

ATTACHMENT POLICIES IN IMMIGRATION LAW

STEPHEN LEE*

Regularization opportunities for migrants in the United States remain scarce and difficult to obtain. The few programs offering such benefits often focus on a migrant's attachments, defined loosely as some mix of family ties within or economic contributions to the United States. These programs reflect this principle in both explicit and implicit ways. This Article analyzes the meaning and implications of using "attachment" as a policy-setting principle and in doing so makes two points.

First, attachment offers explanatory value only if it accounts for the punitive policies in which modern immigration benefits programs are embedded. Today, immigration laws operate on a spectrum ranging from attachment on one end and stretching toward "anti-attachment" policies on the other. Conceptually, attachment helpfully illustrates the ways that immigration law blends inclusive and harmful impulses, making it difficult if not impossible to separate inclusive and exclusionary policies. Such a framing provides a more nuanced and precise description of the immigration system than the "benefits/enforcement" distinction embraced by many immigration officials. Second, analyzing immigration laws as a system that manages migrant attachments can help ground ongoing and evolving discussions about how to resist the punitive elements of immigration law.

INTRODUCTION	958
I. ATTACHMENT POLICIES	961
II. ANTI-ATTACHMENT POLICIES.....	969

* Associate Dean for Faculty Research and Development and Professor of Law, University of California, Irvine. For helpful comments, I am grateful to Swethaa Balakrishnen, Courtney Cahill, Pratheepan Gulasekaram, Jennifer Koh, Susan McMahon, and Ari Ezra Waldman. This Article benefited from discussions at the University of Arizona and the University of Colorado. Finally, I owe a debt to the student editors who provided a patient and steady hand throughout the editing process.

III. THEORIZING ATTACHMENT	977
A. Territoriality	978
B. Temporality.....	983
C. Normativity.....	992
CONCLUSION.....	995

INTRODUCTION

Current immigration policy permits the detention and deportation of long-term residents, even those who came to the United States as children. Within this system of legal precarity, migrants enjoy few opportunities to regularize their status, many of which are governed by strict criteria and subject to agency discretion. This Article focuses on a key organizing principle of these discretionary programs, namely evidence of a migrant's attachment to the United States. Within the universe of potentially removable migrants, one way that agency officials have justified prioritizing certain migrants for relief has been on the basis of a migrant's "attachments" to the United States. Usually, this means proof of existing relationships with Americans or embeddedness within and indispensability to their workplaces, which are both broadly, yet vaguely, understood as contributions to American communities.

This Article interrogates what it means to dispense relief from removal on this basis. I argue that reframing certain immigration policies as a series of attachment policies can shed light on broader arguments about inclusion for a large, legally vulnerable class of noncitizens. In particular, I make two points. First, describing immigration relief opportunities in terms of attachment programs is an accurate but incomplete account of the existing immigration system. While relief-oriented immigration programs do reward and sometimes foster migrant relationships with family, friends, coworkers, and employers, this description does not capture the many immigration programs and policies that seek to punish and exclude these same migrants. Indeed, many punitive immigration laws seek to frustrate or prevent migrants from developing any attachments to the United States at all.¹ Thus, as a descriptive matter, the attachment principle is best understood as operating on a spectrum in which it captures

1. See *infra* Part II.

a set of inclusionary impulses on one end that stretch toward punitive, “anti-attachment” policies on the other.

Analyzing immigration benefits programs in terms of attachment policies provides coherence to and refines official accounts of the immigration system in which policies are divided between “enforcement” and “benefits.” The attachment spectrum shows that separating these two functions is not possible under current laws. Moreover, this account highlights the way that anti-attachment principles are baked into the immigration system. While President Trump’s policies suggest that he is much more willing to pursue punitive strategies as compared to his Democratic predecessors, it would be inaccurate to suggest that either the Biden or Obama Administrations implemented inclusionary agendas.² In both Democratic and Republican administrations, agency officials implemented exclusionary policies that aim to disrupt the ability of migrants to develop attachments with the United States.³ These policies govern where migrants can wait during the pendency of their claims, which types of waiting counts for purposes of accruing time credits, and even how much time migrants must spend within the United States before attaining basic rights and protections.⁴

A second point has to do with how the attachment principle can advance broader conversations about precarity in migrant communities. Although use-of-force policies such as apprehension, detention, and deportation remain the most obvious causes of migrant vulnerability, other policies implemented under the banner of relief and benefits help normalize these harms.⁵ Many immigration benefits have been organized around ideas of territoriality (where a migrant lives), temporality (how long they have lived here), and normativity (whether they are “deserving” of relief). The concept of attachment can help ground and further refine these conversations. In particular, while a migrant’s mere presence in the United States confers a greater set of protections against government action than protections available to the migrant outside of the United States, at a port of entry, or at the

2. See, e.g., LAW ENF’T IMMIGR. TASK FORCE, *Comparison of the Obama, Trump, and Biden Administration Immigration Enforcement Priorities* (Apr. 22, 2021), <https://leitf.org/2021/04/enforcement-priorities> [<https://perma.cc/TM4X-PPM3>].

3. *Id.*

4. See *infra* Part II.

5. See generally Stephen Lee, *Administrative Violence in Immigration Law*, 66 ARIZ. L. REV. 739 (2024).

border, this gap is dwindling. Given the limited basis upon which a migrant's presence may serve as the basis of rights and protections, legal scholars have begun grappling with the legal significance of time spent in the United States. This conversation on the temporal elements of migration remains in its infancy. An attachments framework can help ground this conversation as legal scholars explore the territorial and temporal elements of the immigration legal system. Explicitly connecting the territorial and temporal components of our immigration system can sharpen our understandings of deservingness and help us better understand how existing laws enable agency abuse and overreach.

Part I of this Article analyzes various immigration benefits programs as a set of policies for rewarding, or creating opportunities for, migrants with attachments to the United States. As this Part shows, these policies rely on the demonstration of continuous presence or residence in the United States for a number of years. These temporal rules are embedded within legal schemes that provide migrants with the only meaningful opportunity for stability. Programs like cancellation of removal, asylum, and others operate under clear timelines.⁶

Part II then explains how a complementary set of rules functions as anti-attachment policies, which aim to disrupt or prevent migrants from developing ties to the United States. Together, this presents a more complete picture of the immigration system, one that uses a common vocabulary—namely, attachment—to show the relationship between punitive enforcement policies and policies that provide incomplete and temporary forms of inclusion. While immigration law continues to operate as a system that manages movement across borders and through geographic space, the continuing presence of legally vulnerable residents helps explain the degree to which agency officials utilize attachment-based justifications and aims. The significant presence of unauthorized migrants reveals the failures of immigration law to control movement across borders, thus motivating officials to find other ways to exert control over migrants, especially through the creation of rules that frustrate the process of putting down roots.

6. See 8 U.S.C. § 1229b(a)–(b) (cancellation of removal); *id.* § 1158(d)(2) (stating requirements for obtaining employment authorization after filing an asylum application); *id.* § 1158(a)(2)(B) (stating a one-year deadline for affirmative asylum applications).

Part III then explores how theorizing immigration law as a system that regulates and defines attachments might advance related and ongoing conversations about precarity and legal vulnerability among migrants. In particular, I focus on how migrant attachments can help ground discussions about how best to resist and reform punitive immigration laws. One such discussion focuses on allocating rights and protections to migrants on the basis of territorial presence. A second discussion explores how such rights and protections should prioritize those migrants who have spent significant time in the United States. In short, territorial-based claims have provided migrants with only limited bases for relief which has prompted legal scholars to consider temporal-based critiques of the immigration system. This system has created a “new normal” for migrants who inhabit a legally vulnerable position in which they reside in the United States for decades without meaningful opportunities to regularize status. As legal scholars continue to grapple with temporality in the immigration system, one important line of inquiry should focus on how time-based policies can be reformed to constrain rather than expand agency power. I then conclude.

I. ATTACHMENT POLICIES

Within the universe of noncitizens with legally vulnerable status who might be eligible for long-term residence and membership, relief programs often focus on those who can demonstrate continuous presence or residence. Such policies are often justified as prioritizing those who have the deepest ties and greatest attachments to the United States.⁷ As this Part and the next show, while this justification might be defensible, properly assessing this rationale requires contextualizing these benefits programs within the broader—and broadly punitive—immigration system of which it is a part.

A range of immigration programs reflect preferences for migrants with attachments to the United States⁸—both in terms of rewarding existing attachments but also in terms of carefully meting out opportunities for migrants to establish or deepen connections. These policies are implemented in the form of administrative benefits pegged to duration of presence or residence in

7. ELIZABETH F. COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* 93 (2018).

8. *Id.*

the United States.⁹ Policies are often organized around the idea that a migrant with a family, friends, and a community in the United States for a period of ten or twenty years creates a more punitive outcome than imposing the same deportation order on a recent entrant. Relatedly, prioritizing the removal of migrants who have spent relatively little time in United States affirms the intuitive notion that expelling or deporting a migrant after a brief visit would cause no meaningful harm while doing the same to a longtime resident would exact a significant harm to fundamental relationships and interests—including familial bonds, close friendships, and economic investments or work.

The attachment principle builds on ideas developed by many legal scholars, but perhaps most notably by Professor Hiroshi Motomura, who has observed that different parts of the immigration system reward migrants with a strong “affiliation” to the United States.¹⁰ This affiliation, he argues, does and ought to serve as a basis for belonging or membership.¹¹ Affiliation and related ideas also have informed political protest and advocacy. In pushing Congress to pass a mass legalization program, the National Day Laborer Organizing Network (NDLON) argued that such a fix was necessary to benefit “millions of Americans-in-Waiting.”¹² Interestingly, this phrase references Motomura’s book, *Americans in Waiting*,¹³ which addresses a historical period in immigration law where lawful permanent residents needed to declare an intent to naturalize.¹⁴ The class of people on whose behalf organizers like those at NDLON have been advocating for, of course, do not have lawful status, but this speaks to the intuitive appeal of the attachment thesis. Many, if not most, of the longtime residents who are unauthorized are not eligible for existing forms of relief and would likely fail to qualify

9. *Id.*

10. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

11. *Id.*; see also Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 *THEORETICAL INQUIRIES L.* 389, 404–05 (2007) (defining the importance of “affiliations” as “not so much the connection with the land per se” but rather “to acknowledge attachments and social ties that often develop among persons who are leading a common life within a single territorial space”).

12. Press Release, Pablo Alvarado, Exec. Dir., Nat’l Day Laborer Org. Network, Distance Between Beltway and Reality Evident on First Day of Immigration Reform Mark-Up (May 9, 2013), <https://ndlon.org/beltway-distant-from-reality> [<https://perma.cc/XK2A-JAED>].

13. See MOTOMURA, *supra* note 10.

14. *Id.* at 8.

for any of the various packages for legalization that have been proposed over the last couple of decades. Their lives do not comport with norms governing desirability, putting them in a separate category of being “super undocumented.”¹⁵ And yet, even for this category of unauthorized migrants, debates often focus on the cruelty of expelling these migrants because of the long-standing ties they have to this country and the attachments they are developing in their communities.

Putting aside aspirational legal claims, existing legal programs do permit some longtime residents facing removal to avoid adverse immigration consequences. The most obvious example is the Deferred Action for Childhood Arrivals (DACA) program.¹⁶ The bonds DACA beneficiaries have formed with Americans—family members and employers alike—figured prominently not only into the creation of the program but also into the Supreme Court’s opinion invalidating the effort of the Trump Administration to rescind that program.¹⁷ A similar sort of logic figured into the Biden Administration’s effort to expand deferred action to those involved in workplace disputes.¹⁸ Toward the end of the Biden Administration, the Department of Homeland Security (DHS) announced that it would begin granting deferred action to migrants who are working for employers

15. Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 *HOW. L.J.* 899, 902, 915–19 (2014) (arguing that although immigration reform theoretically fixes problems, millions of undocumented individuals remain “super undocumented” for a variety of reasons, including recent arrival, “upholding a tradition of valuing connection to community,” failure to meet tax liabilities or the twelve-year work requirement, lack of English language proficiency, and general disapproval of those with criminal convictions).

16. See Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/4LX9-YEVM>].

17. See *id.* (noting that many of the soon-to-be beneficiaries of DACA “have already contributed to our country in significant ways”); *Dep’t of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. 1, 31 (2020) (observing the “noteworthy concerns” raised by the University of California that rescinding DACA would create harms that would “radiate outward” from the beneficiaries to their surrounding communities).

18. See Memorandum from Alejandro N. Mayorkas, Sec’y, Dep’t of Homeland Sec., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf [<https://perma.cc/DF8X-BTL2>].

being investigated by federal officials for potential labor and employment violations.¹⁹

Given the bipartisan support for childhood arrivals, many immigrant rights advocates have argued for first seeking relief in the form of full legal inclusion for DREAMers before expanding organizing efforts to other classes of migrants.²⁰ Documentation and documentation requirements operate on a two-way street. Just as migrants can push and prod officials to broaden their regulatory imaginations, government officials can also expand the parameters for eligibility. But the expansion of deferred action illustrates how law can be wielded to “thicken” the different bands of migrant ties and bonds that have legal significance. This broadening of the deferred action category obviously helps construct different ideas of deservingness—such as migrant workers, often in low-wage and dangerous work environments, challenging exploitative behavior by employers—and it highlights a different set of attachments.

Another example of an immigration policy organized around the principle of attachment is the cancellation of removal statute.²¹ Under these programs, relief is available to both lawful permanent residents facing the threat of losing their status as well as to unauthorized migrants whose prior lawful status expired or who never had it in the first place.²² A core requirement is establishing “continuous residence” or “physical presence” in the United States for a period of time (between five to ten years, depending on the individual’s status)—something that migrants must prove through documents, official records, and photographs.²³

19. *Id.*; *DHS Support of the Enforcement of Labor and Employment Laws*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/dhs-support-of-the-enforcement-of-labor-and-employment-laws> [<https://perma.cc/3LZY-W388>] (last updated Jan. 24, 2025).

20. See Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 368 (2018); *Featured Issue: Citizenship and Protections for Dreamers and Others Without Permanent Status*, AILA (Dec. 4, 2025), <https://www.aila.org/library/featured-issue-citizenship-and-protections-for-dreamers-and-others-without-permanent-status> [<https://perma.cc/B6B4-JC9T>].

21. 8 U.S.C. § 1229b(a)–(b).

22. *Id.* For a summary of the kinds of relief that are available to noncitizens who have resided in the United States for periods of time, see Lee, *supra* note 5, at 755–61.

23. Lee, *supra* note 5, at 761–66; see also SUSAN BIBLER COUTIN, ON THE RECORD: PAPERS, IMMIGRATION, AND LEGAL ADVOCACY 79–80 (2025) (describing

Some immigration policies also create opportunities for migrants to establish secure attachments while waiting for the final adjudication of their immigration benefits. Notably, noncitizens who obtain asylum status are authorized to work under the relevant federal immigration and employment laws.²⁴ Such benefits are also available to noncitizens who are seeking asylum but who have not yet had their applications adjudicated.²⁵ In those instances, applicants may qualify for employment authorization while they are waiting for a final adjudication.²⁶ Critical to understanding how and why employment opportunities embody an attachment-based policy is the historical role played by workplaces as critical institutions for deepening bonds among workers even across immigration and citizenship status differences.²⁷ Access to the formal economy is a decision that largely belongs to the discretion of immigration agencies.²⁸ Attachment is not a prerequisite for obtaining asylum, thus gaining access to job opportunities in the formal economy provides an important head start for migrants to begin the process of developing ties, networks, and community support systems. In other words, permitting migrants stuck in a precarious legal status to access formal work fosters opportunities for those migrants to form bonds and develop relationships with others working and living within the United States.

In terms of the technical requirements of the asylum statute, agencies are required to adjudicate applications within 180 days of filing.²⁹ Due to backlogs and the attendant economic

the range of documents that legal service providers have to sometimes secure to help noncitizens apply for benefits).

24. Under the immigration code, employers are prohibited from hiring “unauthorized” migrants. See 8 U.S.C. § 1324a. A noncitizen is in turn defined as “unauthorized” where they are not “lawfully admitted for permanent residence” or otherwise authorized by the Attorney General. *Id.* § 1324a(h)(3). Under the asylum statute, Congress has instructed the Attorney General to authorize noncitizens who obtain asylum to be authorized “to engage in employment” for purposes of immigration law. *Id.* § 1158(c)(1)(B). Like other noncitizens who are authorized to work, asylees and refugees cannot be denied a position or fired because of national origin. *Id.* § 1324b(a)(1).

25. *Id.* § 1158(d)(2).

26. *Id.*

27. See Stephen Lee, *Screening for Solidarity*, 80 U. CHI. L. REV. 225 (2013); Jennifer Gordon & Robin A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2007). See generally CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

28. 8 U.S.C. § 1158(d)(2) (providing discretion to the Attorney General).

29. *Id.* § 1158(d)(5)(A)(iii).

hardships that come from waiting in limbo, DHS policy permits applicants to seek employment authorization 180 days after filing an application, but the agency will stop the clock if it determines that the applicant has done something to delay the adjudication of the application, such as failing to appear for an interview.³⁰ This timeline follows what is known as the asylum Employment Authorization Document (EAD) clock.³¹

DHS possesses near-total control over the process for crediting time under the asylum EAD clock. Challenges to these practices first began during the Obama Administration in 2011 when a class of asylum seekers challenged the lack of transparency and rationality in rules governing how the clock started and stopped.³² The 2011 complaint culminated in class certification and then an eventual settlement agreement.³³ The settlement made the process more rational by addressing problems like the requirement for applicants to file with an immigration judge rather than with an agency clerk, an unnecessarily onerous requirement in light of backlogs, or the limited scheduling opportunities forcing applicants to choose between a hearing date that is two weeks out (with insufficient time to prepare) or months and years out (with no opportunity to work legally in the meantime).³⁴ The agreement also made the timeline more

30. U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., THE 180-DAY ASYLUM EAD CLOCK NOTICE (2025), <https://www.uscis.gov/sites/default/files/document/notices/Applicant-Caused-Delays-in-Adjudications-of-Asylum-Applications-and-Impact-on-Employment-Authorization.pdf> [<https://perma.cc/6MWN-GXTL>].

31. *Id.* Without employment authorization, noncitizens either have to forego formal employment or else engage in work and risk subsequent immigration consequences like removal or denial of an immigration benefit like a green card. *See* 8 U.S.C. § 1255(c)(8).

32. Revised Settlement Agreement at 2, *B.H. v. U.S. Citizenship & Immigr. Servs.*, No. CV11-2108 (W.D. Wash. Sep. 18, 2013), https://www.uscis.gov/sites/default/files/document/notices/abt_revised_settlement_agreement_-_redlined.9.27.13.pdf [<https://perma.cc/CVS9-38SX>]. *See generally* *Notice of Settlement: B.H. v. U.S. Citizenship and Immigration Services et al.*, No. CV11-2106-RAJ, *Also Known as the ABT Class Action*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/notice-of-settlement-bh-et-al-v-united-states-citizenship-and-immigration-services-et-al-no-cv11> [<https://perma.cc/MND5-UBDR>] (last updated Aug. 25, 2020) (providing various documents related to this litigation).

33. *See* Revised Settlement Agreement, *supra* note 32, at 1–2.

34. Litigation began with “A.B.T.” as the named plaintiff, but this individual was changed to “B.H.” by the time it settled. *See* Corrected Class Notice at 1 & n.2, *B.H.*, No. CV11-2108, https://www.justice.gov/sites/default/files/eoir/legacy/2013/09/27/ABT_Settlement_Agreement_corrected.pdf [<https://perma.cc/S6Y4-UYBL>]. Still, the agreement is referred to as the “ABT Settlement Agreement.” *Id.*;

transparent and fairer by more clearly articulating when the clock would start and stop. Under prior agency policy, the asylum EAD clock would stop once an asylum claim was denied on the merits and would not automatically restart even where the applicant won on appeal and had the case remanded.³⁵ Now, applicants will receive credit for the time after initial denial and the remand of the case.³⁶

Despite the positive changes from the settlement agreement, the asylum EAD clock continued to face issues in its implementation. In *Garcia Perez v. USCIS*, a class of asylum seekers brought suit against different agencies challenging the ways they processed applications for EAD.³⁷ The complaint alleged that the agencies had “adopted uniform nationwide policies and practices to administer the asylum EAD clock” but that the asylum applicants were “at the [agencies] mercy as to how [the agencies] administer the asylum EAD clock, because there is no notice requirement and no viable mechanism to challenge when the clock starts, stops, or does not restart.”³⁸ Effectively, the *Garcia Perez* plaintiffs argued that these agencies had weaponized bureaucratic delay as a strategy for managing time.³⁹ Eventually, the parties entered into a settlement agreement in which the government agreed to publish and state transparent criteria for navigating the asylum EAD clock.⁴⁰

The asylum EAD clock illustrates how agencies can open up opportunities for migrants to further embed themselves within their communities through inclusive exercises of discretionary

see AM. IMMIGR. COUNCIL ET AL., FREQUENTLY ASKED QUESTIONS ABOUT THE ASYLUM CLOCK CLASS ACTION SETTLEMENT 2 (2014), <https://www.masslegal-services.org/system/files/library/FAQ%202-5-14%20FIN.pdf> [<https://perma.cc/YL89-ZFF4>].

35. AM. IMMIGR. COUNCIL ET AL., *supra* note 34, at 4–6.

36. *How the Agreement Affects Adjudication of Asylum and EAD Applications*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/how-the-agreement-affects-adjudication-of-asylum-and-ead-applications> [<https://perma.cc/9M73-W4M3>] (last updated June 14, 2019).

37. Class Action Complaint for Injunctive & Declaratory Relief at 2–3, *Garcia Perez v. U.S. Citizenship & Immigr. Servs.*, No. 22-cv-00806 (W.D. Wash. June 9, 2022), <https://immigrationlitigation.org/wp-content/uploads/2022/06/Garcia-Perez-Complaint.pdf> [<https://perma.cc/UYC6-BLBQ>].

38. *Id.* The defendants included U.S. Citizenship and Immigration Services (an agency under DHS), the Executive Office for Immigration Review (under the Department of Justice (DOJ)), and each agency’s respective director. *Id.* at 6–7.

39. *See id.*

40. Settlement Agreement at 11–14, *Garcia Perez*, No. 22-cv-00806, <https://www.uscis.gov/sites/default/files/document/legal-docs/Settlement-Agreement-in-Garcia-Perez-v-USCIS.pdf> [<https://perma.cc/73DH-VF28>].

authority. Like any kind of discretionary authority, time policies can be construed in ways that ease continued access to benefits like employment authorization and not just in ways that burden applicants. Toward the end of the Biden Administration, immigration officials began moving time policies regarding EAD renewals (as opposed to initial EAD applications) in a more applicant-friendly direction.⁴¹ Once asylum applicants obtain EAD, it is not uncommon for their authorization to lapse while continuing to wait for a final adjudication on their underlying asylum application.⁴² To keep them in the workforce during this liminal period, DHS policy provided for an automatic renewal of employment authorization in anticipation of an expiring EAD document.⁴³ The renewal period had previously extended for only 180 days, but in the final weeks of the Biden Administration, U.S. Citizenship and Immigration Services (USCIS) issued a final rule that increased the period for automatic extension to 540 days or eighteen months.⁴⁴ Expanding the period of renewal recognized the realities of bureaucratic delay and the frustration and unfairness that EAD beneficiaries might experience in having their employment authorization disrupted without explanation.⁴⁵

From a certain vantage point, the Biden-era renewal policy advances an inclusive vision of allocating benefits using a timeline that reduces the chances that someone is denied EAD

41. In December 2024, the Biden Administration issued a policy that automatically extended the period of employment authorization from 180 days to 540 days. *See* Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants, 89 Fed. Reg. 101208 (Dec. 13, 2024) (to be codified at 8 C.F.R. pt. 274a); Press Release, Dep't of Homeland Sec., DHS Announces Permanent Increase of the Automatic Extension Period for Certain Employment Authorization Document Renewal Applicants (Dec. 10, 2024), <https://www.uscis.gov/archive/dhs-announces-permanent-increase-of-the-automatic-extension-period-for-certain-employment> [<https://perma.cc/64QT-2ALZ>].

42. *See* Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants, 89 Fed. Reg. at 101208–09 (highlighting “lapses in employment authorization” as one motivating factor in extending the renewal period).

43. *Id.*

44. *See id.* The agency justified this because of the lengthy times for processing applications for reauthorization. *Id.* As of this writing, the policy has been rescinded by the Trump Administration, and it now applies only to renewal applications filed before October 30, 2025. *See* 8 C.F.R. § 274a.13(d)(1) (2026).

45. *See* Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants, 89 Fed. Reg. at 101209–10.

because of bureaucratic overload, insouciance, or incompetence rather than because they simply do not qualify.⁴⁶ But the scope and meaning of this power—the ability to set timelines—shows how these discretionary policies can change as political priorities shift.⁴⁷

II. ANTI-ATTACHMENT POLICIES

Justifying immigration relief on the basis of attachment offers a commonsense approach to achieving inclusive regulatory goals. Within this scarcity landscape, not all noncitizens can obtain relief—or so the thinking goes—therefore officials sensibly prioritize those who are most embedded within American communities. But these benefits programs work alongside—indeed, derive from the same legal authority as—more punitive immigration enforcement programs, highlighting the incomplete nature of describing the immigration system as effectuating a principle of attachment. While some immigration policies do facilitate the formation of attachments among legally vulnerable migrants, it is also important to highlight how other policies seek to frustrate the formation of such attachments—between migrants and their communities, family members, neighbors, classmates, and coworkers. Just as immigration law effectuates attachment policies so does it utilize anti-attachment policies.

Within cancellation programs, one obvious example is the “stop-time rule,” which gives agencies nearly unfettered control over the clock governing time credits. Most notably, the statute stops the clock once immigration officials initiate removal proceedings with the issuance of a notice to appear (NTA) document, the immigration analogue to the indictment or charging document in the criminal system.⁴⁸ Immigration agencies can adjust their policies to make it easier for officials to issue NTAs, thereby freezing the clock for migrants. Although the Supreme

46. The policy was initially announced in 2024, toward the end of the Biden Administration. Press Release, Dep’t of Homeland Sec., *supra* note 41.

47. For example, while the 540-day rule still governed asylum seekers, it did not cover those seeking EAD renewal for those applying for temporary protected status (TPS). *Automatic Employment Authorization Document (EAD) Extension*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/eadautoextend> [<https://perma.cc/SZK9-WP5K>] (last updated Oct. 29, 2025) (explaining the TPS applicants only have a 365-day period or the duration of the TPS, whichever is shorter); USCIS Immigration Fees Required by HR-1 Reconciliation Bill, 90 Fed. Reg. 34511, 34514 (July 22, 2025).

48. 8 U.S.C. § 1229b(d)(1)(A)–(B).

Court has interpreted the stop-time rule statute to require officials to provide more than just a bare-bones document,⁴⁹ the federal government still has plenty of room to churn out NTAs quickly to suit its own enforcement needs. For example, Immigration and Customs Enforcement (ICE), which oversees immigration enforcement, has been the agency that traditionally issues NTAs.⁵⁰ In early 2025, the Trump Administration authorized USCIS, which is devoted to allocating immigration benefits, to also issue NTAs under certain circumstances.⁵¹ Conferring such authority on USCIS officers removes an additional burdensome step for the government, thereby withholding precious time credits that migrants might use to establish continuous presence or residence. The stop-time rule is written into the cancellation statute,⁵² which is ostensibly a benefits program that provides an off-ramp from removal to migrants with strong attachments. But this illustrates the degree to which attachment and anti-attachment principles blend together in the administration of immigration programs.

Other immigration policies seek to prevent migrants from developing any attachments at all with the United States. The example of the Migration Protection Protocols (MPP) usefully illustrates this dynamic. Instead of temporarily admitting or paroling asylum seekers into the United States to wait for their turn on the American side of the border, under the protocols, the Mexican government has agreed to allow these would-be migrants to wait on the Mexican side of the southern U.S. border.⁵³

49. *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021); *Pereira v. Sessions*, 585 U.S. 198, 202 (2018).

50. U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., PM-602-0187, ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (2025), https://www.uscis.gov/sites/default/files/document/policy-alerts/nta_policy_final_2.28.25_final.pdf [https://perma.cc/BBW7-VK9Y].

51. *Id.*

52. *See* 8 U.S.C. § 1229b.

53. During the first Trump Administration, then-Secretary of Homeland Security, Kirstjen Nielsen, announced the implementation of the Migration Protection Protocols (MPP), in which asylum seekers arriving at the U.S.-Mexico border would wait in Mexico until their hearing dates, at which point they would return to the United States for processing. *See* Memorandum from Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Sec., Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 15, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/GJD4-SGM4]. During the Biden Administration, Nielsen's successor, Alejandro Mayorkas, announced a new policy terminating the MPP. *See* Memorandum from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., Termination

This policy disrupts the formation of attachments by keeping migrants in Mexico until a hearing date.⁵⁴ This arrangement also puts migrants in a weak position by putting them beyond the reach of constitutional rights that apply only within the territorial United States.⁵⁵ The Mexican government has taken on similar duties at its own southern border to slow the movement of migrants from South and Central America up the North American continent.⁵⁶ These formal arrangements with other countries to stymie and manage border flows unfold within the American consular network, as well as the global transportation infrastructure.⁵⁷

Once migrants are in the United States, immigration policies also work to destabilize and disrupt the ability of migrants to form attachments. During the Obama Administration, for example, ICE officials prioritized the removal of recent entrants.⁵⁸ In a series of memoranda outlining enforcement priorities, ICE Director John Morton listed recent entrants as an enforcement and removal priority alongside noncitizens who had committed

of the Migrant Protection Protocols Program (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [<https://perma.cc/2M5Z-PD9G>]. Litigation then followed challenging the rescission of the MPP programs. See *Biden v. Texas*, 597 U.S. 785 (2022).

54. Federal law also requires carriers to verify that its passengers possess the requisite immigration travel documents qualifying them to be inspected and admitted into the United States. See 8 U.S.C. § 1321. Carriers like airlines and ships must bear the costs of return travel for passengers who are denied on these grounds. See *Understanding the Issue of Inadmissible Passengers (INADs) and Their Impact on Travel*, IATA (Sep. 23, 2023), <https://www.iata.org/en/publications/newsletters/iata-knowledge-hub/understanding-inads-inadmissible-passengers-and-their-impact-on-travel> [<https://perma.cc/5W2A-H6W4>].

55. It also subjects migrants to violence within migrant camps. See, e.g., Alfonso Mercado et al., *Trauma in the American Asylum Process: Experiences of Immigrant Families Under the Migrant Protection Protocols*, 16 PSYCH. TRAUMA S379 (Supp. 2022); Kirk Semple, *Migrants in Mexico Face Kidnappings and Violence While Awaiting Immigration Hearings in U.S.*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/world/americas/mexico-migrants.html> [<https://perma.cc/D6TV-4XFX>].

56. See Memorandum from Kirstjen Nielsen, *supra* note 53, at 2–3 (describing the coordinated effort to manage this migrant population).

57. See Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 673–74 (2009); Ana Muñoz, *Bordering Circuitry: Crossjurisdictional Immigration Surveillance*, 66 UCLA L. REV. 1636, 1651 (2019).

58. See Memorandum from John Morton, Dir., U.S. Citizenship & Customs Enft, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/6PMX-KERZ>].

or been convicted of crimes.⁵⁹ From a public safety or crime control perspective, it is not obvious how these two types of migrants fit together. The two types present very different concerns and make for an awkward pairing of enforcement targets from either perspective. At the same time, they reveal a spectrum of undesirability in which ideas about community attachments and danger to the public work together to justify the use of enforcement resources and personnel. Furthermore, the coupling of recent entrants and “criminal aliens” illustrates the oddity of organizing benefits programs around principles of attachment in the first place. It feels disingenuous to justify regularization opportunities in terms of a migrant’s attachments to the United States when those programs are administered within a broader system that push in the opposite direction, motivated by anti-attachment policies. In this way, the concept of attachment is susceptible to manipulation like other legal concepts with emotional value, such as “public safety” or “hard work.” The immigration system regulates the formation of attachments and in doing so advances different political projects beneficial to agencies and elected officials.

Notice that the MPP and asylum policies generally are benefits programs that implement a largely inclusive vision of the law. This “benefits” label is a part of what creates the dissonance. In theory, asylum policies should protect vulnerable migrants with the benefit of refuge in the United States against threats of violence and persecution in other countries, but as implemented through the MPP, asylum has embraced enforcement-oriented logics and created a punitive system.⁶⁰ At the same time, relief from removal that allows migrants to remain in the United States and build a life with others can be justified as an equitable or merciful act of nonenforcement. The concept of attachment steps into this descriptive void showing that the various policies of the modern immigration system can be organized on a spectrum ranging from policies that facilitate

59. *Id.*

60. Legal programs labeled “benefits” can implement punitive aims. While the benefits/enforcement distinction has doctrinal consequences for those subject to these policies—in terms of constitutional protections and the rights one may enforce—this distinction does not offer much descriptive value. On the legal advantages agencies enjoy in the benefits context as compared to the enforcement context, see Lee, *supra* note 5, at 766–69.

attachments⁶¹ to those that merely reward them⁶² and on the opposite end of the spectrum to those that aim to make it difficult⁶³ if not impossible⁶⁴ for migrants to develop legally cognizable bonds.

Other procedures governing asylum adjudications further illustrate how immigration law advances anti-attachment impulses. In *DHS v. Thuraissigiam*, a Sri Lankan migrant entered the United States at the southern border seeking asylum.⁶⁵ He made it twenty-five yards into the territorial United States before being apprehended.⁶⁶ Thuraissigiam asserted a claim for asylum, which was denied, subjecting him to expedited removal proceedings.⁶⁷ He filed a habeas petition claiming that he was entitled to a greater set of procedural protections than what he had received.⁶⁸ He argued that the process he received was inadequate because immigration officials failed to adequately inquire or “probe” into his account to determine whether he qualified for asylum and therefore was entitled to a more “meaningful opportunity to establish his claims.”⁶⁹ Writing for the Court, Justice Alito sided with the government and denied Thuraissigiam’s habeas petition.⁷⁰ In response to the argument that the petitioner was entitled to greater procedural protections by virtue of his apprehension within the territorial United States, Justice Alito disregarded this fact, noting that, as a constitutional matter, Thuraissigiam was properly treated as a first-time entrant seeking admission at the border.⁷¹ Relying on the entry fiction⁷² that the government was entitled to treat

61. See, e.g., Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants, 89 Fed. Reg. 101208, 101208 (Dec. 13, 2024) (to be codified at 8 C.F.R. pt. 274a).

62. See, e.g., 8 U.S.C. § 1229b(a)–(b).

63. See Memorandum from John Morton, *supra* note 58.

64. See Memorandum from Kirstjen M. Nielsen, *supra* note 53.

65. *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 114 (2020).

66. *Id.*

67. See *id.*

68. *Id.* at 114–15.

69. *Id.* at 156–57 (Breyer, J., concurring) (describing Thuraissigiam’s procedural claims).

70. *Id.* at 106–07 (majority opinion).

71. *Id.* at 139.

72. Cf. Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 565 (2021) (explaining entry fiction as the idea that “‘arriving’ immigrants stopped at the border are deemed ‘unentered’ and ‘not here’ for constitutional due process purposes,” meaning they can be detained for extended periods of time without any bond hearing).

Thuraissigiam as someone detained at the border despite being physically within the interior of the United States, the Court concluded that the expedited removal proceeding was all that the Due Process Clause afforded him.⁷³ The hours and minutes Thuraissigiam had spent in the United States were not enough to make a constitutional difference.⁷⁴

In her dissent, Justice Sotomayor emphasized the constitutional importance of Thuraissigiam's location.⁷⁵ In response to Justice Alito's characterization of Thuraissigiam as seeking relief at the "threshold of initial entry," she concluded that the Due Process Clause reached the migrant who "was actually within the territorial limits of the United States."⁷⁶ The dissent's approach would allow the more protective version of due process to apply after spending even a few moments within the territorial United States.⁷⁷ By contrast, Justice Alito and other members of the Court seemed to accept that noncitizens must spend a certain amount of time in the United States before being recognized as within the territory for constitutional purposes. In his concurring opinion, Justice Breyer explicitly limited his support for the judgment to the facts presented by Thuraissigiam's challenge.⁷⁸ Notably, he explained that time spent in the United States very much could make a constitutional difference:

Addressing more broadly whether the Suspension Clause protects people challenging removal decisions may raise a host of difficult questions in the immigration context. What review might the Suspension Clause assure, say, a person apprehended years after she crossed our borders clandestinely and started a life in this country? Under current law, noncitizens who have lived in the United States for up to two years may be placed in expedited-removal proceedings, but Congress might decide to raise that 2-year cap (or remove it altogether). Does the Suspension Clause let Congress close the

73. *Thuraissigiam*, 591 U.S. at 139.

74. *See id.*

75. *See id.* at 191 (Sotomayor, J., dissenting) ("As a noncitizen within the territory of the United States, . . . [Thuraissigiam] is entitled to invoke the protections of the Due Process Clause.").

76. *Id.* at 192 (citing *id.* at 107 (majority opinion)).

77. *See id.* at 191.

78. *Id.* at 150 (Breyer, J., concurring).

courthouse doors to a long-term permanent resident facing removal?⁷⁹

Viewing the immigration system as a set of laws that aim to deter the formation of attachments also brings into view laws that affect benefits that will not be fully realized for many years, maybe even for an entire generation of people. Regulatory responses to birth tourism might be understood in this way. Birth tourism refers to an industry that caters to pregnant mothers who enter the United States for the primary purpose of giving birth in the country and thereby conferring citizenship onto their child through the birthright citizenship rule⁸⁰ and creating the possibility of obtaining citizenship for themselves down the road.⁸¹ During the first Trump Administration, the State Department amended its policy to empower consulate officers to deny the issuance of tourist visas, which are issued for “pleasure” travel, to individuals suspected of entering for the purposes of giving birth to a child.⁸² The new policy targets noncitizens seeking to enter the United States for the “primary purpose” of giving birth and renders them ineligible for a tourist visa.⁸³ Defenders of this policy suggest that birth tourism allows migrants to confer membership to future generations without having to endure the wait times imposed by visa bulletins.⁸⁴ In other

79. *Id.* at 150–51 (internal citations omitted).

80. Nicole Hong & Arielle Dollinger, *Women in ‘Birth Tourism’ Ring Had 119 Babies on Long Island, Officials Say*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/nyregion/birth-tourism-long-island.html> [<https://perma.cc/9ZPR-CMAP>]; Victoria Kim & Frank Shyong, *‘Maternity Tourism’ Raids Target California Operations Catering to Chinese*, L.A. TIMES (Mar. 3, 2015, at 6:41 PM), <https://www.latimes.com/local/lanow/la-me-ln-birth-tourism-schemes-raids-20150303-story.html> [<https://perma.cc/S93W-C9QC>].

81. Importantly, under longstanding admissions policy, citizens may sponsor their noncitizen parents for a green card only upon turning twenty-one years of age meaning that any mother who enters the United States for the purposes of obtaining legal status for themselves would be able to do so, if at all, only after two decades. *See* 8 U.S.C. § 1151(b)(2)(A)(i).

82. *See* Hong & Dollinger, *supra* note 80; Kim & Shyong, *supra* note 80.

83. Visas: Temporary Visitors for Business or Pleasure, 85 Fed. Reg. 4219, 4220 (Jan. 24, 2020) (to be codified at 22 C.F.R. § 41.31(b)(2)(i)).

84. *Id.*; U.S. SENATE, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, MINORITY STAFF REPORT: BIRTH TOURISM IN THE UNITED STATES, https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022.12.20-%20Final_Birth%20Tourism%20Report.pdf [<https://perma.cc/UGE2-L6QJ>]; Merrill Matthews, *Can We At Least Put a Stop to ‘Birth Tourism’?*, THE HILL (Jan. 28, 2025, at 8:30 AM), <https://thehill.com/opinion/5109661-trump-birth-tourism-limitations> [<https://perma.cc/L493-ACF2>].

words, it allows migrants to obtain automatic membership without first securing attachments to the United States. Critics of this policy focus on both the disproportionate reaction to what is a relatively small problem and the xenophobic undertones animating the anti-birth tourism movement especially as it is directed against Chinese migrants.⁸⁵

A policy that operates in the same vein—and presents even more troubling implications—is the attempt to eliminate birthright citizenship for certain classes of people born in the United States to noncitizens, an especially controversial policy rolled out during the second Trump Administration.⁸⁶ This policy would deny birthright citizenship to those born to mothers who were unlawfully present or temporarily admitted to the United States unless the father was a citizen or LPR.⁸⁷ For birthright citizens, every part of their subjective experiences as members corresponds with the legal definition of being an insider as compared to naturalized citizens, who must pass through different stages over time—in other words, wait for their turn—before becoming citizens. Unlike those born to birth tourists, those born to unauthorized or temporary migrants have developed some attachments to the United States, and probably more, given that nearly half have lived here for more than ten years.⁸⁸ Attempting to exclude those born into this category from the status of

85. See Frank Shyong, *Why Birth Tourism from China Persists Even as U.S. Officials Crack Down*, L.A. TIMES (Dec. 30, 2016, at 3:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-birth-tourism-persists-20161220-story.html> [<https://perma.cc/64JK-2RM5>]; Sean H. Wang, *Fetal Citizens? Birthright Citizenship, Reproductive Futurism, and the “Panic” over Chinese Birth Tourism in Southern California*, 35 ENV'T & PLAN D. 263 (2017). For a thoughtful analysis of the birth tourism debate in Canada, see Amanda R. Cheong et al., *Unpacking ‘Birth Tourism’: Incidental Citizenship and the Diverse Migration and Reproduction Trajectories of Nonresident Mothers in Canada*, 51 J. ETHNIC & MIGRATION STUD. 4299 (2025).

86. Protecting the Meaning and Value of American Citizenship, Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025); see also *Trump v. CASA, Inc.*, 606 U.S. 831, 839 (2025) (holding on procedural, and not constitutional, grounds that federal courts lack the authority to issue universal injunctions).

87. Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. at 8449.

88. It is common for many mothers entering the United States to engage in birth tourism to return to their home countries immediately after their children obtain citizenship. See Kim & Shyong, *supra* note 80. By contrast, unauthorized migrants who give birth to children in the United States do not enjoy the same degree of mobility or freedom to move across borders, or even in the open, given the dangers of even minimal contact with public officials. See ASAD L. ASAD, *ENGAGE AND EVADE: HOW LATINO IMMIGRANT FAMILIES MANAGE SURVEILLANCE IN EVERYDAY LIFE* 36–37 (2023).

birthright citizen amounts to a policy pushing these individuals into the line of noncitizens who must wait their turn to naturalize on a prolonged timeline.

III. THEORIZING ATTACHMENT

Describing immigration laws as jointly effectuating attachment and anti-attachment policies captures core inconsistencies in the modern administration of immigration programs. From the perspective of some immigrants, especially immigrants of color, federal programs that aim to reward those who have made contributions to the United States and thereby have established attachments cannot be disentangled from a broader legal system that excludes and harms migrants.⁸⁹ Ultimately, despite the commonsense and intuitive appeal of using the attachment principle to justify the allocation of public resources, the concept of attachment is a legal and political construction. It offers officials seeking an ostensibly inclusive vision of immigration policy to obfuscate the broader administrative context that seeks to frustrate the ability of migrants to move freely through society, to form relationships, and to build lives. This dynamic is important to explaining the disconnect between agency officials creating and administering inclusive benefits programs in good faith, on the one hand, and the skepticism and dissatisfaction expressed by migrants—the ostensible beneficiaries—on the other.⁹⁰

My suggestion to rethink our immigration laws as a system that regulates migrant attachments operates mostly on a descriptive plane. This account considers the practical effects of various enforcement policies and benefits programs, which inform or frustrate the ability of migrants to connect with others within families, friend groups, workplace relationships, and broader community connections. But highlighting migrant attachments can also ground discussions about the various normative commitments that ought to inform efforts to resist or reform immigration law's punitive elements. One scholarly conversation argues that *territoriality* ought to inform how rights and benefits are allocated. Migrants who face or experience the immigration system within the United States ought to be prioritized and treated differently than those who have not yet arrived

89. See JENNIFER CHACÓN ET AL., *LEGAL PHANTOMS: EXECUTIVE ACTION AND THE HAUNTING FAILURES OF IMMIGRATION LAW* 216–18 (2024).

90. See *id.* at 119.

or who are no longer here. A second conversation focuses on *temporality*, which develops the intuitive idea that the time a migrant spends engaging with the immigration system ought to inform the scope of protections or priority they receive.

These two conversations are related but rarely are the bases of this relationship explicitly articulated. In the years following the 1996 federal reforms—which greatly increased the legal vulnerability of migrants—legal scholars grounded reform arguments in ideas related to presence in the United States.⁹¹ Specifically, they made arguments about rights or interests related to territoriality. These scholars argued that the law ought to allocate greater protections to migrants who lived or worked or simply set foot within the territorial United States than to those who were at the border or outside of the United States.⁹² Moving toward the present, as the legality of these punitive reforms were largely upheld by courts and Congress passed no new forms of relief, the unauthorized population continued to grow creating a class of noncitizens who have lived in the United States for years and decades without a meaningful opportunity to regularize their status. Thus, as discussions about territoriality begin to grapple with the temporal dimension of long-term unauthorized presence, attachments can help ground these discussions.

A. *Territoriality*

For decades, territorial distinctions have framed the debate about how and if rights are appropriately allocated to noncitizens. In particular, legal scholars have critiqued the fixation by lawmakers and courts on lawful admission as a prerequisite for constitutional protection.⁹³ Such criticism emphasized that cabin-ing rights in this way threatens to exclude a large class of noncitizens from constitutional protections. As legal scholar Linda Bosniak noted in 2001, reserving protections for only those who have been lawfully admitted “would seriously disadvantage one group of undocumented immigrants—those who entered without inspection—who would now fall outside the

91. See *infra* Section III.A.

92. See *infra* Section III.A.

93. This stemmed from a series of sweeping and harmful changes to immigration enforcement in 1996. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 536(2)(A), 110 Stat. 1214, 1265.

domain of protection.”⁹⁴ As a result, many legal scholars have emphasized the importance of presence in the United States as a marker of legal inclusion with the intention of de-emphasizing other markers like lawful admission.⁹⁵ In effect, these scholars argued that a noncitizen’s physical presence in the United States should dictate, or at least greatly inform, whether they enjoy rights and benefits, both inside and certainly outside of the immigration system.⁹⁶ One version of this idea was Linda Bosniak’s description of membership as grounded in the idea of a “hard outside, soft inside conception of citizenship represent[ing] liberal democracy’s commonsense moral template of community belonging.”⁹⁷ The scholarly focus on territoriality coincided with the growth of the unauthorized migrant population.⁹⁸ In 1990, the unauthorized migrant population hovered around 3.5

94. See, e.g., Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 412 (2002) (raising concerns that courts will tie constitutional protections to whether a noncitizen has been admitted rather than has simply effectuated an entry); see also T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 376–78 (2002) (discussing the constitutional problems of treating parolees who have resided in the United States for significant periods of time as first-time entrants).

95. See, e.g., Andrew Tae-Hyun Kim, *Penalizing Presence*, 88 GEO. WASH. L. REV. 76, 79 (2020) (noting the statutory “choice to penalize unlawful presence” as opposed to unlawful acts is deliberate); Bosniak, *supra* note 11, at 392 (noting the benefits of the “territorial approach” to membership, including that it “appropriately insists on treating membership as a matter of social fact rather than as a legal formality”); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2502–03 (2005) (noting that those held outside of the territorial United States are not protected by the Constitution).

96. For example, legal scholars have rightfully argued a noncitizen’s ability to access a range of rights in the criminal context or access to civil courts should not be tied to their immigration status. See generally Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011) (discussing the differing advantages and disadvantages for unauthorized immigrants involved in the criminal justice system); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT’L L. 1 (1996) (arguing for reform to the current alienage jurisdiction system and the influence of bias and xenophobia in state and federal courts).

97. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 125 (2006).

98. Language has limits, and existing terminology describing migrants is inadequate. I use the term “unauthorized” throughout the Article as an imperfect label to describe migrants in the United States who are legally vulnerable because they face immigration consequences like detention and removal with some degree of immediacy. For a longer explanation of the limits of language with legal scholarship governing immigration, see CHACÓN ET AL., *supra* note 89, at 22–23.

million.⁹⁹ That figure doubled over the next decade and continued to rise, stabilizing in the ten to twelve million range.¹⁰⁰ This empirical reality informed arguments for inclusion.¹⁰¹ The urgency of this inquiry intensified as the percentage of unauthorized migrants who became long-term residents predictably increased.¹⁰² Though the precise numbers vary, most unauthorized migrants have lived in the United States for at least a decade with few opportunities for regularizing its status.¹⁰³

99. See Jeffrey S. Passel & Jens Manuel Krogstad, *What We Know About Unauthorized Immigrants Living in the U.S.*, PEW RSCH. CTR.: SHORT READS (July 22, 2024), <https://www.pewresearch.org/short-reads/2024/07/22/what-we-know-about-unauthorized-immigrants-living-in-the-us> [https://perma.cc/V5EY-EYMH].

100. *Id.*

101. In critiquing borders and the concept of citizenship, Linda Bosniak argued that even if we accept the “legitimacy of borders,” the exclusionary aspects of citizenship law create an “internalized border that is invoked to justify discriminatory and marginalizing treatment of noncitizens, or aliens, in a variety of contexts.” Linda Bosniak, *Varieties of Citizenship*, 75 *FORDHAM L. REV.* 2449, 2451 (2007); see also T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 *HASTINGS CONST. L.Q.* 915, 919–23 (1995) [hereinafter Aleinikoff, *Tightening Circle of Membership*] (“[T]he actual justification for the exclusion of immigrants from major entitlement programs turns on a narrowing conception of membership There is one justification that fits It is the argument that we may, plain and simple, favor citizens over permanent resident aliens.”); T. Alexander Aleinikoff, *Between National and Post-National: Membership in the United States*, 4 *MICH. J. RACE & L.* 241, 243 (1999) [hereinafter Aleinikoff, *Between National and Post-National*] (noting that “U.S. models of membership that extend rights to non-citizens are largely territorialized”); Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 30 *MICH. J. INT’L L.* 809, 809–10 (2009) (“[T]he drawing of borders between member and non-member, insider and outsider, the interior and the exterior bear dramatic consequences for the scope of rights, protections, and opportunities that noncitizens hold.”).

102. See Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Mar. 12, 2025), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#size-origins> [https://perma.cc/SZZ5-UTXE] (noting the increase in long-term residency for immigrants, specifically that “nearly 44 percent of all immigrants in the United States in 2023 arrived prior to 2000,” which arguably includes members of the unauthorized population); Jennifer Van Hook et al., *The Unauthorized Immigrant Population Expands amid Record U.S.-Mexico Border Arrivals*, MIGRATION POL’Y INST. (Feb. 2025), <https://www.migrationpolicy.org/news/unauthorized-immigrant-population-mid-2023> [https://perma.cc/A24S-UHUT] (“Between 2019 and 2023, the unauthorized immigrant population grew by 3 million, or an average of 6 percent per year The nation had not seen yearly increases this large since the early 2000s.”).

103. JEANNE BATALOVA, MIGRATION POL’Y INST., EXPLAINER: WHO ARE IMMIGRANTS IN THE UNITED STATES? 3 (2024), <https://www.migrationpolicy.org/sites/default/files/publications/mpi-explainer-who-are-immigrants-us-2024.pdf> [https://perma.cc/AL4W-FASU]. A key hurdle in obtaining these

This early wave of scholars accepted that migrant rights could be diminished at the border but vigorously (and rightly) defended the idea that migrants should have elevated, if not equal, rights in the interior.¹⁰⁴ This pragmatic and inclusive vision of migrant rights has not yet materialized. Over the years, immigration laws have not only become more punitive,¹⁰⁵ constitutional doctrine has evolved in ways that further diminish migrant rights when subject to an exercise of government authority at the border. In particular, lawmakers and regulators have expanded policies associated with the border into the interior, diminishing rights for all.¹⁰⁶ To the extent that the border functions as a physical space in which officials can exert maximum control over migrants, this space has expanded beyond territorial boundaries separating the United States from Canada and Mexico and outside of ports of entry. Instead, officials can reach deep into the interior of the United States to snatch migrants and place them on the same legal footing—even after months and years—as first-time entrants. Most notably, border officials heavily rely on the tool of expedited removal to detain and quickly expel or remove migrants who lack proper documentation or raise failed asylum claims at the border.¹⁰⁷ Under these procedures, an immigration officer (not an immigration judge) summarily adjudicates a noncitizen’s right to enter the United States.¹⁰⁸ More recently, different administrations have expanded the scope of expedited removal to allow officers to use this enforcement tool on noncitizens apprehended anywhere within the United States who cannot establish that they have

regularization benefits is wide-ranging and judicially unreviewable agency discretion. *See, e.g., Lee, supra* note 5, at 743.

104. *See* sources cited *supra* note 95.

105. For example, in 2025, Congress passed the Laken Riley Act, which expanded the types of crimes triggering the mandatory detention of immigrants pending removal. *See* Laken Riley Act, Public Law 119-1, 139 Stat. 3, Jan. 29, 2025.

106. *See* Pratheepan Gulasekaram, *The Borderline Constitution*, 135 YALE L.J. (forthcoming 2026).

107. *See, e.g.,* YAEL SCHACHER, REFUGEES INT’L, ADDRESSING THE LEGACY OF EXPEDITED REMOVAL: BORDER PROCEDURES AND ALTERNATIVES FOR REFORM 2 (2021), <https://d3jwam0i5codb7.cloudfront.net/wp-content/uploads/2023/03/ExpeditedRemovalBriefSchacherfinal.pdf> [<https://perma.cc/69BZ-HKU2>] (describing expedited removal as “an entirely ‘defensive’ system—whereby asylum seekers are presumed removable”).

108. *Id.* at 2–3.

been continuously present in the United States for at least two years.¹⁰⁹

This expansion of border jurisprudence into the interior of the United States explains why territorial-based claims cannot, without more, effectively constrain government power.¹¹⁰ As zones of exceptionalism in which state actors can assert maximum authority over all those seeking passage into the internal geographic space of a country,¹¹¹ borders have expanded into the interior of the United States. For the most part, courts have maintained that such incursions into the interior on this basis are lawful.¹¹² In the context of the expansion of border exceptionalism into the interior, attachment-based benefits function as a kind of stand-in for territorial boundaries. Those who advocate for robust territorial-based rights would likely agree that a part of what makes such claims meaningful is the kinds of relationships and opportunities that unfold within the interior of the United States.¹¹³ In that way, attachments reflect a continuation of the territorial idea albeit within the context of more manipulable adjudication settings and on the basis of more malleable criteria.

Today, the underlying fears of territorialists have been realized. Millions of unauthorized migrants, their families, and their communities face a kind of legal purgatory in which their immigration status casts a shadow over so many everyday interactions.¹¹⁴ Immigration law enforcement policies have become

109. *Id.* at 3, 15–16; Designating Aliens for Expedited Removal, Off. of the Sec’y, Dep’t of Homeland Sec., 90 Fed. Reg. 8139 (Jan. 24, 2025) (most recent modification under the second Trump Administration).

110. *See, e.g.*, Dep’t of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 114 (2020).

111. *See* Matthew Longo, *The Border as Accordion: Linear Borders, Territoriality, and the Problem of Naturalness*, in *LAWLESS ZONES, RIGHTLESS SUBJECTS: MIGRATION, ASYLUM, AND SHIFTING BORDERS* 109, 112 (Seyla Benhabib & Ayelet Shachar eds., 2025). The “border experience” means experiencing immobility and something approximating “rightlessness.” *See* Ayten Gündoğdu, *From the Colony to the Border: The Lawful Lawlessness of Racial Violence*, in *LAWLESS ZONES, RIGHTLESS SUBJECTS: MIGRATION, ASYLUM, AND SHIFTING BORDERS* *supra*, at 175, 175–77.

112. *See* Pratheepan Gulasekaram, *The Borderline Constitution*, 135 *YALE L.J.* (forthcoming 2026).

113. *E.g.*, BOSNIAK, *supra* note 97, at 122, 125–26; T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 161–81 (2002).

114. The unauthorized population has hovered between ten and twelve million for the past few decades. Van Hook et al., *supra* note 102 (noting that this stability was due to “entries were [being] continually offset by exits”). One recent study suggests that the unauthorized immigrant population has increased in recent years.

harsher, more punitive, and less interested in the human costs of removal. Territorial rules and principles alone can no longer guide debates about immigration law, neither its present nor its future.

B. *Temporality*

Migrants living within the interior of the United States remain vulnerable because of their immigration status prompting legal scholars to begin focusing on the legal meaning of time spent in the United States. This conversation is motivated by the urgency caused by unauthorized migrants residing in the United States for decades, which invite moral concerns about a growing underclass. Thus far, legal scholars have deployed time-based or temporal critiques to highlight the cruelty of the immigration system.

In *Doing Time*, legal scholar Juliet Stumpf astutely observes that immigration law and criminal law use “temporal yardsticks” to operationalize different goals such as assessing a migrant’s attachment to their communities and managing risks posed by newcomers.¹¹⁵ In Stumpf’s formulation, time operates as a metric for evaluating (1) the value of a benefit, such as LPR status or the right to remain in the United States, and (2) the intensity of a legal penalty, like long-term or permanent expulsion.¹¹⁶ In a similar fashion, Adam Cox has argued in favor of reforms that include temporary or conditional forms of deportation.¹¹⁷ This further reflects the idea that what makes lawful

Jeffrey S. Passel & Jens Manuel Krogstad, *U.S. Unauthorized Immigrant Population Reached a Record 14 Million in 2023*, PEW RSCH. CTR. (Aug. 21, 2025), <https://www.pewresearch.org/race-and-ethnicity/2025/08/21/u-s-unauthorized-immigrant-population-reached-a-record-14-million-in-2023> [https://perma.cc/2PGM-ALA2].

115. Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1711–12 (2011).

116. *Id.* at 1712. Legal scholars have used temporality and time to argue in favor of different types of reforms. See, e.g., Jessica Hambly & Nick Gill, *Law and Speed: Asylum Appeals and the Techniques and Consequences of Legal Quickening*, 47 J.L. & SOC’Y 3 (2020); Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531 (2017); Miranda Cady Hallett, *Temporary Protection, Enduring Contradiction: The Contested and Contradictory Meanings of Temporary Immigration Status*, 39 LAW & SOC. INQUIRY 621 (2014).

117. See Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 391–93 (2008) (“A temporary deportation rule would be one that required the physical removal of a person from the country but accorded this person the right

admission and access valuable is the ability of migrants to enjoy and further develop the attachments they have fostered. At heart, both Cox and Stumpf argue that the temporal thresholds written into federal immigration statutes leading to long-term or permanent expulsion impose a disproportionately harsh penalty in light of the underlying legal violation.¹¹⁸ Embedded in this argument is the idea that the penalty derives from the harm of being denied access to the relationships and opportunities developed and enjoyed within the United States.

Long periods of presence operate as a metric for evaluating the harms of deportation. The most obvious example is expulsion with no possibility of readmission for certain categories of “criminal aliens” and related bars to readmission for deportees and the like.¹¹⁹ The intuition is that the bar to reentry or readmission operates as a punishment and therefore should be proportionate to the underlying offense. That is how time operates on the punishment side. A similar dynamic unfolds in tagging consequences to migrant behavior. Migrants who overstay or remain in the United States without authorization receive a punishment that reflects the degree of their defiance. The three- and ten-year bars embody this principle precisely.¹²⁰ A temporal analysis of these types of immigration policies helps to highlight the punitive elements of detention and deportation.

The “time as a metric of harm” account makes an important and helpful intervention by highlighting how time and temporality offer useful tools for evaluating the extent to which immigration rules impose human costs—the more time a migrant

to reenter after a fixed period of time. Relatedly, conditions other than temporal restrictions could be placed on the noncitizen’s right of reentry.”)

118. *Id.* at 349–50; Stumpf, *supra* note 115, at 1722.

119. 8 U.S.C. § 1182(a)(9)(A).

120. See 8 U.S.C. § 1182(a)(9)(B)(i), The three- and ten-year bars “impose[] re-entry bars on immigrants who accrue ‘unlawful presence’ in the United States, leave the country, and want to re-enter lawfully.” *The Three- and Ten-Year Bars*, AM. IMMIGR. COUNCIL (Oct. 28, 2016), <https://www.americanimmigrationcouncil.org/fact-sheet/three-and-ten-year-bars> [<https://perma.cc/RHY7-XFV8>]. An individual is typically found inadmissible based on the “accrual of unlawful presence” by (1) seeking “admission again within 3 years of leaving the United States before removal proceedings begin, after . . . accru[ing] more than 180 days but less than 1 year of unlawful presence during a single stay” and (2) seeking “admission again within 10 years of leaving or being removed from the United States, after . . . accru[ing] 1 year or more of unlawful presence during a single stay.” *Unlawful Presence and Inadmissibility*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility> [<https://perma.cc/554T-8AMH>] (last updated Jan. 25, 2025).

spends in the United States, the greater the costs created by expulsion. But this conversation could benefit from further interrogation of temporal policies beyond their utility in measuring human devastation.

First, temporal rules can also operate as a forward-looking projection of the kinds of attachment migrants might develop if given enough time. Legal scholarship could benefit from more nuanced or historically specific analyses. Migrants often come to the United States as family units with significant years, sometimes decades, separating family members in age. Parents and children in the same family may migrate at the same time but thereafter fall into different life trajectories that color the way they understand and experience different time events.¹²¹ Embracing a “life course” perspective on migration highlights the traumas and harms that migrants experience after they have migrated.¹²² Moreover, it also refers to the age of the person going through those events and moments.

Within the context of mixed-status families¹²³ one common narrative is that first-generation migrants are propelled to the United States in response to some kind of traumatic event—war, natural disaster, or economic and social dissolution—and must piece together a life in the United States with very few resources. This makes for a difficult path of incorporation. Subsequent generations, including childhood arrivals, experience everyday challenges in different ways. Although they possess a comparative advantage to their parents in incorporating into social and economic life in the United States because of language, acculturation, and networks, they continue to experience challenges and microaggressions especially as they arise from racial differences. The challenges of navigating a punitive benefits scheme amid bureaucratic indifference can vary depending on the temporal cohort to which a migrant belongs.

Scholarship embracing life course perspectives spans a number of different fields of study, but its core insight focuses on the different trajectories and transitions that comprise a

121. Isok Kim et al., *Trauma, Discrimination, and Psychological Distress Across Vietnamese Refugees and Immigrants: A Life Course Perspective*, 55 *CMTY. MENTAL HEALTH J.* 385, 386 (2019).

122. *Id.* (noting that post-migration factors as a separate consideration from pre-migration trauma in assessing refugee mental health).

123. Passel & Krogstad, *supra* note 99.

migrant's life in the United States.¹²⁴ This takes into account how different global or regional events inform the trajectories that migrants follow.¹²⁵ It considers migrants in holistic terms by focusing on factors like historical timing, ecological environment, and how “the timing of an event in a person's life and the socio-environmental context in which it occurs can shape a person's life path differently.”¹²⁶ Like the native-born population, migrants belong to “temporal cohorts” whose migration decisions are often tied to specific events such as war and violent conflict or economic and social distress.¹²⁷ The concept of belonging to a temporal cohort stems not just from the historical conditions underlying the migration decision but also includes the type of visa received or entry effectuated by the migrant as well as the receptivity at the moment of a person's migration. Different opportunities associated with mainstream or “normal” living such as marriage or work in the formal economy can be affected by visa type and lawful status.¹²⁸ All of these factors create a cohort identity and can shape the opportunities available to cohort members downstream as those migrants grow older in the United States.

A second way that temporalists might expand our understandings of the regulation of migrant attachment is by better articulating how time-based policies operate as a mode of governance. Attachment policies, which are legal programs that

124. See Floris Peters & Maarten Vink, *Naturalization and the Socio-Economic Integration of Immigrants: A Life-Course Perspective*, in HANDBOOK ON MIGRATION AND SOCIAL POLICY 362, 367 (Gary Freeman & Nikola Mirilovic eds., 2016).

125. See Adrian M. Bacong & Lan N. Doan, *Immigration and the Life Course: Contextualizing and Understanding Healthcare Access and Health of Older Adult Immigrants*, 34 J. AGING & HEALTH 1228, 1229 (2022).

126. Kim et al., *supra* note 121, at 385.

127. Bacong & Doan, *supra* note 125, at 1229. For example, the Vietnam War generated a wave of refugees to the United States and all around the globe as has the Russian invasion of Ukraine more recently. *Id.* at 1231, 1238 (discussing the Vietnam War as a prime example of “peaks in immigrant admission [that] correspond to immigration policies and historical events that shaped policies to be more or less favorable to immigrants”); Batalova, *supra* note 102 (noting that the increase in the unauthorized migrants population is partially due to the increase of Ukrainian entry with humanitarian parole); Joshua Rodriguez & Jeanne Batalova, *Ukrainian Immigrants in the United States*, MIGRATION POLY INST. (June 22, 2022), <https://www.migrationpolicy.org/article/ukrainian-immigrants-united-states> [<https://perma.cc/Y6KW-4H88>] (discussing the wave of Ukrainian immigrants that came with the Biden Administration's grant of TPS).

128. For further discussion of how immigration status can affect romantic relationships, see LAURA E. ENRIQUEZ, *OF LOVE AND PAPERS: HOW IMMIGRATION POLICY AFFECTS ROMANCE AND FAMILY* (2020).

take into account the legal meaning of time spent in the territorial United States, operate within a broader governance structure that obfuscates larger disagreements among the public. As political scientist Elizabeth Cohen notes: “Durational time . . . often proxies for multiple things simultaneously.”¹²⁹ In addition to providing regulators with a malleable governing principle, time as a basis for punishment or denial of benefits is seen as fundamentally fair. Time is extractive, and for this reason it is perceived to be a fair metric because all people have it in roughly comparable supply. Compare this to other types of penalties such as fines, fees, and taxes, which obviously privilege those with wealth and economic security.¹³⁰ At the same time, some legal scholars have criticized the immigration system for using temporal concepts and frameworks. Part of the unfairness of the immigration system stems from the way it applies to noncitizens, many of whom are virtually indistinguishable from their citizen counterparts in terms of the attachments they have developed in the United States. Citizens who are convicted of crimes would never have to face the additional penalty of removal, unlike noncitizens.

Theorizing immigration laws as a system that regulates migrant attachments can help denaturalize that category of deservingness and the temporal policies that operationalize them.¹³¹ This Article and the specific example of “continuous presence”-based benefits programs build on this observation to illustrate the social dimensions or legally constructed aspects of

129. COHEN, *supra* note 7, at 103.

130. The immigration admissions system already privileges wealthy visa applicants by prioritizing those who can invest \$1 million for the purposes of creating jobs in the United States. *See* 8 U.S.C. § 1153(b)(5)(A)–(C). The recently passed One Big Beautiful Bill Act also appears to punish economically insecure applicants for relief by imposing or raising filing fees for vulnerable migrants like those seeking asylum, parole, special immigrant juvenile status, temporary protected status, and related applications for employment authorization documents. *See* One Big Beautiful Bill Act of 2025, Pub. L. No. 119-21, §§ 100002–06, 139 Stat. 72, 364–69.

131. A helpful distinction here is between scientific time and legal time. Scientific time refers to the movement of the earth in relation to the sun that gives people in society a common reference point to coordinate activities. As anthropologist Thomas Hylland Eriksen puts it, “In the same way as writing externalises language, clocks externalise time. Time becomes ‘something’ existing independently of human experience, something objective and measurable.” *See* THOMAS HYLLEND ERIKSEN, TYRANNY OF THE MOMENT: FAST AND SLOW TIME IN THE INFORMATION AGE 38 (2001). Of course, even the official time used by people and institutions reflect a social and legal policy known as standard time. Ian R. Bartky & Elizabeth Harrison, *Standard and Daylight-Saving Time*, 240 SCI. AM. 46, 46 (1979).

time.¹³² As noted earlier, the stop-time rule confers agencies with the power to allocate time credits. A noncitizen may have resided in the United States well beyond the minimum number of years necessary to qualify for a benefit, at least as measured by rotations around the sun, but will get credit only for a fraction of those days depending on the government's effort to begin removal efforts or a noncitizen's criminal record.¹³³ In this example, the government possesses a monopoly over the power to determine which calculations of time qualify for a public good such as cancellation of removal or asylum.

Various attachment and anti-attachment policies illustrate how the state acts like the "owner" of time, at least from the perspective of some affected vulnerable communities.¹³⁴ The realities surrounding long wait times take into account the social and political meaning that applicants for relief attribute to "waiting." As many social scientists and sociological scholars have shown, waiting stands as a kind of hallmark of bureaucratic neglect.¹³⁵ In his ethnographic study of a welfare benefits office in Buenos Aires, Argentina, Javier Auyero theorizes "poor people's waiting as a relational process characterized by uncertainty, confusion, and arbitrariness."¹³⁶ Common complaints included "the long waiting period with an insecure result."¹³⁷ Interestingly, at least some of Auyero's interviewees used waiting as a measure of a

132. Stumpf, *supra* note 115, at 1712–16.

133. See *supra* notes 48–52; see also *Barton v. Barr*, 590 U.S. 222, 231–33 (2020).

134. See Jahaira Pacheco, *Incalculable Time: The Bureaucratic Wait in Immigrants' Efforts to Secure Family Unity 6* (2025) (unpublished manuscript) (on file with author).

135. See S. Lisa Washington, *Time and Punishment*, 134 *YALE L.J.* 536, 540 (2024); PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* 27 (2018) ("The simple act of waiting communicates that the state believes that individuals' time is of little value."); Cathrine Brun, *Active Waiting and Changing Hopes: Toward a Time Perspective on Protracted Displacement*, 59 *SOC. ANALYSIS* 19, 23 (2015) ("It is when we wait that we become conscious of time because there is a mismatch between expectations and chance."); JAVIER AUYERO, *PATIENTS OF THE STATE: THE POLITICS OF WAITING IN ARGENTINA* (2012); Michael Hanchard, *Afro-Modernity: Temporality, Politics, and the African Diaspora*, 11 *PUB. CULTURE* 253, 264–67 (1999) ("[T]he end of waiting meant the beginning of a more autonomous existence The more powerful the imposition of one group's conception of time upon another, the more a subordinate group will be forced to measure its hopes and aspirations against what is generally considered to be humanly possible within the context of their social and political circumstances.").

136. See Javier Auyero, *Patients of the State: An Ethnographic Account of Poor People's Waiting*, 46 *LATIN AM. RSCH. REV.* 5, 14 (2011).

137. *Id.* at 18.

benefit's value.¹³⁸ One interviewee's comments suggest that "waiting time is an indicator of clients' perseverance and thus of their 'real need.'"¹³⁹ This interviewee explained that applicants that "really need" something use that as a way of showing agencies that they are "worthy of aid."¹⁴⁰

Legally vulnerable noncitizens facing removal or comparable immigration consequences must affirmatively seek relief and demonstrate time spent in the United States that earns them time credits.¹⁴¹ Agencies and other officials decide whether this time ought to get credited, which, in turn, determines whether noncitizens may obtain or retain status.¹⁴² As political scientist Noora Lori puts it, "What matters is not how much time a person has resided in a territory but rather how that time is counted by the state."¹⁴³ And more to the point, the time that gets counted is a moral project, or more precisely a political one. While time-based policies might project neutrality as a tool for governance, they "veil all manner of normatively ambiguous political compromises."¹⁴⁴ More than just routine exercises of counting days on a calendar, these programs lock in vulnerability within the immigration system.

This kind of arrangement reinforces the legal vulnerability of migrant applicants and affirms their tenuous social standing. In the context of child protective services, Professor S. Lisa Washington details the ways that temporal policies shape the administration of what she calls the "family regulation system."¹⁴⁵ In this context, Washington explains that time can be manipulated and weaponized.¹⁴⁶ Specifically, she suggests that

138. *See id.* at 21.

139. *Id.*

140. *Id.*

141. *E.g.*, 8 U.S.C. § 1229b(a)(2) (requiring seven years of continuous residence for eligibility for cancellation or removal); *id.* § 1229b(b)(1)(A) (requiring ten years of continuous presence for eligibility for cancellation of removal).

142. *E.g.*, *id.* § 1229b (generally giving the Attorney General wide authority to interpret and implement the statute); 8 C.F.R. § 1003.10(b) (2025) (instructing immigration judges to use "their independent judgment and discretion" to implement their statutory duties); 8 C.F.R. § 2.1 (2025) (vesting total authority in the Secretary of Homeland Security to delegate authority to subordinates, including redelegation to "any employee of the United States to the extent authorized by law").

143. Noora Lori, *Migration, Time, and the Shift Towards Autocracy*, in *THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY* 118, 119 (Antony Simon Laden et al. eds., 2020).

144. *See* COHEN, *supra* note 7, at 141.

145. *See* Washington, *supra* note 135, at 540 & n.5.

146. *Id.* at 600.

the state owns a monopoly over how timelines are set in family proceedings: “[T]ime can be manipulated to prolong, speed up, or redirect the proceedings, all while testing parental response and performance.”¹⁴⁷ Importantly, from the perspective of families subject to these government services, it can be hard to separate the ministerial exercise of setting timelines from broader, substantive determinations laden with moral judgments.¹⁴⁸ For Black families navigating the family regulation system, Washington argues that “time, surveillance, and parental performance are deeply linked.”¹⁴⁹ This dynamic is not so different from the one unfolding in immigration adjudication settings focused on benefits, especially those in which eligibility is pegged to continuous presence and residence.

In recent years, different scholars have questioned the “taken for granted” nature of time as a tool for governance. Instead, this work has highlighted the deliberately constructed nature of time policies and the functional value they bring to the lawmaking process. In an ecosystem that evaluates a legislator’s effectiveness by the ability to pass laws, legislators must find ways to compromise and produce laws and requirements that satisfy a range of interests.¹⁵⁰ In other words, temporal policies have political value. Where parties are close but not entirely in lockstep, time requirements allow legislators to obfuscate areas of disagreement in the interest of passing legislation, which serves their interests in showing that they are effective.¹⁵¹ Political scientist Elizabeth Cohen notes that standardized time policies create a “currency” by which parties—under the supervision of agencies—could “transact over rights.”¹⁵² Using the example of applying for citizenship, while people may argue about

147. *Id.* at 604.

148. *See id.* at 607–08.

149. *Id.* at 609.

150. *See* COHEN, *supra* note 7, at 17 (“When an individual or group’s time is undervalued or devalued by politics they experience something akin to a political version of exploitation.”); *id.* at 137–38 (“Although political formulae [or statutory temporal criteria] can be criticized for oversimplifying very complex decisions, temporal formulae actually accommodate and incorporate a substantial degree of complexity.”).

151. *See id.* at 8–9 (noting how political actors may disagree about the purposes of punishment regarding a prison sentence but nonetheless unite around the acceptability of the duration).

152. *Id.* at 104, 108, 150–51; accord Elizabeth F. Cohen, *The Political Economy of Immigrant Time: Rights, Citizenship, and Temporariness in the Post-1965 Era*, 47 *POLITY* 337, 337, 340 (2015).

whether a five-year waiting period is the right length of time before asking someone to swear an oath of loyalty, this debate is grounded in “a common currency” for evaluating the proper period of time for a probationary period.¹⁵³ This debate qualitatively differs from a related debate in some countries about whether loyalty should be sworn to a deity or a public document like the Constitution.¹⁵⁴ This theory of temporal rights highlights the legally constructed nature of time policies. The perceived neutrality of time stamps insulates agency findings regarding time spent in the United States against close judicial scrutiny. In this way, it resembles timekeeping practices utilized by employers to underpay workers.¹⁵⁵ In that context, timekeeping software maintains time and date information on workers, but the raw data become indecipherable when transported into other contexts.¹⁵⁶

Critical analyses of bureaucracies view time as an instrumental part of justifying and normalizing social and economic inequality.¹⁵⁷ Anthropologist Akhil Gupta argues that “extreme poverty should be theorized as a direct and culpable form of killing made possible by state policies and practices rather than as an inevitable situation in which the poor are merely ‘allowed to die’ or ‘exposed to death.’”¹⁵⁸ Gupta calls these “invisible forms of violence that result in the deaths of millions of the poor, especially women, girls, lower-caste people, and indigenous people.”¹⁵⁹ Gupta focuses on how these forms of violence are “taken for granted in the routinized practices of state institutions such that it disappears from view and cannot be thematized as violence at all.”¹⁶⁰ The urgency exhibited by Auyero, Washington, and Gupta stems from the human consequences of bureaucratic

153. See COHEN, *supra* note 7, at 108.

154. See *id.*

155. See Elizabeth Tippet et al., *When Timekeeping Software Undermines Compliance*, 19 YALE J.L. & TECH. 1, 40 (2017) (noting how employees do not have access to the raw data of their timesheets while employers do, so the latter have the sole control to shape how much time counts toward their paycheck).

156. *Id.* at 42–43.

157. This is a point that S. Lisa Washington makes and one that I am also advancing in this Article. See Washington, *supra* note 135, at 611 (“A critical view of time appreciates that the system does not merely impose temporal burdens as a byproduct of family regulation, but rather actively creates them and then fails to attempt to remedy them.”).

158. AKHIL GUPTA, RED TAPE: BUREAUCRACY, STRUCTURAL VIOLENCE, AND POVERTY IN INDIA 5–6 (2012).

159. *Id.* at 5.

160. *Id.*

indifference, but an important strand of their critique serves as a reminder that temporal rules propping up social policies—such as those allocating benefits on the showing of sufficient attachment—are not just objective phenomena but also the reflection of political compromises.¹⁶¹

In sum, the inability of presence-based claims to advance the interests of migrants has forced regulators and advocates to more squarely address the legal meaning of time spent in the United States under precarious conditions. Attachment policies reflect an ad hoc and highly discretionary administrative response to a large population of migrants living within the territorial United States for long periods of time.

C. *Normativity*

For defenders of immigrant rights, one common lament focuses on what has become the “new normal.” Marginalized and disregarded, vulnerable migrants can secure relief only by stepping forward as applicants (or maybe supplicants), often at great personal risk. Rewarding migrants for long-term attachments creates a confused set of norms in light of the ways that immigration law evinces impulses moving in the opposite, exclusionary direction. This critique is a microcosm of the broader critique of immigration programs grounded in ideas of “deservingness.” But only some types of attachments—those that comport with dominant norms and visions of normalcy—are considered deserving. But what even is a normal life?¹⁶² The answer, Professor Dean Spade notes, is socially constructed but matters deeply given the critical benefits normalcy opens up for vulnerable members of our community.¹⁶³ In this final Section, I want to briefly consider not the harms of the new normal but instead the structure of it. Given that so many attachment policies confer broad discretion to agencies to dispense or withhold credit for time spent in the United States, it is worth thinking through whether these laws can be administered in ways that lead to less arbitrary and marginalizing ways.

161. See *id.* at 6; Washington, *supra* note 135, at 600, 604, 611; Auyero, *supra* note 136, at 20–26; COHEN, *supra* note 7, at 103.

162. See DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (Duke Univ. Press rev. & expanded ed. 2015) (2011) (describing the division between “deserving” or “undeserving” conduct and noting the only difference between either type is simply the narrative).

163. *Id.*

Moving forward, as legal scholars begin to further document and theorize the temporal dimensions of immigration law, one set of inquiries should prioritize whether and how time-based rules can constrain government power in light of the problems of abuse that the existing system showcases. In some ways, timelines and time policies reflect the ideal bureaucratic task. Such policies, which reference natural phenomena such as the sun and are implemented through objective, measurable criteria like minutes on a clock, leave little risk of cheating, incompetence, or self-dealing. And yet, temporal policies are laden with discretionary power that can be exercised within a politically fraught regulatory context, which gives agencies incentives to interpret provisions of the immigration code broadly. Policies regarding time do not obviously lend themselves to abuse of agency power, mainly because time is thought of as self-evident and objective, therefore putting courts in a relatively easy position to determine whether an agency has strayed from the organic statute. So long as an agency provides some kind of timeline for its actions, courts will often leave them alone. But as the “stop-time rule” example illustrates, these policies do not involve the simple task of counting days but instead consider whether certain events—like arrests or convictions—qualify as the kind of criminal act within the immigration code that prevents the crediting of time.¹⁶⁴

Specifically, the stop-time rule instructs agencies to withhold time credits from noncitizens who commit certain types of crimes.¹⁶⁵ The Supreme Court was asked to decide which types of crimes trigger the use of this “stop-time rule” in *Barton v. Barr*.¹⁶⁶ In that case, a long-term lawful permanent resident (LPR) applied for cancellation of removal but was denied relief on the grounds that an assault he committed six-and-a-half years after his admission as an LPR prevented him from meeting the seven-year continuous residence requirement.¹⁶⁷ A five-Justice majority upheld the government’s denial.¹⁶⁸ Writing for the Court, Justice Kavanaugh described the benefit of cancellation of removal as operating effectively like a “recidivist” statute that authorizes the imposition of “greater sanctions on

164. See *supra* notes 131–134, 141–149 and accompanying text.

165. *Id.* § 1229b(d)(1).

166. *Barton v. Barr*, 590 U.S. 222, 227 (2020).

167. *Id.* at 225–26.

168. *Id.* at 240.

offenders who have committed prior crimes.”¹⁶⁹ This view portrays legally created benefits like cancellation as filling the negative space left open by a far-reaching criminal legal system. Construing the stop-time rule as an anti-recidivist policy affirms an ethos of “individual responsibility” in which migrants must refrain from engaging in criminal activity to maintain eligibility for benefits. Justice Kavanaugh expressly (and casually) draws a parallel from sentencing enhancements in the criminal context: “It is entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is likewise entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage in immigration cases.”¹⁷⁰ Within the context of a program that rewards ties and bonds to the United States, *Barton* demonstrates how a conviction, even an old one, can render those ties irrelevant.¹⁷¹

This example illustrates how attachment policies subject a migrant’s entire life to examination by immigration officials when adjudicating deportability. But just as borders can be redrawn to constrain agency power and jurisdiction, so can temporal policies through statutes of limitation, which could impose deadlines on the government’s ability to deport noncitizens.¹⁷² Statutes of limitations and deportation deadlines keep this basic arrangement in place—officials are prevented from considering community ties in the face of criminal activity—but tightly circumscribe the window of time in which they may do so. This type of arrangement implicitly recognizes that certain, negative character information loses force and relevance over time, but it also acknowledges that giving agency officials a wide berth invites the risk of agency abuse. In short, the more time in a migrant’s life that an agency may consider, the greater the power that agency officials can exert over critical adjudications affecting the path to regularization. Therefore, by extension, the shorter the period of review, the less authority and discretion that agencies can use and abuse in immigration adjudications.

169. *Id.* at 225–26.

170. *Id.* at 231.

171. *Id.* at 240.

172. Kim, *supra* note 116, at 535; Stumpf, *supra* note 115, at 1745–48; Mae M. Ngai, Opinion, *We Need a Deportation Deadline*, WASH. POST (June 14, 2005), <https://www.washingtonpost.com/archive/opinions/2005/06/14/we-need-a-deportation-deadline/02ba2cb3-f5e9-4149-a281-4186dbb10c5d> [https://perma.cc/62NW-QZRV].

CONCLUSION

In describing the immigration system in terms of regulating immigrant attachments, one goal of the Article has been to develop a basic vocabulary that reflects the lived experiences of migrants. Although the immigration system attempts to allocate power through different labels such as enforcement and benefits, the harms exacted upon migrants do not remain within these domains. One way of capturing the consequences of denying asylum benefits versus detaining and removing migrants—agency actions that operate within ostensibly separate administrative spheres—is to describe them as modes of regulating immigrant attachments to family, friends, coworkers, and employees within the United States. Common sense suggests that these sorts of attachments ought to inform the process by which agencies develop priorities in allocating immigration benefits. Properly contextualizing the attachment principle reveals the cost of this mode of governance, which is to erase, minimize, and ultimately normalize the punitive environment in which those benefits are allocated. This Article has sought to highlight the absurdity of justifying the allocation of relief on the basis of attachment given all that the immigration system does to deter the formation of meaningful bonds and ties between immigrants and their communities.

In her provocative history of in the nineteenth century unauthorized migration by Chinese laborers, legal historian Beth Lew-Williams explains that her project is to “de-center the state in the history of ‘illegal immigration.’”¹⁷³ She asks: “What if we tell the history of the undocumented as a history of a people, rather than a history of a state-constructed category?”¹⁷⁴ For my part, I have tried to incorporate some of this instinct to decenter by attempting to create an account of immigration law in terms that map onto the lives of migrants. What makes their lives valuable is not some legal status but rather what makes so many lives valuable, namely the relationships, friendships, and other attachments we form over the course of our lives. Looking at the immigration system from this perspective (from the ground up) on these terms (with a belief in the inherent worth of migrants) can help give shape and logic to the day-to-day realities of

173. Beth Lew-Williams, *Paper Lives of Chinese Migrants and the History of the Undocumented*, 4 MOD. AM. HIST. 109, 111 (2021).

174. *Id.*

migrants in this era. Migrant attachments can form the basis for better understanding how the law ought to give meaning to living within the United States (territoriality) for a meaningfully long period of time (temporality) and under conditions for those viewed as deserving of relief (normativity).