partner without the off-putting encumbrance of a child."^{xlii} In conclusion, she says, "I chose myself on my own terms over a possible someone else, for self-absorbed reasons."^{xliii}

Abortion pits mother against child in a life and death struggle. Some argue that the abortion decision is "an intensely personal decision" for the mother alone to make. To this Naomi Wolff says, "No: one's

choice of *carpeting* is an intensely personal decision” but not one’s “struggles with a life-and-death issue.”^{xliv} We as a society must resolve these conflicts when presented to us. If we are not going to fully protect the weak and innocent in their quest for membership, we can surely enforce our concepts of separation of powers not allowing the mother to be law maker, prosecutor, and judge in a case in which she has an inherent conflict. We could also insist on fair procedures, allowing the unborn child an advocate and a forum to make the case for membership against the certain death if membership is denied.

Dissenting in the *Mezei* case, Justice Jackson severely criticized the majority for creating a legal fiction, which denied the alien’s personhood.

By pretending that Mezei was not a person for constitutional purposes, the Court held that he was not entitled to the protections given other’s pursuant to the due process clause; therefore, the Executive under authority granted by Congress could hold him indefinitely as a prisoner on Ellis Island without ever disclosing the charges against him or giving him an opportunity to defend himself.^{xlv} After concluding that basic “fairness in hearing procedures does not vary with the status” of the one subject to harm, Jackson suggested that the Court’s logic could allow the United States to “eject [an alien] bodily into the sea.”^{xlvi} While the Court’s use of legal fiction might allow this outcome in immigration cases, the *Roe* and *Casey* mandate an even worse fate for the unborn. Yes, Professor Schuck is right, immigration law resides at the fringes of our public law. But, the law dealing with the distribution of membership benefits to the pre-born is even more “radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”^{xlvii}

NOTES

i. See Kevin Johnson, “‘Aliens’ and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons,” *Univ. of Miami Inter-American Law Review* 28 (1996-97) 263, 272.

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- ii. Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," *Supreme Court Review* (1984) 255, 255; Hiroshi Motomura, "The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights," *Columbia Law Review* 92 (1992) 625, 1631; Peter H. Schuck, "The Transformation of Immigration Law," *Columbia Law Review* 84 (1984) 1, 1.
- iii. Schuck, *supra* n.2 at 1.
- iv. See, e.g., Gabriel J. Chin, "Segregation's Last Stronghold: Race, Discrimination and the Constitutional Law of Immigration," *UCLA Law Review* 49 (1998) 1.
- v. Gerald Neuman, "Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine," *UCLA Law Review* 42 (1995) 1425.
- vi. Berta Esparanza Hernandez-Truyol & Kimberly Johns, *Southern Cal. Law Review* 71 (1998) 547.
- vii. Bill Ong Hing, "Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform," *Harvard Civil Rights & Civil Liberties Law Review* 33 (1998) 159.
- viii. Stephen Knight, *UCLA Pacific Basin Law Journal* 15 (1997) 289.
- ix. 410 U.S. 113, 162 (1973).
- x. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2840 (1992) (Stevens, J., concurring in part and dissenting in part).
- xi. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Constitution, Amendment 14 (1868).
- xii. See Michael Scaperlanda, "Who is My Neighbor? An Essay on Immigrants, Welfare Reform, and the Constitution," *Connecticut Law Review* 29 (1997) 1587, 1599 (suggesting that the responsibility for ensuring that our immigration law and policy is consonant with our constitutional norms lies with the citizenry and its elected representatives); and Michael Scaperlanda, "Partial Membership: Aliens and the Constitutional Community," *Iowa Law Review* 81 (1996) 707, 771 (same). See also Victor Romero, "Expanding the Circle of Membership By

Reconstructing the ‘Alien’: Lessons From Social Psychology and the ‘Promise Enforcement Cases,” *Univ. of Michigan Journal of Law Reform* 32 (1998) 1 (taking this task of communal formation seriously).

xiii. *Chae Chan Ping v. United States* (the Chinese Exclusion Case), 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149, U. S. 698 (1893).

xiv. *Fiallo v. Bell*, 430 U.S. 787 (1977).

xv. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

xvi. *Harisaides v. Shaughnessy*, 342 U.S. 580 (1952).

xvii. 8 United States Code Annotated, Section 1151 (1999).

xviii. Stephen Legomsky, *Immigration and Refugee Law and Policy* (Foundation Press, 2nd ed., 1997), p. 762.

xix. *Yamataya v. Fisher* (the Japanese Immigrant Case), 189 U.S. 86 (1903).

xx. *Fong Yue Ting v. United States*, 149 U.S. 698, 759 (1893)(Field, J., dissenting).

xxi. *Landon v. Plasencia*, 459 U.S. 21 (1982).

xxii. 8 United States Code Annotated, Section 1158 (1999).

xxiii. *E.g., Abdel-Masieh v. INS*, 73 F.3d 579, 583 (5th Cir. 1996).

xxiv. See *Matter of Kasinga*, Int. Dec. 3278 (BIA 1996).

xxv. 8 Code of Federal Regulations Section 235.3 (1999).

xxvi. 8 United States Code Annotated, Section 1225 (1999).

xxvii. *Shaughnessy v. United States, ex rel. Mezei*, 345 U.S. 206, 217 (Black, J., dissenting).

xxviii. See Lenni Benson, “Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings,” 29 *Connecticut Law Review* 29 (1997) 1411.

xxix. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

xxx. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935)(Cordozo, J., concurring).

xxxi. *The Federalist Papers*, No. 47 (1788).

xxxii. *Ibid.*

xxxiii. Henry J. Friendly, "Some Kind of Hearing," *U. Penn. Law Rev.* 123 (1975) 1267, 1279-95.

xxxiv. Johnson, *supra* note 1 at 273, 268 & 270. He draws a parallel between the alien and the fetus in this article. *Ibid.* at 278, n.73.

xxxv. Naomi Wolff, "Our Bodies, Our Souls," *The New Republic* (October 16, 1995) 26.

xxxvi. *Ibid.* at 33 & 26.

xxxvii. "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale Law Journal* 82 (1973) 920, 924.

xxxviii. *Ibid.* at 923.

xxxix. Wolff, *supra* note 35 at 32.

xl. Ely, *supra* note 37 at 924, n.26 & 935.

xli. Wolff, *supra* note 35 at 32.

xlii. *Ibid.*

xliii. *Ibid.* at 33.

xliv. Wolff, *supra* note 35 at 34.

xlv. 345 U.S. 206 (1953).

xlvi. *Ibid.* at 225 & 226.

xlvii. Shuck, *supra* note 2 at 1.