

1996

## "One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine

Anne E. Pettit

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Immigration Law Commons](#)

---

### Recommended Citation

Anne E. Pettit, *"One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 Fordham Urb. L.J. 165 (1996).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol24/iss1/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

# "One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine

## **Cover Page Footnote**

J.D. Candidate, Fordham University School of Law, 1997; B.A., Columbia University, 1986. The author wishes to thank Prof. Robert J. Kaczorowski for his comments and suggestions throughout the drafting of this Note.

# “ONE MANNER OF LAW”: THE SUPREME COURT, STARE DECISIS AND THE IMMIGRATION LAW PLENARY POWER DOCTRINE

Anne E. Pettit\*

## Introduction

“Ye shall have one manner of law, as well for the stranger, as for one of your own country. . . .”<sup>1</sup>

“Verily he who dooms a worse doom to the friendless and the comer from afar than to his fellow, injures himself.”<sup>2</sup>

Olga Gonzalez, 33 years old and a single mother, arrived in the United States from Colombia at the age of six. She became a lawful permanent resident, and except for a brush with the drug laws in 1987 (facilitating a purchase, a felony for which she served two years in prison) she has been successful, as most would measure the term, graduating from college, serving as a secretary to a former mayor of New York, and most recently holding a job as a social worker, helping children. Tragedy intervened, and on May 29, 1996 Gonzalez had to travel to Colombia to bury her mother. When she returned to the United States after the funeral, immigration inspectors arrested her and jailed her at the Immigration and Naturalization Service’s Varick Street, New York City detention facility, where as of this writing she awaits permanent exile to Colombia, a country she has barely seen in 27 years.

Olga Gonzalez was to have been sworn in as a U.S. citizen on May 30, 1996.<sup>3</sup>

---

\* J.D. Candidate, Fordham University School of Law, 1997; B.A., Columbia University, 1986. The author wishes to thank Prof. Robert J. Kaczorowski for his comments and suggestions throughout the drafting of this Note.

1. *Leviticus* 24:22.

2. *The Laws of King Cnut*, in 1 THORPE’S ANCIENT LAWS AND INSTITUTES OF ENGLAND 397, quoted in *Fong Yue Ting v. United States*, 149 U.S. 698, 744 (1893) (Brewer, J., dissenting).

3. Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at A1, B5. See also *infra*, notes 6-9 and accompanying text (describing provisions of the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), rendering Ms. Gonzalez deportable for her earlier conviction).

Inscribed over the entrance to the Supreme Court in Washington, D.C. is the motto "Equal Justice Under Law," a more modern counterpart to the ancient Levitical imperative and the centuries-old command of the English king, predating even Magna Charta.<sup>4</sup> Despite the intervening centuries and millenia, however, the United States is far from achieving the principle of "one manner of law" under which the citizen and the immigrant can find equal justice. No matter how far from American constitutional principles and tradition immigration legislation may be, the Supreme Court for over a century has deferred to Congress's determination to doom a worse doom to the comer from afar.<sup>5</sup>

On April 24, 1996, President Clinton signed into law the comprehensive Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")<sup>6</sup> which among other provisions virtually eliminates the possibility of political asylum for refugees without proper travel documents<sup>7</sup> and renders deportable practically any alien (including lawful permanent residents) convicted of a felony, no matter how long ago the conviction occurred.<sup>8</sup> AEDPA also strips most aliens deemed excludable from the United States of the right to meaning-

---

4. Cnut, or Canute, ruled England from 1016 to 1035. AMERICAN HERITAGE DICTIONARY 1418 (2d College ed. 1991). King John signed Magna Charta on June 15, 1215. *Id.* at 754.

5. One court described statutory provisions for the exclusion of various groups from the United States as "a magic mirror, reflecting the fears and concerns of past Congresses." *Lennon v. INS*, 527 F.2d 187, 189 (2d Cir. 1975). See also Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2 (1984) ("Throughout our history, [immigration law's] changing character has reflected more fundamental social and ideological structures.").

6. Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (hereinafter "AEDPA"). See generally Alison Mitchell, *Clinton Signs Measure on Terrorism and Death Penalty Appeals*, N.Y. TIMES, April 25, 1996, at A18.

7. AEDPA § 422, 110 Stat. at 1270-71 (amending Immigration and Nationality Act (hereinafter "INA") § 235, 8 U.S.C. § 1225 (1994)). See also Eric Schmitt, *Provision in Terrorism Bill Cuts Rights of Illegal Aliens*, N.Y. TIMES, April 19, 1996 at B9 (highlighting provisions of AEDPA affecting aliens both already within the United States and seeking to enter the country).

Throughout this Note, the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), or "INA," as amended, is cited both by the Act's original section numbers and to Title 8 of the U.S. Code. Immigration practitioners, the Immigration and Naturalization Service ("INS"), and other agencies with jurisdiction over immigration matters almost always use the original section numbering, which is also tied to the section numbering of Title 8 of the Code of Federal Regulations, which codifies the INA's implementing regulations, and to many every-day usages in the immigration field.

8. AEDPA § 440(c), 110 Stat. at 1277 (amending INA § 242, 8 U.S.C. § 1252 (1994)).

ful habeas corpus review of that determination<sup>9</sup>—a right the Supreme Court has recognized for over a century.<sup>10</sup>

On August 22, 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>11</sup> Enacted in part because of congressional belief that immigrants come to the United States (legally or illegally) to get welfare benefits,<sup>12</sup> the law eliminated almost all benefits, including food stamps and Supplemental Security Income,<sup>13</sup> for aliens, including elderly and disabled legal immigrants of many years' residence in the United States.<sup>14</sup> Finally, just before adjourning, the 104th Congress passed, and President Clinton signed, a major immigration reform

---

9. AEDPA § 423, 110 Stat. at 1272. This section provides that no court shall have jurisdiction to review any individual claim under § 422's expedited exclusion determinations, strips the federal courts of jurisdiction to entertain petitions for declaratory, injunctive or any other equitable relief, and forbids the certification of any class under FED. R. CIV. P. Rule 23. "Rump" habeas proceedings will be available, the only allowable issues being whether the petitioner is an alien (provided the petitioner makes a non-frivolous claim to U.S. nationality); whether the petitioner was ordered excluded under the new law (which is, of course, the reason for the petition in the first place, but which conceivably could catch some fatal procedural error); and whether the petitioner is a lawful permanent resident, should s/he make that claim. The only allowable relief is a hearing, and all collateral attacks on the exclusion determination are barred.

10. The Supreme Court has recognized the right of *any* alien restrained of liberty (whether physically detained, released on bond, or granted parole to remain in the United States pending a hearing) to seek review in habeas corpus proceedings since its earliest rulings on immigration statutes. *See, e.g.,* The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889) (reviewing habeas corpus proceedings). *See also* Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) ("[A]n alien immigrant, prevented from landing by any . . . officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful.").

11. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

12. *See* Charles Wheeler & Josh Bernstein, *Welfare Bill Impacts Immigrants Hardest*, BENDER'S IMMIGRATION BULLETIN, September 1996, at 3. Benefits to immigrants accounted for about 44% (\$23.7 billion over six years) of the law's anticipated savings; however, only about 5% of all immigrants actually receive welfare although 9% of the U.S. population are non-citizens. *Id.* at 3-4.

13. Congressional Budget Office estimates indicate that some 500,000 *legal* immigrants will lose SSI benefits and that almost 1,000,000 will lose food stamps. Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245, 1248 (Sept. 23, 1996), citing Congressional Budget Office, *Federal Budgetary Implications of H.R. 3734, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Aug. 9, 1996, at 14, 15.

14. Approximately half of the legal aliens who will lose SSI benefits have been in the United States for ten years or longer. Wheeler, *supra* note 13, at 1248. In addition, the states may bar legal immigrants from receiving non-emergency Medicaid benefits and newly created block grant programs, a move which may actually cost them more in the long run, for example because many treatable health problems will degenerate into serious, and expensive, emergencies. *Id.* at 1248-50.

bill<sup>15</sup> which also contains provisions posing extremely serious constitutional questions.<sup>16</sup>

Immigration and civil liberties advocates will surely seek to challenge provisions of these bills in the federal courts. Since its earliest rulings on immigration matters, however, the Supreme Court has held that the Constitution does not restrain Congress's power to regulate immigration.<sup>17</sup> The Court has found Congress's power

---

15. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRIRA], Pub. L. No. 104-208, 142 CONG. REC. H11787-H11833 (daily ed. Sept. 28, 1996). President Clinton signed the bill on September 30, 1996, as part of a fiscal 1997 budget bill. *President Signs Immigration Overhaul Measure*, 73 INTERPRETER RELEASES 1317 (Oct. 7, 1996).

16. Provisions of IIRIRA of particular concern to immigration law commentators and practitioners include §§ 301-309 (amending scattered sections of Tit. 8 U.S.C.), 142 CONG. REC. at H11795-808 (creating a new alien "removal" procedure with simplified process, including a summary exclusion procedure, and reduced substantive review possibilities); sec. 348, § 212(h) (amending 8 U.S.C. § 1182(h)), 142 CONG. REC. at H11811 (creating almost mandatory deportation for lawful permanent residents convicted of almost any felony and stripping the federal courts of review power over waiver of deportation decisions); sec. 377, § 245 A(f)(4) (amending 8 U.S.C. § 1255a(f)(4)), 142 CONG. REC. at H1184 (stripping federal court jurisdiction over certain types of class action suits), sec. 381, § 279 (amending 8 U.S.C. § 1329), *id.*, ("clarifying" that federal district courts have jurisdiction over all causes of action arising under the Immigration and Nationality Act, but only if brought by the U.S. government); §§ 401-405, 142 CONG. REC. at H11816-18 (establishing pilot programs to verify employee identity and work eligibility through INS databases); secs. 551-553, § 213A (to be codified at 8 U.S.C. §§ 213A and 1631), 142 CONG. REC. at H11821-22 (substantially tightening income and other requirements for aliens and U.S. citizens wishing to sponsor relatives for immigration, and making affidavits of support legally enforceable), and § 642, 142 CONG. REC. at H11829 (barring any state or local entity from prohibiting its employees from reporting aliens unlawfully present in the United States).

The "court-stripping" sections of IIRIRA, §§ 377 and 381, may in the final analysis be its most constitutionally dangerous provisions, and have drawn significant comment in the national press for such a seemingly arcane jurisdictional topic. *See, e.g.*, David Johnston, *Government Is Quickly Using Power of New Immigration Law*, N.Y. TIMES, Oct. 21, 1996, at A20 (noting government motions to dismiss a number of class-action lawsuits, even suits unrelated to the actions supposedly targeted by IIRIRA); Anthony Lewis, *Running From the Law*, N.Y. TIMES, Oct. 21, 1996, at A17 (noting the proliferation of court-stripping statutes, including IIRIRA, signed into law by President Clinton, when even at the height of the 1950s Red Scare Congress failed to pass such measures); Anthony Lewis, *Clinton's Sorriest Record* N.Y. TIMES, Oct. 14, 1996, at A17 (describing consequences of legislation, including several cases which stand to be dismissed after IIRIRA); Patrick J. McDonnell, *New Law Could End Immigrants' Amnesty Hopes*, L.A. TIMES, Oct. 9, 1996, at A1 (noting, *inter alia*, a letter from 90 law professors urging Congress to reject the court-stripping proposals as a threat to "[t]he most basic safeguards of due process").

17. *E.g.*, *Wong Wing v. United States*, 163 U.S. 228 (1896); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case (Chae Chan Ping v. United States)*, 130 U.S. 581 (1889). Two cases involving Japanese immigrants ordered excluded as likely to be-

to be both *plenary*, i.e., completely the subject of legislative prerogative, as are Congress's constitutionally enumerated powers,<sup>18</sup> and *extraconstitutional* in origin, requiring extreme deference from the Court.<sup>19</sup> Furthermore, the Supreme Court has held that it cannot substantively review the constitutionality of immigration statutes because they implicate foreign affairs.<sup>20</sup>

This jurisprudential outlook is unique. In no other legislative area has the Supreme Court shown so much deference to Congress or permitted Congress such freedom from constitutional restraints.<sup>21</sup> It is also self-contradictory, for a truly plenary power of

---

come public charges also contributed significantly to this phase of "plenary power" doctrinal development. The Japanese Immigrant Case (*Yamataya v. Fisher*), 189 U.S. 86 (1903); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). For a discussion of cases developing the judicial power to review legislative acts, see *infra*, note 27. See also *infra*, notes 21, 23-24 and accompanying text (describing how the Supreme Court's view of Congress's plenary powers in other constitutionally enumerated areas has evolved toward placing greater constitutional limits on such powers).

18. U.S. CONST. art. I, § 8. Congress generally has plenary power to legislate in constitutionally enumerated areas. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). Under this traditional view, Congress's plenary powers are complete in themselves, may be exercised to their fullest extent, and are unlimited, *except by the Constitution itself*. *Id.* See also *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995) (stating the Court's current understanding of Congress's plenary power over interstate commerce).

The "plenary" powers include the ability to legislate in areas *implied* by the enumerated powers as well. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 386 (1819). The unique features of the plenary power over immigration are its status as an extraconstitutional "inherent" power and the Court's reluctance to apply constitutional norms and restrictions to Congress's exercise of the power except on grounds of constitutionally mandated procedure. *INS v. Chadha*, 462 U.S. 919, 954-55 (1983) (former § 244(c)(2) of the Immigration and Nationality Act, providing for a House of Representatives legislative veto, violates bicameralism and presentment requirements, U.S. CONST., art. I, §§ 1, 7).

19. See *infra* part I.B (reviewing the origins and evolution of the Court-created "immigration plenary power doctrine").

20. See generally *infra* part II for a history of these doctrinal developments.

21. See, e.g., *Seminole Tribe of Fla. v. Florida*, 116 U.S. 1114, 1123 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and holding that Congress cannot abrogate states' Eleventh Amendment immunity from private suits in the federal courts by deeming state consent to suit through the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3); *United States v. Lopez*, 115 U.S. 1624, 1630-31 (1995) (invalidating gun-free school zone legislation as having "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"); *Perez v. Brownell*, 356 U.S. 44, 58 (1958) (limiting exercise of the power to regulate foreign affairs) ("Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations."); *Reid v. Covert*, 354 U.S. 1 (1957) (limiting power to regulate the armed forces and holding all of Congress's powers limited by the Bill of Rights). *But see* *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto provision, Immigration

legislation would be beyond the Supreme Court's power of review completely, an idea the Supreme Court adopts or ignores seemingly at its own pleasure, referring to it when in effect upholding immigration legislation and resting on constitutional provisions, notably the Due Process Clause,<sup>22</sup> when it wishes to intervene.<sup>23</sup> Immigration law practitioners and constitutional commentators refer to the Court's general principle of extreme judicial restraint in immigration law matters as the "plenary power doctrine."<sup>24</sup>

---

and Nationality Act ("INA") § 244(c)(2), former 8 U.S.C. 1254(c)(2), *repealed by Immigration Technical Corrections Act of 1988*, Pub. L. No. 100-525, § 2(q), 101 Stat. 2609, 2613 (1988), and stating in dicta that even plenary authority to regulate immigration has some limit). In context, this statement fairly implicates only the separation of powers doctrine, which the legislative veto provision trenched upon.

Commerce, the war power and foreign policy are the areas in which Congress historically has exercised its power to legislate to the fullest possible extent. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (foreign affairs); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (commerce). These are leading cases in which the Supreme Court expressed great deference to Congress's determinations in these areas. In later years, the Court became much less deferential. *See Perez*, 356 U.S. at 58 (foreign affairs) and *Seminole Tribe*, 116 U.S. at 1123 (commerce); *cf. Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over that with which the act we are now considering deals," *i.e.*, the power to regulate the entry of aliens into the United States.). The Court cited *Oceanic Steam Navigation Co.* with approval as recently as 1993, and has never backed away from the sweeping pronouncement quoted above. *See Reno v. Flores*, 507 U.S. 292, 305 (1993), *citing Fiallo v. Bell*, 430 U.S. 787, 792 (1977), *quoting Oceanic Steam Navigation, Co.*, 214 U.S. at 339.

22. U.S. CONST. amend. V.

23. A "plenary" power is full and complete in itself, uncheckable by any other power. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977), *quoting Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909), discussed *supra* note 21. Furthermore, the Court's jurisdictional power is limited to cases and controversies arising under the Constitution, laws of the United States and treaties of the United States, U.S. CONST. art. III, § 2, and laws of the United States must accord with the Constitution's provisions. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803); *see infra* note 27 (discussing judicial review). Yet, as the large body of case law cited in this Note indicates, the Supreme Court does in fact exercise its power of review over immigration legislation, and the degree of deference which it accords to Congress appears to vary with the result reached. *See generally* Brian K. Bates and Bruce A. Hake, *A Tale of Two Cities: Due Process and the Plenary Power Doctrine*, 90-04 IMMIGRATION BRIEFINGS (April 1992) (comparing lines of cases giving almost complete deference to Congress on one hand with cases upholding procedural due process rights of aliens on the other); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter *Phantom Norms*] (discussing the use of procedural safeguards in immigration proceedings as a substitute for recognizing substantive constitutional rights).

24. *Compare supra* note 18, describing Congress's power to legislate in constitutionally enumerated areas. For the sake of clarity, immigration law's special variant



The Supreme Court's deference to Congress in immigration regulation springs from century-old holdings which the Court consistently refuses to reevaluate, citing considerations of *stare decisis*.<sup>25</sup> Recently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>26</sup> the Court explained in great detail its practical and prudential considerations in evaluating its precedents. The *Casey* "joint opinion" and dissents laid bare these considerations, in perhaps the most penetrating analysis of the Supreme Court jurisprudential process since the early opinions of Chief Justice John Marshall and Justice Joseph Story.<sup>27</sup>

---

of plenary power is referred to hereinafter as the "immigration plenary power doctrine." See *infra*, part II for a history of the doctrine's development and effects.

25. In chronological order, the seminal immigration plenary power cases include *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*), 130 U.S. 581 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Wong Wing v. United States*, 163 U.S. 228 (1896); *The Japanese Immigrant Case* (*Yamataya v. Fisher*), 189 U.S. 86 (1903); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Carlson v. Landon*, 342 U.S. 524 (1952); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Galvan v. Press*, 347 U.S. 522 (1954); *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Jean v. Nelson*, 472 U.S. 846 (1985); and *Reno v. Flores*, 507 U.S. 292 (1993).

26. 505 U.S. 833 (1992). *Casey* arose as a constitutional challenge to a Pennsylvania abortion statute requiring, *inter alia*, a 24-hour waiting period before a woman could obtain an abortion; spousal notification before a married woman could obtain an abortion; parental permission for a minor to do so; and that physicians provide certain detailed information about the abortion procedure before an abortion could be performed. *Id.* at 879-901 (analyzing statutory provisions). The Court upheld all but the spousal notification provision. *Id.* at 901. In doing so, the Court reaffirmed the central proposition of *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman has a constitutional right stemming from the Fourteenth Amendment to terminate her pregnancy before fetal viability), *Casey*, 505 U.S. at 871, but held that since the state has an "important and legitimate interest in potential life," *id.* (citing *Roe*, 410 U.S. at 163), it may regulate abortion from the moment of conception. *Id.* at 869. Such regulation cannot impose an "undue burden" on the woman's constitutional right to an abortion before the fetus becomes viable. *Id.* at 872.

*Roe* had promulgated a "trimester" framework for abortion regulation: during the first three months of pregnancy, virtually no special regulation of abortion was permissible; during the second three months, regulations reasonably related to preserving maternal health were permissible; and during the last three months of pregnancy (which at the time of *Roe* approximated fetal viability), the state could extensively regulate or even proscribe abortion in the interest of potential life, except when the mother's life or health was at stake. *Roe*, 410 U.S. at 164-65; see also *Casey*, 505 U.S. at 872. *Casey* rejected the trimester scheme in favor of the "undue burden" test. 505 U.S. at 873. This holding effectively *guts Roe*, however, as the only abortion regulation imposing an "undue burden" is one that "*strike[s] at the right itself*," *i.e.*, seeks to *ban* abortion for a class of women. *Id.* at 874 (emphasis supplied).

27. The groundbreaking cases establishing and developing the power and limitations of judicial review of legislative acts include *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) ("an act of the legislature, repugnant to the

This Note argues that the *Casey* analysis of stare decisis, precedent and the rule of law provides a strikingly effective paradigm through which to view the history of Supreme Court immigration rulings. Viewed through the Court's own analysis of its power to make and revise precedent decisions, the immigration plenary power doctrine's jurisprudential shortcomings become more evident and the arguments to overturn the doctrine become more powerful. Part I of this Note briefly sketches the history and development of the immigration plenary power doctrine. Part II examines the constitutional problems and anomalies of the doctrine and outlines the importance of stare decisis principles in perpetuating it. Part III discusses the constitutional and jurisprudential framework for stare decisis considerations in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and applies this framework to the immigration law plenary power doctrine. This Note concludes that no principled constitutional or prudential consideration upholds the Supreme Court's extraordinarily deferential approach to immigration legislation. It further concludes that the Court should review immigration legislation by the same standards it applies to any other act of Congress.

### I. History and Development of the Immigration Plenary Power Doctrine

The U.S. Constitution is practically silent on questions of immigration. Although the Naturalization Clause delegates the power to establish "a uniform rule of naturalization" to Congress,<sup>28</sup> the Supreme Court has never rested solely upon the clause to give broader authority to Congress to regulate the entry and terms of stay of aliens.<sup>29</sup> The Importation of Persons Clause in Article I of

---

constitution, is void"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (Story, J.) (extending the Supreme Court's appellate jurisdiction to constitutional decisions of state courts); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (Marshall, C.J.) (clarifying that if Congress should legislate outside its enumerated powers, the Court must declare the act void, but where the Constitution does not prohibit such lawmaking and the act is "really calculated to effect any of the objects entrusted to the government" by enumerated power, the Court will not inquire into the degree of the law's necessity, as this would violate the separation of powers).

28. U.S. CONST. art I, § 8, cl. 4.

29. See, e.g., DAVID A. MARTIN, FEDERAL JUDICIAL CENTER, MAJOR ISSUES IN IMMIGRATION LAW, 1987 WL 123658 at \*7 (1987). But see *INS v. Chadha*, 462 U.S. 919, 952 (1983) (referring in passing to Congress's "purporting to exercise power defined in Art. I, § 8, cl. 4 to 'establish an uniform Rule of Naturalization'" while actually altering the legal rights, duties and relations of officials outside the legislative branch by including a legislative veto provision which the Court then declared unconstitutional). See also *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (describing power of

the Constitution<sup>30</sup> was a euphemism for the slave trade, and the Court never sought to apply this provision to the immigration of free persons.<sup>31</sup> The Court briefly rested the power in the Commerce Clause,<sup>32</sup> but it did not fit comfortably into that framework either.

Instead, in a 100-year-old series of cases, the Supreme Court developed the immigration plenary power doctrine as a largely extraconstitutional theory of federal legislative authority over immigration.<sup>33</sup> The Court found this power to be a necessary and inherent attribute of sovereignty.<sup>34</sup> Furthermore, because it considered the power to regulate immigration to be related to the war power<sup>35</sup> as a matter of foreign affairs,<sup>36</sup> the Court held itself largely without power to review immigration legislation.<sup>37</sup>

The Supreme Court has clearly stated that Congress may not authorize a violation of the Constitution.<sup>38</sup> Nonetheless, Congress regularly passes—and the Court upholds—immigration legislation that would be unconstitutional if applied directly to U.S. citizens.<sup>39</sup>

---

Congress as deriving from a combination of the Naturalization Clause, “its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders”).

30. U.S. CONST. art. I, § 9, cl. 1.

31. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 856 (1987) [hereinafter *A Century of Chinese Exclusion*].

32. U.S. CONST. art. I, § 8, cl. 3. See *The Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580 (1884) (defining the power to regulate immigration as an aspect of foreign commerce).

33. See *infra*, part II.A, for an account of the evolution of the Court’s theory of inherent plenary power in Congress to regulate immigration.

34. *E.g.*, *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*), 130 U.S. 581, 607 (1889) (finding power to exclude and expel aliens so clearly within “essential attributes of sovereignty” that the proposition cannot be seriously contested).

35. U.S. CONST. art. I, § 8, cl. 11.

36. See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261-69; see also *infra* notes 144-55 and accompanying text (describing the effect on immigration law of the “political question” doctrine, which the Court often applies to foreign affairs matters to preclude judicial review). See generally Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976) (describing and criticizing application of the doctrine to various legal areas, including foreign affairs).

37. *The Chinese Exclusion Case*, 130 U.S. at 606 (Congress’s finding that presence of “foreigners of a different race” is “dangerous to . . . peace and security” is conclusive upon the judiciary.).

38. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

39. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-16, at 358 (2d ed. 1988). See also *Mathews v. Diaz*, 426 U.S. 67, 79 (1976) (upholding statute requiring participants in a federal medical insurance program to be either citizens or permanent resident aliens with five years of continuous residence in the U.S.). A similar statute

These immigration laws do in fact impinge on citizens' constitutional rights, especially on the First Amendment areas of marriage and intimate association,<sup>40</sup> freedom of religion,<sup>41</sup> freedom of speech and political association.<sup>42</sup> Additionally, some immigration statutory provisions interfere with the citizen's right to equal protection of the laws through the Fifth Amendment's due process liberty interest.<sup>43</sup> Immigration enforcement statutes may also interfere with the Fourth Amendment right to freedom from un-

---

requiring that a citizen reside for five years in a particular state to obtain a government benefit would immediately run afoul of the 14th Amendment's Equal Protection Clause. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (one-year waiting period for new arrivals to receive welfare benefits "constitutes an invidious discrimination denying them equal protection of the laws") (footnotes omitted). *Shapiro* directly implicated the federal power to make such regulations, as Congress had imposed a residence requirement on the District of Columbia and had authorized the states to do the same. *Id.* at 641.

40. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 548 (1950) (Frankfurter, J., dissenting) (War Brides Act, exempting servicemen's foreign brides from immigration law provisions that would normally exclude them from the United States, was "a bounty afforded by Congress not to the alien who had become the wife of an American but to the citizen who had honorably served his country"); *id.* at 551-52 (Jackson, J., dissenting) ("Congress will have to use more explicit language than any yet cited before I will agree that it has authorized an administrative officer to break up the family of an American citizen or force him to keep his wife by becoming an exile").

41. *See, e.g., American Friends Serv. Comm. v. Thornburgh*, 961 F.2d 1405 (9th Cir. 1991); *Intercommunity Ctr. for Justice and Peace v. INS*, 910 F.2d 42 (2d Cir. 1990) (holding in both cases that enforcing ban on employing undocumented workers against religious organizations does not violate the First Amendment right to free exercise of religion). Other cases involved the "sanctuary" movement of the 1980s which brought Central American refugees into the United States and sheltered them, often in churches. *See, e.g., United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991) (consolidating on appeal and upholding eight convictions of sanctuary movement defendants for "alien smuggling"); *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985) (*Merkt I*), *reaff'd on other grounds*, 794 F.2d 950 (5th Cir. 1986) (*Merkt II*) and *cert. denied*, 480 U.S. 946 (1987) (comparable alien smuggling charges).

42. *E.g., Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Carlson v. Landon*, 342 U.S. 524 (1952). *See infra* notes 96-105 and accompanying text for further discussion.

43. *E.g., Fiallo v. Bell*, 430 U.S. 787 (1977) (non-marital children and their fathers excluded from mutual immigration benefits while such children and their mothers are not). For a long list of Supreme Court cases requiring that gender-based classifications outside the immigration area must "serve important governmental objectives and . . . be substantially related to achievements of those objectives," *see id.* at 809-10 (Marshall, J., dissenting) (citing among many others *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

reasonable searches and seizures<sup>44</sup> and the Fifth Amendment right to procedural and substantive due process of law.<sup>45</sup>

The historical circumstances of immigration legislation and the Supreme Court's promulgation of the abstentionist immigration plenary power doctrine explain this contradiction in part. In America's early days, Congress, insofar as it considered the question at all, believed that immigration was a natural right inherent in the peoples of the world.<sup>46</sup> However, as ever larger numbers of immigrants arrived on American shores after the Civil War, calls for immigration regulation increased as well.<sup>47</sup> In 1875 Congress passed the first law excluding classes of aliens—prostitutes and

---

44. See, e.g., *Abel v. United States*, 362 U.S. 217 (1960) (in espionage investigation, use of administrative INS warrant to gain entry to suspected illegal alien's premises permissible although no probable cause existed to support issuance of a magistrate's warrant and criminal prosecution, not immigration enforcement, was the main purpose of the raid). In the border enforcement context, U.S. citizens of Hispanic origin may suffer enhanced scrutiny from Border Patrol officers who perceive them as foreigners. See *Murillo v. Musegades*, 809 F. Supp. 487 (W.D. Tex. 1992) (enjoining INS Border Patrol from stopping, questioning, searching and in some cases arresting faculty, staff and students of a high school located next to the border in El Paso, Texas); *Mendoza v. INS*, 559 F. Supp. 842 (W.D. Tex. 1982) (enjoining INS from conducting warrantless raids on El Paso bars). Absent specific articulated facts and away from the border or its functional equivalent (i.e., a fixed checkpoint), such race and nationality based inquiries are unconstitutional. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

45. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (upholding summary exclusion from the United States of U.S. citizen's foreign-born wife). In his biting dissent, Justice Jackson remarked:

Now this American citizen is told he cannot bring his wife to the United States, but he will not be told why. . . . So he went to court and sought a writ of *habeas corpus*, which we never tire of citing to Europe as the unanswerable evidence that our free country permits no arbitrary official detention. And the Government tells the Court that not even a court can find out why the girl is excluded. . . . The menace to the security of this country . . . is as nothing compared to the menace to free institutions inherent in procedures of this pattern.

*Id.* at 551 (Jackson, J., dissenting). Justice Jackson knew whereof he spoke, having served as chief United States prosecutor at the Nuremberg war crimes trials in 1945. EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 307-406 (1958) (describing Justice Jackson's role at Nuremberg as both an organizer of the tribunal and a lead prosecutor).

46. For example, Congress declared in 1868 that "the right of expatriation is a natural and inherent right of all people. . . . [I]n recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship. . . ." Act of July 27, 1868, ch. 249, 15 Stat. 223 (1868), quoted in Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 855 n.10.

47. The Chinese Exclusion Case (*Chae Chan Ping v. United States*), 130 U.S. 581, 593-99 (1889) (discussing history of Chinese immigration and of the laws passed to limit it). See also Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 855-56 (discussing socioeconomic factors underlying immigration legislation).

convicts—from the United States.<sup>48</sup> As economic depression deepened and unemployment mounted in the 1870s, representatives, in particular from California, argued that immigrants undesirably competed economically with American citizens.<sup>49</sup> In response to complaints that Chinese laborers, encouraged by treaty<sup>50</sup> to settle in California in more prosperous times, were taking white men's jobs,<sup>51</sup> Congress restricted and in 1892 halted further immigration from China to the United States.<sup>52</sup>

In 1889, the Supreme Court in *The Chinese Exclusion Case*<sup>53</sup> upheld these laws. Without basing its holding on the Constitution's enumerated powers, the Court found that Congress had the *inherent* power to regulate immigration,<sup>54</sup> and specifically the power to exclude any particular class of aliens from the United States.<sup>55</sup> Additionally, Congress could derogate from international agreements, in this case the Burlingame Treaty with China,<sup>56</sup> in the exercise of any of its powers.<sup>57</sup>

---

48. Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 855-56; Act of March 3, 1875, ch. 141, 18 Stat. 477.

49. *The Chinese Exclusion Case*, 130 U.S. at 593-99.

50. Presidential Proclamation of July 28, 1868, 16 Stat. 739-41 (amending Treaty between the United States and China of June 18, 1858).

51. Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 855-56.

52. Act of May 6, 1882, ch. 126, 22 Stat. 58; Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of October 1, 1888, ch. 1064, 25 Stat. 504 (providing, respectively, for exclusion for a ten-year period of new Chinese immigrants and registration of those present in U.S.; establishing certificates of residence as the only evidence by which resident Chinese could re-enter the U.S.; and invalidating all certificates of Chinese residents absent from the U.S. on or after date of passage, thus prohibiting their reentry). The Act of May 6, 1882 was the first congressional restriction on voluntary Chinese immigration, prior acts having addressed only the importation of indentured Chinese laborers. Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 856 n. 12. The Act of October 1, 1888 was the subject of *The Chinese Exclusion Case*, 130 U.S. 581, in which the Supreme Court first considered Congress's authority to pass such legislation at all. The Act of May 5, 1892, ch. 60, 27 Stat. 25, continued the 1882 Act's suspension of Chinese immigration and provided, for the first time, for deportation of Chinese persons found unlawfully present in the U.S. Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 856 n. 12.

53. 130 U.S. 581.

54. *Id.* at 606-07.

55. *Id.* at 608.

56. Treaty of Peace, Amity and Commerce, between the United States of America and China, 12 Stat. 1023 (1858), *as amended* by Additional Articles to the Treaty between the United States and China, 16 Stat. 739 (1868).

57. *The Chinese Exclusion Case*, 130 U.S. at 600. Treaties are on an equal footing with the Constitution and laws enacted in pursuance of the Constitution as the supreme law of the land. *Id.*; U.S. CONST. art. VI, cl. 2. *See also* *Whitney v. Robertson*, 124 U.S. 194 (1888) (treaties and acts of Congress carry equal obligations and effect). The Court in *The Chinese Exclusion Case* viewed treaties as executory contracts, requiring legislation for their "performance," and only rarely as operating by

On one hand, the *Chinese Exclusion* Court noted that the constitutionally enumerated powers of Congress to declare war,<sup>58</sup> make treaties,<sup>59</sup> suppress insurrection,<sup>60</sup> repel invasion,<sup>61</sup> regulate foreign commerce,<sup>62</sup> secure a republican form of government to the states,<sup>63</sup> and admit subjects of other nations to citizenship<sup>64</sup> were "sovereign powers, restricted in their exercise *only by the [C]onstitution itself* and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."<sup>65</sup> On the other hand, the Court found, the power to regulate immigration originated *outside* the Constitution and escaped such constitutional restriction altogether.<sup>66</sup> Thus, the power to regulate immigration gained a special *extraconstitutional* standing which it has retained, with relatively few modifications, to the present day.<sup>67</sup>

---

their own force and thus directly effective as legislative acts. If Congress must pass implementing legislation, Congress could equally pass legislation to derogate from a treaty, and Congress's act last in time would become the effective law. 130 U.S. at 600.

58. U.S. CONST. art. I, § 8, cl. 11.

59. *Id.*, art. II, § 2, cl. 2 (President has power to conclude treaties "by and with the Advice and Consent of the Senate. . .").

60. *Id.*, art. I, § 8, cl. 15.

61. *Id.*

62. *Id.*, art. I, § 8, cl. 3.

63. U.S. CONST., art. IV, § 4.

64. *Id.*, art. I, § 8, cl. 4.

65. *The Chinese Exclusion Case*, 130 U.S. at 604 (emphasis supplied).

66. *Id.* at 603 (finding that the power to exclude aliens from its territory is necessary to any independent nation).

67. Commentators differ over the Constitution's role in *The Chinese Exclusion Case*. In one view, *The Chinese Exclusion Case* severed immigration regulating authority from the enumerated powers by invoking "sovereignty." Legomsky, *supra* note 36, at 274. By contrast, Hiroshi Motomura considers that the Court did focus on the expanse of the federal government's power under the Constitution, at least in contradistinction to whether individual rights might set any limits on that power, a proposition the Court would not reach for many years and in other contexts. *Phantom Norms*, *supra* note 23, at 551. Another authority finds that the proposition that Congress has a power to regulate immigration which is not rooted in constitutional provisions is not a particularly radical one, but that the later *accretions* to that proposition, such as the idea that immigration legislation is not subject to the constitutional controls governing other legislation (a proposition which the originating *Chinese Exclusion Case* did not even stand for), "cry out for the sharpest criticism." Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 858. Another approach to the problem is that the Court did conduct a constitutional analysis, but did so through the lens of the conduct of foreign affairs rather than making an inquiry into how the immigration regulating power might be inferred from the text or structure of the Constitution. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L LAW 862, 863 (1989). Aleinikoff noted Justice Field's comparison of the need to regulate immigration to the need to defend against invading armies, and Field's evocative reference to the "vast hordes . . . crowding in upon us." *Id.*; *The Chinese Exclusion Case*, 130 U.S. at 606. Perhaps it is simplest to view *The Chinese Exclusion Case*

Three years after its *Chinese Exclusion* ruling, the Supreme Court in *Nishimura Ekiu v. United States*<sup>68</sup> strengthened Congress's power to regulate immigration, affirming that Congress could delegate to executive branch officers the immediate authority to exclude an alien from the United States.<sup>69</sup> Finally, the Court held that the executive officer's decision alone *was* due process of law for an alien seeking entry into the United States.<sup>70</sup>

Other Supreme Court decisions in this early period held constitutional the deportation of aliens who had entered the United States, no matter how long their period of U.S. residence.<sup>71</sup> This deportation power matched the power to exclude aliens from initial entry, because entry into the United States and permission to remain were both matters of the sovereign's pure permission.<sup>72</sup> Thus, even longtime resident aliens reentering the United States

---

and its progeny as examples of result-oriented jurisprudence rather than as principled attempts to locate and construct the immigration power in terms of the Constitution.

68. 142 U.S. 651, 660 (1892). *Nishimura Ekiu* was a Japanese immigrant denied entry to the United States on grounds that she could become a "public charge," that is, that she would be unable to support herself.

69. *Id.* At first, these executive officers were from the Treasury Department. At present, the Department of Justice's Immigration and Naturalization Service (INS) is primarily responsible for immigration enforcement.

70. *Nishimura Ekiu*, 142 U.S. at 660 ("It is not within the province of the judiciary to order that foreigners . . . be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."), *citing* *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855). The *Murray* Court, however, specifically examined whether in fact the process provided for in the distress warrant property seizure provision at issue comported with the rest of the Constitution and with "settled usages and modes of proceeding" which the United States had received from England. 59 U.S. (18 How.) at 276-77. The *Nishimura Ekiu* Court did not make such an examination, focusing instead on the constitutional appointment power. 142 U.S. at 663.

Before President Clinton signed the Anti-Terrorism and Effective Death Penalty Act into law on April 24, 1996, aliens in *Nishimura Ekiu*'s position were statutorily entitled to a hearing before an immigration judge and federal habeas review of their eligibility to enter the United States. INA § 106, 8 U.S.C. § 1105a(b). Under the AEDPA, certain aliens (e.g., those forced to flee their homelands with false papers and whom a low-level inspector feels cannot state a claim of persecution, *see supra* note 7) will be entitled to *even less* process than *Nishimura Ekiu*—she had the right to appeal an adverse decision of the port inspector first to the Superintendent of Immigration and then to the Secretary of the Treasury. 142 U.S. at 662-63.

71. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). *See also* *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86, 99 (1903) (discussing due process in context of deportation authority); *Wong Wing v. United States*, 163 U.S. 228 (1896) (upholding power to deport but striking down imposition of a sentence of imprisonment for a term absent a full judicial hearing).

72. *Fong Yue Ting*, 149 U.S. at 707-08.



from travel abroad faced the same legal barrier as new arrivals: a federal official could forbid them to enter the United States, no matter how strong their ties to their adopted homeland.<sup>73</sup>

The Supreme Court in *Wong Wing v. United States*<sup>74</sup> found that the Constitution did impose some limits on Congress's power to regulate immigration. Analogizing to its Fourteenth Amendment holding in *Yick Wo v. Hopkins*,<sup>75</sup> the Court held that the Fifth and Sixth Amendments<sup>76</sup> applied to aliens within the United States.<sup>77</sup> Any alien in detention for exclusion or deportation could invoke the writ of habeas corpus to seek review of the propriety of that detention.<sup>78</sup> In fact, the Court held in *Fong Yue Ting v. United States*<sup>79</sup> that aside from questions of their entry and expulsion, aliens within the United States enjoyed the same constitutional protections as citizens.<sup>80</sup> On this ground, the Court held unconstitutional a federal provision authorizing executive officers to impose a term of hard labor upon illegally present Chinese immigrants,<sup>81</sup> finding that the Fifth and Sixth Amendments permitted such a punishment only after a full judicial trial.<sup>82</sup>

Despite these modest constitutional protections within the United States, aliens in general remained subject to Congress's discretionary decisions to exclude or expel them.<sup>83</sup> Resident aliens possessed only modest constitutional protection of their ability to remain in the United States, for the Supreme Court held in 1893 in *Fong Yue Ting* that deportation, harsh as it might be in a given case, is not a "punishment" to which Fourth, Fifth, Sixth, and

---

73. *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (holding that a Chinese merchant permanently domiciled in San Francisco who temporarily traveled abroad before exclusion act went into effect may be excluded upon his return).

74. 163 U.S. 228 (1896) (Congress may not impose a sentence of hard labor upon aliens illegally present in the United States unless after a trial by jury).

75. 118 U.S. 356, 369 (1886) (Fourteenth Amendment reference to "persons" is not confined to citizens).

76. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); *id.*, amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.").

77. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

78. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

79. 149 U.S. 698 (1893).

80. *Id.* at 724 ("Chinese laborers . . . like all other aliens residing in the United States . . . are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.").

81. Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25.

82. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

83. *Fong Yue Ting*, 149 U.S. at 724.

Eighth Amendment protections apply.<sup>84</sup> An alien who has entered the United States must have due process notice and opportunity to be heard, but that is all the process that the Constitution *requires*.<sup>85</sup> The Court in *The Japanese Immigrant Case* limited even this protection; if the deportee could not understand English, and thus the substance of the proceeding against her, that was her misfortune.<sup>86</sup>

The Cold War era provided the Supreme Court with yet another justification for its immigration law plenary power doctrine—the need to protect the United States' national security interests.<sup>87</sup> The case law of this era shows extreme Court deference to the government at the expense of both aliens and citizens. The Immigration and Nationality Act of 1952<sup>88</sup> and other legislation of the period<sup>89</sup>

84. *Id.* at 730.

85. *The Japanese Immigrant Case* (*Yamataya v. Fisher*), 189 U.S. 86, 100-01 (1903).

86. *Id.* at 102. See INA § 242(b)(1) and (3), 8 U.S.C. §§ 1252(b)(1) and (3) (providing for notice reasonable under the circumstances and a reasonable opportunity to examine the opposing evidence, present evidence, and cross-examine witnesses, all of which clearly imply the ability to understand the proceedings). See also 8 C.F.R. § 235.6(a) (providing that an interpreter shall explain notices of hearings to detained aliens if necessary). While statutory requirements are ambiguous, INS agency "common law" requires an interpreter as a matter of due process at any hearing where the alien does not understand English. See *Matter of Tomas*, Int. Dec. 3032, 19 I. & N. Dec. 464 (BIA 1987) (fundamental fairness requires that an interpreter be provided when the respondent does not understand English).

Modern due process requires that the opportunity to be heard must be "meaningful." See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (hearing must be held "at a meaningful time and in a meaningful manner"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). This requirement suggests that when a respondent cannot meaningfully understand the proceedings against him or her, some level of translation may be a constitutionally irreducible due process requirement. A number of lower federal court decisions have held *in dicta* that the requirements of due process include at least some translation of proceedings. See *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980) (dictum); *Niarchos v. INS*, 393 F.2d 509 (7th Cir. 1968) (dictum). Recently, the District Court for the Southern District of New York held directly that translation is a due process requirement in at least some INS hearings. *Abdullah v. INS*, 921 F. Supp. 1080, 1098 (S.D.N.Y. 1996).

87. See, e.g. *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*), 130 U.S. 581, 606 (1889).

88. Pub. L. No. 82-414, 66 Stat. 163 (1952), codified as amended at 8 U.S.C. §§ 1101-1524. The legislation is also known as the McCarran-Walter Act, particularly when referring to its provisions barring Communists and others from the country on ideological grounds.

89. See, e.g., the Alien Registration Act of 1940 ("Smith Act"), ch. 439, 54 Stat. 673, allegedly aimed at Nazi sympathizers, which served as the basis for many deportation actions against Communist Party members and sympathizers. The McCarran-Walter Act (the basis for the INA) added a number of ideologically motivated exclusion and deportation provisions to the immigration laws as well. Pub. L. No. 82-414, 66 Stat. 163 (1952).

seriously restricted the First Amendment rights of association and freedom of speech<sup>90</sup> of even longtime resident aliens.

The Court's first major pronouncement on these legislative developments, *United States ex rel. Knauff v. Shaughnessy*,<sup>91</sup> held that government officials could summarily bar the foreign-born bride of a United States citizen from the United States on national security grounds, without a hearing and without informing her of the evidence mandating her exclusion.<sup>92</sup> The Court made no mention of the American spouse's right to marry or associate with his wife. The three dissenting Justices, on the other hand, gave great weight to these interests.<sup>93</sup>

The same summary exclusion procedures applied to permanent resident aliens returning from travel abroad.<sup>94</sup> The Court upheld these provisions, even though this ruling meant that the government could detain an alien with long-term ties to America, a citizen spouse and property, potentially forever—with no charges lodged against him or her and no trial.<sup>95</sup> Similarly, in a number of deci-

---

90. U.S. CONST. amend. I

91. 338 U.S. 537, 546 (1950).

92. *Id.* at 546-47. See *supra* notes 6-9 and accompanying text (describing effect of AEDPA in resurrecting summary expulsion). See also Anthony Lewis, *How Terrorism Wins*, N.Y. TIMES, March 11, 1996, at A17 (describing the then-pending anti-terrorism legislation as "a return to the discredited, and repealed, sections of the McCarran-Walter Immigration Act under which supposed Communists . . . were excluded" and the secret evidence provision as "a gross violation of the due process guaranteed by the Constitution [and] . . . another throwback to the McCarran-McCarthy period").

93. *Knauff*, 338 U.S. at 549-550 (Frankfurter, J., dissenting) ("A regulation permitting such exclusion . . . in the case of an alien claiming entry on his own account is one thing. To construe such regulation . . . to apply to the wife of an honorably discharged U.S. soldier is quite another thing."); *id.* at 550-51 (Jackson, J., joined by Black and Frankfurter, JJ., dissenting) ("[T]his American citizen is told he cannot bring his wife to the United States, but he will not be told why. He must abandon his bride to live in his own country or forsake his country to live with his bride.").

94. *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206 (1953); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). See *infra* notes 95, 140 (discussing later judicial and legislative amelioration of the exclusion provisions' effects on permanent residents).

95. *Mezei*, 345 U.S. 206. Interestingly, only weeks before announcing its opinion in *Mezei*, the Court had held that returning resident aliens had a right of procedural due process including a full hearing before he or she could be excluded on security grounds. *Kwong Hai Chew*, 344 U.S. at 600-01. The Court distinguished one resident alien from the other on the grounds that Kwong Hai Chew, a seaman, had gotten clearance for his journey, while Mezei had not. In fact, Mezei had apparently left the U.S. in emergent circumstances in 1948 to see his dying mother in Rumania, had not been allowed to enter that country, had spent 19 months in Hungary trying to get permission to leave Hungary and reenter the United States, and had gotten an immigrant visa from the U.S. Consul in Budapest. *Mezei*, 345 U.S. at 208. No other coun-

sions,<sup>96</sup> the Court upheld deportations of longtime resident aliens who had once been Communist Party members, even though their membership ended before the Alien Registration Act,<sup>97</sup> ordering the deportation of alien Communists, went into effect.

Such policies seriously endangered U.S. citizens' own civil liberties. Dissenting in a 1952 Communist deportation case, *Carlson v. Landon*,<sup>98</sup> Justice Hugo Black noted, "[t]he stark fact is that if Congress can authorize imprisonment of 'alien Communists' because [they are] dangerous, it can authorize imprisonment of citizen 'Communists' on the same ground."<sup>99</sup> Indeed, prosecutions and jailings of U.S. citizens as well as aliens for "advocacy," especially advocacy of communism or socialism, had been all too common in U.S. history.<sup>100</sup>

---

try would accept him, leaving him stranded on Ellis Island. *Id.* at 209. Years later, Mezei received humanitarian parole but was never formally admitted to the United States. Thus, he could rejoin his family but he remained in a legal limbo. T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 370 n.1 (2d ed. 1991). The Supreme Court has since clarified that returning lawful permanent residents are constitutionally entitled to due process protection in exclusion proceedings. *Landon v. Plasencia*, 459 U.S. 21 (1982).

96. The best known of these cases include *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (finding no abridgement of freedom of speech or assembly in provision for deportation of resident alien Communist Party members, and no violation of the prohibition on ex post facto laws even though Party membership ended before date of enactment); *Carlson v. Landon*, 342 U.S. 524 (1952) (finding that delegation of discretionary authority to detain Communist Party member aliens without bail to Attorney General was not unlawful and did not violate Fifth Amendment due process clause); and *Galvan v. Press*, 347 U.S. 522 (1954) (holding deportation provisions applicable even if alien successfully showed he did not know of Communist Party's alleged advocacy of violence when he knowingly joined that organization).

97. 54 Stat. 670, § 23 (1940).

98. 342 U.S. 524 (1952).

99. *Id.* at 552.

100. Wars and the national security "emergencies" that surround them prompt prosecution and convictions under "criminal anarchy," sedition or related statutes with grim regularity. *See, e.g.*, the Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917); the Sedition Act of 1918, ch. 75, 40 Stat. 553 (1921). During the First World War years, U.S. prosecutors brought approximately 2,000 cases, mostly under the 1917 Act. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1026 (2d ed. 1991). One of the best known cases from this period is *Debs v. United States*, 249 U.S. 211 (1919) (upholding conviction of prominent Socialist leader and future presidential candidate Eugene V. Debs for violating Espionage Act of 1917 by speaking against recruitment of soldiers for U.S. war effort). The states were also active in such prosecutions, and for many years the United States Supreme Court upheld state criminal syndicalism and criminal anarchy laws. *See, e.g.*, *Whitney v. California*, 274 U.S. 357 (1927) (upholding conviction under California Criminal Syndicalism Act); *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding conviction of Communist leader under New York criminal anarchy statute). The facts of both cases arose in 1919.

The Second World War brought another wave of "advocacy" legislation. *See supra* note 89 (giving examples). Once again, the Court upheld the statutes, some of which

Nor was the ban on "subversive" or "Communist" aliens confined to the 1950s. As late as 1972, the Supreme Court in *Kleindienst v. Mandel*<sup>101</sup> upheld the exclusion on ideological grounds of Ernest Mandel, a Marxist journalist and author of a number of works on Marxist economic theory.<sup>102</sup> Other visa refusals barred from the United States Hortensia Allende, widow of assassinated Chilean president Salvador Allende;<sup>103</sup> former Nicaraguan Interior Minister Tomas Borge;<sup>104</sup> and former deputy to the Italian Senate General Nino Pasti, a prominent critic of the United States' European military deployment policies.<sup>105</sup>

---

(including the Smith Act, ch. 439, 54 Stat. 670 (1940), codified at 18 U.S.C. § 2385) are still on the books, albeit attenuated in scope by later decisions. See, e.g., *Yates v. United States*, 354 U.S. 298 (1957) (finding that "mere" advocacy, even if uttered in hope that overthrow of government will eventually result, is too remote from such a consequence to be caught by the Act). By the time of the *Yates* decision, over 120 leaders of the Communist Party had been tried and mostly convicted under the Smith Act. STONE ET AL., *supra*, at 1065. While a complete discussion of these periods of United States legal history is beyond the scope of this Note, a mention of them places the Supreme Court's deportation and exclusion holdings from them in some historical context.

101. 408 U.S. 753 (1972).

102. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). The Court noted Congress's "almost continuous attention . . . to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of increasing control with particular attention, for almost 70 years now, first to anarchists and then to those with communist affiliation or views." *Id.* at 761-62. In finding for the government, the Court dismissed the claim that even if Mandel himself had no "right" to enter the United States, citizens of this country *did* have a First Amendment right to hear him speak. *Id.* at 762-66.

103. *Allende v. Schultz*, 845 F.2d 1111 (1st Cir. 1988).

104. *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987) (per curiam). Many other prominent cultural and political figures appeared on State Department and INS so-called "lookout books," meaning that the State Department was likely to deny them visas and INS likely to bar them from the United States on ideological grounds. See Martin Tolchin, *U.S. to Delete Almost All Names From Political Blacklist of Aliens*, N.Y. TIMES, June 14, 1991, at A1 (naming, *inter alia*, Nobel laureate writers Gabriel Garcia Marquez and Pablo Neruda, novelist Graham Greene, actor Yves Montand, and naturalist Farley Mowat as appearing in the lookout books).

105. *Abourezk*, 785 F.2d at 1043. Facing severe international criticism of these exclusions based on political beliefs, Congress enacted temporary legislation barring ideological exclusion of visiting aliens. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 100-461, § 555, 102 Stat. 2268, 2268-36 (1989) (temporary measure in effect for two years from date of enactment); Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1339-1400 (1987) (temporary measure in effect for one year from date of enactment). Congress permanently eliminated most of the political belief-based ideological exclusion grounds in the Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067 (amending INA § 212(a), 8 U.S.C. § 1182(a) (1994)).

However, the 1990 act retained and modernized many closely related exclusion grounds. See, e.g. Immigration Act of 1990 § 601(e) (codified at INA §§ 212(a)(3), 8

The most recent wave of immigration cases to reach the Supreme Court concerned the federal government's widespread and indefinite detention of thousands of Cuban<sup>106</sup> and Haitian<sup>107</sup> refugees who arrived, mainly by sea on rickety boats and rafts, in the 1980s and early 1990s. The huge size of the refugee wave and the harsh federal response of interdicting, detaining, and in some instances forcibly returning the refugees<sup>108</sup> brought the underlying philosophy of immigration law, the immigration plenary power doctrine, sharp criticism as unjust and incompatible with the American constitutional and historical tradition.<sup>109</sup>

---

U.S.C. § 1182(a)(3) (1994)) (allowing exclusion due to an alien's "past, current, or expected beliefs, statements, or associations," if these beliefs, statements or associations "compromise a compelling U.S. foreign policy interest"). The AEDPA (§ 302, 110 Stat. 1214, 1248 (adding INA § 219)) broadens the Immigration Act of 1990's already loose definition of "terrorists" as an excludable class. Immigration Act of 1990, § 601(e) (codified at INA § 212(a)(3), 8 U.S.C. § 1182(a)(3) (1994)).

106. See, e.g., Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans: Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1736-38 (1989) (providing numbers ranging toward 8000 of *marielitos* detained by INS, or to be detained following completion of criminal sentences, *id.* at 1737 n.12).

107. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 161 (1993) (over 25,000 Haitians interdicted at sea in decade following President Reagan's Exec. Order No. 12,324, 3 C.F.R. § 2(c)(3) (1981-1983 Comp.)); *id.* at 163 (over 34,000 interdicted between October 1991 and May 1992; 10,497 in the first three weeks of May 1992 alone). See also *Jean v. Nelson*, 472 U.S. 846, 849-50 (1985) (noting 1700 members of plaintiff class of Haitians detained without parole since early 1981).

108. For a description of the conditions under which the INS detained Cuban refugees at the Atlanta Federal Penitentiary beginning in 1980, see Kemple, *supra* note 106, at 1736-43. Kemple cites a House subcommittee report finding detention conditions at the penitentiary to be "brutal and inhumane" and "intolerable." *Id.* at 1741, quoting Atlanta Federal Penitentiary: Report of the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, U.S. House of Representatives, 99th Cong., 2d Sess. 4 (1986). Nevertheless, the INS continued to transfer Cuban refugees to the prison and took no steps to improve conditions there. Kemple, *supra* note 106, at 1742.

When Haiti's dictator Jean-Claude "Baby Doc" Duvalier fell in 1986, and again in 1991 when a military coup deposed democratically elected Haitian president Jean Bertrand Aristide, thousands of Haitians fled to the United States on dangerously overloaded boats and fragile rafts. The Reagan, Bush and Clinton Administrations have all ordered the United States Coast Guard to interdict any refugees found in international waters. See Exec. Order No. 12,324, 3 C.F.R. 181 (1981-1983) (Reagan order); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) (Bush order, which President Clinton renewed). At various times, the Coast Guard returned refugees to Haiti with no determination of whether they would be subject to persecution there; held them aboard Coast Guard cutters pending determination of their claims; and transported them to U.S. bases at Guantanamo Bay, Cuba and later in Panama for detention. See generally *Sale*, 509 U.S. at 159-67 (describing circumstances and quoting Bush Executive Order).

109. Motomura, *Phantom Norms*, *supra* note 23, at 547; see generally Schuck, *supra* note 5; Legomsky, *supra* note 36.

In 1985 the Supreme Court decided *Jean v. Nelson*,<sup>110</sup> a case involving the indefinite detention of Haitian refugees who had reached U.S. soil. Amid growing criticism of the immigration plenary power doctrine,<sup>111</sup> many scholars foresaw the doctrine's imminent demise and hoped for the application of normal standards of judicial review to immigration cases.<sup>112</sup> The Court's decision in *Jean* did not bear out these expectations. Avoiding all constitutional entanglements, the Court decided the case on procedural grounds.<sup>113</sup>

## II. Stare Decisis and the Immigration Law Plenary Power Doctrine

### A. The Problems with Plenary Power

With no clear constitutional text to guide it, the Supreme Court in large part created Congress's power over immigration matters by acquiescing to Congress's actions.<sup>114</sup> The Court held Congress's power to pass legislation regulating immigration to be inherent in U.S. sovereignty,<sup>115</sup> and further found:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.<sup>116</sup>

The Court found that there had *never been any question* that paupers, criminals and the diseased, for example, could be excluded,

---

110. 472 U.S. 846 (1985). The Court, however, did not reach the petitioners' arguments to reevaluate the plenary power doctrine, deciding the case on procedural grounds. See *infra* note 113.

111. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627 n. 10 (1992) [hereinafter *Curious Evolution*] (citing recent scholarly articles).

112. *Id.*; see also Schuck, *supra* note 5, at 3-4, 73-90.

113. *Jean v. Nelson*, 472 U.S. 846, 855-57 (1985) (finding that Court of Appeals properly remanded to district court for consideration of whether INS had violated its own regulations, but finding regulations nondiscriminatory; further finding that Court of Appeals should not have reached petitioners' constitutional arguments when ruling on detainee parole denials).

114. See Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 67-75 (1989) (describing evolution of Court's theory of sovereignty).

115. The Chinese Exclusion Case (*Chae Chan Ping v. United States*), 130 U.S. 581, 604 (1889).

116. *Id.* at 603-04.

even if no statute so provided.<sup>117</sup> At least one commentator has speculated that such reasoning suited the Court's needs in the *Chinese Exclusion* ruling better than a finding of legislative power over immigration through the text of the Constitution would have done.<sup>118</sup>

Furthermore, the immigration regulatory power's special extraconstitutional standing as a power inherent in nationhood, from which flows Congress's absolute, unreviewable power to regulate immigration,<sup>119</sup> is inconsistent with American constitutional history and tradition.<sup>120</sup> In the Framers' scheme of government, sovereignty lies in the *people*, not Congress, which is the beneficiary only of such powers as the people choose to delegate to it in the Constitution.<sup>121</sup> In this conception of sovereignty, Congress's plenary

117. *Id.* at 608-09. The Court cited for this proposition a nation's inherent right to self-preservation and correspondence between James G. Blaine, Secretary of State under President Arthur and the U.S. minister to Switzerland. Blaine stated that there was in the United States "no room outside of its prisons or almshouses" for criminals and paupers who had become a burden on their own countries. (Emphasis supplied.) This latter proposition does not appear to imply a doctrine of *excludability*. It merely indicates confinement to institutions on the same terms as U.S. citizens in a like situation, a clear desire that the foreign equivalent not come to the United States, and a hope that their governments would not encourage them. Of course, it is doubtful that Blaine suspected he was laying the foundation for Supreme Court precedent when he wrote the remarks cited. For a modern-day example of Blaine's complaint, see *supra* note 108 (describing treatment, including indefinite detention upon arrival in United States, of Cuban *marielitos*, some of whom Castro released from jails and mental institutions).

118. Wani, *supra* note 114, at 62 ("It is not far fetched . . . to speculate that sovereignty perfectly fit the Court's purpose at the time, a purpose that a constitutionally derived source of power would not have as easily fulfilled.").

119. *The Chinese Exclusion Case*, 130 U.S. at 609 ("Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition . . . are not questions for judicial determination."). By phrasing its rationale in these terms, the Court implicitly created a nonjusticiable "political question," excusing itself from any further consideration of the exclusion legislation, no matter what its ultimate effects on individuals. See *infra* notes 143-48 and accompanying text.

120. Wani, *supra* note 114, at 66-67. While Professor Wani notes that undoubtedly there are areas where federal power must preempt the states, he believes the Court's emphasis on the doctrine and its further development (*e.g.*, as reflected in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), a case which has aroused much comment and controversy since its decision) is wrong as a matter of constitutional theory. Wani, *supra* note 114, at 75-78.

121. See, *e.g.*, THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that a bill of rights was not necessary in the proposed Constitution, as "[h]ere, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations . . ."); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 530-32, 544-47 (1969) (sovereign power resides in the people, not in state or federal government, under the United States' constitutional scheme). The states themselves have essen-



power to pass laws in constitutionally enumerated areas is central to the American system of government.<sup>122</sup> Consequently, the Supreme Court has given Congress wide latitude to legislate in areas “necessary and proper” to the execution of its enumerated powers.<sup>123</sup>

In *McCulloch v. Maryland*, one of the earliest cases to touch on the scope of the “necessary and proper” power, the Court held that “the powers given to the government imply the ordinary means of their execution,”<sup>124</sup> including any necessary auxiliary legislation. However, the principle of limited, enumerated powers does set outer limits on Congress’s “necessary and proper” legislative authority.<sup>125</sup> Furthermore, the very existence of a written Constitution binds Congress to the terms of that document, which is the supreme law of the land.<sup>126</sup>

The authority to regulate immigration, however, is a horse of a different color. The Supreme Court simply *assumed* the existence of a power in Congress to exclude and expel noncitizens at will as “an incident of every independent nation”<sup>127</sup> and “not . . . open to controversy.”<sup>128</sup> This assumption is not the “ordinary means of execution”<sup>129</sup> of any enumerated power, but an entirely *new* source of power to legislate. In rationalizing this extraconstitutional source of power, the *Chinese Exclusion* Court believed, at least implicitly,

---

tially no power to regulate immigration. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (“The States enjoy no power with respect to the classification of aliens,” in this case to deny a public education by state law). However, as previously noted, a *federal* power to do so is nowhere enumerated in the Constitution, which speaks only of naturalization, not at all the same thing as the conditions of entry and stay of an *alien* in the United States. *See supra* note 117; U.S. CONST. art. I, § 8, cl. 4.

122. *See* U.S. CONST. art. I, § 8 (setting forth powers of Congress).

123. *Id.* at cl. 18.

124. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819).

125. *See* Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 862 n.46, quoting *Reid v. Covert*, 354 U.S. 1, 5 (1957) (“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”).

126. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.”). *See also* *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (holding unconstitutional a Border Patrol unit’s warrantless search of Mexican citizen’s automobile within the United States for lack of reasonable suspicion of illegal presence or activity) (“It is clear, of course, that no Act of Congress can authorize a violation of the Constitution.”).

127. *The Chinese Exclusion Case*, 130 U.S. at 603.

128. *Id.*

129. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 409.

that the Constitution's framers, in founding a sovereign nation, also *assumed* that powers "inherent" in sovereignty existed, thus explaining the Constitution's silence on the matter.<sup>130</sup>

Legal fictions<sup>131</sup> of various kinds have dominated immigration case law since its beginnings.<sup>132</sup> A forest of fictions has grown up around the concept of "entry," defined, until recently,<sup>133</sup> decep-

130. See, e.g., *The Chinese Exclusion Case*, 130 U.S. at 609. Even if the Court's assumption about the framers' views is true, the framers' *clearly expressed* idea of a federal government of limited, enumerated powers should still cause the Court discomfort in making sweeping pronouncements about the practically limitless scope of the plenary power to regulate immigration. See, e.g., THE FEDERALIST NO. 45, at 290-93 (James Madison) (Clinton Rossiter ed., 1961), in particular *id.* at 292 ("[t]he powers delegated by the proposed Constitution to the federal government are few and defined"). Yet Court majorities from *The Chinese Exclusion Case* to the present day have felt free to make such sweeping pronouncements with an untroubled conscience, despite dissenters' qualms. See, e.g., *Fong Yue Ting*, 149 U.S. at 758 (Field, J., dissenting) (arguing that the Court allowed Congress to exceed the scope of its limited powers by extending unlimited plenary immigration regulatory authority to deportation of aliens already present in the United States); *id.* at 737 (Brewer, J., dissenting) ("axiomatic" that federal government is one of enumerated powers); *Harisiades v. Shaughnessy*, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) (quoting Justice Brewer's *Fong Yue Ting* dissent noting the "indefinite and dangerous" nature of powers inherent in sovereignty, and questioning why such a power should defeat the Fifth Amendment's expressly stated right to life and liberty).

131. A legal fiction is an "[a]ssumption of fact made by a court as basis for deciding a legal question. A situation contrived by the law to permit a court to dispose of a matter, though it need not be created improperly. . . ." BLACK'S LAW DICTIONARY 894 (6th ed. 1990). Another source defines legal fiction as "an assumption that certain facts exist, whether or not they really do exist, so that a principle of law may be applied in order to achieve justice on the facts as they do exist." BARRON'S LAW DICTIONARY 273 (3rd ed. 1991).

Professor Ibrahim J. Wani notes the special character of immigration law fictions, which "range from nebulous abstractions to outright distortions and misrepresentations. They are often used to achieve ends that would be unthinkable in other areas of American law and popular belief. In many respects, immigration law fictions also tend to substitute for the sound, enquiring and searching analysis expected and demanded of judicial decision-making." Wani, *supra* note 114, at 53.

132. See generally Wani, *supra* note 114. Professor Wani exhaustively discusses the use and abuse of fiction in the immigration area and identifies four main fictions in immigration law: sovereignty, an idea created to legitimate federal regulation of immigration, *id.* at 63-84; the entry fiction, "the most deceptive and sometimes embarrassing use of legal fiction," *id.* at 54, 89-96; concepts such as detention and punishment, especially in the distinction between criminal and civil matters, *id.* at 97-100; and the concept of national community as an underlying ideology which legitimates unjust immigration policies, *id.* at 106-116.

133. IIRIRA's Title III redefined the entire concept of "entry," creating a unified "removal" procedure that replaces the separate deportation and exclusion provisions of the Immigration and Nationality Act, and eliminating "entry" in favor of an "admission" definition which includes *only* the inspection and formal admission process. IIRIRA sec. 301(a), § 101(a)(13) (amending 8 U.S.C. § 1101(a)), 142 CONG. REC. H11795-96 (daily ed. Sept. 28, 1996). This new concept also redefines aliens who are within the United States and have not been formally inspected and admitted as "ap-

tively simply, as “any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise . . . .”<sup>134</sup> As long ago as *Nishimura Ekiu v. United States*, the Supreme Court held that even though officials might remove an alien from shipboard and bring her into the United States for further processing, that alien still had not “entered” the United States.<sup>135</sup> This idea became the basis for the “entry” fiction, one of the most harshly criticized doctrines of American immigration law, under which an alien physically present in the United States is still “abroad” and without constitutional protections.<sup>136</sup> Notwithstanding this long-running criticism, however, IIRIRA has actually *extended* the “entry” fiction by law to *all* aliens within the United States who have not been inspected and admitted, not just those who have been paroled or are awaiting adjudication of their applications for entry.<sup>137</sup>

---

plicants for entry,” enabling Title III’s summary expulsion process to be employed against them. IIRIRA sec. 302(a)(1), § 235 (amending 8 U.S.C. § 1225), 142 CONG. REC. H11796 (daily ed. Sept. 28, 1996) (defining “applicants for admission” physically present in the United States without having been inspected and admitted); IIRIRA sec. 302(b), § 235 (amending 8 U.S.C. § 1225), 142 CONG. REC. H1196-97 (daily ed. Sept. 28, 1996) (inspection and expedited removal proceeding). *See also infra*, note 137 and accompanying text.

134. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994). The provision contains an exception for permanent resident aliens who can show that their departure was not intentional or reasonably expected. *Id.*

135. 142 U.S. 651, 662 (1892). In so ruling, the Court summarily accepted Congress’s power to create such fictional constructs when defining “entry” into the United States regardless of the effect such definitions might have on an individual’s constitutional rights in the future. *See* Act of March 3, 1891, § 8, ch. 551, 26 Stat. 1085; *Nishimura Ekiu*, 142 U.S. at 661-62 (quoting relevant sections of the Act without further comment). The effect of the *Nishimura Ekiu* decision was to create a future class of individuals who might be physically present on U.S. soil and even at large under parole into the United States for many years, but who would still have few constitutional protections. *See* *Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925) (holding that an alien paroled into the United States nine years previously had never “entered or dwelt in the United States” for purposes of obtaining an immigration benefit). *See also* *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (alien must “enter” the United States in order to accrue rights and ties to the United States).

The Act of March 3, 1891 designated “idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease; persons who had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude” and a few other classes as excludable, and provided for inspection of all arriving aliens by immigration officials under the auspices of the Treasury Department. *Lem Moon Sing v. United States*, 158 U.S. 538, 542 (1895) (describing the Act).

136. *See infra* notes 138-142 and accompanying text for a discussion of the effects of the entry doctrine as a legal fiction.

137. IIRIRA, sec. 303(a) and (b), § 235(a) and (b) (amending 8 U.S.C. § 1225 (1994)), 142 CONG. REC. H11796-97 (daily ed. Sept. 28, 1996) (defining, respectively,

The severe consequences of this fiction for individuals, who can be separated forever from their homes and families in the United States,<sup>138</sup> have made entry fiction one of the most harshly criticized aspects of immigration statutory and case law.<sup>139</sup> At times, the entry fiction's draconian consequences have been too much even for the Supreme Court, which has buried the entry fiction under a mound of additional legal fictions. The Court has held, for instance, that an alien who did not *intend* to leave the United States does not really "enter" upon his or her return, since he or she had never "left" in the first place.<sup>140</sup> The Court resorted to this tor-

---

aliens to be treated as applicants for admission and the inspection/expedited removal process for aliens not admitted); *see also supra* note 133.

138. *See, e.g.,* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), and *supra* note 42.

139. *See generally* Brian K. Bates, *A Brief Tour of Wonderland: A Practical Introduction to Exclusion Proceedings*, 90-01 IMMIGRATION BRIEFINGS (January 1990); Wani, *supra* note 114 (discussing courts' use of the entry doctrine to avoid constitutional and other substantive issues); *see also id.* at 91-92 ("It has been described as scandalous, shocking, morally outrageous, deplorable, an embarrassment and an anomaly in constitutional government. Despite its acknowledged falsity and outrageousness, entry has had tremendous staying power and is still used as the primary determinant of procedural due process."); Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARVARD L. REV. 1362, 1389-96 (1953); *id.* at 1395 ("I cannot believe that judges adequately aware of the foundations of principle in this field would permit themselves to trivialize the great guarantees of due process and the freedom writ [of habeas corpus] by such distinctions [between "entry" and "non-entry"]."); Kemple, *supra* note 106, at 1791 (logic of deportation cases and deportation and exclusion provisions of immigration law allows "no reasonable inference that Congress intended to authorize the Attorney General either to incarcerate excludable aliens longer than deportable aliens or to detain excludable aliens indefinitely"); Ethan A. Klingsberg, Note, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights*, 98 YALE L.J. 639 (1989) (proposing an entitlement model based on *Perry v. Sinderman*, 408 U.S. 593 (1972), to replace the doctrine). For a recent account of the entry doctrine's consequences to individuals, see Alisa Solomon, *The Worst Prison System in America*, VILLAGE VOICE, Aug. 8, 1995, at 25 (in the wake of an inmate uprising at an Elizabeth, New Jersey INS detention facility, describing deplorable detention center conditions and immigration detainees' lack of constitutional rights).

140. *Rosenberg v. Fleuti*, 374 U.S. 449, 459-60 (1963). *Fleuti* involved a gay man who became a U.S. permanent resident before Congress barred homosexual aliens from entering the United States. *See* former INA § 212(a)(4), 8 U.S.C. § 1182(a)(4), 66 Stat. 182 (1952), *repealed by* Immigration Act of 1990, P.L. 101-649, § 601(a), 104 Stat. 4978, 5067. *Fleuti* was safe as long as he did not leave the United States, as the statute only barred *entries* by homosexual aliens. He spent an afternoon in Mexico in 1956, *after* the ban on homosexuals went into effect, and returned to the United States without incident. However, in 1959 the government sought to deport *Fleuti* as "afflicted with psychopathic personality" upon his 1956 return from Mexico, an entry to which the new law applied. *Fleuti*, 374 U.S. at 450-51; INA § 241(a)(1), 8 U.S.C. § 1251 (a)(1) (1994) (rendering deportable an alien excludable under any provision of the law in effect at the time of that alien's entry into the United States).

tured reasoning in order to avoid confronting the substantive constitutionality of the entry fiction and its statutory codifications.<sup>141</sup> As IIRIRA has extended the scope of the "entry doctrine" even further to include aliens entering the United States without inspection (who will be susceptible to summary removal, if they cannot prove continuous physical presence in the United States throughout the previous two years),<sup>142</sup> the Supreme Court may now be compelled, in the interests of due process and fundamental fairness, to face this issue directly.

Another facet of the Court's passivity and abstentionism on immigration questions stems from its early holdings that immigration legislation presents nonjusticiable "political questions" because of its foreign affairs implications.<sup>143</sup> The "political question" approach to immigration legislation relies on two assumptions: that Congress's immigration decisions inherently affect foreign affairs, and that such foreign policy decisions are necessarily "political

---

Fleuti argued that then-INA § 212(a)(4) was unconstitutionally vague and ambiguous, and the Supreme Court granted certiorari on that issue. *Id.* at 451. However, the Court did not reach the constitutional issue, deciding instead to give relief to Fleuti through a broad reading of an "unintended departure" exception to the "entry" definition. Under this broad reading, Fleuti had in effect *never left* the United States on that afternoon in 1956. *Id.* at 458-59. This judicial sleight of hand prevented the ban on homosexuals from applying to Fleuti in the circumstances of his case. *Id.* at 453.

The Ninth Circuit had ruled the INA's "psychopathic personality" clause unconstitutionally vague as applied to homosexuals, prompting Congress to amend the provision by adding the term "sexual deviate." *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449 (1963); Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911 (amending former INA § 212(a)(4), 8 U.S.C. § 1182(a)(4)). The Supreme Court never ruled the "sexual deviate" homosexual bar unconstitutional, and it remained the law of this land until 1990, when Congress repealed it. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 601 (amending INA § 212, 8 U.S.C. § 1182).

The *Fleuti* exception to the entry doctrine requires that an absence from the United States be "innocent, casual, and brief" in order to avoid making an entry upon return. *Fleuti*, 374 U.S. at 462-63. This finding can be vitally important, for instance, when an alien seeks a benefit available only after a given period of continuous residence in the United States. *See, e.g.*, INA § 244, 8 U.S.C. § 1254 (1994) (providing for discretionary suspension of deportation proceedings and granting of permanent residence to aliens meeting various requirements, including seven years of continuous residence in the United States).

141. *Fleuti*, 374 U.S. at 468 (Clark, Harlan, Stewart and White, JJ., dissenting). The four dissenters believed the Court should have reached the constitutional question. Presumably, since the four did not concur in the result, they would have upheld the "psychopathic personality" provision as applied to homosexuals.

142. IIRIRA, Pub. L. No. 104-208, sec. 302(b)(1)(A)(iii)(I) and (II), § 235 (amending 8 U.S.C. § 1225), 142 CONG. REC. H11796 (daily ed. Sept. 28, 1996).

143. Legomsky, *supra* note 36, at 261-62.

questions.”<sup>144</sup> Neither of these assumptions necessarily holds true in any given immigration case,<sup>145</sup> although in theory one or both considerations may apply.<sup>146</sup> Notably, the leading “political ques-

---

144. *Id.*; see also *Goldwater v. Carter*, 444 U.S. 996 (1979) (granting certiorari, vacating, and remanding for dismissal a case in which the Court of Appeals for the D.C. Circuit had held that President Carter could withdraw recognition from Taiwan without consulting Congress). Using disparate rationales, five Justices in *Goldwater* found that the issue presented—distinctly one of foreign affairs—was not a political question, while four found that it was.

Some authorities do not believe that the political question doctrine as such truly exists. See, e.g., Henkin, *Is There a “Political Question” Doctrine?*, *supra* note 36, at 600-01 (“political questions” really reflect the prudential consideration of respect toward the coordinate branches; matters within the powers granted to those branches are found constitutional, not dismissed as “political questions”). Professor Wechsler went even further: “[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.” Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959). Such a finding *itself*, of course, requires a court to exercise its interpretive powers. *Id.* at 8.

Greater clarity results when the doctrine is seen as one of political remedies, which a court could not grant without violating the separation of powers. Professor Henkin argues that even in the case of the Constitution’s “republican form of government” clause at Art. IV, § 4, perhaps the most intractable source of political questions and most often offered as a prime example of the doctrine, courts could rule on one of several non-political question grounds that the claims involved asserted no constitutional cause of action upon which relief could be granted. Henkin, *Is There a “Political Question” Doctrine?*, *supra* note 36, at 607-10. If the only remedies that plaintiffs can propose require the court to play the role of one of the political branches, then there is simply no relief that the court could constitutionally grant.

Even where this is the case, Professor Henkin proposes that the courts could avoid totally foreclosing themselves from examining such questions by invoking the doctrine of “want of equity” to deny relief. *Id.* at 617-22. The Supreme Court acted in such a fashion, he argues, in *Gilligan v. Morgan*, 413 U.S. 1 (1973), in which Kent State University students sought to restrain future unconstitutional activities of the Ohio National Guard. The Court held that “[t]he relief sought . . . would . . . embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government” and that it would be “inappropriate” for a judge to intervene in these areas. 413 U.S. at 7-8.

145. Legomsky, *supra* note 36, at 262-69. In examining the application of the “political question” doctrine to immigration cases, Professor Legomsky notes that it “ignores reality” to assume that every such question is “so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations,” and that the very structure of the immigration laws—giving an administrative agency, the INS, pride of place and the State Department a secondary role, militates against such an assumption. *Id.* at 262 n.34 and accompanying text.

Professor Legomsky further notes that even immigration statutes targeting a specific nationality, such as the Chinese Exclusion Act, see *supra* note 52, are more convincingly explained as the result of domestic pressure than as implicating foreign affairs. Legomsky, *supra* note 36, at 262, 286-95 (describing at length historical factors and specific events involving various nations which may have influenced judicial opinion in immigration cases involving aliens of those nationalities).

146. See *id.* at 262-63 (a finding that foreign affairs were actually affected in a given case may mandate judicial deference; reference to aliens of a particular nationality

tion” case, *Baker v. Carr*,<sup>147</sup> required an inquiry into the *precise facts* presented in a case before finding the matter at hand nonjusticiable.<sup>148</sup>

The political question/foreign affairs nexus in immigration case law arose in its modern form after the Supreme Court’s decision in *United States v. Curtiss-Wright Export Corp.*<sup>149</sup> The Court, in ruling that Congress could constitutionally delegate authority to the President to issue an executive order halting arms trade to warring Paraguay and Bolivia, held that the federal government possesses sweeping and essentially unreviewable powers in international affairs.<sup>150</sup> *Curtiss-Wright* also enunciated the radical and controversial idea that the plenary foreign affairs powers do not derive from the Constitution *at all*.<sup>151</sup> *Curtiss-Wright* indicated a number of ar-

---

may be persuasive evidence that foreign policy considerations were the basis for an executive order or statute). A specific example for Professor Legomsky was the series of executive orders and INS directives enacted to control the activities of Iranian students in the United States during the Iranian hostage crisis. *Id.* at 294. See also TRIBE, *supra* note 39, § 5-16, at 353 (1988) (in war and alien cases, the “peculiarly ‘national’ character of the power granted Congress limits judicial review” in ways “seemingly inconsistent with the usual restraints on congressional power”).

147. 369 U.S. 186 (1962).

148. *Id.* at 217 (“The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’ The courts cannot reject as ‘no lawsuit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”).

*Baker v. Carr* laid out a number of factors to consider in finding a controversy to be a nonjusticiable political question. These include a “textually demonstrable constitutional commitment” to another branch; “lack of judicially discoverable and manageable standards”; the case cannot be decided without making policy determinations clearly meant for nonjudicial discretion; the dispute cannot be resolved without disrespect to a coordinate branch; unusual need for unquestioning adherence to political decisions already made; and potential of embarrassment from multiple pronouncements on an issue. 369 U.S. at 217; see TRIBE, *supra* note 39, § 3-16, at 71 n.1. Professor Tribe finds that typically in political question jurisprudence the issue at hand is “political” not because it is of any particular concern to the *political branches*, but because the constitutional provisions that a party invokes do not lend themselves to judicial application to the matter at hand. *Id.*, § 3-16, at 75. That, however, edges into a failure to state a claim for which relief can be granted (e.g., FED. R. CIV. P. 12(b)), which does not imply nonjusticiability of the issue on *any* ground, but only on those invoked.

149. 299 U.S. 304 (1936).

150. *Id.* at 315-29 (discussing distinction between domestic powers, which are enumerated in the Constitution, and external powers, which the Constitution does not touch beyond committing them to the political branches).

151. *Id.* at 315-16 (“The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”); see also Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 858 (immigration regulation is “surely” one of *Curtiss-Wright*’s “powers inherent in national sovereignty”). Aspects of Sutherland’s

eas in which the Court “found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.”<sup>152</sup> Ironically, one of these areas was the “power to expel undesirable aliens,” which is “inherently inseparable from the conception of nationality.”<sup>153</sup>

*Curtiss-Wright's* sweeping approach to government power found an echo in the Court's immigration rulings from the 1950s. In a number of alien Communist deportation cases during that period, the Court relied on broad pronouncements on government power similar to those in *Curtiss-Wright* to uphold the exclusion and deportation of ideologically unsavory aliens.<sup>154</sup> However, while the

---

“external sovereignty” include the war and treaty powers, which the Constitution distributes between the political branches. U.S. CONST. art. I, § 8, cl. 11-14 (war power and regulation of armed forces committed to Congress); *id.* art. II, § 2, cl. 1 (president is commander in chief of armed forces); *id.* art. II, § 2, cl. 2 (committing power to conclude treaty to President with advice and consent of Senate).

Justice Sutherland's theory that “external” sovereignty bypassed the Constitution and came to rest in the federal government as an attribute of sovereignty is fundamentally at odds with the American conception that sovereignty resides in the people, except insofar as “We the People” delegated enumerated functions of sovereignty to the federal government in the Constitution. See Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L. J. 1, 29-30 (1973) (noting that Sutherland's historical and precedential evidence for the assertion of extraconstitutional, inherent external affairs power actually suggest that “[f]ederal power in foreign affairs rests on explicit and implicit constitutional grants and derives from the ordinary constitutive authority”).

152. 299 U.S. at 318.

153. *Id.* (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). Despite Justice Sutherland's use of the immigration example, the Court in the 1880s and '90s more than once stated that the paramount law of the Constitution could require it to intervene in the immigration area. See, e.g., *Fong Yue Ting*, 149 U.S. at 713; see also *The Chinese Exclusion Case*, 130 U.S. at 604 (war, treaty, commerce and other “sovereign powers” from which Court infers power to regulate immigration are “restricted in their exercise only by the constitution itself”).

Professor Lofgren points out that *The Chinese Exclusion Case* serves as a shaky ground for Justice Sutherland's premise of extraconstitutional federal foreign affairs powers for yet another reason: Justice Field, writing in that case, indicated the alien exclusion power to be “an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers *delegated by the constitution*. . . .” 130 U.S. at 609 (emphasis added), *quoted in* Lofgren, *supra* note 151, at 18.

154. The Court in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), relied directly on *Curtiss-Wright* in dismissing petitioner's argument that the regulations under which she was ordered excluded were an unconstitutional delegation of legislative power, stating that “[t]he right [to exclude aliens] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.” *Knauff*, 338 U.S. at 542 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-22 (1936)). Justice Sutherland in fact cited the immigration plenary power doctrine as one of the bases for his finding of an extraconstitutional origin of the executive foreign affairs power. *Curtiss-Wright*, 299 U.S. at 318 (citing “the power to expel undesirable aliens,” among others, as not expressly affirmed by



Court has retreated from *Curtiss-Wright's* extraconstitutional theories of discretionary power in the political branches,<sup>155</sup> it has never reevaluated its abstentionist attitude toward the nation's immigration laws.

---

the Constitution but nevertheless "inherently inseparable from the conception of nationality," the Court finding "the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations").

Cases not directly citing *Curtiss-Wright* but adhering to much of its reasoning include *Galvan v. Press*, 347 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (courts recognize power to exclude and expel aliens as a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (footnote omitted). Cf. *Carlson v. Landon*, 342 U.S. 524, 542-44 (1952) (addressing a claim of unconstitutional delegation to the executive branch without reference to *Curtiss-Wright*).

Note that the Court wrote all but one of the above quotations in the passive voice, conveniently excusing itself from tracing the exact origins of the political branches' power in the immigration area with greater precision. The one exception, the *Galvan* quotation, touches only on the breadth of the power, not on its source.

155. E.g., Lofgren, *supra* note 151 *passim*. The Supreme Court has never overruled *Curtiss-Wright*, but it has brought most aspects of the foreign affairs power within the Constitution's bounds. See *Reid v. Covert*, 354 U.S. 1 (1957) (treaty power) (nothing in the Supremacy Clause or history of Constitution's enactment suggests that treaties do not have to comply with Constitution and holding that the Bill of Rights limits all congressional powers, including control over the armed forces); *The Paquete Habana*, 175 U.S. 677 (1900) (war power) (finding that Supreme Court could review question of whether seizure of Spanish civilian fishing vessels was militarily justified; further finding that seizure in fact was unjustified and ordering vessels' return). Some Executive decisions may be unreachable through the courts and subject only to political control, e.g., through the power of the pursestrings. See *Goldwater v. Carter*, 444 U.S. 996 (1979) (granting certiorari, vacating and remanding with directions to dismiss), in which a highly divided Court found President Carter's decision to withdraw diplomatic recognition from Taiwan to be theoretically justiciable, but presenting an almost insurmountable ripeness problem, as Congress would have had to cause a constitutional impasse by taking some undefined "appropriate formal action" to challenge Carter's discretionary determination. *Id.* at 1002. See also *Dellums v. Bush*, 752 F. Supp. 1141 (D.C. 1990) (denying on ripeness grounds petition for an order restraining President Bush from launching Persian Gulf attack without Congressional authorization, as only 10% of members of Congress had sued). For a general discussion of the courts' reach in interbranch and foreign affairs disputes, see Henkin, *Is There a Political Question Doctrine?*, *supra* note 36 *passim*.

## B. The Uses and Abuses of Precedent: Staring Decisively at the Immigration Plenary Power Doctrine

Stare decisis, the doctrine that a court's decisions on a particular issue become precedents binding on lower courts and stand absent good cause to overturn them,<sup>156</sup> serves a number of purposes in the common-law legal tradition. It allows for stability and a certain level of predictability in judicial decisionmaking.<sup>157</sup> Stare decisis serves reliance interests by making it possible, at least to some extent, to determine what the law on a particular topic is.<sup>158</sup> Stare decisis also adds to public acceptance of judicial authority by providing a powerful counterbalance to political pressure toward a desired result: a court that stands firm against such pressure becomes more legitimate in the eyes of the people as that court appears, at least, to base its decisions on some principle above and beyond the political whim of the moment.<sup>159</sup>

All of these stare decisis interests contribute to the American perception of the "rule of law."<sup>160</sup> In this regard, stare decisis serves as insurance that judges will base their decisions on "neutral

---

156. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

157. See, e.g., Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENTARY 67, 69-70 (1993); Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeastern Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11 *passim* (1992); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 *passim* (1949) (all describing stability, neutrality, reliance and related interests and values which stare decisis purports to enhance).

158. This is true, of course, only insofar as the facts of one's matter accord with those of previously decided cases or precisely fit a legislated rule. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 143 (1922) ("No doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule. But life is too complex to bring the attainment of this ideal within the compass of human powers."). *But cf.* Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 216 (1931) ("elementary logic teaches us that every legal decision and every finite set of decisions can be subsumed under an infinite number of different general rules, just as an infinite number of different curves may be traced through any point or finite collection of points. Every decision is a choice between different rules, which logically fit all past decisions but logically dictate conflicting results in the instant case."). See also *supra* note 157 and sources cited therein.

159. See, e.g., Gerhardt, *supra* note 157, at 80-81 (criticizing Rehnquist/Scalia approach of overruling "erroneously reasoned" precedent as injecting instability into constitutional law by failing to recognize impact of majoritarian pressure on the Court, e.g., through judicial appointments). Professor Gerhardt also notes that such "political" overrulings create instability by encouraging judicial appointments to "politically" overrule the new precedent. "Such instability ultimately fosters an image of constitutional law as being nothing more than politics being carried on in a different forum." *Id.* at 82.

160. Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1345, 1349 (1990).

principles,"<sup>161</sup> and that the judiciary will uphold the Constitution even if the political majority currently finds the Constitution's mandates unpalatable.<sup>162</sup>

In contrast, the Court's refusal to review the constitutionality of Congress's immigration legislation violates this expectation of judicial review of acts of Congress.<sup>163</sup> Whether one regards judicial review as a nuisance<sup>164</sup> or a duty,<sup>165</sup> it is a well-accepted part of the American constitutional landscape and one which the American people have come to rely upon.<sup>166</sup> If for no other reason, the

161. See Wechsler, *supra* note 144, at 19:

The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions . . . . In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.

Stare decisis serves these interests because its requirement of justification for change encourages searching reflection on the justifications for both the old and the possible new rule. Such reflection adds to the rule's legitimacy, whether the court making the ruling upholds or overturns it, and that legitimacy is essential to the Court's power. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *But see* Maltz, *supra* note 157, at 21-22 (questioning that the public pays close attention to the Supreme Court's reasoning and noting that the Court has not lost legitimacy even from its major disruptions of precedent).

162. See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962) (discussing "countermajoritarian difficulty" of justifying the institution of judicial review); see also Note, *Constitutional Stare Decisis*, *supra* note 160, at 1350 (doctrine of stare decisis helps to overcome "countermajoritarian difficulty" by requiring special justification for overruling a previous decision, thereby reducing fear that judges make decisions arbitrarily).

163. BICKEL, *supra* note 162, at 14. See also *Fong Yue Ting v. United States*, 149 U.S. 698, 761 (1893) (Fuller, C.J., dissenting) (criticizing majority holding that immigration regulation is a political question committed to the political departments, Congress and the Executive, *id.* at 712-13; "[h]owever reluctant courts may be to pass upon the constitutionality of legislative acts, it is of the very essence of judicial duty to do so, when the discharge of that duty is properly invoked").

164. See LEARNED HAND, THE BILL OF RIGHTS 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of nine Platonic Guardians, even if I knew how to choose them, which I assuredly do not."). Judge Hand felt that the power of Supreme Court review, particularly over the state courts, had no textual basis in the Constitution, although, he believed, "it was not a lawless act to import into the Constitution such a grant of power." Wechsler, *supra* note 144, at 3, quoting HAND, *supra*, at 29.

165. *E.g.*, Wechsler, *supra* note 144, at 1-10 (power of judicial review has a textual basis in the Constitution's Supremacy Clause, art. VI, § 2 and in Article III; in addition, at least some of the framers, particularly Hamilton, assumed its existence); *Fong Yue Ting*, 149 U.S. at 761 (Fuller, C.J., dissenting), quoted *supra* note 163.

166. See *supra* notes 161-65 and accompanying text.

Supreme Court, in the interest of its own legitimacy,<sup>167</sup> needs to review immigration legislation by the same standards as legislation in any other area.

One hundred years of precedent claims to support the current state of immigration jurisprudence, potentially a powerful argument to leave the current constitutional understanding of immigration law intact.<sup>168</sup> However, precedential age as a justification of the legal status quo has its limits. As Justice Douglas noted:

Precedents are made or unmade not on logic and history alone . . . . We can get from those who preceded a sense of the continuity of a society. We can draw from their learning a feel for the durability of a doctrine and a sense of the origins of principles. But we have experience that they never knew. Our vision may be shorter or longer. But it is ours. It is better that we make our own history than be governed by the dead.<sup>169</sup>

At times, stability, reliance or "rule of law" interests in upholding a precedent may pale beside that decision's current evil effects.<sup>170</sup> In such circumstances, for a court, particularly the Supreme Court, to uphold a precedent because of its age *cuts against* these interests; such a course smacks of an unprincipled willingness to submit to the rule of the dead rather than to address the requirements of the rule of law.

---

167. See *Casey*, 505 U.S. at 865 ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures . . . ."). Political pressure is all too evident in many of the Court's leading immigration decisions, from the widespread anti-Chinese feeling preceding *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*), 130 U.S. 581 (1889), to the anti-Communist hysteria of the McCarthy era, overshadowing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), *Knauff v. Shaughnessy*, 338 U.S. 580 (1952), and their progeny, and finally to recent popular and governmental exasperation at the number of refugees arriving from Cuba and Haiti, reflected in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 161 (1993), *Jean v. Nelson*, 472 U.S. 846 (1985), and other cases.

168. The immigration plenary power doctrine's age as the means of its precedential support is so psychologically significant that scholars note its anniversaries. See, e.g. Hiroshi Motomura, *Phantom Norms*, *supra* note 23; Henkin, *A Century of Chinese Exclusion*, *supra* note 31.

169. Douglas, *Stare Decisis*, *supra* note 157, at 739.

170. See *id.* at 746-49. Justice Douglas considered reexamination of doctrine to be a "healthy practice" and felt that respect for any court increased with its willingness to admit error. *Id.* at 746-47. He also noted that the Court often repeatedly distinguishes a precedent from the case at hand before finally deciding that it must overrule the precedent, which may now have little practical effect. *Id.* at 747. "[T]his gradual process of erosion of constitutional doctrine . . . has the true unsettling effect." *Id.* at 749. See also CARDOZO, *supra* note 158, at 150-52 (when rules tested by experience are inconsistent with justice or social welfare, courts should be less hesitant in striking them down).

Notwithstanding these considerations, the Supreme Court has often considered the great age of the immigration plenary power doctrine to be its most salient virtue.<sup>171</sup> Since the precedents involved are one hundred years old, *stare decisis* in and of itself now suffices to maintain the immigration plenary power doctrine, and debate on the merits ends before it starts.<sup>172</sup> In other areas of law, however, the Court has not gotten away so easily. The doctrinal struggle over whether the Fourteenth Amendment “incorporates” provisions of the Bill of Rights against the states<sup>173</sup> provides a striking demonstration of the failure of doctrinal age as an independent *stare decisis* ground. The Supreme Court’s 1954 dictum in *Galvan v. Press*<sup>174</sup> that “much could be said” in favor of placing constitutional limitations on the immigration plenary power “were we writ-

---

171. In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely “a page of history,” but a whole volume.

*Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (citations omitted).

172. *Id.*; see also *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

173. The course of the “incorporation” debate, through which the Supreme Court eventually held most of the first eight constitutional amendments’ guarantees applicable against the states, ran roughly as follows. In 1833, the Court ruled that the Fifth Amendment, and by implication the rest of the Bill of Rights, operated solely to limit the federal government, as the Constitution as a whole delineated only the powers of the federal government. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), effectively rendered the Fourteenth Amendment’s Privileges or Immunities Clause a nullity, holding that the clause included only the (limited) privileges and immunities of a citizen of the United States, not those of a citizen of a state, and that the first eight amendments are not “privileges or immunities” of a United States citizen. *Twining v. New Jersey*, 211 U.S. 78 (1908), held that the Fourteenth Amendment’s Due Process Clause was equally ineffective in applying the first eight amendments against the states.

Through a process of intense judicial debate too complex to describe at length in this Note, the Fourteenth Amendment’s Due Process Clause finally won the day as a mechanism to lend actual practical meaning to the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment right to compulsory process to secure attendance of witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to a speedy and public trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confrontation of opposing witnesses); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right not to be compelled to incriminate oneself); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to assistance of counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment right of freedom from unreasonable search and seizure, along with the exclusionary rule barring the use of evidence so obtained); and *Fiske v. Kansas*, 274 U.S. 380 (1927) (First Amendment rights to freedom of speech, press and religion).

174. 347 U.S. 522 (1954).

ing on a clean slate"<sup>175</sup> eerily echoes its reasoning in 1908 in *Twining v. State of New Jersey*,<sup>176</sup> that while "[m]uch might be said in favor of the view that the privilege [against self-incrimination] was guaranteed against state impairment . . . the decisions of this court have foreclosed that view."<sup>177</sup> During the same period in which it decided *Galvan v. Press*, the Court, facing advancing ideas

175. *Id.* at 530.

176. 211 U.S. 78 (1908). In ruling that the Fourteenth Amendment did not incorporate the Fifth Amendment protection against compulsory self-incrimination against the states, the Court opined that "[m]uch might be said in favor of the view that the privilege [against self-incrimination] was guaranteed against state impairment as a privilege and immunity of national citizenship, but . . . the decisions of this court have foreclosed that view." *Id.* at 113. Furthermore, "[t]here seems to be no reason whatever . . . for straining the meaning of due process of law to include this privilege within it . . ." *Id.* Sixty years later, in the midst of the series of opinions generally known as the "Incorporation Cases," Justice Black, concurring in *Duncan v. Louisiana*, could refer to the "now discredited *Twining* doctrine." 391 U.S. 145, 167 (1968). See generally *Malloy v. Hogan*, 378 U.S. 1 (1964) (overruling *Twining* and holding the privilege against self-incrimination incorporated against the states through the Fourteenth Amendment's Due Process Clause).

177. 211 U.S. at 113. This statement referred to guarantees through the Fourteenth Amendment's Privileges or Immunities Clause, but in the very next sentence the Court foreclosed incorporation through the Due Process Clause as well. The road from *Twining* to incorporation was long and rocky, and the results only partially satisfying. The Court never consented to simply rule the Bill of Rights applicable against the states, jot for jot, once and for all, as Justice Black argued had been the intent of the Fourteenth Amendment's framers. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 162-171 (1968) (Black, J., joined by Douglas, J., concurring) (explaining Justice Black's theory of incorporation). Instead, the Court articulated a number of tests centering on the notion of "fundamental fairness" in order to separate the constitutional sheep from the goats. *Id.* at 148-49. In order to avoid a troublesome redefinition of the scope of the Fourteenth Amendment's Privileges or Immunities Clause, a reading arguably closer to the amendment's framers' intent, *infra*, the Court resorted to an awkward ballooning of the concept of "due process of law," incorporating the protections necessary to "fundamental fairness" through the Fourteenth Amendment's Due Process Clause. *Supra*, note 173.

The most recent scholarship strongly indicates that Justice Black has had the last laugh in this debate, on the intent of the Fourteenth Amendment's framers if not necessarily on his strict constructionist "jot-for-jot" application of that intent. See generally Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (arguing on the basis of historical documents and statements that the Fourteenth Amendment's framers shared a conception of the primacy of the federal government over the states and thus sought to delegate ultimate authority for protecting and enforcing constitutional rights for all citizens to the federal government and to define the Bill of Rights' protections as "privileges or immunities of citizens of the U.S.," capable of federal enforcement against the states). For a history of this vision's fate at the hands of the courts and federal enforcement officials, see *id.* at 864-65 nn. 8-9, and see generally MICHAEL CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985). But see RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE*

of justice and fairness, incorporated many Bill of Rights protections into its understanding of "due process of law" and applied them against the states.<sup>178</sup> However, it refused to extend doctrinal reexamination to its immigration rulings: the Court met its incorporation debate face to face in *Galvan v. Press*,<sup>179</sup> and simply turned away.

The vast majority of immigration cases require for their resolution only the application of ordinary constitutional principles, as in any other case arising under a federal law.<sup>180</sup> They are not nonjusticiable "political questions"<sup>181</sup> and they seldom involve a true need for the Court to exercise prudential self-restraint.<sup>182</sup>

The Court states that it must speak and act so that the American people will accept its decisions on the terms the Court claims for those decisions, which must be "grounded truly in principle, not . . . compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make."<sup>183</sup> The Court has never applied this admirable principle to its line of immigration opinions, and it does not presently seem inclined to do so.<sup>184</sup> Perhaps the sharply angled provisions of the

---

BILL OF RIGHTS (1989) (arguing that framers did not intend to incorporate any of the Bill of Rights' provisions against the states).

178. U.S. CONST. amend. XIV, § 1; *see supra* notes 173-77.

179. *See Galvan v. Press*, 347 U.S. 522, 530-31 (1954), quoted *supra*, note 171.

180. U.S. CONST. art. III, § 2.

181. *See supra* notes 143-55 and accompanying text.

182. *See supra* notes 156-63 and accompanying text.

183. *Casey*, 505 U.S. at 865-66. *Cf. Wechsler, supra* note 144, at 12 ("The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law."). *See also* THE FEDERALIST NO. 78 (Alexander Hamilton).

184. *See, e.g., Summaries of Immigration Decisions in the Federal Courts*, 73 INTERPRETER RELEASES 71, 74-75 (Jan. 16, 1996) ("[T]he Supreme Court in recent years has not been prone to review decisions arising under the immigration and nationality laws, even when the lower courts are in conflict on the issue . . ."). In the context of this statement, the article noted that the Solicitor General has requested certiorari in one such issue, *i.e.*, whether subsequent acts of fraud arising from an original fraudulent entry should count as separate adverse factors in certain discretionary relief determinations. *Id.* This strategy may indeed be effective, as the Court did grant certiorari in the case. *Yang v. INS*, 58 F.3d 452 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 907, *rev'd*, 117 S. Ct. 350 (1996) (summarized in *INS Asks Supreme Court to Review Ninth Circuit's Construction of Fraud Waiver Statute*, 73 INTERPRETER RELEASES 44-45 (Jan. 10, 1996)). Whether an activist Solicitor General's office might obtain substantive review of immigration legislation where individual petitioners cannot is an intriguing question.

anti-terrorist bill<sup>185</sup> and recent immigration legislation<sup>186</sup> will goad the Court to change its mind.

### III. *Planned Parenthood of Southeastern Pennsylvania v. Casey*: A Constitutional Framework for Abolishing the Immigration Plenary Power Doctrine

Commentators have examined the Supreme Court's various rationales in support of the immigration plenary power doctrine and found them unconvincing and without historical support or legal justification.<sup>187</sup> However, the Court's own legal analysis has never provided a basis for well-focused jurisprudential argument that would lead it to abolish the immigration law plenary power doctrine as a failed legal theory.

Recently, however, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>188</sup> the Court set out in carefully considered and authoritative terms the meaning and application of precedent and stare decisis in its legal analyses.<sup>189</sup> In doing so, the Court provided a framework by which it could evaluate not only *Roe v. Wade*,<sup>190</sup> the case called into question in *Casey*, but *any other* case involving issues of precedent and stare decisis.<sup>191</sup>

The *Casey* joint opinion,<sup>192</sup> intended beyond its narrow holding as an authoritative judicial pronouncement on the nature of the

---

185. See *supra* notes 6-9 and accompanying text.

186. See *supra* notes 15-16 and accompanying text.

187. See, e.g., Motomura, *Curious Evolution*, *supra* note 111; Bates & Hake, *supra* note 23 (examining the Supreme Court's contradictory findings that aliens within the United States are entitled to due process in matters not concerning their right to enter or remain in the United States, and that Congress may restrict due process rights at will in the latter instance); Motomura, *Phantom Norms*, *supra* note 23 (examining the federal courts' substitution of procedural due process findings for substantive constitutional determinations in recent years); Wani, *supra* note 114 (examining the increasingly heavy fictionalization of immigration law concepts as courts attempt to do justice on particular facts); Edward M. Morgan, *Aliens and Process Rights: The Open and Shut Case of Legal Sovereignty*, 7 WIS. INT'L L.J. 107 (1988) (viewing the exclusion and deportation power in context of Canadian law); Henkin, *A Century of Chinese Exclusion*, *supra* note 31 (examining and criticizing the doctrinal bases involving U.S. sovereignty that the Supreme Court has relied upon in immigration cases).

188. 505 U.S. 833 (1992).

189. *Id.* at 843-69 (Parts I, II and III of the joint opinion). For critical perspectives on whether the Court majority in fact accomplished its goal of enunciating such a rational framework, see generally Gerhardt, *supra* note 157, and Maltz, *supra* note 157.

190. 410 U.S. 113 (1973).

191. *Casey*, 505 U.S. at 854-55.

192. The term "joint opinion" refers to the opinion of Justices O'Connor, Kennedy and Souter, with which Justices Blackmun and Stevens separately concurred in part and in the result, creating a working majority for the decision in *Casey*.



Court's stare decisis considerations,<sup>193</sup> set forth with clarity a number of the Court's considerations for invoking stare decisis and for weighing the relative costs of overruling or reconfirming a case or line of cases. These considerations include, in the order in which the Court presented them, (i) whether the holding at issue defies practical workability;<sup>194</sup> (ii) whether people and entities have come to rely so heavily on the existence of a holding that hardship would ensue should the holding be overruled;<sup>195</sup> (iii) whether related principles of law have developed so that the rule in question is now a remnant of an abandoned doctrine;<sup>196</sup> and (iv) whether the facts which surrounded that holding have so changed, or have come to be seen so differently, that the old rule is robbed of any significant application or justification.<sup>197</sup> The joint opinion further described the special prudential considerations which the Court must take into account when it reconsiders a ruling on a nationally controversial and divisive issue, such as abortion.<sup>198</sup>

The joint opinion supported these considerations by citing the need for a fair decision-making process and freedom from governmental and judicial arbitrariness.<sup>199</sup> These concepts, the joint opinion writers noted, are inherent in the American idea of the rule of law and are essential to the Court's legitimacy to play its constitutional role.<sup>200</sup> The Court reasoned that the American people must be able to accept its decisions on the grounds stated for them and that therefore the Court must decide cases on a *principled* basis and not through political or social pressure.<sup>201</sup> While by no means

---

193. Justice Souter took the "unprecedented" course of announcing orally from the bench that "[t]o overrule [*Roe v. Wade*] would subvert the Court's legitimacy beyond any reasonable question. If the Court were undermined, the country would also be so." Gerhard, *supra* note 157, at 75. The Court itself felt it was addressing the nation to constitutionally resolve an intensely divisive issue in a manner it had used only twice in recent history: once in 1954 in *Brown v. Board of Educ.* and once when announcing *Roe v. Wade* itself. *Casey*, 505 U.S. at 866.

194. 505 U.S. at 854.

195. *Id.* at 854-55, also expressed as a "reliance" doctrine analogous to that at contract. *See id.* at 956-57 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

196. *Id.* at 855.

197. *Id.*

198. *Id.* at 861-71.

199. *Casey*, 505 U.S. at 865-66.

200. *Id.*

201. *Id.* This reasoning is important in reconsidering the Court's line of immigration decisions, many of which appear to be based squarely on political and social pressure. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 798 (1977) ("With respect to . . . these legislative policy distinctions [between legitimate and illegitimate children], it could be argued that the line should have been drawn at a different point and that the

intended as a factored or a multi-pronged test, the joint opinion's precedential analysis provides a useful framework for reexamining the doctrinal underpinnings of the Court's immigration jurisprudence, particularly the immigration plenary power doctrine.

### A. Is the Immigration Plenary Power Doctrine Unworkable?

The *Casey* joint opinion dealt briefly with the practical workability of the *Roe* holding before it, finding *Roe* "a simple limitation beyond which a state law is unenforceable" and not prone to arbitrary interpretation.<sup>202</sup> *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>203</sup> a leading case which the joint opinion cited in finding *Roe* workable, defines "practical unworkability" as the impossibility of applying the ruling other than by judicial fiat, and the ruling's own inability to accommodate changing circumstances.<sup>204</sup>

---

statutory definitions deny preferential status to parents and children who share strong family ties."). The Court did not address whether the Constitution in fact *required* the line to be drawn at another point. *See also* *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) ("We hold that when the Executive exercises this power [to exclude an alien from the United States] . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (despite returning resident status of Mezei and presence of U.S. citizen immediate family members whom he could not rejoin, "we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (ignoring Court's historical responsibility to invalidate unconstitutional legislation, "whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *The Chinese Exclusion Case (Chae Chan Ping v. United States)*, 130 U.S. 581, 595 (1889) (indicating as part of the factual background the "differences of race" between Chinese immigrants and white U.S. citizens; that the Chinese "remained strangers in the land" that "[i]t seemed impossible for them to assimilate with our people;" and that China's large population led to the possibility that the West Coast "would be overrun by them unless prompt action was taken to restrict their immigration").

202. *Casey*, 505 U.S. at 855.

203. 469 U.S. 528 (1985).

204. *Casey*, 505 U.S. at 855. *Garcia* considered whether the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, could be validly enforced against the San Antonio Metropolitan Transit Authority (SAMTA). To escape FLSA regulation, SAMTA had to show either that its activities did not affect interstate commerce (a proposition for which it did not try to argue), 469 U.S. at 537, or that its activities were a traditional state government function which the federal government, acting under the Commerce Clause as it did in enacting the FLSA, could not reach (the argument it made before the Court), *id.* at 537-38.

The *Casey* joint opinion found that while state and federal courts would have to continue to assess state laws regulating the right to an abortion—a requirement the *Casey* ruling would not change—such review was within judicial competence.<sup>205</sup> Moreover, the joint opinion found, *Roe*'s central holding was not prone to arbitrariness of application, and that *Roe*'s doctrinal framework allowed for necessary flexibility of interpretation.<sup>206</sup>

In contrast, immigration law is notoriously complex, and judges find interpreting immigration statutory and case law extremely frustrating.<sup>207</sup> Furthermore, the lower courts' attempts to interpret and employ immigration law's many legal fictions lead straight to the *Garcia* evils of arbitrary application of the law, through lack of any discernible organizing principle,<sup>208</sup> and doctrinal fossilization.<sup>209</sup> In consequence, practically every immigration case be-

---

In ruling that enforcing the FLSA against SAMTA did not exceed the scope of the Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, the Court rejected the "traditional government functions" test it had established in *National League of Cities v. Usery*, 426 U.S. 833 (1976). Upon reviewing lower courts' attempts to apply the test, the Court concluded that the test was unworkable because any possible approach to it would be arbitrary, requiring courts to decide by fiat which governmental functions were "traditional" enough to be exempt from the FLSA, and that the test could not accommodate changing circumstances, e.g., the radically increased state role in the once privately run education system. 469 U.S. at 545-46.

205. *Casey*, 505 U.S. at 855.

206. *Id.*

207. United States Circuit Court Judge Irving Kaufman wrote in one opinion, "We have had the occasion to note the striking resemblance between some of the [immigration] laws we are called upon to interpret and King Minos' labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges." *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977). While there is little the judiciary can do in such a situation unless a statute is so incomprehensible as to violate due process norms, it could at least call a halt to its own fictional embellishments on immigration law's statutory edifice.

208. The Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 538-39 (1985), in discussing cases decided in light of its holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976), noted:

We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group [holding various state activities to be "essential government functions" immune from federal regulation] on one side of a line and each of the cases in the second group [in which the federal courts held other state government activities susceptible to federal regulation] on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.

209. *Garcia*, 469 U.S. at 543-44 ("The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical function of a state, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions."). *See*

comes a hard case, and at times these cases make exceedingly bad law.<sup>210</sup>

History has been another victim of the Court's attempts to create workable doctrinal supports for the immigration plenary power doctrine. For instance, the Supreme Court in *The Chinese Exclusion Case* formally acknowledged that in the framers' view sovereignty lay in the people, not in the federal government.<sup>211</sup> To get around the contradiction between a sovereign people and sovereign powers that the government simply arrogates to itself, the Court distinguished *external* affairs, which the nation faces as a unitary entity, finding the federal government *alone* "sovereign" for this purpose.<sup>212</sup> In applying this distinction, the Court had little sense of proportion; it did not give any convincing reason (unless one counts the "encroaching horde" theory<sup>213</sup>) why the full might of an otherwise unrecognized federal sovereignty should *need* to be directed at the hapless alien.<sup>214</sup>

Furthermore, the Court's hegemonic, extraconstitutional view of external affairs sovereignty does not concur with the framers' vi-

---

*also id.* at 557 ("Attempts by other courts . . . to draw guidance from [the *Usery* model] have proved it both impracticable and doctrinally barren."). Cf. Wani, *supra* note 114, at 53 ("Fictions are more pervasive, insidious and entrenched in immigration law than in other legal areas. Where other fictions shift and reform to accommodate changing views, century old fictions still rule immigration law.").

210. "[H]ard cases make bad law." *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

211. 130 U.S. at 604.

212. *Id.* at 606; see Wani, *supra* note 114, at 67.

213. *The Chinese Exclusion Case*, 130 U.S. at 594-96. The Court's "horde" rationale combined elements of protectionism (competition with native-born workers and artisans) and xenophobia (e.g., "differences of race," "strangers in the land," "impossible . . . to assimilate," and "danger . . . that portion of our country would be overrun by them," *id.* at 595). See also Wani, *supra* note 114, at 76 ("the Court does not point to a single instance of a threat arising from these numbers [of immigrating Chinese], nor does it explain how they would threaten national security or why available constitutional powers would not suffice").

214. See Wani, *supra* note 114, at 76 (noting difficulty of imagining an immigration crisis so severe that total concentration of unbounded government power would be required to combat it, when the Constitution's framers denied the power for such a concentration even in a time of direct military attack). The rights of the individual facing the monolithic U.S. sovereign power may actually have *decreased* since the founding. See LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 93-94 (1990) [hereinafter CONSTITUTIONALISM] ("Nothing in the framers' conception of rights suggested that respect for individual rights should be less or different in the conduct of the foreign relations of the new republic;" in the following 200 years the evolution of individual rights jurisprudence lessened individual rights in the foreign affairs context).

sion of the Constitution's reach in foreign affairs.<sup>215</sup> Nor does the clash of hegemonic sovereignties on a world scale which underlies the Court's immigration rulings validly apply to the present-day vision of international relations requiring cooperation, international law, and intergovernmental organizations having at least some power to dictate rules of international behavior.<sup>216</sup> Rather, the Supreme Court created its notion of sovereignty both to support a desired result in the *Chinese Exclusion Case* and to obviate the need<sup>217</sup> to find a textual constitutional home for the immigration regulatory authority.<sup>218</sup>

In common-sense terms, it is completely reasonable to imply a federal power to regulate immigration, as the fifty states' separate attempts to regulate entry into the United States would surely lead to chaos.<sup>219</sup> However, the American constitutional tradition provides no basis for the Court's false notion of American "sover-

---

215. See Henkin, *CONSTITUTIONALISM*, *supra* note 214, at 99-100 (noting with approval Justice Black's argument that the framers conceived of the rights of man everywhere, not simply within the United States); *Reid v. Covert*, 354 U.S. 1, 17 (1957).

216. See Wani, *supra* note 114, at 69 ("[T]he very idea of international law seems inconsistent with such a concept [of absolute sovereignty]."). Wani points to several examples of international institutions which can function only if sovereignties cooperate (thereby necessarily ceding a portion of their absoluteness) including the Permanent Court of International Justice, the Nuremberg tribunal, and the existence of *ius cogens*, the doctrine that the world community considers certain values to be so fundamental that these values preempt state powers. *Id.* at 69-70. Today, nations may even have constitutional provisions allowing delegation of sovereign powers to international bodies, such as the United Nations or the European Union. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* (1993), at 213-14 (quoting and describing provisions of the constitution of the Netherlands), 216 (Germany), 228-30 (Italy), 231 (Denmark and Ireland), 242 n.6 (Greece, Portugal and Spain). While the constitutional provisions differ in scope and on whether parliamentary action is required to transfer aspects of sovereignty to supranational bodies, all of these nations recognize some level of direct effect in the national legal order for at least some variety of international law. Furthermore, all of the European Union member states necessarily recognize the supremacy of E.U. law over conflicting national laws as well as the direct effect of certain E.U. treaty provisions and legislation in the national legal order. *Id.* at 166-203.

217. See Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 857 (describing Supreme Court efforts to define and place an authority to regulate immigration within the Constitution).

218. Most notably, the *Head Money Cases*, 112 U.S. 580 (1884), attempted to fit the federal power to regulate immigration into the commerce power. See Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 856.

219. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1970* at 224-25 (1978) (naturalization power delegated to Congress in order to avoid controversy of separate attempts to define citizenship); see also Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 856.

eighty” used to strip immigration legislation of judicial review.<sup>220</sup> No foreign affairs-related need for national unity compels such an anti-constitutional result, and this hegemonic view of sovereignty contradicts both the framers’ underlying conception of the nature of the United States and present-day international realities.<sup>221</sup> The fossilized, century-old concept of an absolute plenary power, inherent in sovereignty, to regulate immigration does not accord with reality and thus has become “intolerable simply in defying practical workability.”<sup>222</sup>

## B. Reliance Interests in the Plenary Power Precedent

At the heart of the *Casey* joint opinion lies the question of whether affected parties, mainly women, so rely upon the existence of legal abortion that the cost should the Court repudiate *Roe v. Wade* would be unacceptably high.<sup>223</sup> The joint opinion writers found that in the abortion context, “the liberty of the woman is at stake in a sense unique to the human condition and so unique to

---

220. See Wani, *supra* note 114, at 75-78. Professor Wani notes that “absolute sovereignty is generally associated with despotism, while progressive demands for liberalism and political rights are generally based on a conception of limited government.” *Id.* at 75. Additionally, he sees little support in either logic or constitutional history for a broader version of sovereignty for immigration or foreign affairs than for any other area of national concern. *Id.* at 77. See also *Perez v. Brownell*, 356 U.S. 44, 58 (1958) (“The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.”).

Even as an inherent attribute of sovereignty, the power to regulate immigration should not escape constitutional review. See HENKIN, *CONSTITUTIONALISM*, *supra* note 214, at 98-99 (“there is nothing to suggest that constitutional restrictions apply with less vigor when Congress (or the executive) acts under powers not expressly delegated by the framers but which the Court later found to be inherent in the international sovereignty of the United States”). Nor does the Court regard inherent powers very highly at present. Professor Wani notes that since *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), “[n]o Supreme Court decision has accepted inherent (extraconstitutional) powers as the sole basis for executive power[.]” Wani, *supra* note 114, at 77 n.136. The inherent power rationale maintains strength in immigration law because the age of the precedents has become the major reason for their survival. See *supra* part II.B.

221. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 (1987) (“The provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations as well as in domestic matters, and generally limit governmental authority whether it is exercised in the United States or abroad, and whether such authority is exercised unilaterally or by international agreement.”). See also *supra* note 155.

222. *Casey*, 505 U.S. at 854 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

223. *Id.* at 855-56.

the law,"<sup>224</sup> and that the people's sharply differing and strongly held views on the abortion question involve questions of personal liberty best left to individuals.<sup>225</sup>

Within our constitutional framework of enumerated and delegated powers,<sup>226</sup> there can be no legitimate reliance on Congress's exercise of an extraconstitutional power.<sup>227</sup> Such reliance licenses the arbitrary and liberty-restricting exercise of an extraconstitutional, unreviewable power on behalf of one or another aggrieved faction, such as the victims of economic downturns, sections of the population holding nativist beliefs or those simply desiring a designated scapegoat,<sup>228</sup> and is thus inconsistent with our conceptions of fundamental fairness and of the rule of law.<sup>229</sup> Furthermore, to countenance the existence of such an extraconstitutional power strikes at the Supreme Court's own legitimacy as interpreter of the Constitution.<sup>230</sup> Finally, many Americans, as well as visitors and immigrants to this country, find the immigration laws at best counterintuitive<sup>231</sup> and at times horribly cruel.<sup>232</sup> It is doubtful, for

---

224. *Id.* at 852.

225. *Id.*

226. *See supra* part III.A.

227. *See supra* notes 18-21, 217-21 and accompanying text (discussing constitutional limits on the exercise of legislative power and the contradictory nature of the immigration law plenary power doctrine within that framework).

228. *See Lennon v. INS*, 527 F.2d 187, 189 (2d Cir. 1975) (noting that immigration law is "a magic mirror, reflecting the fears and concerns of past Congresses"); Schuck, *supra* note 5, at 2 (character of immigration law reflects "more fundamental social and ideological structures").

229. *See generally* THE FEDERALIST NO. 10 (James Madison) (urging the proposed constitutional structure as a means of dampening the undesirable effects of factional struggle).

230. *See Casey*, 505 U.S. at 865-66; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). *See also infra*, part III.E (discussing consideration of Court's legitimacy, *inter alia*, as a prudential consideration of the Court when it rules on a matter of precedent).

231. *See, e.g.*, Hart, *supra* note 139, at 1389-96 (discussing seemingly inconsistent results of applying the former "entry doctrine"); *see also supra* note 133 (explaining the still-bizarre results of IIRIRA's redefinition of the "entry" concept).

232. *See supra*, note 3 and accompanying text (describing plight of longtime permanent resident detained pending deportation just short of swearing in as citizen). *See also* Celia W. Dugger, *Woman's Plea for Asylum Puts Tribal Ritual on Trial*, N.Y. TIMES, April 15, 1996, at A1 [hereinafter *Woman's Plea for Asylum* (describing two-year detention, including in maximum security prison, of Fauziya Kassindja (whose name immigration officials at first misspelled as "Kasinga"), a teenaged girl who fled Togo to avoid forced genital mutilation and arranged marriage). Ms. Kassindja told the reporter, "I keep asking myself, 'What did I do to deserve such punishment? What did I do?'" *Id.* Apparently, many Americans had the same question; after widespread public outcry, Ms. Kassindja was released on parole pending the Board of

example, that many Americans would feel that permanently banishing a long-time lawful permanent resident one day short of being sworn in as a U.S. citizen accords with any notion of fundamental fairness.<sup>233</sup> Abolishing the immigration law plenary power doctrine in favor of immigration regulation following constitutional norms would further both the interests of fundamental fairness and the federal courts' legitimacy in the constitutional framework, while refraining from this step will generate ever-increasing costs to the rule of law through the courts' tolerance of illegitimate factional reliance on an extraconstitutional (and therefore illegitimate) exercise of legislative power.

### C. Evolution of Legal Principles Weakens Doctrinal Footings

The *Casey* joint opinion gave particular attention to the doctrinal strength of the principles under its review. It examined the constitutional doctrines and legal principles underlying *Roe v. Wade*<sup>234</sup> and concluded that further developments in constitutional law had not left these principles behind.<sup>235</sup> Lower courts would not go astray through applying *Roe's* principles in the abortion or other

---

Immigration Appeals decision which approved her asylum case. *In re Kasinga*, Int. Dec. 3278 (BIA 1996); see Celia W. Dugger, *U.S. Grants Asylum to Woman Fleeing Genital Mutilation Rite*, N.Y. TIMES, June 14, 1996, at A1. See also Solomon, *supra* note 139 (interviewing detainees at various facilities and their friends and relatives who express bewilderment over immigration laws and their apparent punishment for seeking asylum).

Furthermore, immigration detainees at most prison facilities must wear prison uniforms, are shackled hand and foot for transport to visiting hours, hearings and other facilities, and are at times subject to the same strip and body cavity searches as convicted criminals following visits, vastly heightening the punitive nature of their detention. See Dugger, *Woman's Plea for Asylum*, *supra*; Solomon, *supra* note 139. Since this detention is not legally considered "punishment," the Eighth Amendment does not apply to detention conditions, which often fail to meet established standards for correctional facilities. See Solomon, *supra* note 139, at 26.

233. See *supra* note 3 and accompanying text (describing circumstances of one casualty of the recently enacted Anti-Terrorism and Effective Death Penalty Act); see also AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996), described *supra*, notes 6-9 and accompanying text.

234. 410 U.S. 113 (1973).

235. *Casey*, 505 U.S. at 857-59.



contexts,<sup>236</sup> including newly arising problems,<sup>237</sup> and could apply these principles neutrally.<sup>238</sup>

The Supreme Court sought textual support<sup>239</sup> in the Constitution for its privacy rulings, including *Griswold v. Connecticut*,<sup>240</sup> *Roe v. Wade*<sup>241</sup> and their progeny, although it faced constitutional silence on the privacy issue per se.<sup>242</sup> It did not invent a fictional, extra-Constitutional source of the privacy interest as it had invented a fictional attribute of sovereignty seventy years earlier in the first immigration cases.<sup>243</sup> In fact, the *Casey* majority noted three separate doctrinal lines of reasoning that would constitutionally uphold *Roe*, giving the decision strong support from several lines of approach.<sup>244</sup>

236. *Id.*

237. *Id.* at 857 (*Roe* created a rule, mistaken or not, of bodily integrity and personal autonomy and accords with later cases finding that state interests could not override individual liberty claims in a plenary fashion where bodily integrity and/or personal autonomy were concerned).

238. *Id.* at 859 (noting that the recognition in *Roe* of a woman's interest in deciding whether to bear a child equally bars the state from forcing termination of pregnancy).

239. In writing for the *Griswold* majority, Justice Douglas cited the Ninth Amendment, but based the Court's holding on "penumbras" and "emanations" of the First, Third, Fourth, Fifth and Fourteenth Amendments. *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965). The "penumbras" and "emanations" from the Constitution's text on which Justice Douglas based much of *Griswold* may not seem very convincing given the Court's present textualist and historicist/originalist bent. *See, e.g., id.* (enumerating case law extending by penumbra and emanation the textual understanding of the First, Ninth, Fourth, Fifth and Fourteenth Amendments). In Justice Douglas's defense, however, the sheer number of already recognized penumbras and emanations from various constitutional provisions that he was able to find underscores the vitality of *Griswold's* theory of personal liberty.

Notably, Justice Douglas stated in *Griswold* that "[w]e deal with a right of privacy older than the Bill of Rights." *Id.* at 486. However, unlike writers for the Court in its immigration holdings, he did not use that perception to place the privacy right *outside* the Constitution altogether — in fact, in examining the case law noted above, he did just the opposite, seeking to constitutionalize it more firmly. *Id.* at 483-85.

240. 381 U.S. 479 (1965).

241. 410 U.S. 113 (1973).

242. The closest candidate is the Ninth Amendment, which provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend IX. However, the Court has never authoritatively interpreted the Ninth Amendment to include a retained right of privacy. *See generally* Symposium on Interpreting the Ninth Amendment, 64 CHI.-KENT L. REV. 37 (1988).

243. The Chinese Exclusion Case (*Chae Chan Ping v. United States*), 130 U.S. 581, 604-06 (1889); *see supra* notes 130-132 and accompanying text.

244. *Casey*, 505 U.S. at 857-58. The joint opinion noted that the *Roe* Court had based itself on the protected liberty interest relating to intimate relationships expressed in *Griswold*, noting that *Griswold's* progeny had not disturbed its basic holding. *Casey*, 505 U.S. at 857. The joint opinion further indicated *Roe's* "doctrinal affinity to cases recognizing limits on governmental power to mandate medical treat-

In contrast, the Court's immigration rulings from *The Chinese Exclusion Case* forward do not attempt to cite any firm constitutional roots; rather, the Court justifies its decisions in terms of themselves, citing to them layer upon layer, until their very age becomes their greatest virtue.<sup>245</sup> Instead of undertaking fresh evaluation of the immigration plenary power doctrine's underlying principles, the Court left immigration law "blissfully untouched" through the virtual revolution in constitutional law which has taken place since the 1950s.<sup>246</sup>

#### D. Underlying Facts Have Changed or Are Seen Differently

The *Casey* joint opinion<sup>247</sup> extensively explored the effect of changes in the facts underlying a legal issue—whether these facts are scientific, such as the gestation period for fetal viability,<sup>248</sup> or interpretive, such as the Court's view of the economic rights of employers in the context of workplace safety and wages and hours laws.<sup>249</sup> The Court noted that not only had the facts (or at least the

---

ment or to bar its rejection," noting that personal autonomy and bodily integrity cases since *Roe* had themselves accorded with *Roe*'s views on these matters. *Id.* Finally, in a much less convincing argument, the joint opinion noted that even if *Roe* had to stand on its own doctrinal feet, majorities of the Court had upheld its central principles regularly since the case was decided. *Id.* at 858.

245. See *supra* part II.B.

246. Aleinikoff, *Federal Regulation of Aliens*, *supra* note 67, at 865 (citing developments in due process, equal protection and the rights/privileges distinction in the conferral of government acts or benefits which have passed by immigration law doctrines affecting these areas); see also Henkin, *A Century of Chinese Exclusion*, *supra* note 31, at 860-61. It is interesting to note that the Warren Court, which broke much constitutional ground in due process and equal protection in particular, could not do the same for immigration law. Chief Justice Warren, along with Justices Douglas, Black, and sometimes Frankfurter or Jackson, dissented, often vehemently, from the usually 5-4 or 6-3 rulings of the Court in immigration cases. After Justice Brennan joined the Court, he too became a frequent dissenter in immigration cases.

247. *Casey*, 505 U.S. at 858-66.

248. *Id.* at 860 (noting advances in maternal health care increasing late-term abortion safety as well as advances in neonatal care allowing survival from an earlier stage of pregnancy, approximately 23 to 24 weeks).

249. *Id.* at 861-63. The Court compared previous Courts' changing views of economic facts and circumstances from *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum hours law as infringement of employers' substantive due process rights and thus rendering most government regulation of the economy unconstitutional) to *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525 (1923), which had invalidated a minimum wage, and implicitly overruling *Lochner*), as well as its changing views of racial equality from *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that legally racially segregated accommodations could still be equal for purposes of the Fourteenth Amendment) to *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that segregated educational facilities were *ipso facto* unequal).

Court's view of them) underlying these issues changed, but the issues themselves were momentous in American history.<sup>250</sup> Immigration, which in large part defines Americans both to themselves<sup>251</sup> and to the rest of the world,<sup>252</sup> is another such momentous issue and equally deserves the Court's searching reevaluation.

Interestingly, in a footnote to his concurring opinion in *Casey*, Justice Stevens chose to compare the state interest in protecting potential life in the abortion context to the "state interest in protecting those who seek to immigrate to this country,"<sup>253</sup> such as Haitian refugees in their "desperate attempt to become 'persons' protected by our laws."<sup>254</sup> He then opined that "[h]umanitarian and practical concerns would support a state policy allowing those persons unrestricted entry; countervailing interests in population control support a policy of limiting the entry of these potential citizens."<sup>255</sup>

---

250. *Casey*, 505 U.S. at 861 (discussing the need for additional analysis above and beyond the ordinary where such issues are involved).

251. The concept of the United States as a "nation of immigrants" gets frequent play in the press and in politics. See, e.g., Suzanne Fields, *We're a Nation of Immigrants Now and Forever*, TIMES-UNION (Albany), Nov. 21, 1996, at A15 (describing a day at the Statue of Liberty and Ellis Island monuments); *A Nation of Immigrants Whose Blood Is American*, HOUSTON CHRON., Nov. 11, 1996, at 22 (Veterans Day editorial praising contributions of immigrant soldiers); *Immigrant War Heroes*, WALL ST. J., Nov. 11, 1996, at A16 (same). Both President Clinton and Bob Dole invoked the metaphor during the presidential campaign, despite having spent the previous year in Congress and the White House passing and signing restrictive immigration legislation. See, e.g., M2 Presswire, *The White House: Remarks to the People of the El Paso Area*, 1996 WL 13550299 (Nov. 8, 1996) (transcript of a campaign speech); M2 Presswire, *Remarks by the President to the Colorado Democratic Coordinated Campaign and the African American Initiative of Colorado*, 1996 WL 13549287 (Nov. 7, 1996) (same); John Marelius, *Dole Tosses Script, Goes After Clinton*, SAN DIEGO UNION-TRIB., Oct. 27, 1996, at A1 (quoting Bob Dole invoking the "nation of immigrants" image at a campaign rally); *All Things Considered*, seg. no. 16, show no. 2306, 1996 WL 12726300 (NPR broadcast, Aug. 15, 1996) (Jack Kemp's acceptance speech for the Republican vice-presidential nomination, invoking image of "nation of immigrants"). The Immigration and Naturalization Service even invoked the metaphor of a nation of immigrants as it announced that in fiscal 1995 it had deported a record number of them. Janet Hook, *INS Deported a Record 67,000, Report States*, L.A. TIMES, Oct. 28, 1996, at A1.

252. E.g., the Statue of Liberty, with its famous poem, *The New Colossus*, by Emma Lazarus ("Give me your tired, your poor . . ."), is instantly recognizable worldwide as a welcoming symbol of the United States.

253. *Casey*, 505 U.S. at 915 n.3 (Stevens, J., concurring in part and dissenting in part).

254. *Id.*

255. *Id.*

On the other hand, "while the state interest in population control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman's liberty interest. Thus, a state interest in population control could not justify a state-imposed limit on family size. . . ."256

Unfortunately, a year later Justice Stevens, writing for an 8-1 majority, held that the U.S. government could interdict the Haitian refugee subjects of his *Casey* footnote at sea and return them summarily to Haiti.<sup>257</sup> The state's "countervailing interests in population control"<sup>258</sup> has won the balance, at least for the moment. Haitian refugees (who are only "attempt[ing] to become 'persons' protected by our laws"<sup>259</sup>) are legally *worse off* than pre-viable fetuses, which are not "persons"<sup>260</sup> but which the Constitution protects from any "state interest in population control."<sup>261</sup>

Perhaps, however, Justice Stevens's musings do indicate some readiness to see the facts underlying immigration law differently.<sup>262</sup> The Court could even begin by concluding that *no* governmental interest in "population control" is sufficient by itself to overcome an individual's liberty interest under the Fifth or Fourteenth Amendment. Congress would then have to formulate an immigration policy in accord with the Constitution, a policy which accounts for the liberty and other constitutionally protected interests that

---

256. *Id.* This statement is particularly ironic in light of the treatment meted out to the Chinese refugees who arrived on the *Golden Venture*, many of whom made asylum claims based on opposition to China's mandatory one child per family policy. Many of them waited for over three years in Pennsylvania's York County Jail and other facilities for their claims to be heard, and the U.S. government admitted that it had instituted a mandatory detention policy for Chinese refugees as a cautionary measure to any others who might consider risking the trip to the United States. *Court Orders INS to Consider PRC Nationals for Parole From Detention*, 72 INTERPRETER RELEASES 417, 418 (Mar. 27, 1995).

257. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993). Justice Blackmun dissented.

258. *Casey*, 505 U.S. at 915 n.3 (Stevens, J., concurring in part and dissenting in part).

259. *Id.*

260. *See, e.g., Casey*, 505 U.S. at 913-14 (Stevens, J., concurring in part and dissenting in part) (discussing the status of fetuses under the Fourteenth Amendment).

261. *Id.* at 915 n.3.

262. The *Casey* joint opinion recognized this aspect of factual change as part of the Court's prudential and pragmatic evaluation of a given precedent. 505 U.S. at 855 ("whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification").

accrue when any person is the subject of U.S. government action.<sup>263</sup>

### E. The Supreme Court's Prudential Considerations

The *Casey* joint opinion examined the Court's prudential considerations when ruling on matters of precedent.<sup>264</sup> The legitimacy of the courts, and especially the Supreme Court, is shown through the "people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."<sup>265</sup> This acceptance is the sole source of the Court's power, as it can neither buy nor directly coerce support and obedience.<sup>266</sup>

Special, heightened prudential considerations attach when the Court decides a case in order to resolve an intensely divisive national controversy such as the legality of abortion.<sup>267</sup> A wrong conclusion would not only be an unjustifiable (albeit later reversible) result, but a serious weakening of the Court's capacity to function as the upholder of the rule of law.<sup>268</sup> The more errors and flip-flops the Court makes, the more acceptance of and respect for its rulings declines.<sup>269</sup> When the Court's rulings create disrespect within the lower courts, the legislature and the people, however, it must consider carefully whether advancing legal and social ideas have overtaken its prior line of decisions.<sup>270</sup>

---

263. See, e.g., *TRIBE*, *supra* note 39, § 5-16 at 361 (noting of the immigration regulation power that "[t]he traditional international perspective, that internal limits on the powers of national governments are without significance to foreign affairs, is ultimately unrealistic and cannot be the perspective of the Constitution. Yet it is the Constitution that is the lens through which American government must judge its authority . . .").

264. *Casey*, 505 U.S. at 860-69. The joint opinion writers noted and described the fates of two lines of cases prior to *Roe v. Wade* that involved comparable national controversies. The first was *Lochner v. New York*, 198 U.S. 45 (1905) (effectively adopting laissez-faire economic theory through substantive due process concept of "liberty of contract"); the second, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (ruling that "separate but equal" status of races accords with Fourteenth Amendment proscription of race-based deprivation of equal protection of the laws). The joint opinion noted both the arguable wrongness from the beginning of the opinions in these cases and the changed factual situation underlying them. *Casey*, 505 U.S. at 861-64.

265. *Casey*, 505 U.S. at 865.

266. *Id.*; see also *THE FEDERALIST* No. 78 (Alexander Hamilton).

267. *Casey*, 505 U.S. at 866-67.

268. *Id.*

269. *Id.* at 866 ("There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. . . . The legitimacy of the Court would fade with the frequency of its vacillation.").

270. The *Casey* dissenters (Chief Justice Rehnquist, joined by Justices White, Scalia and Thomas) particularly stressed this aspect of stare decisis analysis. 505 U.S. at 953-66. They argued that *Roe* should be overruled outright and that in fact the majority

Both the enforcement<sup>271</sup> and judicial interpretation<sup>272</sup> of the United States' immigration laws have engendered this very disrespect. Since the earliest days of the Republic the Court has insisted that "no Act of Congress can authorize a violation of the Constitution."<sup>273</sup> Yet the government has argued almost since the Supreme

---

had managed to accomplish much of this end *sub rosa*. *Id.* at 953-57. The dissenters argued (not without cause) that the majority's "undue burden" standard for evaluating abortion regulations had left *Roe* an empty shell: "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality." *Id.* at 954. Indeed, if "[l]iberty finds no refuge in a jurisprudence of doubt" as the first line of the joint opinion avers, *id.* at 844, a liberty-restricting "jurisprudence of doubt" is exactly what the "undue burden" test creates, as all now turns upon what "undue" means to the court considering it.

Most important for jurisprudential analysis, however, is that neither side felt that a given precedent's age, without more, was a proper reason for perpetuating it. This view contrasts sharply with the Court's treatment of its immigration precedents. Compare *Casey*, 505 U.S. at 955 ("Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question.") (Rehnquist, C.J., with White, Scalia and Thomas, JJ., dissenting) and *id.* at 864 ("In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.") (joint opinion of O'Connor, Kennedy and Souter, JJ.) with *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) ("[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion . . . in regulating the entry and deportation of aliens. But the slate is not clean. . . . [T]here is not merely 'a page of history,' but a whole volume.") (citation omitted) and *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972) ("We are not inclined in the present context to reconsider [the *Galvan*] line of cases."); accord *Fiallo v. Bell*, 430 U.S. 787, 792 n.4 (1977) ("We are no more inclined to reconsider [the *Galvan*] line of cases today than we were five years ago when we decided *Kleindienst v. Mandel*.") (citation omitted).

271. See *supra* note 41 (describing popular resistance, often on religious grounds, to enforcement efforts against Central American refugees and undocumented workers during the 1980s).

272. The Government has often argued with a straight face before the Supreme Court that immigration statutes are utterly and completely beyond Court review in *all respects*. See, e.g., *Wong Wing v. United States*, 16 U.S. 228, 239 (1896) (Field, J., concurring in part and dissenting in part) ("I . . . dissent entirely from . . . harsh and illegal assertions, made by counsel to the government . . . as to the right of the court to deny to the accused the full protection of the law and Constitution against every form of oppression and cruelty to them."); *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 491 (1991) (describing INS's presumption that its conduct would be unreviewable in the courts, *infra* note 278); *Fiallo v. Bell*, 430 U.S. 787, 804-05 (1977) (Marshall and Brennan, JJ., dissenting) ("The Government contends that this legislation is not subject to judicial review. . . . [T]he Government concludes [in its brief to the Court] that '[t]he congressional decision . . . is not a subject of judicial review,' a bald assertion that even the majority in *Fiallo* rejected as too expansive).

273. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). The Court reserved to itself the power to invalidate an unconstitutional act of Congress in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), noting that "all those who have framed written constitutions contemplate them as forming the fundamental and paramount

Court's earliest immigration rulings that Congress's power to legislate on immigration matters is *completely*, in *all* respects, outside the limits of both the Constitution and judicial review.<sup>274</sup> Despite these challenges to the Constitution, the Court, and the rule of law in general, the Supreme Court continues to countenance immigration legislation which would be unconstitutional by the Court's

---

law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void," and further that, as it was "emphatically the province and duty of the judicial department to say what the law is," the judiciary, being also bound by the Constitution, must declare such laws void or reduce the Constitution to a status no higher than that of any other law. *Id.* at 177. See also THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is . . . a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

The merits of the arguments for and against Chief Justice Marshall's famous proposition in *Marbury* are outside the scope of this Note. At any rate, the nation as a whole has acquiesced to them throughout its history, with the exception of the period of acute political crisis surrounding the Civil War.

274. One of the earliest cases in which the government raised this argument was *Wong Wing v. United States*, 163 U.S. 228 (1896), in which the Court held that Congress could not impose a fixed term of incarceration as punishment for illegal presence in the United States without allowing for a judicial trial with full due process protections. In a scathing "dissent," Justice Field concurred in the judgment but lambasted the "harsh and illegal assertions, made by counsel of the government, on the argument of this case, as to the right of the court to deny to the accused the full protection of the law and constitution against every form of oppression and cruelty to them." *Id.* at 239.

Ironically, Justice Field had written the majority opinion in *The Chinese Exclusion Case* which appeared to put immigration regulation outside the ambit of Court review in the first place. In reality, since Congress had overruled prior treaty provisions, the Court had felt that Congress's determination was a kind of "political question" as the term was then understood, requiring redress by the political branches of the government. 130 U.S. 581, 609 (1889). For a brief summary of the modern "political question" doctrine's effect on judicial review of immigration statutes, see *supra* notes 143-55 and accompanying text.

More recently, the government has argued that immigration statutes are completely outside the scope of judicial review, in *Fiallo v. Bell*, 430 U.S. 787 (1977). In response, the *Fiallo* majority noted that its cases "reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens," and that such regulations were not inherently nonjusticiable. 430 U.S. at 793 n.5. The Court noted in passing the "need for special judicial deference to congressional policy choices in the immigration context" without giving any particular rationale for this need. *Id.* at 793.

own admission if applied to U.S. citizens.<sup>275</sup> No invocation of the "political question" doctrine<sup>276</sup> or prudential restraint in matters of foreign affairs<sup>277</sup> can rationalize the drive to lawless government and agency action<sup>278</sup> that the Supreme Court has engendered by its abstentionist refusal to reconsider its earlier immigration holdings.

### Conclusion

The latest round of Draconian immigration and crime control legislation is reimposing the legal conditions of the last century upon aliens and threatening the promise of "equal justice under law" for all of us. The Supreme Court must reevaluate the constitutionally aberrant immigration plenary power doctrine that spawns such laws at its earliest opportunity. The Court's own mandate, as expressed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>279</sup> requires no less of it. Otherwise, the worse

---

275. See *supra* notes 38-45 and accompanying text.

276. See *supra* notes 143-55 and accompanying text (describing "political question" doctrine).

277. See *supra* notes 149-55 and accompanying text.

278. Consider the following excerpt from *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491 (1991), on application of a law providing for permanent residence for certain alien agricultural workers: "Nor . . . is there any dispute that the INS routinely and persistently violated the Constitution and statutes in processing SAW applications. Petitioners do not deny that those violations caused injury in fact to the two organizational plaintiffs as well as to the individual members of the plaintiff class." The Court noted that petitioner's (the government's) arguments assumed there *would* have been federal question jurisdiction if Congress had not supposedly eliminated it by the wording of § 210(e) of the Immigration and Nationality Act, a contention that the Court rejected. *Id.* at 491-92. In other words, the government acted as it did because it felt it could get away with it. Cf. DAVID P. CURRIE, *FEDERAL COURTS* 18 (4th ed. 1990) on the "political question" doctrine: "Except where the [political] designation reflects a decision that the Constitution commits the matter to discretion, to characterize an issue as political means that the executive or the legislature may violate the Constitution and get away with it."

Notably, Congress has once again attempted to strip the courts of jurisdiction over lawsuits against INS "discretionary determinations," which would have included the adjudication of the applications at issue in *McNary*. See *supra* note 16 (describing "court-stripping" provisions of Illegal Immigration Reform and Immigrant Responsibility Act of 1996). Perhaps the Supreme Court will be forced to rule once and for all upon whether Congress's lawmaking authority or the Constitution's Fifth and Fourteenth Amendment Due Process Clauses have the upper hand in the American legal system.

279. 505 U.S. 833, 901 (1992) ("Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.").



“manner of law”<sup>280</sup> that America “dooms” on the stranger today will be its own “doom”<sup>281</sup> tomorrow.

---

280. *See supra* text accompanying note 1.

281. *See supra* text accompanying note 2.

