INSTILLING FEAR AND REGULATING BEHAVIOR: IMMIGRATION LAW AS SOCIAL CONTROL

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> Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.[1]
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> As to [noncitizens seeking admission], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are* due process of law.[2]

Immigration law has been aptly described as offering a window into our national psyche. As evidenced in the recent presidential campaign, our national psyche is in a state of heightened anxiety, particularly with regards to immigrants. President Trump tapped into and stoked this fear with vows to build a wall at our southern border, bar Muslims from entering the country, and deport Mexicans dubbed "rapists and murders." From the initial days of the new Administration, it became clear that this fear of foreigners would play a central role in re-shaping immigration policy and in regulating the behavior of immigrants, and citizens, within the nation. For example, shortly after assuming office, the President issued an Executive Order barring all refugees from entering the United States for three months, indefinitely barring Syrian refugees, and prohibiting visas for nationals of seven Muslim-majority nations.[3] The President also signed Executive Orders to build a wall

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1. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

2. Ekiu v. United States, 142 U.S. 651 (1892) (emphasis added).

3. EXECUTIVE ORDER: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES, Exec. Order. No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states [hereinafter PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY]. After constitutional challenges in courts across the country and a nation-wide injunction issued by a federal district court and upheld by the Ninth Circuit, President Trump issued a revised Executive Order. *See* EXECUTIVE ORDER: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES (March 6, 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states, discussed *infra*. The revised Executive Order has been upheld in part by the United States Supreme Court. Trump v. Int'l Refugee Assistance Project, 582 U.S. __(2017),

at our Southern border, enhance interior enforcement efforts and dramatically increase detention and deportation directed at all unauthorized immigrants within the nation.[4] Even if the new administration cannot effectively build a wall to seal off our southern border or detain and deport upwards of nine million undocumented immigrants, the new climate of fear is already serving to control the immigrant population.[5]

In prior scholarship I have focused on the ways in which borders, traditionally perceived as the locus for immigration regulation, have shifted, simultaneously creeping inward and expanding outward. The inward seepage has even permeated the workplace, with employers essentially deputized to enforce immigration laws.[6] Unofficial and unauthorized regulation of the border is also carried out in cases where hospitals, using for-hire private transportation companies, deport uninsured immigrant patients.[7] Meanwhile, our external borders have pushed out into the sea and onto other nations, who reap benefits in exchange for deterring migrants and enforcing United States immigration regulation.[8] This fluidity of immigration regulation and its tendency to push deeply inward into domestic arenas while also reaching out beyond our territorial borders, merits a re-examination of the nature of immigration law beyond its traditionally-perceived role as an Executive and Congressional tool for advancing foreign policy and protecting national sovereignty. While much scholarly attention has been paid to critiquing the

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https://www.supremecourt.gov/opinions/16pdf/16-1436_l6hc.pdf (lifting the injunction against implementation of the travel ban but holding that it "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States").

4. *See* EXECUTIVE ORDER: BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements; EXECUTIVE ORDER: ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

5. For just one example of the way that this heightened climate of fear is influencing behavior in the immigrant population, see Michael L. Sulkowski, *Unauthorized Immigrant Students in the United States: The Current State of Affairs and the Role of Public Education*, 77 CHILD. AND YOUTH SERVS. REV. 62, 62-68 (2017) (noting that students from immigrant families are more likely to be victimized and to have less recourse for protection and linking this in part to "the polarizing political discourse that currently is targeting these youth for mass deportation, social ostracization, and even violence in some cases . . ."). On September 5, 2017, U.S. Attorney General Jeffrey Sessions announced the end of the Deferred Action for Childhood Arrivals (DACA) program as of March 5, 2018. *See Attorney General Delivers Remarks on DACA*, U.S. DEP'T OF JUSTICE (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca. This decision leaves approximately 800,000 young adults and children at risk of deportation as soon as March 6, 2018. While President Trump subsequently signaled a willingness to support a bipartisan effort to protect these children and young adults from deportation, the reality is that they, and their families and friends, now live in a state of uncertainty and fear.

6. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001).

7. Lori A. Nessel, *Disposable Workers: Applying a Human Rights Framework to Analyze Duties Owed to Seriously Injured or Ill Migrants*, 19 INDIANA J. GLOBAL L. STUD. 61 (2012); Lori A. Nessel, *The Practice of Medical Repatriation: The Privatization of Immigration Enforcement and Denial of Human Rights*, 55 WAYNE L. REV. 1725 (2009).

8. Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625 (2009).

plenary power doctrine and to analyzing the criminalization of immigration law, this article explores the interaction between the plenary power doctrine and the domestic use of immigration law to create a heightened state of fear for immigrants within the United States.

Immigration law has long been used to carry out functions which would be deemed unconstitutional if attempted through our criminal justice or civil laws. For example, immigration law was widely used in the wake of September 11th, 2001 to target and detain particular groups of individuals without the constitutional constraints that would otherwise apply. Noncitizens of particular races, religions, or national origin, were rounded up and detained for prolonged periods without criminal charges.[9] Such action did not even require new laws because immigration law has long allowed the Executive and Legislative branches to create and sustain laws that selectively discriminate against particular classes with minimal accountability.[10] In fact, one leading immigration scholar has dubbed this practice the "business as usual" standard.[11] It encompasses: an overreaching set of laws adopted by the Executive and/or Legislative branch during times of national insecurity; a tangible set of harms impacting particular foreign nationals as a consequence of these laws; blanket permission to the government to sustain such laws without any evidence of improved national security or stated benefits; and extreme deference by the courts to the "political branches" in recognition of the plenary power doctrine.[12]

The President's recent Executive Orders test the limits of the Executive power to exclude groups of persons based on nationality or religion in the name of national security.[13] As of this writing, federal district and appellate courts across the country have issued injunctions based on preliminary findings that the various incantations of the travel ban, in whole or in part, are unconstitutional and grounded in racial and religious animus.[14] In defense of its Executive Orders, the Administration continues to rely on the centuries old plenary power doctrine to argue for unfettered executive authority when

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9. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 J. OF CONST. L. 1084, 1085 (2004) (noting that in the aftermath of 9-11, federal authorities used immigration law to single out immigrants based on nationality or religion and to subject them to prolonged detention without access to counsel or family, sometimes without charges and often for prolonged periods, even after deportation proceedings were concluded).

10. *See, e.g.*, Kandamar v. Gonzales, 464 F.3d 65 (1st Cir. 2006) (rejecting immigrant's claim that the government's special registration requirements for nationals of particular countries violated his right to equal protection and due process).

11. Shoba Sivaprasad Wadhia, *Business As Usual: Immigration and the National security Exception*, 114 PENN ST. L. REV. 1485 (2010).

12. *Id.* at 1489.

13. *See, e.g.*, PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY, *supra* note 3.

14. *See, e.g.*, Trump v. Washington, Order No. 17-35105, D.C. No. 2:17-cv-00141 (9th Cir. Feb. 9, 2017), (temporarily restraining the entire Executive Order from enforcement nation-wide, upheld on appeal by the Ninth Circuit Court of Appeals), http://cdn.ca9.uscourts.gov/datastore/general/2017/02/27/17-35105%20-%20Motion%20Denied.pdf.

acting in the name of national security.[15] While a present day executive mandate to exclude broad classes of persons from entering the nation based solely on their nationality or religion presents an opportunity for the Supreme Court to re-examine the viability of the plenary power doctrine, the Administration continues to retract and re-issue its travel bans, to date evading the Supreme Court's constitutional scrutiny.[16] If the Supreme Court ultimately reaches the merits of the challenges to the Executive Orders, it will have the opportunity to decide whether a doctrine which allowed for discrimination based on racial and national origin in the name of regulating immigration (at a time when racial segregation was constitutionally permissible on the domestic front) is still valid today. In other words, has the evolution of constitutional norms and jurisprudence in the domestic context finally pierced through the immunity and exceptionalism that has shielded immigration law since Congress first enacted the Chinese Exclusion Act in 1882?[17]

Since 1892, pursuant to the Plenary Power Doctrine, the Supreme Court has held that the power to regulate immigration rests with the Executive and Legislative branches, with the Judicial branch having an extremely narrow role, if any.[18] Although the United States had largely open borders for its first one hundred years, followed by state regulation of immigration, by the late 1800's, the Supreme Court linked immigration regulation with national sovereignty, foreign affairs, and the ability to stand on equal footing with

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15. Trump v. Int'l Refugee Assistance Project, 582 U.S.__(2017).

16. For example, in Trump v. Int'l Refugee Assistance Project, 582 U.S.__(2017) the Supreme Court granted certiorari to decide the constitutionality of the Administration's revised Executive Order and lifted the Ninth Circuit Court of Appeal's injunction on the travel ban for those impacted who could not establish a bona fide relation to a U.S. person or entity. However, perhaps in an effort to avoid a ruling, which might signal the end of the plenary power doctrine, the Administration issued a third version of the travel ban on September 24, 2017. See EXECUTIVE ORDER BY PRESIDENT DONALD J. TRUMP PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES, Exec. Order No. 13780 (Mar. 6 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states. The third version of the travel ban indefinitely bars travel to the United States from nationals of seven countries. Notably, Sudan is no longer one of these countries and Chad, and North Korea have been added in addition to heightened security standards for particular visitors from Iraq and Venezuela. *Id*. The Supreme Court subsequently dismissed the Fourth and Ninth Circuit pending challenges and remanded them to the Circuit Courts. *See Int'l Refugee Assistance Project*, 583 U.S.__(16-1436) (Oct. 10, 2017) (finding that the provision of the Executive Order being challenged on appeal from the Fourth Circuit Court of Appeals had expired and no longer presented a live case or controversy) and *Int'l Refugee Assistance Project*, 583 U.S.__ (16-1540) (Oct. 24, 2017) (similarly dismissing and remanding the challenge from the Ninth Circuit Court of Appeals based on the provision at issue expiring). As of this writing there are new challenges to the third version of the Executive Order pending before the Fourth and Ninth Circuits.

17. Chinese Exclusion Act of 1882, H.R. 5804, 47th Cong. (suspending entry of Chinese immigrants for 10 years). The Supreme Court will also need to evaluate Congressional intent when it amended the Immigration and Nationality Act in 1965 to remove the provisions that authorized national origin-based discrimination in immigration law. *See* 1965 Amendments to the Immigration and Nationality Act (Hart-Cellar Act), H.R. 2580; Pub. L. 89-236; 79 Stat. 911, 89th Cong. (Oct. 3, 1965) (abolishing the national origins quota system).

18. *See* Ekiu v. United States, 142 U.S. 651, 659 (1892) (holding that "As to [persons facing exclusion], the decisions of executive or administrative officers, acting within powers expressly conferred by congress, *are* due process of law") (emphasis added); Chae Chan Ping v. United States, 130 U.S. 581, 589-90 (1889).

other free nations in the world.[19] In characterizing immigration law as foreign and essential to our safety and relations with other countries, the Court insulated it from the type of judicial review and constitutional norms that would otherwise apply to domestic actions by the government.[20]

However, immigration law has also played an equally significant but less visible role. In addition to regulating the terms for entry and removal, immigration law has served as a powerful form of domestic law, aimed at controlling and shaping the behavior of immigrants within the United States. The government has relied upon immigration law to advance its domestic policy agenda on fronts as varied as labor law, health care, crime control and national security. Indeed, the ever-present threat of deportation is itself an important immigration enforcement tool. The new Executive Order on Interior Enforcement casts aside the prior policy of prioritizing criminal noncitizens for removal in favor of an enforcement strategy aimed at all nine to eleven million unauthorized immigrants.[21]

While Congress would need to authorize dramatically enhanced resources to carry out this massive deportation effort, the Executive Order serves an immediate function by instilling fear in the undocumented population. By calling for heightened detention and deportation efforts to the full ability available under the law, the entire undocumented population is put on notice that family ties, or length of time in the United States, will no longer offer safety. Terrified immigrants are then more likely to forego asserting their rights or challenging lower court decisions, adding another layer of immunity to state and private regulation of immigration.[22]

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19. *See, e.g., Chae Chan Ping*, 130 U.S at 609 ("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"); *Ekiu*, 142 U.S. at 659 ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe . . . In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government . . .") (internal citations omitted).

20. *See, e.g.,* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L. J. (2001); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,* 100 YALE L. J. 545 (1990); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 255 SUP. CT. REV. 1984 (1984).

21. EXECUTIVE ORDER: ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES, *supra* note 4 (directing federal agencies to employ "all lawful means" to carry out federal immigration laws against "all removable aliens," as compared with prioritizing certain categories of removable individuals).

22. Scholars have long-noted the chilling effect of immigration enforcement on immigrants' ability to pursue statutory rights. For example, see Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003), noting that ". . . millions of undocumented persons are working long hours for illegally low pay, in workplaces that violate health and safety codes, for employers who defy labor and antidiscrimination laws. Many more fall victim to criminal activity, forced into involuntary servitude and subjected to physical abuse. Yet these immigrants often do not

This article begins with a historical perspective, exploring the connection between the Supreme Court's deference to the legislative and executive branches when regulating immigration and the myriad laws, policies, and enforcement strategies that are implemented and carried out in such a way as to (not unintentionally) instill fear in the immigrant community. This combination of constitutional immunity and fear of detection have given rise to a largely compliant workforce and population that demands little in return for the labor provided. Rather than examining this result as an unwanted or unintended consequence of enforcement measures, or even an effort to encourage self-deportation, I argue that one goal of immigration regulation within the U.S. has always been to instill fear and control immigrant behavior as a means of creating an obedient workforce and community. By shedding greater light on the domestic aspect of immigration regulation, this article complements existing scholarship advocating for greater judicial scrutiny and constitutional protections for immigrants.[23]

Part One of this article provides a brief historical overview beginning with the nation's initial period of open immigration. By chronicling the growing anti-Chinese sentiment, like the anti-Muslim sentiment fostered by President Trump, this section shows how race-based animus and fear of the other led to the development of the plenary power doctrine, and the shielding of immigration law from constitutional norms. Part Two examines the Industrial Revolution and its impact on creating a compliant immigrant workforce. Part Three analyzes the way in which immigration law serves to regulate immigrant behavior within the nation. Part Four argues for greater constitutional scrutiny in immigration cases. Finally, Part Five scrutinizes the vast web of agencies which engage in de facto immigration enforcement, and its impact on immigrants.

I. FROM CONSTITUTIONAL SILENCE AND OPEN IMMIGRATION TO PLENARY POWER AND INSULATION FROM CONSTITUTIONAL NORMS

The United States Constitution is silent when it comes to regulating immigration. Our founding fathers clearly gave Congress the power to regulate naturalization,[24] but setting forth the terms and conditions by which one can become a citizen of the United States is distinct from the power to determine the terms by which one can enter into, and be removed from, the country. They also explicitly delineated Congressional power to declare war,[25]

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report their harsh conditions and cruel treatment for fear that they will attract the attention of immigration officials and be deported."

23. As discussed *infra*, the view of immigration law as political and part of foreign relations and essential for sovereignty has resulted in the plenary power doctrine that has served to insulate immigration law from constitutional norms and judicial scrutiny.

24. *See* U.S. CONST. art. I, § 8, cl. 4. (Naturalization Clause).

25. U.S. CONST. art. I, § 8, cl. 11. (War Power Clause).

to regulate inter-state commerce,[26] and to prohibit migration or importation (presumably of slaves).[27] But there is no reference anywhere in the Constitution to the power to regulate immigration. For nearly a hundred years, throughout the eighteenth and early nineteenth centuries, immigrants entered the United States with minimal federal restrictions.[28] Indeed, immigrant labor was greatly needed during this period, which included the construction of the transcontinental railroad. In 1864, Congress passed legislation aimed at encouraging immigration.[29]

In extoling the virtues of the Chinese as laborers, the President of the Central Pacific Railroad Company explained to the President of the United States, "[a]s a class they are quiet, peaceable, patient, industrious and economical—ready and apt to learn all the different kinds of work required in railroad building, they soon become as efficient as white laborers. More prudent and economical, they are contented with less wages."[30] However, this initial welcome quickly gave way to simmering anti-Chinese sentiment, which boiled over once the railroad was completed and the Chinese labor was no longer deemed necessary. The nativist movement labelled the Chinese as a threat to American culture. Simultaneously, the labor movement depicted the Chinese as a threat to American jobs.

By the 1870s, certain states and municipalities with large Chinese populations began enacting laws aimed at making life unbearable for Chinese immigrants. For example, in San Francisco, the Cubic Air Law of 1870 required lodging houses to provide at least 500 cubic feet of open space for each adult occupant.[31] While not discriminatory on its face, it was only enforced in Chinese neighborhoods.[32] In those neighborhoods, police raided homes in the middle of the night and arrested Chinese residents.[33] Similarly, the 1870 "sidewalk ordinance" criminalized the act of walking through the city carrying a pole with baskets over one's shoulder (an act that only the Chinese engaged in).[34]

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26. U.S. CONST. art. I, § 8, cl. 3. (Commerce Clause).

27. U.S. CONST. art. I, § 9, cl. 1. (Migration or Importation Clause).

28. However, the Alien Act of 1798, part of the Alien and Sedition Laws, authorized the President to expel any alien he deemed to be dangerous. This law expired after two years and was not extended. Regulation of trans-border movement of persons existed largely at the state level. *See* Gerald Neuman, *The Lost Century of American Immigration Law* (1776-1875), 93 COLUM. L. REV. 1833 (1993) (characterizing the notion of open immigration during this period as a myth).

29. Immigration Act of 1864 (Act to Encourage Immigration), ch. 246, 13 Stat. 385. Designed to increase the flow of immigrant laborers to the US to ameliorate the disruptions of the Civil War, the Act provided for the appointment of a commissioner on immigration and immigrant labor contracts with funded transportation to the U.S. *See id.*

30. Central Pacific Railroad Statement Made to the President of the United States, and Secretary of the Interior, on the Progress of the Work at H.S. Crocker & Co., Printers, 92 J Street, Sacramento (Oct. 10, 1865).

31. IRIS CHANG, THE CHINESE IN AMERICA 119 (2003).

32. *Id.*

33. *Id.*

34. *Id.* at 120.

Ultimately, economic fears and nativism led Congress to enact the Chinese Exclusion Act in 1882.[35] The Act provided for an absolute ten-year moratorium on Chinese immigration to the United States. It was subsequently extended and expanded so that it remained in effect until 1943 and barred not just new Chinese immigrants from entering the United States, but also prohibited Chinese immigrants already within the country from naturalizing.[36] Chinese immigrants already within the country were also required to register and obtain a certificate of residence.[37] Any Chinese immigrant found without the certificate would face immediate deportation unless a white witness could testify on their behalf.[38]

Amidst this backdrop of domestic xenophobia directed at the Chinese, the United States Supreme Court first addressed the power to regulate immigration in the infamous case of *Chae Chan Ping v. United States*, known as the *Chinese Exclusion* Case.[39] At issue was the Chinese Exclusion Act, which at that time prohibited new Chinese immigration but allowed for Chinese laborers who were already in the U.S. to leave and return with advance permission.[40] The petitioner, Mr. Ping, obtained permission to leave and re-enter the U.S., but while he was on his voyage back to the U.S., Congress amended the Chinese Exclusion Act to revoke the provision which allowed for Chinese immigrants like Mr. Ping to re-enter the United States.[41] Notwithstanding the certificate of reentry that Mr. Ping had lawfully obtained, he was denied admission to the U.S. under the amended law.[42]

In holding that Congress had broad and largely unreviewable power to regulate immigration, Justice Field relied upon notions of sovereignty, political question, foreign policy, and cohesion as one nation.[43] Because the law in question was significant and implicated foreign affairs, the Court held that Congressional, and to a lesser extent Executive power, were plenary and

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35. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943). Prior to the Chinese Exclusion Act, the only federal legislation to limit immigration was the Page Law of 1875 (March 3, 1875) (excluding convicts and prostitutes) and an 1882 act to impose a head tax of 50 cents and expand the immigrant exclusion grounds to include idiots, lunatics, and persons likely to become a public charge. Immigration Act of 1882, ch. 376, 22 Stat. 214.

36. Geary Act, Ch. 60, 27 Stat. 25 (1892); *see* Magnuson Act, Ch. 344, 57 Stat. 600 (1943) (repealing the Chinese Exclusion Acts).

37. *Id.*

38. *Id.*

39. *See Chae Chan Ping*, 130 U.S. at 589.

40. Geary Act, Ch. 60, 27 Stat. 25 (1892).

41. *Chae Chan Ping*, 130 U.S at 582 (1889).

42. *Id.*

43. *Id.* at 604 ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source") (quoting Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)).

largely unreviewable in immigration matters.[44]

In subsequent cases, the Court extended this plenary power to immigrants within the nation as well, holding that traditional constitutional norms do not apply when immigration regulation is at issue.[45] Pursuant to the plenary power doctrine, the Court has held that deportation proceedings, even if conducted in a language which the immigrant does not speak, constitute "due process" of law.[46] Similarly the Court has upheld a rule requiring that any Chinese laborers found within the United States without required documentation could defend themselves against deportation only by producing a white witness.[47] Indeed, for constitutional purposes, the plenary power doctrine has meant that federal immigration regulation has merely been subjected to a rational basis review standard and that acts which would clearly be unconstitutional in any other area of law, are permissible in the context of regulating immigration.[48]

The Contract Labor Laws of 1885[49] and 1887,[50] and then the 1891 Immigration Act signified the first time Congress created grounds for federal deportation, rather than exclusion, enabling the federal government to deport anyone found within one year who had entered the country in violation of the immigration law.[51] By 1903, the Act extended the time to three years, but the provision was still limited to exclusion grounds existing at the time of entry.[52] From this foundation, immigration law then evolved, with almost no

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44. *Id.* at 603-04 (stating "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power").

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

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

47. *Fong Yue Ting*, 149 U.S. at 698.

48. Fiallo v. Bell, 430 U.S. 787 (1977) (applying a rational review standard notwithstanding issues of both gender and legitimacy and holding that Congress could prefer for immigrant benefit classification unwed mothers over unwed fathers, and that such a distinction was a political question that should be left in the hands of Congress, not the judiciary); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (upholding as constitutional the exclusion and lack of a hearing for a returning long-time lawful permanent resident being held at Ellis Island); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (holding that the exclusion of a spouse of a United States citizen without a hearing, based on secret evidence, satisfied due process requirements under the Constitution); *Fong Yue Ting*, 149 U.S. at 763 (upholding the constitutionality of a white witness rule for Chinese laborers found in the United States without the required certificate of residence); *Ekiu*, 142 U.S. at 651 (finding that due process requirements were met when a noncitizen seeking entry was given a hearing in a language she could not apprehend); *Chae Chan Ping*, 130 U.S. at 581.

49. 1885 Contract Labor Law, Sess. II Chap. 164; 23 Stat. 332 (Feb. 26, 1885) (prohibiting American individuals or organizations from engaging in labor contracts with individuals prior to their immigrating to the United States and forbidding ship captains from transporting immigrants with existing labor contracts to the U.S. Significantly, the Contract Labor Law also granted the Secretary of the Treasury the power to deport any immigrants found in the United States in violation of the law).

50. 1887 Contract Labor Law, 1887. Pub. L. 24, 414 Stat. (Feb. 7, 1887) (empowering the Secretary of the Treasury to enforce the 1885 Contract Labor Law).

51. Other than the Chinese Exclusion Act. 1891 Immigration Act, Sess. II Chap. 551; 26 Stat. 1084. 51st Cong. (Mar. 3, 1891*; see also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).

52. 1903 Immigration Act, Sess. II Chap. 1012; 32 Stat. 1213. 57th Congress; March 3, 1903.

judicial analysis, from a regime initially focused solely on deportation as a remedy for those who were found in the country after entering in violation of the law, to one which increasingly utilizes deportation as a mechanism for domestic social control.[53] This evolution occurred within the context of "highly charged ideological and criminal deportations."[54]

The plenary power doctrine has been widely criticized by scholars over the years, and fissures have emerged over time.[55] Lawyers have also had some success casting constitutional challenges as procedural, rather than substantive due process challenges.[56] However, the plenary power doctrine has remained in place and has continued to insulate immigration regulation from appropriate constitutional standards and norms.[57]

Characterizing immigration law as foreign policy and linking it with national security, sovereignty, and political questions has pulled it into a shroud of secrecy, an area that exists apart from constitutional standards. From this constitutional-free zone, immigration law has largely been used for domestic purposes. From the perspective of regulating immigrants within the United States, immigration laws serve to maintain a compliant workforce and instill fear and vulnerability. Immigration law also allows the government to pursue criminal and national security goals in ways that might otherwise be foreclosed by the Constitution.

II. THE INDUSTRIAL REVOLUTION AND IMMIGRATION LAW'S ROLE IN CREATING A DOCILE WORKFORCE

Although immigration law has a foreign policy component, it has been overemphasized by the Court and has unnecessarily insulated what are

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53. KANSTROOM, *supra* note 51 at 125.

54. *Id.*

55. *See e.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (Princeton Univ. Press 1996) (highlighting the role that states played in controlling immigration throughout the nineteenth century); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992) (arguing that the courts' willingness to decide constitutional claims sounding in procedural due process signifies an important exception to the plenary doctrine); Legomsky, *supra* note 20 (first introducing the terms 'plenary power doctrine' and critiquing seven policy rationales that have been offered by the Court over the years, including the characterization of immigration law as inherently foreign policy); Motomura, *supra* note 20 (concluding that, "[t]he constitutional norms that courts use when they directly decide constitutional issues in immigration cases are not the same constitutional norms that inform interpretation of immigration statutes. To serve the latter function, many courts have relied on [. . .]"phantom constitutional norms,' which are not indigenous to immigration law but come from mainstream public law instead. The result has been to undermine the plenary power doctrine through statutory interpretation.").

56. *See, e.g.,* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRANTS AND CITIZENSHIP IN THE UNITED STATES (Oxford 2006).

57. In fact, during the presidential campaign, prominent immigration law scholars opined that the plenary power doctrine might enable the Supreme Court to uphold President Trump's proposed ban on Muslim immigrants, particularly if Congress enacted such a law. *See, e.g.,* Roque Planas, *U.S. Immigration Law is Racist Enough to Allow Trump's Muslim Visitor Ban*, HUFFINGTON POST (Dec. 8, 2015), http://www.huffingtonpost.com/entry/donald-trump-immigration-law-muslim-visitor-ban_us_5666ec0ce4b072e9d1c77979 (citing Stephen Legomsky and Natsu Taylor Seito).

largely domestic laws from judicial review. From its inception, federal immigration law was motivated in large part by nativist concerns and fear that immigrant laborers would be better suited to industrial work than "native" citizens.[58] In the late nineteenth century, the federal government assumed the role of health screening at the border. Until that time, the states had performed this function. Starting in 1891, the federal government set forth exclusion grounds for immigrants with communicable diseases. The health-based exclusion grounds were aimed at those who were deemed socially undesirable. Even as far back as the late 1800s, the immigrant medical exam at Ellis Island and other ports of entry was intended to control and shape behavior and create a docile workforce, rather than exclude immigrants.[59] As Amy Fairchild explains, "[f]irst and foremost . . . the immigrant medical inspection became an important part of a subtle yet pervasive nationwide endeavor to discipline this labor force."[60] The inspections were done publicly in order to instill fear.[61] Pointing to the reality that, between 1891 and 1930, the federal government excluded only half a million immigrants on health-related grounds while inspecting all 25 million entering immigrants, Fairchild concludes that,

> these immigrants represented the nation's industrial workforce, and it was imperative that they work efficiently, obediently, unflaggingly. The assembly line of flesh and bone developed to defend the nation from diseased immigrants served as the inaugural event in the life of the new working class—one that would impress upon each immigrant the national hierarchy and his or her low place in it. Only when groups of immigrants failed to conform to societal expectations about the fit industrial worker did the immigrant medical exam serve to exclude those groups at the nation's borders.[62]

As it became clear that there was a need for an immigrant industrial workforce, a system of federal deportation laws evolved to keep out those who were unable to work, such as the insane, paupers, and unhealthy immigrants.[63] The fear of "inferior races" which were simultaneously perceived as being better-suited for industrial work and capable of outbreeding the Anglo-Saxon race, provided the impetus for exclusionary immigration

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58. Indeed, when Congress first established the United States Border Patrol Agency, it was housed within the Department of Labor. This remained the case from 1924 until 1940. GOVERNING IMMIGRATION THROUGH CRIME: A READER 43 (Julie A. Dowling & Jonathan Xavier Inda, eds., 2013).

59. *See* AMY FAIRCHILD, SCIENCE AT THE BORDERS: IMMIGRANT MEDICAL INSPECTION AND THE SHAPING OF THE MODERN INDUSTRIAL LABOR FORCE (2003).

60. *Id.* at 7.

61. *Id.*

62. *Id.*

63. KANSTROOM, *supra* note 51, at 132.

laws.[64] In order to counter the fear of immigrants outworking and outnumbering "native" workers, prominent scholars and politicians called for isolation and eugenics.[65] While recognizing that open immigration would be best from an economic standpoint, the benefits of immigrant workers were deemed to be outweighed by "race and eugenics."[66]

This is borne out by documented instances of hardworking immigrants with capital, valuable skills, and strong family ties in the United States, who were nevertheless excluded because of their appearance or perceived disability. The medical inspectors internalized societal discrimination against persons with disabilities, using the ground of "poor physical physique" to exclude those who were unable to perform hard labor as well as those who were able to do so but might face discrimination in hiring by employers because of their appearance.[67] Immigration officers at Ellis Island linked an unappealing physical appearance with the possibility of employment discrimination and therefore poverty in order to ground such exclusions on economic grounds.[68] The language of the inspectors was revealing, justifying exclusions based on physical appearance on the belief that the immigrant in question, as supported by an attached photograph, would not be "a desirable acquisition."[69]

Immigrants who were viewed as "defective" were seen as a threat to the nation, through a combined lens of economics, racism, and eugenics.[70] As explained by the Commissioner General of Immigration in 1907, "[t]he exclusion from this country of the morally, mentally, and physically deficient is the principal object to be accomplished by the immigration laws."[71] Two years earlier, the Commissioner explained in a memorandum that an immigrant who is "undersized, poorly developed [and] physically degenerate . . . [is] not only unlikely to become a desirable citizen, but also very likely to transmit his undesirable qualities to his offspring should he, unfortunately for the country where he is domiciled, have any."[72]

While the plenary power doctrine is premised on the belief that the nation must speak with one voice on immigration matters and that the political and foreign policy implications of immigration regulation are inappropriate for

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64. David Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 L. & CONTEMP. PROBLEMS 177, 183 (2009) (noting that two important tools for exclusion were immigration laws and statutory minimum wages).

65. *Id.*

66. *Id.*

67. *See, e.g.*, Douglas C. Baynton, *Defectives in the Land: Disability and American Immigration Policy*, *1882-1924*, 24 J. AM. ETHNIC HIST. 31, 35 (2005).

68. *Id.* at 38.

69. *Id.* at 39.

70. *Id.* at 32 (clarifying that the desire to keep out "defective" immigrants was linked to state movements to segregate disabled people into institutions and sterilize the "unfit" and "degenerate" pursuant to state eugenics laws).

71. *Id.* at 34 (internal citations omitted).

72. *Id.* at 35 (internal citations omitted).

judicial intervention, state and private actors nevertheless have always played a significant role in de facto immigration regulation, thereby exerting an additional layer of social control on immigrant behavior.

For example, as early as 1904, the New York State Hospital Commission in Lunacy represented state mental institutions and was responsible for "detecting and deporting the alien insane."[73] Three alienists from New York's Lunacy Commission were present during the Ellis Island medical inspections to alert the medical examiners if they believed any immigrant who might have been excludable based on mental health had slipped by during the medical exam.[74] The State Board of Alienists deported or repatriated 5,471 "alien insane" from 1905–1912.[75]

The notion of using immigration law and the threat of deportation to permeate all social and public spheres to create fear and cause immigrants to leave the country has been advocated since the early 1900s.[76] Indeed, in 1931 alone, approximately 75,000 Mexican immigrants and U.S. citizen children were repatriated as a result of anti-immigrant scare tactics.[77]

Fear of crime has also been a driving force sparking radical changes in immigration law, even when there is an absence of empirical evidence to substantiate that crime has risen. This manipulation of the immigration law based on alleged criminal conduct dates back to the early twentieth century when more than fifty major crime surveys were undertaken as part of a fact-gathering mission to garner public support for new post-entry deportation laws.[78]

One of the reasons that there were originally calls for the federal government to take over responsibility for deportations was because of the vigilante deportations occurring in the early 1900s. Angry "native Americans" took it upon themselves to run undesirable workers out of town.[79] Hundreds of deportees brought civil suits against the vigilantes, the railroad companies, and the copper companies. However, not one case was ever tried, though some settlements were reached. Eventually, one County Attorney charged 210 people with kidnapping. The defense successfully argued a "necessity defense" based on the alleged rights of a community to defend itself against

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73. Report on the Alien Insane in the Civil Hospitals of New York State (Albany 1914) (on file with author).

74. *Id.* at 66.

75. *Id.* at 10.

76. *See e.g.* Abraham Hoffman, *Stimulus to Repatriation: The 1931 Federal Deportation Drive and the Los Angeles Mexican Community*, 42 PAC. HIST. REV. 205, 208 (1973) ("It was not [the Los Angeles official's] intent to press the Bureau of Immigration into actually conducting an indefinite number of deportation hearings, but rather to establish an environment hostile enough to alarm aliens") (recounting the effort to scare off undocumented immigrants from Los Angeles in order to free up jobs for American workers in the 1930s).

77. *Id.* at 219.

78. KANSTROOM, *supra* note 51, at 133.

79. *Id.* at 144.

"overwhelming peril."[80]

Economic fears similarly animate immigration policy and have led to massive repatriations. During the Great Depression, the repatriation of over one million Mexican immigrants and US citizens of Mexican descent was carried out through increased federal enforcement and a combination of state and local practices designed to force Mexicans out.[81] This was characterized by one historian as a national "scare" campaign. Then Secretary of Labor William Doak "encouraged local immigration officers, law enforcement agencies, and repatriation-sympathetic newspapers to join forces to publicize deportation raids, frightening many Mexicans into self-deportation."[82]

III. MODERN IMMIGRATION LAW AS REGULATION OF BEHAVIOR WITHIN THE NATION

Alongside the use of immigration law to exclude groups of immigrants who were seen as threatening to the economy and culture, immigration law has increasingly been used domestically to control and shape the behavior of immigrants living within the United States. Mitt Romney is often associated with coining the oxymoronic term "self-deportation."[83] During his 2012 presidential campaign, he proposed making conditions so difficult for undocumented immigrants that they would choose to "self-deport." But while Mitt Romney may have popularized the term "self-deportation," the idea of making life in America so difficult for immigrants that they will give up and choose to leave has been part of the bedrock of our immigration regime.

At the state level, for example, the Alabama Taxpayer and Citizen Protection Act of 2011 (HB56) requires law enforcement to attempt to determine the immigration status of a person involved in a lawful stop; allows state residents to sue state and local agencies for noncompliance with immigration enforcement; requires an employment eligibility verification system; prohibits the harboring or transporting of unauthorized aliens; makes failure to carry an alien registration document a violation; criminalizes the act of seeking a driver's license or employment while undocumented; voids any contract entered into by an undocumented party (including contracts regarding child support, leases, or employment); and requires public schools to verify students' immigration status.[84] The legislation was aptly character-

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80. *Id.* at 145.

81. Kevin R. Johnson, *The Forgotten "Reparation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1, 6 (2005) (describing the acts of state and local government agents in "repatriating" Mexican immigrants and their American citizen family members, with the support of the federal government, as "ethnic cleansing").

82. KANSTROOM, *supra* note 51 at 218.

83. *See e.g.*, Lucy Madison, *Romney on Immigration: I'm for Self-Deportation*, CBS NEWS (Jan. 24, 2012), https://www.cbsnews.com/news/romney-on-immigration-im-for-self-deportation/.

84. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Sec. 32-6-9 am'd. (2011-21101) (although the provision requiring schools to verify students' immigration status was subsequently enjoined by a District Court).

ized as "the most stringent and extreme in the developed world" and resulted in a mass exodus of immigrants from Alabama, with those who remained "left in a state of fear and anxiety."[85] Similar state bills which undermined opportunities and made life increasingly difficult for undocumented immigrants were passed in Arizona, Georgia, Indiana, South Carolina, and Utah.[86]

This notion of "self-deportation" or "attrition through enforcement" took on new meaning during the 2016 Presidential election campaign. At the start of the Presidential campaign season, then-presidential-candidate Trump tapped into the climate of fear and gained traction by promising to deport *all* the undocumented immigrants in America.[87] However, once it became clear how much this would cost, the plan morphed into one aimed at deporting two to three million criminal aliens.[88] As of this writing, the plan seems to have circled back to rounding up and deporting all of the undocumented immigrants in the United States.[89] For those immigrants without legal status or criminal records, the uncertainty and fear generated is intended to result in self-deportation. In the wake of the election, Kris Kobach explained on Fox News that, "[t]he jobs are going to dry up, the welfare benefits are going to dry up, and a lot of people who may not be criminal aliens may decide, hey, it's getting hard to disobey federal law, and may leave on their own."[90]

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85. *See, e.g.,* Voto Latino, *The Impact of Alabama's Extreme HB56 Law*, HUFFINGTON POST (Jan. 4, 2012), http://www.huffingtonpost.com/voto-latino/the-impact-of-alabamas-ex_b_1074113.html (reporting that thousands of immigrants fled from their houses, jobs and schools in Alabama after passage of HB56). Alabama subsequently re-visited this legislation and enacted an amended law in 2012 (blunting some of the harshest provisions). *See* HB 658 (2012).

86. *See, e.g*., SB 1070/HB 2162 (Arizona) (2010) (three provisions of the law were held to be preempted by the United States Supreme Court in 2012).

87. *See e.g*. Tom Lo Bianco, *Donald Trump promises 'deportation force' to remove 11 million*, CNN (Nov.12, 2015), http://www.cnn.com/2015/11/11/politics/donald-trump-deportation-force-debate-immigration/ (Donald Trump promised a deportation force to round up and deport 11 million undocumented immigrants).

88. Katie Reilly, *Donald Trump Plans to Deport Up to 3 Million Immigrants*, TIME (Nov. 13, 2016) (quoting Donald Trump as saying, "[w]hat we are going to do is get the people that are criminal and have criminal records, gang members, drug dealers, we have a lot of these people—probably two million, it could be even three million—we are getting them out of our country or we are going to incarcerate . . . But we're getting them out of our country. They're here illegally"). Although there are not 2-3 million criminal immigrants in the United States, in many ways President-elect Trump's new stated focus on removing criminal immigrants sounds quite similar to immigration enforcement priorities under President Obama. The Obama Administration removed a total of 3,094,208 persons as compared with 2,012,539 during the Clinton Administration and 869,646 during the Bush Administration. *See* Muzaffar Chishti, Sarah Pierce, & Jessica Bolter, Migration Policy Institute, *The Obama Record on Deportations; Deporter in Chief or Not?*, MIGRATION POL'Y (Jan. 26, 2017), http://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not (noting that "[t]he Obama-era policies represented the culmination of a gradual but consistent effort to narrow its enforcement focus to two key groups: The deportation of criminals and recent unauthorized border crossers.")

89. *See* PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY, *supra* note 16.

90. Wayne A. Cornelius, *Why Immigrants Won't Self-Deport*, LA TIMES (Nov. 30, 2016) (quoting Kris Kobach on Fox News).

Certainly, current immigration enforcement policies have the effect of unsettling Latino immigrant communities in the United States.[91] But this is not an unintended consequence of our immigration laws.[92] Undermining undocumented immigrants' (particularly Latinos) ability to participate meaningfully in everyday life is intended to isolate and disenfranchise this population from society.[93] Laws and regulations which deny access to employment, housing, affordable health insurance, higher education, and financial aid prevent undocumented immigrants from being able to embed themselves in our society, so as to persuade a large number of them to give up and self-deport.[94] Current immigration policing practices further serve to dehumanize immigrants, undermine workers' rights, tear families apart, and weaken immigrants' sense of dignity and peace of mind.[95] While it is true that the skyrocketing number of deportations carried out in recent years have separated families, the ever-expanding grounds of deportability instill fear and control the behavior of all immigrants (documented and undocumented) within the United States.[96]

Indeed, prominent immigration scholars have distinguished between deportation grounds that are based on conditions which existed at the time of entry, and those which are based on post-entry conduct. For example, Professor Daniel Kanstroom has forcefully argued that deportation grounds based on post-entry conduct, in comparison with those grounds based on immigration issues that existed at the time of admission, must be viewed as social control grounds.[97] And Hiroshi Motomura argues that the U.S. should have considerable discretion in deciding who can enter the country, but once that determination is made, it should consider those who are selected to be citizens-in-waiting, and treat them the same way citizens are treated.[98] Adam Cox has argued that the long-standing distinction between laws governing immigrant selection on the one hand and immigration regulation within the nation on the other is actually a false dichotomy, as all selection laws also impact behavior among immigrants within the country.[99]

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91. GOVERNING IMMIGRATION THROUGH CRIME, *supra* note 58, at 22 (noting that "[a]ltogether, there is no doubt that the effect of current immigration policing practices has generally been to unsettle immigrant communities in the United States, Latinos in particular").

92. *See, e.g.*, Matthew Coleman & Austin Kocher, *Detention, Deportation, Devolution and Immigrant Incapacitation in the US, post 9/11*, 177 GEOGRAPHICAL J., 228, 229 (2011) (asserting that "the active disenfranchisement of undocumented immigrant communities in the US interior—a form of legal, political, and economic apartheid—has always been a strategic element of US immigration enforcement.") (internal citations omitted).

93. GOVERNING IMMIGRATION THROUGH CRIME, *supra* note 58, at 23.

94. *Id.* (citing Mark Krikorian, Center for Immigration Reform).

95. *Id.*

96. As scholars have noted, "[i]t is deportability, and not deportation per se, that has historically rendered Mexican labor as a distinctly disposable commodity." *Id.* at 54.

97. DANIEL KANSTROOM, DEPORTATION NATION (Harvard Univ. Press ed., 2007).

98. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 201-04 (1953).

99. Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341 (2008).

Immigration enforcement agencies are in large part aimed at creating this sense of fear and vulnerability amongst immigrants within the nation. By criminalizing immigrants, the law transforms hard working immigrant laborers into criminals.[100] For the undocumented immigrant population, their "illegality" is experienced through an ever-present sense of deportability and the omnipresent threat of being removed from the country. The criminalization of immigration law and legal production of "illegality" provides a structural mechanism for sustaining immigrants' sense of vulnerability as workers. An immigrant workforce which is branded as illegal and subject to deportation at any time, is one easily exploited. [101]

IV. REVISITING THE EXECUTIVE'S POWER TO DISCRIMINATE IN THE NAME OF NATIONAL SECURITY 135 YEARS AFTER THE CHINESE EXCLUSION CASE

Fong Yue Ting is the clearest example of a case which might well have turned out differently if the Court applied greater constitutional scrutiny. As discussed *supra*, the Court upheld as constitutional a provision of the Chinese Exclusion Act that provided that any Chinese laborer found within the United States without a certificate of residency would be deported unless he could procure the testimony of a White witness.[102] The plenary power doctrine armed the Court with the shield of rational review. The Court held that Congress might have required the testimony of a white witness because of its experience with Chinese witnesses and "the suspicious nature, in many instances, of the testimony offered . . . arising from the loose notions entertained by the witness of the obligation of an oath."[103] The Court also analogized the white witness rule with the requirement that immigrants seeking to naturalize must provide testimony from a United States citizen.[104] Although it is questionable whether the Court's proffered justifications were sufficient to sustain even a rational review standard, it is hard to imagine that the "white witness rule" could have withstood strict scrutiny as a race-based classification.

Undoubtedly, *Fong Yue Ting* must be understood within the broader context of then-existing constitutional jurisprudence. At the time it was decided in 1893, the Court had yet to extend Equal Protection Fourteenth Amendment principles to the federal government through the Fifth Amend-

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100. Jamie Longazel, *Subordinating Myth: Latino/a Immigration, Crime, and Exclusion,* 7 SOC. COMPASS 87–96 (2013), http://www.academia.edu/2568293/Subordinating_Myth_Latino_a_Immigration_Crime_and_Exclusion.

101. *See* Kitty Calavita, IMMIGRANTS AT THE MARGINS: LAW, RACE, AND EXCLUSION IN SOUTHERN EUROPE 74 (Cambridge Univ. Press ed., 2005) (noting, "employers welcome the vulnerability of immigrants who 'work scared and hard,' whose utility is precisely their marginality, and whose exclusion is effectively their passport").

102. *See* note 47 and accompanying text.

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

104. *Id.*

ment Due Process Clause.[105] The same Court that found the use of a race-based classification in *Fong Yue Ting* permissible also upheld race-based segregation in public facilities three years later.[106]

Once established in the *Chinese Exclusion* and *Fong Yue Ting* cases, the plenary power doctrine was similarly relied upon by the Court to discriminate against and control Native American Indian nations and external colonies such as Guam and Puerto Rico.[107] As noted by scholar Natsu Taylor Saito, "[w]hat all these groups have in common is that while they are subject to U.S. jurisdiction, they are simultaneously regarded as 'Other' - outsiders by virtue of race, ethnicity, national origin, citizenship, or some combination thereof."[108]

Although the Court's jurisprudence on constitutional norms has evolved dramatically over the past one hundred thirty-five years, it has not eclipsed the plenary power doctrine, resulting in immigration exceptionalism when it comes to constitutional protections. In its landmark decision in *Brown v. Board of Education,* the Supreme Court ruled that racial segregation in education violated the constitutional guarantee of equal protection.[109] The Court's ruling opened the door to striking down race-based discrimination in a variety of venues including employment, public benefits, voting, criminal justice, jury selection, marriage, and the family.[110] But notwithstanding the evolution of the equal protection doctrine and the civil rights movement, immigration law has historically remained apart, locked into an archaic view of limited constitutional protections. Over the years, in decisions issued by various federal circuit courts of appeal, judges have suggested that racial classifications in the context of regulating immigration are "lawful per se."[111]

Even in the handful of cases where the Court has struck down immigration regulations, plenary power has hovered ominously in the background, waiting to provide cover if the political climate or make-up of the Court

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105. *See* Gabriel Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998)

106. Plessy v. Ferguson, 163 U.S. 537 (1896). This case was not overturned until the Court decided *Brown v. Board of Education* in 1954.

107. *See e.g.* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding that, "Congress has always exercised plenary authority over the tribal relations of the Indians and the power has always been deemed a political one not subject to be controlled by the courts"); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for Ongoing Abuses of Human Rights*, 10 ASIAN L.J. 13, 25 (2003)

108. *Id.*

109. Brown v. Board of Education, 347 U.S. 483 (1954)

110. Chin, *supra* note 105 at 34 (1998).

111. Chin, *supra* note 105 at 4. The case cites to modern-day cases from circuits across the nation upholding racial discrimination such as: Unification Church v. INS, 547 F. Supp. 623, 628 (D.D.C. 1982) (assuming that Congress could authorize racial discrimination in immigration); Pierre v. United States, 547 F.2d 1281, 1290 (5th Cir. 1977) ("[A]liens may be denied entrance on grounds [of] race . . . ."), vacated on other grounds, 434 U.S. 962 (1977); Fiallo v. Levi, 406 F. Supp. 162, 165 (E.D.N.Y. 1975) (three-judge court) (stating that an alien may be denied entry on the basis of race), *affd sub nom.* Fiallo v. Bell, 430 U.S. 787 (1977).

shifts.[112] In *Zadvydas v. Davis*,[113] the Court was faced with a constitutional challenge to a statutory provision that authorized detention for particular classes of noncitizens beyond the normal ninety-day period after issuance of a final order of deportation.[114] The immigration agency interpreted the statute to allow for *indefinite* detention of noncitizens with final deportation orders whose native countries did not have repatriation agreements with the United States. Thousands of noncitizens hailing from Cuba, Vietnam, Cambodia and Laos with final deportation orders were referred to by the immigration authorities as "lifers" as they faced indefinite post-deportation order detention. In a landmark decision, the Court highlighted grave constitutional deprivations posed by a statute authorizing indefinite detention without an opportunity for review.[115] However, rather than ruling that the statute was unconstitutional and confronting the plenary power doctrine head-on, the majority invoked the constitutional avoidance doctrine to strike down indefinite detention and read in a "reasonable" time period standard.[116]

The constitutional avoidance doctrine provides a valuable safety valve in such cases. Appellants have also effectively cast constitutional claims as procedural, rather than substantive challenges to avoid rational review. This has led some to question whether the plenary power doctrine really matters and whether the dangers in overruling it might outweigh any benefits. For example, Professor David Martin has argued that the plenary power doctrine

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112. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (where the Court struck down a gender-based distinction in immigration law, which had placed greater physical presence requirements on fathers than mothers, in order to transmit citizenship). The decision is noteworthy in that the Court applied heightened scrutiny to this gender-based discrimination claim, notwithstanding that it was within the context of immigration regulation. Although this suggests a weakening of the plenary power doctrine, the Court chose to remediate the disparate gender-based requirements for mothers and fathers seeking to transmit citizenship to a child born out of wedlock by heightening the requirements for unwed mothers, rather than by relaxing the requirements for unwed fathers. This stands in stark contrast to the Court's practice of affording greater benefits to the aggrieved class in order to remove unlawful gender-based distinctions. For example, in the context of equal protection challenges to federal benefits, the Supreme Court has noted its long history of affording greater benefits to affected group, rather than diminishing benefits for all in the name of equality. Califano v. Westcott, 443 U.S. 76 (1979). The Court's lessening of benefits for all in the immigration context in Sessions v. Morales-Santana may suggest that the plenary power doctrine continues to seep in to immigration cases, even when normal constitutional standards are applied.

113. Zadvyda v. Davis, 533 U.S. 678 (2001)

114. *Id.* at 682. "An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . "8 U. S. C. § 1231(a)(6) (Supp. V 1994).

115. *Id.* at 690 (internal citations omitted) ("a statute permitting indefinite detention would raise a serious constitutional problem . . . Freedom from imprisonment . . . lies at the heart of the liberty [Due Process] Clause protects . . . government detention violates [the] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections . . ." or a special justification outweighs the individual's liberty interest. The instant proceedings are civil and assumed to be nonpunitive, and the Government proffers no sufficiently strong justification for indefinite civil detention under this statute.).

116. *Id*. at 699.

remains an important tool for the Congressional and Executive Branch to carry out national security functions.[117] While acknowledging that the *Chinese Exclusion Case* was largely decided to protect domestic interests with foreign policy justifications added on, Professor Martin points to the dangers if plenary power disappears and the states and lower courts become more actively involved in immigration regulation.[118]

A. *Will the Court's Decision in Trump v. International Refugee Assistance Project Finally Signal the End of the Plenary Power Doctrine?*

The President's travel ban provides a vehicle for the courts to decide what the outer limits are to discrimination in the name of security. After campaigning on the promise of a Muslim ban, within his first two weeks in office, President Trump banned the admission of immigrants from seven Muslim-majority nations.[119] While the Executive Branch relied upon the plenary power doctrine and the deference historically afforded to the President when national security is at issue, immigrants, states, and not for profit organizations across the country immediately brought legal challenges grounded in the Equal Protection and Due Process guarantees of the Constitution.[120] In addition to arguing that the constitutional right to be free from invidious discrimination based on religion and nationality as currently understood rendered the Executive Order unconstitutional, plaintiffs also relied on the anti-discrimination provisions of the Immigration and Nationality Act. Within days, the District Court for the Western District of Washington issued a nation-wide injunction against enforcement of the travel ban,[121] and the Administration appealed to the Ninth Circuit Court of Appeals.[122]

The Ninth Circuit Court of Appeals refused to lift the District Court's injunction against the ban on entry into the United States. In rejecting the Department of Justice's argument that the court must completely defer to the executive when national security is at issue, the court replied,

> [T]he Government has taken the position that the President's decisions about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions potentially contravene constitutional rights and protections . . . . There is no prec-

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117. David Martin, *Why Immigration's Plenary Power Doctrine Endures,* 68 OKLA. L. REV. 29 (2015).

118. *Id.*

119. *See* PROTECTING AMERICA FROM FOREIGN TERRORIST THREATS, *supra* note3.

120. Class action challenges include: Washington v. Trump, No. C17-0141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (alleging violations of the right to religious freedom and equal protection under the law); Council for American Islamic Relations v. Trump, No. 1:17-cv-00120 (E.D. Va. Jan. 30, 2017) (alleging the Muslim Ban violates the Free Exercise Clause of the First Amendment and due process as protected by the Fifth Amendment); Darweesh v. Trump, No. 17 Civ. 480 (AMD) (E.D.N.Y. Jan. 28, 2017) (alleging Fifth Amendment Due Process violations).

121. Washington v. Trump, No. C17-0141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

122. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).

> edent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.[123]

The Ninth Circuit per curiam panel was not willing to relinquish its judicial review role, even in cases involving national security. In fact, rather than test the legality of the original travel ban before the Supreme Court, the Administration released a revised travel ban order on March 6, 2017.[124] The new Order removed Iraq from the list of Muslim-majority nations subject to the travel ban.[125] It also exempted lawful permit residents and those with visas from the terms of the ban and allowed for a ten-day period before it became effective.[126] Removing lawful permanent residents from the ban appeared to be a strategic move to avoid a judicial ruling that the initial Executive Order was unconstitutional and in violation of the anti-discrimination provisions in the Immigration and Nationality Act.

States and immigrant rights organizations immediately challenged the revised Order in multiple lawsuits and District Courts in Hawaii and Maryland issued preliminary injunctions that blocked implementation of the ban.[127] The Administration appealed those orders up to the Supreme Court.[128] On June 26, 2017, the Supreme Court granted certiorari to decide the scope of the president's authority and whether campaign rhetoric and post-campaign statements were properly used as evidence that the order was intended to discriminate against Muslims. The Supreme Court also lifted the stay against President Trump's Second Executive Order on Immigration, allowing enforcement against all except those with bona fide connections to family members or entities in the United States.[129] However, shortly before oral arguments on the merits were to be heard, the Administration issued a third version of its travel ban and the provisions at issue in the earlier ban expired, causing the Supreme Court to dismiss and remand the challenges.[130] If the Court ultimately rules on the legality of the Executive Order, it will send a signal as to the ongoing viability of the plenary power doctrine and the limits, if any, of religious and national-origin-based discrimination in the name of regulating immigration.

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123. *Id.* at 14.
124. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).
125. *Id.* at 1161.
126. *Id.*
127. Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (order granting preliminary injunction); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017) (order granting preliminary injunction).
128. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017), *petition for cert. filed*, 85 U.S.L.W. 4477 (U.S. June 1, 2017) (No. 16-1436).
129. *Id.*, petition for cert. granted (U.S. June 26, 2017) (deciding issues raised before the Fourth and Ninth Circuits).
130. *See* note 16 (summarizing court challenges to President Trump's Executive Orders).

B. *The Immigration and Nationality Act's Original Discriminatory Provisions and Congressional Actions to Remove Them*

Up until 1965, the Immigration and Nationality Act embodied national origin-based quotas allowing for substantially greater immigration for people from particular European nations. Prior to the 1965 Amendments, eligibility to immigrate depended mainly on one's country of birth.[131] Indeed, seventy percent of all immigrant slots were allotted to natives of just three countries — United Kingdom, Ireland and Germany — and went mostly unused, while those from Italy, Greece, Poland, Portugal, and elsewhere in eastern and southern Europe had to wait for long periods due the limited number of visas available to nationals of those regions.[132]

In finally removing the national-origin quotas from the Immigration and Nationality Act in 1965, Congress declared that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence . . . ."[133] Significantly, the use of the term "immigrant visa" refers to lawful permanent residents, rather than temporary visitors, classified under immigration law as "nonimmigrants."[134]

A review of the legislative history surrounding the 1965 Amendments evidences the congressional intent to bring immigration law into conformity with the civil rights norms and language in other domestic statutes. In the words of Attorney General Robert F. Kennedy, in testimony before the House Judiciary Committee,

> The national origins system contradicts our basic national philosophy and basic values . . . . It judges men and women not on the basis of their worth but on their place of birth . . . . Everywhere else in our national

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131. *See* 8 U.S.C. § 1181 (2011) (continuing the National Origins Quota System first enacted in 1924).

132. David S. FitzGerald and David Cook-Martín, *The Geopolitical Origins of the U.S. Immigration Act of 1965*, MIGRATION POL'Y INST. (Feb. 5, 2015), https://www.migrationpolicy.org/article/geopolitical-origins-us-immigration-act-1965. The 1952 Act "revised the 1924 system to allow for national quotas at a rate of one-sixth of one percent of each nationality's population in the United States in 1920. As a result, 85 percent of the 154,277 visas available annually were allotted to individuals of northern and western European lineage. The Act continued the practice of not including countries in the Western Hemisphere in the quota system, though it did introduce new length of residency requirements to qualify for quota-free entry." Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952); *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, OFFICE OF THE HISTORIAN (last visited Oct. 2017), https://history.state.gov/milestones/1945-1952/immigration-act.

133. Immigration and Nationality Act of 1952, Pub. L. No. 89-236, 79 Stat. 911. (1965) (amending original act by carving out limited exceptions for INA provisions related to family-based and special immigrants), http://library.uwb.edu/Static/USimmigration/79%20stat%20911.pdf.

134. 8 U.S.C. § 1101(a)(15). This is likely why the Administration exempted lawful permanent residents from its revised Executive Order.

> life we have eliminated discrimination based on one's place of birth. Yet this system is still the foundation of our immigration law.[135]

As Rep. Philip Burton (D-CA) said in Congress:

> Just as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this nation composed of the descendants of immigrants.[136]

Rep. Robert Sweeney (D-OH) said:

> I would consider the amendments to the Immigration and Nationality Act to be as important as the landmark legislation of this Congress relating to the Civil Rights Act. The central purpose of the administration's immigration bill is to once again undo discrimination and to revise the standards by which we choose potential Americans in order to be fairer to them and which will certainly be more beneficial to us.[137]

Plainly, singling out persons for disparate treatment based solely on their nationality violates the spirit of the Immigration Act Amendments of 1965.[138] However, in light of the plenary power doctrine, Congress and the Executive have continued to discriminate on the basis of nationality and religion in the name of national security since 1965, without sufficient judicial oversight. For example, in *Reno v. American-Arab Anti-Discrimination Committee*, the INS brought deportation actions against a group of noncitizens, including two lawful permanent residents, based in part on their support of the Popular Front for the Liberation of Palestine (PFLP), an organization alleged to advocate terrorism.[139] The noncitizens claimed that the government had selectively targeted them because of their membership in the PFLP, in violation of their First Amendment rights to free speech and free association.[140]

In ultimately holding that recent congressional legislation had eviscerated the Court's jurisdiction over the matter, it noted that an undocumented immigrant has no constitutional right to assert a selective enforcement action

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135. *Immigration and Nationality Act of 1952: Hearing on H.R. 7700 Before the H. Comm. on the Judiciary,* 87th Cong. (1964) (statement of Robert F. Kennedy, Attorney General)), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/07-22-1964.pdf.

136. 111 Cong. Rec. 21650, 21783 (1965).

137. 111 Cong. Rec. at 21765.

138. *See* 8 U.S.C. § 1101(a)(26). However, the statutory language on its face is limited to the issuance of *immigrant* visas. Technically, as used in the Immigration and Nationality Act, the term immigrant refers only to lawful permanent residents. All other visitors are referred to under the Act as *nonimmigrants*. *See* 8 U.S.C. § 1101.

139. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 471 (1999).

140. *Id.* at 471.

as a defense to the government's efforts to deport him/her.[141] In deferring to the Executive in the name of national security, Justice Scalia writing for the majority was blunt in stating,

> [t]he Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.[142]

Notwithstanding the Court's willingness in the past to uphold discriminatory practices in the name of national security, the current Executive travel ban does not advance national security. There is no connection between the nations targeted by the travel ban and terrorism in the United States.[143] Similarly, suspending refugee admission does not advance security since refugees are already the most extensively vetted immigrants.[144] In fact, the Executive Order belies the notion that extraordinary deference is necessary in cases involving immigration regulation. The Order is aimed primarily at Muslims for a discriminatory domestic purpose—to sow fear and disenfranchise an immigrant group seen as "other." It serves as a prime example of why the Court must recognize the domestic nature of immigration regulation and the need for normal constitutional scrutiny.

C. *Interior Enforcement Orders*

In addition to the highly publicized travel and refugee ban, the Executive Orders on interior enforcement and securing the southern border also conflict with constitutional guarantees and require judicial scrutiny. For example, the Executive Order mandates that state and local entities cooperate with DHS or risk losing federal funding.[145] This type of federal commandeering of state functions has been held to violate the Constitution in other contexts.[146] In

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141. *Id.*

142. *Id.* at 491.

143. *See* Joint declaration of Madeleine K. Albright, Avril D. Haines, Michael V. Hayden, John F. Kerry, John E. Mclaughlin, Lisa O. Monaco, Michael J. Morell, Janet A. Napolitano, Leon E. Panetta, and Susan E. Rice, http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/2017-2-5_Declaration_of_National_Security_Officials.PDF (stating that, "[w]e all . . . unaware of any specific threat that would justify the travel ban established by the Executive Order issued on January 27, 2017. We view the Order as one that ultimately undermines the national security of the United States, rather than making us safer. In our professional opinion, this Order cannot be justified on national security or foreign policy grounds").

144. Randy Capps and Michael Fix, *Ten Facts About U.S. Refugee Resettlement*, MIGRATION POL'Y INST. (2015), https://www.migrationpolicy.org/research/ten-facts-about-us-refugee-resettlement.

145. *See supra* note 21.

146. *See e.g.*, Printz v. U.S., 521 U.S. 898 (1997) (holding that certain interim provisions of the Brady Handgun Violence Prevention Act that required state and local background checks to fulfill a federal mandate violated the 10th Amendment).

National Federation of Independent Business v. Sebelius, the Supreme Court held that the Affordable Care Act's coercion of states to expand eligibility for the federal-state Medicaid program by threatening a loss of all federal matching funds for failing to do so was unconstitutional.[147] Here, the Court might well find that the commandeering of state and local entities to enforce immigration law or risk losing federal funding violates the Constitution.

Judicial scrutiny is also essential to ensure that immigration officers are operating within the boundaries of the law. In just the first few weeks since the Executive Orders on immigration were signed, reports abounded of immigrant agents feeling emboldened to take actions that would not have been permissible in the past.[148] Clearly, there are inherent dangers in officers operating without limits. Even before the change in Administration, the immigration regime suffered from a lack of transparency and insufficient oversight. As an employee in charge of reviewing disciplinary cases at a privately run immigration detention facility explained to a New York Times reporter, "I am the Supreme Court."[149]

D. *Eroding Civil Liberties in the Name of Border Control*

Historically, the United States and Australia have shared a punitive approach to deter asylum seekers at sea from reaching their shores.[150] A new law in Australia, which criminalizes even the discussion of detention conditions at remote immigrant detention facilities, therefore provides an interesting vehicle for exploring the dangers in unchecked immigration law and policy.[151] The Australian Border Force Act of 2015 prohibits disclosure of immigrant detention conditions on Nauru and Manus Islands. Under the Act,

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147. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519(2012)

148. Nicholas Kulish, Caitlin Dickerson, and Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES, (Feb 27, 2017), https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html; *see also* Elise Foley, *Immigration Enforcers, Unleashed By Trump, Can Finally 'Do Our Jobs Again', Huffington Post,* HUFFINGTON POST (Feb. 15, 2017), http://www.huffingtonpost.com/entry/trump-immigration-border-deportations_us_58a49e7be4b0ab2d2b1b6ed3?imubfp6pecuxwp14i.

149. Martin Tolchin, *Jails Run by Private Company Force It To Face Question of Accountability,* N.Y. TIMES, (Feb. 19, 1985) (statement by Corrections Corporation of America employee, John Robinson).

150. After the U.S. Supreme Court held that the Refugee Convention, as incorporated into United States immigration law and prohibiting the US from returning one to a country where her life or freedom would be threatened, did not prohibit an Executive Order that authorized the Coast Guard to engage in extraterritorial interdictions and literally push-back Haitian asylum-seekers away from the U.S coastline and into the sea, without providing any opportunity to seek protection, Australia similarly began interdicting asylum seekers and refused to allow them to access land to seek protection. For a discussion of both situations, *see* Emily C. Peyser, *"Pacific Solution?" The Sinking Right to Seek Asylum in Australia,* 11 PAC. RIM L. & POL'Y J. 431 (2002); *see also* Mary Crock, *In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows*, 12 PAC. RIM L. & POL'Y J. 49, 62 (2003). As mandatory detention of arriving asylum seekers without proper immigration documentation has taken root in the United States, Australia has moved to a system in which asylum seekers arriving by boat are sent to remote detention centers on Nauru and Manus Island.

151. *Australia Border Force Act 2015* (Cth).

it is a criminal offense, punishable by up to two years in prison for any person working directly or indirectly for the Department of Immigration and Border Protection to reveal to the media or any other person or organization (aside from the Immigration Department and other Commonwealth agencies, police or coroners) anything that happens at the detention centers like Nauru and Manus Island.[152] Former and current medical staff, teachers and social workers who signed and released a letter referring to sexual assaults and abuse at the Nauru detention center are now fearful of being charged and prosecuted under the Act.[153] The United Nations Special Rapporteur on the Human Rights of Migrants also cancelled a scheduled visit because it was concerned that human rights workers could be prosecuted under the new law.[154]

The secrecy provisions of the Australian Border Force Act are particularly alarming in that they target the domestic population in the name of maintaining security. One scholar has situated this punitive Australian law within a growing international trend of laws targeting citizens' civil liberties in an attempt to diminish services for asylum seekers and, ultimately, curtail the refugee flow.[155]

In the United States, we also have immigration laws aimed at citizens in an attempt to constrict and control the immigrant population. For example, under federal immigration laws, Americans are subject to civil penalties for knowingly employing undocumented workers.[156] Various states and municipalities have also passed laws and ordinances punishing those who rent apartments or houses to undocumented immigrants.[157] While we have not seen broader laws curtailing the civil liberties of the domestic population to date, the Australian Border Force Act could be a harbinger of things to come, given the global effort to deter refugees and migrants and the Court's deference to the legislative and executive branches when immigration is at issue.

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152. *Id.* at § 42(1).

153. *See e.g.*, John-Paul Sanggaran et al., "*Open Letter on the Border Force Act—we challenge the Department to prosecute"*, THE GUARDIAN, June 30, 2015, https://www.theguardian.com/australia-news/2015/jul/01/open-letter-on-the-border-force-act-we-challenge-the-department-to-prosecute. In 2016, Doctors for Refugees filed a lawsuit in Australia's highest court challenging the Border Force Act. The human rights organization alleges that the Act unlawfully breaches the doctors' and health professionals' constitutional right to engage in political communications.

154. Matthew *Doran, United Nations Special Rapporteur for Asylum Seeker Human Rights Delays Australian Visit, Cites Border Force Act*, AUSTL. BROADCASTING CORP. (Sept. 26, 2015, 10:07 AM), http://www.abc.net.au/news/2015-09-26/un-human-rights-investigatoraustraliavisit-border-force-act/6807146; *see* Eric A. Ormsby, *The Refugee Crisis as Civil Liberties Crisis*, 117 COLUM. L. REV. 1191 (2017).

155. Eric A. Ormsby, *The Refugee Crisis as Civil Liberties Crisis*, 117 COLUM. L. REV. 1191,1218 (2017), referring to such efforts as "intra-territorial deterrence policies."

156. 8 U.S.C. § 1324(a).

157. Although, many of the state and local ordinances have been overturned by the courts. *See e.g.*, Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV 55 (2009)

For example, dissenting justices on the Supreme Court have long probed the outer limits of the plenary power doctrine and its attempt to insulate a body of law from constitutional norms. In dissenting from the majority's holding that a returning lawful permanent resident's exclusion and 18-month imprisonment on Ellis Island without a hearing did not run afoul of constitutional guarantees, Justice Jackson queried whether,

> "the power to exclude means that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law?"[158]

Immigration law continues to operate on two levels. On the one hand, the political and foreign policy label ensures minimal judicial intervention over the broad net of domestic immigration laws. On the other hand, official federal immigration regulation has always been supplemented by states and private actors who engage in official and de facto immigration regulation. While state action has been reigned in at times, private action has proved harder to challenge. Finally, immigration regulation, whether federal, state or private, plays a substantial domestic role in shaping the day-to-day behavior of immigrants within the nation.

V. DE FACTO IMMIGRATION ENFORCEMENT

Alongside the Court's use of the plenary power doctrine to insulate the federal regulation of immigration law from the evolution of constitutional norms, a plethora of state, local, and private actors have simultaneously created a de facto second tier of immigration enforcement. This non-federal enforcement apparatus also operates largely without judicial scrutiny but for different reasons. For the vast majority of undocumented persons in the United States, the immigration regime offers no mechanism for obtaining lawful status. At the same time, the criminalization of immigration law has created a multitude of removal grounds so that the undocumented population is increasingly vulnerable to arrest, detention, and deportation at any moment.[159] All of these realities operate in tandem and create a situation in

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158. Shaughnessy v. United States, *ex rel.* Mezei, 345 U.S. 219, 226-227 (1953).

159. *See e.g.*, Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 696–98 (2016) (discussing the wide range of criminal convictions that can trigger deportation, and the significant number of noncitizens that have been deported for minor crimes since the introduction of the term "aggravated felony," a crime category that results in the most serious immigration consequences and has been amended to include crimes that are neither aggravated nor a felony); Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CAL. L. REV. 149, 153 (2016) (discussing "crimmigration" and its reliance on over-policing as a form of

which the undocumented population lives in a heightened state of fear. This fear then manifests itself in a de facto exclusion from governmental agencies with the mandate to protect workplace rights, as well as schools, hospitals, and the courts.[160]

A. *The Impact of Fear on the Workplace*

Undocumented immigrants' fear of deportation permeates and influences the workplace. Unscrupulous employers exploit this fear of exposure, subjecting undocumented workers to illegal wages and working conditions.[161] Low-wage undocumented workers have been found to be more than twice as likely as low-wage American workers to suffer minimum wage violations in the workplace.[162] Notwithstanding the illegality, undocumented workers are often too fearful to report labor, wage, and health code violations.[163] In the workplace, for example, undocumented immigrants who assert their rights

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surveillance on largely immigrant communities); Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 711 (2015) ("The age-old punitive method of banishment is an increasingly common form of contemporary social control, and it is not limited to the sphere of immigration enforcement. The susceptibility of certain noncitizens to banishment in the form of deportation is mirrored by the exposure of other liminal populations to banishment in the form of spatial exclusion and susceptibility to incarceration. In both instances, the criminal justice system operates in tandem with civil systems of law to effectuate the expulsion of individuals deemed undesirable. Federal, state and local agents empowered to enforce the criminal law use fluid and mutually reinforcing civil and criminal law mechanisms to manage the movement of particular groups of citizens and noncitizens."); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107 (2012) ("In a separate manifestation of the convergence of criminal and immigration law, since 1997, when the executive branch began to enforce major new legislation, approximately one million immigrants have been deported or removed from the United States as a consequence of a criminal conviction. Approximately twenty percent of those deported due to a criminal offense were in the country lawfully, many having lived in the United States for decades; most of the relevant violations involved only minor, nonviolent crimes.").

160. *See e.g.* Roxana Mondragón, *Injured Undocumented Workers and Their Workplace Rights: Advocating for A Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447, 450–51 (2011) ("[D]espite high injury and fatality rates, undocumented workers rarely enforce their right to seek remedies for workplace injuries. This reluctance is due to their fear of employer retaliation, including discharge or even deportation. Another barrier to enforcement of injured workers' rights is the poor enforcement of labor laws and health and safety laws and regulations in the United States.").

161. Nessel, *supra* note 6.

162. Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J.L. & PUB. POL'Y 611, 616 (2012). In addition, "[a]lmost 85 percent of undocumented workers experienced an overtime violation in the workweek, as compared to 68.2 percent of U.S.-born workers". *Id.*

163. Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 30 (2008) (noting that employers' routine use of immigration-related questions with impunity has caused immigrant plaintiffs, who were already uneasy with asserting workplace claims, to cease suing employers in order to avoid answering questions about their immigration status. As Cunningham points out, without an effective methodology for addressing status-based discovery, immigrant workers, both legal and unauthorized, will continue to opt out of employment litigation); Daniel Ford, Lori Jordan Isley, Richard W. Kuhling &Joachim Morrison, *Protecting the Employment Rights and Remedies of Washington's Immigrant Workers*, 48 GONZ. L. REV. 539, 541 (2013) (discussing the hurdles immigrants face in asserting their employment and workplace rights, including intimidation tactics and efforts to coerce immigrants into relinquishing their ability to vindicate workplace rights).

all too often face unlawful retaliation by employers.[164] Similarly, victims of human trafficking have been too scared to come forward and report their traffickers, even though there are specific immigration visas allocated to provide for lawful immigration status for these victims in exchange for their assistance with the trafficking prosecutions.[165]

B. *A Blurred Line between Education and Immigration Policy*

Because there are approximately 3.5 million children with at least one undocumented parent in the United States, immigration policy is also education policy.[166] This is especially true in the current climate when public school officials take on the role of immigration agent. Notwithstanding every child's right to a free public elementary school education,[167] heightened enforcement efforts have created a sense of panic in the immigrant community with a reach well beyond those who are actually at risk of deportation. As one education advocate in Maryland explains, fear of raids means that "parents are laying low, and if their child is at risk of being detained and deported, they're keeping them at home. In practical terms, this means children missing doctor's appointments, missing playdates, and of increasing concern to educators, missing school."[168]

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164. Rebecca Smith et al., *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* (2009), http://digitalcommons.ilr.cornell.edu/laborunions/29/. The authors cited to a survey over 4,000 workers in New York City, Chicago and Los Angeles that finds out 43% of workers who made a complaint to their employer or attempted to form a union experienced one or more forms of illegal retaliation, including threats to report the workers to immigration authorities. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009) at 3, http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf.

165. *See* 8 U.S.C.. § 1101 (a)(15)(T) (2014). The Immigration and Nationality Act provided for T visas for victims of a severe form of trafficking in persons, if the applicant can also show that s/he is physically present in the United States on account of such trafficking; has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime; or is unable to cooperate with such a request due to physical or psychological trauma; or has not attained 18 years of age; and would suffer extreme hardship involving unusual and severe harm upon removal. *See also* Sophie Feal & Emma Buckthal, *Finding Protection Under US Immigration Law: A Guide to Remedies for Undocumented Immigrant Survivors of Violence,* 31 CRIM. JUST. 4, 4-5 (2016) (discussing the reluctance that human trafficking survivors experience in coming forward to vindicate their rights after being subjected to human trafficking); Janet B. Beck, *Human Trafficking and the T Visa Process*, 75 TEX. B.J. 770, 773 (2012) (discussing the challenges facing trafficking victims seeking to utilize T visas); Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN. ST. L. REV. 443, 463 (2012) (discussing the inadequacy of victims' services and ineligibility for T visas as a major impediment to victims using the visa and qualifying for its protection).

166. *See* Melinda D. Anderson, *How Fears of Deportation Harms Kids' Education,* THE ATLANTIC (Jan. 25, 2016), https://www.theatlantic.com/education/archive/2016/01/the-educational-and-emotional-toll-of-deportation/426987/.

167. Plyler v. Doe, 457 U.S. 202, 230 (1982).

168. Anderson, *supra* note 166. A senior education administrator at an immigrants' right organization in Maryland explained that "[f]ear is at an all-time high in the community. Parents are not going out unless they absolutely need to." *Id*.

School officials in particular areas with large undocumented immigrant populations have also required parents to provide so much documentation that undocumented parents have been too fearful to even enroll their children in school.[169] For example, a statewide study in New York found that one-in-five school districts were erecting illegal obstacles to discourage immigrant youth.[170] As reported by the Associated Press, in at least 35 districts in 14 states, hundreds of unaccompanied minors from El Salvador, Guatemala and Honduras have been discouraged from enrolling in schools or pressured into what advocates and attorneys argue are separate but unequal alternative programs.[171]

C. *When Necessary Medical Treatment Triggers Deportation*

Undocumented immigrants who are fearful of being deported at any moment are likely to avoid situations in which they might be asked about their immigration status. This includes health centers and hospitals. In addition to avoiding medical treatment for themselves, fear of detection and deportation may also cause undocumented parents to forego taking their children for medical care, even though the children may be American citizens.

Undocumented immigrants are unlikely to have health insurance, particularly because they are explicitly excluded from purchasing affordable insurance through the subsidized exchange under the Affordable Care Act.[172] In an emergency situation, undocumented and uninsured immigrants can receive medical treatment at any hospital which receives Medicaid funding.[173] However, when undocumented immigrants turn to hospitals for emergency

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169. Victor M. Ramos, *Westbury School District Changing Immigrant Student Policy Reaches Agreement with Attorney General's Office after Investigation*, NEWSDAY6 (Mar. 1, 2016) (school officials questioning and documentation requirements undermined ability of immigrant children to attend school); Daniel Wiessner, *Some N.Y. Schools Unlawfully Bar Immigrant Students*, REUTERS LEGAL (Oct. 30, 2014) ("At least 86 of the nearly 700 districts in the state have enrollment requirements that could have a 'chilling effect' on immigrant children registering for school.").

170. *See* Press Release, N.Y. Civil Liberties Union, N.Y. School Districts Illegally Denying Education to Immigrant Children (Oct. 30, 2014).

171. *See* Garance Burke & Adrian Sainz, *AP Exclusive: Migrant children kept from enrolling in school*, AP NEWS (May 2, 2016), http://bigstory.ap.org/article/b7f933ef6e054c2ca8e32bd9b477e9ab/ap-exclusive-migrant-children-kept-enrolling-school.

172. Affordable Care Act § 1312(f)(3), 42 U.S.C.A. § 18032(f)(3) (2012). "If an individual is not, or is not reasonably expected to be for the entire period for which enrollment is sought, a citizen or national of the United States or an alien lawfully present in the United States, the individual shall not be treated as a qualified individual and may not be covered under a qualified health plan in the individual market that is offered through an Exchange." *Id.*

173. *The Emergency Medical Treatment and Labor Act*, 42 U.S.C. § 1395dd (2006); Jennifer M. Smith, S*creen, Stabilize, and Ship: EMTALA, U.S. Hospitals, and Undocumented Immigrants (international patient dumping),* 10 HOUS J. HEALTH L. & POL'Y 309, 310 (2010) ("EMTALA requires hospitals receiving federal funding to medically screen and stabilize all persons who present to their emergency department with emergency medical conditions, including undocumented . . . immigrants. In particular, EMTALA, also coined the Patient Anti-Dumping Act, prohibits hospitals from "dumping" or denying treatment to emergency patients or inappropriately transferring (including discharging) patients in unstable conditions to other hospitals.")

care, they are at risk of de facto deportation if they require ongoing hospital care once they are no longer in critical condition.[174]

The problem is that once the patient is stabilized, the hospital is not required to continue treating the patient and will no longer receive federal reimbursement for doing so.[175] Hospitals are obligated to have an appropriate discharge plan in place.[176] This becomes complicated when the immigrant patient does not have insurance for ongoing treatment or family to assume responsibility.[177] All too often, hospitals pressure foreign consulates to arrange for transfers back to the patient's native country and increasingly turn to private transportation companies to effectuate repatriations.[178] These de facto deportations directly from hospitals create fear of even emergency medical treatment amongst the immigrant community.

In the past, hospitals turned to private transportation companies to execute these de facto deportations because immigration authorities were not interested in placing vulnerable ill immigrants in deportation proceedings and assuming the high cost of medical treatment while in detention. This practice may now be changing however with the move away from prioritization and the announcement that all undocumented immigrants are on notice that they can be detained and deported at any moment, regardless of circumstances or ties to this country.[179] For example, the media reported that a critically ill woman from El Salvador was in a hospital awaiting emergency surgery for a brain tumor when ICE bound her hands and ankles, refused to allow her to communicate with her family, and forcibly removed her in a wheelchair in order to detain and deport her.[180] Doctors and hospital personnel are also

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174. Lori A. Nessel, *Disposable Workers: Applying a Human Rights Framework to Analyze Duties Owed to Seriously Injured or Ill Migrants*, 19 IND. J. OF GLOBAL LEGAL STUD. 61 (2012) (noting that hospitals in the U.S. that receive federal Medicare funding are required to provide emergency treatment regardless of immigration status. However, once an undocumented patient is stabilized, the federal government ceases to pay for ongoing necessary medical care in hospitals or in rehabilitation facilities. Many public and private hospitals take it upon themselves to enforce the nation's immigration laws by deporting desperately ill immigrants directly from their hospital beds.); Lori A. Nessel, *The Practice of Medical Repatriation: The Privatization of Immigration Enforcement and Denial of Human Rights,* 55 WAYNE L. REV. 1725 (2009) (discussing medical repatriations of seriously ill and injured immigrants by U.S. hospitals); Ctr. for Social Justice at Seton Hall Law Sch. & the Health Justice Program at N.Y. Lawyers for the Public Interest, *Discharge, Deportation, and Dangerous Journeys: A Study On The Practice Of Medical Repatriation* (2012), https://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/final-med-repat-report-2012.pdf.

175. *See* 42 U.S.C. § 1395dd (2006).

176. 42 C.F.R. § 482.4 (2010).

177. *See Discharge, Deportation and Dangerous Journeys, supra* note 174.

178. *Discharge, Deportation and Dangerous Journeys, supra* note 174; David Pitt, *Deported While Unconscious: American Hospitals Quietly Deport Hundreds Of Undocumented Patients*, ASSOC. PRESS (Apr. 29, 2013), https://blog.ap.org/behind-the-news/deported-while-unconscious-reporter-explains-medical-repatriation-practice.

179. *See supra* note 4.

180. *See* Erin White, *Ice Agents Move Hospitalized Salvadoran Woman Awaiting Emergency Surgery to a Detention Facility in Texas*, L.A. TIMES (Feb. 23, 2017), http://ktla.com/2017/02/23/ice-agents-move-hospitalized-salvadoran-woman-awaiting-emergency-surgery-to-detention-facility-in-texas/, (noting that the woman had no criminal convictions and had been detained prior to the hospitalization based on being denial asylum protection).

reporting being concerned about the potential for ICE agents to enter their hospitals to target and deport vulnerable patients.[181]

D. *Instilling Fear in Lawfully Present Immigrants*

Anti-immigrant policies have a dramatic impact on lawfully present immigrants as well. Because anti-immigrant policies lead to racial profiling and discrimination, its effects are felt throughout the Latino community in particular. A recent study found that anti-immigrant policies stigmatize both foreign and US-born Latinos by creating a hostile social environment which affects their experiences of discrimination. Such policies can adversely affect Latino health, in part through exposure to discrimination.[182]

Although undocumented immigrants are the primary target of anti-immigrant policies, "because race, ethnicity and immigrant status are often conflated, such that all Latinos are presumed to be immigrants and all immigrants are seen as undocumented", in practice these policies create a hostile environment for an entire social group.[183] Anti-immigrant policies also work to marginalize, stigmatize and exclude those being treated as *the other*.

Anti-immigrant laws instill fear and serve to control behavior of all immigrants, and even of United States citizens with immigrant family members. It has been well-documented that the vast majority of immigrant families are made up of members with different immigration statuses. For example, it is quite common for a nuclear family to contain one or two parents who are undocumented and children who, by virtue of being born in the United States, are U.S. citizens.[184] From the perspective of the United States citizen children, having one or two parents who are undocumented dramatically impacts access to education, language acquisition, income, and health.[185] Studies have also documented the psychological effects on children who live in fear that their parent(s) will be deported at any moment.[186]

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181. E-mail on file with author.

182. Joanna Almeida et. al, *The Association Between Anti-immigrant Policies and Perceived Discrimination among Latinos in the US: A Multilevel Analysis*, 2 SSM POPULATION HEALTH 897 (2016), http://www.sciencedirect.com/science/article/pii/S2352827316301471.

183. *Id.* (internal citations omitted).

184. Randy Capps et al., *A Profile of U.S. Citizen Children with Unauthorized Immigrant Parents*, MIGRATION POL'Y INST. (Jan. 2016), https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorized-FactSheet-FINAL.pdf (over 5.1 million United States citizen children were living in a household headed by at least one undocumented parent during this period).

185. *Id.* (documenting lower preschool enrollment, linguistic isolation, limited English proficiency, significantly high rates of poverty and reduced socio-economic progress). Three-quarters of children with undocumented parents had incomes below the threshold for free and reduced-price school lunches, as compared with 51% of all immigrant children and 40% of children of the overall U.S. child population. *Id.* at 2.

186. *See* Human Impact Partners, *Family Unity, Family Health* (2013), http://www.familyunityfamilyhealth.org/#top. The report links the threat of detention and deportation to poorer educational outcomes, concluding: "U.S.-citizen children who live in families under threat of detention or deportation will finish fewer years of school and face challenges focusing on their

If this marginalization is codified into law and supported by the state, the effects of such policies are likely to be far-reaching. To date, the Administration has signaled that its ambitious goal of prioritizing all nine to eleven million undocumented immigrants for removal will be carried out in large part through mandatory state and local enforcement of immigration laws. Pursuant to the Executive Orders and DHS Implementation Memoranda, all state and local law enforcement agencies must cooperate with ICE or risk losing federal funding.[187] Mandating that police officers serve as immigration agents leaves immigrants too fearful to report crimes or seek protection when needed.[188] The Obama Administration moved away from this type of local enforcement of immigration law for this very reason. By reinstituting local enforcement efforts, the federal government is once again using immigration law to control immigrant behavior, undermining policing and safety for all residents.

It is true that unlawful actions can be challenged in the courts and the plenary power doctrine only shields federal regulation of immigration. However, the atmosphere of fear undermines the ability of immigrants to assert their statutory rights or seek redress from the courts. Moreover, the criminalization of immigration law has developed alongside what has been termed the "dejuridicalisation" of immigration enforcement.[189] In articulating the relationship between the plenary power doctrine and the increased criminalization of immigration law, a geography scholar noted that,

> "the plenary power enables immigration enforcement practices which float—by design—separately from the rule of law . . . the plenary power to make immigration law is about delineating a space of policing practices—a juridical void—which cannot be subject to constitutional review and/or protection, notwithstanding its reliance on the criminal

studies." *Id.* According to the study, "[n]early 30 percent of undocumented parents reported that their children were afraid either all or most of the time, much higher than among children of documented parents. Nearly half reported that their child had been anxious, and almost three-fourths of undocumented parents reported that a child had shown symptoms of post-traumatic stress disorder." *Id.*; *see also* Melinda D. Anderson, *How Fears of Deportation Harm Kids' Education*, THE ATLANTIC (Jan. 26, 2016), https://www.theatlantic.com/education/archive/2016/01/the-educational-and-emotional-toll-of-deportation/426987/. (Reporting that, according to an immigrant advocate in Maryland, "[f]ear is at an all-time high in the community. Parents are not going out unless they absolutely need to . . . a consequence of the immigration raids is that parents are laying low, and if their child is at risk of being detained and deported, they're keeping them at home. In practical terms, this means children missing doctor's appointments, missing playdates, and of increasing concern to educators, missing school."

187. *See* Executive Orders, *supra* note 4.

188. *See e.g.*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

189. Matthew Coleman and Austin Kocher, *supra* note 92 at 229; Matthew Coleman, Immigration Geopolitics Beyond the Mexico—US Border, 38 ANTIPODE 54, 62 (2007) (noting that "[t]he plenary power over immigration does not simply jettison the law. Rather, it works paradoxically through the law as it at once holds the law at bay").

justice system as well as its own formal codification as law in the INA."[190]

Having a steady supply of undocumented immigrants who are too fearful to assert their statutory rights or to avail themselves of benefits which they or their children are lawfully entitled to clearly benefits society in certain respects. From an economic perspective, undocumented immigrants pay taxes on goods consumed and often pay into federal and state funds which they will never be able to access.[191] Undocumented labor tends to depress wages, leading to lower costs for consumers on products.[192]

However, the societal costs of having a large segment of the population living in a state of anxiety are significant in both the short- and long-term. Instilling fear such that undocumented workers are unwilling to complain about wage violations leads to depressed wages for all, as employers have an incentive to prefer undocumented employees.[193] The same climate of fear also makes it less likely that workers will complain about labor or health code violations, again deteriorating working conditions for all.[194] Undocumented parents may be too fearful to avail themselves of the services available for their citizen children.[195] People who are undocumented may also be too fearful to report crimes or to seek medical care when necessary.[196]

In the long run, there are repercussions from having a large segment of the population grow up in a climate of fear. Living in a constant state of anxiety and fearing family separation at any moment undermines the health and well-being of this population.[197]

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190. Coleman, *supra* note 189 at 62.

191. *See e.g.* The National Academies of Sciences, Engineering and Medicine Report on Immigration (2016); Gordon H. Hanson, *The Economics and Policy of Illegal Immigration in the United States*, MIGRATION POL'Y INST. (2009), https://www.migrationpolicy.org/sites/default/files/publications/Hanson-Dec09.pdf (illegal immigration benefits employers).

192. Veronica De Rugy, *The Case for More Low-Skill Immigration*, THE DAILY BEAST, (Dec.r 7, 2014) ("By working for less, immigrant workers help produce goods and services at a much lower cost, which in turn lowers prices for consumers."), http://www.thedailybeast.com/articles/2014/12/07/the-case-for-more-low-skill-immigration.html.

193. *See e.g.* Nessel, *supra* note 6.

194. *See e.g.* Jayesh Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813 (2016); Kati L. Griffith, *Laborers or Criminals? The Impact of Crimmigration on Labor Standards Enforcement*, In A. R. Ackerman & R. Furman (Eds), THE CRIMINALIZATION OF IMMIGRATION: CONTEXTS AND CONSEQUENCES (pp. 89-100). Durham, NC: Carolina Academic Press.

195. *See e.g.*, Michael Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status Families in an Era of Reform*, 35 INT'L MIGRATION REV. 397 (2001).

196. *See e.g.* Robert C. Davis, Edna Erez & Nancy Avitabile, *Access to Justice for Immigrants Who are Victimized: The Perspectives of Police and Prosecutors*, 12 CRIM. JUST. POL'Y REV. 183 (2001).

197. *See e.g.* Patricia A. Cavazos-Rehg, Luis H. Zayas, & Edward L. Spitznagel, *Legal status, emotional well-being and subjective health status of Latino immigrants*, 99 J. NAT. MED. ASS'N. 1126 (2007) (concluding that undocumented Latino immigrants' concerns about their legal status and preoccupation with disclosure and deportation can heighten the risk for emotional distress and impaired quality of health).

VI. CONCLUSION

When viewed cumulatively, the constitutional exceptionalism, criminalization, and de facto enforcement regime create a state of "legal violence."[198] Within this framework, immigrants' sense of vulnerability permeates their daily interactions and causes them to avoid asserting rights or seeking benefits or services which might call attention to themselves and their families.[199] Clearly, the criminalization of immigration law starting in 1990 has played a dramatic part in normalizing the law's role in excluding immigrants from legal protections while holding them accountable to the law. However, the use of immigration law to control immigrant behavior within the nation dates back to the first immigration restrictions in the late 1800s.

With a new administration (which relied on anti-immigrant rhetoric to win the election), understanding the domestic nature of immigration law and its impact on immigrants and society is essential. Irrespective of whether the new administration carries out its plan to quickly deport millions of immigrants, the climate of fear and threat of deportation impacts society on a daily level. While all laws exert some level of social control, and immigration laws have allowed for cheap labor and underutilization of government services and benefits, there are long-term societal costs that demand greater attention.

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198. Cecilia Menjivar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOC.1380, 1387 (2012) (noting that the legal violence is "rooted in the multi-pronged system of laws at the federal, state, and local levels that promotes a climate of insecurity and suffering among individual immigrants and their families.")

199. *Id.* at 1402 (documenting, for example, the ways in which immigrants avoid contact with social service providers, even with United States citizen children are entitled to benefits).