DEPORTATION, DUE PROCESS, AND DEFERENCE: RECENT DEVELOPMENTS IN IMMIGRATION LAW

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> *However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.* – Judge Learned Hand[1]

The American immigration adjudication system has witnessed profound change in recent years. Starting in the 1980s, a series of legislative and administrative shifts has produced an immigration adjudication system that increasingly mirrors the criminal justice system. This phenomenon, termed the "criminalization of immigration,"[2] reflects a paradigm shift in the discourse on immigration law and policy. Historically focused on the exclusion and removal of the undocumented, immigration law and policy now increasingly prioritize removal of noncitizens with any criminal history. These developments have both revealed and exacerbated internal tensions in the Supreme Court's treatment of immigration law, leading to a moment of unparalleled dissonance between the Supreme Court's doctrine on immigration and the reality of the American immigration enforcement and adjudication systems.[3]

LEGISLATING THE CRIMINALIZATION OF IMMIGRATION

Legislative politics of immigration in the 1980s and 1990s reflected contradictory moral intuitions in American society about immigration. On one hand, American identity has historically been intertwined with the idea of a land of immigrants[4] and the notion that all persons by virtue of their humanity deserve the op-

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portunity to seek a better life. On the other hand, deeply rooted and at times racially charged fears have often been expressed about the economic and security concerns associated with immigration. The category of the criminal alien, referring to not only the undocumented but also legal residents with any criminal history, has emerged as a mechanism for navigating the politics of immigration law.

Starting in the mid 1980s, a flurry of legislation, animated by the idea of the criminal alien, increasingly connected the regulation of immigration with the regulation of crime. Despite the increasing overlap between criminal and immigration law, procedural protections in immigration law were continually weakened to look less and less like protections historically associated with the criminal justice system. Stephen Legomsky suggests that this process reflects a "selective, asymmetric … importation … of the criminal justice model into the domain of immigration law."[5]

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), a piece of legislation emblematic of an emerging trend toward creating more opportunities for admission while emphasizing the removal of criminal aliens. IRCA introduced a new amnesty program for undocumented noncitizens living in the United States while dramatically increasing funding for border enforcement[6] and criminalizing knowingly hiring undocumented workers.[7] Throughout the 1980s, Congress also passed increasingly punitive legislation governing drug policy and frequently built immigration consequences for criminal offenses into the legislation. The 1986 Anti-Drug Abuse Act, for example, tied drug offenses directly to bases of inadmissibility to the United States.[8]

The criminalization of immigration continued with the 1990 Immigration Act (IMMACT). Like IRCA, IMMACT expanded opportunities for immigration by raising the limit on admissions[9] but created harsher penalties for immigration violations and more severe immigration consequences for criminal violations. The Violent Crime Control and Law Enforcement Act of 1994 continued the trend by increasing the criminal penalty "for unlawful reentry after deportation that followed criminal convictions …. and for as-

sisting noncitizens to enter unlawfully," among other measures.[10] The Act also increased federal resources allocated to immigration enforcement, particularly enforcement directed toward noncitizens with criminal records.[11]

AEDPA AND IIRIRA

Though harsher immigration enforcement policies and greater overlap between criminal and immigration law marked the decade following IRCA, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) changed immigration law more expansively and comprehensively than any other legislation in the previous decade.

AEDPA expanded the grounds of deportability primarily by amending the definition of aggravated felony to include certain racketeering, gambling, forgery, bribery, perjury, and obstruction of justice offenses among others. AEDPA dramatically changed the term's place in immigration law.[12] IIRIRA expanded the term's definition even further.[13] AEDPA and IIRIRA also broadened the reach of the term aggravated felony by defining it in terms of the length of the sentence imposed in a criminal proceeding as well as redefining the term conviction in immigration law. Through this measure, common plea bargain practices such as imposing a suspended sentence were retroactively redefined as convictions for immigration purposes. These convictions could then serve as the basis for an offense's recategorization as an aggravated felony. Judicial discretion that had been exercised by providing a suspended sentence was effectively revoked. These changes allowed for crimes generally understood as minor crimes and treated as such in state law to be categorized as aggravated felonies in immigration law.

AEDPA and IIRIRA also expanded the grounds of deportability in other ways. AEDPA amended the INA to "[extend] deportation to aliens convicted of a crime of moral turpitude within five years of their date of entry, for which a sentence of one or more years is statutorily permitted."[14] IIRIRA created new federal im-

migration crimes such as "knowingly making a false claim of U.S. citizenship …. and failing to cooperate in the execution of one's removal order."[15] The retroactive application of these changes meant that many noncitizens who were legally present and had already served their sentences for minor crimes suddenly became deportable.[16] Additionally, AEDPA and IIRIRA expanded the use of detention in immigration proceedings. The legislation attached mandatory detention to a "wide range of crimes including simple drug possession"[17] and expanded the use of detention primarily through redefinitions of aggravated felony since that category triggers mandatory preventive detention.

The 1996 laws changed the avenues of relief available to noncitizens in removal proceedings as well. Most significantly, Congress repealed Section 212(c) of the INA, a provision that had previously allowed immigration judges significant discretion in determining the fairness of deportation in a particular case.[18] Section 212(c) had required immigration judges to "balance the adverse factors indicating the alien's undesirability as a permanent resident with the social and human considerations presented on his behalf."[19] The 1996 laws also changed the standard for relief for another commonly invoked provision, Section 244.[20] Under Section 244, the INA had provided relief for noncitizens who could show ten years of continuous presence and good moral character, while proving that deportation "would result in extreme hardship to the alien or a U.S. citizen or permanent resident who is the alien's spouse, parent, or child."[21] The 1996 legislation replaced the extreme hardship clause with a more exacting requirement of "exceptional and extremely unusual hardship,"[22] and also precluded any discretionary relief for aggravated felonies.[23]

Subsequent legislation continued this trend toward criminalization of immigration and greater restrictions on procedural protections. The USA Patriot Act, passed on October 26, 2001, increased executive power of deportation and limited requirements of judicial review in cases "that the attorney general had 'reason to believe' [a noncitizen] might commit, further, or facilitate acts of terrorism."[24] The REAL ID Act of 2005 further limited judicial

review of immigration cases[25] by, among other measures, limiting the availability of habeas corpus claims to noncitizens, restricting those claims to courts of appeals, and not allowing them to be brought into federal district courts.[26] In addition, the REAL ID Act "expanded the grounds of inadmissibility and deportability for terrorism-related charges, and introduced even more rigorous criteria for asylum cases."[27]

The cumulative effect of this wave of legislation was a "revolution in the law of immigration."[28] Immigration and criminal law were increasingly intertwined as new criminal sanctions were attached to immigration offenses and new immigration consequences were attached to criminal offenses.

Against a backdrop of anti-crime, anti-drug rhetoric, Congress relied on the morally loaded classification of the criminal alien to negotiate a deep tension between societal fears about increasing immigration and American identity as a nation of immigrants. This category of criminal alien, however, cut across historical categories organizing the discourse on immigration policy according to legal status. Criminal alien at times referred to undocumented citizens and at times to legally present persons with criminal histories, and blurring this boundary often had consequences that legislators did not seem to have fully anticipated. In addition, noncitizens' disenfranchisement undermined efforts to voice concerns in the face of what was termed a "legislative steamroller,"[29] attaching harsher penalties to immigration violations and restricting procedural protections in immigration proceedings.

Administrative Changes and Current Enforcement Policy

Following the 1996 legislation, a series of shifts in administrative policy affecting both enforcement and adjudication practices furthered the trend of criminalization of immigration and restrictions on procedural protections. Immediately following the passage of the 1996 laws, the "number of INS law enforcement agents grew by 40 percent … [and] the increase in spending also, predictably, produced an increase in immigration related prosecutions."[30] How-

ever, the largest shift in enforcement policy followed the Homeland Security Act of 2002, which restructured the government agencies relating to national security under the umbrella organization: the Department of Homeland Security (DHS).[31]

The Immigration and Naturalization Service (INS) was absorbed by the Department of Homeland Security only six weeks after DHS's creation, and INS's functions were divided into three bureaus: the Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).[32] The DHS's mission, stated in its strategic plan, reflected shifting priorities in enforcement: "We will lead the unified national effort to secure America. We will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the Nation. We will secure our national borders while welcoming lawful immigrants, visitors, and trade." While the INS was a *service* with a clearly regulatory purpose, DHS focused on terrorist attacks and "respond[ing] to threats and hazards" while regulating immigration.[33] Unprecedented sums were appropriated to these new agencies. In fiscal year 2008, ICE and CBP had an operating budget of over $15 billion,[34] a massive increase in funds compared to the INS budget of just over $3.6 billion in 1998, particularly since the INS had been responsible for the functions of CIS in addition to ICE and CBP.[35]

Additionally, immigration officials have increasingly worked directly with police, as illustrated by INS beginning to enter civil immigration information into the FBI's criminal database in 2001.[36] This collaboration has expanded with DHS's increasing emphasis under the Obama administration on Secure Communities, a program that "mobilizes local law enforcement agencies' resources to enforce federal civil immigration law."[37] DHS has also enforced immigration regulations with increasing intensity, illustrated by their ambitious ten-year plan created in 2003 termed "Operation Endgame," calling for removal of all removable noncitizens by 2012,[38] at the time an estimated twelve million people.[39]

As enforcement policy was changing, so was adjudication policy. Attorney General Ashcroft's 2002 "reform" of the Board of

Immigration Appeals (BIA) dramatically changed the procedural protections afforded to noncitizens in immigration proceedings. The BIA hears appeals of immigration judges' decisions, and prior to the "reform" (also referred to as the "streamlining" of BIA procedures[40]), the Board would presumptively hear appeals in panels of three. The reform provided for adjudication by a single Board member, unless the case fell into one of six categories[41] or was specifically requested in writing by the appellee.[42] The reform also changed guidelines for Board members' opinions, promoting and in many cases requiring summary affirmances in which a single Board member would affirm an immigration judge's decision by using predetermined language defined by regulation instead of writing a case specific opinion.[43] "The Attorney General went so far as to authorize individual Board members to dispose of cases through the affirmance without opinion procedure even if there were errors in the immigration judge's decision below, and even if the Board member did not agree with the reasoning of the decision below."[44]

These trends in administrative policy have continued under the Obama administration. Janet Napolitano, President Obama's Secretary of Homeland Security, has prioritized removal of legal residents deportable due to criminal charges. A DHS press release states, "Secretary Napolitano's announcements … reflect this administration's continued focus on smart and effective immigration enforcement over the past twenty months – prioritizing the identification and removal of criminal aliens who pose a threat to public safety."

Criminalized Immigration

The result of the legislation passed throughout the 1980s and 1990s and recent trends in administrative policy was, as Dan Kanstroom notes, a "paradoxical picture of a nation-state that has expanded both the number of people whom it admits and the number of people whom it expels."[45] As Bruce Western suggests, the politics of crime were connected in new ways to the politics of race and the economic concerns of the 1960s, 1970s, and 1980s.[46] Un-

derlying anxieties about race and economic insecurity that drove the anti-drug, anti-crime rhetoric of the 1980s at times drove anti-immigrant sentiment as well. These overlapping concerns help explain the insertion of this rhetoric into the immigration debate, a process that resulted in a paradigmatic shift in the government's approach to the regulation of immigration. Noncitizens in immigration proceedings now experience an immigration adjudication system that functions dramatically differently than any other time in U.S. history. Reorganization of immigration law and policy around the removal of criminal aliens has affected every level of the immigration enforcement and adjudication systems. Rates of detention and deportation, as well as government spending on all levels of the immigration adjudication and enforcement system, are unparalleled.

RATES OF DEPORTATION

Deportation rates have steadily increased since the 1980s, with 18,013 persons deported in 1980, 30,039 in 1990, 188,467 in 2000, and 393,289 in 2009.[47] Following the 1996 legislation the deportation rate increased more than 60 percent, jumping from 69,680 deportations in 1996 to 114,432 in 1997.[48] Crime related deportations have increased even more dramatically. Before 1986, crime-related deportations, "rarely, if ever, reached 2,000 per year."[49] Following the passage of IRCA in 1986, however, the number of crime related deportations began to rise. There were 4,385 crime related deportations in 1987,[50] 42,014 in 1999,[51] and 88,000 in 2004.[52] This trend only accelerated during the 1990s with the passage of AEDPA and IIRIRA. From 1996 to 2003, there were 1.2 million deportations, 517,861 of which were for criminal violations.[53]

This trend is still accelerating, as Napolitano reported a record 392,862 deportations in 2010, with about half of that number, 195,772, convicted criminals.[54] Even these figures, however, fail to convey the full scale of this phenomenon, given that federal statistics count only orders of removal and not voluntary depar-

tures. As Jennifer Chacon points out, currently "for every noncitizen who receives a formal order of removal, another four depart 'voluntarily' as a result of their encounters with the immigration enforcement bureaucracy."[55] DHS reports more that 1 million "returns" as opposed to "removals" in eighteen of the twenty-four years for which statistics have been reported.[56]

IMMIGRATION DETENTION

Rates of detention have increased along with increased efforts at enforcement and increased eligibility for mandatory detention. Between 1995 and 2007, the average daily population of U.S. immigration detainees increased from about six thousand to more than 27,000,[57] and in 2008 and 2009 an average of 33,000 individuals were detained on any given night.[58] From 1994 to 2008, the overall number of yearly detentions rose from roughly 81,000 to 380,000,[59] and estimates place the number of detentions for 2009 between 380,000 and 442,000 at an annual cost of $1.7 billion.[60]

The government detains noncitizens in Service Processing Centers, Contract Detention Facilities, Intergovernmental Service Agreement Facilities, and in U.S. Bureau of Prisons.[61] Intergovernmental Service Agreement Facilities, generally state or county jails with beds designated for immigration detainees, house the vast majority—almost 67 percent—of detainees.[62] Conditions in immigration detention facilities largely mirror conditions of prisons or jails. Detainees are treated similarly to those convicted of crimes and have reported being "constrained with handcuffs, belly chains, and leg restraints."[63] Additionally, the immigration detention system is "woefully unregulated"[64] and lacks legal binding standards, "sending a clear message that noncompliance [with standards] carries no real penalty."[65] As rates of detention have increased dramatically without a corresponding development of capacity and standards for detention, an overburdened detention system has been widely criticized for alleged violations of human rights and failures to adequately respond to claims of abuse.[66]

COSTS IN TERMS OF FAIRNESS

Concerns about whether the immigration adjudication system is meeting basic standards of fairness have increasingly been voiced from within the legal community.[67] For example, Judge Richard Posner has argued, "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice,"[68] and in various opinions has suggested immigration courts' decisions are "arbitrary, unreasoned, irrational, inconsistent, and uninformed."[69]

The BIA has also been widely criticized for its failure to meet basic standards of justice. The Seventh Circuit alleged that the BIA was "not aware of the most basic facts."[70] Additionally, "Board decisions in favor of noncitizens fell from 25 percent to 10 percent"[71] immediately following the "streamlining," raising questions about whether the streamlining had changed the decision-making process in a way that compromised the fundamental fairness of the proceeding.

The costs in terms of fairness associated with the dramatic changes in immigration law and policy are more difficult to measure than absolute numbers of deportations or rates of detention. Fairness is an elusive concept. While some hold that fairness requires individualized review, others assert that fairness requires treating like cases in a similar fashion. These two components can often pull in different directions, one toward allowing greater judicial discretion and the other toward more standardization through more specific rules.

However, even as immigration adjudication procedures have moved steadily away from individualized review by increasing the number of cases subject to expedited removal, restricting opportunities for judicial review, and "streamlining" adjudication procedures, studies of immigration court outcomes show wide disparities in grant rates depending on factors that few believe should determine outcomes. For example, a thorough study of disparities in asylum adjudication conducted by Jaya Ramji-Nogales, Andrew Shoenholtz, and Philip Schrag determined that (1) whether asy-

lum seekers were represented by legal counsel (2) the asylum seeker's number of dependants, (3) the gender of the judge, and (4) the prior work experience of the judge each had a statistically significant relationship to asylum grant rates, at a 99 percent confidence level.[72] Certainly, asylum cases are not representative of all immigration cases, but the dramatic disparities emphasize the costs in terms of fairness associated with recent policy changes, as more and more noncitizens experience an immigration adjudication system that defies expectations for consistency as a component of fairness.

Cumulatively, these changes reflect a fundamental shift in American immigration law and policy. The criminalization of immigration has created new tensions within constitutional immigration law that still relies on a nineteenth century picture of immigration law and policy and is increasingly disconnected from the current reality of the American immigration system.

"A CONSTITUTIONAL ODDITY": THE LEGAL HISTORY OF THE SUPREME COURT'S TREATMENT OF IMMIGRATION

Constitutional law governing immigration adjudication is an area of law in which, as Anna Law has noted, "it appears, the normal rules do not apply."[73] The Supreme Court is generally called upon to provide meaningful substantive protection of constitutional rights and to justify these protections against critiques that say these protections are counter-majoritarian and anti-democratic. As Ronald Dworkin has explained, "The right method [constitutional scholars] say, is something in between which strikes the right balance between protecting essential individual rights and deferring to popular will. But they do not indicate what the right balance is, or even what kind of scale we should use to find it."[74]

These challenging questions about the proper scope of judicial review, the proper interpretive methods, and the proper interpretations, however, have been largely absent from the development of constitutional immigration law. The Court has justified its silence on these questions with reference to the "plenary power"

doctrine[75] that "confer[s] upon Congress and the Executive Branch the power to regulate immigration without judicial restraint."[76] The Supreme Court's consistent deference in immigration cases sets immigration law apart from any other area of public law in which different justices have historically approached constitutional interpretation in dramatically different ways despite the existence of clearer textual bases for interpretation.[77]

Early Immigration Cases and the Plenary Power

Early Supreme Court opinions provided the foundation for the plenary power doctrine at the heart of the Court's deferential approach to judicial review of immigration cases. In these cases, the Court relied heavily on extralegal judgments about immigration, an approach that likely resulted from the lack of a significant body of federal immigration law at the time.[78] Justice Field writes in *Chae Chan Ping v. United States* (1889) that "the powers to declare war, make treaties, suppress insurrections … are all sovereign powers, restricted in their exercise only by the Constitution itself," suggesting that though the Constitution may constrain government action, the Court is not empowered to interpret the nature of that constraint.[79]

Chae Chan Ping's case arose from his detention at the border, even though he had been a legal resident of the United States, and was framed in terms of exclusion. Justice Field wrote:

> If … the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.[80]

This comparison between the judicial review of immigration adjudication and the judicial review of congressional powers in war helps contextualize Justice Field's judgment about the scope of interpretive authority. However, Justice Field does not explain why these types of cases merit different interpretive authority or why the facts of *Chae Chan Ping* (1889) make the case analogous to national sovereignty matters in the salient respect that merits exemption from judicial review. Chae Chan Ping's exclusion was based on nationality, and beyond his identity as a Chinese national, the government made no indication that it considered his presence a threat to national sovereignty. The Court's inchoate explanation of the relationship between national sovereignty, national security, and interpretive authority would typify future holdings in immigration cases.

In the case *Nishimura Ekiu v. United States* (1892), the Court reformulated the rationale for its holdings on interpretive authority in immigration matters. In *Ekiu*, the Court suggests that sovereignty and self-preservation justify judicial interpretive deference. Ekiu arrived by steamship to meet her husband with $22 in cash. She told the immigration inspector that though she did not have her husband's phone number, they had planned for him to call her at a prearranged hotel.[81] Still, the inspector excluded her on the grounds that she was likely to become a public charge. She applied for habeas corpus, providing evidence to refute the accusation, but that evidence was excluded by the circuit court due to its finding that the administrative decision regarding her likelihood of becoming a public charge "was conclusive upon the judiciary."[82]

Addressing the question of whether or not the statute violated due process by making the administrative findings of fact conclusive upon the judiciary, Justice Gray wrote, "As to [foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law], the decisions of executive … officers, acting within powers expressly conferred by Congress, are due process of law."[83] By claiming that the executive's decision is due process, Justice Gray suggests that due process is required but judicial

review may not be necessary to ensure due process. Justice Gray's rhetorical focus on national security and foreign relations throughout the opinion again helps contextualize this interpretation of due process that leaves ambiguous whether the Court is asserting a lack of interpretive authority or a requirement for interpretive deference.

In *Chae Chan Ping* and *Ekiu*, the Court held that federal power to exclude merited deference comparable to that afforded to wartime actions and that due process afforded noncitizens in exclusion proceedings necessarily met constitutional requirements. *Fong Yue Ting v. United States* (1893) extended those holdings to include expulsion (deportation) as well. In *Fong Yue Ting*, three Chinese laborers were arrested for not possessing required certificates of residence proving that they had been living in the United States when the Act of May 5, 1892, was passed. That Act stipulated that a laborer would be deportable without a certificate of residence or proof that he had been unable to secure the certificate and testimony about his residence by "at least one credible white witness."[84]

Evaluating the three laborers' challenge to the constitutionality of the white witness requirement, Justice Gray wrote, "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power."[85] Justice Gray cited the "power … inherent in sovereignty" asserted in Ekiu and the "independence" and "relation to foreign countries" asserted in *Chae Chan Ping* as the relevant reasons, suggesting that these reasons for restricting judicial review in cases involving exclusion were also reasons for judicial deference in cases involving deportation.[86] Justice Gray continued, "The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment."[87]

Justice Gray's emphasis that deportation is not punishment illustrates the tension created by his argument for judicial deference. Though he argues for extreme judicial deference and possibly that the government should have final interpretive authority in this

case, he nonetheless attempts to provide a constitutional interpretation justifying the government's action—in this case basing that interpretation of the requirements of due process on the argument that deportation is not punishment. This holding still powerfully shapes constitutional jurisprudence on immigration today.

Taken together, these opinions "can be viewed as the three basic building blocks of the 'plenary' congressional power over immigration. The *Chinese Exclusion Case* recognized an inherent federal power to exclude noncitizens; *Ekiu* appeared to reject due process limits on the exercise of that power, and *Fong Yue Ting* extended the principle of both cases from exclusion to deportation."[88] Additionally, in *Chae Chan Ping*, the Court connected judgments about immigration to an argument about interpretive authority, in *Ekiu* that argument was for judicial interpretive deference, and in *Fong Yue Ting* the reasons given for restricting judicial authority or for interpretive deference were applied in a case involving deportation rather than exclusion. In these cases, the Court relies on a characterization of immigration as raising the same concerns as sovereignty or foreign relations, rather than on statutory interpretation, to justify its deference. The opinions, however, never fully articulate why these concerns should exempt these cases from judicial review or change the Court's interpretive method. Similarly, the Court never fully articulates why immigration proceedings should not be categorized as punishment. Still, these judgments about the nature of immigration and immigration law have remained remarkably durable features of the Court's jurisprudence on immigration, even as trends in immigration law and policy have undermined their plausibility, particularly the plausibility of the assertion that deportation is not punishment.

Due Process Protections in Early Immigration Law

Though *Fong Yue Ting v. United States* (1893) provided a cornerstone for the plenary power doctrine that justified "extraordinary judicial deference,"[89] the three dissents in that case also laid the foundation for the subsequently accepted proposition that non-

citizens should be afforded due process rights. In Justice Brewer's dissent, he emphasized that "whatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution."[90] He further emphasizes that "deportation is punishment," and that "no person who has once come within the protection of the Constitution can be punished without a trial."[91] Additionally, Justice Field, the author of *Chae Chan Ping* and *Ekiu*, wrote:

> The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent – and such consent will always be implied when not expressly withheld … he becomes subject to all their laws, is amenable to their punishment and entitled to their protection.[92]

All three dissents argued for the importance of affording constitutional protections to noncitizen residents in the United States, implicitly challenging the majority's ruling that these constitutional protections could be sufficiently guaranteed without judicial review by the fact of their dissent. Justice Brewer described the argument for constitutional protections for noncitizens, particularly due process protections, most clearly when he wrote:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws … If the use of the word "person" in the Fourteenth Amendment protects all individuals lawfully within the State, the use of the same word "person" in the Fifth must be equally comprehensive, and secures to all persons lawfully within the territory of the United States the protection named therein.[93]

These Justices' dissents suggest that their willingness to assert judicially reviewable constitutional rights of Chinese immigrants was based on an understanding of the centrality of protecting due process to maintaining meaningful protection of rights under law, as

well as concern with unchecked government power and the implications of such extreme judicial deference in terms of rule of law.

Yamataya v. Fisher (1903)

The due process protections for noncitizens asserted in these dissents were later affirmed in *Yamataya v. Fisher* (1903), though the scope of these protections was still strongly influenced by the views articulated in *Chae Chan Ping*, *Ekiu*, and *Fong Yue Ting*. In *Yamataya v. Fisher,* Justice Harlan wrote, "this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."[94] Harlan continued, however, that the due process protection required, "not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will … be appropriate to the nature of the case."[95] Harlan even specified that due process did not require that appellant understand the procedure.[96]

Harlan's ruling would foreshadow the Court's treatment of noncitizens' due process protections in immigration proceedings. The Court has shown strong and consistent support for the noncitizen due process protections in cases such as *Wong Wing v. United States* (1896), which guaranteed that noncitizens may not be subject to criminal punishment without due process protections,[97] and *Zadvydas v. Davis* (2001),[98] which asserts that indefinite detention of irremovable admitted aliens violates due process requirements. However, like Harlan's opinion in *Yamataya v. Fisher*, despite asserting due process protections, the Court has defined the requirements of due process so narrowly that it raises the question of whether the Court's interpretive deference crossed a line into a functional abdication of interpretive authority. This interpretation highlights the indeterminacy inherent in due process and suggests how this indeterminacy allows for interpretations of due process that can betray the spirit of rights protection.

The indeterminacy of the phrase combined with the Court's extreme interpretive deference have allowed for a tension to develop between the Court's deferential treatment of due process claims and an immigration law that increasingly merits stronger procedural protections according to standards the Court has developed in other areas of law. The Supreme Court has explained the inadequacies of these protections by pointing out both that noncitizens may be treated differently from citizens and that immigration proceedings present a unique set of concerns that merit different procedural protections than would, for example, a criminal proceeding.

In *Demore v. Kim* (2003), the Court decided whether allowing mandatory preventive detention for a wide range of noncitizens in immigration proceedings violated due process. Justice Rehnquist wrote for the majority, upholding the constitutionality of the detention and noting, "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."[99] Though the Court suggested in *Demore v. Kim* that different protections should be afforded based on the identity of the person claiming due process protection, the Court has more often justified its narrow interpretation of the procedural protections owed noncitizens with arguments about why different protections are due.

The holding in *Ekiu* that any procedure dictated by the government would necessarily constitute due process seems to have formed the baseline for the Court's evaluation of the procedural protections "due" to noncitizens in immigration proceedings. In *Zadvydas v. Davis*, Justice Clark noted, "the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights."[100] But against what standard the courts may review that authority has been left largely undefined, despite the admittedly fundamental rights of personal freedom at stake.

In determining the requirements of due process in immigration proceedings, the Court has repeatedly deferred to the legislature. The Court demonstrated this deference when addressing the question of whether deportation proceedings must meet the

requirements of the Administrative Procedure Act in order to meet the required constitutional standard. In 1950, Justice Jackson wrote in *Wong Yang Sung v. McGrath*:

> The Administrative Procedure Act … does cover deportation proceedings conducted by the Immigration Service … [since] it might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress [in the APA] as unfair even where less vital matters of property rights are at stake.[101]

Justice Jackson also pointed to the particular importance of procedural protections in cases of "voteless…litigants … [lacking] the influence of citizens … strangers to the laws and customs in which they find themselves…and who often do not even understand the tongue in which they are accused."[102] The Court held that the APA should apply.

However, in 1951, Congress included a provision in the Supplemental Appropriation Act that the relevant sections of the APA should not govern deportation proceedings.[103] When asked to determine whether Congress had implicitly reinstated the APA requirement with the passage of the INA in 1952, the Court held in *Marcello v. Bonds* (1955) that "the [INA] expressly supersedes the hearing provisions of that Act."[104] The Court dismissed the contention that the procedural protections provided would not meet the requirements of due process, writing "[this] contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal court, and against the special considerations applicable to deportation which Congress may take into account in exercising its particularly broad discretion in immigration matters."[105] Kanstroom suggests that "the Court, at the height of the Cold War, had simply lost the strong 'rule of law' spirit that had been engendered by the 1946 APA … [and] relegated [immigration law] to extra-constitutional status."[106] Now, although deportation hearings now conform to many APA requirements, compliance is not constitutionally required.[107]

More recently, the Court has indicated some willingness to assert interpretive authority over immigration cases, pointing out that immigration provisions are subject to constitutional limits. However, the few cases in which the Court has ruled in favor of noncitizen appellants have been primarily cases involving statutory interpretation rather than protections of constitutional rights.

In *INS v. St Cyr* (2001), the Supreme Court held that noncitizens who would have been eligible to seek 212(c) relief had they not taken plea agreements, following the passage of IIRIRA in 1996, could still apply. However, Justice Stevens, writing for the majority, did not specifically invoke noncitizens' due process protections. Rather than focusing on the constitutional guarantee against ex post facto criminal penalties, the Court emphasized case law providing for a "presumption against retroactivity"[108] and a consideration of legislative intent. Justice Stevens points out, "We find nothing in IIRIRA unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) retroactively to such aliens."[109]

Similarly, the Court held in *Carachuri-Rosendo v. Holder* (2010) that a noncitizen convicted twice in state court for non-felony simple possession should not be categorized as an aggravated felon and be precluded from seeking discretionary relief. [110] Justice Stevens wrote for the majority:

> As the text and structure of the relevant statutory provisions demonstrate, the defendant must also have been actually convicted of a crime that is itself punishable as a felony under federal law. The mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be 'convicted of a[n] aggravated felony' before he loses the opportunity to seek cancellation of removal.[111]

Again, rather than relying on interpretation of constitutional requirements, Justice Stevens reasons from "the text and structure of the relevant statutory provisions."[112]

In *Zadvydas v. Davis* (2001), the Court seemed more willing

to recognize noncitizens' constitutional rights. In an opinion stating that the government may not indefinitely detain admitted noncitizens subject to removal, Justice Breyer emphasized, "the 'plenary power' [doctrine]…is subject to important constitutional limitations."[113] Despite suggesting its responsibility to uphold noncitizens' constitutional protections, however, the Court also emphasized that "if Congress has made its intent in the statute clear, 'we must give effect to that intent.'"[114] As these opinions illustrate, Supreme Court decisions relating to immigration seem to assert the applicability of the Constitution and at times even assert the Court's authority to interpret constitutional requirements. However, when those rights may conflict with Congressional intent, the Court has functionally failed to protect noncitizens' constitutional rights, often not even acknowledging constitutional issues at stake.

Padilla v. Kentucky (2010)

In a departure from this long trend of refusal to consider the precepts underlying the plenary power doctrine, the Court gave some indication in *Padilla v. Kentucky* (2010) that it may reconsider the designation of immigration law as civil rather than criminal, an assumption that has persisted since *Fong Yue Ting*. In Padilla, the Court considered whether Padilla's attorney's mistaken advice that taking a plea in a criminal proceeding would not have immigration consequences constituted a violation of the Sixth Amendment's guarantee of effective assistance of counsel.

The Court's decision hinged upon its determination of whether deportation was, "merely a 'collateral' consequence of his conviction."[115] This distinction is meaningful because courts have generally found defendants entitled to constitutional protections of criminal proceedings when a consequence of a conviction is punitive rather than remedial and direct rather than collateral.[116] The Court ultimately ruled that, "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation."[117]

Justice Stevens wrote, "deportation as a consequence of a

criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence."[118] As Peter Markowitz explained, "we can understand the Court's inability to classify deportation as direct or collateral as a proxy for, or at a minimum strongly suggesting, a similar conclusion that deportation is neither purely civil, nor purely criminal."[119]

The opinion also contained strong language that suggested a willingness to reconsider the civil designation of deportation proceedings. Justice Stevens' opinion chronicled the progressive overlap between criminal and immigration law as well as the increasingly automatic immigration consequences of criminal convictions. He wrote:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation … Although removal proceedings are civil in nature … deportation is nevertheless intimately related to the criminal process … Importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus we find it "most difficult" to divorce the penalty from the conviction in the deportation context.[120]

Though the Court's ruling in Padilla does not directly affect the due process protections afforded noncitizens, it suggests a willingness to reconsider some of the assumptions that have persisted in constitutional immigration law since the early immigration cases, a willingness that is a significant departure from a long history of extreme deference in constitutional immigration law.

DEVELOPMENT OF THE CONSTITUTIONAL DOCTRINE ON IMMIGRATION

Constitutional law governing the immigration adjudication system reflects "two different ideological threads: the one deny-

ing that a society owes aliens any obligation to which it does not consent, the other affirming the existence of certain obligations to aliens owed simply by reason of their humanity."[121] Since *Yamataya*, the Court has consistently and strongly asserted that noncitizens may claim protection under the Due Process Clause by virtue of their personhood. However, the Court has consistently deferred to Congress in interpreting the scope of noncitizens' constitutional protections in immigration proceedings, often citing different obligations to noncitizens. Under this doctrine, a tension has developed between the Court's assertion of constitutional protections and its unwillingness to interpret those constitutional protections in any way that may conflict with Congressional intent in regulating immigration. The result is an approach to interpretation of immigration law best understood as "a constitutional oddity."[122]

Changes in immigration law and policy since the 1980s have brought to light the implications of such a doctrine, as the assertion that "deportation is not punishment" has become an increasingly unreasonable justification for the Court's refusal to meaningfully protect noncitizens' due process claims in immigration proceedings. The Court may argue that since deportation is not punishment, noncitizens' due process protections are sufficiently protected even despite the Court's deference. However, the discrepancy between the Court's interpretation of due process in immigration proceedings and in other cases where increasingly similar interests are at stake undermines this assertion.

As trends toward the criminalization of immigration continue to intensify, the implications of the Supreme Court's unique deference in constitutional immigration law are increasingly exposed. Most notably, should the Supreme Court acknowledge—as Stevens' opinion in *Padilla* indicated some willingness to do—that deportation is punishment, the Court would be forced to explain allowing for drastically different procedural protections in admittedly similar circumstances.

EVALUATING ARGUMENTS FOR JUDICIAL DEFERENCE IN IMMIGRATION CASES

The proper role of courts in a democratic society has long been the subject of a philosophical debate that reflects deeply entrenched views about what constitutional democracy means. This paper does not attempt to argue for a particular role that courts should play in society or for a particular approach that the Supreme Court should adopt in interpreting the Constitution. Rather, this paper seeks to establish that the fact that a case relates to immigration should neither weaken the argument for judicial review nor fundamentally change the Court's approach to Constitutional interpretation.

The Court's arguments for deference in cases related to immigration have relied heavily on certain precepts about immigration law and policy that have remained largely unexamined since their introduction in the nineteenth century. First, constitutional law relating to immigration relies on an argument for deference that at times conflates arguments about interpretive authority with arguments about the correct interpretive approach. That argument characterizes immigration as meriting deference because of its relationship to national sovereignty and foreign relations. Second, constitutional law contends that deportation is not punishment. Recent changes in immigration law and policy, however, have undermined the plausibility of these precepts.

PLENARY POWER AND THE ARGUMENT AGAINST JUDICIAL REVIEW

Early Supreme Court cases framed immigration in terms of national sovereignty and foreign relations to justify the restriction of judicial review.[123] Arguments that the Supreme Court should not have interpretive authority over immigration matters have been widely criticized and implicitly rejected by the Court itself, as it has resolved constitutional questions of immigration matters.[124] Nonetheless, the reasons initially given for restricting judicial re-

view merit evaluation because they are still invoked to explain judicial deference in constitutional immigration law.

The two central arguments for restricting judicial review are immigration law's connection to foreign relations and to national sovereignty.[125] Though the Court has not clearly articulated what about these cases merits special deference, one account of the foreign relations argument suggests that the Court owes special deference in immigration cases because immigration decisions "operat[e] on the subject of a foreign state,"[126] and the Court should not interfere with government relations with that state through a decision about the immigration status of that state's subject.[127]

Even taking as a premise the unexplained claim that all cases relating to foreign relations merit special judicial deference, this argument identifies cases that should be shielded from judicial review at once too broadly and too narrowly. Not all cases relating to immigration affect foreign relations. Although the United States' treatment of refugees arriving at its border may have foreign relations implications, a long-term resident alien deported following a criminal conviction for an offense committed within the territorial United States would not likely raise foreign relations concerns. Additionally, many cases that *are* subject to judicial review, such as foreign nationals' criminal cases, do have clear foreign relations implications. Similarly, the Constitution provides for judicial review of "cases arising under treaties, disputes between an American state or its citizens, and even cases affecting ambassadors,"[128] all instances in which foreign relations concerns do arise.

In *Hamdi v. Rumsfeld* (2004), the Court upheld the due process claims of an American citizen captured in Afghanistan and labeled an enemy combatant. Justice O'Connor wrote, "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[129] In this case, the government claimed that the authority to detain Hamdi under the Authorization for Use of Military Force, which "empower[ed] the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determined "planned,

authorized, committed, or aided" in the September 11, 2001 al Qaeda terrorist attacks."[130] Foreign relations were directly implicated in the case, yet the Court did not seem to approach this case with special deference.

Though this contradiction suggests that a foreign relations concern may not be the complete justification for restricting judicial review, one possible response could be that erring on the side of non-interference with foreign relation cases is preferable to erring on the side of preserving judicial review despite possible foreign relations concerns. However, the Court need not categorize all immigration cases in the same way. The Court could, as Legomsky suggests, balance foreign relations concerns in a particular case against individual rights at issue.[131] This overbroad categorization of immigration cases as relating to foreign relations is also an increasingly less accurate picture of immigration proceedings as the number of crime-related immigration cases has risen dramatically over the past twenty years.

The other argument for restricting judicial review is national sovereignty.[132] Sovereignty, so the argument goes, "entail[s] the unlimited power of the nation … to decide whether, under what conditions, and with what effects it would consent to enter into a relationship with a stranger."[133] However, as Gerald Neuman points out:

> One can readily agree that the sovereignty and independence of the United States would be impaired if other nations could unilaterally force it to accept or retain their citizens without its consent. But … in the postwar era, international human rights norms may impose limits on a nation's discretion to expel or exclude aliens. Sovereignty is a more relativized concept today and absolute control over the movement of persons in its territory is no longer regarded as a necessary ingredient of sovereignty.[134]

Sovereignty is an even less compelling explanation for judicial deference in cases of removal on the grounds of post-entry conduct. In these cases, the nation has already entered into a relationship with and assumed certain obligations to a noncitizen. Moreover, even accepting the unlikely proposition that all immigration cases directly

imply a threat to national sovereignty does not explain why that relationship to sovereignty should preclude judicial review. Judicial review suggests a requirement of adherence to the Constitution and does not necessarily preclude national ability to shape decisions about membership.

Furthermore, as Legomsky points out, the national sovereignty argument, like the foreign relations argument, bases a claim about the proper scope of judicial review on "the existence of an inherent, nonenumerated Congressional power [from which] the plenary power doctrine follows".[135] The Court's willingness to accept a nonenumerated Congressional power as the basis for restricting judicial review contradicts the Court's strong presumption for judicial review, a presumption illustrated by its willingness to review even cases in which Congress has a clear enumerated power.[136]

These two arguments against judicial review center on the dependence of self-determination and national autonomy on a government's ability to make decisions and take action. However, the arguments largely fail to discuss how judicial review or a particular interpretive approach would undermine the government's capacity for self-determination. After all, the Supreme Court is an integral part of American government. These arguments seem to suggest an unarticulated argument for a different balance of power between branches of government when certain interests are at stake.

Although constitutional authority for judicial review is at times contested, the authority of the Supreme Court to interpret the requirements of the Constitution has emerged as a definitional feature of American federalism. If immigration merits a departure from this system, the precise boundaries and nature of the reasons for this departure should be clearly articulated. Failing to articulate these reasons seems to disregard the historical and philosophical reasons for affording the Supreme Court judicial review.

ADDITIONAL ARGUMENT FOR JUDICIAL DEFERENCE

In constitutional immigration law, previously discussed arguments for deference tend to invoke the explanations relating to

national sovereignty or foreign relations that were originally used as arguments for restricting interpretive authority. Since immigration is a subset of administrative law, arguments for deference have also been drawn from general arguments for deference invoked in administrative law.

When agency decisions that do not clearly implicate constitutional requirements are at issue, the *Chevron* doctrine counsels deference to "reasonable agency interpretations of ambiguous statutory provisions, even if the court disagrees with those interpretations."[137] Since the Executive Office for Immigration Review (EOIR) is an administrative agency under the authority of the Department of Justice, *Chevron* has been invoked to call for Court deference to agency decisions regarding immigration law.

Chevron's importance in administrative law derives not only from the Court's ruling for a fairly strong presumption of deference toward agency interpretations but also from "Justice Stevens' broad articulation of the reasons judges should defer."[138] William Eskridge explains:

> Most originally [Stevens claimed that] agencies are relatively more legitimate policy-balancers than courts, because the executive branch is more 'directly accountable to the people.' Thus, when Congress (the most accountable branch) has not directly addressed the issue, and the agency has filled the statutory gap in a reasonable way, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.[139]

Deference under the *Chevron* doctrine is also "often defended on the ground that administrative agencies have greater expertise … than courts."[140] Even these arguments for deference to agency interpretations are extremely weak in the context of immigration court, particularly given recent changes in immigration law and policy.

The structure of immigration courts and the selection process of immigration judges do not suggest that immigration courts would have greater expertise that should merit deference. Immigration judges were "special inquiry officers" with the INS until their

adjudicatory function was transferred to the EOIR in 1983.[141] They are not members of the judicial branch,[142] nor are they strictly considered administrative law judges, as administrative law judges are required to pass an administrative judge examination to qualify for the position.[143] The Appleseed Network reported in 2009 that 56 percent of immigration judges had a prior job defined as adversarial to immigrants, including "INS/DHS Trial Attorneys, Office of Immigration Litigation attorneys, special Assistant United States Attorneys, border patrol lawyers, and other similar positions," and another 24 percent of immigration judges had other prior government jobs.[144]

Additionally, a unique feature of immigration court presents a stronger reason against judicial deference in the interpretation of agency decisions. The "supervision of an adjudicative body by a prosecuting official runs counter to the APA philosophy that governs other administrative proceedings."[145] Yet a scenario in which both the immigration judges and ICE operate under the authority of the DOJ has been allowed in immigration periods. In fact, "immigration judges are appointed by the Attorney General and act under his control and supervision."[146] Despite the fairness, the APA's philosophy reflects an understanding of the potential costs of allowing supervision of an adjudicating body by prosecuting officials. Given the potential for abuse in such a situation, judicial deference seems less desirable than in other areas of administrative law. Moreover, the sharp criticism of the immigration courts from the judiciary in recent years has undermined the plausibility of the argument that immigration courts have expertise that merits deference.

Given these strains on arguments for deference to agency decisions, arguments that are consistent across different areas of administrative law, any argument for special deference in constitutional immigration law seems even less plausible.

ARGUMENTS AGAINST JUDICIAL DEFERENCE IN IMMIGRATION CASES

The consequences of employing such a different approach to the interpretation of constitutional requirements into one area of law raises challenging moral questions. As Kanstroom points out, an overwhelmingly deferential approach to judicial review of enforcement legislation targeting certain racial or ethnic groups illustrates the reasons why judicial review is revered as central to the preservation of American constitutional democracy.[147]

Though there are many different theories about the proper scope of judicial review and the proper interpretive approach the Court should adopt, one philosophical tradition holds that the Court should have a role in ensuring the protection of minority rights and voice in the political process. This view is reflected in the interpretive approach based on Justice Stone's famous footnote four in *United States v. Carolene Products Co.*, in which he asked, "whether prejudice against discrete and insular minorities may be a special condition, which tends generally to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[148] From such a perspective, noncitizens in immigration proceedings would, if anything, be strong candidates for more, rather than less, searching judicial inquiry, since the lack of the right to vote limits noncitizens' capacity to correct against discrimination through political processes.

Furthermore, changes in immigration law and policy—particularly the increased use of immigration detention—strengthen the argument that noncitizens in immigration proceedings may be considered a discrete and insular minority. As noncitizens in immigration proceedings are increasingly removed from normal societal interactions through detention, they arguably become more vulnerable to discrimination and less likely to be able to effectively assert their rights. Additionally, Stephen Legomsky suggests that, "aliens' relative lack of familiarity with the legal system, the language, and the customs" may undermine their ability to participate in the po-

litical process,[149] creating precisely the type of circumstance that drives concern for protecting the interests of discrete and insular minorities.

John Hart Ely has advanced the clearest theoretical justifications for what he calls a "representation-reinforcing, participation-oriented approach to judicial review,"[150] similar to the approach outlined in footnote four. Ely argues that the Constitution itself supports this approach and that the approach is "entirely supportive of, the underlying premises of the American system of representative democracy."[151] This approach also "involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials."[152]

While the argument from the text of the Constitution has no special applicability to immigration cases, the argument about the court's capacity emphasizes why judicial deference is less desirable in immigration cases. As Ely points out, "lawyers are experts in process writ small, the processes by which facts are found and contending parties are allowed to present their claim."[153] Since procedural rights are central in constitutional immigration law, the Court's expertise in process may justify judicial review in immigration cases.

One response may be that Ely's argument was constructed with reference to citizens, and since noncitizens do not have comparable rights to political participation, Ely's concern with potential restrictions on participatory rights would not apply. However, affording noncitizens due process rights at all reflects recognition that these rights should not be contingent upon political participation.

PUNISHMENT

The Court has historically invoked the claim that "deportation is not punishment" to resolve tensions created by its uniquely deferential approach to constitutional interpretation of immigration cases. Since deportation is not punishment, so the argument goes, noncitizens are not owed the same procedural protections

afforded those in the criminal justice system. That this claim has become less plausible illustrates the dangers associated with employing a uniquely deferential interpretive approach in one area of constitutional law.

Firstly, deportation and immigration detention are experienced as punishment. As Judge Sarokin emphasized in a 1996 opinion:

> The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality, especially in the context of this case. Mr. Scheidemann entered this country at age twelve; he has lived here for thirty-six years; he has been married to an American citizen for twenty-four years; he has raised three children all of whom are American citizens; his elderly parents are naturalized American citizens; two of his four siblings are naturalized American citizens, and all four of them reside permanently in the United States; he has no ties to Colombia, the country to which he is to be deported; and he has fully served the sentence imposed on him. If deportation under such circumstances is not punishment, it is difficult to envision what is.[154]

Deported or detained noncitizens suffer significant harm due to the often degrading conditions in immigration detention facilities and the sometimes permanent, forced separation from friends, family, and community. Also, lawful permanent residents often accept harsher consequences in sentencing in criminal proceedings such as longer terms of incarceration or extensions of parole to avoid triggering negative immigration consequences.[155] Immigration consequences are often even directly considered by the court during sentencing in criminal proceedings, according to a Boston attorney specializing in immigration law and criminal defense.[156]

While the severity of the consequences in immigration proceedings leads noncitizens to experience and understand detention and deportation as punishment, severity of harm alone does not constitute punishment.[157] As Huge Bedau and Erin Kelly have explained, punishment "in its very conception is now acknowledged to be an inherently retributive practice."[158] Theories of punishment have ranged, as Bedau and Kelly discuss, from "deterrent effects of

punishment … [to] social defense through incarceration [to] retributivism."[159] Increasingly, American immigration law and policy have assumed these definitional features of punishment. In certain immigration cases, such as those in which a legal permanent resident is placed in removal proceedings following a conviction for an aggravated felony, the punitive intent seems clear.

Kanstroom provides a useful framework for understanding the different intent in different types of immigration cases by distinguishing between extended border control policy and post-entry social control enforcement.[160] While the extended border control model "implements basic features of sovereign power: the control of territory by the state and the legal distinction between citizens and noncitizens,"[161] post-entry social control imposes immigration penalties based on actions of noncitizens once admitted. As the legislation starting in the 1980s significantly accelerated the overlap between immigration and criminal law, the immigration system shifted away from the border control, regulatory model and toward the "post-entry social control" model, a model that strongly implies a punitive rather than remedial purpose for removal.

Certain immigration proceedings have also increasingly taken on a distinguishing philosophical purpose of punishment and, particularly, of incarceration: incapacitation. Incapacitation is present as an element of the current immigration adjudication system in two ways. Most literally, preventive detention, a "stapl[e] of the criminal justice system," is increasingly employed as a mechanism of incapacitation in immigration proceedings over the past twenty years.[162] At a more theoretical level, as Legomsky notes, criminal sentencing should reflect the desired "degree of retribution, deterrence, and incapacitation."[163] If one argues that immigration consequences are neither retributive nor deterrent, the best characterization of deportation for post entry crimes is as the country's "ridding [itself] of those noncitizens whose presence is undesirable."[164] Employing deportation to effectuate this judgment about desirability could be considered a form of incapacitation that operates by removing the offender from society.[165] Finally, the Department of Homeland Security describes noncitizens with criminal records

as "criminal aliens" who are among the "worst of the worst."[166] The expressive component of this labeling illustrates the retributive intent of immigration policy.

In explaining the conclusion that deportation is not punishment, courts have largely employed circular reasoning, pointing to the designation of immigration law as civil rather than criminal to justify continuing to categorize deportation or immigration detention as not-punishment.[167] Though the argument to consider immigration proceedings as punishment is certainly stronger in some cases than others, in many cases the Court's argument that deportation is not punishment has become untenable.

DEFERENCE AND CONSTITUTIONALISM

Although the Court gave some indication in *Padilla v. Kentucky* (2010) of willingness to reconsider the designation of deportation as non-punishment, the Court's treatment of immigration cases still largely reflects the deference embedded in the plenary power doctrine. Particularly given the changes in immigration law and policy in recent years, the claim that deportation is not a punishment has become a less convincing explanation for the divergence between the Court's assumptions about immigration and the reality experienced by hundreds of thousands of noncitizens in immigration proceedings each year.

The consequence of this divergence is a doctrine that nominally protects noncitizens' constitutional claims to due process protections but functionally fails to do so, effectively placing noncitizens who are in immigration proceedings outside the protection of the Constitution. Failure to meaningfully protect constitutional guarantees undermines the United States' claims of commitment to due process and constitutional democracy. Even though the Court's own explanations for definitions of due process in other areas of law apply with increasing force to immigration laws, the Court has continued to show striking deference in interpreting the scope of noncitizens' due process rights in immigration proceedings. For instance, the Court's explanation for finding a due process right to

government appointed counsel in criminal proceedings in *Gideon v. Wainwright* (1963) also applies to immigration proceedings. Justice Black wrote:

> In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him … That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.[168]

In immigration court, the government hires lawyers to prosecute DHS's case in an adversarial system, and defendants with the resources consistently hire an attorney. Statistical analyses have demonstrated different outcomes for those afforded legal counsel in immigration proceedings, further suggesting that the concern with fairness that motivated the Court to hold that due process required provision of an attorney in criminal proceedings is also relevant in immigration proceedings.

Furthermore, as Legomsky points out, "the reason for building such stringent procedural safeguards into the criminal justice system is that the consequences of criminal convictions are potentially so severe."[169] Yet, the consequences in immigration court increasingly mirror those in criminal court. Immigration detention has become more common, and most noncitizens in criminal proceedings would accept harsher penalties in criminal court in order to avoid immigration consequences.

The criminal justice and immigration adjudication systems in the United States serve different purposes and may legitimately provide for different procedural protections. However, as the reasons for requiring a certain procedure in one situation increasingly apply to the other, different circumstances seem to be a less compelling explanation for affording such different rights protections.

This tension at the intersection of constitutional and immigration law is ethically problematic because of its implications for constitutionalism as well as the historical and philosophical significance of procedural due process protections.

PROCEDURAL DUE PROCESS

The concept of procedural due process is inextricably linked to rule of law and constitutionalism. Anna Law suggests that, "the idea [of due process] also represents a value that derives directly from the roles and mission of legal institutions."[170] Putting aside questions of how due process would be interpreted, the idea of procedural protections against inappropriate exercise of government power resonates deeply in American society and ethics, thus reflecting a societal commitment to an ideal of fairness. Though procedural requirements do not guarantee against government taking a certain action, they reflect the understanding that the exercise of power is constrained by law that applies to all persons. For this reason, Larry May argues, "the idea of due process of law is recognized as the cornerstone of domestic legal systems … Due process rights thus bring deep-seated considerations against the arbitrary exercise of power into some kind of institutional structure, especially one that connects these moral ideas to legal practicalities."[171]

In American law, procedural due process restricts the government's ability to deprive persons of "life, liberty, or property" without first adhering to certain procedures designed to ensure that deprivation is not undue. Though the procedural protections due in a particular case may translate into different substantive guarantees in different cases, procedural protections reflect an underlying faith in law as a mechanism for protecting against fundamentally unfair government action. The Court's interpretation of due process is increasingly explained by the Court's judgments about the identity of the claimant—a noncitizen in immigration proceedings, for example—rather than by situational concerns associated with those proceedings. Determining that lesser procedural protections would be owed based on the claimant's identity rather than on situational concerns that may affect the likelihood of 'undue' government deprivation of life, liberty, or property contradicts the concern with basic fairness so intertwined with procedural due process.

Failure to meaningfully protect due process rights afforded noncitizens suggests a lesser concern with inappropriate govern-

ment violations of those persons' claims to life, liberty, or property, and even, arguably, a willingness to place these persons outside the law. The unacceptability of functionally stripping a person of rights deemed so important that they should be conferred by personhood is illustrated by Alexander Bickel's observation that, "It has always been easier, it always will be easier, to think of someone as a non-citizen than to decide that he is a non-person, which is the point of the *Dred Scott* case."[172] Denying legal protections associated with personhood violates deeply held notions about respect for human dignity and what democratic governments owe persons by virtue of their personhood.

DEPORTATION AND CONSTITUTIONAL DEMOCRACY

The rhetoric of moral desert in the discourse on immigration policy historically recognized legal status as marking the cleavage between the deserving and the undeserving. Throughout the 1980s and 1990s, however, this paradigm shifted, and documented residents with any criminal history were re-categorized as undeserving. As law increasingly targeted these criminal aliens, a divergence occurred between the procedural protections afforded in immigration proceedings and the similarity of these cases to criminal cases in the salient respects identified as meriting stronger procedural protection.

At the same time, the Supreme Court identified immigration law as different from other types of law. The plenary power doctrine was developed in the late nineteenth century, relying heavily on extra-constitutional arguments about the nature of immigration to justify special treatment of immigration law. Under the plenary power doctrine, early arguments for restricting judicial review were translated into a largely unexplained requirement for judicial deference. In an attempt to reconcile the tension between the claim that the Constitution protected noncitizens' due process rights and the ruling that the Court did not have the authority to interpret the scope of those constitutional requirements, the Court announced that deportation was not punishment. The Court de-

flected arguments of inappropriate deference to Congress and the executive by insisting that constitutional requirements in immigration proceedings were not being violated, no matter how narrowly other branches of government protected those requirements. After all, deportation was not punishment and did not merit comparable procedural protections to those afforded in criminal court. As the landscape of immigration law and policy has changed, however, this explanation has become increasingly implausible. The growing overlap between criminal and immigration law underscores the discrepancy between the Court's treatment of due process requirements in criminal and immigration cases. In this way, changes in immigration law and policy exacerbate internal tensions in the Court's interpretation of constitutional requirements in immigration cases.

These developments in immigration law and policy have pragmatic, legal, and moral concerns that are worthy of consideration. On a practical level, the immigration enforcement and adjudication system currently operates at massive cost to the government. Precisely what the goals of those two systems are and whether current policies allow for those systems to fulfill their intended purposes are debatable. In many instances, policies do not effectively fulfill their stated purposes. For example, if concern for public safety is the driving force behind the Obama administration's focus on apprehending and deporting criminal aliens, the administration should evaluate whether the massive costs associated with the enforcement of immigration laws is the most effective allocation of those funds. That the criminal justice system had already purportedly imposed a just penalty undercuts the idea that all noncitizens processed through the criminal justice system pose a threat to public safety.

Not only do the immigration enforcement and adjudication systems currently operate at massive cost to the government, they also cause massive suffering. Given the severity of the trauma of deportation or immigration detention, reasonable interpretations of the constitutional due process requirements suggest that fairly robust procedural protections must accompany any imposition of

those penalties. If certain procedural protections, such as the right to legal counsel, have been deemed necessary to ensure fundamental fairness in criminal court, failure to provide those protections in immigration proceedings—where comparable interests are at stake—suggests a lack of concern with the fundamental fairness of those proceedings.

A wide range of commentators on the ethics of immigration regulation accept the proposition that the United States has moral obligations to all persons, and particularly strong moral obligations to long-term permanent residents the state has accepted. That obligation, at a minimum, requires that the United States not impose harsh penalties without minimal procedural safeguards to protect against fundamentally unfair imposition of those penalties. Protection of noncitizens in immigration proceedings under the Due Process clause need not yield the same procedural protections in all cases or the same procedural protections as those afforded in criminal courts. However, in at least certain cases the United States has a moral obligation to afford noncitizens stronger procedural protections in immigration proceedings in order to protect the fundamental fairness of those proceedings. Different beliefs about American constitutional democracy may yield different judgments about the acceptability of the Court's deference. However, even those who believe the Court ought to show greater deference in all cases should accept the claim that the Court ought to give stronger reasons for interpreting one area of law so differently from others, if consistency and coherence are to be valued as conferring institutional legitimacy.

This notion of limits on the exercise of coercive government power is central to the American constitutional democracy, and while reasonable people may disagree about the proper scope of those limits, most accept that procedural protections against government impositions on fundamental interests form a baseline of what is constitutionally required. From this perspective, the Supreme Court, as the branch of government historically charged with interpreting the scope of constitutional limits on the exercise of government power, has a strong duty to at a minimum protect

the procedural rights of the "12.4 million permanent residents and 1.7 million legal temporary migrants"[173] in the United States as of March 2010.

Notes

1. U.S. ex rel. Klonis v. Davis 13 F.2d 630, C.A.2 (1926).
2. Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," *American University Law Review* 56:2 (2006): p. 376.
3. Throughout this thesis, the term "constitutional immigration law" will be used to refer to constitutional law governing immigration adjudication procedures. The term is not intended to encompass all possible constitutional claims that immigrants may advance.
4. Michael Walzer, "What Does it Mean to be an 'American?'" *Social Research* vol. 71 no. 3 (2004), p. 634.
5. Stephen H. Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms," *Washington & Lee Law Review*, vol. 469 (2007): p. 472.
6. Douglas S. Massey, *Categorically Unequal : The American Stratification System* (New York : Russell Sage Foundation, 2007), p. 136.
7. Stumpf, "The Crimmigration Crisis," p. 384.
8. Ira J. Kurzban, "Democracy and Immigration," in David C. Brotherton and Philip Kretsedemas, eds., *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today* (New York: Columbia University Press, 2008), p. 64.
9. U.S. Citizenship and Immigration Service, "Immigration Act of 1990," USCIS website, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=84ff95c4f635f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD
10. Legomsky, "The New Path of Immigration Law," p. 478.
11. William F. McDonald, "Crime and Illegal Immigration: Emerging Local, State, and Federal Partnerships," *National Institute of Justice Journal*, vol. 232 (1997): p. 6.
12. Socheat Chea, "The Evolving Definition of an Aggravated Felony," Findlaw, http://library.findlaw.com/1999/Jun/1/126967.html
13. Ibid.
14. Sara A. Martin, "Postcards From the Border," *Boston College Third World Law Journal* 19 (1998–1999): p. 694.
15. Legomsky, "The New Path of Immigration Law," p. 477.
16. Andrew Moore, "Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity," *Georgetown Immigration Law Journal*, vol. 22 (2007–2008): pp. 667–668.
17. Nancy Morawetz, "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms," *Harvard Law Review*, vol. 113 no. 8 (2000): "Understanding the Impact," p. 1946.
18. Zoe Lofgren, "A Decade of Radical Change in Immigration Law: An Inside Perspective," *Stanford Law & Policy Review* vol. 16 no. 2 (2005): p. 358.
19. Martin, "Postcards From the Border," p. 699.
20. Ibid., p. 700.
21. Martin, "Postcards From the Border," p. 700.
22. Ibid.
23. Ronald J Tasoff, "Short Summary of the New Immigration Law," Findlaw, http://library.findlaw.com/1996/Dec/1/126303.html

24. Massey, *Categorically Unequal*, p. 148.

25. Kurzban, "Democracy and Immigration," p. 66.

26. Donald S. Dobkin, "Court Stripping and Limitations on Judicial Review of Immigration Cases," *The Justice System Journal* vol. 28 (2007): p. 106.

27. Philip Kretsedemas and David C. Brotherton, "Conclusion: Immigration Reform at a Crossroads," in *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today*, eds. David C. Brotherton and Philip Kretsedemas (New York: Columbia University Press, 2008), p. 378.

28. Maureen Sweeney, "Fact or Fiction: The Legal Construction of Immigration Removal for Crimes," *Yale Journal on Regulation,* vol. 27 no. 1 (2010): p. 63.

29. Kurzban, "Democracy and Immigration," pp. 63–64.

30. Tamara K. Nopper, "Why Black Immigrants Matter," in *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today*, eds. David C. Brotherton and Philip Kretsedemas (New York: Columbia University Press, 2008), p. 211.

31. Stephen H. Legomsky and Cristina M. Rodríguez, *Immigration and Refugee Law and Policy 5th Edition* (New York: Foundation Press: Thomson Reuters, 2009), p. 2.

32. Kathrin S. Mautino, "Law Watch: More on Organizational Changes," *Journal of Immigrant Health,* vol. 5 no. 4 (2003): p. 141.

33. U.S. Department of Homeland Security, "One Team, One Mission, Securing Our Homeland. U.S. Department of Homeland Security Strategic Plan Fiscal Years 2008–2013," p. 3.

34. Jennifer M. Chachón, "A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights," *Duke Law Journal*, vol. 59 (2010): pp. 157–1572.

35. Ibid.

36. Stumpf, "The Crimmigration Crisis" p. 389.

37. Aarti Kohli, Peter Markowitz, and Lisa Chavez. "Secure Communities by the Numbers: An Analysis of Demographics and Due Process," Research Report released by The Chief Justice Earl Warren Institute on Law and Social Policy, (October 2011), p. 1. http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

38. ACLU of Massachusetts, "Detention and Deportation in the Age of ICE: Immigrants and Human Rights in Massachusetts," (2008), p. 5.

39. Erik Camayd-Freixas. "Raids, Rights, and Reform: The Postville Case and the Immigration Crisis," *DePaul Journal for Social Justice*, vol. 2 no. 1 (2008): p. 10.

40. Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge: Harvard University Press, 2007), p. 228.

41. Those six categorizes are listed in 8 C.F.R. §1003.1(e)(6); American Bar Association Commission on Immigration "Report to the House of Delegates." detentionwatchnetwork.org/files/ABA%20Due%20Process%20Resolution.pdf.

42. "Representing Immigration Clients in San Diego: A Manual for Pro Bono Advocates." Compiled by Sarah Paige for the American Bar Association's Immigration Justice Project, August 2010.

43. Shruti Rana, "'Streamlining' the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action," *Immigration & Nationality Law Review* vol. 30 (2009): p. 847.

44. Ibid, p. 832.

45. Kanstroom, *Deportation Nation*, p. 4.

46. Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006), p. 4.

47. U.S. Department of Homeland Security. "2009 Yearbook of Immigration Statistics," p. 95.

48. Ibid.
49. Legomsky, "The New Path of Immigration Law," p. 486.
50. Ibid.
51. Ibid.
52. Stumpf, "The Crimmigration Crisis" p. 386.
53. Subhash Kateel and Aarti Shahani, "Freedom for Families," in *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today*, ed. David C. Brotherton and Philip Kretsedemas. (New York: Columbia University Press, 2008), p. 260.
54. Julia Preston, "Deportations From U.S. Hit a Record High," *The New York Times*, October 6, 2010, http://www.nytimes.com/2010/10/07/us/07immig.html?ref=juliapreston.
55. Chachón, "A Diversion of Attention?" p. 1565.
56. U.S. Department of Homeland Security, "2009 Yearbook of Immigration Statistics," p. 95.
57. Mark Dow, "Designed to Punish: Immigrant Detention and Deportation," *Social Research*, vol. 74 (2007): p. 535.
58. Constitution Project, "Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings" (2009), p. 21, www.constitutionproject.org/pdf/359.pdf.
59. Anil Kalhan, "Rethinking Immigration Detention," *Columbia Law Review Sidebar*, vol. 110 (2010): p. 3.
60. Human Rights Watch, "Costly and Unfair: Flaws in U.S. Immigration Policy," (2010), p. 1, http://www.hrw.org/en/by-issue/publications/2366
61. Karen Tumlin, Linton Joaquin, and Ranjana Natarajan, "A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers," National Immigration Law Center, ACLU of Southern California, and Holland & Knight (2009), p. vi.
62. Ibid.
63. Amnesty International, "Jailed Without Justice: Immigration Detention in the USA," 2009, p. 39, www.amnestyusa.org/uploads/JailedWithoutJustice.pdf.
64. Tumlin, "A Broken System," p. vi.
65. Ibid.
66. "Lost in Detention," *Frontline*, October 19, 2011, PBS Online. October 24, 2011, http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/how-much-sexual-abuse-gets-lost-in-detention/.
67. Adam Cox, "Deference, Delegation, and Immigration Law," *The University of Chicago Law Review*, vol. 74 (2007): p. 1682.
68. Kanstroom, *Deportation Nation*, p. 238.
69. Cox, "Deference," p. 1680.
70. Fred SSALI v. Alberto R. GONZALES, 424 F.3d 556, C.A.7 (2005).

71. Sydenham B. Alexander, "A Political Response to Crisis in the Immigration Courts." *Georgetown Immigration Law Journal* vol. 21 (2006–2007), p. 12.
72. Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag. *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York: New York University Press, 2009), p. 44.
73. Anna O. Law, *The Immigration Battle in American Courts*, (Cambridge: Cambridge University Press, 2010), p. 30.
74. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (Cambridge: Harvard University Press, 1996), p. 14.
75. Stephen H, Legomsky and Cristina Rodríguez, *Immigration and Refugee Law and Policy* (Foundation Press, 2009), 5th Edition, p. 113.
76. Meredith K Olafson, "The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine," *Georgetown Immigration Law Journal*, vol. 13 (1998–1999): p.

433.

77. Ibid.

78. Gerald L. Neuman, "The Lost Century of American Immigration Law (1776–1875)," *Columbia Law Review* vol. 93, no. 8 (1993): p. 1834.

79. Ibid.

80. Chae Chan Ping v. U.S., 130 U.S. 581 (1889).

81. Nishimura Ekiu v. United States, 142 U. S. 651 (1892).

82. Ibid.

83. Ibid.

84. Fong Yue Ting v. United States, 149 U. S. 698 (1893).

85. Ibid.

86. Ibid.

87. Ibid.

88. Legomsky and Rodríguez, *Immigration and Refugee Law and Policy*, p. 155.

89. Matthew J. Lindsay, "Immigration as Invasion," *Harvard Civil Rights-Civil Liberties Law Review*, vol. 45, no. 1: p. 3.

90. Fong Yue Ting v. United States, 149 U. S. 698 (1893), Brewer Dissent.

91. Ibid.

92. Fong Yue Ting v. United States, 149 U. S. 698 (1893), Field Dissent.

93. Ibid., Brewer Dissent.

94. Yamataya v. Fisher, 189 U.S. 86 (1903).

95. Ibid.

96. Ibid.

97. Wong Wing v. United States, 163 US 228 (1896).

98. "Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?" Harvard Law Review, vol. 116, no. 6 (2003): p. 1868

99. Demore v. Kim, 538 US 510 (2003).

100. Zadvydas v. Davis, 533 US 678 (2001).

101. Wong Yang Sun v. McGrath, 339 U. S. 33 (1950).

102. Ibid.

103. Kanstroom, *Deportation Nation*, p. 174.

104. Marcello v. Bonds, 349 US 302 (1955).

105. Ibid.

106. Kanstroom, *Deportation Nation*, p. 178.

107. Ibid.

108. Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289 (2001).

109. Ibid.

110. Legal Information Institute, "Carachuri-Rosendo v. Holder," Cornell University Law School, http://topics.law.cornell.edu/supct/cert/09-60.

111. Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010).

112. Ibid.

113. Zadvydas v. Davis, 533 US 678 (2001).

114. Ibid.

115. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

116. Sweeney, "Fact or Fiction", p. 52.

117. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

118. Ibid.

119. Peter L Markowitz, "Deportation is Different," Cardozo Legal Studies

Research Paper No. 308 (2010), p. 34, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666788##

120. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

121. Peter H. Schuck, "The Transformation of Immigration Law," *Columbia Law Review*, vol. 84 no. 1 (1984): p. 7.

122. Stephen H. Legomsky, "Ten More Years of Plenary Power: Immigration Congress, and the Courts," *Hastings Constitutional Law Quarterly*, vol. 22 (1995): p. 937.

123. Chae Chan Ping v. U.S., 130 U.S. 581 (1889).

124. Zadvydas v. Davis, 533 US 678 (2001), INS v. St Cyr .

125. Fong Yue Ting v. United States, 149 U. S. 698 (1893).

126. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," p. 262.

127. Ibid.

128. Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America*, (New York : Oxford University Press, 1987), p. 310.

129. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

130. Ibid.

131. Legomsky, *Immigration and the Judiciary*, p. 313.

132. Nishimura Ekiu v. United States, 142 U. S. 651 (1892)

133. Schuck, "The Transformation of Immigration Law," p. 6.

134. Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton: Princeton University Press, 1996), pp. 120–121.

135. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," p. 273.

136. Ibid., p. 275.

137. Cox, "Deference, Delegation, and Immigration Law," p. 1671.

138. William N. Eskridge and Lauren E. Baer, "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan," *The Georgetown Law Journal*, vol. 96 (2008): pp. 1067–68.

139. Ibid., pp. 1086–87.

140. Cox, "Deference, Delegation, and Immigration Law," p. 1682.

141. Stephen H. Legomsky, "Deportation and the War On Independence," *Cornell Law Review*, vol. 91 (2006), p. 372.

142. Benedetto, "Crisis on the Immigration Bench: An Ethical Perspective," p. 475.

143. Ibid., p. 477.

144. Appleseed, "Assembly Line Injustice," (May 2009), p. 8, http://www.appleseednetwork.org/bPublicationsb/RecentReports/tabid/522/Default.aspx..

145. Legomsky, *Immigration and the Judiciary*, p. 286.

146. Benedetto, "Crisis on the Immigration Bench: An Ethical Perspective," p. 478.

147. Kanstroom, *Deportation Nation*, p. 232.

148. United States v. Carolene Products Co., 304 U.S. 144 (1938).

149. Legomsky, *Immigration and the Judiciary*, p. 300.

150. John Hart Ely. *Democracy and Distrust* (Cambridge: Harvard University Press, 1890), p. 87.

151. Ibid.

152. Ibid., p. 88.

153. Ibid., p. 102.

154. Sheidemann v. INS, 83 F. 3d 1517, C.A.3 (1996). (Sarokin, J.

concurring).

155. Sweeney, "Fact or Fiction," p. 50.

156. Masferrer, Eduardo. Personal Interview. October 7, 2011.

157. Legomsky, "The New Path of Immigration Law," p. 513.

158. Hugo Adam Bedau and Erin Kelly, "Punishment," *The Stanford Encyclopedia of Philosophy* (Spring 2010 Edition), ed. Edward N. Zalta, http://plato.stanford.edu/archives/spr2010/entries/punishment/

159. Ibid.

160. Kanstroom, Deportation Nation, p. 5.

161. Ibid.

162. Legomsky, "The New Path of Immigration Law," p. 471.

163. Ibid., p. 519.

164. Ibid.

165. Ibid., p. 520.

166. Sweeney, "Fact or Fiction," p. 85.

167. Legomsky, "The New Path of Immigration Law," p. 512.

168. Gideon v. Wainwright, 372 U.S. 335 (1963).

169. Legomsky, "The New Path of Immigration Law," p. 473.

170. Law, *The Immigration Battle*, p. 189.

171. Larry May, *Global Justice and Due Process* (Cambridge: Cambridge University Press, 2011), p. 17.

172. Alexander M. Bickel, *The Morality of Consent*, (New Haven: Yale University Press, 1975), p. 54.

173. Jeffrey S. Passel and D'Vera Cohn. "Unauthorized Immigrant Population: National and State Trends, 2010," Washington, DC: Pew Hispanic Center, February 1, 2011, p. 9.

Bibliography

ACLU of Massachusetts. "Detention and Deportation in the Age of ICE: Immigrants and Human Rights in Massachusetts." 2008.

Alexander, Sydenham B. "A Political Response to Crisis in the Immigration Courts." *Georgetown Immigration Law Journal* vol. 21 (2006–2007): pp. 1–59.

American Bar Association Commission on Immigration "Report to the House of Delegates." *detentionwatchnetwork.org/files/ABA%20Due%20Process%20Resolutio.pdf.*

Amnesty International. "Jailed Without Justice: Immigration Detention in the USA." 2009. *www.amnestyusa.org/uploads/JailedWithoutJustice.pdf.*

Appleseed Network. "Assembly Line Injustice". May 2009. http://www.appleseednetwork.org/bPublicationsb/RecentReports/tabid/522/Default.aspx.

Benedetto, Michele. "Crisis on the Immigration Bench: An Ethical Perspective." *Brooklyn Law Review* vol. 73 no. 2 (2008): pp. 467–523.

Bickel, Alexander M. *The Morality of Consent*. New Haven: Yale University Press, 1975.

Carens, Joseph H. "The Case for Amnesty: Time Erodes the State's Right to Deport." *Boston Review* vol. 34, no. 3 (May/June 2009): pp. 7–10. http://bostonreview.net/BR34.3/carens.php.

Camayd-Freixas, Erik. "Raids, Rights, and Reform: The Postville Case and the Immigration Crisis." *DePaul Journal for Social Justice* vol. 2 no. 1 (2008): pp. 1–24.

Chachón, Jennifer M. "A Diversion of Attention? Immigration Courts and the Adjudication

of Fourth and Fifth Amendment Rights." *Duke Law Journal* vol. 59 (2010): pp. 1563–633.

Chea, Socheat. "The Evolving Definition of an Aggravated Felony." Findlaw. http://library.findlaw.com/1999/Jun/1/126967.html.

Cohen, Elizabeth F. *Semi-citizenship in Democratic Politics*. Cambridge: Cambridge University Press, 2009.

Cole, David. "In Aid of Removal: Due Process Limitations on Immigration Detention." *Emory Law Journal* vol. 51 (2002): pp. 1003–40.

Constitution Project. "Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings." 2009. http://*www.constitutionproject.org/pdf/359.pdf*.

Cox, Adam. "Citizenship, Standing, and Immigration Law." *California Law Review* vol. 92 no. 2 (2004): pp. 373–423.

_____. "Deference, Delegation, and Immigration Law." *The University of Chicago Law Review* vol. 74 (2007): pp. 1671–687.

Detention Watch Network, "Conditions in Immigration Detention." 2008. http://www.detentionwatchnetwork.org/node/2383.

Dobkin, Donald S. "Court Stripping and Limitations on Judicial Review of Immigration Cases." *The Justice System Journal* vol. 28 (2007): pp. 104–08.

Dow, Mark. "Designed to Punish: Immigrant Detention and Deportation." *Social Research* vol. 74 no. 2 (2007): pp. 533–546.

Dworkin, Ronald. *Freedom's Law : the Moral Reading of the American Constitution*. Cambridge: Harvard University Press, 1996.

Ely, John Hart. *Democracy and Distrust*. Cambridge: Harvard University Press, 1890.

Eskridge, William N. and Lauren E. Baer. "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan." *The Georgetown Law Journal*. vol. 96 (2008): pp. 1083–226.

Gelernt, Lee. "The 1996 Immigration Legislation and the Assault on the Courts." *Brooklyn Law Review* vol. 67 (2001–2002): pp. 455–77.

Human Rights Watch. "Costly and Unfair: Flaws in U.S. Immigration Policy." 2010. http://www.hrw.org/sites/default/files/reports/usimmigration0510webwcover.pdf.

Hutchinson, Edward P. *Legislative History of American Immigration Policy, 1798–1965*. Philadelphia: University of Pennsylvania Press, 1981.

"Immigration." *This American Life*. Chicago: Chicago Public Radio. October 13, 2000. http://www.thisamericanlife.org/radio-archives/episode/170/immigration.

"Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?" *Harvard Law Review* vol. 116 no. 6 (2002–2003): pp. 1868–888.

Kalhan, Anil. "Rethinking Immigration Detention." *Columbia Law Review Sidebar* vol. 110 (2010): pp. 42–58.

Kanstroom, Daniel. *Deportation Nation: Outsiders in American History*. Cambridge: Harvard University Press, 2007.

Kanstroom, Daniel. "Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases." *Harvard Law Review* vol. 113 no. 8 (2000): pp. 1890–1935.

_____. "Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?" *Stanford Journal of Civil Rights & Civil Liberties* vol. 3 no. 2 (2007): pp. 195–232.

Kateel, Subhash and Aarti Shahani. "Freedom for Families." In *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today*, edited by David C. Brotherton and Philip Kretsedemas, pp. 258–90. New York: Columbia University Press, 2008.

Kohli, Aarti, Peter Markowitz, and Lisa Chavez. "Secure Communities by the Numbers: An Analysis of Demographics and Due Process," Research Report released by The Chief Justice Earl Warren. Institute on Law and Social Policy. October 2011. http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

Kretsedemas, Philip and David C. Brotherton. "Conclusion: Immigration Reform at a Crossroads." In *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today*, edited by David C. Brotherton and Philip Kretsedemas, pp. 365–378. New York: Columbia University Press, 2008.

Kurzban, Ira J. "Democracy and Immigration." In *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today*, edited by David C. Brotherton and Philip Kretsedemas, pp. 63–75. New York: Columbia University Press, 2008.

Law, Anna O. *The Immigration Battle in American Courts*. Cambridge: Cambridge University Press, 2010.

Legal Information Institute. "Carachuri-Rosendo v. Holder." Cornell University Law School. http://topics.law.cornell.edu/supct/cert/09-60.

Legomsky, Stephen H. and Cristina M. Rodríguez. *Immigration and Refugee Law and Policy*. New York: Foundation Press : Thomson Reuters, 2009.

_____. "Deportation and the War On Independence." *Cornell Law Review 91* (2006): pp. 369–409.

_____. *Immigration and the Judiciary: Law and Politics in Britain and America*. New York: Oxford University Press, 1987.

_____. "Immigration Law and the Principle of Plenary Congressional Power." *The Supreme Court Review* (1984): pp. 255–307.

_____. "Ten More Years of Plenary Power: Immigration Congress, and the Courts." *Hastings Constitutional Law Quarterly* vol. 22 (1995): pp. 925–38.

_____. "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms." *Washington & Lee Law Review* vol. 469 (2007): pp. 467–528.

Lindsay, Matthew J. "Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power." *Harvard Civil Rights-Civil Liberties Law Review* vol. 45 (2010): pp. 1–56.

Lofgren, Zoe. "A Decade of Radical Change in Immigration Law: An Inside Perspective." *Stanford Law & Policy Review* vol. 16 no. 2 (2005): pp.. 349 – 378.

"Lost in Detention" *Frontline*. 19 Oct. 2011. PBS Online. 24 October, 2011 http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/how-much-sexual-abuse-gets-lost-in-detention/.

Markowitz, Peter L. "Deportation is Different." Cardozo Legal Studies Research Paper no. 308 (2010). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666788##.

Martin, Sara A. "Postcards From the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA." *Boston College Third World Law Journal* 19 (1998–1999): pp. 682–708.

Masferrer, Eduardo A. Personal Interview. October 7, 2011.

Massey, Douglas S. *Categorically Unequal : The American Stratification System*. New York: Russell Sage Foundation, 2007.

Mautino, Kathrin S. "Law Watch: More on Organizational Changes." *Journal of Immigrant Health* vol. 5 no. 4 (2003): pp. 141–42.

May, Larry. *Global Justice and Due Process*. Cambridge: Cambridge University Press, 2011.

McDonald, William F. "Crime and Illegal Immigration: Emerging Local, State, and Federal Partnerships." *National Institute of Justice Journal*. vol. 232 (1997): pp. 2–10.

Miller, Teresa A. "Blurring the Boundaries Between Immigration and Crime Control After September 11th." *Boston College Third World Law Journal* vol. 25 (2005): pp. 81–123.

Moore, Andrew. "Criminal Deportation, Post-Conviction Relief and the Lost Cause of

Uniformity." *Georgetown Immigration Law Journal* vol. 22 (2007–2008): pp. 665–714.
Morawetz, Nancy. "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms." *Harvard Law Review* vol. 113 no. 8 (2000): pp.1936 –962.
Neuman, Gerald L. *Strangers to the Constitution : Immigrants, Borders, and Fundamental Law.* Princeton: Princeton University Press, 1996.
_____. "The Lost Century of American Immigration Law (1776–1875)." *Columbia Law Review* 93 no. 8 (1993): pp.1833 – 901.
Ngai, Mae M. *Impossible Subjects : Illegal Aliens and the Making of Modern America.* Princeton: Princeton University Press, 2004.
Nopper, Tamara K. "Why Black Immigrants Matter." In *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today*, edited by David C. Brotherton and Philip Kretsedemas, pp. 204 –40. New York: Columbia University Press, 2008.
Olafson, Meredith K. "The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine." *Georgetown Immigration Law Journal* vol. 13 (1998–1999): pp.
433–53.
Passel, Jeffrey S. and D'Vera Cohn. "Unauthorized Immigrant Population: National and State Trends, 2010." Washington, DC: Pew Hispanic Center, February 1, 2011.
Preston, Julia. "Deportations From U.S. Hit a Record High." *The New York Times*, October 6, 2010.
http://www.nytimes.com/2010/10/07/us/07immig.html?ref=juliapreston.
Ramji-Nogales, Jaya, Andrew I. Schoenholtz, and Philip G. Schrag. *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform.* New York: New York University Press, 2009.
Rana, Shruti. "Streamlining' the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action." *Immigration & Nationality Law Review* vol. 30 (2009): pp. 715–79.
"Representing Immigration Clients in San Diego: A Manual for Pro Bono Advocates." Compiled by Sarah Paige for the American Bar Association's Immigration Justice Project. August 2010.
Schriro, Dora. "Immigration Detention Overview and Recommendations." *United States Department of Homeland Security* (2009).
http://www.lirs.org/atf/cf/%7Ba9ddba5e-c6b5-4c63-89de-91d2f09a28ca%7D/09_09%20DHS%20INTERNAL%20REPORT.PDF.
Schuck, Peter H. "Membership in the Liberal Polity: The Devaluation of American Citizenship." *Georgetown Immigration Law Journal* vol. 3 no. 1 (1989): p. 1–18.
_____. "The Transformation of Immigration Law." *Columbia Law Review* vol. 84 no. 1 (1984): pp. 1–90.
Siskin, Alison, and Ruth Ellen Wasem. "CRS Report for Congress: Immigration Policy on Expedited Removal of Aliens." Congressional Research Service (2005).
http://trac.syr.edu/immigration/library/P13.pdf.
Ssali, Fred v.Alberto R. Gonzales, 424 F.3d 556, United States Court of Appeals, Seventh Circuit (2005).
Stumpf, Juliet. "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power." *American University Law Review* vol. 56 no. 2 (2006), pp. 367–419.
Sweeney, Maureen. "Fact or Fiction: The Legal Construction of Immigration Removal for Crimes." *Yale Journal on Regulation* vol. 27 no. 1 (2010): pp. 47–89.
Tasoff, Ronald J. "Short Summary of the New Immigration Law." Findlaw.
http://library.findlaw.com/1996/Dec/1/126303.html.
Tumlin, Karen, Linton Joaquin, and Ranjana Natarajan. "A Broken System: Confidential

Reports Reveal Failures in U.S. Immigrant Detention Centers." National Immigration Law Center, ACLU of Southern California, and Holland & Knight, 2009.

U.S. Citizenship and Immigration Service. "Immigration Act of 1990." http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f6141765436d1a/?vgnextoid=84ff95c4f635f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD.

U.S. Customs and Border Patrol. "Border Patrol: Protecting the Homeland Video." http://nemo.cbp.gov/obp/BPcommercial_High.mpg.

U.S. Department of Homeland Security. "2009 Yearbook of Immigration Statistics, Office of Immigration Statistics." www.dhs.gov/files/statistics/publications/yearbook.shtm.

U.S. Department of Homeland Security. "Annual Report: Immigration Enforcement Actions: 2009." www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf.

U.S. Department of Homeland Security. "One Team, One Mission, Securing Our Homeland. U.S. Department of Homeland Security Strategic Plan Fiscal Years 2008–2013." www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf.

Walzer, Michael. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books, 1983.

Walzer, Michael. "What Does it Mean to be an 'American?'" *Social Research* vol. 71 no. 3 (2004): pp. 633–54.

Western, Bruce. *Punishment and Inequality in America*. New York: Russell Sage, 2006.