The Court's Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference

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"The ex post facto effect of a law cannot be evaded by giving civil
form to that which is essentially criminal."

I. INTRODUCTION

For over one hundred years, the United States Supreme Court has
held that deportation is not punishment. The Court has determined that
since deportation is technically a civil proceeding, the ex post facto
clause is inapplicable to immigration laws. Congress may therefore
enact legislation that retroactively renders inhabitants deportable.

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1 Burgess v. Salmon, 97 U.S. 381, 384 (1878)
2 See Galvan v. Press, 347 U.S. 522, 530 (1954) (holding ex post facto clause in-
applicable to deportation despite similarity to criminal punishment); Harisiades v.
Shaughnessy, 342 U.S. 580, 594 (1952) (recognizing Court has always classified depor-
tation as civil rather than criminal procedure); Bridges v. Wixon, 326 U.S. 135, 152
(1945) (asserting deportation not criminal despite hardship and deprivation of right to
live in U.S.); Mahler v. Eby, 264 U.S. 32, 38 (1924) (affirming deportation not punish-
ment despite its degree of severity and burden); Bugajewitz v. Adams, 228 U.S. 585, 591
(1913) (affirming deportation simply refusal of government to harbor persons it does not
want); Fong Yue Ting v. United States, 149 U.S. 698, 728 (1893) (asserting deportation
not punishment). The Court framed deportation as simply a method of enforcing the
return of an alien to his or her own country for violating conditions of the host govern-
ment. Fong Yue Ting, 149 U.S. at 728.
3 See U.S. CONST. art. I § 9 cl.13, cl.10 (stating prohibitions against ex post facto
laws). The ex post facto clause forbids legislation that retroactively alters the definition
of a crime or increases the penalty by which the crime is punishable. Id. See also Cum-
nings v. Missouri, 71 U.S. 277, 324 (1866) (holding law retroactively denying right to
practice profession violates ex post facto clause), Fletcher v. Peck, 10 U.S. 87, 138-39
(1810) (holding ex post facto law renders acts punishable in different manner than when
committed).
4 See Harisiades, 342 U.S. at 594 (upholding deportation based on past member-
ship in communist party); Eichenlaub v. Shaughnessy, 338 U.S. 521, 527 (1950) (af-
firming congressional power to enact statutes to deport aliens based on past misconduct);
Chae Chan Ping v. United States, 130 U.S. 581, 609(1889) (upholding Congressional
Act retroactively excluding Chinese laborers previously accorded lawful status by Con-
Moreover, grounds for deportation may be retroactively expanded to include past crimes that were not deportable offenses when they occurred. Thus, individuals lawfully admitted to the United States as permanent residents, of which there are over ten million, can unexpectedly be subject to deportation notwithstanding many years of lawful status in the United States.

The Supreme Court utilized the plenary power doctrine in establishing that deportation is not punishment. Specifically, the Court used this judicially constructed doctrine to reject the application of the ex post facto clause in deportation cases. Subsequently, the Court's civil classification of deportation is frozen in immigration jurisprudence. The result has been the foreclosing of opportunity for modification of the doctrines to keep pace with evolving constitutional trends.

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4 See Lehmann v. United States, 353 U.S. 685, 690 (1957) (holding deportations permissible based on past convictions); Mulcahy v. Catalanotte, 353 U.S. 692, 694 (1957) (recognizing Congressional Authority through 1952 Act to render person deportable for 1923 narcotics convictions); Marcello v. Bonds, 349 U.S. 302, 313 (1955) (upholding constitutionality of statute making any marijuana conviction deportable offense despite conviction predating statute); Hamama v. INS, 78 F.3d 233, 234 (6th Cir. 1996) (acknowledging retroactive application of statute authorizing deportation for firearms offense despite conviction predating statute); Campos v. Immigration and Naturalization Service, 16 F.3d 118, 122 (6th Cir. 1994) (upholding constitutionality of retroactive bar to relief from deportation). In Campos, Congress classified the respondent's conviction as an aggravated felony after the conviction occurred. Id. The classification barred the respondent's relief from deportation. Id.


6 See Bugajewitz v. Adams, 228 U.S. 585, 590 (1913) (applying plenary power doctrine to deportation case); Fong Yue Ting v. United States, 149 U.S. 698, 704 (1893) (applying plenary power doctrine).

7 See Morawetz, supra note 6 (noting that Court has changed its own precedent in other areas).

8 See Aleinikoff, supra note 6, at 863.
In 1996, Congress enacted legislation that greatly expands the grounds for which past crimes render lawful permanent residents deportable or "removable" from the United States. This note argues that the consequences of these changes for lawful permanent residents compel a renewed critique of the Court's view that deportation is not punishment. Further, the note argues that retroactively attaching deportation or removal as a consequence to past criminal convictions and changing the definition of crimes for immigration purposes perpetrates the precise harm the ex post facto clause is designed to prevent.

Part II of this note explains how the consequences of the 1996 legislation support the view that the ex post facto clause should apply to deportation proceedings. This section discusses significant changes Congress created pertaining to the immigration consequences of past criminal conduct. Part III considers the judicial construction of the Court's "deportation is not punishment" theory. Part IV critiques and challenges this determination and suggests that modifying the plenary power doctrine would allow deportation to be recognized as punishment. This section also discusses precedent in which the Court applied the ex post facto clause to other non-criminal contexts to support its application to immigration proceedings. Part V concludes by urging

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11 See Daniel C. Kanstroom, Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law, 71 TUL. L REV. 703, 719 (1997). Professor Kanstroom notes that the 1996 immigration legislation has been described as the most fundamental statutory restructuring of immigration law in two hundred years. Id. See also Pilcher, supra note 10, at 271 (highlighting merger of criminal justice and immigration procedures).

12 See supra note 3 and accompanying text (outlining purpose of ex post facto clause).

13 See supra notes 18-59 and accompanying text.

14 See supra notes 18-59 and accompanying text.

15 See infra notes 60-96 and accompanying text.

16 See infra notes 60-96 and accompanying text.

17 See infra notes 102-115 and accompanying text.
the Court to recognize that immigration statutes that render individuals removable based on past convictions violate the prohibitions of the ex post facto clause.

II. THE CONSEQUENCES OF THE 1996 IMMIGRATION LEGISLATION

Two pieces of legislation enacted by Congress in 1996 dramatically altered the nation's immigration laws: The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Through this legislation, Congress redefined what constitutes a conviction and greatly influenced the treatment of past crimes in immigration cases. Such changes greatly expanded which crimes constitute "aggravated felonies" under the Immigration and Nationality Act. The legislation also redefined "sentence" for immigration purposes. The cumulative effect of these changes greatly increases the likelihood of removal for long-time residents with past convictions.

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21 See 8 U.S.C. § 1101(a)(48)(B) (Supp. 1997) (defining sentence as incarceration period or confinement ordered by court, regardless of suspension of imposition). The statute specifically includes suspended sentences in the definition. Id. Prior to 1996, a suspended or not imposed sentence did not constitute a sentence for immigration purposes. Id. Sentencing has become critical in determining immigration consequences of convictions. Id.

22 See Morawetz, supra note 6, at 107 (noting increased likelihood of removal from United States of permanent residents under AEDPA and IIRIRA).
A. The Altered Definition of "Conviction"

The IIRIRA redefined "conviction" for immigration purposes. Prior to 1996, case law of the Board of Immigration Appeals (B.I.A.) defined what constituted a conviction. The prior B.I.A. case law analyzed whether a conviction achieved sufficient finality under state law to support a deportation order. The IIRIRA specifically overruled the B.I.A. definition of conviction. Under the current law, a conviction may be sufficient to support a removal order even where a court has withheld a formal adjudication of guilt.

i. The Pre-Ozkok Definition of "Conviction"

As early as 1942, the B.I.A. considered the status of a conviction and the effect of the state expunction statute. The Supreme Court in Pino v. Landon held that a conviction under a Massachusetts statute that provided for the sentence to be revoked and "put on file" did not constitute sufficient finality to support a deportation order. The B.I.A.

\[\text{23 See} \text{ Dan Kesselbrenner & Lory D. Rosenberg, Immigration Law and Crimes} \text{ § 2.6, 2.31-32 (1998) (explaining prior law required final conviction before deportation consequences could attach).}

\[\text{24 See Matter of Ozkok, 19 I & N Dec. 546,551 (B.I.A. 1988) (defining conviction for immigration purposes); infra note 38-40 and accompanying text (outlining Ozkok decision).}

\[\text{25 See id. at 550 (providing pre-IIRIRA definition of conviction for immigration purposes).}

\[\text{26 See generally Kesselbrenner and Rosenberg, supra note 23. (noting prior law required final conviction).}


\[\text{The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-}

\[\text{(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or no lo contendre or has admitted sufficient facts to warrant a finding of guilt, and}

\[\text{(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.}

\[\text{Id.}

\[\text{28 Matter of F-, 1 I. & N. Dec. 343 (B.I.A. 1942)}

\[\text{29 349 U.S. 901 (1955).}

\[\text{30 See id. (holding statute not sufficiently final to support deportation order).}
subsequently held in 1957 that a conviction achieved sufficient finality to support a deportation order only after a court made a finding of guilt, imposed a fine or sentence of imprisonment, or suspended the execution or imposition of a sentence.\textsuperscript{31}

In 1959, the B.I.A. enunciated the three-part test that was applied until 1988 to determine whether a conviction exists for immigration purposes.\textsuperscript{32} The test required a judicial finding of guilt, removal of the case from the category of pending cases, and consideration as a conviction by the state for at least some purpose.\textsuperscript{33} In \textit{Matter of A-F},\textsuperscript{34} however, the attorney general considered the effect of expunction statutes on narcotic offenses.\textsuperscript{35} The attorney general concluded that Congress did not intend narcotics violators to escape deportation by technical erasure of their convictions.\textsuperscript{36}

ii. The Ozkok Definition of "Conviction"

The B.I.A.'s decision in \textit{Matter of Ozkok}\textsuperscript{37} was an attempt to establish uniformity in determining immigration consequences of convictions.\textsuperscript{38} The B.I.A. held that a conviction exists for immigration purposes if three factors are present:

1. a judge or jury has found the alien guilty or he has entered a plea of guilty or no lo contendere or has admitted sufficient facts to warrant a finding of guilty;

\textsuperscript{31} See \textit{Matter of O-}, 7 I. & N. Dec. 539 (B.I.A. 1957). The Board also held that if the court postponed further consideration of the case so it was still pending for imposition of a sentence, an inquiry was needed as to whether the sentence it achieved sufficient finality to support a deportation order. \textit{Id.} at 543.

\textsuperscript{32} See \textit{Matter of L-R-}, 8 I. & N. Dec. 269 (B.I.A. 1959) (outlining three part test)

\textsuperscript{33} See \textit{id.}


\textsuperscript{35} See \textit{id.} at 446 (noting inequity of deportation avoidance for some in absence of state expunction statute).

\textsuperscript{36} See \textit{id.} (reasoning congressional intent not to relieve narcotics offender of deportation because conviction technicality).


\textsuperscript{38} See \textit{id.} at 554. (requiring finality established standard to measure myriad state definitions of conviction.)
2. the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed; and

3. a judgement or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order without the availability of further proceedings regarding the person's guilt or innocence of the original charge.\textsuperscript{39}

This definition provided uniformity among the myriad of state definitions of conviction.\textsuperscript{40}

iii. The IIRIRA Definition of "Conviction"

Subsequent to the court's holding in \textit{Ozkok}, Congress enacted the IIRIRA and altered the definition of conviction so that it can form the basis of a deportation or removal order, even when the conviction has not achieved absolute finality under state law.\textsuperscript{41} Thus, the IIRIRA definition of conviction extends far beyond the commonly understood meaning of conviction.\textsuperscript{42} The effect of the changed definition is the increased likelihood that permanent residents with unresolved convictions from years past will be placed in removal proceedings.\textsuperscript{43}

\textsuperscript{39} \textit{Id.}
\textsuperscript{40} See \textit{id} (providing definition of conviction).
\textsuperscript{41} See Pino v. Landon, 349 U.S. at 908 (considering whether state statute resulted in sufficient finality to support deportation).
\textsuperscript{42} See Pilcher, \textit{supra} note 10, at 320 (criticizing harsh effects of definition and asserting it is overly broad and lacks logic).
\textsuperscript{43} See Morawetz, \textit{supra} note 6, at 107 (highlighting increased likelihood of deportation and removal for permanent residents with past convictions).
i. Congressional expansion of the definition of "Aggravated Felony"

The IIRIRA greatly expands the class of crimes that constitute an aggravated felony under the immigration laws. The amended definition of aggravated felony includes any crime of violence for which the term of imprisonment is at least one year. The amended definition provides that any theft offense, including receipt of stolen property, is an aggravated felony, where the term of imprisonment is at least one year. The new definition also lowers the minimum amount of monetary loss needed to classify crimes involving fraud and unlawful derivation of funds as aggravated felonies. For example, prior to enactment of the IIRIRA, courts could base a conviction for an aggravated felony for money laundering or monetary transactions involving illegally obtained property only on property values equaling or exceeding $100,000.00; under the IIRIRA definition that amount need only be $10,000.00. The amended definition further expands the number of crimes related to document fraud and passport alterations that are classified as aggravated felonies.

Offenses related to commercial bribery, counterfeiting, and forgery where the term of imprisonment is at least one year are now aggravated felonies. The amended aggravated felony classification now ap-

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48 See 8 U.S.C. § 1101(a)(43)(D) (Supp. 1997) (lowering monetary minimum required to constitute aggravated felony from $100,000 to $10,000).
49 See 8 U.S.C. § 1101(a)(43)(P) (Supp. 1997) (outlining offenses related to document fraud classified as aggravated felonies). Under this provision, a party is an aggravated felon if convicted of "false making, forging, counterfeiting, mutilating, or altering a passport or instrument" if the term of imprisonment is at least one year. Id. The pre-IIRIRA definition included the offense of trafficking in these instruments where the term of imprisonment was at least five years. Id. (emphasis added)
plies to offenses relating to obstruction of justice, perjury, or bribery of a witness, for which the term of imprisonment is at least one year.\textsuperscript{51} The failure to appear before a court pursuant to a court order to answer to, or dispose of a charge of a felony is now an aggravated felony if punishable by a sentence of two or more years.\textsuperscript{52}

\section*{ii. Consequences of the "Aggravated Felony" Designation}

Once a person falls into the aggravated felony category, virtually all relief from removal is foreclosed.\textsuperscript{53} Further, Congress explicitly made the expanded definition retroactive.\textsuperscript{54} Scholars have criticized the aggravated felony classification for being overly broad because an offense need not be classified as a "felony" or even as "aggravated" under state

\textsuperscript{51} See 8 U.S.C. § 1101(a)(43)(S) (Supp. 1997) (providing offenses pertaining to obstruction of justice with one year sentence are now aggravated felonies).


\textsuperscript{53} See 8 U.S.C. § 1158 (Supp. 1997) (barring aggravated felons from eligibility for political asylum); 8 U.S.C. § 1229(b)(Supp. 1997) (acknowledging aggravated felons are barred from eligibility for cancellation of removal). So long as the offense does not involve drugs (except simple possession of thirty grams or less of marijuana), however, a waiver of deportation under INA § 212 (h) remains available. The §212(h) waiver is not available to lawful permanent residents convicted of an aggravated felony. In order to be eligible to apply for this discretionary waiver, however, lawful permanent residents convicted of a non-aggravated felony crime need seven years to have passed between their date of admission as a permanent resident and the date INS initiates removal proceedings against them. Thus, persons with no lawful immigration status, who arrived in the U.S. recently, may seek residence under the §212(h) waiver (if they can show that their removal would cause extreme hardship to U.S. citizen or permanent resident relatives), but lawful permanent residents with U.S. citizen or permanent resident family members, ties to the community, and other favorable equities may not seek relief and are mandatorily removable from the United States if: a) convicted of an aggravated felony, or b) convicted of a minor crime and less than seven years have passed between their admission as a permanent resident and the start of removal proceedings. 8 USC § 1182(h)(Supp. 1997). \textit{See also} Pilcher \textit{supra} note 10 at 302-03 (explaining how aggravated felony classification eliminates almost all opportunities for individualized consideration). Professor Pilcher notes the "statutory definition of 'aggravated felony' has been expanded by amendment by virtually every piece of immigration legislation since the term was added to the Immigration and Nationality Act in 1988." \textit{Id}. n.5.

\textsuperscript{54} See 8 U.S.C. § 1101(a)(43)(F)(Supp. 1997) (delineating retroactive nature of new definition). The provision provides, in pertinent part: "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996." \textit{Id}. 
law to fall within the immigration definition. The automatic consequences resulting from the aggravated felony designation eliminates court or agency discretion in many deportation cases.

The 1996 amendments to the immigration statute alter the definition of crimes and increase the penalties by which those crimes are punishable. A vastly increased number of past crimes now render a person removable from the United States. Thus, the ex post facto clause should apply because the removal penalty has been added to past crimes.

III. THE JUDICIAL CONSTRUCTION THAT DEPORTATION IS NOT PUNISHMENT

The Supreme Court held as early as 1893 that it did not categorize deportation as punishment. The Court reasoned that a deportation order is not punishment for a crime, rather a mechanism to expel an alien who has not complied with the conditions of the host government. The Court categorizes deportation proceedings as civil matters to determine a person's eligibility to remain in the United States. As a result, many

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66 See Pilcher supra note 10 at 302-03. Professor Pilcher argues:--

The aggravated felony classification is, with the exception of the terrorism-related categories, the most harsh and inflexible category in immigration law. It virtually always eliminates all opportunities for individualized consideration, even long into the future. The much amended definition has been roundly criticized from every criminal justice perspective for its over-inclusiveness and its lack of overall logic.

Id. at 305.

64 See id. at 302-03 (explaining how aggravated felony classification eliminates almost all opportunities for individualized consideration).

67 See supra, note 3 and accompanying text (noting these changes perpetrate precise harm ex post facto clause was designed to prohibit).

68 See Pilcher supra, note 10 at 302 (considering effect of IIRIRA and AEDPA on residents with past convictions).

69 See Cummings v. Missouri, 71 U.S. 277, 280 (1866) (holding ex post facto clause intended to prevent deprivation of rights for past conduct).

70 See Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (determining deportation is not punishment).

71 See id. (outlining deportation theory).

constitutional protections inherent in criminal proceedings are inapplicable to deportation proceedings.63

The Court has long regarded Congressional authority over immigration matters as plenary.64 In Fong Yue Ting v. United States,65 the Court ruled that the government's ability to exclude aliens for whatever reason it sees fit is an inherent attribute of sovereignty.66 As explanation for this position, the Court reasoned that immigration is a matter of foreign policy under the control of the Executive and Legislative branches of government.67 The Court depicted aliens as guests who may remain in the country subject to the host's desire to extend hospitality.68 The Court ruled that the power to deport aliens in the United States is as absolute as the power to exclude those who have not yet entered.69 Subsequent cases echoed this rationale regarding deference to Congress based on sovereignty and foreign policy theories.70

63 See id. at 1050 (holding exclusionary rule not applicable to deportation proceedings).
65 149 U.S. 698 (1893).
66 See id. at 730.
67 See id. at 713 (emphasizing political rather than judicial nature of immigration regulation). The Court reasoned:

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution to intervene.

Id. at 713. See also United States v. Curtis-Wright Export Co., 299 U.S. 304, 315-33 (1936) (providing broad support for inherent federal power to regulate foreign affairs); Turner v. Williams, 194 U.S. 279, 285 (1904) (affirming congressional authority to prescribe terms under which aliens may be admitted, remain and expelled).

68 See Legomsky, supra note 64, at 269-70.
69 See Fong Yue Ting, 149 U.S. at 713 (asserting Courts power to deport aliens).
70 See Galvan v. Press, 347 U.S. 522, 528 (1954) (confirming broad congressional authority over admission of aliens and their right to remain broad). The Galvan Court held that the power to expel aliens encompasses aspects of national sovereignty, foreign relations, and foreign security. Id. See also Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952) (affirming expulsion of aliens after residence as weapon of defense inherent in every foreign state); Mahler v. Eby, 264 U.S. at 38 (affirming sovereign power to expel aliens political and vested in political branches of government).
The concept that deportation is not punishment is one of the fictions of immigration law. Deportation more closely resembles a criminal punishment than a civil sanction. Despite failing to classify deportation as punishment, judges have acknowledged similarities between deportation and punishment. Dissenting opinions in the earliest immigration cases argued this position. In *Fong Yue Ting*, Justice Brewer's dissent included a direct quote from President Madison to strengthen his argument that the Court should recognize deportation as punishment.

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71 See Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate uses of Legal Fiction in Immigration Law*, 11 Cardozo L. Rev. 51, 58-59 (1989) (explaining legal fictions are used to escape duty of reasoned analysis and pursue political agenda). Professor Wani asserts that in immigration law fictions are often used to achieve ends that would be unthinkable in other areas of American law and popular belief. *Id.* at 53. "Legal fictions are more insidious, pervasive and entrenched in immigration law than in other legal areas." *Id.*

72 See *id.* at 102 (arguing nature and consequences of deportation closer to criminal than civil proceeding). See also Peter H. Schuck, *The Transformation of Immigration Law*, 84 Columbia L. Rev. 1, 26 (1984) (arguing deportation unlike civil sanctions). Deportation is often imposed for conduct that also constitutes a crime and frequently results in incarceration. *Id.*

73 See *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (recognizing deportation may result in loss of "all that makes life worth living"); *Harisiades*, 342 U.S. at 594 (noting classifying deportation debatable as original proposal, but issue considered closed for many years). The *Harisiades* Court upheld deportation of three individuals, who had each been permanent residents for more than thirty years. *Id.* at 514. The Alien Registration Act of 1940 made them deportable for past membership in the Communist Party despite their membership termination prior to enactment of Act. *Id.*

74 See *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting) (arguing deportation is punishment because it deprives of liberty, home and family); *id.* at 763 (Field, J., dissenting)(arguing removal of aliens authorized by Chinese Exclusion Act among severest of punishments); *id.* at 761. (Fuller, Chief J., dissenting) (arguing Chinese Exclusion Act inflicts punishment).

75 *Id.* at 740-41. Justice Brewer quoted President Madison as stating:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for, if moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked,—*if banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.*
In the same case, Justice Field called deportation involving retroactive application of an immigration statute excessively cruel and unusual punishment.\textsuperscript{76} He highlighted the hardships and cruelty of breaking personal and business ties as a result of being forcibly removed.\textsuperscript{77}

A 1996 Third Circuit case, *Scheidemann v. Immigration and Naturalization Service*,\textsuperscript{78} contains the most compelling recent opinion refuting the theory that deportation is not punishment.\textsuperscript{79} In *Scheidemann*, the B.I.A. denied petitioner's relief from deportation by retroactively applying an amendment to the Immigration and Nationality Act.\textsuperscript{80} Judge Sarokin noted in his opinion that he concurred with the Third Circuit in affirming the B.I.A.'s opinion only because he was bound by precedent.\textsuperscript{81} Judge Sarokin also urged the Supreme Court to recognize the reality that deportation following a criminal conviction is punishment.\textsuperscript{82}

\textit{Id.} at 739 (citing 4 Elliot Deb. 555) (emphasis added).

\textsuperscript{76} See \textit{id.} at 757 (Field, J., dissenting).
\textsuperscript{77} See \textit{id.} at 759 (emphasizing hardships of deportation).
\textsuperscript{78} 83 F.3d 1517, 1526 (3d Cir. 1996).
\textsuperscript{79} See \textit{id.} (Sarokin, J., concurring) (arguing deportation following criminal convictions is punishment).
\textsuperscript{80} See \textit{id.} The immigration judge found Mr. Scheidemann deportable in November, 1994 based on a 1987 drug conviction. \textit{Id.} at 1517. Mr. Scheidemann applied for a discretionary form of relief from deportation known as a "212(c) waiver." \textit{Id.} In 1990, while Mr. Scheidemann was serving a five-year sentence for his conviction, Congress enacted legislation barring individuals who had served at least five years for a drug conviction from the discretionary relief from deportation he was seeking. \textit{Id.} at 1519. (citing the Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (1990)). The immigration judge denied Mr. Scheidemann's application for a 212(c) waiver and ordered him deported, finding he was statutorily ineligible for relief from deportation based on the 1990 amendments to the Immigration and Nationality Act. *Scheidemann*, 83 F.3d at 1519. The judge found that the bar to 212(c) relief applied retroactively to Mr. Scheidemann. \textit{Id.} The Third Circuit affirmed the Board of Immigration Appeals' denial of Mr. Scheidemann's application for a waiver of deportation. \textit{Id.}

\textsuperscript{81} See \textit{id.} Judge Sarokin provided, "because I am bound to follow precedent . . . I have no option but to concur in the opinion of my colleagues affirming the decision of the Board that deportation is not subject to the Ex Post Facto Clause."
\textsuperscript{82} See \textit{id.} (urging court to revise legal fiction that deportation following criminal conviction is not punishment). \textit{Id.} Judge Sarokin urged the Court to revisit its theory:

The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality . . . Mr. Scheidemann entered this country at age twelve; he has lived here for thirty-six years; he has been married to an American citizen for twenty-four years; he has raised three children all of whom are American citizens; his elderly parents are naturalized citizens, two of his four siblings are naturalized American citizens, and all four of them reside permanently in the United States; he has no ties to Colombia, the country to which he is to be de-
B. The Evolution of the Plenary Power Doctrine and scholars' criticisms of the doctrine

The plenary power doctrine emerged in the nineteenth century during a period of pronounced national anti-Asian hostility and nativism. In 1882 Congress responded to nativist hostility by passing legislation restricting Chinese entry into the United States. This was the first statute restricting entry to the United States on the basis of race. Anti-Japanese sentiment grew as increased numbers of Japanese immigrants began arriving in California in the 1880's. Several states passed anti-Japanese resolutions, and in 1924 Congress enacted legislation prohibiting the entry of all Japanese immigrants. The Court solidified the plenary power doctrine by upholding these restrictive immigration measures. Similarly, during the 1950's, the Court reaffirmed the plenary power doctrine in a series of decisions involving aliens charged with ties the Communist Party. Since this period, scholars have argued for more rigorous judicial review of immigration statutes, despite the

ported; and he has fully served the sentence imposed upon him. If deportation under such circumstances is not punishment, it is difficult to envision what is. I think the deportation of aliens for the commission of crimes is clearly punishment.

Id. at 1526 [emphasis added].

See Legomsky supra note 64, at 288. Professor Legomsky explains that in the 1850's when labor was in short supply, many Chinese immigrants came to the United States. By 1869, after the need for labor subsided, public hostility toward Chinese immigrants increased. Id. at 288.

See Legomsky supra note 64, at 288, n.173.

Id.

See id. at 288

See id. Professor Legomsky notes that two years earlier, in Ozawa v. United States, 260 U.S. 178 (1922), the Supreme Court held the Japanese were ineligible for citizenship. Id.

See Legomsky, supra note 64, at 289 (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889), Nishimura Ekiu v. United States, 142 U.S. 651 (1892) and Fong Yue Ting v. United States, 149 U.S. 698 (1893)). Professor Legomsky refers to these decisions the “principal building blocks” of the plenary power doctrine. Id.

See Legomsky, supra note 64, at 290 (noting nation’s preoccupation with Communism peaked during this time). Supreme Court decisions reaffirming the plenary power doctrine from this era include Galvan v. Press, 347 U.S. 522 (1954) and Harisiades v. Shaughnessy, 342 U.S 580 (1952). Id.
Court's early insistence that immigration is a matter of foreign policy.\textsuperscript{90} Specifically, scholars and judges disagree with the Court's view that Congress's power to expel and exclude aliens at will is inherent and inevitable.\textsuperscript{91} Scholars have criticized the plenary power doctrine as failing to comport with contemporary notions of the Court's role in checking the arbitrary exercise of governmental power.\textsuperscript{92}

The Court's earliest immigration decisions setting forth Congress's power and control of immigration regulation reveals nativist prejudices and ideas that would not be tolerated in mainstream areas of the law.\textsuperscript{93} In \textit{Fong Yue Ting}, for example, the Court disguises anti-

\textsuperscript{90} See Aleinikoff, supra note 6 at 862-63 (noting Supreme Court's view of immigration as aspect of foreign policy greatly restricts role of courts in immigration matters); see also Legomsky, supra note 64, at 262 (criticizing Court's determination that regular judicial review would interfere with foreign relations).

\textsuperscript{91} See Wani, supra note 71, at 62-63 (criticizing Court's view of Congress's inherent power over immigration). Professor Wani asserts that the Court's act of "[l]ocating the basis of sovereignty outside the Constitution permits the conclusion that the immigration power is inherent, absolute, comprehensive, and, therefore, not subject to any constitutional restraints, including judicial review." \textit{Id.} at 63. See also \textit{Fong Yue Ting} v. United States, 149 U.S. 698, 758 (1893) (Field, J., dissenting) (arguing that supreme power in United States is vested in people, not Congress). Justice Field emphasized the fact that the government is one of limited and delegated powers, and cautioned against the dangers associated with "inherent" power. \textit{Id.} Justice Field argued:

\begin{quote}
Sovereignty or supreme power is in this country vested in the people, and only in the people. By them certain sovereign powers have been delegated to the government of the United States or to themselves. This is not a matter of inference and argument, but is the express declaration of the Tenth Amendment to the Constitution, passed to avoid any misinterpretation of the powers of the general government. That amendment declares that the 'powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people'. When therefore power is exercised by congress, authority for it must be found in express terms in the constitution, or in the means necessary and proper for the execution of the power expressed. \textit{If it cannot be found, it does not exist.} \textit{Id.} 149 U.S. at 757. [emphasis added]
\end{quote}

\textsuperscript{92} See Morawetz, supra note 6 at 125.

\textsuperscript{93} See Legomsky, supra note 64, at 260. (criticizing Court's lack of constitutional scrutiny in immigration law) Professor Legomsky provides, "immigration is an area in which the normal rules of constitutional law simply do not apply"; Schuck, supra note 72, at 1 (arguing that many of immigration law's doctrines have been radically insulated from fundamental constitutional norms); Aleinikoff, supra note 6, at 863 (arguing immigration law has remained outside of drastic changes in constitutional law since World War II). These areas include criminal procedure, Due Process and Equal Protection. \textit{Id.}
Chinese animosity with assertions of Congress's inherent power to expel and exclude aliens at will. The Court stated:

Chinese laborers, therefore, like all other aliens residing in the United States are entitled, so long as they are permitted by the government of the United States, to remain in the country but they continue to be aliens, having taken no steps towards becoming citizens; and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country whenever, in its judgement, their removal is necessary or expedient for the public interest.

C. The Plenary Power Doctrine is flawed

Under the plenary power doctrine, the Supreme Court has declined to review federal immigration statutes for compliance with substantive constitutional restraints. The Court's reluctance to recognize deportation as punishment is attributable to the nearly exclusive entrustment of immigration regulation to Congress. Without such deference to congress, the Court may well have changed its view over time to reflect the recognition that the retroactive application of deportation laws is punishment. The Court's traditional deference to Congress in this area, however, has resulted in judicial reluctance to scrutinize a number of

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94 See id. (acknowledging Chinese persons not born in U.S. are not recognized as citizens, nor authorized to become such under naturalization laws).
95 Id.
96 See Legomsky, supra note 64, at 255 (arguing against special deference Supreme Court has historically shown congress in pertaining to immigration regulation).
97 See Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasizing deference to Congress's authority over immigration matters). The idea that immigration regulation is "entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." Id. at 531.
98 See Morawetz, supra note 6, at 98-99 (noting that Court has on rare occasions reversed its own precedent). Professor Morawetz contrasts the evolution of the Court's treatment of race from Plessy v. Ferguson, 163 U.S. 537 (1896) to Brown v. Board of Education, 347 U.S. 483 (1954), with the lack of progression it has shown pertaining to immigration. Id. Professor Morawetz notes that Harisiades v. Shaughnessy, 342 U.S. 580 (1952), was decided during the same judicial term as Brown, but instead of reforming the law as Brown did in context of school desegregation, the Court reaffirmed the entire line of cases that held deportation is not punishment. Id. at 98.
questionable immigration determinations made by Congress. The upshot of this reluctance is an increased severity in punishment for past crimes when deportation is retroactively imposed as an ex post facto consequence. Since the Court, and not the Constitution, is the source of the plenary power doctrine, the Court has the power to abandon or modify it.

D. The Court's Extension of the Ex Post Facto Clause to Other Civil Contexts

Despite the Court's insistence that the ex post facto clause applies only to criminal proceedings, a line of precedent exists which has extended its application beyond the criminal context. While one line of precedent holds that the clause applies only to strictly criminal proceedings, another refuses to construe the clause so narrowly. The Court

99 See Legomsky, supra note 64 at 255 (criticizing Court's deference to Congress in immigration regulation). "In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration regulations that explicitly classify on such disfavored bases as race, gender, and legitimacy." Id. at 255 n.2. (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889)(upholding classification based on race); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding classification based on race); Fiallo v. Bell, 430 U.S. 787 (1977)(upholding classification based on gender and legitimacy).

100 See Scheidemann v. Immigration and Naturalization Service, 83 F.3d 1517, 1526 (3rd Cir. 1996) (Sarokin, J., concurring) (arguing deportation following criminal conviction equals punishment).

101 Harisiades v Shaughnessy, 342 U.S. 580, 596 (1952) (Douglas, J., and Black, J., dissenting). The Court noted:

The power of congress to exclude, admit or deport aliens flows from sovereignty itself and from the power 'To establish an uniform Rule of Naturalization'. U.S. Const., Art. I, §8, cl. 4. The power of deportation is therefore an implied one. The right to life and liberty is an express one. Id. "Why the implied power should be given priority over the express guarantee of the Fifth Amendment has never been satisfactorily answered."

Id.

102 See Cummings v. Missouri 71 U.S. 277, 286 (1866) (preventing state from denying right to practice for acts that carried no such penalty when committed); Ex Parte Garland 71 U.S. 333, 338 (1866) (applying holding to federal government); Fletcher v. Peck, 10 U.S. 87, 90 (1810) (holding vested property rights may not be displaced by legislative fiat).

The Court has extended the application of the ex post facto clause beyond solely criminal prosecutions. In *Fletcher v. Peck* a legislative act that seized a person's estate for a crime not declared such under previous law was held to violate the ex post facto clause. Similarly, the Court held that laws that take away the right to practice a profession for acts that carried no such penalty when committed violate the ex post facto clause. The Court has also recognized disenfranchisement as punishment. The Court's recognition that a civil sanction can be punishment supports its application to deportation. This is particularly applicable to deportation because deportation may be as severe as loss of livelihood.

The Court has recognized that deportation may result in the loss of property and life. The severity of deportation as a penalty supports the application of the ex post facto clause to it. The Court noted that in precedent cases applying the ex post facto clause beyond the criminal context, "novel disabilities imposed were really criminal penalties for which civil form was a disguise." The Court has yet to offer a satisfactory explanation as to why the ex post facto clause does not extend to

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105 See Marcello v. Bonds 349 U.S. at 318-19 (Douglas, J., dissenting) (highlighting that there is no controlling line of precedent on issue); Lehmann v. United States, 353 U.S. 685, 690 (1957) (Black, J., dissenting). It is noteworthy that the cases extending the ex post facto application to non-criminal contexts are still good law but have not been followed by the Court in the deportation context. See Marcello, 349 U.S. at 319-20 (Douglas, J., dissenting). The Court's reluctance to apply this favorable precedent to the deportation context is a direct result of the excessive deference the Court displays to Congress under the plenary power doctrine. See Galvan v. Press, 347 U.S. 522, 532 (1954) (holding immigration regulation entrusted exclusively to Congress).

106 See *Fletcher*, 10 U.S. at 137.

107 *Id.*


109 See *Ex Parte Garland*, 71 U.S. 333 (1866) (applying ex post facto clause to non-criminal statute which permanently denied right to practice law.)

110 See *Cummings*, 71 U.S. at 319 (holding that deprivation of any rights, civil or political, previously enjoyed, may be punishment.) *Id.*


112 See *Ng Fung Ho*, 259 U.S. at 284.

113 See *supra* note 63 (citing Justice Brewer's dissent in *Fong Yue Ting*, 149 U.S. 698 (1893) (recognizing harsh effects of deportation).

114 See *Harisiades*, 342 U.S. at 594 (affirming that these cases have never been considered to govern deportation).
deportation. The Court simply acknowledged that cases extending the application of the clause beyond the criminal context "have never been considered to govern deportation."115 This circular reasoning by the Court is a clear illustration of the excessive deference caused by adherence to the plenary power doctrine.

IV. CONCLUSION

The ex post facto clause prohibits legislation that retroactively alters the definition of a crime or increases the penalty by which a crime is punishable. The IIRIRA alters the definitions of crimes and increases the number of past crimes, which render a person removable from the United States. These legislative changes retroactively increase the penalties of the underlying crimes.

Despite the Court's historic insistence to the contrary, deportation is punishment. In light of the inequities and injustice created by AEDPA and IIRIRA, as well as the liberty interests held by lawful permanent residents, the Court should finally recognize and admit that the retroactive application of laws which render individuals removable for past convictions violate the ex post facto clause of the United States Constitution.

Lisa Mendel

115 Id.