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# Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution

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**Immigration as Commerce:  
A New Look at the Federal Immigration Power and the Constitution**

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Jennifer Gordon<sup>1</sup>  
*Draft—November 20, 2017*

**Introduction**

Can the United States government set immigration law and policy with little regard for constitutional rights? This question has been much debated since President Donald Trump issued a series of immigration-related executive orders in his first week in office, including a bar on entry by citizens of a set of majority-Muslim countries, but it was controversial long before then. In important part, the answer depends on what the Constitution says about the scope and limits of the power of the federal government over immigration. Therein lies the tale. On this subject, the country's founding documents say very little, and the Supreme Court's interpretations have been inconsistent at best.

The reigning understanding is that the immigration authority is rooted in the Constitution's grant to the federal government of control over matters related to sovereignty and foreign affairs. This explanation forms the basis of the plenary power doctrine, first announced in 1889, which grants Congress and the Executive Branch nearly unreviewable powers in the immigration arena. This Article offers an alternative. It asserts that immigration to the United States is and has long been economic in its purpose and impact, and thus is properly considered a function of both the foreign and interstate Commerce Clause. The constitutional source of a particular authority of a branch of the government does not wholly determine the degree of constitutional review that courts will exercise, but it is an important factor. An immigration power rooted in the Commerce Clause, the Article argues, would put a thumb on the scale in favor of ordinary judicial review for immigration statutes, rules, and policies challenged as violating constitutional rights.

The argument that the immigration power grows from the *foreign* Commerce Clause has a "Return of the Jedi" quality. For half of the nineteenth century, the Supreme Court did root the immigration power in the Constitution's explicit statement that the federal government has control over commerce with foreign nations.<sup>2</sup> In the mid-1800s, when immigration first became seen as a national rather

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<sup>2</sup> The Commerce Clause grants this power to Congress, not to the Executive Branch. Later in this article, I argue that the Executive Branch shares in this power, both because of its role as the enforcer of congressional policies, and because of its independent authority. See *infra* Notes [187-188] and

than state issue, courts treated the federal immigration power as an ordinary function of the foreign Commerce Clause, and relied on this theory to sustain the federal government's right to tax the ships that transported newcomers. While plenary in the sense that it granted control over immigration to the federal rather than the state governments, this power was subject to ordinary constitutional limitations.

This era came to an end with the Court's announcement of the plenary power doctrine in the *Chinese Exclusion Case* in 1889. There, the Supreme Court declared that Congress and the President have a near-absolute power to control immigration, with the corollary that the power is "plenary": courts are highly deferential when reviewing such decisions for constitutionality. For over 125 years, intermittently but particularly at times of peak concern about national security, the Supreme Court has relied on this plenary power doctrine in limiting the extent of constitutional review of immigration policies that facially discriminated against individuals on the basis of their race, nationality, political beliefs, and gender.

In the contemporary era, the Supreme Court's use of the plenary power doctrine has fluctuated. In a number of cases, the Court has ignored the doctrine, leading many scholars to predict its demise.<sup>3</sup> In others, it has relied on it.<sup>4</sup> In no case has the Court overruled the doctrine or even explicitly critiqued it, and has proposed no alternative theory to take its place. Plenary power arguments still make consistent appearances in contemporary briefs, including those filed by the Trump administration,<sup>5</sup> and in today's lower court decisions as well.<sup>6</sup> In 2017, the Supreme Court postponed decisions in two cases that squarely raised issues about the relationship of the Constitution to immigration law, leading to speculation that the Court was split 4-4 and that newly seated Justice Neil Gorsuch would be called on to decide the tie.<sup>7</sup>

At this moment of incoherence in the relationship of immigration law to the Constitution, and of urgent need for clarity, this Article advances the Commerce Clause as the anchor of a new understanding of the relationship between the

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accompanying text. [Ed: the note I'm referring to begins "Cox & Rodriguez, *supra* note..."]

<sup>3</sup> E.g., Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 305; Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 934 (1994-1995); Kevin Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015).

<sup>4</sup> See, e.g., *Demore v. Kim*, 538 U.S. 510, 521-22 (2003). The controlling opinion in a recent Supreme Court plurality decision also cited plenary power with approval. *Kerry v. Din*, No. 13-1402, slip op. at 2-4 (576 U.S. \_\_\_ (2015)) (Kennedy, J., concurring).

<sup>5</sup> See, e.g., Brief for the Respondents in Opposition at 15-19, *Castro v. United States Department of Homeland Security*, 835 F.3d 422 (3d Cir. 2016); opening lines of the Deputy Solicitor General's argument in *Jennings v. Rodriguez* (Transcript of Oral Argument at 3, *Jennings v. Rodriguez*, -- S.Ct. -- (2016) (No. 15-1204)).

<sup>6</sup> See, e.g., Memorandum and Order issued by Judge Gorton in *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 37 (D. Mass. 2017).

<sup>7</sup> See, e.g., IMMIGRATIONPROF BLOG, *Breaking News: Supreme Court Ends 2016 Term, Agrees to Hear Travel Ban Cases, Vacates and Remands Cross-Border Shooting Case, Punts in Two Immigration Cases* (June 26, 2017), <http://lawprofessors.typepad.com/immigration/2017/06/supreme-court-ends-2016-term-with-three-immigration-decisions.html#>.

Constitution and immigration law and policy. The Commerce Clause today plays almost no role in immigration jurisprudence. Despite the extensive early history of the foreign Commerce Clause as the presumed source of the immigration power, few scholars have seriously considered its contemporary suitability for that role.<sup>8</sup> More strikingly, none have explored the interstate Commerce Clause as an appropriate source of the immigration power, and one that could open the door to a normalization of constitutional analysis in the immigration context.<sup>9</sup>

Given the outsized economic impact of immigration on the United States during the past two centuries, the absence of contemporary discussion about the relationship between the Commerce Clause and the immigration power comes as a surprise. Immigration to the United States was fundamentally an economic phenomenon at the nation's founding, and the courts soon acknowledged as much by grounding it in the foreign Commerce Clause. And it is fundamentally an economic phenomenon today.<sup>10</sup> Most newcomers arrive in search of more, better, or higher-paying work. Even those admitted in non-economic categories—as refugees, to study, to be reunited with relatives—are likely to seek a job soon after arrival.<sup>11</sup> The numbers tell the current story: currently, twenty-six million permanent, temporary, and undocumented immigrants make up almost seventeen percent of the US labor force, a higher percentage than at any other point in the nation's history and a labor market participation rate far higher than natives.<sup>12</sup> Immigrants work in rural areas, suburbs, and metropolises throughout the nation.

By highlighting this longstanding aspect of immigration, and with it the Commerce Clause as an alternative source of government power, the Article seeks to clear a pathway to more consistent judicial consideration of constitutional rights in

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<sup>8</sup> The principal treatments of this issue are historical in focus. *See, e.g.*, Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 761 and *passim* (1996); Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 99–112 (2002); Matthew Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HAR. C.R.-C.L. L. REV. 1 (2010); Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 718–721 (2005). Others have suggested more briefly that the foreign Commerce Clause might be an appropriate contemporary source for the immigration power: STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 186 (1987); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L LAW 862, 864, 866 (1989); Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 26–27 (2010) (arguing that his “interaction theory” of foreign commerce “best explains and justifies Congress’s powers over immigration”); Gabriel “Jack” Chin, *Segregation’s Last Stronghold*, 46 UCLA L. REV. 1, 56–57 (1998).

<sup>9</sup> The closest to such a discussion that I have seen is Cristina Rodriguez’s mention of the potential impact of *United States v. Lopez*, 514 U.S. 549 (1995), on the reformulation of the division between federal and state/local spheres of immigrant regulation that she proposes in *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 629–630 (2008).

<sup>10</sup> On the economic nature of immigration in the history of the United States, *see generally* MICHAEL PIORE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* (1979); ARISTIDE ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006).

<sup>11</sup> *Cf.* ZOLBERG at 14 (“In the perspective of capitalist dynamics, immigrants of any kind—including refugees—are considered primarily as labor.”).

<sup>12</sup> Bureau of Labor Statistics, *Labor Force Characteristics of Foreign-born Workers Summary*, U.S. Department of Labor (May 19, 2016), <https://www.bls.gov/news.release/forbrn.nr0.htm>.

the immigration context. Drawing on the history of the Supreme Court’s early immigration jurisprudence rooting the immigration power in the foreign Commerce Clause, and on data demonstrating immigrants’ higher level of engagement with national and interstate labor markets compared to natives, and their greater interstate mobility in search of work,<sup>13</sup> it argues that immigration today is fundamentally economic in its impact, and thus properly considered a function of both the foreign and interstate Commerce Clause.

The consideration of the *interstate* Commerce Clause as a source of the immigration power is one of the Article’s unique contributions. Changes in Commerce Clause jurisprudence during the twentieth century have extended the understanding of “commerce” beyond international or interstate transportation of goods or people to include direct regulation of individuals crossing national or state borders for economic reasons. Meanwhile, when the New Deal interstate Commerce Clause cases expanded the scope of the interstate Commerce Clause, it, too, became available to ground the immigration power.

Beginning with *Lopez* in 1995, the Supreme Court has sought to rein in Congress’s power under the Commerce Clause.<sup>14</sup> Yet, the Article contends, even the more restrictive contemporary understanding of interstate commerce leaves room for the interstate Commerce Clause to encompass federal action on immigration. Immigrants are a central force in the United States economy. This Article asserts that law and policy on immigration fundamentally serves both as regulation of interstate commerce in the form of the national labor market and as regulation of individuals in interstate commerce.

To be clear, were the Court to accept the Commerce Clause as an appropriate source of the modern immigration power, it would not automatically guarantee broader judicial review of the constitutionality of immigration-related laws or policies.<sup>15</sup> Other doctrines—such as limits on the extraterritorial application of the Constitution, and the conceptual link between sovereignty and immigration—seem likely to continue to cast a shadow over Supreme Court review of the political branches’ determinations about admission and deportation categories and processes. Yet an explicit recognition of the relationship between the Commerce Clause and the immigration power has the potential to initiate a constructive

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<sup>13</sup> See *infra* Part III.B.

<sup>14</sup> 1995 was the year *United States v. Lopez*, 514 U.S. 549 (1995), was decided. Since then, the boundaries of the Commerce Clause have remained somewhat fluid, with cases such as *United States v. Morrison*, 529 U.S. 598 (2000) and *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), reinforcing the limits of interstate commerce, and cases such as *Gonzalez v. Raich*, 545 U.S. 1 (2005), suggesting a return to openness. See *infra* Part III.B for discussion of the current legal landscape regarding the interstate Commerce Clause and its implications for the immigration power as an outgrowth of that Clause.

<sup>15</sup> The relationship between constitutional powers and constitutional rights is its own field, a full exploration of which is beyond the scope of this article. For a sense of the scope of debate in this area, see Symposium: Individual Rights and the Powers of Government, 27 GA. L. REV. 343-501 (1993). For my purposes, it suffices to note that the clause of the Constitution that grants the government a particular power influences, but is not the only determinant of, the degree to which the Court will recognize individual constitutional rights as a constraint on that power.

reconsideration of jurisprudence regarding the constitutional norms that should govern immigration policies.

The Article proceeds as follows. Part I briefly traces the evolution of the plenary power doctrine from its introduction in the late 1800s through 2017, with particular attention to the Court's ambivalence toward and frequent abdication of constitutional review in the immigration context. Part II turns to the Commerce Clause as an alternative source of the immigration power. It highlights the view widely held earlier in the nineteenth century that immigration *was* commerce, which supported the Supreme Court's attribution at the time of the federal government's authority over immigration to the foreign Commerce Clause. It then contends that changes in the jurisprudence of the interstate Commerce Clause during the New Deal have rendered the interstate Commerce Clause available as an underlying source of the government's authority to make immigration laws and policies, notwithstanding some retrenchment on the scope of interstate commerce since the Supreme Court's *Lopez* decision in 1995. Part III argues that both the foreign and the interstate Commerce Clauses should be understood to undergird the immigration power today, and suggests that acknowledging immigration's relationship to the Commerce Clause clears a path to more routine judicial review of immigration laws for constitutionality. Part IV concludes.

## I. The Evolution and Impact of the Plenary Power Doctrine

Early in his presidency, Donald Trump asserted that the United States faced a crisis of national security that justified immediate Executive Branch action with regard to immigration. In a series of executive orders issued in early 2017, President Trump followed through on his campaign promises to bar Muslims from entering the United States<sup>16</sup> and to create ideological tests to screen would-be immigrants for American values.<sup>17</sup> Faced with what appeared to be a policy of facial discrimination against immigrants on the basis of religion,<sup>18</sup> advocates for and scholars of constitutional rights alike cried foul.<sup>19</sup> Immigration scholars, however, tended to be

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<sup>16</sup>Patrick Healy & Michael Barbaro, *Donald Trump Calls for Banning Muslims from Entering U.S.*, N.Y. TIMES (Dec. 7, 2015), <http://www.nytimes.com/politics/first-draft/2015/12/07/donald-trump-calls-for-banning-muslims-from-entering-u-s>.

<sup>17</sup>As to the President's campaign promises, see Christina Wilkie & Elise Foley, *Donald Trump Proposes Ideological Test For Entry To The United States*, HUFFINGTON POST (Aug. 16, 2016), [http://www.huffingtonpost.com/entry/donald-trump-immigration-test\\_us\\_57b224c9e4b007c36e4fc81e](http://www.huffingtonpost.com/entry/donald-trump-immigration-test_us_57b224c9e4b007c36e4fc81e); David E. Sanger & Maggie Haberman, *Donald Trump's Terrorism Plan Mixes Cold War Concepts and Limits on Immigrants*, N.Y. TIMES (Aug. 15, 2016), <http://www.nytimes.com/2016/08/16/us/politics/donald-trump-terrorism.html>. As to his execution of those promises, see Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); and Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>18</sup>For a detailed exploration of the last time a President sought to apply restrictions to men from predominately Muslim countries, in the wake of 9/11, and the outcome of court challenges to that policy, see Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485 (2010); see also Shoba S. Wadhia, *Is Immigration Law National Security Law?*, EMORY L. J. (forthcoming 2017).

<sup>19</sup>When President Trump campaigned on these promises, constitutional experts declared that they

less sanguine.<sup>20</sup> Their skepticism that the Supreme Court would invalidate these orders was grounded in their awareness of the longstanding debate about the source of the immigration power and the plenary power doctrine that had grown from it.

In a federal government of enumerated powers, immigration is an exception: nowhere does the Constitution explicitly grant the federal government full immigration authority.<sup>21</sup> There are some apparent leads—the Migration and Importation Clause, for example, which sounds like a fine option but in fact, most agree, was written with slavery and indentured servitude rather than voluntary immigration in mind.<sup>22</sup> There are some partial sources, such as the Naturalization Clause, which is generally understood to refer only to the government’s ability to set rules for the granting of citizenship.<sup>23</sup> The War Powers Clause probably includes the

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would likely be struck down by the Supreme Court as facial violations of fundamental rights. *See, e.g.*, Ari Melber, *Constitutional Scholars: Trump’s Anti-Muslim Immigration Proposal Is Probably Illegal*, MSNBC (Dec. 7, 2015), <http://www.msnbc.com/msnbc/trump-anti-muslim-proposal-probably-illegal>; Debra Cassens Weiss, *Trump’s Policies Would Be Unconstitutional and Will Be Challenged If Adopted*, *ACLU Says*, ABA JOURNAL (July 14, 2016), <http://www.abajournal.com/news/article/trumps-policies-would-be-unconstitutional-and-will-be-challenged-aclu-says/>; Anthony D. Romero, *ACLU Director: We will defend the constitution against a President Trump*, WASHINGTON POST (Jan. 24, 2017), [https://www.washingtonpost.com/opinions/a-president-trump-would-threaten-our-constitutional-freedoms/2016/07/13/42b41048-4876-11e6-bdb9-701687974517\\_story.html?utm\\_term=.7f388a43e4ad](https://www.washingtonpost.com/opinions/a-president-trump-would-threaten-our-constitutional-freedoms/2016/07/13/42b41048-4876-11e6-bdb9-701687974517_story.html?utm_term=.7f388a43e4ad); Ari Melber, *Legal Scholar: Trump’s Muslim Ban Is Probably Legal*, MSNBC (Dec. 22, 2015), <http://www.msnbc.com/msnbc/trump-muslim-ban-probably-legal> (quoting Lawrence Tribe: “The Constitution’s ‘bar against declaring an official religion’ would apply to discrimination against non-citizens.”)

<sup>20</sup> *See, e.g.*, Peter Spiro, *Trump’s Anti-Muslim Plan is Awful. And Constitutional.*, N.Y. TIMES, (Dec. 8, 2015), <http://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html>; Ariel Melber, *Legal Scholar: Trump’s Muslim Ban Is Probably Legal (Interview with Eric Posner)*, MSNBC (Dec. 22, 2015), <http://www.msnbc.com/msnbc/trump-muslim-ban-probably-legal>. *But see* Adam Cox, *Why A Muslim Ban Is Likely To Be Held Unconstitutional: The Myth of Unconstrained Immigration Power*, JUST SECURITY BLOG (Jan. 30, 2017), <https://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power/>.

<sup>21</sup> STEPHEN LEGOMSKY & CHRISTINA RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 99 (6th ed. 2015).

<sup>22</sup> U.S. CONST. art. 1, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”). Despite its open wording, some scholars believe that the Importation Clause was intended only to relate to slavery. *See, e.g.*, Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198 (1968). Others see the Clause as having had a broader meaning at the time of its adoption, reaching white immigrants as well as slaves. *See* DAVID LIGHTNER, SLAVERY AND THE COMMERCE POWER 21 (2006); Bilder, *supra* note 8.

<sup>23</sup> The Naturalization Clause exclusively enables Congress to set the terms on which a noncitizen can gain citizenship, not temporary or permanent admission short of naturalization, and has nothing to say about removal. U.S. CONST. art. 1, § 8, cl. 4 (“Congress shall have the power . . . To establish a uniform Rule of Naturalization.”). *But see INS v. Chadha*, 462 U.S. 919, 940–41 (1983) (locating the immigration power exclusively in the Naturalization Clause but stating that the resulting power was plenary); In a forthcoming paper, my colleagues Andrew Kent and Thomas Lee offer evidence from original debates that Founders saw Naturalization as encompassing immigration more broadly. Andrew Kent & Thomas Lee, “Congress’s Unenumerated Powers,” draft on file with author.

ability to regulate “enemy aliens,”<sup>24</sup> but says nothing about the majority of newcomers who come from friendly nations. The best candidate for the source of an implied power is the Commerce Clause. Indeed, the Supreme Court relied on the foreign Commerce Clause to undergird the immigration power for decades in the 1800s.<sup>25</sup> But given the lack of an explicit link between the two, the Court was free to change its mind—and did so as that century drew to a close.

The origin story of judicial deference to the federal political branches over immigration has been oft-told.<sup>26</sup> The Supreme Court articulated the plenary power doctrine for the first time in *Chae Chan Ping v. United States* (the “*Chinese Exclusion Case*”).<sup>27</sup> The Court declared that the “political branches,” and particularly Congress, held the exclusive power to determine who could enter the United States and on what terms. Legislative action regarding the exclusion of newcomers would be subject to extremely limited judicial review for constitutionality.<sup>28</sup> With no clear constitutional boundaries on the field, the Court established a doctrine for review of immigration law and policy that stood outside the mandate of *Marbury v. Madison* that “a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”<sup>29</sup>

The *Chinese Exclusion Case* was decided at a time of positive U.S.-China diplomatic relations, but virulent anti-immigrant sentiment directed at Chinese people in the United States. In *Chae Chan Ping*, despite the absence of hostilities with China, Justice Field develops an extended metaphor of immigrants as invaders to justify transferring the political branches’ power to manage foreign affairs during times of war to the control of routine immigration from a friendly nation during peacetime.

To preserve its independence, and give security against foreign aggression

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<sup>24</sup> See *Harisiades v. Shaughnessy*, 342 U.S. 580, 587–88 (1952) (relating the immigration power to deportation in times of war or “Congressional apprehension of foreign or internal dangers short of war”).

<sup>25</sup> See *infra* Part III.A.

<sup>26</sup> Stephen Legomsky was the first to lay out a comprehensive, case-by-case account of the evolution of the doctrine, in his 1987 book *Immigration and the Judiciary*. See *supra* note 8, at 177-219. Legomsky argued that the Supreme Court had constructed the Plenary Power doctrine by leaping from the international law principle that countries have the right to exclude foreigners, to the assertion that US constitutional law assigned the immigration power exclusively to the political branches of the federal government, and that the decisions of those branches were immune from judicial review. *Id.* at 184-87.

<sup>27</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). Chae Chan Ping, a 12-year lawful resident of the United States, was barred from returning to the US because he had failed to obtain a re-entry permit—even though the permit requirement had not been in place at the time of his departure. The Chinese Exclusion Act of 1882, this country’s first (but far from last) effort to bar immigration from a nation or ethnic group, was the source of this mandate. The Act was not repealed until 1943. Later, the Asian Exclusion Act, part of the Immigration Act of 1924, banned *all* immigration from Asian nations. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924).

Legomsky traces the beginning of the plenary power doctrine to the earlier line of cases invalidating state efforts to regulate immigration, establishing the federal government as the sole authority in that arena. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY* at 180-192. For a discussion of those cases, which relied on the Commerce Clause as the source of the immigration power, see *infra* Part III.A.

<sup>28</sup> *Chae Chan Ping*, 130 U.S. 581 (1889).

<sup>29</sup> 5 U.S. 137, 180 (1803).



and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.<sup>30</sup>

....

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.<sup>31</sup>

In the phrase that elevated the immigration power out of the ordinary sphere of checks and balances into the “plenary” domain, Justice Field declares that the legislature’s decision about who to exclude from the United States “is conclusive upon the judiciary.”<sup>32</sup>

It is not surprising that there is some judicial deference to the political branches in the context of immigration. Despite predictions to the contrary at the turn of the twenty-first century, the nation-state remains the foundational unit of governance around the globe.<sup>33</sup> Most people instinctively feel that a sovereign country should have the right to establish rules about the categories and processes for immigration. More controversial has been the doctrine’s extent. A number of other government powers have been labeled “plenary” and yet remain subject to constitutional constraints.<sup>34</sup> Yet the immigration plenary power doctrine has often been deployed by courts to insulate rules and processes regarding those who seek to enter or remain in the United States from most of the protections of individual rights that the Constitution grants in other contexts.<sup>35</sup> The irony is acute: a government power tenuously rooted in the Constitution has been interpreted to grant the political

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<sup>30</sup> *Chae Chan Ping*, 130 U.S. at 605.

<sup>31</sup> *Id.* at 606.

<sup>32</sup> *Id.* at 630.

<sup>33</sup> *But see* Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965 (1993) (arguing that the sovereignty rationale for a broad plenary power is a relic of the 19<sup>th</sup> century, and no longer make sense after the creation of a positive law structure for nations’ obligations in the international realm and the individual rights revolution); Sarah Cleveland, *Powers Inherent in Sovereignty*, 81 TEX. L. REV. 1, 277-285 (2002), *supra* n. 8; Matthew Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HAR. C.R.-C.L.L. REV. 1, 53-56 (2010) *supra* n. 8.

<sup>34</sup> For example, the War Powers and the Indian and Foreign Commerce Clauses. For discussion of the difference between how “plenary” has been interpreted in the context of the foreign Commerce Clause and in the immigration context, see *infra* notes [189-192] [Ed: Note 189 cites *Gibbons v. Ogden*; note 190 cites *Chew Heong*.]

<sup>35</sup> *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.”); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”) (quoting *Ocean Steam Navigation v. Stranahan*, 214 U.S. 320, 339 (1909)); *Demore v. Kim*, 538 U.S. 510, 523 (2003) (“[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”) (internal citations omitted).

branches carte blanche to ignore constitutionally-protected rights with regard to immigrants and those who associate with them.<sup>36</sup>

Within a few years of the *Chinese Exclusion Case*, the Supreme Court had elaborated the federal government's control of immigration as inherent in the rights of a national government to conduct foreign affairs and establish and defend its sovereignty.<sup>37</sup> In a series of decisions, it extended the plenary power doctrine to the immigration actions of the executive branch as well as Congress, and (in a weaker form) to the deportation of noncitizens residing in the United States as well as the exclusion of those seeking admission.<sup>38</sup> It established doctrinal distinctions still dominant today, for example that judicial review will usually be more vigorous where noncitizens have already been admitted to the country rather than standing (literally or by legal fiction) outside the border,<sup>39</sup> and where procedural rather than substantive rights are at stake.<sup>40</sup> These cases set the course for the jurisprudence of the federal immigration power well into the 1970s, with sporadic reappearances through the twenty-first century.<sup>41</sup>

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<sup>36</sup> Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 275.

<sup>37</sup> “The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.” *Chae Chan Ping*, 130 U.S. at 609.

<sup>38</sup> In *Nishimora Ekiu v. United States*, 142 U.S. 651 (1891), the Supreme Court extended plenary power doctrine to procedures and decisions of the California immigration commissioner and the (separate) federal inspector for port of San Francisco, both acting via grant of authority from federal Treasury Secretary. This closed off most avenues to appeal to federal courts by noncitizens denied entry. “[T]he decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Id.* at 660 (emphasis added). *Ekiu* did, however, preserve the writ of *habeas corpus* for noncitizens who were detained by the US government after being excluded. *Id.* at 660.

Note that this extension of the power to *both* political branches goes beyond the Chinese Exclusion Case's initial assignment of plenary power to Congress alone. In *Fong Yue Ting*, the Supreme Court extended the plenary power doctrine to noncitizens already admitted to the country. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

The Executive Branch plays a critical role in regulating immigration. The plenary power doctrine encompasses both of the political branches, and courts have been unable or unwilling to clarify where which aspects of the power lie. See Adam Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 YALE L. J. 458 (2009); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013). The Commerce Clause, however, is explicit in granting the authority over commerce solely to Congress. See *infra* notes [187-188] and accompanying text for a discussion of how the Executive's current extensive role in immigration decision-making and standard-setting is related to the congressional immigration power as currently understood. A similar understanding would bring the Executive Branch under a Commerce Clause-based understanding of the immigration power.

<sup>39</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001). Immigration law uses the legal fiction of “standing outside the border” to distinguish those who have been legally admitted from those who have not. A noncitizen is referred to as “standing outside the border” whether she is in another country applying for a visa, actually at the border requesting admission, or present in the United States without having been legally admitted.

<sup>40</sup> Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990).

<sup>41</sup> At the outset, it is important to clarify that jurisprudence on immigrants and the Constitution is generally bifurcated. Although the plenary power line of cases, at issue here, limits judicial review for

Litigation over the relationship between immigration and the Constitution has waxed and waned. Immigration all but fell off the federal docket during the restrictionist 1920s, 30s, and 40s, taking the question of plenary power with it. When the issue returned in 1950, however, the Cold War was underway, and the plenary power doctrine came back in full force. The Supreme Court's 1950 statement in *Knauff v. Shaughnessy* that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"<sup>42</sup> signaled the renewed vigor with which the Court would turn to the doctrine during the decades that followed.<sup>43</sup> National security and foreign affairs rationales were central to decisions upholding actions on immigration by both the legislative and executive branches as the Cold War proceeded.<sup>44</sup>

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constitutionality of immigration law and policy, i.e. as to noncitizens' right to enter and remain in the United States, a separate line of cases, dating from *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), grants immigrants—including in many cases undocumented immigrants—constitutional protections as to many aspects of their daily lives in the country. See, e.g., *Mathews v. Diaz*, 426 U.S. 67 (1976): "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. [citations omitted] Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id.* at 77. The Court emphasizes, however, that these protections do not extend to the context of exclusion and deportation. "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry." *Id.* at 79-80.

So, for example, the 5<sup>th</sup> and 14<sup>th</sup> Amendments have been held to encompass the right of noncitizen children, including undocumented children, to a free public education through secondary school (*Plyler v. Doe*, 457 U.S. 202 (1982)); and of noncitizens in criminal proceedings to the same Miranda warning and protection against unconstitutional searches and seizures enjoyed by citizens (*Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)). For assessments of the extent of the constitutional rights of noncitizens, see GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1731 and *passim* (2010).

The Supreme Court has, however, permitted Congress to distinguish between legal permanent residents and citizens in certain other contexts. In *Graham v. Richardson* 403 U.S. 365 (1971), the Court established that state classifications based on alienage should be subject to strict scrutiny [*id.* at 372], but soon carved out an exception where the distinction was tied to the state's governmental operations, permitting state discrimination against legal permanent residents in hiring for policing (*Foley v. Connelie*, 435 U.S. 291 (1978)) and for public school teaching (*Ambach v. Norwick*, 441 U.S. 68 (1979)) among other arenas. In *Mathews v. Diaz*, moreover, the Court made clear that a lower level of scrutiny applied when examining federal alienage classifications created by Congress. That case upheld a federal law requiring five years of continuous residents from legal permanent residents before qualifying for certain federal public benefits, with no such requirement for citizens. 426 U.S. 67 (1976).

<sup>42</sup> *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

<sup>43</sup> See *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (Justice Frankfurter: While "much could be said for the view" that due process limits congressional power in the immigration arena "were we writing on a clean slate," "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. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . .").

<sup>44</sup> *Shaughnessy v. United States el rel. Mezei*, 345 U.S. 206 (1953) (citing national security concerns and the plenary power doctrine in upholding as constitutional the indefinite detention of a legal permanent

Others have amply described the impact of the plenary power doctrine over the past century. For the purposes of this Article, it suffices to note that despite its tenuous link to an enumerated power, the doctrine has been cited by the Supreme Court in upholding immigration policies that openly discriminate on the basis of a noncitizen's race, gender, national origin, and political views.<sup>45</sup> As of 2017, the Supreme Court had never held unconstitutional a substantive criterion for admission or "removal" (the modern term that covers both exclusion at the border and deportation from the interior), whether established by Congress or the executive branch.<sup>46</sup> In addition, the Court has relied on plenary power in permitting

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resident seeking re-admission to the United States); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (citing national security concerns and the plenary power doctrine in upholding as constitutional the exclusion from the United States without a hearing of the wife of a United States citizen); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (citing national security concerns and the plenary power doctrine in upholding the decision of the Attorney General not to permit a foreign scholar with Marxist views to enter the United States to attend a conference).

<sup>45</sup> See, e.g., *Demore v. Kim*, 538 U.S. 510, 521–22 (2003). The controlling opinion in a recent Supreme Court plurality decision also cited plenary power with approval. *Kerry v. Din*, No. 13-1402, slip op. at 2-3, 4 (576 U.S. \_\_\_\_ (2015)) (Kennedy, J., concurring). For a review of modern cases, see Legomsky, *supra* note 36, at 261–69; Chin, *supra* note 8, at 3–7; Regarding *Fiallo v. Bell*, 430 U.S. 787 (1977), Chin argues that despite its holding the case actually represents a “quiet expansion of judicial review,” because the Court did not say that there was *no* review of Congress’s substantive categories in the immigration context, instead accepting “limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens.” *Id.* at 62–66 (quoting *Fiallo v. Bell*, 430 U.S. at 793 n.5). However, as Chin notes, the Court upheld Congress’s differential gender-based standard following “an exceedingly deferential review.” *Id.* at 64.

<sup>46</sup> Note, though, that in 2017 the Court *did* decide *Sessions v. Morales-Santana*, No. 15-1191, slip op. (U.S. June 12, 2017). There, it found that the larger burden that the Immigration and Nationality Act imposes on unwed U.S. citizen fathers vs. mothers in order to pass citizenship to their children was a violation of Equal Protection. In so doing, the Court explicitly sidestepped the question of the vitality of the plenary power doctrine. It distinguished the question presented as related to a claim of citizenship on birth, rather than “an entry preference for aliens” that might have triggered the need for maximal judicial deference that plenary power mandates in considering constitutional challenges to immigration. Slip op. at 15.

This is not by any means to say that noncitizens always lose in cases about immigration. As Stephen Legomsky observed thirty years ago, in the modern era the Court has not infrequently turned to liberal statutory interpretation as a way of avoiding the plenary power doctrine. LEGOMSKY, IMMIGRATION AND THE JUDICIARY at 156-170. See also Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992). Kevin Johnson has recently argued that the Court increasingly relies on ordinary tools of statutory construction, including the constitutional avoidance doctrine and clear statement rules, as well as the application of administrative law principles, to rule in favor of immigrants. See Kevin Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61–65 and *passim* (2015).

Indeed, Supreme Court decisions in 2017 saw a number of immigrants prevail in challenges to immigration law. See, e.g., *Maslenjak v. United States*, 137 S.Ct. 1918 (2017) (before the government can denaturalize a naturalized citizen on the basis of a conviction for misstatements on her citizenship application, it must show that the misstatements were central to the grant of citizenship); *Lee v. United States*, 137 S.Ct. 1958 (2017) (finding that attorney’s faulty advice regarding the immigration consequences of a criminal plea led to prejudice, and ruling for noncitizen); *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017) (applying a categorical approach to the crime of statutory rape for the purposes of immigration law; holding that for a conviction of statutory rape to qualify as an aggravated felony, the underlying state law must criminalize sexual intercourse with an individual younger than sixteen).

procedures in the immigration arena that would clearly violate the due process protections of the Constitution if they were applied elsewhere. These include indefinite detention on the basis of evidence not revealed to the noncitizen;<sup>47</sup> removal based on an administrative hearing held in English at which the noncitizen—whose sole language was Japanese—was unrepresented, had no translator, and was unaware that the procedure related to her deportation;<sup>48</sup> and indeed the removal of a noncitizen based on a hearing held *in absentia* or without any hearing at all.<sup>49</sup> When, in the wake of 9/11, the Executive Branch required that all men from predominately Muslim countries in the United States on temporary visas register with the government, the initiative was upheld by every circuit court that considered constitutional challenges to it.<sup>50</sup> As a number of scholars have pointed out, in addition to its consequences for immigrants, the plenary power doctrine limits *citizens'* ability to exercise their constitutional rights.<sup>51</sup>

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Consistent with Johnson's thesis, all of these rulings were made on statutory interpretation grounds and did not mention plenary power. In the one immigration case where the Supreme Court resolved a constitutional question, *Morales-Santana* (discussed *supra*), it was careful to distinguish between the context where the constitutional challenge arose, which it characterized as relating to citizenship at birth, and the context of noncitizen admission categories in which greater deference is due to Congress. . . Slip op. at 15.

<sup>47</sup> *Shaughnessy v. United States el rel. Mezei*, 345 U.S. 206 (1953).

<sup>48</sup> *Yamataya v. Fisher*, 189 U.S. 86 (1903). Ironically, *Yamataya* is a case remembered for acknowledging some procedural rights in the deportation context, because it required a sliver of opportunity for the immigrant to be heard in administrative proceedings. This standard was found to be met when Ms. Yamataya, who spoke no English, was granted a hearing at which she was not provided a translator and did not realize that the proceedings related to her deportation. "If the appellant's want of knowledge of the English language put her at some disadvantage . . . that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by habeas corpus." *Yamataya*, 189 U.S. at 102.

<sup>49</sup> 8 U.S.C. § 1252(b); *Maldonado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989) ("Another example of a diminished constitutional safeguard in a deportation hearing, and most significant to the present case, is that an immigration judge may deport an alien in absentia based on the existing record.")

<sup>50</sup> For a review of these decisions, see Center for Immigrants' Rights at Penn State's Dickinson School of Law, *NSEERS: The Consequences of America's Efforts to Secure Its Borders* at 22–23 (2009), <http://www.adc.org/fileadmin/ADC/Pdfs/nseerspaper.pdf>; see also Wadhia, *Is Immigration Law National Security Law?*, *supra* note 18.

<sup>51</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (although the Court there claimed it did carry out constitutional review on this issue, it did so with extreme deference to Congress, and ultimately held that citizens' rights were not infringed); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (declining to balance US citizen professors' asserted First Amendment right to engage with the views of a noncitizen professor whose visa was denied, against Congress's plenary power over immigration; requiring that the US government provide only a "facially legitimate and bona fide" reason for its denial of the visa); *Kerry v. Din*, 576 U.S. \_\_\_ (2015) (Justice Scalia for the plurality: a citizen has no liberty right in being reunited with her noncitizen spouse, and therefore there is no process due to her that would require notice of why her husband's visa was denied). *But see* Justice Kennedy's controlling concurrence in *Kerry v. Din*, where he assumes without deciding that US citizens have a liberty interest in being reunited with a noncitizen spouse or other relatives abroad, but finds that right not infringed by the U.S. government policy of giving no further information when a visa is denied on terrorism grounds by a consular authority. No. 13-1402, slip op. at 1 (576 U.S. \_\_\_ (2015)) (Kennedy, J., concurring). For further discussion, see Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013); NEUMAN, *supra* note 41 at 138 (mentioning as examples citizens' 1<sup>st</sup> amendment rights when denied the opportunity to hear from and interact with the noncitizen).

Plenary power has been roundly critiqued by academics and advocates who see it as an unwarranted exception to baseline constitutional protections, born of an era of xenophobia and racism.<sup>52</sup> As to the source of the power, scholars have emphasized in particular the weak constitutional soil in which the Court rooted the doctrine when it turned away from the enumerated powers to foreign affairs and sovereignty rationales.<sup>53</sup>

One such critique emphasizes that if the foreign affairs power is to be relied on across the board as a source of the immigration power, it must be justified by reference to the centrality of international relations to most immigration decisions made by the executive and legislative branches.<sup>54</sup> Indeed, some small number of immigration determinations do have the potential to influence the United States' standing with other nations. A decision to refuse a visa to a foreign official, for example, or to create additional requirements for entry for citizens of a country with which the United States is in conflict, may provoke a reaction from the government of the affected country.<sup>55</sup> But today, the vast majority of immigration laws and procedures, and the decisions made under them, are routine, set out criteria that apply to nationals of all countries, and at least ostensibly reflect considerations unrelated to foreign relations, such as the individual's impact on the public health, her criminal record, the likelihood she will become a public charge, and whether her presence will deprive U.S. workers of employment. While relationships with individual nations may receive outsized attention when they arise in the immigration context, in fact they affect a miniscule percentage of immigration law and its application.<sup>56</sup> Shoba Sivaprasad Wadhia has made a similar argument regarding the limited nexus between genuine national security concerns and most

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<sup>52</sup> See, e.g., Chin, *supra* note 8 at 56-57. See also LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 69-93 (Univ. North Carolina Press 1995); Kevin R. Johnson, Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique, 2000 U. Ill. L. Rev. 525, 531 (2000).

<sup>53</sup> Note, however, that foreign affairs was already present as an explicit rationale in *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875) and *Chy Lung v. Freeman*, 92 U.S. 275 (1876). The principle concern about foreign affairs at that time seems to have been that one state could end up disrupting the country's relationship with another country. "If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations." *Chy Lung* 92 U.S. at 280.

<sup>54</sup> For variations on this argument see T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP 160-62 (2002); Legomsky, *supra* note 36, at 261-69; NEUMAN, *supra* note 41, at 135-38; Lindsay, *supra* note 8, at 53 (2010); Matthew Lindsay, *Disaggregating 'Immigration Law'*, 68 FLA. L. REV. 179 (2016); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 615-616 (2017). *But see* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 38-42 (2015) (Arguing that the foreign affairs rationale remains a valid justification for a diminished level of judicial review of immigration policies in some instances).

<sup>55</sup> One example of this is the retaliatory action the Brazilian government took against U.S. citizens seeking to enter Brazil when the United States refused to allow Brazilians to enter without a visa. C.S., *You're Not Welcome*, THE ECONOMIST (February 19, 2013), <https://www.economist.com/blogs/gulliver/2013/02/tourist-visas>.

<sup>56</sup> See sources cited in note [54], *supra*. [Ed.s: The note begins: "For variations on this argument see T. Alexander Aleinikoff..."]

of immigration law.<sup>57</sup>

More broadly, a number of scholars outside the immigration arena have sought to undermine the assumption that the political branches' foreign affairs power itself lies beyond the realm of constitutional protections.<sup>58</sup> Control over foreign affairs is only implied from the Constitution, rather than explicitly set forth in it.<sup>59</sup> Nonetheless, during the years from the Supreme Court's 1936 *Curtiss-Wright*<sup>60</sup> decision through the end of the Cold War, the Court interpreted the power expansively, permitting the Executive to use it to insulate a wide range of actions from meaningful constitutional review. In "The Normalization of Foreign Relations Law," Ganesh Sitaraman and Ingrid Wuerth have recently argued that the Supreme Court has now entered a new "normalized" phase of construction of the foreign affairs power, with a turn to more ordinary review.<sup>61</sup> When the Court considers immigration cases, however, this normalization is not evident.

Sovereignty has been separately critiqued as a basis for the immigration power. Some scholars have questioned the notion of sovereignty as a modern rationale for a number of government powers, arguing that it is rooted in an outdated nineteenth century territorial conception of what it means to be a nation-state.<sup>62</sup> It is beyond the scope of this Article to resolve the debate about the contemporary relevance of sovereignty to immigration policy. Instead, it proceeds on the pragmatic view that arguments about the demise of sovereignty are unlikely to meet a warm reception in the federal courts. With that assumption in mind, one response might be to accept the relationship between sovereignty and immigration, while contesting the exemption that plenary power grants the government from constitutional constraints. But such an approach faces an uphill battle, in that its demand for constitutional rights will always be taken up in the shadow cast by the tradition of deference that accompanies sovereignty justifications. In response, this Article calls for a doctrinal counterweight: an additional constitutional source for the immigration power, on which judges and litigants can draw as a reminder that most immigration laws and policies have quotidian rather than grand aims, and should receive an ordinary measure of constitutional review.

With some exceptions, in recent years plenary power has appeared to be in decline.<sup>63</sup> A number of Supreme Court decisions have veered away from applying a

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<sup>57</sup> Wadhia, *Is Immigration Law National Security Law?*, *supra* note 18.

<sup>58</sup> See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (with responses in the Harvard Law Review Forum by Carlos Vasquez, Curtis Bradley, and Stephen Vladek); see also Kerry Abrams, *supra* note 38, at 635–36. Most recently, in his forthcoming book, Martin Flaherty critiques the idea of judicial deference to the Executive in the realm of foreign affairs as a "newcomer to the legal landscape," and argues for a no-deference standard. MARTIN FLAHERTY, THE SUPREME COURT AND FOREIGN AFFAIRS, ch. 10 (forthcoming 2018) (on file with the author).

<sup>59</sup> LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 16 (1972).

<sup>60</sup> *U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

<sup>61</sup> Sitaraman & Wuerth, *supra* note 58.

<sup>62</sup> LEGOMSKY, *supra* note 8, at 184–86; Lindsay, *supra* note 8; Cleveland, *supra* note 8, at 99–112.

<sup>63</sup> The case most responsible for this theory was *Zadvydas v. Davis*, 533 U.S. 678 (2001), decided just a few months before 9/11, in which the Court applied the constitutional avoidance canon to justify reading a six-month limit into a statutory provision authorizing unlimited detention of noncitizens who are

plenary power analysis, albeit without overruling the doctrine. Kevin Johnson has argued that although the Supreme Court has announced no move to change the doctrine, in practice it now seeks to resolve most immigration cases that raise a combination of constitutional, statutory interpretation, and administrative law questions by avoiding the constitutional issues, consistent with the constitutional avoidance canon.<sup>64</sup> Instead, it uses the ordinary tools of statutory construction and assessment of the scope of the agency's exercise of its discretion to resolve the case.<sup>65</sup> He concludes that "[i]mmigration exceptionalism—and, with it, the *Chinese Exclusion Case*—after 125 years appears to slowly but surely be on its way out."<sup>66</sup>

Others are less optimistic.<sup>67</sup> In 2003, the Supreme Court relied on plenary power to uphold a statute mandating detention for classes of noncitizens prior to determination of their deportability.<sup>68</sup> In 2015 the Supreme Court upheld a State Department policy of providing minimal explanation to a noncitizen whose visa application is denied by a consular official in a plurality opinion in *Kerry v. Din*,<sup>69</sup> with several justices explicitly citing the doctrine.<sup>70</sup>

Many had hoped that the Court would resolve persistent questions about the vitality of the plenary power doctrine in the course of its 2016 term, which included an unusually large number of immigration controversies. It was not to be. In June 2017, the Court announced that it had not reached a resolution on two cases that squarely posed the question of the applicability of constitutional norms to

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excludable, removable, or a flight risk. Following 9/11, however, the door appeared to close. *See Demore v. Kim*, 538 U.S. 510 (2003). Nonetheless, even before the 2017 cases, the Court only occasionally referred to plenary power or cited the *Chinese Exclusion Case* and its fellows, even when it appeared to apply the doctrine.

<sup>64</sup> Johnson, *supra* note 46, at 61–65 and *passim*. *See also* LEGOMSKY, IMMIGRATION AND THE JUDICIARY at 156–170; Motomura, *Immigration Law after a Century of Plenary Power*; Motomura, *The Curious Evolution of Immigration Law*.

<sup>65</sup> Johnson, *supra* note 46, at 61–65.

<sup>66</sup> Johnson, *supra* note 46, at 118; David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, *supra* note 54; Lindsay, *supra* note 54, at 241. *But see* Kevin Johnson, *No decision in two immigration-enforcement cases*, SCOTUSBLOG (June 26, 2017), <http://www.scotusblog.com/2017/06/no-decision-two-immigration-enforcement-cases/> (noting uncertainty about the direction the Court will take following its 2017 decision to postpone decisions in two cases challenging the constitutionality of aspects of immigration law).

<sup>67</sup> *See* Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 27 (2015) (“A sober observer would point out that immigration law scholars have been predicting the imminent demise of the plenary power doctrine for at least three decades.”) (citing Legomsky, *supra* note 45, at 305.); *see also* Lindsay, *supra* note 8, at 8 (“Although the SC in recent decades has muted some of the more severe aspects of the plenary power doctrine, the constitutional exceptionalism of the immigration power, as well as its core legal rationale, remain fundamentally intact.”) (citation omitted).

<sup>68</sup> *Demore v. Kim*, 538 U.S. 510, 521 (2003).

<sup>69</sup> 135 S.Ct. 2128 (2015).

<sup>70</sup> *See, e.g., id.* at 2139–41 (Kennedy, J., concurring). Using this case as a jumping off point to argue that the plenary power doctrine is being dismantled as to procedural challenges but preserved as to substantive constitutional rights, *see* Kagan, *supra* note 67. Kagan notes that although “recent case law has significantly weakened the doctrine,” the Supreme Court “may be hesitant to discard the doctrine entirely.” *Id.* at 23.



immigration law: *Lynch v. Dimaya*,<sup>71</sup> challenging the “crime of violence” deportation ground as unconstitutionally vague; and *Jennings v. Rodriguez*,<sup>72</sup> challenging the denial of bond hearings to immigrants mandatorily detained for longer than six months as a violation of due process. Instead, it ordered that they be reargued in the 2017 term, leaving Justice Gorsuch—not on the Court at the time they were first heard—to cast a deciding vote.<sup>73</sup>

As the term drew to a close, all eyes turned to the litigation surrounding the Trump administration’s “travel bans,” temporarily barring nationals of seven, and then six, predominately-Muslim countries from entering the United States. In September of 2017, the administration issued a third version of the travel ban, imposing restrictions on a somewhat different list of six majority-Muslim countries, together with North Korea and some officials from Venezuela.<sup>74</sup> Following this, and the expiration of the earlier orders, the Supreme Court dismissed the earlier litigation as moot.<sup>75</sup> However, litigation on the third version is moving at a rapid pace toward the Supreme Court. As of this writing...

In 2017-2018, when the Supreme Court turns back to its pending cases on constitutional rights in the context of immigration law, it is far from clear that it will render the plenary power doctrine obsolete. Even Johnson notes that the doctrine “conceivably could return in truly exceptional cases, such as ones implicating an imminent mass migration or following another catastrophic act of terrorism.”<sup>76</sup> One might reasonably fear that the ongoing global refugee crisis and recent acts of terrorism in Europe and the United States could too easily be relied on to provide entrée for such a return, particularly given a shift in balance on the Supreme Court.

### III. The Commerce Clause as a Source of the Immigration Power

Today it is recalled that for decades in the 1800s, the Supreme Court held that the federal immigration power was rooted in the foreign Commerce Clause. The

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<sup>71</sup> *Lynch v. Dimaya*, 803 F.3d 1110 (9th Cir. 2015), cert. granted, 85 U.S.L.W. 3114 (U.S. Sept. 29, 2016) (No. 15-1498).

<sup>72</sup> *Rodriguez, et al. v. Robbins, et al.*, 804 F.3d 1060 (9th Cir. 2015), cert. granted sub nom. *Jennings v. Rodriguez*, ---S. Ct. ---, (2016) (No. 15-1204).

<sup>73</sup> The Court did decide *Sessions v. Morales-Santana*, No. 15-1191, slip op. (U.S. June 12, 2017). As discussed *supra* note 46, this case overturned on equal protection grounds a US law imposing a greater burden on unwed U.S. citizen fathers than on mothers in order to automatically pass citizenship to their children. The Court also decided several other cases challenging immigration law on non-constitutional grounds. These included another case related to citizenship, *Maslenjak v. United States*, 137 S.Ct. 1918 (2017), where the Court applied statutory construction to reach a unanimous conclusion that immaterial false statements were not grounds for denaturalization, and *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), where the Court applied statutory construction to conclude, again unanimously, that sexual abuse of a minor is not an aggravated felony unless the statute under which the noncitizen was convicted defined “minor” as younger than sixteen, at 1568.

<sup>74</sup> Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, (Sept. 24, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry>.

<sup>75</sup> *Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017).

<sup>76</sup> Johnson, *supra* note 46, at 66.

interstate Commerce Clause has never been seriously considered for this role. Yet together, they offer an alternative framework for the federal immigration power, one that is directly rooted in the Constitution and that sets the stage for a more robust standard of judicial review.

Article I, Section 8 of the U.S. Constitution grants Congress power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>77</sup> Each element of the clause has been interpreted as giving rise to a distinct form of the power, with its own evolution over time. In addition, a fourth “negative” or “dormant” Commerce Clause has been derived from this language, rendering a state or local law unconstitutional when it unduly burdens interstate commerce.

Beginning with *Gibbons v. Ogden*<sup>78</sup> in 1824, the Commerce Clause has been understood as governing a broad swath of economic activity, although the precise contours of the commerce power have been interpreted differently over time. This section briefly traces the evolution of Commerce Clause jurisprudence, argues for locating the immigration power in the foreign and interstate Commerce Clauses, and contends that adoption of this view would facilitate more robust judicial review of immigration laws and policies for constitutionality.

### A. The Lost Source: The Foreign Commerce Clause

From early in the nation’s history, it was understood that the Commerce Clause permitted the federal government to control certain aspects of immigration—those that were analogous to international trade in commercial goods—with the states retaining all other authority under their police powers.<sup>79</sup> Underpinning this view of the federal power was the concept that the human beings could be “articles of commerce,” and therefore that their transportation across national borders was under federal purview, an idea goes back to the importation of slaves and indentured servants in the earliest days after the founding of the United States.<sup>80</sup>

The initial consensus that people were properly considered articles of commerce fell apart in the mid-1800s.<sup>81</sup> The dispute was not generated by

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<sup>77</sup> U.S. CONST. art. 1, § 8, cl. 3.

<sup>78</sup> 22 U.S. 1 (1824).

<sup>79</sup> *Id.* at 196–97; Lindsay, *supra* note 8, at 6, 13; Abrams, *supra* note 38, at 611 n.41 (citing NEUMAN, *supra* note 41, at 138. For an overview of this question, see Erin Delaney, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 NYU L. REV. 1821 (2007).

<sup>80</sup> Bilder, *supra* note 8, at 761 and *passim*.

<sup>81</sup> *Id.* at 748 (“[T]his assumption—that persons entering from abroad were ‘articles of commerce’—became one of the most disputed questions of constitutional law.”).

An important question is whether considering *people as commerce* and arguing that immigration is fundamentally economic commodifies human beings, demeaning their dignity, denying their agency, and masking their noneconomic reasons for migrating. This is especially problematic given that the pre-*Chae Chan Ping* jurisprudence rooting the immigration power in the foreign commerce clause and arguing for people as commerce really was about pacifying the South and permitting southern states to continue denying entrance to free Blacks. In focusing on economic concerns, does this proposal obscure the frankly racist basis of much U.S. immigration policy? See Chin, *supra* note 8, at 29 (“Mass immigration . . . was not the problem; Chinese represented a fraction of total immigration. Moreover, labor competition from white aliens was not criticized.”). See also quotes from multiple legislators expressing white supremacist

immigration. With important exceptions, the general attitude in the country in the mid-1800s was pro-immigration: even as Irish and Asian immigrants faced rampant xenophobia,<sup>82</sup> newcomers were recruited for their labor—if not always made welcome on arrival—in a growing nation with ample space.<sup>83</sup> Instead, it originated with the national conflict over slavery. If immigrants were articles of commerce, then so too were slaves—and if so, Congress could ban the domestic slave trade under its Commerce Clause authority.<sup>84</sup> As conflict over slavery between the North and South gained intensity, southern states and slave owners fought this interpretation. Mary Sarah Bilder, in her history of this period, notes the profound irony of lawyers for the pro-slavery camp accusing abolitionists of demeaning slaves as “chattels” by categorizing them as articles of commerce.<sup>85</sup>

As it navigated this conflict, the Supreme Court continued to assert the federal government’s power over the transportation of immigrants was a function of the Commerce Clause. For the bulk of the nineteenth century, most efforts to regulate immigration occurred on a state level, and were limited to weeding out those seen as criminal, sick, or unable to support themselves—and/or to funding their care—rather than to reducing immigration numbers as a whole.<sup>86</sup> The regulated parties generally were not individual immigrants, but the merchants who brought them into the country.<sup>87</sup> Most of these state initiatives efforts sought to impose per-passenger fees and reporting requirements on ships arriving from overseas and docking at a port in the state.

In the cases that arose from challenges to these policies, the Supreme Court made clear that it saw the foreign commerce power as the explicit source of the federal government’s authority over the transportation of immigrants.<sup>88</sup> The

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views as a basis for exclusion in this context; for example Chin quotes Senator Teller during the debate over the Chinese Exclusion Act in 1882 as saying “[t]he Caucasian race has a right, considering its superiority of intellectual force and mental vigor, to look down upon every other branch of the human family. . . . We are superior to the Chinese.” *Id.* at 31.

I take these questions seriously. Yet on balance, I have concluded that, even given that terrible history, locating the immigration power in the Commerce Clause is a better fit and reflects more respect for immigrant dignity and agency than the current rooting of the power in foreign affairs and national security, which implicitly or explicitly sees every immigrant through a lens of “enemy alien,” invasion, and terrorist threat.

<sup>82</sup> Chin, *supra* note 8, at 20; Lindsay, *supra* note 8, at 12–13.

<sup>83</sup> Lindsay, *supra* note 8, at 11; TONY ALLEN FREYER, *THE PASSENGER CASES AND THE COMMERCE CLAUSE* 109-110 (2014).

<sup>84</sup> One example of such an argument can be seen in *Groves v. Slaughter*, an 1841 Supreme Court case regarding the validity of Mississippi constitution’s prohibition on the importation of slaves. *Groves v. Slaughter*, 40 U.S. 449 (1841). As Bilder points out, although the Supreme Court avoided explicit decision about whether slaves were articles of commerce, the case was “argued as a case about commerce.” Bilder, *supra* note 8, at 808.

<sup>85</sup> The attorney for Mississippi argued that slaves were persons not commerce and decried abolitionists who would reduce them to “chattels.” The opposing anti-slavery attorneys were forced to argue that slaves ARE articles of commerce in order to gain federal regulation. Bilder, *supra* note 8, at 807–09.

<sup>86</sup> Lindsay, *supra* note 8, at 13.

<sup>87</sup> “Consistent with the belief that immigration involved a commerce, regulation did not focus on the people entering, but on the merchants who imported them.” Bilder, *supra* note 8, at 772.

<sup>88</sup> *Mayor of New York v. Miln*, 36 U.S. 102 (1837); *Smith v. Turner (Passenger Cases)*, 48 U.S. 283

seaboard states justified their head taxes and related reporting requirements as a way to assess the needs of newcomers and to pay for their care and support.<sup>89</sup> Shipmasters argued that the states' actions represented efforts to control foreign commerce, a power which lay exclusively with the federal government.<sup>90</sup> The Supreme Court sometimes rejected these dormant Commerce Clause challenges, as it did in *Miln*<sup>91</sup> in 1837, permitting New York's reporting requirement to stand as an exercise of the state's police power. It sometimes upheld them, as with the 1849 *Passenger Cases*,<sup>92</sup> where the Court struck down New York and Massachusetts head tax laws as unconstitutional because they usurped the federal commerce power. Either way, what the justices debated was the *distribution* of power over immigration between the states under their police powers and the federal government under its foreign commerce power. Despite debate among the justices, shifting majorities consistently reached the conclusion that the federal authority over immigration derived from the foreign Commerce Clause.

When the Civil War ended, the Supreme Court left behind any hesitation about explicitly rooting the federal government's immigration power in the foreign Commerce Clause.<sup>93</sup> After Congress passed an 1875 immigration statute, one of its earliest efforts to regulate immigration on a national level, the Supreme Court struck down New York, California, and Louisiana statutes regulating shipmasters bringing newcomers to those seaboard states under a dormant Commerce Clause analysis that reiterated the foreign Commerce Clause as the source of an exclusive federal authority over the transportation of immigrants. In *Henderson v. Mayor of New York*,<sup>94</sup> the Supreme Court explicitly held that immigration was commerce with foreign nations.<sup>95</sup> In *Chy Lung v. Freeman*,<sup>96</sup> the Court invalidated a California law

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(1849); Lindsay, *supra* note 8, at 13, 19; FREYER, *supra* note 84, at 73.

<sup>89</sup> Lindsay, *supra* note 8, at 17; *Passenger Cases*, 48 U.S. 283.

<sup>90</sup> *Miln*, 36 U.S. 102; *Passenger Cases*, 48 U.S. 283.

<sup>91</sup> 36 U.S. 102.

<sup>92</sup> 48 U.S. 283.

<sup>93</sup> *Henderson v. Mayor of City of New York*, 92 U.S. 259 (1875); *Chy Lung v. Freeman*, 92 U.S. 275 (1876). See *Wickard v. Filburn*, 317 U.S. 111, 121 (1942) for discussion of how almost all Commerce Clause cases were dormant Commerce Clause cases until 1887. For the importance of the distinction between the federalism cases and the immigrants' rights cases, see Rubenstein & Gulasekaram, *supra* note 54.

“Only after the Reconstruction Amendments formally barred people from actually being held as potential articles of commerce under slavery or involuntary servitude could the Court accept that immigrants were ‘articles of commerce.’” Bilder, *supra* note 8, at 823.

<sup>94</sup> 92 U.S. 259 (1875).

<sup>95</sup> The *Henderson* Court states that during the time passed since the holding in *Gibbons v. Ogden*, 22 U.S. 1 (1824), that navigation was commerce, “the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other branches of commerce. It has become a part of our commerce with foreign nations of vast interest to this country as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture. Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels shall engage in it is a law regulating this branch of commerce?” 92 U.S. at 270–71. Answering this rhetorical question in the affirmative: “A law or a rule emanating from any lawful authority which prescribes terms or conditions on which alone the vessel

limiting and taxing immigration to the state, arguing that “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the states. It has the power to regulate commerce with foreign nations; the responsibility for the character of those regulations and for the manner of their execution belongs solely to the national government.”<sup>97</sup> Undergirding this conclusion was the understanding that the transportation of immigrants to the United States was foreign commerce of great economic importance to the country.<sup>98</sup> Congress’s immigration power grew from the right to regulate such commerce, as well as its power over foreign affairs.<sup>99</sup>

All of these cases were challenges to state action in the immigration arena. It was not until 1884 that the Supreme Court was called upon to affirmatively rule on a challenge to the federal immigration power, again in the context of a law imposing taxes and other responsibilities on shipmasters. In the *Head Money Cases*,<sup>100</sup> which involved a challenge to the federal Immigration Act of 1882,<sup>101</sup> taxing the transporters of immigrants at fifty cents per head, the Court unanimously upheld the law on the grounds that it was a valid exercise of the government’s immigration authority, explicitly granted by the foreign Commerce Clause.<sup>102</sup> In support of its

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can discharge its passengers is a regulation of commerce, and in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations.” *Id.* at 271.

<sup>96</sup> 92 U.S. 275 (1867).

<sup>97</sup> *Id.* at 280. As the last sentence quoted in the text indicates, the Court emphasizes the political rather than economic implications of permitting states to regulate immigration, akin more to the foreign affairs power that the Court would later cite in *Chae Chan Ping* than to the Commerce Clause. “If that government has forbidden the states to hold negotiations with any foreign nations or to declare war and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the states to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the states the acts for which it is held responsible?” *Id.* Kerry Abrams traces the relationship between these cases and the contemporary Supreme Court decisions on whether state legislation regarding immigrants are preempted by the federal immigration power. See Abrams, *supra* note 38.

<sup>98</sup> See Lindsay, *supra* note 8, at 23. The transportation of European immigrants to the United States has “attained a magnitude and importance far beyond its proportion at that time to other branches of commerce.” *Id.* at 24–25 (quoting Justice Miller in *Henderson v. Mayor of City of New York*, 92 U.S. 159, 270 (1875)). The reference is to when *Gibbons* was decided about 50 years earlier, declaring that laws on navigation constituted regulation of foreign commerce. See *id.* at 24. “In addition to the wealth which some of them [the European immigrants] bring, they bring still more largely the labor which we need to till our soil, build our railroads and develop the latent resources of our country.” *Id.* at 25 (quoting *Henderson*, 92 U.S. at 270).

<sup>99</sup> Regarding foreign affairs, see *id.* at 25 (quoting *Henderson*, 92 U.S. at 273).

But as Mary Sarah Bilder and others have argued, for the Supreme Court to hold that the Commerce Clause covered the movement of human beings as well as goods across borders was complicated by far more than definitional issues. See Bilder, *supra* note 8.

<sup>100</sup> *The Head Money Cases*, 112 U.S. 580 (1884).

<sup>101</sup> The Act taxed the arrival of noncitizens at a U.S. port at fifty cents a head, declaring that “the money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purposes and expenses of carrying this act into effect.” *Id.* at 589–90 (citing the Immigration Act of 1882).

<sup>102</sup> *Id.* at 591 (“We are now asked to decide that [the immigration power] does not exist in Congress,

finding that the immigration “power does reside in Congress, [and] is conferred upon that body *by the express language of the Constitution*,”<sup>103</sup> the Court cited its dormant Commerce Clause analysis in the earlier state immigration law cases.<sup>104</sup> Immigration laws “are regulations of commerce—of commerce with foreign nations,” the Court states, and they “constitute a regulation of that class which belongs exclusively to Congress [].”<sup>105</sup> If the federal immigration power is rooted in the Commerce Clause for the purposes of preempting state action, the Court reasoned, that same source grants the federal government the sole power to regulate affirmatively in the field.<sup>106</sup> The *Head Money Cases* are not remembered for this holding, which was uncontroversial at the time. Instead, they are recalled as striking a new balance between state and federal control over immigration, one that strongly favored the federal government.<sup>107</sup>

The course of immigration jurisprudence changed only five years later, however, when a Court with just two new members took an uncharted path.<sup>108</sup> In *Chae Chan Ping*, a case about individual constitutional rights rather than immigration federalism, Justice Field’s opinion for a unanimous Court sets out the plenary power doctrine described in Part II, rooting immigration not in the Commerce Clause but in the nation’s sovereignty and authority over its foreign affairs.<sup>109</sup> In his entire *Chinese Exclusion Case* opinion, Justice Field cites the *Head Money Cases* but one time, and there for an aspect of the holding unrelated to the source of the immigration power.<sup>110</sup> The foreign Commerce Clause also appears only

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which is to hold that it does not exist at all—that the framers of the Constitution have so worded that remarkable instrument that the ships of all nations, including our own, can, without restraint or regulation, deposit here, if they find it to their interest to do so, the entire European population of criminals, paupers, and diseased persons without making any provision to preserve them from starvation and its concomitant sufferings even for the first few days after they have left the vessel.”). *See also* Chin, *supra* note 8, at 56–57 (1998); Augustine-Adams, *supra* note 8, at 719.

<sup>103</sup> *Head Money Cases*, 122 U.S. at 591 (emphasis added).

<sup>104</sup> *Id.* at 591–93.

<sup>105</sup> *Id.* at 591, 595 (“[T]he power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration.”).

<sup>106</sup> Most recently, the dormant Commerce Clause has been raised in the context of challenges to state efforts to limit the rights of immigrants in Arizona, Alabama, and Georgia, among other states, in the first decade of the 2000s. For a discussion of the blurring of lines between the plenary power doctrine and immigration preemption, see Abrams, *supra* note 38, at 617–18 and *passim*.

<sup>107</sup> *See* Lindsay, *supra* note 8, at 28; FREYER, *supra* note 84, at 144–45. Note that the debate had important implications for the parallel debate about slavery and state vs. federal power in that context. FREYER, *supra* note 84, at 56 and *passim*.

<sup>108</sup> Between the *Head Money Cases* and the *Chinese Exclusion Case*, Chief Justice Morrison Waite and Associate Justice William Woods left the Court and were replaced by Chief Justice Melville Fuller and Associate Justice Lucius Lamar II. The seven associate justices who remained on the Court during this period joined the unanimous opinions in both cases.

While the view I present here—that the emergence of the plenary power doctrine represented a break with past jurisprudence, reflecting and motivated by a rise in anti-Chinese sentiment—is widely shared, it is not without dissenters. *See, e.g.*, Andrew Kent & Thomas Lee, *supra* note 23, arguing that the plenary power doctrine was woven into the Constitution since the founding.

<sup>109</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>110</sup> “The effect of legislation upon conflicting treaty stipulations was elaborately considered in The

once in the opinion, as part of a grab-bag list of federal powers relevant to relations with other countries.<sup>111</sup> Interstate commerce is mentioned a single time, in a similarly broad recital of aspects of internal governance.<sup>112</sup> Neither is claimed as a source for plenary power.

Justice Field offers no explanation for the Court's abandonment of the Commerce Clause as the primary source of the immigration power, and few commentators have explored the question. One exception is Matthew Lindsay, who has argued that the shift came about due to transformations taking place in the U.S. political economy and in perceptions of immigration at the time.<sup>113</sup> He contends that the motivation had little to do with changing interpretations of the Constitution; rather, "the plenary power doctrine was borne of an urgent sense of national peril"<sup>114</sup> which recast the arrival of newcomers as a foreign invasion rather than an economic benefit, and that the Supreme Court unleashed the plenary power doctrine in order to free the political branches to defend against it.<sup>115</sup>

Many scholars have argued that racism and xenophobia were a driving force

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Head Money Cases, and it was there adjudged 'that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.'" *Chae Chan Ping*, 130 U.S. at 600 (quoting *The Head Money Cases*, 112 U.S. 580, 599 (1884)).

<sup>111</sup> *Chae Chan Ping v. United States*, 130 U.S. at 604 ("The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate *foreign commerce*, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.") (emphasis added).

<sup>112</sup> *Id.* at 605 ("It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands and *interstate commerce*, all which subjects are expressly or impliedly prohibited to the state governments.") (emphasis added).

<sup>113</sup> Lindsay, *supra* note 8.

My colleague Tom Lee suggests that the shift may, instead, have been due to the fact that the Chinese Exclusion Acts represented the first affirmative federal immigration statutes to exclude a group of people based on nationality or race, since prior immigration was principally from Europe and regulated by treaty and state taxes on persons transported as in the Head Money cases. Because the Chinese Exclusion Case was the first time the Court faced this new question, and because—as he and my colleague Andrew Kent argue in a forthcoming article—plenary power was "part of the original DNA" of the Constitution, Lee argues that the Court's initiation of the plenary power doctrine did not represent a change of course but rather the first exercise of a dormant but inherent sovereign power to exclude entry to territory long recognized under the law of nations. Email from Thomas Lee, Fordham Law School, to author (March 19, 2017, 1:56pm EST).

<sup>114</sup> Lindsay, *supra* note 8, at 6 (as Lindsay goes on to point out "most contemporary policymakers, judges, and scholars would reject" the terms on which the sense of peril was based); *See also id.* at 31–32 (arguing that the rise of modern immigration exceptionalism lies "more fundamentally in an urgent and pervasive discourse of national self-preservation that emerged at the end of the nineteenth century."). This is key to his payoff, which is that the slate of plenary power is not clean: "[T]he 'slate' of the American immigration power is in fact a palimpsest of anachronisms: alien invasions, existential threats to the republic, and simple racism. . . . If the plenary power doctrine is going to survive into the future . . . it should at the very least be on grounds that today's policymakers and judges recognize as legitimate and intellectually coherent." *Id.* at 56.

<sup>115</sup> *Id.* at 6, 31, and *passim*.

behind the Supreme Court's shift in doctrine.<sup>116</sup> This Article posits that another factor was working in tandem. Both state and federal immigration legislation prior to the Chinese Exclusion Act governed the transportation entities that brought immigrants to the United States, rather than regulating immigrants individually.<sup>117</sup> This fit squarely within the Court's understanding of foreign commerce as related to trade and navigation. The Chinese Exclusion Act broke with this tradition by directly restricting the immigration rights of individuals of a particular country, without reference to intermediaries. Although the opinion gives no hint as to why the Court moved away from the traditional foreign Commerce Clause grounding of the immigration power, some of the impetus may have come from this new approach in the law. Since the challenged statute was not related to commercial entities, but instead represented the first time that Congress had directly sought to exclude a particular racial or ethnic group, the Court was free (and perhaps felt obliged) to find a different basis in the Constitution for this aspect of the federal immigration authority.

Despite its turn away from commerce, the *Chinese Exclusion Case* evidences a strong concern about the economic impact of immigration. Even as Justice Field cuts the immigration power free from the Commerce Clause, he identifies the problem at the core of Chinese immigration as a domestic economic one rather than an issue of politics or foreign relations. He states that Chinese people in the United States "were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. The differences of race added greatly to the difficulties of the situation."<sup>118</sup> It was this particularly toxic combination of racism and competition for jobs that set the table for the announcement of the plenary power doctrine.

Following the *Chinese Exclusion Case* and its companions, the Supreme Court sometimes mentioned the foreign Commerce Clause in passing as a kind of backup for the plenary power doctrine, either alone or among other possible sources for the immigration power. But with one exception, none of these subsequent holdings ultimately relied on the foreign Commerce Clause as the source of the federal immigration power. Instead, they cited the *Chinese Exclusion Case* and its progeny, with their emphasis on sovereignty and foreign affairs, as the source of the plenary power doctrine.

That single outlier, *Oceanic Steam Navigation v. Stranahan*,<sup>119</sup> provides strong

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<sup>116</sup> See sources cited in *supra* note 54. [Ed: note begins "See, eg, Gabriel "Jack" Chin, Segregation's Last Stronghold..."].

<sup>117</sup> Note that Alien and Sedition Acts of 1798 did purport to regulate the immigration rights of individual noncitizens, but were never enforced, and—with the exception of the Alien Enemies Act (now codified at 50 U.S.C. § 21–24)—were allowed to expire within three years of their passage.

<sup>118</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

<sup>119</sup> *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).



support for the theory advanced here that the Court's shift from the Commerce Clause to the plenary power doctrine in the *Chinese Exclusion Case* came about in part because the Commerce Clause at the time was seen to allow the federal government to govern the commercial transportation of immigrants, but not the right of individual immigrants to enter and remain. The one time that Congressional action after the *Chinese Exclusion Case* led to a Supreme Court challenge by a shipping company, rather than an individual, the Court reverted to its earlier Commerce Clause theory.

In 1903, Congress passed an 'Act to Regulate the Immigration of Aliens into the United States.' Responding to growing concern about the role of anarchists in the United States and the recent assassination of President McKinley, the Act created new categories of deportable and excludable noncitizens, and penalized shipmasters for bringing noncitizens to the United States who were ineligible to enter. The Act's constitutionality was twice challenged before the Supreme Court. First, in *Turner v. Williams*,<sup>120</sup> an anarchist found deportable under the Act asserted that its provisions were invalid because it infringed on his free speech and due process rights. The Court's refusal to consider whether the immigration law violated the Constitution was by then unsurprising. In rejecting Turner's individual claims, the Court hedged its bets. It cited the *Chinese Exclusion Case* and subsequent plenary power holdings, relying on sovereignty rationale, but also "the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States," in concluding that "the act before us is not open to constitutional objection."<sup>121</sup>

Five years later, the same law was challenged by the Oceanic Steam Navigation Company, which had been fined under the law for passengers who arrived with contagious diseases that barred them from entry. The company contended that such a penalty was beyond Congress's powers to impose under the Constitution. In *Oceanic Steam*, the Court rejected the navigation firm's arguments without ever citing *Chae Chan Ping* and later plenary power decisions, or so much as mentioning the foreign affairs or national sovereignty rationales that for the prior two decades had undergirded the strong version of Congress's plenary immigration power.<sup>122</sup> Instead, faced with a case about the transportation of immigrants, it turned back to the foreign Commerce Clause.<sup>123</sup> The opinion characterized immigration as functionally the same as trade: the Act's validity rested on the assertion that "no

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<sup>120</sup> *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904).

<sup>121</sup> *Id.* at 290.

<sup>122</sup> 214 U.S. 320 (1909).

<sup>123</sup> Several cases in lower or administrative courts in the years following *Ocean Steam Navigation Co.* reiterated the tie between foreign commerce and the immigration power, without relying on the statement in upholding a congressional act regarding immigration. Such cases generally did not cite the *Chinese Exclusion Case*, referring instead exclusively to prior holdings that the immigration power was rooted in the Commerce Clause. See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 374 (1928) (U.S. Ct. Cust. Appeals, T.D. 42,030 1927) (upholding Congress's imposition of a "flexible tariff" on foreign nations: "In *Henderson v. Mayor of New York*, 92 US 259, and *Oceanic Steam Navigation Co. v. Stranahan*, 214 US 320, 344 (1909), the regulation of foreign immigration was held to be within the congressional power to regulate commerce.").

individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country, and the terms upon which a right to import may be exercised.”<sup>124</sup>

Relying on this authority, the Court upheld the Act despite its admission that in another field its provisions might raise troubling constitutional issues.<sup>125</sup> The most quoted line of the *Oceanic Steam* opinion states that “over no conceivable subject is the legislative power of Congress more complete than it is over” immigration.<sup>126</sup> In so holding, the Court imported the new assumption of plenary power into the old line of cases based on the Commerce Clause.<sup>127</sup>

In one sense, *Oceanic Steam* offers hope for the argument advanced here, because it points to the continued viability of the foreign Commerce Clause as a basis for the immigration power. But it also signals its potential limitations. If the relationship between the Commerce Clause and the federal immigration authority requires the regulation of a commercial transportation entity, then this would pose a serious obstacle to the argument that federal statutes establishing the terms on which individuals may enter and remain in the United States (rather than those targeting transportation entities) are authorized by the foreign Commerce Clause. Of equal concern is the standard of review. If the Court in *Oceanic Steam* could ground Congress’s immigration authority in the foreign Commerce Clause and yet describe it as virtually unlimited, perhaps the clause provides as little protection from legislative overreaching as do foreign affairs and national sovereignty.<sup>128</sup>

The Article addresses both of these concerns below, noting in Part III.B that the Commerce Clause now is understood to encompass individuals moving across foreign and interstate borders, not just those who transport them; and arguing in Part IV.B that the understanding of foreign Commerce Clause plenary power has been limited so that it does permit meaningful judicial review. Meanwhile, the interstate Commerce Clause offers an additional response to both challenges. During

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<sup>124</sup> *Oceanic Steam*, 214 U.S. at 335.

<sup>125</sup> *Id.* at 338. The Act barred the entry into the United States of foreigners with contagious diseases, and imposed on each shipmaster the duty to inspect the health of his passengers and provide a report to the immigration inspection officer at the port of docking.

<sup>126</sup> “As the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject . . . it follows that the constitutional right of Congress to enact such legislation is the sole measure by which its validity is to be determined by the courts.” *Id.* at 340.

“In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals . . . . These conclusions are apparent, we think, since the plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority to impose the penalty” *Id.* at 343 (emphasis added). *Cf.* *Augustine-Adams*, *supra* note 8.

<sup>127</sup> Like the *Chinese Exclusion Case*, the opinion refers to the immigration power as “plenary.” *See Oceanic Steam*, 214 U.S. at 343.

<sup>128</sup> See discussion of this question *infra* Part IV.B. On the other hand, *Oceanic Steam* is a muddled case. Without mentioning plenary power or the cases that established it, it grafts the blanket exception from judicial review that was only justified by plenary power’s reference to sovereignty and foreign affairs, onto the Commerce Clause, which had not previously been deployed to justify a carve-out from ordinary standards of constitutional review.

the New Deal, the Supreme Court explicitly rejected the requirement that an activity involve actual transportation across state lines in order to fall within the ambit of the interstate Commerce Clause. And the interstate Commerce Clause has never been held to immunize Congressional action from constitutional review. What, then, of the relationship between immigration and the interstate Commerce Clause?

## B. A New Source: The Interstate Commerce Clause

It is not surprising that nineteenth and early twentieth century courts gave no serious consideration to the interstate Commerce Clause as a source of the immigration power.<sup>129</sup> The interpretation of interstate commerce that held sway at the time was a limited one. Through the 1800s, interstate commerce was understood in constrained terms, as principally justifying Congress's regulation of the transportation of goods between states for the purpose of sale. Several Supreme Court Cases at the end of that century narrowed the understanding of the interstate Commerce Clause further.<sup>130</sup> During the New Deal, however, one case on domestic labor migration and a cluster of others on the scope of federal regulation authorized by the interstate Commerce Clause opened the door to the argument that internal migration is within the ambit of the Commerce Clause.

### 1. The Modern Jurisprudence of the Interstate Commerce Clause

In 1941, the Supreme Court in *Edwards v. California* stated with confidence that it was “settled beyond question” that the transportation of persons between states was interstate commerce.<sup>131</sup> This assertion rested on the affirmative resolution of the Supreme Court debate outlined above over whether *people* could be *commerce* in the context of the foreign Commerce Clause. Like the early foreign Commerce Clause immigration cases, *Edwards*—which challenged California’s prosecution of a man for driving his unemployed brother-in-law into the state—was about whether Congress could regulate the act of moving others across state or national borders. This is consistent with early understandings of commerce as related to trade, navigation, or transportation. To be relevant to the regulation of immigrants themselves, rather than only to the intermediaries who transported them, however, the Court had to reject this literal understanding of interstate commerce.<sup>132</sup>

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<sup>129</sup> But note that in the context of slavery, there was serious debate about whether interstate commerce included the movement of slaves across state borders. See David Lightner, *SLAVERY AND THE COMMERCE POWER* (2006); see also Bilder, *supra* note 8.

<sup>130</sup> See, e.g., *United States v. E.C. Knight Company*, 156 U.S. 1 (1895) (holding that manufacturing is not interstate commerce).

<sup>131</sup> *Edwards v. California*, 314 U.S. 160, 172 (1941); see also *Gibbons v. Ogden*, 22 U.S. 1 (1824), essentially stating the same thing in 1824.

<sup>132</sup> Ilya Somin states “[t]he Commerce Clause also gives Congress the power to regulate interstate as well as international commerce. Yet almost no one at the time of the Founding believed that Congress therefore had the power to forbid Americans from moving from one state to another.” Ilya Somin, *Yes, Obama’s Executive Action Deferring Deportation for Millions of Immigrants Is Constitutional*, REASON (Apr. 19, 2016), <http://reason.com/archives/2016/04/19/yes-obamas-executive-action-deferring-de>. But Annie Chan notes, with reference to *Chy Lung* and the *Head Money Cases*, “Finding immigration power within Congress’ foreign commerce power dovetailed with the view at the time that domestic commerce power encompassed authority over the migration of persons across state lines.” Annie Chan, *Community*

It was not until the New Deal that the Supreme Court made plain that actual transportation of persons or articles of commerce across borders was not necessary for an economic activity to be covered by the Commerce Clause.<sup>133</sup> To be sure, a few cases in the early 1900s had hinted at this possibility.<sup>134</sup> But at the same time that it made these limited exceptions, the Court continued to reject efforts by Congress to set standards for commercial activity such as mining and manufacturing, on the grounds that the standards would be applied to work that took place in a local area, rather than to the movement of products between states.<sup>135</sup>

The Supreme Court decisively severed its definition of interstate commerce from literal interstate transportation of goods or people in a series of cases in the 1940s. *US v. Darby*,<sup>136</sup> which upheld the Fair Labor Standards Act, represented an important step in this direction. The Act established a national minimum wage as well as other workplace protections, and prohibited the shipment across state borders of goods produced in violation of the Act. As to the part of the Act related to transportation, the Court's holding was relatively uncontroversial. "While manufacture is not, of itself, interstate commerce," the Court held, "the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."<sup>137</sup> Where *Darby* broke new ground was by holding that federal regulation under the Commerce Clause could set nation-wide standards for the conditions of production. Noting that the lack of a federal minimum wage allows firms in states with low pay and poor working standards to compete unfairly with firms in other states that hold employers to a higher standard, the Court held that Congress also had the power to "regulate *intrastate* activities where they have a substantial effect on interstate commerce."<sup>138</sup> This "substantial effect" test marked the outer limits of interstate

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*and the Constitution: A Re-Assessment of the Roots of Immigration Law*, 21 VT. L. REV. 491, 535 (1996). She cites Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L. J. 1578, 1603 (1959).

<sup>133</sup> *But see Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (indicating that the Commerce Clause was understood as very broad from the beginning: "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes.") (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824)).

<sup>134</sup> *See, e.g., Wilson v. New*, 243 U.S. 332 (1917); *Swift and Company v. United States*, 196 U.S. 375 (1905) (holding that Congress properly drew on its interstate commerce authority when it permitted regulation of the local meat market under the Sherman Anti-Trust Act. Local business can affect the interstate movement of goods and services).

<sup>135</sup> *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251 (1918) (manufacturing is not "commerce"); *Carter v. Carter Coal*, 298 U.S. 238 (1936) (coal mining is not "commerce").

<sup>136</sup> 312 U.S. 100 (1941).

<sup>137</sup> *United States v. Darby*, 312 U.S. 100, 113 (1941). In so holding, the Court defined interstate commerce to "embrace[] at least the case where an employer engaged . . . in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that, according to the normal course of his business, all or some part of it will be selected for shipment to those customers." *Id.* at 117.

<sup>138</sup> *Id.* at 119 (emphasis added). "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The

Commerce Clause doctrine to that point in the nation's history.

A year later, the Supreme Court expanded the doctrine further, holding that an impact on interstate commerce could be demonstrated via aggregate *noncommercial* activity. In *Wickard v. Filburn*, Ohio farmer Filburn challenged a federal regulation that required him to pay a penalty for the amount of wheat he grew in excess of the allotment given to him by the federal government, even though he raised it in part for his own use on the farm.<sup>139</sup> Filburn contended that a limit on a farmer's production for his use alone could not be justified as flowing from the constitutional clause authorizing Congress to regulate interstate commerce.<sup>140</sup> The Court was not persuaded. Although any individual's wheat grown for home use might have a minimal impact on commerce, it held, in aggregate with many others the effect could be substantial.<sup>141</sup> In the wake of *Wickard*, conservative justices and commentators in particular have expressed the concern that if the aggregation of private noneconomic activity can meet the standard for "affecting interstate commerce," Congress could regulate almost anything—including "quilting bees, clothes drives, and potluck suppers throughout the 50 States,"<sup>142</sup> in the words of Justice Clarence

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motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction, and over which the courts are given no control." *Id.* at 115. "Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." *Id.* at 115.

<sup>139</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942). The allotment was calculated under the 1938 Agricultural Adjustment Act; the penalty in question was imposed by a 1941 amendment to the Act. *Id.*

The Act explicitly regulated not only wheat produced for sale, but that intended to feed animals that would then be sold or otherwise exchanged. *Id.* at 118–19 (citing the Act). Mr. Filburn's principal business seems to have been the sale of milk, poultry and eggs from his own cows and chickens, but he also grew a relatively small amount of wheat, some of which he sold and some of which he used as seed for the next crop, animal feed, and to make flour for his family. *Id.* at 114. "The intended disposition of the crop here involved has not been expressly stated." *Id.* The challenge was based on the (unstated) portion of the crop intended for consumption on Filburn's farm, not the part intended for sale.

<sup>140</sup> *Id.* at 119. The farmer's case raised a question beyond that answered in *Darby*, because the Act "extend[ed] federal regulation to production not intended in any part for commerce but wholly for consumption on the farm." *Id.* at 118. The case also challenged the Act on Fifth Amendment due process grounds, which were discussed and dismissed elsewhere in the opinion. *Id.* at 129–31.

<sup>141</sup> *Id.* at 128. A farmer could use his own wheat to "forestall resort to the market by producing to meet his own needs." *Id.* at 127. In other words, "[h]ome-grown wheat...competes with wheat in commerce." *Id.* at 128. Taken in total, the Court argued, "[i]t can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Id.* "This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market." *Id.* "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125.

<sup>142</sup> *Gonzalez v. Raich*, 545 U.S. 1, 43 (2005) (Thomas, J., dissenting). Thomas's dissent is in line with calls from conservative commentators who have decried the broad scope of federal power permitted by the New Deal cases. See, e.g., David F. Forte, *Commerce, Commerce Everywhere: The Uses and Abuses of the Commerce Clause*, HERITAGE FOUNDATION (Jan. 18, 2011), <http://www.heritage.org/research/reports/2011/01/commerce-commerce-everywhere-the-uses-and-abuses-of-the-commerce-clause> (urging Congress to join the Supreme Court in reining in the scope of the interstate Commerce Clause).

Thomas—under its commerce power.<sup>143</sup>

Within the past twenty years, the Supreme Court has retrenched somewhat on the scope of the authority granted to the federal government through the interstate Commerce Clause. In *United States v. Lopez*,<sup>144</sup> the Court held that an attempt by Congress to ban the possession of guns in school zones exceeded congressional power under the interstate Commerce Clause, reining in the commerce power for the first time since the New Deal. Justice Rehnquist, writing for the majority, distinguished the law at issue, a criminal statute, from Congress's restrictions on home-grown wheat at issue in *Wickard*. He characterizes *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," but states that it still "involved economic activity in a way that the possession of a gun in a school zone does not."<sup>145</sup>

In *Lopez*, Justice Rehnquist offers three options for congressional action that could be authorized by the interstate Commerce Clause: regulation of "the use of the channels of interstate commerce,"<sup>146</sup> "the instrumentalities of interstate commerce, or persons or things in interstate commerce,"<sup>147</sup> or, finally, "activity [that] 'substantially affects' interstate commerce."<sup>148</sup> The law at issue in *Lopez* fell only in the third category. Although the briefs and dissenting justices presented empirical evidence of the aggregate impact of guns in school zones on educational opportunity, arguing that the damage to the national economy and productivity was substantial,<sup>149</sup> Justice Rehnquist dismisses those arguments as too attenuated.<sup>150</sup> He identifies the target of the regulation as noneconomic, noncommercial, purely criminal activity.<sup>151</sup> If aggregation of this sort activates Congress's power to legislate under the Commerce Clause, he states, "it is difficult to perceive any

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<sup>143</sup> One additional development in the 1960s is worth note. In *Katzenbach v. McClung*, 379 U.S. 294 (1964), commonly known as the "Ollie's Barbecue" case, the Supreme Court faced a private restaurant that openly discriminated against African Americans. Such discrimination in privately-owned public accommodation had been barred in 1964 by Congress through Title II of the Civil Rights Act. The Court upheld the Act against the restaurant's challenge, making clear that it saw the protection of human dignity in commerce as part of Congress's constitutional mandate, even without considering the Fourteenth Amendment. In support of this view, Justice Clark's majority opinion in *Heart of Atlanta* noted that "[t]he Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' At the same time, however, it noted that such an objective has been and could be readily achieved 'by congressional action based on the commerce power of the Constitution.'" *Heart of Atlanta*, 379 U.S. at 250 (citing S.Rep. No. 88-872 at 2371 (1964)). See also Justice Goldberg's concurrence, linking Congress's authority under the interstate Commerce Clause to the power to pass a statute affecting "the vindication of human dignity, and not mere economics." *Heart of Atlanta Motel* at 292 (Goldberg, J., concurring; his concurrence also applied to *Katzenbach v. McClung*, 379 U.S. 294 (1964), with which *Heart of Atlanta* was consolidated.)

<sup>144</sup> 514 U.S. 549 (1995)

<sup>145</sup> *Id.* at 560.

<sup>146</sup> *Id.* at 558.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 559.

<sup>149</sup> *Id.* at 563–64.

<sup>150</sup> *Id.* at 563–67.

<sup>151</sup> *Id.* at 560, 567.

limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”<sup>152</sup> The regulation of firearms on school grounds, he concludes, does not meet the test.<sup>153</sup>

Five years later, in *United States v. Morrison*, the Court used a similar rationale to strike down a private right of action for domestic violence under the Violence Against Women Act.<sup>154</sup> Again, in *Morrison*, the parties and dissents presented statistics demonstrating the impact on the national economy from violent attacks on women, seeking to demonstrate a substantial effect on commerce.<sup>155</sup> Again, Justice Rehnquist held that noneconomic activities such as violence against a particular group could not be aggregated to reach a level of impact on interstate commerce that justified Congress’s intervention.<sup>156</sup> Justice Rehnquist particularly emphasized the need to be vigilant about the reach of the Commerce Clause in order to avoid the federal government encroaching on the traditional spheres of state autonomy.<sup>157</sup>

In *Gonzalez v. Raich*,<sup>158</sup> however, the Court returned to the *Wickard* standard permitting aggregation of economic activity—including activity that on its face was private and noncommercial. In *Raich*, a case about medical marijuana, the question was whether Congress’s Controlled Substances Act, which criminalized the possession of marijuana, could override California’s statute permitting the seriously ill to grow and use marijuana pursuant to a valid prescription. Writing for the majority, Justice Stevens approvingly cited *Wickard*’s holding that “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”<sup>159</sup> Reasoning that the local use had a meaningful effect on the interstate commercial market for marijuana, the Court noted that an individual marijuana patch was much like wheat grown for personal use.<sup>160</sup> It rejected the argument that medical marijuana fell outside the national market for the drug. “We have never required Congress to legislate with scientific exactitude. When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”<sup>161</sup> The situation fell within Congress’s power to regulate local “activities that substantially affect interstate commerce.”<sup>162</sup> The court emphasized, however, that its decision to permit the Controlled Substances Act to override California’s regulation of medical marijuana rested in part on the extensiveness and coherence of the federal regulatory scheme.<sup>163</sup>

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<sup>152</sup> *Id.* at 564.

<sup>153</sup> *Id.* at 561.

<sup>154</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>155</sup> *See, e.g., id.* 631–34 (Souter, J., dissenting).

<sup>156</sup> *Morrison*, 529 U.S. at 617.

<sup>157</sup> *Id.* at 644.

<sup>158</sup> 545 U.S. 1 (2005).

<sup>159</sup> *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (cited in *Gonzalez v. Raich*, 545 U.S. 1, 14 (2005)).

<sup>160</sup> *Gonzalez v. Raich*, 545 U.S. at 15.

<sup>161</sup> *Id.* at 14 (citations omitted).

<sup>162</sup> The Court has since held that all aspects of drug dealing affect interstate Commerce Clause. *See Taylor v. United States*, 579 U.S. \_\_\_ (2016), slip op. at 6.

<sup>163</sup> *Gonzalez v. Raich*, 545 U.S. at 24 (2005) (“[T]he subdivided class of activities defined by the Court

## IV. The Argument for Rooting the Immigration Power in the Commerce Clause Today

### A. Immigration as an Economic Activity

Most immigration to the United States is economic in motivation and impact. The majority of immigrants come to the United States in search of better economic opportunities, and their presence is felt in local, state, and national job markets. In 2015 there were twenty-six million immigrants in the United States labor force, representing 16.7% of all workers in the country.<sup>164</sup> This is the highest percentage of foreign-born individuals in the workforce since the U.S. Census Bureau began collecting such data.<sup>165</sup> In certain industries, the percentage is even higher. 28% of construction trade workers,<sup>166</sup> 31% of accommodation workers,<sup>167</sup> and 71% of crop workers are foreign-born.<sup>168</sup> In particular localities and occupations, immigrant

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of Appeals [ie medical marijuana, the part that plaintiffs argued was not related to commerce] was an essential part of the larger regulatory scheme.”). “One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.” *Id.* at 26.

No discussion of contemporary Interstate Commerce Clause jurisprudence is complete without mention of *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), regarding the lawfulness of the Affordable Care Act, in which a majority of justices agreed that the individual health insurance mandate of that Act was invalid because the Commerce Clause does not authorize Congress to regulate economic *inactivity*. *Sebelius* majority opinion at 2589; Scalia/Alito/Kennedy/Thomas dissent. I do not focus here on *Sebelius* because it is less relevant for my argument than *Lopez*, *Morrison*, and *Raich*.

<sup>164</sup> Bureau of Labor Statistics, *Labor Force Characteristics of Foreign-born Workers Summary*, U.S. DEP’T OF LABOR (May 19, 2016), <https://www.bls.gov/news.release/forbrn.nr0.htm>.

<sup>165</sup> Daniel White, *Foreign-Born Workforce at a Two Decade High*, TIME (May 20, 2016), <http://time.com/4343274/foreign-born-labor-data-2015/>. In 1970, immigrants made up 5% of the population and 5% of the labor force; by 2010 they were 13% of the population and 16% of the labor force. See PARTNERSHIP FOR A NEW AMERICAN ECONOMY, IMMIGRANT WORKERS IN THE U.S. LABOR FORCE 2 (2012), [http://www.renewoureconomy.org/sites/all/themes/pnae/img/Immigrant\\_Workers\\_Brookings.pdf](http://www.renewoureconomy.org/sites/all/themes/pnae/img/Immigrant_Workers_Brookings.pdf).

The percentage of immigrations as a proportion of the total population is approaching the historic highs of nearly 15% at the turn of the nineteenth century. See Bureau of Labor Statistics, *Foreign-Born Workers: Labor Force Characteristics—2015*, U.S. DEP’T OF LABOR (May 19, 2016), <https://www.bls.gov/news.release/pdf/forbrn.pdf> at 3. In absolute numbers the country has never seen numbers of foreign-born residents remotely approaching that of the past decade. In 1920, for example, at the end of the Golden Era, the foreign born population stood at 13.9 million; in 2010 it was 40 million. *Id.*

<sup>166</sup> NAHB Economics, *Immigrant Workers in the Construction Labor Force*, HOUSINGECONOMICS.COM (Feb. 3, 2015), <https://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=241345&channelID=311>.

<sup>167</sup> PARTNERSHIP FOR A NEW AMERICAN ECONOMY, IMMIGRANT WORKERS IN THE U.S. LABOR FORCE 5 (2012), [http://www.renewoureconomy.org/sites/all/themes/pnae/img/Immigrant\\_Workers\\_Brookings.pdf](http://www.renewoureconomy.org/sites/all/themes/pnae/img/Immigrant_Workers_Brookings.pdf). Accommodation workers include hotel maids and janitors.

<sup>168</sup> U.S. DEP’T OF AGRIC. ECON. RESEARCH SERV., *Immigration and the Rural Workforce*, <https://www.ers.usda.gov/topics/in-the-news/immigration-and-the-rural-workforce.aspx>. In specific immigrant-heavy states and/or occupations, the percentage of immigrants is considerably higher. See, e.g., Christian González-Rivera, *Where Immigrant New Yorkers Go to Work—Top Occupations by Share of Foreign-Born Workers*, CENTER FOR AN URBAN FUTURE (Oct. 2016), <https://nycfuture.org/data/immigrant-workers-data-brief#1> (analyzing concentration of immigrants in a range of occupations within New York City). While immigrants are disproportionately represented in the service industries that are less of an obvious fit with the traditional definition of interstate commerce, more than three-quarters of them work outside the service sector, in industries from commercial agriculture that put goods in the stream of



concentrations are even higher: for example, almost 74% of young Silicon Valley computer and mathematical workers,<sup>169</sup> and between 77–91% of less-skilled construction workers in New York City, depending on their trade, are immigrants.<sup>170</sup>

In truth, a relatively small proportion of permanent residents are admitted to the United States on the basis of employment.<sup>171</sup> Temporary visas permitting the holder to work in the United States are much more common.<sup>172</sup> But whatever the category through which they enter—including as refugees, as family members of US permanent residents or citizens, or without authorization<sup>173</sup>—almost all immigrants in the United States are denied access to public benefits, and must seek employment in order to support themselves and their dependents.<sup>174</sup> Immigrants participate in

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interstate commerce, to manufacturing (17% of the foreign-born workforce is in the manufacturing sector: Elizabeth Grieco & Brian Ray, *Mexican Immigrants in the U.S. Labor Force*, MIGRATION POLICY INSTITUTE (Mar. 1, 2004), <http://www.migrationpolicy.org/article/mexican-immigrants-us-labor-force>.)

<sup>169</sup> 2016 Index News Release, JOINT VENTURE SILICON VALLEY (Feb. 10, 2016), <http://www.jointventure.org/2016-index-news-release>.

<sup>170</sup> Christian González-Rivera, *Where Immigrant New Yorkers Go to Work — Top Occupations by Share of Foreign-Born Workers*, CENTER FOR AN URBAN FUTURE (Oct. 2016), <https://nycfuture.org/data/immigrant-workers-data-brief#1>.

<sup>171</sup> In FY 2015, approximately 144,000 individuals were admitted to permanent residence through the employment-based categories. DEP'T OF HOMELAND SECURITY, *Table 6. Persons Obtaining Lawful Permanent Resident Status By Type And Major Class of Admission: Fiscal Years 2013 To 2015* (2016), <https://www.dhs.gov/immigration-statistics/yearbook/2015/table6#>.

<sup>172</sup> A reliable recent analysis places the number of temporary work visas issued in 2013 at 1.42 million. Daniel Costa & Jennifer Rosenbaum, *Temporary foreign workers by the numbers*, ECONOMIC POLICY INSTITUTE (March 7, 2017), <http://www.epi.org/publication/temporary-foreign-workers-by-the-numbers-new-estimates-by-visa-classification/>.

<sup>173</sup> In FY 2015, the last for which statistics are available, the Department of Homeland Security reports that the United States admitted 1,051,031 immigrants to permanent residence in the following categories:

Immediate Relatives:	465,068
Family-sponsored:	213,910
Employment-based:	144,047
Refugee:	118,431
Asylee:	33,564
“Diversity” lottery:	47,934
(fewer than 30,000 via other categories)	

DEP'T OF HOMELAND SECURITY, *Table 6. Persons Obtaining Lawful Permanent Resident Status By Type And Major Class of Admission: Fiscal Years 2013 To 2015* (2016), <https://www.dhs.gov/immigration-statistics/yearbook/2015/table6#>.

In 2013 (the most recent for which analysts have complete data), approximately 1.42 million noncitizens entered the United States on temporary visas primarily granted for work purposes. See Daniel Costa & Jennifer Rosenbaum, *Temporary foreign workers by the numbers*, ECONOMIC POLICY INSTITUTE (March 7, 2017), <http://www.epi.org/publication/temporary-foreign-workers-by-the-numbers-new-estimates-by-visa-classification/>. The authors note that this represents approximately 1% of the United States work force.

Finally, the Pew Charitable Trust estimates that 350,000 undocumented immigrants entered the United States in 2015. Jeffrey S. Passel & D’Vera Cohn, *Unauthorized immigrant population stable for half a decade*, PEW RESEARCH CENTER (September 21, 2016), <http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade/>. Pew estimates the total undocumented population in 2015 at 11.1 million. Jens Manuel Krogstad, Jeffrey Passel & D’Vera Cohn, *5 facts about illegal immigration in the U.S.*, PEW RESEARCH CENTER (April 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/>.

<sup>174</sup> In broad strokes: with the exception of refugees, all legal permanent residents are ineligible for

the labor force at rates higher than their native counterparts: they make up 13% of the total population but nearly 17% of workers.<sup>175</sup> They are also unusually economically active as entrepreneurs and small business owners, launching new enterprises at twice the rate of the native-born.<sup>176</sup> From the perspective of many foreign governments in immigrant-origin countries, meanwhile, remittances from emigrants working in the United States are a major source of GDP.<sup>177</sup>

The Supreme Court itself has not infrequently referenced control of the domestic job market as an important purpose of and justification for immigration regulation, including with regard to aspects of immigration law that make no mention of employment.<sup>178</sup>

## B. The Foreign Commerce Clause Argument

In many ways, then, immigration is a prototypical economic activity with both domestic and international impact. But under a contemporary understanding of the Commerce Clause, is immigration *commerce*?

At first glance, the foreign Commerce Clause seems to be a more obvious modern source of the immigration power than its domestic counterpart. Today, it is not uncommon for federal courts to note that the immigration power “derives from many sources,”<sup>179</sup> including the foreign Commerce Clause.<sup>180</sup> While this recital has a

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means-tested federal benefits for five years after admission. Temporary immigrants and undocumented immigrants are barred from almost all federal benefits. For a detailed overview of these rules, see National Immigration Law Center, *Overview of Immigrant Eligibility for Federal Programs* (December 2015), <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf>.

President Trump has suggested that he will tighten these restrictions further. See Draft Executive Order on Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility (Jan. 23, 2017), <http://apps.washingtonpost.com/g/documents/national/draft-executive-orders-on-immigration/2315/>.

<sup>175</sup> The Pew Charitable Trusts, *Immigrants in the Workforce, State by State and Industry by Industry*, THE ATLANTIC (Jan. 7, 2016), <http://www.theatlantic.com/politics/archive/2016/01/immigrants-in-the-workforce-state-by-state-and-industry-by-industry/458775/>. By contrast, in 1970 immigrants were 5% of the population and 5% of the labor force. See Audrey Singer, *Immigrant Workers in the U.S. Labor Force*, BROOKINGS (Mar. 15, 2012), <https://www.brookings.edu/research/immigrant-workers-in-the-u-s-labor-force/>.

<sup>176</sup> Dane Stangler & Jason Wiens, *The Economic Case for Welcoming Immigrant Entrepreneurs*, EWING MARION KAUFFMAN FOUNDATION (Sept. 8, 2015), <http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-economic-case-for-welcoming-immigrant-entrepreneurs>.

<sup>177</sup> World Bank, *Migration and Remittances Fact Book 2016*, <https://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/4549025-1450455807487/Factbookpart1.pdf>. “Migrants are now sending earnings back to their families in developing countries at levels above US\$441 billion, a figure three times the volume of official aid flows.” *Id.* at iv. “In 2015, the top recipient countries of recorded remittances were India, China, the Philippines, Mexico, and France. As a share of GDP, however, smaller countries such as Tajikistan (42 percent)/ the Kyrgyz Republic (30 percent), Nepal (29 percent), Tonga (28 percent), and Moldova (26 percent) were the largest recipients.” *Id.* at v-vi. Worldwide, “The United States is by far the largest [source of remittances], with an estimated \$ 56.3 billion in recorded outflows in 2014.” *Id.* at vi.

<sup>178</sup> See discussion in Part IV.D.2, *infra*.

<sup>179</sup> *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

<sup>180</sup> See, e.g., *Id.* at 10 (“Federal authority to regulate the status of aliens derives from various sources, including the Federal Government’s . . . power ‘[t]o regulate commerce with Foreign Nation’”); *Korab v. Fink*, 797 F. 3d 572, 593 (9th Cir. 2012), *cert. denied sub nom. Korab v. MacManaman*, 135 S. Ct. 472

rote quality, as it is rarely accompanied by an affirmative argument that the Commerce Clause does or should undergird the immigration power,<sup>181</sup> it would not be difficult to make such an assertion.<sup>182</sup> Immigration is the movement of people from other countries into the United States, where most will work. It is of critical economic importance to many foreign governments because of the remittances migrants send home from the United States, and to this country because of its reliance on immigrants to fill particular categories of jobs in both low- and high-wage sectors. The prior line of cases tying the immigration power to foreign commerce remains available to draw on, having never been explicitly rejected by the Court.<sup>183</sup>

Recognizing the relationship between foreign commerce and immigration would not, however, clear the field of obstacles. As a preliminary matter, the Commerce Clause grants power only to Congress, not the Executive Branch. As Adam Cox and Cristina Rodriguez point out in their article, *The President and Immigration Law*, the Supreme Court has at times stated that the Executive has inherent authority over immigration, independent of Congress.<sup>184</sup> If rooting the immigration authority in the Commerce Clause would facilitate greater judicial review of legislative but not presidential action, a critical part of immigration policy would be left behind under the plenary power doctrine, providing no answer to the currently pressing questions about the legality of presidential actions on immigration.

The simplest response to this concern is to note that in contemporary times, the Executive is granted most of its immigration power by statute. Cox and Rodriguez observe that this delegated authority is extensive: among other elements, it includes

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(2014) (mem.). For an examination of the very few instances in which federal courts mention the interstate Commerce Clause in relation to the immigration power, *see infra* Part IV.C.2.

<sup>181</sup> *See, e.g., United States v. Arizona*, 703 F. Supp. 2d 980, 991 & n.4 (D. Ariz. 2010), *aff'd* 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part and remanded*, 132 S. Ct. 2492 (2012), and *aff'd in part, rev'd in part*, 689 F.3d 1132 (9th Cir. 2012) (“The Supreme Court has consistently ruled that the federal government has broad and exclusive authority to regulate immigration, supported by both enumerated and implied constitutional powers. . . . A variety of enumerated powers implicate the federal government’s long-recognized immigration power, including the Commerce Clause, the Naturalization Clause, and the Migration and Importation Clause.”) (citing relevant constitutional provisions, *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893), and *Chae Chan Ping v. United States*, 130 U.S. 581, 603–04 (1889)).

<sup>182</sup> Several scholars touch on the idea as a part of broader analyses, including T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L LAW 862, 864, 866 (1989) (“The power to regulate the admission and residence of aliens may be securely located in the commerce power or implied from a structural analysis of the Constitution.”); Balkin, *supra* note 8, at 26–27 (comparing the commerce power to the naturalization power: “But there is a far more obvious source of the power to regulate the flow of populations across the nation’s borders: it is the commerce power . . . The eighteenth-century definition of commerce as ‘intercourse’ or ‘exchange’ among different peoples easily encompasses immigration and emigration of populations for any purpose, whether economic or noneconomic.”); Legomsky, *supra* note 46, at 186; Chin, *supra* note 8, at 56–57.

<sup>183</sup> *See* discussion *supra* Part III.A.

<sup>184</sup> Cox & Rodriguez, *supra* note 38, at 462–63 and *passim*. The existence of the President’s independent immigration authority is reinforced by two major instances the authors recount in which the President has acted inconsistently with congressional instructions, and that action has either been unchallenged or been upheld by the Court. *Id.*, at 483–528.

prosecutorial discretion to decide whether or not to pursue the deportation of noncitizens within the categories for removal established by the Immigration and Nationality Act, which the authors estimate to affect about a third of the noncitizens present in the United States.<sup>185</sup> Were the Commerce Clause to be understood as the source of the immigration power, federal courts could review the constitutionality of Congress's instructions, and then of the President's actions pursuant to them.

An equally critical concern is whether re-rooting the immigration power in the foreign Commerce Clause with the goal of granting immigrants greater access to constitutional rights would merely trade one plenary power for another. In *Gibbons v. Ogden*, Justice Marshall famously states that the Commerce Clause power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."<sup>186</sup> This oft-quoted line appears to assert plenary status for Congressional action under the foreign Commerce Clause.

The cases that link the immigration power to the foreign Commerce Clause are of little help in grasping the appropriate standard of review. They are over a century old, with no real judicial consideration of the question in the interim. They are also contradictory. In two immigration cases just before and after the *Chinese Exclusion Case*, both based on the assumption that the federal immigration power derived from the foreign commerce clause, the Supreme Court considered this question and reached opposing conclusions.

In *Chew Heong v. United States*,<sup>187</sup> the Supreme Court was explicit in stating that the immigration power, rooted in the foreign Commerce Clause, was subject to judicial review. Like the *Chinese Exclusion Case* five years later, *Chew Heong* challenged aspects of the Chinese Exclusion Act as in violation of an 1880 treaty through which the US promised Chinese citizens present before the Act the ability to "go and come of their own free will."<sup>188</sup> In the *Chinese Exclusion Case*, Justice Field would dismiss this treaty as irrelevant, invalidated by the Act's subsequent passage. For Justice Harlan, however, considering the question in light of a federal immigration power derived from the foreign Commerce Clause, the Court had an obligation to read Congress's later action as consistent with the treaty, thus

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<sup>185</sup> *Id.* at 463–65. Cox and Rodriguez argue that about a third of noncitizens present in the United States fall within a deportation category and can be removed at the discretion of the president. *Id.* at 463. They describe this as an ex-post screening system that "operates as a substitute for front-end policymaking power; both are possible methods of achieving a particular size and composition of immigrants." *Id.* at 464.

<sup>186</sup> *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

<sup>187</sup> *Chew Heong v. United States*, 112 U.S. 536 (1884). In *Chew Heong*, the underlying statute was the 1882 Chinese Exclusion Act and its amendments in 1884, and the challenged provision was its requirement of a certificate of reentry for Chinese noncitizens who had departed the United States but had been in the country prior to the passage of the Act, and now sought to return, including Chew Heong. (This was prior to the 1888 amendments to the Act, at issue in *Chae Chan Ping*, which voided all such certificates.) Chew Heong had been outside the country when the requirement arose, and thus was not able to obtain the required certificate.

<sup>188</sup> Immigration Treaty of 1880, U.S.-China, art. II, Nov. 17, 1880, 22 Stat. 826. Quoted in Lindsay, *supra* note 8, at 29; for discussion of this case see *id.* at 29–31.

requiring that Chew Heong be permitted to return to the United States. Justice Harlan characterized Congress's use of the immigration power as a potential *threat* to sovereignty—not an exercise of it as in the *Chinese Exclusion Case*—unless it could be limited by the Courts.<sup>189</sup>

In *Oceanic Steam Navigation v. Stranahan*, decided twenty years after the *Chinese Exclusion Case*, the Court takes a different position.<sup>190</sup> In that case, addressed in more depth above, a challenge to the constitutionality of a federal immigration statute, the Court does not mention the *Chinese Exclusion Case*, foreign affairs, or the matter of sovereignty. It discusses the immigration power solely as a derivative of the foreign Commerce Clause. And yet, it repeatedly says that Congress's power over immigration is “absolute” and “plenary.” *Oceanic Steam*, not the *Chinese Exclusion Case*, provides the oft-cited assertion regarding immigration that “over no conceivable subject is the legislative power of Congress more complete.”<sup>191</sup> Relying on *Oceanic Steam*, Kif Augustine-Adams has thus argued that “Grounding the power to exclude aliens in the Foreign Commerce Clause, rather than in sovereignty, may be a starting point for applying constitutional protections in immigration law. It is not, however, an entirely clean beginning.”<sup>192</sup>

Nonetheless, most other scholars who have considered the question offer a more optimistic assessment of the standard of constitutional review that would attend a renewed link between the foreign Commerce Clause and the immigration power.<sup>193</sup> Cases outside the immigration arena make clear that Congress's actions

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<sup>189</sup> Lindsay, *supra* note 8, at 31. “Notwithstanding its expansive scope . . . the federal immigration power of the 1870s and 1880s remained a creature of and subject to the U.S. Constitution.” *Id.* at 23.

<sup>190</sup> Augustine-Adams, *supra* note 8, at 719–21. “In sum, Supreme Court jurisprudence has limited congressional power under the Domestic Commerce Clause, but that case law does not address the scope of the Foreign Commerce Clause.” *Id.* at 719 [citations omitted] “Even when recognizing the Foreign Commerce Clause as a basis for congressional control over immigration, the Supreme Court has refused to apply the Bill of Rights to a noncitizen’s claim to remain in the United//States.” *Id.* at 719–720 (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904)). In *Turner*, the Court relies on the *Chinese Exclusion Case* in rejecting challenge to a federal statute excluding/deporting noncitizen anarchists, saying that Congress’s decision was “not open to constitutional objection,” and says that it would have reached same result under foreign Commerce Clause analysis. *Turner*, 194 U.S. at 290.

<sup>191</sup> *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). Furthering this concern, see, e.g., *Lopez v. U.S. Immigration and Naturalization Services*, 758 F.2d 1390, 1392 (10th Cir. 1985): “Although in the present case the INS acts pursuant to the immigration clause of Article I, S. 9 rather than the Commerce Clause, congressional authority under both clauses is plenary.” (citation omitted to *Kleindienst v. Mandel* at 766—although that case does not, in fact, mention commerce.)

<sup>192</sup> Augustine-Adams, *supra* note 8, at 721. She elaborates: “While there may be no question that the Bill of Rights limits Congress’ authority under the Domestic Commerce Clause, the answer is far from clear with respect to the Foreign Commerce Clause.” *Id.* at 719.

<sup>193</sup> See, e.g., T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L LAW 862, 866 (1989) (acknowledging that “the commerce power has been labelled ‘plenary.’ . . . [But] [e]liminating the talk of sovereignty and inherent power [present in the immigration plenary power doctrine] ought to help decision makers recognize that the immigration power does not stand above or before the Constitution.”); Chin, *supra* note 8, at 56–57 (“Because there is no question that the commerce authority is limited by the Bill of Rights, if the Court reverted to its original theory of immigration power, constitutional immigration law would be brought in to the mainstream.”); Lindsay, *supra* note 8, at 55 (“Recasting the federal immigration power as but one instance of Congress’s ‘plenary’ power to regulate commerce, for example, would carry with it a presumption that regulations of immigrants and immigration

under the foreign commerce power are subject to constitutional review. The sweep of the Supreme Court’s pronouncements on the question is typified by its assertion in *Buckley v. Valeo*<sup>194</sup> that “Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.”<sup>195</sup> Justice Marshall, of course, says the same with specific reference to the Commerce Clause in the *Gibbons* quote above, holding Congress’s power to legislate under the that clause “acknowledges no limitations *other than are prescribed in the Constitution*.”<sup>196</sup> This line of cases offers support for the claims by Alexander Aleinikoff, Jack Chin, Sarah Cleveland, and others, that while the foreign commerce power may be plenary, it is still subject to baseline constitutional constraints—and would remain so even in the immigration context.<sup>197</sup>

### C. The Interstate Commerce Clause Argument

#### 1. Immigration in Relation to Modern Interstate Commerce Clause Jurisprudence

The argument that the regulation of immigration falls within the ambit of the interstate Commerce Clause has barely been made by litigants or courts, much less gained traction. Despite the door that *Darby* and *Wickard* would seem to have opened to understanding immigration as a part of interstate commerce, not a single federal circuit court case since they were decided cites them for that purpose. Academics have been similarly silent. Like courts, although scholars and advocates have amply criticized the origins and impact of the plenary power doctrine, and some academics in passing have argued for consideration of the foreign Commerce Clause as a source of the immigration power,<sup>198</sup> none have contended that the interstate Commerce Clause should stand alone or alongside the foreign Commerce Clause as a source of the immigration power.

If this argument was not made when *Wickard* was the last word on the interstate Commerce Clause, it seems less likely to gain traction now, once *Lopez*, *Morrison*, and *Sebelius* have narrowed the scope of interstate commerce. Yet, I assert, this more recent line of cases does not close the door to the idea that the federal immigration power could be rooted in the interstate Commerce Clause. Indeed, immigration law more easily falls within the restricted boundaries of the Commerce Clause announced in *Lopez* and *Morrison* than either guns near schools or gender-based crimes of violence. I rely on three points in reaching this

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are subject to the same substantive, judicially enforceable constitutional norms as most other federal laws.”).

<sup>194</sup> 424 U.S. 1 (1976).

<sup>195</sup> *Id.* at 132 (citing *McCulloch v. Maryland*, 17 U.S. 316, 316 (1819)).

<sup>196</sup> *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (emphasis added).

<sup>197</sup> See, e.g., Cleveland, *supra* note 8, at 279 (2002) (“Since *Gibbons v. Ogden*, the federal commerce power has been recognized as ‘plenary,’ at least with respect to federal-state relations. Yet Congress may not constitutionally exercise its authority under the commerce power to discriminate overtly on the basis of race, to deny basic First Amendment rights, or to violate other fundamental constitutional protections which are routinely waived in immigration cases.”); see also Lindsay, *supra* note 8, at 55.

<sup>198</sup> See sources cited *supra* note 8.

conclusion. First, with regard to the category at issue in *Lopez* and *Morrison*, “whether the regulated activity ‘substantially affects’ interstate commerce,”<sup>199</sup> immigration is more fundamentally and directly an economic activity than guns near schools or violence against women. In addition, and critically, immigration does not raise the specter of federal infringement on traditional arenas of state action that so clearly preoccupied the Court in those two cases. Finally, separate and apart from the argument that immigration substantially affects commerce, it should also be considered within an additional category announced by Rehnquist in *Lopez*: the regulation of “persons or things in interstate commerce.”<sup>200</sup>

Regarding the link between commercial activity and the target of the regulation, in *Lopez* and *Morrison*, Justice Rehnquist rejects what he terms the “‘costs of crime’ and ‘national productivity’ arguments”<sup>201</sup> offered about the impact of guns near schools and violence against women on the economy. He characterizes them as “but-for reasoning”<sup>202</sup> that would open the doors to federal regulation of just about anything, including in spheres traditionally reserved to the states. For immigration, however, there is a strong case to be made that the regulated activity is itself economic, with no causal arguments necessary. Again, immigrants are usually economic actors whether or not their visa is granted under an employment category.<sup>203</sup> No less than those who enter after being sponsored by an employer, refugees and those who are admitted as siblings of citizens must work.<sup>204</sup> There are exceptions, of course, but they do not undermine Congress’s authority to regulate immigration under the interstate Commerce Clause. As the Supreme Court has stated “where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”<sup>205</sup>

Second, immigration presents quite a different picture as to the concern in both *Lopez* and *Morrison* that an expansive understanding of the interstate Commerce Clause would encroach on traditional realms of state power. While education and criminal law have historically (although perhaps less exclusively than Justice Rehnquist would have it) been governed by the states, immigration is a traditional subject of federal regulation.<sup>206</sup> To declare that the power to regulate immigration

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<sup>199</sup> *United States v. Lopez*, 514 U.S. 549, 559 (1995).

<sup>200</sup> *Id.* at 558.

<sup>201</sup> *United States v. Morrison*, 529 U.S. 598, 612–13 (2000).

<sup>202</sup> *Id.* at 612.

<sup>203</sup> Also, recall that the test is not *whether* the challenged activities affect commerce, but *could Congress have so concluded*. “We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a “rational basis” exists for so concluding.” *Gonzalez v. Raich*, 545 U.S. 1, 19 (2005) (citing *Lopez*, 514 U.S. at 557). “That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.” *Gonzalez*, 545 U.S. at 19.

<sup>204</sup> On refugees, see my arguments in “Refugees as Low-Wage Workers,” a work in progress. JG: Do you want to cite this as an unpublished work? Or a forthcoming publication?

<sup>205</sup> *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968), *overruled on other grounds by Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>206</sup> *See supra* Part II.

derives from the Commerce Clause would not change the 180-year understanding that immigration is fundamentally an area of federal control.<sup>207</sup> In that sense, the immigration-as-interstate-commerce argument poses little threat to the established boundaries between the state and the federal, the policing of which motivates the Court's holdings in *Lopez* and *Morrison*. Rather, it would tie an area of admittedly federal control more closely to the Constitution, a development that would seem normatively allied with Justice Rehnquist's emphasis in *Morrison* that "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."<sup>208</sup>

Third, while in *Lopez* and *Morrison* the Court analyzed the law at hand under only one of the three potential categories of Commerce Clause regulation announced in *Lopez*—that related to "substantial effects on interstate commerce"<sup>209</sup>—in the case of immigration, another of the options offers a distinct basis. A separate category announced in *Lopez* includes regulation of "persons or things in interstate commerce, even though the threat may come only from intrastate activities."<sup>210</sup> Immigrants would seem to fit this description. They not only are more active in the labor market than natives, but more mobile between states in response to changes in demand. Recent studies of interstate migration in response to the Great Recession affirm the assertion of Harvard economist George Borjas some years ago that "immigration greases the wheels of the labor market by injecting into the economy a group of persons who are very responsive to regional differences in economic opportunities."<sup>211</sup> This argument is bolstered by the impact of immigrants on the state and national economies noted above.

Thus, under the test announced in *Lopez* and *Morrison*, there are viable arguments that interstate Commerce Clause can undergird the federal government's immigration power. Post-*Raich*, however, to advance the position that immigration falls under the interstate Commerce Clause, one must also contend that the

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<sup>207</sup> None of this is to imply that all regulation affecting immigrants is reserved to the federal government. The states have always retained their police powers with regard to governing immigrants, even as the scope of those powers has been interpreted differently over time. See, e.g., *Mayor of New York v. Miln*, 36 U.S. 102 (1837); *De Canas v. Bica*, 424 U.S. 351 (1976); *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd* 641 F.3d 339 (9<sup>th</sup> Cir. 2011), *aff'd in part, rev'd in part and remanded*, 132 S. Ct. 2492 (2012), and *aff'd in part, rev'd in part*, 689 F.3d 1132 (9<sup>th</sup> Cir. 2012). There is a rich literature on immigration federalism exploring the boundary between state and federal powers over immigration, particularly in the context of active state and local efforts over the past two decades to either protect immigrants from federal enforcement of immigration law or to enact measures more restrictive than federal immigration law. See, e.g., PRATHEEPAN GULASEKARAM AND S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* (2015); Jennifer Chacon, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007).

<sup>208</sup> *United States v. Morrison*, 529 U.S. 598, 607 (2000).

<sup>209</sup> *United States v. Lopez*, 514 U.S. 549, 559–60 (1995); *Morrison*, 529 U.S. at 611.

<sup>210</sup> *Lopez*, 514 U.S. at 558 (citations omitted).

<sup>211</sup> George J. Borjas, *Does Immigration Grease the Wheels of the Labor Market?*, Brookings Papers on Economic Activity, No. 1, 2001, at 69, 70; Mark Ellis, Richard Wright & Matthew Townley, *State-Scale Immigration Enforcement and Latino Interstate Migration in the United States*, 106 ANNALS OF THE AM. ASS'N OF GEOGRAPHERS 891 (2016).



regulation of the economic and noneconomic aspects of immigration are together part of an indivisible scheme.<sup>212</sup> In other words, removing control over labor migration from the immigration statute would leave behind a scheme that was incoherent and/or still had an impact on interstate commerce.<sup>213</sup>

This is a fairly straightforward argument to make. To excise the temporary and permanent employment visa categories from the statute would not be sufficient to separate out labor migration, because the eleven million undocumented workers in the United States are largely labor migrants. (In this context, it is worth noting that in the few cases that address the issue, most federal courts have found no impediment to including undocumented immigrants within the scope of the interstate Commerce Clause.<sup>214</sup>) Undocumented men have the highest labor-force participation rates of anyone in the United States: 91% as compared to 84% for legal immigrants and 79% for native workers.<sup>215</sup> Measures regarding border and interior enforcement of immigration law thus would have to be removed from the statute as well. This would leave behind an immigration law without immigration control, which few would consider a coherent scheme of regulation. In addition, excising the explicitly labor-related aspects of the statute—resulting a law that set terms for entry and continued presence of noncitizens only on the basis of family

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<sup>212</sup> *Gonzalez v. Raich*, 545 U.S. 1, 26 (2005) (“One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.”).

<sup>213</sup> Immigration raises this question in a somewhat different way than *Raich*. In *Raich*, the question was whether severing the regulation of privately grown medical marijuana (asserted by the plaintiffs to be unrelated to commerce) from the larger federal scheme regulating drugs (which was assumed to have a relationship to commerce) would leave a coherent regulatory scheme behind, or whether an exemption for the former would undermine the integrity of the latter. *Gonzalez v. Raich*, 545 U.S. 1, 26 (2005) (framing question as “whether Congress’ contrary policy judgment, *i.e.*, its decision to include this narrower ‘set of activities’ within the larger regulatory scheme, was constitutionally deficient.”). In the immigration context, the question is whether the regulatory scheme could coherently be divided in two: one part directly addressing labor migration and mobile immigrant workers in interstate commerce (assumed to be an economic phenomenon), and the other, larger part regulating immigration unrelated to commerce. In what follows, I argue that the two are not divisible because both relate to the impact of immigration on commerce and should be regulated together to create a coherent regulatory scheme.

<sup>214</sup> *United States v. Hanigan*, 681 F.2d 1127, 1131 (9th Cir. 1982). This is consistent with Commerce Clause jurisprudence about Congress’s power to regulate other kinds of illegal economic activity. *See, e.g., Gonzalez v. Raich*, 545 U.S. 1, 15 (2005). *But see United States v. State of Arizona*, No. CV 10-1413-PHX-SRB, 2010 WL 11405085 (D. Ariz. 2010) (In the context of deciding defendant Arizona’s motion to dismiss, rejecting the argument of plaintiff United States that “it is a violation of the dormant Commerce Clause for Arizona to regulate the interstate movement of people who are not lawfully present in the United States.” *Id.* at 9, (citation omitted). “*Edwards* is distinguishable because, in that case, the underlying conduct (being indigent) was not unlawful.” *Id.* at 9.

<sup>215</sup> *Securing the Border: Defining the Current Population Living in the Shadows and Addressing Future Flows Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. 7, fig. 3 (2015) (written testimony of Jeffrey S. Passel, Senior Demographer, Pew Research Center) <http://www.hsgac.senate.gov/download/?id=CA5A3DC6-951E-48BD-9AA4-A7F6D8EDD34F>. The reverse is true, however, for undocumented women. *Id.* However, men make up the majority of the undocumented population. Ariel G. Ruiz, Jie Zong & Jeanne Batalova, *Immigrant Women in the United States*, MIGRATION POLICY INSTITUTE (Mar. 20, 2015), [http://www.migrationpolicy.org/article/immigrant-women-united-states#Unauthorized Population](http://www.migrationpolicy.org/article/immigrant-women-united-states#Unauthorized%20Population).

ties, refugee status, study, and other non-work-related factors—would not eliminate the direct impact of immigration on the United States labor market. As noted above, immigrants lawfully admitted through nonemployment categories work in large numbers.<sup>216</sup>

If this argument proves persuasive, *Raich* then opens the door more widely to linking immigration to interstate commerce. In *Raich*, the Court reiterates a key aspect of the *Wickard* holding: “When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class,”<sup>217</sup> even if some of the activity is purely local. In addition, the critical question is not whether the activity at issue “substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>218</sup>

There is no question that laws passed by Congress pursuant to its interstate commerce authority can be subject to judicial review for constitutionality. Setting aside the *Wickard-Lopez* line of cases, which is about the extent of the commerce power itself, the Supreme Court is not infrequently called on to assess whether legislation that incontrovertibly falls under Congress’s interstate commerce authority nonetheless infringes on other constitutional provisions. In such situations, the Court has not hesitated to review the statute—and indeed to strike it down. The Supreme Court has stated clearly that “Congressional enactments which may be fully within the grant of legislative authority contained in the [interstate] Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment or the Due Process Clause of the Fifth Amendment.”<sup>219</sup> The Tenth Amendment is another common source of challenge to government action under the interstate Commerce Clause. In *New York v. United States*, for example, the Court held unconstitutional a provision of a federal law that required states to dispose of low-level radioactive waste within their own borders. There was no assertion that the provision itself exceeded the scope of the interstate Commerce Clause. Instead, it was struck down because it conflicted with the Tenth Amendment by “commandeering” state governments in an arena where the Amendment reserved power to the states.<sup>220</sup>

## 2. Discussion of Immigration as Interstate Commerce in Contemporary Case Law

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<sup>216</sup> This focus on paid work is not meant to marginalize immigrants whose motive for migrating is noneconomic or those who are less likely to work for pay on arrival, such as mothers migrating with children, older adults migrating to be reunited with their families, and disabled people. My argument is that in its totality, it is a better description of the *impact* of immigration to say that it is economic than to characterize it as a threat to sovereignty or national security.

<sup>217</sup> *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005) (citations omitted). “The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.” *Id.* at 26.

<sup>218</sup> *Id.* at 22 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

<sup>219</sup> *Nat’l League of Cities v. Usery*, 426 U.S. 833, 841 (1976), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (citations omitted).

<sup>220</sup> *New York v. United States*, 505 U.S. 144 (1992); *see also Printz v. United States*, 521 U.S. 898 (1997).

Paradoxically, the only contemporary case in which a circuit court considers whether congressional regulation of individual immigrants is tied to the Commerce Clause appears in a challenge not to an immigration law, but to the Hobbs Act, which criminalizes robbery that obstructs, delays, or affects commerce “or the movement of any article of commodity in commerce.”<sup>221</sup> In *United States v. Hanigan*,<sup>222</sup> the government sought to use the Hobbs Act to prosecute a man who robbed and tortured three undocumented Mexican immigrants. The Act defines “commerce” as coextensive with the scope of the Commerce Clause.<sup>223</sup> The defendant challenged the government’s prosecution and the underlying statute on the grounds that migrants were not articles of commerce, and even if they were, regulation impacting “undocumented alien laborers” fell outside of Congress’s Commerce Clause authority. A three-judge panel of the Ninth Circuit disagreed. The court noted that “[t]he statute by its terms does not limit ‘commerce’ to the flow of legally condoned articles. Nor could the Commerce Clause itself mean that an activity to be regulated by Congress must be legally permissible.”<sup>224</sup> The case holds that “the movement of undocumented alien laborers across a national boundary into this country is within the constitutional power of Congress to regulate [under the Commerce Clause].”<sup>225</sup>

The few cases where immigration regulation itself has been discussed in relation to the Commerce Clause are all in lower courts, and only one of them touches on the questions just raised with regard to *Lopez*. In the context of recent litigation challenging state laws creating restrictions on immigrants, advocates—and, under the Obama administration, the government itself—attempted to advance the dormant Commerce Clause argument that such laws impermissibly burden interstate and foreign commerce.<sup>226</sup> In general, district courts have found this position unpersuasive as applied to the state laws under consideration. For example, the relationship between interstate commerce and immigration undergirded a dormant Commerce Clause analysis in the unreported 2010 opinion of the Arizona US District Court considering the legality of Arizona’s “attrition through enforcement” law.<sup>227</sup> The Solicitor General argued that the Arizona law—

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<sup>221</sup> *United States v. Hanigan*, 681 F.2d 1127, 1129 (9th Cir. 1982) (“The Hobbs Act makes it a federal crime to obstruct, delay, or affect commerce ‘or the movement of any article of commodity in commerce, by robbery’”) (citing 18 U.S.C. § 1951(a)). “The Hobbs Act definition of commerce is coextensive with the constitutional definition.” *Id.* at 1130 (1982) (citing *Edwards v. California*, 314 U.S. 160, 173–74 (1941) (noting that “intercourse” in the commerce clause includes the movement of persons); *Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 76 (5th Cir. 1980) (striking down registration fee imposed on all workers as hindrance to migrant labor).

<sup>222</sup> *Hanigan*, 681 F.2d 1127.

<sup>223</sup> *Id.* at 1129 (“As defined in the Act, commerce includes ‘all...other commerce over which the United States has jurisdiction.’”) (citing 18 U.S.C. § 1951(b)(3)).

<sup>224</sup> *Id.* at 1131.

<sup>225</sup> *Id.*

<sup>226</sup> *See, e.g., United States v. Arizona*, 703 F. Supp. 2d 980, 1003 (D. Ariz. 2010); Brief for the League of United Latin American Citizens, et. al. as Amici Curiae Supporting Appellee, *U.S. v. Arizona*, 641 F.3d 339 (9th Cir. 2011).

<sup>227</sup> *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) *aff’d*, 641 F.3d 339 (9th Cir. 2011) *aff’d in part, rev’d in part and remanded*, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012) and *aff’d in part, rev’d in part*, 689 F.3d 1132 (9th Cir. 2012).

“Attrition through enforcement” refers to the idea, popularized by the restrictionist policy organization

which created new state penalties for offenses ranging from transporting and hiring undocumented immigrants to making unlawful presence a state trespassing violation—“offends the Dormant Commerce Clause by restricting the interstate movement of aliens.”<sup>228</sup> The District Court agreed that “the regulation of immigration does have an impact on interstate commerce,”<sup>229</sup> but since the state law in question did not explicitly limit the entry of immigrants to Arizona, instead prohibiting conduct already banned by federal law, the United States failed to show that the Arizona law raised this concern.<sup>230</sup> Higher courts declined to consider the Commerce Clause issue on appeal.<sup>231</sup>

*United States v. Hernandez Guerrero*, a 1997 Southern District of California case in which a noncitizen with a record of multiple deportations challenged the legality of provisions of the Immigration and Nationality Act setting out the consequences for unlawful re-entry following deportation,<sup>232</sup> is the one published post-*Lopez* federal court decision to seriously consider whether the immigration power derives from the Commerce Clause. There, the court states plainly that “[t]he fact that prior precedent recognizes Congress’s power over immigration as an incident of sovereignty does not signify that Congress could not regulate immigration under the auspices of one of its enumerated powers. Accordingly, even if Congress could not enact criminal immigration sanctions pursuant to the inherent power of a sovereign nation, S. 1326 would still be constitutional as an exercise of Congress’s authority under the Commerce Clause.”<sup>233</sup>

The opinion goes on to assert that “[i]t is undeniable that the entry of foreign nationals could affect both foreign and interstate commerce. Indeed, one can assume that many individuals enter the United States illegally because of their desire to find better economic opportunities here. Such individuals provide both an inexpensive source of foreign labor, and a market for domestic goods and services, thereby affecting both interstate and foreign commerce.”<sup>234</sup> Having decided that

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the Center for Immigration Studies, that undocumented immigrants will leave the country (“self-deport”) if the government closes off access to housing, employment, drivers’ licenses, and medical care. The theory undergirded many state and local anti-immigrant initiatives in the 2000s. For a summary of and argument for the strategy, see Jessica Vaughan, *Attrition through Enforcement*, CENTER FOR IMMIGRATION STUDIES 2006, <http://cis.org/Enforcement-IllegalPopulation>; Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155 (2008).

<sup>228</sup> *Arizona*, 703 F. Supp. 2d at 1003 (internal quotations omitted).

<sup>229</sup> *Id.* at 1003.

<sup>230</sup> *Id.* The Court of Appeals and Supreme Court cases reversing and affirming the District Court’s decision did not discuss the Commerce Clause argument.

Similarly, in *United States v. Alabama*, 813 F. Supp. 2d 1282, 1328–29 (N.D. Ala. 2011) *aff’d in part, rev’d in part, dismissed in part*, 691 F.3d 1269 (11th Cir. 2012), the District Court rejected the US government’s argument that the Alabama law imposed an excessive burden on interstate commerce, and therefore dismissed the Commerce Clause portion of the federal government’s argument (the section in question was nonetheless enjoined on the grounds that it was preempted under federal immigration law).

<sup>231</sup> In neither the Arizona nor the Alabama case appeals did the circuit court or the Supreme Court discuss the Commerce Clause issue.

<sup>232</sup> *United States v. Hernandez-Guerrero*, 963 F. Supp. 933 (S.D. Cal. 1997) *aff’d*, 147 F.3d 1075 (9th Cir. 1998).

<sup>233</sup> *Id.* at 937.

<sup>234</sup> *Id.* at 937–38.

immigration is tied to the commerce power, the court then rejects the contention that in this instance Congress exceeded the boundaries set forth in *Lopez*. “‘The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.’ In the present case, however, the illegal entry of foreign nationals after deportation does substantially affect interstate commerce. Moreover, individuals who enter the country illegally provide a source of labor, thereby constituting ‘persons or things in interstate commerce.’”<sup>235</sup> The Ninth Circuit affirmed the District Court’s decision on sovereignty grounds; it did not reach the commerce argument.<sup>236</sup>

#### **D. What Do We Get from Conceiving of Immigration as Commerce?**

##### **1. Impact Overall**

If the interstate and foreign Commerce Clauses were recognized as sources of the contemporary federal immigration authority, that power would have a far firmer anchor in the Constitution than it does under current jurisprudence. Of course, taking this step will not eliminate the plenary power doctrine in one fell swoop. The constitutional source of a particular governmental power is related to, but not the sole determinant of, the degree to which courts will review government action in that arena for violations of individual constitutional rights.<sup>237</sup> Nor will it automatically divorce immigration questions from sovereignty or national security concerns. Whatever the source of the power, the government can always assert that any policy related to control over immigration implicates sovereignty, or that national security concerns motivate its promulgation of a particular policy, in an effort to persuade courts to give it room to operate unfettered.<sup>238</sup>

With this in mind, the Article is pragmatic in its claims and its argument. Its goal is to counteract the reflexive assumption embedded in the plenary power doctrine’s tie to sovereignty and foreign affairs, that *all* immigration law relates to foreign relations and/or national security. This assumption encourages judges to default to a position of deference without an actual inquiry about whether it is

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<sup>235</sup> *Id.* at 938 (citations omitted).

<sup>236</sup> *Id.*

<sup>237</sup> *See supra* [note 11].

<sup>238</sup> Lindsay, *supra* note 54, at 241. Likewise, it seems unlikely that the distinction in immigration jurisprudence between immigrants already admitted to the United States and those who are seeking admission, which grants some measure of constitutional review to the former while essentially denying it to the latter, will disappear. It is interesting—but beyond the scope of this article—to consider whether the 2017 Supreme Court decision to grant certiorari in *Trump v. IRAP*, the first travel ban case, signals the beginning of a process of reconsidering this distinction. In its *per curiam* opinion on the question of whether to uphold the preliminary injunctions against the travel ban granted by the Fourth and Ninth Circuits, the Court draws the line not at lawful admission, but between would-be immigrants with “bona-fide relationships” to persons or entities in the United States, and those without such relationships. As to the former, the Court upheld the injunction; as to the latter, it permitted the travel ban to take effect. *Trump v. IRAP*, No. 16-1436, slip op at 13 (U.S. June 26, 2017). It is important to note, though, that all plaintiffs in this case were individuals and institutions inside the United States.

appropriate given the immigration policy in question.<sup>239</sup> The Article seeks to build a stronger constitutional undergirding for the immigration power, one that reminds judges that in the main, immigration is an economic issue, and therefore that claims about rights violations in the immigration context should receive ordinary judicial review unless the policies in question actually impact national security or foreign affairs.

A recognition that the Commerce Clause grounds the government's immigration power has the potential to re-orient the federal courts' degree of constitutional analysis of immigration questions in several important ways.

First, returning to the foreign Commerce Clause as a source of the government's immigration authority ties modern immigration jurisprudence to the historical understanding of the immigration power adopted in the early immigration federalism cases. Those cases arose under the foreign Commerce Clause and were about federalism—ie, whether the states or the federal government had the power to regulate immigration—rather than individual rights. Nonetheless, it is significant that, as it answered these federalism questions, the Supreme Court treated the immigration power as non-exceptional with regard to the Constitution. Although early immigration cases were not explicitly about the interstate Commerce Clause, in deciding them the justices often spoke of the power to regulate immigrants from abroad as having the same constitutional origin and limitations as the power to regulate migrants between states, reasoning that a holding about one would also apply to the other.<sup>240</sup> This offers some indication that during the 19<sup>th</sup> century the Supreme Court did not contemplate that all uses of the immigration power would be subject to a more deferential standard of constitutional review.

Second, the addition of the interstate Commerce Clause as a source of the immigration power grounds that authority even more firmly in an arena without any carve-outs from constitutional oversight. As I note in Part IV.B., *supra*, although courts have explicitly held that government actions under the foreign Commerce Clause are subject to constitutional constraints, there is a danger that locating immigration only in the foreign branch of the Commerce Clause might create echoes of foreign policy concerns requiring deference to the political branches. The interstate Commerce Clause as a constitutional source of the immigration power signals that the government's exercise of that authority arises from a power under which courts routinely review government actions for constitutionality. The default assumption is that a government action rooted in the interstate Commerce Clause receives ordinary review in the face of a challenge to the action's constitutionality.

Finally, an immigration power that arises from the Commerce Clause highlights the economic nature of most immigration. It serves as a reminder that the vast majority of immigration law is about the daily management of a flow of noncitizens

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<sup>239</sup> Legomsky, *supra* note 36 at 261-9.

<sup>240</sup> See, e.g., *The Passenger Cases*, 48 U.S. 283, 417 (Wayne, J., concurring in the judgment) (arguing that the federal power to regulate the movement of human beings across borders applies in the same way to interstate and foreign commerce.) See also Matthew Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness* at 781-82, 784-85.

who contribute to the US economy through tourism, investment, purchases, and labor. Most immigration statutes, regulations, and policies relate to routine matters of bureaucratic processing and management of this flow. Aspects of immigration law that do address national security or foreign affairs are generally contained in discrete statutory provisions, regulations, or policy documents that explicitly reference such concerns.<sup>241</sup> The remaining majority of the federal government's exercises of the immigration power are grounded in the central concerns of the Commerce Clause. This insight offers an important counter-narrative to the government's repeated claims in litigation that foreign affairs and national security are the drivers of *all* aspects of immigration policy, and that immigration law as a whole should thus receive greater judicial deference.

## 2. Impact on Constitutional Challenges to Different Classes of Immigration Policies

Grounding the immigration power in the Commerce Clause is likely to have a different impact on judicial review depending on the nature of the underlying law being challenged. I will consider the effect of such a shift on three categories of immigration policies: those that are intended to regulate employment-related visas or otherwise address concerns about labor market competition; those that set general categories and procedures for admission and removal, unrelated to employment *or* to national security concerns; and those that specifically address foreign affairs or national security concerns.

### a. Immigration Policies Related to Employment and Labor Competition

The arguments put forth in this Article are likely to have the greatest impact where plaintiffs challenge an aspect of immigration law or policy that directly regulates immigrant employment, or that was enacted in response to labor market concerns. The latter category, I would argue, includes almost all provisions regulating undocumented immigrants. The Supreme Court has not infrequently asserted that immigration restrictions are motivated by the need to limit competition for work within the United States. In 1991, for example, in a case upholding the validity of a regulation requiring that the Attorney General make a bar on unauthorized work a bond condition for noncitizens in removal proceedings, a unanimous Court stated that protecting US workers against displacement was an "established concern of immigration law."<sup>242</sup> Looking to past cases, the opinion noted, "We have often recognized that a 'primary purpose in restricting immigration is to preserve jobs for American workers.'"<sup>243</sup>

In the context of a constitutional challenge to an aspect of immigration law that sets out the routes through which noncitizens can enter the United States for the purposes of employment; or that penalizes unlawful entry, presence in the country without admission, or visa overstay; plaintiffs can trace the power to enact such a

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<sup>241</sup> The inadmissibility grounds related to terrorism and foreign policy are examples. *Security and Related Grounds*, Immigration and Nationality Act § 212(a)(3), 8 U.S.C. 1182 (1965).

<sup>242</sup> *INS v. National Center for Immigrants Rights, Inc.*, 502 U.S. 183, 194 (1991).

<sup>243</sup> *Id.* (citing *Sure-Tan v. NLRB*, 467 U.S. 883, 893 (1984)).

provision to the foreign and interstate Commerce Clause and the government's acknowledged right to control the movement of noncitizen workers (by now clearly understood as "commerce"<sup>244</sup>) across its borders. In recognizing this connection, the Court would be in line with longstanding interpretations of the foreign Commerce Clause and the modern understanding of the interstate Commerce Clause. While there is no question that regulating immigration to limit labor competition remains a federal power, tying it to the Commerce Clause underscores the argument that challenges to such policies should be subject to ordinary levels of constitutional review.

Ironically, the Chinese Exclusion Act itself—which supplied the occasion for the Supreme Court's abandonment of the Commerce Clause as the constitutional source of the immigration power—is a paradigmatic example of an immigration law passed to regulate the labor market.<sup>245</sup> The Act applied exclusively to Chinese "laborers," not to most other categories of Chinese immigrants.<sup>246</sup> In the Chinese Exclusion Case, Justice Fields explicitly recognized that fear of job competition was a key factor behind the passage of the statute.<sup>247</sup> It is telling that in order to avoid reviewing the procedures laid out in the Act for compliance with due process requirements, the Court felt compelled to break with longstanding precedent anchoring the immigration power in the Commerce Clause, and create a new doctrine of plenary power, constitutionally justified by the federal government's control of sovereignty and foreign affairs. Had the case been understood as a challenge to a procedural aspect of legislation arising under the Commerce Clause, it would have been harder for the Court to hold that Congress's actions were outside the scope of judicial review for constitutionality.

#### b. Immigration Policies Not Related to Employment or National Security

The middle category identified here consists of laws that set generally-applicable substantive or procedural terms for admission or removal, with few if any special implications for national security or foreign affairs. This class of cases encompasses the majority of challenged immigration laws and policies. In such cases, the government does not argue that this specific law or policy is primarily motivated by national security or foreign policy concerns, although they may suggest that it could nonetheless have some impact on diplomacy.<sup>248</sup> Instead, it advances the plenary

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<sup>244</sup> See discussion in Parts III.B.1 and IV.B, *supra*.

<sup>245</sup> See discussion in note [120] and accompanying text. [Ed: Note in its entirety is "Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889)."]

<sup>246</sup> Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882), Preamble (Suspending for ten years "the coming of Chinese laborers to the United States"); Sec. 6 (setting out procedures for "every Chinese Person other than a laborer who may be entitled...to come within the United States" to obtain a certificate from the Chinese government indicating that they met the entrance requirements); Sec. 13 (exempting diplomats and their servants); Sec. 15 ("That the words 'Chinese laborers', whenever used in the act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.")

<sup>247</sup> See *supra* Note [120—at end of quote from the case regarding competition].

<sup>248</sup> For example, in *Zadvydas*, the government asserted that the Court should not review for due process concerns its policy of indefinitely detaining noncitizens who had been found deportable, without an individualized determination of dangerousness. While the government conceded that there were no important national security concerns implicated by this policy, it did argue that judicial review might



power doctrine in general, contending that this should minimize or eradicate judicial review of immigration law for constitutionality without reference to whether the actual policy implicates sovereignty, foreign affairs, or national security.<sup>249</sup>

The Supreme Court's response to such arguments has been inconsistent. In recent years, the Court has moved between applying ordinary standards of constitutional review (often without rejecting or refuting the plenary power doctrine), and applying the plenary power doctrine and deferring to the government. In cases where it does the former, it has de-emphasized the idea that the immigration power is rooted in sovereignty—but has not offered an alternative constitutional source. In the latter cases, it has leaned heavily on the sovereignty anchor. In this category, consistent recognition of the link between the immigration power in the Commerce Clause would serve to counterbalance the government's assertion of plenary power, anchoring the government's authority in an ordinary constitutional power that has not developed pockets of exemption from judicial review.

A recent trio of Supreme Court cases on the detention of noncitizens during or after removal proceedings offers an illustration of this inconsistency problem, and suggests the potential stabilizing impact of tying the immigration power to the Commerce Clause. The cases are *Zadvydas*, decided less than three months before 9/11, *Demore v. Kim*, issued nineteen months after, and *Jennings v. Rodriguez*,<sup>250</sup> which is before the Court in the 2017 term. All fall within this middle category: they address due process challenges to aspects of the Immigration and Nationality Act that relate to the detention of noncitizens during or after the conclusion of deportation proceedings,<sup>251</sup> with no reference to employment, undocumented immigration, or foreign affairs. Indeed, in none of the cases did the Court find that national security or foreign policy concerns motivated the statutory provision at issue.

In *Zadvydas*, although the government asserted that the plenary power doctrine required the Court to defer to Congress's decision to permit indefinite detention of noncitizens pending removal, the Court disagreed. It held that indefinite detention of deportable noncitizens beyond the time when removal was reasonably

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“interfere with ‘sensitive’ repatriation negotiations” (at 696) and thus impact foreign policy. See Part IV.D.2.b, *infra*.

<sup>249</sup> See, e.g., Transcript of Oral Argument at 3, *Jennings v. Rodriguez*, --- S. Ct. --- (2016) (No. 15-1204). (In case related to the long term detention of noncitizens during the pendency of removal proceedings, a policy unrelated to national security or foreign policy concerns, the Deputy Solicitor General opened his oral argument by reminding the Supreme Court that it had “often stressed the breadth of Congress’s constitutional authority to establish the rules under which aliens will be allowed to enter and remain in the United States.”)

<sup>250</sup> *Rodriguez, et. al. v. Robbins, et. al.*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, --- S. Ct. ---, 2016 WL 1182403 (2016) (No. 15-1204).

<sup>251</sup> The fact that all of these cases related to deportation and not exclusion is significant, given that the plenary power doctrine is understood to be much stronger as to policies relating to noncitizens the government seeks to exclude than as to those it seeks to deport. See eg *Zadvydas* at 693-694.

foreseeable was an unconstitutional deprivation of liberty.<sup>252</sup> In deciding the case, the Court recognized the “primary Executive Branch responsibility”<sup>253</sup> in the immigration area, which “require[s] courts to listen with care”<sup>254</sup> to the government’s arguments. But the Court took note of the absence of any national security concerns in the case before it,<sup>255</sup> and considered and rejected the government’s assertion that its interpretation of the statute to permit indefinite detention implicated foreign policy concerns.<sup>256</sup> The majority’s conclusion that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem”<sup>257</sup> grew from an essentially ordinary substantive and procedural due process analysis. Notably, the opinion did not once mention the source of the immigration power, or even use the word “sovereignty” in its opinion.

In *Demore v. Kim*, the issue before the Court was whether the government could mandatorily detain all noncitizens pending deportation proceedings on certain grounds (for example, because they had committed certain crimes), without any individualized determination of flight risk or danger to the community. Here, with the country still on high alert less than two years after 9/11, the Court took a very different approach to reviewing the statute for constitutionality. The government did not allege that the challenged policy was motivated by or impacted foreign relations or national security. Yet in deciding the case, the Court tied the federal government’s immigration authority to foreign relations and the war power,<sup>258</sup> and emphasized Cold War cases where immigration provisions were upheld under plenary power to protect the country from Communism,<sup>259</sup> thus waving the flag in a way that implicitly suggested a link between the routine provision at issue and the need to protect national security. It then relied on the plenary power doctrine to reach the conclusion that the mandatory detention policy did not violate due process, despite the holding in *Zadvydas*.<sup>260</sup>

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<sup>252</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>253</sup> *Id.* at 700.

<sup>254</sup> *Id.* at 700.

<sup>255</sup> *Id.* at 695-96.

<sup>256</sup> *Id.* at 696.

<sup>257</sup> *Id.* at 690.

<sup>258</sup> *Demore v. Kim*, 538 U.S. 510, 522 (2003).

<sup>259</sup> *Id.* at 523-25.

<sup>260</sup> *Demore* at 521-22, 531.

While acknowledging that the government traditionally is held to higher constitutional standards in proceedings for deporting a noncitizen, as here, than for excluding one at the border (at 523), the Court carried out a very limited due process analysis, quickly rejecting the claim that *Zadvydas* was the controlling case. At 527-530. In addition, the Court relied on data provided by the government (retracted thirteen years later as false) to conclude that detention times were shorter, and flight risk higher, for noncitizens mandatorily detained before the conclusion of removal proceedings than for those in detention pending deportation as in *Zadvydas*. See Letter from the Department of Justice, Office of the Solicitor General, to the Supreme Court (August 26, 2016) available at <https://online.wsj.com/public/resources/documents/Demore.pdf>. See also Transcript of Oral Argument at 18, lines 18-21, *Jennings v. Rodriguez*, --- S.Ct. --- (2016) (No. 15-1204) (Acting Solicitor General, for the government, in response to a question from Justice Kagan: “Your honor is right that the statistics we provided to the Court were inaccurate, and we apologize.”).

After *Demore v. Kim* was decided, several circuits found that once a noncitizen had been detained for some time pending the conclusion of proceedings, a bond hearing was mandatory to avoid due process concerns.<sup>261</sup> The 2<sup>nd</sup> and 9<sup>th</sup> circuits followed the reasoning in *Zadvydas* and imposed a 6 month limit on mandatory detention before an individualized bond hearing must be held.<sup>262</sup> This issue is now before the Supreme Court in *Jennings v. Rodriguez*.<sup>263</sup> During oral argument on *Rodriguez* on October 3, 2017, the government opened with a strong statement of the plenary power doctrine.<sup>264</sup> A majority of justices responded with skepticism that the Constitution permitted lengthy periods of detention without opportunity for a bond hearing pending the outcome of a removal proceeding.<sup>265</sup> Neither the litigants nor the justices once mentioned the constitutional source of the immigration power. As of this writing, the Court has not issued a decision.

The comparison between *Zadvydas* and *Demore* illustrates the Court's tendency to ignore the question of the constitutional grounding of the immigration power when it is inclined to undertake ordinary constitutional review, but to return to the line of cases rooting the immigration power in sovereignty when it defers to the government—even and perhaps especially when the provision or policy being challenged raises no specific foreign policy or national security issues. If the oral argument is an accurate predictor, *Rodriguez* seems likely to follow this pattern. The result is an incoherent doctrine, leaving the relationship of immigration law to the Constitution (in terms of both power and rights) subject to change with the political mood. If the source of the immigration power is important in one case, it is important in all.

Recognition of the Commerce Clause as an anchor of the immigration power would put the Court on a path to developing a constitutional jurisprudence for immigration law that consistently identifies the source of the immigration authority, and applies ordinary constitutional review unless there is an additional reason (beyond the fact that the law relates to the entry or departure of noncitizens) for deference.

### c. Immigration Policies Related to Foreign Affairs and National Security

The third class of cases are those challenging aspects of immigration law that explicitly address national security and foreign affairs, or those that the government asserts were primarily motivated by such concerns. Where the government

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<sup>261</sup> *Rodriguez, et. al. v. Robbins, et. al.*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, --- S. Ct. --- (2016) (No. 15-1204); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *petition for cert. denied* (June 20, 2016). Both circuits required bond hearings at the six-month mark. The First, Third, Sixth, and Eleventh Circuits, have also required a bond hearing, but have tied the timing to an unspecified “reasonable period.” See *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Sopo v. United States AG*, 825 F.3d 1199 (11th Cir. 2016).

<sup>262</sup> *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015).

<sup>263</sup> Oral argument on the case was heard during the 2016 term, but after Justice Scalia died and Justice Gorsuch replaced him, the case was put over for additional briefing and reargument in the 2017 term.

<sup>264</sup> Transcript of Oral Argument at 3, *Jennings v. Rodriguez*, --- S.Ct. --- (2016) (No. 15-1204).

<sup>265</sup> Transcript of Oral Argument, *Jennings v. Rodriguez*, --- S.Ct. ---(2016) (No. 15-1204).

responds to a constitutional challenge to an immigration policy by making an assertion that the policy implicates security or foreign policy, the obstacle to judicial review of rights is twofold. First is the plenary power presumption of deference for all federal immigration actions. Second, both foreign affairs and national security have their own deference doctrines, independent of immigration.

As to the first obstacle, scholars have suggested that the appropriate judicial response to the government's assertion that the immigration policy in question implicates national security and foreign affairs would be a meaningful inquiry into whether the policy *actually* is based on or meaningfully affects such concerns.<sup>266</sup> In this they seek to adapt the holding of *Baker v. Carr*,<sup>267</sup> a 1962 case regarding a challenge to redistricting, to the immigration context. In *Baker v. Carr*, the Supreme Court made clear that it would not find a question to be political (and therefore beyond the scope of its review for constitutionality) simply because it arose, as this one did, in the context of politics. In reaching this conclusion, the Court summarized its jurisprudence on the justiciability of issues related to foreign relations,<sup>268</sup> asserting that "Our cases in this field [foreign relations] seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."<sup>269</sup> Stephen Legomsky and others contend that courts should undertake a similar assessment before determining that a particular immigration policy should be reviewed deferentially because it implicates foreign affairs and national security.<sup>270</sup>

If the government demonstrates to the courts' satisfaction that an actual risk to national security motivated the particular immigration policy, constitutional rights arguments would then face the challenges growing from independent traditions of deference to the political branches on questions of security and foreign affairs. Although a full examination of the arguments are beyond the scope of this paper, suffice it to note that, like plenary power, these deference doctrines have critics of their own.<sup>271</sup>

Among current cases, judicial review of challenges to President Trump's series of Travel Bans provide a relevant example. In spring of 2017, the Fourth Circuit upheld a preliminary injunction against the first iteration of the travel ban based on a finding of an Establishment Clause violation, and the Ninth Circuit later reached the same result on statutory grounds.<sup>272</sup> Both courts rejected the government's

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<sup>266</sup> Legomsky, *supra* note 36, at 261-9; ALEINIKOFF, *supra* note 54, at 160; Lindsay, *supra* note 54, at 236-38.

<sup>267</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>268</sup> *Id.* at 211-13.

<sup>269</sup> *Id.* at 211-12. [ed: page break is after "consequences"]

<sup>270</sup> Legomsky, *supra* note 36, at 261-9; ALEINIKOFF, *supra* note 54, at 160; Lindsay, *supra* note 54, at 265 and *passim*.

<sup>271</sup> See notes [53-62] and accompanying text. [Ed.s: Note 53 begins "Note, however, that foreign affairs was already present..."]

<sup>272</sup> *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, No. 17-15589 (9th Cir., June 12

assertion that the President’s reliance on a rationale of national security shielded the orders from constitutional review. The Supreme Court granted certiorari. In an interim decision on the stay, it upheld the injunctions against the ban as to those seeking to enter from the six countries who have a “bona fide relationship” to a U.S. relative, institution, or employer. It allowed the ban to go into effect, however, as to anyone without such a relationship. In its *per curiam* opinion, the Court did not reach the merits.<sup>273</sup> Subsequently, in September of 2017, the administration issued a third version of the travel ban, rendering most aspects of the earlier cases moot.<sup>274</sup> However, litigation on the third version is moving at a rapid pace toward the Supreme Court.

Exchanges between judges and litigants in the context of challenges to the first Executive Order banning nationals of seven countries from entering the United States suggest that at least some federal judges are inclined to look behind the government’s assertions. For example, during oral argument regarding the propriety of a nation-wide temporary restraining order on the Order, Seattle District Court Judge Robart responded to the administration’s argument that he should not question the Order since it was justified by the President’s assessment of a national security risk by stating, “I’m...asked to look and determine if the Executive Order is rationally based. And rationally based to me implies that to some extent I have to find it grounded in facts as opposed to fiction.”<sup>275</sup> Judge Robart then ruled against the President, issuing the TRO.<sup>276</sup> The 9<sup>th</sup> Circuit upheld his decision.<sup>277</sup> Such colloquies, and a number of the opinions on the various iterations of the travel ban,

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2017).

<sup>273</sup> *Trump v. IRAP*, 582 U.S. \_\_\_, slip op. at 9 (2017). The distinction between those with and without a bona fide relationship to a U.S. relative or entity does not reflect an existing doctrine in immigration law. It appears to represent the Supreme Court’s effort to assess the level of potential harm to noncitizens and U.S. citizens and entities as it balanced the equities in deciding on the stay. The Court subsequently issued a second decision in response to a lower court’s clarification of the extent of the stay, refining the definition of close relationship. U.S. Supreme Court, Order in Pending Case, *Trump v. Hawaii*, 16-1540 (July 19, 2017), available at [https://www.supremecourt.gov/orders/courtorders/071917zr\\_o7jp.pdf](https://www.supremecourt.gov/orders/courtorders/071917zr_o7jp.pdf).

<sup>274</sup> “Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public Safety Threats” (Sept. 24, 2017)

<sup>275</sup> Transcript of Oral Argument, *State of Washington vs. Donald J. Trump, et. al.*, No. 17-CV-00141-JLR (W.D. Wash 2017).

<sup>276</sup> Temporary Restraining Order issued by Judge Robart in *State of Washington and State of Minnesota vs. Donald J. Trump, et. al.*, No. 17-CV-00141-JLR (W.D. Wash. 2017).

On the other hand, a District Court judge in Massachusetts, reviewing the same policy as applied to Logan Airport in Boston, referenced the plenary power doctrine and applied the “facially legitimate and bona fide” standard to find the policy rational on the basis of the assertion within the document that its genesis was a national security concern, and allowed a TRO previously issued by the same court to expire. *Louhghalam v. Donald J. Trump*, No. 17-10154-NMG at 17-19 (D. Mass. 2017).

<sup>277</sup> *State of Washington; State of Minnesota vs. Donald J. Trump, et. al.*, 847 F.3d 1151 (9th Cir. 2017) (per curiam). Similarly, in the Order Granting Motion for Temporary Restraining Order in *Hawaii v. Trump*, Judge Derrick Watson of US District Court in Hawaii temporarily enjoined the part of the third travel ban, referred to as Executive Order 3 or EO-3. In his order, Judge Watson stated that “EO-3 suffers from precisely the same maladies as its predecessor: it lacks sufficient findings that the entry of more than 150 million nationals from six specified countries would be ‘detrimental to the interests of the United States,’ a precondition that the Ninth Circuit determined must be satisfied before the Executive may properly invoke Section 1182(f).” *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. 2017) at 2.

model the sort of meaningful inquiry regarding national security considerations that should be more widespread when the government asserts that they are the motivation for its actions in the immigration arena.

At base, most immigration law is about economic relationships between nations and within the United States. An immigration power anchored in the Commerce Clause would offer a counterweight to the tendency of courts to engage in only limited constitutional review of actions taken by Congress and the Executive Branch on immigration matters. It would signal that, as a whole, the exercise of the immigration authority is ordinarily subject to ordinary judicial review. It would encourage courts to hold plenary power inapplicable when they found that the policy in question did not, in fact, threaten national security or implicate important aspects of foreign policy, rather than deferring to the government's routine assertion that it should *always* be free to act as it sees fit in the immigration arena, because the power is rooted in its constitutional control over sovereignty, and because all immigration law is an issue of foreign policy.

### 3. The Same End by Different Means?

Could the Supreme Court achieve a more normalized jurisprudence of immigration in relation to constitutional rights *without* holding that immigration power is derived from the Commerce Clause? As other scholars have noted, there are alternative routes to the outcome this Article seeks.<sup>278</sup> Most recently, in *Disaggregating "Immigration Law,"* Matthew Lindsay argues that courts should disaggregate the interests implicated by various immigration laws, "and recognize both federal and state regulation of noncitizens for what it is: a variegated conglomeration of laws and enforcement actions that concern labor, crime, public health and welfare, and, sometimes, foreign affairs and national security."<sup>279</sup> He calls for ordinary constitutional review of all immigration law except aspects that actually relate to security and foreign policy.<sup>280</sup>

But to disaggregate immigration law without disaggregating our understanding of the origins of the immigration power, only goes half way. As long as the immigration power remains understood as principally derived from national sovereignty and foreign affairs, the default will remain a thumb on the scale in favor of judicial abdication of constitutional review no matter what the challenged policy.

Others have argued that the courts should, and indeed already often do, apply ordinary statutory interpretation principles in order to avoid reaching constitutional questions, proposed a burden shift that would require the government to demonstrate an actual impact on foreign affairs or national security, or made frontal attacks on the concept of sovereignty or the origins and coherence

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<sup>278</sup> Legomsky, *supra* note 36, at 261-9; Lindsay, *supra* note 54; see also sources cited *supra* note 54. [Ed.s: note begins "For variations on this argument see T. Alexander Aleinikoff,..."]

<sup>279</sup> Lindsay, *supra* note 54, at 186. In a previous article, Lindsay proposed returning the immigration power to the foreign Commerce Clause. Matthew Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HAR. C.R.-C.L.L. REV. 1, 43-44 (2010).

<sup>280</sup> Lindsay, *supra* note 54, at 186.

of the foreign affairs power.<sup>281</sup> Similarly, what would anchor those changes? Without a clear new articulation of the source of the constitutional power, the level of review of immigration policy for constitutional violations will remain untethered, leaving it vulnerable to drift with the winds of public sentiment.

### Conclusion

When the Supreme Court stated in *Marbury v. Madison* that it was the role of federal courts to review all legislation for constitutionality, it did not exempt immigration from its scope. Nor is there an immigration loophole in the doctrine of enumerated powers. Yet for the past century and a quarter, the Supreme Court has rooted the immigration authority in a tenuous series of implications from constitutional powers, and has repeatedly (if, of late, inconsistently) used that reasoning to justify abdicating constitutional review of immigration law. The impact of this approach on constitutional rights in the immigration context has been devastating.

Plenary power was created by the Supreme Court in 1889 to cloak rank racial prejudice, fears about economic competition, and xenophobia in the vaunted garments of sovereignty and foreign affairs. Today, immigration law in its vast majority has nothing to do with foreign policy. The core questions that arise in the field are about creating fair, rational, and efficient procedures to carry out the work of a bureaucracy whose decisions touch tens of millions of lives a year in every nation around the globe, with a direct impact on the U.S. labor market.

The task of modernizing and constitutionalizing federal court review of immigration policy is complicated by the fact that no one aspect of the Constitution covers all facets of immigration. Cognizant of that challenge, this Article has advanced the argument that, in many circumstances, the federal government's authority to control immigration can be understood as derived from the foreign and interstate Commerce Clause.

Courts have made clear that the foreign Commerce Clause grants Congress a "plenary power"—but, unlike the immigration power rooted in foreign affairs and sovereignty, one subject to judicial review for constitutionality. The Supreme Court has never disavowed the foreign Commerce Clause as a source of the immigration power. It remains available to modern litigants and courts. Given the large number of immigrants in the United States labor market, their interstate mobility, and the more capacious standard for what constitutes "interstate commerce" today as opposed to a century ago, there are strong arguments that the interstate Commerce Clause is also available to undergird the federal government's immigration authority.

Some scholars would respond that a "dramatic new reading of the Constitution"<sup>282</sup> is not necessary to cure the constitutional outlier status of immigration law wrought by the plenary power doctrine. They would point out that

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<sup>281</sup> See discussion in Part I, *supra*, notes [52-66] and accompanying text. [Ed.s: the note to which I refer as 52 begins "*See, eg, Gabriel "Jack" Chin, Segregation's Last Stronghold...*"].

<sup>282</sup> ALEINIKOFF, *supra* note 54, at 159 ; *see also* Johnson, *supra* note 46; Martin, *supra* note 54.

in many, although not all, recent cases, the Supreme Court appears to be quietly moving away from immigration exceptionalism. The Court should be left in peace, they might say, to apply ordinary tools of statutory interpretation, administrative law, and—on rare occasions—constitutional review to laws about entry and removal, as it sees fit, without the upheaval that would attend overruling plenary power.

This Article asserts by contrast that plenary power must be explicitly rejected, not just pushed to the back of the shelf. Otherwise, it will remain ripe for revival when national anxiety about immigration runs high and the political branches take action against immigrants in ways that threaten core constitutional values. In its stead, the Commerce Clause offers a coherent source of the federal government's immigration authority that can undergird broader constitutional review of congressional and executive actions in the immigration arena.