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The 50th Anniversary marking the conclusion of the U.S. Supreme Court's Warren Court period, which lasted from 1953-1969, offers a timely opportunity to reflect on this Court's important legacy on due process rights. Scholars credit the Warren Court with a constitutional due process revolution that sought to expand

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procedural rights available to criminal defendants.[3] The Warren Court's criminal due process revolution has generated significant reflections on its impact, both positive and negative, on the criminal justice system. We seize this opportunity instead to conduct an assessment of the Warren Court's impact on the constitutional due process rights of immigrants.

There are at least two important reasons why this analysis matters. First, it provides an opportunity to reflect on the critique that has been made repeatedly, but not quite heard: that the asymmetrical procedural due process rights between criminal defendants and immigrants facing immigration enforcement is hard to justify given the symmetry in the punitive function and methods between criminal and immigration law.[4] Interestingly, the Warren Court period was a time when the expansion of rights for criminal defendants increased the divergence in the nature and scope of procedural due process rights available to immigrants as compared to criminal defendants. In contrast to criminal defendants, the Warren Court was entirely silent, for instance, on whether the right to remain silent or the right to counsel should apply similarly to immigrants. Yet, an analysis of the immigration cases decided during the Warren Court period–and the historical context in which these were decided–suggests that the justification for these differing results cannot rest on an explanation that immigrants were not facing significant harms arising from immigration enforcement's harsh hand. Indeed, 1953 to 1969 was an especially bellic period in the United States and included such wars as the Vietnam War and the Cold War. Unsurprisingly, the government's tendency to restrict the due process rights of immigrants by relying on war powers, whether these wars are real or constructed,[5] functioned extremely well during this period. Especially during the Cold War, the government sought, *inter alia,* to exclude or to deport noncitizens based on secret evidence or to deny naturalization based on ideological

3. *See, e.g.*, Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 525. For cases expanding the due process rights of criminal defendants during the Warren Court, *see, e.g.*, Miranda v. Arizona, 384 U.S. 436, 479 (1966); United States v. Wade, 388 U.S. 218, 227 (1967) (defendant has right to counsel at post-indictment line-up); Griffin v. California, 380 U.S. 609, 615 (1965) (Fifth Amendment forbids both comment by prosecution on defendant's refusal to testify and instructions to jury that defendant's trial silence is evidence of guilt); Douglas v. California, 372 U.S. 353, 357–58 (1963) (indigent entitled to appointed counsel at state mandatory appeal stage); Griffin v. Illinois, 351 U.S. 12, 18–19 (1956) (indigent defendant has right to obtain free trial transcripts in order to ensure adequate appellate review); Stovall v. Denno, 388 U.S. 293, 302 (1967) (due process mandates exclusion of out-of-court identification based on unnecessarily suggestive identification procedure); Pointer v. Texas, 380 U.S. 400, 407–08 (1965) (defendant has constitutional right to confront and cross-examine witnesses at trial); Brady v. Maryland, 373 U.S. 83, 87–91 (1963) (prosecutor has duty to disclose exculpatory evidence to defendant at trial); Fay v. Noia, 372 U.S. 391, 398–99, 435 (1963) (federal courts retain power to decide merits of federal constitutional claim despite state procedural forfeiture of claim unless defendant deliberately bypassed state opportunity to raise claim).

4. *See, e.g.,* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469 (2007).

5. *See, e.g.,* Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183 (2018); *see also* Shoba Sivaprasad Wadhia, *Business as Usual: Immigration Law and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1512–13 (2010).

grounds without adequate procedural safeguards.[6] It was not that the Warren Court was entirely unsympathetic to immigrant's plight. Indeed, the cases decided during this period reveal a mixed record of outcomes, with the Court vacillating between complete deference to the government and a few interventions to rein in immigration's exceptionalism. The latter was particularly true in cases involving long-term permanent residents and those seeking to naturalize or faced loss of citizenship.[7] But, especially in contrast to the bold steps (regarded as misguided by some)[8] that the Court took to advance the rights of criminal defendants, even the decisions that sometimes favored immigrants cannot be characterized as anything other than meek.

War's exceptionalism and the Warren Court's reluctance to meddle too much in all war cases could offer a different explanation for these results.[9] Yet, we must mention that the nebulous contours and dubious legality of the Cold War could have provided a prime opportunity to challenge the illegitimate conflation of immigration and war powers that has too often characterized the expansion of the immigration enforcement power.[10] Moreover, the Warren Court also decided a sufficient number of immigration cases with hardly any linkages to war that also did not lead to revolutionary or bold decisions.[11] Undoubtedly, for the Warren Court to create due process rights for immigrants during this time would have been equally, if not more, revolutionary as its criminal due process revolution, albeit in different ways. In the criminal context—aside from strong critiques against the nature of the rights themselves[12]—the Warren Court's perceived significant departures in the construction of new rights for criminal defendants from both federalism and separation of powers principles especially fueled the critique by opponents and proponents alike for going too far, at least too soon.[13] At the time, the imposition of the federal constitution on the state policing function–even when

6. *See infra* Part I.A.

7. *See infra* Part I.B.

8. *See, e.g.*, Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153–54 (1998) (acknowledging that the Court's 1960's criminal procedure cases were designed to eradicate an "American apartheid" regime, but asserting that this doctrine has "outlived [its] utility" and urging the implementation of a new doctrine that recognizes the legitimate function of discretionary policing techniques and the competence of inner-city communities to protect themselves from abusive police power); *see also* CRAIG BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 37–56 (1993).

9. *See, e.g.,* Elizabeth J. Elias, *Red Monday and Its Aftermath: The Supreme Court's Flip-Flop Over Communism in the Late 1950s*, 43 HOFSTRA L. REV. 207 (2014) (discussing Cold War cases that contrasted with the Warren Court's civil rights legacy); *see also* Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 66 (1998) (arguing that the Warren Court displayed little appetite for activism and policy-making during the Vietnam War).

10. *See infra* Part I.A.

11. *See infra* Part I.B.

12. *See, e.g.,* George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 197 (2005); *see also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Court's Competing Ideologies*, 72 GEO. L. J. 18 (1983).

13. *See, e.g.,* Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO. ST. J. CRIM. L. 105, 105 (2005); *see also* Darryl K. Brown, *The Warren Court, Criminal Procedure, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1412 (2002).

some states were already moving in similar directions–and its creation of the exclusionary remedy for violations to these new rights outside the legislative process were significant departures that raised questions of legitimacy for some or of ripeness for others.[14] In the context of immigration law, even without similar federalism concerns, the recognition of a right to counsel or the right to bail–to name a few–would also have been seismic in different ways given immigration law's treatment as civil at a time when very few constitutional substantive and procedural due process rights were recognized in the civil context.[15] It is important to remember that while the Warren Court coincided with the Civil Rights Movement (1940s–1960s), it also ended at a time when new rights grounded in equal protection, including for immigrants, were just starting to emerge.[16] Similarly, the expansions of substantive constitutional rights to recognize liberty interests in certain public benefits[17] or family,[18] and which the stakes doctrine[19] later applied to the immigration context, also occurred post the Warren Court period. Indeed, this evolution of expanded rights and its impact on immigrants even led several scholars to predict at the turn of the last century that immigration's exceptionalism was finally here.[20]

Secondly, viewing the current state of immigrants' due process rights through the lens of the Warren Court provides an opportunity to reexamine the treatment

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14. *See, e.g.*, *id.*; *see also* Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J. L. & PUB. POL'Y 173, 183 (1991).

15. *See, e.g.*, Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 5 WASH. & LEE L. REV. 5, 9 (1993).

16. *See*, *e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 2 (1998).

17. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (holding that classifications based on alien status are inherently suspect and a statute that denies welfare benefits to noncitizens and restricts benefits to longtime residents violates the Equal Protection Clause of the Fourteenth Amendment); Toll v. Moreno, 458 U.S. 1, 102 S. Ct. 2977 (1982) (holding that because Congress specifically allowed the respondents, who were nonimmigrants with G-4 visas, to acquire domicile, the State's policy denying in-state status to the respondents on account of their G-4 status violated the Supremacy Clause); Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518 (1999) (holding that a statute that mandated residency requirements of a certain duration before becoming entitled to receive benefits violated the Privileges and Immunities Clause because it improperly discriminated against citizens on the basis of their length of residency).

18. *See, e.g.*, Deana Pollard Sacks, *Elements of Liberty*, 61 SMU L. REV. 1552, 15791557 (2008); *see also* C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 447 (2004).

19. *See, e.g.*, Angela M. Banks, *Deporting Families: Legal Matter or Political Question?*, 27 GA. ST. U. L. REV. 489, 553 (2011); *see also* Robert Pauw, *Plenary Power: An Outmoded Doctrine that Should Not Limit IIRIRA Reform*, 51 EMORY L. J. 1095, 1095 (2002).

20. *See, e.g.*, Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 282–83 (2000); *see also* Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 34 (1999); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002). For skepticism about the claim that the end of the plenary power doctrine was imminent, *see* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289, 289–90 (2000).

of immigrants in the United States through the evolution of law during the past fifty years. For example, after the Warren Court period, the important legal gains of the Civil Rights Movement took hold and influenced the development of equality principles and other substantive rights for immigrants.[21] The peace that followed the Warren Court period, at least until the War on Terror took hold, provided an opportunity for deep reflection and some reckoning on whether courts should defer so much, especially as to wars like the Cold War, that are ill-defined and prone to abuses of power. This conversation, too, led to critiques on the dangers of treating immigration law as an exercise of war powers or foreign affairs with some important gains in rights for immigrants.[22] Yet, high levels of anti-immigrant sentiment that arose in the 1990s led to substantial contraction of public benefits for immigrants and the significant expansion of criminal measures as immigration enforcement through new federal laws.[23] Whatever few gains were had in the courts to push back against these measures were halted immediately with the September 11, 2001 attacks and the ensuing war on terror which applied fiercely to immigrants.[24] Since then, with few exceptions, federal immigration laws and their enforcement have been harshly punitive to immigrants. Given that the Warren Court's criminal procedure revolution had little impact on the rights of immigrants at the time, it is perhaps ironic that the Warren Court's due process revolution is now pushing back against what many scholars now label as "crimmigration."[25] Another critical development arising from the post-September 11 era is the explosion of a new immigration federalism. This wave of immigration federalism, which is as varied as it is vast, has included push back against the unforgiving federal punitive machinery against immigrants in ways that also recall the Warren Court's important values of privacy and liberty that guided its criminal due process revolution.[26]

At the University of the Pacific Law Review Symposium titled "The Warren Court's Criminal Procedure Revolution: a 50 year Retrospective," held October 11, 2019,[27] much of the commentary around the legacy of the Warren Court's due process revolution was somber for very legitimate reasons.[28] Yet, a retrospection of this important due process revolution through an immigration lens elucidates lessons perhaps overlooked. Foremost, by expanding the universe of the laws,

21. *See infra* Part II.

22. *Id.*

23. *Id*.

24. *Infra* Part II.

25. *Infra* Part II.

26. *Infra* Part II.

27. *See* Event Details, *University of the Pacific Law Review Symposium*, *available at* https://calendar.pacific.edu/event/university_of_the_pacific_law_review_symposium.

28. George C. Thomas III, *The Warren Court, Idealism, and the 1960s*, 51 U. PAC. L. REV. 843 (2020); William Pizzi, *The Failure of the Criminal Procedure Revolution*, 51 U. PAC. L. REV. 823 (2020); Gabriel J. Chin & Hannah Bogen, *Warren Court Incrementalism and Indigent Criminal Appellants' Right to Trial Transcripts*, 51 U. PAC. L. REV. 667 (2020).

people, and context we consider to evaluate the Warren Court's criminal due process legacy, we glean that it is much broader than initially imagined; indeed, broader than it was intended even by the Warren Court itself. Moreover, this legacy is perhaps not quite finished in the area of immigration law. At least, we foresee that the crimmigration crisis and the immigration federalism wave could still yield an unintended and unimagined due process revolution for immigrants that is long overdue. We proceed in this essay in two principal parts. In Part I, we provide a historical context to the immigration cases decided during the Warren Court and contrast the few due process gains that immigrants enjoyed compared to criminal defendants. In Part II, we expand on the important immigration law developments fifty years post-the Warren Court through the lens of the Warren criminal due process revolution.

I. THE HISTORICAL CONTEXT AND THE IMMIGRATION LAW PROCEDURAL DUE PROCESS CASES DURING THE WARREN COURT

A. The Historical Context

When President Eisenhower appointed Earl Warren as Chief Justice in October 1953, the United States had just extracted itself from a "hot war" on the Korean Peninsula but remained deeply entangled in a Cold War around the globe. Indeed, throughout much of the twentieth century, the United States found itself involved in large-scale and undeclared wars, professing to fight for its democratic principles. This nearly constant state of war has had significant repercussions in American politics and for the administration of justice. Judicial deference to the "political departments" in the regulation of immigration, however, did not originate during a twentieth-century war but during an equally tumultuous period in the previous century.

The authority of Congress to regulate immigration initially derived from the Commerce Clause.[29] However, regulating immigration was not an issue either the framers of the Constitution or antebellum administrations concerned themselves with as millions of immigrants from Europe and internal migrants from older eastern cities moved in to occupy the trans-Appalachian West.[30] Immigrants from Europe were welcomed (primarily by the states which competed with one another to attract new residents) and, in fact, desperately needed in the new nation. There was little fear that immigrants could not successfully integrate into the growing nation, and the need for farmers to occupy western territory the U.S. claimed as its

29. U.S. CONST. art. I, § 8, cl. 3; Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 9 (2010).

30. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICAN, 1815–1848, 136–42 (2007). In 1790, Congress passed a Naturalization Act that restricted citizenship to "free white persons." In 1798, the Federalist government, led by President John Adams, passed the Alien and Sedition Acts as "national security" measures meant to silence critics of the "quasi-war" with France, many of whom were thought to be immigrants. However, by the time the law expired in 1800, no immigrant had been deported.

own and laborers to operate the machinery of an industrializing nation was insatiable. However, by the end of the nineteenth century, Congress took a more active role in proscribing who would be allowed entry into the United States. In these efforts, Congress found a deferential partner in the federal judiciary that articulated the legal premise of "immigration exceptionalism," which based the power to exclude or deport individuals on a nation's inherent sovereignty, wrapped in "an urgent and pervasive discourse of national self-preservation."[31]

Legal scholars and historians alike recognize the Chinese Exclusion Act of 1882 as the turning point in American immigration history which transformed the United States from a nation with an "open door" to a "gatekeeping nation."[32] The initial forays into restricting immigration from Asia came from the Workingmen's Party in California that expressed their racist anger at foreign competition for jobs first through violence and then through legislation.[33] Despite the fact that state and local laws that attempted to strip Chinese residents of their right to vote, work, and enter the country were struck down by the courts as unconstitutional, the furor created by anti-Chinese advocates led Congress to take up the issue and eventually renegotiate a treaty with China that led to the Exclusion Act.[34] The 1882 law barred the entry of Chinese laborers into the United States and required any Chinese worker who previously resided in the U.S. to obtain a certificate of reentry should they leave the country and wish to return.

Although the first case that appeared before the Supreme Court in 1884 challenging the Exclusion Act resulted in a favorable decision for the plaintiff, by 1889, the Court firmly established the plenary power of Congress with respect to immigration.[35] Without dissent, Justice Field wrote in *Chae Chan Ping v. United States* that the plaintiff represented "a menace to our civilization," and therefore, by the terms of the treaty with China, Congress acted within its authority to "regulate, limit, or suspend such coming or residence" of Chinese laborers.[36] In recounting the history of the Chinese in post-Gold Rush California, Field echoed some of the rhetoric of the Workingmen's Party about the steadily increasing

31. Lindsay, *supra* note 27, at 31–32.

32. ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943, 4–7 (2003); ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882 2 (2004); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 3 (2004).

33. PHILIP J. ETHINGTON, THE PUBLIC CITY: THE POLITICAL CONSTRUCTION OF URBAN LIFE IN SAN FRANCISCO, 1850 –1900, 267–81 (1994); WILLIAM ISSEL AND ROBERT W. CHERNY, SAN FRANCISCO, 1865–1932: POLITICS, POWER, AND URBAN DEVELOPMENT, 125–30 (1986).

34. Lindsay, *supra* note 27, at 30; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550 (1990).

35. In 1884, the Court ruled in favor of Chew Heong who had arrived in San Francisco in 1880 but departed for Honolulu before the 1882 law took effect. Upon his return, he was initially denied entrance because he failed to obtain the required certificate of reentry before he left California. However, because he departed before that provision was enacted, the Court ruled, he could not reasonably have been expected to fulfill the requirement and thus carved out an exception to exclusion for those Chinese who had departed before 1882 but wished to return. Lindsay, *supra* note 27, at 29–32; Chew Heong v. United States, 112 U.S. 536, 538 (1884).

36. Chae Chan Ping v. United States, 130 U.S. 581, 626 (1889).

economic threat they posed–such as the lack of families they brought with them to support, their ability to subsist on "the simplest fare"–and the "differences of race" with white Americans. However, the legal basis upholding exclusion was on the grounds of national sovereignty and security.[37] The Court's framing of exclusion as "protective legislation" from the "great danger" of "an Oriental invasion," made the actions of Congress an exercise in national sovereignty, which the Constitution delegated to the "political departments" of the federal government.[38]

This "plenary power doctrine," thus refers to the power of Congress to regulate immigration without much practical restraint by the Constitution and "subject to extraordinary judicial deference."[39] Furthermore, Justice Field made the point that this authority based on national security interests did not require the United States to be involved in an actual conflict to invoke:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon. . .Their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.[40]

Thus, the government could preemptively invoke the rational of national security and–as discussed below–utilized it throughout the twentieth century.

The Supreme Court extended its national sovereignty logic and judicial deference in 1892 when it denied the habeas corpus suit of Nishimura Ekiu, a Japanese woman seeking entry into the United States.[41] An immigration official at the Port of San Francisco refused her entry per the Immigration Act of 1891 that prohibited entry to any person "likely to become a public charge." In upholding her exclusion, the Court ruled Nishimura was not entitled to a hearing where she might examine or question the evidence used to determine her status. Additionally, the Court ruled that because immigration regulation was an inherent power of Congress based on the principle of national sovereignty, whatever procedures and decisions made by immigration officials in carrying out the laws of Congress were final and not subject to judicial review.[42]

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37. *Id.*; *see also* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1867–681832 (2007); Lindsay, *supra* note 27*,* at 40.

38. Chae Chan Ping v. United States, 130 U.S. 581, 631 (1889); Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 747752 (2017).

39. Lindsay, *supra* 27.

40. Chae Chan Ping v. United States, 130 U.S. 581, 630 (1889); Fields, *supra* note 36, at 748.

41. Nishimura Ekiu v. United States, 12 S. Ct. 340336 (1992).

42. Motomura, *supra* note 32*,* at 552. Jennifer M. Chacón notes, however, that the denial of due process

Congress flexed its plenary power muscle almost immediately after entering the Great War with the Espionage Act of 1917. President Woodrow Wilson (elected first in 1912) tried hard to keep the United States out of the conflagration that was consuming Europe. During his reelection campaign in 1916, he ran on the boast that he had kept the U.S. out of war. However, when Germany continued to make hostile gestures towards the U.S., he asked Congress for a declaration of war in April 1917. The war was deeply unpopular with numerous Americans who felt it was not their fight and saw no advantage in participating in the indiscriminate slaughter of modern warfare.[43]

Wilson was well aware of the resistance he might face in leading the nation to war. However, once committed, he was determined to unite the nation around the national emergency at hand and would not tolerate dissent. As early as 1915, in his annual message to Congress, Wilson warned about the "gravest threats" to the nation's peace and safety that came from "those born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America." He urged the use of "processes of law by which we may be purged" of such malcontents.[44] Thus, only two months after the U.S. declared war, and many months before any American troops even saw combat, Congress passed the Espionage Act. In short, the law made it illegal to undermine the military's operation or effectiveness.[45]

Such concerns were of particular importance as a result of the growing popularity of socialists, anarchists, and pacifists, organizations that often drew their supporters from labor radicals, ethnic or immigrant communities, and minority political parties. The Postmaster General received broad authority to prevent the mailing of literature from these groups who, despite very different motivations, were unified in their opposition to the war.[46] The anti-war condemnation by these groups of the "warmongers" and "capitalists" that would profit from U.S. involvement in the war contributed to increased distrust of immigrants or so-called "hyphenated Americans." By the time the Espionage and Sedition Acts expired in 1921, more than two thousand people had been indicted

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was not absolute, even if it proved grossly insufficient for most immigrant seeking redress. In the court's decision of the *Yick Wo* case in 1886, they affirmed that "'aliens' physically present in the United States,"—that is, residents ineligible for citizenship—were entitled to the equal protections and due process guaranteed by the Fourteenth Amendment. Chacón, *supra* note 35*,* 1867–68; Yick Wo v. Hopkins, 118 U.S. 356 (1886).

43. DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY, 45–46 (25th Anniv. ed., 2004).

44. ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR 94 (2011).

45. Congress made it unlawful (1) to obtain military information on the national defense with the intent to use such information to the injury of the United States, or to the advantage of any foreign nation, (2) to willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, (3) to promote the success of its enemies, (4) to cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or (5) to willfully obstruct the recruiting or enlistment service of the United States. *Id.* at 93.

46. *Id.* at 94; KENNEDY, *supra* note 41, at 26, 75–76.

and half convicted.[47] Because the Great War, which began in Europe in 1914, had already begun slowing the rate of immigration to the U.S., many of the cases the Court heard in the 1910s and early 1920s revolved around the power of Congress and the President to regulate the economy and compel cooperation or service with the war effort.[48] In the cases challenging the constitutionality of the Espionage and Sedition Acts, most failed to secure a reversal of a conviction and, in fact, by establishing the "clear and present danger" test, "[wove] into the legal fabric of the nation restrictions on freedom of speech that been unknown before 1917."[49]

For the United States, the Great War lasted little more than eighteen months, but the fear and loathing of political subversives had only just begun its half-century run in American politics and law. The first "Red Scare" began in mid-1919 after a series of newspaper reports uncovered a plot to send bombs through the mail to prominent political leaders. Suspicions immediately fell on communist party members, and U.S. Attorney General A. Mitchell Palmer launched a series of raids on suspected subversive organizations across the country. Besides employing coercive and illegal practices such as break-ins and warrantless arrests, Palmer targeted foreigners "because they could be deported through a purely administrative process" made possible by the Alien Deportation Act of 1918.[50] As with the namesake of the 1950s Red Scare, Palmer's aggressive pursuit of communists eventually led to a backlash that brought a respite to the persecution of political radicals. With the landslide election of Warren Harding as President in 1920, the American people were eager for a "return to normalcy."[51]

The fears that drove the anti-immigrant and anti-communist responses during the Great War resumed with ferocity in the 1940s. Of course, the most noteworthy event of the Second World War concerning the denial of due process for immigrants and citizens alike was the internment of over 120,000 Japanese and Japanese-Americans. Antagonists of a conspiracy to engage in sabotage or espionage came from the highest levels of the U.S. military, including Lt. General John L. DeWitt, the commanding officer on the west coast, who convinced

47. In 1918, Congress amended Section 3 of the Espionage Act to include the criminalization of speech abusive or disloyal to the U.S. government, which became known as the Sedition Act. GARRISON, *supra* note 42, at 96. Burt Neuborne, *The Role of Courts in Time of War*, 29 NYU REV L & SOC. CHANGE 555, 558 (2005).

48. The free speech cases discussed here of course, but also the power of Congress to interrupt interstate commerce, regulate labor disputes, set wages, raise an army through a compulsory draft, and prohibit the consumption of alcohol. *See* GARRISON, *supra* note 42, at Chapter 3.

49. KENNEDY, *supra* note 41*,* at 86; GARRISON, *supra* note 42, at 103–4, 108–10.

50. KENNEDY, *supra* note 41*,* at 290. The Immigration Act of 1918. Sections 1 and 2 of the 1918 Immigration Act authorized the Department of Labor to arrest and deport aliens who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law. H.R. 12402, ch. 186, 40 Stat. 1012 (October 16, 1918).

51. GARRISON, *supra* note 42, at 115–16.

President Roosevelt to sign Executive Order 9066. This now-infamous order authorized the immediate imprisonment of Japanese-Americans residing on the west coast. In support of Executive Order 9066, Congress passed its own law, which placed a curfew on "all persons of Japanese ancestry in prescribed West Coast military areas."[52] In both cases (the curfew and internment), the Supreme Court upheld the government's actions as a permissible use of their war powers. Kiyoshi Hirabayashi challenged the curfew as racially discriminatory because it applied only to those with Japanese ancestry, but the Court rejected that claim and was satisfied with the military's claim that "the danger of espionage and sabotage . . . was imminent, and that the curfew order was an appropriate measure to meet it."[53] Similarly, in *Korematsu v. United States*, the Court upheld the lawfulness of internment as a military necessity.[54]

The Court remained consistent in its deference to the actions taken by Congress and the Executive during the war in cases beyond the mistreatment of Japanese-American citizens. In an example of what Shawn Fields calls "empty formalism," the court upheld the exclusion of Ellen Knauff, a German who fled her country after the Nazi takeover of Germany, married a U.S. citizen, and attempted to become a naturalized citizen.[55] After U.S. Customs and Enforcement denied her entry without a hearing, she sought a writ of habeas corpus, but the courts refused her petition. The Supreme Court again invoked the authority of national sovereignty to both exclude aliens or to submit the actions of the immigration official to judicial review. The primacy of war and the confirmation that simply having a procedure to remove or bar entry of an immigrant was sufficient to qualify for "due process." In the simplest language, the Court declared, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[56]

Although Justice Oliver Wendell Holmes made the point that–insofar as speech was concerned–some utterances that may be illegal during times of war were permissible during peacetime, this did not hold true for the extension of due process rights to aliens during peacetime.[57] Just as the Russian Revolution of 1917 generated a Red Scare in U.S. domestic politics in the late 1910s, so too did Russia's emergence as a global superpower after the Second World War created the conditions for a second, more prolonged Red Scare in the 1950s. One historian describes the post-war era in America as one of immense hopefulness, particularly in resolving long-standing ethnic and racial tensions. The horrors of World War II and the Holocaust, the ideals of freedom and democracy extolled as justifications

52. Act of Congress of March 21, 1942, 56 Stat. 173.

53. Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 104 (1943); Celeste McCaw, *A Never Ending State of Emergency: The Danger of National Security in Emboldening the Color Line in America*, 7 U. MIAMI RACE & SOC. JUST. L. REV. 107, 111 (2017).

54. Korematsu v. United States, 323 U.S. 214, 234 (1944); McCaw, *supra* note 51, at 114.

55. Fields, *supra* note 36, at 744.

56. United States *ex rel.* Knauff v. Shaughnessy*,* 70 S. Ct. 309 (1950); Motomura, *supra* note 32, at 555.

57. Schenck v. United States, 39 S. Ct. 247 (1919).

for the war, the increased activism of the oppressed in the U.S. and in many former colonial nations, left many liberals with "grand expectations" for the future.[58] The Warren Court fed into these hopes. Right from the start, with his fortuitous ascendancy to Chief Justice, he managed a fractious court that seemed split on desegregation, and proceeded to issue a host of rulings that "reflected and accelerated one of the major trends of the era: the rise of rights-consciousness."[59] That hope merged with an optimism in the potential of the state to create a more just and equitable society by addressing social tensions and economic disparities.

Nevertheless, there were countervailing forces in U.S. politics that were ready to resist the federal government resuming its trajectory from the New Deal era of growth and intervention in the everyday lives of citizens. This was especially true in the context of race relations in the South. The massive resistance to desegregation and the continued violence against black Americans frustrated liberal hopes. The intensity and stakes of the Cold War, of course, contributed to a conservative brand of politics that could be careless of civil liberties and muted liberal leaders for fear of being labeled a communist sympathizer.[60] These forces were also reluctant to reverse the restrictions placed on immigration in 1924.

Just a year before the Warren Court era began, Congress passed the Immigration and Nationality Act of 1952 ("McCarran-Walter"), overriding Truman's veto in the process who derided the bill for being anti-immigrant and reflecting the same racist sentiments that shaped the 1924 immigration bill. Despite some "liberalizing elements" of the law, it was largely "part and parcel of the second Red Scare" and reflected "the subordination of immigration policy to foreign policy." The Immigration and Nationality Act ("INA") kept the quota system for European immigrants–with the majority of the allocation given to northwest European countries–and eliminated the Asian exclusion provision of previous immigration law, replacing it with an extremely modest allocation of one hundred entries per country.[61] The Senate sponsor of the bill, Nevada Senator Patrick McCarran, was a leading nativist in Congress. Two years before the INA, he led the passage of the Internal Security Act that barred entry to anyone who had ever belonged to the Communist Party or similar radical groups and required "subversive" domestic organizations to register with the Attorney General. Those that did not face the possibility of investigation by the Subversive Activities Control Board ("SACB"). Those implicated by the SACB could not hold government jobs or apply for passports.[62]

Because the INA came from such a vocal opponent of immigration, it created a sense that little would change as far as the demographic make-up or relative scale of immigration. However, most observers overlooked and underestimated the

58. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945– 1974, 22, 385 (1996).

59. *Id.* at 388, 568.

60. *Id.* at 409–12, 203–04.

61. DANIELS, *supra* note 30, at 118–19.

62. PATTERSON, *supra* note 56, at 240.

extent to which the two quota exceptions would be utilized: immigration from the Western Hemisphere and the spouses or minor children of U.S. citizens. Between 1952 and 1965, about 3.5 million immigrants arrived in the U.S., of which only slightly more than one-third were quota immigrants.[63]

Thus, before the Warren Court period, the continued expansion of legislative and executive power concerning immigration in times of war (hot or cold) in the interest of "national security" led to nearly complete power in the admission and deportation of aliens.[64] From the nineteenth century to the twenty-first, the Supreme Court has been willing to "overlook significant, deliberate constitutional rights violations in deference to vaguely articulated national security interests" and "still undergirds contemporary immigration law."[65]

B. The Warren Court's Immigration Due Process Cases

Our search of the immigration cases that raised issues of procedural due process during the Warren Court yielded a total of twenty-nine opinions.[66] These decisions fell into eight broad categories: (1) the ability of government to rely on immigration investigations in criminal prosecutions; (2) due process in asylum cases; (3) due process of returning lawful permanent residents; (4) the right to seek bail in immigration detention cases; (5) due process in immigration deportation cases; (6) due process in immigration collateral consequences of deportation cases; (7) due process in citizenship cases; and (8) due process in loss of citizenship cases. Of these, the categories with the most decided cases were due process in immigration deportation cases, due process in loss of citizenship cases, and due process for returning lawful permanent residents. The mixed results of these cases reveal that the Warren Court was most sympathetic to the rights of long-term lawful permanent residents and those facing loss of citizenship. In broad strokes, the Warren Court granted the relief sought by immigrants in 18 of the cases and denied them in 10. Within these cases, there are seminal decisions that both significantly denied due process to immigrants as well as those that established important limits to these powers, each with lasting effects today.

Perhaps the best example of this is the Warren Court's opinion in both the infamous *Mezei* and *Fleuti* cases, decided in 1953 and 1963, respectively, both 5–4 decisions. More than the decade that separates these decisions, the presence of the Cold War in the earlier case meant that a lawful permanent resident of more than 23 years who left to visit his dying mother in Romania would be treated as an arriving alien after being stopped several times from coming back and given no

63. DANIELS, *supra* note 30, at 123.

64. *Id.* at 746.

65. *Id.* at 747; Chacón, *supra* note 35, at 1834; McCaw, *supra* note 51, at 109.

66. Our search on Westlaw was very broad as follows DA (aft 12-31-1952) & bef 01-01-1970 & alien immigra!. This search yielded a total of 490 cases. We read each one but only considered actual opinions to identify those that pertained to procedural due process for immigrants. We did not consider cases denied certiorari or writ of mandamus (close to 200).

due process rights to challenge his denial of entry based on his communist ties.[67] In contrast, *Fleuti*, a post-Cold War case, was much luckier since his history of petty theft and his exit for two days to Mexico would not deny him his rights as a lawful permanent resident of ten years when the government tried to charge him as having a "psychopathic personality" for being gay.[68] *Fleuti* would become an important tool to spare other lawful permanent residents the same fate endured by Mezei,[69] but *Mezei*'s had an enduring fate beyond his own deportation. In the end, Congress got the final word in 1996 when it codified which lawful permanent residents would be treated as arriving aliens despite being previously admitted.[70] Treatment as an arriving alien includes those gone more than six months but also those leaving with certain types of criminal convictions or who engaged in any illegal activity after departure.[71] Scholars still debate whether *Fleuti* constrains this definition in any way,[72] but, even if it does, the effect is feeble. The more important point, as illustrated by these two cases, is that the Warren Court both denied significant due process rights to immigrants and was never bold in cementing constitutional due process rights for immigrants when it did recognize these, at least not in the same way it was for criminal defendants.

1. Immigration Investigations and Criminal Prosecutions

Only one case falls into this category. In *Abel v. United States*, another split decision, the Court held that the results of a warrantless search conducted at a criminal defendant's residence (defendant lived in a hotel room) following his

67. Shaughnessy v. Mezei, 345 U.S. 206, 219–20 (1953).

68. Rosenberg v. Fleuti, 374 U.S. 449, 463 (1963).

69. Mezei, for example, is a widely cited case; 191 federal cases, nine of which are Supreme Court cases, frequently cited to deny basic due process to persons treated as "arriving aliens."

70. 8 USCA § 1101§ 101(a)(13)(C) reads: An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien-

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

71. *Id.*

72. *See, e.g.,* Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality Act,* 2005 MICH. ST. L. REV. 979, 981 (2005); Kathrin S. Mautino, *Entry: What Mama Never Told You About Being There*, 31 SAN DIEGO L. REV. 911, 940 (1994); § 5:4. *The Fleuti rule under IIRAIRA, Immigr. Law & Crimes* § 5:4; Kate Aschenbrenner, *Beyond "Because I Said So": Reconciling Civil Retroactivity Analysis in Immigration Cases With A Protective Lenity Principle,* 32 REV. LITIG. 147 (2013); Michelle Slayton, Interim Decision No. 3333: *The Brief, Casual, and Innocent Conundrum,* 33 NEW ENG. L. REV. 1029, 1030 (1999).

arrest to commence his deportation were admissible in his subsequent trial.[73] The outcome in the case seems surprising, at least at a time when the Court seemed more willing to hold police accountable for abuses of power. Yet, in *Abel*, while pursuing the defendant–a foreign national–for espionage, the facts demonstrate that the Federal Bureau of Investigation ("FBI") worked strategically with immigration agencies when it became evident it lacked probable cause to secure a search warrant of his home precisely to take advantage of the more flexible rules that applied in the immigration context.[74] But perhaps we should not be entirely surprised. The Warren Court did not appear bothered with pretextual uses of the administrative power to pursue criminal law enforcement,[75] nor did it think it necessary a few years later–when deciding *Camara v. Municipal Court*–to impose similar checks to administrative search warrants, even when these could lead to criminal sanctions.[76] The effect of this, of course, has been to encourage law enforcement's strategic use of the more flexible immigration investigative powers to conduct criminal investigations against foreign nationals.[77] Furthermore, and this is also true in other areas of administrative law, the co-existence of civil and criminal sanctions that flow from immigration violations today means that foreign nationals can be investigated as immigrants but treated as criminals when charged with immigration violations.[78]

2. Due Process in Asylum Cases

Only one case falls in this category. *INS v. Stanisic* raised the crucial question about the type of hearing that an "alien crewman" should get after claiming he would face persecution if returned to his native land.[79] In this case, U.S. immigration originally granted Stanisic, a Yugoslavian national, a landing permit but later revoked it when a single immigration officer denied his claim to political asylum.[80] Stanisic was later successful before the Ninth Circuit in arguing that a special inquiry officer should hear his claim to asylum, but the Court would reverse this decision.[81] During this time, Stanisic fit the common profile of thousands

73. 362 U.S. 217, 219–20 (1960).

74. *Id*. at 222–23.

75. *See, e.g.*, Jeff D. May, Rob Duke, and Sean Gueco, *Pretext Searches and Seizures: In Search of Solid Ground*, 30 ALASKA L. REV. 151, 178–84 (2013); *see also,* Margaret M. Lawton, *The Road of* Whren *and Beyond: Does the "Would Have" Test Work*, 57 DEPAUL L. REV. 917, 917 (2008).

76. 387 U.S. 523 (1967).

77. *See, e.g.*, Wadhia, *supra* note 3, at 13; *see also* David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L. J. 1, 4 (2006).

78. *See, e.g.*, César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 222 (2018); *see also* Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L. J. 1, 9 (2005).

79. 395 U.S. 62 (1969).

80. *Id*. at 66–67.

81. *Id.* at 72.

coming to the United States to escape communist regimes.[82] While Congress passed laws during the Warren Court that opened the doors to certain asylum seekers (i.e., the 1953 Refugee Relief Act), it was not until 1968 that it ratified the 1967 Protocol to the 1951 UN Convention on the Status of Refugees, but not the underlying 1951 Refugee Convention itself. And, it was not until 1980 that it incorporated the requirements of the 1967 Protocol into US law by enacting the 1980 Refugee Act, a law that conferred for the first time the right to seek asylum from within the U.S. territory.[83] Yet, the missed opportunity, including in *Stanisic*, to grant these due process rights constitutional standing has made them vulnerable to the types of massive violations we now see under President Trump's treatment of Central American asylum seekers.[84]

3. Due Process of Returning Lawful Permanent Residents

The Warren Court decided three of the four cases involving the due process rights of returning lawful permanent residents, including *Mezei,*[85] during the Cold War. One of these cases was dismissed for lack of ripeness since it was the workers' union that brought suit preemptively attempting to prevent the government from treating foreign national workers as "arriving aliens" upon on temporary assignment in Alaska.[86] Of the two cases decided on the merits, only in one of these cases, *Chew v. Colding*,[87] did the Warren Court refuse the government's treatment of petitioner as an arriving alien. The facts of that case were compelling in favor of petitioner, and eight justices agreed. Chew, a Chinese national, had been living in the U.S. as a lawful permanent resident for seven years, was married to a U.S. citizen, and was a veteran who had applied for naturalization. The Court drew a line when the government tried to treat him as an arriving alien upon his return after four months away serving as a U.S. Coast Guard on a U.S. merchant ship.[88]

The outcome in *Chew* stood in sharp contrast to the *Mezei*, from the same year. In fact, both Chew and Mezei stood accused, based on undisclosed evidence, that their entry into the U.S. would be prejudicial to the public interest. Mezei had been

82. Xiaojian Zhao, *Immigration to the United States After 1945*, OXFORD RESEARCH ENCYCLOPEDIAS, AMERICAN HISTORY (2016), *available at* https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-72 (on file with *The University of the Pacific Law Review*).

83. Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 305 (2001).

84. *Id.*; *see also* B. Shaw Drake and Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 109 (2017).

85. *See generally* 345 U.S. at 206, 219–20.

86. International Longshoremen's and Warehousemens' Union, Local 37, et al., v. Boyd (INS), 347 U.S. 222, 224 (1954).

87. 344 U.S. 590, 591–95 (1953).

88. *Id.*

a lawful permanent resident for 23 years and was also married to a U.S. citizen.[89] Yet, although his prolonged absence from the U.S. (19 months) was in great part due to his troubles securing an exit document, the Court would affirm the government's treatment of him as an arriving alien.[90] In the fourth returning lawful permanent resident case, *Fleuti*–decided nearly a decade after *Mezei*–the Warren Court again rejected the arriving alien treatment applied to a Swiss gay national, with a criminal history of petty theft, who left the U.S. for only two days to vacation in Ensenada.[91] In trying to reconcile these cases, the Court took great lengths to distinguish the cases factually based on such factors as the circumstances of their departures, length of time petitioners were gone, and whether, ultimately, their departures were innocent. The Court would have been more honest to draw lines based on national security, except doing so would have required deference in cases in which the government refused to disclose the evidence against petitioners. Why the Warren Court deferred in *Mezei* and not *Chew* is hard to explain when Mezei arguably had greater stakes and was largely not at fault for his delays in getting back home. Mezei, moreover, arguably would suffer a fate worse than Chew and most certainly Fleuti since he was lingering in indefinite detention as his efforts to secure a home in any other country had failed.[92] How could, then, the Warren Court pretend that the factors it constructed to distinguish *Chew* from *Mezei* could make up for the fact that Mezei's life was completely destroyed without a hearing and without even knowing why? The Warren Court should have been bold in its commitment to due process, but it was not. As a result, the feeble gains in *Chew* and *Fleuti* granting certain returning lawful permanent residents deserve some due process rights remains, although now as codified and modified by statute.[93] But, *Mezei*'s legacy to deny basic due process to many foreign nationals remains. This includes the non-innocent lawful permanent residents who depart the U.S.[94] and those who have been paroled and are detained or living in the U.S., no matter for how long.[95] *Mezei* also foreshadowed the normalization to today of state secrets, cursory proceedings, and other harsh treatment of foreign

89. 345 U.S. 206, 219–20 (1953).

90. *Id.* at 211.

91. 374 U.S. 449, 463 (1963).

92. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PENN. L. REV. 933, 964–66 (1995).

93. *See supra* note 68 and accompanying text discussing 8 USCA § 1101(a)(13)(C).

94. *Id.* By statute, the non-innocent now includes anyone who commits any illegal offense after leaving the U.S. but also anyone with a criminal history that would render that person inadmissible under the immigration laws. This latter list is quite expansive. *See, e.g.*, Rob Doersam, *Punishing Harmless Conduct: Toward A New Definition of "Moral Turpitude" in Immigration Law*, 79 OHIO ST. L.J. 547 (2018); Sara Salem, *Should They Stay or Should They Go: Rethinking the Use of Crimes Involving Moral Turpitude in Immigration Law*, 70 FLA. L. REV. 225 (2018); Frank George, *On Moral Grounds: Denouncing the Board's Framework for Identifying Crimes of Moral Turpitude*, 51 AKRON L. REV. 577 (2017); Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163 (2008).

95. *See, e.g.*, Note, Allison Wexler, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-*Zadvydas, 25 CARDOZO L. REV. 2029 (2004).

nationals perceived as national security threats.[96]

4. The Right to Seek Bail in Immigration Detention Cases

In two strongly worded opinions decided the same year, the Court in no uncertain terms decided in favor of petitioners to overturn the immigration agencies and grant them bail. Interestingly, both were Cold War cases, and both involved removals of lawful permanent residents based on their alleged associations with the Communist Party. In one case, *Yanish v. Barber*, a Russian national who had already been ordered removed was denied bail while he awaited the resolution of his writ of habeas challenging his removal.[97] In its holding, the Court acknowledged that the immigration law gave the Attorney General discretion to grant or deny bail but that this power was subject to judicial review for abuses of power.[98] Then, the Court held in this case that the Attorney General abused his powers by conditioning bail on petitioner's renouncement of his beliefs and associations with the Communist Party.[99] Similarly, in *Carlisle v. Landon*, the Court considered that it was an abuse of power for the Attorney General to deny bail to petitioner, who was facing removal for his past communist membership, based solely on this association.[100] In each of these cases, the Court cites to the Eighth Amendment for its authority to review administrative bail decisions. In *Carlisle v. Landon*, the Court stated:

> There is a constitutional question that lurks in every bail case. The Eighth Amendment provides that 'excessive bail' shall not be required. . . Requirement of bail in an amount that staggers the imagination is obviously a denial of bail. It is the unreasoned denial of bail that the Constitution condemns. The discretion to hold without bail is not absolute. If it were, we would have our own model of the police state which looms on the international horizon as mankind's greatest modern threat.[101]

Despite the strong constitutional language in these cases, it did not yield constitutional safeguards against the significant adoption of mandatory detention in subsequent immigration legislation.[102] Nor did these cases protect immigrants

96. *See, e.g.*, Sudha Setty, *Obama's National Security Exceptionalism*, 91 CHI.-KENT L. REV. 91 (2016); *see also* Emily C. Kendall, *The Alien Terrorist Removal Court and Other National Security Measures You May Have Never Heard Of*, 18 TEX. WESLEYAN L. REV. 253 (2011).

97. 73 S. Ct. 1105 (1953).

98. *Id.* at 1108.

99. *Id.* at 1108–09.

100. 73 S. Ct. 1179 (1953).

101. *Id.* at 1182.

102. Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L. J. 363 (2014).

from denials of bail with limited due process[103] or from the imposition of excessive bail.[104] Today, the constitutional foundation of any limits on the immigration detention power is still unsettled,[105] even as immigration detention has grown exponentially and started to look no different from criminal detention.[106]

5. Due Process in Immigration Deportation Cases

The Warren Court was most active in deciding cases–a total of 13–that raised questions of due process rights for lawful permanent residents facing deportation. The cases involved important questions of due process such as the right to judicial review, the standard of proof applicable in deportation cases, and. the application of post facto protections in deportation proceedings. Here, too, the results were mixed.

The clearest decision in favor of petitioners was *Woodby v. INS*, which held the burden of proof in deportation cases had to be clear and unequivocal evidence as required by the Administrative Act, despite language in the National Immigration Act of 1952 requiring only reasonable, substantial and probative evidence.[107] *Woodby* is unusual because the immigration statute did not trump the stricter protections imposed by the Administrative Act, something that did not similarly occur in the area of judicial review as discussed below. *Woodby* has had staying power to today and has offered important due process protections to immigrants.[108]

In contrast to *Woodby*, in the four cases deciding whether judicial review was required in orders of deportation, the Court deferred to the statute over the Administrative Procedure Act. As such, these cases yielded different outcomes depending on the degree of judicial review that the relevant immigration laws required at the time of the deportation. For example, in *Heikilla v. Barber*, the Court held that under the 1917 Immigration Act, final orders of deportation were only subject to habeas corpus review.[109] In contrast, in two cases that involved deportations regulated under the Immigration and Nationality Act of 1952, the Court found that a final order of deportation and the denial of suspension of

103. *See, e.g.*, Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75 (2016); Note, Anthony R. Enriquez, *Structural Due Process in Immigration Detention*, 21 CUNY L. REV. 35 (2017).

104. Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor:* Hernandez v. Sessions, 21 CUNY L. REV. 69 (2017).

105. Whitney Chelgren, *Preventive Detention Distorted: Why it is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477 (2011).

106. Comment, Megan Shields Casturo, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 PENN ST. L. REV. 825 (2018).

107. 385 U.S. 276 (1966).

108. *But see* Hillary Gaston Walsh, *Unequivocally Different: The Third Civil Standard of Proof*, 66 U. KAN. L. REV. 565 (2018) (discussing Circuit split between the Ninth and Sixth Circuits in the interpretation of the *Woodby* standard).

109. *See generally* 345 U.S. 229 (1955).

deportation both were subject to judicial review under the statute.[110] Conversely, the Court would affirm the Third Circuit's rejection of jurisdiction to review the agency's denial of motions of stay post-removal in order to seek other discretionary remedies as it was not subject to judicial review under the statute.[111] The Court's deferral to immigration statutes when an immigration decision requires judicial review has resulted in Congress often moving to deny immigration petitioners' access to the courts.[112]

Denying ex post facto protections to lawful permanent residents facing removal is another area with vast implications for immigrants facing removal for crime. However, in two separate opinions, the Warren Court denied this protection to two lawful permanent residents with significant stakes in the U.S. The first case involved a lawful permanent resident convicted of a drug crime in 1925 whose case did not trigger deportation until the passage of the Nationality Act of 1952.[113] The second case involved a lawful permanent resident who had been in the U.S. for over 35 years and had been pardoned for his 1935 blackmail crime, yet he was still deportable under the Nationality Act of 1952 because it applied retroactively and discounted pardons.[114] The willingness of Congress to expand criminal grounds for deportation and apply retroactively to immigrants continues to inflict pain on long-term permanent residents, many of whom were young when they committed crimes, have paid their debt to society, and face family separation and permanent expulsion from the only country they know.[115]

Other areas of immigration over which the Warren Court would not intervene to impose greater due process included claims of bias in the deportation proceedings when the same agency acted as investigator and prosecutor,[116] and denials of discretionary relief to deportation even when these were the result of secret proceedings,[117] or based on proceedings that compelled disclosure of incriminating facts.[118] In contrast, the Warren Court did impose a right of judicial review in cases that refused a motion to reopen an order of deportation for reconsideration[119] and compelled the agency to review petitioner's suspension of deportation application.[120] The Warren Court also compelled the agency to order a rehearing in a deportation case, finding bias based on the Attorney General's public

110. Foti v. INS, 375 U.S. 217 (1963); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

111. Chan Kwan Chung v. INS., 392 U.S. 642, (1968).

112. *See, e.g.*, Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIG. L. J. 595 (2009); Brian G. Slocum, *Courts vs. the Political Branches: Immigration "Reform" and the Battle for the Future of Immigration Law*, 5 GEO. J. L. & POL'Y 509 (2007).

113. *See generally* 353 U.S. 692 (1957).

114. Lehmann v. U.S. *ex rel* Carson, 353 U.S. 685 (1965).

115. *See, e.g.*, Lupe S. Salinas, *Deportations, Removals, and the 1996 Immigration Act: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L. J. 245 (2004).

116. Marcello v. Bonds, 349 U.S. 302 (1955).

117. Jay v. INS, 351 U.S. 345 (1956)

118. Kimm v. Rosenberg, 363 U.S. 405 (1960).

119. Giova v. Rosenberg, 379 U.S. 18 (1964).

120. Dessalernos v. Savoretti, 356 U.S. 269 (1958).

statements prior to the hearing of wanting to get rid of "unsavory characters" and making public a list of 100 names that included petitioner.[121]

6. Due Process in Immigration Deportation Collateral Consequences Cases

Only one case falls in this category. In *Fleming v. Nestor*, the Court held that the termination of social security benefits following the deportation of a lawful permanent resident, based on past membership with a communist party, did not require review by a three-judge panel as opposed to a single district court judge.[122]

7. Due Process in Citizenship Cases

In the two cases involving the conferral of citizenship, the Court granted the petitioners' due process requests. In *Brownell v. We Shung*, the Court held that Shung, a Chinese national claiming to be a U.S. citizen by virtue of *jus sanguinis*, was entitled to either a declaratory judgment, habeas corpus, or both.[123] Then, in *Thompson v. INS*, the Court adopted a flexible rule on time to appeal a naturalization case because of the stakes involved.[124]

8. Due Process in Loss of Citizenship Cases

The Warren Court was also quite concerned with the due process rights of U.S. citizens facing denaturalization or repatriation, deciding all five cases in favor of petitioners. In *Gonzalez v. Landon*, the Warren Court held that the government must meet the high standard of clear, unequivocal and convincing evidence in cases involving expatriation, the same standard applying to denaturalization cases.[125] In *U.S. v. Zucca*, the Court read the denaturalization statute strictly to require the Attorney General to enter an affidavit of good cause prior to proceeding with denaturalization.[126] In *Rusk v. Cort*, the Court held that a U.S.-born citizen who left to England and refused to respond to the draft was entitled to the same due process protections for citizens still inside the U.S. who lost their citizenship.[127] In *Kennedy v. Mendoza-Martinez*, the Court declared unconstitutional a statute that denationalized citizens for evading the draft because it failed to provide sufficient due process under the 5th and 6th Amendments for essentially punitive measures.[128] Finally, in *Scheider v. Rusk*, the Court held that only a three-judge panel, and not a single judge, possessed the power to dismiss an

121. U.S. *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).
122. 363 U.S. 603 (1960).
123. 352 U.S. 180 (1956).
124. 375 U.S. 394 (1964).
125. 350 U.S. 920 (1955).
126. 351 U.S. 91 (1956).
127. 369 U.S. 367 (1962), *abrogated by* Califano v. Sanders, 97 S. Ct. 980 (1977).
128. 372 U.S. 144 (1963).

action raising constitutional questions involving deprivation of nationality through denaturalization.[129]

II. THE STATUS OF THE IMMIGRATION PROCEDURAL DUE PROCESS REVOLUTION FIFTY YEARS AFTER THE WARREN COURT

Thus, while sympathetic to immigrants' due process in important ways at a time when immigrants faced significant tribulations from harsh immigration laws and enforcement, the Warren Court did not provide much of a due process resolution for immigrants in the end. Indeed, in some areas—such as the treatment of immigrants deemed excludable, even those with significant ties to the United States, such as Mezei—the Warren Court significantly expanded immigration law's exceptionalism in ways that have had a lasting legacy. For example, in 2015, the Court also cited to *Mezei* when it held that a U.S. citizen could not challenge the denial of a family-based visa to her husband based on secret evidence that he would represent a national security risk if admitted.[130] Also, the Court cited to *Mezei* in 2018 to hold that the immigration statutes could not be read as imposing a six-month limit on the detention without bail or a bond hearing of foreign nationals seeking entry into the United States.[131] While the Court did not cite to *Mezei* when it affirmed President Trump's power to enact the travel ban against six predominantly Muslim nations in 2018, *Mezei* is certainly relevant in having established a near-absolute power to keep foreign nationals out–even those with close family relations in the United States.[132]

In this context, the answer to the question of how immigrants are faring in terms of procedural due process rights fifty years after the Warren due process revolution seems rather bleak. However, despite these significant recent setbacks, the road to where immigrants are today regarding procedural due process has not been linear and is therefore more nuanced, and perhaps even more hopeful. In general, we see three important trends in attempts to expand the procedural due process rights of immigrants which may still have sustaining power. Interestingly, each of these trends can also attribute positive impact on the Warren Court's due process precedents, both those that applied to criminal defendants and those that started to carve out important areas of immigration law a non-exceptional.

The first of these trends is what we broadly call the domestication of immigration law. By this we mean that immigration law's exceptionalism, the so-called plenary power doctrine, at least in the area of procedural due process, has not applied equally to those inside the U.S. territory who can demonstrate significant stakes that included liberty or property interests. In general, greater due process rights, which are arguably required by or at a minimum deeply informed

129. 372 U.S. 224 (1963).

130. Kerry v. Din, 575 U.S. 86 (2015).

131. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

132. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

by constitutional norms, apply to immigrants who live in the United States, irrespective of the circumstances of their entry. As we documented in Part I.B., this trend was very present in the immigration decisions of the Warren Court, in which lawful permanent residents especially, as well as those facing the loss of citizenship, fared a better fate.

The second trend has occurred as a result of the persistent and expanding imposition of punitive measures on immigrants in the enforcement of immigration law. As we also documented in Part I.B., the harsh treatment of immigrants in ways that are impossible to distinguish from criminal defendants is not new, and it was most certainly present during the Warren Court period. What is new, however, is that now, the rise of due process rights for criminal defendants during the Warren Court period has provided a new constitutional framework to advance similar due process rights for immigrants in at least three areas: to constrain as much as possible immigration detention practices; to accord certain rights to immigrants in criminal proceedings who face deportation as a result of the criminal proceedings; and, to argue for a right to counsel, at least for a subset of immigrants facing deportation. While the Warren Court did not directly recognize these types of rights for immigrants, some positive effects from the criminal due process revolution have spilled over to immigrants.

Finally, the third trend that contributes to the analysis of due process rights to immigrants fifty years after the Warren Court is the rise in immigration federalism, especially post-9/11.[133] The rise in immigration federalism responded to deep disagreements with federal immigration laws and policies, which raised substantive and structural concerns that the federal government was encroaching on state powers through immigration law.[134] The results have certainly been mixed for immigrants who have both gained greater rights or been treated worse by local sovereigns.[135] However, as we explore below, some of the strong push back has been to improve the due process rights of immigrants as a direct result of the enormous expansion of the effectiveness and scope of the federal immigration enforcement powers since 9/11. Here too, localities have relied on the Warren Court's criminal due process framework to demand greater rights for immigrants.

A. The Domestication of Immigration Due Process

When teaching the plenary power doctrine to law students, immigration professors draw important distinctions to frame a discussion of whether any constitutional limits apply. At least three bedrock principles are helpful to separate the immigration cases in which the plenary power is strongest–i.e., absolute to near absolute–from those where it is weaker–i.e., some constitutional limits apply: (1)

133. KEVIN R. JOHNSON, RAQUEL ALDANA, BILL ONG HING, LETICIA M. SAUCEDO, AND ENID TRUCIOS-HAYNES, *Immigration Federalism, in* UNDERSTANDING IMMIGRATION LAW 135–138 (3d ed. 2019).

134. *See generally, id.* at 135–219.

135. *Id.*

the territoriality principle; (2) the distinctions between substantive and procedural rights; and, (3) the relevance of war powers. Of these, the territoriality principle guided the Warren Court's immigration cases in ways that continue to provide lasting protections, at least to some immigrants today.

The territoriality principle, the constitutional principle that the U.S. Constitution applies differently to immigrants inside the U.S. as opposed to those who seek entry, was certainly not new, but it took on greater meaning during the Warren Court years. Immigration law has drawn clear demarcations to restrict the reach of U.S. constitutional rights only to those who have made an entry to the U.S. territory. This demarcation, in fact, is what left Mezei unprotected through a series of legal fictions and factual conclusions: his departure from the U.S. broke his ties to the U.S. territory (the factual conclusion),[136] and his ongoing detention in the U.S. (without end in sight) did not constitute a new entry such that he would be treated as being outside the U.S. (the parole legal fiction).[137] Interestingly, the below dicta in *Mezei* became critical in trying to distance Mezei's terrible fate from that of other immigrants who could establish entry and presence in the U.S.:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law (citations omitted). But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned' (citations omitted).[138]

This critical outside/inside distinction mattered during the Warren Court to recognize important rights, especially for lawful permanent residents and those seeking citizenship or facing the loss of it.[139] This legacy is still important today and has combined with what has become known as the "stakes principle" in immigration law to improve largely procedural due process rights for immigrants inside the U.S., largely irrespective of immigration status.[140] The stakes principle essentially recognizes that over time immigrants living in the U.S. build significant

136. *See supra* notes 90–91 and accompanying text discussion the circumstances of Mezei's departure from the U.S.

137. *See, e.g.*, M. Gavan Montague, *Should Aliens Be Indefinitely Detained Under 8 U.S.C. S 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 FORDHAM L. REV. 1439 (2001); Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 67–75 (1989).

138. *Mezei*, 345 U.S. at 212.

139. *See generally supra* Part I.B.

140. *See, e.g.*, Matthew J. Linday, *Disaggregating Immigration Law*, 68 FLA. L. REV. 179 (2016); Stephen Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L. Q. 925 (1995); *see also* Note and Comment, Alyssa Markenson, *What's at Stake?: Bluman v. Federal Election Commission and the Incompatibility of the Stake-Based Federal Immigration Power and Freedom of Speech*, 109 NW. U. L. REV. 209 (2015).

social and economic ties that ought to matter to recognize how deportation affects their liberty, property or life interests such that, at a minimum, due process rights should guarantee them a fair process.[141] *Mezei*'s dicta also strongly suggested that territoriality + stakes principle applies also to those who establish presence and build a life in the U.S., even after crossing the U.S. border without authorization.

In the decades that followed the Warren Court and pre-9/11, the territoriality + stakes principle combined with important civil rights developments expanding equality and liberty interests in other areas to law (e.g., public benefits, criminal law, family law, racial justice) attempt to rein in the immigration plenary power in favor of greater protections for immigrants.[142] For example, important constitutional-like restrictions on the immigration detention power emerged,[143] as did constitutional-like scrutiny on certain discriminatory immigration practices like gender discrimination in conferral of citizenship cases.[144] In a seminal article published by the Yale Law Journal, Hiroshi Motomura elegantly called this trend in immigration law "phantom constitutional norms."[145] These cases did not always yield the expected outcomes,[146] but they did provide some hope that they signaled the beginning of the end of near absolute immigration powers,[147] or at a minimum, a cultural shift that would make a return to the darker side of immigration powers politically unfeasible.[148]

The September 11 attacks on the United States, however, largely put an end to this optimism. Overwhelmingly, analysis of the nature of the immigration power today highlight its exceptionalism both in terms of its absoluteness–i.e., the lack of checks and balances imposed by the judiciary and increasingly by Congress over executive action–but also in terms of its significant departure from fundamental

141. *See, e.g., id.*

142. *See, e.g.*, Joseph Landau, *Due Process and the Noncitizen: A Revolution Reconsidered*, 47 CONN. L. REV. 847 (879) (discussing the "Mathewsization" of immigration law); Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 706–18 (2005) (discussing the constitutional basis for limiting the immigration plenary power pre-9/11).

143. *See, e.g*., Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L. J.1003 (2002); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47 (2001).

144. *See e.g.*, Martha F. Davis, *Sex-Based Citizenship and the "New Rationality"*, 80 ALB. L. REV. 851 (2016-2017); Rebecca L. Barnhart & Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y. CITY L. REV. 275 (2004).

145. Motomura, *supra* note 32.

146. This was especially true in the derivative citizenship immigration cases where, despite the application of intermediate scrutiny, the Court neither definitely apply the standard in INS v. Nguyen, 533 U.S. 53 (2001), but also affirmed the validity of the gender discrimination as applied in the case in ways that worried Justice O'Connor and other feminist scholars alike who viewed the results as watering down the intermediate scrutiny standard beyond immigration cases. *See, e.g.*, Comment, Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 190–92 (2017).

147. *See*, *e.g.*, Spiro, *supra* note 18 at 339; *see also* Chin, *supra* note 14 at 1.

148. *See, e.g.*, Johnson, *supra* note 18.

civil rights.[149] Undoubtedly, there is very little reason to be hopeful that the territoriality + stakes doctrine will do much to curtail today's immigration power. The national security exceptionalism of the war on terror as applied once more to immigrants already in the United States post 9/11, for example, had led to similar types of abuses seen during the Cold War that were left largely untouched by the courts.[150] Also, the Supreme Court appears to have little appetite post 9/11 to continue expanding the constitutional gains in limiting the immigration detention power, while the racialized nature of immigration enforcement continues to grow without a remedy in court.[151] Even in the narrow gains of gender equality principles as applied in derivative citizenship cases, the Court's subsequent application of intermediate scrutiny challenging the unfavorable treatment of fathers resulted only in reducing rights for mothers.[152] If this were not enough, one of the most important battles occurring in immigration law today is whether the Warren Court's *Mezei* exceptionalism will extend to foreign nationals who are living in the United States but cannot prove a presence in the United States for at least two years.[153] This possibility, while dormant for decades, had been codified as part of the 1996 immigration laws, although only President Trump had opted to rely on it.[154] Now, the constitutionality of this law is being tested in the Courts with an uncertain future given what many perceive as the rise of immigration's exceptionalism Post-9/11.[155]

None of the above, however, should be read as the death of due process protections–or even substantive constitutional rights–for immigrants. Much of the important precedent granting due process rights to immigrants during and after the Warren Court period remain. More importantly, the values that gave rise to this

149. *See, e.g.,* Wadhia, *supra* note 3; *see also* Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7 MOD. AM. 42 (2011).

150. *See, e.g.*, Marvin L. Astrada, *Fear & Loathing in the Current Political Context: The Incubus of Securitizing Immigration,* 32 GEO. IMMIGR. L. J. 169 (2018); Ellen C. Yarosshefsky, *The Slow Erosion of Adversary System: Article III Courts, FISA, CIPA, and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203 (2006).

151. *See, e.g.*, Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L. J. 118 (2018).

152. *See, e.g.*, Laura Murray-Tijan, *Transmission of U.S. Citizenship to Children Born Abroad: Issues and Cases in the Aftermath of Morales-Santana*, 18–12 IMMIGRATION BRIEFINGS 1 (2018); John Vlahoplus, Sessions v. Morales-Santana, *Beyond the Mean Remedy*, 17 CONN. PUB. INT. L. J. 311 (2018).

153. *See* Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing The New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253 (2018).

154. *Id.*

155. *See*, *e.g.*, Make the Road New York v. McAleenan, 405 F. Supp. 3d. 1 (2019) (granting preliminary injunction to stall the application of expedited removal to certain undocumented immigrants under President Trump's Executive Order). Already, in 2004, President George W. Bush adopted regulations to extend the application of "arriving alien" and expedited removal to anyone found within 100 miles of the U.S. border who also could not prove having been in the country more than 14 days through regulation. Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions for the Legal Blackholes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337 (2018). Court challenges to this practice had yielded mixed results. *See e.g.*, Comment, Vanessa M. Garza, *Unheard and Deported: The Unconstitutional Denial of Habeas Corpus in Expedited Removal*, 56 HOUS. L. REV. 881 (2019).

precedent–that immigrants in the United States deserve protections as persons and that their stakes should limit the sovereign's absolute power to detain and deport them–are powerful principles that continue (or should continue) to influence the thinking of judges and policy-makers who must weigh how far to permit immigration power's reach.[156] Insisting on these principles–in fact, building and innovating upon these to expand constitutional protections for immigrants[157]–is paramount in times of rule of law crisis when immigrants are at their most vulnerable. Similar to what the Warren Court did for criminal defendants, this is a time to be bold: to imagine an alternative rights-based future for immigration law, even if its realization must wait.[158]

B. Crimmigration's Rise and the Warren Due Process Revolution

In a 2011 article titled *Deportation is Different*, Professor Peter L. Markowitz traced the origins of how U.S. immigration law received the label of civil as opposed to criminal law.[159] At the time of the Constitution's framing, deportation as a concept did not appear in U.S. law.[160] Instead, banishment was the earliest precursor to modern deportation. Banishment, a widely used form of criminal punishment for citizens and noncitizens alike in ancient times,[161] constituted the sole historical common law practice in England and the United States by which both citizens and noncitizens were expelled from the territory based on the commission of crime.[162]

Starting in the late 1800s, however, in a series of important U.S. Supreme Court cases involving Chinese immigrants in the United States, the treatment of deportation as distinct from punishment became solidified and has remained constant to today. In 1889, with the decision of *Chae Chan Ping*–or, the Chinese

156. *See, e.g.*, Note, Jorge A. Solis, *Detained Without Relief*, 10 ALA. C.R. & C. L. L. REV. 357 (2019); Note, Megan K. Bradley, *Assessing the "Proper Judicial Role" in Reviewing Immigration Detention*, 27 J. TRANSNAT'L L. & POL'Y 137 (2017–18);

157. *See, e.g.*, Bing Le, *Constitutional Challenges to Courthouse Civil Arrests of Noncitizens*, 43 N.Y.U. REV. L. & SOC. CHANGE 295 (2019); Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427 (2018); Note, Zainab A. Cheema, *A Constitutional Case for Extending Due Process to Asylum Seekers: Revisiting the Entry Fiction After* Boumediene, 87 FORDHAM L. REV. 289 (2018); Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485 (2018); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*; 80 OHIO ST. L. J. 13 (2019); Shawn E. Fields, *From Guantanamo to Syria: The Extraterritorial Constitution in the Age of Extreme Vetting*, 38 CARDOZO L. REV. 1123 (2018).

158. *See, e.g.*, Allison Crennen Dunlap, *A Constitution that Starves, Beats, and Lashes (or the Plenary Power Doctrine):* Jennings v. Rodriguez *and a Peek into Immigration Dissent History*, 95 DENV. L. REV. ONLINE 95 (2018).

159. Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

160. *Id*. at 1308–11.

161. *Id*.

162. *Id*. The origins of the treatment of the immigration power as civil has been explored in several other writings as well. *See*, *e.g.*, Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L J. 115 (1999).

Exclusion Case–the U.S. Supreme Court framed the federal government's immigration power as grounded in sovereignty and war powers and, thus, largely immune from constitutional limits.[163] Under its facts, the Chinese Exclusion Case granted the federal government absolute power to exclude a long-term, returning lawful permanent resident based on changes in law that occurred after his departure without any due process rights and certainly not those that would have applied to persons in criminal proceedings.[164] Four years later, in the 1893 *Fong You Ting* case, the U.S. Supreme Court applied the same breadth of powers to remove four long-term lawful permanent residents still living in the United States but who refused or could not secure the testimony of a "white witness" who could credibly attest to their lawful presence in the United States.[165] The petitioners, three Chinese laundrymen, would face deportation–really banishment–from New York,[166] the place they had called home for decades, without the rights (4th, 5th, 6th and 8th Amendments) that at least three dissenting Justices felt should have been given to them.[167] The dissenting Justices, and in particular Justice Brewer, could not reconcile how the harshness of deportation as applied to long-term lawful permanent residents could be treated as differently from punishment.[168]

Ironically, perhaps, only three years after the Court decided *Fong Yue Ting*, the U.S. Supreme Court would find that four other Chinese nationals, including Wong Wing, had been punished with 60 days of hard labor for failure to comply with the same law, the Geary Act,[169] which required them to produce a white witness to legitimate their immigration status.[170] Thus, in contrast to all other Chinese nationals denied entry or banished from their home, those sentenced to hard labor had a right to a judicial trial to adjudicate their guilt. To the Court, the key distinction between a Fong Yue Ting and a Wong Wing turned not on the harshness of deportation versus hard labor but rather on their intent: with hard labor, Congress intended to punish Chinese nationals for violating the Geary Act, whereas deportation's purpose under the same law was solely a measure incident to the sovereign's powers to control the border especially against unwanted foreign invasions like the Chinese.[171]

Deportation's harshness, of course, has led several scholars to critique its

163. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

164. *Id.*

165. Fong Yue Ting v. United States, 149 U.S. 698 (1893). For a more comprehensive treatment of the background to Fong Yue Ting, including the campaigns of civil rights resistance that emerged from Chinese nationals against racist laws, *see* Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION STORIES, at 7–29 (Davis. A. Martin and Peter H. Schuck, eds. 2005).

166. Chin, *supra* note 163, at 17.

167. *See generally* The dissenting Justices included Brewer, Field and Fuller. *Fong Yue Ting*, 149 U.S. at 733–63.

168. *See generally id.* at 733.

169. Geary Act, ch. 60, 27 Stat. 25 (May 5, 1892)

170. Wong Wing v. U.S., 163 U.S. 228 (1896).

171. *Fong Yue Ting*, 149 U.S. at 981.

treatment as non-punishment.[172] This critique has intensified especially as scholars have documented the ways in which immigration and criminal law have become increasingly intertwined and indistinguishable, while still leaving significant asymmetry in the rights that attach to immigrants in immigration proceedings compared to defendants in criminal proceedings.[173] This overlap between immigration and crime–"crimmigration"–came early in the history of U.S. immigration laws as illustrated by *Wong Wing*. Most scholars, however, situate its exponential growth to the mid-1980s when Congress moved to substantially expand the criminal grounds for removal.[174] Similarly, the U.S. Supreme Court's conflation of immigration law with federal war powers or national security–which was also present in the early Chinese cases–and its abuse in U.S. wartime to persecute perceived foreign enemies of the state have also raised significant questions about the advisability of retaining an asymmetrical due process regime in immigration versus criminal proceedings.[175]

During the Warren Court years, of course, both the harshness of deportation as applied to long-term permanent residents and other newer developments of crimmigration were present. The Warren Court, while sympathetic to the harms of deportation,[176] most certainly did not take the opportunity to treat deportation as punishment. The most important illustration of this is the Court's refusal to extend ex post facto protections to lawful permanent residents who had been convicted of crimes and served their time when these were not deportable offenses. The 1952 Immigration and Nationality Act (McCarren-Walter Act) added not only the so-called Red Scare provisions but also so-called social cleansing provisions which categorized homosexuality and prostitution as crimes of moral turpitude and included drug crimes as deportable offenses, applying these retroactively.[177] Not

172. *See, e.g.,* Beth Caldwell, *Banishment for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261 (2013); Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 77 U. PITT. L. REV. 431 (2011); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000).

173. *See, e.g.,* Stephen Legomsky, *supra* note 2 at 469; Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 54 AM. U. L. REV. 367 (2006); Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L. J. 611 (2003). For a comprehensive treatment of the history of what has become known as crimmigration—the overlap between immigration and crime—*see Crimmigration*, in UNDERSTANDING IMMIGRATION LAW, at Chapter 15 (Kevin Johnson, et. al., 3d ed. 2019).

174. JOHNSON, *supra* note 171, at 559–60.

175. *See, e.g.,* Chacón, *supra* note 35, at 1827; Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369 (2007).

176. *See supra* Part I.B.4 and 5 discussing the recognition of the right to bail in immigration detention cases and due process in deportation proceedings involving lawful permanent residents.

177. *See, e.g.*, Daniel M. Kowalski & Daniel C. Horne, *Defending the Noncitizen*, 24 COLO. LAW 2177 (1995); *see also* Gregory E. Fehlings, *Deportation as a Consequence of a Court-Martial Conviction*, 7 GEO.

surprisingly, the retroactive application of deportable crimes has become quite popular in immigration law with harsh consequences for long-term residents with established ties in the U.S.[178] As well, the Warren Court refused to curtail the ability of law enforcement to rely on its more flexible administrative powers to conduct criminal investigations, despite its predictable effect of watering down the Warren Court's important new criminal due process protections in criminal investigations.[179]

The verdict, thus, would seem that the Warren Court largely failed immigrants in the area of crimmigration. However, there are at least two ways in which the criminal due process revolution led to important developments (albeit not yet sufficient) to increase due process rights for immigrants that would not have occurred without the Warren Court's criminal due process revolution. First, the Warren criminal due process revolution created the benchmark against which to evaluate the due process guarantees available to immigrants in criminal proceedings. For example, should the exclusionary remedy apply to tainted evidence or confessions in deportation cases, or should immigrants get a right to counsel? We are far from parity in these areas, especially if we only consider the federal immigration power. For example, the Fourth Amendment's exclusionary remedy applies, but only in particularly egregious violations[180] and not at all to tainted confessions.[181] Similarly, limited right to counsel remedies have made their way to federal court rulings in innovative ways in immigration cases.[182] Yet, undoubtedly, immigration scholars and advocates apply the strong rhetorical force of the Warren Court's criminal due process revolution arguing that the convergence of immigration and crimmigration law today can no longer justify this asymmetrical treatment.[183] Furthermore, as explored in Part II.C. below, the rise in immigration federalism has, at times, also led to increased due process protections for immigrants that are deeply influenced by the Warren Court's due process revolution.

Second, the Warren Court's due process revolution has influenced the

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IMMIGR. L. J. 295 (1993).

178. *See, e.g.*, Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

179. *See supra* Part I.B.1 discussing immigration investigations and criminal prosecutions

180. *See, e.g.*, Elizabeth L. Young, *Converging Systems: How Changes in Fact and Law Require a Reassessment of Suppression in Immigration Proceedings*, 17 U. PA. J. CONST. L. 1395 (2015); Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza: *Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013).

181. *See* Anjana Malhotra, *The Immigrant and Miranda*, 66 SMU L. Rev. 277 (2013).

182. *See, e.g.*, *Ninth Circuit Finds Statutory Right to Counsel for Non-LPRs in Reasonable Fear Proceedings Before an Immigration Judge*, 96 No. 33, INTERPRETER RELEASES Art. 4 (2019); César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violate Their Right to Counsel*, 21 BERKELEY L. J. 17 (2011).

183. *See, e.g.*, *supra* notes 144 and 145*; see also* Sandra E. Bahamonde, *Due Process for U.S. Permanent Residents: The Right to Counsel*, 20 ILSA J. INT'L & COMP. L. 85 (2013); Comment, Shane T. Devins, *Using the Language of* Turner v. Rogers *to Advocate for a Right to Counsel in Immigration Removal Proceedings*, 46 J. MARSHALL L. REV. 893 (2013).

development of rights in the narrow space of blatant convergence of criminal law and immigration: when an immigrant faces removal based on the commission or conviction of crime. Treating deportation as a collateral consequence to crime, courts did not recognize a right to counsel remedy when immigrants– often based on the wrong advice by their defense lawyers–pled guilty to crimes without realizing the immigration consequences of their plea. This all changed when the U.S Supreme Court held in *Padilla v. Kentuck*y that Padilla's attorney engaged in ineffective assistance of counsel when he wrongly told his client that pleading guilty to marijuana trafficking and to a sentence of five years plus an additional five years' probation, would not have adverse immigration consequences.[184] To the contrary, the plea not only subjected Padilla to deportation, but it did so as an aggravated felon under the immigration law, which triggered mandatory detention, barred him from any relief from deportation, and excluded him from reentering the U.S. for life, with the prospect of facing up to 20 years in jail if he tried.[185] In finding a Sixth Amendment violation, the Court reasoned:

> We have long recognized that deportation is a particularly severe "penalty," but it is not in, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizens. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.[186]

Padilla has been considered both revolutionary and disappointing. A number of scholars, for example, have written about *Padilla*'s potential for bridging the due process gap between the treatment of deportation and punishment and also potentially in expanding its holding to other types of collateral consequences.[187] At the same time, *Padilla*'s remedy to immigrants has been substantially narrowed by making its application non-retroactive, limiting its application only in instances of clear wrong advice, or declaring simple notice of the consequences as sufficient, as opposed to meaningful representation.[188] Despite these limitations, *Padilla* has improved the plight of immigrants in criminal court proceedings and has even led

184. 559 U.S. 356 (2010).

185. Johnson & Trujillo, *supra* note 173, at 577-78.

186. *Padilla*, 559 U.S. at 365–66.

187. Johnson & Trujillo, *supra* note 173, at 578.

188. *Id.* at 578–81.

to some innovations in the criminal defense of immigrants, developments which would not have occurred without the Warren Court's recognition of a right to counsel in criminal proceedings in the first place.[189]

C. *A Federalism Due Process Revolution for Immigrants?*

A third impact of the Warren Court's criminal due process revolution on immigrants can be described as a voluntary devolution effect as states and localities have moved to constrain the expansion of federal immigration enforcement power locally. Since the 1990s, collaboration, whether voluntary or imposed, between local law enforcement institutions and federal immigration agencies, has grown exponential, sometimes, in ways that have split localities.[190] Some states and localities have fully embraced this welcomed collaboration while others have pushed back vehemently, relying, in part, on important criminal due process principles that emerged during the Warren Court period.[191] An example of this is what Professor Christopher N. Lasch has called "rendition resistance": the refusal of certain localities to execute immigration detainers which raise constitutional due process concerns over the prolonged detention of immigrants by localities for purposes of immigration enforcement.[192] Another type of due process immigration federalism influenced by the Warren Court is the rise of local efforts to fund and support a right to counsel for immigrants[193] or to regulate those who seek to provide it by imposing standards of representation and accountability.[194] A final example pertains to the ways in which forceful conceptions on the right to privacy and other concerns over law enforcement abuses are leading many states and localities to adopt sanctuary laws to push back against federal immigration enforcement's encroachment into the lives of immigrants.[195]

III. CONCLUSION

The Warren due process revolution could be characterized as a missed opportunity when examined through the lens of immigrants and immigration law. A deeper look reveals, however, that its influence has been broader and deeper and is still, in fact, expanding and evolving in complex ways. The slow pace in which

189. *See, e.g.*, Talia Pegeg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193 (2019).

190. *See* Johnson & Trujillo, *supra* note 173, at 200–05 (discussing the Law Enforcement Support Center, 287(g) agreements, and Secure Communities, among others).

191. *Id.* at 205–14.

192. *Id.* at 213–14 (citing to Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149 (2013).

193. *See, e.g.*, Farrin Anello & Lori A. Nessel, *Raising the Bar for Immigrant Representation in New Jersey*, 304-FEB N. J. LAW 10 (2017).

194. *See, e.g.*, Careen Shannon, *Regulating Immigration Legal Services Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577 (2009).

195. *See* Johnson & Trujillo, *supra* note 173, at 209–13*; see also* Sarah Rogerson, *Sovereign Resistance to Federal Immigration Enforcement in State Constitutions*, 32 GEO. IMMIGR. L. J. 275 (2018).

immigrants have gained rights, and the way that these rights seemingly remain vulnerable to political forces, could suggest that the gains are not firmly grounded in constitutional doctrine. Yet, perhaps because these rights rise often as counter-responses to these strong anti-immigrant forces and consist of both political and judicial interventions, the hope remains that these could, in the long run, have staying power.