NON-CITIZEN RIGHTS DEPRIVATIONS: A CONSTITUTIVE RHETORIC ANALYSIS OF *PATEL V. GARLAND*

THOMAS DE XAVIER*

TABLE OF CONTENTS

INTRODUCTION

On May 16, 2022, the U.S. Supreme Court eviscerated a fundamental fail-safe for reviewing bureaucratic errors made by an overburdened immigration court system in *Patel v. Garland*.[1] The facts reflect the common experience which many noncitizens face: a permanent resident applicant claimed to have made a mistake by checking a box on a state-issued form that identified him as an American citizen.[2] Because of this, the immigration courts deemed him untrustworthy and ordered his removal.[3] Upon reaching the Supreme Court, it held that federal courts are prohibited from reviewing any factual determinations made by the Immigration Courts for discretionary relief,[4] even when the factual challenges raised were probative to resolving the underlying legal question.[5] The result in *Patel* greatly diminished the available procedural rights for noncitizens.

This paper seeks to uncover the rhetorical roots in *Patel v. Garland* that have intensified rights deprivation for noncitizens. Part I expounds upon the case of *Patel v. Garland* and presents Justice Barrett's language in the majority. Part II outlines constitutive rhetoric theory, which serves as the analytical framework used in this note to evaluate Justice Barrett's rhetoric. The framework is designed to reflect law as rhetoric and reveal the communities spoken to within its discourse.[6] Part III applies constitutive rhetoric theory to the *Patel* decision. Finally, Part IV concludes with a discussion of the due process deprivations which have been exacerbated by Justice Barrett's rhetoric in *Patel*.

I. *PATEL V. GARLAND*

In 1992, Pankajkumar Patel illegally entered the United States from India with his wife, Jyostnaben, and two of their sons.[7] After entering the United

1. Patel v. Garland, 596 U.S. 328, 364 (2022) (Gorsuch, J., dissenting) (discussing the consequences of the holding by the majority in *Patel*); *See U.S. Immigration Courts See A Significant and Growing Backlog,* GOV'T ACCOUNTABILITY OFFICE (Oct. 19, 2023), https://perma.cc/W6PD-PXHK (discussing more than two million pending cases in U.S. immigration courts tripling the backlog since 2017).

2. *Patel,* 596 U.S. at 333.

3. *Id.* at 333–34 (discussing the Immigration Judge's conclusions that Mr. Patel's testimony was not credible and he intentionally deceived Georgian state officials); *Id.* at 349–50 (Gorsuch, J, dissenting) (discussing the Immigration Judge's inaccurate basis for finding Mr. Patel justifiably had intent to deceive state officials").

4. *Id.* at 330.

5. *Id.* at 335 (discussing the BIA interpretation of discretionary relief eligibility bar applicable to Mr. Patel which included subjective intent or the element relevant to the factual determinations seeking to be reviewed).

6. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 UNIV. OF CHI. L. REV. 684, 684 (1985).

7. Petition for Writ of Certiorari at 8, *Patel,* 596 U.S. 328 (2022) (No. 20-979).

States, Mr. Patel and his family moved to Georgia.[8] In 2007, Mr. Patel applied to the United States Citizenship and Immigration Services (USCIS) for discretionary adjustment of status, which would allow him and his wife to become lawful permanent residents.[9] In December 2008, Mr. Patel checked a box identifying himself as an American citizen while renewing his Georgia driver's license.[10] By checking this box, US Citizenship and Immigration Services ("USCIS") determined that Mr. Patel "falsely represented himself to be a citizen of the United States for any purpose or benefit under state or federal law."[11] This led to Mr. Patel's adjustment for status application being denied by USCIS for becoming statutorily inadmissible.[12] Subsequently, Mr. Patel and his wife were subjected to removal proceedings due to their illegal entry.[13] Mr. Patel pursued relief from removal by refiling his discretionary adjustment of status application.[14] The Immigration Courts denied Mr. Patel's refiled adjustment of status application and ordered removal for both him and his wife.[15] Mr. Patel petitioned the Eleventh Circuit for review.[16] The Eleventh Circuit determined it lacked jurisdiction to review Mr. Patel's case.[17] The Supreme Court granted certiorari for Mr. Patel's case,[18] in response to the appellate courts' inconsistent application of prohibiting judicial review on factual determinations involving "any judgment regarding the granting of relief."[19]

In *Patel*, the majority held that factual determinations for discretionary relief proceedings are prohibited based on the meaning of three terms of the governing provision: "any," "judgment", and "regarding."[20] Justice Barrett uses a plain meaning statutory interpretation in *Patel*, which refrains from looking at otherwise relevant information when the text is plain or unambiguous.[21] Although there was uncertainty amongst the Circuit Court's to prohibit judicial review on factual determinations related to "any judgment regarding the granting of relief," Justice Barrett wrote that there was no ambiguity in barring factual determinations.[22] The majority in *Patel* determined Congress showed clear intent of denying jurisdiction on factual questions based on their existing immigration powers, the purpose of the statute and governing

8. *Patel*, 596 U.S. at 333.
9. *Id.*
10. Petition for Writ of Certiorari, *supra* note 7.
11. *Patel*, 596 U.S. at 334.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 335.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Patel,* 596 U.S. at 364.
20. *Id.* at 337–39.
21. William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule,* 84 U. CHI. L. REV. 539, 541 (2017).
22. *Patel, supra* note 1, at 346.

provision, and the case law's interpretation of the key terms. This allowed Justice Barrett to formulate the definitions of the key terms.

First, Justice Barrett articulated the definition of "any" to be "one or some indiscriminately of whatever kind" of the subsequent term.[23] Second, "Justice Barrett shapes the definition of "judgement" to refer to authoritative actions or determinations rather than a decision attached to discretionary relief.[24] Lastly, Justice Barrett concluded that the effect of "regarding" is not particularized to discretionary relief grants but broadened to include "any judgment relating to the granting of relief."[25] When put together, Justice Barrett determined that judicial review of factual determinations was barred for "any judgment related to the granting of relief."[26] Thus, Mr. Patel's case did not necessitate a presumption for reviewability based on the majority's statutory interpretation. The impact of *Patel* is more than the removing the courts' ability to review factual determinations in discretionary orders of removals—the decision reflects the Court's willingness to use constitutive rhetoric that constrains noncitizen procedural rights to reinforce social values reflecting disdain for noncitizens.

II. WHITE'S CONSTITUTIVE RHETORIC

Within his work, James Boyd White, an American legal rhetorical theorist, defines his "constitutive rhetoric" framework as an inventive process for communal rhetorical engagement.[27] White claims that constitutive rhetoric centers an intention to build legal interpretations of societal ideals such as liberty, rights, duties, identity, and respect.[28] The main contention of White's constitutive rhetoric is that law is a form of rhetoric built from the communal engagements between individuals.[29] According to White, the law is not viewed as rhetoric because society predominantly views it under traditional and contemporary lenses.[30] Under a traditional lens, people view the law as a collection of authoritative commands upheld for its longstanding nature and religious undertones.[31] The contemporary lens frames the law as a construct for the purpose of analyzing structures within different social institutions under an institutional sociological lens.[32] Both views reflect the underlying notion that the law is composed of managed systems of institutionally created

23. *Id*. at 338.
24. *Id*. at 355.
25. *Id*.
26. *Patel*, *supra* note 25, at 1628.
27. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 UNIV. OF CHI. L. REV. 684, 684 (1985); James Boyd White, *Is Cultural Criticism Possible*, 84 UNIV. OF MICH. L. REV 7, 1373,1374 (1986).
28. *Id*.
29. *Id* at 695.
30. *Id*. at 685.
31. *Id*.
32. *Id*.

rules.[33] White suggests that the current view of law is a bureaucratic system of rules and thus, as a result, becomes "reducible to two features: policy choices and their implementation."[34] White concludes that law reducible to policy choices and their implementation is overly mechanistic and minimalistic in nature.[35] White introduces constitutive rhetoric to combat this overly bureaucratic perspective of law. White presents the three fundamental aspects of constitutive rhetoric, which establishes the framework for law to be analyzed as rhetoric.[36]

This framework consists of three main considerations. First, a lawyer requires strong abilities in recognizing cultural specificity when communicating with different parties. A lawyer must choose their word usage, complexity, use of jargon, and other linguistic patterns based upon their audience.[37] Second, White notes the creativity found in rhetoric is present within the successful practice of law.[38] White contends that a lawyer needs the creativity to induce variations within the law favorable to their client, attaching different authorities to the legal arguments to do so.[39] The final aspect of White's constitutive rhetoric is viewing the lawyer as the negotiator on behalf of the community.[40] White contends that the lawyer must ethically use the language of the law to reflect his societal ideas on how the law should be formed.[41] The lawyer's successful crafting of the law establishes the communities' basis of values and future guidelines.[42]

White uses the law's constitutive nature to define rhetorical analysis as a means to address the "most significant questions of shared existence," prioritizing justice and ethics over the deterministic sciences.[43] These goals of rhetoric find themselves within the fundamental sources of the law.[44] This is because sources of law can be translated into a shared intellectual experience formulated by a collective of legal minds rather than its bureaucratic expression of means-to-ends rationality.[45]

White's constitutive rhetoric seeks to identify the communities whose collective voices and values build the law. To accomplish this, White's constitutive rhetoric framework uses a three-pronged analysis: (1) *the inherited language*, the working language or culture that the speaker uses;[46] (2) *the art*

33. White, *supra* note 27, at 685–86.
34. *Id.* at 686.
35. *Id.*
36. *Id.* at 688.
37. *Id.* at 689.
38. *Id.* at 690.
39. White, *supra* note 27, at 690.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 697
45. *Id.*
46. *Id.* at 701 (discussing that natural facts, social facts, human motives, or reason are articulated within the working language or working culture of an artifact).

of the text, which examines how the speaker recreates the inherited language;[47] and (3) *the rhetorical community*, which defines the characteristics of the recognized communities and voices within the rhetoric.[48]

III. CONSTITUTIVE RHETORIC ANALYSIS OF *PATEL V. GARLAND*

A. *The Inherited Language*

Justice Barrett inherits the language in *Patel* from three sets of sources: (1) the Constitution; (2) the governing statute or "the Act"; and (3) precedent. Her use of these sources reflects the values of administrative efficiency, permissive legislative interference into federal courts, and the noncitizen's provisional rights that are constrained by the perceived incentive to contribute to the U.S. economy.

1. *The Constitution*

In *Patel*, the presence of constitutional jurisprudence is significant yet understated. The inherited language of *Patel* stems from constitutional interpretations of Congress' authority. Particularly, Congress' ability to confer appellate jurisdiction to federal courts under Article III and Congress' plenary powers over immigration.[49] These constitutional interpretations serve as the working culture that surrounds the *Patel* decision.

a. The Influence of Article III in the Working Culture of Patel

The mention of Article III in *Patel* by name is non-existent. However, the spirit of Article III is evoked within the *Patel* decision. Under Article III, courts have historically understood that Congress can limit the jurisdiction of the lower courts that they establish.[50] Further, the Exceptions Clause of Article III grants Congress the authority to limit the appellate jurisdiction of the Supreme Court.[51] The decision in *Patel* concerns the courts' interpretation of a "jurisdictional-stripping" governing statutory provision, a conceptualization inherent with Article III.[52] Thus, it provides Justice Barrett with the working culture and values to formulate the decision in *Patel*.

---

47. *Id.* at 702.

48. *Id.*

49. U.S. CONST. art. III, § 2, cl. 2 (granting Congress the power to delegate appellate jurisdiction to federal courts under Article III); U.S. CONST. art. 1, §8; cl. 3; *See also Passenger Cases,* 48 U.S. (7 How.) 283 (1849) (discussing Congress had exclusive control over foreign affairs under Commerce Clause); U.S. CONST. art. 1, §8; cl. 4 (granting Congress the authority to enact federal laws governing naturalization); U.S. CONST. art. I, § 8; cl.18.

50. Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 96 N.Y.U. L. REV. 1778, 1780–1781 (2020).

51. U.S. CONST. art. III, § 2, cl. 2. (Exceptions Clause).

52. *Patel, supra* note 10, at 1627 (identifying INA 1252(a)(2)(B)(i) as a "jurisdictional-stripping" statute that is outside the Court's reviewability function as per statutory language); U.S. CONST. art. III, § 2; cl. 2.

The values of Article III are utilitarian in nature. Article III points to efficient judicial resolution by its allocation of federal judicial power constrained by due process[53] and justice principles of liberty, independence, equality, and fairness.[54] Furthermore, Article III promotes national uniformity of law and legislative accountability by an independent federal judiciary with the authority to review and resolve cases and controversies.[55] In addition, Article III shows that legislative interference with the federal judiciary's functions and jurisdiction is constitutionally acceptable provided it remains consistent with the Constitution.[56] These themes of permissive legislative interference and allocation of federal judicial power appear in other areas of Article III, such as the Exceptions Clause's minimally defined scope and Congress' power to create lower federal courts.[57] The permissiveness of legislative interference within the jurisdiction of federal courts is embedded within Congress' plenary powers in immigration affairs, a key focal point of the working culture in *Patel*.

b. The Presence of Congress' Immigration Plenary Powers within the Working Culture of Patel

The plenary powers of Congress in immigration governance are constitutionally entrenched on numerous fronts.[58] Congress has the sole responsibility of formulating the immigration doctrine that shapes the contours of America's national sovereignty.[59] Stephen Legmosky, leading immigration law scholar and former Chief Counsel of the USCIS[60], labels the Court's perception of Congress' plenary immigration powers as "largely immune from judicial control."[61] Legmosky's work highlights the pressures of Congress' immigration sovereignty within Barrett's rhetoric in *Patel*. Legmosky examines these plenary powers in relation to judicial review under four dimensions. First, Legmosky contends that Congress' plenary immigration doctrine

---

53. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered,* 96 UNIV. VA. L. REV. 1043, 1050 (2010) (discussing the need for judicial powers to be allocated to protect substantive constitutional rights).

54. John Rawls, *Justice as Fairness,* 67 PHIL. REV. 164, 165-167 (1958) (discussing principles of justice that should be equally distributional in their benefits and burdens upon justice's implementation).

55. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy Requirement",* 93 HARV. L. REV 297, 301 (1979) (discussing the spirit of Article III in reference to Cases or Controversies requirements of adversity of parties, ripeness, and standing, for judicial power being exercised).

56. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III,* 132 UNIV. PENN. L. REV. 741, 765 (1984).

57. *Id*. at 761-765.

58. *See generally* U.S. CONST. art. 1, §8, cl. 3; U.S. CONST. art. 1, §8, cl. 4; U.S. CONST. art. I, § 8, cl.18.

59. Matthew Lindsay*, Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 747 (2013).

60. *Removing Barriers to Legal Migration to Strengthen our Communities and Economy: Before the S. Comm. On Immigration, Citizenship, and Border Safety*, 117th Cong. 1 (2022) (written testimony of Stephen H. Legomsky, Professor, Washington Univ. School of Law).

61. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 THE SUP. CT. REV. 255, 258 (1984).

has a territorial dimension that delineates noncitizens who seek admission versus those who solely avoid deportation.[62] Second, Legmosky turns to immigration law having a temporal dimension. This points to the Court changing its stance from absolute noninvolvement of reviewing immigration doctrine to willfully intervening in limited circumstances.[63] Third, immigration legislation has an organic dimension to which Legmosky notes that Congress "is the governmental organ whose power over immigration is plenary." [64] Fourth, Legmosky speaks to the rights dimension of immigration that allows for the Court to exhibit selective restraint on deciding upon individual rights based on deference to Congress and the noncitizen's interest at stake.[65] Each of the dimensions speak to the natural, social facts, human motives, and reason of Congress' plenary powers. Further, Legmosky points to an exception of Congress' plenary power as the protection of individual procedural due process rights. [66] This exception highlights the Court's dichotomous rhetoric of their responsibilities in implementing judicial review. This is the crux of the working culture that *Patel* inherited from the Constitution.

In *Patel*, the court presents a dichotomy: the Court's function to review infringement on an individual's constitutionally protected rights and their reluctance to interfere with public policy set by Congress.[67] The *Patel* decision inherits Congress' justiciability value assessment which determines the extent of the public policy demarcation that restrains judicial review.

Geoffrey Marshall, internationally acclaimed constitutional law scholar,[68] defines the measurement of justiciability by two senses: (1) the fact-stating sense and (2) the prescriptive sense. [69] The fact-stating sense refers to a claim's enforceability being constrained procedurally regardless of it can be remediated by judicial review.[70] The prescriptive sense speaks to the Court's capacity and legitimacy in resolving a judicially discoverable question that is politically normative for the Court to resolve.[71] The majority in *Patel* explores justiciability, questioning if it is procedurally permissive and politically normative for the Courts to review Mr. Patel's challenge. The majority turns on factual determinations interpreted to be barred by Congress.[72] This is where the inquiry of analysis pivots from the Constitution informing the inherited working culture of *Patel* to the contributions of the statutory language.

---

62. *Id*. at 256
63. *Id*. at 257.
64. *Id*.
65. *Id*. at 258-259.
66. *Id*. at 259.
67. Jeff A. King, *Institutional Approaches to Judicial Restraint,* 28 OXFORD J. OF LEGAL STUD. 409, 419 (2008).
68. Vernon Bogdanor & Robert S. Summers, *Geoffrey Marshal 1929-2003*, BRITISH ACAD. 133, 133-135 (2005), https://www.thebritishacademy.ac.uk/documents/1713/130p133.pdf.
69. *Id*.
70. *Id*.
71. King, *supra* note 67, at 420.
72. *Patel*, 596 U.S. at 1627.

2. *The Immigration and Nationality Act*

In *Patel,* the jurisdictional scope of statutory language for Judicial Review of Denials of Discretionary Relief or INA §1252(a)(2)(B)(i) [hereinafter known as "governing provision"] centers the dispute. Its language is as follows:

> "Notwithstanding any other provision of law (statutory or nonstatutory), . . . regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review- (i) any judgment regarding the granting of relief under section. . . 1255 of this title."[73]

Its purpose is consistent with Congress enacting no legislation that allows for judicial review of the decision to grant, deny, or terminate a stay of removal.[74] This speaks to the social facts and the reason for the statute, because there is often nothing for a court to review following the order of final removal.[75] However, the statute does not preclude judicial review of factual determinations if a reasonable adjudicator is compelled to find that the findings are not conclusive.[76] Thus, the purpose of the governing provision in *Patel* is to ensure values of stability and predictability within the discretionary relief decision-making.[77] Values of stability and predictability are aligned with pragmatic rule-of-law tenets whose interpretive divergence needs to be minimized when the law is established to be unclear.[78] The issue of a circuit split on the interpretation of the governing provision is the central issue in *Patel*.[79]

The governing provision's language reinforces the "administrative grace" that comes with the process of granting discretionary relief to the deportable noncitizen.[80] For a successful grant of discretionary relief the applicant has the burden of proof to "show that the facts. . .warrant the favorable exercise of discretion" of the immigration judge.[81] The governing provision implies that the protections for a deportable noncitizen is constrained to what the immigration judge, appointed by the Department of Justice (hereinafter "DOJ") to preside over immigration courts, deems permissible. The governing provision offers the natural fact that noncitizens' protections for reviewing

---

73. 8 U.S.C. § 1252(a)(2)(B)(i).
74. Daniel Simon, *Immigration, Retaliation, and Jurisdiction*, 2020 UNIV. OF CHI. LEGAL F. 477, 487 (2020).
75. *Id.*
76. 8 U.S.C. § 1252(b)(4)(B) (discussing scope and standard of review for determination challenges).
77. Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 UNIV. OF CHI. L. REV. 1215, 1226 (2012); *See Patel,* 596 U.S. at 1627.
78. Aaron-Andrew P. Bruhl & Ethan J. Leib, *supra* note 77, at 1226.
79. *Patel*, 596 U.S. at 1621.
80. Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts,* 119 YALE L. J. 1012, 1035-1037 (2010).
81. Herman L. Bookford, *Discretionary Relief From Deportation,* 2 IN DEFENSE OF THE ALIEN 87, 88 (1979).

discretionary relief decisions are subject to inconsistent administrative discretion.[82] There is an existing contradiction between the purpose of the provision, ensuring procedural predictability, and the underlying reliance on administrative discretion.

3. *The Precedents Informing the Values of Jurisdictional Bars in* Patel

The precedents in *Patel* inform its audience of the existing values and views of jurisdiction bars within immigration proceedings. First, the precedents show the value of intentionality. In particular, Congress must show clear intent to grant federal courts jurisdiction to review immigration questions.[83] For clear intent to be met, there need not be express mention to review immigration questions but intent must be reasonably inferred.[84] In addition, the precedents show federal jurisdiction [85] Second, the cases indicated that the noncitizens' jurisdictional claims were rarely compelling, and were provisional due to their status as outsiders of the moral and political communities that sustain the American justice system.[86]

The failure of the jurisdictional claims highlights how noncitizens' rights are denied based on the national interest indicated by Congress. [87] Further, the denials of jurisdiction in the name of national interest are contingent upon whether it would discourage migrants to make country-specific investments such as contributing to the labor force and other economic benefits.[88] Lastly, the precedents of the *Patel* decision demonstrate a series of values. They demonstrate the permissible broadness of the jurisdiction stripping available within the statute that prevents federal courts from infringing on Congress' sovereignty of regulating immigration.[89] Most importantly, the precedents emphasize that the statute's broadness is for maintaining administrative efficiency, even if it came at the expense of rightful immigrant integration into functional participation in American society.[90] The theme of administrative efficiency that sacrifices immigrant integration into American society drives Justice Barrett's reconstitution of the language from these sources into the decision.

---

82. *Id*. at 88-89.

83. INS v. St. Cyr., 533 U.S. 289 (2001) (discussing the clear intent requirement for Congress to remove federal court jurisdiction in answering questions of law).

84. *Id*. at 293.

85. *Id*. at 305.

86. Peter H. Schuck, *The Transformation of Immigration Law,* 84 COLUM. L. REV. 1, 1-4 (1984) (discussing immigrant exclusion from participation in political communities); *See Nasrallah v. Barr*, 140 S. Ct. 1683 (2020) (discussing the exception to factual judicial review due to CAT provision).

87. Eric A Posner, *The Institutional Structure of Immigration Law,* 80 THE UNIV. OF CHI. L. REV. 289, 299 (2013) (discussing how national policy interest structures immigration law); *See* Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020) (discussing that it is appropriate to review removal order if legal standard was incorrectly applied to undisputed facts).

88. Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 THE UNIV. OF CHI. L. REV. 289, 297 (2013).

89. U.S. CONST. art. 1, § 8, cl. 3; U.S. CONST. art. 1, § 8, cl. 4; U.S. CONST. art. I, § 8, cl. 18.

90. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2031, 2072 (2008).

B. *The Art of Text: Rhetorical Reformation of the Sources Influencing* Patel

Justice Barrett's transformation of the pertinent constitutional values and the governing provision in the *Patel* decision serves as an entrenchment of nationalist theories of immigration law. Further, Justice Barrett's reconstitution of the precedents emphasizes Congress' priority in denying judicial review is to serve administrative and judicial efficiency rather than deny noncitizen rights.

1. *Justice Barrett's Article III and Congressional Powers Framing*

The majority in *Patel* is imbued with undertones of Article III and Congress' plenary powers over immigration. Justice Barrett entrenches a country-focused immigration law regime by using Congress' plenary immigration powers and their ability to permissively interfere with the federal judiciary.[91] Kit Johnson defines four theories of immigration law under two subsets: (1) country-focused and (2) non-country focused.[92] Non-country focused immigration law prioritizes the relationship that immigration law has to others, whether that be with prospective migrants or humanity as a whole.[93] Meanwhile, domestic interest and national values immigration theory, the two forms of country-focused immigration law, assess immigration law by the degrees they promote the *interests* and *fundamental values* of the United States.[94] Justice Barrett reconstitutes the spirit of Article III in *Patel* in the form of domestic interests theory. In particular, Justice Barrett measures the governing provision through the lens of Congress' desire for efficient judicial resolution of noncitizens' cases. Further, Justice Barrett assesses whether denying the jurisdiction limit for a noncitizen would infringe upon Congress' Exceptions Clause to limit appellate jurisdiction. Thus, Justice Barrett uses the domestic theory analysis to assess Congress' interests of limiting jurisdiction in relation to the perceived benefits of allowing noncitizens to challenge factual determinations.

Justice Barrett's assessment of the domestic theory points to its internal coherence in the form of Dworkin's theory of legal reasoning.[95] Under Dworkin's theory, when a case does not provide clear guidance on the disputed law it is decided upon the authoritative principles determined by the judge.[96] In the case of *Patel*, Justice Barrett's authoritative principles can be

---

91. Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. STATE L. J., 1214, 1215-1216 (2015).
92. *Id.* at 1216-1217.
93. *Id.* at 1216.
94. *Id.* at 1217.
95. Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 377-378 (1984).
96. *Id.*

inferred to be Congress' Article III powers and the benefits of judicial efficiency with minimal accounting for the noncitizens' adjudicative rights. The congressional powers over immigration served as guiding authoritative principles in the resolution of *Patel*.

Justice Barrett uses Congress' plenary powers over immigration control to reinstate the national values theory that evaluates whether immigration law is tenable with pro-American values.[97] The national values theory looks at whether the law comports with American values upon the enactment of the legislation.[98] While the original *Immigration and Nationality Act* was enacted in 1952,[99] the governing provision at issue in *Patel* was instituted in 2005.[100] Thus, the national values of immigration applicable are those of 2005: a time where policy concerns stemmed from noncitizens overburdening the U.S. labor markets and benefits systems.[101] This was during a period when the population of legal and undocumented immigrants living in the United States was at its largest since 1910.[102] On average, this class of immigrants suffered from higher rates of poverty and low levels of education.[103] In this context, jurisdiction-stripping statutes were tools to mitigate the non-citizen burdens on the American markets and welfare systems.[104]

These social issues showed American immigration policy to have values reflecting an "us versus them" mentality.[105] In particular, the minimal efforts to address noncitizen poverty and inadequate funding for schools with higher noncitizen children, demonstrate greater care for the rights of the naturalized community over the non-naturalized.[106] Justice Barrett reconstitutes the plenary powers of Congress in *Patel* in a way that noncitizens are not privy to the same security of reviewability as citizens barring stringently narrow exceptions.[107] In particular, Justice Barrett eliminates noncitizen reviewability protections for judges reviewing factual questions that are blurred with

97. Johnson, *supra* note 92, at 1232.
98. *Id.*
99. *Immigration and Nationality Act,* U.S.C.I.S. (July 10, 2019) https://perma.cc/3KPR-SFH7.
100. *See* 8 U.S. Code § 1252 n. (discussing the editorial notes of when the statute was amended).
101. *See* Steven A. Camarota, *Immigrants at Mid-Decade, A Snapshot of America's Foreign-Born Population in 2005,* CTR. FOR IMMIGR. STUD. 1-2 (2005), https://perma.cc/9KX7-97HL.
102. *Id.*
103. *Id.*
104. Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping,* 123 COLUM. L. REV. 2077, 2088-2089 (2023) (discussing jurisdictional stripping as a possible avenue for policy implementation subject to external Constitutional constraints).
105. *See* Ana T. Bedard, *Us versus Them? U.S. Immigration and the Common Good,* 28 J. SOC'Y CHRISTIAN ETHICS 117, 121 (2008).
106. *See id.*
107. *See, e.g.*, Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020) (holding specifically that noncitizens may seek review of factual challenges to Convention Against Torture orders). *See also* Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1068 (2020) (holding specifically that an appellate court may review denial of a request for equitable tolling of a deadline for filing statutory motions when the underlying facts are not in dispute).

the law that the court knows.[108] Lastly, Justice Barrett's elimination of this security shows coherence with Congress' history of restricting noncitizens' rights to prevent undesirable settlement.[109] Similar to the constitutional undertones here, Justice Barrett reconstitutes the statute in alignment with as traditionalist stance of Congress' action.

2. *Justice Barrett's Expansionary Reconstitution of the Statute*

Historically, traditional legal theory points to legislation serving as a communicative act between two parties: the sovereign and the subject.[110] The sovereign power authorizes legislation to fully impose upon the subjects or the parties it intends to bind.[111] Justice Barrett reinforces the traditional legal theory of legislative language by interpreting Congress' limited jurisdiction ban as an expansively dispositive bar against noncitizen subjects. This emboldened expansion causes an interpretive divergence from how the governing provision was originally construed, which only refers to the final judgment of relief.[112] Justice Barrett superimposes Congress' authority onto the Supreme Court's unwillingness to review claims of the noncitizen subjects.[113] Justice Barrett supports this superimposition by entrenching the notion that it is not the court's obligation but administrative grace that grants discretionary relief to the deportable noncitizen.[114] However, Justice Barrett differs from the stance of generalized judicial deference to Congress by suggesting the formal distinction between law and fact is not illusory, but clear in the jurisdictional ban.[115] Therefore, Justice Barrett does not use the Court's ameliorative powers where "laws should be construed as to prevent an injury being done to the innocent."[116] Instead, she opts to employ the Court's powers to void where, if it is reasonably conceivable for Congress to intentionally enact a law, the Court cannot constrain the statutory intent of the legislature subject to its constitutionality.[117]

---

108. *See generally* Nathan Isaacs, *The Law and the Facts,* 22 COLUM. L. REV. 1, 4 (1922) (arguing that questions of fact come to be "indistinguishable from any other proposition of law" once such factual determinations are cited in other cases).

109. Michael Williams, *Coherence, Justification, and Truth*, 34 REV. METAPHYSICS 243, 249 (1980); *See generally* Erika Lee, *Immigrants and Immigration Law: A State of the Field Assessment*, 18 J. AM. ETHNIC HIST. 85, 104 (1999) (discussing history of exclusionary policies of Congress against groups of immigrants that were perceived removable or undesirable).

110. Maley Yon, *The Language of Legislation*, 16 LANGUAGE IN SOC'Y 25, 31 (1987) (discussing the communicative relationship that legislation creates for legislature and its citizens).

111. *See id*. at 31-32.

112. Bruhl & Leib, *supra* note 77, at 1.

113. *See generally* Corin James, *Fairness and Efficiency in Removal Proceedings: The Hidden Costs of Not Appointing Counsel to Noncitizens*, 71 ADMIN. L. REV. 391, 405-409 (2019).

114. Mendelson, *supra* note 80.

115. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation,* 126 YALE L.J. 908, 917 (2008).

116. William N. Eskridge, *All about Words: Early Understandings of the 'Judicial Power' in Statutory Interpretation, 1776-1806,* 101 COLUM L. REV. 990, 1021 (2001).

117. *Id*. at 1005.

Lastly, the expansion of the governing provision's scope does not either possess internal coherence or follow the internal interconnectedness of the statute.[118] The ban of judicial review for factual determinations for "judgments regarding the grant of relief" does not rationally extend to any authoritative action related to the discretionary relief.[119] The surplusage within this interpretation would not make it internally coherent with the other restrictions of judicial review the statute. Next, this analysis turns to Justice Barrett's use of precedents to justify this surplusage within her statutory interpretation.

3. *Exceptions Do Not Make the Rule: Justice Barrett's Use of Precedents*

In *Patel*, Justice Barrett uses the inherited precedents to suggest that any interpretation allowing for judicial review of factual determinations is unfounded.[120] First, Justice Barrett affirms that the precedents' show of Congress' intentionality is sufficient for barring jurisdictional review and reflects jurisdictional stripping as the norm, not the exception.[121] Second, Justice Barrett emphasizes that the cases show that Mr. Patel's jurisdictional challenge, like most noncitizens' jurisdictional challenges, were hardly persuasive.[122] There is a deep implicit retrenchment of the status of being outsiders of political communities.[123] In particular, Justice Barrett affirms that in such cases, the reliance upon administrative discretion of Congress is upheld in the name of the national interest of ensuring national sovereignty.[124] Lastly, although Justice Barrett initiates *Patel* with a discussion on forms of noncitizen relief from removal, she reaffirms the values of judicial economy and maintaining the semblance of administrative efficiency,[125] even if it comes at the expense of the noncitizen right to participate fairly in their own proceedings.[126] Justice Barrett's reconstitution of these sources serves as the reseeding for rhetorical communities that promote an exclusionary nationalist rhetoric. Further, this reconstitution dissipates noncitizens' hopes to participate fairly in the American justice system.

C. *The Creation of Rhetorical Communities*

Justice Barrett's audience consists of (1) the judicial community; (2) the legal community that engages in the practice of immigration law; and (3) the

118. Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation,* 25 OXFORD J. OF LEGAL STUD. 369, 372 (2005).
119. *Patel, supra* note 12.
120. *Id.*
121. INS v. St. Cyr., 533 U.S. 289 (2001); *See Patel*, *supra* note 15.
122. *See* Nasrallah v. Barr, 590 U.S. 573 (2020).
123. Schuck, *supra* note 87.
124. *Id.* at 14-20.
125. *U.S. Immigration Courts See a Significant and Growing Backlog*, G.A.O. (Oct. 19, 2023) https://perma.cc/2M2A-J759 (discussing backlogged immigration courts with 750,000-1,500,000 pending immigration cases).
126. Motomura, *supra* note 89.

public. She intends to convince all parties that the decision *fairly* protects Congress' authority to limit federal jurisdiction within the Act and its governing provision. Justice Barrett acknowledges potential avenues of relief for noncitizens at risk of removal and appeals to the plain-meaning statutory interpretation of Congress' directives. While it serves as an attempt to legitimize the fairness of decisions to all levels of the audience, it separates from the Court's historical willingness to turn aside its reviewability functions for noncitizens. Further, it demonstrates the historical Constitutional values of protecting national sovereignty and cultural homogeneity without regard to consequence. [127] The expansionary interpretations of the statute by the *Patel* majority entrench the ideology that noncitizens' rights are provisionally defined in relation to potential returns of the noncitizen provides to society.[128]

Barring factual determinations for discretionary relief allows for the economic capitalization of the migrant labor force while reducing the risk or costs of noncitizen naturalization.[129] The factual jurisdictional bar creates a 'keeping them on their toes' mentality for noncitizens while reducing the potential of compelling factual justifications being considered if they are denied by lower immigration courts. This creates a rhetorical world that promotes exclusionary nationalism by heightening the complexity of judicial review.[130] As a result, the exclusion of noncitizens is preserved as the hallmark of national sovereignty.[131] Justice Barrett re-entrenches the Anglo-Saxon hegemonic rhetoric of American citizenship.[132] She does this by emphasizing that the statute's language, although silent, can be clear in saying that judicial review of factual determinations was barred for any authorized action related to discretionary relief proceedings.[133] The majority in *Patel* justifies an undue interpretation of a statute's judicial review of fact findings when subsequent provisions of the same statute and applicable in Mr. Patel's case allow for it. Allowing reviewability of factual determinations in discretionary relief proceedings threatens Congress' authority to exempt judicial review and to protect national sovereignty by immigration control. Thus, the Court in *Patel* creates a rhetorical world where upholding

127. Kurt M. Saunders, *Law at Rhetoric, Rhetoric as Argument,* 44 J. LEG. EDUC. 567 (1994) (discussing the legitimization of a drafted opinion comes from the ability to procure assent from its intended audience).

128. Posner, *supra* note 88.

129. Emily Ironside and Lisa M. Corrigan, *Constituting Enemies Through Fear: The Rhetoric of Exclusionary Nationalism in the Control of 'Un-American' Immigrant Populations, in* THE RHETORICS OF U.S. IMMIGR.: IDENTITY, CMTY., OTHERNESS 157, 158 (E. Johanna Hartelius ed., 2015) (defining exclusionary nationalism as dominant Anglo-Saxon citizenship narrative in immigration policy that strove to eliminate the "threatening" voices of their cultural competitors).

130. *Id.*

131. *Id.* at 157-160.

132. *Id.* at 160-163 (discussing immigration policies incentivizing assimilationism, racism, xenophobia, and classism, in contributing to the Anglo-Saxon hegemonic rhetoric of American citizenship).

133. *Patel*, *supra* note 8, at 1621-1623.

Congress' discretion must be prioritized, even if it comes at the expense of an unfounded deportation.

IV. CONCLUSION

In a complete examination of the *Patel* decision, a dichotomy emerges in the Court's judicial review of discretionary relief decisions and orders of removal. In particular, *Patel* highlights the precarious balance between national sovereignty's interests and noncitizens' due process rights. White's constitutive rhetoric method shows how *Patel* underscores the Court's requisite balancing role in upholding the public policy proposed by Congress and the noncitizen's right to due process.[134] However, the rhetoric employed by Justice Barrett highlights the heartbreaking reality that the perceived national interests overshadow noncitizen rights,[135] resulting in a systemic deprivation of due process for noncitizens. The rhetoric in *Patel* exposes the underlying values that drive immigration policy forward, where jurisdiction-stripping legislation exists to maintain Congress' sovereignty over immigration policy.[136] Although the approach may aim for administrative efficiency and economical use of judicial resources, it comes at the cost of noncitizens rights to fairly participate in their immigration proceedings.[137] Justice Barrett's broadening of judicial review restrictions for discretionary relief exacerbates this problem. Her rhetoric furthers an entrenchment of the exclusionary narrative against noncitizens that reflects the historical Anglo-Saxon view on naturalization.[138] This decision in *Patel* serves as a pivotal inflection point—one that calls for urgent advocacy in securing the due process rights of noncitizens. The rhetoric in *Patel* aligns itself with protecting Congress' interest in securing national sovereignty. However, recognizing the rights and dignity of the noncitizens present is not mutually exclusive to this goal. Thus, there needs to be a shift in the community rhetoric that accounts for equitable and fair treatment of noncitizens' due process rights.

134. King, *supra* note 67.
135. Johnson, *supra* note 92.
136. Epps & Trammell, *supra* note 105, at 2088.
137. Motomura, *supra* note 91, at 2072.
138. Ironside & Corrigan, *supra* note 129.