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The Normalization of Immigration Law

Mac LeBuhn*

In “The Normalization of Foreign Relations Law,” Professors Ganesh Sitaraman and Ingrid Wuerth argue that the Supreme Court increasingly treats foreign relations law like other bodies of law—it has “normalized” this body of once-exceptional law. However, a subset of foreign relations law, immigration law, receives little attention in their account, which obscures the fact that immigration law, unlike the rest of foreign relations law, has not normalized in nearly the same fashion.

To understand the normalization of immigration law, this paper proposes a theory of rights normalization: the Court has been reluctant to normalize immigration law except where immigrants’ rights are most at issue. Unlike foreign relation law normalization, immigration normalization has been halting and uneven in the contexts of justiciability, federalism and executive dominance. Yet, in questions affecting immigrants’ constitutional or international human rights, the Supreme Court has been more willing to normalize immigration law. Naturally, all immigration cases affect the rights of immigrants in some manner, but the Supreme Court shows an increased willingness to bring rights claims to the fore as a basis for rejecting exceptionalist arguments. In this way, the Supreme Court implements rights normalization.

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INTRODUCTION

The Supreme Court is slowly and surely shaping foreign relations law into a “normal” body of law. As Professors Sitaraman and Wuerth argue, foreign relations law, which includes national security, international and immigration law, has long been characterized as “exceptional,” given the Supreme Court’s distinctive treatment of questions of federalism, justiciability, and the dominance of the executive branch.¹ Through a process of “normalization,” courts come to answer foreign relations questions no differently than other legal questions. However, immigration law, a subset of foreign relations law, does not figure prominently in their account. How, if at all, does immigration law fit into the story of foreign relations normalization?

At least three narratives are possible. The first account holds that immigration law and foreign relations law have normalized together. Immigration law moves like a railcar connected to the larger foreign relations train, with all cars proceeding towards normalization.²

In the second story, immigration law has remained exceptional and drifted apart from the rest of foreign relations law, which has normalized.³

In the third story—the account that this paper advances—normalization has happened in parts of immigration law, but not others, with implications for the larger normalization story.⁴ In immigration law, the process of *rights normalization* erodes immigration exceptionalism when exceptional interpretations of immigration law implicate human rights questions.⁵

The third story is more attractive, as neither of the first two narratives fits the reality of the Supreme Court’s immigration decisions over the previous four decades. For one, immigration law has not normalized with the rest of foreign affairs law. In decisions like *Jama v. Immigration & Customs Enforcement*,⁶ the Court shows substantial deference to the executive branch on statutory interpretation and other matters. States are excluded from the regulation of immigration matters,

¹ Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1906–11 (2015).

² Presumably, Professors Sitaraman and Wuerth, who expressly identify immigration as part of foreign relations law, would commit to this camp. *See id.* at 1907 n.28. This paper is largely addressed to the position that immigration and foreign relations law have normalized together, and it focuses primarily, but not exclusively, on the account of this position that Professors Sitaraman and Wuerth provide.

³ *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (arguing that “no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role.”). *See also* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 Geo. Immigr. L.J. 289, 302 (2000) (arguing that the plenary power remains significant in immigration law); David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 42 (2015) (proposing the plenary power is retained to provide the political branches flexibility in confronting foreign affairs challenges).

⁴ I treat normalization of the various “siloes” of immigration as distinct processes for simplicity of argumentation here, but there is reason to suspect that normalization in one area of law may “spillover” into other areas of immigration law. For a thoughtful treatment of the relationships between the various elements of immigration law, see David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017).

⁵ Although this Note departs from Professors Sitaraman and Wuerth’s understanding of what is exceptional about immigration law, it shares the same definition as to what exceptionalism is. Foreign relations exceptionalism occurs when “domestic and foreign affairs-related issues are analyzed in distinct ways as a matter of function, doctrine or methodology The term itself sets a baseline of generally applicable analysis . . . and seeks to identify places where the analysis of foreign affairs diverges from this baseline.” Sitaraman & Wuerth, *supra* note 1, at 1907–08.

⁶ 543 U.S. 335, 348 (2005) (holding that immigration authorities could remove an individual to Somalia, a country that had not consented to his arrival despite evidently clear statutory language requiring such consent).

as in *Arizona v. United States*,⁷ which Professors Sitaraman and Wuerth describe as an “outlier.”⁸ The whole of immigration law is founded upon the plenary power doctrine, which holds that the federal government’s power to regulate immigration is inherent and unlimited. These are the cases one expects of an exceptional body of law.

But it is inaccurate to say that immigration law remained wholly exceptional while the rest of foreign relations law changed. With respect to justiciability, federal courts, once wholly excluded from review of immigration cases, have now snuck their noses under the tent in high-profile, rights-related cases. In cases like *Zadvydas v. Davis*, non-justiciability arguments and arguments for deference to the executive branch are unable to prevent the Supreme Court’s intervention in the limitless detention of an immigrant.⁹ Likewise, the plenary power itself has been slowly eroded by the introduction of “phantom constitutional norms,”¹⁰ as well as direct application of constitutional and international-legal rights. Immigration law is best understood under the third narrative: it has normalized in those places where the rights of immigrants were most affected, and remained exceptional elsewhere.¹¹

Part I describes the manner in which immigration law and foreign relations exceptionalism have developed together. Part II describes the characteristics of foreign affairs exceptionalism, as evinced in immigration and other areas of foreign relations law. In Part III, the normalization framework that Professors Sitaraman and Wuerth developed is fit to immigration law, with mixed results. What renders foreign relations law exceptional is not precisely what renders immigration law exceptional and, on this alternative account of immigration exceptionalism, immigration law has not seen significant normalization.

Part IV offers a new contribution to the study of foreign relations normalization: rights normalization provides an explanation for immigration law’s otherwise inconsistent departure from foreign relations exceptionalism.

I. IMMIGRATION’S LASTING INFLUENCE UPON EXCEPTIONALISM

It is a mistake to treat immigration and foreign relations exceptionalism as unrelated doctrines. The Supreme Court’s embrace of foreign relations exceptionalism was preceded by its development of immigration exceptionalism, which occurred through a series of cases handed down to a country gripped with anti-immigrant hysteria.

This Part offers a revised account of the rise of foreign relations exceptionalism. First, it describes the Supreme Court decisions that embraced foreign relations exceptionalism in the context of immigration a full half-century before Justice George Sutherland, who has otherwise been described as the “central architect” of exceptionalism,¹² arrived on the Court. Next, it reviews the contributions Justice Sutherland made to the exceptionalist view of foreign affairs. Finally, this Part reviews the immigration decisions arising during the early Cold War that built upon and

⁷ 132 S. Ct. 2492 (2012).

⁸ Sitaraman & Wuerth, *supra* note 1, at 1951 (noting that Justice Kennedy, the author of the opinion, employed “exceptionalist language” in reaching a decision illustrative of “immigration exceptionalism”).

⁹ 533 U.S. 678 (2001) (rejecting the government’s effort to indefinitely detain an immigrant despite apparent statutory authorization to do so).

¹⁰ Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

¹¹ See *infra* Part IV.

¹² Sitaraman & Wuerth, *supra* note 1, at 1913.

extended the reigning foreign relations exceptionalism further into immigration law. As this Part attempts to show, the rise of immigration exceptionalism is intertwined with the birth of foreign relations exceptionalism.

A. *Foreign Relations Exceptionalism in Early Immigration Cases*

The central themes of foreign relations exceptionalism—an emphasis on non-justiciability, a disregard for federalism and a reliance upon inherent claims of authority¹³—were developed by the Supreme Court’s early immigration decisions. During the late nineteenth century, the Supreme Court rendered a string of immigration decisions establishing each of these themes.

Preceding these early immigration cases was the orthodox view of foreign affairs.¹⁴ Under the orthodox approach, the federal government’s exercise of foreign affairs powers was evaluated through the standard analysis of government powers.¹⁵ On each of the factors that render foreign affairs law exceptional—questions of justiciability, federalism and executive deference—orthodox foreign relations law used normal modes of judicial reasoning.¹⁶

This orthodox approach to immigration law was called into question by a mass panic over an influx of Chinese immigrants in the late nineteenth century.¹⁷ The population of Chinese immigrants swelled in California and other Western states,¹⁸ sparking a national hysteria about the alleged risks posed by Chinese immigrants.¹⁹ The state legislature of California issued a report to the rest of the nation, *Chinese Immigration: Its Social, Moral, and Political Effect*,²⁰ that detailed the supposed risks posed by Chinese immigrants.²¹

In response to the national outcry, Congress passed the Chinese Exclusion Act.²² From the legislative sidelines, Justice Stephen J. Field, who would later rule on the constitutionality of this legislation, encouraged Congress to adopt a restrictive approach towards Chinese immigration.²³ In an interview, he argued that, in the balance of the immigration controversy, was “whether the civilization of this coast, its society, morals and industry shall be of American or Asiatic type.”²⁴

The anti-immigrant panic of Congress, of Justice Field and of the public runs through the

¹³ Sitaraman & Wuerth, *supra* note 1, at 1906.

¹⁴ G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 9 (1999).

¹⁵ Sitaraman & Wuerth, *supra* note 1, at 1911.

¹⁶ See White, *supra* note 14, at 9 (concluding that orthodox foreign relations law used a “mode of constitutional analysis in foreign relations cases . . . similar to that employed in domestic police power cases”).

¹⁷ *Id.* at 31.

¹⁸ Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 113–14 (2002).

¹⁹ *Id.*

²⁰ Special Committee on Chinese Immigration, Report to the Cal. State Senate: Chinese Immigration: its Social, Moral and Political Effect (1878), available at <http://pds.lib.harvard.edu/pds/view/4226138> [hereinafter Chinese Immigration].

²¹ For example, the report warned of secret tribunals of Chinese immigrants that provided Chinese law, thus “exercis[ing] a despotic sway over one-seventh of the population of the State of California.” *Id.* at 9.

²² Act of May 6, 1882, ch. 126, 22 Stat. 58, repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600; see also Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6–7 (1998) (describing the role that racial animus played in motivating the development of discriminatory immigration laws).

²³ Cleveland, *supra* note 18, at 115.

²⁴ *Id.*

major immigration decisions of the era: *Chae Chan Ping v. United States*,²⁵ *Nishimura Ekiu v. United States*,²⁶ and *Fong Yue Ting v. United States*.²⁷ Though decided during a period of a heated xenophobia, these three cases continue to provide the foundation for Congress's broad power in the field of immigration.²⁸

In *Chae Chan Ping*, the Supreme Court affirmed Congress's sovereign power to pass the Chinese Exclusion Act.²⁹ Brushing away concerns that there was no direct enumerated power for Congress to rely upon, the Court argued that immigration law was distinct from other issues of domestic law:

While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers³⁰

Present within the *Chae Chan Ping* decision are the exceptional approaches towards unenumerated power and federalism that characterize both immigration and foreign relations exceptionalism today. The Supreme Court was willing to commit to broad, unchecked powers for the national government.³¹ Moreover, the Court held that these powers were exclusive of the states, thus denying the states their previously unencumbered role in nineteenth-century immigration.³²

In *Nishimura Ekiu*, the Court continued to develop the themes of exceptionalism.³³ The Court disavowed any role in overseeing immigration administration, unless authorized by Congress.³⁴ The Court's decision was grounded in concerns about justiciability, since it found that the oversight of immigration was given solely to the political branches of government.³⁵ Likewise, the *Fong Yue Ting* Court held that "it is well settled that the provisions of an [immigration statute] must be upheld by the courts."³⁶ This radical conclusion, taken with the rest of the *Fong Yue Ting* decision meant that future Congresses could legislate in immigration however they liked, almost fully unburdened by the prospect of judicial review.³⁷ The filings submitted to the Court during these decisions indicate the atmosphere of xenophobia from which these decisions emerged.³⁸ The

²⁵ 130 U.S. 581 (1889).

²⁶ 142 U.S. 651 (1892).

²⁷ 149 U.S. 698 (1893).

²⁸ Chin, *supra* note 22, at 3 (indicating that current Supreme Court immigration decisions base the federal government's authority on the same unenumerated powers that early immigration decisions relied upon).

²⁹ *Chae Chan Ping*, 130 U.S. at 604.

³⁰ *Id.*

³¹ *Id.*

³² See also *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (finding that the power to regulate immigration was exclusively federal and did not permit a competing California regime).

³³ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–60 (1892).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893).

³⁷ *Id.*

³⁸ Schuck, *supra* note 3, at 5 ("Unlike the "old" immigrants, who had come to the United States primarily from Northern and Western Europe, most of the "new" immigrants came from Southern and Eastern Europe and—until

government brief filed in *Fong Yue Ting* analogized Chinese immigrants to “hordes of barbarians” who had come to the United States “to debase our labor and poison the health and morals of the communities in which they locate.”³⁹ It is not unlikely that the Court’s marked departure from its previous constitutional interpretation was influenced by this pervasive antipathy towards the Chinese.

Thus, by the end of the nineteenth century, the Supreme Court had developed a body of immigration cases that recognized a difference between domestic and foreign relations cases.⁴⁰ These cases held that, when dealing with immigration, the judiciary should adopt a unique approach towards questions of justiciability, federalism and inherent powers of sovereignty. Of course, at the time, administrative deference was not yet a meaningful concept on the Court, but these doctrines would eventually extend into that body of law.

Notably, this body of doctrine preceded Justice Sutherland’s argument in *United States v. Curtiss-Wright* by a full 47 years. As Professor Henkin noted, the Supreme Court decisions affirming the Chinese Exclusion Act provided much of the analytical material for Justice Sutherland’s delayed “revolution.”⁴¹ The next Section describes how Justice Sutherland’s scholarship developing foreign relations exceptionalism was informed by, and dependent upon, the Supreme Court immigration decisions preceding it.

B. Justice Sutherland’s Contributions to the Rise of Exceptionalism

Justice Sutherland, according to Professors Sitaraman and Wuerth, largely initiated a “revolution” that brought about the exceptionalist foreign relations regime.⁴² While the previous discussion describes how the revolution, began prior to Justice Sutherland’s time on the bench, the present Section describes how Justice Sutherland’s project was not of his own creation—in his own writings, it is evident that he was influenced by, and reliant upon, immigration doctrines from 50 years earlier.⁴³ This Section also briefly reviews the Sutherland Court decisions that furthered foreign affairs exceptionalism.

Justice Sutherland’s work on exceptionalism began before he joined the Court. Writings from his career as a senator from Utah reveal both that he was developing a theory of exceptionalism and that this theory rested in significant part upon immigration precedent.⁴⁴ This Section relies upon Professor Cleveland’s thorough account of the role of immigration in the development of foreign affairs exceptionalism.⁴⁵

In 1909, Sutherland published his first book, *The Internal and External Powers of the National*

their entry was sharply restricted in the 1880’s—from the Orient. This change triggered the explosive passions of racial and religious prejudice, fears of revolutionary contagion, class conflict, and other deep-seated animosities . . .”).

³⁹ Cleveland, *supra* note 18, at 141–42.

⁴⁰ Chinese Immigration, *supra* note 20, at 7.

⁴¹ Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 858 (1987).

⁴² Sitaraman & Wuerth, *supra* note 1, at 1913.

⁴³ Henkin, *supra* note 41, at 858.

⁴⁴ GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS (1916) [hereinafter SUTHERLAND, WORLD AFFAIRS]; GEORGE SUTHERLAND, THE INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT (1910) [hereinafter SUTHERLAND, INTERNAL AND EXTERNAL POWERS].

⁴⁵ Cleveland, *supra* note 18, at 141–42.

Government.⁴⁶ He argued for a bifurcation of constitutional powers and analysis between the domestic, internal powers of the federal government and foreign, external powers.⁴⁷ To support the notion that the government's foreign relations powers were broad and unenumerated, Sutherland cited the Court's affirmation of the Chinese Exclusion Act.⁴⁸ In *Constitutional Power and World Affairs*, the longer, subsequent treatment of his exceptionalist theory, Sutherland continued to rely upon the Chinese immigration statutes of the late 1800s as support for his broader thesis.⁴⁹

Thus, the immigration cases preceding Justice Sutherland's contributions to foreign relations exceptionalism were not merely prescient of future developments. Rather, *Chae Chan Ping*, *Fong Yue Ting* and *Nishimura Ekiu* were decided during a formative period in which then-Senator Sutherland was developing his attitudes about foreign affairs. While his exceptionalist doctrine is not wholly dependent upon the immigration decisions, scholars recognize that it "derived directly" from this body of doctrine.⁵⁰

After his appointment to the Supreme Court, now-Justice Sutherland "implemented his theory"⁵¹ for an exceptionalist doctrine through a series of Supreme Court cases—most notably, *Curtiss-Wright*⁵² and *United States v. Belmont*.⁵³

Curtiss-Wright involved the prosecution of a U.S. arms dealer who had violated a prohibition on the sale of arms to belligerents in a conflict between Bolivia and Paraguay.⁵⁴ The prohibition arose from a Joint Resolution that Congress passed in 1934 authorizing President Roosevelt to bar sales of U.S. commerce to the conflict.⁵⁵ While the defendants argued that the Joint Resolution constituted an unlawful delegation of Congress' power, the Court held otherwise in a decision authored by Justice Sutherland.⁵⁶ Unlike domestic affairs, in which the Court was expected to police separation-of-powers concerns, the Court's decision was in the sphere of foreign affairs, in which greater judicial deference to the executive was warranted.⁵⁷ To shore up support for his exceptionalist interpretation of foreign affairs law, Justice Sutherland cited both to *Chae Chan Ping* and to *Fong Yue Ting* in the *Curtiss-Wright* opinion.⁵⁸

Much as *Curtiss-Wright* foreshadowed that deference to the executive would become a hallmark of foreign relations exceptionalism, *Belmont* indicated that dismissal of federalism concerns would become another characteristic of the exceptionalist project.⁵⁹ In *Belmont*, the Supreme Court upheld an agreement between the newly established Soviet Union and the President that had not been approved by the Senate despite a conflicting New York state law.⁶⁰ The Soviet-

⁴⁶ White, *supra* note 14, at 47.

⁴⁷ White, *supra* note 14, at 47.

⁴⁸ SUTHERLAND, INTERNAL AND EXTERNAL POWERS, *supra* note 46, at 385.

⁴⁹ SUTHERLAND, WORLD AFFAIRS, *supra* note 44, at 56–57.

⁵⁰ Cleveland, *supra* note 18, at 273.

⁵¹ Sitaraman & Wuerth, *supra* note 1, at 1915.

⁵² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁵³ 301 U.S. 324 (1937).

⁵⁴ *Curtiss-Wright*, 299 U.S. at 311.

⁵⁵ Cleveland, *supra* note 18, at 3 n.4.

⁵⁶ *Curtiss-Wright*, 299 U.S. at 315.

⁵⁷ *Id.* at 320.

⁵⁸ *Id.* at 317–18.

⁵⁹ Sitaraman & Wuerth, *supra* note 1, at 1915.

⁶⁰ *United States v. Belmont*, 301 U.S. 324, 326–27 (1937).

U.S. agreement had recognized that the Soviet government had colorable claims against American parties and the federal government would assume responsibility over the management of those claims.⁶¹ Despite a New York law that would bar the U.S. government from seizing property held within the state, the Court held that any federalism concerns were set aside once the case moved upon the foreign affairs field.⁶² No matter the New York policy, Justice Sutherland argued, “the external powers of the United States are to be exercised without regard to state laws or policies.”⁶³ With *Curtiss-Wright* and *Belmont*, Justice Sutherland set into motion a “striking departure” from the orthodox understanding of foreign relations law.⁶⁴

C. *The Early Cold War Retrenchment*

The revised account of foreign relations exceptionalism recognizes that the foundations of exceptionalism, laid by early immigration cases and Justice Sutherland’s subsequent contributions, were further strengthened by a set of cases decided during and immediately after World War Two. These cases—“some of the most extreme plenary power precedents”—affirmed and extended the vitality of the Chinese immigration cases of a half-century earlier.⁶⁵ This Section reviews how these immigration cases—*United States ex rel. Knauff v. Shaughnessy*⁶⁶ and *Shaughnessy v. United States ex rel. Mezei*⁶⁷—strengthened and extended foreign relations exceptionalism.

These immigration cases are notable for several reasons. At a time of national anxiety, they not only reaffirmed the exceptionalism of the Chinese immigration cases, they applied the exceptionalism in unqualified terms.⁶⁸ One scholar describes these early cases as “the modern zenith of the plenary power doctrine in the Court.”⁶⁹ Moreover, the cases arguably extended the inherent plenary power authority from Congress to the executive.⁷⁰ Finally, they offered early instances of the Court affording deference to agency determinations of statutory authority.

Early Cold War immigration cases reaffirmed the relevance of the Chinese immigration cases in no uncertain terms. *Knauff* reaffirmed the government’s power to exclude aliens as a “fundamental act of sovereignty,” citing to both *Curtiss-Wright* and to *Fong Yue Ting* in support.⁷¹ With respect to the prospect of due process for non-citizens, the *Knauff* Court responded dismissively: “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”⁷² Similarly, the Court withdrew the judiciary almost entirely from oversight in the administration of immigration law: “reform in this field must be entrusted to the

⁶¹ 301 U.S. at 326.

⁶² *Id.*

⁶³ *Id.* at 331.

⁶⁴ Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379 (2000).

⁶⁵ *Id.*

⁶⁶ 338 U.S. 537 (1950).

⁶⁷ 345 U.S. 206 (1953).

⁶⁸ Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954 (1995).

⁶⁹ *Id.*

⁷⁰ Anne Y. Lee, *The Unfettered Executive: Is There An Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 223, 239 (2005).

⁷¹ *Knauff*, 338 U.S. at 542.

⁷² *Id.* at 544.

branches of Government in control of our international relations.”⁷³ Across these early Cold War cases, the Court “doubled down” on the traditional themes of foreign relations exceptionalism: non-justiciability, rejection of federalism concerns and commitment to inherent powers in the field of foreign affairs.

Knauff is also notable for its slight amendment to the earlier plenary power decisions.⁷⁴ While cases like *Chae Chan Ping* and *Fong Yue Ting* were centrally concerned with the extent of Congress’s power to regulate immigration, *Knauff* arguably extended the plenary power to the executive branch.⁷⁵ According to the *Knauff* majority, the exclusion of aliens stems “not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”⁷⁶

Finally, the early Cold War cases demonstrate preliminary instances of heightened administrative deference. While these cases precede *Chevron*, they offer an initial insight into the Court’s heightened deference for administrative determinations involving immigration and foreign affairs.⁷⁷ In *Mezei*, the Court evaluated whether the ongoing, indefinite detention of an individual that the United States government perceived as a security risk was authorized by law.⁷⁸ The Court affirmed the government’s proposed reading of an earlier statute, the Passport Act of 1918, to justify the government’s proposed detention of the defendant.⁷⁹

An understanding of foreign relations exceptionalism, as developed in immigration law, is critically incomplete without an appreciation of how the early Cold War cases developed the doctrine. By reaffirming the viability of the earlier Chinese immigration cases, recognizing the executive’s inherent plenary powers and demonstrating early instances of heightened administrative deference, early Cold War cases contribute to the revised account of foreign relations exceptionalism.

The animus showered upon Chinese immigrants motivated the beginning of the Court’s foray into exceptionalism. Early immigration cases like *Chae Chan Ping* did not create foreign relations exceptionalism, but they offered doctrinal resources that could be used to construct the eventual doctrine.⁸⁰ Justice George Sutherland, whose career rise occurred during the anti-Chinese immigrant hysteria, expressly relied upon these cases when developing his account of foreign affairs exceptionalism.⁸¹ In turn, the Supreme Court returned to both the early Chinese immigration cases and the Sutherland foreign affairs decisions in a flurry of Cold War cases. This historical interrelationship demonstrates that immigration law cannot be understood without reference to foreign relations exceptionalism; likewise, exceptionalism cannot be fully appreciated without an understanding of immigration law. Given the close relation between immigration and foreign relations law, the next Part integrates immigration law into the broader analysis of foreign affairs exceptionalism.

⁷³ *Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952).

⁷⁴ *Knauff*, 338 U.S. at 542.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207 (1953).

⁷⁹ *Id.*

⁸⁰ Cleveland, *supra* note 18, at 4 (finding that Sutherland’s foreign affairs exceptionalism “derived directly” from early immigration decisions).

⁸¹ See *infra* Part I.B.

II. EXCEPTIONALIST NORMS IN IMMIGRATION AND FOREIGN AFFAIRS

Scholars have treated foreign relations law as exceptional because the Court departed from its baseline analytical assumptions when confronted with foreign affairs issues.⁸² Exceptionalism is defined by the Court's "distinctive functional, doctrinal or methodological analysis."⁸³ To define what renders the Court's analysis distinctive, it may help to distinguish what does *not* make foreign affairs distinct. Congress's power to declare war is an aspect of foreign relations law,⁸⁴ but not what makes it distinct.⁸⁵ There are many enumerated powers involving foreign affairs that do not apply to domestic affairs, but it is not these enumerated powers that render the field of law special. In crafting this definition, I hew to the useful standard offered by Professors Sitaraman and Wuerth.⁸⁶

Rather, scholars treat foreign relations law as exceptional because the federal judiciary applied a systematically different approach to issues arising in foreign affairs than they did to issues arising in domestic affairs. To provide a very general example, a state's complaint about excessive federal authority would be treated differently in the field of foreign affairs than it would in domestic affairs.⁸⁷ This difference in analysis, rather than a difference in the Constitution itself, is what renders foreign affairs law exceptional.

Professors Sitaraman and Wuerth characterize exceptionalism by three central characteristics: distinctive approaches to justiciability, federalism and "executive dominance."⁸⁸ Justiciability and federalism are familiar concepts, "executive dominance," however, refers to a collection of Supreme Court doctrines relating to the executive, including the Court's deference towards executive arguments in foreign affairs and a willingness to acknowledge non-textual bases for the President's powers.⁸⁹

Application of Professors Sitaraman and Wuerth's exceptionalist framework to immigration law reveals issues underlying the final prong of their tripartite structure, "executive dominance." What renders immigration law exceptional—and foreign affairs law more generally—is not simply that the executive is particularly dominant in this field. Rather, immigration law is exceptional because the Court extends significant deference to certain administrative judgments within immigration *and* because the Court acknowledges inherent powers beyond the text of the Constitution applicable to both Congress and the Executive. This Part thus divides "executive dominance" into two related concepts: administrative deference and inherent powers.

This Part reviews the exceptionalist approach to justiciability in foreign relations law. Next, it turns to federalism: when dealing with questions of foreign affairs law, federal courts have been consistently less willing to entertain state claims. Finally, this Part further explores why "executive dominance," standing alone, is unable to account for what renders immigration law exceptional. It then applies two factors—administrative deference and inherent power—to foreign relations law.

⁸² Sitaraman & Wuerth, *supra* note 1, at 1908; *see also* Curtis A. Bradley, *A New American Foreign Relations Law?* 70 U. COLO. L. REV. 1089, 1096 (1999); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 655 (2002) (describing the unique approach to foreign affairs law as the "foreign affairs differential").

⁸³ Sitaraman & Wuerth, *supra* note 1, at 1907.

⁸⁴ U.S. CONST., art. I, § 8.

⁸⁵ Sitaraman & Wuerth, *supra* note 1, at 1908.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1899.

⁸⁹ *Id.* at 1930–35.

Thus, foreign relations law—and by implication, immigration law—has historically been exceptional for its unique approach to justiciability, federalism, administrative deference, and inherent powers.

A. *Non-Justiciability in Immigration and Foreign Relations Law*

The first prong of foreign affairs exceptionalism is a heightened willingness to find foreign affairs issues non-justiciable. Whether by reference to the political question doctrine or the act of state doctrine, exceptionalist foreign affairs law avoids addressing issues by rendering them non-justiciable.⁹⁰

The political question doctrine provided the Court with the means to skirt issues of foreign relations law. Through reference to the political question doctrine, the Court was able to avoid addressing international air travel regulations,⁹¹ property claims against a transitional Mexican government,⁹² or the unilateral Presidential termination of a treaty.⁹³

Likewise, *Banco Nacional de Cuba v. Sabbatino*⁹⁴ is illustrative of the Court's approach towards utilizing the act of state doctrine as a means of avoiding ruling on foreign affairs issues. The Supreme Court declined to address the validity of a claim to goods that had been seized by the Cuban government, since ruling on such an issue would require the court to impose its judgment on another sovereign, an area of law best reserved to the political branches.⁹⁵

Issues in immigration have been insulated from judicial review through similar application of justiciability doctrines. The Supreme Court cited the limited justiciability of immigration issues when denying a due process claim relating to a blanket ban on the admission of Chinese migrants⁹⁶ or rejecting a challenge to an alien's indefinite detention on immigration grounds.⁹⁷ Immigration law, as with the rest of foreign relations law, received exceptional treatment from the Court with respect to justiciability issues.

B. *Discounting Federalism in Immigration and Foreign Affairs*

States are the unhappy subject of the second characteristic of foreign relations exceptionalism: federalism. In foreign relations law, federal courts are less likely to heed state concerns about

⁹⁰ Sitaraman & Wuerth, *supra* note 1, at 1911; White, *supra* note 14, at 37–38 (describing the shift from orthodox foreign affairs law, which applied standard justiciability analyses to foreign affairs law, to exceptional foreign affairs law, which was less likely to find foreign legal issues justiciable).

⁹¹ *Chicago & Southern Air Lines v. Waterman S&S Corp.*, 333 U.S. 103, 111 (1948) (arguing that “the very nature of Executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative”).

⁹² *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (refusing to evaluate claims against the Mexican government, since “the conduct of the foreign relations of our government is committed . . . to . . . the political departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision”) (internal quotations omitted).

⁹³ *Goldwater v. Carter*, 444 U.S. 996 (1979) (Rehnquist, J., concurring) (describing “the authority of the President in the conduct of our country's foreign relations” as a “nonjusticiable political question”).

⁹⁴ 376 U.S. 398 (1964).

⁹⁵ *Id.* at 427–28.

⁹⁶ *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (holding that challenges to interpretations of immigration statutes are “not questions for judicial determination”).

⁹⁷ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (holding that “the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control”).

federal activity and are more likely to side with the federal government in any disputes affecting this field.⁹⁸ The salience of state arguments in foreign affairs declined as foreign relations exceptionalism became increasingly prominent.⁹⁹

In *United States v. Belmont*, the Supreme Court upheld a presidential directive regarding Soviet funds that conflicted with a New York State statute directing the disposition of the funds.¹⁰⁰ The Court's opinion, written by Justice Sutherland, brushed off any suggestion that the interests of the state government should affect the Court's judgment: "the external powers of the United States are to be exercised without regard to state laws or policies."¹⁰¹ Because the foreign relations power of the United States was vested in the federal government, which had negotiated a protocol for terminating claims against the Soviet state, New York's interests could not carry the day—or, as Justice Sutherland memorably wrote, "as to such purposes, the State of New York does not exist."¹⁰² The Court reaffirmed its exceptional approach to federalism in a subsequent decision, *United States v. Pink*,¹⁰³ which upheld the same presidential directive respecting Soviet assets in the face of state opposition.¹⁰⁴

The Supreme Court's application of exceptionalist logic to deny arguments from federalism was as common in immigration law as it was in foreign relations law as a whole. In *Hines v. Davidowitz*,¹⁰⁵ the Supreme Court expressly relied upon *Belmont* in invalidating a state statute that taxed and regulated aliens entering Pennsylvania.¹⁰⁶ The Court held that the State of Pennsylvania could not legislate in a way that interfered with federal immigration activities, since the challenged legislation was "in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority."¹⁰⁷ This decision echoed earlier immigration decisions, which foreshadowed the exceptionalist reasoning that would dominate the intersection of foreign affairs and federalism law.¹⁰⁸ Further demonstrating that foreign affairs exceptionalism and immigration exceptionalism are not parallel "exceptionalisms," but rather intertwined doctrines, the Supreme Court's decision in *Hines* was cited in numerous subsequent decisions by the Court evaluating federalism claims in

⁹⁸ Sitaraman & Wuerth, *supra* note 1, at 1915–16 (noting that, by treating foreign affairs as a plenary federal authority, "Sutherland's exceptionalism transformed federalism"); see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1643 (1997) (finding that challenges to federal foreign affairs activities based upon federalism were unsuccessful at the Supreme Court); Peter J. Spiro, *Foreign Relations Exceptionalism*, 70 U. COLO. L. REV. 1223, 1224–25 (1999) (arguing that foreign affairs exceptionalism had a significant impact upon federalism and that the end of the Cold War provided an impetus to terminate the exceptional treatment of federalism issues).

⁹⁹ White, *supra* note 14, at 115 (noting the rise of exceptionalist approach to foreign affairs law, in which "the states, by Sutherland's account, had ceased to become actors in the realm of constitutional foreign affairs jurisprudence").

¹⁰⁰ 301 U.S. 324, 325–27 (1937).

¹⁰¹ *Id.* at 331.

¹⁰² *Id.*

¹⁰³ 315 U.S. 203 (1942).

¹⁰⁴ *Id.* at 231 ("[T]he power of a State . . . must give way before the superior Federal policy evinced by a treaty or international compact or agreement.").

¹⁰⁵ 312 U.S. 52 (1941).

¹⁰⁶ *Id.* at 59–60.

¹⁰⁷ *Id.* at 68.

¹⁰⁸ *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) ("For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

foreign affairs decisions outside of immigration.¹⁰⁹ Exceptionalist federalist analysis dominated the Supreme Court’s foreign affairs doctrine, both inside and outside of immigration law.

C. “*Executive Dominance, Understood as Administrative Deference and Inherent Powers*”

Under Professors Sitaraman and Wuerth’s characterization of the doctrine, foreign affairs exceptionalism’s third trait is “executive dominance.”¹¹⁰ Executive dominance is not expressly defined in their argument, but it rests upon two notions: executive power and administrative deference to executive interpretations.¹¹¹ Intertwining these two concepts may be effective at explaining other areas of foreign affairs law, but it is not as helpful in immigration. Indeed, the concept of “executive dominance” obscures more than it reveals, for it fails to acknowledge the way that notions of federal power in immigration bleed from the President to Congress. This section explains why a foreign relations exceptionalism that includes immigration law must disentangle these two concepts, evaluating each on its own merits.

1. Inherent Powers

A historical oddity of foreign affairs exceptionalism is that Justice Sutherland, who so supported the extension of Presidential authority in foreign affairs, was one of the Four Horsemen who fought so virulently to oppose the extension of New Deal federal authority.¹¹² While fighting against the extension of federal powers in the domestic sphere, Justice Sutherland and other members of the Court who supported the *Curtiss-Wright*, *Belmont* and other exceptionalist decisions were happy to affirm virtually unbounded federal power in the foreign sphere.¹¹³ Foreign affairs exceptionalism is thus characterized in part by the Court’s willingness to affirm unenumerated federal powers. This Section proposes that inherent powers must be understood separately from executive dominance, since the inherent powers at issue in immigration reside with Congress, rather than the executive.

The recognition of inherent governmental powers preceded Justice Sutherland. In early immigration decisions, the Supreme Court recognized what has come to be known as the “plenary power,” a doctrine that recognizes the federal government’s power to regulate immigration as an incident of sovereignty.¹¹⁴ While Professors Sitaraman and Wuerth restrict their discussion of inherent powers to the executive,¹¹⁵ the plenary power doctrine generally refers to the powers of Congress to regulate immigration.

The plenary power developed in decisions like *Fong Yue Ting* that preceded Justice Sutherland’s tenure on the Court. There, the Court did not search out a specific source of textual

¹⁰⁹ See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288, 2289 (2000); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

¹¹⁰ Sitaraman & Wuerth, *supra* note 1, at 1930.

¹¹¹ *Id.* at 1931; see also Bradley, *supra* note 82, at 1092–93 (defining “executive domination” by the Court’s recognition of the President’s unconstrained foreign affairs power, its acceptance of presidential “Executive agreements” and its deference to executive interpretations of sovereign immunity).

¹¹² White, *supra* note 14, at 118 (“Sutherland and other Justices conventionally thought of as opponents of the New Deal were perfectly comfortable with the use of an Executive international agreement to confiscate private property situated in a state, without any concern for potentially competing state interests . . .”).

¹¹³ *Id.*

¹¹⁴ Motomura, *supra* note 10, at 551–53 (characterizing the plenary power as founded upon national sovereignty, rather than an express constitutional warrant of power).

¹¹⁵ See *supra* Part II.

authority, such as the Naturalization Clause, to undergird Congress's power to regulate immigration. Rather, the Supreme Court described Congress's immigration power as deriving from the "inherent and inalienable right of every sovereign and independent nation."¹¹⁶ The Supreme Court continued to rely upon the plenary power to justify congressional activity in immigration that was otherwise unsupported by any enumerated basis in the Constitution.¹¹⁷

The Court's sovereignty-based description of the plenary power in immigration anticipated the inherent executive powers that would be elaborated upon in *Curtiss-Wright*.¹¹⁸ Citing to *Fong Yue Ting*, Justice Sutherland expressly analogized between Congress' inherent authority to expel aliens and the President's inherent authority "to speak or listen as a representative of the nation."¹¹⁹ Likewise, *Curtiss-Wright* also relied upon *Chae Chan Ping*, citing the case in support of the proposition that sovereignty was passed from Great Britain to the United States collectively, and with it, the inherent authority to engage in foreign affairs.¹²⁰ The Court returned to the exceptionalist approach to inherent powers of the early immigration decisions in later cases regarding foreign affairs issues unrelated to immigration. Dissenting justices, frustrated by the limitation imposed on the President in *Youngstown Sheet & Tube Co. v. Sawyer*,¹²¹ would again return to the language of *Fong Yue Ting* in their dissent.¹²²

Therefore, the inherent authority that foreign affairs exceptionalism recognizes is not simply inherent Presidential power, but also inherent congressional powers. As early immigration cases held, the inherent powers of sovereignty came to rest both in the executive and legislative branches.¹²³

2. Administrative Deference

Because Professors Sitaraman and Wuerth's executive dominance heading is unable to contain the exceptionalist approach to inherent power, which involves both Congress and the President, inherent power must be separated out into its own issue—leaving administrative deference as the remainder within the original category of executive dominance. This section reviews the familiar phenomenon of heightened administrative deference with respect to foreign affairs issues.¹²⁴

The Supreme Court, when reviewing issues of foreign affairs, applies a more substantial form

¹¹⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). *See also* *Chae Chan Ping v. United States*, 130 U.S. 581, 603–04 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory, is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.")

¹¹⁷ *Motomura*, *supra* note 10, at 551–53.

¹¹⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (arguing that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution").

¹¹⁹ *Id.* at 319.

¹²⁰ *Id.* at 317.

¹²¹ 343 U.S. 579 (1952) (Vinson, C.J., dissenting).

¹²² *Id.* at 685 (affirmatively referencing dicta in *Fong Yue Ting* that recognized unilateral executive power to surrender individuals charged with a crime in another country).

¹²³ *See* Cleveland, *supra* note 18.

¹²⁴ Much of this discussion draws upon the helpful account of administrative law provided in William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098 (2008).

of deference to executive determinations: *Curtiss-Wright* deference.¹²⁵ In *Department of the Navy v. Egan*,¹²⁶ for instance, the Supreme Court rejected the respondent's challenge to the statutory authorization for a naval organization that had revoked the respondent's security clearance.¹²⁷ Underlying the *Egan* decision was the Court's concerns about intervening in executive determinations relating to national security.¹²⁸ Other questions involving statutory interpretation were likewise resolved with "extreme deference" to the federal government.¹²⁹

This *Curtiss-Wright* deference continued into immigration law. In *Hiryabashi v. United States*,¹³⁰ the Court affirmed the executive's power, pursuant to congressional affirmation, to order a racially discriminatory curfew for Japanese-Americans living on the West Coast.¹³¹ In *Ex parte Republic of Peru*, the Supreme Court offered considerable deference to executive findings of foreign sovereign immunity.¹³²

A recent analysis of the Court's administrative deference doctrine found that the bulk of administrative deference decisions that expressly rested on *Curtiss-Wright* occurred in the context of immigration law.¹³³ In *Sale v. Haitian Centers Council, Inc.*,¹³⁴ the Court deferred to the executive's interpretation of the Immigration Nationality Act and the United Nations Protocol Relating to the Status of Refugees in finding that the President could order the Coast Guard to forcibly return ships with fleeing migrants to Haiti.¹³⁵ Despite finding that the statute at issue allowed the President to suspend the entry of certain aliens—a power not at issue in an order dealing with the illegal entry of migrants¹³⁶—the Court deferred to the executive's interpretation of the statute.¹³⁷ Citing to *Curtiss-Wright*, the Court held that heightened deference was appropriate when "construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."¹³⁸ Heightened deference, therefore, is an element of foreign affairs exceptionalism, applicable alike in the foreign affairs and immigration law.

If, in the analysis of foreign relations exceptionalism, one takes a step back and perceives foreign affairs law broadly enough to include immigration law, it becomes evident that the characteristics used to define foreign affairs exceptionalism apply to immigration as well. While immigration law, like its siblings in foreign affairs law, shares similarly exceptional approaches to federalism and justiciability, the executive dominance prong does not effectively capture what renders immigration exceptional. Rather, executive dominance must be disaggregated into two

¹²⁵ Eskridge & Baer, *supra* note 124, at 1100–01.

¹²⁶ 484 U.S. 518 (1988).

¹²⁷ *Id.* at 534.

¹²⁸ *Id.* at 529.

¹²⁹ Sitaraman & Wuerth, *supra* note 1, at 1918 (quoting Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 1006 (2011)).

¹³⁰ 320 U.S. 81 (1943).

¹³¹ *Id.* at 82–86, 110 (Murphy, J., concurring) (noting that "we give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war . . .").

¹³² 318 U.S. 578 (1943).

¹³³ Eskridge & Baer, *supra* note 124, at 1140 (finding that five of the nine administrative deference cases relying on *Curtiss-Wright* during the period studied were immigration decisions).

¹³⁴ 509 U.S. 155 (1993).

¹³⁵ *Id.* at 159.

¹³⁶ *Id.* at 200–01 (Blackmun, J., dissenting).

¹³⁷ *Id.* at 188.

¹³⁸ *Id.*

components—inherent power and administrative deference—which better explain the exceptional character of immigration and foreign affairs law.

Professors Sitaraman and Wuerth argue that the elements of foreign affairs that rendered it exceptional are increasingly dissolving into a more normalized body of law.¹³⁹ While much of foreign affairs law has lost its exceptionalist character, they contend, they do not thoroughly address whether immigration law has also normalized, and if it has, how so. The next Part takes up this question.

III. ABNORMAL NORMALIZATION: HALTING PROGRESS IN IMMIGRATION LAW

In analyzing normalization, scholars have most closely studied two pillars of foreign relations law: national security and foreign affairs law, the law regarding relationships between the U.S. and other countries. Immigration law, a third pillar of foreign relations law, has not enjoyed the same study from normalization scholarship. This Section provides that attention by contrasting the understanding of normalization that Professors Wuerth and Sitaraman offer with the state of normalization in immigration law today. As the following Part makes clear, normalization is decidedly *not* normal in the field of immigration law. Progress towards normalization has been uneven and halting. Section A describes Professors Sitaraman and Wuerth's account, which describes three waves of normalization in foreign relations law. Section B indicates how these waves are inapplicable in the context of immigration law, and reviews the more limited progress that normalization has made within immigration law.

A. *Normalization Across Foreign Relations Law*

Under the standard account of foreign relations normalization, the “Sutherland Revolution” has been largely negated by a counter-revolution: the normalization of foreign relations law.¹⁴⁰ Over a twenty-five year period, the Court has dismantled the exceptionalist platform upon which foreign relations law rested.¹⁴¹ Over the course of three waves of normalization, the Court has carried out the project of “eliminating exceptionalist reasoning from foreign relations law.”¹⁴²

Strikingly, Professors Sitaraman and Wuerth find that the Court's normalization project has progressed significantly—the progress in normalization is “on par” with Justice Sutherland's accomplishments in developing an exceptionalist understanding.¹⁴³ After twenty-five years of normalizing doctrine from the Supreme Court, foreign relations doctrine has made normalization normal and exceptionalism exceptional: “We should now *expect* “normal” treatment of foreign relations issues—and characterize the remaining instances of exceptionalism as outliers. Normalization is the new normal.”¹⁴⁴ Three waves of normalization eroded foreign relations exceptionalism: at the end of the Cold War, during the War on Terror and during the Roberts Court.¹⁴⁵ The following discussion provides only a brief overview of the cases and scholarship that attended each wave; it does not attempt to fully review the supporting authorities that Professors

¹³⁹ Sitaraman & Wuerth, *supra* note 1, at 1919.

¹⁴⁰ *Id.* at 1935.

¹⁴¹ *Id.* at 1901.

¹⁴² *Id.* at 1935.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1906.

¹⁴⁵ *Id.* at 1919.

Sitaraman and Wuerth marshal in their argument.¹⁴⁶

1. End of the Cold War

The first indicator of normalization occurred at the end of the Cold War and was comprised by an emerging scholarly critique of foreign relations exceptionalism and a Supreme Court willing to challenge the tenets of exceptionalism. Describing “the end of the Cold War and the attendant breakup of the Soviet Union” as a “propitious time” for an evaluation of American foreign relations law, Professor Bradley outlined a shift from “twentieth-century” foreign affairs law.¹⁴⁷ Scholars critiqued the special deference to the executive,¹⁴⁸ as others criticized foreign relations law’s disregard for federalism.¹⁴⁹ Although Professors Sitaraman and Wuerth do not go so far as to characterize this body of scholarship as expressly encouraging normalization *qua* normalization, it is evidence of a widespread recognition that exceptionalist reasoning in foreign relations was not inevitable.¹⁵⁰

For its part, the Supreme Court only “dipped its toe in the waters of normalization.”¹⁵¹ In a handful of cases, the Court curtailed non-justiciability and extended federalist reasoning into foreign relations law. Thus, *Japan Whaling Ass’n v. American Cetacean Society*¹⁵² featured a Court unwilling to apply the political question doctrine to an arguably applicable case.¹⁵³ Similarly, the Court trimmed the act of state doctrine in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*.¹⁵⁴

The Court also paid new attention to federalism issues in foreign relations law. For instance, in *Barclays Bank PLC v. Franchise Tax Board of California*,¹⁵⁵ the Court upheld a state statute requiring global reporting for large corporations from a challenge that it was preempted by an executive policy concerning taxation of international corporations.¹⁵⁶ Likewise, the Court refused to apply traditionally exceptionalist reasoning in a separate case regarding preemption of a Massachusetts state law imposing sanctions upon Burma.¹⁵⁷

In short, “momentum was gaining” for normalization.¹⁵⁸ This early scholarship and Supreme Court case law did not terminate exceptionalism, but it was sufficient for Professors Sitaraman and Wuerth to mark a turn in the doctrine.¹⁵⁹

¹⁴⁶ Sitaraman & Wuerth, *supra* note 1, at 1919–35.

¹⁴⁷ Bradley, *supra* note 82, at 1089–91.

¹⁴⁸ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 195 (2d ed. 1996).

¹⁴⁹ Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1998).

¹⁵⁰ Sitaraman & Wuerth, *supra* note 1, at 1921 (“The significance of the first wave of normalization was primarily foundational. Scholars cracked the armor of foreign relations exceptionalism, identifying its relatively recent emergence, its doctrinal problems, and its analytic failures.”).

¹⁵¹ *Id.*

¹⁵² 478 U.S. 221 (1986).

¹⁵³ *Id.* at 229–30.

¹⁵⁴ 493 U.S. 400 (1990).

¹⁵⁵ 512 U.S. 298 (1994).

¹⁵⁶ *Id.* at 324.

¹⁵⁷ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366 (2000).

¹⁵⁸ Sitaraman & Wuerth, *supra* note 1, at 1921.

¹⁵⁹ *Id.*

2. War on Terror

The second wave of normalization, occurring during the War on Terror, was marked by increased critiques from the legal academy about the viability of the doctrine of foreign relations exceptionalism and by a Court that was surprisingly unwilling to go along with exceptionalist arguments from the government in the midst of the War on Terror.

Scholars reviewed the string of Supreme Court cases limiting the executive detention of individuals held in Guantanamo Bay and elsewhere.¹⁶⁰ Given the Court's willingness to buck the executive's claims of authority, the cases provided support for scholars arguing for normalization in the field of detention,¹⁶¹ administrative law¹⁶² and state privilege.¹⁶³

The Supreme Court's decisions during this period served to normalize claims of executive power and non-justiciability alike. In *Rasul v. Bush*¹⁶⁴ and *Hamdi v. Rumsfeld*,¹⁶⁵ the Court denied government arguments that the Court should defer to executive prerogatives regarding detention of combatants.¹⁶⁶ Similarly, in *Hamdan v. Rumsfeld*,¹⁶⁷ the Court rebuked the government's argument that the case was non-justiciable.¹⁶⁸ It went on to reject the executive's interpretation of a contested statute relating to detention.¹⁶⁹ Finally, the Court rejected foreign relations exceptionalism throughout its decision in *Boumediene v. Bush*.¹⁷⁰

Professors Sitaraman and Wuerth note that this second wave of normalization is particularly significant given the context in which the Court reached its decisions.¹⁷¹ The War on Terror represented "the strongest possible challenge to the normalization project" and yet the Court continued to withdraw exceptionalist reasoning from the areas of non-justiciability, federalism and executive deference.¹⁷² Again, the War on Terror wave did not fully excise exceptionalism from foreign affairs, though the cases demonstrated that "the trend toward normalization was unmistakable."¹⁷³

3. Roberts Court

Professors Sitaraman and Wuerth provide their most extended treatment of normalization during the Roberts Court, given that this period has not received the same critical treatment that

¹⁶⁰ Sitaraman & Wuerth, *supra* note 1, at 1922–23.

¹⁶¹ Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

¹⁶² Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009).

¹⁶³ David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

¹⁶⁴ 542 U.S. 466 (2004).

¹⁶⁵ 542 U.S. 507 (2004).

¹⁶⁶ Sitaraman & Wuerth, *supra* note 1, at 1922.

¹⁶⁷ 548 U.S. 557 (2006).

¹⁶⁸ *Id.* at 558–64.

¹⁶⁹ *Id.*

¹⁷⁰ 553 U.S. 723 (2008).

¹⁷¹ Sitaraman & Wuerth, *supra* note 1, at 1924.

¹⁷² *Id.*

¹⁷³ *Id.*

the previous two waves already enjoyed.¹⁷⁴ As in the previous two waves, the third wave of normalization features a marked departure from previous reliance upon exceptionalist reasoning with respect to non-justiciability, federalism and executive deference issues.¹⁷⁵

The Roberts Court has increasingly normalized its approach to foreign relations justiciability. In *Zivotofsky v. Clinton (Zivotofsky I)*,¹⁷⁶ Chief Justice Roberts led a six-member majority in rejecting the government's argument that the political question doctrine rendered a dispute between Congress and the President over the issuance of passports non-justiciable.¹⁷⁷ Faced with a dispute between Congress and the State Department over the status of Israeli control over Jerusalem, the Supreme Court described the controversy as “a familiar judicial exercise”—hardly language consistent with an exceptionalist posture.¹⁷⁸

The Supreme Court also made progress in normalizing its foreign relations case law, as applied to questions of federalism.¹⁷⁹ The Court's decision in *Bond v. United States*¹⁸⁰ insisted upon a “clear statement rule” for statutes implementing treaties that impinged upon areas of state police power.¹⁸¹ Specifically, the Court required that Congress provide a “clear indication” that the statute implementing the Chemical Weapons Convention applies to purely local activities.¹⁸² Such a requirement reflects a concern for federalism that was expressly rejected in earlier exceptionalist decisions.¹⁸³

Finally, the Roberts Court's normalization project cabined formerly expansive claims of executive prerogative.¹⁸⁴ *Medellín v. Texas*,¹⁸⁵ which concerned an executive order intended to implement provisions of the Vienna Convention, marked a defeat for claims of executive power.¹⁸⁶ The Court was unwilling to concede that the executive possessed the power to unilaterally authorize the implementation of a non-self-executing treaty.¹⁸⁷

Likewise, the Court rejected arguments for executive deference in *Morrison*¹⁸⁸ and *Kiobel*.¹⁸⁹ In *Morrison*, the Court declined to adopt the executive's evaluation of whether the Securities Exchange Act applied abroad.¹⁹⁰ Similarly, in *Kiobel*, the Court rejected the government's argument that the presumption against extraterritoriality did not apply to the Alien Tort Statute.¹⁹¹ While Professors Sitaraman and Wuerth note that the executive is likely the more competent institution to assess the foreign consequences of the extraterritorial application of statutes, neither

¹⁷⁴ Sitaraman & Wuerth, *supra* note 1, at 1924–34.

¹⁷⁵ *Id.* at 1925.

¹⁷⁶ 132 S. Ct. 1421, 1422 (2012).

¹⁷⁷ Sitaraman & Wuerth, *supra* note 1, at 1925.

¹⁷⁸ *Zivotofsky*, 132 S. Ct. at 1427.

¹⁷⁹ Sitaraman & Wuerth, *supra* note 1, at 1927–28.

¹⁸⁰ 134 S. Ct. 2077 (2014).

¹⁸¹ *Id.* at 2081–82.

¹⁸² Sitaraman & Wuerth, *supra* note 1, at 1928.

¹⁸³ *Id.*

¹⁸⁴ Sitaraman & Wuerth, *supra* note 1, at 1930.

¹⁸⁵ 552 U.S. 491 (2008).

¹⁸⁶ Sitaraman & Wuerth, *supra* note 1, at 1931–32.

¹⁸⁷ *Id.*

¹⁸⁸ 130 S. Ct. 2869 (2010).

¹⁸⁹ 133 S. Ct. 1659 (2013).

¹⁹⁰ *Morrison*, 130 S. Ct. at 2887–88.

¹⁹¹ *Kiobel*, 133 S. Ct. at 1669.

case afforded the executive special deference in determining the reach of the statutes at hand.¹⁹²

Thus, Professors Sitaraman and Wuerth argue that the Roberts Court's foreign relations decisions advance normalization. On each of justiciability, federalism and executive power, as considered in the field of foreign relations, the Roberts Court's decisions align with a broader twenty-five year trajectory of normalization.¹⁹³

B. *Limited Normalization in Immigration Law*

Despite the optimistic report for foreign relations law, normalization has not proceeded apace in immigration law. Unlike the depiction of foreign relations normalization that Professors Sitaraman and Wuerth offer, immigration normalization has occurred only haltingly—or not at all. Moreover, the three waves of normalization used originally do not at all illuminate the trajectory of normalization in immigration. This section, rather than attempt an organization by chronological period, arranges its discussion of normalization by each of the exceptionalist factors.¹⁹⁴

1. Justiciability

While foreign relations exceptionalism originally entailed an immigration law that was largely perceived as non-justiciable, this exceptionalist approach has since changed. In a break from its exceptionalist past, courts increasingly view immigration law as amenable to judicial review. Recent scholarship notes both the exceptional character of justiciability analysis in immigration law and its normalization, though it does not employ these precise terms.¹⁹⁵ Professor Legmosky noted that “immigration policy and judicial review have always had a kind of oil-and-water relationship Those judges who incline even slightly toward trepidation might regard immigration, with its potential foreign affairs implications, as an especially treacherous arena to enter.”¹⁹⁶ Professor Abrams also noted the manner in which immigration law's position within the broader body of foreign relations law produced an exceptional approach to justiciability.¹⁹⁷

However, immigration law scholars have reached similar conclusions to Professors Sitaraman and Wuerth: the non-justiciability that characterized foreign relations exceptionalism was beginning to shift, albeit slightly. For example, Professor Schuck notes that “the courts' almost complete deference to Congress and the immigration authorities . . . is beginning to give way to a new understanding . . . of judicial role.”¹⁹⁸ Likewise, Professor Legomsky argues that “the suggestion . . . that courts had literally no power to review the constitutionality of Congress's actions” has given way to “the possibility of some judicial role in assessing the constitutionality of federal immigration statutes.”¹⁹⁹

¹⁹² Sitaraman & Wuerth, *supra* note 1, at 1932–33.

¹⁹³ *Id.* at 1935.

¹⁹⁴ For an argument that the most recent Supreme Court cases in immigration reveal a normalizing immigration law, see Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015).

¹⁹⁵ See, e.g., LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* 71 (1990); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000); Motomura, *supra* note 10; Schuck, *supra* note 3.

¹⁹⁶ Legomsky, *supra* note 195, at 1615, 1625–26.

¹⁹⁷ Abrams, *supra* note 195, at 615.

¹⁹⁸ Schuck, *supra* note 3, at 73.

¹⁹⁹ Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS

Recent immigration case law confirms that immigration exceptionalism is indeed giving way to an increased willingness to find such issues justiciable. The Court confronted immigration exceptionalism by reaching out to address issues that the blunt language of *Knauff* and *Mezei* would otherwise forbid. In *Kleindienst v. Mandel*,²⁰⁰ the Court considered a suit brought by citizen-plaintiffs alleging a violation of their First Amendment rights based upon the executive's exclusion of an alien.²⁰¹ The Court held that the executive needed to marshal a "facially legitimate and bona fide reason" for excluding an alien in order to avoid such a challenge. While hardly a dramatic step, *Kleindienst* normalizes immigration law by imposing a standard for whether judicial review applies; to be sure, a low standard, but it marked a new willingness to engage questions arising from immigration law.²⁰²

Likewise, in *Fiallo v. Bell*,²⁰³ the Supreme Court challenged provisions of the federal immigration statute that denied preferential immigration status to the illegitimate children of American citizen-fathers, as opposed to the illegitimate children of American citizen-mothers.²⁰⁴ While the Court affirmed the statutory language, it characterized the judicial role more broadly than early precedents.²⁰⁵ Thus, the Court enjoyed a "limited scope of judicial inquiry into immigration legislation," rather than no review at all.²⁰⁶ The Court also expressly rejected the government's argument that immigration was not subject to judicial review.²⁰⁷ Justice Marshall, writing in dissent, noted that he was "pleased" to see the Court depart from "the old immigration cases that reflect an absolute 'hands-off' approach by this Court."²⁰⁸

Like other areas of foreign affairs law, immigration law is hardly a "normal" body of law with respect to non-justiciability. However, in narrow and specific ways, it is slowly normalizing: the Supreme Court is increasingly willing to contest those "old immigration cases"²⁰⁹ that foreclosed judicial review.

2. Federalism

Courts persist in treating questions of federalism in immigration law differently than in other areas of law. This discussion reviews the differential treatment of federalism within immigration law.

Immigration law, unlike other areas of public law, offers little heed to the interests of states. Scholars recognize that immigration is essentially "an exclusively federal power . . . because it has the potential to influence foreign affairs."²¹⁰ As Professor Abrams argues, immigration law

CONST. L.Q. 925, 926 (1995).

²⁰⁰ 408 U.S. 753 (1972).

²⁰¹ *Id.* at 760.

²⁰² Motomura, *supra* note 10, at 582.

²⁰³ 430 U.S. 787 (1977).

²⁰⁴ *Id.* at 788–91.

²⁰⁵ *Id.* at 792.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 796.

²⁰⁸ *Id.* at 805.

²⁰⁹ *Id.* at 805.

²¹⁰ Abrams, *supra* note 195, at 615; *see also* Erin F. Delaney, *Justifying Power: Federalism, Immigration and 'Foreign Affairs,'* 8 DUKE. J. CON. L & PUB. POL. 153 (2008) ("The federal plenary power over immigration is largely rooted in the connection between immigration and foreign affairs The link between immigrants, necessarily from foreign countries, and foreign relations is a powerful justification for exclusive federal action—whether under a theory of

continues to place “a very heavy thumb . . . on the government’s side of the scale” when faced with federalism-based challenges.²¹¹ *Plyler v. Doe*²¹² and *Arizona v. United States*,²¹³ two Supreme Court decisions, affirm Professor Abrams’ characterization: normalization of federalism concerns in immigration remains a distant objective.

In *Plyler*, the Supreme Court considered a class action challenge brought on behalf of schoolchildren who were living in Texas without admission by immigration authorities.²¹⁴ The class action challenged a state statute excluding unlawfully present school-age children from attending Texas’ schools. While the Court ultimately struck down the Texas statute as a violation of Equal Protection Clause, it also addressed the state’s interest in regulating the flow of undocumented immigrants through its territory.²¹⁵ While the Court affirmed the federal role in regulating immigration, the Court also found that “only rarely are [immigration] matters relevant to legislation by a state.”²¹⁶ “Rarely” is more than “never,” of course, suggesting a slight loosening of the standard announced in early immigration cases like *Chy Lung*.²¹⁷

The Supreme Court’s more recent decision in *Arizona* also affirms an exclusive federal role—while including dicta favorable to future federalism-based arguments in immigration. In *Arizona*,²¹⁸ the State of Arizona appealed the Ninth Circuit’s decision to affirm the injunction of its recent immigration statute.²¹⁹ At issue in the statute, S.B. 1070, were four provisions: the first and second provisions established new criminal penalties for aliens who violated state and federal immigration laws, the third and fourth authorized law enforcement officers to carry out additional immigration enforcement activities.²²⁰ The Supreme Court held that the federal immigration scheme preempted three of the four provisions, while remanding the fourth provision for further review by lower courts.²²¹

While the Court sided largely with the federal government in finding that Arizona’s attempt to regulate immigration was preempted, the Court acknowledged the State’s “understandable frustrations.”²²² Moreover, the approach that the Court took to find that Arizona’s program was preempted was not so exceptional in character: the Court undertook a careful preemption analysis between the state and federal statutes, even finding that one of the provisions was not preempted.²²³ A more exceptionalist approach to immigration federalism would have held the whole of immigration law to be beyond the powers of the states.

Indeed, Justice Scalia, writing in dissent, argued for a more thorough normalization of

collective action federalism (or subsidiarity), or due to the federal government’s inherent sovereignty.”)

²¹¹ Abrams, *supra* note 195, at 603.

²¹² 457 U.S. 202 (1982).

²¹³ 132 S. Ct. 2492 (2012).

²¹⁴ *Plyler*, 457 U.S. at 206.

²¹⁵ *Id.* at 225.

²¹⁶ *Id.* (“[T]he states do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”)

²¹⁷ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (holding that “the passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States”).

²¹⁸ *Arizona v. United States*, 132 S. Ct. 2492 (2012).

²¹⁹ *Id.* at 2498.

²²⁰ *Id.* at 2497–98.

²²¹ *Id.* at 2510.

²²² *Id.*

²²³ *Id.*

federalism's role in immigration.²²⁴ Analogizing between *Medellin*, in which the Court rejected the government's argument for special foreign affairs consideration, and *Arizona*, Justice Scalia wrote: "[in *Medellin*] we rejected [the government's] request, as we should reject the Executive's invocation of foreign-affairs considerations here. Though it may upset foreign powers—and even when the Federal Government desperately wants to avoid upsetting foreign powers—the States have the right to protect their borders against foreign nationals, just as they have the right to execute foreign nationals for murder."²²⁵ Not only does *Arizona* demonstrate that foreign affairs federalism is experiencing flickers of federalism normalization, Justice Scalia's dissent indicates that the Court is cognizant of immigration law's interrelationship with broader trends of normalization.

Nonetheless, normalization in immigration federalism remains nascent. While *Plyler* and *Arizona* provide only initial steps towards change, they indicate that the treatment of federalism within immigration law remains deeply exceptional.

3. Inherent Governmental Powers

In a recent decision, *Zivotofsky v. Kerry* (*Zivotofsky II*),²²⁶ the Supreme Court dismissed the Executive's argument that it possessed "broad, undefined powers over foreign affairs" as unnecessary dicta of the *Curtiss-Wright* decision.²²⁷ The case, which dealt with whether the Congress or the Executive possessed the power to recognize governments through passport determinations, ultimately vested the Executive with the power.²²⁸ The majority concluded that the Executive possessed an exclusive recognition power through the textual commitment of the Receptions Clause.²²⁹ *Zivotofsky II* expressly declines to adopt an argument for executive authority based upon inherent, unenumerated power in favor of authority based upon an express Constitutional delegation of responsibility. Such a shift from the inherent, sovereigntist understanding of government power in foreign affairs to a more modern textual, enumerated understanding represents a normalizing tendency.²³⁰

However, it is difficult to imagine the Supreme Court making a comparable transition in the context of immigration. Here, it is Congress, not the executive, which generally makes a claim of inherent authority over foreign affairs grounded in sovereignty itself.²³¹ This plenary power, the near-absolute power identified in *Chae Chan Ping* and elsewhere, remains a constant trope in the Court's discussion of federal immigration law.²³² While other elements of immigration exceptionalism—justiciability, federalism and administrative deference—refers to differences of degree from the rest of public law, the plenary power represents a difference of kind. It is exceptional for the Court to entertain claims of inherent, unenumerated and unlimited power from branches of the federal government. Normalizing this aspect of law would require a tectonic shift in how the Court justifies the activities of the federal government in the field of immigration.

²²⁴ *Arizona*, 132 S. Ct. at 2515 (Scalia, J., dissenting).

²²⁵ *Id.*

²²⁶ 135 S. Ct. 2076 (2015).

²²⁷ *Id.* at 2089–90.

²²⁸ *Id.* at 2087–88.

²²⁹ *Id.* at 2084–85.

²³⁰ Ingrid Wuerth, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 109 AM. J. INT'L L. 636, 640–41 (arguing that the majority's rejection of the Government's argument for a broad inherent power in lieu of a narrower, textual basis for the recognition power, constituted a step towards normalization).

²³¹ Motomura, *supra* note 10, at 608.

²³² *Id.* at 550.

Rather than adopt this approach, the Court has undermined the plenary power through the use of “phantom constitutional norms.”²³³ According to Professor Motomura, phantom norms serve as a subtext for otherwise curious decisions in statutory interpretation and executive deference.²³⁴ Because the Court will not directly confront the unbounded plenary power, it trims the edges of the power through the use of phantom norms that buffer its harshest consequences.²³⁵ All the same, the persistent use of the plenary power as the justification for government activity in the field of immigration ensures that immigration law will remain exceptional in this respect.

There are alternatives available to the Court with respect to justifying immigration law. The Court, in several cases, embraced some initial efforts to develop an alternative rationale. Consider the following from *Plyler*:

The Constitution grants Congress the power to “establish an uniform Rule of Naturalization.” . . . Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders.²³⁶

While scholars continue to call for the Court to “disavow the plenary power doctrine,”²³⁷ the Court has not yet taken this step. Rather, the Court continues to maintain doctrine that vests the government with power to regulate immigration through an unenumerated, plenary power framework established by nineteenth-century Supreme Court doctrine. Normalization of the Court’s review of the inherent powers underlying immigration would require discarding the plenary power and finding a new basis for Congress’s regulation of immigration. Here, normalization remains a distant goal.

4. Administrative Deference

Whereas the evidence of normalization in other aspects of immigration law is slight at best, the Court’s application of traditional administrative deference norms reflects greater evidence of normalization. Indeed, the normalization of the judiciary’s approach to administrative law in immigration is evinced by the fact that there is no one approach. Rather than maintain a consistently deferential approach grounded in the recognition of potential effects upon foreign affairs, the Court applies differing levels of deference to immigration decisions based upon their proximity to truly foreign concerns.

Using a framework for analyzing administrative deference developed in Professor Eskridge and Baer’s analysis of administrative deference doctrine, we can group the Supreme Court’s deference towards immigration cases into two categories.²³⁸ The Supreme Court either offers

²³³ Motomura, *supra* note 10, at 567.

²³⁴ *Id.* at 610–11.

²³⁵ *Id.* (“[C]ourts will continue to avoid this directly applicable constitutional doctrine through subconstitutional decisions that rely on phantom constitutional norms much more favorable to aliens. Cases that purport to speak only subconstitutionally have become the indirect expression of an alternative body of constitutional immigration law in which the plenary power doctrine has lost much of its force.”).

²³⁶ *Plyler v. Doe*, 457 U.S. 202, 225 (1982).

²³⁷ Motomura, *supra* note 10, at 610. *See also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 303 (calling for “a judicial willingness . . . to cut away at the notion of plenary Congressional power over immigration”).

²³⁸ *See* Eskridge & Baer, *supra* note 124, at 1099–1100.

standard-to-exceptional deference to the decisions of immigration agencies or it offers *no deference-to-anti-deference*.²³⁹ This bifurcation of the Court’s approach to administrative deference in immigration suggests that the Court’s decisions on immigration deference are sensitive to the content of the agency determination. As a result, issues with colorable risks of international blowback receive exceptional deference,²⁴⁰ while cases raising human rights concerns—notably, within criminal law—receive either no deference or anti-deference.²⁴¹ This Section reviews these two approaches and elaborates upon their relationship to the normalization of immigration law.

a. Standard-to-Exceptional Deference

Exceptional deference is the extremely heightened deference the Court pays to administrative decisions involving foreign affairs.²⁴² The Court’s decision to employ exceptional deference is often marked through citation to *Curtiss-Wright*, though exceptional deference may also rest upon an implicit reliance on the principles of the case.²⁴³ The close relationship between immigration and foreign affairs is belied by the fact that over half of the instances in which the Court invoked *Curtiss-Wright* in an administrative deference case occurred in the context of immigration.²⁴⁴ A review of the Court’s administrative law cases involving immigration indicate that it can offer a uniquely deferential standard.

Consider *INS v. Aguirre-Aguirre*²⁴⁵ for an illustration of the exceptional deference the Court pays to certain immigration cases. In *Aguirre-Aguirre*, the Court reversed the Ninth Circuit, which had concluded that the Board of Immigration Appeals (BIA) had wrongly interpreted the phrase “serious nonpolitical crime” in a deportation decision.²⁴⁶ The BIA’s finding that the defendant had committed such a crime rendered the defendant ineligible for a suspension of his deportation.²⁴⁷ In affirming the BIA’s interpretation of “serious nonpolitical crime,” the Court noted that “judicial deference . . . is especially appropriate in the immigration context where officials exercise especially sensitive questions that implicate questions of foreign relations.”²⁴⁸ In defending its decision to extend deference beyond that which *Chevron* calls for, the Court noted that the judiciary was “not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.”²⁴⁹

²³⁹ Eskridge & Baer, *supra* note 124, at 1098–1100 (elaborating on the *Curtiss-Wright* “super-deference,” *Beth Israel* deference for “agency elaborations of statutory schemes,” and the anti-deference and no-deference regimes described, respectively).

²⁴⁰ *Id.* at 1101–02.

²⁴¹ *Id.* at 1115–18.

²⁴² *Id.* at 1100 (explaining that exceptional deference is “the strongest form of deference . . . encountered: super-strong deference to executive department interpretations in matters of foreign affairs and national security The source of this discretion in statutory enforcement is the inherent power of the President to represent the nation in foreign matters and to protect America’s security interests.”).

²⁴³ *Id.* at 1102.

²⁴⁴ *Id.* at 1140–42 (finding that 55.6% of all cases relying upon *Curtiss-Wright* exceptional administrative deference were immigration-related).

²⁴⁵ 526 U.S. 415 (1999).

²⁴⁶ *Id.* at 418.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 425 (internal quotations omitted).

²⁴⁹ *Id.*

On the whole, immigration issues that raised foreign affairs questions continue to receive strong administrative deference. This habit of deference indicates that foreign relations exceptionalism carries on across numerous Court decisions at the intersection of immigration and administrative law.²⁵⁰

b. No Deference-to-Anti-Deference

Unfortunately for immigration agencies, the Supreme Court does not always consider administrative deference to be “especially appropriate” for its determinations.²⁵¹ In decisions involving immigrant rights, often in criminal law, the Court either drops any reference to administrative deference or applies so-called “anti-deference” through heightened scrutiny of agency determinations.²⁵² Intersections of immigration and criminal law often trigger this lower standard of deference. In a recent decision, *Moncrieffe v. Holder*,²⁵³ the Supreme Court rejected the government’s argument supporting deportation of the defendant.²⁵⁴ The BIA’s approach towards interpreting whether the defendant committed an “aggravated felony,” as defined by statute, was reversed by the Court.²⁵⁵ The decision reached by the majority in *Moncrieffe* does not reference any administrative deference scheme whatsoever. Indeed, the decision is arguably influenced by a concern about the prospect of deportation-as-a-punishment for undeserving defendants—a rule of lenity principle.²⁵⁶

Thus, the Supreme Court’s deference in immigration cases swings between strong deference for agency determinations that implicate foreign affairs and no deference for decisions raising other issues. The persistence of strong administrative deference for those immigration decisions particularly raising foreign relations concerns is exceptional; however, the willingness to forgo a categorical foreign affairs deference posture may be evidence of some normalization. As with earlier factors, immigration law is often exceptional with respect to administrative law questions, though there is some evidence of normalization.

Normalization, if it is taken to include immigration law, is not a substantially completed project. Across the domains of justiciability, federalism, inherent powers and administrative deference, foreign affairs exceptionalism continues to strongly shape the Court’s decisions. Foreign affairs law, viewed with immigration as a component, has not consistently normalized in the manner that Professors Sitaraman and Wuerth propose.²⁵⁷

Normalization also does not fit as neatly into the three waves that Professors Sitaraman and Wuerth characterize. The three waves used in their original article—at the end of the Cold War, during the War on Terror and during the Roberts Court—perhaps reflects Professors Sitaraman and Wuerth’s emphasis upon national security and war powers throughout their argument.

²⁵⁰ See, e.g., *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005) (affirming government’s interpretation of statutory provision on deportation); *Reno v. Flores*, 507 U.S. 292 (1993) (affirming government’s reading of statute authorizing temporary detention of minors); *INS v. Abudu*, 485 U.S. 94, 94–95 (1988) (affirming the BIA’s decision not to reopen a deportation determination).

²⁵¹ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); Eskridge & Baer, *supra* note 124, at 1115–18.

²⁵² Eskridge & Baer, *supra* note 124, at 1115.

²⁵³ 133 S. Ct. 1678 (2013).

²⁵⁴ *Id.* at 1682–83.

²⁵⁵ *Id.* at 1682–84.

²⁵⁶ *Id.* at 1693 (applying a rule of lenity principle in arguing that “we err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen’s favor”).

²⁵⁷ Sitaraman & Wuerth, *supra* note 1, at 1935 (normalization in foreign affairs is “on par” with the progression of exceptionalism at the time that Justice Sutherland occupied the Supreme Court bench).

Including immigration in this narrative disrupts this neat historical progression, inviting a reconsideration of the utility of the three-stage framework currently employed.

Although it is not accurate to say that immigration law is normalized, it is also inaccurate to say that immigration law has remained static over the past four decades. Indeed, the body of law has changed, as the Court and the rest of the federal judiciary pay far more attention to the rights of immigrants than was previously the case. The next section deals with how an immigrants' rights framework for evaluating immigration law has normalized immigration law by challenging specific areas of exceptionalism, rather than the doctrine of exceptionalism generally.

IV. RIGHTS NORMALIZATION IN IMMIGRATION

What explains immigration law's uneven normalization? Unlike the picture described by Professors Wuerth and Sitaraman, immigration normalization has not occurred as fully or as thoroughly as it has in foreign relations law. This Part proposes that immigration normalization is best understood as a process of *rights normalization*: areas that were once considered exceptional foreign relations questions are increasingly normalized when a contrary decision could implicate immigrants' rights.²⁵⁸

Of course, *any* immigration issue can be said to affect the rights of immigrants in some way. However, as the following review of cases suggests, the Court appears ready to intervene on behalf of immigrants when it identifies a rights-related matter is in the foreground of a case. When those rights questions are not as pronounced, the process of rights normalization is not as likely to occur. Distinguishing between cases that are related to rights and those that are not is a matter of degree, not a matter of kind.

Rights normalization occurs in immigration through a number of different channels. Immigration exceptionalism has weakened through immigrants' rights arguments resting on the Equal Protection Clause and the Due Process Clause, which Section A reviews; and through arguments resting on international human rights norms, which Section B reviews.

A. *Applying Constitutional Protections to Immigrants*

Given that immigration involves relations between foreign sovereigns, the federal government's regulation of immigration is a plenary power, the Court originally concluded, and it allows very little judicial review. Yet, the application of constitutional protections has weakened the position of immigration exceptionalism. Increasingly, the Court is increasingly likely to apply constitutional rights analysis to immigration law, through the use of equal protection and due process norms.

1. Equal Protection

While distinctions based upon race or gender are all but eliminated from the rest of the Federal Code, immigration law continues to treat both citizens and aliens differently based upon both of these characteristics. Distinctions on both of these axes have long been permitted by reference to

²⁵⁸ This argument relates to Professor Motomura's description of two jockeying accounts of immigration law: one that understands immigration as a matter of foreign relations and one that recognizes how immigration law may affect the rights of immigrants. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1394 (1999) (describing two views of immigration law: "the foreign affairs view subsumes the noncitizen under the relationship between sovereign countries. In contrast, the immigrants' rights view separates the noncitizen from her native country and focuses on her as an individual.").

the foreign relations character of immigration, but a spate of Supreme Court decisions abruptly challenged this posture. While the Court first skirted the intersection of racial equal protection issues in *Jean v. Nelson*,²⁵⁹ it chose to embrace equal protection issues relating to sex in two subsequent cases: *Miller v. Albright*²⁶⁰ and *INS v. Nguyen*.²⁶¹

In *Jean*, Chief Justice Rehnquist, writing for the majority, narrowly avoided addressing whether a policy in which Haitians, unlike other undocumented aliens at the time, were automatically detained and excluded, rather than receiving temporary parole.²⁶² The Haitian plaintiffs alleged that they were being denied parole on the basis of race and national origin in violation of the Equal Protection Clause.²⁶³ While the Eleventh Circuit had held that the Government's plenary power rendered an equal protection argument unavailing, the Supreme Court declined to reach the question. Rather, it remanded the case to determine whether the policy with regard to Haitian migrants was administered according to regulations.²⁶⁴ Justice Marshall, writing in dissent, stated that the proper question was whether "the Government may discriminate on the basis of race and national origin even in the absence of any reasons closely related to immigration concerns."²⁶⁵ To Justice Marshall, the Constitution "clearly" provided that the Government could not discriminate in this way.²⁶⁶ While *Jean* represented an opportunity for the Court to clarify the role of equal protection analysis in immigration, the Court ultimately declined the invitation.

In *Miller* and *Nguyen*, the Court finally chose to apply the Equal Protection Clause to immigration law.²⁶⁷ Unlike *Jean*, which dealt with the equal protection implications of racial classifications, *Miller* and *Nguyen* dealt with sex classifications. Professor Spiro notes the significance of the Supreme Court's decision to adopt the familiar gender-based classification analysis for immigration law "without any alteration of the test to account for the immigration context."²⁶⁸ Similarly, Professors Pillard and Aleinikoff described the significance of the shift from a foreign relations framework to a rights framework. The Equal Protection Clause cases "[do] more than cast doubt on sex-based citizenship laws. [They force] fundamental reconsideration of the plenary power doctrine."²⁶⁹

Both *Miller* and *Nguyen* analyzed the same provision of the immigration statute. At issue was

²⁵⁹ 472 U.S. 846 (1985).

²⁶⁰ 523 U.S. 420 (1998).

²⁶¹ 533 U.S. 53 (2001).

²⁶² *Jean*, 472 U.S. at 848.

²⁶³ *Id.*

²⁶⁴ *Id.* at 857 ("On remand the District Court must consider: (1) whether INS officials exercised their discretion under § 1182(d)(5)(A) to make individualized determinations of parole, and (2) whether INS officials exercised this broad discretion under the statutes and regulations without regard to race or national origin.").

²⁶⁵ *Id.* at 881–82.

²⁶⁶ *Id.* at 882.

²⁶⁷ Critical readers may argue that these decisions focused on the narrower question of *jus sanguinis* citizenship, rather than the broader question of immigration. However, as Professors Aleinikoff and Pillard argue, it is difficult to cabin the Court's decision to apply Equal Protection Clause analysis to this segment of immigration law. Immigration and citizenship determinations are closely intertwined. See 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, 64 (1998).

²⁶⁸ Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 342 (2002).

²⁶⁹ Pillard & Aleinikoff, *supra* note 267, at 70.

a statutory requirement that established a different set of requirements for U.S. citizen-fathers of children born out of wedlock to secure citizenship for their children than the requirements for citizen-mothers.²⁷⁰ *Miller*, the first case in which the Court addressed the issue, produced a splintered Court. Professors Pillard and Aleinikoff noted that, in spite of the divided Court opinion, “no majority endorsed the statute’s constitutionality as a matter of equal protection Not a single Justice embraced the government’s suggestion that Ms. Miller was an alien lacking any Fifth Amendment rights.”²⁷¹ Although the Court did not strike down the provision at issue as unconstitutional, its willingness to apply equal protection norms marked a significant shift in how the Court perceived justiciability, executive deference and inherent powers norms in immigration law.²⁷²

Addressing a gender-discrimination claim in the context of immigration shows the Court’s willingness to disregard earlier doctrines of non-justiciability. While the Government’s brief in *Nguyen* argued that the right to admit was “exercised by the Executive and Legislative Branches, not by the Judiciary,”²⁷³ the Court maintained its oversight over gender-discriminatory immigration decisions.

Although federalism was not an issue before the *Nguyen* Court, the Court did have the opportunity to consider the plenary power. The Court, in evaluating the Equal Protection claim prior to its abbreviated and inconclusive treatment of the plenary power doctrine, clearly had an opportunity, which it chose not to take, of side-stepping the application of the Equal Protection Clause altogether. The Court’s deliberate unwillingness to use the plenary power as an excuse to avoid the gender-based analysis shows a Court less willing to defer to plenary power arguments.²⁷⁴

Though the Supreme Court also affirmed the constitutionality of the statute in *Nguyen*, its decision to evaluate the case through an unambiguous gender-classification analysis was remarkable.²⁷⁵ The Court’s analysis of the provision evaluated whether the statute furthered an “important interest” in a manner that was “tailored” to that interest—the familiar standard for gender-based classification that the Court would use in any other body of law.²⁷⁶

What is remarkable about both decisions is that the Court largely skips over the impacts on foreign affairs that one might imagine arising from invalidating this portion of the INA. Rather than attend to the traditional elements of foreign relations doctrine—justiciability, executive deference and inherent powers are all relevant arguments in this decision—the Court’s attention was focused much more closely on the rights of the immigrants at issue in each case.

2. Due Process

While the Supreme Court has recognized that some due process protections are available to aliens since the 1903 decision in *Yamataya v. Fisher*,²⁷⁷ the procedural due process protections afforded were more formal than real.²⁷⁸ However, the Supreme Court’s initial reluctance gave way

²⁷⁰ *Miller v. Albright*, 523 U.S. 420, 424 (1998).

²⁷¹ Pillard & Aleinikoff, *supra* note 267, at 10.

²⁷² *See id.* at 17 (describing the *Miller* decision as “a victory masquerading as a defeat”).

²⁷³ Brief for the Respondent at 24, *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (No. 99-2071).

²⁷⁴ *See Nguyen*, 533 U.S. at 72–73.

²⁷⁵ Spiro, *supra* note 268, at 342.

²⁷⁶ *Nguyen*, 533 U.S. at 71.

²⁷⁷ 189 U.S. 86, 100 (1903).

²⁷⁸ Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive*

to a willingness to entertain individual claims of due process right, especially in the previous thirty years.²⁷⁹ Today, an alien seeking to enter the United States may challenge a decision to exclude²⁸⁰ and an alien facing deportation may challenge indefinite detention pending deportation.²⁸¹ These extensions of procedural due process illustrate the manner in which due process norms have bloomed within immigration doctrine.

When the Court originally applied the Due Process Clause to immigration, the application was a limited one. In *Yamataya*, the Supreme Court acknowledged that a Japanese individual who had been in the United States could claim due process protections regarding an exclusion order.²⁸² The Court held that due process had been satisfied in the exclusion hearing, despite the fact that the individual had not received notice of the hearing, could not speak English and did not understand the subject of the hearing.²⁸³ Given the way that the plenary power doctrine crowded out meaningful due process norms in *Yamataya*, Professor Motomura characterized this as a “formal exception to the plenary power,” rather than a protection with any “real content.”²⁸⁴

The Supreme Court’s early Cold War decisions largely ratified the *Yamataya* approach. In *Mezei*, the Court held that Mezei, an alien returning from Eastern Europe, could be excluded on the basis of whatever process Congress saw fit, establishing the same exceedingly low threshold as *Yamataya*.²⁸⁵ The *Mezei* Court paid due to traditional norms of non-justiciability and deference to inherent powers by holding that a returning alien “has only such rights as Congress sees fit to grant in exclusion proceedings.”²⁸⁶ This holding stood without challenge for several decades.

However, in *Plasencia*,²⁸⁷ the Supreme Court held that an alien resident returning to the United States could challenge her exclusion hearing using the Due Process Clause. Moreover, the Court directly applied the *Mathews v. Eldridge* balancing factors to the immigration hearing,²⁸⁸ thus using the same due process analysis as other areas of domestic law.²⁸⁹ While the alien at issue in *Plasencia* was in a similar position to the *Mezei* litigant—a resident alien on the threshold of the United States—the Court’s due process reasoning changed dramatically.²⁹⁰

Central to the Court’s reasoning in *Plasencia* were the alien’s ties to the United States. A returning resident alien had a stronger due process claim, recognizing that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his

Constitutional Rights, 92 COLUM. L. REV. 1625, 1646 (1992) (“The Court’s readiness to recognize procedural due process as a formal exception to the plenary power doctrine stood in tension with its unwillingness to give the procedural due process requirement any real content.”).

²⁷⁹ See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

²⁸⁰ *Id.*

²⁸¹ *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

²⁸² See *Yamataya*, 189 U.S. at 100.

²⁸³ *Id.* at 102.

²⁸⁴ Motomura, *supra* note 278, at 1646.

²⁸⁵ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 216 (1953).

²⁸⁶ *Id.* at 221 (Jackson, J., dissenting).

²⁸⁷ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

²⁸⁸ See also Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 879 (2015) (arguing that the due process “revolution” effectuated by the *Mathews* factors “undermines the categorical inquiries into sovereignty, citizenship, and territoriality that defined more than a century of immigration . . . law”).

²⁸⁹ *Plasencia*, 459 U.S. at 34.

²⁹⁰ Motomura, *supra* note 278, at 1653 (arguing that the expansion of due process rights “marked the arrival of the due process revolution in immigration law”).

constitutional status changes accordingly.”²⁹¹ This emphasis on individual ties replaced the *Mezei* Court’s formalistic emphasis on foreign relations.²⁹²

In recent decisions, the Supreme Court has continued to extend the scope of due process protections available to aliens in detention. In *Zadvydas*, the Supreme Court held that the Government could not indefinitely detain an individual pending a deportation.²⁹³ Notably, the Court only devoted two sentences to the role that foreign relations played in its decision:

The sole foreign policy consideration the Government mentions here is the concern lest courts interfere with “sensitive” repatriation negotiations. But neither the Government nor the dissents explain how a habeas court’s efforts to determine the likelihood of repatriation, if handled with appropriate sensitivity, could make a significant difference in this respect.²⁹⁴

Rather than reach the due process considerations after struggling through arguments of inherent power and non-justiciability, the Supreme Court sidelined the role that foreign relations played in *Zadvydas*.²⁹⁵ As Professor Spiro notes, the Court’s decision “seems to have stepped out of the discourse of immigration exceptionalism.”²⁹⁶

Rather, the Supreme Court re-read the immigration statute to require a “reasonable time” limitation that barred the federal government from holding detainees indefinitely.²⁹⁷ The Supreme Court reached this reading through reference to *Zadvydas*’ Fifth Amendment liberty interest.²⁹⁸ The Supreme Court thus thrust an alien’s quasi-Fifth Amendment rights into the core of a case nominally addressing statutory interpretation issues.²⁹⁹

Two years after *Kim* and four after *Zadvydas*, the Supreme Court re-applied a newly heightened Due Process Clause review to the ongoing detention of a Cuban individual who arrived in Florida during the Mariel boatlift. In *Clark v. Martinez*,³⁰⁰ the Supreme Court rejected the Government’s argument that the alien’s ongoing detention prior to deportation, which exceeded six months, was consistent with the Due Process Clause.³⁰¹ As in *Zadvydas*, the Supreme Court briefly addressed the foreign relations arguments that were previously dominant in immigration law: “The Government fears that the security of our borders will be compromised if it must release

²⁹¹ *Plasencia*, 459 U.S. at 33.

²⁹² Motomura, *supra* note 278, at 1653 (noting that, unlike in *Mezei*, the *Plasencia* Court “looked past the statutory exclusion or deportation categories and thereby extended procedural due process in immigration law to a wider circle of aliens”).

²⁹³ *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001).

²⁹⁴ *Id.* at 696.

²⁹⁵ While the Court’s subsequent decision in *Demore v. Kim*, 538 U.S. 510 (2003), which denied a similar challenge to an indefinite detention, complicates the role that *Zadvydas* plays, the *Kim* holding does not unsettle the fact that the Due Process Clause plays an increased role in detentions pending deportation.

²⁹⁶ Spiro, *supra* note 268, at 344–45.

²⁹⁷ *Zadvydas*, 533 U.S. at 689.

²⁹⁸ *Id.* (noting a “cardinal principle” of statutory interpretation that requires “that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided’”).

²⁹⁹ See Matthew J. Lindsay, *Disaggregating “Immigration Law”*, 68 FLA. L. REV. 179, 230 (2016) (“[T]he [*Zadvydas*] majority refused to treat as dispositive one of the plenary power doctrine’s most foundational categorical presumptions: that courts owe the political branches broad deference based on the inextricable connection between the regulation of immigration and the conduct of foreign affairs and national security.”).

³⁰⁰ 543 U.S. 371 (2005).

³⁰¹ *Id.* at 374–76.

into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it.”³⁰² An increased emphasis on individual rights, made concrete through the Due Process Clause, produced more normalization in justiciability, deference and inherent powers areas of the foreign relations law than a broad review of immigration law otherwise predicts.

B. *Applying International Human Rights Norms to Immigration*

The role of immigration exceptionalism is challenged both by the rise of constitutional norms, reviewed in the previous Section, and the rise of international human rights norms, discussed in this Section. Much as constitutional arguments have displaced the framework of immigration as foreign relations with respect to issues like due process and equal protection claims, international human rights norms, codified through national treaties, have further eroded the commitments of immigration exceptionalism.

Less than three decades ago, leading scholars dismissed the role that international human rights law could play in changing immigration law. Professor Henkin, writing on the continuing influence of *Chae Chan Ping* and other early plenary power cases, noted that “international human rights law has developed to help prevent such harms, but the executive branch has not seen fit to respect this law, and the courts have not yet ordered the executive to do so.”³⁰³ The role of international human rights law in immigration law since then has changed dramatically: immigration lawyers increasingly have a facility in wielding international human rights law before courts³⁰⁴ and courts increasingly recognize such arguments.³⁰⁵

Likewise, Justice Stephen Breyer, speaking before the American Society of International Law, reflected on the increasingly relevance of international human rights norms in immigration law.³⁰⁶ Describing an “ever-stronger consensus . . . on the importance of protecting basic human rights,” Justice Breyer applauded the manner in which international treaties and national judiciaries collaborated in advancing common human rights norms across national boundaries.³⁰⁷

The Supreme Court and lower federal courts have both sought to weaken immigration exceptionalism through the application of international human rights legal standards.³⁰⁸ *INS v. Cardoza-Fonesca*³⁰⁹ concerned the appeal of an alien seeking status as a refugee for fear of

³⁰² 543 U.S. at 374–76.

³⁰³ Henkin, *supra* note 41, at 885–86.

³⁰⁴ See Risa E. Kaufman, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149, 149–50 (2008) (“[D]omestic lawyers are increasingly adopting human rights strategies. These include appeals to international human rights bodies, use of international human rights and comparative law in U.S. courts, and broader activism such as documentation, organizing, and education.”); see also Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT’L L.J. 243, 288 (2013) (arguing that immigration law ought to be interpreted to promote consistency with international human rights standards to which the United States is a party).

³⁰⁵ See David Cole, *The Idea of Humanity: Human Rights and Immigrants’ Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 645 (2006) (“Courts have been more hospitable, however, to arguments that international human rights norms are an appropriate guide for statutory or constitutional interpretation.”).

³⁰⁶ Justice Stephen G. Breyer, *Keynote Address at the Ninety-Seventh Annual Meeting* (April 4, 2003), in SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW 99 (Christopher J. Borgen ed., 2007).

³⁰⁷ *Id.* at 102.

³⁰⁸ See Cole, *supra* note 305, at 645.

³⁰⁹ 480 U.S. 421 (1987).

persecution if she were returned to Nicaragua.³¹⁰ At issue was whether the agency should apply a “well-founded fear” standard, as the alien proposed, or the more stringent “clear probability” standard, as the Government argued.³¹¹

The Court interpreted the INA with an eye towards the United Nations Protocol Relating to the Status of Refugees.³¹² In determining the proper standard for an individual’s refugee claim, the Court’s analysis was shaped by the Protocol, as well as additional guidance offered by the United Nations High Commissioner for Refugees.³¹³ Finally, the Court also described its concern regarding the possibility that aliens, like the plaintiff, would be “subject to death or persecution if forced to return to his or her home country.”³¹⁴

A more recent application of human rights law to immigration arises in *Cabrera-Alvarez v. Gonzales*.³¹⁵ While the Ninth Circuit ultimately sided with the Government against the alien’s challenge, the decision is notable because the court did not resist the application of an international human rights agreement to the interpretation of domestic immigration law.³¹⁶ At issue was whether the properly considered the interest of children as required by the United Nations Convention on the Rights of the Child³¹⁷ when determining whether the deportation of a parent-alien would produce “exceptional and extremely unusual hardship.”³¹⁸ The Convention on the Rights of the Child required that the Government weigh a child’s best interests as a “primary consideration” and the Ninth Circuit ultimately concluded that the “exceptional and extremely unusual hardship” weighed the interests appropriately.³¹⁹

The advent of international human rights cases in immigration law demonstrate a federal judiciary more willing to hear cases than the plenary power doctrine would otherwise admit. The Court shows less deference to executive interpretations and less willingness to kowtow to the obligations of the plenary power doctrine. Normalization is not afoot everywhere in immigration law, but it appears much more active in the areas rights are implicated.

What explains the willingness to normalize immigration law in these areas, while allowing deeply exceptional cases to persist in most other areas of immigration law? Part IV suggests that *rights normalization* explains the difference. As a descriptive argument, rights normalization holds that normalization proceeds more quickly in cases in which the rights of immigrants are at the forefront than in other cases.

Consider justiciability concerns: while courts are discouraged from intervening in foreign affairs issues between sovereigns, courts are encouraged to protect the rights of immigrant minorities. While immigration law *qua* foreign relations law continues to entail unique approaches to justiciability, federalism, administrative deference and inherent powers, the exceptionalist posture weakens significantly once immigration law is no longer viewed as a subset of foreign affairs law. On net, immigration law becomes increasingly normalized as federal courts

³¹⁰ 480 U.S. at 424.

³¹¹ *Id.* at 426.

³¹² *Id.* at 424.

³¹³ *Id.* at 438–39.

³¹⁴ *Id.* at 449.

³¹⁵ 423 F.3d 1006 (9th Cir. 2005).

³¹⁶ *Id.* at 1013. *See also* *Cardoza-Fonesca*, 480 U.S. at 429.

³¹⁷ United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1459.

³¹⁸ 8 U.S.C. § 1229(b) (West, Westlaw through PL 114-248).

³¹⁹ *Cabrera-Alvarez*, 423 F.3d at 1013.

increasingly situate the rights of immigrants in their overall analysis.³²⁰

Rights normalization is not a causal argument, just as Professors Sitaraman and Wuerth's normalization account is not a causal argument. The federal judiciary may not be normalizing immigration law *because* it is clashing with the rights of immigrants, though that seems to be a likely account. All this argument establishes is that normalization appears to encounter more fertile soil when the courts perceive the rights of immigrants to be at stake than when it is the foreign relations concerns of the United States.³²¹

CONCLUSION

The Supreme Court is slowly and surely shaping immigration law into a “normal” body of law—at least when the rights of immigrants are affected. Just as a broad survey may obscure specific trends within a population, a general overview of immigration decisions hides the areas in which normalization has occurred. Viewed as a monolith, immigration law has only slowly shifted, but viewed as a collection of constituent parts, immigration law has become increasingly normalized in particular areas that implicate immigrants' rights.

By analyzing immigration law through the framework of normalization, several lessons become evident. First, the manner in which Professors Sitaraman and Wuerth describe normalization—as a monolithic shift in law—ignores the ways in which foreign relations law can normalize at different rates, and in different places, within the broader body of doctrine.

Relatedly, a promising area for future research is in the application of rights-focused frameworks elsewhere in foreign relations law.³²² The habeas corpus decisions arising during the War on Terror, including *Hamdi*, *Hamdan* and *Boumediene*, are likely explicable as rights normalization decisions, in which an increased emphasis upon the rights of detainees hastened the pace of normalization in national security law.³²³

Rights normalization offers scholars a new story to understand the process of normalization. For those who wish to see greater normalization in foreign relations law, Professors Sitaraman and Wuerth offer an optimistic narrative of normalization: foreign relations law is striding into a new, normal world of doctrine. For those who focus on the Court's persistently exceptional areas of law—such as the retention of the plenary power doctrine in immigration—a more pessimistic story

³²⁰ One area of persistent exceptionalism is immigration federalism. Yet, immigration exceptionalism in federalism is *consistent* with rights normalization, since the exclusion of the states from immigration law is likely favorable to immigrants' rights. See David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 984–86 (2016) (discussing arguments for and against the notion that federalism exceptionalism favors immigrants' rights *per se*).

³²¹ In some respects, this argument is similar to Professor Lindsay's normative argument for the “disaggregation” of immigration law. Lindsay, *supra* note 299, at 180–86. Just as Professor Lindsay argues that the Supreme Court *should* treat immigration-as-foreign-relations-law differently from immigration-as-constitutional-rights-law differently, I argue that the Court *does* treat these strands of law differently, or is at least moving in this direction.

³²² See, e.g., Landau, *supra* note 288 (arguing that the *Mathews* decision injected due process considerations into national security law, thereby “ushering in new rights protections and weakening doctrines of exceptionalism”).

³²³ Indeed, Professors Sitaraman and Wuerth describe the Supreme Court's decisions regarding these habeas decisions with some surprise. See Sitaraman & Wuerth, *supra* note 1, at 1924 (“[T]he war on terror posed the strongest possible challenge to the normalization project. In the context of wartime exigency, in which exceptionalist arguments should be at their strongest . . . the Supreme Court continued to proceed with normalization.”). Under the rights normalization account, this string of decisions seems less surprising and also provides an explanation for persistent exceptionalism in other War on Terror cases, such as *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013) (noting that “we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs”).

is apt. Normalization is not occurring here; immigration law remains stubbornly exceptional.

Rights normalization offers a third story. Under the narrative of rights normalization, immigration law has become more normal in some areas of immigration law, while remaining stubbornly exceptional in others. This account is uniquely able to make sense of the Court's seemingly conflicting decisions about justiciability, federalism, executive deference and inherent powers, while highlighting those areas of immigration law that remain exceptional.