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## Canadian Immigration Law in the Face of a Volatile Politics

Colin Grey  
*Queen's University Faculty of Law*

Constance MacIntosh  
*Schulich School of Law, Dalhousie University*

Sarah Marsden  
*Thompson Rivers University Faculty of Law*

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## **Canadian Immigration Law in the Face of a Volatile Politics**

By Colin Grey,\* Constance MacIntosh\*\* and Sarah Marsden\*\*\*

The genesis of this special issue was a conference of Canadian immigration law scholars at the Université du Québec à Montréal in March 2018. Conference participants sought to look back on the many changes made to Canadian immigration law during the near-decade the Stephen Harper-led Conservative government spent in power (2006–2015). Although the Conservatives did not introduce a single, revamped immigration law—the major legislation remains the *Immigration and Refugee Protection Act*,<sup>1</sup> brought in under the Jean Chrétien-led Liberals (1992–2006) in 2002—they altered parts of the law nearly beyond recognition.<sup>2</sup> In this introduction, we reflect briefly on these changes; on what has come after, under Justin Trudeau’s Liberal government (2015–), which has employed a more welcoming rhetoric yet left most of its predecessor’s amendments in place; and on what may lie ahead as we approach a federal election in which immigration again promises to be an important issue.

Why, at a conference of legal scholars, the results of which are now published in a law journal, did we consider it apt to frame our discussion around the political parties that happen to hold power? Our answer is that it is nearly impossible to examine immigration law meaningfully without focusing on how the politics of immigration have changed and are changing, in Canada and globally. As those who teach and practice it are aware, immigration law evolves continuously; there is no such thing as an up-to-date syllabus. But the politics shift rapidly, too. And the political transformations shape the legal ones, and vice-versa. Thus, our opening premise is that to understand the law, you have to understand the politics. As will be evident throughout this special issue, a focus on both immigration law and politics allows us to do more than critique the decisions of a particular government: it makes visible the ways in which deeper dynamics between immigration law and politics persist even as governments change.

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\* Assistant Professor, Queen’s University Faculty of Law.

\*\* Viscount Bennett Professor of Law, Schulich School of Law, Dalhousie University.

\*\*\* Associate Professor, Thompson Rivers University Faculty of Law.

1. SC 2001, c 27 [IRPA].

2. As Ratna Omidvar has written elsewhere: “The immigration system has undergone a small revolution. The name, the *Immigration and Refugee Protection Act*, is merely the skin of an old system. Inside is a very different beast”: Ratna Omidvar, “The Harper Influence on Immigration” in Jennifer Ditchburn & Graham Fox, eds, *The Harper Factor: Assessing a Prime Minister’s Policy Legacy* (Montreal: McGill-Queen’s University Press, 2016) at 179.

It is not fruitful either to focus on the rhetoric of closure and fear of the Harper-led Conservatives or the rhetoric of openness and optimism of the Trudeau-led Liberals. Indeed, neither tells the whole story of either government. It is plausible to claim, as Donald Galloway writes in this issue, that Conservative immigration policies bore the imprint of “xenophobic ideologies which may, in turn, have been fertilized autopoetically by government laws and policies.”<sup>3</sup> But it is also plausible to claim that “for the most part, it is remarkable and laudable that the outlook of Harper’s Conservative Party remained liberal and pro-immigrant in a growing global anti-immigrant environment.”<sup>4</sup> After all, the Conservatives increased immigration numbers, continued to endorse multiculturalism, and assiduously courted suburban voters belonging to immigrant and minority communities as part of an “ethnic strategy” to target new Canadians whom they believed shared conservative values.<sup>5</sup> Similarly, it is obvious that the new Liberal government is “more temperate in its language.”<sup>6</sup> Yet it is also possible to criticize this government for leaving in place or merely tweaking many of the changes installed by its predecessor—including some of the most controversial—and for perpetuating the underlying structural dynamics that all too often render non-citizens vulnerable to oppression and unfreedom.

It is true that the Conservative government distinguished itself by going much further down certain policy roads.<sup>7</sup> The Conservative era brought a marked rise in temporary migration, both relative to permanent migration and in absolute terms.<sup>8</sup> Immigration policy underwent significant decentralization, devolving selection power to the provinces, territories or

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3. Donald Galloway, “Immigration, Xenophobia, and Equality Rights” (2019) 42:1 Dal LJ 17 at 22.

4. Omidvar, *supra* note 2 at 182. We refrain from evaluating the relative plausibility of these claims. Other attempts at evaluating the legacy of the Harper Conservatives in immigration include: Peter J Carver, “A Failed Discourse of Distrust Amid Significant Procedural Change: The Harper Government’s Legacy in Immigration and Refugee Law” (2016) 21:2 Rev Const Stud 209; Erin Tolley, “Political Players or Partisan Pawns? Immigrants, Minorities, and Conservatives in Canada” in JP Lewis & Joanna Everitt, *The Blueprint: Conservative Parties and Their Impact on Canadian Politics* (Toronto: University of Toronto Press, 2017) 102 at 112-16. As Paquet and Larios write, “Immigration policy changes implemented under this government have been hard to characterize because they moved in several directions—both restrictive and liberalizing—and used different discourses as justifications, from the idea of the economic contribution of immigrants to the trope of the “bogus” refugee claimant.” (see Mireille Paquet & Lindsay Larios, “Venue Shopping and Legitimacy: Making Sense of Harper’s Immigration Record” (2018) 51:4 Can J Political Science 817).

5. Tolley, *supra* note 4 at 112-116. See also Omidvar, *supra* note 2.

6. Galloway, *supra* note 3 at footnote 17.

7. Good overviews of the Conservatives’ immigration reforms include: Naomi Alboim & Karen Kohl, “Shaping the Future: Canada’s Rapidly Changing Immigration Policies” (October 2012), online (pdf): *Maytree Foundation* <maytree.com/wp-content/uploads/shaping-the-future.pdf> [perma.cc/H6N9-R67Y]; Lotf Ali Jan Ali, “Welcome to Canada? A Critical Review and Assessment of Canada’s Fast-Changing Immigration Policies,” (2014) RCIS Working Paper No 2014/6, online (pdf): *Ryerson Centre for Immigration and Settlement* <www.ryerson.ca/content/dam/rcis/documents/RCIS\_WP\_Ali\_Final.pdf> [perma.cc/66E8-66HL].

8. As Sarah Marsden notes in this issue. See also Alboim & Cohl, *supra* note 7, at 45-53; Ali, *supra* note 7, at 9-14.

to private actors.<sup>9</sup> The Conservatives radically transformed both the system for hearing refugee protection claims in Canada,<sup>10</sup> as well as the system for selecting economic immigrants, culminating in a new “Express Entry” system that includes a step in which applicants are selected by computer algorithm based on a regularly updated new “Comprehensive Ranking System.”<sup>11</sup> They expanded the grounds for losing citizenship and raised the bar for acquiring it.<sup>12</sup> Finally, as several authors in this special issue note, in selling this agenda the Conservatives often employed a vocabulary of suspicion toward refugee claimants as well as toward citizens to whom they seemed to impute dual loyalties. This manifested itself during the 2015 federal election, during which the Conservatives pledged to ban face coverings during citizenship ceremonies, a measure seen as targeting Muslim women, and to create a tip line for people to report “barbaric cultural practices.”<sup>13</sup> It also seems to be the case that the Liberals won in 2015 in part by capitalizing on the perception that the Conservatives had become excessively restrictive and, in particular, anti-Islamic in a way that enough Canadians saw as contrary to their values, as well as inhumane in the face of the surge in the numbers of refugees worldwide, particularly those from Syria.<sup>14</sup>

At the same time, however, many of the trends in law and policy that scholars and activists found noteworthy or troubling in the Conservative approach to immigration had begun under the Chrétien Liberals and have

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9. Alboim & Cohl, *supra* note 7 at 14-19; Ali, *supra* note 7 at 9; Sasha Baglay, “Provincial Nominee Programs: A Note on Policy Implications and Future Research Directions” (2012) 13:1 *J Intl Migration & Integration* 121.

10. Most notably in the *Balanced Refugee Reform Act*, SC 2010, c 8 [BRR] and the *Protecting Canada’s Immigration System Act*, SC 2012, c 17 [PCISA]. This aspect of the Conservatives’ immigration policy reforms has garnered the most attention. In addition to the papers by Hilary Evans Cameron and H el ene Mayrand in this issue, see Emily Bates & Jennifer Bond, “Troubling Signs: Mapping Access to Justice in Canada’s Refugee System Reform” (2015) 47:1 *Ottawa L Rev* 1; Angus Grant & Sean Rehaag, “Unappealing: An Assessment of the Limits on Appeal Rights in Canada’s New Refugee Determination System” (2016) 49:1 *UBC L Rev* 203; Idil Atak, Graham Hudson & Delphine Nakache, “‘Making Canada’s Refugee System Faster and Fairer’: Reviewing the Stated Goals and Unintended Consequences of the 2012 Reform” (2017) CARFMS/ACERMF Working Paper No. 2017/3, online: *Canadian Association for Refugee and Forced Migration Studies* <carfms.org/wp-content/uploads/2017/05/CARFMS-WPS-No11-Idil-Atak.pdf> [perma.cc/27T3-UMSJ].

11. In addition to the paper by Asha Kaushal in this issue, see Alboim & Cohl, *supra* note 7 at 21-27; Ali, *supra* note 7 at 3-14, 18-19; Carver, *supra* note 4 at 228-230.

12. For discussion of some of the reforms of the *Citizenship Act*, RSC 1985, c C-29, see Elke Winter, “(Im)possible citizens: Canada’s ‘citizenship bonanza’ and its boundaries.” (2014) 18:1 *Citizenship Studies* 46; for other discussions of the changes to the *Citizenship Act*, see Craig Forcece, “A Tale of Two Citizenships: Citizenship Revocation for ‘Traitors and Terrorists’” (2014) 39:2 *Queen’s LJ* 551.

13. Tolley, *supra* note 4 at 112.

14. *Ibid* at 122-123; Omidvar, *supra* note 2 at 184.

carried on under the Trudeau Liberals:<sup>15</sup> a focus on security, perhaps to the detriment of rights; an expanding overlap between criminal and immigration law; a growing number of legal tools and strategies developed to either discourage or prevent refugees from claiming protection, or to withdraw protection once granted; and an ongoing quest for greater flexibility for executive actors in the administration and promulgation of the rules of immigration law and policy. In other words, the continuities outweigh the discontinuities between the different governments. It was, after all, the Chrétien Liberals who signed the Safe Third Country Agreement, under which either Canadian or U.S. officials can return refugee claimants to the other country if they arrived there first. It is the Trudeau Liberals who are now renegotiating it in the face of large numbers of asylum seekers crossing into Canada from the United States.<sup>16</sup> Or, as H  l  ne Mayrand<sup>17</sup> notes in this issue, while the Liberals have been afforded the chance (through the private members' bill of an NDP MP), they have not acted to repeal a provision of the *IRPA* introduced by the Conservatives that leads to inadmissibility and the loss of permanent resident status for refugees who return to their home countries—even when such trips were undertaken before the new measure was put in place.<sup>18</sup> For her part, Constance Macintosh critiques a new Liberal policy aimed at barring fewer non-citizens from permanent residence on account of the health care costs they are likely to incur. She argues that by limiting, rather than eliminating, the health care bar “it is not that Canada has stopped discriminating, it is that Canada is now discriminating against a smaller number of people with disabilities or health conditions.”<sup>19</sup> Finally, the managerial ethos that birthed the new Express Entry system for economic-class immigrants at the end of the Conservative's last mandate is a direct descendant of the points system that originated under the Liberals in 1967. The new Liberal government, as Asha Kaushal writes in this issue, has continued to “refine” the system but otherwise left it in place.<sup>20</sup>

15. In 1998, Yasmeen Abu-Laban traced the beginning of a new Canadian immigration policy era to the early 1990s, when she said the politics of immigration in Canada moved away from a period in which there had been “a secure consensus over the general value of immigration” to one characterized by a greater emphasis on addressing security risks, admitting more “self-sufficient” immigrants, and reducing family immigration. This new era was largely ushered in under the Chr  tien liberals: Yasmeen Abu-Laban, “welcome/STAY OUT: The Contradiction of Canadian Integration and Immigration Policies at the Millenium” (1998) 30:3 *Can Ethnic Studies/  tudes ethniques au Can 190*; see also Yasmeen Abu-Laban, “Jean Chr  tien's Immigration Legacy” (2004) 9 *R   tudes const/Rev Const Stud* 133.

16. Michele Zilio & Adrian Morrow, “Canada, U.S. move to redraft border treaty to cut flow of asylum seekers,” *The Globe and Mail* (1 April 2019), online: <[www.theglobeandmail.com/politics/article-us-moves-to-open-talks-with-canada-on-asylum-seeker-treaty/](http://www.theglobeandmail.com/politics/article-us-moves-to-open-talks-with-canada-on-asylum-seeker-treaty/)> [perma.cc/C43E-YNL2].

17. H  l  ne Mayrand, “Quand voyager m  ne au renvoi : analyse critique de la l  gislation canadienne sur la perte du statut de r  sident permanent li  e    la perte de l'asile” (2019) 42:1 *Dal LJ* 183.

18. *IRPA*, s 46(1)(c.1). Under this provision, a permanent resident loses their status if their need for refugee protection is found to have ceased under *IRPA*, ss 108(1)(a) to (d) and 108(2) for such reasons as, for example, having “voluntarily reavailed themselves of the protection of their country of nationality.”

19. Constance Macintosh, “Medical Inadmissibility, and Physically and Mentally Disabled Would-be Immigrants: Canada's Story Continues” (2019) 42:1 *Dal LJ* 125 at 147.

20. Asha Kaushal, “Do the Means Change the Ends? Express Entry and Economic Immigration in Canada” (2019) 42:1 *Dal LJ* 83.

So there are differences of rhetoric, but much that is shared: a kind of iterative collaborative effort across alternating governments to expand the tools for immigration control. As a result, in studying the law through the lens of politics, we should not necessarily focus on the positions publicly embraced, or even necessarily on the particular policies pursued, by this or that government or this or that party. Rather, the most salient characteristics of immigration politics today seem (to us) to be its volatility and polarization. This volatility and polarization result, according to a new study by the political scientists David Brady, John Ferejohn, and Aldo Aparo, from increasing anxieties with respect to immigration, brought about by globalization and made more pronounced since the onset of the Great Recession in 2008.<sup>21</sup> The anxieties have caused a significant disconnect between mainstream political parties and their supporters: that is, voters across the West—including in Canada, for all three major parties—perceive their favoured party as more pro-immigration than they are.<sup>22</sup> This makes immigration politics dangerous terrain. Some parties respond by trying to fight off populist capture by speaking to those anxieties (as we write, this seems to be the case with the current federal Conservative opposition, or the Coalition Avenir Québec government in Québec). Others seek to tame or face down these anxieties with a mix of lofty language accompanied by reassurances of control (as seems to be the case with the federal Liberals). In some ways, the latter stance is more worrying, since the balance between openness and control is harder to strike.

Many different kinds of analyses might be undertaken with this political instability as starting point, as the papers in this issue show. In the remainder of this introduction, we offer just one that might serve as a connecting thread.

One role of the law (or of the rule of law) is to provide a set of public law rules and principles—administrative, constitutional, and international—that moderate or discipline the exercise of political power. Such rules and principles in theory ensure that political power, forced to adhere to formal constraints or to respect certain rights, avoids the worst abuses and even evinces a baseline of respect toward subjects of the law. If that is a fair statement, the question becomes how far immigration law can be expected to moderate or discipline the exercise of political power over non-citizens, when the exercise of that power promises to be unstable and thus in increasing danger of arbitrariness.

There is cause for worry. One reason to worry is that, at root, immigration

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21. David Brady, John Ferejohn & Aldo Aparo, “Political Economy and Immigration” (2018) NYU School of Law, Public Law Research Paper No 19-03, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract\_id=3295178> [perma.cc/7E9Z-MWUN]. The paper shows that in Canada, as in six other countries studied, mainstream political parties are generally perceived as being more pro-immigrant than other parties. Another important work that seeks to trace the connection between immigration and populist politics is Pippa Norris & Ronald Inglehart, “Immigration” chapter 6 of *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (New York: Cambridge University Press, 2019).

22. *Ibid.* Brady, Ferejohn & Aparo discuss data relating to the federal Conservatives, Liberals, and New Democratic Party in Canada. They do not present data on the Green Party.

law rests on a doctrine that grants extraordinarily broad executive and legislative discretion to control the movement across borders, and the territorial presence, of non-citizens. The statement of this doctrine invoked most often by present-day Canadian courts comes from Justice Sopinka's majority opinion in *Canada (Minister of Employment and Immigration) v Chiarelli*: "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."<sup>23</sup> This fundamental principle can ultimately be traced back (another continuity) to an earlier era of (largely racial) anti-immigration animus. In the face of laws passed by White settler countries aimed at excluding different Asian groups on account of their race at the end of the nineteenth and the open of the twentieth centuries, the courts to a large extent abdicated their role, ceding an "absolute and unqualified" power over immigration to the political branches.<sup>24</sup> If Justice Sopinka was merely smuggling *this* principle of *absolute* discretion into the *Charter* era, it means that immigration law need only be based on national self-interest, with no regard for the needs or rights of non-citizens. Such an immigration law would do little to temper an unstable new politics. This may explain why, as Sarah Marsden argues in this issue, the rule of law seems to lose its moderating or disciplining force when the state polices membership within Canada's borders, especially in the case of migrant workers. Using the example of the longstanding use of seasonal migrant labour in agriculture, Marsden contrasts the *de jure* existence of multiple legal remedies for workers as well as increasing policy talk of rights and protection with the *de facto* subordination of workers, which is also a product of the doctrine of ultimate sovereign power. She argues that it is only through direct worker action within and beyond the law that the rights of migrant workers can be vindicated.

But Justice Sopinka's invocation of the "fundamental principle" contains an important ambiguity. On the one hand, it is in fact redolent of past assertions of absolutist discretion grounded in a now-submerged racial logic. This is the face of immigration law that yields to a politics of fear and control. It is the part of immigration law that allows minors to

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23. *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 90 DLR (4th) 289 para 26 [*Chiarelli*]. Justice Sopinka cites two cases in support: *R v Governor of Pentonville Prison*, [1973] 2 All ER 741, 2 WLR 949; *Prata v Minister of Manpower and Immigration*, [1976] 1 SCR 376, 52 DLR (3d) 383 [*Prata*]. He might have cited the older Privy Council case in which Lord Atkinson wrote, "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests." *Canada (Attorney General) v Cain*, [1906] AC 542, [1906] UKPC 55 (PC), at 546.

24. *Fong Yue Ting v United States*, 149 US 698 (1893). Here we draw on the discussion in Colin Grey, "Inegalitarianism in Immigration Governance" chapter 2 of *Justice and Authority in Immigration Law* (Oxford: Hart Publishing, 2015).

be detained,<sup>25</sup> appeal rights to be denied,<sup>26</sup> long-pending applications for permanent residence to be cancelled.<sup>27</sup> This is the part of immigration law that gives way to what Peter Carver has called a “discourse of distrust”<sup>28</sup> or what Catherine Dauvergne has called “mean-spirited.”<sup>29</sup> Not surprisingly, several of the contributions to this issue discuss the Harper Conservatives’ mobilization of this kind of immigration politics. Lobat Sadrehashemi offers a vivid illustration by way of a case study of the government’s response to boat arrivals. Sadrehashemi notes that within hours of the arrival of some 492 Tamil asylum seekers off the coast of British Columbia, former Minister of Public Safety and Emergency Preparedness Vic Toews denounced the passengers as terrorists and people smugglers. This statement was prelude to an aggressive campaign to contest all their refugee protection claims, to get as many as possible declared inadmissible, and to use all available tools to keep them in detention. The campaign against these boat arrivals also foreshadowed the kind of language used to sell the Conservative’s refugee reform package, which came into force in 2012. As Hilary Evans Cameron argues, the Conservatives strategically employed such rhetoric to make more salient the “mistake” of granting refugee protection to those who do not need it and reducing the salience of failing to protect those who do.<sup>30</sup> Evans Cameron quotes former Conservative Immigration Minister Jason Kenney as saying that “when Canadians don’t think the government can control its own borders, public support for generous levels of immigration drops significantly.”<sup>31</sup> In this way, they prepared the way for their reforms. H  l  ne Mayrand’s contribution notes that between 2012 and 2015, the government put aside \$15 million to pursue applications to bring successful

25. *IRPA*, s 55(3.1). This provision requires the detention of “designated foreign nationals” sixteen years or older, subject to review after 14 days and then every six months (*IRPA*, s 57.1(1) and (2)). This differs from the general detention regime, under which initial detention is discretionary and reviews take place within 48 hours, 7 days, and subsequently every 30 days (*IRPA*, ss 55(1)-(3) and s 57). The designated foreign national regime came into force under *PCISA*, *supra* note 10, on 15 December 2012.

26. *IRPA*, s 110(2) denies the right of appeal to the Refugee Appeal Division (RAD) to certain categories of refugee protection claims and of certain types of decisions. These provisions also came into force under *PCISA*, which amended the earlier *BRRRA*, *supra* note 10; the *BRRRA* had contained provisions to implement the new RAD with no restrictions on appeal rights (for discussion, see Grant & Rehaag, *supra* note 10). The Conservative government also further restricted access to appeals of non-refugee deportation cases: see the *Faster Removals of Foreign Criminals Act*, SC 2013, c 16, s 24 [*FRFCA*], amending *IRPA*, 64(3).

27. *IRPA*, ss 87.4 and 87.5. These provisions cancelled pending applications under the Federal Skilled Worker, the Federal Investor, and the Federal Entrepreneur classes. Challenges to both provisions, on several grounds, failed: *Austria v Canada (Citizenship and Immigration)*, 2014 FCA 191; *Jia v Canada (Citizenship and Immigration)*, 2015 FCA 146.

28. Carver, *supra* note 4 at 209.

29. Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge: Cambridge University Press, 2016) at 2, 4, 143 and 202.

30. Hilary Evans Cameron, “The Battle for the Wrong Mistake: Risk Salience in Canadian Refugee Status Decision-Making” (2019) 49:1 Dal LJ 1.

31. Evans Cameron, *ibid* at 7, citing Jason Kenney, “Speaking notes for the Honourable Jason Kenney, PC, MP Minister of Citizenship, Immigration and Multiculturalism at an event at the Faculty of Law, University of Western Ontario” (London, Ontario, 11 Feb 2011), online: <[www.cic.gc.ca/english/department/media/speeches/2011/2011-02-11.asp](http://www.cic.gc.ca/english/department/media/speeches/2011/2011-02-11.asp)> [<https://perma.cc/L6LC-2PW9>].



refugees' protection to an end, resulting in the loss of status in 224 cases.<sup>32</sup>

*Chiarelli's* "fundamental principle" seems to abet such strategies. Yet, on the other hand, in stating that principle, Justice Sopinka in *Chiarelli* added the unexplained word "unqualified": "non-citizens do not have an *unqualified* right to enter or remain in the country." (Emphasis added.) The implicit suggestion is that non-citizens might have a *qualified* right to enter or remain.<sup>33</sup> Later Justice Sopinka suggests, albeit in the course of rejecting Mr. Chiarelli's constitutional argument, that the *Charter* would only permit "legitimate, non-arbitrary" grounds of deportation.<sup>34</sup> These aspects of *Chiarelli*, it seems to us, contain the germ of a different face that immigration law might turn toward an unstable immigration politics, one that might allow us to make sense of the idea of having a qualified right to enter or remain. This different face would be one grounded in the search for principled interpretations of the law that take the interests of non-citizens into account to some extent alongside those of citizens. If no such principled alternative exists, Justice Sopinka's references to non-arbitrariness and legitimacy would be empty gestures.

It is, in fact, surprising that much of the case law that has emerged since the beginning of the Harper-led Conservative government can be interpreted as developing this germ of principle; as a search for ways to limit the illegitimacy and arbitrariness of immigration law. Indeed, it might be said that almost all Supreme Court decisions related to immigration (with one exception, *Khosa*,<sup>35</sup> to which we return below)—and more than a few lower court decisions as well<sup>36</sup>—since the start of the Conservative's time in power have sought to soften the sharp edges of immigration politics as expressed in legislation with a principled consideration of the interests of

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32. Mayrand, *supra* note 17 at 3-4.

33. In French, the passage is translated as: « Or, le principe le plus fondamental du droit de l'immigration veut que les non-citoyens n'aient pas un droit absolu d'entrer au pays ou d'y demeurer. »

34. *Chiarelli*, *supra* note 23 at para 27.

35. *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*].

36. See, e.g., *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 (striking down limits on access to health care for certain protection claimants); *YZ v Canada (Minister of Citizenship and Immigration)*, 2015 FC 892 (striking down limits on the right to appeal to the Refugee Appeal Division for claimants from countries designated as safe) [*YZ*]; *Fehrer v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335 (striking down three-year bar, after unsuccessful refugee protection claims, on making claim for a "pre-removal risk assessment" for claimants from countries designated as safe) [*Fehrer*].

non-citizens.<sup>37</sup> We will not belabour the point by discussing each case. Nor do we want to paint too rosy a picture. Still, it is worth examining the ways in which the Court seems to be striving, in these cases, to meet the interests of non-citizens halfway.

Take an under-discussed example, *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*.<sup>38</sup> Mr. Agraira was a Libyan national who, having been found inadmissible for membership in a terrorist organization, sought a Ministerial exemption on the grounds that his presence in Canada would not be “detrimental to the national interest.”<sup>39</sup> The Minister at the time (again, Mr. Toews) rejected the application against the advice of his own department. He wrote a brief, bullet-point decision that focused exclusively on the terrorist nature of the group to which Mr. Agraira had belonged, while failing to remark upon other factors in the file—such as the presence of two children in Canada and an established transport business—or to note that the evidence of the group’s terrorism was limited. The Federal Court found the decision unreasonable on this basis. The Federal Court of Appeal reversed, finding that the “national interest” was limited to the protection of public and national security.<sup>40</sup>

The Supreme Court upheld the Federal Court of Appeal’s decision. However, in doing so, it attributed to the Minister an interpretation of the term “national interest” that went beyond security concerns, to include such things as *Charter* values, the degree to which applicants have become established in Canada, and the degree to which they have adopted democratic values, among other considerations.<sup>41</sup> That is, the Court first defined the “national interest” broadly and in a way that would favour future non-citizen applicants. It then found the Minister had in fact applied that broad meaning of the term, leading to the rejection of Mr. Agraira’s judicial review application. In one sense, this decision represents a case of abject deference to the executive on a security-related immigration matter: the court seemed to stretch to the limit the permission it had granted itself to “consider the reasons that could be offered for the decision when conducting

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37. These are: *Charkaoui v Canada (Minister of Citizenship and Immigration and Solicitor General)*, 2007 SCC 9; *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38; *Canada (Attorney General) v Mavi*, 2011 SCC 30; *R. v Pham*, 2013 SCC 15; *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*]; *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*]; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 [*B010*]; *R v Appulonappa* 2015 SCC 59; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61; *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50; *R v Wong*, 2018 SCC 25. For a contrary view of the Supreme Court’s record with respect to non-citizens, specifically with respect to the application of the Charter, see Catherine Dauvergne, “How the Charter has Failed Non-Citizens: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence” (2013) 58:3 McGill LJ 663.

38. *Agraira*, *supra* note 37.

39. *IRPA*, s 34(2) (repealed).

40. *Canada (Public Safety and Emergency Preparedness) v Agraira*, 2011 FCA 103, rev’g *Ramadan Agraira v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1302.

41. *Agraira*, *supra* note 37, at para 65.

a reasonableness review<sup>42</sup> in order to credit the Minister with a broad consideration of factors that simply do not seem to feature in his thinking. Yet the Court also interpreted the ministerial exemption power in a way that would have encouraged more principled decisions on future applications. On the broader issue of statutory interpretation, the Minister lost. We believe similar analyses can be made of many of the cases decided in the Harper-and-after era. The Supreme Court and some lower court decisions often seem to want to restrain arbitrariness by appealing to deeper public law values that can be found in doctrines of statutory interpretation, *Charter* principles, or international law obligations.

However, while we think that the Court has demonstrated a tendency to try to place immigration law on a more principled foundation—to qualify the non-citizens’ absence of rights—, there are many reasons for avoiding complacency. In concluding this introduction, we will mention four. The first is that a determined government which sees judicial interventions as unwarranted limitations on sovereign power, and which is not concerned about being perceived to be making decisions focused solely on national self-interest, can usually find legislative workarounds. *Agraira*, again, is a case in point. The Supreme Court released *Agraira* on 20 June 2013. On 19 June 2013, a government amendment came into force stating that “the Minister may only take into account national security and public safety considerations.”<sup>43</sup> So, a day prior to the Court’s decision, the government legislatively overruled it. The Harper-era government was adept at such moves or counter-moves, drawing up legislation in ways to deprive the courts of interpretive or other means of softening otherwise callous measures. In no area did the government empower itself and future governments more, perhaps, than with the dramatically expanded use of a sub-legislative device known as Ministerial Instructions, which do not require the parliamentary scrutiny normally applied to new legislation or regulations. Through the use of Ministerial Instructions, the government created a parallel regime of novel immigration categories, thoroughly revamped the temporary labour immigration regime, and completely overhauled of the federal skilled worker program through the Express Entry system. As Kaushal discusses in this issue, such instructions are nearly immune from judicial interference, since any unwanted judicial interpretation can be overturned *Agraira*-style, only with far greater ease.

A second reason not to be too impressed with the Court’s search for principle is that one kind of counter-move often made by the Harper-era Conservatives involved the shaping of discretionary powers in a way that resists judicial interference. The *IRPA* is spangled with such powers. Some

42. *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at para 54. For discussion, see Sharryn Aiken et al, eds, *Immigration & Refugee Law: Cases, Materials, and Commentary*, 2nd ed (Toronto: Edmond Montgomery, 2015) at 158-159.

43. *IRPA*, s 42.1(3). The amendments had consolidated the exemption powers formerly found in paragraphs 34(2), 35(2), and 37(2) of the *IRPA*. See *FRFCA*, s 18.

are expressly legislated, such as the power to provide relief for “humanitarian and compassionate” reasons.<sup>44</sup> Others have been developed through judicial or executive interpretation, such as the discretion of an immigration officer to defer the removal of a foreign national because of the risk they would face once home.<sup>45</sup> The Conservative government steadily clawed back the availability of those discretionary powers that might favour non-citizens under the *IRPA*. For instance, it amended the *IRPA* to make humanitarian exemptions unavailable to persons inadmissible on security grounds and certain grounds of criminality.<sup>46</sup> At the same time, it added or strengthened discretionary powers aimed at exclusion. For example, it added discretionary powers that would allow the government to take strict measures aimed at discouraging mass arrivals, in a manner that decidedly does not seek to take the interests of the affected non-citizens into account.<sup>47</sup> It also added powers that allow for the designation of putatively safe countries on the basis of opaque mathematical formulae; nationals of such countries enjoyed less favourable procedures when making their refugee claims.<sup>48</sup> Every discretionary power that was modified or created by the Conservative government remains in place in the *IRPA*.

Third, as discussed by Amar Khoday and Gerald Heckman, the approach to the standard of review that grew out of the Supreme Court’s *Dunsmuir* decision in 2008<sup>49</sup> has largely insulated administrative decisions made under the *IRPA* from judicial review on a correctness basis. Of course, this is the result of developments in Canadian administrative law outside

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44. That is, the power to grant exemptions from the normal operation of the *IRPA* based on “humanitarian and compassionate considerations.” This power is in fact granted by several provisions: *IRPA*, ss 25(1), 25.1(1), 67(1)(c), 68(1), and 69(2). In the first two cases the power is the Minister’s; in the last three, it is exercised by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB).

45. The sub-Supreme federal courts have found this power in *IRPA*, s 48. See, e.g. *Baron v Canada (Public Safety and Emergency Preparedness)* 2009 FCA 81.

46. *IRPA*, s 25(1) was amended to bar humanitarian and compassionate applications to persons inadmissible on grounds of security, the violation of international rights, or organized criminality (respectively *IRPA*, ss 34, 35 and 37). Such persons also do not have a right to appeal removal orders to the IAD (*IRPA*, s 64), which otherwise has the power to grant humanitarian exemptions (see note 27, above).

47. *IRPA*, s 20.1 allows the Minister of Public Security to designate groups of foreign nationals as “irregular arrivals” if he or she is of the opinion that they cannot be examined in a timely manner or if he or she suspects that their arrival was “in relation” to an act of people smuggling. Members of such groups become “designated foreign nationals,” subject among other things to mandatory detention, if sixteen years of age or older, with less frequent detention reviews. See note 25, *supra*.

48. *IRPA*, s 109.1 allows for the designation of certain purportedly safer countries based on the rates of rejection, withdrawal or abandonment of claims from those countries. Nationals from so-called designated countries of origin were previously subject to a six-month bar on work permits, a bar on appeals at the Refugee Appeals Division, limited access to the Interim Federal Health Program and a 36-month bar on the Pre-Removal Risk Assessment. The courts have struck down some parts of this regime as unconstitutional: see *YZ* and *Fehrer*, *supra* note 36. In May 2019, the government announced they were removing all countries from the list of designated countries, effectively ending the program (see Government of Canada, “Canada ends the Designated Country of Origin practice” (17 May 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/05/canada-ends-the-designated-country-of-origin-practice.html>>. Thus far, however, the empowering provisions remain in place.”

49. *Dunsmuir v New Brunswick*, 2008 SCC 9.

the immigration domain. In the case of the *IRPA*, however, as Khoday and Heckman argue, this deferential approach can be worrying because so many immigration-related decisions involve human rights. This brings us back to *Khosa*,<sup>50</sup> which involved an application for judicial review of a decision by the Immigration Appeal Division denying an Indian national a humanitarian exemption from deportation. The Federal Court of Appeal allowed the application, but was reversed by the Supreme Court, which characterized the decision as one of “policy, not law”<sup>51</sup> in a context in which the individual has “no right whatever” but rather “attempts to obtain a discretionary privilege.”<sup>52</sup> The case cited in support of this last conclusion was *Prata*, upon which Justice Sopinka had relied for his fundamental principle in *Chiarelli*.<sup>53</sup> Thus, the fundamental principle, allied with *Dunsmuir*-style deference, is used by the courts to justify a hands-off approach when examining how administrative decision-makers consider the interests of non-citizens.

Fourth, while the Court may have ruled in favour of non-citizens on many issues in recent years, it remains exceptionally hard, and in some respects has gotten harder, to bring *Charter* scrutiny to bear on decisions affecting non-citizens. In this volume, Donald Galloway argues that the Supreme Court’s equality rights jurisprudence in the context of immigration eschews its vaunted substantive approach because the Court is overly impressed with the fact that section 6 of the *Charter* grants the right to enter and remain in Canada only to citizens.<sup>54</sup> That has led to an equality rights jurisprudence that “ensures that harsh and oppressive forms of treatment will likely be viewed as unique or isolated and directed towards discrete groups of non-citizens rather than as indicative of a more general and entrenched antagonism towards non-citizens as a whole.”<sup>55</sup> Galloway criticizes the basic premise of this impoverished jurisprudence, namely that differential treatment between citizens and non-citizens is effectively treated as “immune from section 15 challenge.”<sup>56</sup> Instead, he argues for an approach to equality rights in which laws affecting non-citizens as such are susceptible to *Charter* scrutiny on grounds coherent with the contextual approach that characterizes contemporary equality jurisprudence outside the immigration domain. A similar story might be told regarding the protections found in section 7 of the *Charter* for the rights to life, liberty, and security of the person. Although the *Singh* decision is still generally cited for the proposition that section 7 applies in the context of refugee protection claim hearings before the Refugee Protection Division (RPD) of the Immigration and Refugee Board, the reality is that this is no longer the case. In *Febles* and *B010*,

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50. *Khosa*, *supra* note 35.

51. *Ibid* at para 17.

52. *Ibid* at para 57.

53. See note 23, above.

54. Galloway, *supra* note 3 at 15.

55. *Ibid* at 33.

56. *Ibid* at 6.

the Supreme Court rejected the claim that section 7 applies before either the RPD or in decisions that would affect the eligibility to make refugee claims.<sup>57</sup> As a result, section 7 protections now appear to be available only just prior to removal.<sup>58</sup> The upshot of the Court's jurisprudence on sections 7 and 15 of the *Charter* in the immigration context is that a weakened form of constitutionalism makes it easier legislatively to shield assertions of power over the non-citizen.

We have argued that keeping the politics of immigration in view provides essential context and perspective when scrutinizing immigration law's role in mediating the state's expression of power over non-citizens. Maintaining such perspective seems especially important in a volatile political landscape in which even the putatively open and welcoming Trudeau Liberals, in the run-up to the next federal election, have taken steps to limit the right to make refugee protection claims. Under a proposed amendment to the *IRPA*, persons who have made claims for protection in a country with which Canada has entered into an "information sharing" agreement will no longer be eligible to claim protection in Canada;<sup>59</sup> it is unclear what an "information sharing" agreement might be, although a good bet might be one of the memoranda of understanding through which Canada shares information on immigration matters with Australia, New Zealand, the United Kingdom and the United States.<sup>60</sup> If that is right, the amendment amply demonstrates the reasons for caution just listed: it is a pre-emptive legislative counter-move that may render meaningless current litigation challenging the continuing application of the Safe Third Country Agreement; its application depends on the exercise of the discretionary power to enter into "information sharing" agreements with other countries (without apparent limit on who those countries might be); and challenges in judicial review to such ineligibility decisions would be extraordinarily difficult to win because they would be evaluated by the courts on a deferential standard of review and largely immune to *Charter* scrutiny. It is yet another instance in which the study of immigration law cannot be divorced from the underlying politics.

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57. See *Febles supra* note 37 at para 68 and *B010 supra* note 37 at para 75.

58. For discussion, see Idil Atak, Graham Hudson, and Delphine Nakache, "The Securitisation of Canada's Refugee System: Reviewing the Unintended Consequences of the 2012 Reform" (2018) 37:1 *Refugee Survey Q* 1, at 14-17; Colin Grey, "Thinkable: The *Charter* and Refugee Law after *Appulonappa* and *B010*" (2016) 76 *SCLR* (2d) 111; Gerald Heckman, "Revisiting the Application of Section 7 of the *Charter* in Immigration and Refugee Protection" (2017) 68 *UNBLJ* 312.

59. Bill C-97, *Budget Implementation Act, 2019, No. 1*, 1st Sess, 42nd Parl, 2019, cl 306.

60. For information, see Department of Homeland Security, *Five-Country Joint Enrollment and Information-Sharing Project (FCC)* (4 April 2019), online: <[www.dhs.gov/publication/five-country-joint-enrollment-and-information-sharing-project-fcc](http://www.dhs.gov/publication/five-country-joint-enrollment-and-information-sharing-project-fcc)> [perma.cc/QN78-56NQ].