

# Tulsa Law Review

---

Volume 47  
Number 1 *Book Review Issue*

Volume 47 | Number 1

---

Summer 2011

## Citizenship under Fire: the Forging of the New Americans

Shruti Rana

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Shruti Rana, *Citizenship under Fire: the Forging of the New Americans*, 47 Tulsa L. Rev. 31 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol47/iss1/4>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# CITIZENSHIP UNDER FIRE: THE FORGING OF THE NEW AMERICANS

Shruti Rana\*

ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* (Cambridge Univ. Press 2010). Pp. 280. Hardback. \$90.00.

EDIBERTO ROMÁN, *CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE* (N.Y. Univ. Press 2010). Pp. 224. Cloth. \$45.00.

Immigration law has long occupied a distinctive and rather exceptional position in American law.<sup>1</sup> On one hand, immigration law and its underlying notions of citizenship are intended to reflect an idealized American democracy, embodying the foundational myths that have helped shape the concept of America as a repository of freedom and hope, one where anyone with talent and a little bit of luck can hope to succeed beyond her or his wildest dreams.<sup>2</sup> The ultimate honor realized through U.S. immigration law is, of course, the attainment of citizenship and its attendant rights and privileges.<sup>3</sup> On the other hand, U.S. immigration law has in numerous ways become a repository of hate, xenophobia, and fear. This strand of immigration jurisprudence has both deliberately and unconsciously constricted rather than expanded the American notion of citizenship.<sup>4</sup>

---

\* Associate Professor of Law, University of Maryland School of Law. The author appreciates the helpful comments of Mark Graber, Smriti Rana, Song Richardson, Christopher Rickerd, and David Super and the discussants at Anna Law's Author-Meets-Reader Session at the Midwest Political Science Association Annual National Conference..

1. See Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 *GEO. IMMIGR. L.J.* 257 (2000); Hiroshi Motomurad, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545 (1990); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 *B.C. L. REV.* 755 (2000); James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 *U.C. DAVIS J. INT'L L. & POL'Y* 227 (1995). See also Peter H. Schuck, *The Transformation of Immigration Law*, 84 *COLUM. L. REV.* 1, 1 (1984) ("Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and [the] judicial role . . .").

2. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 *N.C. L. REV.* 273 (1996).

3. EDIBERTO ROMÁN, *CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE* (2010).

4. Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 *OKLA. L. REV.* 697, 718 (1998) ("Part of the reason for congressional and administrative ill-will towards aliens stems from a general anti-immigrant sentiment prevalent in the United States. In addition, this sentiment 'blurs the distinction between legal and illegal migration.' This backlash has prompted Congress to discriminate severely against both legal and illegal aliens and has spilled over into recent congressional decisions to restrict administrative and judicial remedies for aliens facing deportation. Throughout this century, America as a whole can be

Each of these strands has become deeply entrenched, clashing at nearly every level of political and legal discourse.<sup>5</sup> From a doctrinal perspective, these clashes and their consequences are only sharpened by the high level of deference the judiciary accords to the immigration agency: whatever approach the political system takes at a given juncture is unlikely to be moderated, thereby creating in the immigration arena a “realm in which government authority is at the zenith and individual entitlement is at the nadir.”<sup>6</sup>

In recent years, scholars and practitioners sympathetic to immigrants have dealt with this dichotomy (and the related problem of deference) in two predominant ways. One is proceduralist, seeking technical means to chip away at restrictive immigration laws bit by bit to create a more just system. Its vision of justice is highly practical: a more legally inclusive notion of citizenship, a less arbitrary deportation system, and fewer denials of human rights.<sup>7</sup> The second response is more personal, metaphorical, and philosophical, hoping to expand the meaning of citizenship, and in particular, the conception of citizenship in America. It seeks to fulfill the promise of a land where freedom can actually be held and realized by all Americans. It strives to include those who hope to be recognized legally, not just culturally, as truly American.<sup>8</sup>

Two new books on the debate over immigration and citizenship exemplify these divergent approaches to immigration law, and each offers unique and intriguing contributions to this “peculiar” yet vibrant area of American jurisprudence.<sup>9</sup> Consistent with the respective traditions into which they fall, these books, Anna O. Law, *The*

---

characterized as xenophobic.” (footnotes omitted)).

5. See Shruti Rana, “Streamlining” the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action, 2009 U. ILL. L. REV. 829 (2009) (arguing U.S. deportation policy and adjudication should be conducted in a less arbitrary manner and discretionary authority over deportation should be modified); see, e.g., Julia Preston, *Political Battle on Illegal Immigration Shifts to States*, N.Y. TIMES, Dec. 1, 2010, at A1; Tim Rutten, *On Immigration, It’s up to Washington*, L.A. TIMES, May 5, 2010, available at <http://articles.latimes.com/2010/may/05/opinion/la-oe-0505-rutten-20100505>; Peter H. Schuck, Op-ed., *Birthright of a Nation*, N.Y. TIMES, Aug. 14, 2010, at A19.

6. See Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059 (2011); Claire R. Kelly, *The Brand X Liberation: Doing Away with Chevron’s Second Step as well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 174 n.111 (2010) (“A fundamental premise of the immigration enforcement process must be that the substantive regulations codified in title 8 of the Code of Federal Regulations are binding in all administrative settings, and this specifically includes substantive regulations interpreting and applying the provisions of the Act. Of course, the Service and the Board are bound by the decisions of the federal courts, but even the federal courts owe deference to authoritative agency interpretations of the substantive provisions of the Act, within the limits recognized by the Supreme Court.”) (citations omitted) (quoting Board of Immigration Procedure: Procedural Reforms Improve Case Management, 67 Fed. Reg. 54878, 54878-01 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3)).

7. See, e.g., Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT’L L. 453 (2008); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007).

8. See, e.g., Michelle A. McKinley, *Conviviality, Cosmopolitan Citizenship, and Hospitality*, 5 UNBOUND: HARV. J. LEGAL LEFT 55 (2009); Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637 (2008).

9. Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 507 (2008) (recognizing “the constantly changing world of immigration law” that judges and BIA members must be aware of); Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 603 (2007) (stating “[i]mmigration law is a constantly changing area . . .”).

*Immigration Battle in American Courts*,<sup>10</sup> and Ediberto Román, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique*,<sup>11</sup> contrast along many dimensions, including their approaches to deciphering the current state of American immigration law and the meaning of citizenship as well as their narrative style and the empirical approaches each author deploys in search of answers to these dilemmas..

ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS*.

Anna Law's new book falls into the first category of immigration jurisprudence identified above — she takes a procedural approach to unraveling the complex and often inscrutable immigration cases emanating from the U.S. courts of appeals and the U.S. Supreme Court. She focuses on how each court's evolving institutional context affects its decision-making.<sup>12</sup> Professor Law, a political scientist at DePaul University, conducted detailed empirical analyses of the Supreme Court and several U.S. courts of appeals, interviewing judges and examining the different approaches the Supreme Court and the courts of appeals<sup>13</sup> have taken to immigration cases across time.<sup>14</sup>

She begins her book with an interesting premise. She questions whether the Supreme Court and the U.S. courts of appeals treat immigration cases in a similar fashion, and employs empirical data to examine divergences in how these courts treat immigrants. She argues that her data analysis shows that the U.S. Supreme Court and U.S. courts of appeals have gradually begun treating non-citizens' petitions to remain in this country in markedly different ways.<sup>15</sup> Professor Law's analysis is driven by the question of why immigrants' chances of success (as measured by denial of deportation, exclusion, or a grant of citizenship) decrease as their cases move towards the Supreme Court. As Law notes, this question takes on an added gravity because the consequences of deportation and exclusion decisions are often so severe; the stakes involved can sometimes literally lead to a decision marking a non-citizen for life or death.<sup>16</sup> From here, she contends that the federal judiciary's path appears to have "taken a [radically] different form than the one envisioned by the [founding fathers]."<sup>17</sup> She argues that the Supreme Court, at least in a structural sense, has deviated from its original mission by

10. LAW, *supra* note 6.

11. ROMÁN, *supra* note 3.

12. LAW, *supra* note 6, at 3.

13. Specifically, Professor Law focused on the Third, Fifth, and Ninth Circuits in her evaluations of the U.S. courts of appeals. *See id.* at 12, 83-87.

14. *Id.* at 2.

15. *Id.*

16. LAW, *supra* note 6, at 4. According to Senator Patrick Leahy (D. Vt.), for "an asylum seeker with a valid claim of persecution in her home country, a denial may be tantamount to a death sentence." *Improving Efficiency and Ensuring Justice in the Immigration Court System, Hearing Before the Subcomm. on Immigration, Refugees, and Border Security*, 112 Cong. (2011) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on Judiciary). *See also* John Lantigua, *In Asylum Cases, Immigration Judges Under a Lot of Pressure*, PALM BEACH POST (May 10, 2008), [http://www.palmbeachpost.com/localnews/content/state/epaper/2008/05/10/mla\\_judges\\_0511.html](http://www.palmbeachpost.com/localnews/content/state/epaper/2008/05/10/mla_judges_0511.html) (quoting Judge Dana Marks, President of the National Association of Immigration Judges, who notes that asylum cases can be like "death penalty cases" since some people may face death if asylum is denied); Jacqueline Stevens, *Lawless Courts*, THE NATION (Nov. 8, 2010), <http://www.thenation.com/article/155497/lawless-courts>.

17. LAW, *supra* note 6, at 3.

becoming more of a policy court than a court of law. She contrasts this role with that of the courts of appeals, which she sees as having taken on more of an error-correction role in the immigration arena, noting that in most cases they have become the courts of last resort for immigrants.<sup>18</sup>

Professor Law ultimately concludes “that the Supreme Court and [U.S.] Courts of Appeals [now] operate in [distinctly] different . . . contexts, and that each court’s unique institutional context acts as a filtering mechanism that shapes the judges’ perception[s] of” their roles and actions.<sup>19</sup> In her view, these courts have not played a static but rather a dynamic role in the federal judicial system over time. She then explores the consequences of these dynamic roles, both for the courts themselves and for the immigrants who appear before them.<sup>20</sup>

In particular, after noting that both courts are supposed to be concerned with “stable sets of rules, procedures, and norms,”<sup>21</sup> Professor Law claims that both empirical and anecdotal data appear to show that the U.S. Supreme Court has transformed from an appellate court into much more of a policy court,<sup>22</sup> “that is, a court that that thinks in terms of grand ideas of jurisprudence and policy rather than focusing on the facts of the individual cases, as a court of appeals devoted to the correction of errors might do.”<sup>23</sup> She then concludes that the U.S. courts of appeals are in a number of instances “engaged in seemingly purpose[ful] behavior to either shirk existing precedent or congressional intent in order to find in favor of the [non-citizen].”<sup>24</sup> She questions this development in light of the deference the courts owe to Congress and the deference the lower courts owe to the Supreme Court, especially given her claim that immigration law is characterized by “strong and unequivocal doctrinal directives”<sup>25</sup> from the Supreme Court. She then claims that immigration law is the ultimate test case for such claims about the courts’ roles, although she qualifies this latter assertion by noting that immigration law is perhaps uniquely characterized by strong government power and a lack of individual power..<sup>26</sup>

Professor Law’s tireless empirical work is impressive and her institutional analysis is thought-provoking. Her constitutional originalism, and the sharp lines she draws between law and policy, will not sit well with legal scholars, although they are not her chosen audience. She argues that the now-“evolved federal judiciary has taken a different form from the one envisioned by the founders, but this new form has simply redistributed the missions and duties of the judicial institution to its different segments. In the end”, in her ultimate analysis,, “the federal judiciary may have wandered from the structural design intended by the founders, but the roles and missions that the founders wished the judiciary to serve in the political system are still being carried out”<sup>27</sup> While

---

18. See LAW, *supra* note 6, at 4, ch. 3.

19. *Id.* at 3.

20. *Id.* at 12.

21. *Id.* at 2.

22. *Id.* at 15.

23. *Id.* at 13.

24. LAW, *supra* note 6, at 8.

25. *Id.* at 7.

26. *Id.* at 7 (quoting Schuck, *supra* note 1, at 1).

27. *Id.* at 3.

many may disagree with these assertions, or simply find them unremarkable from a legal perspective, Professor Law's argument could be strengthened by tackling head-on two issues which she addresses only briefly.

First, Professor Law sets up a somewhat circular argument with her claim that immigration law is an ideal test case for the institutional analysis she carries out. She notes that immigration law is often singled out for its insulation and isolation from other areas of American law because of the high level of judicial deference accorded to immigration decisions and the level of political interference in immigration cases.<sup>28</sup> She then concludes that the Supreme Court has evolved from the forum envisioned by its founders into much more of a "policy" court than a court of law in the immigration arena.<sup>29</sup> In this sense, then, immigration law is not necessarily the ideal test case Professor Law describes it as — it is (and has been) a highly politicized area of the law,<sup>30</sup> and this politicization is, not surprisingly, reflected in the decisions of the Supreme Court. Moreover, the high level of deference to the executive involved in immigration decisions is likely to intensify the political nature of immigration decision-making, particularly at the Supreme Court. Thus, her claims about the Supreme Court's role — whether seen through her policy-law dichotomy or as a novel form of deference to administrative agencies — appear limited to the immigration arena. At a minimum, one should tread with caution in interpolating her conclusions to the Court's decision-making in another area of law.<sup>31</sup> Furthermore, her analysis and conclusions appear to rely perhaps too heavily on her formulation of an originalist perspective on the roles of the courts, and her analysis could be deepened by delving further into the differences or similarities she finds between the model she characterizes as originalist and the results of her contemporary research. Getting beyond the distraction of what was or was not the intent of the founders and exploring the relative strengths and weaknesses of alternative models would allow the reader to focus on the evident core of her concerns. Again, these insights will not seem as fresh to legal academics, but may provide interesting fodder for political scientists approaching these issues.

Second, in coming to her claim that the U.S. courts of appeals have begun acting as

---

28. There can frequently be politicized interactions between the judiciary and Congress on immigration issues. For example, a former Department of Justice liaison to the White House, Monica Goodling, testified before Congress that the Bush Administration's hiring policy on immigration judges was based on political ties and ideological beliefs, not experience in the field. See U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 110-11, 116 (July 28, 2008), available at <http://www.justice.gov/oig/special/s0807/final.pdf>; Steven H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

29. LAW, *supra* note 6, at 9.

30. The politicization of immigration law is not confined to the halls of Congress, or more recently, the state and municipal legislatures. Additionally, Professional Michael A. Olivas noted that "immigrant-bashing has a long and venerable tradition in U.S. politics," which further illustrates the politicized nature of immigration. Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 130 (2008). Professor Olivas also points to a rise in media pundits, such as Lou Dobbs, who espouse anti-immigration views, which, in turn, can further politicize immigration law. *Id.* at 104-05.

31. *But see* Shruti Rana, *Chevron Without the Courts? The Supreme Court's Chevron Revision Project Through an Immigration Lens*, 25 GEO. IMMIGR. L. J. (forthcoming) (discussing the role of immigration cases as predictive of Supreme Court attitudes).

error-correction courts in the immigration law arena, Professor Law gives short shrift to two significant recent developments in immigration law which did much to transform the role of the courts of appeals in immigration cases.

Many of the recent changes in immigration adjudication can be traced to the Department of Justice's restructuring of the immigration agency in the aftermath of September 11, 2001.<sup>32</sup> A surge of cases that began even before the terrorist attacks led the Department to institute "streamlining" reforms in 2001, which greatly enhanced the level of discretion accorded to agency decision makers and correspondingly sought to limit the discretion the courts of appeals had over the decisions that ultimately reached them.<sup>33</sup>

As Professor Law herself notes, these changes led many appellate judges to begin to see their role as an increasingly error-correction one in the immigration context. The judges saw increasingly numbers of sloppy, ill-considered agency cases arriving in their dockets and started losing trust in the agency itself. As the courts of appeals, particularly the Ninth and Second Circuits, were inundated with immigration cases, they became increasingly critical of an agency they felt was failing to fulfill its allotted role of fair, careful adjudication and meaningful review by the Board of Immigration Appeals (BIA) over the work of individual immigration judges. This failure, the judges believed, shifted the burden of error-correction to the courts of appeals.<sup>34</sup> Appellate judges in several circuits cited the agency's repeated failures to comply with the rule of law, finding that "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice,"<sup>35</sup> and they, and others, repeatedly criticized the Board for "rubberstamping" cases to reduce the agency's caseload.<sup>36</sup> Professor Law cites judges she interviewed who "stated over and over again that they were dismayed by the lack of quality control at the BIA and the routine summary affirmances the Board issued."<sup>37</sup>

Compounding these problems were the ways in which both agency rules and congressional legislation have circumscribed the courts of appeals' discretionary decision-making authority in immigration cases.<sup>38</sup> For example, in addition to the agency's streamlining rules, which sought to strip the federal courts of discretionary authority to review immigration agency decisions except in limited circumstances,<sup>39</sup> Congress passed several acts stripping the courts of appeals of jurisdiction to review

---

32. Rana, *supra* note 5, at 832.

33. *See id.* at 843-44.

34. LAW, *supra* note 6, at 186-87.

35. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) ("This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."). *See also* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 401 (2007) ("When a court ignores congressional intent and aggressively interprets a statute in favor of an alien by applying the avoidance canon, and thus does not act as a 'faithful agent' of Congress, it can still be said to act with restraint by not deciding the case on constitutional grounds.")

36. *See* LAW, *supra* note 6, at 177-78.

37. *Id.* at 183.

38. *Id.* at 182-84; *see* Rana, *supra* note 5, at 832-34.

39. *See* Rana, *supra* note 5, at 835-36.

certain types of immigration issues in the 1990s.<sup>40</sup>

Both of these factors appear to have played a large role in driving the courts of appeals into a broad (and perhaps expanding) error-correction role as they dealt with the unprecedented wave of immigration appeals over the last decade; these changes went well beyond merely “reinforc[ing]” the courts of appeals’ error-correction mission, as Professor Law describes it.<sup>41</sup> In this light, the evolution of the courts of appeals to more of an error-correction court arguably stems more from the historical contingencies of the last decade, mostly occurring at the immigration agency and spreading through to the courts of appeals, rather than from a true institutional evolution.<sup>42</sup> That is, from a legal and historical perspective, it appears that the courts of appeals and Supreme Court have not so much changed or evolved their roles, but rather the post-9/11 changes have heavily underscored or emphasized certain functions the courts were forced to deal with as they faced a sudden onslaught of immigration cases. In this sense, Professor Law’s analysis points to a sharpening of already existing roles and divisions of responsibilities between the courts rather than a truly novel institutional transformation with broader implications.

While Professor Law provides a wide ranging and detailed longitudinal study of the Supreme Court and several courts of appeals, an even larger data set would help strengthen or further refine her arguments. For example, while Professor Law conducts an excellent analysis of these developments at the Ninth Circuit, she provides far less data on the Second Circuit, the other federal appellate court most flooded by immigration cases.<sup>43</sup> This data set would have presumably provided fertile areas of comparison with the data collected on the Supreme Court and other courts of appeals.<sup>44</sup>

In sum, Professor Law has written a detailed and insightful analysis of the changing nature of our highest courts. She demonstrates how seemingly minute institutional changes can bring about severe consequences for immigrants, the courts of appeals, and the U.S. Supreme Court, leading them further away from what Professor Law sees as the founders’ original intent for these individual institutions. Yet, Professor Law ends her analysis on a positive note, concluding that while the respective roles of the Supreme Court and courts of appeals have diverged or been redistributed, at least in the immigration context, nonetheless in her view and overall, these two courts, working in tandem, do still do play a constructive role of the judiciary in our political system.

---

40. See LAW, *supra* note 6, at 156-57; see also Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 & 18 U.S.C.).

41. LAW, *supra* note 6, at 186.

42. See, e.g., Rana, *supra* note 5, at 843 (describing the influx of appeals at the Department of Justice and the Attorney General’s response aimed at increasing the discretionary authority and speed of agency decision making). See also Hobbs Act, Pub. L. No. 87-301, § 106, 75 Stat. 650, 651-53 (1961) (codified as amended in scattered sections of 8 U.S.C.) (routing most federal appeals of immigration agency decisions directly to the U.S. courts of appeals).

43. See John R.B. Palmer et al., *Why Are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005).

44. LAW, *supra* note 6, at 187.



EDIBERTO ROMÁN, CITIZENSHIP AND ITS EXCLUSIONS:  
A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE.

In his recent book, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique*, Ediberto Román approaches similar questions involving immigration and citizenship from a completely different perspective — he questions and analyzes how our notion of citizenship has itself been constructed, and in particular, how the citizenship concept has been expanded and restricted.

While Professor Law's book focuses on empirical data and a relatively narrow subset of time and space to analyze the current immigration battle in the United States, Professor Román, a legal scholar at Floirda International University, takes on a much broader view of the idea of citizenship. He explores the roots of the present day American citizenship construct with a far more personal and philosophical approach than Professor Law.

Professor Román's primary contribution to the citizenship debate is an intriguing one: he claims that the citizenship construct underlying American jurisprudence is not based on equality and a democratic ethos, as is commonly assumed. Instead, he argues that American citizenship, and Western ideas of citizenship, have a history of often hidden exclusionary precepts that ultimately operate to deny all American citizens the rights and privileges to which they are entitled.<sup>45</sup>

First, he traces the ideal versions of citizenship, as posited in Western thought, since classical times, all the while pointing to ways that citizenship has often been used for exclusionary rather than inclusory purposes.<sup>46</sup> He then moves to a detailed analysis of how, despite the ideal of American citizenship invoked in political and democratic rhetoric, American citizenship still has significant, and often overlooked, exclusionary facets. For example, he distinguishes between *de jure* and *de facto* citizenship exclusions, explaining how groups like Puerto Ricans, while ostensibly American citizens, are barred from exercising full American citizenship rights.<sup>47</sup> He then takes on the topic of *de facto* exclusions, explaining that although groups like African Americans are legally entitled to the full privileges of citizenship, in practice, systematic forms of oppression operate to deny them the ability to fully exercise those rights.<sup>48</sup>

This contribution identifies possible holes in the current American citizenship construct and points out areas for future work to ensure that all American citizens can exercise the rights and privileges to which they are entitled. In pursuit of this goal, one of Professor Román's key suggestions is that that international human rights norms can and should help inform these debates. In attempting to incorporate these norms explicitly into the American citizenship construct, he offers a path towards a truly universal concept of citizenship, one based on inclusion rather than exclusion. This concept offers a fertile area for further research. However, building such a truly universal concept of citizenship, or even making meaningful progress in that direction, remains a daunting task, which in many ways has merely begun.

---

45. ROMÁN, *supra* note 3, at xi.

46. *See id.* at 15-81.

47. *See id.* at 97-98.

48. *See id.* at 119.

Taken together, both Law's and Román's books offer fascinating insights into the current state of immigration law and make valuable contributions to the contemporary debates about the ever-evolving concept of American citizenship.

