The Constitutional Weirdness of Immigration Law and Why It Is the Way It Is

Calder Rodriguez

Department of Political Science

University of Colorado UCB 333

Boulder, CO 80309

04/07/2023

Thesis Advisor: Vanessa Baird, PSCI

Honors Council Representative: Jennifer Fitzgerald, PSCI

Outside Reader: Jason Potter, PHIL

Abstract

This paper investigates the field of immigration law, specifically in the context of the US Supreme Court, and finds it to be a constitutional oddity. It begins by examining the text of the Constitution itself to establish a lack of any particularly useful constitutional basis for the federal government and the Supreme Court to use to ground immigration law. Then, it examines the history of how the Court has, ever since the Chinese Exclusion Cases of the late 19th Century, conducted itself in the field, identifying the plenary power doctrine—the Court's longstanding stance that immigration is an exceptional field of law largely immune from judicial review on the basis that it is a core aspect of national sovereignty—at the center of America's immigration jurisprudence, even though it has been whittled away to a very limited degree. It further details the ideological ramifications of the field, including arguing that conservative originalist doctrine offers no useful solution, before going over what has ever been involved when the Court has found an aspect of immigration and naturalization law to be unconstitutional, finding that it's largely limited to attempts by the federal government to strip somebody of citizenship and attempts by exclusively state governments to discriminate against aliens. I then look at the application of strict scrutiny review in immigration law as both what the Supreme Court has refused to do and as what would return it to the constitutional mainstream, while also considering the implications of such a major doctrinal shift and thus concluding that, barring a major ideological shift on the Court or a particularly egregious case of animus which forces the Court's hand, the status quo is likely to remain in place for the foreseeable future.

Significance and Methodology

In modern American politics, the Supreme Court is, and in all likelihood will remain, a significant center of gravity around which much of the process of policymaking, as well as the public attention devoted to it, orbits. Much the same could be said about the general topic of immigration law, which for many decades has proven itself to be a consistent cornerstone of political debate. And yet, unlike a large array of other issues such as gun control, abortion, and the rights of racial, ethnic, gender, and sexual minorities, there is very little to be found in the broader public discourse about the constitutionality of immigration law, even though both constitutionality and the lack thereof tend to make for useful rhetorical bludgeons. Instead, the political aspect of immigration law tends to be rhetorically contested exclusively over moral or economic, rather than constitutional, grounds, and thus is centered around the actions of the executive and legislative branches of government and the statutory approaches to immigration law which they take or ought to take. This discursive paradigm carries the implicit assumption that there is little room for the judiciary, and specifically the Supreme Court, to exercise its power of judicial review in the field of immigration law, and thus takes for granted that it is a matter rightfully entrusted to some combination of Congress and the Presidency. It makes sense that this is the case, given two factors. The first of these factors is that the fields of law which are linked to the Supreme Court in the public's mind, such as those mentioned earlier, tend to be those in which the Court has at some point made some decisive or otherwise politically significant intervention in one direction or another. The second factor, which I will later detail further, is not only just that the Supreme Court has never made such a decisive and dramatic decision over immigration, but also that it has steadfastly refused to do so, at least with regard to federal immigration law, even when presented

with the opportunity. What I intend to explore in this thesis is why this is the case and what it can tell us about judicial behavior.

One possible explanation for the status of immigration law would be that immigration is an issue so obviously immune to the Court's modes of constitutional scrutiny that exploring this is akin to wondering why the constitutionality of the income tax is largely unquestioned by the Court. After all, who would think it conceivable that any state—that is, any sovereign government—could lack the legal or constitutional authority to exert control over its own borders, to dictate who is and is not permitted to cross over or live within its international boundaries? The problem with this is that anybody who engages in a simple, plaintext reading of the US Constitution will notice at least the possibility that there is no clause, neither that of Naturalization, Commerce, or any other, which readily or apparently provides any sort of direct authority over matters of immigration. However, although I will explore this more thoroughly later in this thesis, this answer is both insufficient and unnecessary to explain the lack of a strong judicial presence on immigration. If not in theory then in all practical terms, the text of the Constitution does not determine what is and what is not constitutional. Instead, the power to do that has found itself in the hands of the Supreme Court, which uses the text of the Constitution as merely one of the sources which can guide or justify its rulings. Given this, the question is raised: why and when does the Supreme Court decide to make an issue one of constitutional importance and assert its self-created power of judicial review, and when and why does it decide to leave such matters largely exclusively to the "political" branches of government?

This is a difficult question to approach for a number of related reasons, all of which come together to make rampant endogeneity and confounding ever-present possibilities. The fact exists that while the Court is by-and-large the ultimate arbiter of constitutionality and thus rarely if ever

faces any challenges over its authority from the other branches of government which extend beyond attempts nullification, it is at least in theory restrained by its responsibility to follow and enforce the Constitution. This is somewhat paradoxical, as it presents a case of an institution which is constrained in its action by a document whose meaning it within reason gets to dictate the meaning of, and any effort to resolve this paradox runs the risk of introducing the biases or assumptions of a researcher. In contrast with the legislative and executive branches of government, there is a certain expectation that individuals within the judiciary not be, in a word, politicians, and while they often are exactly that, it seems uncontroversial to suggest that many if not most of them do to some degree hold that expectation for themselves and behave accordingly. As such, while it is always theoretically possible to discern whether a given Justice's stance on a particular issue is either largely an expression of ideological preference, an act of political decision-making, or something which, in some way, is simply something obligated by the obviousness of the law, it is often difficult to do so, especially without introducing one's own biases. While this issue is arguably sidestepped to some degree by the facts that 1. many cases are decided unanimously and 2. those which are not decided unanimously almost definitionally exist in a legal or constitutional grey area where politics or ideology are the only things which can serve to create distinctions between legal interpretations (meaning that the issue exists in an area where any constitutional reading has long since passed by any credible claim to be solvable through pure legal objectivity), such sidestepping does little to address the question at hand. Immigration law, which—as I will establish—exists largely outside the normal confines of judicial review, represents a third category which stands in contrast to the two presented above; they are the odd-ones-out, ones which, crucially, have been designated as such by the Court.

Given all of that, I do not think it possible, or at least feasible, to propose any sort of definitive objective test, insofar as those are ever possible to begin with. Instead, I intend to produce an account of the constitutional basis of immigration law as well as the Supreme Court's history on the issue which, taken together, can serve to provide a credible assumption—namely, that there is no obvious constitutional or legal basis for the current jurisprudential regime for immigration law—which can be used to isolate the Court's decision from the influence of possible legal necessity. That is to say, while I do not believe it possible to definitively disregard the possibility that the Court has largely exempted immigration law from judicial review because that is simply what the law obviously requires, I intend to establish that this can more than reasonably be taken to not be the case, with the Constitution in fact providing almost zero basis for this whatsoever—with the Court's own rulings backing up this claim. As such, this thesis will not only ask the question of why the Supreme Court might decline to establish something as a constitutional matter subject to judicial review, it will additionally explore, by necessity, how constitutional courts make decisions when they are unconstrained by anything so inconvenient as a constitution—or, more charitably, when they cannot rely upon a constitutional text for guidance and support in resolving politically contentious issues.

Hypothesizing

Regarding the political concerns which may drive the Court's behavior on immigration matters, one potential explanation for what has been its generally highly deferential stance is that even though or even if the Court is not overly constrained by the Constitution when it comes to immigration, it faces practical or political constraints. It is possible that immigration is a matter where any behavior other than deference on the part of the judiciary would raise the risk that the legislature and executive branches might once again pull what would be, for the Court, a highly

undesirable "John Marshall has made his decision; now let him enforce it" moment—this possibly apocryphal quote from President Andrew Jackson having been supposedly made in the context of the Court's inability to actually enforce its decision in its 1832 decision in *Worcester v. Georgia.* However, both executive and legislative compliance with judicial review are, in the modern day, practically universal, especially on the federal level, although in this regard there is a possible selection bias in that the Court may very well simply never make rulings that would likely or inevitably be ignored. It is also possible that while a shift in the Court's stance on immigration away from deference would be heeded, it would likely produce a slew of impracticalities and chaos which make the prospect particularly unappealing. And, of course, it is additionally possible that the Court's deference on immigration matters is well-founded in the Constitution and is simply a derivative of that, although I intend to and must provide a strong argument against this notion for the rest of my thesis to be worthwhile. While the possibilities are not quite endless, there are many of them and, problematically, most are not traditionally falsifiable; the questions at play are much more historical and inferential than truly scientific. However, if it can be reasonably accepted at least for the sake of argument that the Court's jurisprudence on immigration is not *un*constitutional per se but rather decidedly *non*-constitutional, then the two primary explanations as listed above, nullification and/or impracticality, seem promising avenues for exploration.

Reading the Constitution

I believe that there exist no constitutional grounds which allow for any *general* capacity for either the prohibition of immigration to the United States or the general expulsion of aliens from the United States by legislative or executive authority. Not only do the powers actually enumerated in the Constitution not explicitly provide for such power to be held by any branch of the federal government, something which as I will cover later is evidenced by the generally extra-

constitutional grounds upon which the Supreme Court has tended to uphold federal immigration law, the presence of several of them produces a penumbral repudiation of any federal authority over immigration; as John Marshall wrote in *Gibbons v. Ogden*, "enumeration presupposes something not enumerated."[1] While the Article 1, Section 8 enumeration of Congressional powers in the Constitution contains nothing that directly mentions immigration, it does contain two provisions which might reasonably be taken as being pertinent to immigration, namely the Commerce Clause, which gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and the Naturalization Clause, which gives Congress the power "to establish an uniform Rule of Naturalization."

While immigrants or aliens may engage in commerce across national borders in a manner particular to their status as such—remittances being an important modern example—they themselves, as people, cannot reasonably be said to constitute commerce under any circumstance, at least ever since the passage of the 13th Amendment. Furthermore, while the Commerce Clause does have a long history of serving as the basis for a wide breadth of significant federal laws and regulations, the fact that immigrants might engage in international commerce is insufficient to provide for an expansive federal authority over immigration, especially under current precedent. In *United States v. Lopez*, the Supreme Court rejected an argument put forth by the federal government that indirect commercial effects produced by noncommercial activity could be used to "convert congressional authority under the Commerce Clause to a general police power."[2] While *Lopez* dealt with federally established "gun-free zones" and criminal regulations pertaining to them, the applicability of its logic to immigration is readily apparent. Trading across borders is a different thing from moving across borders, even though one does not infrequently implicate the

[1] *Gibbons v. Ogden*, 22 U.S. 1 (1824), 22.
[2] *United States v. Lopez*, 514 U.S. 549 (1995), 567.

other. Similarly, in the context of the Naturalization Clause, while naturalization is intimately connected to immigration, the two are nonetheless fundamentally distinct from each other. Residency and movement do not necessarily involve or even impact the attainment of citizenship, and regulation of the former is unnecessary to functionally regulate the latter, thus precluding any potential incorporation through the Necessary and Proper clause.

The only mention of migration in the Constitution is found within Article 1, Section 9, the section dedicated to denying powers to Congress. Specifically, it is found within the Migration or Importation Clause, whose twenty-year prohibition on a specific field of federal legislation was made in specific reference to the commercial transatlantic slave trade and written to be circumspective so as to avoid explicit mention of slavery. As this clause is found within the section meant to deny and not provide for Congressional power, it would be incongruous to use it to by itself expand the enumerated powers of Congress. Thus, it must be taken to restrict a power otherwise possessed by Congress, namely the authority to regulate international commerce. Given the obvious and undeniable context of the slave trade, there is no reason to treat the Migration or Importation Clause as doing anything other than prohibiting for a period of time any restrictions which Congress would otherwise be able to impose upon that very specific and heinous form of commerce, and regardless of whether it could reasonably be taken to infer a power over immigration, this clause's direct connection to slavery has evidently functioned to made it somewhat taboo; the Supreme Court in its various immigration rulings has occasionally made reference to one or both of the Naturalization or Commerce clauses—more frequently Naturalization than Commerce—but never, so far as I have been able to read, the Migration or Importation clause. Even though the Court has made use of the potential constitutional grounding offered by the Commerce and Naturalization clauses, it has only done sporadically and invariably

secondarily to what has long been the actual foundation, predicated upon certain ideas of national sovereignty, of the immigration jurisprudence of the United States, namely, the plenary power doctrine.

Does the Emperor Have Clothes? The Plenary Power Doctrine

The Constitution, it must be said, is not poorly written, and for a document written almost two hundred fifty years ago in a preindustrial context it has, with the help of many amendments, held up well in terms of serving as a guiding instrument for American government. However, its relative silence on immigration has not left the judiciary with a comfortable baseline, and in the absence of any clear and easy method through which to resolve constitutional disputes over immigration, the Supreme Court created its own alternative, one non-or-extra-constitutional in nature. "The doctrine that Congress has broad "plenary" power over immigration is long established and – today – rarely questioned. But it is actually an emperor walking around without clothes, or at least far more scantily clad than most assume," writes Ilya Somin in the prologue to an article rejecting the idea of federal power over immigration on originalist grounds.[3] He is not alone in the legal academia with his skepticism towards the supposedly clothed state of the emperor. The suspect nature of standing immigration jurisprudence has been identified by various legal scholars over the last several decades, and even the Supreme Court itself has, to a limited degree, experienced a shift in its behavior on the matter. In 1984, Professor Stephen Legomsky wrote that "immigration law is a constitutional oddity," before going on to explain the Court's history of applying what he termed the "plenary power doctrine" to immigration cases and arguing, in effect, that this doctrine,

[3] Ilya Somin, "Does the Constitution Give the Federal Government Power Over Immigration?" Cato Unbound, September 12, 2018, https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration/.

being predicated upon nothing enumerated in the constitution, is largely bunk.[4] Additionally, he argued that portions of the judiciary had been waking up to this reality and thus had begun to entertain the notion that the courts could consider overruling the rest of the government on such matters, for a number of reasons attempting to bring immigration jurisprudence more in line with the "central currents of American constitutional law" through various "ameliorative devices."[5] "Eventually," he predicted, "the plenary power doctrine will become unable to support their weight," and that as a result the Supreme Court would eventually be forced to reject the plenary power doctrine altogether.[6] Forty years later, and this has not happened—mostly and effectively, anyway.

What is the plenary power doctrine? As Legomsky describes it, it is the implicit doctrine arising from the consistent trend of the Court declaring itself "powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy."[7] In other words, it is the notion, established by the Supreme Court itself, that Congress and the Presidency have a broad authority over immigration law that is largely immune from the threat of judicial review. Notably, this doctrine is apparent in the data available from the Supreme Court Database, which shows that immigrants are significantly more likely to win the matter at hand when challenging anything but the federal government on constitutional grounds. The below table shows data comparing how likely an immigrant challenger is to win according to what source of legal authority a governmental action is challenged under, for instance whether it is argued to be unconstitutional or merely a violation of statute. Each category is in comparison

[4] Legomsky, Stephen H. "Immigration Law and the Principle of Plenary Congressional Power." *The Supreme Court Review* 1984 (1984): 255–307. http://www.jstor.org/stable/3536942.
[5] Ibid.
[6] Ibid, 307.
[7] Ibid, 255.

to a sixth classification, Judicial Review (Federal), which represents constitutional challenges against the federal government. As the data shows, immigrant challengers are much more likely to win when challenging on almost any grounds but constitutional. The only category in which an immigrant is similarly unlikely to win is when they are arguing that some decision of the executive branch (Admin Reg., Rule, E.O.) is in violation of another executive branch rule.[8]

```
Ordered logistic regression                       Number of obs =    234
                                                  LR chi2(5)    =  14.93
                                                  Prob > chi2   = 0.0106
Log likelihood = -164.82462                       Pseudo R2     = 0.0433
------------------------------------------------------------------------------
             imm_win | Coefficient  Std. err.      z    P>|z|     [95% conf. interval]
---------------------+--------------------------------------------------------
           auth_dec1 |
JUDICIAL REVIEW (STATE)  |   2.172703   .7830165     2.77   0.006     .6380188    3.707387
ORIGINAL JURIS. OR SUPERVIS.  |   1.424841   .6414329     2.22   0.026     .1676556    2.682027
STATUTORY CONSTRUCTION  |   1.185366   .4417273     2.68   0.007     .3195967    2.051136
ADMIN. REG., RULE, E.O.  |   .1819016    .672188     0.27   0.787    -1.135563    1.499366
FED. COMMON LAW  |   1.064924   .8176597     1.30   0.193    -.5376591    2.667508
---------------------+--------------------------------------------------------
              /cut1 |   1.046717   .4105229                      .2421065    1.851327
              /cut2 |   1.083132   .4109155                      .2777528    1.888512
```

The historical origins of the plenary power doctrine can be found in the Chinese Exclusion Cases of the late nineteenth century, namely *Chae Chan Ping v. United States*, decided unanimously in 1889, and *Fong Yue Ting v. United States*, decided six to three in 1893. *Chae Chan Ping* was one of the first instances of federal immigration law being challenged in front of the Supreme Court. In its decision, the Court relied upon the legal notion of inherent power, deciding that the federal authority over immigration is not something affirmatively couched within the Constitution itself but rather as something inherent to the concept and reality of national sovereignty, finding "that the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent

[8] Data from: Harold J. Spaeth, Lee Epstein, et al. 2022 Supreme Court Database, Version 2022 Release 1. URL: http://Supremecourtdatabase.org. Professor Vanessa Baird helped greatly with the data analysis.

nation,"[9] and "the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise… cannot be granted away or restrained on behalf of anyone."[10] Not only does the Court find the power to exclude aliens to be found not in the text of the Constitution itself but rather in a nebulous notion that it is requisite of the fact that the U.S. government is sovereign, it also intimately ties the two concepts of *plenary* and *inherent* together, dependent upon each other. This is significant, for it suggests that if the power of exclusion rested upon something enumerated in the Constitution, it would be subject to judicial review, and it is the fact that it is found as a power inherent to sovereignty that immunizes it. Four years later in *Fong Yue Ting v. United States*, the Court extended *Chae Chan Ping's* power of exclusion to a power of expulsion, writing that "the right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[11]

"Unqualified and absolute," is certainly a good way to summarize the immigration authority ceded to the other branches of government by the judiciary in these cases of the late nineteenth century. However, it certainly is not an apt description of that authority as it now stands in the twenty-first century. Already by the mid-1980s, as Legomsky covered, the judiciary had begun to apply some amount of scrutiny to federal immigration law—but not much. And yet, despite this, the plenary power doctrine remains largely in effect—the powers to exclude and expel have become only slightly less than absolute and have only been qualified to a limited extent.

---

[9] *Chae Chan Ping v. United States,* 130 U.S. 581 (1889). 603.
[10] Ibid, 609.
[11] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). 707.

Writing in 2015, Michael Kagan described the situation well with his title alone: "Plenary Power is Dead! Long Live Plenary Power!"[12] Beyond the pithy title, Kagan details how, in *Kerry v. Din* in 2015, the Supreme Court had the opportunity to formally eliminate the plenary power doctrine, but declined to do so, and how, despite a number of cracks appearing in its foundation, the bulwark of the doctrine has remained intact despite "significant progress in this war of attrition" that the judiciary as a whole has been waging against it. Legomsky's predicted collapse or revolution has not yet occurred, but together Kagan and Legomsky work to illustrate both that the plenary power doctrine is fatally, fundamentally flawed and, more crucially and objectively, that the Court has slowly begun to perceive it as such.

If, from a certain point of view, Kagan and Legomsky's interpretation of the trajectory of American immigration jurisprudence can be defined as optimistic, then David A. Martin is either a pessimist or a realist. Writing in the same year as Kagan, 2015, Martin first attempted to reframe the invocation in the Chinese Exclusion Cases of "inherent sovereignty" as the grounds for the plenary power doctrine as specifically being for the purpose of solving a "federalism problem" rather than "as a basis for denying rights."[13] Indeed, Martin goes far to argue the virtues of *Chae Chan Ping* as being vital in couching immigration authority as something belonging explicitly to the federal government and not to the states. In particular, he notes that the prospect of immigration law falling under the police power of the states as of 1889 "certainly did not point toward adoption of more humane laws,"[14] and makes further arguments, one theoretical and one practical. Theoretically, he argues that it is both important and in-line with the spirit of the Constitution to couch immigration authority in the democratically elected bodies of the federal government;

---

[12] Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power*, 114 Michigan Law Review First Impressions 21 (2015). Available at: https://repository.law.umich.edu/mlr_fi/vol114/iss1/10

[13] David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 Oklahoma Law Review 29 (2015). 33.

[14] Ibid, 35.

practically, Martin observes that it is unrealistic to expect the Supreme Court to actually do away with the plenary power doctrine, particularly since lower courts cannot be trusted to uphold crucial government interests on such matters.[15]

While Martin's argument regarding the virtues of *Chae Chan Ping* may legitimately hold water if the case were to be taken by itself, it fails to adequately recognize or address the fact that the decision in question has functioned as the precedential foundation of most constitutional review of immigration since its issuance. As covered, it almost immediately served as the basis for *Fong Yue Ting*, despite a vociferous dissent in the latter case coming from the same justice who penned the decision in *Chae Chan Ping*, Justice Fields (something which does suggest that Martin's reading of *Chae Chan Ping* by itself is correct). *Fong Yue Ting* itself, for instance, is only two referential degrees removed from the ruling in *Trump v. Hawaii,* 585 U.S. __ (2018), which itself cites such decisions as the one in *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952) and the one in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), both of which are predicated upon *Fong Yue Ting* and, thus, *Chae Chan Ping* and which upheld the authority of the federal government to either expel or exclude persons on the basis of their specific political views and affiliation. The decision in *Chae Chan Ping* may well have not been written the for purpose of denying rights, as Martin puts it, but it is exceedingly difficult to argue that it has not been used for exactly that purpose as the rulings in *Harisiades* and *Kleindienst* demonstrate, whatever its original intent may have been. However, Martin's point about the practical impact of the plenary power doctrine both in denying immigration delegation to the states and in enabling functional immigration law without either overburdening the courts or overburdening such laws with the courts is more salient and, furthermore, is in fact immensely valuable in understanding the Court's continued deference to the

[15] Ibid, 29, 48-50.

political branches on such matters. Moreover, his statement that, given the context of the modern world, he does not "foresee the Supreme Court retreating significantly from the strong deference doctrines derived from *Chae Chan Ping*"[16] is making largely the same prediction as Kagan's imperative to "expect the war of attrition to continue,"[17] except in two different but related aspects. The first is that Martin, unlike Kagan, largely supports the Supreme Court continuing to uphold a slightly reduced version of the plenary power doctrine. The second is that, whereas Kagan appears to anticipate a continued whittling down of that doctrine over time as its fundamentally flawed nature becomes more and more exposed, Martin expects that the doctrine will continue to be upheld both because of its practical importance and because it is not, in fact, actually flawed.

This approach of nominally reduced but practically upheld plenary power is apparent in *Trump v. Hawaii,* 585 U.S. ___ (2018). Despite the basic meaning of the word *plenary* suggesting that there can be no middle ground, that a power is either plenary or it is not, in practical terms the Court has demonstrated that it easily be transformed into something of a sliding scale, i.e. that a power can be *mostly* plenary. "For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control,'" the Court's majority wrote.[18] That congressional and presidential authority over immigration is merely "largely immune" from judicial review is certainly a step down from the "absolute and unqualified" standard established in the Chinese Exclusion Cases, but it only subjects immigration laws that may pose an unconstitutional burden to scrutiny under the basis of "rational review," which practically in most cases means that "largely immune" is functionally identical to "absolute

[16] Ibid, 50.
[17] Kagan, 29.
[18] *Trump v. Hawaii,* 585 U.S. ___ (2018). 30.

and unqualified." As the Court's majority wrote in *Trump v. Hawaii*, "given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."[19] The Court thus upheld the government's policy, and its application of merely rational review meant that so long as that policy could be credibly explained without resort to animus (which the Court, far from unreasonably, found that it could), the policy would stand. Under such a standard, that a policy "must lack any purpose other than bare desire to harm a politically unpopular group,"[20] even the Chinese Exclusion Act might reasonably stand despite the animus laid bare in its title and contents, although it most likely would have a far harder time doing so than did the executive branch Proclamation, colloquially referred to as the "Travel Ban" or "Muslim Ban," at question in *Trump v. Hawaii*. Other significant immigration cases in recent years, such as *Department of Homeland Security v. Regents of University of California*, 591 U.S. ___ (2020) and *Biden v. Texas*, 597 U.S. ___ (2022) hinged on statutory rather than constitutional challenges, and thus are less relevant. Plenary power *de facto* lives, even though *de jure* it is indeed reduced.

It is significant and worth examining where and why the government's plenary power over immigration has been reduced by the Supreme Court. In general, it has been the result of immigration law tending to necessitate that denial of rights which Martin argued was not in any way intended by the foundational ruling in *Chae Chan Ping*. Returning to Kagan, he identifies the Court's ruling *Zadvydas v. Davis,* 533 U.S. 678 (2001), "which presented the question of whether the government could indefinitely detain deportable noncitizens when the United States was unable to find another country willing to take them… [making] clear that procedural due process concerns apply to immigration enforcement," as something which opened the door for

[19] Ibid, 33.
[20] Ibid.

constitutional limits on immigration law.[21] Peter L. Markowitz identifies *Padilla v. Kentucky*, 559 U.S. ___ (2010) as a potential turning point from which the Court may have begun to recognize that deportation is not the purely civil procedure as proscribed in *Fong Yue Ting* but rather something "different," neither wholly civil nor criminal in nature, requiring a different jurisprudence more favorable to immigrants than what they could enjoy were the issue to remain purely civil or administrative in nature.[22] Indeed, he identifies the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which increased the level of criminalization present in federal immigration law, as a pivotal moment in the judicial-legislative relationship, finding that whereas before the IIRIRA's passage during the Rehnquist Court "immigrants won only 14% of the time," they won 57% of their cases under the Rehnquist Court after the IIRIRA and even 63% of their cases under the following Roberts Court.[23] By making immigration violations more criminal in nature, Congress may well have forced the Supreme Court to start treating immigrants as criminals—meaning, perhaps ironically, to treat them as people who do in fact have constitutional rights. It appears to be the case that the plenary power doctrine is to a limited degree withering from the reality that the mainstream of American constitutional law makes it almost perfectly untenable to allow for any sort of absolute and unqualified abrogation of individual rights, immigrant or otherwise.

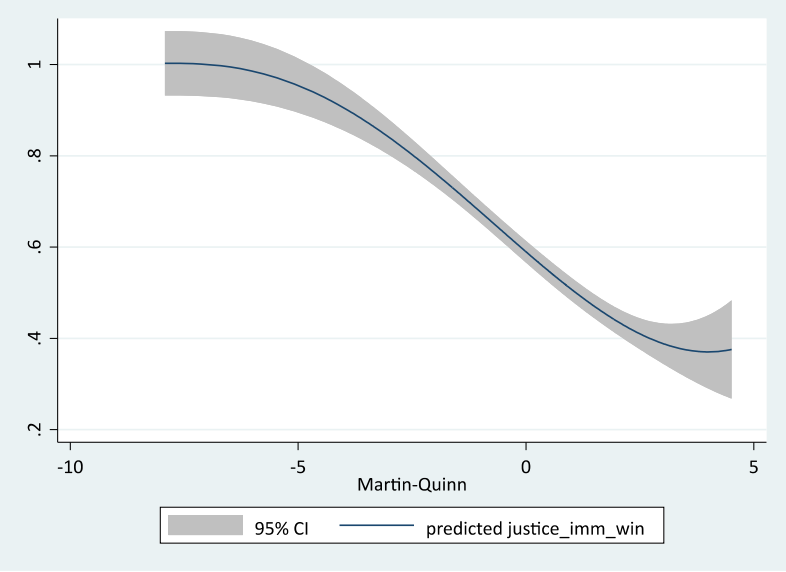
Ideology, Conservatism, and Immigration

When attempting to identify potential prospects for future change, it is tempting to ascribe great importance as to whether liberal Democrats or conservative Republicans will end up appointed to the Court's benches as a function of the unpredictable whims of the democratic process. While the

[21] Kagan, 24.
[22] Peter L. Markowitz, *Deportation is Different*, 13 U. Pa. J. Const. L. 1299 (2011).
Available at: https://scholarship.law.upenn.edu/jcl/vol13/iss5/3
[23] Ibid, 1345-1346

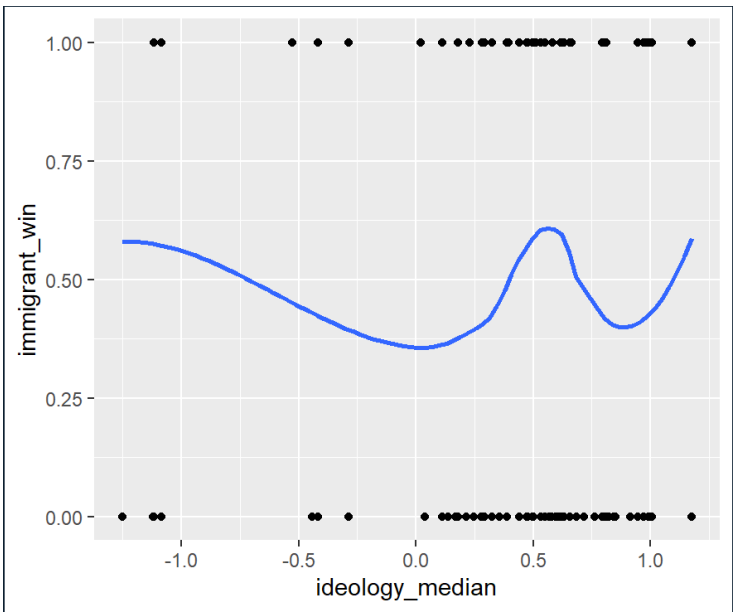
evidence suggests that the more liberal an individual justice leans, the more likely they are to vote in favor of immigrants,[24] it also suggests that the overall ideological lean of the Court has little predictive power over how it will rule on immigration matters.[25] After but not because Legomsky, in 1984, argued that "taken as a whole, the hypothesis that a conservative set of judicial attitudes has contributed to the plenary power doctrine does not seem convincing. Its greatest weakness is that it does not account for the selective nature of the judicial decisions… constitutional liberties that have been meticulously protected in other areas have received no protection in the immigration cases,"[26] the conservative Rehnquist and Roberts courts did begin to offer protection in those areas. As Markowitz notes, "the Court has often surprised everyone by handing down unexpected and resounding victories on behalf of immigrants. Moreover, many of these victories were lopsided wins, with immigrants garnering significant support from the Court's conservative voting block."[27]

Figure 1:



[24] See Figure 1 below, drawing from the Supreme Court Database, which shows that as a Justice's Martin-Quinn score increases, indicating a higher degree of conservatism, they are more likely to rule in favor of an immigrant. Professor Baird aided in the data work.
[25] See Figure 2, also drawing from the SCD, showing how the Court's ideological median has little predictive power over whether or not it will rule in favor of an immigrant litigant. Gavin Rodriguez helped with the data.
[26] Legomsky, 282.
[27] Markowitz, 1340.

Figure 2:



Markowitz's IIRIRA hypothesis, presented earlier, appears convincing, and it is noteworthy that it does not offer an ideological explanation as to how increased criminalization would motivate conservative justices to begin treating cases differently. A possible explanation which does not require ideological influence per se, specifically the previously explained notional constitutional requirement that criminals, unlike aliens, be treated as having substantial due process rights, feels correct but incomplete. Markowitz's further explanation, that because public opinion has shifted to view illegal immigrants as criminals, the Court, being often responsive and beholden to public opinion, has followed suit,[28] appears paradoxical: it can surely be *prima facie* accepted that those who view undocumented aliens as criminals harbor few if any positive feelings towards them, and it would be weird for a Supreme Court acting in line with that shift in public opinion to begin being much more favorable towards those undocumented aliens. That something appears paradoxical does not necessarily make it untrue, but it does prompt further exploration.

[28] Ibid, 1347-1349

Immigration jurisprudence perhaps does not fit neatly within the general conservative-liberal judicial dichotomy. On the one hand, as Legomsky details, there are a number of easily dichotomized values that are implicated by substantive immigration policy, including "stability, the interests of the State in preference to certain interests of the individual, effective law enforcement, property rights, views on race relations, nationalism, the balance between national security and civil rights, and the distribution of wealth."[29] On the other hand, not all of the conservative sides of these dichotomic values—specifically those of property rights and the interest of the state in preference to interests of the individual—necessarily align with a hostility towards immigration. Furthermore, the plenary power doctrine, which necessitates a remarkably expansive reading of the power of the federal government even as it touches on other discrete fields of policy, does not feel particularly in-line with traditional conceptions of small or limited government conservatism.

And as with any question of judicial conservatism, doctrinal originalism is implicated. In an essay arguing against constitutionality of immigration restrictions in general, Somin applies originalist doctrine—that is, the belief that the Constitution and constitutional law are best understood purely by what was intended to be the case at the time that the Constitution was written. While originalism may be epistemologically problematic, particularly with its historically fraught assumption that for a given issue or case there actually can be found a coherent intent behind any passage in the Constitution that can be successfully isolated from or identified in the morass of historical evidence so as to produce a legally useful fact, it is nonetheless a mainstream approach of American constitutional law, at least from the conservative side of the aisle. Somin's originalist arguments are by themselves interesting, but for the sake of the topic at hand it is more important

[29] Legomsky, 281.

that they merely exist than whatever their contents and overall validity may be. This is because of their stark absence in the immigration case law produced in conservative-written opinions; insofar as I have been able to review, appeals to the original intent of the framers in opinions written by conservative justices are few and far between, albeit not entirely nonexistent. Regardless of what this inconsistency in application may be taken to say about the validity of originalist doctrine in general, on the matter of immigration it at least serves as another aspect of the weirdness, outsideness, or incongruity of immigration law in comparison to other fields of jurisprudence.

On Originalism

Indeed, the field of immigration law appears to expose some of the fundamental flaws inherent in originalist doctrine, or at least provides a robust example of the limitations thereof. The basic problem is that immigration law, specifically law regarding willful migrants (that is, not regarding the slave trade), was largely nonexistent outside of the realm of naturalization because there was no real conception that it would even be desirable for the American government to restrict the flow of migrants into the country.

Indeed, restrictive, or at least insufficiently permissive, migration policies were among the cited grievances against Britain in the Declaration of Independence: "[Britain] has endeavored to prevent the population of these states; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands." From this text alone, disregarding all possible context, there are at least two pertinent implications. The first is that at the time of the country's founding, naturalization was conceived of as something crucial to immigration; the second is that restricting migration through denying naturalization provided some cause for the colonies to engage in an armed insurrection. As Pfander and Wardon explain, the essentialness of naturalization specifically

to migration more generally, beyond the obvious factor that the ability to attain citizenship may be desirable for its own sake, was that under common law, aliens could not hold title to real property; "immigrants to British North America during the second half of the eighteenth century would know that their future property ownership rights depended on their ability to secure naturalized citizenship."[30] Given the still-agrarian nature of the economy, and the costs associated with transiting the Atlantic, European migration to the colonies and then the United States of the period would have been an unappealing prospect to anyone denied the ability to pursue naturalization. This appears to situate the Naturalization Clause *in its original intent* as being to some degree concerned with immigration more broadly.

John C. Eastman argues that since, as a result of the aforementioned practical realities of immigration in the period, "immigration and naturalization were largely synonymous" at the time of the writing of the Constitution, the naturalization clause provides a textual basis for Congressional power over immigration.[31] Implicit and necessary in this is a logical connection between a power to *control* immigration and a power to *restrict* immigration, and such a connection is entirely reasonable given our modern understandings of language and the enumerated powers. However, the fact that the broader argument to which the connection belongs is still fundamentally predicated upon the validity of reading original intent actually exposes that supposedly logical, and admittedly reasonable, connection to attack. While Pfander and Wardon's reading of the historical record largely agrees with (and, indeed, is cited by) Eastman's contention regarding the effective synonymity of immigration and naturalization at the time of the founding, it also contextualizes the intent of the naturalization clause within the motivational paradigms of both

[30] James E. Pfander and Theresa R. Wardon, "Reclaiming the Immigration Constitution of the Early Republic: Perspectivity, Uniformity, and Transparency." 96 *Virginia Law Review* 359 (2010). 366.
[31] John C. Eastman, "The Power to Control Immigration Is A Core Aspect Of Sovereignty," 40:1 *Harvard Journal of Law & Public Policy* 9 (2016). 9.

concentrating interstate matters in the federal government and in the former colonies' opposition to British restrictions—meaning that federal power over naturalization was intended, at least in part, to promote and enable immigration.[32] If the Constitution ought to be exclusively read according to the (perceived) intent of those who wrote it, then it is difficult to find cause to use the intent implied by the claim of synonymity but not the intent implied by the purposes of harmonization and permissiveness. There is, additionally and perhaps more crucially, the problem that basing the identification of the founders' intent on the *general* contemporary interplay between naturalization and immigration, however valid in and of itself, fails to consider the possibility that even though the common law concerning real property may have applied in many cases, it almost certainly did not apply in all cases; the early American economy was predominately agrarian, but not wholly agrarian, and for many prospective immigrants the promise of the American republic would not necessarily have consisted solely of the opportunity to own land. The reality is that under the naturalization laws of the time, there was still very little to nothing that would actually prevent such people from getting off the boat, so to speak. It is also clear, from the text of the Declaration of Independence alone, that while naturalization and immigration did have a much stronger connection to each other than they do today, that the people of the time could still distinguish between them on a conceptual level, which arguably makes important the mention of only one and not the other within the enumerated powers.

The point of all this is to identify the epistemological problems with an originalist approach to immigration. Pfander and Wardon provide a very compelling analysis of the immigration law of the early United States, and Eastman soundly draws upon their work, but they are still fundamentally and necessarily limited in their ability to provide perfect insight into the past, and

[32] Pfander & Wardon.

especially into the minds of the people therein. Moreover, between the works of on one side Eastman and on the other side Pfander and Wardon, the same body of historical evidence is credibly used to advance arguments both for substantially conflicting approaches to immigration law. The modern understanding, very much expressed within the body of the law itself, is that immigration and naturalization are wholly distinct things that merely have a great deal of situational interplay; doctrinal originalism more or less rejects this as prescriptively relevant, framing the matter instead as whether at the time of the founding they were considered to be the same thing. The problem, then, is that whereas one reasonable person could look at the general synonymity in the period and conclude that they can legally be considered identical, another reasonable person could find the general synonymity to be entirely insufficient to establish an actual one-to-one relation and argue that had the framers intended to enumerate a power over immigration, they surely would have done so. It is a perfectly valid first principle to value the theoretical promise of permanence and consistency that is offered by originalism, and even the most liberal believer in a wholly living document necessarily is in engaging in some degree of originalism when, at the very least, they look at the Constitution and deduce that it provides that the federal government should exist (for what is language at all but a medium through which to communicate meaning?), but it is epistemologically dubious to attempt to use intent to determine legal implications of a clause in the Constitution when the intent in question cannot in actuality reliably be inferred.

Of course, the plenary power doctrine upon which current immigration jurisprudence continues, albeit diminishingly, to rest is not in any way originalist in nature, having been first formulated a century after the Constitution's ratification. Thus, to take an originalist approach on immigration matters would necessitate the elimination of the plenary power doctrine as valid

precedent—although this would not necessarily work in immigrants' favor, as Justice Scalia's partial concurrence in *Arizona v. United States,* 567 U.S. 387 (2012) demonstrates. There, Justice Scalia, of course drawing upon an originalist methodology and instances of state governments in the early days of the republic enacting on their own limited immigration restrictions, argued that the sovereign or inherent power to exclude can be found in the hands of the individual states, with each state, in his reckoning, being only slightly less sovereign than the federal government but nonetheless sovereign. In his concurrence, Scalia effectively takes the same logic that was applied to the federal government by the Supreme Court in *Chae Chan Ping* and applies it to the states, namely that, being sovereign, they have the right to exclude. This hearkens back to David A. Martin's previously covered contention that a major function and purpose of the Court's decision in *Chae Chan Ping* to establish the plenary power doctrine was to strip the individual states of any authority they might have had to establish their own immigration laws. The plenary power over immigration—established as belonging to the political branches of the federal government—was akin to the same over matters of war and international relations: subject to neither review from the federal judiciary nor the whims of the states. In this sense, originalism can be used to uphold plenary power just as much as it can be used to negate it; even as immigration law in general holds an incongruous position within American constitutional jurisprudence, it specifically is offered no easy answers by the originalist doctrines often favored by the more conservative faction of the legal realm.

Why is Immigration So Weird?

Hopefully, it has been successfully or at least sufficiently established that immigration matters are handled in a unique manner when it comes to constitutional questions. In other words, immigration law is weird. Federal matters of immigration are denied meaningful judicial review according to a

doctrine more in line with how the Court treats "political questions" than how it treats regulatory matters far more similar to immigration law. Moreover, there was exceedingly little conception in the eighteenth century that such an immigration regime as seen and (some would argue) necessitated in the modern day would even be desirable, especially in the colonial context, meaning both that the Constitution gives little guidance on the issue and that an originalist approach is particularly ill-suited for the subject. Even as over the course of the nineteenth century, of course, opinions and outlooks on immigration changed, the Constitution's text, or its lack thereof, regarding it did not, arguably leaving the Supreme Court without a invaluable tool for it to use when dealing with constitutional issues: a relevant constitution. In some sense, the creation of the plenary power doctrine has been an understandable path of least resistance.

While the Supreme Court has at times made some reference to the Constitution whilst reviewing an immigration-related case, it has done so only sporadically, inconsistently, and rarely ever without reference to the plenary power doctrine first established in the Chinese Exclusion cases. As I argued earlier, the Constitution is largely silent on the issue and thus is remarkably unhelpful in providing guidance to the Court, as such silence is typically taken to imply that constitutional authority over such an issue is something that the federal government simply does not possess—clearly, an implication found to be distasteful by the justices of the Court for the last century and a half, thus in practical terms being what it is that has forced immigration law into its continuing state of weirdness. Typically, and conventionally, such a Constitutional dictate would suggest that either immigration be a matter left more or less entirely up to the states, particularly under the 10th Amendment, or simply go largely unregulated, but it certainly takes little effort to recognize the problems with both approaches. Constitutionally mandated open borders have long been, if nothing else, politically unfeasible, and allowing for state-level regulation of immigration

both 1. raises the difficult questions inherent in effectively allowing each individual state to establish rules that affect every other state while also being expected to honor the rules originating from every other state and 2. necessitates that states be granted powers over subjects, such as that of expulsion, that necessarily implicate the domains of the federal government, such as international affairs. With this as context, it should come as little surprise that the Court has opted to grant immigration authority entirely to Washington.

Prior to the 1870s, the Chinese Exclusion Act of 1882, *Chae Chan Ping*, and so on, it could be said that the United States lacked any real immigration law. In every way but the factual, this is true. This is not merely a blithe or seemingly contradictory statement, but rather is actually a rather decent way to describe the state of American immigration law in the first century of the country's existence. As Gerald Neuman argued back in 1993:

> Legal discussions of immigration regulation in the United States rest upon a myth. This pervasive myth asserts that the borders of the United States were legally open until the enactment of federal immigration legislation in the 1870s and 1880s… the myth has a substantial foundation in fact: U.S. legal policy warmly welcomed certain kinds of immigrants, and restrictive laws were often poorly enforced. Neither Congress nor the states attempted to impose quantitative limits on immigration. Nonetheless, the borders were not legally open. Regulation of transborder movement of persons existed, primarily at the state level, but also supplemented by federal legislation.[33]

Neuman identifies five major categories of immigration legislation that were enacted by state governments (acting independently of each other) prior to the late-nineteenth century overhaul of immigration law. The first of these categories is "crime;" state governments looked to prohibit convicted criminals from being permitted entrance, particularly given an apparent proclivity of European governments to send or banish their criminals to the United States so as to be done with them.[34] Similarly, the second category is comprised of poverty and disability; certain state

[33] Neuman, Gerald L. "The Lost Century of American Immigration Law (1776-1875)." *Columbia Law Review* 93, no. 8 (1993): 1833–1901. 1833-1834.
[34] Ibid, 1842-1846.

governments, such as that of Massachusetts, sought to prevent by exclusion and expulsion the building up of "public charges" from abroad, i.e. the indigent, the mentally ill, the physically disabled, that might burden them in some way.[35] Reasonably, state governments also sought to restrict the movement of the sick and contagious for the sake of public health; less reasonably, certain states, such as Illinois, enacted laws to prevent the entrance and movement of free Blacks, in both cases garnering a significant degree of consent and support from the federal government in doing so.[36] There was, additionally, the Alien and Sedition Acts.[37]

Clearly, there did exist a number of laws across the several states which in many ways regulated and restricted the flow of people to and across the country. This is factual and undeniable. However, what is questionable is whether the pre-Plenary Power regime of immigration law truly constitutes a real, national system of rules, consistently enforced, which could properly be referred to as immigration law if it were to be applied in the modern context. This is less clear. To be sure, some aspects of the regime are imitated in the law today, most notably the quarantine regulations as well as the criminal concerns, but by-and-large, even as Neuman correctly assails the rather simplistic notion "that the powerholders in the antebellum United States were content to receive *anyone* who wanted to immigrate, even among those from Europe,"[38] what immigration law was in place during the period hardly resembles what is seen today. It was sporadic and inconsistent as it varied from state to state, enforcement was lacking and thus any major effect would have had to come indirectly through indirect means such as deterrence, and there were zero quantitative limits imposed to begin with.[39] Moreover, it took on explicitly racial aspects, both in its prohibitions on

[35] Ibid, 1846-1859.
[36] Ibid, 1859-1872.
[37] Ibid, 1881.
[38] Ibid, 1901.
[39] Ibid, 1834, 1884-1885.

the internal movement of free Blacks and in the first instance of major non-White/non-European external immigration prompting a major overhaul of its fundamental logic so as to enable the prohibition thereof.[40]

It is difficult to see how the antebellum immigration regime of the United States could be used as any sort of reasonable basis for a modern overhaul, and I have zero intention of using it as such. What it is useful to or essential for, however, is elucidating why it was that the Supreme Court decided to generate the regime of plenary federal power over immigration that it did. With nothing in the Constitution being all that useful, nativist political movements having reached sufficient strength and having acquired sufficiently non-White people to array themselves against, and the existing regime being what it was as covered, it should come as no surprise that the Court opted to exclusively empower the federal government in the Chinese Exclusion Cases—intentionally and mindfully so, as Martin covered. In this sense, immigration law is weird and exceptional because it has to be. Without any strong constitutional basis for immigration law in the first place, and considering the likely political ramifications of denying that power to the federal government and even, potentially, to the states, the Supreme Court has not been provided with what would be for it an appealing alternative to plenary power.

So When is Immigration Law Unconstitutional?

Despite the weirdness, there are still patterns in the Court's historical behavior. The only descriptive or objective measure of the constitutionality of a law is whether the Supreme Court says it is constitutional or not, explicitly or implicitly. Any other attempt to assess constitutionality is prescriptive or normative, concerned with what-ought-to-be rather than what-is. As such, it is worth considering each instance that the Supreme Court has made a declaration of

[40] Such racial discrimination in the modern day can typically only be *implicit*. There's a difference. You could never title a bill, "The Chinese Exclusion Act."

unconstitutionality in an immigration case—all fourteen times, according to the Supreme Court Database[41]—to see if there is any recognizable pattern.

The first such case was *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), a case in which Takahashi, a Japanese immigrant denied naturalization by federal statute on account of his race, brought suit against the State of California for its law barring "any person ineligible to citizenship" from acquiring a fishing license. The Court, in an opinion penned by Justice Black, found that "it does not follow, as California seems to argue, that, because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications,"[42] as unlike the federal government, state governments have zero authority on immigration matters and thus are subject to the provisions of the Fourteenth Amendment barring discrimination, namely the Equal Protection Clause. (Notably, penned before such cases as *Bolling v. Sharpe*, 347 U.S. 497 (1954), the opinion is unconcerned with how the federal due process, and thus equal protection, provision found in the Fifth Amendment might conflict with the discrimination suffered by Takahashi and other Asian immigrants under laws sustained by Congress's "broad and wholly distinguishable powers over immigration and naturalization."[43]) Regardless, in this case, California's statute was found to be unconstitutional because it was enacted by California, in line with the plenary power doctrine and its partial purpose to invest immigration authority solely in the hands of the federal government.

Ten years later, in 5-4 decision in *Trop v. Dulles*, 356 U.S. 86 (1958), the Court found in favor of a native-born American citizen who, as punishment for an attempted desertion from the Army during the Second World War, was, among other punishments, dishonorably discharged

[41] Harold J. Spaeth, Lee Epstein, et al. 2022 Supreme Court Database, Version 2022 Release 1. URL: http://Supremecourtdatabase.org
[42] *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), 419.
[43] Ibid, 420.

following a court-martial and as such, pursuant to the Nationality Act of 1940, was stripped of his American citizenship and denied a passport. In short, the Court found that "use of denationalization as a punishment is barred by the Eighth Amendment" as cruel and unusual punishment.[44] This case is not particularly relevant in the context of immigration law, although it does hold denaturalization—stripping citizenship from a naturalized immigrant as a rectification for errors in the naturalization process—as distinct from and far more valid than denationalization—stripping citizenship from a natural-born citizen. Somewhat similarly in the next such case, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court found that two native-born US citizens (one named Mendoza-Martinez, another named Cort) who, having left the United States for an extended period in part to avoid the draft and, in the case of one, political reasons befitting the 1950s, were denied a passport that would allow them to return to the country. Whereas in *Trop*, due process in the form of a court martial was provided and it was merely the resulting punishment, namely denationalization, which was declared unconstitutional, in *Kennedy* the Court found that the procedures, or specifically the lack thereof, used to deny Mendoza-Martinez and Cort their requests for a passport violated their due process rights. Again, this case involves native-born US citizens, not immigrants, and deals with denationalization rather than denaturalization. The next two cases identified by the Supreme Court Database, however, do deal with the question of denaturalization, namely *Schneider v. Rusk*, 377 U.S. 163 (1964) and *Afroyim v. Rusk*, 387 U.S. 253 (1967), which in effect established as law the culmination of what the Court had slowly been building to since *Trop v. Dulles*: a person cannot be deprived of their citizenship, period. Immigration law is unconstitutional when it stops dealing with immigrants (or, more accurately, aliens) and starts treating citizens as if they were the former.

[44] *Trop v. Dulles*, 356 U.S. 86 (1958), 101.

With the question of denationalization settled, the Court was then asked to return to the issue at hand in *Takahashi*: whether state governments could enact discriminatory legislation targeting non-citizens. In *Graham v. Richardson*, 403 U.S. 365 (1971), the states of Arizona and Pennsylvania attempted to unilaterally deny welfare benefits to resident aliens; the Court found this to be unconstitutional, both as a violation of the Equal Protection Clause and because they have the capacity to conflict with the federal government's plenary power over immigration. Two years later, in *Sugarman v. Dougall*, 413 U.S. 634 (1973), a New York law prohibiting non-citizens from holding positions in the state's civil service was also struck down as a violation of the Fourteenth Amendment, as was a similar law regarding civil engineers in Puerto Rico in *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976), a New York law denying financial assistance to non-citizen college students in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), a Texas law withholding education funding for illegal immigrants and allowing school districts to deny them enrollment in *Plyler v. Doe*, 457 U.S. 202 (1982), and another Texas law requiring public notaries be citizens in *Bernal v. Fainter*, 467 U.S. 216 (1984). Between the previously covered citizenship cases and these state-level discrimination cases, most of the immigration cases identified by the Database are not even directly related to immigration law directly, but rather one degree removed from it.

The remaining three cases identified by the Supreme Court Database are somewhat eclectic. In *INS v. Chadha*, 462 U.S. 919 (1983), the Court found that the section of the Immigration and Naturalization Act which allowed for just one chamber of Congress to veto an executive-branch decision to stay an individual's deportation was an unconstitutional violation of the separation of powers, in *Boumediene v. Bush*, 553 U.S. 723 (2008) the Court found that hostile combatants detained at Guantanamo Bay still had a constitutional right to habeas corpus, and in *Sessions v. Morales-Santana*, 582 U.S. ___ (2017), the Court found that Congress had violated the

Equal Protection Clause by drawing a distinction along the gender lines of a child's parents when it came to the question of how and whether a child born abroad to just one American parent can attain birthright citizenship. Disregarding *Sessions v. Morales-Santana* for the moment, as the Court's semi-unanimous decision is interesting and worth detailing further, and *INS v. Chadha*, which has more to do with an issue of procedural propriety than immigration law directly, it would appear that there are have been only two reliable ways to get the Court to declare an immigration law unconstitutional since the end of the Second World War: either be the federal government and attempt to strip someone of their citizenship, or be a state (or territorial, in the case of Puerto Rico) government that attempts to flagrantly discriminate against immigrants without authorization from the federal government.[45]

Only recently, in *Sessions v. Morales-Santana,* was a federal immigration law successfully challenged on the grounds of equal protection, but even then, the Court was unable to deliver a desirable outcome for the respondent. The Immigration and Nationality Act of 1952 provided rules for conferring birthright citizenship upon children born abroad to one American parent and one foreign parent, both when the two parties are married and when they are not. Crucially, in the event of unwed parents, the INA provided different standards depending upon whether the American parent in question child's father or mother, with the standards being more lenient or favorable should they be the mother. Notably, the Court's decision, penned by Justice Ginsburg was wholly unconcerned with any question of plenary power, saying that because the case "involves no entry preference for aliens… the Court has not disclaimed, as it did in *Fiallo*, the application of an exacting standard of review."[46] In effect, the unanimous Court sidestepped any potential conflict

[45] *Boumediene* is separate from these two categories, and largely falls in line with the dynamic detailed by Markowitz, wherein aliens facing criminal or similar penalties are afforded constitutional protections without reduction on account of being non-citizens. See, Markowitz, 1340-1349.
[46] *Sessions v. Morales-Santana*, 582 U.S. ___ (2017), 15.

with plenary power precedent that its desire to enact stringent, gender-based review on the law in question could have produced. It did so on the basis that the respondent, Morales-Santana, claimed to be a U.S. citizen.[47]

In its ruling, the Court found that the different treatment along gender lines was an unconstitutional violation of equal protection and ordered that parents of either gender be treated the same. However, "although the preferred rule in the typical case is to extend favorable treatment,"[48] meaning to apply the less stringent standard (in this case, the one applying to an unwed American mother), in this case doing so would have meant making the exception applying to American mothers the general rule, and as such, in the Court's reckoning (offered without much justification), required the Court to instead to more stringent rule applying to American fathers, thus eliminating the gender disparity but also increasing the burden for citizenship and leaving the respondent without relief. "That Morales-Santana does not seek this outcome does not restrain the Court's judgement," write Ginsburg in a footnote,[49] rendering Morales-Santana an alien and thus, seemingly retroactively, negating that Court's argument that its previous ruling in *Fiallo* need not be heeded. Whereas in *Trump v. Hawaii*, when the Court declared that it could apply judicial review to immigration law but only in a way that would be all but guaranteed to leave it intact, in *Sessions v. Morales-Santana* the Court decided to apply heightened scrutiny to an immigration case but only by pretending that it was not an immigration case and in effect materially heightening the restrictions on citizenship and immigration imposed by Congress.

Morales-Santana is remarkable for several reasons. It is the only time, at least as identified as such by the Supreme Court Database, that an aspect of *federal* immigration law was struck down

[47] Ibid.
[48] Ibid, 27-28.
[49] Ibid, 28.

as unconstitutional by the Supreme Court outside of the denaturalization and denationalization cases—and the Court did so only by arguing that it was not, in fact, immigration law, or at least that the respondent involved was not an alien. Even then, its subject matter is not overly far removed from the denationalization cases, and, importantly, is intrinsically related to the explicitly enumerated power over naturalization granted to Congress by the Constitution—and as such is not dealing with a plenary power. More than that, it seems apparent that the reason that the Court declined to do what is "preferred" and "typical" in such circumstances, namely extend favorable treatment, and instead extended unfavorable treatment "as the Government suggest[ed]"[50], seems to be a direct result of the fact that had the Court rectified the gender-based equal protection violation in the normal way, it would have necessarily entailed the Court mandating more permissive immigration policy, something it remains evidently unwilling to do, at least upon constitutional grounds.

Considering Strict Scrutiny

In establishing plenary power, and in continuing it in practice even after acknowledging some of its theoretical shortcomings, the Supreme Court solved a practical problem with what was, but perhaps decreasingly continues to be, a clean and simple solution. Even now, it seems unlikely that the Court feels any meaningful political pressure from the publications of law school professors. Nonetheless, the discomfort and incongruity imposed by plenary power exists, and the Court has not, at times, failed to feel it. The status quo is likely sustainable; Legomsky's predicted collapse did not occur, and only a remarkable idealism could lead one to think that it ever will. The extant doctrine of general deference with occasional intervention in specific cases is perfectly workable in practice, if not in theory. However, if that doctrine were to be replaced and if immigration law

[50] Ibid.

were to be brought more comfortable into line with the main streams of American jurisprudence, what could replace it? The most obvious and consistent answer which could be drawn from the Court's extant toolbox is the standard of strict scrutiny.

Strict scrutiny represents the highest, most rigorous standard of constitutional review that the judiciary can apply to a law. Whereas rational basis review effectively means that a law is almost certain to be upheld, the application of strict scrutiny has a much greater tendency to portend a law's imminent demise. When a law is subjected to strict scrutiny, it must be necessary and as narrowly tailored as possible in service of a compelling government interest.[51] Such subjection occurs under a number of circumstances, often related to each other. The most prominent uses are when a law may violate the Equal Protection Clause by discriminating based on race, national origin, or some other suspect or protected class, when due process is otherwise implicated, and/or when First Amendment and other fundamental rights such as speech (and the potential sanction or censorship thereof), association, travel, and so forth are limited or impacted.[52] Moreover, according to Richard H. Fallon, there are now in effect three distinct interpretations or iterations of judicial inquiry under strict scrutiny, the first arising in the instance of infringement upon fundamental rights (whatever those fundamental rights may be) which can only be justified impending "catastrophe," the second happening when "a particular intrusion on protected liberties," liberties less essential than those fundamental rights in the first category, can be fairly balanced with its benefits, and the third occurring when the issue at stake is not whether an infringement that can in theory be justified is in fact justified but rather whether the motivation behind the infringement is a "forbidden purpose" and thus fundamentally cannot ever be justified, "such as promoting white privilege at the expense of racial minorities or suppressing speech based

[51] Fallon, Richard H. "Strict Judicial Scrutiny," 54 *UCLA Law Review* 1267 (2007). 1273
[52] Ibid, 1270.

on disagreement with its message."[53] In other words, if a violation of rights and/or liberties is incidental to the pursuit of a legitimate government purpose, the Supreme Court gauges whether the benefit of the violation is worth the cost and meets the other requisite standards in a manner according to the importance of the right or liberty; if said violation is the purpose of the law, then the law is immediately invalid. (Of course, it is often a matter of dispute whether the violation is incidental or purposeful.)

It is exceptional that there is even a question of whether federal immigration laws (as opposed to state laws affecting or targeting immigrants, which, as covered, have been proven to often, but not always, be subject to the Court's strict scrutiny) should be subjected to strict scrutiny, and the existence of the question by itself demonstrates the constitutional weirdness of the field. In practically any other field of law, the possibility of strict scrutiny is the default state of being, making immigration law is in this regard the stark exception. It is difficult to come up with another field of government statute which is simply immunized to such scrutiny in the way that federal immigration law has been; it has at least proven to be beyond my abilities to do so. The reason for this, of course, hearkens to, as discussed, the legacy of the plenary power doctrine and the political considerations which went into it, but it is worth demonstrating some of the plethora of cases where the absence of strict scrutiny is remarkable.

There is, for instance, *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952), wherein three non-citizens were facing imminent deportation under the Alien Registration Act of 1940 for their respective membership in the Communist Party. While this case was heard and decided prior to the initial establishment of strict scrutiny, it remains cited as precedent in such cases as *Arizona v. United States* (2012), and while political affiliation is not a suspect class in and of itself, the

[53] Ibid, 1302-1303.

inherent connection between political affiliation and such fundamental rights as speech and association and the obvious affect upon those rights inflicting expulsion as punishment for political affiliation would inflict squarely couches the case as something that would normally find itself subject to strict scrutiny in the modern context. The result of such scrutiny, i.e. the decision of whether the Cold War context would make the government's interest in quelling hostile agents sufficiently compelling and whether deportation is narrowly-tailored in pursuit of that goal, is another matter.

Similarly, in *Kleindeist v. Mandel*, 408 U.S. 753 (1972), a Belgian Marxist scholar, Mandel, was barred entry from the United States, both generally for his Communist affiliations and ideology and specifically for "unscheduled activities engaged in… on a previous visit to the United States."[54] As a result, Mandel and a number of American academics brought suit against the government, arguing that the ideological grounds for his exclusion were a violation not only of Mandel's freedom of speech, but of that of the American scholars who wished to talk, debate, or otherwise engage in academic intercourse with him. It was not an immigration case per se, but it nonetheless fell under the category of the federal government's broad power over exclusion. As such, while in any other context strict scrutiny would have applied, the fact that this case dealt with an alien resulted in the only mention that "it is established constitutional doctrine, after all, that government may restrict First Amendment rights only if the restriction is necessary to further a compelling government interest" coming in Justice Marshall's dissent.[55] Justice Marshall continued:

> Today's majority apparently holds that Mandel may be excluded and Americans' First Amendment rights restricted because the Attorney General has given a "facially legitimate and *bona fide* reason" for refusing to waive Mandel's visa ineligibility. I do not understand the source of this unusual standard. Merely "legitimate" governmental

[54] *Kleindeist v. Mandel*, 408 U.S. 753 (1972), 408.
[55] Ibid, 777.

> interests cannot override constitutional rights. Moreover, the majority demands only "facial" legitimacy and good faith, by which it means that this Court will never "look behind" any reason the Attorney General gives. No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule.[56]

This I quote in full because Justice Marshall summarizes the issue better than I ever could, demonstrating how the origin of the case made the Court's majority ignore the existence of standing precedent in order to decide the way it did. However, while no citation to precedent is given to justify the majority's opinion, a reasoning nonetheless is, with the Court's majority arguing, in essence, that should it side with Mandel in this case, the judiciary either would be forced to entirely eliminate government's plenary power whenever a bonafide speech claim were made as justification for entrance or would have to handle each such claim piecemeal and apply a "yet undetermined standard" to them, a possibility the Court describes as dangerous and undesirable.[57] Whether its motivation was cowardice, practicality, or some other third thing, the majority's decision in *Mandel* works well to demonstrate the absence of strict scrutiny in immigration-related law.

So, too, does the 2018 decision in *Trump v. Hawaii*. It is highly parallel to the decision in *Mandel*, containing a majority opinion whose outcome depends upon the non-application of heightened or strict scrutiny and dissents which wonder, pointedly, why heightened scrutiny (but not quite strict, as it dealt with specifically potential *religious* discrimination) is not applying. However, whereas Mandel dealt solely with the possibility of a fundamental right—free speech in particular—being infringed and not with discrimination against a formally suspect class, *Trump v. Hawaii* added on the potentiality of unconstitutional animus, specifically against Muslims, being involved in the promulgation of the law—that third "forbidden purpose" against which strict

[56] Ibid.
[57] Ibid, 768-769.

scrutiny spells out a death sentence. Citing *Mandel* as precedent, the Court's majority elected to apply only a rational basis review to the executive order in question,[58] thus sidestepping the possibility that the conduct and statements of President Trump and those around him (the content of the proclamation itself having been constitutionally innocuous) could have constituted the sort of demonstrable animus which under strict scrutiny could have nullified the "travel/Muslim ban" proclamation. This stands in stark comparison to the *Masterpiece Cakeshop*[59] decision, wherein antireligious animus displayed by the Colorado Civil Rights Commission triggered strict scrutiny and put an end to its bureaucratic judgement. The Court's decision in *Masterpiece Cakeshop* operated within the normal realm of judicial review, involving a typical Establishment Clause question. While some may point to the difference in the animosity-receiving religion—Christian in *Masterpiece*, Muslim in *Hawaii*—as the determining factor, the majority's decision to apply only rational review in *Trump v. Hawaii* was explicitly motivated by the fact that it revolved around federal immigration law. I see little reason to assume the majority dishonest, particularly given the jurisprudential history of immigration law. Simple immigration exceptionalism is a safe default assumption.

It is difficult to find other recent immigration cases where the relevance of strict scrutiny, or the lack thereof, is so readily apparent. In no small part, this is likely because potential litigants feel no need to waste their time, money, and energy pursuing such a path for relief. Instead, the increased connection between criminal procedures and residency, deportation, and other immigration-related consequences has produced a large number of cases seeking to incorporate due process procedural protections into the process,[60] while challenges to major changes or

[58] *Trump v. Hawaii* 585 U.S. ___ (2018), 30-38.
[59] *Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm'n*, 584 U.S. ___ (2018)
[60] See: Markowitz.

implementations of federal law have been based upon statutory grounds.[61] As also covered previously, throughout the 1970s and 1980s a number of state statutes targeting non-citizens were declared unconstitutional under a combination of strict and heightened scrutiny,[62] and states seem to have received the message on that account. From Legomsky's predicted imminent revolution in immigration law in the 1980s,[63] to David Rubenstein's 2017 more hesitant anticipation "of something brewing" in the field of immigration law,[64] legal scholars have long found the exceptionalism of immigration law to be inherently flawed in a way that portends long term nonviability. It is tempting to liken this impending revolution in immigration law to fusion power: always five years away from being five years away. In reality, it seems, while the status quo may or may not be uncomfortable, it is inarguably persistent. In this sense, the 5-4 decision in *Trump v. Hawaii*, with all the immense political excitement surrounding it, may well represent for pro-immigration advocates a gravely missed opportunity: an immigration case so well-tailored for the animus-prong of strict scrutiny, and so centered in the public's eye at the time, that it was potentially a single vote away from being the first federal immigration law to which such a standard was ever applied.

What would be the implications of an application of strict scrutiny, or at least an intermediate level of review, directly to federal immigration law? There is, of course, no single federal immigration law; it is, rather, an incredibly expansive field of regulations, statutes, court

---

[61] See: *United States v. Texas*, 579 U.S. ___ (2016), *Department of Homeland Security v. Regents of the University of California*, 591 U.S. ___ (2020), & *Biden v. Texas*, 597 U.S. ___ (2022), among others, which tend to revolve around the "arbitrary and capricious" standard established for executive action under the Administrative Procedures Act.
[62] See: *Graham v. Richardson*, 403 U.S. 365 (1971), *Sugarman v. Dougall*, 413 U.S. 634 (1973), *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976), *Nyquist v. Mauclet*, 432 U.S. 1 (1977), *Plyler v. Doe*, 457 U.S. 202 (1982), and *Bernal v. Fainter*, 467 U.S. 216 (1984), etc.
[63] Legomsky, Stephen H. "Immigration Law and the Principle of Plenary Congressional Power." *The Supreme Court Review* 1984 (1984): 255–307. http://www.jstor.org/stable/3536942.
[64] Rubenstein, David. "Immigration symposium: The Future of immigration exceptionalism." SCOTUSblog.com (2017). Available at: https://www.scotusblog.com/2017/06/immigration-symposium-future-immigration-exceptionalism/

doctrines, executive orders, and other instruments of government power. As such, any broad declaration that such a standard as strict scrutiny may be relevant to each article and aspect of immigration law, or that the field as a whole is unconstitutional due to its lack of an enumerated basis in the Constitution, would if nothing else be rather naïve. However, it takes little imagination to perceive the general ripeness of the field for strict scrutiny, as two of its three triggering prongs—infringements upon suspect classes and fundamental liberties—are necessarily implicated in some way by fundamental aspects of immigration while the third—the presence of animus—may often arise from the contentious political environment surrounding immigration issues. Suspect classes receive the protection they do as a result of the historical tendencies of the American government(s) to discriminate against certain discrete groups of people, and it is easy to envision how the four resulting suspect classes, namely race, religion, national origin, and alienage (the last one only in the context of state laws, however) can all be discretely affected by immigration law. Much the same goes for the fundamental rights and liberties, such as speech, association, and travel, violations of which are similarly subject to strict scrutiny. Covering the specific implications of how the immigration legal regime might be radically affected by being made subject to the Court's strict scrutiny would be an extensive task and, thankfully, is not necessary for the purposes of this thesis; to explain the Supreme Court's behavior, it is sufficient to simply establish the possibility that said implications are probable to exist. A shift to strict scrutiny in the regime of immigration law could very well mandate radical alterations to its most fundamental structures, the consequences of which likely situate the possibility beyond the pale for the Court.

Conclusion

Or, at the very least, it would be beyond the pale for any particular Justice on the Court who might seek to avoid entangling the Court within a political quagmire any more than it already is. Immigration law may be exceedingly weird, legally exceptional, and divorced from the constitutional mainstream, but it is not for no reason that this is the case. The alternative, be it either strict or heightened scrutiny or some other impactful judicial technique, would have the potential to produce such political disruption that an iterative status quo, with the circumstantial application of minor and uncontroversial ameliorations of the sort observed by Markowitz,[65] is the far preferable option for a Court that is both ideologically conservative in its current—and likely future—composition and structurally hesitant to risk overextending itself in attempts to exert authority over the other branches of government. For at least four decades now, legal scholars have been identifying immigration law as a field with the potential massive judicial upheaval, akin to a poorly designed dam straining under its own weight and destined for catastrophic failure. To continue the metaphor, it seems fair to say that while those scholars are certainly have a point about the dam's construction, they have overlooked the teams of black-robed construction workers and engineers who are on hand to quickly respond to and patch up any potential breach—perhaps by letting more water through, or reworking its contours, but nonetheless keeping the superstructure in place. The ostentatious political environment and politicians which produced *Trump v. Hawaii* meant that that case represented a serious threat as a breaching charge, but it is far from certain, or even likely, that the Supreme Court at any point soon will have an ideological composition as overall favorable to immigrants as it was at the time of *Hawaii*, should a similarly contentious example of potential animus arise which could force the Court to reconsider the issue. Immigration

[65] Markowitz, "Deportation is Different."

weirdness and *de facto* plenary power is likely here to stay—although it would be unwise to discount the possibility that in the near future further animus might arise to reintroduce the issue into the public's eye and the Court's docket. For the time being, however, the weirdness of immigration law, and the resulting effects on those subject to it, will continue to reign.

Bibliography

Eastman, John C. "The Power to Control Immigration Is A Core Aspect Of Sovereignty," 40:1 *Harvard Journal of Law & Public Policy* 9 (2016).

Fallon, Richard H. "Strict Judicial Scrutiny," 54 *UCLA Law Review* 1267 (2007). Available at: https://www.uclalawreview.org/wp-content/uploads/2019/09/33_54UCLALRev1267June2007.pdf

Kagan, Michael, *Plenary Power is Dead! Long Live Plenary Power*, 114 Michigan Law Review First Impressions 21 (2015). Available at: https://repository.law.umich.edu/mlr_fi/vol114/iss1/10

Martin, David A., *Why Immigration's Plenary Power Doctrine Endures*, 68 Oklahoma Law Review 29 (2015). Available at: https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1013&context=olr

Markowitz, Peter L., *Deportation is Different*, 13 U. Pa. J. Const. L. 1299 (2011). Available at: https://scholarship.law.upenn.edu/jcl/vol13/iss5/3

Neuman, Gerald L. "The Lost Century of American Immigration Law (1776-1875)." *Columbia Law Review* 93, no. 8 (1993): 1833–1901. https://doi.org/10.2307/1123006.

Pfander, James E. and Theresa R. Wardon, "Reclaiming the Immigration Constitution of the Early Republic: Perspectivity, Uniformity, and Transparency." 96 Virginia Law Review 359 (2010).

Rubenstein, David. "Immigration symposium: The Future of immigration exceptionalism." SCOTUSblog.com (2017). Available at: https://www.scotusblog.com/2017/06/immigration-symposium-future-immigration-exceptionalism/

Somin, Ilya, “Does the Constitution Give the Federal Government Power Over Immigration?” Cato Unbound, September 12, 2018, https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration/.